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REMARKS ON THE ADMISSIBILITY OF THE CHOICE OF LAW FOR DOMESTIC CONTRACTS PREPARED ON THE BASIS OF THE JUDGEMENT OF THE EUROPEAN COURT OF JUSTICE OF 8 JUNE 2017 (C-54/16)

O dopuszczalności wyboru prawa dla umów o charakterze wewnątrzkrajowym. Uwagi na tle wyroku Trybunału Sprawiedliwości Unii Europejskiej z 8 czerwca 2017 roku (C-54/16)

Artykuł zawiera analizę skutków wyboru prawa dokonanego przez strony w umowach o charakterze międzynarodowym oraz w umowach, które zamykają się w obszarze jednego państwa i nie zawierają elementu obcego, który uzasadniałby stosowanie norm kolizyjnych. Podstawą do dokonanej analizy jest wyrok TSUE z 8 czerwca 2017 r. w sprawie C-54/16, Vinyls Italia SpA w upadłości a Mediterranea di Navigazione SpA, w którym Trybunał uznał, że przepisy rozporządzenia upadłościowego są przepisami *lex specialis* wobec rozporządzenia Rzym I o prawie właściwym dla zobowiązań umownych. Daje to zdaniem Trybunału kompetencje stronom do dokonania wyboru prawa – prawa państwa trzeciego (członkowskiego) w tym przypadku prawa angielskiego – ze skutkami wyboru kolizyjnego w umowach, w których nie występuje element obcy – w tej sprawie umowy czarteru morskiego statku włoskiego pomiędzy dwoma spółkami włoskimi (z siedzibą we Włoszech). Autor wyklucza możliwość istnienia relacji *lex specialis – lex generalis* pomiędzy rozporządzeniem upadłościowym i Rozporządzeniem Rzym I. Wskazuje także na kierunek wykładni – liberalny – występowania elementu obcego w ramach umowy. Artykuł zawiera wniosek, że drogą poszerzania autonomii woli stron jest materialnoprawna zasada swobody umów.

Pojęcia kluczowe: wybór prawa, materialnoprawne wskazanie, kolizja praw, normy kolizyjne, rozporządzenie Rzym I, rozporządzenie upadłościowe nr 1346/2000, rozporządzenie upadłościowe nr 2015/848

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I. Introduction

The Judgement of the European Court of Justice of 8 June 2017 in case C-54/16, Vinyls Italia SpA, in liquidation, v Mediterranea di Navigazione SpA[1] and the opinion of Advocate General Szpunar[2] issued in this case serve as a pretext to reflect upon private international law. This reflection concerns, in particular, the scope of the application of its rules in situations when there is no conflict between foreign legal systems (no foreign or transborder element is involved). It also attempts to consider whether it is admissible to select the law of a specific country to apply it to a contract if the contract is evidently of domestic nature and it is "limited to one area of the law of the state". This occurs when there is no foreign element that would justify a reference to and the application of foreign law (the law of another state). In particular, the question arises whether, in such a case, it is admissible to choose the law under Article 3 of Rome I[3] and whether this choice of law in an evidently domestic situation may lead to the application of a foreign law in its full scope excluding the application of the law which is applicable in the absence of the choice of law, i.e. in the situation when the contract is subject to the national law of the country with which all the elements relevant to the situation are connected (Article 3 (3) of Rome I). Is it possible that, in such a case, the choice of law may infringe the mandatory rules of the law that would be applicable in the absence of the choice of law? Do the parties have the competence to exclude the application of any state's legal system to the contract and regulate everything in a casuistic and complex way in the contract itself? How to understand the premise of connecting the contract with legal systems of various countries, which is the condition for the application of conflict-of-law rules, in particular, the rules of Rome I (Article 1)?

The issues considered here can be used to formulate more general questions and conclusions as to whether, on the basis of the freedom

[1] http://curia.europa.eu/juris/liste.jsf?language=en&num=C-54/16, see John Whiteoak, Andrew Cooke, CJEU Limits Situations in Which Insolvency Laws Relating to Transaction Avoidance May Override Parties' Contractual Choice of Law, https://hsfnotes.com/litigation/2017/07/14/cjeu-limits-situations-in-which-insolvency-laws-relating-to-transaction-avoidance-may-override-parties-contractual-choice-of-law/, Kathy Stones, Restructuring and Insolvency monthly highlights—June 2017, LexisPSL, https://blogs.lexisnexis.co.uk/content/restructuring-and-insolvency/lexispsl-restructuring-and-insolvency-monthly-highlights-june-2017, Stefan Ramel, Examines various issues raised in Vinyls Italia V Mediterranea Di Navigazione http://www.guildhallchambers.co.uk/pdfs/guildhall-2042.pdf; Geert van Calster [in:] Conflict of Laws /Private international law on 21/07/2017,https://gavclaw.com/tag/vinyls-italia/; Geert van Calster in Vinyls Italia: Szpunar AG on the chemistry between the Insolvency Regulation and Rome I, and the actio pauliana https://gavclaw.com/2017/03/07/vinyls-italia-szpunar-ag-on-the-chemistry-between-the-insolvency-regulation-and-rome-i-and-again-on-the-pauliana/

[2] http://curia.europa.eu/juris/liste.jsf?language=en&num=C-54/16

[3] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. L 177, hereinafter referred to as Rome I.

of contract in private, civil and commercial law, it is possible, by the will of the parties, to exclude the contract from any legal system employing the autonomy of will, including the autonomy of will in the conflict-of-law area[4]? Is it possible, by the will of the parties, to indicate any legal system in the world seen as beneficial from their perspective, or may it lead to the exclusion of the application of the rules of the applicable legal system and mandatory rules which implement certain axiological assumptions of a specific legislator? The function of law is to protect the values recognised by society and the legislator. Is it possible to waive this function by choosing the law of a third country, which was developed using different axiological foundations? This issue is of particular importance in insolvency proceedings, which may, to a greater or lesser extent, protect either the interests of the assets of the insolvent entity in one legal system or the interests of the creditors, i.e. the contractors of the insolvent entity, in another legal system.

II. A brief presentation of the facts of the case adjudicated by the European Court of Justice

The dispute in the main proceedings brought before Tribunale Ordinario di Venezia (District Court, Venice, Italy) was between Vinyls Italia, a company in liquidation, established in Venice (Italy), and Mediterranea, a company whose registered office was in Ravenna (Italy), concerning an action to set aside two payments (hereinafter referred to as "the contested payments") made pursuant to a ship charter contract concluded on 11 March 2008, the term of which was extended by an addendum of 9 December 2009.

On 11 March 2008, Vinyls Italia entered into a ship charter contract with Mediterranea di Navigazione SpA (hereinafter referred to as "Mediterranea") based in Ravenna (Italy) for the transport of chemical substances by vessels flying the Italian flag. The contract was between two Italian entities. The ship charter contract of the entity subject to the Italian law stated that the English law was the chosen law although no foreign law aspect arose in the case or no foreign element occurred in the facts of the case. The dispute concerned the remuneration paid in instalments by Vinyls in the period when the Italian law protected the insolvent entity (the future insolvent entity).

