

The clauses of exception in «domestic law» and in Hague Conventions

Las cláusulas de excepción en el «derecho interno» y en los convenios de La Haya

Dimitris LIAKOPOULOS

Full Professor of European Union Law at the Fletcher School-Tufts University
Full Professor of International and European Criminal and Procedural Law at the De Haage Hogenschool-The Hague. Attorney at Law a New York and Bruxelles
profd.liakopoulos.968@gmail.com

Fecha de recepción: 15 de enero de 2019

Fecha de aceptación definitiva: 20 de abril de 2019

Resumen

El presente trabajo se propone, después de un examen preliminar necesario sobre la terminología y el nivel de clasificación, analizar las cláusulas (en modo comparativo) en cuestión según la legislación de la UE y la jurisprudencia a nivel convencional. En esta reconstrucción, será necesario identificar no solo el contenido y el alcance de los datos

Abstract

The present work is proposed after a necessary preliminary examination on the terminology and classification level to analyze the clauses (in comparative mode) in question under EU legislation and jurisprudence at a conventional level. In this reconstruction it will be necessary to identify not only the content and scope of the normative data

Dimitris LIAKOPOULOS
The clauses of exception in «domestic law»
and in Hague Conventions

Ars Iuris Salmanticensis,
vol. 7, Junio 2019, 173-197
eISSN: 2340-5155
© Ediciones Universidad de Salamanca - CC BY-NC-ND

normativos, sino también comprender, donde sea posible, con referencias prácticas, las hipótesis que pueden justificar y concretar concretamente la no aplicación de la regla de conflicto destinada a operar en general, así como el uso de la cláusula de excepción.

Palabras clave: REG. 650/2012; REG. 2016/1104; *clausulas de excepción; Convenios de la Haya; derecho internacional privado; Unión Europea.*

but also to understand with examples where possible supported by practical references, the hypotheses that can concretely justify and concretize the non-application of the conflict rule destined to operate in general as well as the use of the exception clause.

Key words: REG. 650/2012; REG. 2016/1104; *clauses of exceptions; Hague Conventions; international private law; European Union.*

1. INTRODUCTION. THE EXCEPTION CLAUSE NOTION

The expression clause exception, escape clause, exemption clause (ABBASSI BAZ- RPACH, 2016: 1906), clause Échappatoire ou d'exception, clause de escape, Ausnahmeklauseln, Ausweichklausel or even Berichtigungsklausel appears relatively recently in private international law (SIEHR, 2005: 28; VON OVERBECK, 1982: 178; HEY, 2018)¹ and constitutes the fruit of a doctrinal elaboration.

Consider the use of the expression escape clause or clause échappatoire which enhances its functional profile. It is not only an exception to the rule but also an instrument to escape the concrete application of a rule where this application produces results that are not compatible with the principles underlying the rule itself. And having regard to the function that they perform in relation to the functioning of the rule of private international law, the exceptional clauses are defined by the doctrine also as corrective clauses of the localization in the discipline of the applicable law (GONZÁLEZ CAMPOS, 2000: 253; KNOEPFLER, 1982: 114)². Noting that the legal basis of the exception clause is to be found in the proximity principle, it can be deduced that in the light

1 From the CJEU see: C-133/08, *Intercontainer* of 6 October 2009, ECLI:EU:C:2009:617, I-09687. See also the green paper on the transformation of the convention of Rome of 1980 applicable to contractual obligations into a community instrument and on the renewal of the same sub-section COM (2002) 654 final, where it is stated: «[...] the judge may not apply this presumption when from all the circumstances it appears that the contract has a closer connection with another country [...] (art. 4, par. 5). In this case, we return to the general rule of looking for the law with which the contract is most closely connected. This mechanism that makes it possible to return to the general rule is called an exception clause [...] in general it can be said that it is a rule that under certain preconditions such as the closest connection of the facts to another jurisdiction allows the deviation from the relevant written conflict rule [...]».

2 According to GONZÁLEZ CAMPOS: «[...] clauses correctives de la localisation dans le domaine du droit applicable [...]».

of this principle it can be detected not only for an appropriate location but also for the purpose of correcting the location made by the conflict rule.

The combination of the exception³ with the clause term⁴ assume a detail significant on the hermeneutic plane: just as the exception comes to oppose the rule term, so that the first assumes value and meaning precisely because it is combined with the second, in the same way this combination is reinforced by the clause term. As can be deduced from its etymological derivation, the clause is part of a broader proposition of which it determines the meaning or more technically it completes, defines to delimit the meaning and the scope of the rule. As such, the clause is devoid of autonomy but operates in an integrative or substitute function of a rule (LIAKOPOULOS, 2009).

The aforementioned combination also results in different characterizations in private international law system (WILKE, 2019). A characterization can emerge in order to mitigate the rigor of the general rule and this by introducing a different and specific discipline in the hypothesis they present, in addition to the assumptions of applicability of the general rule, additional peculiarities that can justify a different treatment of the right.

In a peculiar perspective, the terminology used by EU legislator appears to be subdivided into material matter. Both Rome I (FERRARI, LEIBLE, 2009: 180; STONE, FARAH, 2015; MCPARLAND, 2015)⁵ and Rome II Regulation use a safeguard clause (HATJE, TERHECHTE, MÜLLER-GRAFF: 2018. SCHWARZE, BECKER, HATJE, SCHOO: 2019)⁶. So

3 Leaving aside any linguistic and etymological in-depth analysis, we limit ourselves to recalling how the function of what represents an exception in a juridical sphere is highlighted by the doctrine under a double perspective. On the one hand, the exception may constitute the new treatment of a category that turns out to be different from the one in which it was so far included. On the other hand, it can constitute the old treatment of a category that turns out to be the same as that from which it was kept divided.

4 Here to be understood not so much as a general clause, which evokes profiles of semantic indeterminacy from which derives the need for an evaluation integration and obviously does not under a negotiating profile but as a forecast-limit to the general rule, in accordance with the relative etymology of *claudere* or *close*.

5 Commission Regulation n. 593/2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177).

6 It should be noted that the term safeguard clause is used in other areas such as public international law, making reference to it to indicate the exceptions for reasons of emergency in international law. On the terminological level, from the perspective of European Union law, the use of the expression in question in the communication from the commission to the council that provides additional information in relation to the committee's report on the exception clause of 13 July 2011, sub COM/2011/0829 final which concerns art. 10 of Annex XI to the Regulation of council which defines the statute of EU officials. This provision establishes that in the event of a serious and sudden deterioration of the economic and social situation within the community, assessed in the light of the objective data provided by the commission, the latter presents appropriate proposals to the council which decides by qualified majority after consulting the other institutions involved, according to the procedure provided for in art. 283 TEC.

in recital n. 20 of the first Regulation it is clarified that if the contract manifestly has a closer connection with a country other than that indicated by the general rule (article 4, par. 1 and 2) a safeguard clause should provide that it should apply the law of this different country. In similar terms, the second regulation cited in recital n. 14 specifies how, in concrete cases it models its own connection criteria according to the achievement of objectives, on the other hand it must set itself alongside a general and specific rule and in certain provisions a safeguard clause that allows to depart from latter if it is clear from all the circumstances of the case that the unlawful act manifestly has a closer connection with another country.

Of the two terminological options just indicated, the one that uses the term exception seems to be more focused on the effects of the clause that operates in the sense of extracting from the general rule a narrower scope from otherwise regular due to the presence of specific assumptions, while the one that uses the term safeguard (PALAO MORENO, ALONSO LANDETA, BUÍGUES: 2015, 58)⁷ it appears to be predominantly oriented towards the aims of the discipline in derogation from the common provision, which can be included in the protection of the interest in the application of a law that ultimately, in the light of the circumstances existing in practice (EINSELE, 2017)⁸ is the most consistent with the proximity principle (LAGARDE: 1986, 10; VON OVERBECK, 2000: 550).

