ROME I REGULATION: SOME CONTROVERSIAL ISSUES

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INTRODUCTION

The Regulation no 593/2008 on the Law Applicable to Contractual Obligations (Rome I) is designed to replace the Rome Convention on the Law Applicable to Contractual Obligations (1980). Both are milestones in the unification of Private International Law but many of their solutions are far from being consensual.

As a contribution for a Festschrift in Honour of Bernd von Hoffmann, who is an eminent Academic who commented the Chapter on Contractual Relationships in the Volume on the EGBGB of the 12nd edition of Soergel Kommentar (1996), dealing with the provisions of the EGBGB which incorporated the Rome Convention rules, it seems appropriate to address some of those controversial issues.

The present contribution will, therefore, deal with the limitations to choice of law regarding contracts localized in one country or intra-European Union (I), the exclusion of choice of non-State law (II), the combination of a primary connection with an escape clause in Article 4 (III), the scope of application of Article 6 regarding consumer contracts concluded through the Internet (IV) and the problem of applicability of overriding mandatory rules (V). The contribution ends with a few final remarks (VI).

I. CHOICE OF LAW REGARDING CONTRACTS LOCALIZED IN ONE COUNTRY OR INTRA-EUROPEAN UNION

Article 3(1) of Rome I Regulation adopts the widely-accepted principle of freedom of choice of the law applicable to an international contract. This is in conformity with the scope of application of the Regulation, which concerns "situations involving a conflict of laws" (Article 1(1)). A similar formula is employed in the Rome Convention ([1]), and was interpreted in the GIULIANO/LAGARDE Report as comprising "situations which involve one or more elements foreign to

[1] - More clearly in the French version that refers to "les situations comportant un conflit de lois" than in the English version that refers to a "situation involving a choice between the laws of different countries".

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the internal social system of a country (...), thereby giving the legal systems of several countries claims to apply" ([2]).

In principle, only the mandatory rules of the chosen law shall be applicable. A deviation is allowed regarding consumer contracts (Article 6(2)) and individual employment contracts (Article 8(1)), as well as regarding overriding mandatory provisions of the forum State (Article 9(2)), and of some overriding mandatory provisions of the of the country where the obligations arising out of the contract have to be or have been performed (Article 9(3)). I will deal with the provisions of Article 9 later (V).

Article 3(3), however, provides that where "all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement".

Recital no 15 clarifies that this provision should apply whether or not the choice of law was accompanied by a choice of court and that no substantial change is intended in relation to Article 3(3) of the Rome Convention. Nevertheless, the provision of the Rome I Regulation is drafted with more rigor, aligning with Article 14(2) of Rome II Regulation.

Article 3(3) of the Rome Convention is understood in GIULIANO/LAGARDE Report as referring to purely domestic situations which fall within the scope of the Convention only because the parties have agreed on the choice of foreign law ([3]). According to the convergent prevailing view, the provision is applicable in all cases in which the parties choose the law of one country and the contract is entirely located in other country, including cases of domestic contracts of the forum country ([4]).

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[2] - See Report on the Convention on the law applicable to contractual obligations by Mario GIULIANO and Paul LAGARDE [*Official Journal* C 282/1, of 31/10/1980, ps. 1-50], Article 1, note 1.

[3] - Article 3, note 8. The same view is expressed with respect to Article 14(2) of Rome II Regulation by the Explanatory Memorandum of the Commission's Proposal [22].

[4] - See Hélène GAUDEMET-TALLON – "Le nouveau droit international privé européen des contrats (Commentaire de la convention C.E.E. nº 80/934 sur la loi applicable aux obligations contractuelles, ouverte à la signature à Rome le 19 juin 1980)", *Rev. trim. dr. eur.* 17 (1981) 215-285, 233; Peter NORTH – "The EEC Convention on the Law Applicable to Contractual Obligations (1980): Its History and Main Features", *in Contract Conflicts*, edited by NORTH, 3-30, Amesterdam, New York and Oxford, 1982, 9; REITHMANN/MARTINY/MARTINY [2010 : no 135]; Bernd VON HOFFMANN e Karsten THORN – *Internationales Privatrecht*, 9th ed., Munich, 2007, § 10 no 29; António FERRER CORREIA – "Algumas considerações acerca da Convenção de Roma de 19 de Junho de 1980 sobre a lei aplicável às obrigações contratuais", *RLJ* (1990) nos 3787-3789, no 12; François RIGAUX e Marc FALLON – *Droit international privé*, 3rd ed., Brussels, 2005, 804; Rui MOURA RAMOS – *Da Lei Aplicável ao Contrato de Trabalho Internacional*, Coimbra, 1991, 450-451, n. 140; and Maria HELENA BRITO – "Os contra-

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The wording given to the provision by the Rome I Regulation provides less support to this interpretation than the corresponding provision of the Rome Convention, since it does not refer to the law chosen by the parties as a "foreign law". Nor does it suggest that the country where all the elements of the situation are located is the forum country.

In my opinion, this interpretation contradicts the scope of application provided for by Article 1(1) to the Regulation, which refers to situations involving a conflict of laws ([5]). Domestic situations do not involve a conflict of laws. A choice of a foreign law by the parties of a domestic contract amounts only to a "material reference" [*materiellrechtliche Verweisung*], i.e., an incorporation of foreign law rules as contract clauses. This incorporation is permitted by freedom of contract and not by Article 3(3).

Article 3(3) is useful for other type of situations: those in which the courts of a Member State adjudicate a dispute arising from a mere "foreign situation", i.e., a situation which is solely connected with a foreign State, and the parties have chosen the law of the forum or of a third State ([6]). This can happen, namely, in the case of change of domicile of one party after the dispute has arisen. In this case, there is a situation involving a conflict of laws, since the court has to determine the governing law. The choice made by the parties shall be honoured by the court, but its scope is limited by the application of the mandatory rules of the foreign State in which the contract is located.

A second type of situations which may be covered by Article 3(3) involves domestic contacts that have a functional connection with an international contract. E.g., a corporation A, with seat and place of business in Portugal, concludes with a corporation B, also with seat and place of business in Portugal, a contract for the supply of goods to be performed in Portugal. These goods are designed for performance of a construction contract concluded between the corporation B and

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tos bancários e a convenção de Roma de 19 de Junho de 1980 sobre a lei aplicável às obrigações contratuais", *Rev. da Banca* 28 (1993) 75-124, n. 34.

[5] - See further LIMA PINHEIRO – *Contrato de Empreendimento Comum (Joint Venture) em Direito Internacional Privado*, Almedina, Coimbra, 1998, 512 et seq.; Id. – *Direito Comercial Internacional*, Almedina, Coimbra, 2005, 68 et seq., with more references; Id. – "O novo regulamento comunitário sobre a lei aplicável às obrigações contratuais (Roma I) – Uma introdução", *ROA* 68 (2008) 575-650, 592-593.