The contested payments, totalling EUR 44774027 had been made by Vinyls Italia for the benefit of Mediterranea before the administrative proceedings that rendered Vinyls Italia insolvent were carried out. In the main proceedings, the insolvency administrator of Vinyls Italia claimed that the contested payments had been made

[4] J. Pazdan, *Czy można wyłączyć umowę spod prawa*, PiP 2005, z. 10, p. 5.

after the contractual deadlines had expired, at the time when it had been well known that that company was insolvent and that those payments could be set aside pursuant to Article 67 (2) of the Italian Insolvency Law[5]. Vinyls Italia invoked the protection mechanism for insolvency assets under Italian law. The insolvency administrator demanded the payments be returned as they were ineffective under the Italian Insolvency Law.

Mediterranea objected to the ineffectiveness of the contested payments and contended that the payments had been made pursuant to the contract which, by the choice of the parties, was subject to the English law. Under this law, which is conclusive by virtue of Article 13 of regulation no 1346/2000 on insolvency proceedings[6], contested payments cannot be challenged (i.e. in the light of the English law).

III. The concept of the choice of law and its function. The functions of private international law

The problem of seeking the applicable law arises in situations and contracts in which there is a foreign or transborder element. The application of private law is usually restricted by territory. Seldom does it happen that it "follows the person", a rule applied by the Roman law according to which a citizen was subject to the Roman law regardless of where he was at a given moment. Nowadays, diplomatic immunities are related to the personal scope of the application of laws, but this phenomenon as such should be treated as an exception from the rule of the territorial application of private law (civil and commercial) and it is related to the spatial scope of the application of law. Law is limited in its scope of application, both by time and territory (space). The legal aspect of the sovereignty of each state is the possi-

[5] Article 67(2) of the legge fallimentare (Insolvency Law), approved by regio decreto no 267 (Royal Decree No 267) of 16 March 1942 (GURI No 81, of 6 April 1942), provides that „The following shall also be set aside if the insolvency administrator demonstrates that the other party was aware of the debtor's insolvency: liquidated and payable debts, acts done for consideration and those conferring preferential creditor status in respect of debts, including of third parties, established at the same time, if they were completed within six months of the declaration of insolvency." http://curia.europa.eu/juris/liste.jsf?language=en&num=C-54/16

[6] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings O. J. L 2000, 160/1. The analysed aspects of the applicable law had been regulated by Article 4 (2) (m) and Article 13. This regulation was revoked and currently, as of 26 June 2017, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings has been in force (recast O. J. L 2015, 141/19), which replaced the previous insolvency regulation in force (Article 91 and Article 92). The new regulation did not change in the analysed scope – i.e. the law applicable to insolvency, in particular the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors (Article 7 (2) (m)) and the possibility of invoking the law applicable to the challenged act - other than that of the State of the opening of proceedings (Article 16 (a) *lex concursus*) – and the rules arising from these provisions did not change. Further analysis of the insolvency regulation provisions (Article 4 (2) (m) and Article 13) refers to, respectively, Article 7 (2) (m) and Article 16 (a) of the new insolvency regulation no 2015/848.

bility of law-making, but it applies only to a limited territory[7]. If each state introduces legislation only for itself, the world, as regards private law, is made of a series of "clusters of legal systems of individual states", which differ in their contents. Differences in the contents of law are caused by differences in the perception of values protected by law, the distribution of emphasis, the regulation of the conflict of rights *in personam* (such as the right to privacy, on the one hand, and the freedom of media and the right to criticize, on the other) or other values protected by law. These differences are rooted in the tradition of the legal culture of individual states or, sometimes, the absence of an adequate modernisation of the law.

The question that arises is whether, within the fundamental way of selecting the law applicable to the contract, it is possible to choose the law of the case (contract) or the legal relationship is exclusively internal in its nature (domestic) and does not involve any foreign (international) element. It may lead to the exclusion of the mandatory rules of the legal system that would be applicable in the ordinary course of events if not for the choice of law made.

III.1. The choice of law in the situation of a conflict of laws

The fundamental way of determining the law applicable to contractual obligations is to elect the law that serves as a connector (the applicable law indicator) for the conflict-of-law rule. It is an expression of the autonomy of the parties' will in the situation of a conflict of laws[8]. It is generally accepted

[7] The problem of universalism versus territorialism, M. Sośniak [in:] *System prawa prywatnego* [ed.] M. Pazdan, T. 20A, Warszawa 2014, p. 35-37, K. Grzybczyk, M. Sośniak [in:] *System prawa prywatnego* [ed.] M. Pazdan, T. 20C, Warszawa 2015, p. 6, Bernd von Hoffmann, *General Report on Contractual Obligations*. [in:] O. Lando, B. von Hoffmann, K. Siehr (eds.), *European Private International Law of Obligations*, Tübingen 1975, p. 32.

[8] On the basis of numerous opinions expressed by Adrian Briggs, *The Conflict of Laws*, Oxford 2002, p. 9 and the following, 147, Jürgen Basedow, *Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts*, "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 2011, p. 75, 33, Frank Vischer, Lucius Huber, David Oser, *Die grenzen der kollisionsrechtlichen parteiautonomie* [in:] *Internationales vertragsrecht*, Bern 2000, p. 38, Robert C. Lawrence, III, International Tax and Estate Planning Ch. 1 (3d Ed. 1999), J. Skąpski, *Autonomia woli w prawie prywatnym międzynarodowym w zakresie zobowiązań z umów*, Kraków 1964, p. 62, M. Czepelak, *Autonomia woli w prawie prywatnym międzynarodowym Unii Europejskim*, Warszawa 2015, p. 14, Ł. Żarnowiec, *Wybór prawa według rozporządzenia dotyczącego prawa właściwego dla zobowiązań umownych*, „Przegląd Sądowy" 2012, nr 9, p. 23, M. Pazdan, *Prawo prywatne międzynarodowe*, Warszawa 2017, p. 211, in, M. Pazdan, *Wybór prawa w kontraktach zawieranych w międzynarodowym obrocie handlowym*, PSM 1976, p. 5, M. Pazdan, *O potrzebie zmian polskiego unormowania wyboru prawa dla zobowiązań umownych* [in:] *Księga pamiątkowa ku czci Prof. Z. Radwańskiego* [ed.] S. Sołtysiński, Poznań 1990, M. Pazdan, *Rezolucja bazylejska z 1991 roku w sprawie autonomii woli w zakresie umów zawieranych w międzynarodowym obrocie handlowym*, „Problemy Prawne Handlu Zagranicznego" 1993 t. 17, p. 124–131, I. Kunda, C. M. Gonçalves de Melo Marinho, *Practical Handbook on European Private International Law Practical*, [2010], https://bib.irb.hr/datoteka/606113.Manual_engleza.pdf.

internationally[9] and it was applied in the Rome Convention[10]. Therefore, if the choice of law in the contract is confirmed, it should be examined whether the contract and the factual status underpinning it involve any foreign or international element. According to the traditional approach, the absence of a foreign element does not give the parties any competence to contractually choose the law – as an instrument of conflict-of-law rules – for the contract concluded between them. As a result of such a choice the contract will not become subject to the legal rules of a third state selected by the parties.

Just like in the analysed factual status and the contract regulating it, it may turn out that there is no foreign element at all or that there is a foreign element, but it is insufficient (insufficiently relevant) to award the parties the competences to elect the law as part of conflict-of-law rules.

This issue is considered, in particular, in the context of the conflict-of-law rules provided for in Rome I, which regulate the law applicable to contractual obligations within the European Union. According to Article 1 (1) of Rome I entitled "Scope of the Convention" "The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries" (emphasis added). Article 3 of Rome I entitled "Freedom of choice" in (1) provides that "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract [...]. In (3) it provides that "The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract [...]". Following private international law and Rome I, the question about the choice of law arises when there is a foreign element in the facts of the case, or, more specifically, when this foreign element is important for the resolution of the conflict of laws, i.e. when there is a conflict of laws between two foreign legal systems[11].