The study of the exception clause involves specific aspects relating to its concrete application in the relationship between exception and general rule, as well as questions of general theory of private international law. The use of the exception clause in domestic laws, in EU Regulations and in particular in terms of the law applicable to contractual and non-contractual obligations makes the interest in examining the exception clause further up to date. From this it follows that the supranational practice referable to EU and mainly to the Court of Justice of the European does not appear relevant both for its exclusive suitability and to clarify the provisions relating to Regulations and to establish with specific reference to orientations formed in the Convention of Rome of 1980, the functioning of the closest connection and presumptions in the relationship with the exception clause.

On a systematic level we will try to deepen some aspects of comparison and coordination between exceptional clauses (HIRSE, 2006; SCHREIBER: 2001; KREUZER, 1982: 296; NADELMANN, 1985: 298; DUBLER, 1983; DIETZI, 1973: 50; JAULT-SESEKE,

7 It should be noted that the safeguard appeal is specific to the Rome I and Rome 2 Regulation, while it does not appear in other regulations such as those operating in the field of reinforced cooperation in the field of registered partnerships and in the matter of law application to property relations between spouses, as well as to cite another example at Regulation n. 650/2012 concerning the law applicable to success.

8 This is particularly shown in the recital n. 20 of Regulation Rome I on the law applicable to contractual obligations. See also recital n. 14 of Regulation Rome II.

2010: 1586; MOSCONI, 1989: 189; VON OVERBECK, 2000: 550; MONATERI, 2017: 534ss; SYMEONIDES, 2016) and main institutes of private international law with particular reference to its operating names for the purpose of verifying similarities and possible interferences. This in order to achieve the most exhaustive identification possible of what may fall within the regulatory framework of European private international law in the notion of an exception clause, identifying its operational spaces and compliance with the basic principles of the matter.

2. TYPES OF EXCEPTION CLAUSES IN PRIVATE INTERNATIONAL LAW

The notion of exception clauses focuses on a phenomenon that appears in the unitary substance on a conceptual level, it describes a type of forecast, of exceptional pruning, which is called to apply in connection with a conflict rule, in the presence of certain presuppositions and subordinately with specific limits it is possible to make some categorical distinctions with respect to it, whose usefulness lies in the fact that the belonging of the clause and one or the other category can be attributed a different relevance on the reconstructive and interpretative level depending on the results of an analysis such as that carried out in the present analysis aimed at drawing general conclusions on the nature and functioning of the clause as such, as part of the system of conflict rules. Moreover and more generally, if the functional profile is valued, the exception clauses list each mechanism at a regulatory level capable of correcting the functioning of the conflict rule in relation to specific legislative objectives such as the protection of fundamental interests or coordination between rules belonging to different legal systems. It was considered possible to include the concept of exception clause instruments such as law fraud and public order (MOSCONI, 1989: 194)⁹.

Three specific exception clauses must distinguish between clauses that use the narrowest link criterion and specific criteria. Among the first, the known provision referred to in art. 4 (3) of the Rome Convention on the law applicable to contractual obligations, the analogous provision pursuant to Regulation Rome II and art. 13 (2) of the Convention of Hague on the international protection of adults. The clause envisaged by art. 5 Protocol of 23 November 2007 on the law applicable to maintenance obligations.

9 According to Mosconi: «[...] the exception clause thus has its place within the conflict rules system and conforms to the philosophy inherent therein. The designation of the legal system with which the case is more strongly connected and which, for this very reason, is the most appropriate one to govern it. The exception clause intervenes when the codified connecting factor is unable to carry out its typical role, considering that given the special circumstances of the case, contrary to what the legislator had assumed, this does not lead to the legal system with which the case is more closely connected [...]».

The exception clause can assume a subordinated nature with respect to conditions of public order and in particular to establishes specific legal effects (CUNIBERTI, MIGLIORINI, 2018: 265)¹⁰. Finally, but the most recent acquisition in EU legal order, the exception or safeguard clause can assume an optional value or be subordinated not only to the existence of specific requirements, but also to a manifestation of will in this sense¹¹.

3. RELEVANCE OF THE FLEXIBILITY OF THE CONNECTING CRITERION IN THE RECENT EVOLUTION OF PRIVATE INTERNATIONAL LAW

The twofold ambivalent nature of the exceptional clauses determines the dissapplication of the connecting criterion that should have operated under the general rule¹², on the other hand they allow the conflict rule to materialize or make more consistent with the characteristics of the specific case.

The exception clause is commonly interpreted by commentators as a tool to overcome the rigidity inherent in the classical conflictual method, rigidity that is contrasted with the different and more flexible solutions including those elaborated by the American doctrine (CUNIBERTI, MIGLIORINI, 2018: 265). In this respect, in clause functioning the search for the prevalent connection is less tied to formal criteria, such as the common citizenship of the parts (AUDIT, 2013: 692). It has been observed that the problem of opportunity of inserting an exception clause into the general discipline arises with reference, on the one hand, to the fact that the rules of classical private international law may arise due to the use of a predetermined connection criterion, excessive rigidity due to lack of adaptability, on the other to the fact that such rules may not be appropriate in

10 Art. 26, lett. 2 of Regulation 2016/1104 relating to registered partnerships. Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016.

11 See art. 62.2. of Regulation 2016/1104 of Council of 24 June 2016, *op. cit.*, 30ss, according to which in the absence of an agreement chosen by the parties pursuant to art. 22, the law applicable to the property consequences of registered partnerships is that of the state pursuant to whose law the registered union was established. Exceptionally and at the request of one of the partners, the judicial authority competent to decide on matters concerning the property consequences of a registered partnership may decide that the law of a state other than that whose law is applicable pursuant to par. 1 regulates the property effects of the registered partnership and if the applicant shows that a) the partners had the last common habitual residence in that state for a significantly long period; b) both partners have relied on the law of that other state in the organization or planning of their property relations.

12 The comment is related to the decision of the Court of appeal of Paris of 10 June 1092, confirmed by the court of cassation with sentence of 1974 relative to the personal statute.

certain cases and to remedy this rigidity, the granting of ample autonomy to the parties or the provision of a dense network of differentiated conflict rules.

Assuming that the presence of the exception clause in the system of private international law depends on how the legal nature of the clause is understood. If it is considered to be an expression of the principle of proximity rather than an instrument of flexibility, it translates into an instrument to make the general rule more efficient in the sense that the connection wanted by this rule must express an effective and prevalent connection. If we understand the exception clause as a further rule that, operating parallel to the general rule, can be used to correct the excessive rigidity of this, then flexibility represents an element that characterizes the exception clause on the teleological level.

It should be noted in relation to the foregoing that the search for flexible criteria is typical of the evolution of private international law private international law of EU also with regard to the different issue of jurisdiction. The evolution towards more flexible forms of connection criterion was first of all manifested through the replacement of the criterion of nationality and domicile with that of habitual residence thanks to the conventions of unification of private international law adopted by the Hague Conference (DROZ, 1994: 5). On the one hand exists a greater «concretization» of the connecting criterion on the other, given the need to proceed through a survey of the facts that characterize the case in practice, a less predictability of the result in terms of determination of the applicable law.

It should be noted that the flexibility of private international law rules found in the recent evolution of the codifications on the subject, is developed through the introduction of factual or open connection criteria, as well as through the provision of a plurality of connection criteria for the same case. In this regard, it has also been observed that the most significant evolution of modern conflict systems derives from the affirmation of the proximity principle which tends to replace abstract and general modes of localization of the cases. This operates both with «attributive» methods, in the case of establishing the applicable law on the basis of the closest connection and with «corrective» methods, in the case of applying exceptional clauses.

