

The Exceptional Exclusion of the Applicable Law in International Trade Contracts. A Comparative Law Study

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Abstract

This study examines, from a comparative perspective, the situations in which the law applicable to international trade contracts may be exceptionally excluded through public policy, overriding mandatory rules, and fraud of the law. The analysis begins from the premise that modern conflict-of-laws rules are the result of a long doctrinal and jurisprudential evolution shaped by the constant interaction between national legislation, international instruments, and the practical needs of cross-border commerce. The comparative method employed relies exclusively on exact normative texts: the Rome I Regulation, the Rome Convention (1980), the CIDIP Convention, as well as the main national codifications in Europe, Asia, and North America. The research findings reveal the existence of a functional convergence among major legal systems: the standard of manifest incompatibility, the autonomous definition of overriding mandatory provisions, and the sanctioning of artificial legal behavior constitute shared reference points. Although the substantive content of these mechanisms remains national, their legal structure has become largely uniform. The main implication is that contemporary private international law of contracts provides a predictable and coherent framework capable of balancing party autonomy with the protection of essential state interests.

Keywords: *lex contractus; conflict of laws; public policy; overriding mandatory provisions; fraud of the law.*

JEL Classification: K12, K22, K33

1. Introductory considerations. The methodological premise of the study

The determination of the applicable law is one of the central operations of private international law, since through the conflict-of-laws rule the legal system called upon to govern a cross-border legal relationship is identified. In the field of international trade contracts, this operation acquires heightened significance, as the dynamics of global economic relations require both respect for party autonomy and the protection of the fundamental interests of states and of the international legal order.

Ordinarily, the *lex contractus* is determined either by the will of the parties or, in the absence of an *electio juris* clause, by the objective criteria established in the conflict-of-laws rule. However, the application of the chosen law is not absolute. Any modern system of private international law provides mechanisms for limiting the application of foreign law when that law contradicts the essential values of the forum, undermines imperative state interests, or results from an artificial manipulation of connecting factors. Within this sphere lie the three classical institutions: international public policy, overriding mandatory rules, and fraud of the law.

The evolution of conflict-of-laws rules shows that these mechanisms are not isolated peculiarities of any particular legal system, but the expression of a broader

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process of convergence. Influenced by international conventions and cross-border commercial practice, conflict-of-laws solutions have progressively refined, and a common core of concepts and interpretative techniques has emerged among legal systems. Although not fully uniform, contemporary terminology is largely compatible, and the general lines of development are convergent, reflected in European instruments (the 1980 Rome Convention, the Rome I Regulation), in Inter-American conventions (CIDIP), and in modern codifications of private international law.

Starting from this premise, the present study aims to examine, from a comparative perspective, the situations in which the law applicable to an international trade contract may be exceptionally excluded. The analysis does not seek a formal juxtaposition of solutions, but rather an exploration of the internal logic of each mechanism and the manner in which it reflects the balance between party autonomy and the protection of essential state interests. By examining the principal international instruments and the solutions endorsed in the domestic law of states belonging to different legal traditions, the study highlights both the points of convergence and the particularities that shape the contemporary application of these mechanisms in the context of international trade.

2. *Lex causae* and its natural limits in the field of international trade contracts

The determination of the law applicable to an international contract constitutes the central step of the conflict-of-laws analysis, as it identifies the legal system called upon to govern the formation, validity, interpretation, and performance of the contract. In international trade, this operation acquires particular importance because the contract is the fundamental mechanism through which the cross-border circulation of goods, services, and capital is achieved. Accordingly, whether designated by the parties' will or identified through the objective criteria established by conflict rules, the *lex contractus* must be understood within the logic of a legal system that combines contractual freedom with the protection of the essential interests of states.

2.1. Determining the *lex contractus*

Choice of law (lex voluntatis). Party autonomy is the fundamental rule governing international contracts. The parties are free to designate the applicable law, and this freedom is recognized in major international legal instruments, from the 1980 Rome Convention² to the Rome I Regulation³ and the Inter-American conventions. At the core of this principle lie two imperatives: predictability of the contractual relationship

² The Convention on the Law Applicable to Contractual Obligations (Rome, 1980) was opened for signature to the Member States of the Treaty of Rome establishing the European Community. The Romanian legislator used the text of the Convention as a source of inspiration when drafting Law No. 105/1992 on the regulation of private international law relations (at that time Romania was an associate state of the European Union). See Brândușa Ștefănescu (coord.), Charlotte Ene, Ana Maria Lupulescu and Brândușa Vartolomei, *Dreptul comerțului internațional [International Trade Law]*, Lumina Lex Publishing House, Bucharest, 2003, p. 104.

