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APPLICABLE LAW IN TORTS UNDER EUROPEAN UNION LAW AND ALBANIAN CONFLICT OF LAW RULES

Yüksek Lisans Tezi

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TEZ ONAY SAYFASI

Marmara Üniversitesi
Avrupa Araştırmaları Enstitüsü Müdürlüğüne

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Prof. Dr. Sibel ÖZEL	Danışman	.....
Doç. Dr. Mustafa ERKAN	Jüri Üyesi	.....
Doç. Dr. Faruk Kerem GİRAY	Jüri Üyesi	.....

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ABSTRACT

The purpose of this thesis is to bring to light first the long road of the Rome II Regulation from its first steps going back to its historical background, adoption and enter into force. How Rome II Regulation affected European Union law, what changes brought to it, the scope of non-contractual obligations, freedom to choose the applicable law under Rome II Regulation.

To go further with the concept of tort first as a concept under civil law, the law applicable to tort and the general rules as well as discovering different cases which have tort as their element and to end it up with tort as a concept under European Union law and more developed inside Rome II Regulation with its responsible articles.

Deeper there are studied the European Union law concepts in order to make a comparision between Albanian conflicts of law which still is in its road of improving because of the historical background of Albania as a state which went through dictature for many years it makes it quite complex and challenging.

The thesis consists in a research work, collecting informations, going back in history, analyzing and comparing.

The subject of this thesis is to know which law we apply in case of torts under European Union law and to compare it with Albanian conflict of law rules.

The aim of this thesis is to see the differences between European Union law and non-European Union law.

ÖZET

Bu tezin amacı; ilk olarak Roma II Tüzüğü'nün uzun yolunu tarihsel arka planına, kabulüne ve yürürlüğüne uzanarak ilk adımlarından itibaren aydınlatmaktır. Roma II Yönetmeliği Avrupa Birliği hukukunu nasıl etkilediği, bu hukukta hangi değişikliklere yol açtığı, sözleşmedışı borçların kapsamı, Roma II Tüzüğü uyarınca uygulanacak hukuku seçme özgürlüğü.

Haksız fiil kavramı medeni hukuka ait bir kavram olmaktan öteye gitmiş, haksız fiiler hakkında uygulanan hukuk kuralları ile genel kuralların yanı sıra haksız fiilin bir unsur olarak yer bulduğu farklı davaların keşfiyle haksız fiil Avrupa Birliği hukukundakii bir kavram şeklinde sonuç vermiş ve Roma II Tüzüğü'ndeki ilgili maddelerle birlikte daha da gelişmiştir.

Yıllarca süren bir diktatörlük süreci yaşamış bir devlet olan Arnavutluk'un sahip olduğu bu tarihsel arka plandan dolayı halen gelişim sürecinde olan Arnavutluk'taki kanunlar ihtilafı kuralları ile karşılaştırmak amacıyla Avrupa Birliği kavramlarını daha da derinlemesine değiştirmem, bunu oldukça karmaşık ve zorlayıcı bir hâle getirdi.

Tez; bilgi toplanarak ve tarihe geri dönülerek yürütülen analize ve karşılaştırmaya dayanan bir araştırmanın ürünüdür. Bu tezin konusu, Avrupa Birliği hukukuna göre

haksız fiilin bulunması durumunda hangi hukuku uygulayacağımızı bilmek ve bunu Arnavutluk kanunlar ihtilafı kuralları ile karşılaştırmaktır.

Bu tezin amacı, Avrupa Birliği hukuku ile bunun dışındaki hukuk arasındaki farkları görmektir.

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ABBREVIATIONS

AL	Albanian Law
CJ	Court of Justice
CJEU	Court of Justice of the European Union
EC	European Commission
ECJ	European Court of Justice
EU	European Union
HC	High Court
IP	Intellectual Property
MS	Member States
PIL	Private International Law
PILA	Private International Law Albania
SAA	Stabilization and Association Agreement
TFEU	Treaty on the Functioning of the European Union

INTRODUCTION

This thesis has in its focus the Rome II Regulation, examines different articles of the Rome II Regulation and the most important aspects of these articles. Furthermore, it is continued with torts, firstly with the definiton and after, relating it to the Rome II Regulation and the responsible article. In torts, there are treated its elements and illustrated with different examples. An important aspect of this thesis is also damage, the place where the damage occurs and the law of the country where the damage has occurred. All of these are treated together with the European Court of Justice decision in order to understand the concepts better. An important part of this thesis is the Albanian law, how it changed during the years and the changes in private international law. An important factor in the private international law of Albania is the law of 2011 that changed completely the legal system in this field and got closer to the European Union. Albania as a country that aspires to be part of the EU had to create a uniform law that is similar to the one of the European Union. Since 1964 Albania did not change its law and it can be stated that this law caused a lot of problems for the main reason that this old law had came to force during comunism. For a country that now has a democratic regime, is part of different organisations, aspires to be part of the family of the European Union a new law was more than neccessary. Nowadays, in Albania this law serves as a source when solving different conflicts involving the foreign element. In this thesis is not treated only how Albania changed its legal system but also there is a comparison with the law of the European Union and how close is Albania to it. At the same time are treated the most important aspects of private international law in Albania. In order to illustrate better the law of 2011 there are treated different court decisions in Albania that have as object the foreign element and these cases have been treated by the Court of Tirana. Private International Law offers a fascinating opportunity of analysis, different law cases to interpret and there are also sources that help us for its interpretation.

CHAPTER ONE: TORTS

1.1. In general

Torts are generally the law's accidents. They are messy, not planned and cover a diverse set of interests and duties. Tort itself is a way of acting that therefore will have the harm of a person or property. The original word for tort is 'tortious' that means doing something wrong. The person who will be responsible for performing the tort will be called tortfeasor. The party, that because of tort has received damage can ask for a different kind of compensation such as the monetary one. Generally, we can define three types of torts and those are[1]:

- Intentional torts, which would be damaging someone and being aware that you are actually harming that person. If it would be by accident then in this case we cannot be referring to an intentional tort. In the case when a person would sue as a consequence of an intentional tort, that person should prove that the tortfeasor has acted by having an "intent".
- Torts that are based on negligence, are generally actions done by not predicting that damage might occur[2].
- Strict liability torts might be mentioned in different sources as just liability. It is the legal obligation for injury and damage.

The concept of tort itself is connected closely to Article 4 of the Rome II Regulation[3]. And in Article 4 of the Rome Regulation is stated that in the cases when we would deal with a tort or delict the law that will apply, will be the one of the places where this damage has occurred and this is irrespective of the place or even places in where the

[1] A.Krais-Linder, U.Firth-Introduction to International Legal English, pg.32, 2008; Some torts require intent before there will be liability and some others require no intent

[2] Brendan Greene, Tort Law, pg.1, 2017 (further information can be found in the part 1.3 of this thesis) There is a liability for a tort even though the person committing the tort did not have any intent to do wrong

[3] EMU Official Gazette L 199/40 31.07.2007 For more information reference to Chesire/North/Fawcett, Private International Law, pg.766, 2017

indirect consequences have happen.[4]. Therefore, what is understandable, and what is explained in the first paragraph of Article 4 is that the place of damage will also be the applicable law. To continue further with the second paragraph of Article 4 which irrespective from the first paragraph raises another option of the applicable law and that would be the law of the country where the person claimed to be liable and the person sustaining damage are living in as habitual residents if there is such a common place.

Meanwhile the third paragraph of the Article 4[5] gives another option of the applicable law and that would be the law of the country, which is manifestly more closely to the tort/delict if there is such a country. Under this third paragraph of the Article 4 of the Rome II Regulation, the tort claim can be in some cases governed by the law that will be applicable to a contract between the parties, before the occurrence of tort but this should be on the basis that the tort claim is manifestly more closely connected to the country whose law governs the contract. Article 4 presents to us with
'The general rules', so normally there should not be any blank space left in the interpretation of this article as it is supposed to answer most questions concerning the law applicable. However, in fact Article 4 led us to many questions. First, Article 4 comes into play in the case when parties have not reached an agreement on the applicable law pursuant to article 14. Article 14 makes it possible for the parties to have an agreement in between in order to choose the law applicable. Their agreement can enter into ''play'' after the event giving rise to the damage has occurred. Secondly, is not that Article 4 offers a single "rule" because comprises two blackletter conflicts rules in the first and second paragraph which are coupled with an escape clause[6].

According to Recital 18 what is really "the general rule" is defined by the first paragraph of Article 4, and the second paragraph should be seen as an exception of the general rule which comes up by creating a special connection in case the parties have their habitual residence in the same country. In addition, as for the third paragraph, we can say that it should be seen as an ''escape clause'' from the first and the second paragraph. The

[4] Rome 2 Regulation, Article 4 (General Rule) Chapter II Tort/Delicts, www.eur-lex.europa.eu
[5] Rome II Regulation, Article 4 (General Rule), Chapter II Tort/Delicts, www.eur-lex.europa.eu [6] Calliess, Rome Regulations Commentary Second Edition, pg.461, 2015

Regulation itself contains a significant number of specific rules for special torts. This way automatically the weight that general rule has to carry reduces.

However, beside this, to interprate Article 4 is very important because of the Court of Justice's constant adherence to the principle of ''singularia non-sunt extendenda'' under the Brussels II Regulation[6]. The first and the most important element of the first paragraph of Article 4 is the place of injury. The place of injury is identified as the place where the damage has occurred. This seemed to be fair because it strikes a balance between the interests of the person claimed to be liable to foresee the applicable law and the interests of the person sustaining the damage. Also seen from another point of view like the economic one, the place of injury will lead to a fair distribution of the costs for obtaining the relevant legal information[7]. Article 7 of the Regulation "The rule on the environmental damage" allows the victim to opt for the law of the country in which the event giving rise to the damage occurred instead of the place of injury designated by the general rule in Article 4(1). Also in Article 6(3) b, the rule on the cartel damages grants the plaintiff the right to opt for the law at the domicile of the defendant, which usually is the place of acting[8]. In the case of a market being affected by a restriction of competition in more than one country, the victim who sues the defendant at his domicile, may choose to base his or her claim on the law of the court seized instead of the laws of the place of injury[9]

1.2. The distinction between contractual and non-contractual obligations

Both Rome I and Rome II Regulation have in their essence contractual and non-contractual obligations. The two Regulations have divided somehow the choice of law for the whole of the field of obligations arising in civil and commercial matters into contractual and non-contractual obligations. To start first with contractual obligations that are strongly connected and mentioned in Rome I Regulation which is the one that applies

[6] Von Hein, Art.4 and Traffic Accidents,in the Rome II Regulation: A New Tort Litigation Regime, pg.154, 2009

[7] Mankowski, Art 5 of Brussels I Regulation, Section 2 (Special Jurisdiction) www.eur-lex.europa.eu