The issue of flexibility of the connection criteria therefore appears to characterize the most recent development of private international law (HAY, 1991: 226; PATOCCHI, 1985; SYMEONIDES, 2014)¹³, like other expressions of this phenomenon, or the introduction of conflict rules with alternative connection criteria and forms of choice of the applicable law (SYMEONIDES, 2011: 18). For the alternative connection criteria, the relevance in terms of flexibility is given by the openness to the possibility for the judge

13 It is also observed that the most recent codifications of private international law introduce conflict rules that have a material effect (multiple connection criteria to ensure the formal validity of the act).

to apply different laws, even if this can happen in the context of the options admitted through the different and alternative criteria contemplated by the conflict norm. As for the flexible connection criteria, they are linked to a plurality of circumstances to be evaluated in practice. In this regard, consider how the criterion of the closest connection (MORRIS, 1940: 322ss; JAFFEY, 1987: 438; BENTWICH, 1925: 212)¹⁴ can operate with different methods and functions, or in order to fill some regulations, were a specific conflict rule cannot be found, as the main connection criterion, as a presumptive criterion regarding contracts and illicit, as a means of resolving conflicts between connection criteria (tie-breaker) and this with particular regard to the plurality of citizenship or solutions to the problems of conflict of laws in the context of plurilegislative regulations, thus determining the extension of the discretion of the judge in identifying and assessing the relevant elements, in place or in law in the light of which to reconstruct the relevant or prevalent link between applicable law and the case in point.

4. ARTICLE 15 OF THE FEDERAL LAW ON PRIVATE INTERNATIONAL LAW OF 18 DECEMBER 1987 AND DEVELOPMENT DOCTRINE. SCOPE AND OPERATION OF THE CLAUSE

In Swiss international private law, the exception clause is the subject of an explicit general provision. It is about art. 15 of the federal law on private international law of 18 December 1987, entitled «exception clause» (MCCAFFREY, 1980: 236; BROGGINI, 1971: 282; DUBLER, 1983), the introduction of which has, however, raised criticisms from some authors. The forecast contained in it operates on two levels. His letter 1 establishes that the right referred to by the same law is, by exception, inapplicable «if from the set of circumstances it is evident that the case is only slightly connected to it, but more closely with another». Notwithstanding this provision, lett. 2 establishes that it does not apply if the applicable law has been chosen by the parties¹⁵. This appears to be consistent with the appreciation of parties will in an international private law sense,

14 We recall the definition as in the Anglo-Saxon jurisprudence the notion of «closest and most real connection» is linked to the search for «proper law of the contract» is identified as «the law of the country with which the contract has its most real connection». This is the formula proposed by Morris in his own article entitled.

15 The case law of the Swiss federal court indicates that the choice of the applicable law which excludes the use of the exception clause may be implicit. In the present case, it was a question of incorporating a company into a specific order from which the implicit will of the parties to submit it to the relevant national law was deduced. See Swiss Federal Court, 17 December 1991, 117, II, 494, where it is observed that: «le fait de choisir une forme sociale étrangère pour être assimilé à une èlection de droit. Or le recours à l'art. 15 LDIP est précisément exclu dans ce cas-là (art. 15 al. 2 LDIP) [...]».

having observed in this regard that «il est évident que l'autonomie de la volonté perdrait l'essentiel de son utilité si le juge pouvait faire abstraction du choix des parties pour appliquer une loi qu'il considérerait avoir un line plus étroit avec l'affaire» (VON OVERBECK, 1982: 205).

The origin of the exception clause in Swiss jurisprudence is to be traced back to the sentence handed down on 12 February 1952 by the Swiss Federal Court in the Chevalley/Genimportex case with regard to the criterion of connection of the habitual residence of the characteristic lender, which can be refused in the presence of a more relevant connection (VON OVERBECK, 1999: 128)¹⁶.

A precedent on the regulatory level can be identified in the provision contained in art. 8E of the federal law of 1891 on filiation in the amended version starting from 1st January 1978 but no longer in force as repealed by the Swiss federal law of 18 December 1987 on private international law. With respect to the criteria for this purpose identified in a subsidiary way by the general rule, consisting of the common domicile of the father, mother and child or in their common citizenship or in the application of Swiss law, the aforementioned provision stated that «toutefois, lorsque l'espèce présente des rapport prépondérants avec un autre pays, la loi de ce pays est applicable [...]» (VON OVERBECK, 1982: 205). A comparison was established with respect to the resulting connection between the relationship of filiation and the law identified as applicable against one of the aforementioned criteria, operating on a subsidiary basis, as well as with respect to the resulting connection between the relationship of parentage and other law, so that the considered the preponderance of whether the general criterion was applied in favor of the more relevant connection.

The solution adopted by art. 15 of Swiss law on private international law is based on a comparative assessment between the connection expressed by the rule in the applicable case and the different connection that results in light of the examination of the circumstances of the case. The positions taken by commentators on the provision of a general exception clause contained in art. 5, first letter, of the Swiss federal law. According to some, such a forecast would imply a dangerous margin of uncertainty in determining the applicable law (MANN, 1979: 86). In the opinion of others, the exception

16 In the present case, the Federal Court had considered the application of Swiss law on the basis of the following considerations: «Le contrat a été passé à Genève où devait avoir lieu la livraison et où l'acheteur est domicilié civilement et commercialement. La monnaie du contrat était le franc suisse, le règlement en francs belges, modifié ultérieurement dans le sens d'un acquittement du prix suisse que les parties ont seul invoqué est dans un rapport local plus étroit que le droit belge avec les opérations effectuées, et que les parties devaient s'attendre à ce qu'il soit appliqué à leurs relations juridiques [...]».

clause must be favorably assessed on the assumption that the Swiss courts would have made reasonable use of it (MOSCONI, 1989: 190)¹⁷.

In this perspective, with respect to the discretion attributed to the judge by the general exception clause referred to in art. 15, first paragraph of the Swiss law on private international law, the need to delimit its scope was coherent with the exceptionality of the ordinary functioning of the conflict rules that are commonly attributed to this provision. To this end, recourse to the provision set forth in art. 1, second sub-paragraph of the Swiss Civil Code entitled «application of the law», according to which «in the cases not provided for by law the judge decides according to the custom and in default of this, according to the rule that he would adopt as legislator [...]», recalling in this perspective the logical path that the judge is required to follow in applying the clause.

5. THE JURISPRUDENCE OF THE SWISS FEDERAL COURT. IDENTIFICATION OF THE MOST RELEVANT CONNECTION

From the Swiss jurisprudence (MISCHER, 1962: 130) emerges as the provision of art. 15, sub-paragraph 1 of the federal law on private international law enhances the role of the judge and emphasizes its discretion¹⁸, highlighting on the one hand the exceptional nature («il s'agit d'une clause d'exception au sens strict, qui ne doit être appliquée eu'en cas de nécessité») and on the other the necessity that they concur, for the purposes of its application two conditions or «un lien très lâche avec le droit désigné par la règle de conflit et une relation beaucoup plus étroite avec un autre droit». What differs from the concrete appreciation of the actual and prevalent connection between the case and the applicable law where judge's role is characterized by discretion is instead the application of the clause as such, that is the recourse to it if the conditions exist. In such hypothesis there seems to be no space, according to Swiss jurisprudence, for the discretion of the judging body. In this regard, the Swiss Federal Court has held that the national judge does not have discretion in the use of the provision of art 15 of the federal law. In the judgment of 8 March 2007, 5C.297/2006, in reiterating the exceptional nature of the provision of art. 15¹⁹ and that from it «the faut y recourir de

17 According to MOSCONI: «[...] I have already quoted article 15.1. of the swiss law and mentioned how this represents the most appropriate and general legislative wording of the clause [...]».

18 See the sentence of 27 January 1992, BGE 118 II 79, which is affirmed that: «cette disposition légale s'en remet dans une large mesure à l'appréciations du juge [...]».

