

## Mandatory Rules of the Rome I Regulation:

### Not “Old Wine in New Bottles”

## RÈGLES IMPÉRATIVES DE RÈGLEMENT ROME I:

### PAS DE “VIEUX VIN DANS DE NOUVELLES BOUTEILLES”

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**Abstract:** From the Convention on the law applicable to contractual obligations (the Rome Convention) to the Rome I Regulation<sup>2</sup>, mandatory rules (provisions) have been in a controversial situation for a long period. The effect of the mandatory rules on contracts and their correlation with party autonomy are also debatable in private international law area. Party autonomy is always thought as one of the basic principles of international contracts. It has been paid much attention to since the first day it existed. So it is not surprising that 'the delineation of the proper ambit of party autonomy, and the extent to which it should be subordinated to mandatory law or public-policy principles, preoccupies much private-international-law scholarship.'<sup>3</sup> As the Rome I Regulation come into force, the new article about mandatory rules has brought more debates than ever before. Whether the new article in the Rome I Regulation has its own innovation or not and what is its effect upon party autonomy have also been argued fiercely.

**Key words:** Mandatory Rules; Rome I Regulation; Rome Convention

**Résumé:** De la Convention sur la loi applicable aux obligations contractuelles (Convention de Rome) de Règlement Rome I, les règles impératives (provisions) étaient dans une situation controversée pendant une longue période. L'effet des règles impératives sur les contrats et leur corrélation avec l'autonomie des parties sont également discutables dans le domaine de droit international privé. L'autonomie des parties est toujours considérée comme l'un des principes de base des contrats internationaux. On lui a donné beaucoup d'attention depuis le premier jour de son existence. Il n'est donc pas étonnant que «la délimitation de la portée adéquate de l'autonomie des parties, et la mesure dans laquelle il devrait être subordonné au droit impératif ou aux principes de politique publique, préoccupe beaucoup les experts de droit international privé.» Comme le Règlement Rome I entre en vigueur, le nouvel article sur les règles impératives a apporté plus de débats que jamais. Le fait que le nouvel article dans le Règlement Rome I a sa propre innovation ou non et quel est son effet sur l'autonomie des parties ont aussi discutés férocement.

**Mots clés:** Règles impératives; Règlement Rome I; Convention de Rome

## 1. INTRODUCTION

In order to answer the question whether the mandatory rules in the Rome I Regulation an old wine in new bottle, this paper gives a detailed analysis from various aspects. This analysis is critically based on the Hellner's point of view but gives the

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<sup>2</sup> REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (the Rome I Regulation)

<sup>3</sup> See, Ama S. Bekow, 'The Illusory Choice: Examining the Illusion of "Choice" in Choice of Law Provisions-A Country Study Exploring One Aspect of Foreign Investment in the Caribbean', 42 How. L.J. 505, 511 (1999) ('the success of any choice of law system can and should be measured by the degree of autonomy that contracting parties have to determine which law would govern their cross border contracts.').

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author's own thoughts about the changes in the Rome I Regulation. Accordingly, this paper is divided into three main parts. The first part of it gives out a fundamental illusion of mandatory rules and party autonomy which are mostly discussed from a theoretical point of view. For example, what are mandatory rules within the field of international private law? What is party autonomy? After the theoretical discussion of the mandatory rules and party autonomy, the following part aims at examining the difference of the mandatory rules between the Rome Convention and the Rome I Regulation. In addition, the question whether the mandatory rules is an old wine in new bottle is given an answer which is for the greater part different from Hellner's point of view. At last, the third part of the essay mainly discusses certain effects of the mandatory rules in the Rome I Regulation upon party autonomy then at the same time draws a conclusion of the essay as well.

## 2. OVERVIEW OF MANDATORY RULES AND PARTY AUTONOMY

### 2.1 Mandatory Rules

As is known to all, mandatory rules are rules that cannot be derogated by the parties' agreement when choosing the law applicable to their contracts. They cannot be 'excluded, altered or limited by contract'<sup>4</sup> and are always thought as 'the fruit of specific policies and those policies are regarded as being of such importance that they override the interests of the parties'.<sup>5</sup> This means, due to the imperative nature of mandatory rules, that they must be applied regardless of the parties' wishes. However, in the international private law area, what concerns most is not the mandatory rules within one nation. What caused a lot of debates are the so called international mandatory rules which are of great importance in the contractual relation of the international private law. 'As is well known, the peculiarity of such rules is that they require application by courts to a given dispute whenever the latter falls within their scope, regardless of whether conflict rules would dictate the application of a foreign governing law'.<sup>6</sup>

