Defining Internationally Mandatory Rules in European Private International Law of Contracts

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Grundfragen

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Internationally mandatory rules represent a private international law method that has acquired a certain degree of recognition in case law, legal codifications and scholarship. Yet, there seems to be insufficient clarity regarding their conceptual features. This article looks into the two basic conditions under which a rule may be characterised as being internationally mandatory, particularly within the framework of the European Union private international law: the interest criterion and the overriding criterion. It discusses the development and analyses the wording of the provisions contained in the Rome Convention and the Proposal for its conversion into a Rome I Regulation. It propounds that not only the "interventionist" rules, but also the combined "interventionist-protective" rules may be classified as internationally mandatory.

A. Introduction

The internationally mandatory rules have been discussed in legal literature from various angles. Their relevance in private international law is owed to the fact that they operate in a way to override the law that would otherwise be applicable. Thus, if a contract is governed by the law of country A, either as a result of parties' choice or objective connecting, and the law of the country B contains an internationally mandatory rule which demands its application to the contract, this internationally mandatory rule might be applied or taken account of although not belonging to the lex causae. Whether it will eventually be applied or not depends on different factors, including whether it belongs to lex fori or to the law of a third country. Nonetheless, the initial problem with these rules is the same in all cases – how to recognise them. This is not an easy task because there is no straightforward benchmark that would enable instant recognition of all internationally mandatory rules. Rather, their identification is a process concerned with construing the rules with the help of certain criteria. Therefore, the identification of the internationally mandatory rules necessitates analysis of the requirements that the rules have to fulfil, including the criteria which are specifically established in the legal sources.

A thorny problem of terminology related to the internationally mandatory rules,[1] is manifested in deviations, not only in regard to phrases adopted in different languages and within distinct legal systems, but also among co-lingual authors. This is an overt symptom of the difficulty in accurately conceptualising this type of rules.[2] The definitions offered by various authors differ due to the perspective from which this phenomenon is regarded, as well as to its various aspects that are taken into account. Therefore, academic opinions stating that internationally mandatory rules are "ill-defined"[3] or that "[…] no precise, all-encompassing definition of those rules has yet been established"[4] are unsurprising and appear valid. Consequently, attempts to enlighten the concept of internationally mandatory rules are welcomed, and this article also hopes to offer a modest contribution in that respect.

Given the number of legislative provisions that allow for the application of internationally mandatory rules,[5] this overview is restricted primarily to the concept of the rules as envisaged by the European private international law de lege lata and de lege ferenda: the Convention on the Law Applicable to Contractual Obligations[6] (hereinafter: the Rome Convention) and its subsequent counterpart, the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)[7] (hereinafter: the Rome I Proposal). Perhaps the most troublesome task for the courts or other competent authorities, when applying the provisions of Article 7 of the Rome Convention, is the correct identification of the rules of a foreign law that qualify as in-

1 Juenger, Friedrich K., General Course on Private International Law (1983), Recueil des cours, Vol. 193, 1985-IV, (pp. 131-387) p. 201.

2 Boggiano, António, Derecho internacional privado, Ediciones Depalma, Buenos Aires, 1978, p. 155.

3 Jessurun d'Oliveira, Hans Ulrich, Foreign Law and International Legal Cooperation, in: Hague-Zagreb Essays 2, Hague-Zagreb Colloquium on the Law of International Trade, Hague Session 1976, T.C.M. Asser Institute, Sijthoff-Alphen aan den Rijn, 1987, (pp. 216-240) p. 229.

4 Symeonides, Symeon C., An Outsider's View on Modern American Theories in P.I.L., Harvard SJD Thesis, p. 41 (cited in Guedj, Thomas G., The Theory of the Lois de Police, A Functional Trend In Continental Private International Law – A Comparative Analysis With Modern American Theories, Am. J. Comp. L., Vol. 39, 1991, (pp. 661-697) p. 695, n. 158).

5 See, e.g. Article 16 of the 1978 Hague Convention on the Law Applicable to Agency, Article 16 of the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition, Article 11 of the 1994 Inter-American Convention on the Law Applicable to International Contracts (CIDIP-V), Article 19 of the 1987 Swiss Private International Law Act, Article 3076 of the 1991 Amendment to the Civil Code of Quebec, Article 1192 of the 2001 Civil Code of the Russian Federation, Part 3, Section VI: International Private Law, Article 46 of the 2005 Bulgarian Code on Private International Law.

6 [1980] O.J. L 266, pp. 1-19; the consolidated version published in [2005] O.J. C 334, pp. 1-19.

7 [2005] COM(2005) 650 final, 2005/0261 (COD), Brussels 15.12.2005, accessible at <http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0650en01.pdf> (last visited on 16 July 2007).

ternationally mandatory. The wording of the provisions is not helpful as it contains virtually no indication as to the concrete criteria to be utilised. Namely, the two Rome Convention provisions read:

1. When 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, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Given the fact that the guiding criteria are of paramount importance when attempting to differentiate the internationally mandatory rules from those not having the inherent qualities so to be awarded that status,[8] in preparing the Rome I Proposal, the drafters attempted to fill this gap by inserting the following provision in Article 8(1).[9] This provision states:

Mandatory rules are rules the respect of which is regarded as crucial by a country for safeguarding its political, social and economic organization 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.

Although this provision defines the crux of the internationally mandatory rules, for the benefit of completeness of analysis, other conditions that must be fulfilled are also mentioned here starting from the general one, the character of the rule of law (B), following with an examination of the requirement of the substantive nature (C) and the mandatory nature of a rule in domestic legal relationships (D), in order to narrow down the potential rules and to arrive at the final condition, the internationally mandatory character of a rule (E).

B. Character of the Rule of Law

The fundamental prerequisite for the qualification as internationally mandatory rule is the character of the rule of law. Contrasting the legislative decisions (*décision législative*) such as those on nationalisation, the rules of law (*règle*) are, according to the French scholar Mayer, the only category that may be eventually qualified as mandatory.[10] It should be noted that both types of legal rules, statutory provisions as well as rules developed through court practice, i.e. the common law rules, may be taken into account when evaluating their pertinence with respect to the application of Article 7.[11] That is precisely the intention that the drafters of the Rome Convention revealed when the word *loi* (legislation), which appeared in the earlier draft of the Rome Convention in the French language, was replaced with the word *droit* (law in general) in the final version.[12] It is equally irrelevant whether the rule of law originates from the national codification in force in the particular country or from the international instrument, so long as it forms part of the law in force in the relevant country. This conclusion is based on the exact wording of Article 7(1) of the Rome Convention and Article 8(3) of the Rome I Proposal, being "mandatory rules of the law of another country", which spells out the constraint that the rules applicable by virtue of the cited provisions have to be part of some national legal system.[13]

C. Substantive Nature of the Rule

If the rule is a rule of law in the sense outlined above, it has to qualify further under the second requirement which restricts the number of potential rules to only those which have substantive character,[14] meaning that they are different from the conflict of law rules. This conclusion derives from the very nature of the technique of internationally mandatory rules as they operate at the account of the conflict of law rules. The question is, however, posed whether the procedural rules also, i.e. those that would provide for the exclusive jurisdiction, fall under this category. In particular, this question may arise in relation to the choice-of-court clauses and arbitration clauses.[15] In support of a negative response to this question, one could instantly think of the argument that both the Rome Convention and the Rome I Proposal exclude from their scope *ratione materiae*, issues of procedure in general, arbitration

8 *Kassis, Antoine,* Le nouveau droit européen des contrats internationaux, L.G.D.J., Paris, 1993, p. 457; *Mataczyłski, Maciej,* Obce przepisy wymuszajce swoje zastosovanie. Rozważania na tle art. 7 ust. 1 Konwencji rzymskiej oraz orzecznictwa sdów niemieckich, Kwart. Prawa Pryvat., Vol. 10, 2001, (pp. 375-413) p. 408.

9 The notion "mandatory rules" used in Article 8 of the Rome I Proposal may be misleading since the cited provision actually defines internationally mandatory rules rather than mandatory rules. The substantive difference between mandatory rules (for the purpose of clarity, here also called internally mandatory rules) and internationally mandatory rules see, infra sections D. and E.

10 *Mayer, Pierre,* Les lois de police étrangères, Clunet, Vol. 108, 1981, (pp. 277-345) pp. 305 et seq.

11 *Hill, Jonathan,* International Commercial Disputes in English Courts, Third edition, Hart Publishing, Oxford and Portlands, Oregon, 2005, p. 505.

12 Report on the Convention on the Law Applicable to Contractual Obligations by *Mario Giuliano* and *Paul Lagarde,* [1980] O.J. C 282, pp. 1-50, ad Article 7, para. 2.

13 In the same sense, see *Bonomi, Andrea,* Le norme imperative nel diritto internazionale privato, Considerazioni sulla Convenzione europea sulla legge applicabile alle obbligazioni contratualli del 19 giugno 1980 nonché sulle legge italiana e svizzera di diritto internazionale privato, Schulthess Polygraphischer Verlag, Zürich, 1998, p. 337.

14 See *Beliard, Géraldine/Riquer, Eric/Wang, Xia-Yan,* Glossaire de droit international privé, Bruylant, Bruxelles, 1992; *Guedj, T.G.,* op. cit., p. 665; *Schurig, Klaus,* Zwingende Recht, "Eingriffsnormen" und neues IPR, RabelsZ, Vol. 54, 1990, (pp. 217-250) p. 249; *Sikiri, Hrvoje,* Prisilna pravila, pravila neposredne primjene i mjerodavno materijalno pravo u meunarodnoj arbitraži, PuG, Vol. 37, No. 1, 1999, (pp. 83-110) p. 86; *Šarevi, Petar/Burchardt, Thomas,* Conflict of Laws and Public Law: The Swiss Approach, in: Swiss Reports Presented at the XIIth International Congress of Comparative Law, Sydney/Melbourne, 18-27 August 1986, Schulthess Polygraphischer Verlag, Zürich, 1987, (pp. 139-157) p. 147.

