LIMITATIONS OF CHOICE OF LAW – MANDATORY RULES ANAD INTERNATIONALLY MANDATORY RULES

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Abstrakt v rodném jazyce
Článek pojednává o omezení volby práva vyplývající z kogentních, ochranných kogentních a mezinárodně kogentních norem s ohledem na právní úpravu této problematiky v Římské úmluvě a nařízení Řím I. Článek se nejprve věnuje obecným otázkám dané problematiky a poté rozebírá příslušná ustanovení Římské úmluvy a nařízení Řím I.

Klíčová slova v rodném jazyce
Vůle stran, omezení svobody vůle při volbě práva, imperativní normy, kogentní normy, ochranné kogentní normy.

Abstract
The paper deals with the limitations of the choice of law caused by mandatory, protective mandatory and internationally mandatory rules with the respect to the regulation in the Rome Convention and Regulation Rome I. Firstly the paper comments the general base of the topic then it comments particular articles of Rome Convention and Rome I. Regulation.

Key words
Party autonomy, limitations in choice of law rules, internationally mandatory rules, mandatory rules, protective mandatory rules.

1. INTRODUCTION

The party autonomy, one of the basic principles of general legal regulation of private law relationships, is to be found in many roles in international private law both in the conflict of law rules and procedural rules. This paper will deal especially with first mentioned and wants to focus only on comments on party autonomy limitations in the choice of law rules caused by mandatory, protective mandatory and internationally mandatory rules especially with the respect to the regulation in the Convention on the law applicable to contractual obligations (hereinafter Rome Convention). The paper will try to answer the question where the differences between all types of mandatory rules are and where is a boarder of party autonomy created by them.

The issue of internationally mandatory rules is in the theory of international private law well discussed. Also Czech private international law experts were dealing with this topic in the 1980s‘. Although their work was understandably influenced by political situation in Czechoslovakian republic, they bring a lot of interesting suggestions and impulses to the discussion about this issue. [1] This topic was also widely debated during the transformation of

[1] For example Pauknerová, M. Přímo použitelné administrativně právní normy a mezinárodní právo soukromé. Právník, 1983, s. 477 a násl., Kalenský, P. Právo mezinárodního obchodu a dosah „ius cogens“. Právní zpravodaj čs. zahraničního obchodu, 1975, Kopáč, L. Druhy právních norem upravujících mezinárodní obchod a jejich vztah. Právník, 1985, p. 1099.

Rome Convention to Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (hereinafter Rome I.) [2]

2. PARTY AUTONOMY

The possibility to choose lex causae for international contracts is a widely well recognized principle of conflict regulation of contract law in domestic, community and also international law.[3] The principle of party autonomy in conflict law gives to the parties a possibility to choose a specific law to regulate their obligation relationship, obviously with the respect to the limitation coming from the boarders of the statutes of the obligations. How much is this choice of law free (if the parties are allowed to choose any state law or if they can choose only from some of them) depends on the conflict rules applicable in the concrete situation. By the choice of law the parties intend to use all rules of chosen law that means they displace both ius dispositive and ius cogens rules of the law otherwise applicable (that means in the situation where the law was not chosen). In the case if the law chosen by the parties replaced only ius dispositivum rules, but not ius cogens rules, we would talk about so called „materialized choice of law". This in fact is not a real choice of law. It results from the nature of the ius dispositivum rules that they can be derogated form by an agreement of the parties in their contract that means it is not necessary to choose the applicable law in the contract to derogate their effect.

As it is obvious, the choice of law is not unlimited and there can be a lot of limitations coming from different constraints placed by conflict rules and particular legal orders. Several of these limitations result from the public order, its' passive part – public policy – and active part – application of internationally mandatory rules with which the paper will deal. Besides it another limitation of the choice of law can result from the common ius cogens rules (mandatory rules) and also from the special ius cogens rules so called protective mandatory rules.

3. MANDATORY RULES, PROTECTIVE MANDATORY RULES AND INTERNATIONALLY MANDATORY RULES

3.1 DIFFERENCIES

Firstly it is important to define the concept of mandatory, protective mandatory and internationally mandatory rules. Mandatory rules are generally those rules that cannot be derogated from by agreement. The public law is full of ius cogens rules, in the private law more rules are dispositive but we can find there also ius cogens rules. Within the context of the topic mandatory rules are those ius cogens rules contained in the civil law acts (for example Commercial code, Civil Code etc.), that the parties of a contract must observe and cannot change by their agreement. If in the domestic contracts was contractually derogated the mandatory rule, this would be considered to be void.

