Private International Law on Contracts: the COVID-19 Experience – Tools for Use, Lessons to Learn from 2022 Onwards

Dreptul internaţional privat al contractelor: experienţa COVID-19 – instrumente de folosit, lecţii de învăţat începând cu anul 2022

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Abstract

Cross-border contractual relationships havw gravely suffered from the COVID-19 outbreak. The ultimate challenge for Private International Law (PIL) is to elaborate workable remedies serving international business, employees, producers and consumers alike. This contribution first depicts the impact of the pandemic for contractual relationships relatively 'vulnerable' as they involve personal 'human' conduct (employment, concerts, conferences, holiday travelling, fairs, sports etc.), as may, indirectly, financial and insurance transactions related to these contract types. As standard conflict of law rules on contract, torts etc., appear unsuited to solve the vis major fact constellations arising from the pandemic, notably the instrument of 'mandatory laws' comes in sight. Article 9 of EU Regulation 593/2008 on the Law Applicable to Contractual Relationships ('Rome I') is explored against the backdrop of national (Italian and German) laws regulating contracts reputedly 'vulnerable' in times of the pandemic: employment relationships. Some recommendations emanate from this inquiry. 'Rome I' should be enriched with a brand new sub section 4, endorsing emanating from Community law but also from UN law.' Furthermore, a revision of article 9 of 'Rome I' seems apt, as it is drafted in a too restricted way, solely allowing for the application of mandatory laws of the legal order where duties arising from the contract were or should have been performed.

Keywords: *COVID-19; Cross-border contracts; Private International Law remedies; Regulation 'Rome I'; Mandatory laws.*

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Rezumat

Relaţiile contractuale transfrontaliere au avut mult de suferit în urma pandemiei de COVID-19. Provocarea supremă pentru Dreptul internaţional privat este de a elabora remedii funcţionale în favoarea agenţilor economici cu activitate transfrontalieră, angajaţi, producători şi consumatori deopotrivă. Prezenta contribuţie descrie, mai întâi, impactul pandemiei asupra raporturilor juridice contractuale cu caracter relativ „vulnerabil", datorită faptului că implică o conduită 'umană' personală (contracte de muncă, concerte, conferinţe, călătorii în vacanţă, târguri, sporturi etc.), cum, de altfel, ar putea-o face şi tranzacţiile financiare şi de asigurare aflate în legătură cu acestea. Cât timp normele conflictuale standard în materie contractuală, delictuală etc., par a fi nepotrivite pentru a soluţiona constelaţiile faptice vis major rezultând din pandemie, instrumentul normelor de aplicare imediată devine preponderent vizibil. Art. 9 din Regulamentul UE nr. 593/2008 privind legea aplicabilă obligaţiilor contractuale (Roma I) este explorat în contrast cu prevederile naţionale (italiene şi germane) reglementând contracte reputat „vulnerabile" în perioada pandemie: contractele de muncă. O serie de recomandări rezultă din această analiză. Regulamentul Roma I ar trebui îmbunătăţit cu o nouă Secţiune a 4-a, cu susţinere atât din dreptul UE cât şi din dreptul Naţiunilor Unite. Mai mult, o modificare a art. 9 este indicată, din moment ce formularea actuală este prea restrictivă prin faptul că permite prioritatea normelor de aplicare imediată de la locul unde obligaţiile izvorând din contract au fost sau trebuiau să fie executate.

Cuvinte-cheie: *COVID-19; contracte cu elemente de extraneitate; remedii de drept internaţional privat; Regulamentul Roma I; norme de aplicare imediată; norme imperative.*

1. Introduction

While experiencing the „third COVID-19 year" the world is still fighting new outbreaks and struggling to overcome the damages caused. Apart from its primary and devastating medical impact, the pandemic overthrew private law legal relations as well, on both domestic and cross-border scale, as is reflected by a flood of publications and debates following the pandemic[1].

This contribution concentrates on the backbone of hampered economies, more in particular contractual relationships showing cross-border ties. In the interest of primarily the contracting parties, but also of societies as a whole the rupture of international business and commerce calls for proper legal responses.

Unprecedented as the pandemic may be, in an ever globalizing world the legal discipline of Private International Law cannot and may not shift away from its task to

[1] For an impression of the volcanic outburst on global scale of approximately 1700 (!) legal writings, cf. https://scholar.google.nl/scholar?start=10&q=COVID-19+AND+%22Private+International+Law%22+AND+2021&hl=nl&as_sdt=0,5&as_vis=1. (last visited January 18, 2022).

formulate answers to new 'challenges' and provide for 'workable' remedies doing justice to international business, employees, producers and consumers alike. Following a brief exploration of versatile contractual fact constellations being affected by the pandemic and some observations on 'First aid' oriented measures at international and national law[2] level, first the role and functioning in general of Private International Law in a new 'era' will be set out briefly. Subsequently, the emphasis will be on 'foreign' mandatory laws intervening in the process of ascertaining the 'normally' applicable law. In that regard, conflict of law tools available under EU Regulations 'Rome I' and (inasmuch occasionally relevant for contracts in complementary manner) 'Rome II' serve as a starting point for further elaborations. Notably the concept of national law based mandatory rules superseding the outcome of the conflict of law process aimed at finding the proper law of the contract deserves more attention. Special notice is given to a contract type more vulnerable to the pandemic as it requires 'physical attendance' of at least either of one of the parties, the employee. Some recommendations precede overall conclusions.

2. COVID-19 and Contractual Relationships – Positioning

2.1. From 'Case Zero' Onwards…

In order to create flesh to the bones it makes sense to depict a range of concrete transactions from everyday life, contract parties fully taken by surprise from early spring 2020 onwards. Where did it all start? Tracing back 'Case Zero' with full legal certainty may turn out to be as hard as finding 'Patient Zero'. Just the same, a case which was referred to as 'the very first', at least in Germany, even though still in a domestic context[3], may well serve as an example of what was yet to come.