³ 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), Official Journal of the European Union L 177/6, 6–16.

and the neutrality of the conflict-of-laws mechanism in the context of international commercial mobility⁴.

However, party autonomy is not absolute. Choice of law is possible only when the relationship presents a genuine element of foreignness; in its absence, an *electio juris* clause cannot transform a domestic contract into an international one⁵. Moreover, the will of the parties cannot exclude the overriding mandatory rules of the forum or of a state with a determinative connection to the dispute. Certain fields — consumer protection, employment, insurance — are governed by special regimes in which party autonomy is expressly restricted.

Determining the applicable law in the absence of choice. When no *electio juris* clause exists, conflict-of-laws rules determine the applicable law through objective criteria that are widely harmonized across modern private international law systems.

a) *The Rome I Regulation.* The Regulation transforms the traditional presumption of the characteristic performance into a more structured and predictable system. Article 4(1) establishes fixed conflict rules for eight types of contracts, generally connecting the *lex contractus* to the habitual residence of the party performing the characteristic obligation.

For atypical or hybrid contracts, Article 4(2) maintains the characteristic-performance rule, thereby strengthening the coherence of the system. In addition, Articles 4(3)–(4) codify the “closest connection” escape clause, allowing the court to displace the general rule when the circumstances manifestly indicate a stronger connection with another state. This carefully calibrated supplement ensures the necessary flexibility without sacrificing predictability, reinforcing the functional logic of the characteristic-performance rule.

b) *The CIDIP Convention.*⁶ Unlike the detailed structure of Rome I, the Inter-American Convention (CIDIP) adheres directly to the principle of proximity. In the absence of party choice, the contract is governed by the law of the state with which it has the closest ties (Art. 9.1). CIDIP does not establish presumptions, nor does it operate with lists of predetermined types of contracts; the court determines the *lex contractus* based on all relevant objective and subjective elements (Art. 9.2). This approach yields greater flexibility but also greater variability in practice, reflecting a less formalized conflict-of-laws conception than the European model.

c) *The Romanian Civil Code* Article 2.641 aligns with both systems by adopting the rule of the closest connection, applied primarily through the characteristic-performance criterion. When the circumstances clearly indicate a predominant connection with another state, Romanian law allows the application of that state’s law, incorporating both the logic of flexibility and that of proximity. Thus, the Romanian

⁴ Bogdan Cristian Trandafirescu, *Cadrul uniform al contractului de comerț internațional [Uniform framework of international trade contract]*, Universul Juridic Publishing House, Bucharest, 2019, pp. 35–38, 123–126.

⁵ *Ibid.*, pp. 27–30.

⁶ The Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994) The Mexico City Convention (CIDIP Convention), signed on 10 March 1994 and entered into force on 15 December 1996 binds the member states of the Organization of American States (OAS). See Brândușa Ștefănescu, „Considerații asupra soluțiilor legale uniforme vizând legea aplicabilă contractului de comerț internațional” [„Considerations on uniform legal solutions regarding the law applicable to international trade contracts”], *Revista Română de Drept Privat* no. 6/2007.

solution occupies a balanced position between the structured system of Rome I and the more flexible CIDIP model.

2.2. The limits of the *lex contractus*

The determination of the *lex contractus* does not ensure its absolute application. Modern private international law systems recognize three mechanisms through which the designated law may be wholly or partially excluded when its application would produce effects incompatible with the internal legal order or with the imperative interests of a state.

International public policy. Public policy allows the exclusion of foreign law when its application would lead to a result contrary to the fundamental values of the forum. The mechanism is exceptional and applied restrictively, serving as a final safeguard for the coherence of the domestic legal order.

Overriding mandatory rules (*lois de police*). These rules apply irrespective of the *lex contractus*, as they express essential interests of the forum or of another state with a determinative connection to the case. They limit both party autonomy and objective conflict rules, enjoying absolute priority within the legal relationship.

Fraud of the Law. Fraud sanctions the artificial manipulation of connecting factors or the strategic use of a foreign law for the purpose of circumventing imperative rules that would naturally have applied. Present in most modern national codifications, this mechanism protects the integrity of the conflict-of-laws method and delineates the legitimate exercise of party autonomy from its abusive uses.

