

OBSERVATIONS ABOUT MANDATORY RULES IMPOSED ON TRANSATLANTIC COMMERCIAL RELATIONSHIPS[‡]

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I. INTRODUCTION

The United States and European Union (E.U.) cooperate in broad sections of the field of international law. However, approaches to the law and to market regulation sometimes differ on the two sides of the Atlantic. This article examines some of the remaining frictions and adverse tendencies between the United States and the E.U. First, it reflects on the tension between party autonomy and mandatory rules. Next, it discusses the public law taboo—the divide between private law and public law, where the question is: Can rules be found that can harness the ambitions of a state to have prescriptive jurisdiction in these areas of mandatory rules, or can judges devise rules of conflict and of cooperation in the field of public law?

Europe, as a geopolitical concept, has seen a lot of integration in the not to distant past. One result of this European cooperation is the development of a European convention that determines the law applicable to commercial transactions. Of course, Europe is principally confronted with the private–international law rules of all the E.U. Member States. There is not a supranational “European State,” or any corollary to the federal system of the United States. Furthermore, there is no federal judiciary in Europe. However, it is very clear that national judges and, in far fewer numbers, arbitration tribunals apply the rules of European law. While the United States has federal judges, it does not have a federal set of rules with regard to private–international law or conflicts of law such as those found in Europe. Thus, a more creative chaos can

be found in the United States when it comes to resolving the conflicts of which law applies to any international commercial transaction.¹

Although there have been convergences in the laws of the United States and the laws of the E.U. member states, it should be acknowledged that since there are many differences in governmental policies and in legal principals that apply to international transactions, unavoidable tensions will arise between the E.U. and the United States in the application of mandatory rules.

While the Convention on the Law Applicable to Contractual Obligations of 1980² [hereinafter Rome Convention] gives autonomy to the parties, it marginally limits the autonomy through Article 3.³ If the parties did not chose the national law applicable to their agreement, then Article 4 of the Rome Convention applies the law of the place of the business or establishment of the party that is to perform the relevant characteristic performance.⁴

Part II of this article begins with a discussion of Article 7 of the Rome Convention, which has influenced European scholarship and practice with regard to mandatory rules. Part III discusses how the European community has generally failed to eliminate discrimination against non-European entities found within the laws of the E.U. member states. Part IV addresses the possibility that in the near future a double layer of “mandatory” rules will appear. These rules may complicate transactions between European and non-European actors. While the E.U. always had “national” mandatory rules, currently it is slowly being confronted with so-called “European” mandatory rules. The article next inspects a few examples of this “communitarization” of these mandatory rules. This analysis will focus on the European Court of Justice’s (ECJ) apparent

1. For additional information, see the proposal to replace U.C.C. § 1-105 with section U.C.C. § 1-301, in which the reference to the conflicts rules of the particular state is to be made.

2. Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1, *reprinted in* 19 I.L.M. 1492, 1493 [hereinafter Rome Convention].

3. *See id.*

4. *Id.*

elevation of E.U. harmonized rules into public rules per se. In addition, an observation is made about planned changes to the Rome Convention decreasing the grounds for referencing foreign mandatory rules. Part V analyzes a case where a U.S. law was too ambitious in its demands for cooperation from European judges. In this case, the tools for weighing and balancing the conflicting public policies seem to have worked well. The article concludes with general observations on the conflict of public rules and their resolution in the field of commercial transactions.

II. ARTICLE 7 OF THE ROME CONVENTION—ITS EFFECT AND ITS RELATION TO ARTICLE 3

Article 7, Mandatory Rules, of the Rome Convention states:

(1) When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

(2) Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

The second subsection of Article 7 of the Rome Convention is self-evident: Every member state can enforce its own mandatory rules on a contractual relationship and the Convention does not intervene. As discussed *infra* in regards to Article 3(3) of the Rome Convention, “mandatory rules” refers to those rules of national law which must be applied to a given transaction or

dispute, no matter where the transaction is performed or where the dispute is litigated.⁵ In the past, mandatory rules from foreign countries have been applied by courts. In Europe, when the applicable law—either the law consensually chosen by the parties or the law objectively determined where no choice of law was made—is the law of a foreign European or non-European country, mandatory rules are applied through reliance on contract law (*lex contractus* or *lex causae*). This remains the case as long as there is no true conflict with the mandatory rules. Thus the second subsection of Article 7 limits the freedom of the parties in their choice of law because of the mandatory rules of the forum.⁶

The first subsection of Article 7 is the more difficult rule. This subsection opens up the possibility for a judge to apply mandatory rules from another country, rather than applying *lex causae*—the latter law being the chosen law of the relationship. Professor Andreas Lowenfeld has said he was not aware that this has actually ever led to any application of foreign “public rules.” Although there has been much talk about this possibility, it is unclear if there has been a case where this has occurred. However, there have been interesting developments in The Netherlands. Dutch commentators are proud that at least in one Dutch Supreme Court case there was extensive discussion about the possible respect that a Dutch judge could show towards

5. A key distinction for the effects of “mandatory rules” can be found by comparing them to “default rules.” While “default rules” are designed to fill-in gaps created when there is no agreement between the parties on an issue, “mandatory rules” apply regardless of any agreement by the parties on the issue. Thus “mandatory rules” “must be applied in international relationships irrespective of the law which by application of the relevant set of conflict of laws rules or the parties’ choice-of-law provisions would normally be applicable.” Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT’L ARB. 319, 321 (1996).