[9] Symeon C. Symeonides, *Codifying the Choice of Law Around the World: An International Comparative Analysis*, Oxford 2014, passim. See exemplary legal system referring to the choice of law to indicate the applicable law to contracts indicated by Ł. Żarnowiec, *Wybór prawa… Ibid.*, 22, footnote 11, in particular the legal systems in Algeria, China, France, Japan, Macedonia, Germany, South Korea, Poland and Turkey.

[10] Aleksander Belohlawek, *Rozporządzenie Rzym I. Konwencja rzymska. Komentarz*, Warszawa (2010), see Mario Giuliano and Paul Lagarde Report [1980] on the interpretation of the Rome convention, OJ C282/1, hereinafter referred to as Giuliano and Lagarde Report.

[11] In this way this issue was regulated in Rome I; as regards the autonomy of the will of parties in private international law see J. Kropholler, *Internationales Privatrecht*, Tübingen 2004,

On the basis of Rome I, the choice of law as a way of determining the applicable law in the case of the conflict of laws (resolution of the conflict of laws) appears where the facts of the case involve a foreign (international) element and this element is of legal importance. An example situation when a foreign element is not important for the resolution of the case in the light of Rome I is the situation when, e.g., a Polish citizen with a permanent residence within the territory of Poland hires a movable to a citizen of Sweden as a hirer whose permanent residence is within the territory of Poland. The movable is also located within the territory of Poland. In this situation, the citizenship of the hirer, as a foreign element, is irrelevant for the determination of the applicable law. This case is governed by Polish law.

In the cases with a foreign (transborder) element, the choice of law makes it possible to implement the will of the parties and subject the legal relationship to the most adequate legal system[12]. It should be added that, over the course of history, the unlimited choice of law was admitted to replace the admissibility of the choice of restricted law. The choice of restricted law required the existence of a relationship between the selected law and the legal relationship or the contract (for example, through the citizenship of the parties, their permanent residence, the location of the subject of the contract or the place of the conclusion of the contract).

The autonomy of will in the legal sphere is expressed by freedom – the freedom of shaping one's own legal sphere by performing a legal act with legal consequences for oneself.

The autonomy of the will of the parties of contracts and the freedom of contracts is expressed by extremely extensive possibilities of shaping the legal sphere of the parties, in particular by the selection, made by the parties, of the law applicable to the contract[13]. This gives the parties an unlimited possibility of electing the legal system

p. 298, J. Skąpski, *Autonomia woli w prawie prywatnym międzynarodowym w zakresie zobowiązań z umów*, Kraków 1964, p. 31 and 124; W. Popiołek, *W sprawie ograniczeń kolizyjnoprawnego wyboru prawa w polskiej ustawie o prawie prywatnym międzynarodowym*, [in:] A. Mączyński, M. Pazdan, A. Szpunar (ed.), *Rozprawy z polskiego i europejskiego prawa prywatnego. Księga pamiątkowa ofiarowana Profesorowi Józefowi Skąpskiemu*, Kraków 1994, p. 352, Ł. Żarnowiec, *Wybór prawa według rozporządzenia dotyczącego prawa właściwego dla zobowiązań umownych*, „Przegląd Sądowy" 2012, z. 9, p. 23, M. Pazdan [in:] *System prawa prywatnego* [ed.] M. Pazdan, T. 20B, Warszawa 2015, p. 18, Andrzej W. Wiśniewski, *Prawo prywatne międzynarodowe. Komentarz* [*Private International Law. A Commentary*], [ed.] J. Poczobut, Warszawa 2017, p. 490.

[12] Theories derived from the American doctrine – the *a posteriori* method, see M. Pazdan, *Prawo prywatne*, (Fn.8), p. 194-195.

[13] The choice of law also appears in non-contractual obligations – delicts in Rome II. As for the conflict of laws, the autonomy of will is primarily expressed in making the choice of law for the contract. The autonomy of the will of parties in EU law is discussed in particular in M. Czepelak, *Autonomia woli w prawie prywatnym międzynarodowym Unii Europejskiej*, Warszawa 2015, p. 14. As regards the autonomy of will in the conflict of laws, see K. Kroll-Ludwigs, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht*, Tübingen 2013, passim, G. Żmij, *Party Autonomy and the New Polish Act on Private International La* [in:] *Private Autonomy in Germany and Poland and in the Common European Sales Law*, Köln 2012, p. 96.

which will govern the contract (Article 3 (1) of Rome I). The choice of law as a manifestation of the autonomy of the will of the parties also appears in conflict-of-law relations in other areas of law. Obviously, in the case of non-contractual obligations or other types of legal relationships, the choice of law as a way of seeking the applicable law is limited. For example, in the relationships not pursuant to contracts, the choice of law may apply to the period following the arising of an obligation. The choice of law is also limited for a succession statute (Article 22 of Rome IV makes it possible to choose the law of the testator's native country at the moment of death or at the moment of the selection of law)[14]. In the light of procedural law, the parties may submit a dispute to the court of their choice, including the court of another state (contractual jurisdiction). For some kinds of legal relationships, the choice of law in the case of a conflict of laws is excluded, e.g. in the cases related to property law or the law applicable to the transfer of property ownership.

To conclude this part of considerations, the choice of law arises in those cases and contracts that involve a transborder element. Its fundamental function is to resolve the conflict between foreign laws by indicating which of the two or more competing systems of different countries is applicable to the legal evaluation of the specific contract and its consequences[15].

The Rome Convention and the Rome I regulation mention one case when the choice of law can be made for the factual status (contract) of exclusively domestic nature without the element causing the conflict (Article 3 (3) of Rome I)[16]. It is indicated, however, that such a choice causes the effects of the substantive indication of a specific legal system[17].

[14] Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, L 201/107.

[15] A. Brigss, *Conflict of Law*, (Fn. 8) 8 and the following, p. 147, R. Plender, M. Wilderspin, *The European Contracts Convention: The Rome Convention on the Choice of Law for Contracts*, London 2001, p. 95, Ł. Żarnowiec, *Wybór prawa* (Fn.8), p. 34, M. Pazdan, *Materialnoprawne wskazanie a kolizyjnoprawny wybór prawa*, „Problemy Prawne Handlu Zagranicznego" 1995, t. 18, p. 1045, M. Pazdan, *Wybór kolizyjnoprawny a materialnoprawne wskazanie regulacji prawnej* [in:] *System prawa prywatnego* [ed.] M. Pazdan, T. 20B, Warszawa 2015, p. 76, A. W. Wiśniewski, Prawo prywatne międzynarodowe *(Fn. 11)* 491, M. Pazdan, *Prawo Prywatne Międzynarodowe*, edition 16, Warsaw 2017, p. 24

[16] See Recital 13 of Rome I, Franco Ferrari, EvaMaria Kieninger, Peter Mankowski, Karsten Otte, Ingo Sænger, Götz. Schulze, Ansgar Staudinger, Internationales Vertragsrecht, Rom I-VO, CISG, CMR, FactÜ, Kommentar, 1 Auflage, CH Beck 2012, p. 9, and 3. Auflage, CH Beck 2018, p. 10., M. Pazdan, *Prawo prywatne międzynarodowe*, (Fn. 15), p. 205, M. Szpunar, *The Opinion of Advocate General on Case C- 54/16, Vinyls Italia SpA*, in liquidation, v Mediterranea di Navigazione SpA, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-54/16

[17] M. Pazdan, *Prawo prywatne międzynarodowe*, (Fn. 15), p. 205.

