

OVERRIDING MANDATORY PROVISIONS IN THE CONTEXT OF THE COVID-19 PANDEMIC

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1. In the course of my speech² I will provide an overview of the COVID-19 Response Measures adopted by the Italian legislator which might qualify as overriding mandatory provisions within the meaning of Art. 9 para. 1 Rome I Regulation (hereafter, “Art. 9 Rome I”).³ Preliminarily, I suggest distinguishing between two categories of COVID-19 response measures: Direct and Indirect Response Measures. In my

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³ Art. 9 para. 1 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, pp. 6-16 (“Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation”).

understanding, Direct Response Measures are public law measures directly aimed at tackling the COVID-19 pandemic, namely at strengthening the national health system or, more generally, at safeguarding public health. A notable example of Direct Response Measures is, of course, that of containment measures. On the other hand, Indirect Response Measures are here understood as measures aimed at mitigating the socio-economic effects of the COVID-19 pandemic and of the related containment measures. Examples of Italian Indirect Response Measures are: the extraordinary recruitment of social workers;⁴ redundancy benefits;⁵ and various forms of State grants.⁶ Among the Indirect Response Measures are also measures that impinge on relations between private parties (“Indirect Response-Private Law Measures”, as I will refer to).

Considering their public law nature and objective of safeguarding public health, Direct Response Measures may generally be qualified as Art. 9 Rome I-overriding mandatory provisions. Apart from containment measures,⁷ other examples of Direct Response Measures adopted by the Italian legislator are export restrictions of so-called personal protective equipment⁸ and legally-imposed maximum prices of face masks.⁹ On the other hand, I argue that not all Indirect Response-Private Law Measures may be qualified as Art. 9 Rome I-overriding mandatory provisions.

⁴ See Art. 1 para. 7 Decree-Law (hereafter, “D.-L.”) 34/2020, G.U. No. 128 of 19.5.2020, S.O. No. 21, converted into Law (hereafter, “conv. L.”) 77/2020, G.U. No. 180 of 18.7.2020, S.O. No. 25.

⁵ See Arts. 19-22 D.-L. 18/2020, G.U. No. 70 of 17.3.2020, conv. L. 27/2020, G.U. No. 110 of 29.4.2020, S.O. No. 16.

⁶ See, e.g., Art. 24 D.-L. 34/2020, conv. L. 77/2020.

⁷ See the containment measures listed in Art. 1 para. 2 D.-L. 19/2020, G.U. No. 79 of 25.3.2020, conv. L. 35/2020, G.U. No. 132 of 23.5.2020.

⁸ See Art. 1 para. 1 last period Ordinanza del Capo di Dipartimento della Protezione Civile No. 639 of 25.2.2020, G.U. No. 48 of 26.2.2020.

⁹ See Art. 1 Ordinanza del Commissario straordinario per l’attuazione e il coordinamento delle misure di contenimento e contrasto dell’emergenza epidemiologica COVID-19 No. 11 of 26.4.2020, G.U. No. 108 of 27.4.2020.

2. Among the Italian Indirect Response-Private Law Measures is Art. 3 para. 6-*bis* D.-L. 6/2020.¹⁰ Art. 3 para. 6-*bis* D.-L. 6/2020 introduces a special ground of excuse for nonperformance of obligations due to the respect of Italian containment measure. An Italian scholar, *Frigessi di Rattalma*, states that there is no doubt that Art. 3 para. 6-*bis* D.-L. 6/2020 qualifies as an Art. 9 Rome I-overriding mandatory provision.¹¹ In effect, similar measures have been qualified as Art. 9 Rome I-overriding mandatory provisions also in other EU Member States.

In France, a measure roughly comparable to Art. 3 para. 6-*bis* D.-L. 6/2020 is that found in Art. 4 Ordonnance No. 306-2020, as modified by Art. 4 Ordonnance No. 427-2020.¹² The French Ministry of Justice Explanatory Report to Ordonnance No. 427-2020 suggests that Art. 4 Ordonnance No. 306-2020 qualifies as an Art. 9 Rome I-overriding mandatory provision in the light of the objective pursued by the same Art. 4 Ordonnance No. 306-2020: that of mitigating the negative economic effects of containment measures and thus, ultimately, that of safeguarding the (national) economic order.¹³ However, the French President of the Republic Explanatory Report to Ordonnance No. 306-2020 clearly states that parties can derogate from Art. 4 Ordonnance No. 427-2020, which raises doubts as to the possibility of qualifying the same Art. as an Art. 9 Rome I-overriding mandatory provision.¹⁴

¹⁰ See Art. 91 D.-L. 18/2020, conv. L. 27/2020 (trans.: “The respect of [Italian] containment measures ... must always be considered for ... excluding the debtor’s liability ... pursuant to and for the purposes of Arts. 1218 and 1223 [Italian Civil Code]”).

