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UKRAINIAN AND EUROPEAN LEGAL STUDIES

OVERRIDING MANDATORY RULES IN THE EUROPEAN UNION PRIVATE INTERNATIONAL LAW AND PRIVATE INTERNATIONAL LAW OF UKRAINE

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LIST OF ABBREVIATIONS

1. Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) - is presented in the research as “the Rome I Regulation”.

2. 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998 - is presented in the research as “The Rome Convention”.

3. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007 - is presented in the research as “the Rome II Regulation”.

4. The European Union - is presented in the research as “the EU”;

5. The European Court of Justice – The ECJ.

INTRODUCTION

The modern processes of economic growth, diversification of international imports and exports, as well as the spread of international cooperation between the subjects of private international law, have led to an expansion in the number of agreements between the subjects of law of different states. The parties to a contract often settle their relationship by finding a consensus on the law that governs their relationship. Also, the regulation of relations in private international law occurs on the basis of the application of conflict rules, which indicate the law of the state that should be applied to the particular private law relationships complicated by a foreign element.

Therefore, the states always strive to realize their own interests under maintaining sovereignty. The protection of the bases of the legal order of the state from the negative influence of foreign law is a generally recognized principle of private international law and on the basis of this, the application of foreign law to the relevant legal relations on the basis of the choice of law or by referring to its conflict of laws rules is limited to the effect of the reservation on public order and overriding mandatory norms. In current conditions, when most of the developed countries of the world adhere to the concept of a welfare state and actively intervene in the regulation of socio-economic relations in order to establish the most effective balance of interests of various groups of the population, imperative norms realize vital public socio-economic interests. Different legal systems define differently the range of norms that belong to the overriding mandatory rules, as well as their relationship with the category of public order.

Overriding mandatory provisions are globally recognized. They are stipulated in the latest legislative acts on private international law, international treaties, and acts of the European Union, such as the Rome I Regulation, the Rome II Regulation, EU Matrimonial Property Regulation, domestic legislation of Member States, and the *lex mercatoria*.

Overriding mandatory provisions are also stipulated in the Ukrainian legislation. However, despite the consolidation of these provisions, the problem of their determination, as well as establishing criteria to distinguish such provisions from other mere imperative rules remains unresolved. Accordingly, the judicial practice of Ukraine cannot proceed with giving fundamental decisions in regard to overriding mandatory rules, whereas the legislation does not facilitate the courts in their discretion as to the application of overriding mandatory provisions solely belongs to the courts' discretion.

These circumstances also present difficulties in the doctrine of private international law. In the works of various foreign and Ukrainian legal scientists, there are disagreements regarding

the concept and features of overriding mandatory provisions and their exhaustive range that prevents the formation of a unified approach to understanding this type of norms.

The problem of the research is to define whether the category of overriding mandatory rules is subject to the proper and significant determination in the doctrinal approaches, studies, and legislation of the European Union and Ukraine, and how the content of this category of international private law is defined and specified in relation to the judicial practice.

Relevance of the Master's thesis is explained through the modern globalization processes as diverse legal relationships are expanding involving domestic and foreign agents whereas the presence and enforcement of the category of overriding mandatory rules shall significantly influence the scope of applicable law in case of possible disputes.

The relevance of the research is also confirmed by the significant instigation of judicial and legislative practice in the European Union that can be deliberately and directly adopted by the Ukrainian legislator in order to establish the framework for the proper judicial and legislation inquiry.

The scientific novelty of the presented research is manifested in the first significant study of the category of overriding mandatory provisions in a comparative perspective of the legislative and judicial spheres of the EU and Ukraine, which is justified by the interests of these international agents, in particular, the course of Ukraine to join the EU, which directly affects the prospects for the unification of legislation in the field of overriding mandatory provisions in Ukraine.

The theoretical basis of the research consists of the works of various foreign and Ukrainian legal scholars, such as A. V. Asoskov, I. A. Dikovska, A. S. Dovgert, C. Ferry, P. Francescakis, G. G. Ivanov, O. O. Karmaza, B. R. Karabelnikov, V.I. Kysil, S.B. Krylov, D. Lew, A. N. Makarov, P. Mayer, N. I. Marysheva, O. M. Nagush, I. S. Peretersky, S. V. Panchenko, F. C. Savigny, A. N. Zhiltsov, V. P. Zvekov, and others.

The works of P. Blessing, E. V. Babkina, M. Giuliano, and P. Lagarde were analyzed in order to define the proposed by legal scientists spheres of legal relations that contain overriding mandatory provisions.

Particular importance was given to the works of Boyarsky E. D. and B. Y. Rebrish, who directly analyzed the provisions of Ukrainian legislation and judicial practice in matters related to defining and applying overriding mandatory provisions.

The aim of the research is related to the peculiarities of the goals pursued by overriding mandatory rules and their application which raises numerous questions that require consideration by the competent court in resolving disputes. This category of private international law requires

analysis and research due to the fact that the legislative provisions related to overriding mandatory provisions are of an estimated value, and, based on this, they can be misapplied by the court due to the lack of clearly defined frameworks. This situation requires the development of criteria for determining the applicability of this category of private international law and the possibility of attributing the development of a substantive legislative definition.

The objective of this research is to determine the essence and place of the category of overriding mandatory rules in private international law, compare the current state of the legislative approach to the definition, discover the fundamental features and analyze the judicial practice of the European Union and Ukraine, propose models to improve the law enforcement practices in Ukraine.

In order to achieve the specified goal and objective, the following sub-objectives have to be pursued:

1) Compare doctrinal approaches to the definition of overriding mandatory provisions.

2) Formulate the concept and determinate features of the mandatory norms of an overriding nature.

3) Highlight the connection factors and stipulate differences among overriding mandatory provisions and the categories of public order and *jus cogens*.

4) Determine the distinction between overriding mandatory provisions from ordinary mandatory provisions.

5) Analyze the main legislative acts and judicial practices of the European Union and Ukraine in the context of the category of overriding mandatory provisions.

The significance of the research is indicated in the possibility of using this work in the context of improving legislative and judicial practice. Future researchers can use the results and conclusions and recommendations of this scientific legal research work as a basis for identifying new and unstudied features in the field of overriding mandatory provisions. The materials of the work can be used in the educational process when conducting classes in private international law and by participants in private law relations complicated by a foreign element in resolving different types of conflicts.

Research methodology. In order to achieve and fulfill the aim and related objectives of the research, the following methods are used: analytical, historical, comparative, linguistic, and logical.

The analytical method was used as the core method of the research. It provided an opportunity to search, evaluate and criticize legislative, judicial, and doctrinal approaches for determining overriding mandatory provisions and specifying the range of possible overriding

mandatory provisions rules. Besides that, the analytical method was used to enshrine the fundamental characteristics of overriding mandatory provisions in the law and judicial practice of the European Union and Ukraine.

The historical method was used to evaluate the dynamics of legislative and doctrinal developments and changes in overriding mandatory provisions from the perspective of the European Union and Ukraine.

The comparative method was used in order to estimate the differences between the public order, *jus cogens* and overriding mandatory rules; set up the interaction among overriding mandatory rules, the principle of the autonomy of the will, and conflict of laws rules. This method was also used to compare the degree of consolidation of the category of overriding mandatory rules in the European Union and Ukraine.

The linguistic method ensured the completeness of the examination of the wordings describing overriding mandatory rules in legal acts, judicial cases, and doctrinal approaches.

The logical method was used in conjunction with other methods and allowed to develop personal conclusions on the determination of the difference between ordinary mandatory provisions and overriding mandatory provisions, and highlight the incompleteness of the Ukrainian legislation and lack of Ukrainian judicial practice in regard to overriding mandatory provisions. This method allowed to render significant conclusions and recommendations for strengthening the consolidation of the proper wording definition in relation to overriding mandatory provisions that should be contained in the Ukrainian legislation.

The structure of the research consists of an introduction, list of abbreviations, two chapters, which are divided into nine subchapters, conclusions, recommendations, list of bibliography, abstract, summary, and honesty declaration.

The results of the scientific research formulate the following defense statements containing elements of scientific novelty:

1. The categories of public order and overriding mandatory norms are interdependent and close categories of private international law, which both aim at ensuring the public interest and dismiss the conflict of laws rules and the principle of autonomy of the will, but, at the same time, these categories differ in the mechanism of application, internal content, and degree of dynamics in the development and ongoing consolidation. *Jus cogens* and overriding mandatory provisions should not be equated, whereas overriding mandatory provisions are used by particular states and are the domestic provisions granted with special imperativeness in order to protect the public interest and fundamental organizational spheres, but

jus cogens are internationally stipulated principles and norms constituting the basis of international relations, which should be followed by each state.

2. Despite various diverse doctrinal and legislative approaches towards defining overriding mandatory rules, the unique unified approach should be aimed at facilitating the judiciary by stipulating their purpose, features, and characteristics whereas only the court is entitled to determine certain overriding mandatory provisions on a case-by-case basis.

3. The separation of overriding mandatory norms from ordinary mandatory norms of a domestic nature directly depends on the special purpose contained in their content, case-by-case circumstances, and the stage of development of the state, as a standard mandatory norm can become overriding over time due to changes in domestic and foreign policies of the state.

4. The case law of the European Court of Justice is a cornerstone of the basic features and characteristics, which governs the peculiarities of the application and determination of overriding mandatory rules. It is established by judicial practice that such norms should follow the primacy and uniform application of the European Union law and should not be detrimental to it. Overriding mandatory rules are influenced by the principle of the freedom of the contract and their belonging to the public or private sphere of law does not define the presence of overriding imperativeness.

5. In addition to analyzing and determining the purpose, nature, and consequences of the application or refusal of overriding mandatory provisions, the court must determine which overriding mandatory rules of the foreign state should be applied, examine the evidence basis, which strongly confirms the connection factor with the legal system of another state, and conduct a wording analysis.

1. THE COMPREHENSIVE CHARACTERISTIC OF OVERRIDING MANDATORY PROVISIONS DETERMINATION IN INTERNATIONAL PRIVATE LAW

1.1. Doctrinal Approaches to the Definition of Overriding Mandatory Provisions

The concept of overriding mandatory rules is a relatively young category for private international law. Doctrinal approaches to the definition of overriding mandatory provisions began to appear in the middle of the 20th century when there is an increase in state intervention in private spheres of life and the interpenetration of private and public spheres of law. Overriding mandatory provisions started gradually finding application and consolidation in the judicial and legislative spheres.[1]

It should be emphasized that the general theory of law distinguishes dispositive and mandatory provisions based on criteria of the degree of binding force they entail. Dispositive are the rules that give participants the right to choose behavior within certain limits, which they may wish to use. Such provisions are primarily seen in civil law, as they aim to ensure the principles of formal and legal equality of participants in these legal relations. Instead, imperative rules are strict, authoritative, and categorical and do not allow deviations in the regulation of behavior.[2]

However, legal relations complicated by a foreign element fall within the scope of private international law. Accordingly, private international law doctrine considers that mandatory provisions are special rules of particular importance. Such rules ensure the rights and interests of participants in private international law relations and usually indicate imperativeness and are named as overriding mandatory rules and should be categorically distinguished from simple mandatory rules.[3]

Including conflict rules in its legislation and thus agreeing in principle with the application of foreign law to regulate relations with a foreign element, the state remains interested in maintaining guarantees that in each specific case the most important individual norms of its own legal system from among the imperative ones will not lose of its effect, irrespective of the law of which state will generally govern such relations. This interest is due to

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[1] Dovgert, A. S., and Kysil V.I., ed. *International private law. Main part* (Kyiv: Alerta, 2012), 220.

[2] Volynka, K.G., *Theory of state and law. Textbook* (Kyiv: MAYP, 2003), 154.

[3] Dovgert, A. S., and Kysil V.I., ed. *International private law. Main part* (Kyiv: Alerta, 2012), 216.

those accents in the state legislative policy, which are expressed through such norms. The increased state intervention explains the recognition of the overriding mandatory nature behind such norms in the regulation of the economic life of society.[4]

It is worth stating that despite the many doctrinal approaches and normative consolidation, the category of overriding mandatory rules continues to be not fully defined and specified.

The doctrine of private international law contains three fundamental approaches to the definition of overriding mandatory rules:

1) An approach that is based on the definition of overriding mandatory rules through their content and purposes;
2) An approach that is based on the mechanism of action of overriding mandatory rules;
3) An approach based on determining the public spheres that may contain such rules.

The representative of the first approach is the Greek-French jurist Francescakis, who highlighted a particular category of substantive legal rules that fall out of the conflict of law scheme determining the applicable law in relations with a foreign element, and characterized such provisions as: "necessary to protect the political, social and economic sphere of the state".[5]

Ferry followed a similar position and defined overriding mandatory rules as “provisions that pursue very fundamental interests of the state, by the application of which the conflict of laws rules lose their force”.[6]

The Russian scientists N. I. Maryshev and O. N. Sadikov characterized them as direct-action norms as "a third special method of the regulation of civil law relations with a foreign element along with conflict and unified substantive norms".[7] Consequently, the scientist acknowledged the category of overring mandatory provisions as a special method of regulation that has its own mechanism of application.

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[4] Komarov, A. S., *Choice of Applicable Law in Contracts with Firms in Capitalist Countries* (Moscow, 1998), 68.

[5] Francescakis, Ph. *La theorie du renvoi et les conflits de systems en droit international privee* (Paris, 1958), 11.

[6] Ferry, C., “Contrat international d’agent commercial et lois de police”. *Journal du droit international* 120 (1993): 301.

[7] Marysheva, N. I., *International private law* (Moscow, 1984), 11.

The Ukrainian scientist E. D. Boyarsky emphasized the importance of overriding mandatory rules that primarily serve to ensure the public interests".[8] It is stipulated that overriding mandatory provisions can entail the purpose not only of the protection of the public interest of the state but include other objectives.

Representatives of the first approach focused their attention on the primary importance of overriding mandatory rules for the public interest of the state and outlined the special method of application.

However, the abstract nature and evaluative character of the concepts of "necessity" and "importance", which form the basis of such definitions, do not clearly define the range of application of overriding mandatory rules, given that similar criteria characterize even ordinary mandatory provisions. It is more rational to use this position as a basis for interpreting the category of overriding mandatory provisions, but it is not applicable for a thorough approach.

The second approach was represented by Mayer, who defined overriding mandatory rules through the mechanism of their application, designating them as "rules that are applied whenever the state needs to protect certain interests".[9]

Proceeding from the first approach, Mayer improved the position of the representatives of the first approach by focusing on the nature of the application of the overriding mandatory provisions and expanded the number of cases of application since the scope may not be limited only to the protection of the state, but also includes the protection of individual interests and individuals who need such protection.