6. Before a country’s own national law or “European” law imposes itself, in opposition to foreign rules of the *lex contractus*, it needs to explain the application of the particular rule and justify the imposition by its degree of imperativeness. It must also explain the need for its imposition based on the preponderance or strength of “European” connections in the particular case, based on the social need for its application and on the consequences of its application or its non-application. That wording precisely signals the “relativity” of the mandatory nature of a rule.

Belgian imperative rules.⁷ However, in the end, the decision did *not* apply or positively “respect” the Belgian rule. In Part V of this article returns to the application of this rule, and discusses the treatment an American embargo in the court of The Hague.

The principle of protection against the parties eluding mandatory laws is operative in Article 3(3) of the Rome Convention and limits the parties’ freedom to select the *lex causae*:

The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called mandatory rules.⁸

Because this is the article introduces the definition of mandatory rules, Article 3 is important theoretically, and it would gain importance if Article 7(1) of the Convention is eliminated in the future.

Article 3(3) is evidently very limited in imposing the mandatory rules of a presumably European country.⁹ It only limits those cases where the parties have chosen the applicable law linking one country to the particular contract through all connecting factors except the voluntary choice itself.¹⁰ The text says that “where all the other elements *relevant* to the situation”

7. The Alnati, Judgment of 13 May 1966, Hoge Raad der Nederlanden, *Nederlandse Jurisprudentie* 1967, 3 (referred to by a French translation in *Revue critique de droit international privé*, 522 (1967) with comment by T. Struycken).

8. Rome Convention, *supra* note 2, at 1493.

9. Regarding the mandatory rules explicitly discussed in Article 7 of the Rome Convention, the mandatory rules of the forum are not directly imposed in the second subsection. Article 7 only states that “[n]othing in this convention shall restrict the application of the rules of the law of the forum when they are applicable irrespective of the law otherwise applicable to the contract.” Rome Convention, *supra* note 2, at 1494. The rules of the forum need not be called upon; they impose themselves beyond this treaty and shall continue imposing themselves beyond a future Regulation on the law applicable to contracts.

10. The official report on the convention, by Professors M. Giuliano and P. Lagarde (*Official Journal* 1980, at p. 18) makes clear the drafters debated the point and wished to assure a broad freedom of choice.

shall be linked to the same country.¹¹ Thus, Article 3(3) leaves open a small amount of uncertainty regarding what might be an “irrelevant” foreign connection, which would still require imposing the rule of mandatory law.¹² It only refers to deviating legislation valid at the time of the agreement. Article 3(3) clearly contemplates cases that are not truly “international.” Notably, it does not justify a country’s desire to impose its own mandatory rules just because an important connecting factor—for example, the principal’s place of business—links the case to that country. Clearly, the application of such a national law is strictly conditioned on *all* the connections pointing in one direction.

A single important connecting factor of a contract with a country does not establish a *predominant* connection with that country. On that basis, judges cannot alleviate a country’s fears of evasion of its mandatory rules. One such serious connecting factor—for example, the place of establishment of an agent in an international agency—might, however, be enough under Article 7 of the Rome Convention.

Notably, neither the conflicts provisions of Article 3(3) nor the rules of Article 7(1)-(2) mention an act of an institution of the E.U. as the source of mandatory rules to be safeguarded. In the case of the E.U. directive, this was transposed into Member States’ national law and, as such, could be implemented as a mandatory national rule. The E.U.’s ambition as a community legislator has made attentive observers note that there was no specific legal ground for making sure that the content of the typical E.U. legislative product would be safeguarded as a public-policy minimum. New developments are further discussed in proceeding sections of this article.

III. EUROPE ACCEPTS UNEQUAL TREATMENT OF JURISDICTION CLAUSES FOR NON-EUROPEAN JUDGES

European treaties and regulations on judicial jurisdiction and on the recognition and enforcement of foreign decisions place private parties who have their place of residence outside of

11. Rome Convention, *supra* note 2, at 1493 (emphasis added).

12. See J.DAVID McCLEAN, MORRIS – THE CONFLICT OF LAWS 259-60 (4th ed. 1993).

the European territory at a disadvantage. Notably, if such a party is called as a defendant before a European court, the national rules of jurisdiction continue to prevail; these rules are known to contain some unilateral grounds for jurisdiction discussed in other parts of this Symposium.