3. The public policy exception

3.1. Concept and function

Public policy in private international law constitutes the mechanism through which the forum state may refuse to apply the foreign law designated by the conflict-of-laws rule when its effects would contravene the fundamental principles of the domestic legal order. It is not a rule for determining the applicable law, but an external limitation on the application of the *lex causae*, designed to safeguard the essential values of the national legal system in its interaction with foreign law.

Its nature is strictly exceptional. Mere divergences between the content of foreign law and domestic law do not justify its invocation; the application of the foreign law must, in the concrete case, lead to a result incompatible with the fundamental principles of the forum. In this logic, international public policy does not coincide with internal public policy: it operates only when a legal relationship contains a foreign element, and the standard of incompatibility is interpreted restrictively.

The content of international public policy is relative, shaped by both the normative structure of each state and the evolution of legal values. For this reason, modern legislation and doctrine insist on the prudent and balanced application of the mechanism, so as not to undermine the functioning of conflict-of-laws rules or the

openness of the legal system to the application of foreign law⁷.

3.2. The public policy exception in international regulatory instruments

The Rome I Regulation (EC) No. 593/2008. Rome I enshrines the public policy exception in Article 21, which provides: “The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (public order) of the forum.”

The formulation highlights two defining elements:

- The high threshold of incompatibility (the adverb “manifestly”) restricts the scope of the mechanism and imposes a rigorous justification.
- Focus on concrete effects — incompatibility is assessed by reference to the consequences of applying the foreign law in the particular case, not to abstract differences between legal systems.

Comparison with the 1980 Rome Convention (Art. 16). The 1980 Rome Convention stated: “The application of a rule of the law of any country specified by this Convention may be refused if such application is manifestly incompatible with the public policy of the forum.”

By explicitly introducing the term manifestly incompatible, Rome I narrows the possibility of intervention by the forum and strengthens predictability in international contract law. The evolution from the 1980 text to the 2008 Regulation reflects the maturation of the European conflict-of-laws technique.

The Inter-American Convention (CIDIP). The Inter-American Convention on the Law Applicable to International Contracts (Mexico, 1994) regulates the intervention of public policy through Article 11: „, (1) Notwithstanding the preceding articles of this Convention, the provisions of the law of the forum shall apply when they are mandatory rules. (2) The forum shall decide whether to apply the mandatory rules of another State with which the contract has close ties.”

Unlike the European model, CIDIP does not enshrine an autonomous public policy exception, but integrates it into the regime of overriding mandatory rules. Consequently:

- Public policy operates through the *lois de police* of the forum;
- The application of foreign mandatory rules is left to judicial discretion.

The structure differs, but the underlying purpose remains the same: preventing results incompatible with the fundamental values of the forum.

1955 Hague Convention on the Law Applicable to International Sale of Goods. Article 6 provides: “The application of the law designated by this Convention may be excluded only if such application would be manifestly incompatible with public policy.”

This convention is one of the earliest modern codifications to adopt the “manifest incompatibility” standard. It anticipates the evolution later followed by the Rome Convention (1980) and consolidated in Rome I.

1985 Hague Convention on the Law Applicable to Trusts and their Recognition. Article 18 states: “The application of a provision of the law determined by

⁷ Bianca Maria Carmen Predescu, *Drept internațional privat. Partea generală* [Private International Law. General Part], Wolters Kluwer Publishing House, Romania, 2010, pp. 361–376.

this Convention may be refused only if its application is manifestly incompatible with public policy.”

Even though it concerns a specific institution (the trust), the convention confirms the same coordinates:

- preservation of conflict-of-laws autonomy (the designated law is respected);
- public policy intervenes only as a last-resort mechanism.

Common characteristics identified in international conventions. Analysis of these conventions reveals several features relevant to international trade contracts:

- terminological convergence - most international instruments adopt the “manifest incompatibility” standard, reflecting a global process of conceptual harmonization;

- assessment based on concrete effects, not abstract discrepancies;
- emergence of a “conventional model of public policy” in private international law - subsequently adapted in European instruments (Rome I) and echoed in modern national codifications.

3.3. The public policy exception in national conflict-of-laws systems

Romania. Civil Code (Book VII) The regime is codified in Article 2564: “The application of foreign law shall be excluded if it is manifestly incompatible with the public policy of Romanian private international law.” The text faithfully adopts the European standard of manifest incompatibility and confirms the exceptional nature of the mechanism. The Romanian Civil Code maintains the classical distinction between domestic public policy and international public policy.