¹¹ M. FRIGESSI DI RATTALMA, § 15. *L’individuazione della legge applicabile al contratto: il Regolamento Roma I*, in M. FRIGESSI DI RATTALMA (ed.), *La pandemia da COVID-19*, Torino, 2020, pp. 80-81.

¹² Art. 4 Ordonnance No. 2020-306 of 25.3.2020, JORF No. 0047 of 26.3.2020; as modified by Art. 4 Ordonnance No. 2020-427 of 15.4.2020, JORF No. 00093 of 16.5.2020 (trans.: “[Clauses sanctioning] nonperformance of obligations within a given period, are deemed not to have taken or produced effect, if that period has expired [between 18.3.2020 and 23.6.2020]”).

¹³ See *Circulaire de présentation des dispositions du titre I de l’ordonnance n° 2020-427 du 15 avril 2020*, p. 9, <https://www.legifrance.gouv.fr>.

¹⁴ See *Rapport au Président de la République relatif à l’ordonnance n° 2020-427 du 15 avril 2020 portant diverses dispositions en matière de délais pour faire face à l’épidémie de covid-19*, JORF No. 0093 of 16.4.2020.

A similar measure has been adopted also in Germany, in Art. 240 EGBGB.¹⁵ *Lorenz* and *Prütting* hold that Art. 240 EGBGB might be qualified as an Art. 9 Rome I-overriding mandatory provision.¹⁶ On the contrary, *Maultzsch* holds that, even though Art. 240 EGBGB pursues a public interest, the Art. is primarily “structured” in order to balance private interests and thus should not be qualified as an Art. 9 Rome I-overriding mandatory provision.¹⁷

Drawing back to Art. 3 para. 6-*bis* D.-L. 6/2020, unlike the Italian scholar I earlier named, I have many doubts as to the overriding mandatory nature of that para. within the meaning of Art. 9 Rome I. In the first place, express reference in Art. 3 para. 6-*bis* D.-L. 6/2020 to Arts. 1218 and 1223 Italian Civil Code might suggest that the same para. is intended to apply only if Italian law applies to assess the debtor’s liability. Secondly – unlike other two Indirect Response-Private Law Measures adopted by the Italian legislator, which I will mention – Art. 3 para. 6-*bis* D.-L. 6/2020 was not expressly qualified by the same legislator as an overriding mandatory provision. Thirdly, it appears that many States have adopted measures aimed at protecting debtors amid the COVID-19 pandemic.¹⁸ Following what is referred to as the “proportionality test”, where the law applicable is a foreign law establishing a comparable (or even higher) level of protection of the debtor, Art. 3 para. 6-*bis* D.-L. 6/2020 should not be regarded as being “crucial” within the meaning of Art. 9 Rome I.¹⁹

¹⁵ Art. 5 Gesetz of 10.7.2002, BGBl. Jg 2020 Teil 1 Nr. 14 S. 569 (trans.: “Until 30.6.2020, a consumer shall have the right to refuse performance of an ongoing obligation arising from a consumer contract concluded before 8.3.2020 ...”).

¹⁶ See S. LORENZ, § 1 *Allgemeines Leistungsstörungenrecht und Veranstaltungsrecht*, in H. SCHMIDT (Hrsg.), *COVID-19 – Rechtsfragen zur Corona-Krise*, München, 2020, 2nd edn., para. 83; J. PRÜTTING, *Wegfall der Geschäftsgrundlage als Antwort des Zivilrechts auf krisenbedingte Vertragsstörungen? Systemerwägungen zu § 313 BGB und sachgerechter Einsatz in der Praxis*, in D. EFFER-UHE, A. MOHNERT (eds.), *Vertragsrecht in der Coronakrise*, Baden-Baden, 2020, 1st edn., p. 57.

¹⁷ See F. MAULTZSCH, *Rom I-VO Art. 9*, in *BeckOGK*, München, Stand: 1.6.2020, para. 226.1.

¹⁸ See above, e.g., Arts. 4 Ordonnance No. 2020-306 in France and 240 EGBGB in Germany.