15 See on that issue also *Leclerc, Frédéric,* Le contrat cadre en droit international prive, Droit international privé, Travaux de Comité français de droit international privé, Années 2002-2004, Editions Pedone, Paris, 2005, (pp. 3-25) pp. 15-16.

agreements and agreements on the choice of court.[16] In support with this argument is the arbitral decision rendered in the dispute concerning an exclusive distributorship agreement.[17] The Sole Arbitrator, *inter alia*, expressed the opinion that the arbitration clause was not under the scope of the Rome Convention and, thus, may not be affected by the third country's internationally mandatory rules via Article 7(1). The reasons in the opinion further stated that under the Italian law, which was *lex causae*, the Belgian rules enabling the agent to initiate court proceedings in Belgium against the principal and rendering stipulations to the contrary invalid[18] did not prevail over the *lex causae*, and hence not even over the contractual provisions stipulated by the parties.[19] Due to the specific nature of international commercial arbitration, the question of validity of the arbitration clause in cases similar to the one cited above is resolved under the concept of arbitrability, or to be more precise, of procedural arbitrability, rather than by recourse to the method of the internationally mandatory rules. By the same token, the issue of the validity of the choice of court agreement is to be answered by applying the procedural rules of the forum. Thus, if the law of a certain country prescribes exclusive jurisdiction in specific matters, this will invalidate the contract clause that derogates this country's jurisdiction to the benefit of the courts of another country or arbitration. The result will have nothing to do with the internationally mandatory rules method because this method is concerned with applying *in casu* the law regulating substantive issues. Consequently, rules that prescribe exclusive jurisdiction cannot be considered internationally mandatory in the sense of either Article 7 of the Rome Convention or Article 8 of the Rome I Proposal. Hence, neither arbitration nor the choice of court clauses may be affected on the basis of the internationally mandatory rules method.[20]

A further question which arises is whether this concept allows for application of the private law rules only or also permits application of the rules of public law. The majority of authors agree that the category of rules covered by Article 7 of the Rome Convention and Article 8 of the Rome I Proposal does not merely comprise of the rules belonging to various branches of private law, but also encompasses public law regulations.[21] However, the applicability of foreign public laws by national courts seems to raise a certain difficulty owing to the previously dominating theory that public laws are inapplicable abroad and, likewise, fall outside the realm of private international law. This assumption was connected to the perception of the public laws as laws expressing a country's sovereignty and, thus, of a strictly territorial reach. As a consequence, only the public laws of the forum could have been applied.[22] As early as 1956, commenting on the relevant provisions of the Benelux Treaty 1951, Offerhaus noted that "[t]erritoriality and sovereignty [were] competing with the internationalism."[23] In the domain of private international law it seems that former principles are gradually being defeated. In the view of the Italian academic Vitta, expressed in 1979, "[t]he theory of absolute exclusion of the public law rules from the action of the private international law rules is henceforth surpassed."[24] Many others share this opinion,[25] including Mayer, who, more than twenty years ago, maintained that "the notion of absolute territoriality is in decline"[26] and Van Hecke, who more recently stated that "the theory of non-application of the foreign public law may be considered as generally abandoned".[27] Particularly in respect to the applicability of foreign public laws under the Rome Convention, Lando stated that it "do[es] not distinguish between rules of private and public law."[28] These opinions were preceded by the Institute of International Law in its 1975 Resolution, which expressed an affirmative view regarding the application of foreign public law

16 Article 1(2)(d) and (h) of the Rome Convention and Article 1(2)(e) and (h) of the Rome I Proposal.

17 Arbitral Award in ICC Case No. 6379 of 1990, in: *Arnaldez, Jean-Jacques/Derains, Yves/Hascher, Dominique,* Collection of ICC Arbitral Awards, 1991-1995, Kluwer Law International, Vol. III, 1997, p. 134; excerpt in the English language is published in Y.B. Int'l Com. Arb., Vol. 17, 1992, pp. 212-220.

18 Articles 4 and 6 of the Belgian law of 27 July 1961 (as modified by the Law of 13 April 1971).

19 This award is consistent to the holding of the Court of Appeal in Brussels of 4 October 1985, which in a case with a similar fact-pattern was decided to uphold the validity of the arbitral clause, Y.B. Int'l Com. Arb., Vol. 14, 1989, pp. 618-620.

20 See *Max Planck Institute for Foreign and Private International Law (Working Group on Rome I)*, Comments on the European Commission's Green Paper on the conversion of the Rome Convention into a Community instrument and its modernization, RabelsZ, Vol. 68, No. 1, 2004, (pp. 2-118) pp. 22-25. See, however, *Radicati di Brozolo, Luca G.,* Mondialisation, jurisdiction, arbitrage: vers des règles d'application semi-necessaire?, R.C.D.I.P., Vol. 92, No. 1, 2003, pp. 1-36.

21 See, e.g. *Audit, Bernard,* Droit international privé, Third edition, Economica, Paris, 2000, p. 98; JACKSON, David, Mandatory Rules and Rules of "ordre public", in: *North, Peter M.* (ed.), Contracts Conflicts: The E.E.C. Convention on the Law Applicable to Contractual Obligations: A Comparative Study, North-Holland Publishing Company, Amsterdam/New York/Oxford, 1982, (pp. 59-79) p. 64; *Kaye, Peter,* The New Private International Law of Contract of the European Community, Dartmouth, Aldershot/Brookfield USA/Hong Kong/Singapore/Sydney, 1993, p. 252; *Lando, Ole,* The EC Draft Convention on the law applicable to contractual and non contractual obligations, RabelsZ, Vol. 38, 1974, (pp. 6-55) p. 6; *Philip, Allan,* Mandatory Rules, Public Policy (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations, in: *North, Peter M.* (ed.), Contracts Conflicts: The E.E.C. Convention on the Law Applicable to Contractual Obligations: A Comparative Survey, North-Holland Publishing Company, Amsterdam/New York/Oxford, 1982, (pp. 81-110) p. 105; *Rinze, Jens,* The Scope of the Party Autonomy under the 1980 Rome Convention on the Law Applicable to Contractual Obligations, J.B.L., Vol. 38, 1994, (pp. 412-430) p. 427.

22 *Philip, Allan,* Recent Provisions on Mandatory Laws in Private International Law, in: *Feuerstein, Peter/Parry, Clive* (eds.), Multum non multa – Festschrift für Kurt Lipstein, C.F. Müller Juristischer Verlag, Heidelberg/Karlsruhe, 1980, (pp. 241-250) p. 243.

23 *Offerhaus, Johannes,* International Contracts under the Benelux Treaty on Private International Law, in: Liber Amicorum of Congratulations to Algot Bagge, Kungl. Boktryckeriet P. A. Norstedt & Sner, Stocholm, 1956, (pp. 160-172) p. 160.

24 *Vitta, Edoardo,* Cours général de droit international privé, Recueil des cours, Vol. 162, 1979-I, (pp. 9-243) p. 217, n. 315.

25 *Sperdutti, Giuseppe,* Les lois d'application nécessaire en tant que lois d'ordre public, R.C.D.I.P., Vol. 66, 1977, (pp. 257-270) pp. 263 and 264.

26 *Mayer, P.,* Les lois de police étrangères, op. cit., p. 278 (transl. I.K.).

27 *Van Hecke, Georges,* Notes critiques sur la théorie de la non-justiciabilité, in: Nouveau itinéraires en droit, Hommage à François Rigaux, Bruylant, Bruxelles, 1993, (pp. 517-526) p. 517 (transl. I.K.). In this sense see also *Kassis, A.*, op. cit., p. 426.

28 *Lando, Ole,* The Conflict of Laws of Contract: General Principles, Recueil des cours, Vol. 189, 1984-IV, (pp. 225-447) p. 399.

by virtue of the conflict of law rules.[29] Although public laws are generally regarded as having value-protective purposes, not every rule of public law qualifies *a priori* as internationally mandatory so that it would become potentially effective by the way of operation of Article 7 of the Rome Convention or Article 8 of the Rome I Proposal. The internationally mandatory rule has to meet several criteria, and none of them coincides with the public law character of a rule.

D. Mandatory Nature of the Rule

It is self-evident that the mandatory nature of the rule within the domestic legal order has to be a prerequisite that some rule may further qualify for the assessment of its international effects.[30] Not only that Article 7 of the Rome Convention and Article 8 of the Rome I Proposal bear the title "mandatory rules", but the same term is also included in the provisions contained therein. It has been generally submitted that mandatory rules are those rules that the parties may not deviate from by means of contractual stipulation, as opposed to non-mandatory or suppletive rules that are derogable by contract.[31] This basic distinction is also known in the civil law legal systems as the differentiation between *ius cogens* and *ius dispositivum*. In the exact wording used in Article 3(3) of the Rome Convention and Article 3(4) of the Rome I Proposal, mandatory rules are defined as rules "which cannot be derogated by the contract". In particular, the mandatory rules within the meaning of this provision are relevant to a purely domestic situation, preventing the parties from evading the mandatory rules of the country simply by choosing as applicable the law that does not contain such rules.[32] Article 3(5) of the Rome I Proposal, on the other hand, addresses, in addition, situations that have an international element. Where the parties have chosen the law of a non-Member State, this provision specifically prevents this choice having a detrimental effect over the application of the internally mandatory rules of the Community law. Regarding the internally mandatory feature, it is indeed logical that this element of distinction is to be verified by examining the criteria the foreign court uses, when applying those rules to wholly domestic legal relationships, to determine their mandatory nature. In conflict jargon, this means that the court should apply the *lex causae* qualification.[33]

E. Internationally Mandatory Nature of a Rule

Even if the requirement of mandatoriness has been settled by domestic courts, the foreign court still has to appraise whether the rule at issue encompasses the "internationally" component as well.[34] The difficulty, primarily, occurs due to the fact that the category of internationally mandatory rules is not composed of a definite number of rules; rather it is a heterogeneous and diverse collection of rules able to embrace parts of all traditionally classified fields of laws.[35] Thus, internationally mandatory rules are to be found in criminal law, fiscal law, expropriation and confiscation law, social welfare, currency and foreign exchange law, export and import regulations, competition law, company law, labour and social law, trade law in general, banking law and insurance law, law regulating financial transactions securities market and intellectual property, the so-called "trade with enemy acts", all rules of administrative and financial laws affecting civil and family law, environmental law and laws regulating new technologies. In such diverse sources where one may encounter multiple internationally mandatory rules which are potentially applicable, the court seized with the dispute is faced with a difficult task. It essentially has to decide whether the rule, which has met all the previously enumerated requirements, is additionally intensified with certain inborn objectives demanding its application irrespective of the law that would otherwise be applicable to the cross-border legal relationship.[36] In order to do that, and at the same time avoid disparity among decisions as much as possible, the court should be equipped with a list of decisive factors in respect to the internationality of the mandatory rule. Unfortunately, the Rome Convention lacks adequate criteria, which is the reason that one of the important novelties included in the Rome I Proposal is the definition of internationally mandatory rules (2.). This definition was previously outlined by the European Court of Justice (1.). It provides for the criteria for assessment of the rules, but their implementation *in casu* requires additional attention (3.).