19 Whohc is referred that: «[...] le clause d'exception de l'art. LDIP permet exceptionnellement au juge de ne pas appliquer le droit auquel renvoie une règle sur le conflits de loi lorsque, au regard de l'ensemble des circonstances, il est manifeste que la cause n'a qu'un lien très lâche avec ce droit, et qu'elle trouve dans une relation beaucoup plus étroite avec un autre droit [...]».

manière restrictive» the court pointed out that «l'application de la clause d'exception a lieu d'office; elle ne dépend pas de l'appréciation du juge»; furthermore, as noted elsewhere by the same court²⁰, the exception clause could not be conditioned by material law considerations, specifying that it «n'intervient que de façon restrictive; elle ne tend pas, en particulier, à obvier aux conséquences indésirables du droit matériel»²¹. This relief is linked to that for which the application of the exception clause must take into account the imperativity of the conflict rules and the interest of the order to the certainty and predictability of the legal name²².

In order to verify whether the case is strictly connected with the law referred to in the conflict rule, the Swiss jurisprudence appears to proceed by carrying out, case by case, an analysis and a weighting of the elements that are relevant on an objective and subjective level. The logical path from time to time used does not appear to be of a standardized nature as it is logical that it is given the literal tenor of the provision of art. 15, sub-paragraph 1, of the aforementioned law as well as the function and exceptional nature of the institution. For this purpose, the topicality and concreteness apply, in the light of the interests at stake of the connections with the various legal systems (i.e. the one referred to by the conflict rule and the one that becomes relevant as an exception due to the clause). An example of this prospect is the pronouncement of 27 January 1992 (SYNKOVÁ, 2013: 304)²³, with regard to the application of art. 61 of the Swiss federal law on private international law concerning the law applicable to divorce and separation²⁴. In this case, the Swiss federal court held that it was clear in the light of all the circumstances that there was a very weak connection («très lâche») with the right referred to in the aforementioned art. 61 (in the concrete case the right of the state of

20 Tribunal fédéral suisse of 12 juin 2008, 5A 220/2008.

21 Tribunal fédéral suisse, 19 août 2008, 5A 49/2008, which is affirmed: «La clause d'exception prévue par l'art. LDIP permet exceptionnellement au juge de ne pas appliquer le droit auquel renvoie une règle sur les conflits de loi lorsque, au regard de l'ensemble des circonstances, il est manifeste que la cause n'a qu'un lien très lâche avec ce droit. Selon la jurisprudence, il faut y recourir de manière restrictive: elle ne doit notamment pas permettre d'éviter les conséquences indésirables du droit matériel [...]».

22 According to the cited sentence: «[...] en effet, logiquement, la règle de conflit de lois est impérative: lorsqu'elle donne une solution, celle-ci doit être respectée et la sécurité du droit commande que les désignations contenues dans la loi soient suivies sans équivoque dans la très grande majorité des cas [...]».

23 27 January 1992, BGE, 118 II 79.

24 Article 61 of the Swiss federal law on private international law provides that divorce and separation are governed by Swiss law. However, if the spouses have a common foreign citizenship and only one of them is domiciled in Switzerland, their common national law applies. However, if the common foreign national law does not allow divorce or admits it only under extraordinarily strict conditions, Swiss law applies if one of the spouses is also Swiss or has been living in Switzerland for at least two years.

Texas) being the parties «dans une relation beaucoup plus étroite avec le droit suisse» (SYNKOVÁ, 2013: 304).

The court reached this conclusion considering, concretely, how the spouses, already citizens of the state of Texas, had for a long time installed their married life in Switzerland and had also lost, together with the domicile, the citizenship of Texas, resulting consequently subjects to Swiss law pursuant to art. 15, sub-paragraph 1 of the federal law.

On other occasions the greater concreteness of the connection established by the general rule has pruned the jurisprudence to exclude recourse to the exception clause. The Swiss federal court²⁵, in relation to art. 68 of the federal law on the subject of private international law²⁶, considered the inapplicability of the clause pursuant to art. 15, lett. 1, noting that on the one hand the lack of common domicile of the family members did not allow the application of art. 68 and on the other hand how the exception clause could not be applied because «le seul lien avec l'Italie était la nationalité des parties, mais aucune d'elles n'y vivait», doendosi invece applicare «le droit suisse de la résidence habituelle de l'enfant au moment de sa naissance était donc applicable en vertu des art. 68, al. 1 et 69 al. 1 LDIP» (SYNKOVÁ, 2013).

6. ART. 3082 OF THE CIVIL CODE OF QUÉBEC

A general exception clause is contemplated in art. 3082 of the Québec civil code (WATTÉ, 2011: 1012). It provides that «à titre exceptionnel, la loi désignée par le présent livre n'est pas applicable si, compte tenu de l'ensemble des circonstances, il est manifeste que la situation n'a qu'un lien éloigné avec cette loi et qu'elle se trouve en relation beaucoup plus étroite avec la loi d'un autre État. La présente disposition n'est pas applicable lorsque la loi est désignée dans un acte juridique» (SYNKOVÁ, 2013).

The forecast implies a path of comparison between the connection envisaged by the conflicting rule and the circumstances or situation of the case, in order to arrive at a judgment of prevalence in favor of a connection different from that indicated by the rule (CASTEL, 2007: 566)²⁷. In its subordinate recourse to the clause of lack of choice

25 Sentence of 18 September 2003, 5c.123/2003.

26 According to this provision the filiation of filiation is regulated by the law of habitual residence of minor, except in the case in which none of the parents is domiciled in the minor's state of residence and both the parents and the minor have the citizenship of the same state, applying in this last case the law of the state of common citizenship.

27 According to Castel: «measure of uncertainty into legal relationships», specifying, however, the provision of art. 3082, which «fortunately, it cannot be used to avoid the mandatory rules of Quebec or a law designated by the parties in a juridical act, for instance a contract, will or trust [...]».

of the applicable law and in its linking the operation of the clause, from a high, to an application by way of exception in terms of derogation from the general rule, from the other, to the presence of a main connection criterion that is manifestly lacking in value from the point of view of proximity, this provision has similarities with that of art. 4.3. of Regulation Rome I. However, the two clauses for being the first of a general nature differ, extendable to any area of operation of the conflict rules provided for by Québec law (tenth book of the civil code-private international law) and the second of special character, limited to the subject of contractual obligations.

The clause in question operates in the combination and completion of the proximity principle and expresses an inherent need for certainty in identifying the relevant criterion, from which it follows its application by way of exception. In this sense the decision of 6 December 2002, made in the case of Spar Aerospace Ltd., can be recalled. American Mobile Satellite Corp, based on the application of the *lex loci delicti* (art. 3126 Civil Code) where the Supreme Court of Canada has noted the exceptional nature of the provision under art. M3082 civil code, as well as recalling the proximity principle, the need for the closest connection to be provided on the basis of exception clause, is completely manifest²⁸.

This need to define the prevailing link between those that can be envisaged in relation to the specific case finds a parallel confirmation in the conflictual discipline concerning multi-legislative systems. It is interesting to note how the jurisprudence in linking the exception clause contained in art. 3082 civil code to the need to identify «un lien substantiel» between the case and the applicable law has placed a close parallelism to art. 3082 and art. 3077 of the same civil code, which governs the determination of the applicable law in the case in multi-legislative systems²⁹.

7. ARTICLE 19 OF THE BELGIAN LAW ON PRIVATE INTERNATIONAL LAW

The general exception clause provided for by art. 19 of the Belgian law relating to the code of private international law, aimed, as has been observed, at «à assouplir quelque

28 Canada supreme Court reports, 2002, 4, p. 236, which is stated that: «l'article 3082 C.c.Q. constitue l'exception à cette règle dans des circonstances où il est manifeste que l'affaire n'a qu'un lien éloigné avec le système juridique prescrit par l'art. 3126 et beaucoup plus étroit avec la loi d'un autre État».