¹⁹ See A. BONOMI, *Art. 9*, in U. MAGNUS, P. MANKOWSKI (eds.), *ECPII, Rome I Regulation*, Vol. II, Köln, 2017, 1st edn., para. 85.

3. Art. 88-*bis* D.-L. 18/2020 is the first provision contained in the Indirect Response Measures which the Italian legislator expressly qualified as overriding mandatory.²⁰ Art. 88-*bis* D.-L. 18/2020 concerns travel, accommodation and package travel contracts terminated due to the COVID-19 pandemic, or due to national and foreign containment measures. Art. 88-*bis* D.-L. 18/2020 allows carriers, hoteliers and organizers to issue vouchers in place of price reimbursements.

Incidentally, other EU Member States have “copied” Art. 88-*bis* D.-L. 18/2020.²¹ The Greek legislator has even copied the legislative qualification.²²

Art. 88-*bis* D.-L. 18/2020 appears to infringe EU law (namely, the Passenger Rights Regulations²³, the Package Travel Directive²⁴ and the Voucher Recommendation²⁵). In fact, under Art. 88-*bis* para. 12 D.-L. 18/2020 in case of contracts terminated within the 31st of July 2020, the carrier and organiser

²⁰ Art. 88-*bis* D.-L. 18/2020, conv. L. 27/2020, and modified by Art. 182 para. 8 lets. a) - d) D.-L. 34/2020, conv. L. 77/2020 (trans.: “Reimbursement of Travel and Hotel Tickets, and Travel Package ... 12. The issuing of vouchers following the exercise, within 31.7.2020, of the right to withdraw does not require any form of acceptance by the addressee ... 13. The provisions of the present article constitute overriding mandatory provisions within the meaning ... of Art. 9 [Rome I]”).

²¹ E.g., in France, Belgium and Greece. See, respectively, Ordonnance No. 2020-315 of 25.3.2020 (JORF No. 0074 of 26.3.2020), Arrêté ministériel of 19.3.2020 (M.B. No. 84 of 6.4.2020) and Art. 70 Πράξη Νομοθετικού Περιεχομένου of 13.4.2020 (ΦΕΚ Α' 84/13.04.2020).

²² See A. ANTHIMOS, *Covid-19 and overriding mandatory provisions*, in *Conflict of Laws .net* 15.4.2020.

²³ See, e.g., Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement, OJ L 46, 17.2.2004, pp. 1-8.

²⁴ See Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11.12.2015, pp. 1-33.

²⁵ See Commission Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic, C/2020/3125, OJ L 151, 14.5.2020, pp. 10-16.

can issue a voucher, regardless of whether the latter is accepted by the consumer.

Notwithstanding the legislative qualification, I still doubt as to correctness of qualifying Art. 88-*bis* D.-L. 18/2020 as an Art. 9 Rome I-overriding mandatory provision.²⁶ Among the reason to doubt, national legislators of the EU Member States cannot unilaterally determine which interests – including public interests – should be pursued in areas governed by Regulations (such as the Passenger Rights Regulations) or maximum harmonization Directives (such as the Package Travel Directive): Simply put, only the Union can determine whether the carrier / organizer or the passenger / traveller should be protected and how. Therefore, in areas governed by the Passenger Rights Regulations and the Package Travel Directive, Art. 88-*bis* D.-L. 18/2020 should not be qualified as an Art. 9 Rome I-overriding mandatory provisions.

4. There are other Indirect Response-Private Law Measures which might qualify as Art. 9 Rome I-overriding mandatory provisions. Just to make one final example, in Art. 78 para. 2-*bis* D.-L. 18/2020, the Italian legislator has determined as unfair the practice of making the purchase of food products conditional upon the issuing of so-called “Coronavirus-free” certificates.²⁷

This provision was adopted following an article published on the 28th of February 2020 in “Il Sole 24 Ore”.²⁸ According to that article, Greek authorities had imposed the issuing of “Coronavirus-free” certificates for the import clearance of

²⁶ *Contra* P. DE MIGUEL ASENSIO, *Medidas de emergencia y contratos internacionales*, in *La Ley Unión Europea*, 2020, pp. 11-12; P. FRANZINA, comment in E. PIOVESANI, *Italian Self-Proclaimed Overriding Mandaotry Provisions to Fight Coronavirus*, in *Conflict of Laws .net* 19.3.2020; G. ZARRA, *Alla riscoperta delle norme di applicazione necessaria brevi note sull'art. 28 co. 8 del DL 9/2020 in tema di emergenza COVID-19*, in *SIDIBlog* 30.3.2020; see also F. MARONGIU BUONAIUTI, *Le disposizioni adottate per fronteggiare l'emergenza coronavirus come norme di applicazione necessaria*, in E. CALZOLAIO, M. MECCARELLI, S. POLLASTRELLI (eds.), *Il diritto nella pandemia*, 2020, pp. 235 ff.

