

Placing choice of law under lockdown: COVID-19 measures and overriding mandatory provisions

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The COVID-19 pandemic has prompted many States, in Europe and beyond, to pass new laws specifically aimed at safeguarding crucial interests. Some of these involve intervention in contractual relations. What attitude are the courts likely to take to the doctrine of overriding mandatory provisions in this scenario? Gordon Nardell QC and Angharad Parry look at the position under the Rome I Regulation.

Most legal systems recognise the freedom of contracting parties to choose the law applicable to their bargain. They may choose the law of a particular territory to regulate risk or to benefit from contract rules they see as commercially more desirable than those in the territory of performance. However, the authorities in that territory may wish to override the parties' choice where there are public interest reasons for doing so. For that reason, rules on conflict of laws generally recognise the principle of "overriding mandatory provisions" of national law, which apply to the contract regardless of the parties' choice. Choice of law often (though not always) aligns with choice of jurisdiction or arbitral seat. So the status of an ostensibly overriding mandatory provision enacted in one territory may have to be determined in a forum in another.

The conflicts rules of EU Member States include the Rome I Regulation (Regulation 593/2008) governing the law applicable to contractual obligations. It applies to contracts concluded on or after 17 December

2009 relating to civil or commercial matters. Unlike the EU jurisdiction and judgments *acquis*, Rome I does not require reciprocity. So EU Member States will continue to apply it to the UK after the Brexit transition period, even though the UK will then be a "third State". Under Article 2, any law specified by the Regulation may be applied whether or not it is the law of a Member State. Rome I will continue to apply in the UK as "retained EU law" after the currently scheduled end of the transition period on 31 December 2020, with amendments made by statutory instrument to ensure it is workable outwith the EU context: see the *Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations* (SI 2019 No. 834).

Rome I accommodates the principle of overriding mandatory provisions. Article 9(1) defines these as "*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 are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation*".

"Lockdowns" resulting from the COVID-19 pandemic have had huge impacts on economic life. Different nations have introduced varying legislative measures to safeguard economic interests, at a business and consumer level. Italy has already self-declared that certain enactments made in response to COVID-19 are overriding

mandatory provisions¹. Capital controls in Greece previously sparked legal consideration of mandatory rules and their interrelationship with the conflict of laws regime. However, the current COVID-19 crisis is of much wider-ranging scope, impacting on many more countries, and resulting in rules proclaimed as "mandatory" affecting numerous different sectors. Indeed, all aspects of economic and political life are currently impacted in the majority of nations. Disputes about the operation of some of these rules are inevitable, making it likely that the doctrine of overriding mandatory rules in this context will shortly require consideration.

Under Rome I, mandatory rules in the legal system of the forum itself are quite straightforward. A court can apply the mandatory rules of its own system to override the choice of law otherwise prescribed by the Regulation. Article 9(2) provides that nothing in the Regulation restricts the application of such mandatory provisions. However, the treatment of mandatory rules of other countries raises more complex issues. Article 9(3) provides that "*effect may be given to the overriding mandatory provisions of the law of the country [of performance] in so far as those... provisions render the performance of the contract unlawful*".

1. Article 28 of Decree-Law 9/2020, which declares performance of certain travel contracts "impossible", requires reimbursement of payments, and proclaims these "overriding mandatory provisions": <https://conflictoflaws.net/2020/italian-self-proclaimed-overriding-mandatory-provisions-to-fight-coronavirus/>

In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”

This is similar to English common law principles establishing that a contract governed by English law will not be enforced where performance of that contract is forbidden by the law of the place of performance (*Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 28; see also *Eurobank Ergasias SA v Kalliroi Navigation Company Limited* [2015] EWHC 2377 (Comm)).

Issues could come before the English courts in the wake of EU Member States' COVID-19 interventions in contractual relations. An obvious example would be a contract with English choice of law and jurisdiction, but with performance due in Italy and prevented by overriding mandatory Italian provisions.

Rome I principles may also mandate a UK or EU court to apply the law of a non-European State (Article (2): see above). This will potentially compel the court to consider whether rules of distant territories in a different factual situation should be considered as overriding and mandatory, and what effect they should be given. For instance, Singapore has enacted the COVID-19 (Temporary Measures) Act 2020, providing temporary relief for those unable to perform their contractual obligations due to the pandemic. How should a foreign court address such matters, particularly where its own national legislation and public policy may differ in its emergency response? For example, would the court recognise a distinction between a rule making performance of a contract unlawful and a rule temporarily barring a claim to enforce it? Can a civil court – or indeed an

arbitral tribunal – deal adequately with argument and evidence about the high-level social and economic consequence of the “application or non-application” of national rules adopted to address the pandemic?

There has not been, in this generation, an event that will have seen the introduction of so many emergency legal provisions addressing the same problems – in different ways – across the globe. We can readily predict that courts will, sooner or later, have to address the fall-out of resulting contractual wrangles. What is less easy to predict is how courts will resolve the complex and sensitive task of addressing other jurisdictions' overriding mandatory provisions.



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Angharad specialises in advisory and advocacy work in a wide range of commercial and private international law disputes concerning litigation and arbitration (both domestic and international). Angharad works with public international law issues arising in a commercial context.

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He formerly served as Leader of the European Circuit of the Bar and as Chair of the Bar Council's EU Law Committee. As well as practising in London and Singapore he is a member of the EU-List of the Dutch Brussels Bar. Gordon is a regular contributor to professional publications and training events.

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