29 Résolution concernant l'application du droit public étranger, Institut de droit international, Session de Wiesbaden, 11 August 1975. Text is accessible via the Institute's official Internet site at the address: <http://www.idi-iil.org/idiE/navig_res_chon.html> (last visited 30 July 2007).

30 *Anderegg, Kirsten,* Die Anwendung ausländischer Eingriffsnormen, Diskussionbereicht zum Syposium "Extraterritoriale Anwendung von Wirtschaftsrecht" Hamburg 1986, RabelsZ, Vol. 52, 1988, (pp. 260-270) p. 261; *Bonomi, A.,* Le norme imperative, op. cit., p. 143. See also in that sense *Junker, Abbo,* Internationales Arbeitsrecht im Konzern, J.C.B.Mohr (Paul Siebeck), Tübingen, 1992, pp. 286 et seq.

31 *Lando, O./Beale, H.,* op. cit., p. 101; *O'Brien, J.,* op. cit., p. 351. In the American terminology also the term such as "default" rules is used to mean rules that fill the gaps in an incomplete contract and govern unless the parties contract around them, whereas the term "immutable" rules stands for the rules which parties cannot modify by contractual agreement. *Ayres, Ian/Gertner, Robert,* Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, Yale L. J., Vol. 99, 1989, p. 87.

32 *Collins, Lawrence* (ed.), Dicey, Morris and Collins on the Conflict of Laws, Volume 2, Sweet & Maxwell, London, 2006, p. 1590; *Giuliano-Lagarde* Report, op. cit., ad Article 3, para. 8; *Philip, A.,* Mandatory Rules, op. cit., p. 82; *Plender, R./Vildersipn, M.,* op. cit., p. 105 and 106.

33 See the contrary opinion *Toubiana, Annie,* Le domaine de la loi du contrat en droit international privé (contrats internationaux et dirigisme étatique), Librairie Dalloz, Paris, 1972, p. 265.

34 *Bonomi, A.,* Le norme imperative, op. cit., p. 143; *Magnus, Ulrich* (ed.), J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Einführungsgesetz zum Bürgerlichen Gesetzbuche/IPR. Einleitung zu Art. 27 ff. EGBGB und Kommentierung der Art. 27, 28, 29, 29a, 30, 32, 34, 36, 37 EGBGB, Thirteenth edition, Sellier de Gruyter, Berlin, 2002, p. 601.

35 See *Lando, Ole,* Party Autonomy in the EC Convention on the Law Applicable to Contractual Obligations, in: *Bourel, Pierre* et al., L'influence des Communautés européennes sur le droit international privé des états membres/The Influence of the European Communities upon private International Law of the Member States, Institut Universitaire International Luxembourg (session 1979, sous la direction scientifique de François Rigaux), Maison Ferinand Larcier S.A., Bruxelles, 1981, (pp. 191-208) p. 203; *Marques Dos Santos, António,* As Normas de Aplicação Imediata no Direito Internacional Privado – Esboço de uma teoria geral, Vol. 2, Livraria Almedina, Coimbra, 1991, p. 937; *Mezghani, Ali,* Méthodes de droit international privé et contrat illicite, Recueil des cours, Vol. 303, 2003, (pp. 129-430) pp. 250-251 and 323.

36 *Bonomi, A.,* Le norme imperative, op. cit., p. 143.

1. Definition in the Case Law of the European Court of Justice

As far as the author is aware of, the European Court of Justice has not developed a definition of the internationally mandatory rules under the Rome Convention. Even so, the European Court of Justice showed quite an interest in the concept of mandatory rules. Two rulings are of primary interest, the ruling in *Ingmar* (1. 1.), and the ruling in *Arblade* (1. 2.).

1.1. Ingmar

The preliminary question in *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.* (hereinafter: *Ingmar*),[37] referred to by the English court, arose from a dispute concerning a contract with a commercial agency concluded between a British company, as agent, and a Californian company, as principal. The contract explicitly called for the application of Californian law. Following the termination of the contract, the agent requested compensatory payments related to the termination guaranteed under Articles 17 and 18 of the Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (hereinafter: the Directive 86/653/EEC).[38] The issue was whether those provisions must be applied where the commercial agent carried out its activity in a Member State, although the principal is established in a non-member country, and a clause of the contract stipulated that the contract is to be governed by the law of that non-member country. The Court answered in the affirmative and in its justification stated that the purpose served by the provisions in question requires that they be applied whenever the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, "irrespective of the law by which the parties intended the contract to be governed."[39] The quoted part of the sentence corresponds to the wording in Article 7 of the Rome Convention, with a minor deviation due to the fact that this case was actually concerned with the situation in which the parties had chosen the applicable law.

Although this case could not have been decided under the Rome Convention[40] it is obvious, however, that the preliminary ruling was indeed inspired by it. This is obvious not only from the similar wording used, but also from the opinion of the Advocate General Légere where he confirmed that he had made use of the Rome Convention for the purpose of guidance.[41] The opinion states that the rules at issue in *Ingmar* belong to the category of laws which are categorised as "mandatory rules", this expression denoting "the device of applying a domestic rule to an international situation according to its intention to be applied and regardless of its designation by a rule of conflict."[42] These are undoubtedly references to the internationally mandatory rules.[43] They primarily concern the overriding effect the rules have, however, the ruling was equally concerned with the interests that the rules are designed to protect in order to provide the grounds for allowing the Community rules to take precedence over the law of the State of California as chosen by the parties. The European Court of Justice stated that the purpose of the regime established in Articles 17 to 19 of the Directive 86/653/EEC is to protect, for all commercial agents, the freedom of establishment and the operation of undistorted competition in the internal market; hence those provisions must be observed throughout the Community if those Treaty objectives are to be attained.[44]

This ruling received harsh criticism from commentators, who believe that the reasons relied on could not have compelled the rules' application as internationally mandatory. *In toto*, they refuse to admit the direct and strong connection between the necessity to guarantee rights of compensation or indemnity to commercial agents after the termination of agency contracts and the freedom of establishment or, more generally, the internal market.[45] The latent consequence of the ruling, that any rule resting on the Community interest will be *per se* susceptible to be attributed internationally mandatory character, is seen as especially objectionable.[46] These objections gained additional approval in German, French and Dutch case law where the national courts interpreted the substantive provisions in question in such a way as to deny their internationally mandatory forcefulness.[47] Nonetheless, the discrepancies between the interpretations of the European Court of Justice and the national courts is intolerable, given

37 C-381/98, [2000] E.C.R. I-9305.

38 [1986] O.J. L 382, pp. 17-21, [1988] O.J. L 189, p. 28 (Corrigendum).

39 Para. 25 of the preliminary ruling in *Ingmar*.

40 At the time the agency contract was concluded (in 1989), the Convention was not yet in force. See Article 17 of the Rome Convention.

41 Para. 64 of the Advocate General Légere opinion in *Ingmar*, accessible at <http://www.curia.eu.int/> (last visited on 30 July 2007). The Rome Convention is explicitly referred to in para. 72 of the opinion in *Ingmar*.

42 Para. 88 of the opinion in *Ingmar* (citing AUDIT, B., Droit international privé, Second edition, Economica, Paris, 1997, p. 97).

43 In that sense also, *Ballarino, Tito/Ubertazzi, Benedetta,* On *Avello* and Other Judgments: A New Point of Departure in the Conflict of Laws?, Y.B. Priv. Int'l L., Vol. 6, 2004, (pp. 85-128) p. 120.

44 Para. 24 of the preliminary ruling in *Ingmar*. See also para. 91 of the opinion in *Ingmar*.

45 See *Erauw, Johan,* Observations about Mandatory Rules Imposed on Transatlantic Commercial Relationships, Hous. J. Int'l L., Vol. 26, No. 2, 2004, (pp. 263-286) p. 277; *Kruger, Thalia,* Ingmar GB Ltd. v. Eaton Leonard Technologies Inc., Colum. J. Eur. L., Vol. 8, No. 1, 2002, (pp. 85-91), p. 90; *Verhagen, H.L.E.,* The Tension between Party Autonomy and European Union Law: Some Observations on *Ingmar GB Ltd v Eaton Leonard Technologies Inc*, Int'l & Comp. L.Q., Vol. 51, 2002, (pp. 135-154.) pp. 148 and 151.

46 *Pataut, Étienne*, Lois de police et ordre juridique communautaire, in: *Fuchs, Angelica/Muir Watt, Horatia/Pataut, Étienne* (eds.), Les conflits de lois et le système juridique communautaire, Édition Dalloz, Paris, 2004, (pp. 117-143), p. 121. Such a development was previously anticipated previously by some authors: *Rinze, J.,* op. cit., p. 428; *Plender, Richard,* The Rome Convention – on the Law Applicable to Contractual obligations, in: *Lando, Ole/Magnus, Ulrich/Novak-Stief, Monika* (eds.), Angleichung des materiellen und des internationalen Privatrechts in der EU/Harmonisation of Substantive and International Private Law, Peter Lang, Frankfurt am Main, 2003, pp. 54-55.