29 Cour du Québec of 21 June 2006, par. 58. According to art. 3077 of cited civil code: «Where a country comprises several legal systems applicable to different categories of persons, any reference to a law of that country is a reference to the legal system prescribed by the rules in force in that country; in the absence of such rules any such reference is a reference to the legal system most closely connected with the situation [...]».

peu la règle de rattachement telle qu'elle a été conçue par M. Savigny» (WAUTELET, 2006: 348; CARLIER, 2005: 12; BOULARBAH, 2005: 174; FALLON, ERAUW, 2004: 202). It is however known that critical voices have been expressed in relation to this forecast. In particular, as observed by the Belgian State Council in relation to the first formulation of the code of private international law, the exception clause «ébranle si fortement la fermeté des règles du projet qu'elle en compromet l'utilité»³⁰.

Article 19 of the Belgian law on private international law of 16 July 2004 (WAUTELET, 2005: 25) outlines an exception clause which determines the non-application of the conflict rule in favor of another connection criterion where the comparison between the connection concerning the case and the applicable law established by said rule and the connection with respect to other law that emerges from the whole of the circumstances shows a little relevant link with the first and a closer connection with the second one. However, this prevalence must be manifest. Two cumulative conditions are thus applied for the purpose of applying the clause, since the law normally applicable cannot be exceeded unless it is shown that the case has a very weak connection with this law and at the same time there are very close links with another state³¹. The assumption therefore for the application of the clause according to said art. 19 and the exceptional nature of the appeal to it, is that the connecting criterion used by the conflict rule which should be applicable to the case in question, reveals in itself a very weak almost evanescent link with the applicable law. On the basis of this, recourse to another law takes place, where it is evidently a very close connection with the case in point.

If the link between the applicable law and the offense results in a «lien très faible», according to the aforementioned provision, it follows that the conflict rule is not suitable for fulfilling its function in a perspective that values the substantial data with respect to the formal: the connecting criterion is actually such, noting in the sense of involving the application of a specific law, to the extent that it manifests a real connection, not necessarily predominant with respect to other connections which are abstractly conceivable, but certainly not so weak as not to manifest however, it is not applied in accordance with the provisions of sub-paragraph 2 of art. 19 of the Belgian law if the choice of the

30 Avis du Conseil d'Etat, n. 29.201/2, Doc. Parl. Sénat, SO 20012002, 21225/1, (243). The peculiarity of the clause so governed by the Belgian law was highlighted observing that in the review referred to in the aforementioned art. 19.1. subparagraph 2 (taking into account «de la circonstance que la relation en cause a été établie régulièrement selon les règles de droit international privé des États avec lesquels cette relation présentait des liens au moment de son établissement»), «emphasis is also placed on the validity of the legal relationship».

31 See also the second part of art. 19, according to which: «lors de l'application de l'alinéa 1^{er}, il est tenu compte notamment: du besoin de prévisibilité du droit applicable, et de la circonstance que la relation en cause a été établie régulièrement selon les règles de droit international privé des États avec lesquels cette relation présentait des liens au moment de son établissement [...]».

applicable law occurs or when the designation of the applicable law is connected to material justice considerations³².

8. AN INTRODUCTION TO THE GERMAN EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH, TO THE ENGLISH PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT OF 1995 UNDER THE LAWS OF KOREA, CZECH, SLOVENIA, LITHUANIA, ESTONIA, ARGENTINA, MONTENEGRO, BULGARIA, TURKEY, HOLLAND AND POLAND

An exception clause relating to the law applicable to non-contractual obligations, specifically, unlawful (Unerlaubte Handlung) unjustified enrichment (ungerechtfertigte Bereicherung) and other people's business management (Geschäftsführung ohne Auftrag) is provided for in art. 41 (1)³³ of the German Einführungsgesetz zum Bürgerlichen Gesetzbuche. It operates in the case of a significantly more relevant connection (Wesentlich engere Verbindung) than that contemplated by the general rules set out in art. 38, 39 and 40 of the same law (LOOSCHELDERS, 2004: 620). The application of the clause is made easier by the specific provision of two hypotheses in which a closer connection can be established with a law different from that indicated by the general rule. This is particularly the case where there is a specific relationship between the subjects involved in the compulsory relationship³⁴, or in the event that the subjects involved have our habitual residence in the same state at the time in which the relevant facts occur³⁵. It should then be recalled art. 46³⁶ Einführungsgesetz zum Bürgerlichen Gesetzbuche German, which regulates other hypothesis of exception clause concerning real rights (Rechte an einer Sache) as for art. 43 of the same law and concerning transport

32 According to this provision: «Le paragraphe premier n'est pas applicable en cas de choix du droit applicable par les parties conformément aux dispositions de la présente loi, ou la désignation du droit applicable repose sur le contenu de celui-ci»

33 Which is stated: «Besteht mit dem Recht eines Staates eine wesentlich engere Verbindung als mit dem Recht, das nach den Artikeln 38 bis 40 Abs. 2 maßgebend wäre, so ist jenes Recht anzuwenden [...]»

34 The forecast that establishes the closest connection: «aus einer besonderen rechtlichen oder tatsächlichen Beziehung zwischen den Beteiligten im Zusammenhang mit dem Schuldverhältnis» (art. 41, par. 2, n. 1).

35 Which is referred: «[...] in den Fällen des Artikels 38 Abs. 2 und 3 des Artikels 39 aus dem gewöhnlichen Aufenthalt der Beteiligten in demselben Staat im Zeitpunkt des rechtserheblichen Geschehens; artikel 40 Abs. 2 Satz 2 gilt entsprechend [...]».

36 Which affirmed that: «Besteht mit dem Recht eines Staates eine wesentlich engere Verbindung als mit dem Recht, das nach den Artikeln 43 und 45 maßgebend wäre ist jenes Recht anzuwenden».

rights (Transportmittel) noting the existence of «wesentlich engere Verbindung» for its application.

Also of importance is art. 12, par. 1 of private international law (Miscellaneous Provisions) Act of 1995 in relation to the law applicable to the offense (tort or delict)³⁷, which contemplates an exception clause involving a comparison (comparison) between the elements of connection with respect to the law that would result applicable «under the general rule» and any other element of connection relating to a different law if it appears that «it's is substantially more appropriate for the applicable law for determining the issues arising in the case or any of those issues to be the law of the other country»³⁸.

The aforementioned provision must be coordinated with the connecting criterion that the private international law (miscellaneous provisions) act establishes, in general with regard to the law applicable to the offense. The rule, pursuant to art. 11, par. 1 is focused on the logo of the event: «the applicable law is the law of the country in which the events constituting the tort or delict in question occur». The connection criterion in question can be set aside in favor of another criterion whose law presents a greater connection than the case in point. It is true how it has been observed that the reference to the «substantially» adverb in relation to the evaluation of the greater suitability of a connection criterion different from that envisaged by the general rule, is to circumscribe its application to exceptional hypotheses.

Of a general nature in the sense mentioned above is also the exception clause pursuant to art. 8.1. of the Korean law on private international law of 2001 which is applied subject to the evidence of the existence of a different and prevalent localization with respect to that expressed by the connecting criterion used by the special rule. A further general exception clause is found in art. 8 of law n. 1/2014 of Montenegro on private international law as well as in art. 8 of Book 10 of the Dutch Civil Code by virtue of which the connection criteria that establish its application on the principle of the closest connection can be set aside by way of exception in the event that on the basis of the characteristics of the case, a different and prevalent connection³⁹.

37 The distinction is clarified by art. 9, par. 1 of the aforementioned Act «Purpose of Part III», which is affirmed that: «the rules in this part for choosing the law (in this part referred to as the applicable law) to be used for determining issues relating to tort or (for the purposes of the law of Scotland) delict».

38 According this disposition: «if it appear, in all the circumstances form a comparison of- a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issues (as the cas may be) is the law of that other country [...]».

39 According to the aforementioned provision: «1. The law that is designated by a legal rule which itself is based one presumed close connection with that law, shall be way of exception

The Slovenian law n. 56/1999 on private international law whose art. 2 operates as a general exception to the references of applicable law contained in the law itself, except in the case of the choice of the parties. The application of the clause thus outlined assumes, moreover, that the circumstances relating to the case in question present a different connection from that indicated by the applicable rule and its operation is permitted only exceptionally.