The Paderborn Regional Court[4] adjudicated a claim brought by students against an event agency for repayment of a EUR 10,000 deposit which the class had made for the organisation of a student ball. The organisation of the student ball in the intended scope (i.e. with the parents) failed due to the Corona Protection Ordinance of the state of North Rhine-Westphalia. In the contract, the parties had agreed on a specific clause regarding *force majeure*. Accordingly, the Regional Court obliged the event agency to refund the deposit. In doing so, it expressly recognised the Corona pandemic as a *force majeure* event: „The Corona pandemic and its consequences represent an external event outside the

[2] It may not be overlooked that legal first aid was preponderantly sided by *economic* first aid, measures taken by the European Central Bank and by legislators of individual EU Member States.

[3] Although, as already said, there were no ties what so ever with any 'foreign' legal order, the 'sudden stop' of a 'normal' contractual relationship may well serve as an illustration. N. Sievi, First court ruling in Germany on Covid-19 as an event of *force majeure* though extrapolated the concept underlying the *force majeur* clause to Swiss legal order, https://www.lexfutura.ch/en/whats-keeping-us-busy/article/erstes-gerichtsurteil-in-deutschland-zu-covid-19-als-ereignis-hoeherer-gewalt-force-majeure/.

[4] 25 September 2020, 3 O 261/20), Blog post in German: https://lnkd.in/d6h3bqT, Blog post in English: https://lnkd.in/dyaxB37.

control of the parties. Because there has never been a pandemic of this magnitude before, it was also unforeseeable for the individual. Even with the application of the most reasonably expected care, it was unavoidable for the individual. The corona virus thus constitutes an event falling under the concept of *force majeure*". Furthermore, the court came to the conclusion that it was impossible to find an alternative date for the event, since § 13 Va of the Corona Protection Ordinance of the State of North Rhine-Westphalia would not have permitted events of corresponding size involving the parents of the students within a reasonable time window after the graduation. This would have also entitled the students to reclaim the deposit; either on basis that the event had become impossible or, at least, by way of withdrawing from the contract.

Given the domestic nature of the contractual relationship, the concept of *force majeure* was undoubtedly suited for use. It is questionable, however, whether the use of that concept would still be permitted in case this student ball would show cross-border ties. Before opening windows to contracts showing cross-border ties, it makes sense to find out which contracts seem to be (more) vulnerable for the pandemic.

2.2. Exploring the Field – Contracts (Un)affected by the Pandemic

The alleged 'Case Zero' as set out above may serve as incitement for a further inquiry on contracts affected – or not in the least affected – by the pandemic. Surprisingly, perhaps, is that contrary to fears for a 'slow down' of business, for the bulk of contracts, to start with, apparently or at least seemingly the motto is 'business as usual'. Even more, certain sectors are thriving better than they ever did: one may think of e.g. the sale of 'uncontaminated' therefore safe consumer goods on line, having substituted regular holiday expenses. Other contracts, however, experience grave consequences of the pandemic, notably those that require 'physical' attendance of the parties involved ('Case Zero' on a 'student ball' depicted above is a fine example)[5].

Thus, in view of 'vulnerable' contractual relations, one may primarily think of employment, more in particular on a timely or freelance basis, as notably employees and free lancers, as they involve weaker parties *ab initio* already. Further, one may think of concerts, conferences, holiday travelling, fairs[6], sports events, but also tenancies of immovable for e.g. (exchange) students. There is also collateral damage, as more secondarily, financial and insurance transactions related to these contract types are likely to suffer from the pandemic. Contractual relationships having shown to be vulnerable to the pandemic may give rise to collective or individual non-performances and reactions thereto, these reactions finding their basis in either contract or tort law.

[5] Cf. also cases dealt with below, 3.3.2 and ff.

[6] CF. EU measures: EU Council Recommendation (EU) 2021/1170 of 15 July 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, sided by (perhaps too?) many, many successive 'recommendations', and 'amendments': https://eur-lex.europa.eu/search.html?name=covid19%3Ajustice-freedom-and-security&type=named&qid=1642668869688&page=2. (last visited January 18, 2022).

2.3. Zooming Out – Toolkits for Contracts Requiring Legal 'First Aid'

As the worldwide inflammation of the pandemic was unprecedented, legal responses could in first instance not be but of an ad hoc nature. The world coming to a standstill, legal 'first aid' had to be elaborated by legislators of most EU Member States fairly soon. Simultaneously, websites of international organisations came up with toolboxes' to accommodate cross-border contractual relations in times of COVID-19[7]. The European Union followed suit with updated sites such as 'Impact of COVID-19 on the justice field'[8], and, jointly with Council of Europe, 'National Judiciaries' COVID-19 emergency measures of COE Member States'[9]. Academia joined in fairly soon after the first global outbreak of the pandemic: an ongoing flood of contributions via quick response websites[10] and even a brand-new 'COVID-19 and the Law' Journal[11] saw the light.

Meanwhile, taking into account that even 'emergency' legislation requires a certain time span[12], it is for courts to solve disputes in everyday practice, but the pivotal question is: how? Grasping some examples from everyday life: how to deal with postponement, if not cancellations of a concert?; how about a 'combi' consumer relationship (e.g. a package deal of flight and hotel arrangement? Is it apt in a cross-border setting, straight away, to make use of the legal concept of *vis major*/*force majeure*? Is such a *voie directe* (i.e. applying substantive law without even referring to the cross-border nature of the contract)[13] allowed, or, presuming that it is, recommendable? As any 'sweeping brush' concept of *vis major* is not in the least well-equipped, programmed to the scene to capture each and every

[7] For in particular Europe, one may think of the following 'toolkits': European Law Institute (ELI), set of Principles, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_for_the_COVID-19_Crisis.pdf.; The Hague Conference, https://www.hcch.net/en/news-archive/details/?varevent=731; for UNIDROIT, cf. S. Loizou, UNIDROIT: Tackling COVID-19 through Private Law (March 3, 2021). Available at SSRN: https://ssrn.com/abstract=3796991 or http://dx.doi.org/10.2139/ssrn.3796991.