[6] - See the remarks made by NORTH (n. 4) 13, and compare *Cheshire, North & Fawcett Private International Law*, 14th ed., by J. FAWCETT, J. CARRUTHERS and Peter NORTH, Oxford, 2008, 679-680.

the Spanish State. The contract of supply is domestic but has a relevant functional connection with an international contract ([7]).

In these situations, Article 3(3) plays a double role. On one hand, it limits the scope of application of the law chosen by the parties. On the other hand, it refers, through an implicit choice of law rule, to the mandatory regimes of the country where the contract is localized.

This does not constitute a "material reference" because the contract is otherwise governed by the chosen law – including its mandatory rules – which, as far as compatible with the mandatory rules of the country where the contract is localized, limit the freedom of contract, prevailing over the contract clauses ([8]).

Turning now to intra-EU contracts, Article 3(4) provides that where "all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement" ([9]).

The text of this provision takes into account that mandatory rules of the EU law may not only be contained in the founding treaties and in immediately applicable regulations but also in directives. The directives are instruments of harmonization of the national laws of the Member States which allow national legislators the choice of form and methods to achieve the prescribed result and which apply between the parties only upon their transposition to national laws. In the case of mandatory rules contained in directives, it is necessary to determine which national law implementing these rules shall be relevant.

Article 3(4) points to the law of the forum. Where all the elements are located in one Member State, however, the situation should be comprised by § 3 and the directive provisions should be applicable as implemented in the law of this Member State rather than as imple-

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[7] - See the suggestion put forward by Allan PHILIP – "Mandatory Rules, Public Law (Political Rules) and Choice of Law in the EEC Convention on the Law Applicable to Contractual Obligations", *in NORTH* (org.), Contract Conflicts (n. 4), 81-110, 95.

[8] - In the sense that the designation made by the parties operates as a "conflictual reference", see EGON LORENZ – "Zum neuen internationalen Vertragsrecht aus versicherungsvertraglicher Sicht", *in FS Gerhard Kegel II*, 303-331, Stuttgart, 1987, 313-314, and "Die Rechtswahlfreiheit im internationalen Schuldvertragsrecht", *RIW* 33 (1987) 569-584, 569; *Cheshire, North & Fawcett Private International Law* (n. 6) 680 and 701; Paul LAGARDE – "Les limites objectives de la convention de Rome (conflits de lois, primauté du droit communautaire, rapports avec les autres conventions", *RDIPP* 29 (1993) 33-42, 35.

[9] - The proposal of a provision of this nature was first made by Jürgen BASEDOW – "Materielle Rechtsangleichung und Kollisionsrecht", *in Internationales Verbraucherschutzrecht*, edited by Anton Schnyder, Helmut Heiss and Bernhard Rudisch, 11-34, Tübingen, 1995, 34.

mented in the forum Member State. It is not clear if this deviation is intentional or relies on the assumption that the forum State is also the localization State. On the other hand, where the elements of situation are located in two or more Member States it seems that it should be relevant the law applicable in absence of choice rather than the law of the forum. This has been proposed by the *Groupe européen de droit international privé* ([10]) and by the Max Planck Institute for Comparative and International Private Law ([11]). As a matter of fact, this is the law that, in principle, has the most significant relationship with the situation and whose application is most foreseeable by the parties. The arguments that the differences between the national regimes implementing directives are of minor importance and that the application of the *lex fori* is easier for the court ([12]) should not prevail over choice of law justice.

In any case, the scope of application of Article 3(4) seems to be residual, since most EU instruments containing mandatory rules applicable to contracts include choice of law rules which prevail over the rules of the Rome I Regulation according to its Article 23 ([13]). Less clear is the relationship between Article 3(4) and Article 9(2) concerning overriding mandatory rules. It could be sustained that Article 9(2) only applies where the requirements for the operation of Article 3(4) are not met and the mandatory rule is overriding in the sense of Article 9(1) and belongs to the law of the forum.

Furthermore, it would appear that there is a tension between Article 3(4) and the *Ingmar* judgment in which the ECJ inferred from the purpose of Articles 17 and 18 of the Directive on commercial agents that these provisions must be applied where the commercial agent carried out his activity in a Member State, although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country ([14]). In

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[10] - Réponse au Livre vert de la Commission sur la transformation de la Convention de Rome en instrument communautaire ainsi que sur sa modernisation – Vienne 2003 [*in http://www.gedip-egpil.eu/documents/gedip-documents-19rlv.html*].

[11] - "Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)", *RabelsZ.* 71 (2007) 225-344, 252. See also Helmut HEISS – "Party Autonomy", *in Rome I Regulation*, edited by Franco Ferrari and Stefan Leible, 1-16, Munich, 2009, 5.

[12] - See Paul LAGARDE e Aline TENENBAUM – "De la convention de Rome au règlement Rome I", *R. crit.* 97 (2008) 727-780, 737-738.

[13] - See also Peter MANKOWSKI – "Die Rom I-Verordnung – Änderungen im europäischen IPR für Schuldverträge", *IHR* 8 (2008) 133-176, 135; Nerina BOSCHIERO – "I limiti al principio d'autonomia posti dalle norme generali del regolamento Roma I", *in La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, edited by Nerina Boschiero, 66-147, Torino, 2009, 113.

[14] - 9/11/2000 [*in curia.europa.eu*]. In Portugal this is allowed by application of Article 16 of the Hague Convention on the Law Applicable to Agency (directly or by analogy), which is not prejudiced by

this case the EU mandatory rules were deemed to be applicable albeit there was a significant connection with a third country and the directive does not contain a choice of law rule. It may be considered that the ECJ has revealed an implicit choice of law rule in the directive, similar to the rules contained in other directives aimed at protecting the weaker contracting party. Nevertheless, this does not seem enough to trigger the operation of Article 23 of the Rome I Regulation. On the other hand, it is doubtful that those provisions correspond to the definition of overriding mandatory rules laid down by Article 9(1): "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests" and that are applicable "irrespective of the law otherwise applicable to the contract under this Regulation". As a matter of fact, those provisions are aimed at the protection of the interest of one of the parties and only displace the law chosen by the parties. An extensive interpretation of the concept of "public interests" and an application by analogy to rules that only displace the law chosen by the parties may, however, be defensible (see also *infra* V).