[8] Jurgen Basedow, EC conflict of laws-a matter of coordination, 2008

[9] John Ahern, William Binchy,The Rome II Regulation on the Law Applicable to non-contractual obligations (2009), pg.94, 2009

to contractual obligations in civil and commercial matters and which is applied to all Member States and Cyprus except Denmark[10]. Even though the Rome I

Regulation applies to "contractual" obligations does not define its concept, the notion of a contractual obligation should be understood as autonomous concept and its concept changes from a Member State to another[11]. According to the Brussels I Regulation a "contractual obligation" must be understood to mean an "obligation freely assumed". A contract is a form of agreement between two parties generally, and these parties decide for the applicable law in case of unexpected events. If the law applicable will not be the one that parties have chosen still, it will be coming from a kind of common connection between parties and they are supposed to know this type of connection. Until the year 1991 the rules of private international law concering the contractual obligations were established by the common law. Soon this ended when Euopean legislation displaced the common law by providing uniform rules for choice of law in relation to contractual obligations arising in civil and commercial matter. For all the contractual obligations that were made after 1 April 1991 the choice of law rules can be found in the Rome Convention on the law applicable to contractual obligations[12]. The Rome I Regulation was adopted in 2008 and will be applied to all contracts made after 17 December 2009[13] except here the matters specifically excluded from its material scope by Article 1. Rome I Regulation is not very different from the Rome Convention. Most of the contractual claims will arise as civil and commercial matters and its jurisdiction will fall within the domain of the Brussels I Regulation. Generally as it can be understood that the definition of "contract" in both Brussels I Regulation and Rome I Regulation is similar. One of the most important principles of the Rome I Regulation is the choice of law. This principle defines that as long as the parties have the contractual capacity, they have also the substantial contractual autonomy and at the same time, they can choose any kind of law to govern their relation. By the principle of the choice of law, the parties have the

[10] Geert Van Calster, European Private International Law, pg.206, 2016; Applicable law for contracts is regulated by the Rome I Regulation

[11] Rome I Regulation applies to all situations within its scope of application, involving a conflict of laws (reference to Geert Van Calster, European Private International Law, 2016)

[12] Guiliano- Lagarde Report, Art 2; The Regulation is a uniform measure of private international law which replaces national private international law

[13] Art. 28 of Rome I Regulation (Application in time) eur-lex.europa.eu

autonomy to choose the governing law for their contract[14]; this governing law can be applied to a part of the contract or to all the contract and it can also be changed as long as the parties want such a thing. In cases when the parties have not chosen the applicable law, there are a couple of rules according to the type of contract.

- In the case of a contract for the sale of goods, provision of services, franchises or distribution, the law applicable will be the law of the seller's habitual residence, service provider or franchisee.
- In the case of a contract that concerns an immovable property, the applicable law will be the law of the country where the property is located, excluding in here the case of temporary and private tenancy that the applicable law will be the law of the landlord's habitual residence.
- In the case of a contract dealing with sale of goods by auction, the law of the country of the auction applies.

As a conclusion if the contract will be more closely connected to another country than those provided by the rules will, than the law of that country will be applied.

As about the term of non-contractual obligations is strongly connected to Rome II Regulation and what is important to understand is that any national legal system should interpret the concept of "non-contractual'' autonomously. In Article 2 of Rome II, there is a specific space and interpretation for non-contractual obligations[15]. The first paragraph of Article 2 conludes that damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*. To continue further with the second paragraph it specifies that Rome II Regulation will apply to noncontractual obligations, which are likely to arise. In the third paragraph are included references to the Regulation to an event giving rise to the damage shall include events giving rise to damage that are likely to occur and damage shall include damage that is likely to occur[16]. The

[14] Geert Van Calster, European Private International Law, 2016, pg. 203; A contract shall be governed by the law chosen by the parties

[15] Dickinson, The Rome II Regulation: The Law Applicable to Non-Contractual Obligation (2008), pg. 30; The concept of a non-contractual obligations varies from one Member State to another

[16] Place of injury: Frohlich: The private international law of non-contractual obligations according to the Rome II Regulation (2008)

proposal of the Commission in 2003 did not contain any equivalent to what we have today Article 2. Even though tort/delict, unjust enrichment and negotiorum gestio where mentioned and their examples with specific rules, still there was not a residual rule for "other" non-contractual obligations. During 2005-2006 negotations, we noticed a change in favour of a supposedly more precise system that distinguished between certain types of non-contractual obligations but without leaving any space for any "other" non-contractual obligations. The current Article 2 was designed to clarify the use of some concepts and term, which are used in the Regulation and are part of these specific types of non-contractual obligations[17]. The term is interpreted autonomously according to the CJEU case law and autonomously from any national legal system. Article 2 raises different questions and the first one is whether the Rome II Regulation will apply only to tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo. In such interpretation, the other categories of non-contractual obligations will be eliminated from the Rome II Regulation. The other one is if the law of obligations will be divided in contractual and non-contractual obligations than apperantly there should not be any other category of obligations left out of the frame.

1.3. Elements of torts

The law of torts itself includes a lot of situations, from a passenger who can get injured in a road accident, a patient who gets injured by the negligence of a doctor, or a random citizen who is arrested by a police in the street wrongfuly. The term tort is connected to something, which is done wrongly, and when a tort will occur, the law allows the victim to claim something; generally, compensation is claimed in the moment when damage has occurred[18]. In the law case *Kalfelis*[19] the term tort is defined ''as all actions which seek to establish liability of a defendant and which are not related to a contract with the meaning of Article 5(1) of the Brussels Regulation''. There are also cases when the

[17] Van Calster, European Private International Law, pg.244, 2016

[18] Alastair Mullis & Ken Oliphant,Torts 4th edition, 2011, pg.20

[19] Kalfelis law case 189/87 (Arrticles 5(1) and 6 (3) of the Brussels Convention-Concept of tort, delict and quasidelict, CJEU defines the concept of tort, curia.europa.uk

victim is able to claim the damage just in the cases that he provides that has been hurt from the tort.

Negligence is the most "famous" tort and the best definition for it would be carelessness, doing something but not thinking that or having the intention to cause any kind of harm or damage. Four elements help us in defining a tort[20]:

- Firstly, the defendant must owe the claimant a duty of care. Therefore, the duty should be obvious and present.
- Secondly, the defendant must breach that duty of care.
- Thirdly, the failure should cause damage to the claimant, which means than an injury is necessary to happen.
- The last one is that this injury or damage will have to come as a result from the breach.

In the tort of negligence people who have suffered a damage they have the right to ask for compensation, but law has its own exceptions and cannot provide a remedy for everyone who suffers. The main way in which the access to the compensation is restricted is though the doctrine of the duty of care[21]. Duty of care itself is a legal concept, which demonstrates the circumstances in which one party will act to another one in the case of negligence. In order for the tort cases to take place in the court they should meet some criterias and some of these criterias are that the defendant should owe the claimant a duty of care and this should be clear from all the circumstances. The other criteria is that the court will be looking at is whether the claimant can prove that the defendant breached that duty. The term breach of duty is met in one of the most famous cases of negligence and that is the case *Donoghue v.Stevenson* of 1932[22]. Mr.Donoghue went out for a drink asking for a ginger beer. After he drank a little bit from the beer, he poured the other part in the glass noticing the remains of a decomposing snail. After he became sick and decided to sue the manufacturer. The House of Lords in this case agreed that the manufacter yes

[20] Brendan Greene, Tort Law, pg.10, 2013

[21] Richard Owen, Essential Tort Law,Third Edition, 2000, pg.77

[22] Donoghue v Stevenson [1932]. case law. A famous case in the tort of negligence. Famous case in shaping the law of tort and doctrine of negligence. www.escr-net.org

owed a duty of care to the consumer of their products. A duty in tort takes reasonable care in order to avoid different acts or omissions, which someone can easily predict, and those acts can most probably injury your neighbour. This is known as the legal principle. By the term neighbour, its not refered to the person who leaves the next-door but is a person who is close to you.

In the case when court decided that a specific provision gives rise to a tort liability, it should decide if there is the case of a breach and that the damage, which the claimant has suffered, will fall with the tortuous liability arsing from that statue. To be able to decide that a breach of duty has occurred the court itself should decide in what this duty conisists and if the situation itself with complains, conforms to it or not. There is the case *R v East Sussex Country Council*[23] in which the council had been giving suppliments of five hours in a week of home tuition to a kid who was not able to go to school due to a sickness. In the moment that the hours were reduced with the purpose of saving money, it was sued with the excuse that the hour reduction was in breach of the statutory duty under an Education Act of the year 1993 which used to provide a convenient education for the children who were not able to go to school because of different sicknesses. In this case the House of Lords decided that the statue which imposed a duty on the council in order to decide the convenient education on educational grounds, not the financial ones. This was realized by the fact that other parts of the Act referred to take into account the financial considerations, but the section in questioning did not. Parliament itself would make it clear in the case that they would want finance to be an issue in the decision, that is why the Parliament did not have the
intention that these considerations should affect the council's assessment of the meaning of convenient education for the claimant, and the council was in breach of its duty.

In the case of deceit a claimant has some important things that he should prove[24]
:

[23] R v East Sussex Community (1998) www.lawschoolcasebriefs.net; Application for judicial review of decision to reduce number of hours of home tutition for financial reasons

[24] Emily Finch & Stefan Fafinski, 3rd edition tort law, pg.31, 2011

- the defendant has made a false representation
- the representation was one of fact
- the defendant should have knowledges that the representation has not been true
- the defendant intended the claimant to act on the false representation
- the claimant has acted on the representation
- the claimant has suffered a damage by the acting on the representation.

An example of this is a case of the year *1837 R v.Barnard*[25] in which the defendant put on an academic cap in order to obtain good on credit when going inside a shop. In this way, he wanted to give the impression that he was part of the university and able to pay the bills. However, as he was not a member of the university, so he is the perfect example of a false representation by conduct, rather than words because it was something done physically.

Another tort is also defamation, which is done generally by publishing something that put the reputation of the referred person low. This kind of publishment should be not true and should damage the reputation of the person for whom it has been published. In order to start an action in defamation there are three important elements which need to be proven by the claimant:

- First, the statement complained of was defamatory,
- Second, the statement reffered to the claimant Third, the statement should be published.

What is important to know and understand is that in this point the defendant should be able to prove that his statement was true in order to profit from a defence. When commiting a tort without a defence is necessary for the liability, but in the case of slander the defendant will only will be liable in the case when the defamation has caused the claimant a specific damage, which is generally a financial loss[27]. There is not an exact

[25] Case R v Barnard 1837, case that represents the breach of duty, scc-csc.lexum.com [27] Brendan Greene, Tort Law, pg.145, 2013

meaning of what defamation is but taking in consideration the definitions made before the defamation will happen in the case when there is a tendance to low the personality of a specific person in front of the society. A specific statement is considered defamatory in the cases when reading or hearing would make an ordinary, reasonable person tend to:

Change the opinion of the person, treat the person differently like an object of fun and humiliate him/her, avoid the person.