[8] Cf. the impact of COVID-19 on the 'European' Justice Field (in general): https://e-justice.europa.eu/37147/EN/impact_of_covid19_on_the_justice_field. (last visited January 18, 2022), and the extended list of 'key documents' (legislative acts in the fields of, e.g., agriculture, competition, consumers, customs, digital single market, economic and monetary affairs, employment and social policy, enterprise, external relations, external trade, food policies, human rights, internal market etc.) of the EU, https://eur-lex.europa.eu/content/news/Covid19.html. (last visited January 18, 2022).

[9] https://www.coe.int/en/web/cepej/national-judiciaries-covid-19-emergency-measures-of-coe-member-states.

[10] H-P. Mansel/K. Thorn/R. Wagner, *Europäisches Kollisionsrecht 2020 – EU im Krisenmodus*, IPRax 2021, p. 105. For an updated overview, cf. further www.conflictoflaws.net.

[11] COVuR (COVID-19 und Recht). So far, however this forum preponderantly concentrates on domestic law developments in the field of insurance, employment, tenancy of immovable, tax law, safety requirements, criminal law, Private International Law exceptionally only (cf. referrals below).

[12] Cf. also below, 3.3., in particular with a view to the geographical 'scope' of mandatory laws.

[13] For an overview of numerous contributions on the use of force majeure in the COVID-era, cf. www.conflictoflaws.net. Whereas in non-EU context the concept of *force majeure* may indeed deserve approval, in court proceedings initiated in EU Member States, one may not overlook that courts are obliged to apply EU Conflict of Law rules first (cf. further below).

aspect of cross-border contracts[14] it seems reasonable to start from the premise that Private International Law (further referred to as: PIL), cross-border contracts after all being its core business, must come into play.

3. Zooming in – Private International Law

3.1. A Delimitation First – Narrowing the Object of Research

Private International Law (PIL) regulates cross-border private law relationships in threefold manner: after a proper characterization of the dispute at stake (e.g. contracts, torts, other) the quest is for the court's competence, the law applicable, and, at the end of the day, whether, where and how a court judgment is eligible for recognition and enforcement.

Although from cross-border civil and commercial procedural law perspective the pandemic understandably lead to 'siding' legislative measures (e.g. delays, on line proceedings etc.)[15], hitherto there have been no major changes, at least EU-wide, in respect of jurisdiction. Notably for contracts this is comprehensible[16], as any such changes in e.g. the regime of EU Regulation 1215/2012 ('Brussels I bis') on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters[17], any infringement should have been regulated via either EU/EEA-legislation, or – in view of the former – at least acknowledged in preliminary staying by the CJEU[18]. *Mutatis mutandis* the same is to be said about recognition and enforcement of judgments under the reign of the same Regulation.

That leaves the critical beholder with the 'middle' out of the three main PIL questions: which law governs contractual relationships in times of the pandemic? Is PIL capable, in the first place, of dealing with the far-reaching ramifications of PIL at all? By all means, there is good reason to take a closer look at the proper law of the contract, as substantively speaking

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[14] It is worth mentioning here that 'in common law jurisdictions, force majeure is not a doctrine applied by the courts absent a provision in the applicable agreement', V. Lee/M. Lehberg/V. Sanchez/J. Vickery, COVID-19 Contract Issues Reach Beyond Force Majeure, Law 360, Blog March 13, 2020, https://www.law360.com/articles/1251749/covid-19-contract-issues-reach-beyond-force-majeure. (last visited May 18, 2021).

[15] This is what litigation in court and adjudication of disputes in private (arbitration) have in common these days.

[16] For cross-border jurisdiction in respect of torts, there is so far scarce case law R. Wagner, *Internationale und örtliche Zuständigkeit für zivilrechtliche Schadenersatzansprüche aufgrund von Virusinfektionen*, COVuR 2020, p. 566.

[17] For Europe in conjunction with the so called 'Lugano II' Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters*, OJ L 339, 21.12.2007, p. 3.*

[18] This impression seems justified, a quick scan on approximately one thousand digital publications from spring 2020 onwards via e.g. SSRN – Law, GoogleScholar etc. so far showing that in respect of cross-border contracts the emphasis lies on 'remote proceedings' in *private*, i.e. dispute adjudication via arbitration or mediation. This is not surprising, as first, adjudication of conflicts in private entails a higher degree of procedural discretion, and second, arbitration and mediation were used to e-proceedings already way before the pandemic broke out. Cf. also G. Chiapponi, *Judicial cooperation and coronavirus: the law must go on*. http://www.judicium.it/judicial-cooperation-and-coronavirus-the-law-must-go/.2020.

so far academic debates seem to concentrate more on either *uniform* sales law[19], or on approaches favouring a '*voie directe*' (i.e. setting Conflict of Laws aside in favour of *vis major/force majeure*)[20]. Comprehensible as such a direct approach is, it must be stressed once more that courts of EU Member States cannot and may not however 'skip' the binding nature of European Regulations in the field relevant.