There is another special dichotomy to be found in European law: European law treats the jurisdiction clauses agreed upon by parties quite differently depending on whether the parties chose to bring a dispute in a European forum or before judges of a country outside of Europe. I can illustrate this with a line of Belgian cases.

Since the 1930s, Belgium has had a mandatory rule stating that international maritime transport carriers cannot entirely exempt themselves from any liability for damage caused to transported goods when the shipment either departs from or was destined to arrive in a Belgian harbor.¹³ Belgian judges have said that this rule is mandatory in the international field, and only reluctantly allow parties to sue in other countries over liability in maritime transport for fear that parties may plan to circumvent Belgian law. The mandatory rule is protective of a category of parties that are vulnerable when contracting for a transport agreement, and are in a poor position to negotiate freely with carriers—who are, in fact, an oligarchy.

In 1924, an international conference of maritime powers convened in Brussels and decided that the rule against contractual exculpation needed to be enforced as a mandatory rule. This was the basis for the “Hague Rules” for maritime transport. In the end, however, Belgium was the only country that fully adhered to the Hague Rules by introducing the concept into its national law. Thus, Belgium saw itself as fighting the battle of the righteous, which was not bad for business around the court in its harbor city. Since 1928, Belgium has kept a wary eye on carriers, and its law states: For those shipments that involve Belgian harbors—primarily Antwerp—parties cannot evade the imperative standard of protection for the holder of goods.

13. Code of Commercial, Book II art. 91, § 3, para. 8 (Belg. Maritime Law) (regarding the bill of lading on which carriers would print the Law “Paramount clause”).

In practice, judges want to assure that parties will not run away to more accommodating foreign judges. The enforcement of a substantive policy comes via the control of judicial jurisdiction. In order to imperatively impose the liability rule with regard to transport by sea, the courts of Antwerp, in particular, cannot respect parties' choice-of-court when the choice is for a foreign court.¹⁴ Belgian courts have somewhat distinguished this rejection of clauses that refer disputes to foreign judges and have settled on a conditional imposition of their own mandatory intervention.¹⁵ Furthermore, it is only when the defendant cannot prove to the Belgian court that the foreign judge will show respect and submission to Belgian (originally international) policy in regard to the non-exemption that the foreign forum is considered to be ineffective. This is an example of discrimination between European and non-European countries.

The rule regarding jurisdiction clauses made by parties for the benefit of courts within Europe should no longer be enforced. These clauses give exclusive jurisdiction on the basis of the European Brussels I-Regulation.¹⁶ In effect, the enforcement of Belgian protective practice in cases is only applied where the jurisdiction clauses gave international competence to judges of non-European countries. That is something of an oddity, but it is a reality,¹⁷ and other European countries have their own

14. This non-exemption is similar to what was much later introduced for the protection of consumers against "unfair contract terms."

15. Cour de Cassation (Belgium) June 9, 1932, *Pasicrisie belge* 1932, 183; *Journal des Tribunaux* 1932, 438. See also Cour de Cassation (Belgium) Feb. 2, 1979, *Rechtskundig Weekblad* 1978-1979, 2109; F. Rigaux & G. Zorbas, *Les grands arrêts de la jurisprudence belge-Droit international privé*, Brussels, 1993, 458, comment by Zorbas.

16. See Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 23, 2001 O.J. (L 12) 1; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1998 O.J. (C 27) 1 (relating to relations between parties in other E.U. Member States and parties in Denmark); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 9 (relating to the relations between parties of established E.U. Member States and countries of the European Free Trade Association).

17. Belgian Supreme Court practice has entrenched another similar jurisdictional rejection for fear of denying Belgian distributors all kinds of mandatory protection on the occasion of a unilateral termination of an exclusive distribution

variants.

The practice in Belgium is certainly far from the non-parochial attitude advocated by the U.S. Supreme Court in its landmark decision of *Mitsubishi v. Soler*,¹⁸ in which the Court expressed faith that a rule of U.S. antitrust law—a substantive, mandatory set of rules—would probably not be violated by an arbitral tribunal seated in Japan. The decision expressed confidence that if indeed a foreign tribunal were to violate the mandatory law and disillusion U.S. judges, a reprieve could still be exercised when the foreign decision was imported to the United States for a request of recognition or execution.