In the case of a statement, which is defamatory, important is the impression of other people rather how the person itself felt.

Breach of confidence[26] is another kind of tort, which provides protection against the disclosure of confidential information. In order to understand its elements better a reference has been made to the case *Coco v A N Clark* of the year 1969[27] as:

- there should be an existing information, preferred private rather than public one, the defendant himself should be "under an obligation of confidence",
- the defendant also should use the information without being authorized to. Better explaining the breach of confidence is a kind of tort, which is done by someone who uses personal private information by not being authorized to do such a thing.

In the case *Argyll, v Argyll* of the year 1967[28] it was stated that the breach of confidence could be used also in order to protect the personal information. In this case, the Duke of Argyll was not allowed to publish details about his stormy marriage, by the excuse that married couples owe to each other a duty of confidentially. Breach of confidence in this point offered a limited protection in the cases which had to do with personal secrets, being "touchable" only when there was a pre-existing relationship

[26] Emily Finch & Stefan Fafinski,3rd edition tort law , pg.40, 2011

[27] Case Coco v A N Clark 1969 (claim made for breach of confidence in respect of technical info whose value was commercial) swarb.co.uk

[28] Case Argyll v Argyll 1967 swarb.co.uk

between the parties who owed each other a duty of confidentially. In our case, it is a marriage but it can be also a relationship between an employer and an employee.

Nuisance it will be considered everything that will interfere to the rights of citizens and it can be either public or private.

In the case of private nuisance there should be done something that will affect on an individual and therefore the claimant should be able to prove:

- First, the interference with their enjoyment of land,
- Second, the interference has not been reasonable,
- Third, there is a damage, which was caused by the interference.
- Meanwhile in the case of public nuisance there should be a damage to the community.

Trespass is considered the illegal act that will be causing harm to a person, to its property and to the rights of another one. I can mention three categories:

- To good,
- To person To land.

As a trespass to a person, it can be presented in two forms:

- As an assaulting, that consists in harming the person
- As battery, that consists in giving the idea to the person that we will actually get harmed.

What they do is the protection of the claimant against the interference with their bodies, property and land.

1.3.1. Act giving rise to the damage

The act-giving rise to the damage is generally understood as any kind of event or omission that has caused the damage. In order for the damage itself to occur there

should be something that has caused this damage[29]. Nevertheless, this should not be interpreted in a very strict way from the courts. The localization of the omission or the event is quite difficult. Generally, what is used and accepted is that the place of the omission should be the place where the person responsible has acted. It is more preferred to localize the violation of the acts that are committed by the people who are responsible for the supervision of the sources of the danger in the place where this source of danger is situated[32]. There are cases when the acts giving rise to the environmental damage occur in different places, it is quite impossible to invoke the general escape clause in order to concentrate the applicable law with regard to a single act. In this way, the plaintiff can opt for different laws as long as there are acts by multiple tortfeasors acting in different places concerned. If there is an act in country A that causes an incident in country B that will lead to an environmental damage in the third country C, than the final incident causing the damage should be characterized as the decisive "event" with the meaning of Article 7 of the Rome II Regulation. To extend the victim's right as choosing the applicable law of each place of acting would be undermining the legal predictability. Also at the same time, this approach would fit the favour naturae underlying Article 7. A very important case, which has in its base the act giving rise to the damage, is the case *Melzer v.MF Global UK*[30] . The Court of Justice of the European Union in this case refused to extend the scope of the third paragraph of Article 5 of Brussels I. In this case, there is a German person who is resident in Berlin. He was asked on the phone by a German company with its base in Dusseldorf that opened an account for him in an English brokerage company, MF Global UK that was trading in futures in return for remuneration. However, it did not go as it was planned, the investment and as a consequence the German client lost almost all his initial investment and later he took the decision to go to the Court in order to claim compensation for what he had lost. What he sued was the English company in Dusseldorf but the Court in there needed to assess its jurisdiction concerning the third paragraph of Article 5 of the Brussels I[31]. By the German court it was considered

[29] Calliess, Rome Regulation Commentary, Second Edition, pg.569-603, 2015 [32]
Thorn, Rome II Regulation, 2008, pg.414

[30] Case 288/11 Melzer v MF Global LTD (Request for a preliminary ruling from Landgericht Dusseldorf), May 2013; Curia.europa.eu

[31] Dicey/Morris/Collins,Conflict of Laws, 2006, pg.455

that the damage had occurred in Berlin which was the place where the plaintiff had also his assets and as regarding to the harmful events the places where London where the company has its business and Dusseldorf where the German company is based. Nevertheless, having in consideration by the court that the German company was not even a party in this litigation, they explored if they would be able to apply the national principle of "reciprocal attribution of the place where the event occurred". This is a principle derived from the provisions of the German Civil Code and the German Code of Civil Procedure. In this way, the court is allowed to maintain jurisdiction in the place where the act-giving rise to the damage has been caused. Nevertheless, Court argued that there was no connecting factor between the English defendant and the Court of Dusseldorf and from using the national legal concept in the interpretation of Brussels I , could lead to different outcomes amnong the Member States[32].

[32] Bogdan,The Treatment of Environmental Damage in Rome II Regulation, 2009, pg.220

CHAPTER TWO: APPLICABLE LAW TO TORTS

2.1. Rome II Regulation

As a matter of analysis, Rome II Regulation is a fascinating chance and the law, which brings with it is a very complex one. Rome II Regulation[33] in the sphere of the private international law has opened a new page and developed more. Rome II Regulation belongs to the European legislation. It felt for so many year the necessity to create and have a clear regime especially for the conflict of laws by the European Union[34]. Firstly, the Brussels Convention mentioned the term "choice of law". Rome II Regulation, in 1980 started to deal with the case of choice of law but for contractual obligation. In 1996, The Council of the European Community decided that was the perfect moment to give life to a project in regarde to a convention on the law applicable to non-contractual obligations. It was this reason why Member States started in 1998 the negotiations and EC Commission funded a study by the Groupe Europeen de Droit International Prive which resulted in a "Proposal for a European Convention on the Law Applicable to non-contractual obligations[35]." The EU Council in 1999 issued an "Action Plan" with the Treaty of Amestardam. This "Action Plan" was a preparation of a judicial act in regardance with the applicable law to non-contractual obligations. The first drafted was launched in 2002 by the Commission and it can claimed that it was the starting point of the development of the Rome II Regulation. One year later in 2003, the Commission came up with a new proposal. In this process, the initiative by the Parliament was not successful. In 2007, conciliation procedures let to todays Rome II

Regulation. European Parliament received the Commission's Proposal[36] and this was a very exciting task for the main reason that there was not any pre-existing Convention on the subject.

[33] Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2017 on the law to noncontractual obligations eur-lex.europa.eu

[34] Dickinson, the Rome II Regulation, 2008, pg.4/23

[35] John Ahern & William Binchy, The Rome II Regulation on the Law Applicable to Non-Contractual Obligations, 2009, pg.11

[36] Commission Proposal, COM (2003),427,3 (Great impact on the operation of a common market) ec.europa.eu

This proposal was a statement of a general rule prescribing as the law applicable to a non-contractual obligation that in which the event giving rise to the damage occurred. Commission proposed the the general rule. The Members of the Parliament hoped in having a general rule, which would contain also some significant judicial flexibility. The Parliament propsed to create a non-exhaustive list of factors to take into account as more closely connecting a non-contractual obligation with another country. The rule that ultimately prevailed was one that set out a general rule with a number of exception for specific torts[37].

2.1.1. Historical background and adoption of the Regulation

The history of Rome II Regulation starts many years ago and it is a really important and significant development in the history of private international law[38]. As mentioned also in the introduction the year in which the Rome Regulation was mentioned will be 1980 which delt with the issue of choice of law in relation to contractual matters. Internal market had a need itself in order to function properly and normally commercial operatiors expect the country of origin principle to apply which means that the parties have the expectation to apply their law home even when being abroad. The Rome II Regulation is part of the EU Regulations regarding to the conflict of laws on the law applicable to non-contractual obligations. July 2007 is taken as the date for the adoption of the Regulaton and 11th of January 2009 is considered to be the date of entering into force. As mentioned before in this thesis the Regulation is applicable to all the Member States of the European Union except Denmark[39]. A very important part to underline, is that the Rome II Regulation does not replace the national substantive laws, on non-contractual obligations. The Rome II Regulation only determines which national substantive law will apply. The Rome II Regulation is characterized by rather traditional jurisdiction-selecting choice of law. The major purpose of the Rome II Regulation was to reduce forum-shopping withing the European Community by unifying choice of law

[37] Peter Stone, Eu Private International Law, 2006, pg.96

[38] Joan Kuipers, Eu Law and Private International Law, 2011, pg.100

[39] Calliess, Rome Regulation Commentary,Second Edition, 2015, pg.443

rules. Very important part, which we should mention, is that Rome II Regulation incorporates a revulotinary and salutary rule bringing within its scope all aspects of qualification of damage[40].The material scope of the Rome II Regulation can be defined in two ways:

1. By reference to nature of the legal relationship in issue.
2. By reference to the context in which such relationships arise, namely civil and commercial matters.

Article 1 of the Rome II Regulation clearly specifies that: ‘’This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters’’[41].

This Regulation cannot be applicable to revenue, customs or administrative matters or to liability of the state of acts and omissions in the exercise of the state authority. As about the Rome II Regulation, it can be stated that its applicability will be in those situations that will involve conflict of laws. By this statement we can conclude that in order to have the application of various law systems there should be one or more foreign elements to the national life of a country.

2.1.2. The law of the country where the damage occurs

The general rule of the law of the country where the damage occurs is a case raised down also by the Rome II Regulation. The applicable law to a tort will be the place of direct injury in the case of absence of a common habitual residence. In the first paragraph of the Article 4 of the Rome II Regulation is stated that: “the law of country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur”[42]. In the Recital 17 is also added when there is a personal injury or damage to property, which will be the law of the country applicable.In

[40] Peter Stone, Eu Private International Law, 2006, pg.101

[41] Geert Van Calster,European Private International Law, 2016, pg.238-239

[42] Peter Stone, The Rome II Regulation on Choice of Law in Tort, 2006, pg.98

this case the law applicable will be the law of the country where the injury or property was damaged respecetively. The decisions of the European Courts have been making the difference between the consequential loss and direct injury for the purpose of jurisdiction under the third paragraph of the Article 5 of the Brussels I Regulation[43]. What one should keep in mind is that those decisions of the European Court under the third paragraph of Article 5 will be relevant also to the application of the first paragraph of Article 4 of the Rome II Regulation. It is not quite difficult to understand and distinguish which law will be applicable in the case when we have just two countries included as for example, when there is a quantity of goods, which have been damaged while being transported by the sea, and when they reached the land the maritime carrier will be sued. In this case, the direct injury will arise in the place where the goods had to be delivered not at the consignee's residence. Also in the case when a bank is being sued for worngul cancellation of a credit in connection with a building project. In this case, the direct injury will arise in the country where the project is suspended[44].