²⁷ See Art. 78 para. 2-*bis* D.-L. 18/2020, conv. L. 27/2020 (trans.: “Making the purchase of agricultural ... products conditional upon [the issuing “Coronavirus-free” certificates] constitutes an unfair trading practice ...”).

²⁸ See *Atene blocca il Grana Padano senza bollino virus free*, in *Il Sole 24 Ore* 28.2.2020, p. 6.

Italian Grana Padano cheese. The Greek Embassy in Rome immediately issued a note where the Grana Padano blockade was rejected as fake news.²⁹ The same Managing Director of the Grana Padano Consortium, Mr Berni, impliedly admitted that the news was fake.³⁰ Mislead by the fake news, early in March, Italian EU MPs brought two questions for written answer by the Commission complaining about the Coronavirus-free certificates.³¹ Unsurprisingly the Commission replied: “What are you all talking about?”³² yet, of course, stigmatising the possible request of Coronavirus-free certificates.

This notwithstanding, on the 17th of March 2020, the Italian legislator adopted Art. 78 para. 2-*bis* D.-L. 18/2020. A month later, when converting the D.-L. into L. 27/2020, the legislator even felt the compelling need to expressly qualify that Art. 78 para. 2-*bis* of the D.-L. as an overriding mandatory provision.³³

5. In summary, Direct Response Measures may generally be qualified as Art. 9 Rome I-overriding mandatory provisions. On the other hand, the simple fact that Indirect Response-Private Law Measures are connected to Direct Response Measures does

²⁹ See AMBASCIATA DI GRECIA A ROMA, *Comunicato relativo ad articoli “La grecia blocca il grana-padano”*, 28.2.2020, <https://www.mfa.gr> (trans.: “With regard to the articles published in Italy, which refer to the need for certificates indicating that the Grana Padano cheese imported into Greece is not contaminated by the COVID-19 virus, the Greek Embassy in Rome informs that Greek authorities have not issued any relevant recommendation or directive”).

³⁰ See CONSORZIO PER LA TUTELA DEL GRANA PADANO, *Coronavirus, Grecia: nota esplicativa del Consorzio Grana Padano*, 28.2.2020, <https://www.granapadano.it> (trans.: “The alarmist headlines on the blockade of Grana Padano by Greece, published today on some newspapers, are putting us in great difficulty, in a rather unmotivated way, apart from not true, further fomenting the collective psychosis which has taken hold in these last days and contributing to an incorrect perception of the current situation by foreign countries. Relations with Greece continue. A few minutes ago, for instance, I promptly gave the OK to an exporter to ship a container”).

³¹ See Questions for written answer E-001263/2020 of 3.3.2020 and E-001359/2020 of 5.3.2020 (“According to ... the media, some Member States are assessing ... the possibility of requiring ‘virus-free’ certification ... for Italian ... top-quality products such as Grana Padano ...”).

³² See Answers by Mr Breton and by Ms Kyriakides on behalf of the European Commission, respectively, of 14.5.2020 and of 11.6.2020 (“... The Commission is not aware of national rules ... requiring ... ‘virus free’ certification ... the Commission has not seen any evidence of such requests ...”).

³³ See Art. 78 para. 2-*ter* D.-L. 18/2020, conv. L. 27/2020 (trans.: “... para. 2-*bis* constitutes an overriding mandatory provision ...”).

not entail that also the former may generally be qualified as Art. 9 Rome I-overriding mandatory provisions.

In times of what could be referred to as “pandemic legeforismo” there is a need to contain the exceptions to the normal play of private international law.³⁴ Accordingly, rather than qualifying whichever provision passed by the pandemic legislator as an overriding mandatory provision, scholars, courts and the same legislator should – more than ever – identify methods in order to contain that exception.

³⁴ See H. MUIR WATT, D. BUREAU, S. CORNELOUP, *Du droit international privé en période de confinement*, in Riv. cr. dr. int. priv. 2020, 211 (“... l’exception figure ... dans la pensée de droit international privé ... Dès lors, la discipline ne pourrait-elle offrir des enseignements sur les façons de contenir l’exception ... il est en effet urgent de savoir continuer à accueillir l’altérité”).