47 In *Allium v. Alfin Inc.*, Cour de casassion, 28 November 2000, Clunet, Vol. 128, No. 2, 2001, pp. 505-548 (including the note by *Dion, S./Jacquet, J.M./Poillot Peruzzetto, S./Revillard, M.*). See also Bundesgerichtshof, 30 January 1961, IPRspr. 1960/61 No. 39b), NJW 1961, 1062; Rb. Arnhem 11 July 1991, Ned. IPR 1992, 151, No. 100. However see, Corte di cassazione, 30 January 1999, Riv. Dir. Int'le Priv. & Proc., Vol. 89, 2000, pp. 741 et seq. (the latter three decisions are cited in *Max Planck Institute for Foreign and Private International Law,* op. cit., p. 73, nn. 171, 173 and 174).

the principle of supremacy of the Community law and necessity to abide by it.[48]

In order to prevent problems of this sort in the future, the Rome I Proposal contains a provision that will enable the application of the rules, such as those that were at issue in *Ingmar*, without the need to establish their internationally mandatory character. Article 3(5) of the Rome I Proposal provides that where the parties choose the law of a non-Member State, that choice shall be without prejudice to the application of such mandatory rules of the Community law as are applicable to the case. This provision makes certain that the *electio iuris* may not have as a consequence the non-application of the Community rules that are mandatory. At first glance it may seem as if the cited provision is intended to cover merely intra-Community relations and, by viewing them as internal, to avoid the circumvention of the rules of the *acquis communautaire*. The creation of the category of the "Community mandatory" rules was actually advocated by Wilderspin as an alternative to extending the scope of Article 3(3) of the Rome Convention, with the aim of preventing the parties from opting out of the mandatory provisions of Community law by means of *electio iuris*.[49]

By analysing Article 3(5) of the Rome I Proposal, it becomes obvious that this rule *de facto* captures, not only the intra-Community relations but also the so-called semi-intra-Community relations, i.e. the relations that, apart from having a connection to the Community, are connected to some third country.[50] The issue worth noting here is that this provision is not placed under Article 8, where the internationally mandatory rules are regulated, but under Article 3, which relates to the autonomy of the parties. In addition, it uses wording that mirrors that of Article 3(4), save for the part on the condition that the contract is connected merely to the territory of one country or, in this instance, with the Community as the relevant territory. Against this backdrop, it is safe to conclude that this rule is actually designed to hamper the *kollisionrechtliche Verweisung* by negating any choice of the Community-foreign law to the extent that the result would be the non-application of a Community mandatory rule. Despite the confusing nomenclature, which was not amended in the Rome I Proposal, the rules that operate through Article 3(5) are internally mandatory, and not internationally mandatory rules; the latter function via Article 8.[51]

As a final point in relation to *Ingmar*, the new provision of Article 3(5) of the Rome I Proposal indicates that it would be the right mechanism for the application of the rules under Articles 17 and 18 of the Directive 86/653/EEC, and reveals that the European Court of Justice's characterisation of those rules as internationally mandatory was not correct.[52] Consequently, under the current regime of the Rome Convention, those rules should not be applied. It remains to be seen whether the Community-centric provision of Article 3(5) of the Rome I Proposal will survive to be incorporated in the final text of the Rome I Regulation when adopted, as it severely encroaches upon the conflict of law autonomy of the parties.[53] In view of its function, it is indubitable that in some form this provision will be retained; probably confined to the intra-Community situations only, mirroring the parallel provision of the recently passed Regulation 864/2007 on law applicable to non-contractual obligations (Rome II).[54]

1.2. Arblade

Moving further from the Rome Convention wording, the European Court of Justice in the seminal ruling *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL, and Bernard Leloup, Serge Leloup and Sofrage SARL* (hereinafter: *Arblade*)[55] created a missing piece of the definition of internationally mandatory rules. In this case, the Court was confronted with the issue of whether, and to what extent, the mandatory rules of the Belgian labour and social security law, which were characterised as *loi de police* under that law, could lawfully restrict the movement of services under Article 49 of the EC Treaty. The part of the preliminary ruling in *Arblade* relevant for the purpose of defining the internationally mandatory rules, reads as follows:

"[…] concerning the classification of the provisions at issue as public-order legislation […], that term must 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."[56]

48 *Pataut, É.,* op. cit., p. 120.

49 *Wilderspin, Michael,* The Rome Convention: Experience to date before the courts of Contracting States, in: *Lando, Ole/Magnus, Ulrich/Novak-Stief, Monika* (eds.), Angleichung des materiellen und des internationalen Privatrechts in der EU/Harmonisation of Substantive and International Private Law, Peter Lang, Frankfurt am Main, 2003, (pp. 111-142) p. 125 and n. 48. See also, *Hellner, Michael,* the Country of Origin Principle in the E-Commerce Directive: A Conflict with Conflict of Laws?, in: *Fuchs, Angelica/Muir Watt, Horatia/Pataut, Étienne* (eds.), Les conflits de lois et le système juridique communautaire, Dalloz, Paris, 2004, (pp. -205-224) p. 224.

50 *Fallon, Marc,* Libertés communautaires et règles de conflict de lois, in: *Fuchs, Angelica/Muir Watt, Horatia/Pataut, Étienne* (eds.), Les conflits de lois et le système juridique communautaire, Édition Dalloz, Paris, 2004, (pp. 31-80) p. 55; *Lefranc, David,* Le spécificité des règles de conflit de lois en droit communautaire dérive (aspects de droit privé), R.C.D.I.P., Vol. 94, No. 3, (pp. 413-446) p. 425.

51 Such proposal for renaming the rules, see *Magnus, Ulrich/Mankowski, Peter,* Joint response to the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernisation com (2002) 654 final, accessible at <http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/doc/university_hamburg_en.pdf> (last visited on 8 May 2006) pp. 35.

52 Otherwise the remodelling of Article 7(1), as Plender proposed in 2003, would not have been necessary to comply with the *Ingmar* ruling. See *Plender, Richard,* The Rome Convention – on the Law Applicable to Contractual Obligations, in: *Lando, Ole/Magnus, Ulrich/Novak-Stief, Monika* (eds.), Angleichung des materiellen und des internationalen Privatrechts in der EU/Harmonisation of Substantive and International Private Law, Peter Lang, Frankfurt am Main, 2003, p. 54-55.

53 See *Lefranc, D.,* op. cit., pp. 425-426.

54 [2007] O.J. L199/40.

55 Joined cases C-369/96 and C-376/96, [1999] E.C.R. I-8453. This case has already been recited by the European Court of Justice, confirming the adherence to it, in *Commission of the European Communities v. Federal Republic of Germany*, C-244/04, 19 January 2006, [2006] Bulletin EU 3.

56 Para. 30 of the preliminary ruling in *Arblade*.

In contrast to the decision in *Ingmar*, here the issue was not one of applicable law, or private international law for that matter. The issue was related to the Community freedoms, namely, the freedom to provide services, and the compatibility of national legislation, classified under the national law as internationally mandatory rules, with it. Having said that, the question needs to be asked: can this ruling have bearing on private international law? Or, more precisely, can the definition of mandatory rules contained in the ruling on the Community freedoms be relevant for the purpose of explaining the concept of internationally mandatory rules?[57] In legal doctrine it is submitted that the contradictory positions taken by the European Court of Justice in the rulings in *Ingmar* and *Arblade* represent a reason why the Community provisions on internationally mandatory rules cannot be drawn on the latter. This argument is based on the assumption that in *Ingmar* the ECJ confirmed that internationally mandatory rules may be "protective" rules, while in *Arblade* it explicitly restrained the definition to the "interventionist" rules.[58] The problem with this argument lies in the probability that in *Ingmar* the European Court of Justice either erroneously attributed internationally mandatory prefix to the rules that were not such, or misinterpreted the internationally mandatory rules technique with the outcome that the Community internally mandatory rules were enforced where otherwise they would not apply.[59] It is also possible to argue that in *Ingmar*, the European Court of Justice believed to have justified the application of Articles 17 and 18 of the Directive 86/653/EEC by relying on the interests of economic organisation. Namely, apart from pointing out the interest of commercial agents, the European Court of Justice stated that the Treaty objectives, including the interests of undistorted competition and the preservation of freedom to move freely within the internal market, are goals that would be unattainable should the respective rules not be applied. If that is the case, there would be no inconsistency between the *Ingmar* and *Arblade* rulings. It is, though, an entirely different issue whether these provisions of the Directive 86/653/EEC can actually affect the accomplishment of the declared objectives.

Whatever the case may be, assuming that the author's conclusion on the non-internationally mandatory nature of the rules referred to in *Ingmar* is correct, it becomes clear that the *Ingmar* ruling did not directly affect the drafting of Article 8 of the Rome I Proposal, rather influenced the drafting of Article 3(5). On the contrary, Article 8 was influenced strongly by the *Arblade* ruling. Actually, the relevant provision of the Rome II Proposal is declared to be *Arblade*-inspired.[60]

In the light of the described developments and the arrangement of the respective provisions within the Rome I Proposal, it appears that the inconsistency between the two rulings, even if it seemed to have existed in the beginning, will cease to be of any importance subsequent to the adoption of the Rome I Proposal, provided the provisions of Articles 3(5) and 8(1) are retained in their present form. If, on the other hand, the provision of Article 3(5) of the Rome I Proposal will be amended to reflect its more narrowly drafted counterpart in the Rome II Regulation, the replication of the *Ingmar* ruling should not be possible.

2. Definition in the Rome I Proposal

As opposed to the Rome Convention and the Rome II Regulation, the Rome I Proposal incorporates the actual definition of the internationally mandatory rules in its Article 8(1). Inserting a definition in the Rome I Proposal was strongly advocated,[61] since the lack thereof was seen as a fertile ground for the progressive debate over the issue as to the sort of interest that suffices for a mandatory rule to qualify as internationally mandatory, a discussion that was opened as soon as the Rome Convention was drafted and which caused serious polarisation among academics and practitioners within the European Union. This definition is recited below as it deserves closer examination: "*Mandatory rules are rules the respect of which is regarded as crucial by a country for safeguarding its political, social and economic organization 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 words in italics mark out where this provision essentially differs from those contained in Article 7 of the Rome Convention.