IV. EUROPE ADDS A FRESH LAYER OF MANDATORY RULES AND PUBLIC POLICY CONSIDERATIONS

A. *European Legislative Acts Limiting the Binding Power of Agreements*

1. *Strict ECJ-Ruling on the Termination of a Transatlantic Agency*

An important consequence that must be considered is the effect of the European legislative harmonization of national rules, and more specifically, the test with the European Directive¹⁹ on the minimum required rules for the relationship between principal and agent in commercial agency agreements. Europe has harmonized this area of distribution law, and

agreement. The Court says derogation to arbitral tribunals is invalid if they are appointed to resolve a dispute over a distribution agreement that involves distribution of commercial goods on the Belgian market. This is very similar to what was seen in *Ingmar v. Eaton*, *infra* note 14, because the courts want to impose the severance package for the distributor and against eventual agreements by parties that would opt out of those rules by declaring foreign law to apply to the relationship. In addition, it does not trust arbitrators to enforce Belgian mandatory rules. In this aspect, tribunals with a “European” seat and non-European tribunals are treated the same. See J. Erauw, *Private International Law*, in INTRODUCTION TO BELGIAN LAW 439-440 (H. Bocken & W. De Bondt, eds. 2001).

18. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

19. See the Commercial Agents Directive, Council Directive 86/653/EEC, 1986 O.J. (L 382) 17.

reference to distribution agreements shows a consensus with the examples given by Professor Lowenfeld in this Symposium.

In *Ingmar GB Ltd. v. Eaton Leonard Technologies, Inc.*, the ECJ decided the agency issue on November 9, 2000.²⁰ The ECJ said that the contractual choice by an English agent and an American principal to make Californian law applicable to their contractual relationship could not be followed. This was because the freedom of parties must be limited and the terms of their agreement must meet the minimum requirements formulated in a European harmonized set of rules. These rules refer to the “internal” agency relationship between principal and agent and concern the written nature of the agreement, provisions regarding payment of an agent, causes of termination, and other aspects to be discussed further in this article. The European Directive established rules for Member States to introduce in national legislation, and those rules are undoubtedly mandatory because parties may not deviate from them until after a dispute has arisen. The ECJ stated that the minimum requirements of the European Directive needed to be enforced against an explicit party agreement made at the outset because: the rules were harmonized; the rules were a *minimum requirement throughout* the E.U.; and the agent was a corporation established in Britain. Finally, the chosen California law afforded less advantageous compensation to the agent.

The *Eton* Court did not specify why it was necessary to apply the particular mandatory rules to the particular situation of an agent residing and exclusively acting in England. If it had done so, the ECJ would have impressed the need for restraint and discipline in its reasoning that showing it was not concerned with the relevant questions about the real nature of the contacts with California law or the acceptability of the common choice of the parties to a frame of reference or expectation in the non-European law. The court found the connection of the provision of services to the British Isles and Europe to be controlling despite the fact that the seat of the principal was in the United States. The court could have compared the substantive law of California

20. Case C-381/98, *Ingmar GB Ltd. v. Eaton Leonard Technologies, Inc.*, 2001 E.C.R. I-9305, 1 C.M.L.R. 9 (2001).

and then determined whether other connections to California could suffice to allow the parties choice-of-law provision to stand. In contrast, it is possible that if the principal lived in Europe and the agent in California the parties would have been allowed to freely choose the applicable law to govern the agreement. A reasonable conclusion is that there is a notion of normally applicable law such as Article 6 of the Rome Convention—the law the E.U. uses to impose mandatory rules in labor-law relations.

This was indeed *not a case in which the rules of conflict of law* were discussed.²¹ Pitifully, the conflict of law issue was afforded very little respect. Furthermore, considering that there is an entire body of law surrounding the Rome Convention, and more specifically that the law is part of a “European” consensus built on a soon-to-be “European” act of legislation, the ECJ should have shown more deference to the parties choice of law.

2. *E.U.-Harmony Should Not Beg General Orthodoxy for Trans-Frontier Cases*

There may be reasons for some fear of the imposition of a minimum-protection norm for the severance pay of independent agents. While Europe has prioritized some private protection rules regarding commercial agents, unfortunately it has harmonized the field and drawn the line that may become self-righteous and inward-looking in protecting its own policies, no longer accepting deviations for “international” cases that contain a non-European element. If this happens, Europe risks making a simplistic legal deduction: That simply because there was harmonization within Europe, a contractual relationship with

21. In *Ingmar v. Eaton*, *supra* note 20, English national law was at stake, in the way it incorporates the rules of the European Directive on the protection of commercial agents. But I see no indication that English law imposed itself to the English judges from its own accord; English judges referred their request for interpretation to the ECJ in Luxemburg as a question on the field of application of the directive of 1986 and the nature and effects of its dispositions. They merely asked whether or not it followed from the direct applicability of the European Directive that a party reference to lesser protection under California law was allowed. That request invited, perhaps, a unilateral interpretation. Ralf Michaels & Hans-Georg Kamann, *Grundlagen Eines Allgemeinen Gemeinschaftlichen Richtlinienkollisionsrechts—“Amerikanisierung” des Gemeinschafts-IPR?*, EUROPÄISCHES WIRTSCHAFTS & STEUERRECHT, July 2001, at 301.

an outside connection should not be governed by rules of non-European countries.