3.2. PIL Tools Available

3.2.1. Characterization Comes First – Contract

While getting back once more to contracts that appear to be most vulnerable in times of the pandemic (student balls, concerts, conferences, holiday travels, sport events, employment relationships), starting point for contracts with cross-border ties not submitted to Uniform Laws is EU Regulation 593/2008 on the Law Applicable to Contractual Obligations, usually being referred to as 'Rome I'. In view of notably these contracts, it almost immediately shows that the *lex contractus*, the proper law of the contract as objectively[21] designated by 'Rome I' runs short of 'workable' remedies. This clearly follows from the following examples. How to deal with postponement or even cancellation of an 'international' pop concert? It may seem apt to submit contractual rights and duties of all parties involved (the organizer, consumers etc.) to the law of the country where the concert was supposed to take place (inflammations after all may vary from country to country, and therefore give rise to differentiated approaches), but this alley runs dead right from the start. According to article 4 subsection 1 under (b) a contract for the provision of services shall be governed by the law of the country *where the service provider has his habitual residence*. Subsection 3 indeed allows for the application of a law manifestly more closely connected, but there can hardly be any doubt that this proviso does not and cannot even envisage a pandemic[22]. Too generally worded, not offering any guidance is the following consideration enshrined in the Explanatory Report: 'the application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive

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[19] A. Janssen/C.J. Wahnschaffe, *COVID-19 and international sale contracts: unprecedented grounds for exemption or business as usual?*, Uniform Law Review 2021, Published online 2021 Feb 2. doi: 10.1093/ulr/unaa026.

[20] For an all-embracing overview on global scale on the ramifications of COVID-19 for Private International Law, cf. https://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalBrowse&journal_id=2447744&Network=no&lim=false.

[21] 'Objectively' to be understood here as meaning that the parties refrained from a commonly chosen applicable law in conformity with article 3 of 'Rome I'.

[22] Cf. the Explanatory Report, Cons. 20. 'Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.' For detailed treatment of the predecessor of this escape clause, Article 4 (5) of the Rome Contracts Convention 1980, S. Rammeloo, *Das neue EG-Vertragskollisonsrecht (etc.), 8.3 and Die Auslegung von Art. 4 Abs. 2 und Abs. 5 EVÜ: Eine niederländische Perspektive*, IPRax 1994/3 p. 243.

2000/31/EC of the European Parliament and of the Council of 8 June 2000 oncertain legal aspects of information society services, in particular electronic commerce, in the Internal Market(Directive on electronic commerce)[23].

Still observing the pop concert, article 6 on consumer protection will not be of any help either, as in many situations it is not the law of the country of habitual residence of the consumer applying as many of these concerts tend to be organized outside that country. How about then, perhaps, article 12 subsection 2 of 'Rome I'? This provision reads as follow. 'In relation to the *manner of performance* and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.' This provision however is evidently about practical modes of performance such as deliverance of goods during official holidays etc.

Intermediate and altogether unsurprising conclusion must therefore be that the normally ascertained *lex contractus* is simply not apt for use in times of pandemic.

3.2.2. Characterization comes First and Second – Tort

Exceptional fact constellations may give rise to 'turn the page', and start a search for another *lex causae*, namely where illicit behavior of contracting parties, worth qualifying as tort, comes into play[24]. Again, EU Private International Law imposes itself. Occasionally, EU Regulation 864/2007 on the Law Applicable to Non-contractual Obligations ('Rome II') may apply as a complementary EU Law PIL instrument. If that turns out to be the case, again, different situations are to be distinguished. Improper behavior may 'run parallel' to or be accessorial to the contract under discussion: one may think as an example of deliberately ignoring contractual information (warning) duties by a hotelkeeper towards guests (article 4), or, in pre-contractual stage, future guests (article 12) in an inflammation area, or dispatching contaminated goods[25]. Other sub-categories one could think of are, e.g., product liability for vaccination products causing 'damage' to individuals (article 5), or perhaps even environmental damage (article 7)[26].

As however this contribution mainly focusses on contracts, and by far most 'regular' contracts do *not* involve tort the intermediate conclusion must be that standard conflict

[23] Explanatory Report, Cons. 40.

[24] Obviously, here there is no relief via e.g. *force majeure* concepts, as the notion 'tort' in itself carries normative weight.

[25] Article 17 of 'Rome II': 'In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were inforce at the place and time of the event giving rise to the liability.'

[26] According to M. Lehmann, however, https://eapil.org/2020/03/16/corona-virus-and-applicable-law/.

Article 7 will not turn out to be applicable often. Whilst Recital 24 speaks of '…adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms', 'the virus travels mainly by air, but arguably, it *does not change this natural resource*. Its negative effects are on the health of other individuals. While one may debate this assessment, it seems certain that *Corona does not impair fauna's variation*.'

rules enshrined in 'Rome I' do not seem adequate to solve contracts affected by the pandemic. Recourse to other PIL tools seems therefore needed.

3.3. Mandatory Laws Overriding the Otherwise Applicable Contract Law

3.3.1. Article 9 'Rome I' – A Field Exploration

Inasmuch 'normal' conflict rules appear unsuited for tackling the pandemic's harmful effect to cross-border contracts – an assessment which in itself needs not to surprise – recourse must be had to so called 'mandatory laws' overriding the otherwise applicable outcome of the process of designating the applicable law. Article 9, codifying CJEU case law[27], defines the concept of mandatory laws. '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'.

Unforeseen as they must have been by the drafters of 'Rome I' at dawn of the 21st century, legislative measures[28] emanating from the pandemic nevertheless do not for that reason *a prima vista* fall outside the ambit of this provision. Unlike conflict rules written for 'everyday business transactions' situations like the pandemic are the very common core Article 9 on mandatory rules is assigned with[29]. Recent debates having regard to notably those contracts that are relatively more vulnerable' for the pandemic than others – cross-border employment relationships – on the other hand show that there is no clear guidance on that matter either.