To conclude this point, the adoption of a provision regarding the application of EU mandatory rules in intra-EU contracts seems justified. The criticism that only the application of overriding mandatory rules should be safeguarded, because the EU is not a federal state ([15]), does not take into account that the present situation is midway between the traditional relationship of International Law created by an international organization and the legal orders of the States bound by this law and the integration of these legal orders in a complex legal system. The purpose of some instruments of unification of substantive law in the EU would be frustrated if their application to intra-EU contracts could be avoided through the choice of a third country law ([16]).

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the Rome I Regulation (Article 25), and has not changed the legal situation in what concerns agency contracts performed exclusively or predominantly in Portuguese territory by operation of Article 38 of DL no 178/86, of 3 July. See Ole LANDO – "The Territorial Scope of Application of the EU Directive on Self-Employed Commercial Agents", *in Est. Isabel de Magalhães Collaço*, vol. I, 249-261, Coimbra, 2002, remarking that the judgment is not consensual ; Rui MOURA RAMOS – "O Tribunal de Justiça das Comunidades Europeias e a Teoria Geral do Direito Internacional Privado. Desenvolvimentos Recentes", *in Est. Isabel de Magalhães Collaço*, vol. I, 431-467, Coimbra, 2002, 460 et seq., and "Direito Internacional Privado e Direito Comunitário. Termos de uma interacção", *in Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional*, vol. II, 145-202, Coimbra, 2007, 185 et seq.; and LIMA PINHEIRO – *Direito Internacional Privado*, vol. II – *Direito de Conflitos/Parte Especial*, 3rd ed., 2009, 361-362.

[15] - See PIERRE MAYER – "Le phénomène de la coordination des ordres juridiques étatiques en droit privé. Cours générale de droit international privé", *RCADI* 327 (2007) 9-378, 93; see further BOSCHIERO (n. 13) 107 et seq.

[16] - See also Max Planck Institute (n. 11) 246 et seq.; LAGARDE/TENENBAUM (n. 12) 737.

II. CHOICE OF NON-STATE LAW

According to the prevailing view, Article 3 of Rome Convention does not allow the parties to exclude application of any legal order or choose a non-State legal order ([17]).

The Proposal of Regulation Rome I was innovative in providing that the "parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community" (Article 3(2)(1)). The Explanatory Memorandum made it clear that this wording was intended to "authorise the choice of the UNIDROIT principles, the *Principles of European Contract Law* or a possible future optional Community instrument, while excluding the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognised by the international community" ([18]). The EU legislator did not adopt this solution, and maintained the existing situation under the Rome Convention, as confirmed by Recital no 13 when limiting references to a "non-State body of law or an international convention" to a material reference, which incorporates the rules contained in those instruments as contract clauses, within the frame limited by the mandatory rules of the national legal order designated as *lex contractus* ([19]).

On this issue the EU Conflicts Law diverges from the understanding followed with regard to the Interamerican Convention on the Law Applicable to International Contracts (City of Mexico, 1994). Indeed, Article 7 of this Convention is interpreted as permitting a choice of the *lex mercatoria*, of the "principles of International Business Law" and of the UNIDROIT Principles ([20]).

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[17] - See MOURA RAMOS (n. 4) 511 et seq., and LIMA PINHEIRO (n. 5 [2005]) 102, with extensive references. See also Article 2(1) of the Resolution of the *Institut de droit international* on the Autonomy of the Parties in International Contracts Between Private Persons or Entities (Basel, 1991), and in this respect the report of Erik JAYME – "L'autonomie de la volonté des parties dans les contrats internationaux entre personnes privées. Rapport provisoire", *Ann. Inst. dr. int.* 64-I (1991) 36-52, 37, and the remarks of Berthold GOLDMAN, António FERRER CORREIA e PIERRE LALIVE [*in Ann. Inst. dr. int.* 64-I (1991) 26-27, 29 and 34, respectively].

[18] - 5. On the possibility of choice of the rules of the "Common Frame of Reference", see Max Planck Institute (n. 11) 341-342, and Dieter MARTINY – "Common Frame of Reference und Internationales Vertragsrecht", *ZeuP* (2007) 212-228.

[19] - See also LAGARDE/TENENBAUM (n. 12) 736; REITHMANN/MARTINY/MARTINY [2010: nos 101 and 103]; *Cheshire, North & Fawcett Private International Law* (n. 6) 698-700; Richard PLENDER and Michael WILDERSPIN – *The European Private International Law of Obligations*, London, 2009, 136 et seq.

[20] - Cf., for instance, Friedrich JUENGER – "The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons", *Am. J. Comp. L.* 42 (1994) 381-393, 392, and "Amerikanische Praxis und europäische Übereinkommen", *in FS Ulrich Drobnig*, 305-313, Tübingen, 1998, 311; Diego FERNÁNDEZ ARROYO (ed.) – *Derecho Internacional Privado de los Estados del Mercosur*, Buenos Aires, 2003, 999.

In my opinion, the innovation contained in the Proposal was welcome ([21]), yet an EU instrument could even go further by permitting the designation of rules and principles of non-State objective law without excluding the applicability of State law to matters not settled by these rules and principles. Non-State objective law includes namely international commercial customary law, customary law based upon arbitral cases, rules adopted by private organizations of international business within the framework of collective autonomy, Public International Law and particular international conventions unifying substantive law ([22]).

The main argument against this permission lies on the displacement of State mandatory rules. By limiting the choice to a State law, however, application of mandatory rules of a particular country, namely of the countries connected with the contract, is not assured. Therefore, this problem has to be addressed within the framework of provisions that limit the scope of application of the law chosen by the parties, rather than by limiting this choice to a State law.

It is worth making to final remarks on this subject. First, the parties may submit the contract to a local system whenever a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations (Article 22(1)). Second, the Regulation does not exclude the possibility that an EU instrument which contains rules of substantive contract law provides that the parties may made a "conflictual reference" to these rules, i.e., designate these rules as the law governing the contract (Recital no 14).

III. COMBINATION OF A PRIMARY CONNECTION WITH AN ESCAPE CLAUSE

Under the Rome Convention, in the absence of choice by the parties, the contract shall be governed by the law of the country with which it is most closely connected (Article 4(1)). Article 4(2-4) con-

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[21] - See also Nerina BOSCHIERO – "Verso il rinnovamento e la trasformazione della convenzione di Roma: problemi generali", *in Diritto internazionale privato e diritto comunitario*, ed. by Paolo Picone, 318-420, Padova, 2004, 357 et seq.; Max Planck Institute (n. 11) 229-231 and 244-245; and Ole LANDO e Peter NIELSEN – "The Rome I Regulation", *CML Rev.* 45 (2008) 1687-1725, 1695 et seq. Compare Erik JAYME – "Choice-of-law clauses in international contracts: some thoughts on the reform of art. 3 of the Rome Convention", *in Seminário Internacional sobre a Comunitarização do Direito Internacional Privado*, ed. by Luís de Lima Pinheiro, 53-61, Coimbra, 2005, 56-57; Paul LAGARDE – "Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)", *R. crit.* 95 (2006) 331-359, 336; and Peter MANKOWSKI – "Der Vorschlag für die Rom I-Verordnung", *IPRax* (2006) 101-113, 102, and (n. 13) 136.