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[2] Debates between European Parlament and European Comission about the Rome I. and some importatnt statements are accessible from http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0450&language=EN&mode=XML [cited on 30. 11. 2008], the other comments can be found on www.conflictsoflaw.info.

[3] See paragraph 9 of the Czech International Private and Procedural Act No. 97/1963 Sb., Regulation (EC) No 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (hereinafter Rome I.), United Nations Convention on Contracts for the International Sale of Goods (1980).

Mandatory protective rules are those ius cogens rules, that cannot be derogated from by agreement and their purpose is to protect a weaker party in a contract. Usually a weaker party can be a consumer or an employee. We can find these rules both in private and public law.

Internationally mandatory rules are not normal ius cogens rules contained in the public law. The question of their definition is one of the most difficult tasks of international private law. The concept of internationally mandatory rules was not bindely defined for a long time and there is not specified their catalogue. Newly the definition in contained in the article 9 of Rome I.[4] Also the terminology use in the different countries to identify these rules is very variegated.[5] Finally in English speaking countries wan the concept „internationally mandatory rules", as it seems to best reflex the peculiar nature of these rules.[6] But, in fact, the situation with the term „internationally mandatory rules" is much more difficult than in seems to be. Difficulties arising from this little bit confused terminology will be discussed later.

Because there is no legally binding catalogue of the internationally mandatory rules, it is important to define them via their meaning and purpose they have in the state of their origin. In fact, internationally mandatory rules however we can them are the rules of specific character. We can differ between three basic types of internationally mandatory rules – those coming from lex fori, those form the lex causae and those which form a part of the law of the third state.[7] The fact of their origin influences their application but not their character. To define internationally mandatory rules it is good to see the article 8 of Rome I., that uses the concept of overriding mandatory provisions instead of internationally mandatory rules: „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." That means that these are rules so important to protect specific interests of a country that must be applied even if the different rules of another law should be applicable in that situation. It cannot be simply said that these rules are public law rules. In several situations the character of internationally mandatory rules can have also several rules from private law acts, e. g. family or employment law.[8] Generally it can be said that every internationally mandatory rule is ius cogens rule of a specific character and specific power but not every ius cogens rule can be considered to be an internationally mandatory rule.

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[4] This will be discussed later.

[5] In Czech language for exemple: „ Mezinárodně kogentní normy, nutně použitelné normy, imperativní normy, nezaměnitelné normy apod." For more about this see for example Týč V., Rozehnalová N.: Kolizní smluvní právo, výhrada veřejného pořádku a mezinárodně kogentní normy. Právník, č. 6, 2002, s. 645.

[6] Bonomi, A. Mandatory rules in private international law – the quest for uniformity of desicions in a global environment. In: Šarčević, P., Volken, P.: Yearbook of private international law, roč. 1, 1999, Hague : Kluwer Law International, p. 219.

[7] The question of differences between these three types of rules is out of the goal of this paper. For more about it see Ebrahimi, Seyed Nasrollah: Mandatory rules and other party autonomy limitations in international contractual obligations : (with particular reference to the Rome convention, 1980). London : Athena Press, 2005, p. 297., and Bonomi, A. Mandatory rules in private international law – the quest for uniformity of desicions in a global environment. In: Šarčević, P., Volken, P.: Yearbook of private international law, roč. 1, 1999, Hague : Kluwer Law International, p. 218.

[8] Kučera, Z.: Mezinárodní právo soukromé. Brno : Doplněk, 2004, p. 233 a násl.

4. MANDATORY AND INTERNATIONAL MANDATORY RULES IN ROME CONVENTION AND ROME REGULATION

4.1 PROBLEMS WITH TERMINOLOGY

The Rome Convention deals with mandatory rules in its articles 3.3, 5.2, 6.1, 7 and 9.6. Rome I. talks about them in the articles 3.3, 6.2, 8.1 a 9. It is important to premise that there can arise some essential terminological misunderstandings because of using the concept of "mandatory rules" while talking about their regulation in Rome Convention.[9] The problem is to be found especially in the English version of Convention, where the concept of mandatory rules is used to express internationally mandatory rules, protective mandatory rules and also mandatory rules in the meaning of rules of contractual ius cogens rules. Therefore at first glance on the article 7 of Rome Convention and its comparison with articles 3.3, 5.2 and 6.1 of English version of Rome Convention it seems that these articles deal with the rules of the same quality. But it is not a truth. As it was said above, there are different types of "mandatory rules" in the Rome convention although the English version uses still the same expression for all of them. After the comparison with the other languages it is clear that the character of these provisions is rather different. The term "mandatory rule" in the article 7 and 9.6 means "internationally mandatory rules" whereas the term "mandatory rules" in the article 3.3 expresses only "mandatory rules" in the meaning of rules of "contractual ius cogens rules" and in articles 5.2 and 6.1 it is used instead of protective mandatory rules.