III.2. The substantive indication of a specific legal system

What is the difference between the choice of law in the case of a conflict of laws and the so called substantive indication of a specific set of rules or the substantive indication of a legal system? The choice of law made by the parties as part of a contract rather than a single act (e.g. when the principal indicates the law applicable to the power of attorney) occurs when the case is of a transborder nature and the choice of law functions as a connector – the indication of the applicable law in the case of a conflict of laws. Therefore, it has effects for conflict-of-law rules. They may be defined as the effects that arise in the normative sphere (normative effects). A legal system allows the parties, within their autonomy, to elect the law of the state that should govern the contract (the law of the contract). The choice of law subjects the contract to a specific – selected – legal system with all its consequences. The elected law is applied as the applicable law in the sense of conflict-of-law rules with all the consequences as regards *ius cogens*, *ius dispositive or* semi-imperative standards. The contract is also interpreted according to the same rules – those of the elected law, intertemporal standards – and its legal effects are derived from the applicable law, in its full scope.

Other legal significance and effects are related to the so called substantive choice of law (indication of law), which is based on the principle of the freedom of contract. It has effects for substantive law, but not for the conflict-of-law rules (contractual effects).

An undeniable achievement of the French revolution as regards legal aspects of liberalism was development of foundations for liberal philosophy in contract law. The fruit of this philosophy was the Napoleonic Code of 1804. Before it was adopted, the binding legal standards had been awarded by a sovereign: a king, emperor or parliament. The modern approach to law changed the understanding of the sources of legally binding standards – rules of behaviour. They also started to be found in the will of the authorised entities (the autonomy of the will of the parties) that did not have any competences of power and the will was expressed in the freedom of shaping the contractual relationships between them. It became sufficient for the parties to jointly agree on the legal effects to occur. The agreement between them is binding and sanctioned by law. The role of the state is to use compulsion to sanction the execution of contract, i.e. to sanction the will of the parties.

The freedom of shaping contractual relationships is traditionally considered as one of the foundations of civil law. It was included in the canons of private law rules – obligations – as early as in the be-

ginning of the 19th century[18]. The autonomy of the will of the parties, in its broadest legal sense, is expressed by the shaping of the contents of contracts. The freedom of shaping contracts became a legal foundation for the liberal economy's development following the slogan that everything that was not banned was allowed.

In conflict-of-law rules, contract autonomy is expressed by the freedom of the choice of law and the need for it was noticed in the late 19th and early 20th centuries when the great legal codes were developed (German BGB or Austrian ABGB along with the Napoleonic Code).

The freedom of contract as a legal standard was first formulated in Article 1134 of the Napoleonic Code, which provides that "*legally concluded contracts become the law for those who concluded them*". The freedom of contract thus defined, considering its certain limitations (such as, e.g., mandatory rules or good practice), makes the basis for the formulation of *lex contractus*, which is equally binding as legal standards and protected and sanctioned by the state to the same extent. Binding the parties of a contract with its provisions has the same power as binding them with the standards following from regulations, but the source of "contractual standards" is a legal act. The Swiss law regulates this issue in a similar way. The Polish Code of Obligations of 1933[19], no longer in force, regulated the freedom of contract in Article 55[20].

The freedom of contract has its limitations as it is not absolute in its nature. They include the prohibition of breaching the mandatory rules of a given legal system[21].

The way of exercising the freedom of contract and formulating the contents of contracts as well as the technical side of contract formulation depends on the invention of the parties. The parties may formulate individual contract clauses by themselves. They may also refer to the existing systems of contractual clauses, e.g. private codifications that are not normative, such as *Incoterms* clauses, or they may refer to the models developed by FIDIC (*Fédération Internationale des Ingénieurs-Conseils, International Federation of Consulting Engineers*) which are applied to complex construction projects. It is also possible to refer to such non-normative codifications as the Principles of European Contract Law (PECL), Principles of Unidroit

[18] W. Czachórski, A. Brzozowski, E. Skowrońska–Bocian, M. Safjan, *Zobowiązania, zarys wykładu*, Warszawa 2002, p. 134.

[19] It was introduced by the ordinance of the President of the Republic of Poland on 27 October 1933 (O.J. of 1933, no 82, item 598 as amended later) and entered into force in Poland on 1 July 1934. Repealed by the act of 23 *A*pril 1964 – The Provisions Introducing the Civil Code (O.J. of 1964, no 16, item 94 as amended later), it ceased to be in force on 1 January 1965. It was also based on the idea of liberalism. Article 55, mentioned above, regulated the freedom of contract.

[20] J. Mojak, J. Widło, *Polskie prawo kontraktowe*, Warszawa 2005, p. 59.

[21] R. Trzaskowski, *Swoboda umów w orzecznictwie sądowym. cz.* 1-3. „Przegląd Sądowy" 2002 z. 3, p. 63-86.

or the Draft Common Frame of Reference (DCFR). One may also refer to the legal system of a specific country.

Referring to such contractual clauses may be done by including them (copying) in the contents of the contract. i.e. by applying the method of the incorporation of the contractual model. Referring to foreign clauses or law may also be done by referring to the existing and formulated contractual clauses in the contract without transferring the contents of the model to the contract by using the method of interpolation[22]. This way of drafting and formulation of the contents of contracts follows from the principle of the freedom of contracts and is commonly admissible across the world. In a similar way, it is possible to refer to the codification of law and its rules which have already expired as well as both codifications and model rules that did not enter into force, such as the aforementioned PECL or DCFR or such multilateral international agreements as, e.g., the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) or the standards of a different legal system than the one which governs the contract.

The question that arises is the one about the legal effects of such a reference made in the contract with regard to private codifications, international agreements that did not enter into force or are not binding in the legal system. It should be added that such a contract must be subject to a specific legal system and the legal effects in question concern the reference to the standards of a foreign legal system selected by the parties (e.g. the civil code in force in a specific country, such as France, the Netherlands, Germany, Italy or Hungary). In such a situation these codifications complement each other and regulate the contents of the contract, but only following the principle of contractual freedom within the boundaries set by the legal system applicable to a given contract[23]. It should be emphasised that the incorporation or interpolation of a private codification – a contract model, or the standards of another legal system – to the contents of the contract results in the arising of contractual effects only (*lex contractus*). It does not lead to the situation when the legal regulations or standards included are treated as the "law" (the law of a specific state) that governs the contract. It means that such an inclusion of the standards of another legal system in the contents of the contract may not breach the mandatory standards of the applicable legal system that governs the contract

[22] M. Pazdan, *Wybór kolizyjnoprawny a materialnoprawne wskazanie regulacji prawnej* [in:] *System prawa prywatnego* [ed.] M. Pazdan, T. 20B, Warszawa 2015, p. 76.

