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THE CLAUSES OF EXCEPTION IN "DOMESTIC LAW" AND IN HAGUE CONVENTIONS[1]

AS CLÁUSULAS DE EXCEÇÃO NO DIREITO INTERNO E NAS CONVENÇÕES DE HAIA

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RESUMO: O presente trabalho se propõe, depois de um exame preliminar necessário sobre a terminologia e o nível de classificação, a analisar as cláusulas (em modo comparativo) em questão segundo a legislação da EU e a jurisprudência a nível convencional. Nesta reconstrução, será necessário identificar não apenas o conteúdo e o alcance dos dados normativos, mas também compreender, até onde seja possível, com referências práticas, as hipóteses que podem justificar e concretizar a não aplicação da regra de conflito destinada a operar em geral, bem como o uso da cláusula de exceção.

PALAVRAS-CHAVE: Reg. 650/2012, Reg. 2016/1104, cláusulas de exceção, convenções de Haia, Direito Internacional Privado; Direito Processual Internacional; Direito Internacional privado da União Europeia.

[1] Artigo recebido em 17/05/2019 e aprovado em 21/07/2019.

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 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.

KEYWORDS: Reg. 650/2012, Reg. 2016/1104, clauses of exceptions, Hague Conventions, international private law, International Procedural Law; European Union international private law.

Introduction. The exception clause notion.

The expression clause exception, escape clause, exemption clause[2], clause èchappatoire ou d'excpetion, clause de escape, Ausnahmeklauseln, Ausweichklausel or even Berichtigungsklausel appears relatively recently in private international law[3] and constitutes the fruit of a doctrinal elaboration.

Consider the use of the expression escape clause or clause èchappatoire 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

[2]A. ABBASSI, H. BAZRPACH, **Distinction between exception clause and exemption clause,** in International Journal of Humanities and Cultural Studies, 2016, pp. 1906ss.

[3]K. SIEHR, **General problem of private international law in modern codification. De lege lata and de lge europea ferenda**, in Yearbook of Private International Law, 7, 2005, pp. 28ss. A.E. VON OVERBECK, **Les questions gènèrales du droit international privè à la lumioère des codifications et projects rècents,** in Recueil des cours, 176, ed. Brill, The Hague, 1982, pp. 178ss. P. HEY, **Advanced introduction to private international law and procedure,** Edward Elgar Publishers, Cheltenham, 2018. 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 form the relevant written conflict rule (...)".

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[4]. 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 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 exception[5] with the clause term[6] 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[7].

The aforementioned combination also results in different characterizations in private international law system[8]. 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[9] and Rome II Regulation use a safeguard

[4]A. GONZALEZ CAMPOS, **Diversifcation, spècialisation, flexibiliation et matèrialisation des règles de droit inernational privè, Cours gènèral,** in Recueil des cours, ed. Brill, The Hague, 287, 2000, pp. 253, which states that: "(...) clauses correctives de la localization dans le domaine du droit applicable (...)". In argument see also: F. KNOEPFLER, **Utilitè et danger d'une clause d'exception en droit international privè, in Hommage à Raumond jean prêtre,** Neuchâtel, 1982, pp. 114ss.

[5]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.

[6]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 claudēre or close.

[7]D. LIAKOPOULOS, **Giustizia materiale nel diritto internazionale privato e comunitario,** ed. Giuffrè, 2009.

[8]F.M. WILKE, **A conceptual analysis of European private international law. The general issues in the EU and its member states,** ed. Intersentia, Antwerp, Oxford, 2019.

[9]Commission Regulation n. 593/2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J.

clause[10]. So 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 the letters 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[11] 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[12] is the most consistent

(L 177). For further details see: F. FERRARI, S. LEIBLE, **Rome I Regulation. The law applicable to contractual obligations in Europe,** European Law Publishers, The Hague, 2009, pp. 180ss.P. STONE, Y. FARAH, **Research Handbook on European Union private international law,** Edward Elgar Publishers, Cheltenham, 2015. M. MCPARLAND, **The Rome I Regulation on the law applicable to contractual obligations,** Oxford University Press, Oxford, 2015.

[10]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. For further details and analysis see: A. HATJE, J.P. TERHECHTE, P.C. MÜLLER-GRAFF, **Europarechtswissenschaft,** ed. Nomos, Baden-Baden, 2018. J. SCHWARZE, V. BECKER, A. HATJE, J. SCHOO, **EU-Kommentar**, ed. Nomos, Baden-Baden, 2019.