Russian scientists I. S. Peretersky and S. B. Krylov believed that mandatory rules in private international law are provisions of a "special kind", specially designed to regulate relations with a foreign element.[10] Their position was supported by G. G. Ivanov, who characterized the use of overriding mandatory rules as "a special method of regulating relations with a foreign element".[11]

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[8] Boyarsky, E.D., "Institute of overriding mandatory norms in the international private law of Ukraine: character and methodological belonging." *Scientific notes of the Taurida National University of V.I. Vernadsky"*. Series "Legal sciences". 2-1. Part 1, 26 (65) (2013): 237.

[9] Mayer, P., "Mandatory rules of law in international arbitration". *Arbitration International* 2, №4 (1986): 275.

[10] Peretersky, I. S., Krylov S. B. *International private law* (Moscow, 1940), 7-8.

[11] Ivanov, G. G., Makovsky A. L. *International private marine law* (L., 1984), 11.

According to A. A, Danilova, overriding mandatory provisions is a special category of mandatory rules of law used to regulate civil relations with a foreign element, regardless of which law was chosen by the parties on the basis of autonomy of the parties or determined by arbitration or court on the basis conflict rules.[12]

The second approach presents that the essence of overriding mandatory rules is expressed through their unique nature, which is aimed at protecting the pursued interests of the state and contributes to the mechanism of their application to regulate relations with a foreign element. This category of international private law combines both the material principle, expressed through the regulation of relations, and the direct regulation method.

This approach is also quite abstract. Considering such a characteristic, the question of particular criteria for determining cases of the application of overriding mandatory provisions remains unresolved and open. Representatives of this approach also do not provide clear criteria that would make it possible to point them out from ordinary mandatory rules used in states' domestic legislation. This approach is impossible to be used in practice in order to establish particular overriding mandatory provisions.

M. Giuliano and P. Lagarde are prominent representatives of the third approach. When characterizing overriding mandatory rules, scholars focus on specific areas that are critical to the public interest:

- protection of consumers and workers;
- regulations on monopolies;
- antitrust, import and export restrictions,
- price control;
- control over currency exchange.[13]

The spheres containing overriding mandatory provisions are presented by Croatian scientist I. Kunda. He considers the provisions of criminal legislation, tax, and currency

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[12] Danilova A. A., "Norms of direct application (mandatory rules, lois de police, regles de applicacion immediate) in private international law" dissertation for the candidate of legal sciences," (Moscow, 2005), 13.

[13] Giuliano, M., Lagarde P., Report on the Convention of the law applicable to contractual obligations. *Official Journal*, P.: C 282, (1980): 16-18.

regulations, export and import restrictions, as well as administrative law provisions that affect private law relations to be of an overriding nature.[14]

Zhiltsov divided all overriding mandatory provisions into two categories. The basis for such a division was the goals, as well as the interests that the relevant norms are protecting. The author attributed to the first category the norms aimed at protecting generally recognized interests, such as the state's cultural heritage. The second group, in his opinion, consisted of norms expressing interests alien to the country of the court, for example, provisions reflecting the planned way of organizing the economy inherent in socialist states.[15]

E.V. Babkina defined overriding mandatory rules as a category of international private law through the purposes it entails, which is expressed in:

- protection of the weak party in the contract;
- protection of the rights of a third party;
- protection of legal order and public safety.[16]

According to M. Blessing a more comprehensive and exhaustive classification includes rules aimed at:

- protection of the economic interests of domestic producers that include, for instance, licensing of exports and imports operations, the establishment of different types of restrictions applied to exports and imports;
- protection of local financial markets, including restrictions related to the securities market and stock exchanges;
- protection of the environment and wildlife, excluding the import of goods containing certain harmful substances, and establishing restrictions applied to the circulation of certain types of animals and plants;

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[14] Kunda I. *Internationally Mandatory Rules of a Third Country in the European Contract Conflict of Laws.* (Rijeka, 2007), 143-144.

[15] Zhiltsov, A.N., "Applicable law in international commercial arbitration (mandatory rules)." Dissertation for the candidate of legal sciences, (M., 1998), 18.

[16] Babkina, E.V., "Overriding mandatory rules as a mechanism for limiting the effect of conflict rules". Belarus in the modern world: materials of the V International scientific conference dedicated to the 85th anniversary of BSU. Minsk: BSU (2007): 192.

- protection of competition that excludes monopoly and establishes efficient functioning of commodity and financial markets, and establishes anti-corruption provisions;
- implementation of the political and military interests of the state, including the imposition of embargoes and sanctions for political reasons, prohibitions on transactions with persons from certain forbidden foreign states, for example, due to international and domestic sanctions;
- protection of fiscal interests that includes customs and tariff regulation;
- protection of the interests of states aimed at maintaining the payment system and the budget of a state that covers currency regulations, and restrictions on certain payment transactions.[17]

Based on the presented approach to interpretation and characteristics, the overriding mandatory rules can be contained in public and private legal spheres.The first category will include provisions enshrined in international legal treaties, as well as the rules of national public branches of law. The second group will include provisions of private branches of law. These rules can be both substantive and procedural.

The identification of spheres does not solve the problem of defining overriding mandatory rules. It requires the establishment of additional criteria to distinguish them from ordinary mandatory rules, which may also be present in areas under special state protection due to the importance of such areas for the public interest.

The rules of direct application or overriding mandatory rules independently determine the scope of their application with the help of a special qualifying element - an indication of their territorial or personal scope. As a general rule, an indication of the scope of application is directly expressed in the body of the provision, which allows considering the structural form of both the substantive content and the qualifying element[18]. An additional sign of overriding mandatory provisions is the standards established by law that set the negative consequences of refusing to use them for persons who violate these rules.[19]

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[17]Blessing, M., "Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts". *Swiss Commercial Law Series* 9 (1999): 14-15.

[18]Zhiltsov, A.N., "Applicable law in international commercial arbitration (mandatory rules)," dissertation for the candidate of legal sciences, (M., 1998), 85-86.

[19]Karabelnikov, B.R., Makovsky A.L. "Arbitrability of disputes: Russian approach". *International commercial arbitration* 3 (2004): 35.

In concluding the approaches toward defining overriding mandatory provisions, it is possible to enshrine that the protection of public interest is the fundamental purpose that is entailed by overriding mandatory provisions. With the protection of the public interest, overriding mandatory provisions possess the fundamental value on the grounds of the mentioned purpose. In addition, overriding mandatory provisions contain special imperativeness on the grounds of which it is impossible to deviate from the norm in internal domestic contracts, and these norms have to be applied even if the relation contains a foreign element and is regulated by foreign law.

However, the special scope of application of overriding mandatory rules has to be established by the court when interpreting their purpose and content. Determination of the overriding nature of an ordinary mandatory provision and, as the result, identification it from the other ordinary mandatory rules requires the implementation of an approach that is based on the analysis of each particular issue through the comprehensive characteristics and should be based on its function, inside content, policy, as well as the interests involved.

1.2. Overriding Mandatory Rules as the Exemption Limiting the Freedom of Choice and Conflict of Laws Rules

The sources of modern private international law, both at the European Union and individual Member States levels, provide participants of legal relations with fairly wide opportunities for choosing the applicable law by concluding an agreement governing their legal relationship. The relevant provisions are provided for in Art. 3 of the Rome I Regulation[20] and in Art. 14 of the Rome II Regulation.[21]

This opportunity is called – freedom of choice or autonomy of the will. The autonomy of the will is a principle of private international law, which plays a unique role in regulating international relations and has been consolidated both at the national and international levels.

The freedom of choice allows the parties to a contract to exercise their will by choosing the provisions of a particular legal order. The Rome I Regulation establishes that "The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-

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[20] Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 3.

[21] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, art. 14.

of-law rules in matters of contractual obligations".[22] The choice of law should be clearly made or demonstrated through the provisions of the contract or be indicated in cthe ircumstances of the case.[23]

According to the general doctrinal understanding of contractual relations, the autonomy of the will is manifested through the mechanism of harmonizing the interests of the parties regarding the procedure for their regulation or the jurisdiction of the regulatory body or through the means of harmonization with the existing legal order.[24]

The Law of Ukraine "On Private International Law" defines the conflict of laws rules as "the rule that determines the law of which state is applicable to legal relations with a foreign element".[25]

According to the position of the Ukrainian scholar S. V. Panchenko, conflict of laws rules are procedural rules because:

- They regulate public relations and do not consist of rules based on which it is possible to resolve the case on the merits.
- These rules set up a specific procedure, which provides the choice between conflicting legal orders that claim to settle legal relations with the participation of a foreign element.
- Conflict of laws rules are addressed to a public entity or authority empowered to apply substantive law, for example, a court or other jurisdiction that resolves a dispute between the parties over a legal relationship with a foreign element.
- Conflict of laws provisions have a particular structure, that consists of the elements such as a hypothesis, which is usually not reflected in the text of such a rule, as it is universal and is that such a rule applies to private relations only if such relations of a foreign element, and disposition, that entails two elements, namely volume, and binding. The last element of a conflict of laws rules is a sanction, which is also never stipulated in the text of the

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[22] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, recital 11.

[23] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 3.

[24] Pokachalova, A.G., "Autonomy of will as the fundamental principle of regulating the safety of obligations." *Actual problems of international trade* 128 (2006): 94.

[25] Law of Ukraine "On International Private Law" of 23.06.2005 No. 2709-I, art. 1.

conflict rule and is expressed in the possibility of revoking the rendered court decision, adopted in violation or incorrect application of the conflict of laws rules.[26]

An example of the structure of the conflict rule is part 1 of Article 49 of the Law of Ukraine "On Private International Law", which states: "Rights and obligations under the obligations arising from the damage are determined by the law of the state in which the action took place or other circumstance for a claim for damages.[27] In this case, the first part stipulating the case of arising rights and obligations on the grounds of damage is the volume, and the second part of the sentence is the binding, which prescribes how the properly applicable law should be determined in accordance with provided characteristics.

Conflict of law rules are norms that specify the law of the state to be applied to legal relations complicated by a foreign element. They do not regulate relations, unlike substantive rules, but only perform an auxiliary function in establishing the choice of law and order of the legal order to be applied. The conflict rules do not contain information about the rights and obligations of the parties but only indicate the competent legal order. Consequently, they apply together with the substantive provisions to which they refer, which distinguishes them from overriding mandatory rules that directly govern the relevant issue. Conflict rules are an expression of the conflict method of regulation, where is a choice of the applicable law. At the same time, conflict of laws norms initially resolve the conflict in favor of domestic law, and do not require recourse to the concept of overriding mandatory provisions. In contrast, overriding mandatory provisions have a different mechanism of action: they are applied regardless of the law determined and contrary to the conflict rules.[28] The specificity of the conflict rule is that it is based on the conflict principle enshrined in it that is aimed to find the most competent legal system among all, which in one way or another have to do with private law relations complicated by a foreign element. Furthermore, only the legal system chosen on the basis of the conflict rule will be subject to application, excluding the application of all other legal systems.[29]

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[26] Panchenko, S.V., "The place of conflict norms of international private law in the system of law". *Pravdova Derzhava* 8 (2005): 62.

[27] Law of Ukraine “On International Private Law” of 23.06.2005 No. 2709-I, art. 49.

[28] Kysil, V.I. *International private law. Question of codification*. (Kiev: Ukraine, 2005): 152-154.

[29] Boyarsky Y. D., “Support for the interdependence of supra-mandatory and colloquial-legal norms in the international private law of Ukraine,” *Feniks*, Odesa, (2013): 383.

The restriction of the category of overriding mandatory norms exclusively by rules that have a purpose of the realization of public interest is justified by the fact that the mechanism of overriding mandatory norms must be put under strict limits. Otherwise, it threatens the entire traditional system of conflict of laws as the mandatory provisions of private law, designed to protect a party, can destroy the entire conflict of laws system.[30] The danger lies in the fact that the range of substantive rules with a special application mechanism will be extended to almost all mandatory rules.

Together with the method of conflict of laws regulation, the category of freedom of choice allows to effectively recognize the law that is closest to the relations of the parties and which has strong bonds with their will.[31]

The Ukrainian scientist V. I. Kysil carried out an analysis of the legislation on private international law in several states and concluded that the autonomy of the will is an institution of national legislation that performs two essential functions:

- The function of resolving conflicts of laws by choosing the applicable law by the parties to certain legal relations; and
- The function of self-regulation by establishing the conditions for the application of such a choice in conjunction with provisions of national legislation that limit the application of the principle of autonomy of will.

According to these functions performed by the legislator, the provisions on the autonomy of the will are divided into conflict and material, and the latter provisions belong to the category of general provisions of private international law.[32]

The legislation of Ukraine defines the autonomy of will in the Law "On Private International Law" as the principle according to which the participants in legal relations with a foreign element can choose the law to be applied to the relevant legal relations. This principle is implemented by the method of choice of law, which is considered the right of participants in legal relations to find the law of which state to be applied to legal relations with a foreign element. [33]

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[30] Asoskov, A.V., *Fundamentals of conflict law* (Moscow: Infotropic Media, 2012), 202.

[31] Gramatsky, E. M., "Some aspects of the definition of the law governing the autonomy of the will of the parties". *Journal of Kyiv University of Law* 3 (2013): 165

[32] Kysil, V.I. *International private law. Question of codification*. (Kiev: Ukraine, 2005): 95-96.

[33] Law of Ukraine "On International Private Law" of 23.06.2005 No. 2709-I, art. 1.

However, the legislative definition of freedom of choice is not sufficiently complete. It follows that the participants of legal relations can choose the law of any state without any restrictions.

The definition contained in the Ukrainian legislation should be supplemented by clarifying provisions that would indicate the specifics of the application of the principle. In particular, the application of the principle should not violate the rights of third parties, and should follow the customs of good conduct, public policy, and overriding mandatory rules.

The freedom of choice is not an absolute rule and does not mean that the parties have unlimited, absolute rights. The choice of law is possible only within certain limits, determined by a system of requirements for the form and content of the participants' will and the consequences arising from such a will. The choice of law is possible only in a system of restrictions, which depends on the type of private law relations and protected public interests. This is explained due to the sovereignty of the state, through which it can impose restrictions, including in the field of conflict of laws and freedom of choice. The fundamental special restrictions on the choice of law are reservations on public policy and mandatory rules, but such restrictions are interpreted only as an exception to the basic rule and only in view of the circumstances of the case.[34]

Moreover, according to the G.G. Ivanov, overriding mandatory rules exclude the possibility of applying foreign law to resolve the relevant issue and make the statement of the conflict problem senseless in this part since overriding mandatory rules apply to relations complicated by a foreign element, regardless of conflict of laws rules and even contrary to them. The application of overriding mandatory provisions is a method that is applied in addition to the traditional conflict method of regulation, according to which the court applies the law based on a conflict of laws rules. The method of the application of overriding mandatory provisions involves the establishment of the competence of norms by analyzing their goals, taking into account the appropriateness of their application under certain circumstances of a particular case. This method aims to establish exceptions to the principle of operation of conflict of laws rules or supplement their effect.[35]

For this reason, overriding mandatory rules are a limiting factor in the parties' freedom to the contract, which involves the restriction of the freedom to enter into a contract, determine

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[34] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, recital 32.

