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MANDATORY RULES

and

PUBLIC POLICY

- **Mandatory rules:** rules that cannot be derogated from by an agreement. The parties of a contract must observe them.

  In the public law there is a lot of *iuris cogentis* rules, while in the private law more rules are dispositive.

- **Mandatory protective rules:**

  - *iuris cogentis* rules that cannot be derogated from by an agreement,
  - their purpose is to protect a weaker party in a contract (usually a weaker party is a consumer or an employee).

    We can find these rules both in private and public law.

- Internationally mandatory rules

  - not normal *iuris cogentis* rules contained in the public or private law.
  - No definition has existed for a long time.
  - Now we can say that the definition in contained in the Article 9 of Regulation Rome I (also serves for Rome II).

Three basic types of internationally mandatory rules:

- those coming from *lex fori*,
- those coming form the *lex causae*
- those which form a part of the law of the third state.

OVERRIDING MANDATORY RULES

- provisions applicable to any situation falling within their scope irrespective of the law otherwise applicable.
  These are **rules which may not be** within the limits of their subject matter **fundamentally changed or replaced by foreign law** (*joined Cases C-396/96 and C-376/96, Arblade and Leloup*).

- rules of the public law mainly (antitrust law, import and export restrictions) but it is not always so.

These may be also rules of the private law serving to protect the interests of the weaker party to a contract particularly in the area of consumer and employment law.

- rules that meet a specific purpose of the political, economic or social nature which the legal order of which they form a part considers to be particularly significant.
  They **protect the essential interests of a particular state.**

- they restrict the scope for an application of the conflict rules and choice of law undertaken by them because they precede the selection of law on the basis of conflict rules.
  They influence rights and duties of the parties of private law relationships; however, they do not regulate these relationships directly.

In the course of the application of the overriding mandatory rules it is necessary to take into account the differences **between**:

- the concept of public policy (passive part)
- and the concept of the overriding mandatory rules (active part)

The overriding mandatory rules are applicable to any situation irrespective of the content of applicable law.

On the other hand, the reservation of public policy (public order) protects certain specific interests which are contrary to an applicable law.

It is a different mode of safeguarding public interest which identifies public character of the overriding mandatory rules. The reservation of public policy comes into play after determining the applicable law. It is primarily of negative character.

Overriding mandatory rules are applied directly irrespective of the law otherwise applicable.

These are provisions of a strictly positive or peremptory nature because they pursue a principle that **the overriding mandatory rules take precedence over otherwise applicable law and even over the choice of law expressed by the parties**.

Overriding Mandatory Rules in the Rome I Regulation

The overriding mandatory rules are defined in Article 9(1) of the Rome I Regulation such as:

“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”.

This definition is based on the judgement of the ECJ in joined cases C-369/96 and C-376/96 (judgement of the Court of Justice of 23 November 1999, Jean-Claude Arblade and Arblade&Fils SARL, C-369/96 and Bernard Leloup, Serge Leloup and Fofrage SARL – C-376/96).

In the case of the **overriding mandatory rules of a third country** *“regard shall be had to their nature and purpose and to the consequences of their application or non-application”* (Article 9(3) of the Rome I Regulation).
This approach could be problematic because all characters of the overriding mandatory rules should be specified in the definition in Article 9(1) so to avoid any doubts.

The overriding mandatory rules are:

- provisions applicable irrespective of the law otherwise applicable

- must take into account the purpose and character of a certain regulation the aim of which is to protect a public interest and the relation between the factual and legal relationship and territory or other important interests of the forum.

It is not entirely clear **what kinds of public interests** are being targeted.
The article itself mentions the state’s political, social, or economic organisation, but this list is not exhaustive, since the European legislature included the words ‘such as’.

The European legislature seems to afford a wide margin of appreciation to the courts

In Article 9 of the Rome I Regulation are distinguished three kinds of overriding mandatory rules:

- rules of the forum,
- rules of another member state
- overriding mandatory rules of non-Member States.

Article 9(2) of the Rome I Regulation regulates the overriding mandatory rules of the forum.

Generally accepted principle:

“each forum applies the overriding mandatory rules of its own body of laws”.
(“nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum”).