[11]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 succession. For further details see: G. PALAO MORENO, G., ALONSO LANDETA, I., BUÍGUES, (dirs.), **Sucesiones internacionales. Comentarios al Reglamento (UE) 650/2012,** Marcial Pons, Valencia, 2015, pp. 58ss.

[12]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. D. EINSELE, **Kapitelmarketrecht und Internationales Privatrecht,** in Rabels Zeitschrift für ausländisches und internationales Privatrecht, 81, 2017.

with the proximity principle[13].

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[14] 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.

Types of exception clauses in private international law.

[13]P. LAGARDE, **Le principe de proximitè dans le droit international privè contemporain. Cous gènèral de droit international privè**, ed. Brill, Leiden, Boston, 1986, pp. 10ss. A.E. VON OVERBECK, **De qualques règles gènèrales de conflits de lois dans les codification rècentes,** op. cit., pp. 550ss.

[14]For further analysis see: T. HIRSE, **Die Ausweichklausel im Internationalen Privatrecht,** Mohr Siebeck, Tübingen, 2006. S. SCHREIBER, **Ausweichklauseln im deutschen, österreichischen und schweizerischen Internationalen Privatrecht,** Kovac Verlag, Hamburg, 2001. W. KREUZER, **Berightigungsklauseln im internationalen privatrecht, in Festschrift für Imre Zajtay**, Mohr Siebeck, Tübingen, 1982, pp. 296ss. K.H. NADELMANN, **Choice of law resolved by rules or presumptions with an escape clause**, in American Journal of International Private Law, 33, 1985, pp. 298ss. C.E. DUBLER, **Les clauses d'exception en droit international privè**. Etudes suisses de droit international, Genève, 35, 1983. H. DIETZI, **Zur Einführung einer generellen Ausweichklausel im schweizerischen IPR, in Festgabe zum Schweizerischen juristentag**, Helbing & Lichtenhahn, Basel, 1973, pp. 50ss. F. JAULT-SESEKE, **Conflit de lois. Mise en oeuvre de la clause d'exception,** in Recueil Dalloz, Paris, 2010, pp. 1586ss. F. KNOPPFLER, **Utilitè et dangers d'une clause d'excpetion en droit international privè,** op. cit., pp. 118ss. F. MOSCONI, **Exceptions to the operations of choice of law rules**, in Recueil des cours, ed. Brill, The Hague, 217, 1989, pp. 189ss. A.E. VON OVERBECK, **De quelques règles gènèrale de conflits de lois dans le codification prècentes**, in Private law in the international arena. Liber amicorum Jurt siehr, ed. Brill, The Hague, 2000, pp. 550ss. P.G. MONATERI, **Comparative contract law**, Edward Elgar Publishers, Cheltenham, 2017, pp. 534ss. S.C. SYMEONIDES, **Choice of law**, Oxford University Press, Oxford, 2016.

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[15].

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.

The exception clause can assume a subordinated nature with respect to conditions of public order and in particular to establishes specific legal effects[16]. 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

[15]F. MOSCONI, **Exceptions to the operations of choice of law rules,** op. cit., pp. 194ss, which is affirmed that: "(...) the exception clause thus has its place within the conflict rules system and conforms to the philosophy inherent therein. The designation of he 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 he case, contrary to what the legislator had assumed, this does not lead to the legal system with which the case is more closely connected (...)".

[16]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. See also: G. CUNIBERTI, S. MIGLIORINI, **The European account preservation order Regulation. A commentary,** Cambridge University Press, Cambridge, 2018, pp. 265ss.

to a manifestation of will in this sense[17].

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 rule[18], 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[19]. 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[20]. 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 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

[17]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.

[18]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.

[19]B. AUDIT, **A continental looks at contemporary American choice of law principles**, in American Journal of Comparative Law, 27 (4), 1979, pp. 590ss. O. LANDO, **New American choice of law principle and European conflict of laws of contracts**, in *American Journal of International Law,* 30 (1), 1982, pp. 19ss.

[20]B. AUDIT, **Droit international privè,** LGDJ, Paris, 2013, pp. 692ss.

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[21]. 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[22], like other expressions of this phenomenon, or the introduction of conflict rules with alternative connection criteria and

[21]G. DROZ, **A comment on the role of the Hague conference on private international law**, in Law and Contemporary Problems, 57, 1994, pp. 5ss.