The art. 1, lett. 2 of the law of Liechtenstein of 1996 is expressed in different terms on private international law according to which in the absence of a specific conflict rule the applicable law is the one that has the closest connection with the factual situation (SIEHR, 2005: 32). In fact, rather than an exception clause in the terms considered in the present analysis, it appears to be a general and residual forecast, an expression of the proximity principle and for this its similar characteristic as a ratio to clause (SYMEO-NIDES, 2014: 218)⁴⁰.

The provision of art. 24 of 25 January 2012 is of a general nature on the private international law of the Czech Republic. It identifies a form of exception clause linked to the expectation of the parties while limiting their application to exceptional cases, requiring that they be taken into consideration for the purpose of the non-application of the criterion of main link the reasonable expectations of the parties regarding the application of a different law⁴¹.

As for the clauses of a special nature, the art. 32 of the Polish law on private international law of 4 February 2011 may refer to the law applicable to the obligations deriving from unilateral acts while for contractual obligations the same law makes reference to the Rome I⁴² Regulation. For unilateral source bonds it is expected that «in the absence of law choice, the unilateral obligation shall be subject to the law of the country in which the person who performed the unilateral juridical act is habitually resident or

remain inapplicable if in view of all circumstances of the case, the close connection presumed in that legal rule, obviously only exists to a small extent, while there exists a much closer connection with another law. 2. Paragraph 1 does not apply where parties have made a valid choice of law [...]».

40 Affinities are also detectable with respect to art. 3515 of the Louisiana civil code according to which: «except as otherwise provided in this book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue. That state is determined by evaluating the strength and pertinence of the relevant policies and the dispute; and 2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might flow from subjecting a party to the law of more than one state [...]».

41 The reference is: «the reasonable expectations of the parties regarding the use of another legal order».

42 See art. 28 of regulation Rome I.

seated. Where it results from the circumstances that the obligation is more strictly connected with the law of another country, this latter law shall apply [...]»⁴³.

The special exception clause relating to the law applicable to contractual obligations is also found in art. 24, lett. 4 of the Turkish code on private international law and international civil procedure adopted on November 27, 2007 which is modeled on that of the Rome of 1980 Convention, without the constraints provided by the Rome I Regulation⁴⁴. An exception clause in terms similar to those already present in the Convention of Rome of 1980 can also be found in art. 33.6 of the Estonian law of 27 March 2002 on private international law, which refers to contractual obligations (ESPLUGUES, IGLESIAS, PALAO, 2011: 122). It should be remembered that the overall assessment of the circumstances of the case refers to art. 94.8 of the Bulgarian or international private law code 2005 which allows to overcome the complex presumptions provided for by the same art. 94 in favor of finding the closest connection⁴⁵.

The parameter of the evidence about the inapplicability of the presumptions of prevalent localization is used, in the matter of the law applicable to contractual obligations, in art. 1.37 of the Lithuanian civil code, according to which «paragraph 4 of this article⁴⁶ shall not apply where its impossible to determine the place of performance of

43 It should be noted that the criterion of the closest connection operates in the same law as a general clause in the event of inactivity of the main criterion. In particular art. 10.1. which is affirmed that: «if the circumstances on which the applicability of a law depends cannot be established then the law which is most closely connected with the relationship shall apply».

44 This provision in english provision states that: «if the parties have not explicitly designated any law, the relation arising from the contract will be governed by the «most connected law to the contract. This law is accepted to be the law of the habitual residence (at the moment of the conclusion of contract) of the debtor of the characteristic performance, the law of the workplace or (in absence of a workplace) the law of the residence of the above mentioned debtor in case the contract is concluded as a result of commercial and professional activities; in case that the debtor has multiple workplaces, the law o the workplace which is the most tightly related to the contract. Nevertheless considering the state of al affairs if there is a law more tightly related to he contact, that particular law shall govern [...]».

45 The cited provision stated that: «[...] the provisions of parr. 2, 3, 5, 6 and 7 shall not apply if it appears from the circumstances as a whole that the contract is more closely connected with another state. In such case, the law of that other state shall apply [...]».

46 Accordng to the cited provision: «[...] if no law applicable to a contractual obligation is designed by the agreement of the contracting parties, the law of the state with which the contractual obligation is most closely connected shall apply. The contractual obligation shall be presumed to be the most closely connected with the state in the territory of which: 1.the party bound to perform the obligation most characteristic to the contract is domiciled or has its central administration [...] 2. immovable property is located if the subject matter of the contract is the right in the immovable property or the right to this use; 3.was the place of the principal business of a carrier at the time when the contract for carriage was made, if the state of the principle business of the carrier is also the same state where the cargo was located or the head office of the sender is located, or the place the cargo was dispatched from [...]».

the obligation most characteristic to the contract and the presumptions established in this paragraph may not be relied upon as it is evident from the circumstances of the case that the contract is most closely connected with another state». Alla richiesta della parte viene espressamente subordinata l'applicazione della clausola d'eccezione nell'art. 2653 del codice civile argentino, secondo cui «excepcionalmente» a pedido de parte, y tomando en cuenta todos los elementos objetivos y/o subjetivos que se desprendan del contrato, el juez esté facultado para disponer la aplicación del derecho del Estado con el cual la relación jurídica presente los vínculos más estrechos»⁴⁷.

9. THE HAGUE CONVENTIONS

Art. 3, lett. 2 of the Hague Convention of 1989 on the law applicable to succession due to death⁴⁸ in identifying the criterion of habitual residence of the deceased, which lasted for at least five years before death, for the purpose of determining the law applicable to succession, establishes in via exceptional, the application of the law of citizenship of the deceased if on the date of his death he appeared (manifestly more closely connected) (VAN LOON, 1988: 270)⁴⁹. The criterion of citizenship is used here to the extent that it reflects a connection closer than that expressed by the habitual residence which lasted for at least five years. In the hypothesis considered by article 3, lett. 2 in question, two important profiles emerge (MCCLEAN, 2000: 174). The first concerns the fact that the use of the exception clause comes to prevail even in the presence of exceptional circumstances over habitual residence, the second is that a space to admit such prevalence appears to be suggested precisely by the time profile to which the forecast refers. It follows that the habitual residence of the deceased at the time of death for a period of less than five years, together with other circumstances to be evaluated in practice, may be based on the application of a law other than that identified on the basis of the general rule. The lack of habitual residence makes the further provision of art. 3, lett. 3 also integrated with an exception clause according to which

47 Without prejudice to the provisions of the second paragraph of the aforementioned article which «esta disposición no es aplicable cuando las partes han elegido el derecho para el caso».

48 This convention is not yet in force. It is currently underwritten by the four states, and only one instrument of ratification has been deposited. For its entry into force it requires the deposit of at least three instruments of ratification (art. 25).

49 According to that provision: «[...] succession is also governed by the law of the state in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. In exceptional circumstances if at the time of his death he was manifestly more closely connected with the state of which he was then a national, the law of that state applies».

«in other cases succession is governed by the law of the state of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another state, in which case the law of the latter state applies».

Art. 8, lett. 3 of the Hague Convention of 22 December 1986 on the law applicable to international sales contracts provides that «by the way of exception, where in the light of the circumstances as a whole for instance any business relations between the parties, the contract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under parr. 1 or 2 of this article, the contract is governed by that other law». This provision operates as an exception to the general rule which is divided into two provisions: on the one hand, in the criterion of seller's business location (the law of the state where the seller has his place of business at the time of conclusion of the contract), on the other, purchaser's business location (the law of the state where the buyer has his place of business at the time of conclusion of the contract) subject to the presence, alternatively of specific conditions, of revealing a different and more significant relevance of this second criterion (LANDO, 1984: 329)⁵⁰.