France. Although not expressly codified in the Civil Code, the principle is firmly established in jurisprudence: foreign law is not applied when its effects are incompatible with French public policy. Originating in the doctrinal tradition of Bartin and the French school, the mechanism protects values intolerable to the legal conscience of the forum. French courts use it sparingly, especially in contractual matters, applying it only in cases of serious violation of essential principles (e.g., human dignity, substantive freedom of contract, severe consumer protection concerns)⁸.

Italy. Law No. 218/1995 Article 16 provides: “Foreign law shall not apply if its effects are contrary to public policy.” Emphasis on effects aligns the Italian system with the modern European approach, despite the conciseness of the wording.

Belgium. Belgian Code of Private International Law (2004) Article 21 states: “The application of foreign law shall be refused if its effects would be manifestly incompatible with public policy.” The Belgian Code is one of the most coherent European codifications. The use of the term manifestly reinforces the exceptional and last-resort character of the mechanism.

Germany. EGBGB (Introductory Act to the Civil Code) Article 6: “A provision of foreign law shall not apply if its application would lead to a result manifestly incompatible with the fundamental principles of German law.” This is one of the clearest formulations in Europe, emphasizing protection of fundamental principles.

⁸ Henri Batiffol and Paul Lagarde, *Droit international privé*, vol. 1, 8^e éd., LGDJ, Paris, 1993, pp. 434–441; Bernard Ancel and Yves Lequette, *Les grands arrêts de la jurisprudence française de droit international privé*, 6^e éd., Dalloz, Paris, 2018, pp. 57–63.

Russia. Civil Code (Part III) Article 1193: “Foreign law shall not apply if its consequences are clearly incompatible with the foundations of the legal order of the Russian Federation.” Although the terminology (“foundations of the legal order”) may appear broader, practice remains restrictive. The mechanism aligns, functionally, with the European model.

Turkey. Law No. 5718/2007 Article 5: “Foreign law shall not apply if it is contrary to Turkish public policy.” Despite its brevity, judicial interpretation synchronizes with the continental tradition: only grave incompatibility triggers intervention.

Japan. Act on General Rules of Application of Laws (2006) Article 42: “A provision of foreign law shall not apply if its effects are contrary to the public policy of Japan.”

China. Law on the Application of Laws to Foreign-Related Civil Relations (2010) Article 5: “A foreign law shall not apply if its application would violate the public policy of the People’s Republic of China.”

United States. Restatement (Second) of Conflict of Laws Although there is no federal conflicts code, § 90 provides: “A foreign law will not be applied if its application would violate a fundamental public policy of the forum.” The American standard focuses on “fundamental public policy,” functionally equivalent to the European conception.

4. Overriding mandatory provisions (*lois de police*)

4.1. Concept and function

Overriding mandatory provisions, known in the specialized literature as *lois de police* or overriding mandatory rules, constitute that category of domestic rules whose application is required irrespective of the law designated as *lex contractus* by conflict-of-laws rules. They reflect essential interests of the state or of its economic and social order and, for this reason, prevail over foreign law without directly challenging the effectiveness of the conflict-of-laws rule.

Unlike international public policy (which functions as a mechanism to exclude foreign law only in cases of manifest incompatibility), overriding mandatory provisions operate directly and affirmatively as *lex fori*. They do not reject foreign law in its entirety; rather, they intervene selectively to regulate a specific component of the legal relationship whenever the legislator has determined that certain interests cannot be left to party autonomy or to the classic allocation of conflict-of-laws competencies.

Their character is imperative, direct, and autonomous: they apply without undergoing the conflict-of-laws test, without requiring a procedure of exclusion, and irrespective of the parties’ will. In international trade contracts, their role is essential in areas such as competition protection, foreign exchange regulation, export controls, consumer protection, mandatory tax rules, or anti-money laundering provisions.

The underlying logic of these rules lies in the protection of the “vital interests” of the forum, an idea consistently reflected in international instruments and modern national legislation⁹.

⁹ Stéphane Chatillon, *Le contrat international*, 2^e éd., Vuibert, 2006, p. 270; Jean-Michel Jacquet, Philippe Delebecque and Sabine Corneloup, *Droit du commerce international*, 1^{ère} éd., Dalloz, Paris, 2007, 216–231;

4.2. International instruments

Rome I Regulation (EC) No. 593/2008. The comprehensive regime of overriding mandatory provisions is found in Article 9, one of the most sophisticated conflict-of-laws texts in contemporary legislation. Article 9(1) defines overriding mandatory provisions 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 organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”

This definition emphasizes their crucial nature, which distinguishes them from ordinary domestic mandatory rules.