When comparing these provisions, one must bear in mind that the provisions of Article 7(2) and (1) of the Rome Convention were intended to provide criteria both for the identification and for application or effectuation of the internationally mandatory rule of *lex fori* or of a third country, respectively. On the other hand, the provision of Article 8(1) of the Rome I Proposal is designed to provide merely the definition of the notion of an internationally mandatory rule, i.e. the criteria for identification. Application of a forum rule or effectuation of a third country's rule is subject to provisions of Article 8(2) and 8(3) of the Rome I Proposal, respectively. While the provisions of Article 7 Rome Convention did not allow for the clear identification of the internationally mandatory rules, the Rome I Proposal provides an additional element for that purpose. According to the definition under the Rome I Proposal, there are two cumulative requirements that need to be fulfilled in order for the rule to be characterised as internationally mandatory: first, the rule must aim at safe-

57 In view of Bonomi, whose doubts were concerned more with the issue of methodological error being committed if one is to take the definition from the national law of the Member State in order to interpret the uniform law. *Bonomi, Andrea,* Conversion of the Rome Convention on Contracts into an EC Instrument: Some Remarks on the Green Paper of the EC Community, Y.B. Priv. Int'l L., Vol. 5, 2003, (pp. 53-98) p. 87.

58 *Bonomi, A.,* Conversion of the Rome Convention, op. cit., p. 87. There are other opinions which also opposed the use of the *Arblade* ruling as a definition if internationally mandatory rules, but are merely objecting to the part which concerns the territorial criteria for application, the part of which is actually left out from the definition put forward in the Rome I Proposal. *Nordic Group for Private International Law,* Proposal for Amendments to the Convention on the Law Applicable to Contractual Obligations, accessible at <http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/doc/nordic_group_private_international_law_en.pdf> (last visited on 28 January 2006), p. 48.

59 See *Halfmeier, Axel,* Waving Goodbye to Conflict of Laws? Recent Developments in European Union Consumer Law, in: *Rickett, Charles E.F./Telfer, Thomas G.W.* (eds.), International Perspectives on Consumers' Access to Justice, Cambridge University Press, Cambridge, 2003, (pp. 384-406) p. 394.

60 Article 12 of the Rome II Proposal. See, Rome I Proposal, Explanatory Memorandum, op. cit., p. 7; Rome II Proposal, Explanatory Memorandum, op. cit., pp. 24-25.

61 See, e.g., *Nordic Group for Private International Law*, op. cit., p. 48; *Max Planck Institute for Foreign and Private International Law*, op. cit., pp. 71 et seq.

guarding a country's political, social and economic organisation – the interest criterion (2. 1.), and second, compliance with the rule must be so crucial for the enacting country that it is applicable to any situation within their scope, irrespective of the law otherwise governing the contract – the overriding criterion (2. 2.). Relationship between the two criteria is also addressed in this context (2. 3.).

2.1. The Interest Criterion

The first criterion, which may be called the legislative intent criterion, or, more simply, the interest criterion, as expressed in Article 8(1) of the Rome I Proposal, is an absolute novelty in codified European private international law, and barely has any similarity to other provisions preceding it. As evident from the comparison with the preliminary ruling in *Arblade*, the interest criterion was imported from it; however, it does not originate from the European Court of Justice, but was articulated in scholarly writings decades before that.

It seems appropriate to commence with the definition written by Francescakis, the scholar who publicised and initially explained the function of the internationally mandatory rules. He provided the definition that is now inbuilt in future European Community secondary source of law. In the conceptualising endeavours of Francescakis, the *lois d'application immédiate*, were defined to include the rules "[…] whose *observance is necessary for safeguarding the country's political, social and economic organisation.*"[62] Moreover, according to this author, the internationally mandatory rules reflect the notion of "the state organisation", and their truly distinctive characteristic is inherent in the operation which excludes the foreign laws.[63] The resemblance with the definition in Article 8(1) of the Rome I Proposal is striking, and it is clear where the European Court of Justice drew its inspiration from. It seems that the definition that was first provided – that of Francescakis, is actually the one that grasps the essence of the concept of internationally mandatory rules. While the Article 8(1) of the Rome I Proposal as a whole corresponds to the concept of *lois d'application immédiate* as defined by Fransescakis, the basic features of the concept are traceable even earlier than that in the writings of the first authors who made an effort to conceptualise the internationally mandatory rules, such as Zweigert, Wengler or Pillet.[64]

Building on these grounds, other attempts to clarify the concept emerged. Thus Hartly describes internationally mandatory rules, or the mandatory rules in the "narrow sense", as he coined them, to be the rules fulfilling a specific political, economic or social purpose of particular importance for the legal system of which they form part.[65] Moura Ramos concluded that those are internal rules which constitute the "fundamental pillars" guaranteeing the "solidity of the organisation of the state".[66] When distinguishing between the categories and subcategories of the *lois d'application immédiate*, Mayer argued that the character of *lois de police* may be ascribed, and that relevance under Article 7 of the Rome Convention may be given exclusively to those rules whose objective is to protect the interests of the collective.[67] Batiffol and Lagarde expressed a similar belief.[68] In addition, Sperduti argues that internationally mandatory rules, rather than taking account of individual interests, are directed towards the preservation of the collective values, such as social security or stability.[69] Likewise, Villani writes that in the field of contract law, the interests involved are oriented primarily towards the political and economic objectives of a country, in which case the rules manifest governmental intervention in the economic sphere.[70]

The majority of German academic scholars, including Mankowski, Neumayer, Schubert or Sonnenberger,[71] seems to go

62 *Francescakis, Phiocion,* Conflit de lois, in: Encyclopédie Dalloz, Répetitoire de droit international privé, 1976, Vol. 5, Jurisprudence Générale Dalloz, Paris, 1976, p. 480 (transl. I.K.). The original text reads as follows: "[…] dont *l'observation est nécessaire à la sauvegarde de l'organisation politique, sociale et économique du pays*." The described approach has undergone serious criticism from the part of the academic community. The American lawyer Guedj states that reasons, which are so important to be incentive for the legislator to prescribe the applicability of the certain rule, cannot be discernible through the *interprétation exégétique* or rationalized *a priori. Guedj, T.G.,* op. cit., p. 666. For the criticisms of the concepts that limit the list of the possible considerations in the choice of law process to those of social, economical, or political, or in other words, to strictly governmental interests, see, e.g., *Bonomi, A.,* Le norme imperative, op. cit., p. 177; ID., Conversion of the Rome Convention, op. cit., p. 87; *Shapira, Amos,* The Interest Approach to Choice of Law, With Special Reference to Tort Problems, Martinus Nijhoff, The Hague, 1970, pp. 71 et seq.; *Šarevi, Petar,* Prisilni propisi i mjerodavno pravo s posebnim osvrtom na ogranienje autonomije volje stranaka, in: Izvoenje investicijskih radova, Vol. 2, Informator, Zagreb, 1987, (pp. 113-132) p. 124.

63 *Francescakis, Ph.*, Conflit de lois, op. cit., pp. 480 and 481.

64 See *Pillet, Antoine,* Traité pratique de droit international privé, Allier/Librairie de la Société du Recueil de Sirey, Grenoble/Paris, 1923-1924; *Zweigert, Konrad,* Nichterfüllung auf Grund ausländischer Leistungsverbote, RabelsZ, Vol. 14, 1942, pp. 283-307; *Wengler, Wilhelm,* Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht. Eine rechtsvergleichende Studie, ZVglRWiss, Vol. 54, 1941, pp. 168-212;

65 *Hartley, Trevor C.,* Mandatory Rules in International Contracts: The Common Law Approach, Recueil des cours, Vol. 266, 1997, (pp. 337-426) pp. 345 and 346. See also ID., Beyond the Proper Law: Mandatory Rules under Draft Convention on the Law Applicable to Contractual Obligations, E.L. Rev., Vol. 4, 1979, (pp. 236-243) p. 241.

66 *Moura Ramos, Rui Manuel,* Direito Internacional Privado e Constituição – Introdução a uma análise das suas relações, Coimbra Editora, Coimbra, 1980, p. 122.

67 *Mayer, P.,* Le lois de police étrangère, op. cit., p. 291. For the criticisms on his classification see *Kassis, A.,* op. cit., pp. 445 et seq.

68 See *Batiffol, Henri/Lagarde, Paul,* Traité de droit international privé, Vol. 1, Eighth edition, L.G.D.J., Paris, 1993, p. 428. See contrary opinion *Bonomi, A.,* Le norme imperative, op. cit., pp. 176 and 177; ID., Mandatory Rules, op. cit., p. 233; *Kassis, A.,* op. cit., pp. 447 and 448.

69 *Sperduti,* Norme di applicazione necessaria, op. cit., p. 474. Contrary position is expressed by *Pocar, Fausto,* La protection de la partie faible en droit international privé, Recueil des cours, Vol. 188, 1984-V, (pp. 349-417) pp. 379 and 399 et seq.

70 *Villani, Ugo,* La Convenzione di Roma sulla legge applicabile ai contratti, Second revisited and supplemented edition, Cacucci Editore, Bari, 2000, p. 201.