The importance of international mandatory rules is, on one hand, largely due to the liberalization of the world trade and the competition between different legal systems; on the other hand, the enhanced role of the party autonomy cannot be ignored as well. In one of the most vital cases concerning with the international mandatory rules, the European Court of Justice gave out a clear explanation of this importance. It states that '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'.<sup>7</sup>

Mandatory provisions both in the Rome Convention and the Rome I Regulation are separated into different articles. In the Rome Convention, article 3 deals with those mandatory rules which cannot be derogated from by contract while article 7 concerns with internationally mandatory rules. In the Rome Regulation, article 3 and article 9 deal with mandatory rules respectively as article 3 and article 7 of the Rome Convention.

### 2.2 Party Autonomy

"Party Autonomy is a choice of law doctrine that permits parties to choose the law of a particular country or sovereignty to govern their contract that involves two or more jurisdiction".<sup>8</sup> It has to be noted that party autonomy is not an invention of private international law nowadays. The origin of it can be traced back to the sixteenth century in France. However, as an important principle party autonomy has a wider spread today than ever before. In 1999, Nygh wrote: "Today the freedom of the parties to an international contract to choose the applicable law and its corollary, to choose the forum, judicial or arbitral, for the settlement of their disputes arising out of such contract is almost universally acknowledged".<sup>9</sup>

Recital 11 of the Rome I Regulation expressly states: 'the parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations'. So it can be seen that as the fundamental principle in European private international law in matters of contractual obligations party autonomy has already established its unshakable position. It has been said that 'perhaps the most widely accepted private international law rule of our time is that the parties to a contract are free to stipulate what law shall govern their transaction'.<sup>10</sup>

<sup>4</sup> TC Hartley, *Mandatory Rules in International Contracts: The Common Law Approach* (1997) 266 (Recueil des Cours), p 345

<sup>5</sup> See TC Hartley, n. 3, *ibid*.

<sup>6</sup> Horatia Muir Watt & Luca G. Radicati di Brozolo, *Party Autonomy and Mandatory Rules in a Global World*, International Law FORUM du droit international 6: 90, 2004.

<sup>7</sup> Arblade (Case C-369/96) and Leloup (Case C-376/96) [1999] ECR I-8453, para 30. This passage has a crucial connection with the Article 9 of the Rome I Regulation in defining the "Overriding Mandatory Rules" which may be seen as been inspired by this case.

<sup>8</sup> See Willis Reese & Maurice Rosenberg, *Conflict of Laws, Cases and Materials*, 8<sup>th</sup> ed. (1984). pp 576-596

<sup>9</sup> See Peter Nygh, *Autonomy in International Contracts* (1999), p 13.

<sup>10</sup> See Russell J. Weintraub, 'Functional Developments in Choice of Law for Contracts', 187 RECUEIL DES CoURS 239, 271 (1984).

Although in theory it had been argued that the freedom of choice of law is absolute and should not be restricted by anything except the parties' own will, in fact, in the practice of international private law the application of party autonomy has always been restricted and there are still constraints on this autonomy such as public policies and mandatory rules. The reasons for these kinds of restrictions are very clear. For instance, these restrictions on party autonomy could avoid evasion of the mandatory rule of a country with which the contract is closely connected or protect public interest of states or help protect the weaker party such as consumers and employees.

### 3. INHERITANCE AND INNOVATION

As the successor to the Rome Convention, the Rome I Regulation has many provisions in common with it. Nevertheless, we cannot simply say that the Rome I Regulation is just a copy of the Rome Convention. Even in the part of the mandatory rules which are always argued having not changed substantively from the Rome Convention, a great amount of innovations can be figured out and most of them have new substantive meaning in the Rome I Regulation. Compared with the arguments supported by Michael Hellner in his article *Third Country Overriding mandatory rules in the Rome I Regulation: Old wine in new bottles?*, this part of the essay gives reasons why the mandatory rules especially the overriding mandatory rules in Rome I Regulation are not old wine in new bottles.

Both in the Rome Convention and the Rome I Regulation, mandatory rules are categorized into two types. In the Rome Convention, article 3 (3) gives effect to rules of law 'which cannot be derogated from by contract', hereinafter called "mandatory rules"; Article 7 of Rome Convention governing mandatory rules of law which 'must be applied whatever the law applicable to the contract' or rules which are 'mandatory irrespective of the law otherwise applicable to the contract'.<sup>11</sup> While in the Rome I Regulation there are also two kinds of mandatory rules need to be pay attention to and these rules are article 3 and article 9 of the Regulation. Even the Regulation has changed from the Convention, it has to be realized that the rationale behind both the Convention and the Regulation on mandatory rules are not changed too much. So what needs to be done is to treat the two types of mandatory rules differently, especially more carefully with the latter ones.