Article 9(3) introduces the possibility (not an obligation) for the court to apply overriding mandatory provisions of another state: “Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.”

The discretionary nature of applying foreign mandatory provisions reflects the balance between respecting the forum’s legal system and the dynamics of international commercial relations. This solution differs subtly from the public policy mechanism: no manifest incompatibility with fundamental values is required; what matters is the function of the rule and the connection of the contract to the state concerned.

Comparison with the 1980 Rome Convention (Art. 7). Article 7 of the Rome Convention anticipated this mechanism by defining overriding mandatory rules and introducing, for the first time, the possibility of recognizing foreign mandatory provisions. Rome I refines and clarifies the concept, providing a more coherent legal structure and a better-defined judicial control.

Inter-American Convention (CIDIP), Mexico City 1994. Article 11 of the Inter-American Convention states: “The provisions of the law of the forum shall apply whenever they constitute overriding mandatory rules. The court may apply the overriding mandatory provisions of the law of another State with which the contract has close ties.”

CIDIP does not formally distinguish between public policy and overriding mandatory rules; the entire protective function of the forum is absorbed into Article 11. From this perspective, CIDIP resembles the model of the Rome Convention, although in a less conceptually refined form. In contractual matters, CIDIP confirms the central role of the forum’s overriding mandatory rules and grants the court broad discretion in applying foreign ones, emphasizing the flexible nature of the Inter-American system.

4.3. Solutions in national private international law

Romania. Civil Code (Book VII) The regime is codified in Article 2565: “The imperative provisions of Romanian law shall apply irrespective of the law governing the private international law relationship.” The text adopts the consolidated European

terminology, particularly that of Article 9(2) of Rome I, and reflects the idea that certain domestic rules are so closely linked to the structure of Romania's legal order that they cannot be displaced by the parties' choice of law or by the conflictual designation of foreign law. Their application is direct and autonomous, without requiring a compatibility test, as in the case of public policy. In international commercial contracts, these provisions concern foreign exchange regulation, economic control measures, competition law, and certain consumer protection aspects.

France. In French law, overriding mandatory provisions (*lois de police*) are not expressly defined in the Civil Code but are firmly shaped through case law and doctrine. The concept originates from the classical French tradition, which established that certain provisions of French law apply necessarily, regardless of the *lex contractus*, when they protect essential interests of the legal order. French courts consider *lois de police* those norms expressing fundamental legislative choices, such as economic regulation, labour law, specific rules on commercial distribution, or anti-fraud measures. Their application in international commercial matters is selective but firm wherever the state has identified a priority national interest¹⁰.

Italy. Law No. 218/1995, Article 17 provides: "The imperative provisions of Italian law shall always apply, as well as, where appropriate, the imperative provisions of another State with which the relationship has a close connection." Italy adopts a formulation nearly identical to Rome I Article 9(3): the forum's *lois de police* apply absolutely, while the court may apply foreign overriding mandatory provisions if the contract is sufficiently connected to that state. The text is one of the most modern in Europe and is frequently cited in comparative law studies.

Belgium. Belgian Code of Private International Law (2004) Article 20 states: "Provisions considered by Belgian law to be overriding mandatory provisions shall apply regardless of the law designated."

Germany. EGBGB (Introductory Act to the Civil Code) Article 9 provides: "Those provisions of German law which must be applied irrespective of the law governing the relationship shall always apply."

Russia. Civil Code of the Russian Federation (Part III) Article 1192 provides: "Provisions of Russian law which, by virtue of their purpose, must be applied irrespective of the foreign law designated shall apply in all cases." This formulation explicitly recognizes a core of domestic rules hierarchically superior to foreign law.

Turkey. Law No. 5718/2007 Article 6 provides: "The imperative provisions of Turkish law shall apply irrespective of the foreign law governing the relationship."

Japan. Act No. 78/2006 (Hōrei) Article 11 states: "The provisions of Japanese law which must necessarily be applied in view of their purpose shall apply irrespective of the foreign law designated."

China. Law on the Application of Law to Foreign-Related Civil Relations (2010) Article 4 provides: "The provisions of Chinese law which must be applied mandatorily shall apply irrespective of the foreign law designated." China relies on this category especially in currency regulation, foreign investment control, protection of fundamental economic interests, and strategic trade rules.