[22] - See Art. 3(2)(2) oft the Commission's Proposal, and, with more development and policy evaluation, LIMA PINHEIRO (n. 5) 994 et seq. and (n. 17) 103 et seq. For a convergent view, besides the references contained in the previously mentioned texts, see Wulf-Henning ROTH – "Zur Wählbarkeit nichtstaatlichen Rechts", *in FS Erik Jayme*, vol. I, 757-772, Munique, 2004.

tain "presumptions" of closest connection and (5) provides that these "presumptions" shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. The relation between the "presumptions" of closest connection and the general criterion of closest connection has led to disagreement in the legal literature and case law of the Contracting States.

Most authors characterize Article 4(5) as an escape clause ([23]), what should mean that the "presumptions" contain the primary choice of law rule, and that they are rebutted only in exceptional cases in which there is a manifestly closer connection with another country ([24]). The opposing view argues that it is not an escape clause, but a provision which shall be understood, in conjunction with Article 4(1), as conferring to the criterion of closest connection the function of a "general principle" ([25]). It should be pointed out that some authors who, in this

[23] - See references in LIMA PINHEIRO (n. 5) 1204 n. 172. See, in general, on the escape clause, MOURA RAMOS (n. 4) 402 et seq., and 916, and "Les clauses d'exception en matière de conflits de lois et de conflits de juridictions – Portugal", *in Das Relações Privadas Internacionais. Estudos de Direito Internacional Privado*, 295-323, Coimbra, 1995; António MARQUES DOS SANTOS – *As Normas de Aplicação Imediata no Direito Internacional Privado. Esboço de Uma Teoria Geral*, 2 vols., Coimbra, 1991, 397 et seq.; Luís de LIMA PINHEIRO – *Direito Internacional Privado*, vol. I – *Introdução e Direito de Conflitos/Parte Geral*, 2nd ed., Coimbra, 2008, § 25 C, with more references.

[24] - See, for a convergent view, in Germany, Jan KROPHOLLER – *Internationales Privatrecht*, 6th ed., Tübingen, 2006, 472-473, VON HOFFMANN/THORN (n. 4) 440 and 447; in France, Pierre MAYER and Vincent HEUZÉ – *Droit international privé*, 9th ed., Paris, 2007, 544-545; in England, *Dicey, Morris and Collins on the Conflict of Laws* – 14th ed. by Lawrence COLLINS (general ed.), Adrian BRIGGS, Jonathan HARRIS, J. McCLEAN, Campbell McLACHLAN and C. MORSE, London, 2006, 1587; in Italy, Tito BALLARINO – *Diritto internazionale privato*, 3rd ed., Padova, 1999, 626.

[25] - Cf. Raymond VANDER ELST e Martha WESER – *Droit international privé belge et droit conventionnel international*, Bruxelas, 1983, 172-173; Roberto BARATTA – *Il collegamento più stretto nel diritto internazionale privato dei contratti*, Milan, 1991, 132-133 and 176 et seq., and "Convenzione sulla legge applicabile alle obligazioni contrattuali", *in Le nuove leggi civili commentate*, 1995, 901-1116, Article 4 no 4; HELENA BRITO (n. 4) 101, and "Direito aplicável ao contrato internacional de concessão comercial", *in Est. Isabel de Magalhães Collaço*, vol. I, 103-157, Coimbra, 2002, 121; Manlio FRIGO – "La determinazione della legge applicabile in mancanza di scelta dei contraenti e le norme imperative nella Convenzione di Roma", *in La Convenzione di Roma sul diritto applicabile ai contratti internazionali*, edited by Giorgio Sacerdoti and Manlio Frigo, 17-33, 2nd ed., Milan, 1994, 24-25; EUGÉNIA GALVÃO TELES – "A prestação característica: um novo conceito para determinar a lei subsidiariamente aplicável aos contratos internacionais. O artigo 4.º da Convenção de Roma sobre a Lei Aplicável às Obrigações Contratuais", *O Direito* 127 (1995) 71-183, 150-151, and "Determinação do Direito material aplicável aos contratos internacionais. A cláusula geral da conexão mais estreita", *in Estudos de Direito Comercial Internacional*, vol. I, org. por Lima Pinheiro, 63-141, Coimbra, 2004, 63-64, 126-127 and 132; LIMA PINHEIRO (n. 5) § 23 A, with more references; Dário MOURA VICENTE – *Da Responsabilidade Pré-Contratual em Direito Internacional Privado*, Coimbra, 2001, 471-472; Alfonso-Luis CALVO CARAVACA and Javier CARRASCOSA GONZÁLEZ – *Derecho Internacional Privado*, vol. II, 9th ed., Granada, 2008, 496-497, sustaining that the court shall take into account necessarily the "presumprions" and explain the reason why it follow them or rebutt them; PLENDER/WILDERSPIN (n. 19) 173 and 177.

context, speak of escape clause, essentially agree with this interpretation ([26]).

In my opinion, Article 4 of the Rome Convention is as a whole dominated by the general criterion of closest connection. The "presumptions" are interpretative guidelines which operate in cases in which, due to a dispersion of connecting factors – e.g., where the contract is concluded by parties of different countries and performed in a third country – the doubt about the determination of the closest connection arises ([27]).

The ECJ, in the *ICF* judgment (2009) ([28]), came, to a great degree, in line with this second interpretation ([29]). The court was asked if the "presumptions" "do not apply only if it is evident from the circumstances in their totality that the connecting criteria indicated therein do not have any genuine connecting value, or whether the court must also refrain from applying them if it is clear from those circumstances that there is a stronger connection with some other country". The court held that the "presumptions" shall not apply "where it is clear from the circumstances as a whole that the contract is more closely connected with" another country ([30]).

Nonetheless, in the Rome I Regulation the EU legislator adopted the former solution, invoking the need for a high degree of foreseeability of the applicable law, in order to assure "legal certainty in the European judicial area" ([31]). In any case, the legislator considered that the courts "should retain a degree of discretion to determine the law that is most closely connected to the situation" ([32]).

