GEDIP EGPIL

GROUPE EUROPÉEN DE DROIT INTERNATIONAL PRIVÉ – EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW

EGPIL – Working Group on "General Principles"
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Guidelines: Overriding mandatory provisions

These guidelines represent GEDIP's position on a partial reformulation of the European private international law on overriding mandatory provisions. The proposed text partly maintains the existing regulations and case-law solutions interpreting them, and partly departs from them.

I. Definition, aims, implementation

1. An overriding mandatory provision is a provision the respect for which is regarded as crucial by a country for safeguarding its public interests to such an extent that it is applicable to any situation falling within its scope and having a close connection with that State, irrespective of the law otherwise applicable to the situation in question.[1]

The protection of a party to the relationship in question may fall within a country's public interest as defined above.[2]

Provisions derived from acts of European Union law – in particular provisions adopted for the implementation of European directives – may also fall within this definition[3] in situations with a close link to the Union.[4]

2. Compliance with overriding mandatory provisions is a requirement[5]whose implementation is not limited to a particular area.[6]

3. Implementation of overriding mandatory provisions must comply with EU law.[7]

II. Overriding mandatory provisions of the forum

4. Overriding mandatory provisions of the State of the court seised, including those derived from acts of Union law, shall apply in accordance with the rules of applicability[8] which they expressly or implicitly contain.

III. Overriding mandatory provisions emanating from States other than the forum

In general

5. The application or taking into consideration[9] of foreign overriding mandatory provisions by the court seis ed is possible in the cases set out in the following paragraphs. With the

exception of the cases specifically mentioned below, these hypotheses of application or taking into consideration do not depend on whether the State from which the overriding mandatory provision emanates is a Member of the Union.

Application of foreign overriding mandatory provisions

6. *Overriding mandatory provisions and adjudicatory jurisdiction*. – The effect of overriding mandatory provisions should in principle be independent of the rules of jurisdiction. [10] It may be necessary to give them effect, in particular where the courts of the State from which they emanate also have jurisdiction or would have jurisdiction in the absence of an agreement between the parties on the basis of which the court seised has jurisdiction, in particular where these courts are those of another Member State of the Union.[11]

7. *Overriding mandatory provisions of the* lex causae. – Subject to the public policy of the forum, the provisions of the *lex causae* apply even if they are overriding mandatory provisions.[12]

8. *Overriding mandatory provisions not forming part of the* lex causae. – The derogatory application, in the forum, of an overriding mandatory provision not forming part of the *lex causae* is possible where the court seised decides that it is justified in the light of the objectives of the provision in question, in particular where these objectives are common to both States or implement common values, and of the links between the situation and the foreign State.

Between Member States of the Union, particular account will be taken of the principle of sincere cooperation set out in Article 4(3) TEU and of the objective of promoting solidarity between Member States referred to in Article 3(3) subparagraph 3 TEU.[13]

In deciding whether to give effect to a foreign mandatory provision in this way, account should be taken of the consequences which would flow from its application or non-application.[14]

9. *Conflicts between overriding mandatory provisions.* – Where there is a risk of conflict in a particular situation between an overriding mandatory provision of the forum and foreign overriding mandatory rules, the court seised shall endeavour, by an appropriate interpretation or application of the mandatory provisions, to avoid the conflict.[15] If the conflict persists, the court may give preference to the provisions of the forum.[16]

In the event of a conflict between the overriding mandatory provisions of several foreign States, the court shall apply the overriding mandatory provision which best meets the needs of international co-operation in private law, taking into account the objectives pursued by these rules and their relationship to the situation before the court.

Taking into consideration of foreign overriding mandatory provisions

10. The foregoing is without prejudice to the court's taking into consideration of a foreign mandatory law as an element of fact under the applicable substantive law.[17]

EXPLANATORY NOTES

[1] Definition taken from Regulation Rome I, Art. 9(1), and supplemented with the condition of a "close link" taken from Art. 7(1) of the Rome Convention.

[2] This is a specific question of interpretation of the very concept of “overriding mandatory provisions”, which has been otherwise resolved n German and Austrian case law (see in particular BGH 13 December 2005, BGHZ 165, p. 248: a German law on consumer loans, which serves to protect borrowers against banks, is not an overriding mandatory law, since it is primarily aimed at equalising the interests of the parties to the contract. Admittedly, this law may have a secondary effect of protecting public interests - promoting the principle of the social state, the market regulation function inherent in the regulation of consumer contracts or the interest of the proper functioning of the European internal market. But this is insufficient: "such purely incidental protection, by reflex effect, of public interests" is insufficient, according to this national case law, for the qualification of an overriding mandatory provision). - On the other hand, along the same lines as the solution proposed here, see the CJEU judgment of 17 October 2013, C-184/12, *Unamar*.