[35] Ivanov, G. G., Makovsky A. L. *International private marine law* (L., 1984), 12.

its content, choose a counterparty, change and terminate it, and the freedom to choose the law.[36] Together with public order, they are particularly important for the relevant legal system in the field of private international law. These categories are given an additional characteristic of application to international private law relations, prevailing over the conflict of law rules and the principle of freedom of choice.

1.3. Comparison of Overriding Mandatory Rules with Public Order and *Jus Cogens*

Overriding mandatory rules and public order in private international law doctrine are closely related in their content categories. Thus, reservations about public order and overriding mandatory provisions are created to perform similar tasks of adjusting the application of foreign law.

In order to determine the relationship between these law institutions, the following interpretation must start with an determination of the concept of public order.

According to D. Lew, public order "is the basic principles and basics recognized by most states and the international community, which due to their importance and substantive nature require strong subordination to which any exception is not permitted".[37]

S. Komissarov describes "public order" as a system of public relations regulated by legal and other social provisions, which protects the rights and freedoms of citizens, their lives and health, respect for honor, human dignity, and observes the norms of public morality.[38]

M. Malsky notices that the basis of the "public order" concept in the legislation should be aimed at the protection of the significant main and fundamental public interests in case of disputes consisting a foreign element and in case of the recognition and enforcement of foreign judgments by national courts.[39]

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[36] Dikovska, I. A., "Imperative norms and their role in the regulation of contractual obligations business". *Pidpryemstvo i pravo* 1 (2013): 37.

[37] Lew, D. *Applicable Law in International Commercial Arbitration: A Study in International Commercial Arbitration Awards* (New York, 1978): 532.

[38] Komissarov, S., "Structure and main elements of the definition of public order". *Economy and Law* 9 (2019): 117.

[39] Malsky, M. M., "Public order in the transnational enforcement process". *Bulletin of the National University "Lviv Polytechnic"*: *Legal Sciences Series*. 827, (2015): 80.

There is a distinction between positive and negative concepts of public order in the private international law doctrine.[40] Positive public order is expressed through a specific category of legal norms that are available in national law and because of their particular importance for the rule of law of the state cannot be circumvented through the application of foreign law. Negative public order is expressed if the foreign law is not applied if such application contradicts the orders and principles of significant institutions of national law.

An example of the positive consolidation of public order and its positive expression is the French Civil Code of 1804, which established that laws relating to landscaping and security were binding on all who lived in France. It was established that private agreements could not violate laws affecting public order and good customs. Public order was seen as a set of internal rules of law, which because of their importance for the protection of social and moral values of the state, should always be applied in any case. This interpretation of public order made it possible to limit the application of foreign conflict of laws rules. [41]

The negative concept of *ordre public* was developed by the German school of scholars of private international law discipline. The category of public order was interpreted not by internal material norms but by the features of foreign law. In the case of the application of conflict of laws rules of national law, foreign law should not be applied because the rules of foreign law are not compatible with the state's public policy. The negative concept of public order requires the establishment of the content of foreign law, as the non-application of foreign law must be sufficiently justified.[42]

Summarizing approaches to the definition of public order, the scholars assume that public order is a system of principles or social relations that protect citizens' rights, freedoms, and interests. However, the exact content of public order cannot be established, as it is determined by historical, socio-economic, political, and other factors in the process of the development of a particular legal system. Since such conditions are different and changing over time, it is impossible to establish a single standard approach to determining the content and functions of public order.

The Primary law of the European Union, particularly the Treaty establishing the European Community in Article 30, laid down the category of public policy by imposing a ban

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[40] Savigny, F. C., *von. System des heutigen Römischen Rechts* (Berlin, 1849): 38.

[41] Karmaza, O.O., *International heritage law: Scientific and practical manual* (Kyiv: Publisher Fursa S. Y., 2007):.196.

[42] Makarov, A. H., *Basic principles of private international law* (Moscow, 1924): 54.

on imports and exports of goods based on public policy.[43] The restrictions applied to the freedom of movement of workers were similarly established in Article 39, which was based on the guaranteed rights of freedom of movement for workers, which could be restricted based on public policy.[44] At the same time, no definition of public order was envisaged.

The European Union Secondary law prescribed the public order in the Rome Convention on the law applicable to contractual obligations in Article 16[45], however, it did not specify how this concept should be defined or applied in practice leaving the discretion to Member States and their judicial practice.

The same approach is seemed through the Rome I Regulation in Article 21 which does not define the content of public policy, limiting it to the prohibition of the application of foreign law if it is incompatible with the public policy of the state of the court.

Contrary to the mentioned documents of the Secondary Law of the European Union, the Electronic Commerce Directive indicated the non-exhausted list of categories and spheres, which are covered by *ordre public*: "the prevention, investigation, detection and prosecution of criminal offenses, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex religion or nationality, and violations of human dignity concerning individual persons…".[46] The stipulation of spheres and categories covered by the *ordre public* served as an opportunity to set limits and objectives for further judicial interpretation and consideration.

The European Court of Justice interprets that the Member States are responsible for determining their public order. Public order is a territorial concept for each Member State that may change over time.[47] It is recognized that the Member States are able change the content of

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[43] Treaty establishing the European Community (Consolidated version 2002), *OJ C 325, 24.12.2002,* art. 30

[44] Treaty establishing the European Community (Consolidated version 2002), OJ C 325, 24.12.2002, art. 39

[45] 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998, art, 16

[46] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), art. 3(4).

[47] Judgement of the European Court of Justice, Case 41/74, Yvonne van Duyn v. Home Office, 1974, par. 24.

their public policies as necessary with the internal and external developments of the Member States and their time-dependent activities.

Nevertheless, despite the territorial concept, the content of the category of public order should be similar in its character. In the case of Regina v. Pierre Bouchereau[48], the European Court of Justice concluded that the application of the category of public order should involve two elements as a real severe threat to society, and such application should be aimed at protecting the fundamental interests of society.

The primary purpose of the legislative stipulation of *ordre public* is to establish protection, which limits the scope of foreign law. Rejection to apply a rule of law of a foreign state requires the interpretation of such a rule. At the same time, the crucial role in this process belongs not to the legislator but to the court, which must come to a concrete conclusion within its competence.

The legislation of Ukraine establishes in the current law of Ukraine "On Private International Law" provisions on public order in Article 12, which states that "the rule of foreign law does not apply in cases where application leads to consequences that are clearly incompatible with the rule of law (public order) Of Ukraine".[49]

It is assumed that the application of the reservation should be limited to gross inconsistencies, so the reservation should be used only in exceptional cases. Consequently, the refusal to apply the law of a foreign state cannot be based solely on differences between legal, political, or economic systems between the foreign state and Ukraine.

The judicial practice of Ukraine is based on the fact that public order determines the principles and dogmas that are the basis of the existing system and relate to its independence, integrity, sovereignty and inviolability, fundamental constitutional rights, freedoms, and guarantees.[50]

A similar position was supported by the Judicial Chamber for Civil Cases of the Supreme Court of Ukraine on April 13, 2016. In characterizing public order, they proceeded

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[48] Judgement of the European Court of Justice, Case 30/77, Regina v. Pierre Bouchereau, 1977, par. 35.

[49] Law of Ukraine “On International Private Law” of 23.06.2005 No. 2709-I, art. 12.

[50] Resolution of the Plenum of the Supreme Court of Ukraine of 24.12.1999 “On the practice of consideration by courts of petitions for recognition and enforcement of decisions of foreign courts and arbitrations and for cancellation of decisions rendered by international commercial arbitration in Ukraine”, par. 12

from the importance of the interests public order must protect. In this case, the category of public order does not apply to any legal relationship in the state but only to the essential principles of law and order.[51]

The accurate definition of the judicial practice of Ukraine was given in the decision of September 20, 2019, by the Ukrainian Supreme Court of the Civil Court of Cassation. It was proposed to understand the public order of the state as principles and foundations that form the basis of the existing order. The public order of any state includes fundamental principles, morals, rules that ensure the fundamental political, social, and economic interests of the state, and obligations of the state to comply with its obligations to other states and international organizations.[52]

The presented judicial approach is identified with the position of Ukrainian scholar V. Kysil, who defined public order as a set of moral principles of justice, legitimate interests of citizens, universally recognized principles and norms of national law, and international law that is part of Ukrainian legislation.[53]

Given the above, it is concluded that Ukrainian judicial practice is based on the fact that public order is a public-law relationship, fundamental principles, and basics that determine the fundamental elements of the state's social order.

When analyzing the categories of public order and overriding mandatory norms, these legal institutions are seemed to be interdependent and close categories of private international law, which aim at ensuring the public interest of the state.[54] Public order and overriding mandatory norms are interdependent but, at the same time, separate categories.

The example of the division into separate categories is presented in the Hague Principles on the Choice of Law in International Commercial Contracts, which indicates the division into situations in which the application of foreign law is excluded due to special, "positive" norms, which with the perspective to be applied to the relationship regardless of the competent legal order - overriding mandatory rules. And situations in which the effect of foreign

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[51] Resolution of the Judicial Chamber for Civil Cases of the Supreme Court of Ukraine of April 13, 2016 in the case № 6-1528цс15.

[52] Supreme Court of Ukraine, Resolution, case №824/256/2018.

[53] Dovgert, A. S., and Kysil V.I., ed. *International private law. Main part* (Kyiv: Alerta, 2012), 198-199.

[54] Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, preamble 37.

law is "blocked" due to the fact that the consequences of its application are contrary to the fundamental interests and values of the country of the court - public policy.[55]

It should be concluded that the overriding mandatory rules are a narrower category than public order, as every part or norm in the field of public order is overriding, but not every overriding mandatory norm could be a part of public order.

The difference between these two categories of private international law is that public order establishes the general principles of public relations, which are essential for the state and society, and overriding mandatory rules are the usual imperative provisions of national law, which due to their importance for state purposes and interests acquire the status of "overriding nature".

In most cases, the categories of public order and overriding mandatory provisions are commonly associated with the protection of fundamental public interests. They essentially dismiss both the conflict of laws rules and the principle of autonomy of the will of the parties. The preservation mechanism of public order is based on the recognition of foreign law. It is activated when the applicable law established by the conflicts of laws rule can have a devastating impact on the fundamental values of the domestic relations system, but overriding mandatory provisions have a direct effect and have to be applied irrespectively of the chosen law. [56]

The different degree of dynamics in the change and development also reflects the independence of these categories. The public order, like overriding mandatory norms, depends on the development of a particular society and state. However, despite the fact the change or annulment of a particular norm is not global for the state, contrary to the case of public order.

In the event of a change in the content of the public order, the relevant provisions related to the category of public order will also apply to previously concluded contracts.[57] In the case of overriding mandatory norms, their retroactive effect will depend on how this issue is settled in the relevant legal act regulating this type of relationship.

It is worth mentioning that the category of overriding mandatory provisions differs from *jus cogens* rules of international law.

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[55] Hague Principles on Choice of Law in International Commercial Contracts, art. 11.6

[56] Nagush, O.M., "Imperative norms and reservations about public order in international private law". *Pravova Derzhava* 21 (2016): 260.

[57] Dovgert, A. S., and Kysil V.I., ed. *International private law. Main part* (Kyiv: Alerta, 2012), 210.

The Ukrainian legal scholar O. Butkevich in his work devoted to the preclassical *jus cogens* enshrined that the legal nature of these provisions has always been of scientific interest, given the nature of these norms as imperative fundamental principles of international law. If for the representatives of the natural law school, the question was straightforward that *jus cogens* are norms of the highest order over the wills established by people, and they come from the guidelines of higher natural reason, God, and natural law, at the same time the representatives of positive law school were forced to explain their existence by other criteria.[58]

The representatives of the positive law school, according to I. Y. Vidlovskayay followed the approach that *jus cogens* are based on state consent, the principles of state independence, sovereignty and autonomy, and therefore states cannot be bound by norms to which they have not given consent.[59]

It is also was stated by L.A. Aleksidze, who defined "imperative norms (*jus cogens*) in international law should be understood as a set of norms generally recognized through multilateral treaties or the usual process of rule-making".[60]

Despite the presence of similarities in the presented definition with the category of overriding mandatory provisions, *jus cogens* are the established principles of international law. As it is prescribed by Article 53 of the Vienna Convention on the Law of the Treaties: "Treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[61]

Consequently, overriding mandatory provisions should not be equated with *jus cogens*, whereas overriding mandatory provisions are used by particular states and are the domestic provisions granted with special imperativeness in order to protect the public interest and fundamental organizational spheres, but *jus cogens* are internationally stipulated principles and

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[58] Butkevich O.V., "Forming the norms of jus cogens in pre-classical international law," *Bulletin of the Academy of Legal Sciences of Ukraine*, 4 (47), (2006): 208.

[59] Vidlovska I. I., "Theory of norms Jus cogens in international law," *Feniks*, Odesa, (2012): 62.

[60] Aleksidze L.A., *Some questions of the theory of international law. Imperative norms (jus cogens)* (Tbilisi: Tbilisi University Press, 1982), 339

[61] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, art. 53.

norms constituting the basis of international relations, which should be followed by each state. Thus, the mechanism of application and compliance is strictly the opposite. Unlike other international legal norms, *jus cogens* have greater legal force and have a longer process of creation and all newly adopted international norms must comply with them. Compared to most international legal norms, which usually have two stages of creation, imperative norms are created in three stages:

- coordination of the will of the subjects of international law regarding the rules of conduct;
- coordination of the will of the subjects to give this rule of conduct the highest legal force in this legal system;
- consent of the subjects of international law to the legal binding nature of the agreed code of conduct.[62]

Moreover, in the case of *jus cogens*, "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates",[63] accordingly if the agreement as a whole or its individual provision contradicts *jus cogens*, the agreement or provision, if it can be separated from the text of the agreement, must be considered invalid. It is which is contrary to overriding mandatory provisions that do not make the previous acts void and their retroactive effect is settled in the relevant legal act regulating relationships and overriding mandatory provisions apply instead of the chosen law.

In summing up the overriding mandatory provisions and *jus cogens* it should be concluded that these categories are completely diverse in their nature, content, legal force, and mechanism of application.