The question in our case raises in the moment when the direct injury is sustained in several countries. In this case, the law of all these countries will be applicable but on a distributive basis, each law will be applicable to the injury sustained in its territory. In regardance to the tort including a breach of contract, the place of direct injury under the first paragraph of Article 4 will be the one where the breach had occurred and the plaintifl has suffered the direct financial loss.

In the case of a false stametment, which can be made by the defendant, relied on by the plaintiff, the country of the direct injury will be the country in where the goods were delivered or money has been paid because of the plaintiff's reliance on the statement[45]. United Kingdom in its section 11 in the Private International Law Act of 1995 for cases of physical injury to person or property has adopted a solution about the place of direct injury, which is in accordance with the first paragraph of Article 4. At the

[43] Explanatory Memorandum, COM (2003), ec.europa.eu

[44] Geert van Calster, European Private International Law, 2016, pg.242-243

[45] Adrian Briggs, The Conflict of Laws, 2002, pg.270

same time is in accordance with the law that already exists in France, Netherland, Switzerland and Turkey. Meanwhile in the case of Germany, the first paragraph of Article 40 of is introductory law to the Civil Code gives to the plaintiff an option between the law of the place of the defendant's conduct and the law of the place of injury.

Recital 16, explaining that the rule strikes a fair balance between the person who sustains damage and the person who claims to be liable, addresses the logic of the first paragraph of Article 4. At the same time is a reflection to the modern approach to the civil liability and the development of systems of strict liability. There are some points of view, which claim that the place of injury is easier to be determined especially in the case of physical injury rather than a defendant's conduct. In the cases when a person is arrested wrongfuly, than the direct injury will be arising in that country where the arrest has taken place. In the cases when there is a delivery of goods that has been damaged on its way lets suppose the delivery was supposed to be made by the sea, than the direct injury will be the place where the goods had to delivered.

2.1.2.1. The meaning of damage

The concept of damage is mentioned is mentioned the first paragraph of Article 2 of the Rome II Regulation and as well as in the Recital 16. In the first paragraph of Article 2 is stated that[46]: "damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo". In the first paragraph of Article 4 of the Rome II Regulation, the indirect consequences are excluded as base for the applicable law but it does not give any kind of clue for the direct consequence. The term 'damage' must be understood as any consequence that may have occurred, as well as other cases such as delinquencies, gratuitous prosperity, extravagance of another's affairs, violation of moral rights, etc. This broad predicament involves not only material damage, material but also other consequences that may have come from the loss. Even while reading the Article 2 (3) (b) of the Rome II Regulation, this term also refers to damages that have not yet occurred but are expected to occur in the future. In order for the damage

[46] Rome II Regulation, Article 2 (definition of damage) Non-contractual obligations, Chapter I Scope, http://eurlex.europa.eu

to occur there should be an event giving rise to the damage because the damage cannot come itself but anyways this shouldn't be interpreted in a very strict way from the responsible courts[47]**.** Every "event giving rise to the damage" must be considered as a way of causing damage. What this means is that even some unproved effect should be accepted as damage.

What important in the case of damage is how can we localize the damage and one way is to localize damage is by the geographical area with a legal system[48]. What is more difficult to understand is when the damage occurs on an aircraft of seacraft rather than the damage occurring on ground transportation such as trains. Also the Regulation doesn't give further explinations when the damage occurs in the open sea, space, in Antarctica or on the internet. There are groups suggesting some kinds of emergency solutions and there are other suggesting the application of the third paragraph of Article 4. What is presented in the third paragraph of Article 4 in the case of international transportation is a number of alternative countries which can be suitable for application of the manifestly closer connected criteria and that can be the country of departure or destionation. This seems to be more accepted and especially in the case of international.

A case which is closely connected to this issue is *"Reunion Europeenne v.Spliethoff's*[49]. In this case the ECJ decided that in the case that the damage occurred in an international transportation the place of damage can be the place where the actual maritime carrier had to deliver the goods, so the place of destination.

A solution for transportation over the high seas can be the law of the country of the flag of the ship or the country in where this ship or aircraft is registered, and in the case when there is a claimant who sustains the damage in several countries for a single event that has happened, the applicable law can be determined by separating the damage into parts according to the nationality. What this means is that if the damage will occur in

[47] Calliess, Rome Regulations Commentary,second edition, 2015, pg.487

[48] Peter Stone, The Rome II Regulation on Choice of Law in Tort, 2007, pg.90

[49] Case C-51/97 Reunion Europeenne SA and Others (Brussels Convention,Art.5(1)(3)(6)-Reference for a preliminary ruling from the French Cour de Cassation, eur-lex.europa.eu

one specific country let's suppose Germany, german law will be applicable and if damage will happen in Italy than the Italian law will apply.

A very famous case for discussion the one of *Florin Lazar*[50] in which the ECJ has made clear the interpretation of the first paragraph of Article 4 of the Rome II Regulation. This case is related to a traffic accident and the place where the accident occurred was Italy. The result of the accident was the death of one person, woman. In this case there were the relatives of the victim all having Romanian nationality, but some of them were resident in Romania and some others in Italy which seeked for the reparation of the loss both pecuniary and non-pecuniary which they suffered by the death of the woman. The question which raises in here is in order to determine the applicable law which damage should the Court "keep in mind"? Should it be the damage, which was claimed by the relatives, or the damage, which was suffered by the woman who resulted to be the victim of this accident? And in the other side should it be characterized as a "direct damage" by the meaning of the first paragraph of Article 4 or just as "indirect consequence"?

The decision of the Court was stated this way: The damage in this case seeked by the relatives should be classified as "indirect consequence". For this decision the Court took initiative from Article 2 of the Rome II Regulation[51] which states that: "damage shall cover any consequence arising out of tort/delict" by adding in here also Recital 16 which claims that there should be a fair balance between the interests of the person who is claimed to be liable and the person who has sustained damage and also there should be also a connection with the country where the direct damage has occurred. In the Recital 17 is also clear that when there is the case of personal injury or there is damage to the property, the country where the damage occurs should be the country where the injury was sustained or where the property was damaged.

The victim meanwhile the relatives can be regarded as people suffering the indirect consequences of the accident suffers when we have a case of a road traffic

[50] Case C-350/14 Florin Lazar, eur-lex.europa.eu

[51] Art 2 of the Rome II Regulation, eur-lex.europa.eu

accident the direct damage. Article 15(f) confirmed once more the interpretation of the court by determing the persons who are able to claim the damage and they can be also the close relatives of the victim.

Damage can be caused in different kind of forms such as psychological as well as financial.

2.1.2.1.1. The place where the damage occurs

The place where the damage occurs should be understood as the place where the event itself has occurred, where the direct damage has occurred[52].

The main rules related to the place where the damage occurs are stated in the Article 4 of the Rome II Regulation in which is stated that the law, which will be applicable in the case of non-contractual obligations, which arise, from tort or delict shall be the country where the damage occurs. In this case, we are talking about direct immediate damage and the Regulation prefers more the place of the damage for the fact that pays more attention to the compensation of the victim. Contrary from the third paragraph of Article 5 of Brussels I Regulation, which gives the chance to the claimant to choose between the courts of two countries, the Rome II Regulation does not allow to the victim to choose between the law of the place where the harmful act has occurred and the law of the place of the resulting damages. In the case when the harmful act will cause damages in different countries, something that can be quite possible, the first paragraph of Article 4 of the Rome II Regulation claims that the law of all those countries will be applicable to various parts of damage, by linking the injury to a specific country.

Dumez France SA and Tracoba SARL v.Hessische Landesban[53] the Case C220/88 and others is a very important case in the interpretation of the paragraph 3 of Article 5 as a damage suffered by a parent company through financial losses sustained by a subsidiary.

[52] Cf.Frohlich, PIL of Non-Contractual Obligations, 2016

[53] Dumez France SA and Tracoba SARL v.Hessiche Landesban, Case-220/88 eur-lex.europa.eu

In this case the parties are from one side Dumez France with his office registered in Nanterre, France and Tracoba who had registired his office in Paris, France. From the other side the parties are Hessische Landesbank with his office in Frankfurt, Germany, Salvatorplatz-Grundstuecksgesellschaft mbH & Co with their office in Munich, Germany and Luebecker Hypotheken Bank with the office in Luebeck, Germany.

In this case the French Cour de cassation made a reference to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, an important question on the interpretation of Article 5(3) of the Convention.

The case was brought before the French courts by the French companies Sceper and Tracoba, whose rights are now held by the companies Dumez France and Oth Infrastructure, against Hessische Landesbanck,Salvatorplatz-Grundstuecksgesellschaft mbH & Co with their offices in Germany.

What the parties Dumez and Oth were seeking was compensation for the damage that they had suffered owing to the insolvency of their subsidiaries established in Germany. By the judgment of 14th of May 1985 the Commercial Court in Paris,stated that the damage was suffered by the subsidiaries of Dumez and Oth in Germany and the French companies sustained a financial loss indirectly. By the judgment of 13 December 1985, the Court of Appel in Paris claimed that the financial repercussions that Dumez and Oth claimed to have suffered did not affect the location of the damaged suffered in Germany. Against the judgment, Dumez and Oth claimed that the decision of the Court in the Case 21/76 G.J.Bier BV v Mines de potasse d'Alsace SA[54] according to the expression "place where the harmful event occurred" used in Article 5(3) of the Convention would cover both the place where the harmful event occurred and also the place of the event giving rise to the damage. This way the defendant may be sued,in the courts of those places and this would be applicable to cases of indirect damage also.

[54] Case 21/76 G.J Bier 1976, curia.europa.eu; Art. 5(3) – liability in tort, delict or quasi delict

According to Dumez and Oth the place where the financial loss was suffered was France as a consequence of the insolvency of their subsidiaris in Germany.

The expression "place where the harmful event occurred"contained in the third paragraph of Article 5 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters may refer to the place where the damage occured,but the updated concept might be understood only as the place where the event giving rise to the damage has occurred and has directly produced its harmful effect upon the person who is the victim of that event.

Following the case *Dumez* the ECJ[55] has given a definition about the place where the damage occurred as following: "the place where the damage occurred can be understood as the place in where the event giving rise to the damage happened and has produced a direct damage to the person who is the victim of that harmful event".