Art. 15, let. 2 of Hague Convention of 1996 on parental responsibility and protection of minors in accepting the criterion of convergence between the forum and ius, establishes the application of a different law in the light of both the presence of a substantial connection (substantial connection) with this different law, and the presence of considerations of material justice, with the attribution of prevalence to the law that ensures or better ensures the protection of the person or property of the minor⁵¹. By virtue of the aforementioned provision «in so far as their protection of the person or the property of the child requires they may exceptionally apply or take into consideration the law of another state with which the situation has a substantial connection». In this hypothesis the application of the exception clause appears to be related to considerations linked to the result of the operation of the standard, even if it presupposes the

50 This is the specific of the fact that: «a) negotiations were conducted and the contract concluded by nad in the presence of the parties in that state, or b) the contract provides expressly that the seller must perform his obligation to deliver the goods in that state, or c) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tenders)».

51 Which is affirmed that: «in exercising their jurisdiction under the provisions of chapter II, the authorities of the contracting states shall apply their own law. In so far as the protection of the person or the property of the child requires they may exceptionally apply or take into consideration the law of another state with which the situation has a substantial connection. If the child's habitual residence changes to another contracting state, the law of that other state governs, from the time of the change, the conditions of application of the measures taken in the state of the former habitual residence [...]».

exceptionality of the recourse to the criterion of the closest connection with respect to the general connection criterion, consisting in the conscience between forum and ius⁵².

10. CONCLUDING REMARKS

The exception clause appears as a unitary institution, in light of the fact that its various declinations, even the most sui generis which link its functioning to extrinsic profiles with respect to the case in point, do not change the core of its structure, which is articulated in the access of the clause to the general rule which is articulated in accessing the clause to the general rule in basing the latter on a localization criterion inspired by the principle of proximity, in the subordination of the first to the second even with presuppositions that otherwise are connoted on the level of positive law. The clause is thus an expression of consistency in the reference system: a provision of private international law that identifies a flexible and non-univocal connection criterion could not be entirely consistent with its ratio if, when combined with presumptions or rules suitable for predetermining the connection narrower did not foresee corrections to bring the rule back into its specific function by giving priority to what is the most significant link.

Without prejudice to the above, it is necessary to check whether the exceptional clauses that are linked to a rule characterized by a relative presumption of formality can be considered different in terms of structure and foundation.

It seems except what immediately specified that the structure of the clause in its relations with the general rule does not change in either case. The articulation of the provision remains unchanged, its function and the relationship between rule and exception: two non-coinciding connection criteria (the lender's habitual residence, on the one hand, and the closer connection on the other, which access the same case and function) in the relationship of subordination. What varies, if anything, but is graded not by structure is the resistance of the rule with respect to the exception where the rule is originally assisted by relative presumption it is already born with a greater level of penetrability than the exception, while in the case where the rule sets the criterion (the habitual residence of the lender) in categorical terms, said penetrability is reduced and the exception clause takes shape and manifests itself is reduced and the exception clause takes shape and is manifested is reduced and the exception clause takes shape and is manifested in truly «exceptional» terms, which then needs to be reflected in the to motivate the judge, required to support the reasons for the abandonment of the rule due to the presumption of other criteria. Moreover, it is precisely in the context of the formulation adopted by the Convention of Rome of 1980 assorted by a form of relative

52 «In exercising their jurisdiction under the provisions of Chapter II, the authorities of the contracting states shall their own law».

presumption that the discussion about the «weak» or «strong» nature of the presumption referred to in its art. 4, lett. 2 and whose jurisprudential orientations have also been taken into account in the present work.

The examination of the normative data and the practice conducted in the present work has also highlighted how the study of the exception clause involves in addition to exegetical profiles linked to its different attitude in EU, conventional and internal discipline, general theoretical questions of international law private. The first important aspect on which the analysis carried out allows us to give feedback is if the exception clause in the various forms and areas in which it is expressly regulated, represents a forecast whose relevance is limited to the areas of reference, or constitutes expression of a general principle proper to the system of private international law. In this regard, it should be recalled that an attempt to reconstruct the exception clause in terms of the general principle of private international law appears to have not been shared by the doctrine (MARIDAKIS, 1957: 55). This attempt was based on the consideration that the conflict rules, like other juridical norms, are formulated assuming what usually happens in reality, so that they would miss their objective if they even operate when there is a closer connection with another order. In light of the considerations already made in this work, the doctrinal position was expressed that the exception clause underlies a fundamental principle in the field of private international law (VISCHÉR, 1971: 76; ROSENTRITT, 2019). It is to be shared that the interpretation of the conflict rules must take place in accordance with the general precepts of certainty and predictability so that where the connecting criterion has flexibility margins, the actual connection between the cases is sought. However, it does not seem to be able to go further or to claim that the exception clause constitutes a general principle inherent in the system of private international law. Moreover, the thesis that considers the subjection of the conflict rules to the interests underlying them does not seem to be able to be understood in such terms as to go beyond the normative data and assume the presence of a general principle that allows the non-application of the connection criterion according to the search for an effective connection that is justified in light of these interests.

It emerges that the exception clause functions in correlation with a more general rule to represent an alternative, albeit an exceptional one, or a completion. The result of the operation of the exception clause consists in the identification of an applicable law different from that which would be applicable on the basis of the general rule which the clause enters. This may be the consequence of the non-application of forms of presumption destined to disappear when all the circumstances indicate that the contract has a closer connection with another country. Beyond a rule characterized by forms of presumption and therefore on the assumption of a different basic approach if the set of circumstances clearly shows that the relationship has manifestly closer links with a country other than that indicated on the basis of the criteria identified by type contractual law the law of this different country applies. The effect of the foregoing is that the

right invoked on the basis of the criteria provided by the general rule is by exception inapplicable if from the set of circumstances it is manifest that the case is only slightly connected but more closely connected with another.

It appears that the exception clause is a flexible clause. It introduces an element of evaluation suitable to overcome the rigidity of the more general criterion to which it accesses. On the other hand, the international harmony of the solutions, that is, uniformity of the discipline of the relationship regardless of the legal order from which it arises, may appear more protected by a rigid or generally predictable rule of private international law, while the clause exceptional in its characterizing for flexibility and discretion attributed to the judge, it appears to move in a different direction. Through the exception clause, however, the role of the judge is enhanced, which is responsible for determining and motivating, through appropriate assessments, which closer connection is relevant for the purpose of identifying the applicable law in the absence of choice of the parties. It emerged that the use of the exception clause cannot be directly based on considerations of material law. The purpose of the clause is to enable the contractual relationship to be located in a given order, resulting in aspects that are external to the position of the contractual parties or to the effects that the law thus identified as applicable can produce on the relationship itself.

BIBLIOGRAPHY

- ABBASSI, A. & BAZRPACH, H. 2016: «Distinction between exception clause and exemption clause». *International Journal of Humanities and Cultural Studies*, 2016: 1906ss.
- AUDIT, B. 1979: «A continental looks at contemporary American choice of law principles». *American Journal of Comparative Law*, 1979, 27 (4): 590ss.
- AUDIT, B. 2013: *Droit international privé*. Paris: Éd. LGDJ, 692ss.
- BENTWICH, N. 1925: *Westlake private international law*. London: Sweet & Maxwell, 212ss.
- BOULARBAH, H. 2005: «Le nouveau droit international privé belge. Origine, objet et structure». *Journal des Tribunaux*, 2005, 174ss.
- BROGGINI, G. 1971: «La codification du droit international privé en suisse». *Zeitschrift für schweizerisches Recht*, 1971, 90: 282ss.
- CARLIER, G. Y. 2005: «Le code belge de droit international privé». *Revue Critique de Droit International Privé*, 2005, 94: 12ss.
- CUNIBERTI, G. & MIGLIORINI, S. 2018: *The European account preservation order Regulation. A commentary*. Cambridge: Cambridge University Press, 265ss.
- DIETZI, H. 1973: *Zur Einführung einer generellen Ausweichklausel im schweizerischen IPR, in Festgabe zum Schweizerischen juristentag*. Basel: Helbing & Lichtenhahn, 50ss.
- DROZ, G. 1994: «A comment on the role of the Hague conference on private international law». *Law and Contemporary Problems*, 1994, 57: 5ss.
- DUBLER, C. E. 1983: *Les clauses d'exception en droit international privé. Études Suisses de droit International*. Geneve, 35.
- EINSELE, D. 2017: «Kapitelmarktrecht und Internationales Privatrecht». In *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2017, 81.