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[62] Afanasenko S. I., "norms "*jus cogens*", *Pivdennoukrainskui pravnichyi chasopys* 3-4 (2016): 136.

[63] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, art. 64.

2. THE CATEGORY OF OVERRIDING MANDATORY PROVISIONS IN THE LEGISLATION AND JUDICIAL PRACTICE OF THE EUROPEAN UNION AND UKRAINE

2.1. The Determination and Experience of the European Union in Regard to Overriding Mandatory Provisions

2.1.1. Primary EU Law

Despite various doctrine approaches to the definition of overriding mandatory rules in private international law, their determination remains one of the most challenging issues. Their definition and application depend on the scope of their characteristics contained in the text of such rules.

The Treaty on the Functioning of the European Union does not prescribe or define the category of overriding mandatory rules but promotes "the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdictions"[64] by having competence for the regulation of international private law of the EU.

The Treaty on European Union[65] stipulates the fundamental rights and freedoms, and is based on the principle of primacy, enshrining "the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".[66]

This principle should be obligatory for the Secondary law of the European Union and national laws of Member States in the context of overriding mandatory rules, as the primary law provides a crucial direction for determining interests that should be protected, but, at the same time, leaves the framed discretion for the determination of these interests and protection for fundamental rights and freedoms.

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[64] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, art. 81(c).

[65] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.

[66] European Union, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon , 13 December 2007, 2008/C 115/01, par. 17.

Accordingly, the development and determination of overriding mandatory provisions were devoted to the Secondary law of the European Union.

2.1.2. Secondary EU Law and Judicial Practice

The basis for the category of overriding mandatory rules was the Convention on the Law Applicable to Contractual Obligations or as it is commonly known - the Rome Convention[67], which entered into force in 1991. The Rome Convention applied to contracts concluded between April 1st, 1991, and June 17th, 2008. The overriding mandatory provisions were regulated by Article 7, which provided: «when applying under this Convention the law of a country, the effect may be given to the mandatory rules of the law of another country with which the situation has a close connection to 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 the consequences of their application or non-application».[68] These mandatory provisions were the rules "of such importance that it required them to be applied whenever there is a connection between the legal situation and its territory".[69] The Convention provided a clear distinction between rules categories of overriding mandatory provisions and public policy. The Convention has a separate provision on public policy, according to Article 16 “The application of the rules of law of any country, as defined by this Convention, may be refused only if such application is not in accordance with the public order of the court”.[70]

The Convention determined the factors that led to the assessment of the need to apply overriding mandatory rules and established the criterion of close connection, which was the basis of application. By establishing the possibility of their application, the Convention also did not

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[67] 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998.

[68]1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998, art. 7;

[69] Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, question 3.2.8.1.

[70] 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998, art.16.

provide the definition that would allow them to be distinguished from the ordinary mandatory rules.[71]

Overriding mandatory provisions within the wording of the Rome Convention, include both private and public law norms or norms that are both private and public law.

The lack of a common understanding was fraught with controversial issues regarding the interpretation, application, and characterization of overriding mandatory provisions which were based on the criterion of the close connection that was set out. The close connection factor was treated broadly but should have been applied on genuine grounds, for instance, when a party to a contract has a residency or principal place of business in that country, or this party performs the contract in this country.[72]

Besides that, the strict instruction to courts to apply a foreign overriding mandatory rule was not presented. Courts were obliged only to consider such a rule of another country that in general entailed broad discretion of courts in their approaches towards overriding mandatory provisions.

In conjunction with the close connection factor, courts should have considered the internal factors like nature, purpose, and the necessity of application or non-application of the provision.[73] These characteristics were intended to facilitate the judiciary in indicating overriding mandatory rules, but also were not significantly precise and led to uncertainty of the range of potential rules and increased litigation expenses.

The extremely radical nature of Article 7 served to waive the application of this provision in seven Member States, including the UK, Latvia, Portugal, Germany, Ireland, Luxembourg, and Slovenia on the grounds of Article 22 of the Rome Convention, due to which, any Contracting State at the time of signature, ratification, acceptance or approval has had the right to make a reservation not to apply the provisions of paragraph 1 of the Article 7.[74]

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[71] Zhiltsov, A.N. "The problem of application of mandatory norms of third countries in European private international law". *Legislation and Economics* 23 (1997): 39.

[72] Giuliano, M., Lagarde, Report on the Convention of the law applicable to contractual obligations. *Official Journal*, (P.: C 282, 1980): par. 7.

[73] 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998, art. 7.

[74] 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998, art. 22.

Nevertheless, the Rome Convention in Article 6 demonstrated the limitation of the principle of the choice of law in regard to the contract of employment. It follows that if the employee was deprived of the protection afforded to him by the mandatory rules of the law which would be applicable in the absence of a choice of law, such limitation on the ground of the principle of the choice of law should not be applicable.[75]

The similar situation is presented in Article 5, which prescribes that the "a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence".[76]

By determining the special limitations in regard to employment contracts and setting up a high protection for consumers, the Rome Convention provided the basis for future judicial, legislative and doctrinal approaches towards defining the spheres, where overriding mandatory provisions can be contained.

The normative successor, which, as a result, became the fundamental document for determining overriding mandatory rules, was The Rome I, the Regulation which applied to the law applicable to contractual obligations[77]. The definition of overriding mandatory rules was presented due to the need to establish a sole judicial practice. The approach towards applying overriding mandatory provisions of third countries was also revised.

The definition of the overriding mandatory rules in the Rome I was inspired by the case of the Court of Justice of the European Union in the Arblade judgment[78] as it follows from the Proposal of the European Parliament and the Council on the Law Applicable to Contractual Obligations[79].

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[75] 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998, art. 6.

[76] 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998, art. 5.

[77] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 1.

[78] Judgement of the European Court of Justice, criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96), 1999.

[79] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I). Brussels, 15.12.2005 COM(2005), 650 final. art. 8.

The Arblade case was crucial for the category of overriding mandatory rules due to its importance in determining specific categories of relationships to which the judicial attention should be drawn. The European Court of Justice rendered that "the classification of the provisions at issue as public-order legislation under Belgian law … must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance in addition to that by all persons present on the national territory of that Member State and all legal relationships within that State",[80] The European Court of Justice underlined the political, organizational and political organizational spheres as of public interest for overriding mandatory rules due to the importance of such spheres to the public order and society.

Article 9 of the Rome I Regulation included the definition and characteristics of overriding mandatory provisions and consisted of three parts.

The first part defined the purpose, meaning, and its importance: «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 organization, to such an extent that they apply to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation».[81] The provided definition could be split into three main cornerstones:

- The purpose of the overriding mandatory rule is to protect the State's public interest, which consists of a political, social, and economic elements. However, unlike the wording in the Arblade case[82], the range of the organizational spheres is providing an opportunity for its extension.
- The second element is the special significance of a particular provision, which was designated as crucial for safeguarding the interest of the State. "Crucial" interests are the essential elements protecting the State's finances, environment, and safeguarding work, political

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[80] Judgement of the European Court of Justice, criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96), 1999, par. 30.

[81] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 9.

[82]Judgement of the European Court of Justice, criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96), 1999, par. 30.

order, social welfare.[83] It is necessary to consider the consequences to which the application or non-application of the rule will lead. In particular, as noted in the decision of the EU Court in the case of Commission of the European Communities v. Grand Duchy of Luxembourg, the recognition of a provision of an overriding nature can only be justified by the presence of a real and severe threat of violation of the fundamental interests and values protected by such a provision, and must be supported by appropriate evidence.[84] The requirement established by an overriding mandatory provision must be proportionate to the significance of the interest it protects.

- Finally, the importance of the overriding nature of the rule is expressed in the necessity of the obligatory application of the rule in the situation, regardless of the law that should have been applied according to the contract. Also, it is directly noted about the need to distinguish between provisions from which it is not allowed to derogate by agreement on the grounds of ordinary mandatory rules and overriding mandatory rules, the application of which should be "exceptional".[85]

It should be noted that these elements exist together, and it is possible to define such a provision as an overriding one only when all elements are combined.

The second part of Article 9 focused on the characteristics of the overriding mandatory provision, based on the elements of the first part. It indicated its application: "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum».[86] The application of the rule of the forum was established, but at the same time, the third part of Article 9 permitted "the application of overriding mandatory provisions of the country where the obligations arising out of the contract have to be or have been performed or where those rules render the performance of the contract unlawful".[87]

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[83] Ruggeri, Lucia, *Property Relations of Cross-Border Couples in the European Union*. Napoli: Edizioni Scientifiche Italiane, 2020, p. 83.

[84] Judgement of the European Court of Justice, Case 319/06, Commission of the European Communities v. Luxembourg, 2007, par. 90.

[85] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, recital 37.

[86] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 9.

[87] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 9.

It follows from the statement, presented in the third part of Article 9 of the Rome I Regulation, that the range of foreign overriding mandatory rules is limited. However, case law follows a broad interpretation and determines that the application of the overriding mandatory rules is not limited. The law of the third country is applicable as factual circumstances due to the court practice that is entailed from the German Federal Labour Court in the case of Hellenic Republic v. Grigorios Nikiforidis[88], which concerned the interpretation of overriding mandatory provisions stipulated in Article 9(3) and Article 28 of the Rome I Regulation.

The case was between the Hellenic Republic and Grigorios Nikiforidis, who was a Greek national and worked at the Greek primary school in Germany. Grigorios Nikifordic filed a lawsuit on the grounds of the reduction of his gross salary. The reduction of his gross salary was caused by the legal acts of the Hellenic Republic. The facts of the case initially did not render the applicability of Article 9 of the Rome I Regulation as neither the law of the forum nor the law of the place of the performance of the contract was applicable. The Court considered that before the adoption of the Rome I Regulation, the German (domestic) legislation followed Article 7 of the Rome Convention, which included the close connection factor that could be applied to overriding mandatory rules of the third country. Thus, the Court was faced with the possibility of taking into account the overriding mandatory rule of the country where the obligations was fulfilled. Because of the lack of a unified approach to resolving this issue, the German Court turned to the Court of the European Union with three questions, one of which was for clarification as to whether, under paragraph 3 of Article 9 of the Rome I Regulation, such rules have to be seemed as factual circumstances.[89]

In its judgment, the European Court of Justice stated: «Article 9 of the Rome I Regulation does not preclude overriding mandatory provisions of a State other than the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the law that applies to the contract according to the regulation»[90]. This conclusion was highlighted whereas applying the overriding mandatory rules on other grounds

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[88] Judgement of the European Court of Justice, Hellenic Republic v. Grigorios Nikiforidis, Case 135/15, 2016, par. 52.

[89] Judgement of the European Court of Justice, Hellenic Republic v. Grigorios Nikiforidis, Case 135/15, 2016., par. 43, 44, 52.

[90] Judgement of the European Court of Justice, Hellenic Republic v. Grigorios Nikiforidis, Case 135/15, 2016., par. 51, 56(2).

than provided in the Article 9 (3) of the Rome I Convention would entail more risks and unstable judicial practice.

Considering the overriding mandatory rules as factual circumstances follows the Court's duty to examine the potential ability of the application of overriding mandatory rules in their absolute sense. Otherwise, it can be a potential ground to annul the decision rendered without such an examination.[91]

By providing in Article 9 the definition of overriding mandatory provisions and by stipulating the renewed approach in contrast to the "close connection" factor stated in the Rome Convention 1980,[92] the purposes of limiting the Member States of the EU in the broad and unstable judicial practice in connection with an overwhelming range of further overriding rules were pursued.

As the contractual obligations are covered by the Rome I Regulation, the Rome II Regulation is aimed at non-contractual obligations in civil and commercial matters[93]. The Rome II Regulation does not contain the definition of overriding mandatory rules. The exact definition should apply by analogy to the Rome I Regulation, as the Regulations follow the harmonization in functional terms.[94]

Article 16 of the Rome II Regulation prescribes the applicability of overriding mandatory rules regarding the law of the forum and forbids the application of overriding mandatory rules of third countries. Considerations of public interest justify the allowance of the courts of Member States, in exceptional circumstances, to apply exceptions based on public policy and overriding mandatory provisions.[95]

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[91] Judgement of the European Court of Justice, Hellenic Republic v. Grigorios Nikiforidis, Case 135/15, 2016., par. 51, 56(2).

[92] 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998, art. 7.

[93] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, art. 1.

[94] Judgement of the European Court of Justice, Case C-149/18, Agostinho da Silva Martins Dekra Claims Services Portugal SA, 2019, par. 28

[95] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, recital 32.

Article 17 of the Rome II Regulation stipulates the rules that should be deemed of an overriding nature. The courts are allowed to apply the rules of safety and conduct of *lex causae* in the event of giving rise to liability.[96]

Neither the Rome I Regulation nor the Rome II Regulation defines overriding mandatory provisions' public or private character. The division into "private" and "public" would influence the reasonable certainty of justice. Contrary to the division, the presence of a "mandatory nature"[97] of the provision has to be considered.

It is presumed that the nature of a specific provision has to be reviewed by the Court in conjunction with the whole contract on a case-by-case basis. The judicial review has to be done by examining the general structure of the specific provision with all of the internal and external circumstances to prove the mandatory nature.[98]Besides that, the Court has to conduct the wording analysis of the provision, define the crucial objectives, the context of the referring provision, and the consequences of applying or not applying it.[99]

Therefore, the Court of Justice of the European Union presented another approaches towards the peculiarities of applying overriding mandatory rules in its judgment in Unamar v. Navigation Maritime Bulgare.[100]

In this case, the Belgian company Unamar was appointed as the commercial agent of the Bulgarian company Navigation Maritime. The agreement was governed by Bulgarian law. The Bulgarian company terminated the contract, and Unamar applied to the Belgian Court for compensation for the termination of the contract. Unamar based the claim on the rules of Belgian law, which resulted from the implementation of the provisions of Articles 17-19 of the EU

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[96] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, art. 17.

[97] Judgement of the European Court of Justice, Case C-149/18, Agostinho da Silva Martins Dekra Claims Services Portugal SA, 2019, par. 31.

[98] Judgement of the European Court of Justice, Case C-184/12, United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, 2013., par. 50.

[99] Judgement of the European Court of Justice, Case C-149/18, Agostinho da Silva Martins Dekra Claims Services Portugal SA, 2019, par. 31.

[100] Judgement of the European Court of Justice, Case C-149/18, Agostinho da Silva Martins Dekra Claims Services Portugal SA, 2019.