The outcome was the adoption of a primary connection based upon a determinate criterion (Article 4(1) and (2)) inspired mainly by the doctrine of characteristic performance, combined with the relevance of the general criterion of the closest connection in the framework of

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[26] - See Paul LAGARDE – "Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980", *R. crit.* 80 (1991) 287-340, 310; *MünchKomm.*/MARTINY [2006: Art. 28 EGBGB no 110]; and LANDO/NIELSEN (n. 21) 1700-1701.

[27] - In substance, also LAGARDE (n. 26) 310.

[28] - 6/10/2009 [*in http://curia.europa.eu*].

[29] - See also Maria João MATIAS FERNANDES – "Roma vista do Luxemburgo – Notas breves a propósito de uma decisão do Tribunal de Justiça das Comunidades em torno do artigo 4.º da Convenção sobre a Lei Aplicável às Obrigações Contratuais", *O Direito* 141 (2009) 1197-1214, 1221 et seq.

[30] - In the grounds of the judgment, the court also stated that Article 4 is based on the general principle enshrined in Article 4(1) (no 26) and that the judge shall, in first place, determine the applicable law on the basis of the "presumption" (no 62).

[31] - Cf. Recital no 16.

[32] - *Ibidem*.

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an authentic escape clause (Article 4(3)) or to establish a successive connection (Article 4(4)).

In fact, according to Article 4(3), where "it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply". In this context, Recitals nos 20 and 21 stress the importance of a "very close relationship with another contract or contracts". Thus, the general criterion of the closest connection only operates in exceptional cases ([33]), where there is a connection *manifestly* closer with a country other than the one designated by the primary connection or, in residual cases, where the governing law cannot be determined pursuant to the rules that establish the primary connection (Article 4(4)).

What requires further consideration is to what extent the escape clauses provided for in the Regulation may allow – beyond the weighting of the links between the contract and the countries involved (including the relationship between the contract and another contract or contracts) – room for the evaluation of interests of the parties and of the values and goals that the laws of the country involved seek to promote ([34]).

In any case, the reinforcement of the role played by the law of the characteristic performance debtor is not, in my opinion, justified. The advantage resulting therefrom in terms of foreseeability of the applicable law is limited, for two reasons.

First, because the operation of the escape clause always implies some uncertainty. E.g., if a service provider located in country A concludes a contract for provision of services with a client located in country B, pursuant to which the services shall be performed in country B, Article 4(1)(b) designates the law of country A. In principle, this contract has a closer connection with country B. But should this

[33] - Cf. *Cheshire, North & Fawcett Private International Law* (n. 6) 725, LAGARDE/TENENBAUM (n. 12) 738, and REITHMANN/MARTINY/MARTINY [2010: no 169].

[34] - With regard to Article 4 of the Rome Convention, GIULIANO/LAGARDE (n. 2) Article 4 note 1, seem to take into consideration only objective links; also LAGARDE (n. 26) 306 and 310-311, equate the criterion of the closest connection with the "objective localization" of the contract. See also VON HOFFMANN/THORN (n. 4) 447, sustaining that only objective factors concerning the performance exchange [*Leistungsaustausch*] shall be taken into consideration. Differently, for *Münch-Komm.*/MARTINY [2006: Art. 28 nos 12-15] all connecting factors shall be considered, and a weighting of the conflictual interests of the parties in the application of the law with which they are more connected is accepted, but not an evaluation of the "interests of the involved States" in line with the *governmental interest analysis*. See further BOSCHIERO (n. 21) 412 et seq.; Ulrich MAGNUS – "Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice", *in Rome I Regulation*, edited by Franco Ferrari and Stefan Leible, 27-50, Munich, 2009, 49; and Javier CARRASCOSA GONZÁLEZ – *La Ley Aplicable a los Contratos Internacionales: El Reglamento Roma I*, Madrid, 2009, 203 et seq.

connection be considered as manifestly closer and trigger the operation of the escape clause?

Second, because the doctrine of characteristic performance is far from being universally recognized. In cases in which there is a closer connection with a third country (i.e., a country not bound by the Regulation), the parties may have good reasons to abide by the law of this country, if it claims applicability, rather than by the law of the characteristic performance debtor.

Last but not the least, it would appear that applying the law of a country other than the country most closely connected with the contract, only because it is the law of the characteristic performance debtor, amounts to a sacrifice of choice of law justice ([35]).

IV. CONSUMER CONTRACTS CONCLUDED THROUGH THE INTERNET

The applicability of the special regime of consumer contracts contained in Article 5 of the Rome Convention and Article 6 of the Rome I Regulation depends on certain connections with the country of habitual residence of the consumer. Article 5(2) of the Rome Convention enumerates three types of connection. This has generated many problems of interpretation ([36]), namely concerning contracts concluded through the Internet ([37]). It would seem that Article 6(1) of Rome I Regulation, coupled with the available elements of interpretation, has solved most of these problems.

Article 6(1) requires that the professional:

- pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

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[35] - See, on choice of law justice in general, LIMA PINHEIRO (n. 23) § 16 and § 17 C, with further references. See also the criticism of PLENDER/WILDERSPIN (n. 19) 177.

[36] - See, for instance, Luís de LIMA PINHEIRO – "Direito aplicável aos contratos com consumidores", *ROA* 61 (2001) 155-170, 162-163, and EUGÉNIA GALVÃO TELES – "A lei aplicável aos contratos de consumo no 'labirinto comunitário'", *in Est. Inocêncio Galvão Telles*, vol. I, 683-751, Coimbra, 2002, 696 et seq., with further references.

[37] - See, besides the essays mentioned in the previous note, ELSA DIAS OLIVEIRA – *A Protecção dos Consumidores nos Contratos Celebrados Através da Internet. Contributo para uma análise numa perspectiva material e internacionalprivatista*, Coimbra, 2002, 215 et seq., and "Contratos celebrados através da Internet", *in Estudos de Direito Comercial Internacional*, org. por Luís de Lima Pinheiro, vol. I, 219-237, Coimbra, 2004, 228 et seq.; António MARQUES DOS SANTOS – "Direito aplicável aos contratos celebrados através da Internet e tribunal competente", *Estudos de Direito Internacional Privado e de Direito Público*, 159-225, Coimbra, 2004, 182-183; Dário MOURA VICENTE – "A comunitarização do Direito Internacional Privado e o comércio electrónico", *in Seminário sobre a Comunitarização do Direito Internacional Privado*, org. por Luís de Lima Pinheiro, 63-77, Coimbra, 2005, 73 et seq., and *Problemática Internacional da Sociedade da Informação*, Coimbra, 2005, 253 et seq.; Luís de LIMA PINHEIRO – "Direito aplicável aos contratos celebrados através da internet", *ROA* 66 (2006) 131-190, 151 et seq. (Spanish version in *Estudios de Deusto* 54/2 (2006) 151-198), with further references.