This rule **guarantees the application of the overriding mandatory rules** ***lex fori****,* irrespective of the law otherwise applicable.

The forum is given the discretion whether or not to apply the overriding mandatory rules of a third country under Article 9(3) of the Rome I Regulation.

Article 9(3) defines a range of foreign overriding mandatory rules that should be applied.

- *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".*

The judicial discretion is particularly relevant when comparing the effects of conflicting overriding mandatory rules of the various legal orders among which is necessary to decide.

The possibility of the application of other than overriding mandatory rules of the chosen law or law of the forum is **limited to the situation:**

- where a contract has to be or has been performed in the territory of the state whose overriding mandatory provisions render the performance of the contract unlawful.

Limitations of overriding mandatory rules.

In *Unamar* v. *Navigation Maritime Bulgare* (C-184/12) the CJEU laid down certain limitations with respect to the concept of overriding mandatory rules:

- the first one is based on the provisions of the EU Treaty, in particular the four freedoms – the application of national rules **shall not be detrimental to the primacy and uniform application of EU law**.

- in order to secure the effect of the fundamental principle of freedom of contract, the term ‘overriding mandatory provisions’ **should be interpreted strictly**.

Overriding Mandatory Rules in the Rome II Regulation

Article 16 of the Rome II Regulation **does not contain the definition of the overriding mandatory provisions**.

This shows that the overriding mandatory rules **have lower relevance for non-contractual** than contractual obligations.

Article 16 of the Rome II Regulation guarantees the application of the overriding mandatory rules *lex fori* irrespective of the law governing legal relationship.

"nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.".

A generally principle that **the court always applies the overriding mandatory provisions of its own law**.

Rome II Regulation is limited only to the application of the overriding mandatory rules of the forum.

The possibility of the application of the **overriding mandatory rules of a third country** is not given.

The EU legislature does not allow a national court to take into account the overriding mandatory rules of a third state.

However Article 17 of the Rome II Regulation provides more leeway as **it regulates the rules of safety and conduct**.

"in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability".

The rules of safety and conduct **must be taken into account as a matter of fact.**

The person for whose benefit they are applied must establish the content of these rules. These include, for example, traffic rules, regulation for health and safety in various activities such as building regulations, professional safety etc.

The rules of safety and conduct may be the overriding mandatory rules because they pursue a public interest and apply irrespective of the law otherwise applicable. **They are a subcategory of the overriding mandatory rules.**

PUBLIC POLICY (ordre public)

INTRODUCTION

The concept of the public policy is well established in almost all jurisdictions.

It has been defined as the ''most basic notions of morality and justice.''

Public policy **is a reflection of the fundamental social, economic and moral values of the society**.

It is a subject of gradual change as long as the values of the society also change in the course of time.

In the Rome I and Rome II Regulations the concept of public policy has the same meaning.

Articles 21 of Rome I and 26 of Rome II state the same:

"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 (ordre public) of the forum".

This regulation serves as a limitation of foreign law in the forum country.

The requirements of these Articles are **quite different from those which describe the concept of overriding of mandatory provisions**.

Under Article 21 of Rome I and 26 of Rome II **local law is not applied**

- as a *loi d'application immediate,* but

- **the *result***, found under the application of foreign law, is corrected according to the public policy standards of the forum state.

This exception applies only in cases if the situation has close contacts with the forum state.

The outcome of a solution may be quite different whether one applies local law under Article 9 (2) of Rome I or whether one corrects a result found under foreign law according to the minimum standards of Article 21.

Although **it is for national courts to decide on the content of the *ordre public***, but the ECJ also plays a role in its interpretation.

The interpretation of this notion by the European Court is not only possible but necessary.
It is the only way to ensure a uniform interpretation and application of the EU provisions.

The ECJ case law on this field has been traditionally devoted to restricting the use of the public policy clause in the Brussels Convention and Regulation Brussels I (Article 34 (1)).

Since the *Krombach* case (ECJ, 28 March 2000, C-7/98, *Dieter Krombach v. André Bamberski*) it is understood that the public policy exception contained in EU regulations **refers to substantive as well as procedural public policy**.

In this judgement the Court in Luxemburg also stated that although Member States have some free space in establishing the content of the public policy, the use of this freedom can be controlled by ECJ.