Agency Directive[101]that defended the "weaker party". The provisions that protect the "weak" party also implement the social and economic organizational spheres, which are crucial for the public interests of the state. As a result, the rules of Belgian law were recognized by the Court as mandatory. This position of the Court proceeds from the fact that the rules of Belgian law provided for a higher level of protection, which led to the recognition of such rules as overriding, even though Bulgaria also implemented the EU Agency Directive[102], however, a lower level of protection was provided. Therefore, if the State gives priority to the interests of the parties, and considers it necessary to provide them with a higher level of protection when implementing the European Union law, then such rules can be recognized as overriding, but only in the area of partial harmonization, where the EU Member States are allowed to expand both the scope of the EU Directives and the level of protection they provide.[103] Following the arguments, the Court based two cornerstone statements on overriding mandatory rules:

- Overriding mandatory rules should follow the primacy and uniform application of the European Union law and should not be detrimental.[104]
- Overriding mandatory rules are under the direct influence of the principle of the freedom of the contract that entails the strict interpretation of the wording stipulated in the Rome I Regulation and the Rome Convention.[105]

Accordingly, overriding mandatory provisions are directly dependent on the Primary law of the European Union. They must implicate equal or higher standards of guarantees connected with the relationships among agents of private international law influenced by these provisions.

EU Matrimonial Property Regulation concerning the property relationships between the spouses and their relations with third parties in its Article 30 allows the application of the

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[101] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, art. 17, 18, 19.

[102] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, art. 17, 18, 19.

[103] Judgement of the European Court of Justice, Case C-184/12, United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, 2013.

[104] Judgement of the European Court of Justice, Case C-184/12, United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, 2013, par. 46.

[105] Judgement of the European Court of Justice, Case C-184/12, United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, 2013, par. 50.

overriding mandatory provisions. It entails the strict category definition with the imperative nature given in the Rome I Regulation[106], but with the one crucial weakness regarding the application of the overriding mandatory provisions applicable to the property regime only of the State of the forum. [107]

Nevertheless, the document indicates the instance of applying the overriding mandatory rules that protect the provisions related to family home, requiring strict application of this exception in order to meet the general objective pursued.[108]

The Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession in Article 30 define the special rules affecting the applicable law. Accordingly, these special provisions, impose restrictions concerning or affecting the succession in respect for economic, family or social considerations in regard to "immovable property, certain enterprises or other special categories of assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession.".[109] In this case the wording of overriding mandatory provisions was substituted by a reference to "special rules". By all the features prescribed to overriding mandatory provisions as a category of private international law, in particular the prevailing over ordinary mandatory provisions and the protection of fundamental interests it can be concluded that the "special rules" are overriding mandatory provisions. It indicates the diverse attitude of the European Union in regard to the legislative provisions related to a wording consolidation of overriding mandatory provisions.

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[106] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 9.

[107] Council Regulation (EU) 2016/1103 of 24.06.2016 implementing enhanced cooperation in the area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property, OJ. L 183/1, 08.07.2016, art. 30.

[108] Council Regulation (EU) 2016/1103 of 24.06.2016 implementing enhanced cooperation in the area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property, OJ. L 183/1, 08.07.2016, recital 53.

[109] Regulation (EU) No 650/2012 of the European Parlament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, art. 30.

In summing up the legislative and judicial practice of the European Union it is recognized that the primacy of the European Union law is stipulated for the application and determination of overriding mandatory provisions and should be strictly followed. It is also necessary to consider that the Rome I Regulation and the definition contained in its text are mandatory only for the EU Member States. Thus, in non-EU states, the question of defining overriding mandatory rules depends entirely on the provisions of national legislation.

The essential and fundamental place of the case law of the European Court of Justice as it is granted with the competence of "give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions"[110]. The European Court of Justice provides the obligatory frameworks concerning the application of overriding mandatory provisions of third countries by extending the connection to the performance of the contract to establish the determination of the category of factual circumstances. Moreover, it is emphasized that the crucial attention in the distinction of mandatory provisions must be paid only to the "mandatory character" of the rules and not to their belonging to the public law or private law.

2.1.3. Domestic Legislation of the Member States

The category of overriding mandatory provisions has found its place has been stipulated in the internal legislation of the European Union Member States.

The Polish legislation did not indicate the narrower criteria specified in the Rome I Regulation[111] and stipulated the broad "close connection" factor as the cornerstone of determining the applicable law of third countries and indicated overriding mandatory rules as national provisions from their content and purpose, which irrevocably govern the relationships and should apply irrespective of the law applicable thereto.[112]

According to the procedural rules, the court is granted the right by its motion to determine the proper foreign law related to the case. In determining the applicable law, the court

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[110] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, art. 19 (3).

[111] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 9.

[112] Polish Private International Law Act of February 4, 2011, O.J. 2011 No. 80, art. 8.

has the right to obtain a consultation from experts[113] that facilitates judicial practice by giving more discretion and evaluation.

The Polish legislator provides a rule, which can be treated of an overriding nature that is related to the product liability excluding the limitation of liability "by means of a contract or by means of a choice of a foreign law"[114] that can be treated as an overriding mandatory provision due to its direct indication of applicability only of national rules.

At the same time, from the practical point of view, Polish domestic legislation does not provide overriding mandatory rules' specific features related to their content and purpose and does not provide a comprehensive definition that can be used for the determination of such provisions.

The same situation is presented in Lithuania,[115] where the legislator does not identify the characteristics and basic features of overriding mandatory provisions, leaving the issue to Article 9 of the Rome I Convention[116] and judicial practice of the European Court of Justice.

The Estonian legislation, in particular the Estonian Civil Code, presents an example of overriding mandatory provision declaring the transaction void due to its nature against "good morals" if it arose from exceptional need, the relationship of dependency, inexperience, or other similar circumstances of one of the parties.[117]

The provisions on unfair terms of contracts are also considered overriding, which, for example, is provided for in the Civil Code of the Netherlands, according to which the parties cannot derogate from the provisions that restrict unreasonably burdensome conditions to be applied to contracts.[118] In this case the overriding mandatory provisions should limit the possibility to apply provisions if one party to a contract is deprived of the rights that this party normally had, or if the contract excludes or limits the liability of the other party for breach of obligation or contains other conditions that are clearly burdensome for another party. This approach entails the fundamental interest of the state, whereas the state must guarantee the equality of participants.

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[113] Polish Code of Civil Procedure Act of November 17, 1964, art. 1143.

[114] Civil Code of Poland. Apr. 23, 1964, art. 449, sec 11.

[115] Civil Code of the Republic of Lithuania. 18 July 2000 No VIII-1864, art. 1.11.

[116] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 9.

[117] Estonian General Part of the Civil Code Act. 01.07.2002, art. 86.

[118] Civil Code of the Netherlands. 1992, art. 6:246, art. 6:247.

The sphere of consumer protection is characterized by having exceptional organizational importance to the public interest, and the provisions that apply are of overriding mandatory character[119]. According to the legislation of Italy, consumers are still entitled to the basic protections afforded by the Civil Code even if parties of a consumer contract decided to choose to apply any other law than of Italy.[120] The sphere of consumer protection is of special importance in regard to the public interest of the state, whereas the satisfaction of consumer needs in food and industrial goods, household, and communal services should be carried out based on unconditional compliance with the requirements for their quality and safety, and constant monitoring by the competent authorities. The state policy in the field of consumer protection is based on the fact that the state provides consumers with the protection of their rights, provides free choice of products, knowledge, and skills needed to make independent decisions when purchasing and using products according to their needs, and guarantees the purchase or obtaining products by other legal means in an amount that ensures a level of consumption sufficient to maintain health and vitality. In fulfilling this task, the state acquires special importance in conditions of increasing consumption and saturation of the market with food and non-food goods, and services, when the state should guarantee compliance with quality and safety requirements. [121]

The approach, which is stipulated in France, enshrines that the doctrine and judicial practice traditionally proceed from the particular understanding of the category of overriding mandatory provisions, including not only provisions aimed at ensuring the public interests of the state, but also provisions protecting the weak party of the contract. It is followed by The French Court of Cassation in the case SAB v. Agintis, recognized as overriding mandatory provisions of the French subcontracting regulation, which allows the subcontractor to claim payment directly to the customer in the event of non-payment of the work performed by the contractor.[122]

Overriding mandatory provisions are also contained in the field of family law. In Croatia, marriage status is dependent on the conditions determining the ability to enter into

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[119] Bonomi, A. *Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts*. Yearbook of Private International Law №10, (2008), 292 – 293.

[120] Italian Consumer Code, 2005, art. 143(2)

[121] Mashinistova, M. M, "Peculiarities of the protection of the rights of consumers at the current stage of the development of the civil legislation," *Logos. Mystetstvo naykovoi dymku* 1, (2018): 127.

[122] Court de Cassation, 30.11.2007, № 06-14.006

marriage. Such conditions are laid down by the law of the State of each person's citizenship at the date of entering into matrimony. Nevertheless, in the event, that all the conditions are satisfied according to the law of the State of each person's citizenship, and the marriage is deemed to be concluded in that State, the marriage cannot be allowed in the Republic of Croatia due to the present impediments related to kinship, earlies marriage or mental capacity.[123] Such impediments to marriage thereby can be qualified as overriding mandatory provisions. Thus, the analysis allows us to conclude that, at present, the position on the possibility of qualifying family law provisions as overriding mandatory norms is becoming more widespread, finding its expression in the legislation. At the same time, as in other areas of relations, there is no exhaustive list of overriding mandatory provisions in the field of family law. The classification of these rules is carried out mainly at the method of the wording analysis and the comparative method. It is worth noting that the regulation of the right to marriage differs from country to country. The legislation of most countries contains rules that determine the material and formal conditions of marriage, and their compliance with the timing of marriage is a prerequisite for its continued validity.

Overriding mandatory provisions can also be provided for in inheritance relations. Thus, in Spain, where the provisions establishing the prohibition of wills in favor of notaries, confessors, doctors, and other medical workers should be considered of an overriding nature due to the fact that such provisions entail the fundamental goals of protecting the testator from the unlawful influence from notaries, confessors, doctors, and other medical workers on him who are able to make the testator to change his will.[124] The Code of Inheritance of Finland also stipulates the overriding mandatory provisions in regard to a person who has received a right of use to property under a testament. According to Article 12, a person who has received a right of use to property under a testament “shall be entitled to administer the property and to receive its proceeds. In administering the property, he or she shall take into consideration also the right and interests of the owner. The property shall not be mixed with other property unless necessary for its appropriate use”.[125]Besides that, Article 14 also stipulates the ability of the child and spouse to receive financial assistance, including by reducing the legal share due to other heirs in case it

[123] Croatian private international law act, OG of ex SFRY nos. 43/82, 72/82, OG no. 53/9, art. 32.

[124] Civil Code, Spain, art. 752.

[125] Code of Inheritance, Finland, 40/1965, art. 12.

is possible for the surviving spouse and child to receive a sufficient share under the testimony.[126] It is possible to conclude that these provisions are of an overriding nature due to their purpose, which is to ensure the property rights and interests of the family members of a testator, as well as these provisions, contain the special significance for protecting the fundamental interests.

In the international private law of the European Union Member States, the overriding mandatory rules take one of the most essential positions. An analysis of the provisions of the national legislation of various countries allows concluding that at the moment, the concept of overriding mandatory rules is a one-sided mechanism for protecting the interests of the state and essential organizational areas. Overriding mandatory provisions are usually used in spheres including, but not limited to marriage status in family law, consumer protection, which includes product liability, and fundamental contract conditions.

In order to identify the norm as an overriding mandatory provision of the international law, there must be evidence that such a rule is accepted and recognized as a rule from which no derogation is permitted and which can only be modified by a subsequent rule of general international law of the same character. Recognition of a rule as overriding requires compliance with not only the obligatory conditions defined by the Rome I Regulation[127], which includes the purpose, the special significance of the rules for the protection of the public interest, and the overriding nature of the provision, which is determined in its mandatory application, it is also necessary to take into account other conditions that come from the analyzed judicial practice and are aimed at more precise determination of the range of such provisions.

2.1.4. Other Sources of the EU Law

One of the initial documents stipulating the category of overriding mandatory provisions on the international level was the Hague Convention on the Uniform Law on the International Sale of Goods of July 1, 1964.[128] The scope of application was established in Article 4 of the Annex, according to which: "This law also applies when the parties have chosen it as the law of the contract, regardless of whether the parties have their establishments or their permanent residence in the territories of different states and whether these States are the Member

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[126] Code of Inheritance, Finland, 40/1965, art. 14.

[127] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, *art. 9.*

[128] Hague Convention on the Uniform Law on the International Sales of Goods, 1964.

States to the Convention of 1 July 1964 relating to the Uniform Law on the International Sales of Goods, in so far as the said law is without prejudice to the mandatory provisions which would have been applicable if the parties had not chosen a uniform law».[129]

It should be noted that the category of overriding mandatory provisions was only declared and served as a beginning for further adoption in various international documents. However, despite defining the category, the characteristics or features of overriding mandatory provisions were not provided, leaving the discretion of their application to the judicial level.

The application of overriding mandatory rules is also enshrined in international documents devoted to various types of cross-border private law relations. For example, in such as:

- Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents extends the sphere of applicable law regarding liability that is broadened to the control and safety of traffic rules.[130] Following the Article 7 of Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, it can be concluded that the control and safety traffic rules must be deemed to be of an overriding nature, for instance, these provisions can be related to the operation of unregistered vehicles, use of vehicles in violation of the requirements for their re-equipment or the use of vehicles with technical malfunctions and other non-compliance with the requirements of the regulations relating to road safety.
- Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons allows the application of rules of States "where certain immovables, enterprises or other special categories of assets are situated, which rules institute a particular inheritance regime in respect of such assets because of economic, family or social considerations".[131] Developing the scope of applicable rules, the Convention mainly follows the public interest, which consists of the most critical organizational spheres for the states.
- Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition stipulates that: “The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws. If another State has a sufficiently close connection with a

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[129] Annex to the Uniform Law on the International Sales of Goods, art. 4.

[130] Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, art 7.

[131] Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, art. 15.

case then, in exceptional circumstances, the effect may also be given to rules of that State which have the same character".[132]

- Hague Convention of 2 October 1973 on the Law Applicable to Products Liability extends the scope of applicable law to the rules of safety and conduct in connection to the marketed product.[133] Such overriding mandatory provisions can include the rules related to manufacturing of any marketed product, the standards for components used for manufacturing any marketed product.

- Hague Convention of 13 January 2000 on the International Protection of Adults permits the application of provisions protecting adults in the State, where those provisions are mandatory, disregarding the applicable law. [134] These include, for example, the rules on informed consent to medical intervention, as well as provisions establishing a special form of representation. Moreover, Article 22 of the Hague Convention of 13 January 2000 on the International Protection of Adults stipulates that the measures that are taken by the authorities of Contracting States shall be recognised by operation of law in all other Contracting States, but in case "if such recognition is manifestly contrary to public policy of the requested State, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable", the recognition should be refused.[135]

The provided Conventions express the possibility of using both the overriding mandatory rules of the country of the court and third countries, where there is a close connection factor, which is expressed through an indication of the types of mandatory provisions that apply.

Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary in Article 11 stipulates the coexistence of both categories of private international law as public policy and overriding mandatory provisions, which are used as a restriction in regard to the applicable law and allows the application of mandatory rules only of the forum, which are applied to the international situations, disregarding the applicable law. [136]

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[132] Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, art. 16.

[133] Hague Convention of 2 October 1973 on the Law Applicable to Products Liability, art. 9.

[134] Hague Convention of 13 January 2000 on the International Protection of Adults, art. 20.

[135] Hague Convention of 13 January 2000 on the International Protection of Adults, art. 22.

[136] Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, art. 11.

The possibility of applying overriding mandatory rules is also provided for in the *lex mercatoria*:

- Hague Principles on Choice of Law in International Commercial Contracts do not prevent the application of overriding mandatory provisions of the forum. According to paragraph 5 of Article 11, it is indicated that: "The Principles do not prevent arbitrators from applying or taking into account super-imperative rules of law foreign to the competent legal order when they are required or entitled to do so." It is noted that such an obligation may result from the agreement of the parties or from the provisions of the applicable arbitration rules.[137] However, the arbitrators are not granted with additional powers and they are not obliged to apply the relevant overriding mandatory provisions. They also do not indicate the criteria on the basis of which the application of overriding mandatory provisions should be resolved. But ignoring all overriding mandatory provisions that are not part of the international public policy, may lead to the fact that the decision will be overruled or it will be denied in the recognition and enforcement on the grounds of contradicting the public policy of the state concerned. The Hague Principles on Choice of Law in International Commercial Contracts distinguish the procedure of the application of overriding mandatory provisions by the court or relevant arbitral tribunal, as it is clearly prescribed and segregated in regard to the duty of a court to apply overriding mandatory provisions of the law of the forum which have to be applied irrespectively of the law chosen by the parties and the duty of the arbitral tribunal to "apply or take into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so".[138]
- UNIDROIT Principles of International Commercial Contracts 2010 allow the application of mandatory rules of national, international, or supranational origin in cases where their application is in accordance with international private law. It is set up that the contracts concluded on the basis of UNIDROIT Principles of International Commercial Contracts 2010 or even the Principles have no authority to prevail over the mandatory provisions of domestic law, which includes the specific requirements for the conclusion of contracts, licensing requirements, penalty clauses in regard to the application to them the category of invalidity, and environmental provisions and regulations. [139] It is enshrined the spheres where the overriding mandatory provisions are able to be contained, but, at the same time, the prescribed wording does not allow

[137] Hague Principles on Choice of Law in International Commercial Contracts, art. 11.

[138] Hague Principles on Choice of Law in International Commercial Contracts, art. 11(1,5).

[139] UNIDROIT Principles of International Commercial Contracts 2010, art. 1.4.

for concluding that the indicated spheres are necessary to be followed by the competent court in case of finding or distinguishing the overriding mandatory provisions to a particular contract. Besides that, UNIDROIT Principles of International Commercial Contracts 2010 follow the broad notion of overriding mandatory provisions and cover as the overriding mandatory provisions and general principles of public policy as "prohibition of commission or inducement of crime, prohibition of corruption and collusive bidding, protection of human dignity, prohibition of discrimination on the basis of gender, race or religion, prohibition of undue restraint of trade".[140]

- ILA Committee Guidelines on Intellectual Property and Private International Law require the application of mandatory rules of the forum, at the same time, the court may give effect to the law of another State where the obligations arising out of the contract have to be or have been performed. [141] It is followed that the ILA Committee Guidelines on Intellectual Property and Private International Law do not impose the duty to the court to apply overriding mandatory provisions of third countries where the contract have to be or have been performed as the ability of the court to give effect to such overriding mandatory provisions is prescribed.

These documents do not contain either a definition or precise characteristics of overriding mandatory provisions that allow determining the scope of their application. This is grounded on the differences in approaches to solving the of overriding mandatory provisions in different countries, following the confirmation stipulated in the Commentary to the UNIDROIT Principles where it is noted that derogation from establishing the definition of overriding mandatory rules is intentional, leaving the solution of this issue to the discretion of the national legislator.[142] The same approach is presented in Preparatory Work Leading to Hague Principles the Draft on the Choice of Law in International Contracts, according to which differences in understanding this type of provisions in different countries made it impossible to consolidate their precise definition.[143]

There is the global recognition of overriding mandatory rules as a category of private international law used in various types of private law relations. It follows the concept of their

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[140] UNIDROIT Principles of International Commercial Contracts 2010, art. 1.4(2).

[141] ILA Committee Guidelines on Intellectual Property and Private International Law, art. 29.

[142] UNIDROIT Principles of International Commercial Contracts 2010, art. 1.4, p. 12-13.

[143] Consolidated Version of Preparatory Work Leading to Hague Principles the Draft on the Choice of Law in International Contracts., p. 32.

international determination whereas overriding mandatory rules can only be applied if they pursue goals generally recognized by the international community.[144]

The Commercial Court of Mons refused to consider the provision of Tunisian competition law in a formal distribution agreement governed by Belgian law, on the grounds that Tunisian law completely prohibits exclusive distribution agreements and goes far beyond what is generally recognized at the international level.[145]

It is concluded that mandatory provisions are the provisions that have been adopted by most states and which in this respect represent the international normative standard, as opposed to mandatory provisions that exist in only one state and are therefore unusual at the international level.

2.2. The Approach of Ukraine Towards Overriding Mandatory Provisions

2.2.1. Overriding Mandatory Provisions in the Ukrainian Legislation and Judicial Practice

Provisions on overriding mandatory rules in Ukrainian private international law have recently emerged, with the adoption of the Law of Ukraine on Private International Law in 2005. Law of Ukraine "On Private International Law" established by Article 14 the consolidation of overriding mandatory provisions: «1. The rules of this Law do not limit the effect of mandatory rules of law of Ukraine governing the relevant relations, regardless of the law applicable. 2. The court, regardless of the law applicable under this Law, may apply the mandatory rules of law of another state, which are closely related to the relevant legal relationship, except as provided in part one of this article. In this case, the court must take into account the purpose and nature of such rules, as well as the consequences of their application or non-application».[146]

The indicated article consists of two parts. The first part of the article defines the existence of a category of norms, which prohibits the establishment of restriction of the application of mandatory rules of law of the forum, and the second part provides for the possibility of applying mandatory rules of lex cause, in the presence of close connection with legal relationships.

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[144] Institute of International Law, “Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities” 64 II YB 383 (1992), Art. 9.

[145] Tribunal de Commerce Mons, 2.11.2000, Revue de Droit Commercial Belge 2001, 617.

[146] Law of Ukraine “On International Private Law” of 23.06.2005 No. 2709-I, art. 14.

Despite presenting the method of application of overriding mandatory norms, the mere definition or characteristic features for the allocation of such provisions are not provided in the legislation. Ukrainian legislation does not provide for the direct enshrinement in the rule of law their belonging to the dispositive or mandatory rules.

The Civil Code of Ukraine stipulates that the parties to the contract may not deviate from the provisions of civil law, if these acts explicitly state this, as well as if the obligation for the parties to the provisions of civil law follows from their content or the essence of the relationship between the parties.[147] However, a direct reference to the overriding nature of the norm is also a rare phenomenon, which, on the other hand, provides an opportunity to study such infrequent cases to identify features of the definition and structure of overriding mandatory norms.

Nevertheless, there are examples of direct identification of overriding mandatory provisions. An example of a reference to the direct application of overriding mandatory rules of law of Ukraine is paragraph 2 of Article 6 of the Code of Merchant Shipping of Ukraine, according to which the limits of liability of the shipowner and operator of a nuclear vessel flying the flag of a foreign state are governed by the law of the state whose flag the vessel is flying. If these limits are lower than those established by this Code, the provisions of this Code shall be applied during the consideration of a dispute over liability in a court or commercial court of Ukraine.[148]

The Code of Labor Laws of Ukraine also explicitly establishes overriding mandatory provisions in Article 9, which indicates the invalidity of the conditions of employment contracts, which worsen the situation of employees compared to the legislation of Ukraine.[149] The same applies to the terms of the collective agreement, which worsens employees' situation compared to current legislation and agreements.[150] Another provision that should be deemed to be overriding is Article 25 of The Code of Labor Laws of Ukraine, which states that when concluding an employment contract, it is prohibited to require from persons entering into employment contract information about their party and national affiliation, origin, registration of residence or stay and other documents not required by law. [151]It is concluded that Ukrainian

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[147] Civil Code of Ukraine: Law of Ukraine of January 16, 2003 № 435-IV., art. 6.

[148] Merchant Shipping Code of Ukraine, 176/95-VR, 23.05.1995, art. 6

[149] The Code of Labor Laws of Ukraine, № 322-VIII, 10.12.1971, art. 9.

[150] The Code of Labor Laws of Ukraine, № 322-VIII, 10.12.1971, art. 15.

[151] The Code of Labor Laws of Ukraine, № 322-VIII, 10.12.1971, art. 25.

legislators paid sufficient attention to the employment sphere limiting the situation when the rights and guarantees of the employee can be decreased or vanished by the choice of law or conflict of laws rules. The employment law contains the direct public interest which should be followed. Accordingly, it is the sphere, where numerous provisions can be treated as overriding mandatory provisions even without the direct wording indemnification of their application.

The examination of provisions of the Law of Ukraine "On Private International Law" provides examples of overriding mandatory provisions, which is established by interpreting the text of the rule itself.

Thus, Article 45 Law of Ukraine “On consumer protection” regulates consumer contracts and states the circumstances when the choice of law by the parties to such a contract may not be aimed at limiting the protection of consumer rights provided by mandatory laws of the state in which a consumer resides, stays, or located.[152]

It follows those certain provisions of the Law of Ukraine "On consumer protection", which regulate relations between consumers of goods, works, and services and producers and sellers of goods,[153], in addition, establish a specific level of protection that cannot be limited by choosing a law or referring to the law of another state. In this case, the importance of the provisions on consumer protection finds its analogy with the legislative provisions of Italy.[154]

For example, Article 13 of the Law of Ukraine "On consumer protection" can be treated as of an overriding nature as it establishes the rights of consumers in the case of concluding a distance contract and determines the information that the consumer must receive from the contractor. When concluding a distance agreement, the buyer is obliged to provide information that includes product characteristics, warranty obligations, delivery terms, price, period of acceptance of the offer, and the procedure for terminating the agreement.[155] Moreover, consumers are entitled to terminate the distance contract by “notifying the seller within fourteen days from the date of confirmation of the information or from the date of receipt of the goods or the first delivery of goods”.[156]

Accordingly, restricting the consumer's right to receive such information and demand termination will be considered impossible due to the nature of such a provision.

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[152] Law of Ukraine “On consumer protection” of 12.05.1991 № 1023-X, art. 45.

[153] Law of Ukraine “On consumer protection” of 12.05.1991 № 1023-X, art 1.

[154] Italian Consumer Code. 2005, art. 143(2).

[155] Law of Ukraine “On consumer protection” of 12.05.1991 № 1023-X, art. 13(2).

[156] Law of Ukraine “On consumer protection” of 12.05.1991 № 1023-X, art. 13(3).

The mandatory restriction is imposed on the occurrence of obligations of the buyer if an electronic document certifying the fact of the transaction outside the commercial or office premises has not been provided, such a transaction will not serve as a basis for liability of the consumer,[157] Together with the obligation of the seller to return the money paid without delay no later than thirty days from the date of notification by the consumer of the termination of the contract[158], these provisions should be treated as overriding mandatory rules based on their purpose, which pursues the protection of the rights and interests of consumers, following the legislation practice of the Member States of the European Union.

Moreover, overriding mandatory rules that provide certain substantive legal guarantees to the consumer can be considered not only as provisions realizing the purely private law interest of a particular group of consumers but also a public law interest aimed at ensuring a minimum standard of living, legal security, growth in consumer demand, strengthening the economic system of the state.[159] Similarly, the rules on the liability of the carrier for loss or damage to cargo or baggage can be considered not only as aimed at protecting the interests of the carrier in case the upper limit of liability is set or the shipper or passenger if there is a lower limit of liability, should be considered as rules aimed at realizing a fundamental public economic interest associated with the establishment of a unified legal regime for transportation and stimulation of freight and passenger traffic.[160]

Consequently, the Law of Ukraine "On the road transport" can contain the overriding mandatory provisions following the state's economic interest in establishing the rights, obligations, and guarantees of participants in transportation relationships. That includes the features of the contract on maintenance and repair of the vehicle, which should contain the essential elements, such as: the name and location of the parties to this agreement; the list of works on maintenance or repair, and the term of their performance; cost of works and order of calculations; a list of components (materials) used by the contractor, as well as provided by the customer to the contractor for maintenance or repair of the vehicle; a list of documents provided to the customer to confirm the performance of maintenance or repair, and warranty obligations of the contractor for the work performed. Moreover, when concluding the contract on maintenance and repair the vehicle, the contractor under the contract on maintenance and repair of the vehicle

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[157] Law of Ukraine "On consumer protection" of 12.05.1991 № 1023-X, art. 12.

[158] Law of Ukraine "On consumer protection" of 12.05.1991 № 1023-X, art. 12(4).

[159] Asoskov, A.V., *Fundamentals of conflict law* (Moscow: Infotropic Media, 2012), 160.

[160] Asoskov, A.V., *Fundamentals of conflict law* (Moscow: Infotropic Media, 2012, 161.

during its conclusion or execution may not propose the additional paid services to the customer under this contract.[161] Besides that, a particular interest of the state concerns the rights of the passenger to receive proper information about public road transport services and to transport one preschool child free of charge on public bus routes without providing with a separate seat for this child.[162]

According to the Ukrainian legal scholar I. Dikovska, the mandatory nature of the norm follows from its content, as well as the purpose, which must be special, in particular, to protect the fundamental values of law and order, social and economic system.[163]

Provisions of the Family Code of Ukraine regarding the content of the marriage contract can be interpreted as overriding mandatory rules. Hence, the marriage contract cannot reduce the scope of the child's rights established by the Family Code, as well as put one of the spouses in a highly disadvantaged financial position. In addition, the marriage contract imposes a prohibition on the transfer between spouses the real estate and other property, which is subject to state registration.[164] Protection of the rights and interests of children and the prohibition of transfer the real estate can be treated as a priority in regard to the fundamental interest of the state.