71 See, e.g., *Mankowski, Peter,* Wichtige Klärungen in Internationalen Arbeitsrecht, IPRax, Vol. 14, 1994, (pp. 89-98) p. 94 et seq.; ID., Art. 34 EGBGB erfaßt § 138 BGB nicht!, RIW, Vol. 42, 1996, pp. 8-12; *Neumayer, Karl Heinz,* Zur positiven Funktion der kollisionsrechtlichten Vorbehaltsklausel, in: *Von Caemmerer, Ernst/Nikisch, Artur/Zweigert, Konrad* (eds.), Vom deutschen zum europäischen Recht – Festschrift für Hans Dölle, Vol. 2, J.C.B. Mohr (Paul Siebeck), Tübingen, 1963, (pp. 179-208) p. 188; *Schubert, Mathias,* Internationale Verträge und Eingriffsrecht – Ein Beitrag zum Methode des Wirtschafstskollisionsrechts, RIW, Vol. 33, 1987, (pp. 729-746) pp. 730 et seq.; *Sonnenberger,*

along with the *a priori* approach when confining *Eingriffsnormen* exclusively to the rules intervening in the private law relationship with the objective of upholding the interest of the country of enactment, whether it be economical or political (*wirtschafts- oder staatspolitische Ziele*).[72] On the contrary, private interests underlying a certain rule of law are not sufficient to ascribe to the mandatory rule international character, which form the category of *Privatschutzvorschriften*.[73]

In this context, it has been submitted that the mechanism of internationally mandatory rules is rather exceptionally activated, hence to allow the application of the "protective" rules would surpass its original purpose. The incorporation into the Rome Convention of Articles 5 and 6 dealing, *inter alia*, with mandatory rules in consumer and individual employment contracts should, as held by some scholars, be construed as an indication that other "protective" rules, save for those specifically addressed, are excluded from the concept of the mandatory rules under the Rome Convention.[74] Namely, the *raison d'être* of the rules of Articles 5 and 6 is the particular nature of the relationships at issue and a frequent occurrence in practice of specific situations envisaged therein, requiring predictability of outcome and efficiency within the process of ascertaining the applicable law.[75] From the policy perspective, it is obvious that those categories of persons may be in need of special protection attainable primarily by virtue of a specific corrective mechanism – afforded to them by the means of Articles 5 and 6 of the Rome Convention and Article 6 of the Rome I Proposal.[76] This mechanism helps to eliminate the information asymmetries, which are not reasonably expected to be overcome due to the excessive costs of transaction in comparison to the potential benefits.[77] Furthermore, this is advantageous for the efficient distribution of resources, and consequently, for the market as a whole.[78] Therefore, the argument on impossibility of effectuating "protective" rules through Article 7 of the Rome Convention is sustainable, but merely to the extent that the "protective" rules referred to here are those that serve exclusively the purpose of protecting individual interests, and not any political, economic or social interests. Such "protective" rules, as explained above, may not be attributed the character of internationally mandatory rules within the meaning of European instruments regulating private international law of contracts, unless they simultaneously serve some of the above mentioned general interests of state organisation.

Nevertheless, there may not be any restraints on the possibility of giving effect to the combined "protective-interventionist" rules, just as there may be no restraints to the possibility of giving effect to the purely "interventionist" rules. Consequently, the Rome Convention, as well as its successive Community instrument, are intended to give effect by virtue of Article 7 and Article 8, respectively to the "protective" mandatory rules, as long as those rules at the same time protect certain vital political, economic or social country's interests. As an example of such rules, Fawcet mentions the Hague-Visby Rules which protect both cargo-owners and broader interests of the country in ensuring that uniform conditions exist for international carriage.[79]

The issue of the identification of internationally mandatory rules on the basis of Article 7(1) of the Rome Convention was raised in *Caterpillar Financial Services v SNC Passion Caterpillar*.[80] The argument was that the contract violated the mandatory rules of French law since Caterpillar was not an authorised credit institution in France, and therefore should not have been involved in the banking business there. Refuting this argument the judgment states that, taking account of the objective of French Banking law regulations namely the protection of consumers, these regulations could not be applied to the loan agreement at dispute.[81] Though this judgment is somewhat confusing in that it considers the French rules at all,[82] it does confirm that rules that merely protect individual interests, such as those of consumers, should not be regarded as internationally mandatory. This does not mean to exclude from the concept of internationally mandatory rules all those rules which have as their purpose the protection of consumers (or other categories of weaker parties), yet requires that those rules at the same time also foster certain interests which may be viewed as political, or, in the case of consumers, usually economic or social.[83] A rule combining both types of interests surely may qualify for the attribute of internationally mandatory.

2.2. The Overriding Criterion

The discernible character of the internationally mandatory rules referred to under Article 7 of the Rome Convention and Article 8 of the Rome I Proposal is, as the name suggests, their international forcefulness. In more precise terms, those rules are of particular internationally character since, apart from the fact that they cannot be derogated from the purely domestic

Hans Jürgen, Internationales Privatrecht/Internationales Öffentliches Recht, in: *Heinz, Eyrich* (ed.), Festschrift für Kurt Rebmann, Beck, München, 1989, (pp. 819-838) pp. 822 et seq.

72 The cases in point are competition laws, price and currency regulations, import and export restrictions, or the laws protecting the environment and the laws on cultural property.

73 This category includes, for example, the rules created for the purpose of protecting the weaker party or some other person in special need for safeguard, such as minors or adults with partial or no capacity to act.

74 *Ebke, Werner F.,* Erste Erfahrungen mit dem EG-Schuldvertragsübereinkommen, in: *Von Bar,* Christian (ed.), Europäisches Gemeinschaftsrecht und Internationales Privatrecht, Carl Heymanns Vrlag KG, Köln/Berlin/Bonn/München, 1991, p. 101; *Grundmann, Stefan,* Europäisches Vertragsrechtsübereinkommen, EWG-Vertrag und § 12 AGBG, IPRax, Vol. 12, 1992, (pp. 1-5) pp. 1 et seq. See contrary opinion *Kaye, P.,* The New Private International Law of Contracts, op. cit., p. 263.

75 *Bonomi, A.,* Le norme imperative, op. cit., p. 179.

76 *Rinze, J.,* op. cit., pp. 421 and 423.

77 *Grundmann, Stefan,* The Structure of European Contract Law, E.R.P.L., Vol. 4, 2001, (pp. 505-528) p. 520.

78 Ibid., p. 521. See *Nordic Group for Private International Law*, op. cit., p. 48. In respect to consumers in particular, see *Rinze, J.,* op. cit., p. 428.

79 *Fawcet, J.J.,* Evasion of Laws and Mandatory Rules in Private International Law, Cambridge L.J., Vol. 49, No. 1, 1990, (pp. 44-62) p. 60.

80 [2004] E.W.H.C. 569 (Comm).

81 Para. 39 of the judgement in *Caterpillar Financial Services v SNC Passion Caterpillar.*

82 It is not clear why the English judge would need to consider the provision of Article 7(1) of the Rome Convention, having in mind the fact that it is not applicable in the United Kingdom due to the reservation on the basis of Article 22(1).

83 See *Hill, Jonathan,* International Commercial Disputes in English Courts, Third edition, Hart Publishing, Oxford and Portland, Oregon, 2005, p. 9; *Weatherill, Stephen,* The European Commission's Green Paper on European Contract Law: Context, Content and Constitutionality, J.C.P., Vol. 24, 2001, (pp. 339-399) p. 346.

contract by the parties' choice of foreign law, they are made additionally powerful in order to override such choice even when the legal situation actually contains a foreign element.[84] Moreover, those rules are also applicable, under set conditions, when a foreign law based on the objective conflict of law criterion governs the legal situation.[85] The crucial characteristic of internationally mandatory rules is that by their very nature they are not inferior to the choice of law rules.[86] This feature, being the *differentia specifica* of the internationally mandatory rules in relation to the internally mandatory rules, is expressed in the extra wording inserted in the provisions of Article 7(1) and (2) of the Rome Convention, namely "whatever the law applicable to the contract" or "irrespective of the law otherwise applicable to the contract" respectively. The slight variation in the wording of the two provisions seems to be of no relevance[87] and, as already mentioned above, the provisions of both paragraphs in actual fact contain reference to the rules of law that share identical substantive characteristics, save with respect to their origin, which, regarded from the point of view of the court seized with the case, may be either foreign or domestic.[88]

This view is confirmed by use of the wording "irrespective of the law otherwise applicable to the contract" in the provision of Article 8(1) of the Rome I Proposal, which provides the definition of internationally mandatory rules relevant for instances when the rules belong to the *lex fori*, and when they belong to the legal system of a third county. In fact, the latter provision does more: it defines the elements of the second criterion, which may be coined "the overriding criterion". Namely, it accords the status of internationally mandatory rules only to those rules "*the respect of which is regarded as crucial* by a country for safeguarding its political, social and 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.*" The italicised wording is especially important in that it eliminates from the abundance of the rules that satisfy the interest criterion those rules which do not have internationally mandatory character. As stated by Loussouarn, Bourel and de Vareilles-Sommières, defining internationally mandatory rules by their nature alone is not possible due to the fact that in modern states virtually all laws tend to guarantee economic or social interests. For that reason, the internationally mandatory rules are distinguished from other (mandatory) rules by "a simple difference of degree".[89] Establishing the degree of importance of safeguarded interests is a perfect description for the role of the overriding criterion.

This second criterion is familiar, and versions similar or identical to it may be found in almost all counterpart provisions, including Article 7 of the Rome Convention. It has also been often mentioned in doctrinal legal writings. Among the definitions focused on the overriding criterion, the one put forward by Bonomi, resulting from the author's extensive analysis of the Rome Convention, warrants citation: "[T]here are rules of necessary application, i.e. those rules which, besides being mandatory in the domestic sphere, override the bilateral conflict rules and are applicable also when the legal relationship is governed by foreign law. They may also be defined as 'internationally mandatory' rules."[90] Along the same lines is the definition of Vander Elst who stated that "[…] one may say that internationally mandatory rules are rules of substantive law which, within the will of the legislator, have to be applied on the acts and on the facts which they envisage, irrespective of the law which regulated those acts or facts by virtue of the conflict of law rules".[91]

2.3. Relationship between the Two Identification Criteria

The two explicit criteria describing the basic features of the internationally mandatory rules: the interest criterion concerned with the substantive elements of the rules, and the overriding criterion focused on their will to apply or to be given effect form the components of a two-piece puzzle which resolves the problem of the identification of internationally mandatory rules. The end result of the amalgamation between the overriding criterion previously existing under the Rome Convention and the interest criterion imported from the *Arblade* ruling is the cumulative application of the two criteria. If, in respect to the particular rule, either the interest criterion or the overriding criterion is not met, the rule cannot be considered internationally mandatory for the purpose of the Rome I Proposal. In fact, the division of the two criteria is possible only for academic purposes. When in operation, their inseparability becomes obvious. The crucial connection between the two is expressed in the phrase "to such an extent" contained in Article 8 of the Rome I Proposal which suggests that the elements of the interest criterion are used to assess the degree of the elements of the overriding criterion to reach the final conclusion as to the internationally mandatory character of a certain rule of law.