United States. Although the U.S. lacks a unified federal conflicts code, the

¹⁰ Ibid.

concept of overriding mandatory rules appears in case law and in the Restatement (Second) of Conflict of Laws. Numerous courts apply the forum's mandatory rules when they express an "essential public policy," especially in consumer protection, labour law, antitrust regulation, and financial supervision. The American approach is pragmatic and case-based, but its functional role mirrors that of overriding mandatory provisions in continental systems.

5. Fraud of the law in private international law

5.1. Concept and function

Fraud of the law is the mechanism through which one or both parties to a legal relationship attempt, through voluntary and artificial manoeuvres, to divert the normal functioning of conflict-of-laws rules by avoiding the application of the law that would be naturally competent and replacing it with another law perceived as more advantageous.

Unlike public policy in private international law — which operates upon the foreign law designated objectively — and unlike overriding mandatory provisions — which apply directly, *ex officio* — fraud of the law concerns the conduct of the parties, not the content of the law. The mechanism sanctions the abusive use of the freedoms provided by the conflict-of-laws system (mobility of connecting factors, choice of law, relocation of headquarters, etc.), when such use aims at circumventing an imperative legal provision.

In essence, fraud of the law consists in the artificial creation or manipulation of a connecting factor for the purpose of avoiding the law that would normally have been competent. The specific consequence is the reinstatement of the law that would have applied in the absence of the fraudulent manoeuvre¹¹.

5.2. International instruments

Rome I Regulation (EC) No. 593/2008. The Rome I Regulation does not expressly enshrine the concept of fraud of the law, yet it is recognised as a general principle of European private international law. Implicitly, the mechanism arises from the structure of Articles 3 and 4. Article 3 allows the parties to choose the law applicable to the contract, but this freedom operates within the limits of public policy and overriding mandatory rules, while Article 4 establishes the objective criteria for determining the applicable law in the absence of choice.

Fraud of the law intervenes when a party artificially alters one of these criteria (for example, a fictitious relocation of headquarters or the formal designation of a place of performance) in a way that conflicts with the purpose of the Regulation. Case law of the Court of Justice of the European Union recognises the general principle prohibiting abuse of rights and artificial conduct in the context of fundamental freedoms, a principle that applies *mutatis mutandis* to conflict-of-laws mechanisms.

Although not expressed textually, fraud of the law is regarded as an inherent

¹¹ Ion Macovei, *Drept internațional privat [Private international law]*, C.H. Beck Publishing House, Bucharest, 2011, pp. 79–84.

limitation of conflict-of-laws autonomy, arising from the nature of the European rules themselves.

Similarly, *the 1980 Rome Convention* did not contain an explicit provision on fraud of the law, but both doctrine and the practice of contracting states recognised the mechanism as intrinsic to the structure of the Convention.

Inter-American Convention (CIDIP), Mexico City 1994. CIDIP does not expressly regulate fraud of the law, but the solution follows from Article 9 (the closest connection rule). If the parties attempt to create artificial connections with another state in order to avoid the naturally competent law, the court is free to disregard the formal element and apply the law of the state with real and substantial ties to the contractual relationship.

5.3. Solutions in national private international law

Romania. The Civil Code expressly recognises fraud of the law in Article 2570: “Foreign law shall not apply when the foreign element has been created artificially for the purpose of removing the relationship from the application of Romanian law.” The Romanian legislator explicitly identifies the essence of fraud: the artificial creation of the foreign element and the intention to evade the competent law. The mechanism operates by reinstating Romanian law or the law that would have objectively applied absent the fraudulent act.

France. In French law, fraud of the law is a classic jurisprudential creation (the celebrated case *Princesse de Beaufremont*¹²). Courts sanction any artificial modification of a connecting factor when the principal purpose is the evasion of French law. Fraud does not require a total absence of connections with the chosen state, but rather the predominantly artificial and instrumental nature of the party’s conduct. In international contract law, fraud of the law is rarely invoked, but the principle remains fully operative.

Italy. Law No. 218/1995 Fraud of the law is regulated by Article 18: “Foreign law shall not apply when the foreign element has been created fraudulently for the purpose of avoiding Italian law.” Italian doctrine emphasizes that fraud concerns not only the choice of law but any manipulation of relevant connecting factors (seat, place of performance, formal designation of a contractual element).