The provisions related to the matrimonial property regime in Ukraine in regard to the influence they provide on the economic relationship between spouses can be considered of an overriding nature. According to the Article 60 of the Family Code of Ukraine the property acquired by the spouses during the marriage belongs to the wife and husband on the right of joint ownership, regardless of the fact that one of them did not have a valid reason for receiving income because of education, housekeeping, child care, illness, or self-employment. Everything acquired during the marriage, except for things of individual use, is the object of the right of joint ownership of the spouses.[165]

Also, the provisions that cannot be derogated by choice of law or conflict of laws rules are the rules that relate to circumstances that preclude marriage. For example, Article 22 establishes a minimum age at the level of eighteen years old in order to conclude the marriage,

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[161]The law of Ukraine “On the road transport”, 2344-III, 05.04.2001, art. 26.

[162] The law of Ukraine “On the road transport”, 2344-III, 05.04.2001, art. 41.

[163] Dikovska, I. A., “Imperative norms and their role in the regulation of contractual obligations business”. *Pidpryemstvo i pravo* 1 (2013): 37.

[164] Family Code of Ukraine, Law №2947-II, 2003, art. 93.

[165] Family Code of Ukraine, Law №2947-II, 2003, art. 60.

both for men and women.[166] Article 24 prohibits entering into marriage without the consent of either party and prohibits forcing of concluding marriage. It is also stated that the registration of marriage with a person who has been declared incompetent, as well as with a person who, for other reasons, cannot acknowledge the significance of their actions or cannot control these actions are strictly prohibited.[167] Article 26 of the Family Code of Ukraine prohibits the marriage of persons who are relatives in a direct line and prohibits the registration of marriage between an adoptive parent and an adopted child, stipulating the exception to the rule in case if the adoption is annulled.[168] The main purpose of these provisions is to protect the rights and interests of spouses, as well as children, and their observance is essential for ensuring the interests of society and the state.

The provisions of Ukrainian inheritance law can also be classified as overriding mandatory rules, based on the experience of France and Germany. [169]

In particular, Art. 1241 of the Civil Code of Ukraine, which prescribes the right to a mandatory share in the inheritance. Such a qualification of this rule belongs to its special significance for protecting the rights and interests of persons dependent on the testator, including the minor and disabled children, disabled spouse and parents, as well as other disabled persons who were dependent on the testator.[170] This provision entails the purpose of ensuring the social justice in society, providing the protection of the rights and interests of the participants of these relations, regardless of which law is to be applied to the relation.

The justice inside the society has to be deemed as fundamental basis in regard to the public interest as it is provided in Article 1242 of the Civil Code of Ukraine, which prescribes that a condition specified in a will is void if it contradicts the law or the moral principles of society.[171] However, the moral principles of society belong to the concept of public order of Ukraine, but separate provisions of Ukrainian legislation have to be named as overriding mandatory provisions whereas these provisions in connection with public order establish the

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[166] Family Code of Ukraine, Law №2947-II, 2003, art. 22.

[167] Family Code of Ukraine, Law №2947-II, 2003, art. 24.

[168] Family Code of Ukraine, Law №2947-II, 2003, art. 26.

[169] Dovgert, A. S., and Kysil V.I., ed. *International private law. Special part* (Kyiv: Alerta, 2013), 49.

[170] Civil Code of Ukraine, Law of Ukraine of January 16, 2003 № 435-IV, art. 1241.

[171] Civil Code of Ukraine, Law of Ukraine of January 16, 2003 № 435-IV, art. 1242.

level of moral principles and are subject to comprehensive interpretation by the judicial authorities.

The example that pursues the protection of the economic sphere of Ukraine is Article 31 of the Law of Ukraine "On Private International Law", which establishes features of the form of a foreign trade agreement. Consequently, if one of the parties to a contract is a citizen of Ukraine, such an agreement has to be concluded in writing, regardless of the place of conclusion of the agreement, unless otherwise provided by an international agreement of Ukraine. In this case, the exception to the application of the overriding mandatory rule of law can only be the application of another rule of law, which is provided by an international treaty ratified by the Verkhovna Rada of Ukraine.[172]

Mandatory provisions on foreign economic agreements that have a special purpose and significance for the economic structure of the state are provided in the Law of Ukraine "On State Control over International Transfers of Military and Dual-Use Goods". Article 17 states that an economic entity of Ukraine is prohibited from: "concluding foreign trade agreements in respect of international transfers of any goods or participating in their performance in any other way than provided by this Law, if they become aware that such goods may be used by a foreign state or a foreign economic entity for the purpose of creating weapons of mass destruction or their means of delivery".[173]

The special purpose of this provision is seen in the importance of such regulation of relations in terms of ensuring security guarantees, which directly depend on compliance with the provisions of this law.

Aspects of the application of overriding mandatory norms in Ukraine remain uncertain. There is no established case law on interpreting or applying these provisions in Ukraine. Moreover, present decisions are characterized by their ambiguity.

According to Article 8 of the Law of Ukraine “On International Private Law”, when applying the law of a foreign state, a court establishes the content of its norms in accordance with the official interpretation, practice, and doctrine in the relevant foreign state. In order to establish the content of the norms of the law of a foreign state, a court or other body may apply in the manner prescribed by law to the Ministry of Justice of Ukraine or other competent bodies

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[172] Law of Ukraine “On International Private Law” of 23.06.2005 No. 2709-I, art. 31.

[173] Law of Ukraine “On State Control over International Transfers of Military and Dual-Use Goods” of February 20, 2003. № 549-IV, art. 17.

and institutions in Ukraine or abroad or involve experts.[174] It follows that the competence of the court in applying overriding mandatory provisions has to be grounded on sufficient facts and reasons. Moreover, the court is entitled to receive the consultation and official interpretation from the Ministry of Justice of Ukraine or other competent bodies and institutions in Ukraine or abroad or involve, experts, which decreases the ability of the court to misinterpret the foreign provisions of an overriding nature in case the issues of their application arise. Besides that, the part 3 of Article 8 of the Law of Ukraine "On International Private Law" provides the right of persons concerned with the case t submit documents confirming the content of the rules of foreign law, to which they refer in support of their claims or objections, otherwise assist the court or other authority in determining the content of these rules.[175] In follows that not only court and public authorities possess the ability to interpret the foreign overriding mandatory provisions, but the concerned persons receive the possibility to use their best efforts in order to facilitate the court in determining the nature and content of provisions that have to be applied in the particular dispute.

Nevertheless, the Law of Ukraine "On International Private Law" limits the timeframes of the determination of the content of foreign provisions of law, including foreign overriding mandatory provisions. These timeframes of the determination must be reasonable and subject to the discretion of the court,[176] that holds the obligation to determine in a particular case what is reasonable in regard to the facts of the case. The facts of a particular case can include the public interest for partis, as well as the specific social and economic situation of each of the parties to a dispute. If the court does not determine the nature and content of foreign provisions, the law of Ukraine should be applied irrespectively.

The judicial determination of overriding mandatory provisions of Ukraine in regard to the loan was subject to review by the Supreme Court of Ukraine. As it follows from the facts of the case the creditor and debtor concluded the loan agreement secured by the surety and chose the applicable law of Wales and England. The court of the first instance and the court of appeal treated the provisions related to the regulation of the surety as of overriding mandatory nature and, accordingly, in the dispute that has arisen between the parties the chosen law was overruled by the law of Ukraine and the surety was ceased. But, the Supreme Court of Ukraine stipulated, that in the first and second instances the courts did not provide sufficient justification of the

[174] Law of Ukraine "On International Private Law" of 23.06.2005 No. 2709-I, art. 8.

[175] Law of Ukraine "On International Private Law" of 23.06.2005 No. 2709-I, art. 8.

[176] Law of Ukraine "On International Private Law" of 23.06.2005 No. 2709-I, art. 8.

belonging of the provisions related to the surety to the category of overriding mandatory provisions and stated, that the provisions of Ukrainian law applicable to bail, in particular its duration and the period during which a claim against the guarantor must be made, are not overriding mandatory rules in private international law and should not repeal or prevail over foreign law. chosen by the parties. [177] It is summarized that the judicial review should not be detrimental to the principle of the freedom of will in case the court does not provide sufficient grounds for applying the overriding mandatory provisions.

Following the right of the court to determine the nature of provisions that should be applied, The Supreme Commercial Court of Ukraine, considering the claims of a law firm that was a creditor in the case and was a resident of Germany, concluded that the provisions of the Commercial Code of Ukraine and bankruptcy provisions are mandatory in the context of Article 14 of the Law of Ukraine "On International Law". Thus, they should definitely regulate the procedure for bankruptcy proceedings, including creditors' claims of foreign entities, declared to the debtor.[178]

Ukrainian legal scholar B. Rebrysh in his work devoted to the application of overriding mandatory provisions in cross-border unfair competition disagreed with this position, pointing to the court's misinterpretation of the concepts of ordinary mandatory and overriding mandatory norms of law, highlighting the inexpediency of all mandatory norms of law to be classified as overriding mandatory provisions. In his opinion, the position of the Supreme Economic Court of Ukraine on the prohibition of the parties from choosing foreign competition law was not due to the overriding nature of the provisions but due to the peculiarity of legal relations in which the autonomy of the will cannot be exercised. The scientist proposed to consider overriding mandatory rules that, as a result of indication in themselves or their special significance, ensure the rights and legally protected interests. [179]

Considering the position of B. Rebrysh, it should be noted that there are no direct legal spheres or specific features that affect the separation of overriding mandatory norms from the ordinary imperative rules at the legislative level in Ukraine, except for the direct indication of the factor in Article 14 of Law of “Ukraine on private international law” that later do not limit the

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[177] Supreme Court of Ukraine, Decree in the name of Ukraine, September 13, 2022, 824/87/21.

[178] Resolution of the Supreme Economic Court of Ukraine of July 7, 2016, case № 17-1-4-5-32-24-2 / 136-03-5080.

[179] Rebrysh, B.Y., “Application of supra-imperative norms by courts of Ukraine in considering cases arising from cross-border unfair competition,” *Problemy zakonnosti* 136 (2017): 93.

principle of autonomy of the will and choice of laws rules.[180] Therefore, the right of determination should belong to the court, which is able to apply the existing legislation standards, general principles of law, and doctrinal approaches when estimating the conditions of applying overriding mandatory provisions and rendering decisions.

Thus, as laid down by V. P. Zvekov, the legal nature of overriding mandatory norms falls on the edge of public and private law.[181] Consequently, overriding mandatory provisions interact both with private and public law.

As it is followed from the opinion of N. M. Korchak, the competition law performs both private and public law functions and thus establishes the limits of state intervention in the sphere of competition.[182] According to the Recommendation of the Presidium of the Supreme Economic Court, a special imperative is expressed in the provisions of competition law, which cannot be deviated from by concluding an agreement, as such provisions are aimed at prohibiting restrictions on economic competition in commodity and other markets of Ukraine.[183]

Taking into consideration the approach of M. Blessing, who in his work devoted to the application of overriding mandatory rules defined the areas in which the overriding imperative rules of law could be presented, including the sphere of protection of the economic interests of domestic producers,[184]it should be remarked that the field of competition law has a special purpose in ensuring the economic structure of the state.

Accordingly, the mandatory provisions of competition law can be considered overriding by a Ukrainian court, whereas the state always pursues to realize its own interests under maintaining sovereignty.

In summing up the legislative and judicial approaches towards overriding mandatory provisions in Ukraine, it should be noted that the definition contained in Article 14 of the Law of

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[180] Law of Ukraine "On International Private Law" of 23.06.2005 No. 2709-I, art. 14.

[181] Zvekov, V.P., *Collisions of laws in international private law*. (Moscow: Walters Cluver, 2007), 205-206.

[182] Korchak, N.M., "Correlation of competition legislation of Ukraine with private and public law," *Scientific Bulletin of the International Humanities University.* Series: Jurisprudence 8 (2014): 148.

[183] Recommendations of the Presidium of the Supreme Economic Court of Ukraine, 28.12.2007, No. 04-5/14, par. 6.5.

[184] Blessing, M., "Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts". *Swiss Commercial Law Series* 9 (1999): 14-15.

Ukraine “On the international private law” stipulates the category of international private law without outlining the essential features of the application. [185]

As it appears, the judicial authorities possess possibly the unlimited discretion towards establishing frameworks for identifying, estimating the separation of overriding mandatory norms from ordinary mandatory norms of a domestic nature, and, accordingly, applying overriding mandatory provisions, whereas the legislative consolidation remains uncertain.

Nevertheless, the wording and logical analyzes allow determining the non-exhaustive range of spheres of Ukrainian legislation, which contain possible overriding mandatory provisions, including the provisions on consumer protection, inheritance, marriage contract, and competition.

2.2.2. Necessary Changes to the Wording Consolidation of Overriding Mandatory Rules in Ukraine

The legislative definition, which is presented in the Law of Ukraine "On Private International Law",[186] is not sufficiently formulated in the terms of the wording definition, whereas the category that is stipulated can be treated as the category of simple mandatory norms. The rule contained in Article 14 can be defined only in its content as "overriding mandatory norm".

Expressing this proposal, it is necessary to proceed from the special meaning that is expressed in the fact of the existence of overriding mandatory rules.

Considering the wording presented in the Rome I Regulation,[187] the word "imperative" should be categorically changed to "overriding mandatory". This wording will accurately convey and describe the nature of overriding mandatory provisions and, at the same time, make it difficult to confuse these provisions with the ordinary mandatory norms of domestic private law.

Another problem of Ukrainian legislation is the complete absence of signs of overriding mandatory norms, which directly leaves the issue of qualification and definition controversial and unresolved. In the absence of any legally defined guidelines, the courts in the process of

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[185] Law of Ukraine “On International Private Law” of 23.06.2005 No. 2709-I, art. 14.

[186] Law of Ukraine “On International Private Law” of 23.06.2005 No. 2709-I, art. 14.

[187] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 9.

interpreting this concept have, without limitation, the possibility of refusing to apply foreign law, referring to the imperative nature of every rule of domestic law.

The exclusive list of overriding mandatory norms of law could not be rendered. It also applies to the possibility of indication of the nature in the text of each rule of law. This method will not allow overriding mandatory provisions of law to be adaptive and follow the development of the state, in contrast to the public order, which is a grounded category. Also, such an approach will require significant analysis and changes at the practical and legislative levels and is not rational.

In determining the qualifying aspects for the overriding mandatory rules of law, the European Union's legislation should be considered as an example in conjunction with the case law aspects.