#### 3.1 Mandatory Rules

##### 3.1.1 "Inheritance" to the Rome Convention

Article 3 (3) of Rome Convention and article 3 of Rome I Regulation are both rules dealing with mandatory rules within one nation. What is different is that the Rome I Regulation "does not mention the case in which choosing a foreign law is accompanied by the selection of a foreign forum". This does not mean it is not the case that the Rome I Regulation forgets. It is because that recital 15 of the Regulation has already gives out a clear explanation that no substantial change is intended as compared with article 3 (3) of the Rome Convention and the choice of a forum cannot exclude the application of the article.<sup>12</sup> So generally speaking, this part of the mandatory rules in the Rome Regulation does not change substantively. It could be called an "inheritance" to the Rome Convention.

##### 3.1.2 "Fresh Air" of the Rome I Regulation in mandatory rules

Although the change of the wording of article 3 (3) of the Rome I Regulation cannot change the fact that it is just a copy of Rome Convention, no one can deny that "the major novelty which Rome I brings about as far as party autonomy is concerned is the introduction of the new art. 3 para. 4".<sup>13</sup> Thus, protecting the application of the EC law mandatory rules has its own provision and this no doubt emphasize the importance and the equal status (compared with the national laws of the member states) of the EC law. Since the objective of article 3(4) is to protect the application of EC law mandatory rules to against the parties choosing a third country's law to evade the mandatory rules of the Community, this single provision has definitely improved the level of restriction on party autonomy and helps boost the uniformity of the Community laws to a great extent.

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<sup>11</sup> Article 3 (3) of the Rome Convention.

<sup>12</sup> Recital 15 of the Rome I Regulation states: "... This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3 (3) of the 1980 Convention of the Law Applicable to Contractual Obligations. . . "

<sup>13</sup> Helmut Heiss, *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Sellier. European law publishers GmbH, Munich, (2009) p5

## 3.2 Overriding Mandatory Rules

### 3.2.1 The Scope of the Rule: Narrower and Clearer

Article 9 of the Rome I Regulation governs the application of overriding mandatory rules. Those rules were normally referred to as “international mandatory rules” or other names.<sup>14</sup> However, before the Rome I Regulation there is no uniform name for this kind of rules. The change of the title of this kind of mandatory rules does have significance but I have to admit what Michael Hellner said about it. He said that ‘The change . . . is by no means intended to in itself indicate a change of the type of rules caught by the provision’. Looking closely on the paragraphs of article 9, it is no doubt that the title does not give any new type of mandatory rules. The rules of article 9 are just what scholars talk about in various terms. Even though the objects of article 9 do not change, the title of this article does have its unique meaning. On the one hand, it at least gives out a uniform name of this kind of mandatory rules which means there will be less confusion when people talking about it. On the other hand, the new title of article 9 also serves another purpose which provided in the recital 37 which is ‘to illustrate further the difference between internationally mandatory rules and domestically mandatory rules’.

Besides the change of the title, another important change shall be noticed in article 9 paragraph 1. This paragraph provides that:

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

As is known that this definition comes from the case *Arblade*,<sup>15</sup> it is the first time a clear definition was given and this is by no means a meaningless invention. Firstly, as Michael Hellner said, this definition has the purpose of telling the difference between internationally mandatory rules and domestically mandatory rules which is stated in recital 37 of Rome I Regulation, in addition, the definition also clears the confusion mentioned in the Green Paper. Secondly, the definition has narrowed the scope of what was concluded in the judgment of the *Arblade* case and restricts the rules in a proper scope. So generally speaking, ‘the definition emphasizes not only the imperative nature of new rules but also their content representing the public interests of the country concerned, such as its political, social or economic organisation’.<sup>16</sup> Nevertheless, there are still arguments about the interpretation of the article. The debate between public and private interest never ends. But just look purely on the article itself, the purpose of the definition is not to draw the line between them, so even if the distinction of them has to be discussed properly, it is not the duty of this definition. For these reasons, from the Community’s point of view, the definition of the article definitely accelerates the uniformity in EU laws and helps a lot in legal harmonisation of the EU. Meanwhile, from the practical point of view, this definition indeed brings clarification to businesses.