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- by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

Recital no 24, in the line of the Explanatory Memorandum of the Commissions' Proposal ([38]), provides valuable elements for the interpretation of this provision ([39]).

First, it has adopted the criterion of "targeted activity", aligning the scope of application of Article 6 of the Rome I Regulation with the scope of application of Article 15 of the Brussels I Regulation (concerning jurisdiction), to take into account the evolution of distance selling techniques, namely the conclusion of contracts through the Internet.

Second, reference is made to the Joint Declaration by the Council and the Commission on Articles 15 and 73 of the Brussels I Regulation, which points out that "The mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor".

It should be mentioned that there is a discrepancy between the different linguistic versions of the first sentence of this text. In the French version it reads "le simple fait qu'un site internet soit accessible ne suffit pas pour rendre applicable l'article 15, encore faut-il que ce site internet invite à la conclusion de contrats à distance et qu'un contrat ait effectivement été conclu à distance, par tout moyen". Similarly, the German version states that "die Zugänglichkeit einer Website allein nicht ausreicht, um die Anwendbarkeit von Artikel 15 zu begründen; vielmehr ist erforderlich, dass diese Website auch den Vertragsabschluss im Fernabsatz anbietet und dass tatsächlich ein Vertragsabschluss im Fernabsatz erfolgt ist, mit welchem Mittel auch immer". The same may be said of the Portuguese version.

The Explanatory Memorandum adds that the "sites to which this declaration refers are not necessarily interactive sites: a site inviting buyers to fax an order aims to conclude distance contracts. On the other hand, a site which offers information to potential consumers all over the world but refers them to local distributor or agent for the purposes of concluding the actual contract does not aim to conclude dis-

[38] - 6-7.

[39] - See also Recital no 25 and LAGARDE/TENENBAUM (n. 12) 745-746.

tance contracts. Unlike Article 5(2) of the Convention, the proposed Regulation does not require the consumer to have done the acts needed to conclude the contract in the country of his habitual residence, as this is a superfluous condition in terms of contracts concluded via the Internet".

In this light, it would appear that the supplier of goods or provider of services who employs a method of communication which may reach most of the countries (e.g., satellite television or internet) to invite the consumers to conclude contracts at distance directs its activity to all these countries unless, effectively, it only accepts to conclude contracts with consumers of certain countries or excludes the conclusion of contracts with consumers of certain countries ([40]).

Nonetheless, regarding the Brussels I Regulation, the ECJ has recently adopted a different interpretation ([41]) whereby in order to fulfill the requirement of an activity directed to the country of the consumer's domicile, the professional must have manifested, albeit implicitly, his intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile ([42]).

The court distinguished clear expressions of this intention and other items of evidence which, possibly in combination with one another, are capable of demonstrating the existence of an activity directed to the Member State of the consumer's domicile ([43]).

"Clear expressions of such an intention on the part of the trader include mention that it is offering its services or its goods in one or more Member States designated by name. The same is true of the disbursement of expenditure on an internet referencing service to the operator of a search engine in order to facilitate access to the trader's site by

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[40] - See LIMA PINHEIRO (n. 36) 162-163, and (n. 37) 151 et seq., with more references. For a convergent view, see also Max Planck Institute (n. 11) 273, and *Palandt Komm.*/THORN [2010: (IPR) Rom I Art. 9 no 6]. See further PLENDER/WILDERSPIN (n. 19) 246. The Comissions' Proposal contained an exception for the case in which the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence (Article 5(2)(2)). The Explanatory Memorandum mentions, in this context, the case in which the consumer has lied about his habitual residence. Article 6(1) of the Regulation does not contain this safeguard clause, but this does not mean that this concern is irrelevant: if the professional does not conclude contracts with consumers habitually resident in a country, and one of these consumers succeeds in concluding a contract by lying about his habitual residence, he cannot benefit from the protection of the mandatory rules of the country where his real habitual residence is located, because the activity of the professional was not directed to this country. In the same sense, Max Planck Institute (n. 11) 274-275.

[41] - Cf. ECJ 7/12/2010, in the cases *Peter Pammer* and *Hotel Alpenhof* [*in* http://curia.europa.eu].

[42] - *Loc. cit.*, nos 75 et seq.

[43] - *Loc. cit.*, nos 80 et seq.

consumers domiciled in various Member States, which likewise demonstrates the existence of such an intention" ([44]).

The court stressed, however, that a finding that an activity is directed to other Member States does not depend solely on the existence of such patent evidence. In this connection, it noted that the European Parliament rejected wording stating that the trader had to have "purposefully directed his activity in a substantial way" to other Member States or to several countries, including the Member State of the consumer's domicile. "Such wording would have resulted in a weakening of consumer protection by requiring proof of an intention on the part of the trader to develop activity of a certain scale with those other Member States" ([45]).

Therefore, the court held that may constitute items of evidence from which it may be concluded that the professional's activity is directed to the Member State of the consumer's domicile "namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States" ([46]).

On the other hand, the court held that mere accessibility of the professional's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the professional is established ([47]).

The interpretation of the ECJ may be considered a middle course between the positions advocated on this issue; however, it can raise many difficulties of interpretation of Article 15 of the Brussels I Regulation. Although Recital no 24 of the Rome I Regulation has no

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[44] - *Loc. cit.*, no 81.

[45] - *Loc. cit.*, no 82.

[46] - *Loc. cit.*, no 93.

[47] - *Loc. cit.*, no 94.

parallel in the Brussels I Regulation, it is expected an extension of this interpretation, and of the difficulties resulting therefrom, to the former Regulation.

V. OVERRIDING MANDATORY RULES

Recital no 37 of the Rome I Regulation states that considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.

The Regulation deals with the overriding mandatory rules in Article 9. This Article differs from the Rome Convention in two important aspects.

On one hand, Article 9(1) provides a definition of overriding mandatory provisions based upon a substantial criterion: "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".

The purpose of this definition is certainly to point out the exceptional character of the application of mandatory rules which do not belong to the law designated by the choice of law rules of the Regulation to govern the contract. The Explanatory Memorandum of the Commission's Proposal asserts that the definition contained in the Proposal has been inspired by the ECJ judgment in the *Arblade* case ([48]). This judgment, however, concerns a specific problem regarding the compatibility of certain mandatory rules of the Member State in which workers are temporarily deployed in the context of a provision of services by an undertaking established in another Member State with freedom to provide services granted by EU law. It was not aimed at defining overriding mandatory rules for other normative purposes. This judgment, in turn, is inspired by the notion put forward by FRANCESCAKIS (rules "the respect for which is necessary for safeguarding the political, social or economic organization of the country" ([49]). Article 9(1) of the Rome I Regulation deviates from this notion

[48] - ECJ 23/11/1999 [*in http://curia.europa.eu*], no 30.