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[27] CJEU C-369/96 and C-376/96 *Arblade* [1999] *ECR* I-8453. For a flood of comments on this pivotal case 'codified' after in Article 9 'Rome I' but understandably clearly preceding the COVID-19 era, cf. CJCE – Système MINIDOC (CJEU Curia website). For recent writings on overriding mandatory laws under the reign of 'Rome I' in a general contractual context, cf. G. Van Calster, *European Private International Law*, Portland Oregon, 2016, p. 229 and ff.; J. Hill/M. Maíre Ní Shuilleabhaín, *Conflict of laws*, Oxford 2016, Ch 4; *R. Freitag*: *Art. 9 Rome I-VO, Art. 16 Rom-II VO als Superkollisionsnormen des Internationalen Schuldrechts? – Gedanken zum Verhältnis zwischen internen und externen Lücken des EuIPR*, **IPRax 2016, p. 418; P. Mankowski, Drittstaatliche Embargonormen Aussenpolitik im IPR, Berücksichtigung von Fakten statt Normen: Art. 9 Abs. 3 Rom I VO im praktischen Fall (zu Cour d'Appel de Paris, 25-2-2015, 12/23757), IPRax 2016, p. 487. For in particular employment relationships and mandatory laws: R. Callsen, Eingriffsnormen und ordre public Vorbehalt im internationalen Arbeitsrecht – ein deutsch-französischer Vergleich, Baden-Baden 2015.**

[27] Opinion of the Advocate General, Observ. 65 (emphasis SR), inter alia referring to M. Hellner, Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?, Journal of Private International Law, 2009, No 5 (3), pp. 451 to 454 and M. McParland, The Rome I Regulation on the Law Applicable to Contractual Obligations, Oxford University Press 2015, pp. 697 to 705.

[28] Cf. above.

[29] Among many other measures, one may think of, e.g., currency regulating laws or conventions, the protection of cultural objects, measures aimed at fighting terrorism or mending financial crises, hygienic measures etc.

3.3.2. Employment Relationship – National Mandatory Laws Superseding Applicable Conflict Rule

Not surprisingly, while trying to formulate a certain methodology, if not straight answers to the pandemic, debates via fora on line fairly soon centered round contractual relationships that due to the *physical* attendance of the employee showed most vulnerable from the very start of the pandemic: employment relationships.

Quite soon after the pandemic struck the world, Italian legislator 'responded' by issuing a Law Decree in the field of labour law, giving rise to a lively debate in the Conflict of Laws forum[30]. Pursuant to Article 46 of this Decree, any employment contract 'may *may not be terminated* on grounds of a failure by the employee to perform his or her obligations, or on objective grounds such as a drop in the demand for the employer's goods or services'. Whereas functionally speaking the scope was well defined and limited to specific situations, contrary to some other provisions Article 46 lacked a proper 'geographical' scope rule. The Preamble to the Decree solely provided for a guideline: '…impact of Covid-19 on the „national social-economic reality", meaning business, workers and households *located in Italy*', the outcome of which may well result in arbitrary reasoning. It is worth questioning whether this criterion favours a Dutch, German, Austrian, French or any other employee sent to work in Italy as well, and whether or not, this ultimately depends on whether this employee carries out duties habitually or occasionally only. The question arises, as mirror image, in view of an Italian employee working abroad habitually or temporarily, and how about the 'rotating' employee?[31] Meanwhile, the criterion 'national social-economic reality' echoes the Dutch experience in pre-pandemic times, as a Dutch post-war Law Decree also not only aimed at upholding both the employment relationship in the interest of notably employees '*falling back on NL labour market*', but also from a more macro-economic point of view protecting the economic market as a whole[32].

Apart from its geographical 'scope', it is questioned whether Article 46 of the Italian Law Decree may set aside the otherwise applicable *lex laboris* as established under the reign of Article 8 'Rome I' According to Article 8.1, an '…employee cannot be deprived of the protection afforded to him by provisions that cannot be derogated from by agreement under the [objective proper law, SR] law that, in the absence of choice, would have been applicable.' This section, however, only speaks about a law chosen by the parties.

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[30] www.conflictoflaws.net. On the LEGGE 24 aprile 2020, n. 27 (emergency decree converted to law after), Conversione in legge, con modificazioni, del decreto-legge 17 marzo 2020, n. 18, recante misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19. Proroga dei termini per l'adozione di decreti legislativi. (20G00045) (GU Serie Generale n. 110 del 29-04-2020 – Suppl. Ordinario n. 16).

[31] CJEU C-384/10 *Koelzsch*. Perhaps following economic rescue measures, not many employees found themselves dismissed, as may be concluded from so far scarce writings on this topic, cf. R. Falder/C. Frank-Fahle, Entsandte Arbeitnehmer im Niemandsland – Die Corona-Krise und ihre Auswirkungen auf die Auslandstätigkeit (etc.), COVuR 2020, p. 184. A closely related and interesting question, not further dealt with here, is whether in the aftermath of the crisis unemployment rates will rise, and, if so, whether this process may still give rise to invoking mandatory law sas discussed here.

[32] *Sörensen-Aramco*: Employee (US citizen) planning return to US after dismissal by employer, art. 6 BBA.

Choice or not, proper guidelines seem to be missing, even more in respect of the interplay between Article 8 and Article 9 on mandatory laws. Arguably, the Italian self-proclaimed overriding mandatory provisions do not appear to be 'crucial' for safeguarding public interests within the meaning of Article 9(1) of the Rome 1 Regulation, but rather appear to be exclusively purported to protect *private* interests of the (weaker) employee (for however widespread they may be)[33]. It boils down to the question: what are national legislators allowed to, and what is not? It seems reasonable to presume that no mandatory provision may override the conflict-of-laws rules in that Regulation, unless it fits in the definition in Article 9(1). This observation lead to a lively debate on the genuine purpose (or purposes) allegedly underlying the Decree[34], yet without consensus, as the debate unrolling sufficiently demonstrates[35]. In that respect the *Unamar* ruling of the CJEU does not provide genuine guidance either[36]. Employees performing duties in the Single Market, even when struck by the same pandemic, run the risk of different treatment due to disparities among EU Member State's laws.