[22]P. HAY, **Flexibility versus predictability and uniformity in choice of law: reflection on current European and United States conflicts law,** in Recueil des cours, ed. Brill, the Hague, 226, 1991, pp. 226ss. 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). In argument see: P.M. PATOCCHI, **Règles de rattachement localisatrices et règles de rattachement à caractère substantiel,** Geneve, 42, 1985. S.C. SYMEONIDES, **Codifying choice of law around the world: an international comparative analysis**, Oxford University Press, Oxford, 2014.

forms of choice of the applicable law[23]. For the alternative connection criteria, the relevance in terms of flexibility is given by the openness to the possibility for the judge 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[24] 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.

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"[25], 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

[23]S.C. SYMEONIDES, **Codification and flexibility in private international law. General reports of the XVIIIth Congress of the international academy of comparative law**, New York, 2011, pp. 18ss.

[24]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: J.H.C. MORRIS, **The proper law of the contract in the conflict of laws**, in Law Quarterly Review, 46, 1940, pp. 322ss. See also in argument: A.J.E. JAFFEY, **The english proper law doctrine and the EEC Convention**, in International and Comparative Law Quarterly, 33 (3), 1987, pp. 438ss. N. BENTWICH, **Westlake private international law,** Sweet & Maxwell, London, 1925, pp. 212ss.

[25]F. NOEPFLER, **Le projet de la loi fèdèrale sur le droit international privè**, op. cit., pp. 32ss. S.T. MCCAFFREY, **The Swiss draft law on private international law. An overview,** in American Journal of International Law, 28, 1980, pp. 236ss. G. BROGGINI, La codification du droit international privè en suisse, in Zeitschrift für schweizerisches Recht, 90, 1971, pp. 282ss. C.E. DUBLER, **Les clauses d'exception en droit international privè.** Etudes Suisses de droit International, Geneve, 35, 1983.

apply if the applicable law has been chosen by the parties[26]. This appears to be consistent with the appreciation of parties will in an international private law sense, having observed in this regard that "il est èvident que l'autonomie de la volontè perdrait l'essentiel de son utilitè si le juge pouvait faire abstaction du choix des parties pour appliquer une loi qu'il considèrerait avoir un line plus ètroit avec l'affaire (...)"[27].

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[28].

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 prèsente des rapport prèpondèrants avec un autre pays, la loi de ce pays est applicable (...)"[29]. 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

[26]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 èntrangère pour être assimilè à une èlecction de droit. Or le recours à l'art. 15 LDIP est prècisèment exclu dans ce cas-là (art. 15 al. 2 LDIP (...)".

[27]A.E. VON OVERBECK, **Les questions gènèrales du droit international privè à la lumière des codifications et projets rècents,** op. cit., pp. 205ss.

[28]A.E. VON OVERBECK, **The fate of two remarkable provisions of the swiss statute on private international law**, in Yearbook of Private International Law, 1, 1999, pp. 128ss. In the present case, the Federal Court had considered the application of Swiss law on the basis of the following considerations: "le contrat a ètè passè à Genève où devait avoir lieu la livraison et où l'acheteur est domiciliè civilemente et commercialement. La monnaie du contrat ètait le ranc suisse, le règlemente en francs belges, modifiè ultèrierement dans le sens d'un acquittemnet du prix suisse que les parties ont seul invoquè est dans un rapport local plus ètroit que le droit belge avec les opèrations effectuèes, et que les parties devaient s'attendre a ce qu'il soit applique à leurs relations juridiques (...)".

[29]A.E. VON OVERBECK, **Les questions gènèrales du droit international privè à la lumière des codifications et projets rècents**, op. cit., pp. 204ss.

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[30]. In the opinion of others, the exception clause must be favorably assessed on the assumption that the Swiss courts would have made reasonable use of it[31].

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.

The jurisprudence of the Swiss Federal Court. Identification of the most relevant connection.