Belgium. Belgian Code of Private International Law (2004) Article 30 provides: “The parties may not rely on foreign law when the foreign element has been created fraudulently for the purpose of avoiding the law normally applicable.” Belgium adopts a strict but classical approach: the decisive criteria are the artificial character of the foreign element and the intent to circumvent the competent law. The regulation is modern and aligned with the Italian and Romanian models.

Germany. EGBGB Although the EGBGB does not contain a distinct article on fraud, German doctrine and case law recognize the mechanism as a general principle of conflict of laws. German courts sanction artificial conduct aimed at diverting the conflict rule, reinstating the objectively competent law. The German system is especially sensitive to the economic coherence of the legal relationship, and fraud is identified when the parties’ arrangement does not reflect the economic reality of the contract.

¹² Bertrand Ancel and Yves Lequette, *Les grands arrêts de la jurisprudence française de droit international privé*, 5^e éd., Dalloz, Paris, 2006, pp. 47–59.

Russia. Civil Code Fraud of the law is regulated in Article 1192(2), which provides that foreign law does not apply if the foreign element was abusively created to avoid Russian law. The text combines the idea of fraud with that of public policy in a manner characteristic of Eastern European systems.

Turkey. Law No. 5718/2007 Turkish law recognises fraud of the law implicitly: courts apply Turkish law whenever they observe that the foreign element has been introduced artificially. The trend resembles the Italian model, both in reasoning and in legal effect.

United States. The Restatement (Second) of Conflict of Laws recognises the phenomenon under the heading “evasion of law.” The American system is highly pragmatic: what matters is the economic reality of the relationship, not the formal declarations of the parties.

6. Interactions, distinctions, and hierarchies among the mechanisms for setting aside the applicable law

The three mechanisms examined (international public policy, overriding mandatory provisions, and fraud of the law) pursue, in different ways, the protection of the coherence of the domestic legal order in its relationship with foreign law. Although they may produce convergent effects, their legal nature, function, and moment of intervention are distinct. Understanding these differences is essential for the correct application of private international law, particularly in the field of international trade contracts, where the balance between party autonomy and the imperatives of the legal order is delicate.

6.1. Interactions and areas of overlap

There are situations in which these mechanisms appear to lead to the same result: the replacement of foreign law or the limitation of its application. A Romanian statutory provision may be characterized either as an overriding mandatory rule or as an expression of public policy, and certain circumstances may also be analyzed through the lens of fraud of the law. Even in comparative law, the dividing line is not always rigid, and judicial practice often focuses on the underlying purpose: avoiding effects incompatible with the legal structure of the forum or with the principles that inform the conflict-of-laws system.

Substantively, the three mechanisms protect similar values: the integrity of the economic order, essential state interests, and the fairness of the parties’ conduct in international relationships. Accordingly, one may speak of a functional area of overlap, even though the legal techniques differ.

6.2. Essential distinctions

International public policy is a negative mechanism that intervenes solely to exclude the application of a provision of foreign law when its effects would be manifestly incompatible with the fundamental values of the forum. It operates *ex post*, after the *lex contractus* has been determined, functioning as a final filter. The interest protected is the

axiological core of the domestic legal order, and its application is strictly exceptional.

Overriding mandatory provisions (*lois de police*) constitute a positive mechanism through which the state directly and unconditionally imposes its own crucial rules. They operate *ex ante*, before the application of foreign law, and without requiring any incompatibility test. The interest protected is normative and institutional: the economic, political, or social regime that the state considers indispensable.

Fraud of the law is a mechanism that sanctions the behavior of the parties, not the content of the foreign law. It intervenes when a connecting factor has been artificially manipulated to avoid the law that would naturally have been competent. Fraud reinstates the law that was improperly displaced, restoring the balance of the conflict-of-laws system. It protects the integrity of the conflict-of-laws method and the loyalty of international legal relationships.

These distinctions show that although the mechanisms may intersect, their object, function, and moment of application are fundamentally different.

6.3. Hierarchy among the mechanisms

In contemporary private international law, a functional hierarchy has emerged, even if it is not always normatively explicit:

a) Overriding mandatory provisions possess the highest legal force, as they apply directly, irrespective of the *lex contractus*. They express the state's intention to safeguard interests it considers non-negotiable.

b) International public policy intervenes only when the application of foreign law would be intolerable in light of the fundamental principles of the forum. It is a residual, last-level mechanism designed to prevent outcomes incompatible with essential state values.

c) Fraud of the law protects the internal coherence of the conflict-of-laws system and sanctions the abusive use of the freedoms provided by that system. It reinstates the law that would naturally have applied, yet it does not express a normative priority of the domestic law over the foreign law; instead, it controls the parties' conduct.