As it was said above, this confusing situation was solved in the text of Rome I. The term "mandatory rules" in the meaning of "internationally mandatory rules" was replaced by the term "overriding mandatory provisions", the term "mandatory rules" in the meaning of rules of "contractual ius cogens rules" was replaced by the term "provisions of the law of that other country which cannot be derogated from by agreement" and the term „mandatory rules" in the meaning of protective mandatory rules was replaced by the term „protection afforded to him by provisions that cannot be derogated from by agreement". This makes the terminological situation clearer, the difference between three qualities of used rules is more obvious and the English text of the Rome I. better correspondents with the text in other languages.

4.2 GENERAL PARTY AUTONOMY LIMITATION OF CHOICE OF LAW

4.2.1 ARTICLE 3, PARAGRAPH 3 OF ROME CONVENTION

The article 3 of Rome Convention settles freedom of the choice of law by the parties. But the choice of law is not as free as it seems at the first glance. There are basic party autonomy limitations specified in the paragraph 3 the article 3: "The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called ‚mandatory rules'." The question is what kind of party autonomy limitation we can find in this article, that means, what kind of rules sets the limitation of party autonomy. The purpose of this provision is according to the

[9] In the Czech literature this problem was shortly discussed in Rozehnalová, N., Týč, V.: Evropský justiční prostor (v civilních otázkách). Brno : Masarykova Univerzita, 2007, p. 74.

commentators[10] to not allow the contracting parties to avoid mandatory rules applicable in the case of absence of choice of law by parties for a contract in those cases when the contract has no significant foreign elements[11] or in other words to prevent the internationalising a domestic agreement to avoid mandatory rules.[12] The boarders of party autonomy limitation specified in the article 3.3 comes from the ius cogens of the law of a country with the unique close connection to solved situation. Here we can talk about the material choice of law because this limitation causes none choice of law in fact. The parties choose a law to regulate their contract expecially to change ius cogens rules of the law otherwise applicable on the contract. Other rules, those of ius dispositivum, don't need to be changed by the choosing of foreign law by the parties because they can be modified in the provisions of the contract without the choice of law.

On one hand, the party autonomy limitations resulting from article 3.3 are wider than those from the article 7, because undoubtedly there are more of the ius cogens rules than those which are internationally mandatory. But on the other hand the party autonomy limitation of choice of law resulting from article 3.3 is related only to the single-country contracts that are not so frequent as real international contracts.

4.2.2 ARTICLE 3 PARAGRAPH 3 AND 4 OF ROME I.

The article 3 paragraph 3 of Rome I. results from the same basis as the regulation in Rome Convention does, but specifies used mandatory rules better than Convention.[13] Is says: "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." The regulation does not use the concept of "mandatory rules" and expresses exactly the position of ius cogens rules as those rules that cannot be derogated from by agreement. The party autonomy limitation in the choice of law is similar to that one expressed in article 3 paragraph 3 of Rome Convention.

There is one more party autonomy limitation provision in the article 3 paragraph 4 of Rome I. in the comparison to the Rome Convention: "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." In fact this provision copies that one commented above but focuses on the protection provided by the Community law to those legal relationships that are closely connected to any Member State of European Community. The goal of this provision is to prevent the effort of the parties to avoid the EC law mandatory rules. Therefore we can talk about the party autonomy limitation in the choice of law in so

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[10] Lagarde's report talks about two different approaches on limitation of choice of law during creating the relevant articles. Giuliano, M., Lagarde, P.: Report on the Convention of the law applicable to contractual obligations. Official Journal C 282, 1980, p. 1-50.

[11] Ebrahimi, Seyed Nasrollah: Mandatory rules and other party autonomy limitations in international contractual obligations : (with particular reference to the Rome convention, 1980). London : Athena Press, 2005, p. 310.