Because the E.U. is not a state with full legislative authority, it can only legislate when it is habilitated to do so, and—in principle—only when there is a clear need to protect market freedoms.²² European states seem—in the spirit of market integration—to have determined that it is necessary to eliminate or diminish barriers to trans-frontier trade within the European internal market. Commercial representatives might be protected unequally, treated less fairly, or be at a disadvantage when appearing before some national courts or under some national laws. The presumption then would be that such diversity would cause the principals—European or non-European—to prefer agents located in more liberal countries. While the E.U. legislator did act on this issue, it did so by means of a “directive.” Thus, the E.U. actions leave some leeway for national diversity while imposing a minimal content to be respected on a mandatory basis in all of the member-states.

3. *Minimal Requirements for Agents within All of Europe*

There are many social and legislative choices to be made, and the European Directive²³ dictates that in regards to certain rules, Member States may not introduce or lawfully maintain rules of lesser protection for agents.²⁴ For other rules that were necessarily introduced into the Member States’ national law, the Directive indicates that the parties may not deviate from those rules by agreement. In this way, parties cannot validly agree to reduce the agent’s protection:

- by deviating from the rules requiring exchange of

22. Mark Fallon & Johan Meeusen, *Private International Law in the European Union and the Exception of Mutual Recognition*, 4 Y.B. OF PRIVATE INT’L L. 37, 65 (2002).

23. See Council Directive 86/653 of 18 December 1986 on the Coordination of the Laws of Member States Relating to Self-Employed Commercial Agents, 1986 O.J. (L 382) 17. Article 5 allows no deviation from Articles 3 and 4; Article 10(2) and 10(3) refer to the rules in Articles 11(1) and 12, and Article 19 states parties may not deviate from the principles in Articles 17 and 18. *Id.*

24. In this way the crucial aspect of the level of remuneration is guarded. According to article 7 of the European Directive, the Member States even have an option to incorporate in their legislation one of the two possibilities included in the directive. *Id.* The consequences for the mandatory character are not clear to me.

information and honest cooperation;

- by slackening the principal's obligation to warn the agent of an eventual considerable reduction in the number of transactions;
- regarding the foreseen time of remuneration for the services performed as intermediary;
- regarding rules that determine the grounds on which a provision can be denied if the client's transaction falls through;
- regarding the principal's obligation to report sales in a timely manner and the agent's right to certain bookkeeping controls;
- regarding the agent's right to request a written agreement;
- regarding several different minimum terms of advance notice required to terminate the agreement;²⁵
- by deviating, before the agreement is terminated, from the rules of Articles 17 and 18 of the Directive regarding the right to receive equitable payment for new clients and increased business in view of the loss of commissions; or
- by deviating, before the agreement is terminated, from the rules regarding the compensation for disadvantage suffered through the termination (including for termination caused by the death of the agent).²⁶

All the above shall be safeguarded through the E.U. Directive. In the meantime, the payment of remuneration according to the law of the place where the representation takes place shall not diminish the protection under mandatory rules of the Member States.²⁷

25. Some aspects are *not* proclaimed mandatory. For example, the principal's term may not be shorter than the agent's.

26. It is remarkable that in any sort of balanced ensemble, the terms that limit the rights of the agent, such as the statute of limitations, are not mandatory. Only the agent's protection gets categorized as a European policy necessity.

27. It seems one or more rules are not mandatory. Non-compete clauses in contracts must be limited in their binding effect on an agent to two years maximum.

4. *Functioning with a Measure of Diversity and International Flexibility*

It is an exaggeration that Europe's open market and its general social well-being require commercial intermediaries under an international agreement to be unconditionally subjected to imperative rules of protection. International agreements have traditionally been treated with more flexibility than domestic or national contracts. Mandatory rules of minimum protection are not necessarily imposed on situations with a nexus in a foreign country. Even if a rule formed part of what belongs to the public policy (*ordre public*), the imposition of all specific mandatory details may often be unwarranted in many international cases. It is meaningful that numerous dispositions from the E.U. Directive leaves a measure of freedom to the Member States to impose their own surplus of national mandatory protection or to deviate from the imposed minimum by setting a higher level of protection. This shows the major gist of the E.U. legislator's protective intention. It also shows that market harmonization is only a relative concern and merely one guiding principle. The only conclusion that can be drawn is that the common market can function with a relative degree of diversity. When an agency agreement transcends national borders it is logical that the parties should be free to deviate from the protective rules of any single jurisdiction—even if the deviation remains within the jurisdiction of the E.U.

5. *Not so French – Cassation is More Reasonable Than That*

A careful review of the Advocate General and the composition of the court may lead one to conclude that ECJ decisions have a tinge of French *rigueur* with regards to imperative law. Still, there seems to be nothing inexorably French in rejecting party autonomy when independent commercial intermediaries chose U.S. law to govern their agents within the European market. Not even the *règles d'application*

This rule, however, is not explicitly said to be imperative. The Directive does say that Member States may further reduce their effect over time (to the advantage of the agent). Council Directive, *supra* note 21, at 18, 21.

immédiates may be considered inexorably French, because it can be seen that the French Cour de Cassation takes a different view.