[23] There were ideas of making a contract subject to the rules and regulations recognised at the international or Community level or by private codifications – with full effects of the choice of law but this idea was rejected during the first reading of the draft Rome I regulation on 29 November 2007, see Ł. Żarnowiec, *Wybór prawa* (Fn. 8), p. 28.

in the ordinary course of events, in the absence of the choice of law. Therefore, such an inclusion of the legal rules of a foreign legal system has effects for the so called substantive indication of the standards of the third country within the freedom of contracts. But these are contractual effects only. Thus, it is possible that, in the situation when there is no transborder element in the contract, the parties will indicate the rules of a foreign legal system or choose the law of a third country. In such a case, the contract is complemented by these rules following the freedom of contract but it may not lead to the effect of the contract being governed by another legal system of a third state[24]. In the case of a substantive indication, foreign law is not a point of reference for the legal evaluation of the contract (emphasis added). The foreign legal system complements the contract with its own standards, but the contract is not subject to the standards of this legal system selected as law. This law is not applied to the legal evaluation of the contract, but its function is to supplement its contents. Thus, the standards of the selected legal system play a different role in the situation of the conflict of laws than in the one of a substantive indication. Different legal effects are assigned to them. This applies to the effects of a contractual clause that may have the same wording in both cases but cause different legal effects when there is an international element in the contract and when there is none. As for its effects, the choice of foreign law for an evidently domestic contract is treated as a conversion of a conflict-of-law legal act (the choice of law) into the act of substantive law which involves the conclusion of a contract whose contents comply with the provisions of the law indicated by the parties (legal provisions are transformed into contractual provisions) [25]. In conclusion, the EU legislator does not admit the selection of a private codification, an international agreement or the law of a foreign state as the law that governs contracts in evidently domestic situations. It should be noted that this kind of a solution – the choice of law for contracts which are subject to private codifications – was considered in the legislative process related to Rome I, but it was eventually rejected. Such a possibility is provided for in Article 3[26] of the Hague Rules, but these rules do not have the status of an international agreement or normative codification.

[24] M. Czepelak, *Wskazanie prawa właściwego przez strony* [in:] *Międzynarodowe prawo Unii Europejskiej*, Warszawa 2012, SIP Lex.

[25] M. Czepelak, *Wskazanie prawa właściwego przez strony…* (Fn.), p. 24.

[26] The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise – see Article 3 of the Hague Principles on Choice of Law in International Commercial Contracts adopted on 19 March 2015, www.hcch.net. These rules include the UNIDROIT Principles or the Principles of European Contract Law or DCFR. They were introduced to its national law by Paraguay at the stage of their drafting and before their adoption, see M. Czepelak, *Autonomia woli…* (Fn. 8), p. 171.

IV. Is it possible to choose the law only in the cases related to the laws of different countries (Article 1 of Rome I)?

In the analysed situation, which makes the basis for the judgement of the Court of Justice, the charter contract is of exclusively domestic nature as it was concluded between two companies under Italian law. In such a case, there is no relevant foreign element that would provide the reason to resolve any conflict between legal systems, apply conflict-of-law rules or choose the applicable legal system because of the conflict of laws. Italian law should be the applicable law in the evaluation of the contract and insolvency.

In this situation, the role of private international law as the system of standards would boil down to the determination of the competence of applying Italian law as the applicable law. The parties – Italian companies, however, elected foreign law – English law – as the one that would govern the charter contract. As there is no conflict between legal systems, there are no grounds for the application of conflict-of-law rules or the choice of law that makes it possible to subject the contract to a specific legal system – that of a third country.

Although this is an indirect consequence of the factual status, it needs to be added that, as the insolvent company was Italian, the insolvency proceedings were governed by Italian law. Considering the factual status, the question that arises is whether it is admissible to choose the legal system of a third country – England – and what effects such a choice has.

First of all, such an election of the law applicable to the contract should be considered in the light of the substantive indication by the parties. Thus, it would be admissible only as part of the freedom-of-contract rule shaped by legal systems of individual states. Its consequence would be to add the standards of a specific legal system, English in this case, to the contents of the contract - but only within the dispositive standards and regulations of the selected legal system. Such a selection could not breach the mandatory rules of the applicable law – the law of Italy (Article 3 (3) of Rome I). The question is whether such a selection of foreign law may cause far-reaching consequences and exclude the application of the rules of Italian law, which is the applicable law in the ordinary course of events. If the parties choose the applicable law in an evidently domestic situation without a foreign element, there is no conflict of laws that would justify the application of conflict-of-law rules (Article 1 of Rome I).

These considerations are entirely theoretical and detached from the possibility of indicating the law of an EU member state only, unlike in the judgement under examination, which would indicate a limited choice of law. Admitting the possibility of the selection of

any legal system for exclusively domestic contracts would lead, in a simple way, to the exclusion of the application of the rules of the legal system that governs the contract (in the ordinary course of events in an exclusively domestic situation). The question is whether such a competence – to exclude the contract from being subject to any law or the law of a defined country for the benefit of another, randomly chosen country – follows from the freedom of contract without being anchored in any legal system or the transnational normative system and whether such a competence is envisaged for the parties in exclusively domestic contracts? This would exclude the impact of the applicable legal system upon the contract, the protection of the parties, the contents and axiology that follows from it for the benefit of the will of the parties. It would, in fact, lead to the exclusion of the contract from being subject to the applicable legal system, in particular, the mandatory rules regulating it[27]. This would deprive the legislator of a specific state of the real impact on the effects of contracts, including those that would be illegal as part of the specific legal system. What are the arguments in favour of such an exclusion? How can it be normatively justified?

This is the conclusion of the analysis of the judgement of the European Court of Justice of 8 June 2016 (C-54/16).

Thesis 3 of this judgement has the following wording: "Article 13 of Regulation No 1346/2000 may be validly relied upon where the parties to a contract, who have their head offices in a single Member State on whose territory all the other elements relevant to the situation in question are located, have designated the law of another Member State as the law applicable to that contract, provided that those parties did not choose that law for abusive or fraudulent ends, that being a matter for the referring court to determine"[28].

On the basis of this thesis, it may be concluded, first of all, that it is allowed to refer to the law applicable to the contract by making a choice of law in contracts without an international element, i.e. exclusively domestic contracts.

In its justification of this judgement, the Court provided that Articles 4 and 13 of regulation 1346/2000 (and currently, Article 7 (2) (m) and Article 16 (a) of the new insolvency regulation (regulation 2015/848), respectively) constitute a *lex specialis* in relation to Rome I and they should be interpreted in the light of the aims achieved by regulation 1346/2000[29].

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[27] J. Pazdan, *Czy można wyłączyć umowę spod prawa?* (Fn. 4), p. 6.

[28] M. Pazdan, *Prawo prywatne…*, (Fn. 8), p. 103.

[29] A. Leandro, *Harmonization and Avoidance Disputes Against the Background of the European Insolvency Regulation* [in:] *Harmonisation of European Insolvency Law* [ed.] J.LL. Gant, (2017), 76, http://www.academia.edu/34929320/Harmonization_and_Avoidance_Disputes_Against_the_Background_of_the_European_Insolvency_Regulation, Judgement of the European Court of Justice of 16 April 2015, Lutz, C-557/13, EU:C:2015:227, Clause 46.

Secondly, rules of law from public, not private law, and determine, among others, the effects of announcing insolvency with regard to a specific subject of law – the insolvent entity and the contracts concluded by it[30].

V. The relationship between the provisions of Rome I and the insolvency regulation

The aim of Articles 4 and 13 of regulation 1346/2000 (currently, Article 7 (2) (m) of the same contents)[31], Article 16[32] of the insolvency regulation (2015/848)) – as for the conflict of laws – is to indicate the law applicable to insolvency proceedings, the premises and effects of announcing insolvency, also with regard to the concluded contracts, in particular the possibility of declaring the contracts concluded as ineffective and providing services following from them – to the creditors' detriment.