[3] This is sometimes discussed for legalistic reasons (relating to the wording of Rome I, Art. 9(1)) which do not apply to our text.

[4] The requirement of a "close link" with the Union is explained, on the one hand, by the wording of the first sentence of this subparagraph, which requires, in the case of overriding mandatory provisions of national origin, a close link with the State from which the provisions emanate, and is, on the other hand, a reflection of the Ingmar case law of the Court of Justice (judgment of 9 November 2000, *Ingmar*, C-381/98, para. 25).

[5] The generality of the mechanism does not call for a particular method of interpretation. In particular, the CJEU's assertion to the contrary (judgment of 18 October 2016, C-135/15, *Nikiforidis*, para. 44) saying that Article 9 of Rome I is to be interpreted "strictly" cannot be based on recital 26 of the Regulation, which merely states that, compared with the concept of "provisions which cannot be derogated from by agreement", the concept of overriding mandatory provisions should be interpreted "more restrictively". - However, the mechanism of overriding mandatory provisions should not be used to circumvent the more precise conditions for the international effect of mandatory provisions set out in specific texts of European secondary legislation (such as Articles 6 and 8 of the Rome I Regulation).

[6] The proposal is therefore to abandon the solution, characteristic of the Rome I and Rome II Regulations, which introduces different rules (as regards foreign overriding mandatory provisions) for contractual and non-contractual matters. It should be remembered that the silence of the Rome II Regulation on the treatment of foreign overriding mandatory provisions, which may be understandable in general given the rarity of overriding mandatory rules derogating from the ordinary connecting factor in matters of tort, has nevertheless proved problematic in practice during the recent discussions on the lack of international effectiveness of norms giving the character of overriding mandatory provisions to rules of corporate social responsibility, if proceedings are brought in the courts of a State other than the State from which these provisions originate.

[7] The case law of the CJEU shows in particular the impact of the general regime of freedom of movement on the implementation of overriding mandatory provisions of the Member States. According to the Arblade judgment of 23 November 1999 (C-369/96), an overriding mandatory

provision, of which the Court gave a definition that became a part of the definition of overriding mandatory provisions in the Rome I Regulation, may be justified on the basis of an express reason (e.g. public policy) or an imperative reason (e.g. protection of workers) in the general interest, provided that it complies with the principle of proportionality, i.e. in particular that its application does not go beyond what is necessary to achieve the objective pursued. In this respect, it is necessary to check whether an equivalent protection of the general interest is already provided by a regulation to which the economic operator is already subject in his State of origin, as is the employer under the law applicable to the employment contract. This reasoning (repeated for example in the judgment of 15 March 2001, C-165/98, *Mazzoleni* or in the more controversial judgment of 18 December 2007, *Laval un Partneri*, C-341/05), is inherent in the principle of mutual recognition of Member States' regulations in the context of the internal market (since the judgment of 28 January 1986, Commission v. France, "Woodworking Machines", case 188/84; judgment of 16 January 2014, C-481/12, *Juvelta*). This recognition is not absolute but depends practically on the degree of equivalence or comparability of the contents of the conflicting regulations. In particular, where a minimum harmonisation directive establishes by mandatory rules a level of protection which is "reasonable in the single market", the court seised may apply an overriding mandatory provision of the forum to the detriment of the contractual law of another Member State only after having found "in a detailed manner" that the protection intended by the national legislator beyond the directive is deemed "crucial" (judgment of 17 October 2013, C-184/12, *Unamar*). Thus, freedom of establishment implies that, as a rule, the undertaking is not subject to "stricter" requirements of the host Member State of a service - such as the civil liability regime for an act of defamation designated by the conflicts rule of the forum - than those "provided for by the substantive law in force in the Member State of establishment of the provider" of an e-commerce service to which the latter is subject by virtue of an internal market clause in a directive, subject to a derogation based on a legitimate justification in the general interest and compliance with the principle of proportionality (judgment of 25 October 2011, C-509/09, *eDate Advertising*, on directive 2000/31; such a clause merely expresses the general regime of primary law, according to the judgment of 18 November 2010, C-458/08, Commission v. Portugal, concerning directive 2006/123).

[8] Overriding mandatory provisions are substantive rules which have the particularity of being accompanied by a special rule which determines their territorial scope of application, independently of the law applicable according to the connecting rule of the forum (cf. Art. 9(1) Rome I). This special rule is the "rule of applicability", which may be express or, in the absence of an express rule delimiting the spatial scope of the substantive rule, may be implied from its purpose.