Thus, Article 9 of the Rome I Regulation characterizes overriding mandatory rules as norms "respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization".[188] The presented definition, in conjunction with the interpretation of a crucial interest pursued by overriding mandatory provisions stated by the European Court of Justice in the Commission of the European Communities v. The Luxembourg case,[189] makes it possible to establish the limits of the reservation, as well as to be the basis for case law. Such a composite norm, together with judicial interpretation and legislative position, could serve as a real opportunity for the court and practitioners to distinguish overriding mandatory norms from a large number of ordinary imperative norms contained in the legislation of Ukraine. Considering imperativeness in the field of private international law, it is concluded that the category of overriding mandatory provisions is broader than ordinary mandatory norms. This category is not limited to them and covers almost all forms and regulation methods in private international law.

The present Article 14 of the Law of Ukraine "On Private International Law" is based on a different regime of application of domestic and foreign overriding mandatory rules. Article 14 of the Law of Ukraine "On Private International Law" prescribes that overriding mandatory norms of the forum are mandatory for applying. However, mandatory norms of third states defined by the category of close connection are dispositive or not mandatory for application by

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[188] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 9.

[189] Judgement of the European Court of Justice, Case 319/06, Commission of the European Communities v. Luxembourg, 2007, par. 90.

the court. However, the court must analyze and establish the purpose, nature, and consequences of application or refusal in this case. [190]

The range of court actions that are necessary for a comprehensive interpretation of foreign provisions should be broadened.

In addition to analyzing and determining the purpose, nature, and consequences of application or refusal, the court must determine which overriding mandatory rules of the foreign state should be applied, conduct a wording analysis and examine the evidence basis, which strongly confirms the close connection factor with the legal system of another state, whereas the complexity of applying overriding mandatory provisions depends on the legal system such a rule belongs to.

It should be noted that in order to recognize an ordinary mandatory provision to be of an overriding character, all of the above criteria must be applied. If at least one of the indicated features is not observed, the provisions cannot be considered as overriding mandatory provisions.

The close connection criteria will allow the court to apply the overriding mandatory rules it deems necessary, taking into account all the circumstances of the case. However, the approach based on the identification of applicable overriding mandatory legal norms by examining the relevant foreign legal order should be limited to certain conditions, the assessment of which is made from the point of view of the *lex fori* and the content contained in the domestic legislation about the preferable solution to the conflict of laws problem.[191]

Moreover, the court should be obliged in its decision to motivate the application of overriding mandatory provisions by indicating the specific grounds and reasons which determine the special nature and purpose of the certain mandatory provision. The requirement established by an overriding mandatory provision must be proportionate to the significance of the interest it aims to protect.

The examination of overriding mandatory rules contained in the Ukrainian legislation should be exceptional. It must be considered that they are only exceptions to the general rules for determining the competent legal order. As a result, only some of the most influential legislative provisions can be classified as overriding mandatory rules.

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[190] Law of Ukraine "On International Private Law" of 23.06.2005 No. 2709-I, art. 14.

[191] Asoskov, A.V., *Fundamentals of conflict law* (Moscow: Infotropic Media, 2012), 157.

By including these additions to the legislative definition of the category of overriding mandatory norms, Article 14 of the Law of Ukraine “On Private International Law” should be enshrined as follows:

1. The rules of this Law do not limit the effect of overriding mandatory norms of the law of Ukraine, respect for which is considered crucial by a country for safeguarding its public and fundamental interests, including, but not limited to political, social, or economic organizational spheres. Overriding mandatory rules apply irrespectively to the law otherwise applicable, and their application must be supported by appropriate evidence.

2. The court, regardless of the law applicable under this Law, may apply the mandatory rules of law of another state, which are closely related to the relevant legal relationship, except as provided in part one of this article. At the same time, the court must examine the evidence basis, which strongly confirms the close connection factor with the legal system of another state, determine which overriding mandatory rules of this foreign state should be applied, and take into account the purpose and nature of such norms and the consequences of application or non-application.

Consequently, the adoption of proposed changes to the proper wording consolidation will serve as a further establishment of joint case law and dismiss the unlimited judicial discretion towards establishing the potential frameworks of applying overriding mandatory provisions.

The proposed consolidation should form a shared vision of overriding mandatory norms in the legislation of Ukraine and facilitate the parties to a contract foreseeing possible cases of the application of this category of private international law.

CONCLUSIONS

1. Overriding mandatory norms in private international law doctrine are considered special rules of particular importance, which are essentially different from the ordinary mandatory provisions of domestic law. The difference is expressed in their special significance in ensuring the fundamental interests of citizens and the public interest of the state, which strictly depends on the degree of the development of the state as standard mandatory provisions can become overriding over time due to changes in domestic and foreign policies of the state.

2. Doctrinal approaches to the establishment of overriding mandatory norms are usually given through their content and purposes, the mechanism of action of such rules, and through spheres that may contain these rules, with the possibility of indicating overriding nature in the text of the norms. However, a universal approach that makes it possible to establish the whole range of overriding mandatory provisions is not seemed to be possible, whereas the progressive development of states will influence the range of overriding mandatory provisions. No matter how generalizing it may be, any definition is a limitation because of its nature. The strict definition requires a certain simplification and averaging of the meaning of the described phenomenon and, as a result, inevitably leads to the incompleteness of the derived definition, which needs to be further supplemented. Thus, the determination process is the responsibility of the court, taking into account all the proposed approaches and according to this, the universal approach towards defining overriding mandatory provisions should be aimed at facilitating the judiciary by stipulating their purpose, features, and characteristics on a case-by-case basis.

3. Among other categories and institutions of private international law, overriding mandatory rules are a special restriction. Due to the particular importance, the state uses them to limit the freedom of choice and conflict of laws rules and, accordingly, they apply irrespectively to the law applicable. The public order restriction is close in its content and nature to the overriding mandatory norms. These categories are interdependent and are used to protect the public interest by restricting the application of the law of another state. Despite the similarity in the protective aspect, public policy guarantees the non-application of foreign law, which does not comply with the general principles of relations inside a particular state and directly includes overriding mandatory rules, which are the mandatory provisions of national law of special importance and are directly applicable. Moreover, overriding mandatory provisions are a more dynamic category that directly depends on the current approach and interests of the state, which also indicates the possible rapid dynamics of changes in the potential range of these provisions. At the same time, public order is a grounded category that develops over time and depends not

only on the current interests and goals of the state but also on historical aspects. These differences in the mechanism of their application, origins, existence, content, as well as legislative and doctrinal distinctions, serve to define them as separate categories of private international law. In comparison with *jus cogens*, overriding mandatory provisions do not make the previous acts void and their retroactive effect is settled in the relevant legal act regulating relationships. Moreover, the mechanism of application and compliance is strictly the opposite. Unlike other international legal norms, *jus cogens* have greater legal force and have a longer process of creation and all newly adopted international norms must comply with them.

4. The European Union proceeds from the principles of compatibility of the rules applicable in the Member States concerning conflict of laws, which leads to the formation of established practice in determining overriding mandatory norms. The core document that establishes the definition and main features of overriding mandatory provisions is the Rome I Regulation, which laid down a unified definition based on the fact that overriding mandatory norms aim to safeguard the public interest and political, social, and economic organizational spheres. The application of the mentioned norms, except for the country of the court, includes the application of the norm of the country, where the obligations arising out of the contract have to be or have been performed or where those rules render the performance of the contract unlawful.[192] Other overriding mandatory rules, the application of which is not covered by the unified norm and which accordingly cannot be applied, must be considered as factual circumstances. Otherwise, it can be a potential ground to annul the decision rendered without such an examination as it is provided by the European Court of Justice in the case of Nikiforidis.[193] However, despite the established framework for the application of overriding mandatory rules of third countries, overriding mandatory rules also cannot be applied if the international community does not generally recognize them. The comprehensive analysis of the domestic legislation of the European Union Member States determines, at the moment, that the concept of overriding mandatory rules is a mechanism for protecting the interests of the state and essential organizational areas. Overriding mandatory provisions are usually contained in the spheres of family law, inheritance relations, consumer protection, and separate provisions related to the conclusion or termination of contracts.

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[192] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, art. 9.

[193] Judgement of the European Court of Justice, Hellenic Republic v. Grigorios Nikiforidis, Case 135/15, 2016, par. 51, 56(2).

5. The case law of the European Court of Justice is a cornerstone of the basic features and characteristics, which governs the peculiarities of the application and determination of overriding mandatory rules. It is established by judicial practice that such norms should follow the primacy and uniform application of the European Union law and should not be detrimental to it. Overriding mandatory rules are influenced by the principle of the freedom of the contract[194] and their belonging to the public or private sphere of law does not define the presence of overriding imperativeness.[195]

6. The Ukrainian approach towards overriding mandatory norms is more limited than the approach of the European Union due to the legislative inconsistency and practical side. The overriding mandatory provision contained in the Ukrainian legislation directly repeats the Rome Convention[196] and establishes the mandatory application of overriding mandatory provisions of the country of the court, whereas foreign overriding mandatory provisions must be determined by the factor of close connection and their application is not a direct duty of the court. The definition of overriding mandatory provisions is insufficiently formed in the Ukrainian legislation, manifested both in the wording definition and in the absence of qualifying features, which negatively affect the formation of a unified approach to the definition and application of this category in judicial practice. The spheres of Ukrainian law, where overriding mandatory rules are contained in the competition law, consumer protection sphere, inheritance, family law, employment law, and foreign trade agreements regulations. It confirms the existence of the purpose of protecting the public interest, fundamental basis and granting protection to the most vulnerable participants of legal relationships. The Ukrainian legislative approach towards overriding mandatory norms should be supplemented and expanded, taking into account the legislative and judicial practice of the European Union.

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[194] Judgement of the European Court of Justice, Case C-184/12, United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, 2013, par. 50.

[195] Judgement of the European Court of Justice, Case C-149/18, Agostinho da Silva Martins Dekra Claims Services Portugal SA, 2019., par. 31.

[196] 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.1.1998, art.7.

RECOMMENDATIONS

1. The definition of freedom of choice contained in Article 1 of the Law of Ukraine "On Private International Law" should be supplemented by clarifying provisions that would indicate the specifics and limitations contained in the application of the principle of the freedom of choice. The definition should be enshrined as follows: "Freedom of choice is the principle according to which the parties to a legal relationship with a foreign element may choose the law to be applied to the relevant legal relationships. The chosen law should not violate the rights of third parties, and should follow the customs of good conduct, public policy, and overriding mandatory rules."

2. The changes to proper wording consolidation will serve as an establishment of a joint case law by stipulating the core features and guidelines in order to prevent court from misinterpreting overriding mandatory provisions from being only mandatory provisions of domestic legislation. The proposed wording consolidation will form a shared vision of overriding mandatory norms in the legislation of Ukraine and will facilitate foreseeing possible cases of application of this category of private international law. By amending the legislative definition of the category of overriding mandatory norms, Article 14 of the Law of Ukraine "On Private International Law" should be enshrined as follows: "1. The rules of this Law do not limit the effect of overriding mandatory norms of the law of Ukraine, respect for which is considered crucial by a country for safeguarding its public and fundamental interests, including, but not limited to political, social, or economic organization. Overriding mandatory rules apply irrespectively to the law otherwise applicable, and their application must be supported by appropriate evidence. 2. The court, regardless of the law applicable under this Law, may apply the mandatory rules of law of another state, which are closely related to the relevant legal relationship, except as provided in part one of this article. At the same time, the court must examine the evidence basis, which strongly confirms the close connection factor with the legal system of another state, determine which overriding mandatory rules of this foreign state should be applied, and take into account the purpose and nature of such norms and the consequences of application or non-application."

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ABSTRACT

The legal research is devoted to the category of overriding mandatory rules in the European Union private international law and private international law of Ukraine. The research covered the essence and place of overriding mandatory rules in private international law by analyzing doctrinal approaches and collating with the category of public order and *jus cogens*, comparing the current state of the approaches to the legislative consolidation, discovering the fundamental features, analyzing the judicial practice of the European Union and Ukraine. The relevance of the research is justified by the interests of international agents, in particular, the course of Ukraine to join the EU, which directly affects the prospects for the unification of legislation in the field of overriding mandatory provisions in Ukraine.

The research highlighted the optimal approach towards defining overriding mandatory provisions, demonstrated the vision of overriding mandatory rules in the EU, emphasized the importance of the ECJ for determining and applying overriding mandatory rules, and provided the recommendations in regard to the legislative consolidation of the category of overriding mandatory rules and related law enforcement practices in Ukraine.

Keywords: overriding mandatory rules; mandatory provisions; private international law; applicable law; public order.

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SUMMARY

The legal research presents the characteristics and analyzes of overriding mandatory rules in European Union private international law and private international law of Ukraine. This category of private international law requires comprehensive research by reason of the fact that legislative provisions related to overriding mandatory rules are of an estimated value, and accordingly, the courts lack clearly defined frameworks in regard to further law enforcement actions.

Consequently, the research presents a comprehensive comparison of doctrinal approaches to the definition of overriding mandatory provisions, formulates the concept and determinates features of the mandatory norms of an overriding nature, highlights the connection factors and differences between overriding mandatory provisions and public order categories, determines the distinction between overriding mandatory provisions from ordinary mandatory provisions, and analyzes the main legislative acts and judicial practices of the EU and Ukraine in the context of the category of overriding mandatory provisions.

In accordance with demonstrated objectives, it is concluded that overriding mandatory norms are essentially different from the ordinary mandatory provisions due to their special significance in ensuring the fundamental interests of citizens and the public interest of the state. By conducting the comparison with the category of public order and *jus cogens* it is summarized that overriding mandatory rules differ in the mechanism of application, origins, existence, and content.

However, overriding mandatory rules is a dynamic category that directly depends on the current approach and interests of the state, which indicates the possible rapid dynamics of changes in the potential range of these provisions. Therefore, the universal approach towards defining overriding mandatory provisions should be aimed at facilitating the judiciary by stipulating their purpose, features, and characteristics on a case-by-case basis.

The EU follows the strict interpretation stipulated in the Rome I Regulation, which is significantly broadened by the practice of the ECJ. At the same time, the Ukrainian approach to overriding mandatory norms is more limited than the approach of the European Union due to the legislative inconsistency and practical side and should be supplemented and expanded, taking into account the legislative and judicial practice of the European Union.

HONESTY DECLARATION

18/05/2022

Vilnius/Kyiv

I, Zlatin Viacheslav, student of Mykolas Romeris University and Taras Shevchenko National University of Kyiv (hereinafter referred to University),

Private law Institute, Ukrainian and European Legal Studies,

confirm that the Master thesis titled:

"Overriding mandatory rules in the European Union private international law and private international law of Ukraine":

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania, Ukraine or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

_____ Zlatin Viacheslav

(signature) *(name, surname)*