On November 28, 2000,²⁸ the French Cour de Cassation made a final decision in a case of an agent for the distribution of American perfumes in France. The contract dated from before 1994, and the French legal dispositions of the commercial code—in compliance with the above-mentioned E.U. Directive—had become applicable by the time the termination took effect at the end of January 1994.

The facts of the case were very similar to *Ingmar v. Eaton*. A U.S. company, Alfin, Inc. of New York, made an agreement with the French company, Allium, for the exclusive representation of the products it had under world license for the entire European territory and Israel. The agreement explicitly stated that the laws of New York would govern the agreement. The relationship was terminated by the successor to the principal, Inter Parfums, and the French agent demanded special compensation or a severance package for clients brought on by the intermediary, under the principle spelled out in French law and originating in E.U. Directive Article 17. This legal theory proposed by the French agent should not have been up for consideration, because it is not based on New York law, or the law agreed upon by the parties.

In the proceedings of the last resort of Cour de Cassation, the French claimant criticized the September 12, 1997, decision of the Paris Court of Appeals, because it succumbed to a theory of honoring parties' expectations based on their agreement. Allegedly, the French agent's commission had been made higher for the duration of the contract, and the agent was presumed to have waived its right to compensation for its new clients when the contract was terminated. The claimant stated that such an approach was in breach of the rule on party autonomy, because French law does not allow the presumption of a silent waiver of rights. The claimant alleged that French law requires agreement after the dispute had arisen. The Cour de Cassation

28. Cour de Cassation (France) 28 November 2000, *Clunet* 2001, 511, with comment by Jacquet.

would not be led down the garden path of the parties' agreement to provide a high commission. Where the invalidity of the silent waiver was waiting in ambush, the highest court simply stated that the Appeals Court had plainly respected the parties' consensus in their agreement to have New York law govern. The earlier decision was upheld. Thus, two prominent courts have now similarly ruled in favor of respecting the right to contract for the applicable law to govern the agreement between international parties.

The decision of Cour de Cassation in France came less than three weeks after the *Ingmar v. Eaton* decision of the ECJ. The French Supreme Court clearly took the opposite view, and this is the wiser decision of the two. The decision of Cour de Cassation demonstrates an international mindset and an openness to the parties' expectations. It says that the rule requiring compensation payment at unilateral termination of the agency agreement was to be qualified as protecting the national public policy of France, but not as a rule of strict compliance for international cases ("*n'est pas une loi de police applicable dans l'ordre international*"). It should always be that simple.

B. Changes in the Future European Regulation on Conflicts in Contractual Obligations

In the future Europe may lose some of the suggestive power and goodwill present in Article 7 of the Rome Convention, unless this disposition is explicitly repeated when the present Rome Convention is replaced by a European Regulation (the so-called "Rome I-Regulation").

Until this point, this article has avoided stating that there is presently no European unity with regard to Article 7(1). Article 7(1) is indeed not applied in all countries of Europe: Germany made the exception at the time of ratification, as did England and Luxemburg. Notwithstanding the German option not to apply Article 7(1), German courts are allowed to show an open attitude toward foreign law. When the private international law of contractual agreements becomes a truly European instrument through the Rome I-Regulation, Article 7(1) will probably be dropped for need of unanimity. At that time, past and present practices in Germany, as well as, German theoretical writings

about this matter will need to be examined. Even without a clear text to introduce this power, judges may still show an openness towards foreign mandatory rules through the occasional application of the general theory of private international law.

Another possible future amendment has some links to that same issue. As previously indicated, Article 3 of the Rome Convention introduces the notion of mandatory rules and states that party autonomy is limited by such public rules in a minor way. A group of legal scholars associated with the “European Group of Private International Law” suggests adding a paragraph in Article 3(3) after the safeguard for national mandatory rules against evasion by the parties. The Group asks to insert the following in the future Regulation:

The fact that the parties have chosen the law of a non-Member State, whether or not accompanied by the choice of a tribunal of a non-Member State, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one or more of the Member States, prejudice the application of the mandatory rules which are contained in or originate in acts of the institutions of the European Community and which are applicable in a Member State whose law would be applicable in the absence of a choice of law by the parties.

The text of the European Group is again very narrow or restrictive in its mandate to impose the “European mandatory rules,” referring only to cases where *no other* connecting factors tie a relationship to a country outside of Europe. It would be best if this remains strictly interpreted as a safeguard exclusively used in those marginal cases that are preponderantly, if not exclusively, connected with Europe—except for the element of volition to apply a non-European law. Such a limitation should not apply to a relationship with a principal established in the United States. But if the future Rome I-Regulation would provide such a reference to those “mandatory rules which are contained in or originate in [European acts that apply],” other persons less sophisticated than the group of scholars may further spread the erroneous idea that all such European acts, including international

agreements, require their rules to apply indistinctively in a mandatory fashion to all European territories.