Besides what were discussed above, the limitation set by article 9 (3) is another novelty of the Regulation. Since the Rome Convention turned into the Rome I Regulation, reservations are no longer possible for member states. So the new term “performance of contract unlawful” resolves the problem which worried by countries which made reservations under the Rome Convention. Of course, problems can rise because the ambiguity of the term “unlawful”. However, the scope of the article has been narrowed which cannot be denied and this restriction has cut a lot of legal uncertainties which concerned most by some states such as the United Kingdom.<sup>17</sup> However, article 9 (3) ‘increases certainty and also improves the prospect that the provision will be applied in a uniform way throughout the EU’.<sup>18</sup>

### 3.2.2 The Different Connecting Factors

When talking over article 7 (1) of the Rome Convention and article 9 (3) of the Rome I Regulation, an obvious change can be found which is referred to as the “connecting factor” in Hellner’s article. Rome I Regulation has changed the connecting factor from the law “with which the situation has a close connection” to the law of “the country where the obligations arising out of the contract have to be or have been performed”. The change is so obvious in both substance and

<sup>14</sup> See Christopher Tillman, *The relationship between party autonomy and the mandatory rules in the Rome Convention*, (2002) JBL 45 p 49. Overriding mandatory rules are sometimes referred to as “qualified mandatory rules”, “conflict mandatory rules” or “internationally mandatory rules”.

<sup>15</sup> Cases C-369/96 and C-374/96 *Arblade* [1999] ECR I-8453, para 30.

<sup>16</sup> Monika Pauknerová, *Mandatory rules and public policy in international contract law*, ERA Forum (2010) 11: 29–43, DOI 10.1007/s12027-010-0151-2, 2010, p 39

<sup>17</sup> As is well known that at first UK refused to accept the proposal of the Rome I Regulation on overriding mandatory rules because of the legal uncertainty they may bring.

<sup>18</sup> Philippa Charles and Daniel Hart, *Cross-border litigation in the EU Rome I – Utopian theory or effective solution?*, New Law Journal, 14 January 2010

the wording. Opposite to Hellner's view,<sup>19</sup> I prefer to say it is a real and effective innovation which was brought about by the Rome I especially for the countries which have made reservations against article 7 (1) of the Rome Convention.

The meaning of the term "close connection" is probably the most controversial part of the mandatory rules in the Rome Convention. As Michael Hellner in his article says "which in and by itself could mean virtually anything".<sup>20</sup> Thus, the legal uncertainty is clear under article 7 (1) of the Convention. However, the situation changes in the Rome I Regulation. Though it may be argued that connecting factors such as habitual residence or nationality of one of the parties are highly unusual in practice<sup>21</sup>, we cannot refuse to accept the fact that there is the possibility that the connecting factor is a habitual residence or nationality. Although the place of performance can be seen as one of the most important close connecting factors, it is totally different from the term "close connection". Without mentioning other elements, the place of performance has limited the scope of the provision to a narrower level. Connecting factors can be the place of contracting, the place of performance, of payment and the currency of the contract. So if we cannot figure out clearly which the connecting factor is the closest one, it is better to assign one for the parties. Maybe it in some degree restrains the freedom of the parties but it has more benefit than leave it undecided.

#### 4. MANDATORY RULES AND THEIR EFFECT UPON PARTY AUTONOMY IN THE ROME I REGULATION

With the coming into force of the Rome I Regulation, the autonomy of the parties to chosen the law applicable to their contract is becoming more and more important than ever before throughout the European Community. As what the Rome Convention does, the Rome I Regulation does not provide an absolute freedom to the parties on their choice. It is realized that as one of the most influential elements which affect the parties' choice of applicable law in international contractual relationship, mandatory rules are of great importance when talking about the restrictions of the party autonomy. Of course, as the most important regulation governing the choice of laws in Europe, the Rome I Regulation also has to deal with the balance between the party autonomy of the contractual parties and the mandatory rules of related member states.

Article 3 (3) of the Rome I Regulation is one of the general limitation on party autonomy. It states: "Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement". As discussed in the previous part, actually, this is a wider rule that limits parties' choice than article 9 of the Rome I Regulation does. In fact, this provision means when the choice of law is the only foreign element of a contract the mandatory rules of the country which has all the other elements related must not be derogated. The mandatory rules of this country must be applied regardless of the parties' choice. However, there may be one problem in some particular occasion. What if the law the parties chosen is more favorable for protecting the weaker party in the contract? For example, when the law chosen by the parties fulfills the requirement of article 6, will the mandatory rules still need to be applied? In this situation, I think protecting the weaker party's interest and the party autonomy can be more fair and favorable for both parties instead of applying the mandatory rules.