3.3.3. Lex Laboris Superseded by Article 9 'Rome I' CJEU Greece – Nikiforidis

This is however not where the debate on the 'reach' of foreign mandatory laws ends. Another serious aspect is the 'asymmetrical' construction of article 9. According to the second subsection of '*nothing* in this Regulation shall *restrict* the application of the overriding *mandatory* provisions of the law of the *forum*.' Subsection 3, however, does not reach farther than potentially '*giving effect to mandatory laws* 'of (solely!, SR) 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 asymmetry poses problems of its own kind, as is demonstrated by the preliminary ruling by the CJEU in the aftermath of an earlier global catastrophe, the 2008 Financial Crisis: *Greece – Nikiforidis*[37].

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[33] E. Piovesani, https://conflictoflaws.net/2020/italian-self-proclaimed-overriding-mandatory-provisions-to-fight-coronavirus/. (last visited May 2021).

[34] P. Franzina, same source.

[35] C. Benini, idem, contends the view of others that the above Italian provisions are merely concerned with *private* interests, that is, the interests of the parties to the contracts concerned. 'By declaring that the spread of the epidemic makes the performance of obligations impossible within the meaning of Article 1463 of the Italian Civil Code, the legislator aimed at fostering the compliance with the governmental measures adopted to fight the coronavirus. It did so by exempting the parties from their obligations under transport and accommodation contracts, arguably on the assumption that this would reduce the risk that the concern for the unfettered performance of those obligations could undermine the strict compliance of the measures taken by the government to restrict the movement of people. Seen from this angle, the above provisions, while affecting as such the individual rights and obligations of the parties, are meant to safeguard the public health by reducing the movement of people and lowering the risk of any further spread of the virus'.

[36] CJEU *Unamar*, C-184/12, ECLI:EU:C:2013:663.

[37] CJEU Case C-135-15 *ECLI*:EU:C:2016:774 (*Greek Republic v. Grigorios Nikiforidis*).

Briefly, the facts were as follows. Nikiforidis, a teacher employed by Greek government based on a public German school, contested a salary cut emanating from the 2008 Financial Crisis, claiming that exclusively German law chosen, not Greek law applied. Greece, however, was compelled to apply the salary cut pursuant to mandatory laws (imposed by ECB, EU Commission and IMF). Here the asymmetry shows. Obviously, recourse by Nikiforidis to the court of the EU Member State of his employer (Greece) would not save the employee from a salary cut, as Article 9.1 compels Greece to apply its 'own' forum mandatory laws. Would a German court then at least 'may give effect' to Nikiforidis' claim under Article 9.3? Before even considering, this provision, however, cannot apply just like that: although indeed the *performance* of teaching obligations take place in Germany, not the 'normal' *German labour* law obligations but *Greek mandatory* laws are under discussion.

The CJEU tried to find its way between Scylla and Charybdis by stretching the functional reach of Article 9(3). 'This provision (…) must be interpreted as precluding overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed from being applied, as legal rules, by the court of the forum, but as *not precluding* it from *taking such other overriding mandatory provisions into account as matters of fact* in so far as this is provided for by the *national* law that is applicable to the contract pursuant to the regulation'.

A first impression is that this interpretation carries several intrinsic flaws. In the first place, it is hard to conceive that this 'interpretation' is in line with what the drafters of 'Rome I' had in mind, in particular if one realizes that it was the great reluctance of most if not nearly all EU Member States to even take into account foreign mandatory laws right from the start[38]. Second, the referral to *national* laws inevitably creates a difference in approach, as it will ultimately depend on the attitude of such 'facts' under the law of the forum seized. Third, why consider mandatory rules 'from abroad' as a 'matter of *fact*'? Are there perhaps other ways to approach mandatory laws other than those imposed by the law of the forum? A closer look is needed to find out.

3.3.4. Foreign Mandatory Laws in the Pandemic Era – A Workable Way Out?

Whilst recalling once more the Italian Law Decree on the impossible performance of duties arising from employment contracts with cross-border ties, central question is the mandatory laws of *which* 'foreign' legal orders can, may, or perhaps even must be taken into account by courts. Theoretically speaking first, such mandatory laws can originate (i) from the *lex fori* (here: German law), (ii) from the *lex causae*, for in particular employment contracts referred to as the *lex laboris* (idem), or (iii) from any other, closely connected 'foreign' system of law (here, Greek law claiming to be applied). In case of employees being send abroad, occasionally or on temporary basis, but also employees constantly 'on the move' the pandemic most likely interfering, it is relevant to find out how courts should handle mandatory laws.

[38] In detail, cf. below, under 3.3.4.

As I pointed out before, legal history on this issue is notorious for its controversies. Before observing current law, the predecessor of Article 9.3 'Rome I', Article 7 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations deserves mentioning. '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.' Many EU Member States however felt considerable reluctance, notwithstanding the lenient nature of this provision as it left the widest possible discretion to courts ('effect *may* be given'). Fears for not only time consuming proceedings in order to assess which mandatory laws of which legal orders could claim application, but also for political involvements most contracting EU Member States opted for the reservation allowed for by Article 22 of the Convention.

This is why Article 9.3 'Rome I' was rewritten in a far more restrictive way (mandatory laws of *solely* the legal order where the contract was or had to be *performed*). Even so, the new Article does not solve all problems. No less than 73 Observations[39] reflected the struggle of the Advocate General Szpunar preceding the Court's preliminary ruling in the *Greece-Nikiforidis* case while attempting to formulate – if not to frame – a more or less 'satisfactory' Opinion in the fore lying case on this matter. Notably questionable remains, 'the extent to which *EU* law can *prohibit, restrict or require* the application of specific overriding mandatory provisions'[40].