[49] - "Conflits de lois (principes généraux)", *in Rép. dr. int.,* t. I, Paris, 1968, no 137. A substantial test for the characterization of overriding mandatory rules is also favored by Wilhelm WENGLER – *Internationales Privatrecht*, 2 vols., Berlin and New York, 1981, 88-89; António FERRER CORREIA – *Lições de Direito Internacional Privado*, Coimbra, 1973, 24, and *Lições de Direito Internacional Privado - I*, Coimbra 2000, 161; MARQUES DOS SANTOS (n. 23) 927 et seq., 934, 940-941and 1033, compare 959, and *Direito Internacional Privado. Introdução* – I Volume, Lisboa, 2001, 274 et seq.; and MOURA RAMOS (n. 4) 667 et seq., compare 671-672, "Droit international privé vers la fin du vingtième siècle:

first by resorting in first place to the concept of "public interest" – also mentioned in the *Arblade* judgment – and by making it clear that the reference to "safeguarding of the political, social or economic organisation" is not exclusive.

The exceptionality of the operation of overriding mandatory rules converges with the position that I have been advocating ([50]), but the technique adopted is not the best. Diverging from the view prevailing in Germany regarding the characterization of "*Eingriffsnormen*" ([51]), it is widely accepted that many overriding mandatory rules [*lois de police*, *norme di applicazione necessaria*, *normas de aplicação imediata*] aim to protect contractually weaker party, rather than promote the "public interest" ([52]). They may pursue other goals. It does not seem possible to characterize them by their content and goal ([53]). The concept of "public interest" must be interpreted in a broader sense – also in line with the *Arblade* judgment ([54]) – and, therefore, will lose much of its utility as a test for the limitation of the mandatory rules which may prevail over the *lex contractus*.

On the other hand, the EU legislator dropped the general clause contained in Article 7(1) of the Rome Convention and Article 8(3) of the Commission's Proposal and laid down in Article 9(3) that 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 consider-

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avancement ou recul? », *DDC/BMJ* 73/74 (1998) 85-125, 97-98, and "Linhas gerais da evolução do Direito Internacional Privado português posteriormente ao Código Civil de 1966", *in Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977*, 501-547, Coimbra, 2006, 535.

[50] - N. 23, 253.

[51] - See *MünchKomm.*/MARTINY [2006: Art. 34 EGBGB no 12]; MANKOWSKI (n. 13) 146-147; Ulrich MAGNUS – "Die Rom I-Verordnung", *IPRax* (2010) 27-44, 41; and *Palandt Komm.*/THORN [2010: (IPR) Rom I Art. 9 nos 5-8]. See also *Cheshire, North & Fawcett Private International Law* (n. 6) 739, and CARRASCOSA GONZÁLEZ (n. 34) 230-231.

[52] - See Report GIULIANO/LAGARDE (n. 2) Article 7 note 4; Andrea BONOMI – "Le norme di applicazione necessária nel regolamento 'Roma I'", *in La nuova disciplina comunitária della legge applicabile ai contratti (Roma I)*, ed. by Nerina Boschiero, 173-189, Torino, 2009, 180 et seq., with further references.

[53] - For a convergent view, see Yvon LOUSSOUARN – "Cours général de droit international privé", *RCADI* 139 (1973) 271-385, 328-329; Ivo SCHWANDER – *Lois d'application immédiate, Sonderanknüpfung, IPR-Sachnormen und andere Ausnahmen von der gewöhnlichen Anknüpfung im internationalen Privatrecht*, Zurique, 1975, 283; EGON LORENZ (n. 8 [1987]) 578-579; Frank VISCHER – "Zwingendes Recht und Eingriffsgesetze nach dem schweizerischen IPR-Gesetz", *RabelsZ* 53 (1989) 438-461, 446; Klaus SCHURIG – "Zwingendes Recht, 'Eingriffsnormen' und neues IPR", *RabelsZ* 54 (1990) 218-250 , 226 et seq.; MAYER/HEUZÉ (n. 24) 90; LIMA PINHEIRO (n. 5) 1091-1092; and MOURA VICENTE (n. 25) 640 et seq.

[54] - *Loc. cit.*, no 36. See also ECJ 26/10/2006, in the case *Mostaza Claro* [*in* http://curia.europa.eu] no 38. See BONOMI (n. 52) 181 et seq.. with further arguments; PLENDER/WILDERSPIN (n. 19) 336 et seq.; and also, in substance, LANDO/NIELSEN (n. 21) 1723-1724.

ing 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".

On this issue, there is also convergence with my point of view: a general clause on the applicability of overriding mandatory rules of third countries is simultaneously inappropriate and undesirable and preference shall be given to conditional references to certain categories of mandatory rules in force in countries that have a determinate connection with the situation ([55]). The legislator's mission shall be to determine the special connections which may lead to the application of foreign mandatory rules which do not belong to the *lex contractus*, rather than give a blank check to the courts.

Nevertheless, the wording of Article 9(3) seems too narrow ([56]). In any case, I believe that the provision should be interpreted as comprising not only the overriding mandatory rules concerning the performance of the contract, but also those providing for requirements of validity of the content and purpose of the contract ([57]). It is also suggested that not only overriding prohibitive rules but also overriding prescriptive rules governing the obligations of the parties may be applied under Article 9(3) ([58]).

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[55] - N. 23, 275 et seq. See also Peter STONE – *EU Private International Law. Harmonization of Laws*, Cheltenham, UK, e Northampton, MA, USA, 2006, 359. The limitation of the scope of Article 9(3) to overrinding mandatory rules of third countries is also contentious. For a contrary view, see namely (before Rome I Regulation) Gerhard KEGEL – "Die selbstgerechte Sachnorm", *in Gedächtnischrift für Albert Ehrenzweig*, edited by Erik Jayme and Gerhard Kegel, 51-86, Karlsruhe e Heidelberga, 1976, 82-83, and "Die Rolle des öffentlichen Rechts im internationalen Privatrecht", *in FS Ignaz Seidl-Hohenveldern, Völkerrecht. Recht der Internationalen Organisationen. Weltwirtschaftsrecht*, 243-278, Köln et al., 1988, 246 and 250 et seq.; Kaus SCHURIG – "Zwingendes Recht, 'Eingriffsnormen' und neues IPR", *RabelsZ* 54 (1990) 218-250, 217 and 226 et seq.; Anton SCHNYDER – *Wirtschaftskollisionsrecht. Sonderanknüfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter besonderer Berücksichtigung von Marktrecht*, Zurique, 1990, 244 et seq..; Jürgen BASEDOW – Review of KREUZER (*Zum einflußfremdstaatlicher Eingriffsnormen auf private Rechtsgeschäfte*, Heidelberga, 1986), *JZ* (1986) 1053-1054, 1054, and "Conflicts of Economic Regulation", *Am. J. Comp. L.* 42 (1994) 423-447, 435 et seq.; KROPHOLLER (n. 24) 508; and (thereafter), MANKOWSKI (n. 13) 148; *Palandt Komm./*THORN [2010: (IPR) Rom I Art. 9 no 15], invoking respect for the spatial scope of application claimed by those rules. Compare LANDO/NIELSEN (n. 21) 1719; LIMA PINHEIRO (n. 23) 269-271; BONOMI (n. 52) 184; and MAGNUS (n. 51) 42..