Rome I does not regulate these issues, thus there is no relationship of the *lex generalis* and *lex specialis* standards between this regulation and the insolvency regulation. Article 13 of regulation 1346/2000 referred to herein makes it possible to refer to the law of the member state which governs the contract as regards the effects of announcing insolvency, which is a different law than the law of the state of the opening of proceedings. And this very state of the opening of proceedings (*lex concursus*) is the state whose law applies to insolvency and its consequences. A tribute to the contractual statute is an exception from the rule that the applicable statute is the one of the state of the opening of insolvency proceedings (*lex concursus*). But it must be emphasised that it applies only in a narrow scope, the one related to the insolvency consequences for the contract, i.e. the issue of declaring the effects of the contract as ineffective (*lex contractus* of Article 13 of regulation 1346/2000 and Article 16 of regulation 2015/848 in force).

By no means can it be concluded that Article 13 or Article 4 of the insolvency regulation govern the applicable law and the way of determining and indicating it for contractual obligations, including for the purpose of insolvency proceedings, in particular by way of

[30] W. Popiołek, M. Zachariasiewicz, *Prawo właściwe dla roszczenia o uznanie umowy za bezskuteczną — skarga pauliańska w prawie prywatnym międzynarodowym*, „Problemy Prawa Prywatnego Międzynarodowego" 2012, t. 11.

[31] Article 7 (2) provides that "The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following: the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors (m)".

[32] Article 16 provides that "Point (m) of Article 7(2) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (a)the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and (b)the law of that Member State does not allow any means of challenging that act in the relevant case".

the choice of law. The insolvency regulation determines exclusively the law applicable to insolvency proceedings and their consequences and makes it possible, by way of an exception from the rule, to refer to the law applicable to the contract when determining the effects of the announcement of insolvency for the contract (the contractual statute that may be indicated by way of the choice of law follows from Rome I, not the insolvency statute).

The European legislator explicitly limited the effects of the choice of foreign law in exclusively domestic contracts, so maybe it can be concluded that this limitation was waived in the insolvency regulation? It cannot be accepted that there is the *lex specialis – lex generalis* relationship between the provisions of the insolvency regulation with regard to the conflict-of-law rules (specific standards) because there is no relationship of this kind with regard to Rome I. The *lex specialis – lex generalis* relationship aims to remove conflicts of laws from legal systems. It is a doctrine related to the interpretation of laws according to which a specific rule overrides a general rule.

Article 13 (currently Article 16 of regulation 2015/848) of the insolvency regulation includes a correction clause, but only for the purpose of determining the law applicable to the effect of insolvency with respect to the possibility of appealing against legal acts, in particular the contracts concluded to the creditors' detriment or lack thereof. As for the effects of insolvency which are regulated by the law of the place of the announcement of insolvency as a rule, a party may refer to the legal system which governs the contract (contractual statute) in order to exclude the possibility of appealing against the contract if the law applicable to this contract does not provide for such an effect (the possibility of appeal).

It may be defined as the extension of the law indicated by the contractual statute upon the effects of announcing insolvency with regard to the possibility of appealing against a legal act – a contract – concluded to the creditors' detriment. It should be noted that the contractual statute may be indicated by the choice of law made by the parties or objective connectors applied in the absence of the choice of law (Articles 4-8 of Rome I)[33]. The insolvency regulation does not include the rules on seeking the contractual statute, also in insolvency.

It does not mean that normative scopes of both regulations overlap. It may be confirmed that neither Rome I defines the effects of insolvency for the conclusion of contracts made to the creditors' detriment nor the insolvency regulation (1346/2000, and currently 2015/848) regulates the law applicable to the contractual obligations that are affected by the insolvency statute. The insolvency regulation does not regulate the choice of law or the indication of

[33] G. Żmij, *Prawo waluty*, Kraków 2003, p. 26.

the applicable law, which means that in the aforementioned factual status the ship charter contract, as an exclusively domestic contract, should be subject to Italian law. Thus, it may not be a special regulation for Rome I in this respect, even if the law chosen is that of another member state.

This is why the thesis of the Court of Justice that provisions of the insolvency law and the possibility of making, on their basis, an effective choice of law for the contracts with no international element make a special regulation for Article 1 and Article 3 (3) of Rome I does not seem to be a correct one.

Also, it may not be confirmed that the insolvency regulation admits an effective choice of law for contracts that are not related to the law of more than one state and makes this choice fully effective, which allows the exclusion of mandatory rules of the applicable legal system in the ordinary course of events, i.e. the one that would apply to the contract evaluation if no choice of law was made. The implications of the abovementioned conclusions need to be analysed.

It cannot be accepted that provisions of the insolvency law regulate the law applicable to contractual obligations and admit an unlimited choice of law in contracts without an international element because there are no such provisions in this regulation. This regulation defines the law applicable to insolvency proceedings and the effects of announcing insolvency with regard to contracts. Additionally, by way of a correction clause, it allows the possibility of referring to the law applicable to them when evaluating the admissibility of an appeal against them – if they were concluded to the creditors' detriment – at the stage of insolvency proceedings and as part of them.

Therefore, it may not be accepted that, when no insolvency was announced, the parties may choose the law of the contract with no transborder element only in the scope of a substantive indication – without the possibility of the exclusion of mandatory rules of the legal system applicable to the contract – because of Article 3 (3) of Rome I. But when insolvency is announced, this choice has the effects of the conflict of laws and excludes the possibility of the application of mandatory rules of the legal system which is applicable in the absence of the choice of law. Another variant of interpretation – as compared with the view of the Court of Justice presented in the judgement under discussion here – would be to accept that when insolvency is announced, the effects of the choice of law would be evaluated according to the insolvency statute, not the contractual statute. The contractual statute provides that there are unlimited possibilities of the choice of law for contracts without a foreign element, which is contrary to Article 3 (3) of Rome I. But the insolvency statute does not regulate the

law applicable to the contract independently. In this respect, it refers to the conflict-of-law rules for contracts as an exception, employed when the party wants to apply a correction clause (the contractual statute, Article 13 of the insolvency regulation). And these conflict-of-law provisions are included in Rome I as a source of conflict-of-law provisions for contracts in the EU.

The above variants of interpretation should be rejected. It cannot be confirmed that the same contract has different legal effects when the law applicable to it was selected depending on whether the insolvency of a party to the contract was announced (the choice of law would apply to an exclusively domestic situation) or not (the choice of law according to the contractual statute – Rome I – in the contract without a foreign element would have the effects of a substantive indication).

The insolvency regulation does not regulate the mechanism and rules for the indication of the applicable law, the choice of law or the way of indicating the law applicable to the contract in the absence of the choice of law. It indicates which legal system defines the effects of insolvency for the existence of a contract. It should be reiterated that the regulation contains a correction clause which enables a party to refer to the statute applicable to the contract (contractual statute) in the situation when the law applicable to the contract belongs to another legal system than the system applicable to insolvency proceedings (*lex concursus*) and when the law which governs the contract does not provide for the possibility of appeal against the contract made to the creditors' detriment. The burden of proof is on the person who exclusively benefited from such an act.