[9] The application of an overriding mandatory provision consists in adopting the solution prescribed by the foreign legislator; its consideration consists in taking the mandatory provision into account in the context of the application of the substantive law of another State - most often, in practice, the law of the forum. A particular case of consideration is that of a foreign law appearing as part of the factual prerequisite of a norm of substantive law (example: the occurrence of a foreign embargo law, identified as a case of force majeure in the context of the performance of a contract governed by a lex contractus which is not the law of the foreign State in question). - Depending on the nature of the rule of substantive law in the context of which the norm is applied, consideration may also be given to norms of international law, in particular to sanctions not transposed, or not yet transposed, decided by the United Nations Security Council. In the absence of effective sanctions for non-compliance as long as they have not been transposed, these cannot be considered as cases of force majeure; however, the conscious violation of such sanctions may be considered as a case of nullity of the contract for unlawfulness of its object.

[10] Jurisdiction is normally based on the relationship between the parties or the subject-matter of the dispute and the State of the forum and does not take into account the applicability of an overriding mandatory provision of that State. The situation may be different when the legislator, whether national or European, accompanies the rule on the applicability of such a provision with a special rule

on jurisdiction, as in the case of Article 6 of Directive 96/71, which provides for the jurisdiction of the courts of the host State of the posted worker to assert the right to the terms and conditions of employment guaranteed in Article 3 of the Directive.

[11] Between Member States, the recognition of choice of court clauses and the concentration of jurisdiction (or, more broadly, the choice of the forum) provided for in Brussels Ibis should be combined, in appropriate cases, with sincere cooperation (cf. infra, III.8, paragraph 2) of the court designated by the clause with regard to the Member State of the court from whose jurisdiction it is derogated. With regard to third States, the solution may be the same, without however being able to refer to the specific sincere cooperation between Member States. The proposal does not deal with the question - which is a question of conflict of jurisdiction, regulated in particular, between Member States, by Article 25 of the Brussels I bis Regulation - of the conditions for the legality of choice of court clauses. However, in terms of conflicts of law which the proposal is concerned with, it encourages the courts designated by a choice of court clause to give effect to the overriding mandatory rules of the State whose courts are the subject of a derogation and which, in the absence of the choice of court clause, would have been able to declare themselves competent and would therefore have applied the overriding mandatory rules of their State.

[12] This solution, adopted by the case law of several Member States (as well as by Article 13 of the Swiss PIL law), was preferred to the solution adopted in particular in German case law, according to which the application of overriding mandatory provisions of public law is excluded before the courts of the forum, even though foreign law is the applicable law (BGH, 17 December 1959, BGHZ, vol. 31, p. 367, the solution adopted by this judgment being referred to by BGH, 24 February 2015, *NJW*, 2015, p. 2328, para. 53).

[13] *Contra, Nikiforidis* judgment, para. 54. - On the applicability of Article 4 (3) TEU to mutual relations between Member States in the context of compliance with Union law, see already ECJ, Judgment of 5 October 1994, C-165/91, Van Munster, para. 32 (concerning Article 5 EEC), and lately ECJ, Judgment of 31 January 2020, C-457/18, Slovenia v. Croatia, para. 109; furthermore, the "principles of equality, loyalty or solidarity between present and future Member States" are referred to in the judgment of 28 November 2006, C-413/04, Parliament v. Council, paragraph 68. Several judgments refer to the principle of solidarity between Member States in the context of policies related to the area of freedom, security and justice, cf. in particular the judgment of 6 September 2017, C-643/15 and C-647/15, Slovakia and Hungary v. Council, para. 304; judgment of 21 December 2011, C-411/10 and C-493/10, N. S. and Others (Common Asylum System), para. 93.

[14] The inspiration for our text is, on this central point of the regime of foreign mandatory rules, Article 7(1) of the Rome Convention, whose approach has seemed preferable to the political compromise of Article 9(3) of the Rome I Regulation.

[15] Cf. (but this is a case of consideration, not application of a foreign mandatory law) CJEU 21 December 2021, Bank Melli, C-124/20, which invites the referring court to interpret the European Blocking Regulation 2271/96, "in the light of Article 16 and Article 52(1) of the Charter of Fundamental Rights of the European Union".

[16] Preference for the law of the forum is the most frequently advocated solution. It should nevertheless be pointed out that there is, but more particularly in the United States of America, a solution of balancing the interests of the forum and the foreign State, can also be used in connection with the conflict between overriding mandatory rules. See, with regard to the extraterritorial application of competition law, *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), which mentions the following factors that may influence the solution of the conflict :

> *[T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and [their] locations ..., the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with*

those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, [and] the foreseeability of such effect.

Subsequent American case law has tended to revert to a solution giving precedence to the mandatory rules of the forum, except in the case of a "real conflict" (*Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993)), on the understanding that "no conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both'. Restatement (Third) Foreign Relations Law § 403, Comment e" (ibid., p. 799; but see the dissenting opinion of Justice Scalia and three others, pp. 811-821).

[17] Solution of the *Nikiforidis* judgment.