From the Swiss jurisprudence[32] 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 discretion[33], highlighting on the one hand the exceptional nature (“il s'agit d'une clause d'exception au sens strict, qui ne doit être appliquèe eu'en cas de nècessitè”) and on the other the necessity that they concur, for the purposes of its application two conditions

[30]F.A. MANN, **Colloque de Fribourg relatif au projet de la loi fèdèrale sur le droit international privè.** Etudes suisses de droit international Zurich, 1979, pp. 86ss.
[31]F. MOSCONI, **Exceptions to the operation of the choice of law rules,** op. cit., pp. 190, which is affirmed that: "(...) 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 (...)"
[32]F. VISCHER, **Internationales Vertragsrecht**, Schulthess, Berne, 1962, pp. 130ss.
[33]See the sentence of 27 January 1992, BGE 118 II 79, which is affirmed that: "cette disposition lègle s'en remet dans une large mesure à l'apprèciations du juge (...)".

or “un lien très lâche avec le droit dèsignè par la règle de conflit et une relation beaucoup plus ètroite 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. 15[34] and that from it "the faut y recourir de manière restrictive" the court pointed out that “l'application de la clause d'exception a lieu d'office; elle ne dèpend pas de l'apprèciation du juge”; furthermore, as noted elsewhere by the same court[35], the exception clause could not be conditioned by material law considerations, specifying that it “n'intervient que de façcon restrictive; elle ne tend pas, en particulier, à obvier aux consèquences indèsirables du droit matèriel”[36]. 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 name[37].

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

[34]Whohc is referred that: "(...) le clause d'exception de l'art. LDIP permet excepetionellement 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 quìun lien très lâche avec ce droit, et qu'elle trouve dans une relation beaucoup plus ètroite avec un autre droit (...)".
[35]Tribunal fèdèral suisse of 12 juin 2008, 5A 220/2008.
[36]Tribunal fèdèral suisse, 19 août 2008, 5A 49/2008, which is affirmed: "la clause d'exception prèvue par l'art. LDIP permet exceptionnellemnt au juge de ne pas appliquer le droit auquel renvoie une règle sur les conflits de loi lorsque, au egard 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 doiut notamment pas permettre d'èviter les consèquences indèsirables du droit matèriel (...)".
[37]According to the cited sentence: "(...) en effet, logiquement, la règle de conflit de lois est impèrative: lorsqu'elle donne une solution, celle-ci doit être respectiée et la sècuritè du droit commande que les dèsignations contenues dans la loi soient suivies sans èquivoque dans la très grande majoritè des cas (...)"

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 pronunciation of 27 January 1992[38], with regard to the application of art. 61 of the Swiss federal law on private international law concerning the law applicable to divorce and separation[39]. 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 lãche") with the right referred to in the aforementioned art. 61 (in the concrete case the right of the state of Texas) being the parties "dans une relation beaucoup plus ètroite avec le droit suisse".

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 court[40], in relation to art. 68 of the federal law on the subject of private international law[41], 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 or art. 68 and on the other hand how the exception clause could not be applied because "le seul lien avec l'italie ètait la nationalitè des parties, mais aucune d'elles n'y vivait", doendosi invece applicare "le droit suisse de la rèsidence habituelle de l'enfant au moment de sa naissance ètait donc applicable en vertu des art. 68, al. 1 et 69 al. 1 LDIP"[42].

Art. 3082 of the civil code of Quèbec

[38]27 January 1992, BGE, 118 II 79. For futher details see: S. SYNKOVÁ, **Court's inquiry into arbitral jurisdiction at the pre-award stage.** Springer, Berlin, 2013, pp. 304ss.
[39]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.
[40]Sentence of 18 September 2003, 5C.123/2003.
[41]According to this provision the filiation of filiation is regulated by the law of habitual residence de 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.
[42]S. SYNKOVÁ, **Court's inquiry into arbitral jurisdiction at the pre-award stage.** op. cit.

A general exception clause is contemplated in art. 3082 of the Quèbec civil code[43]. It provides that "à titre excepetionnel, la loi dèsignèe par le prèsent livre n'est pas aplicable si, compte tenu de l'enseble des circonstances, il est manifeste que la situation n'a qu'un lien èloignè avec cette loi et qu'elle se trouve en relation beaucuop plus ètroite avec la loi d'un autre État. La prèsente dispostition n'est pas applicable lorsque la loi est dèsignèe dans un acte juridique"[44].

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[45]. In its subordinate recourse to the clause of lack of choice 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 Quèbec 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 manifest[46].

[43]M. WATTÉ, **Clause d'exception. Mise en oeuvre,** in Chronique de Jurisprudence belge (1995-2010), in Journal de Droit International, 2011, pp. 1012ss.
[44]S. SYNKOVÁ, **Court's inquiry into arbitral jurisdiction at the pre-award stage,** op. cit.
[45]C.G. CASTEL, **The uncertainty factor in canadian private international law**, in McGill Law Journal, 52. 2007, pp. 566ss, which speaks in this regard that: "measure of uncertainty into legal relationships", precisando tutavia alla previsione di cui all'art. 3082, che "fortunately, it cannot be used to avoid the mandatory rules of Quebec or a law esignated by the parties in a juridical act, for instance a contract, will or trust (...)".
[46]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 èloignè avec le

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 systems[47].