3. Interpretation of the Two Identification Criteria

When compared to the provisions under Article 7 of the Rome Convention, the provision of Article 8(1) of the Rome I Proposal adds to the overriding criterion a new, explicit element to the meaning of internationally mandatory rules – the interest criterion, and more precisely defines the elements of the overriding criterion itself. Thus, a mandatory rule needs to aim at safeguarding political, social and economic organisation of a country, and its observance must be deemed crucial to such an extent that it is applicable irrespective of the law otherwise governing the contract. Therefore, an assessment has to be

84 *Plender, Richard/Wilderspin, Michael,* The European Contracts Convention, The Rome Convention on the Choice of Law for Contracts, Second edition, Sweet & Maxwell, London, 2001, p. 106.

85 *O'Brian, John,* Conflict of Laws, Second edition, Cavendish Publishing Company, London/Sydney, 1999, p. 352; *Philip, A.,* Mandatory Rules, op. cit., p. 82.

86 *Magnus, U.,* Staudingers Kommentar, op. cit., p. 603; *Bonomi, A.,* Mandatory Rules, op. cit., p. 224.

87 *Philip, A.* Mandatory Rules, op. cit., p. 82.

88 *Hartley, T.C.,* Mandatory Rules, op. cit., p. 369 n. 49; *Kassis, A.,* op. cit., p. 443; *Schultsz, J.C.,* op. cit., p. 276, n. 53.

89 *Loussouarn, Yvon/Bourel, Pierre/De Vareilles-Sommières,* Droit international privé, Eight edition, Dalloz, Paris, 2004, str. 147. The particular intensity of the values protected by the norm is emphasized by other authors, e.g. *Marques Dos Santos, A.,* As Normas de Aplicação Imediata, op. cit., p. 899; *Villani, U.,* op. cit., p. 200.

90 *Bonomi, A.*, Le norme imperative, op. cit., p. 140. (transl. I.K.). See also the definition by the Law Commission of Scotland cited in *North, Peter M./Fawcet, J.J., Chesire* and *North's* Private International Law, Thirteenth edition, Butterworths, London/Edinburgh/Dublin, 1999, sp. 132.

91 Cited in *Beliard, G./Riquer, E./Wang, X.-Y.,* op. cit., p. 183. (transl. I.K.).

made as to whether the interests of the country in applying its rule are in fact as crucial as to warrant its application irrespective of the *lex contractus*,[92] and within that evaluation also whether the interests proclaimed are those the rule genuinely protects.

This appraisal is to be conducted by the judge on a case-to-case basis, with respect to each and every single rule potentially applicable.[93] The difficulty with regard to the identification of internationally mandatory rules lies in the fact that those rules hardly ever contain the expressly stated intention of their creator as to their international relevance, hence, much more often than not, this intention must be inferred from the surrounding circumstances.[94] The relevant circumstances may either be concerned purely with the national interest of a country enacting the rule in question (3. 1.), or may be related to values endorsed on an international or supranational level (3. 2.).

3.1. Legislative Intent Underlying a National Rule

The rule's internationally mandatory character may be subject to variation if different countries in different periods of time are compared, since similar rules in distinct legal systems might be afforded with a diverse quality or intensity of underlying interests. Perhaps this may be associated with the relativity of the content of the *ordre public* (in a negative sense) which may differ depending on the point in time and place. A case in point is an internationally mandatory rule that requires a minimum down payment in deferred sales.[95] The rules of *lex fori* thus should not pose a particular problem in this context since the court is actually asked to interpret its own law. Yet, foreign rules may not be evaluated on the basis of domestic law, as the true intention might remain hidden. Therefore, what was formerly said regarding the evaluation of the mandatory character of a certain rule, by resorting to the concept as construed by its domestic forum, is equally true for weighting the "internationally" aspect of the mandatory rule.[96]

In cases when there is a provision stating clearly that rules are of internationally mandatory character[97] or conclusive case law in that country, the presiding court has to abide by the prevailing view as evident in case law.[98] To that extent, the court's task becomes less demanding.[99] In contrast, if the rule has not been attributed, or denied, an internationally mandatory character, the court faces a fairly burdensome task. That is because the domestic rule of law purporting to apply, regardless of the international character of the legal relationship, usually expresses merely domestic policies contained therein, if any at all.[100] Namely, when a certain law is discussed by the responsible legislative body, or in the case of precedents, when the reasons of the decision given by the court address the objectives pursued, the rule-maker will in principle articulate the groundwork from which the law grew in the domestic context, but there is no discussion of the international implications of such a rule.[101] Hence, in order to determine whether an internally mandatory rule is at the same time an internationally mandatory one, the court is expected to employ the "analysis by initially taking into account the notions, criteria and policies relevant to that effect of the forum enacting such [a] rule."[102] This also derives from the explicit wordings of both Article 7(1) of the Rome Convention and Article 8(1) of the Rome I Proposal. The former provides that effect may be given to the mandatory rules of the law of another country "if and in so far as, *under the law of the latter country*, those rules must be applied whatever the law applicable to the contract". Likewise, the latter legal instrument provides that internationally mandatory rules are "the rules the respect of which *is regarded as crucial by a country* for safeguarding its political, social and economic organisation" and so on. Unmistakably, the italicised

[92] The particular intensity of the values protected by the norm is emphasized by number of authors, e.g., *Marques Dos Santos, A.,* As Normas de Aplicação Imediata, op. cit., p. 899; VILLANI, U., op. cit., p. 200.

[93] *Blessing, Marc,* Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts, Helbing & Lichtenhahn, Basel/Franfurt am Main, 1999, p. 71; *Bonomi, A.,* Le norme imperative, op. cit., p. 167; *Romero, Fabiola,* La Norma de Aplicatión inmediata o necesaria, in: *Parra-Arranguren, Fernando* (ed.), Ley de derecho international privado de 6 de agosto de 1998: (antecedans, commentaries, jurisprudencia), Libro homenaja a Gonzalo Parra-Arranguren, Vol. 2, Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, Caracas, 2001, (pp. 217-234) p. 223.

[94] *Bonomi, A.,* Le norme imperative, op. cit., p. 166; *De Nova, Rodolfo,* Conflits de lois et règles fixant leur propre domaine d'application, in: Mélanges offerts à Jacques Maury, Vol. 1, Droit international privé et public, Librairie Dalloz & Sirey, Paris, 1960, (pp. 377-401) p. 385; *Vitta, E.,* Cours général, op. cit., pp. 119 and 120; *Vischer, Frank/Huber, Lucius/Oser, David,* Internationales Vertragsrecht, Second edition, Stämpfli Verlag, AG, Berne, 2000, p. 420 et seq.

[95] *Lando, O.,* Party Autonomy in the EC Convention, op. cit., pp. 203 and 204.

[96] See *Hill, J.,* op. cit., p. 505; *Jacquet, Jean-Michel,* Le contrat international, Second edition, Dalloz, Paris, 1999, p. 97; *Kassis, A.,* op. cit., p. 471; KAYE, P., The New Private International Law of Contracts, op. cit., p. 261.; *Magnus, U.,* Staudingers Kommentar, op. cit., p. 603; *Villani, U.,* op. cit., p. 204.

[97] Those are indeed rare situations. See Articles 32 and 32a of the Amendment to the German Copyright Act, BGBl. I No. 21, 28 March 2002, p. 1155.

[98] *Dutoit, Bernard,* The Rome Convention on the Choice of Law for Contracts, Chapter 3, in: *Von Hoffmann, Bernd* (ed.), European Private International Law, Ars Aequi Libri, Nijmegen, 1998, (pp. 39-65) p. 62; *Kaye, P.,* The New Private International Law of Contracts, op. cit., p. 261.

[99] This is of course not the end of assessment, but the latter stage concerned with the issue whether a foreign internationally mandatory rules should be given effect *in casu*, is not dealt with in this article.

[100] *Bonomi, A.,* Mandatory Rules, op. cit., p. 231; *Guedj, T.G.,* op. cit., p. 690. See also *Francescakis, Phiocion,* Quelques précisions sur les "lois d'application immédiate" et leurs rapports avec les règles de conflits de lois, R.C.D.I.P., Vol. 55, 1966, (pp. 1-18) p. 10.

[101] *Bodenheimer, Edgar,* The Need for a Reorientation in the American Conflicts Law, Hast. L.J., Vol. 29, 1978, (pp. 731-750) p. 737; *Guedj, T.G.,* op. cit., p. 690.

[102] *Grigera Naón, Horacio A.,* Choice-of-Law Problems in International Commercial Arbitration, Recueil des cours, Vol. 289, 2001, (pp. 9-400) p. 189. In the same sense see *Philip, A.,* Mandatory Rules, op. cit., p. 82; *Plender, R./Wilderspin, M.,* op. cit., p. 187. See, however, *Whincop, Michael J./Keyes, Mary E.,* Statutes' Domains in Private International Law: An Economic Theory of the Limits of Mandatory Rules, Sydney L. Rev., Vol. 20, 1998, (pp. 435-456) pp. 445-451: The co-authors argue that purposive interpretation of the legislative intent underlying the (internationally) mandatory rules in the statutes offers no solution to this problem and hence propose a model consisting of five legal principles for interpreting mandatory rules: the principle of implied limitations on choice of law and jurisdiction, the default rules principle, the choice of law principle, the forum principle, and the disconnecting factors principle.

phrases explicitly instruct the competent authority to examine the law of the enacting country in order to determine whether the threshold of internationally mandatory rules is met.

The *lex causae* qualification of internationally mandatory rules, to borrow the classic vocabulary of the private international law, is hardly objectionable since, be it the legislator or the judiciary of the respective country, the domestic authority is the one that provided those rules with the underlying policies when creating them. Consequently, it seems appropriate that a certain rule's internationally mandatory character is assessed from the perspective of its proper legal system.