Article 3 (4) of the Rome I Regulation states: "where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement". Obviously, as been said above, the aim of this provision is to protect the application of the European Community law mandatory rules. This rules deals with the situation when a contract is between two or more member states but the chosen law of the parties is the law of a non-member state. Clearly, article 3(4) of Rome I establishes a rule at Community level analogous to article 3(3) of Rome I at national level.<sup>22</sup> As we can see the rationale behind this rule is that 'if mandatory rules of national law must not be substituted by the rules of a chosen law, mandatory Community rules must not be substituted by the chosen law of a third country'.<sup>23</sup>

Article 9 of the Rome I Regulation provides rules which are called overriding mandatory rules or internationally mandatory rules. Whether the governing law is determined by party choice or otherwise, the overriding mandatory rules of other countries can sometimes nevertheless apply in addition or instead.<sup>24</sup> And under this situation, a court, in considering whether to give effect to the third State's mandatory rules "shall have regard to their nature and purpose and

<sup>19</sup> See Hellner, *Third Country Overriding mandatory rules in the Rome I Regulation: Old wine in new bottles?*, 3 ( Vol.5) JPIL, 2009. pp 464 ("If we examine the criterion of close connection more closely, we will find that in practice the new rule and the limitation to place of performance might not bring about such great differences.")

<sup>20</sup> See Michael Hellner, n.17, *ibid.* 453

<sup>21</sup> See Willis Reese & Maurice Rosenberg, n.7, *ibid.*

<sup>22</sup> See Solomon, *The Private International Law of Contracts in Europe: Advances and Retreats*, Tulane Law Review 82 (2008) pp 1729

<sup>23</sup> See Helmut Heiss, n.14, *ibid.* p 7

<sup>24</sup> See Philippa Charles and Daniel Hart, n.17, *ibid.*

to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties".<sup>25</sup>

It has been clearly stated by Article 9(2) that the application of the overriding mandatory rules of law of the State which has jurisdiction over the dispute cannot be restricted. Rome I Regulation has left some space for national courts on recognising the importance of mandatory rules of law of another country in certain case. So, on the ground of Art 9(3) that a court with jurisdiction over a dispute may choose to apply the overriding mandatory law provisions of the country 'where the obligations arising out of the contract have to be or have been performed, in so far as those mandatory provisions render the performance of the contract unlawful'.<sup>26</sup> For the UK, article 9(3) is on some degree influenced by the decision of the case *Ralli Brothers v. Naviera*.<sup>27</sup> This is on a large scale restricting the possibility of uncertainty from the English law point of view and this is also the main reason that the UK opts in. In fact, there are some legal certainties brought by article 9 (3) which could limit the choice of the parties than what the Rome Convention does. For example, because of the wide scope of the word "unlawful", it can be concluded that article 9(3) is possible to cover any situations of unlawful contractual performance. This article has left discretion powers to the judge. So how to define "unlawful" can really be a tough task. Besides, article 9(3) has provided the court the so called governmental interest analysis approach which may be quite a burden for judges. This approach has its practical problems when judge actually uses it. For example, the nature and purpose of each mandatory rule requires the judge to know more about those laws which are sought to be applied. The consequences of the application must be examined carefully for the judge. After all, those problems caused by the governmental interest analysis approach could indirectly bring legal uncertainty and unfairness to the parties.

## 5. CONCLUSION

From the discussion above, it can be seen that the mandatory rules of the Rome I Regulation is not a simple copy of the Rome Convention. The new articles concerning about mandatory rules are real improvement which can have their special effect on parties' choice of the applicable law of their contract. These new mandatory rules are clearer and more precise than those of the Rome Convention. Article 9 of the Rome I Regulation can promote important governmental interest of countries with a legitimate interest with their rules being applied<sup>28</sup> and it can also enhance the free movement of judgment among the European Union and meanwhile avoid parties evading from the mandatory rules. Thus it can be concluded that even there are still some problems left unsolved, the mandatory rules of the Rome I Regulation is indeed not old wine in new bottle. The application of them does on a proper extent limit the choice of the parties and the effect of these rules are precise and clear than the Rome Convention.

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<sup>25</sup> CGJ Morse, *The EEC Convention on the Law Applicable to Contractual Obligations* (1982) 2, Yearbook of European Law 107, p 146

<sup>26</sup> Article 9(3) of the Rome I Regulation

<sup>27</sup> Case *Ralli Brothers v. Cia Naviera Sota y Aznar*, [1920] 2 KB 287.

<sup>28</sup> A Chong, *The Public Policy and Mandatory Rules of Third Countries in International Contracts* (2006) 2 Journal of Private International Law 27, 35

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