Through this hierarchy, the mechanisms complement each other: overriding mandatory provisions affirm the legislative sovereignty of the forum; public policy safeguards its fundamental values; fraud of the law preserves the integrity and proper functioning of conflict-of-laws rules.

Overall, these mechanisms are not parallel but convergent. Overriding mandatory rules express direct legislative choices; public policy protects the ultimate values of the forum; fraud of the law maintains the structural integrity of the conflict-of-laws architecture. Through their interaction, they define the framework within which the *lex contractus* effectively applies and delineate its limits with precision, proportionality, and fidelity to the logic of international legal relationships.

6.4. The Rome I Regulation and national legal systems

The Rome I Regulation, having direct and overriding applicability in the law of Member States, establishes the exclusive framework for determining the law applicable to contracts with a foreign element. National conflict-of-laws rules no longer operate as

a primary source, but only in areas not harmonized by the Regulation. This methodological discipline also extends to the mechanisms for setting aside the applicable law: Articles 9 and 21 of Rome I define the institutional structure, but the substantive content of these institutions remains national.

Thus, the relevant public policy under Article 21 is the international public policy of the forum, and the overriding mandatory provisions contemplated by Article 9(2) are likewise those of the judge's state. The optional application of foreign overriding mandatory rules (Article 9(3)) is also filtered through domestic law. Fraud of the law, not expressly regulated in Rome I, remains an exclusively national institution, operating as an implicit limit on conflict-of-laws autonomy.

Rome I establishes the mechanisms for setting aside the applicable law, but it does not harmonize their substantive content. The European judge applies Rome I to determine the *lex contractus*, but identifies public policy, overriding mandatory rules, and fraud of the law within the law of the forum, within the boundaries drawn by the Union instrument.

7. Conclusions

The evolution of modern private international law shows that the conflict rules applicable to international trade contracts are not spontaneous creations of the legislator, but the outcome of a long process of doctrinal, jurisprudential, and legislative sedimentation. The determination of the *lex contractus* and the mechanisms for excluding certain provisions of the competent law have taken shape over time through constant interaction between legal scholarship, judicial practice, national legislation, and international conventions, and were later refined and consolidated — at the European level — within the structure of the Rome I Regulation.

This dynamic, marked by successive movements of advance and retreat, has enabled the crystallization of conflict-of-laws solutions which, although originating in different legal systems, now share a common language, a similar technique, and a convergent underlying philosophy. Whether a state applies a convention, the Rome I Regulation, or its own domestic legislation, the logic of these rules is today remarkably aligned: the same criteria for determining the applicable law, the same concern for the stability of legal relationships, and the same conceptual architecture governing the limits of applying foreign law.

The three mechanisms for setting aside the applicable law — public policy, overriding mandatory provisions, and fraud of the law — confirm this structural proximity. In modern systems, public policy acts as a final filter, limited strictly to situations of manifest incompatibility with the forum's fundamental values. Overriding mandatory provisions express the state's determination to protect its essential economic and social interests, applying directly and autonomously. Fraud of the law sanctions the artificial use of the freedoms offered by the conflict-of-laws method, preserving the integrity of its functioning. Although these mechanisms take different forms from one jurisdiction to another, they share, in essence, the same structure and the same function.

At the European level, the Rome I Regulation has accelerated this convergence by imposing a unified framework for determining the *lex contractus* and disciplining the operation of exclusion mechanisms. Nevertheless, the Regulation does not harmonize

the substantive content of public policy or overriding mandatory rules; it harmonizes only their mode of operation. The substance remains national, yet the legal operation through which the court applies them is structured by European principles. Thus, national law and Union law do not stand in opposition but coexist in a methodological equilibrium, each fulfilling its own role within a coherent conflict-of-laws architecture.

Globally, private international law in the field of international trade contracts has evolved towards functional uniformity. This is not a unification, but rather a sufficiently strong compatibility that renders solutions predictable, coherent, and recognizable across legal systems. The criteria are similar, the underlying philosophy is shared, and the outcomes — though not identical — tend to converge. This convergence supports the affirmation of a “common core” of conflict-of-laws rules in contractual matters, the product of continuous doctrinal and institutional maturation.

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