[12] Ebrahimi, Seyed Nasrollah: Mandatory rules and other party autonomy limitations in international contractual obligations : (with particular reference to the Rome convention, 1980). London : Athena Press, 2005, p. 310

[13] For a very short Czech comment on the Rome I. see Pauknerová, M.: Evropské mezinárodní právo soukromé. Praha : C. H. Beck, 2008, 409 p.

called InterMember-States-contract where the choice of foreign law (means not a law of any Member State) means only the choice of those rules that are not in the contradiction to the rules of ius cogens of EC law.

4.3 SPECIAL PARTY AUTONOMY LIMITATION OF CHOICE OF LAW – PROTECTIVE MANDATORY RULES

4.3.1 ARTICLE 5.2 OF ROME CONVENTION

The party autonomy limitation of choice of law in the special cases is regulated in the article 5.2 of Rome Convention. It deals with consumer contracts and enables the consumer to reach the protection of mandatory rules (protective mandatory rules[14]) of a country in which he has his habitual residence when he concludes a contract in his own country with a supplier or company established abroad.[15] The party autonomy limitation in the choice of law is regulated here in the favour of the weaker party of a contract – a consumer.[16] Some authors consider these mandatory rules to be internationally mandatory rules of the forum,[17] the other authors mean that these mandatory rules have a character of ius cogens rules.[18] At first glance it seems that there rules are the same as those used according the article 3 paragraph 3. But because the article 5.2 deals only with consumer protection the mandatory rules mentioned there are limited to have a purpose of consumer protection.[19] They include especially provisions such as right to cancel the contract, right to be given certain information, controlling exemption clauses etc. notwithstanding they are contained in the public or private law acts. The limitation on choice of law by protective mandatory rules works as follows: if the rules of chosen law provide to the consumer less protection than rules of their domicile, the mandatory protective rules of the consumer's domicile law will be applied. But if the rules of the chosen law provides more protection to the consumer than rules of consumer's domicile the court will apply the rules of chosen law.

4.3.2 ARTICLE 6.1 OF ROME CONVENTION

The article 6.1 of the Rome Convention regulates a limitation of choice of law in individual employment contracts: "Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice." The party autonomy limitation in choice of law is here settled to protect the employee. "The policy beyond this provision is to prevent the employer from escaping the mandatory protective rules in force in that country for the protection of the employees, by choosing a law whose provisions offer no or less

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[14] Rozehnalová, N., Týč, V.: Evropský justiční prostor (v civilních otázkách). Brno : Masarykova Univerzita, 2007, p. 103 a násl.

[15] Ebrahimi, Seyed Nasrollah: Mandatory rules and other party autonomy limitations in international contractual obligations : (with particular reference to the Rome convention, 1980). London : Athena Press, 2005, p. 385.

[16] For a datailed commentary on this consumer contracts and article 5.3 of Rome Convention see Mandatory 384.

[17] Pauknerová, M.: Evropské mezinárodní právo soukromé. Praha : C. H. Beck, 2008, p. 230.

[18] Rozehnalová, N., Týč, V.: Evropský justiční prostor (v civilních otázkách). Brno : Masarykova Univerzita, 2007, p. 100.

[19] Ebrahimi, Seyed Nasrollah: Mandatory rules and other party autonomy limitations in international contractual obligations : (with particular reference to the Rome convention, 1980). London : Athena Press, 2005, p. 401.

protection."[20] Again, there could be a question what quality of mandatory rules is meant by this provision. The Lagarde's Report says: "The mandatory rules from which the parties may not derogate consist not only of the provisions relating to the contract of employment itself, but also provisions such as those concerning industrial safety and hygiene which are regarded in certain Member States as being provisions of public law." According this the mandatory protective rules in the Article 6.1 contains mandatory rules which cannot be excluded by parties' agreement (provisions as to hours of work, minimum wages, rules on industrial safety, the right to strike, remedies for unfair dismissal etc.).[21] Some authors mean that in Article 6.1 there are internationally mandatory rules in the meaning of article 7.[22] The other authors consider these rules are those of ius cogens so called protective rules that are enacted in domestic private law and that cannot be derogated by parties' agreement. Those protective rules enacted in the domestic public law are under the scope of article 7.[23]