A principle providing that once a rule is harmonized on the European level it becomes mandatory per se is a strong over-assertion of European rules—even if they contained some aspects of a public policy.

V. MUTUAL RESPECT FOR MANDATORY RULES— EXTRATERRITORIAL REACH OF POLICIES

The rule of Article 7(1) of the Rome Convention on the law applicable to contractual obligations by which a judge may apply the mandatory rules of another country other than that of the country providing the applicable law of the contract. An examination of a U.S.-European case illustrates some of the limits to mutual cooperation. In the *Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V.* case, the question was whether a Dutch judge would respect an American law introducing a pipeline embargo, specifically aimed at a number of separate contracts in the context of the construction of a gas pipeline from Siberia to Czechoslovakia.²⁹ The rule possibly prohibited the delivery to Russia of 2,400 geophones—a seismographic apparatus used to gauge underground conditions—that are useful in the construction of pipelines for oil or gas.³⁰ The American embargo rules are formulated to control foreign subsidiaries of American companies in their extraterritorial field of application.³¹ For that reason, a Dutch

29. *Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V.* [1983] E.C.C. 532, (District Court of The Hague) 17 September 1982, 47 RABELSZ 141, 147–172 (1983) (German translation of the case and the comments by Prof. Jürgen Basedow)

30. The United States had made known its political objections to the need for Europe to remain independent for its energy supply. The United States was against the forced labor on the Soviet side and against propping up the communist system with the transfer of knowledge and monies. Then in 1981, legal action was taken after the Soviets placed their men in Poland. This led to major tensions with European countries, triggering counter-measures in England and France. In England, the counter-measures were based on the Protection of Trading Interests Act 1980. In France, the Government attached the goods and exported them. *See id.* at 151-52. Finally this tension brought about the system of mutual cooperation and controls in the field of goods for military or “dual-use,” under the COCOM Agreement of 1982.

31. *See* Export Administration Regulations, 15 C.F.R. § 385.2(c) (2003). This

company indirectly affiliated with and a licensee of Geosource, a Texas corporation, saw the possibility of its contract to supply seismographs to a French company envisaged by the transatlantic rule. The issue, however, was never properly clarified. Meanwhile, in the United States the company feared sanctions under criminal law if it sold voluntarily.

There was much "to-do" about this decision. The Dutch judge, the president of the court of The Hague sitting in summary (short-trial) proceedings, made a decision on the French buyer's claim for specific performance. The judge mentioned and dutifully analyzed the U.S. Congress's urgent political and legal wish, materializing a very strictly sanctioned rule to not deliver any embargoed appliances to Russia. The Dutch judge also did not respect the foreign mandatory rule in the sense that he would finally enforce it. He did not give-in to the sovereign demand to declare the contract for delivery of the appliances null and void by operation of the application of the U.S. law extraterritorially. There certainly was rhetorical attention for the U.S. law.

There may well have been good reasons for the Dutch court not to submit to the request of the United States and, on the contrary, for enforcing the affiliate's promise to deliver the geophones under the contract to the advantage of the French claimant. The judge's primary motive seems to have been to focus on the incompatibility of the U.S. embargo with rules of public international law.³²

Although foreign (United States) mandatory law was not actually applied in the *Sensor Nederland* case, it is useful to consider this specific example of transatlantic legal relations, as well as other examples. If the governmental policies did not conflict so severely, there may have been an instance of mutual aid toward regulation and enforcement of business transactions. There is a potential for cooperation, but there are certainly limits to the call for judicial compliance and trans-frontier aid in enforcement of legislative policies. The pipeline incident and the

U.S. regulation was, for all due purposes, withdrawn by the Revision of Export Controls Affecting the U.S.S.R. and Poland, 47 Fed. Reg. 51,858 (Nov. 16, 1982) (codified at 15 C.F.R. pts. 379, 385, 390, 399).

32. See also Basedow, *supra* note 30, at 153.

dramatic political tensions created by the extraterritorial ambitions of U.S. law show one view of a defective transatlantic legal cooperation. But, it effectively demonstrates how a judge can undo international political ambitions and can rule rather predictably on the basis of conflict principles and on rules of jurisdictional probity.

VI. CONCLUSION—A PLEA FOR FLEXIBILITY IN INTERNATIONAL CASES WITH A EUROPEAN ELEMENT

It is not certain that Europe will ever legislate only in areas where the opening of the market necessitates specific harmonized legislation. The urge to protect and to intervene by means of formulating substantive rules from the side of the “Brussels” supranational regulator seems greater than that. The theory that national legal rules are only surpassed and replaced if they formed a market hurdle and that maintaining these rules distorts the functioning of the European market or cross-frontier trade is not plausible. European harmonized rules go further in their quest for a socially integrated Europe.