Let us recall once more the 'scope' of the Italian Law Decree applying to situations where 'business, workers and households (are) *located in Italy*'[41]. This criterion gave rise to the question whether the Decree also applies to a Dutch employee sent to work in Italy (habitually or occasionally), and, the other way round, to an Italian employee working abroad habitually or temporarily. A *strict* interpretation of article 9.3 'Rome I' would, in view of the Advocate General, not be consistent with the objective of the Rome I Regulation. First, the 'rationale and objectives' in many cases 'may also be in the interest of another Member State'[42]. Second, establishing different treatment of mandatory provisions of the forum State and of a third State would promote forum shopping (it would thus be possible to imagine that, if proceedings relating to the same matter of dispute were under way before a Greek court (or, in the context of this contribution Dutch or Italian court, SR)'[43]. Finally, concern that mandatory provisions of a third State prejudices legal certainty and renders decisions unpredictable is considered not convincing[44]. An *excessively strict* interpretation cannot, still in view of the Advocate General, be placed on the concept of

[39] Opinion, Observ. 53-126.

[40] Opinion, Observ. 83 (emphasis SR).

[41] Or, more or less comparably, Dutch mandatory laws depending on whether the employee, after being dismissed would 'fall back on the Dutch labour market'.

[42] Opinion, Observ. 86-88.

[43] Opinion, Observ. 89.

[44] Opinion, Observ. 90, whilst comparing article 9 with the regime of article 21 'Rome I' on *ordre public*.

'country where the obligations are to be or have been performed', still apart from the fact that 'there is no outright presumption that Germany alone is the place where the obligation is performed in the main proceedings in this case'[45].

Conceivable as this approach is, it still makes sense to ask whether the functional scope of Article 9.3 'Rome I', compared to its predecessor Article 7.1 of the Rome Contracts Convention, is not too narrow. A lesson to be learned from the *Greece-Nikiforidis* case may well be that there is a difference between national mandatory laws claiming application in 'normal' times, or an era where the entire world is struck by either a Financial Crisis (like in 2008), or by a pandemic as experienced today. In the light of macro-economic 'responses' formulated by European and/or UN restructuring programs a legislative change to the current conflict of laws regime of 'Rome I' at least deserves to be contemplated. Seen from that perspective it is quite ironical that fairly soon after the outbreak of the 2008 Financial Crisis, Wautelet raised the question: 'When Rome meets Greece. Could Rome I help the Greek debt restructuring?'[46] At issue were 'outstanding Greek bonds, many of the bonds issued governed by English law or the law of New York ', the PIL instrument of 'foreign' (here: Greek) mandatory laws directly having impact on the terms of the debt. Obviously the parallels between CJEU *Greek Republic v. Nikiforidis* and the 2008 Financial Crisis on one hand, the pandemic on the other, are striking, as the conclusion of Wautelet was: '(g)iven the limitations imposed by Article 9.3 of the Rome I Regulation on the application of foreign mandatory rules, the Regulation may offer a very limited protection'. And Wautelet was not the only one[47].

4. Private International Law 'One Year After' – Lessons to Learn

It needs not to surprise that conflict of law rules designating the proper law of a contract for day-to-day cross-border transactions are unsuited to face, let alone solve complications arising from the global pandemic.

Rather than 'buying' (elaborating) 'brand new' instruments (if not this would be starting a search for philosophers' stone), the use of available PIL tools may be worth contemplating. Not surprisingly, it was not until the end of the year 2021 that the first attempts were made, even so still mostly in the framework of national substantive law to provide for a 'consolidated' view on how to combat COVID-19, legally speaking[48]. For the 'international' context, including conflict of laws, debates are still ongoing[49].

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[45] Opinion, Observ. 91-95, whilst a functional comparison is made to the complex nature of 'the place of performance of the obligation in question' in article 7.1 of EU Reg. 1215/2012.

[46] P. Wautelet, www.conflictoflaws.net. May 2012.

[47] Cf. J. Von Hein, *The procedural impact of the Greek debt crisis: The CJEU rules on the applicability of the Service Regulation*, www.conflictoflaws.net. July 2015. Cf. further and extensively A.J. Berends, *Why overriding mandatory provisions that protect financial stability deserve special treatment*, NILR 2014, p. 69.

[48] Cf. V. Jentsch, *Contracts and the Coronavirus Crisis: Emergency Policy Responses between Preservation and Disruption*, European University Institute – Dep. Of Law, EU Working Paper 2021/09, available https://cadmus.eui.eu/bitstream/handle/1814/72060/LAW_2021_09.pdf?sequence=1.

[49] Cf. the referral in footn. 1, above. Furthermore, a series of guest lectures was initiated under the auspice of the Max-Planck-Institut für ausländisches und internationals Privatrecht Hamburg, https://www.mpipriv.de/2394/suchergebnis?utf8=%E2%9C%93&searchfield=COVID. (last visited January 18, 2022).

Yet, there are at least some guidelines. Recourse can – and must – be taken to the concept of mandatory laws which was first introduced in Private International Law halfway the 20st Century[50]. Although this concept did not overthrow 'traditional' PIL, ever since, due to 'socio-economic engineering' in modern economic business and society, its importance grew steadily.

Where, however, until recently it many critical beholders felt that a quest for foreign mandatory laws would face insurmountable complications, thanks to digitalization siding physical world it may become far easier to 'trace' 'foreign' laws that potentially speaking may have a genuine claim to be applied[51].