The conclusion is that there is no *lex specialis – lex generalis* relationship between the aforementioned provisions of the legal acts under examination (Article 4 (2) (m), Article 13 of the insolvency regulation (currently Article 4 (2) (m) and Article (16) of regulation 2015/848) and Article 3 (1) and (3), Article 4 and Rome I. The provisions of the insolvency regulation may not modify the effects of the choice of law for the contract without a foreign element or allow the effects of such a choice within the choice of law for the contract (which is not regulated by the insolvency regulation) in domestic situations, i.e. exclude the consequences arising from Article 3 (3) of Rome I. Also, it may not be accepted that they regulate the autonomy of the will of the parties as regards substantive contract law.

Finally, a reflection of a more general nature is whether the world is sufficiently mature to exclude a contract from any law by the will of its parties. Is it possible that, by the will of the parties, an evidently domestic contract can be made subject to any legal system with its full effects – excluding the mandatory rules of the

law of the country that would be applicable in the absence of the choice of law?

In fact, the result would be similar to excluding the contract from any law as the aim is to find the legal system preferred by the parties, e.g. a very liberal or an exotic one[34]. The choice of law, as it has already been mentioned above, may refer to private codifications that have no normative significance. Would it be admissible to exclude the contract from such a law and make it subject to a private codification only, excluding any legal system?

As indicated by the Court of Justice in the judgement under examination here, the mere fact of the choice of the law applicable to the contract in an exclusively domestic situation is not an abuse of law in itself[35]. This leads to the simple conclusion that the legislator of a specific country may lose legal control over the legal effects of the contracts concluded under its authority because the parties, following the advice of their representatives – professional lawyers – will be choosing foreign systems favourable for them. Additional circumstances must arise before it may be confirmed that the choice of law for an evidently domestic contract would be inadmissible as an abuse of law.

The only limitation of the parties to a contract in the light of the view of the Court of Justice expressed in the judgement commented upon here in the case of the free choice of law (even if it is the law of another EU member state) in exclusively domestic matters is the qualification of the choice of law as a fraud or abuse of law when the qualification criteria for such a situation are very vague. This would mean that legal protection would be significantly loosened or, sometimes, even excluded, and the protective role of the mandatory rules of the applicable law in the absence of the choice of law would be weakened[36].

It would boil down to the will of the parties only, which would not be sanctioned in any provisions as there is no normative system in which private entities would have the right to waive the mandatory rules in a given state. Such a possibility would undermine the rationale of establishing any mandatory standards as the effects of their application could be ignored by selecting the law of a third country that does not include such limitations. There are views that the choice of law may apply only to the law of a member state except for Denmark[37], but this view is doctrinal only and there are no sufficient normative foundations for it.

[34] It should be indicated that the thesis of the judgement limits this choice to the law of member states.

[35] Thesis 3 of the judgement and Clauses 50 and 55.

[36] Judgement of the European Court of Justice of 12 september 2006 r. Cadbury Schweppes plc Cadbury Schweppes Overseas, C-196/04.

[37] F. Zedler, *A commentary to Article 13 of regulation 1346/2000*, SIP LeX, such a limitation may be derived from Article 3 (4) of Rome I, which is excluded in the light of the view of the European Court of Justice.

The assumption that effects follow from the interpretation of the judgement of the Court of Justice would turn mandatory rules into dispositive rules as they might be waived by concluding a contract governed by another legal system with regard to the effects of insolvency, the system that does not include any specified mandatory rules. The result, in principle, would be the same as for dispositive rules. The legislator of a specific state would not have any impact on legal provisions and contents of the contracts concluded under the authority of the law formally in force. In this case, the will of the Italian legislator, which protects the insolvent entity with public rules – the insolvency law – would be excluded and it would be possible to appeal against the legal acts made to the creditors' detriment. This exclusion would be done by the choice of law made by the parties – i.e. a reference to the legal system that may not be applied in the ordinary course of events as the contract has no foreign element. The choice of law for the contract made after the announcement of insolvency could be treated as the circumvention of law because it would harm the interests of other creditors. In conclusion, the competence of private legal entities is not so far-reaching and may not be derived from the principle of the freedom of contract, defined in an abstract way, detached and not anchored in any normative system. This principle has no absolute or mandatory character. If it did, it could be the source of violence arising from the will of the parties or the stronger party and not controlled by law or the state. The evaluation of this issue will not be changed by the possibility to select the law of another member state. Such a possibility is not among the rights guaranteed by any convention. International agreements could be the source of the competencies to apply the freedom of contract to the choice of the law of a third country. In the EU, law-making competencies are related to private international law, i.e. a situation with a foreign element, not domestic law and the possibility of excluding it by the will of the parties[38] as part of the autonomy of the will or the freedom of contracts defined in isolation from a specific normative system.

It needs to be noted that the Court of Justice did not consider another possible interpretation of the admissibility of the application of conflict-of-law rules and possible directions of the interpretation of "contractual obligations related to the law of different countries". Considering the functions of private international law and the possibility of treating its rules as competence rules, it should be emphasised and reiterated that this law is also applied to exclusively domestic cases without a foreign element. But in such situations, the rule that can be derived from this law is that conflict-of-law rules indicate the competence of the law of the country to which the ex-

[38] M. Czepelak, *Autonomia woli* (Fn. 8), p. 308, 320.

clusively domestic factual status is limited. The rule stipulates that "there is no conflict that needs to be resolved, so the law applied is the law of the state to whose territory the contractual relationship is entirely limited". The choice of law in such a situation would be admissible, but, in accordance with Article 3 (3) of Rome I, it would not cause the effects of the choice of a foreign law which would govern the contract, but only the effects of a substantive indication, i.e. supplementing the contents of the contract with dispositive rules of the foreign system under the freedom of contract. The choice of law would have other legal effects than the ones assumed by the parties (some kind of a conversion of a legal act) and it could not cause the exclusion of the mandatory rules of the law of the state governing the contract in the absence of the choice of law.

But a broader interpretation of the international element is also possible. There are situations in which the choice of law would be recommended and admissible despite the fact that the nature of the contract is exclusively domestic (which matters in the case of an exclusively domestic ship charter contract linked with an insurance contract subject to a foreign legal system)[39]. The foreign element present could be interpreted in a relatively liberal way for a range of situations that may occur. On the one hand, it would include objectively obvious situations with a foreign element such as places of residence of the parties located in different states, etc. On the other, it would include an extremely subjective approach where a foreign element can be attributed to the case by the mere will of the parties which would attribute an international element to the contract by choosing the applicable law for an exclusively domestic contract. Such a subjective approach, according to the literature, should be rejected[40] because otherwise Article 1 or Article 3 (3) of Rome I would make no sense. This approach to a foreign element would make it possible to qualify each exclusively domestic contract by the choice of law made for it by the parties as the one that fulfils the requirement of a transborder relationship. It should be remembered, however, that it is not easy to confirm the existence of a foreign element and its relevance for the application of conflict-of-law rules by a simple test. This is demonstrated on the example of the aforementioned lease agreement in which a movable is leased to the lessee who is a citizen of another state but has a place of residence in the lessor's country. There is a foreign element in this situation but it is irrelevant for the application of conflict-of-law rules (no grounds for application). The element of

[39] M. Czepelak, *Autonomia woli* (Fn.8), p. 312.