3.2. Supranational and International Rules Promoting Wider Interests

In the same manner that the internationally mandatory rules may derive from the national legal system, they may be part of a supranational or international legal regime. It has been affirmed that Article VIII(2)(b) of the Breton Woods Agreement on the Statute of the International Monetary Fund[103] is widely regarded as the established rule regarding the mutual recognition of national legislation regulating the exchange control. Namely, exchange contracts, regardless of the law applicable, are not enforceable in the territory of any member country if they contain the currency of one of the member countries and if they are contrary to the legislation regulating the currency control of the latter country when such regulation is maintained or enacted in accordance with the International Monetary Fund Agreement.[104] Here issues of hierarchy or legal norms and the effect that an international agreement may have over private relationship arise which are outside the scope of this work. It suffices to say that, certain aspects of the relationship between the international agreements and national and supranational instruments are dealt within the respective instruments. Thus, English legal commentary states that Article VIII(2)(b) of the Breton Woods Agreement is not affected by the Rome Convention, due to Article 21 of the Rome Convention which regulates issues of priorities with regard to other international conventions.[105] With entry of the Rome I Proposal into force, the conflicts that the future Regulation will settle are those between it and other conventions regulating issues of conflicts of laws in specific matters related to contractual obligations.[106]

In addition, depending on the monist or dualist approach which a particular legal system adopts, the international agreement has to be transposed into a national legal system or the conditions necessary for an international agreement to produce direct effect have to be met. Thus, among international instruments that contain internationally mandatory rules ever since *ALNATI*, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, known as the Hague Rules, signed at Brussels on 25 August 1924,[107] amended by the Protocol to amend the said Convention signed at Brussels on 23 February 1968[108] (thus amended, the instrument is usually referred to as the Hague-Visby Rules) is often cited. The decision in *The Hollandia*[109] suggests that the British Carriage of Goods by Sea Act 1971 (now replaced with Carriage of Goods by Sea Act 1992) giving force to the Hague-Visby Rules falls into the category of mandatory rules mentioned under Article 7(2) of the Rome Convention. Those rules are an example of the "overriding statute", which in this case rendered the selection of the Dutch law ineffective, due to the fact that the place of shipment was in a United Kingdom port.[110]

It is, however, interesting to note how in certain cases the internationally mandatory rules enacted by the United Nations need not even bind a country pursuant to international public law in order to be given effect. By the decision of the Swiss Federal Tribunal handed down in 2001, a contract for the sale of weapons, with Croatia as the destination country, although conforming to Swiss contract law which was the *lex causae*, was declared null and void. The Federal Tribunal's finding was founded on immorality of the contract, on the basis of a United Nations resolution, which did not even bind Switzerland.[111]

Like globally accepted values, also those of supranational organisations, such as the European Union, may be a relatively reliable element in establishing the existence of an interest which triggers the internationally mandatory rules corrective function. The provision often cited to that effect is Article 81 of the EC Treaty, which is deemed to constitute an internationally mandatory rule invalidating every agreement falling under its scope. It has been confirmed by the European Court of Justice that Article 81(1) has horizontal direct effect between individuals and must be implemented by the national courts.[112] From the perspective of private international law, Article 81(2) is to be regarded as an internationally mandatory rule rendering all agreements in violation of Article 81(1) automatically void.[113]

In the context of the interests protected at supranational level, an arbitral award may also be instructive. In the case brought before the Milan Chamber of National and International Arbitration, the EU embargo measures have been characterised as internationally mandatory rules with no hesitation whatsoever.[114] The dispute at hand arose from a subcontract concluded in 1989 to supply the main contractor with

[103] Articles of Agreement of the International Monetary Fund signed at Washington on 27 December 1945 and came into force on 27 December 1945, 2 U.N.T.S. 39, p. 134.

[104] *Sikiri, Hrvoje,* Ugovor o trgovakom zastupanju u poredbenom trovakom i poredbenom meunarodnom privatnom pravu, (Doctorate thesis), Pravni fakultet Sveuilišta u Zagrebu, Zagreb, 1994, p. 333. See also *Boggiano, A.,* Curso de Derecho Internatcional Privado, op. cit., p. 86.

[105] *Collins, L.* (ed.), Dicey, Morris and Collins, Vol. 2, op. cit., p. 2005, n. 13.

[106] Article 23 of the Rome I Proposal.

[107] Accessible at <http://www.oecd.org/document/41/0,2340,en_2649_34367_2086825_1_1_1_1,00.html> (last visited on 12 July 2007).

[108] Accessible at <http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html> (last visited on 12 July 2007).

[109] [1983] I A.C. 565.

[110] *Collins, L.* (ed.), Dicey, Morris & Collins, Vol. 2, op. cit., p. 1591; *Fawcet, J.J.,* op. cit., pp. 49-50. The same opinion, in case of the fact-pattern similar to *Vita Food Products Inc. v. Unus Shipping Co. (the Hurry On)*, [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 All E.R. 513. See also *Tetley, Wiliam,* Vita Food Products Revisited (Which Parts of the Decision Are Good law Today?), McGill L.J., Vol. 37, 1991-1992, p. 308.

[111] Tribunal fédéral, Bulletin ASA, Vol. 19, 2001, 807 (cited in *Knoepfler, François/Schweizer, Phillipe/Othenin-Girard, Simon,* Droit international privé Suisse, Third edition, Stæmpfli Editions SA, Berne, 2005, p. 189).

[112] See *Belgische Radio en Televisie v. SABAM*, C-127/73 [1974] E.C.R. 51, para. 16; *Sacchi*, C-155/73, [1974] E.C.R., 409, para 18; *Anne Marty v. Estée Lauder SA*, C-37/79, [1980] E.C.R. 2481, para. 13; *Delimitis v. Henninger Bräu*, C-234/89, [1990] E.C.R. I-935.

[113] The automatic voidness has been confirmed in *Brauerei A. Bilger Söhne GmbH v. Jehle*, C-43/69, [1970] E.C.R. 127, para. 10.

[114] Final Award No. 1491 of 20 July 1992 (unpublished).

parts of a plant to be built in Iraq. This subcontract was governed by Italian law. The Sole Arbitrator Riccardo Luzzatto stated that the No. 2340/90 of 8 August 1990 banning trade by the European Community with Iraq and Kuwait[115] and the Italian Decree No. 247 of 23 August 1990, which was transformed into Law no. 289 of 19 October 1990, with regard to the Iraq and Kuwait embargo "not only cannot be derogated from; they must be necessarily applied; that is, they are provisions which must be necessarily applied in the EC, whichever law applies to the contract, as it appears from their purpose and public law character."[116] In construing the cited provisions, the Sole Arbitrator Luzzatto took account of the purpose the rule was intended to serve, that is to "preclude in the amplest possible way all activities which may lead to supply goods to Iraq or Iraqi bodies and individuals, or to execute works in their favour. This intention calls for a non-restrictive interpretation, which may contribute towards attaining the goals set on the international level by the UN Security Council decisions and later on EC level."[117]

F. Conclusion

Internationally mandatory rules, as defined in the European private international law of contracts, are rules that meet two basic requirements: they are enacted for the purpose of safeguarding a country's political, social and economic organisation, and respecting those rules is regarded as crucial by that country to the extent that they purport to apply irrespective of the law otherwise governing a contractual relationship. When applying this provision *in concreto* the two requirements, interest criterion and overriding criterion, function inseparably from one another. The internationally mandatory rule has to be assessed as to whether its underlying interests match any of those enumerated in the definition, as well as in respect to the degree of the rule's indispensableness for preserving those interests. The fact that a certain rule is "protective", in a sense of assuring some private interests, should not automatically disqualify that rule from the internationally mandatory category. In order to be still considered internationally mandatory it must, at the same time, guarantee a general interest crucial for state organisation. Therefore, both purely "interventionist" rules as well as those hybrid "interventionist-protective" rules may fall under the notion of the internationally mandatory rules. Regardless of the court seized, the rule is assessed by reference to the conceptions of the enacting country, or endorsing supranational or international organisation, as a case may be.

The above definition is not yet part of the law in force, and has been drafted on the basis of the already unified rules as well as considering the developments in the European Court of Justice case law. This does not, however, mean that the conclusions presented here are inapplicable to the provisions that are part of other legal instruments, as they in principle contain substantive elements matching to a significant degree. However, one must be cautious when using the analogy, it has been noted that the mechanism of internationally mandatory rules, when extended to the legal order of the European Community change character, so that the same terminology is used, but the substance is different.[118]

[115] [1990] O.J. L 213, pp. 1-2, last amended by EC Council Regulation No. 1194/91, [1991] O.J. L 115, pp. 37-40. The Regulation No. 2340/90 was repealed by Article 8 of the EC Council Regulation No. 2465/96 of 17 December 1996, [1996] O.J. L 337, pp. 1-3. Simultaneously, the Representatives of the Governments of the Member States meeting within the Council adopted a corresponding Decision 90/414/ECSC (so-called 'framework-decision') in regard to the products under the ECSC Treaty, [1990] O.J. L 213, pp. 3-4.

[116] Para. 16 of the Final Award No. 1491 of 20 July 1992.

[117] Para. 19 of the Final Award No. 1491 of 20 July 1992.

[118] *Poillot Peruzzetto, Sylvaine,* Ordre public et loi de police dans l'ordre communautaire, in: Droit international privé, Travaux de Comité français de droit international privé, Années 2002-2004, Editions Pedone, Paris, 2005, (pp. 65-106) p. 70.

Service

Allgemeines Gemeinschafts- und Gemeinschaftsprivatrecht

Französische Rechtsprechung zum Gemeinschaftsprivatrecht

Paul Klötgen, Maître de conférences, Nancy Université

Depuis sa création, la *Revue de Droit Privé Communautaire* assure avec constance le suivi des jurisprudences nationales faisant application des dispositions communautaires de droit privé. Tel est précisément l'objet de cette chronique pour ce qui concerne les juridictions françaises. A ce stade mérite d'être tiré un bref bilan d'étape.

La jurisprudence française de droit privé (essentiellement celle de la Cour de cassation, cour suprême en matière de droit privé) fait régulièrement référence à des textes communautaires, principalement règlements et directives, et même parfois (c'est plus rare) à la jurisprudence de la Cour de justice. Si ce type de jurisprudence interne ne saurait jamais tarir, on ne