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 peu la règle de rettachement telle qu'elle a ètè conçue par M. Savigny"[48]. 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 “ebranle si fortement la fermetè des règles du projet qu'elle en comrpomet l'utilitè”[49].

Article 19 of the Belgian law on private international law of 16 July 2004[50] 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

système juridique prescrit oar l'art. 3126 et beaucoup plus ètroit avec la loi d'un autre État".

[47]Cour du Quèbec 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 conencted with the situation (...)".

[48]P. WAUTELET, **Le code de droit international privè ou l'avènement d'un droit internatonal privè "flexible",** in Revue de la Facultè de droit de l'Universitè de Liège, 2006, pp. 348ss. G.Y. CARLIER, **Le code belge de droit international privè,** in Revue Critique de Droit International Privè, 94, 2005, pp. 12ss. H. BOULARBAH, **Le nouveau droit international privè belge. Origine, objet et structure**, in Journal des Tribunaux, 2005, pp. 174ss. M. FALLON, J. ERAUW, **La nouvelle loi sur le droit international privè**, Kluwer, Bruxelles, 2004, pp. 202ss.

[49]Avis du Conseil d'Etat, n. 29.201/2, Doc. Parl. Sènat, 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 circonstante que la relation en cause a ètè ètablie règulièrement selon le srègles de droit international privè des Etats avec lesquels cette relation prèsentatis des liens au moment de son ètablissement"), "emphasis is also placed on the validity of the legal relationship".

[50]P. WAUTELET, **Chronique de droit international privè: le code de droit international privè,** Larcier, Bruxelles, 2005, pp. 25ss.

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 state[51]. 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 applicable law occurs or when the designation of the applicable law is connected to material justice considerations[52].

An introduction to the German Einführungsgesetz zum Bürgerlichen Gesetzbuche, 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.

[51]M.W. WATTÉ, **Clause d'exception. Mise en oeuvre**, in Chronique de Jurispredence Belge (1995-2010), op. cit., of importance are also the criteria used to assess the prevalence of a different connection with respect to the one posed by the conflict rule or from another the predictability of the applicable law on the other hand the recourse to the theory of the requested rights. See also the second part of art. 19, according to which: "lors de l'application de l'alinèa 1er, il est tenu compte notamment: du besoin de prèvisibilitè du droit aplicable, et de la circonstance que la relation en cause a ètè ètablie règulièrement selon le règles de droit international privè des etats avec lesquels cette relation prèsentait des liens au moment de son ètablissement (...)".

[52]According to this provision: "le paragraphe premier n'est pas applicable en cas de choix du droit applicable par les parties conformèment aux dispositions de la prèsente loi, ou la dèsignation du droit applicable repose sur le contenu de celui-ci"

An exception clause relating to the law applicable to non-contractual obligations, specifically, unlawful (Unerlaubte Handlung) unjustified enrichment (ungerechtfertige Bereichrung) and other people's business management (Geschäftsführung ohne Auftrag) is provided for in art. 41 (1)[53] 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[54]. 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 relationship[55], or in the event that the subjects involved have our habitual residence in the same state at the time in which the relevant facts occur[56]. It should then be recalled art. 46[57] Einführungsgesetz zum Bürgelichen 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 rights (Transportmittel) noting the existence of "wesentlich engere Verbindung" for its application.

Also of importance is art. 12, par. 1 of private international law (Misscellaneous Provisions) Act of 1995 in relation to the law applicable to the offense (tort or delict)[58], 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 "its is substantially more appropriate for the applicable law for determinaing the isues arising in the case or any of those issues to be the law of the other country"[59]

[53]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 (...)"
[54]D. LOOSCHELDERS, **Internationales Privatrecht, art. 3-46 EGBGB,** Springer, Düsseldorf, 2004, pp. 620ss.
[55]The forecast that establishes the closest connection: "aus einer besonderen rechtlichen oder tatsächlichen Beziehung zwischen den Beteilighten im Zusammenhang mit dem Schuldverhältnis" (art. 41, par. 2, n. 1).
[56]Which is referred: "(...) in den Fällen des Artikels 38 Abs. 2 und 3 des Artikels 39 aus dem gewöhnlichen aufenthalt der Beteilighten in demselben Staat im Zeitpunkt des rechtserheblichen Geschehens; artikel 40 Abs. 2 Satz 2 gilt entsprechend (...)".
[57]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".
[58]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 aplicable law") to be used for determining issues relating to tort or (for the purposes of the law of Scotland) delict".
[59]According this disposition: "if it appear, in all the circumstances form a comparison of-a) the significance of

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[60].