In addition, there is no logic in dispelling in all cases a possible reference by parties to a foreign, non-European legal system. Even if there were an urgent need for European market regulation, this does not lead inevitably to the conclusion that market integration will be distorted if a commercial relationship with connections *ad extra* were judged differently on application of the parties’ free choice for a foreign rule. It seems incorrect to presume that a harmonized rule is, in all cases, an imperative that must necessarily be enforced in relations *ad extra*.

Cases involving the United States or other non-European parties are involved, or cases where trade with the United States or with another non-European country is involved must again be inspected. Respect and openness for foreign rules and expectations must be exemplified. The U.S. Supreme Court has provided an example of international inspiration in the *Mitsubishi* decision, showing a keen sense of the needs of international trade with its open and well phrased rejection of national parochialism. This decision should stand as an example for European states.

The issue of freedom to contract comes sharply to the

forefront in international commercial agreements on agency. Abuse of power by a stronger contracting party or exploitation of the weaker party need not be condoned in all private contracts. However, inequalities in bargaining power of commercial entities will naturally exist. Parties will anticipate the resolution of their disputes by introducing choice-of-law clauses or by formulating jurisdiction clauses. Furthermore, it is advisable for parties to prospectively agree on such legal topics. When parties refer to legal rules that are valid as the “law of the land” in a country that is a major trading partner—speaking of relations between Europe and the United States—one cannot be repulsed as if those foreign rules would be disruptive to the market at all times. If mutual cooperation and trade with a foreign country are to be seen and felt as beneficial, one cannot reject objective rules of law under the pretense of a general public policy exception when a case has appropriate ties to that foreign country. Notions of “national public policy” do not simply apply to all trans-frontier cases.

As indicated above the European Court’s decision in *Ingmar v. Eaton*, of November 9, 2000, was a wrong decision with poorly developed reasoning. The French Cour de Cassation was correct when it contrarily ruled on November 28, 2000. European agents should be held to their agreement with U.S. commercial partners when they chose to be governed by a set of U.S. rules.³³

In a truly *international* contract, one must practice a less self-centered judgment. A legislator may limit the freedom of parties in truly international cases only through concepts that are part of the “international” public policy of a country. This technical expression refers to a category of the most stringent requirements of civil society, which is a smaller core of basic rules. It has long been the practice of the treaties on private international law to restrict deviations from their rules regarding applicable law to the manifest infringement of rules of public policy and to infringements of rules of truly international public policy. The acceptance of “freedom of contract” and the mitigation of the national *ordre public* in international cases

33. Unless there is a case where the U.S. connection lies only in the choice of rules and the E.U. connection is preponderant.

were hard-fought victories for those who championed flexibility in international trade and who hoped for openness and respect for foreign laws. European countries should not try to re-introduce a new rigor through a new concept of “community public policy,” just when separate nation-states have come to accept international flexibility over the private-public divide. The “newer” European rules of a hierarchically higher order than national rules are not to be treated differently in the face of trans-frontier transactions. They are not better suited for trade beyond the European borders than national rules were for a nation’s international business. They are no more chiseled in stone than national laws.³⁴

It should be especially clear to those who practice international commercial law before tribunals of private commercial arbitrators that the ambit of national rules of a public policy nature is in many ways limited. Arbitrators are freer from their allegiance to rules of national law. The rules of arbitral procedure are free of much of what is evidently mandatory in the field of procedural law. Even the national courts of all European nations and of the United States are under the obligation of the U.N. treaty on the mutual recognition of arbitral awards³⁵ to push back national sentiments over the law and to address in a more liberal fashion the requests for respect of a decision taken by a tribunal with seat elsewhere and operating “internationally” under the protection of that convention.

Europe may be presently moving in the wrong direction, and it may be time to stop to reflect. In trans-frontier transactions, mandatory rules—in this case, so-called European public policy rules—will apply only in a more restricted domain. The grounds

34. European law knows the notion of “subsidiarity” and can interchange a European mode of harmonization with national legislation if that level is sufficient to organize the community in a field of its competence. This co-existence of community acts with national legislation should suffice as an argument not to draw conclusions about the fundamental economic nature of the rules, merely judging by their community origin. European states should defend a non-discriminatory treatment under the principles of private international law for the legislative acts at the European level, as well as the national level.

35. Recognition and Enforcement of Foreign Arbitral Awards, Convention of New York, June 10, 1958, 21 U.S.T. 2517, art. V(2).

for denying respect of foreign law in international legal cooperation are limited. It is another debate for another day to determine *which* rules are the truly international rules of public policy generally respected—and to be respected—by the civilized nations of the world.