- ESPLUGUES, C.; IGLESIAS, G. L. & PALAO, G. 2011: *Application of foreign law*. Bruxelles: Sellier, 122ss.
- FALLON, M. & ERAUW, J. 2004: *La nouvelle loi sur le droit international privé*. Bruxelles: Kluwer, 202ss.
- FERRARI, F. & LEIBLE, S. 2009: *Rome I Regulation. The law applicable to contractual obligations in Europe*. The Hague: European Law Publishers, 180ss.
- GONZALEZ CAMPOS, A. 2000: «Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé, Cours général». *Recueil des cours*, 2000, 287: 25ss. The Hague: Ed. Brill.
- HATJE, A.; TERHECHTE, J. P. & MÜLLER-GRAFF, P. C. 2018: *Europarechtswissenschaft*. Baden-Baden: Ed. Nomos.
- HAY, P. 1991: «Flexibility versus predictability and uniformity in choice of law: reflection on current European and United States conflicts law». *Recueil des cours*, 1991, 226: 226ss. The Hague: Ed. Brill.
- HEY, P. 2018: *Advanced introduction to private international law and procedure*. Cheltenham: Edward Elgar Publishers.
- HIRSE, T. 2006: *Die Ausweichklausel im Internationalen Privatrecht*. Tübingen: Mohr Siebeck.
- JAFFEY, A. J. E. 1987: «The english proper law doctrine and the EEC Convention». *International and Comparative Law Quarterly*, 1987, 33 (3): 438ss.
- JAULT-SESEKE, F. 2010: *Conflit de lois. Mise en oeuvre de la clause d'exception*. Paris: in Recueil Dalloz, 1586ss.
- KNOEPFLER, F. 1982: «Utilité et danger d'une clause d'exception en droit international privé». In *Hommage à Raoumond jean prêtre*. Neuchâtel, 114ss.
- KREUZER, W. 1982: «Berichtigungsklauseln im internationalen privatrecht». In *Festschrift für Imre Zajtay*. Tübingen: Mohr Siebeck, 296ss.
- LAGARDE, P. 1986: *Le principe de proximité dans le droit international privé contemporain. Cours général de droit international privé*. Boston: Ed. Brill, Leiden, 10ss.
- LANDO, O. 1982: «New American choice of law principle and European conflict of laws of contracts». *American Journal of International Law*, 1982, 30 (1), 19ss.
- LANDO, O. 1984: «The conflict of laws of contracts». *Recueil des cours*, 1984, 189: 329ss. The Hague: Ed. Brill.
- LIAKOPOULOS, D. 2009: *Giustizia materiale nel diritto internazionale privato e comunitario*. Ed. Giuffrè.
- LOOSCHELDERS, D. 2004: *Internationales Privatrecht, art. 3-46 egbgb*. Düsseldorf: Ed. Springer, 620ss.
- MANN, F. A. 1979: *Colloque de Fribourg relatif au projet de la loi fédérale sur le droit international privé*. Zurich: Études suisses de droit international, 86ss.
- MARIDAKIS, G. S. 1957: *Le renvoi en droit international privé*. The Hague: Ed. Brill, 105, 55ss.
- MCCAFFREY, S. T. 1980: «The Swiss draft law on private international law. An overview». *American Journal of International Law*, 1980, 28: 236ss.
- MCCLEAN, D. 2000: «De conflictu legum. Perspectives on private international law at the turn of the century». *Recueil des cours*, 2000, 287: 174ss. The Hague: Ed. Brill.
- MCPARLAND, M. 2015: *The Rome I Regulation on the law applicable to contractual obligations*. Oxford: Oxford University Press.
- MONATERI, P. G. 2017: *Comparative contract law*. Cheltenham: Edward Elgar Publishers, 534ss.
- MORRIS, J. H. C. 1940: «The proper law of the contract in the conflict of laws». *Law Quarterly Review*, 1940, 46: 322ss.

- MOSCONI, F. 1989: «Exceptions to the operations of choice of law rules». *Recueil des cours*, 1989, 217: 189ss. The Hague: Ed. Brill.
- NADELMANN, K. H. 1985: «Choice of law resolved by rules or presumptions with an escape clause». *American Journal of International Private Law*, 1985, 33: 298ss.
- PALAO MORENO, G.; ALONSO LANDETA, G. & BUÍGUES, I. (dirs.). 2015: *Sucesiones internacionales. Comentarios al Reglamento (UE) 650/2012*. Valencia: Ed. Marcial Pons, 58ss.
- PATOCCHI, P. M. 1985: *Règles de rattachement localisatrices et règles de rattachement à caractère substantiel*. Genève, 42.
- ROSENTRITT, S. 2019: *Die Gefahrtragung im europäischen und internationalen Kaufrecht*. Tübingen: Mohr Siebeck.
- SCHREIBER, S. 2001: *Ausweichklauseln im deutschen, österreichischen und schweizerischen Internationalen Privatrecht*. Hamburg: Ed. Kovac Verlag.
- SCHWARZE, J.; BECKER, V.; HATJE, A. & SCHOO, J. 2019: *EU-Kommentar*. Baden-Baden: Ed. Nomos.
- SIEHR, K. 2005: «General problem of private international law in modern codification. De lege lata and de lege europea ferenda». *Yearbook of Private International Law*, 2005, 7: 28ss.
- STONE, P. & FARAH, Y. 2015: *Research Handbook on European Union private international law*. Cheltenham: Edward Elgar Publishers.
- SYMEONIDES, S. C. 2011: *Codification and flexibility in private international law. General reports of the XVIIIth Congress of the international academy of comparative law*. New York: Ed. Springer, 18ss.
- SYMEONIDES, S. C. 2014: *Codifying choice of law around the world: an international comparative analysis*. Oxford: Oxford University Press.
- SYMEONIDES, S. C. 2016: *Choice of law*. Oxford: Oxford University Press.
- SYNKOVÁ, S. 2013: *Court's inquiry into arbitral jurisdiction at the pre-award stage*. Berlin: Ed. Springer, 304ss.
- VAN LOON, J. H. A. 1988: «Towards a convention on the law applicable to succession to the estates of deceased persons». *Hague Yearbook of International Law*, 1988, 1: 270ss.
- VISCHÉR, F. 1962: *Internationales Vertragsrecht*. Berne: Schulthess, 130ss.
- VISCHÉR, F. 1971: «Das Problem der Kodifikation des schweizerischen internationalen Privatrechts». *Zeitschrift Schweizerische Recht*, 1971, 90: 76ss.
- VON OVERBECK, A. E. 1982: «Les questions générales du droit international privé à la lumière des codifications et projets récents». *Recueil des cours*, 1982, 176: 178ss. The Hague: Ed. Brill.
- VON OVERBECK, A. E. 1999: «The fate of two remarkable provisions of the swiss statute on private international law». *Yearbook of Private International Law*, 1999, 1: 128ss.
- VON OVERBECK, A. E. 2000: *De quelques règles générale de conflits de lois dans le codification précentes, in Private law in the international arena. Liber amicorum Jurt siehr*. The Hague: Ed. Brill, 550ss.
- WAUTELET, P. 2005: *Chronique de droit international privé le code de droit international privé*. Bruxelles: Larcier, 25ss.
- WAUTELET, P. 2006: «Le code de droit international privé ou l'avènement d'un droit international privé "flexible"». *Revue de la Faculté de droit de l'Université de Liège*, 2006: 348ss.
- WILKE, M. 2019: *A conceptual analysis of European private international law. The general issues in the EU and its member states*. Oxford: Ed. Intersentia, Antwerp.