In the case *Marinari* the place where the victim has suffered his financial damage is not the place where the harmful event has occurred[56].

By the Explanatory Memorandum, the Commission has explained that the place or places where the indirect damage has occurred are not relevant for determining the applicable law. Therefore, in the case of a traffic accident the place of the direct damage is the place where the accident has occurred no matter if there is any financial damage in another country.

In the cases of personal injury or damage of property is stated by the Recital 17 that the country of damage shall be the country where the property was damaged[57]. Is difficulty to define between the damage and the indirect consequences when there is a physical injury and economic loss. There is the case *Protea*[58], a British case dealing with the economic loss as damage. In this case the country in where the economic loss had

[55] Case C-220/88 Dumez France v.Hessische Landesband (Brussels Convention Tort, delict or quasi-delict, Interpretation of Art.5(3) Indirect victim), eur-lex.europa.eu

[56] CJEU Case C-364/93 Antonio Marinari v.Lloyds Bank (''harmful event'' occurred where the physical damage was suffered and not at the time and place of a later financial loss), curia.europa.eu

[57] Calliess, Rome Regulations Commentary, second edition, 2915, pg.490

[58] C-351/96 Protea case law, 1998, eur-lex.europa.eu

happened was not the country in where the most significant element of tort had occurred. The damage consists in failing to pay the sums due under the leases but the leases require also party in a failure consisting in the maintance of the aircraft as. The place where the latter occurred was Cambodia and the location of the bank account in where the payment should been done is not connected with what Protea claims so for this reason Cambodia is the country where the most significant elements of tort has occurred.

2.1.2.2. Common habitual residences of the parties

The term of the parties common habitual residence is closely connected firstly to the second paragraph of Article 4 in which is specified clearly, if both parties are habitually resident in the same country where the damage occurs, the law of that country shall apply[59]. This is based on the connecting factor and this case the connecting factor between parties is the common habitual residence[60]. In the article 23 of the Rome II Regulation there is no specific definition given of a "normal" habitual residence of a natural person in its private sphere considering the fact that its more focused in the habitual residence of different companies, bodies, corporate or unincorporated and according to the first paragraph of this article the habitual residence shall be the place of administration. In case the event giving rise to the damage occurs, the place of the habitual residence shall be the place where is located the branch, agency or any other establishment. In the second paragraph of the same article is stated that the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business. If we compare to the Brussels I Regulation, in the Rome II Regulation does not use the term domicile but the term habitual residence is used[61], which in my opinion should be taken as the same thing. I want to start first to analyse the habitual residence of legal bodies which as specified in Article 23 the habitual residence of companies and other bodies would be the place of central administration. While having no definition of what we will call company and other bodies it should be

[59] Geert van Calster, European Private International Law, 2016, pg.253

[60] Ofner, Rome II Regulation, 2009, pg. 171

[61] Commission Proposal, COM (2003), 427, 25

understood in a broad manner, all kinds of associations, by including in here partnership and foundations and estates[62]. The Rome II Regulation gives just one criterion to be encomplished as a habitual place of a company or other body, which is the place of central administration, meanwhile in Brussels I, Article 63(1) there are three criterias established such as[63]: statutory seat, central administration and the principal place of business. The definition of the place of central administration was suggested by Advocate General Colomer who describes the "actual headquarters","actual centre of administration" and "centre of management" as three expressions synonymously. As for the place of central administration should be understood as the place where the company is being run, where the head offices are located and where central management decisions are being taken. In the case of the event, giving rise to the damage would occur the place of habitual residence should be considered this establishment.

In the case of habitual residence of natural persons as I have already mentioned before Article 23 provides a definition of habitual residence only when the person is acting as a business activity not in the private spehere. Business activity will be identified by the persons principal place of business and the place of business will be the centre of a person's business activites, where the staff is located and also main facilities.

The definition of habitual residence was brought by CJEU[64] as "the place where the person has established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into accountfor the purpose of determing such residence."

But should there be some criterias in order to consider it as a habitual residence or even short stays can be considered the same? In order to consider it as a habitual residence there should be some criterias met such as: the actual presence of the person concered, the duration, regularity, conditions and reasons for staying, the person's family and social relationships, availability of accommodations, the place and conditions of school attendance etc. Therefore, a person should be living in this place for a considered

[62] Junker, Article 23, Rome II Regulation,Habitual Residence Chapter IV (Other provisions)
[63] Dickinson, The Rome II Regulation, 2008, pg. 50
[64] Calliess, Rome Regulations Commentary, second edition, 2015, pg.785

period of time and have some connecting factors with the place where he/she is staying. Short stay wont be enough for "habitual residence" such as people who go somewhere just for holiday purposes. In the other hand, legality of the residence is not important because even when someone is not legally permitted to stay he/she can be a habitually resident.

In order to have a better panorama of the term "habitual residence" i preferred to treat a case from the High Court. I did not choose this case by coincidence because this was the case in which "habitual residence" was considered by the High Court.

The High Court considered "habitual residence"in the case *Winrow v.Hemphill*[65].

In the case of Winrow v.Hemphill, the facts are presented this way: The case occurred on 16 November 2009. We have to do in this case with a traffic accident and the place where this accident occurred was Germany. By the side of the claimant the fact are presented this way: He was a rear seat passanger in the vehicle, which was driven by Mrs.Hemphill who is the first defendant in our case and who collided head on with a German vehicle. The defendant himself accepted fault for the collision. The second defendant in the case was Ageas,t he road traffic insurer for the first defendant. Our claimant had personal injury as well as a prolapsed disc and already she had received some treatments in Germany and later in England. From this situation, the claimant and her husband turned to England earlier than the time that they have planned, in June 2011.

Below it is explained the agreement between the parties:

- The nationality of the claimant was UK
- By the time that the accident happened the claimant was living in Germany, she already had moved there since the January of 2001 together with her husband who was a member of HM Armed Services.
- Taking into consideration that the husband of the claimant was due to leave the army in February 2014 after having 22 years of service he would have

[65] Case law Winrow v Hemphill 2014 EWHC 3164**,** Art.4(2) Habitual residence of claimant and defendant at the time of damage, gavclaw.com

returned to English after one a half or two years. So their intention was to be back to live in England.

- The claimant and her family in Germany were living on a British Army base in where the schools were providing an English education.
- The claimant in Germany was employed on a full-time basis as an Early Years Practitioner by Service Children's Education.
- The claimant claimed that she had suffered damage and loss.The majority of her loss according to her had occurred in England.At the same time by the side of the claimant was claimed that she suffered a lot of pain.
- The first defendant had a UK nationality and an army wife, together with her husband serving with the Army in Germany. She had been living in Germany for between 18 months and two years before the accident. After it, she returned to England.

The second defendant in his defence declared that by pursuing the first paragraph of Article 4 of the Rome II Regulation, the German law would be the applicable law to all the issues that arised from the accident. By the side of the claimant was accepted that in the case that Article 4(1) of the Rome II Regulation[66] would not be displaced than it would be the German law that would apply. Nevertheless, she stated that the second and the third paragraph of the same Article did not displace the rule written down by the first paragraph of Article 4.

The Rome II Regulation itself does not define what "habitual residence" mean in the case of individuals who act in their own capacity. The only time when the habitual residence of a natural person is defined is in the case that this natural person is acting in the course of a business activity. "Habitual residence" was defined by the Court of Justice as the place "where the habitual centre of their interests is to be found.
In this context,account should be taken in particular of the employed person's family situation, the reason which have led to move, the length and continuity of his residence,

[66] Article 4(1) of Rome II Regulation (General rule)- applicable law will be the law of the country where the tort/delict has occurred, http://eur-lex.europa.eu

the fact that he is in stable employment, and his intention as it appers from all the circumstances". In the case that I am analyzing the centre of interests seems to be relevant, for the fact that both the victim and the tortfeasor were resident in Germany because of their husbands posts in military. Germany was the habitual residence of the claimant by the time the accident happened. The High Court by being "supported" from the term of manifestly closer connected of the third paragraph pf Article 4, confirmed the exceptional character of the escape clause. This paragraph is an exception. Finally, by the court it was stated that:

- The claimanted sustained her injury in Germany and as the claimant and also the first defendant were both habitually resident in Germany.
- By the third paragraph of Article 4 the court should be satisfied that the tort is more closely connected to the English law rather than the German law.
- By having all the circumstances in consideration, the relevant factors do not show a manifestly closer connection of the tort with England than with Germany. In this way the law, which does Article 4(1) indicate, is not displaced by Article 4(3). In this way the law applicable to the claim in tort is the German law.

2.1.2.3. Escape clause

In the case that we have a contract or an existing relationship between the parties, the escape clause will play it role and will have its part in here[67]. This is specified in the third paragraph of Article 4 of Rome II Regulation and it has been seen as something that "respects the parties" and also it is very simple and practice in its application[68]." Pre-existing relationship" are seen as a connecting factor and very important at the same time. What is not clear from Article 4(3) is if this article is concerned with the law governing a pre-existing relationship such as a contract or if is concered with the law of a country where the pre-existing relationship is based. However, by law interpreters has been open

[67] Geert van Claster, European Private International Law, 2015, pg.255

[68] Article 4 of Rome II Regulation (General rule), http://eur-lex.europa.eu

to both interpretations. The other thing is the usage of the word "might" in this Article. The word "might" shows that existence of a relationship before does not determine which is the country mostly connected with a tort. Moreover, the last the "pre-existing relationship" can be decisive when the law which governs the contractual relationship will apply to all the parties who are involved.[69]

As an example to this there is the Irish *case Allied Irish Bank Plc and others v.Diamond*[70]. In this case, different contractual and non-contractual relationships were involved and presented to the court. The court by following the third paragraph of Article 4 decided to proceede with Irish law because that law governed all the relationships between the parties in the case. However, there are cases of contractual relationships are splited in different countries, the "pre-existing relationship" cannot be always decisive to develope the escape clause.

Meanwhile in the English case [71] was a case carried by both Polish and English parties against an English company. By the Polish parties the Polish law was goverened in their employment relationship, meanwhile it was not the same for the English parties. In this case, the High Court did not utilize the pre-existing relationship between the Polish parties in the case of claiming the financial loss, which was suffered by the claimant. From the High Court of England was stated that there was not any choice of law made in order to govern the regulations and contract. Beside, in the end the Court took the decision that the law more closely connected was the English law. In addition, the Court used the pre-existing contractual relationship between the parties as an important connecting factor in arguing that the English law was manifestly more closely connected with the non-contractual obligations between the parties under the Rome II Regulation.