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 connection[61].

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.

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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 (...)".

[60]O'BRIEN, Conflict of law, op. cit., pp. 404ss.

[61]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 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 (...)".

The art. 1, lett. 2 of the law of Liecthenstein 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[62]. 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[63].

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 law[64].

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 I[65]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 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 (...)"[66].

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

[62]K. SIEHR, **General problem of priate international law in modern codification. De lege lata and de lege europea ferenda,** op. cit., pp. 32ss.
[63]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 cotnacts with other states is governed by the law of th state whose policies would be most seriously impaired if its law were not applied to that issue. That state is determind by evaluating the strenght and pertinence of the relevant policies and the dispute; and 2) the policies and needs of the interstate and intrnational 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 (...)". S.C. SYMEONIDES, **Rome II and tort conflicts. A missed opportunity,** op. cit., pp. 212ss.
[64]The reference is: "the reasonable expectations of the parties regarding the use of another legal order".
[65]See art. 28 of regulation Rome I
[66]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".

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 Regulation[67]. 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[68]. 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 connection[69].

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 article[70] shall not apply where its impossible to determine the place of performance of the obligation most charecteristic 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". Upon request of the party, the application of the exception clause in art. 2653 of the Argentine civil code, according to which: "excepcionalmente" a pedido de parte, y tomando en cuenta todos los elementos objectivos yu sujectivos que se desprendan del contrato, el juez estè facultado para disponder la aplicaciòn del derecho del estado con el cual la relaciòn jurìdica presente los vìnculos màs

[67]This provision in english provision states that: "if the parties have not expicitly 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 mutiple workplaces, the law o the workplace which is the most tightly related to the contract. Nevertheless considering the state of all affairs if there is a law more tighlty related to he contact, that particular law shall govern (...)".

[68]C. ESPLUGUES, G.L. IGLESIAS, G. PALAO, **Application of foreign law**, Sellier, Bruxelles, 2011, pp. 122ss.

[69]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 (...)".

[70]According 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 (...)".

estrechos (...)"[71].

The Hague Conventions

Art. 3, lett. 2 of the Hague Convention of 1989 on the law applicable to succession due to death[72] 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)[73]. 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[74]. 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 "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

[71]Without prejudice to the provisions of the second paragraph of the aforementioned article which "esta dispociòn no es aplicable cuando las partes han elegido el derecho para el caso".
[72]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).
[73]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 ta 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". See also: J.H.A. VAN LOON, **Towards a convention on the law applicable to succession to the estates of deceased persons,** in Hague Yearbook of International Law, 1, 1988, pp. 270ss.
[74]For further details and analysis see: D. MCCLEAN, **De conflictu legum. Perspectives on private international law at the turn of the century**, in Recueil des cours, ed. Brill, The Hague, 2000, pp. 174ss.

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[75].

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 minor[76]. 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 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 ius[77].

[75]This is the specific of the fact that: "a) negotiations were conducted and the contract concluded by and 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)". See also: O. LANDO, **The conflict of laws of contracts,** in Recueil des cours, ed. Brill, The Hague, 189, 1984, pp. 329ss.

[76]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, form the time of the change, the conditions of application of the measures taken in the state of the former habitual residence (...)".

[77]"in exercising their jurisdiction unfer the provisions of Chapter II, che authorities of the contracting states shall their own law".

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 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[78]. 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[79]. 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

[78]G.S. MARIDAKIS, **Le renoiv en droit international privè,** ed. Brill, The Hague, 105, 1957, pp. 55ss.
[79]. VISCHÉR, **Das Problem der Kodifikation des schweizerischen internationalen Privatrechts**, in Zeitschft Schweizerische Recht, 90, 1971, pp. 76ss. S. ROSENTRITT, **Die Gefahrtragung im europäischen und internationalen Kaufrecht,** Mohr Siebeck, Tübingen, 2019.

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.

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