All in all the concern outspoken a few years ago already that article 9 'Rome I' begs to be clarified more and that further preliminary rulings will likely have to shed further light may well be conceived as an understatement[52]. First, it is worth asking why at dawn of the 21st century already 'Rome I' was not enriched with a brand new sub section 4, which more or less parallel to article 3 subsection 4 would state that the law chosen or objectively applicable 'shall not prejudice[53] the application of provisions emanating from Community law but also from UN law.' Second, two global crises urge legislators of the EU and Member States alike to re-contemplate and perhaps redefine the functioning and scope of Article 9.3 of 'Rome I', notably for global crises like the ones experience in 2008 and 2020. The all-embracing, one could even say 'universal' geographical scope of article 7.1 of the Rome Contracts Convention allowing for scrutinizing the mandatory laws of *any* third country was replaced drastically, but perhaps also too narrowed scope of its successor (solely the mandatory laws of the legal order where duties arising from the contract were or should have been performed.

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[50] Ph. Francescakis, *Quelques precisions sur les 'lois d'application immédiate' et leurs rapports avec les règles de conflits des lois*, Rev. cr. d.i.p. 1966, p. 1.

[51] Cf. the digital instruments referred to above (section 2.3) and, furthermore, e.g. the Oxford COVID-19 Government Response Tracker, https://www.bsg.ox.ac.uk/research/research-projects/covid-19-government-response-tracker. 'scanning' mandatory laws on a world-wide basis. Cf. also in depth G. Rühl, *Digitale Justiz, oder: Zivilverfahren für das 21. Jahrhundert*, JZ 2020, p. 809, M. Velicogna, *Cross-border Civil Litigation in the EU: What can we learn from COVID-19 emergency National e-Justice experience?*, published via SSRN (last visited May 15, 2021): 'The Portal also provides a wizard to help the user selecting the right procedure, search tools to find competent courts and legal professionals, and tools to complete online the forms in one of the EU official languages and generating them afterword in a pdf format for which the standard text can be automatically translated in any of the other available languages selected by the user on the basis of the ones requested by the competent court', and Idem, *In search of smartness: The EU e-Justice challenge. In Informatics*, Multidisciplinary Digital Publishing Institute 2017, (vol. 4, No. 4, p. 38).

[52] Mansel/Thorn, *Europäisches Kollisionsrecht 2016: Brexit ante portas!*, IPRax 2017, p. 32, p. 32, under German law Par. 138 of the Civil Code would have to be used as yardstick, BGH June 22, 1972, II ZR 113/70 BGHZ, 59, 82, 85 ff. This proviso on 'Sittenwidrigkeit' (in a PIL context 'ordre public') is however a rough brush and not equipped to deal with fine tuning super mandatory laws like in the fore lying case., p. 32: 'Freilich bleibt (…) auf Art. 9 Rom-I VO noch manches klarungsbedürftig und hart somit weiterer Vorabentscheidungsfragen.'

[53] The Commission explicitly aims at preventing circumvention of Communautary law, COM (2005) 650 def., 2005/0261, p. 9. This seems a fortiori apt when the facts do not show any tie with *non-EU* legal orders, cf. Van Wechem, p. 21, referring *a contrario* to CJEU 381/91 (*Ingmar-Eaton*) [2000] ECR I-9305 (termination of commercial agency; despite California law chosen, EU protective mandatory rules held applicable).

5. Overall Conclusions

The 2020 COVID-19 Pandemic) drastically changed the world, as an early warning foreshadowing what perhaps is yet to come. 'COVID-19 is the latest in a series of viral outbreaks that researchers predict will only increase in the years ahead. In the last 20 years, the world has experienced SARS (2002-2003), swine flu (2009), MERS (2012), Ebola (2014-2016), Zika (2015), dengue fever (2016) and now COVID-19. Each outbreak presents different challenges to the performance of existing contractual relationships, and the latest virus creates the opportunity to consider — or reconsider — some key strategies for mitigating the risks associated with these ever-increasing global outbreaks in pending contract negotiations'[54].

Seen from legal perspective, more in particular having regard to cross-border private law relationships it is far from surprising that conflict rules written for day-to-day business (contract, occasionally tort) cannot meet the requirements emanating from the pandemic. Rather than elaborating brand-new tools the efficiency of which may remain unclear for a considerable period, recourse to the instrument of mandatory laws seems worth a try; after all these mandatory rules plaid their role in the preceding 2008 Financial Crisis as well.

A re-orientation in the field of Private International Law, in particular having regard to contracts, however, seems recommendable. Still useful as a concept in times of the pandemic, notably the wording and 'scope' of Article 9.3 'Rome I' may no longer be apt to regulate crises striking the entire world. The foregoing shows that hastily elaborated laws often lack precise delimitations as to their geographical scope. Legislators are inclined to *self-restriction of their national 'emergency' laws* and decrees. This undeniably makes sense in case sufficient ties with territory are lacking, but the CJEU *Greece-Nikiforidis* case also demonstrates that the asymmetrical construction of the current provision of article 9.3 'Rome I' needs re-contemplating, if not even redrafting, or, at least, fine-tuning via future interpretative CJEU rulings. Attempts to bring foreign mandatory laws *other* than those enacted by either the forum state (article 9.2) or the state where performance of the contract was due (article 9.3) under the hood of 'facts' is a far from satisfactory and even arbitrary approach. As the digital era more and more provides for a meticulous overview of national EU Member States' legislative measures as well as court judgments combating the pandemic, this 'pool' may well serve as a helpful means to (re)formulate conditions national mandatory laws of EU Member States have to comply with in a cross-border context.

[54] V. Lee/M. Lehberg/V. Sanchez/J. Vickery (cf. footn. 13)., *COVID-19 Contract Issues Reach Beyond Force Majeure*, Law 360, Blog March 13, 2020, https://www.law360.com/articles/1251749/covid-19-contract-issues-reach-beyond-force-majeure. (last visited January 10, 2022).