Court, used the common law for events prior to 11th of January 2009 and after this date, the Rome II Regulation has been used as reference. Meanwhile is not clear what

[69] Peter Stone, EU Private International Law, 2016, pg.117

[70] Case law Allied Irish Bank PLC and others v.Diamond, High Court, 7th November 2011, ie.vlex.com

[71] Case Alfa Laval Tumba AB and another v Separator Spares International Ltd and another (2012) EWCA Civ 1569, curia.europa.eu

decisions would the court take if the events giving rise to the damage such as the pre-existing relationship of the parties would have occurred after 11th of January 2009[72].

The third paragraph of the Article 4 while applying the law of a contract that governs a pre-existing relationship to a non-contractual obgliations should protect the weaker party and this can be done by developing rules of the habitual residence of the party. However, can Article 4(3) move the right of a weaker part of protection, when the accerssory contract of the parties has illegally entered from the back door to govern their non-contracual obligations? In order to answer this questions there are two points of view which are against. Firstly, it is argued that the Article 4(3) should be jointly read with the explanatory memorandum and Article 14(2) of the Rome II Regulation make sure that weaker parties wont be denied from protection. Secondly, having in consideration that the escape clause is an exceptional remedy, the court has the competition to make sure that the escape clause does not deny the protection to the weaker part. In addition, it is accepted that even though the Article 14(2) of the Rome II does not deny the protection of the weaker party, in the third paragraph of Article 4 there is nothing expressing the power of the court to apply a law that does not protect a weaker party under the contract[73].

The first point of view is more preferred for the main reason that produces more results by not threating the legal certainty and uniformity since the escape clause is being moved in an exceptional and discretionary manner. Rome II Regulation should express that by using a pre-existing relationship like a connecting factor to move the escape clause should not deny the protection to a weaker party[74].

As about the relation between the first, second and third paragraph of Article 4 of Rome II Regulation seems to be a contest between the certainty and flexibity in order to determine to what point the third paragraph of Article 4 can replace the applicability of the first and second paragraph of Article 4[75].

[72] Rome II Regulation, third paragraph of Article 4, eur-lex.europa.eu

[73] Adrian Briggs, The Conflict of Laws, 2009, pg. 200

[74] Dickinson, The Rome II Regulation, 2008, pg.345-346

[75] Stone, The Rome II Regulation on Choice of Law in Tort, 2006, pg.99

It raises the issue if the applicable law of the country needs to have not a very strong connection to the tort so in order to have the escape clause as an option. And that escape clasue should be used just as an exception in order to have legal certainty, predictability and uniformity. In addition, these aims will be defeated if we use the escape clause where the main rule does not have a weak connection to the tort. There is a view which opposes this one that states that from the third paragraph of Article 4 the escape clause can be deployed where the law of the country has a "closer relationship" with another country different from the one mentioned in the first and second paragraph[76]. Another issue is if the third paragraph of Article 4 can use the "place giving rise to the damage" and the "place where the indirect consequences of the event occur" in the first paragraph of the Article 4 to make the escape clause operable. Moreover, if the Article 4(3)[77] can connect indirectly between the first and second paragraph of Article 4 in that way that the escape clause can be used as a bridge from the second paragraph of Article 4 to the first paragraph. For this reason, there should be some connecting factors strong in the place of damage, which will make the application of the first paragraph of Article 4 closer to the tort rather than the second paragraph of Article 4. To conclude with the escape clause the Rome II Regulation has mentioned that the escape clause acts immediately. The pre-existing relationship is a necessary factor and an important one. Nevertheless, beside this the court should not move to escape clause in the part of the law which doesn't protect the weaker party under the contract.

2.1.2.4. Party autonomy

In nowadays choice of law, the most important principle is the party autonomy. Before there were arguments claiming that the applicable law could not be replaced by the agreement of the parties. However, after the year 1960 the parties slowly slowly increased their power in both national and international conflicts. In plenty EC member states there are different limits of freedom of choice and these are also in different drafts

[76] Joan Kuipers, EU Law and Private International Law, 2011, pg. 150

[77] Article 4(3) of Rome II Regulation (General rule),- Escape clause from the general rule, http://eurlex.europa.eu

of the Rome II Regulation. This is the main argument, which still supports the party autonomy in the Rome II Regulation[78].

In the case when a party autonomy has free sovereignty connected to the domestic law, the national conflict of laws can allow the parties to choose the law. When the law protects the third parties or in a case of a public interest, the freedom of choice will be denied. For this reason, it is not chosen by the parties the law that governs marriage, adoption, parental responsibility and rights in rem. Generally, is traditionally accepted the closer connection country law as a very important criteria to select the applicable law but this is not the only criteria to be accepted. Exept the concept of party autonomy and the closest connection, there are also two other rules that cannot define the right position of the legal relationship but what they do is giving "life" and expression to a social policy that underlines the substantive forum of the law. This kind of rules can be translated as connecting focuss, which concentrates on the party who need the protection, or into a number of alternative references[79]. The choice of law, which is concentrated on the employees, children, consumers or maintenance creditiors, reflects the function of the matching substantive law, which consists in the protection of the weaker party. They are found on choice-of-law principle which is known as the "protection principle"[80]. There is also the presumed "favor principle" which is the base of the optional reference; in this case there are different alternatives that can be chosen in order to have a desirable result. It must be marked that protection is provided at the choice-of-law level. A rule mentioning the law of the consumer's habitual residence can leave the consumer empty-handed in the sense of substantive law. Conflict of rules based on the principle of functional assignment reach identical treatment of the weaker party, and it does not matter if they entered or not in a national or national legal relationship. The definition of the concept party autonomy by the Rome II Regulation is regarded as the power of the parties to dispose of their rights under substantive law in the level of conflict of laws.

[78] Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law, Mo Zhang, 2009, pg. 15
[79] House of Lords, European Union Committee, The Rome II Regulation
[80] Symeon C. Symeonides, Rome II and Tort Conflict, 2008, pg.172/173

There is a big similarity between the Article 4 and 10 in the first proposal of the Commission[81]. What Rome II Regulation does is through its rule is allowing a party to choose the applicable law in the case of a non-contractual obligation focusing in two objects: first, respecting the principle of party autonomy and secondly enhancing legal certainty. What is not quite understandable is the reason why the party autonomy should be respected. In addition, what is not explained is the reason why the parties can be allowed to choose the law of country, which is not connected by issue with the noncontractual obligation. Although the parties are free to choose the applicable law, still there are some limitations such as:

- First, agreement of choice-of-law enters into force after the event giving rise to the damage occurred,
- Second, that choice should be expressed with the argumented ceratainty always depending on the circumstances of the case,
- Third, the interesses of the third part shouldn't be touched,
- Fourth in the domestic cases, the foreign law shall not substitute the mandatory provisions that would apply without the choice,
- Fifth in the cases of intra-community, mandatory provisions of Community law cannot be repleaced by the choice of the law of a non-member state,

Sixth, the overriding mandatory provisions of the forum cannot be repleaced by the choice of a foreign law, and finally the agreements made in the name of a choice-oflaw cannot affect the law applicable to non-contractual obligations which arise from an infringement of intellectual property rights.

In the Rome II Regulation[82], there are some provisions quite difficult to understand and give an explination. The reason of this difficutly is the fact that there are drafts of Rome II Regulation which prohibit the choice-of-law agreements in all unfair

[81] Dickinson, The Rome II Regulation, 2008, pg.7

[82] http://eur-lex.europa.eu

competation cases even thought the parties freedom of choice matches their freedom of disposition under substantive law. This situation can be illustrated by the second paragraph of Article 6, the freedom of choice of the parties is not curbed by Article 7 which contains provisions in environmental damage or neither by Article 9 which covers the industrial actions[83]. What the second paragraph of Article 6 does is in the case that the interests of a competitor will be affected by unfair competition; the rules of Article 4 about general conflict of law rules will be applied. However, the fourth paragraph of Article 6 blockes a choice-of-law agreement. In the cases when the law of market can be replaced by the law of the parties common habitual residence, it is quite difficult to understand why it cannot be replaced by the law which is designed by the parties in accordance with Article 14.

In this case, it needs to be considered the relation between party autonomy and environmental law. The provisions of Article 7 as the law applicable to an environmental damage takes the law of the place of injury[84]. Something which is not clearly understandable is the reason why the Article 7 does not contain a restriction on a choice by both parties keeping in consideration that the environment protection seem to be no less a public interest of the state. Also about provision that cover industrial actions, the same thing can be said[85].

The first paragraph of Article 14 contains the last restriction on the party autonomy, which requires that the choice-of-law agreements in between nonprofessional parties enter into force after the event has occurred. These types of restrictions can be found in the private international law of different European countries such as Germany, Belgium and Switzerland. They prevent the abusment of the agreements regarding to the choice-of-law in the case when parties do not have the same bargaining powers. Even if this agreement will not be valid under Article 4(1), the law of their choice would still govern an action sounding in tort, because it is common that there is a connection between their contractual relationship and the tort at issue. In the case when the agreement dealing

[83] Ralf Michaels, The New European Choice-of-Law Revolution, 2008, pg. 100

[84] Article 7 of Rome II Regulation (Environmental damage), http://eur-lex.europa.eu

[85] Geert van Calster,European Private International Law, 2016, pg. 300

a choice-of-law will not be valid for the reason that has entered into force before the action that has caused the damage occurs, it can be substituted by another choice. As a conclusion about the party autonomy, it can be argued that the Rome II Regulation has some missing parts about provisions on party autonomy and its limitations. By the Article 14[86], the parties are very free to choose the law that they want. Moreover, except the case when the parties are engaged in commercional activites, the agreement between them can be made before the event, which gives rise to the damage, has occurred.

2.1.3. The scope of the law applicable

The scope of the law applicable comes together with the Article 15 of the Rome II Regulation[87]. Before going to the analysis of the Article 15, I would like to specify that what we have today as the Article 15 of the Rome II Regulation started in 1980 with the Rome Convention in the Article 10. Later on, the Commission in its proposal of 2003 used this as a starting point, but of course, by changing some details.What Commission added was the question of capacity to incur liability, being governed by lex causae. This part was different from the Rome Convention and the Rome I Regulation because both of them exclude the question of capacity to enter into a contract from the lex causae.

Now going back to Article 15[8889], its main purpose is the describsion of the scope of the law applicable under the Rome II Regulation. Rome Regulations as a goal have the harmony between Member States' courts and in order to reach that the role of lex causae should be expanded and the role of lex fori should be kept small.Article 15 from (a) to (h) describes the areas which are covered by the lex causae. Article 15 starts this way: the law applicable to non-contractual obligations under the Regulation shall govern in particular:

[86] Article 14 of Rome II Regulation in the Freedom of Choice, http://eur-lex.europa.eu
[87] Commission Proposal COM (2003), 427.8
[88] Thorn, Article 15 of the Rome II Regulation, Scope of the law applicable, Chapter V-Common Rules, 2008, pg.
[89] , Article 15 of Rome II Regulation, http://eur-lex.europa.eu

a) The base and the extention of the responsibility, and here is included defining also the people who will be responsible for their acts. This way the exentention of the responsibility is used in referring the possible limitations on the claim like ceiling amounts, which are sometimes used in strict liability provisions. The lex causae generally governs the identification of responsible people for purposes of strict liability rules.

b) The reason for exemption from the responsibility, and also any kind of limitation and division of this responsibility.