[56] - This wording is certainly inspired by the English case law – see *Dicey, Morris and Collins* (n. 24) 1592 et seq. See the ciriticism of BONOMI (n. 52) 187-188, with the mention of other connections that should be relevant in this context, but see also the argumentation of Jonathan HARRIS – "Mandatory Rules and Public Policy under the Rome I Regulation", *in Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, ed. by Franco Ferrari and Stefan Leible, 269-342, Munich, 2009, 279 et seq.

[57] - See LIMA PINHEIRO (n. 23) 276-277, with further references. Regarding the validity of the contract the requirements provided for by the law of the place of performance at the time of the conclusion of the contract shall be relevant. Prohibitive or limitative rules adopted thereafter shall only be taken into account in the framework of the *lex contractus* as explained below.

[58] - See *Palandt Komm./*THORN [2010: (IPR) Rom I Art. 9 no 12]. See further PLENDER/WILDERSPIN (n. 19) 347 et seq.

Article 9(2) safeguards the applicability of overriding mandatory rules of the forum country, in terms similar to Article 7(2) of the Rome Convention, but with the limitations which may result from the definition contained in § 1.

Both the wording and the purpose of Article 9(3), in the light of Recital no 37, suggest that the court of a Member State, cannot apply mandatory rules of third countries outside the limits imposed by that provision and beyond the special regimes provided for in the Regulation ([59]). Nonetheless, a certain flexibility may be achieved through the operation of the public policy clause and by the relevance, in the framework of the *lex contractus*, of mandatory rules of third countries.

According to Article 21, the application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum. Regarding the Brussels Convention, the ECJ has exercised a certain control over the limits in which a Contracting State may invoke the public policy clause ([60]). The clause only operates when there is an infringement of a fundamental principle of the *lex fori*. This "infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order" ([61]).

Normally, the operation of the public policy clause requires a sufficient connection of the case with the forum country. It is however defensible that this requirement may be waived where fundamental rights of special importance are at stake ([62]) and where the case has a strong relationship with a foreign country that shares the fundamental principle or rule with the forum country ([63]).

The relevance of mandatory rules of third countries in the framework of the *lex contractus* is well known when it comes to the operation of a prohibitive rule of the country of performance of the contract as fact amounting to impossibility of performance. In principle, how-

[59] - In this sense, namely, LAGARDE/TENENBAUM (n. 12) 779, MANKOWSKI (n. 13) 148, BONOMI (n. 52) 185, PLENDER/WILDERSPIN (n. 19) 345, HARRIS (n. 56) 319, and MAGNUS (n. 51) 42. The issue is considered doubtful by *Palandt Komm.*/THORN [2010: (IPR) Rom I Art. 9 no 14].

[60] - Cf. ECJ 28/3/2000, in the case *Krombach* [*in http:.//curia.europa.eu*], no 23, and 11/5/2000, in the case *Renault* [*in http://curia.europa.eu*], no 28.

[61] - Case *Krombach*, loc. cit., no 37, and case *Renault*, loc. cit., no 30.

[62] - See LIMA PINHEIRO (n. 23) § 47 B.

[63] - See also the remarks of PIERRE MAYER (n. 15) 315-316, 327-328 and 350, but mainly concerning matters of personal status.

ever, this problem has already been solved by Article 9(3). Therefore, there is no need to resort to that doctrine.

Another problem which is dealt with in this context concerns the consequences for the validity of the contract of infringement of mandatory rules of third countries regarding the content or purpose of the contract. If we accept the extension of Article 9(3) to overriding mandatory rules of the country of performance regarding the validity of content and of purpose of the contract, these rules may be applicable. However, the problem remains when it comes to mandatory rules which are not "overriding" or which belong to other legal systems. The court of a Member State cannot apply these rules, but it can rely on doctrine followed in some countries, including Germany, which considers such contracts invalid because, under the *lex contractus*, they are immoral [*sittenwidrig*], when the rule of the third country pursues a goal shared by the *lex contractus* or by the international community as a whole ([64]). When evaluating if the contract is immoral, the court has, as in the application of the public policy clause, a margin of discretion in which it may take into account all the circumstances of the particular case.

VI. FINAL REMARKS

The Rome Convention has been a remarkable progress in the Conflicts Law of Obligation Contracts, at least in many Contracting states. The unification of the choice of law rules in the EU has also promoted the international harmony of solutions and, in general, greater legal certainty and foreseeability of judgments, although these values could only be fully achieved at a universal level.

The Rome I Regulation improved certain features of the Rome Convention and adopted supplemental choice of law rules that were needed for systematic unification of that Conflicts Law. In some important issues, however, the Regulation did not clear up the difficulties of interpretation that have arisen (namely concerning choice of law in domestic contracts), has raised very controversial problems of interpretation (for instance regarding overriding mandatory rules), did not go far enough (namely regarding the choice of non-State law) or has even reversed the trend of evolution in this field (particularly by in-

[64] - See, for instance, CHRISTIAN VON BAR and Peter MANKOWSKI – *Internationales Privatrecht*, 2th ed., Munich, 2003, 288-289; Ulrich DROBNIG – "Die Beachtung von ausländischen Eingriffsgesetzen - eine Interessenanalyse", *in FS Karl Neumayer*, 159-179, 1985, 161-162; François RIGAUX – "Les concepts indeterminés en droit international privé et en droit communautaire", *in Est. Isabel de Magalhães Collaço*, vol. I, 623-647, Coimbra, 2002, 634-635; and LIMA PINHEIRO (n. 23) § 15 E. See further the criticism of VON HOFFMANN/THORN (n. 4) 473, and regarding Rome I Regulation, *Palandt Komm.*/THORN [2010: (IPR) Rom I Art. 9 no 14].

creasing the role played by the law of the characteristic performance debtor).