4.4 THE PARTY AUTONOMY LIMITATION – INTERNATIONALLY MANDATORY RULES

4.4.1 ARTICLE 7 OF ROME CONVENTION

The using of internationally mandatory rules in basically regulated in the article 7 of Rome Convention: "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." As was said above, this article uses the concept of "mandatory rules", although more suitable concept to prevent the possible terminological discrepancies would be "internationally mandatory rules". The article 7 poses limitation of using the law applicable to the contract (including the law chosen by the parties) in two different situations. The first mentioned at the paragraph 2 of this article deals with using the internationally mandatory rules that form a part of the law of the forum. The party autonomy limitation coming from this provision does not mean rejection of whole chosen law. Only those rules that oppose to the internationally mandatory rules of the forum will not be used. Or in other words there will be used also internationally mandatory rules of another country with which the situation has a close connection. Like order public, internationally mandatory rules do not replace bilateral, jurisdiction-selecting rules, but interact with them.[24]

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[20] Ibidem p. 406.

[21] Ibidem p. 412.

[22] Pauknerová, M.: Evropské mezinárodní právo soukromé. Praha : C. H. Beck, 2008, p. 232.

[23] Rozehnalová, N., Týč, V.: Evropský justiční prostor (v civilních otázkách). Brno : Masarykova Univerzita, 2007, p. 104.

[24] Bonomi, A. Mandatory rules in private international law – the quest for uniformity of desicions in a global environment. In: Šarčević, P., Volken, P.: Yearbook of private international law, roč. 1, 1999, Hague : Kluwer Law International, p. 226.

In fact this regulation do not causes problems. The opinion that although without this provision the courts would apply the internationally mandatory rules of lex fori prevails.[25]

The second type of these rules is those of foreign origin. The Rome Convention does not talk about their direct application but says that "effect may be given to the mandatory rules of the law of another country". According to the article 7 of Rome Convention the court can give an effect to the foreign internationally mandatory rules that means the rules of the state with which the legal relationship has a close connection. These don't need to be only the internationally mandatory rules of lex causae but of any other state with that close connection. Therefore in there is some chosen lex causae it's rules do not need to be used because of the application of internationally mandatory rules of the lex fori and aslo of the law of another foreign state with which is the relationship closely connected.[26]

4.4.2 ARTICLE 9 OF REGULATION ROME I.

The article that deals with internationally mandatory rules brings a lot of changes in the comparison to the Rome Convention. As it was said, the paragraph 1 settles a general definition of internationally mandatory rules or overriding mandatory provisions: „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." The article describes areas where internationally mandatory provisions are to be found, the public interest of a state is emphasized. But there is no instruction about the way of application of these provisions contained in the law of the foreign state. The paragraph 2 talks about the application of internationally mandatory rules of lex fori and in fact it copies the same provision of Rome Convention: „Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum." The new from the theoretical and application approach is paragraph 3 of this article: „Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application." This paragraph talks only about the effect of internationally mandatory rules of a country of performance of the obligation, it does not talk about the application of these rules of another state.

It is also important to emphasize that the regulation of internationally mandatory rules or overriding mandatory provisions is different in the text of Rome I. and Rome II.[27] The future will show what problems will this strange approach of EU legislators cause.

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[25] Týč, V., Rozehnalová, N.: Kolizní smluvní právo, výhrada veřejného pořádku a mezinárodně kogentní normy. Právník č. 6, 2002, p. 634-661.

[26] More to the application of the foreign mandatory rules see Bonomi, A. Mandatory rules in private international law – the quest for uniformity of desicions in a global environment. In: Šarčević, P., Volken, P.: Yearbook of private international law, roč. 1, 1999, Hague : Kluwer Law International, p. 234.

[27] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007on the law applicable to non-contractual obligations (Rome II).

5. CONCLUSION

While studying the party autonomy limitation of choice of law caused by mandatory, protective mandatory and internationally mandatory rules it is very important to keep in mind the different character of these rules. The limitation of choice of law by mandatory rules is usually settled to prevent internationalising of purely domestic contracts to avoid mandatory rules of domestic law. The limitations of party autonomy in the choice of law rules resulting from protective mandatory rules are usually enacted to protect the weaker party in the legal relationship. The internationally mandatory rules as an active part of public order create limitation of party autonomy in choice of law rules in a different way. The court is fully entitled to refuse to use those rules of law applicable on the contract which are in the contradiction to the internationally mandatory rules of law of the forum. And the court may give an effect to those internationally mandatory rules that form a part of a law of foreign country when deciding about applicability of certain rules of applicable (chosen) law.

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