The proposal of the Commission in 2003 did not provide any change and the term ‘’exclusion or expemtion from the responsibility” will refer to the privileges that have to do with the liability of specific people like the members of the family or employers in the workplace. In reference to family members even though its excluded from the Regulations scope obligations “arising out of family members”, this does not mean that every privilege for the members of the family should be out of this Regulation[90].

Article 15(b) by referring to “any grounds for exemption” , it also refers in this case to the question whether non-contractual liability can be waived or limited by the contract. Lex causae will be also governing this problem which is applicable to noncontractual obligations.

c) The being, the nature and the evaluation of the damage or the valuation required.

Also in this point, the nature and the evaluation of damage will be totally under lex causae, which automatically means that there is not too much left for lex fori. In the Rome II Regulation there was no special rule regarding to damages in personal injury cases such as Recital 33, but this also takes a big attention for the fact that if the European legislator would have the idea to create a special conflict of rules, would have done it differently in another way such as a normative proivision and not only in a simple recital.

[90] Dickinson, The Rome II Regulation, 2008, pg. 250, article 15 of the Rome II Regulation (Scope of the law applicable), http://eur-lex.europa.eu

For this reason, the Recital 33 just gives general principles of damage assessment that have to be more conreate by applying the lex causae, which is required in this paragraph of Article 15[91].

d) In the limits of competences given by the court by using its procedural law, the actions that a court can take in order to impede or finish the damage or to make certain the provisions for the compensation[92]. The provision in this part of Article 15 tends to find a middle way between the harmonization of the results on one side and the respect for national procedural rules on the other side. In order to have harmony between the courts of the MS, lex causae should not govern only the form of remedy and the assessment of damage but also the availability of any other measures prescribed by the lex causae. The provision of Article 15(d) seems to be a problematic compromise because it leads to the possibility that foreign procedural instruments are used by the court that hardly fit into the forum states procedural system. The courts of the Member States should apply first the lex causae and the exact content of such measures. If the measure will be taken for granted by lex causae, the following step is to determine if such a measure is "within limits of powers conferred on the court by its procedural law". The court has to aim for the best way between such measures under lex causae and the framework given by lex fori.

e) Questioning if the right to demand damage or correct it can be delegated, including here also the inheritance. Lex causae will be applied in the question of Article 15(e) whether an obligation can be delegated between people meanwhile they are still alive or by the ways of succession. Lex causae regarding to non-contractual obligations governs this questions only in the relation between the assigne and the debtor and as long as the contractual relationship between the assignor and the assignee is not covered by the Rome II Regulation will be governed by the law determined according to Article 14(1) of the Rome I Regulation.

f) The people who have the right to profit from compensation from the

[91] Symeonides, Rome II and Tort Conflicts, 2008, pg.52

[92] Dicey/Morris/Collins, Conflict of Laws, 2006, pg. 400

damages that they have suffered in person.

In the case the question that raises is whether a "secondary damage" claim is allowed. The damage in this case is suffered by a second person but as the result of damage suffered by the first victim. A good example in this case would be the financial damage from an accident, which involves a family member. In addition, this will be treated by lex causae but not always from the same applicable law. Article 15(f)[93] does not apply to the problem of standing such as who will bring the claim before the court. This question is part of procedural law which is not governed by the Rome II Regulation.

g) The responsibility for the acts of other people.

The regime of lex causae is extended in this part to all questions in regardance to liability of parents, guardians of their supervised persons or children and all forms of vicarious liability by including in here whether and under conditions an employer is liable for the acts of his employee. Even though this is governed by lex causae, it is argued that the question of who is an employee or child to be supervised is a question of statues, therefore should not be under Rome II Regulation. The Rome II Regulation actually cannot determine the legal sense of who is a child but if everything is given in terms of factual requirements lex causae can be applied. The application of Article 15(g) is also seen in the possible liability of media or internet users for other persons, statements or different acts, which appear on a website. Rome II Regulaton is not applicable in these kinds of statements and interent cases are goverened firstly by the ECommerce Directive.

h) The way of how an obligation can be eliminated and the rules of measures and restriction, including here the rules that have to to with the starting, stopping and interruption of a period of limitation prescription.

This provision demonstrates that the Rome II Regulation regardes prescription and limitation in time as substantive law rules goverened by the lex cauase. By treating prescription as a substantive issue judged by a possibly foreign lex causae may come as

[93] Article 15(f) of the Rome II Regulation defines that the scope of the law applicable will be for persons entitled to compensation for damage sustained personally, http://eur-lex.europa.eu

a surprise to litigants and is discussed by the literature.Article 15(h) is very clear to be applied[94].

2.1.4. Excluded Matters

Generally, in the field of law there are different kinds of exception. In the Rome II Regulation in the second paragraph of Article 1 there are a "group" of exclusions from this Regulation. Generally, these kinds of exclusions should be interpreted in a very strict way, for the main reason that they are exceptions from the choice of law rules, which are set out in this Regulation[95]. Firstly, in the entrance it is mentioned when the Regulation will apply and that is in the cases when there are situations, which include a conflict of laws, to non-contractual obligations both in civil and commercial matters[96]. Than it further continues when the Regulation will not apply and that is in the cases of revenue, customs or administrative matters. Secondly, in the other part of the same article is listed a group of excluded matters and they start by nonconctractual obligations which arise from family relationships, and that might include marriage, parentage and in this case the non-contractual relationship should come as a result of a specific family relationship[97]. In this case is very rare for a tort or delict to arise in family relations. What can apper in family relations is a damage compensation that is caused by a late payment. In the conflict of law there are no harmonized rules regarding to the family law and for this reason it has been more preferable to be excluded from the scope of the Regulation. By family relationship is included parentage, marriage, affinity and also collateral relatives.

Another exclusion are non-contractual obligations which come as a result of a matrimonial property regimes and these follow a similar pattern to family relationship.

Non-contractual obligations, which come because of bills of exchange that mirrors the exclusion under the Rome I Regulation, where the Commission would refer

[94] Schaub, Article 15 of the Rome II Regulation, eur-lex.europa.eu

[95] Geert van Calster, European Private International Law, 2016, pg.245

[96] Dickinson , the Rome II Regulation, 2008, pg.185

[97] Regulation 4/2009 on jurisdiction applicable law, recognition and decisions and cooperation in matters relating to maintenance obligations, https://eur-lex.europa.eu/

to the Giuliano Lagarde Report for the exclusion under the Rome Convention. Later on, the element of the Giuliano-Lagarde justification could have conceivably re-opened the debate in the negotiation of the Rome II Regulation.

Non-contractual obligations, which come because of the law of different companies and other similar bodies. Such non-contractual liability cannot be separated from the law that governs companies or firms and they require a strict interpretation.

Non-contractual obligations coming because of different relations between settlers, trustees and beneficiaries of a trust created voluntarily, non-contractual obligations arising out of a nuclear damage and to end it up with non-contractual obligations which come as a result of violations of privacy and rights which are related to personality including also defamation. In this case, the applicable law shall be the law of the forum where the law designed by the Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.

As mentioned also previously these kinds of excluded matters should be interepreted in a very strict way. In the case of United Kingdom is not demanded to apply the rules of the Regulation when dealing with internal conflicts. At the same time in the case of United Kingdom, the exculsion for voluntary trusts is critical, but is outside the scope of the current volume. In addition, nuclear damage as I already mentioned is excluded giving the extensive body of international law on the issue.

2.1.4.1. Public policy

Artile 26[98] is an article considered very important for the main fact that it has in its content the public policy and that the application of a provision of the law of any specified by this Regulation may be refused if its application will be incompatible with the public policy. Public policy is considered as a very important instrument of the Rome II Regulation, that is based on a jurisdiction-selecting methodology and therefore the

[98] Article 26 of the Rome II Regulation in public policy, https://eur-lex.europa.eu/

"safety valve" is necessary[99]. Excactly when the regular conflicts rules will lead to the application of a foreign law, which is repugnant to the fundamental substantive values, in that case, public policy will deal with it. However, the clauses of the public policy are considered excessively liberal from some commentators and even some EU Regulations in their matters of international civil procedure, does not allow recourse to public policy. Again, from different critics such a follown strategy is not a viable option having in consideration than both Rome Regulations apply in relations with third states. The article 26 of the Rome II Regulation will be applicable to all non-contractual obligations and including in here cases in where parties have determined the applicable law by an agreement between them. Like many cases in the field of law also public policy has its "negative" and "positive" functions.[100] The positive one would be that the public policy works as a "shield" barring the foreign law from being applied and the negative one would be that the public policy works as a "sword" leading to an application of the forum's mandatory laws. Article 26 itself covers the public policy of the forum and when in case of a deciosion the courts wont take into account the public policy of another state. A question which was raised in the case of the public policy was whether a public policy clause related to the forums law was sufficient or there were further specifications needed and whether the Rome II Regulation should define a "Union" public policy. In 2002, the Draft Proposal by the Commission contained a general provision on public policy, almost the same with the actual Article 26. That provision emulated the Rome Convetion's Article 16, but different from Article 16, the Draft Proposal of 2002[101] added a special provision that was dealing with the public policy. Meanwhile the Commission's proposal of 2003[102] maintained both the general public policy as well and the specific provision on Community's public policy. Even thoug the model of the Rome II Regulation was considered the Article 16 of the Rome Convention of 1980 by the Commission, the explanatory memorandum of 2003 emphasized that the bifurcated approach was chosen deliberately. Commission added also Article 24, which was read as below: the application of the provision of the law designated by this Regulation, which has the effect of causing

[99] Calliess, Rome Regulations Commentary, second edition, 2015, pg.800

[100] Von Hein, Rome II and the European Choic of Law Evolution, vol. 82, 2008, pg. 1614

[101] Draft Proposal 2002, Art 16 of the Rome Convention, eur-lex.europa.eu

[102] Commission Porposal (2003), 427, ec.europa.eu

non-compensatory damages, such as exemplary or punitive damages, to be awarded, shall be contrary to Community public policy. Than the Parliament's Draft of 2005 maintained the Commission's approach by keeping both the general public policy clasuse Article 24 and the specific clause on Community public policy. Article 26 of the Rome II Regulation is directed against the application of a foreign law, not against the content of the foreign law. Public policy does not affect the law, which is specified by the Convention[103]. Public policy will be taken into account when a provision of the specified law will lead to a consequence contrary to the public policy. It is known that every MS has its own domestic law and determining the forum's policy can lead to different frictions with also the competence of the CJEU to interpret the Regulation. By putting too much emphasis on the MS to define their own public policy can be frustrating for the EC legislature but also giving to the CJEU too much latitude in the interpration of what it's a concept of domestic law can be criticized as an illegitimate encroachment upon a domain of the MS. In a case of Brussels Convention the Court of Justice stated that the public policy as a concept remains a national concept and its not for the Court to define the content of the public policy of a contracting state. Case
Krombach and Renault[104] transplanted from the Brussels I to the Rome II
Regulation.But that does not lead to uniform results in the application of Article 34 and Article 26. Article 26 states that a court may refuse the application of a foreign law that violates the forum's public policy.