[40] An objective approach to the existence of an international element should be adopted, Volker Behr, Rome I Regulation. A – Mostly – Unified Private International Law of Contractual Relationships Within – Most – of the European Union, „Journal of Law and Commerce" 2011, 29, p. 238, Maria Dragun Gertner, *Ograniczenie autonomii woli stron morskich kontraktów żeglugowych*, Gdańsk 1996, p. 93, M. Czepelak, *Autonomia woli* (Fn. 8), p. 312-313.

the possibly broad understanding of the international nature of the contract is mentioned in the opinion of Advocate General Szpunar and the report of Mario Guliano and Paul. Lagard[41]. By the way, Advocate General Szpunar indicates that there are some circumstances in the factual status of the case commented upon which may provide grounds for the assessment that there is a connection of the contract with the law of more than one state. In particular, it is the possibility of using the ship outside Italian territorial waters. Some of the possible broad understanding of the qualification criteria of the case as a transborder one were also noticed by the court in the reference for a preliminary ruling as it indicated that the contents of the charter contract were prepared in English and the arbitration clause introduced to it awarded the competence of arbitration to LMAA (London Maritime Arbitrators Association). It seems that Advocate General Szpunar is in favour of a subjective approach to the existence of a foreign element. In his opinion, the fact that the choice of foreign law was made in an exclusively domestic contract is sufficient to have a foreign element there and apply Rome I[42]. The possibility of treating a foreign element, which is the jurisdiction of a foreign court, as sufficient is also noted by M. Czepielak, who, however, seems to consider such a transborder relationship as insufficient[43].

The confirmation of the existence of a foreign element according to the objective criteria[44] should be done for every case and contract separately and on an individual basis. Especially if there is a subjective connector for the choice of law, it is necessary to develop detailed criteria for the qualification of transborder cases. There needs to be a catalogue of objective criteria which make it possible to consider the contract as an international one, also on the basis of the circumstances indirectly connected to the contract, which are objectively important for the parties of the contract[45], such as concluding a series of contracts closely linked to one another, legally or economically, including contracts with a foreign element as well as exclusively domestic contracts. It is important that these criteria and relationships be verified in an objective way. Here, a reasonable objection may be raised that the arrangement of the contents of the series of contracts and their mutual compatibility may be done on a substantive basis, which includes the freedom of contract and the application of a substantive indication. In such a situation, it would be done without any reference to the possibility of the application of the choice of law

[41] M. Guliano, P. Lagarde, *Rapport* (Fn. 10), p. 18.

[42] http://curia.europa.eu/juris/liste.jsf?language=en&num=C-54/16, see note 116-117 in the opinion of Advocate General Szpunar.

[43] M. Czepelak, *Autonomia woli* (Fn. 8), p. 310.

[44] Also M. Dragun-Gertner, *Ograniczenie autonomii woli stron morskich kontraktów żeglugowych*, Gdańsk 1996, p. 92 and the following, M. Czepelak, *Autonomia woli* (Fn. 8), p. 312.

[45] M. Czepelak, *Autonomia woli* (Fn 8), p. 313, 315.

caused by a conflict on the basis of an extremely liberal definition of the requirement of the international nature of the contract. Because, if there is no choice of law, the qualification whether the case includes a transborder element that may become a basis for the application of conflict-of-law rules will be based only on the contents of the rules (e.g. Article 1, Articles 4-8 of Rome I) and the circumstances determining whether a transborder element is the result of their application (e.g. the seats of the parties in different countries, the place of the contract conclusion in a third country). Also for this direction of the interpretation of the concept of a "foreign or transborder element", it may be raised that, in fact, the concept itself is interpreted in one way for the purpose of the choice of law as a connector (Article 3 in connection with Article 1 of Rome I) and in another for the purpose of conflict-of-law rules with objective connectors applied in the absence of the choice of law (Articles 4-8 of Rome I).

In conclusion, it may be considered that such a situation is unacceptable and dangerous because, in the legal sphere, the state loses the possibility of sanctioning mandatory rules established in a given territory for itself and the entities that are subject to a specific legal system. It would lead to the creation of islands where contracts would be excluded from the law in force in a given area. In my opinion, it would be too far-fetching because it would lead to the loss of legal control and the protection of the parties or the weaker party in a specific legal system, the loss of legal instruments and the state would no longer supervise the compliance with the rules in force in it – simply honesty, good faith and fairness – in the spheres reserved for the competence of a specific state. It is especially important for other relationships than a consumer relationship or an employment contract. These are protected by special mechanisms. But in this factual status, charter contracts have a professional nature and are concluded between entrepreneurs. This could lead to the abuse of a compulsory situation and the absence of the protection of legitimate rights, interests and expectations of the party that is legally, economically or socially weaker but worthy of legal protection, e.g. in insolvency proceedings regarding the entities that are subject to the same law. This issue is related to the protective function of the law and the state as a guarantor of the protection of rights, in particular those of creditors.

This is why the thesis and conclusion of the Court of Justice following from the judgment under examination is too far-fetching and creates a dangerous precedence without the fulfilment of obvious requirements and without obvious grounds for it – the exclusion of the contract from the application of the legal effects of the applicable legal system – by the selection of a foreign legal system in exclusively domestic contracts.

The admissibility of the choice of law in cases with a foreign element is determined by the conflict-of-law rules of the seat of the court of lex fori. Under these rules, the national legislator may award competencies to elect the law in a sovereign decision. The regulation of the conflict-of-law issues in private international law was included in the competencies of the European Union by limiting it to the "cross-border and conflict-of-law effects"[46] of Article 65 of the Treaty of European Communities.

Maybe, in the future, it will be possible to develop new rules, including also transnational rules by way of conventions or EU regulations, that will give the parties even greater freedom in shaping the contents of contracts. Nevertheless, it needs to be said that the indicated direction of the choice and, in fact, an exclusion of the law applicable to the contracts limited to the area of one country is not the right way. It seems that it is the consequence of the decision whose aim was to achieve a different result than the one concluded from the judgement, its justification and an analysis of the case C-54/16. The choice of law, which performs a strictly defined role if there is a conflict between legal systems, is not the right way to expand the autonomy of the will in shaping the contents of contracts. The right one is the substantive principle of the freedom of contract which is subject to a specific normative system – an internal system of a specific country – or which follows from international conventions or EU law rules, but within the EU competencies awarded.

VI. Conclusions

The conclusions are as follows:

- the choice of law in the case of an exclusively domestic contract causes the effects of a substantive indication (Article 3 (3) of Rome I);
- the choice of law in domestic contracts may not lead to the exclusion of the mandatory rules in force in the provisions of the state whose law would be applicable in the absence of the choice of law;
- there is no *lex specialis – lex generalis* relationship between the provisions of Rome I (Article 1, Article 3 (1), (3) , (4)) and the provisions of the insolvency regulation (Article 4 (2) (m) and Article 13, and currently Article 7 (2) (m) and Article 16 of the insolvency regulation (2015/848));
- the insolvency regulation and Rome I have separate scopes of regulation, the insolvency regulation indicates the law applicable to insolvency proceedings and their effects, while Rome I does not regulate these issues;

[46] A. W. Wiśniewski, *Prawo prywatne międzynarodowe…* (Fn. 11), p. 469, also see footnote 35.

- it is possible that the premise of the connection of the contract with the law of more than one country may be interpreted in a liberal way. In this way, the normative framework of Rome I may be preserved. The criteria for this premise would be objective, but they would take into consideration the interests of the parties;
- the substantive principle of the freedom of contract is a way to expand the autonomy of the will of the parties. Its framework is subject to a specific normative system, i.e. the internal system of a specific state or the one following from international conventions or the rules of the EU law, but within the competencies awarded by the EU. The choice of law in the case of a conflict, whose legal effects may not arise in the situations limited to the area of one country, is not the right way to do it.

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