SUMMARY

Mandatory Rules in International Commercial Contracts

One of the most challenging difficulties encountered by modern international contract law is that of "*overriding mandatory provisions*". Each country considers certain provisions of its law as mandatory, some material provisions even as absolutely irreplaceable. If the law of another country has to be applied according to normal conflict of law rules it raises an issue whether and to which extent these mandatory provisions should override the actually applicable law.

In a broad sense all provisions of law are mandatory which are declared binding by a legal system and which cannot be derogated from by the parties' consent (*ius cogens*). The reasons why a certain provision is considered to be mandatory vary greatly. Partly the mandatory provision is intended to protect a weaker party from injustice; partly general political, social, economic, and cultural ("public") interests of society are involved.

In international contract law the question is to which extent and under which conditions mandatory rules should be recognised. Provisions of this kind may derive either (i) from the applicable contract law (*lex causae*) itself, (ii) or from the law of the state where the deciding body is seated (*lex fori*) and (iii) from the law of third countries which are for any reason also concerned with and/or interested in the subject-matter of the case.

The text is structured into three main parts. The first part, which comprises of Chapters 1 and 2, addresses the general problems of identification, designation and categorisation of overriding mandatory rules.

The current inconsistency in terminology and in determination of this category of rules is illustrated on examples of relevant pieces of national legislation as well as on applicable international treaties. A new concept of mandatory rules adopted in the European Regulation Rome I is compared with Rome Convention and prevailing scholarly opinions.

The application of mandatory rules before national courts and arbitral tribunals is discussed in Chapters 3 and 4. The "different" ways the national judges and arbitrators approach this issue in international civil litigation and commercial arbitration are analysed with reference to available case law, including judgments of the European Court of Justice ruling on the notion of mandatory rules of law.

National courts always apply overriding mandatory rules of the lex fori but are reluctant to apply foreing mandatory rules which claim for international application. It is highly controversial in theory and practice whether or not an international arbitral tribunal has to apply overriding mandatory rules of a legal system which is not the proper law of the contract as it is claimed that arbitrators do not have a lex fori. On the other hand under some jurisdictions an arbitral tribunal may not be well advised to disregard the overriding mandatory rules of the forum as such an arbitral award could be set aside by state courts of the forum at the request of the losing party for the ground of violation of public policy.

Chapter 5 of the Thesis summarizes the legal effects of overriding mandatory rules on international contracts.

It is evident that identification of enormous number of provisions as overriding mandatory provisions undermines the party' autonomy in international contracts. It is well known that their number increased in all systems during the last century with the expansion of economic regulation (e.g. antitrust regulation, securities and exchange control regulations).

The aim is to find a reasonable balance between general application of the ordinarily designated law (including law chosen by the parties) and exceptional application of overriding mandatory provisions of another law.