2.1.4.2. Overriding mandatory provisions

Before going further and deeper into details for overriding mandatory provisions I preferred to start first with the concept of overriding mandatory provisions[105]. Taking initiative by different law experts the term overriding mandatory provision can be defined as some mandatory rules, which are very crucial for the countries in the economic, social

[103] Mills, The Dimensions of Public Policy in Private International Law, 2008, pg. 2
[104] Case 38/98 Krombach and Renault, 2000, eur-lex.europa.eu
[105] Calliess, Rome Regulations Commentary second edition, 2015, pg.729

and political purposes. There are three categories of overriding mandatory rules that we can mention.

Firstly, there are the overriding mandatory rules pertaining to the lex fori.

Secondly, the overriding mandatory rules pertaining the lex cause.

Thirdly, the overriding mandatory rules of a third country.

Overriding mandatory provisions do not regard to private law norms, but generally they are focused on the social and economic politics of a specific country, always by serving to the general public interest. This way these rules can serve to the external economic, environmental and to the social politics of the country. For its importance, these rules would require a very strict implementation. By this we can understand that the overriding mandatory provisions shall apply when a foreing law would govern inter partes relation[106].

Now coming to the point of public policy, we can agree that it is almost the same thing also in this case. In the case when public policy is concerned, a local provision can be more preferred to apply being based on the positive effects of the public policy, even when a foreign law is applicable. So where is the difference between the public policy and the overriding mandatory provisions? When the overriding mandatory provision is concerned, that should be the provision applicable whatever the result can be and no matter if the results are taken into consideration for the implementation of public policy. So, in the case when a foreign law is applicable in a given case, public policy shall interfere if there would be a result unacceptable within the framework of the national law. Now coming to the part, which we are mostly concerned, the one of the Rome II Regulation. The Article 16 of the Rome II Regulation is directly related to overriding mandatory provisions[107]. According to this article, nothing in the Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

[106] Von Hein, Rome II and the European Choice of Law Evolution, 2008, pg. 1615

[107] Geert van Calster, European Private International Law, 2016, pg.272

Friedrich Carl von Savigny was the one who established the base of paradigm of conflict of laws. In its base lays down the idea that lex fori should not have preferred treatmend as compared to foreign laws. The court generally shall apply the law of the country, which is the most closely connected. What is commonly accepted by the European doctrine, the court has to apply internationally overriding mandatory provisions of its own law irrespective of the law designated by regular conflict rules. This has been traditionally accepted since the Rome Convention. In the private international law of non-contractual obgliatons the internationally mandatory provisions have attracted less attention, by relating it with the reason that "examples of such provisions seem to be more exceptional in the field of tort than in the one of contracts".

Article 16 of the Rome II Regulation[108] is applicable only to internationally mandatory rules and pursuant to Article 16, only internationally mandatory rules of lex fori may be applied. Article 16, is closely connected to Article 14 regarding to the freedom of choice. However, what we should keep in mind is that Article 14 itself has two specific provisions that deal within the application of internally mandatory provisions in purely domestic and intra-union cases. Article 16 also covers the cases having their applicable law determined from Article 4 to 13[109]. The existing connection between Article 16 and 26 of public policy is explained that both these provisions are explained by the same Recital. By the doctrine it is said that public policy should be divided into a "negative" and a "positive" function. Firstly we can say that it barriers the foreign law from being applied and secondly it leads to the application of the forum's mandatory provisions. By pursuing Article 16 a court applies the mandatory provisions itself and not the "exception" based on a overriding mandatory provision. The Draft of the Commission of 2003 with its statement makes it clearer. Article 16 will be applicable in all the types of non-contractual obligations, which are covered by Articles 5 until 12. When it comes to unfair competition, if the parties cannot agree on the applicable law, the application of internationally mandatory provisions in this case looses much of its importance. However, from different commentators is argued that there is no need to relate Article 16 to those

[108] Article 16 of the Rome II Regulation in overriding mandatory provisions, https://eur-lex.europa.eu/
[109] Peter Stone, EU Private International Law, 2006, pg.116

kinds of cases because it is already focused in protecting public interests. From Article 16 is understandable that it refers to internationally mandatory provisions not to interally ones. In addition, those ones are covered by the second and third paragraph of Article 14 but still not containing a definition of internationally mandatory provisions[110].

[110] Adrian Briggs, The Conflict of Laws, 2009, pg.278

CHAPTER THREE: ALBANIAN LAW

3.1. In general

Private international law as being the representative of different conventions, legal guides and other instruments as well as documents that take care of different private relationships further than the national borders. Different systems of law exist in the world. The private international law deals generally with matters of jurisdiction and also at the same time with matters dealing with the choice of law and foreign judgments. In the Albanian law, it helps in the cases when a court faces a case containing foreign elements[111]. Private international law itself is a domestic law governing different kind of relationships with the nature of private law including an international aspect. The foreign elements can be found in every component of the legal relationship itself such as in the contect, object and subject. In the cases when the foregin element is found in more than one of the components the relation will involve more than two states and the relationship will be characterized by the international character. The appearance of the foreign element might be in different forms. Let us take an example when one party has a foreign nationality, the action takes places abroad in a property that is located in Albania, meanwhile the contract will be performed in another country. In this case, the parties who use the choice of law rules can address to a foreign states court.

The Private International Law in Albania is definetly goverened by International law sources, which are:

- Treaties and different International Agreements
- Conventions
- International Sources of Law (Constitution, Private Codes)

[111] Aida Bushati ''Europeanisation of private international law'', 2016, pg. 86

The law of the year 1964[112] ‘’On the enjoyment of civil rights by the foreigners and the foreign law enforcement’’. This law has been replaced by the law No.10426, date 02.06.2011[113] “On Private International Law”.

The Albanian Private International Law deals with matters that are closely connected to:

- Firstly, the rules of the law applicable that will ‘’rule’’ private law relations with the foreign component.
- Secondly, jurisdiction and procedural rules that Albanian courts follow in regardance to the civil law relations governed by the foreign element[114].

In the ninth chapter of the Private International Law are settled the criterias of the international jurisdiction of the Courts in Albania. The most used criteria is the “habitual residence”as a connecting criteria applied to expand the opportunity of the Albanian courts in resolving issues that deal with the foreign element. Private International law governes another issue and that the applicable law rules. When shaping the applicable law, Albanian law refers to the guidance from connecting factors.

What they provide are just the means in choosing the appropriate law, but not that choice. Below there are some factors listed:

- First, ‘’lex loci contractus’’, which is the law of the country in where this contract was completed

- Second, ‘’lex loci solutionis’’, which is the law of the country in where this contract is expected to be executed.

- Third, ‘’lex loci celebrationis’’, which is the law of the country in where the marriage was celebrated.

[112] Law No.3920, date.21.11.1964 “On the enjoyment of civil rights by the foreigners and the foreign law enforcement’’

[113] Law No.10426, date.02.06.2011 ‘’On Private International Law’’

[114] Law No.10426, date.02.06.2011 ‘’On Private International Law’’

- Fourth, ‘’lex loci delicti’’, which is the law of the country where the tort was committed.
- Fifth, ‘’lex domicilii’’, which is the law of the place where a person is domiciled.
- Sixth, ‘’lex patriae’’, which is the law of the nationality.
- Seventh, ‘’lex situs’’, which is the law of the place in where the property is located.
- Eighth, ‘’lex fori’’, which is the law of the forum.

The reason of entering into force of the law No.10426, date 02.06.2011 “On Private International Law” was organized to satisfy the requirements of the the world that we live in, distinguished by a large number of movements in goods, services and persons. If we compare to the law “On the enjoyment of civil rights by the foreigners and the foreign law enforcement” the new law has definetly covered a larger field of application and at the same time has applied new criterias and improved the existing ones. There are concepts such as : ‘’habitual residence’’, ‘’real connection’’, ‘’the name of the natural person’’, ‘’representation’’, ‘’protection of cultural matrimonial property regimes’’, ‘’securities’’, ‘’goods in transit’’, ‘’protection of cultural heritage’’, ‘’intellectual property rights’’, ‘’consumer contracts’’, ‘’legal replacement’’, ‘’solidarity obligations’’, ‘’legal compensation’’, ‘’diplomatic immunity’’ [115] and much others more that are just used by the Private International Law that is currently in force as these matters dealing with the foreign element were not governed by the law “On the enjoyment of civil rights by the foreigners and the foreign law enforcement.”

[115] New concepts added to the new law of 2011

3.1.1. Principles of the law "On Private International Law"

The new law "On Private International Law" presented the principles of[116]:

- ''Party Autonomy''
- ''Habitual Residence''
- ''The Most Real Connection''[117]

The party autonomy as a principle is a basic one. This principle at the same time has an important role in the procedural rules of private international law. It gives to the parties the chance to choose the specific law that will regulate their obligation relationship. In the law "On the enjoyment of civil rights by the foreigners and the foreign law enforcement" the Article 17 provides that the first criteria used in the case of contractual obligations and non-contractual obligations will be the party autonomy[118]. However, there are also some restrictions, which do not allow the law that parties have choose to apply, and that would be if this law would be in conflict with the public order of the country where it would apply..

By the law "On Private International Law"the party autonomy is applied in a larger field, including[119]:

- ''The common desire of the parties in determining the content of the contract''.
- ''The common desire of the parties in choosing the jurisdiction that will govern their disputes''.
- ''The common desire of the parties in choosing the applicable law that will govern their contract''.

[116] Drita Shala ''Private International Law'', 2014, pg.7 (Prishtine)

[117] The most important principles of the new law

[118] The term of party autonomy was firstly mentioned in the law no. 3920, date. 21. 11. 1964

[119] Party autonomy later with the new law was extended more

The agreement between parties must be:

a) Written
b) In agreement with the international trade customs.

If the claimant that takes part in a judgment without proposing demands in the lack of international jurisdiction, the Albanian court will have international jurisdiction..

Such an opportunity tho was not showed by the law "On the enjoyment of civil rights by the foreigners and the foreign law enforcement". At the same time, the Civil Procedure Code of the Republic of Albania provides that[120]: law regulates the jurisdiction of Albanian courts for foreign natural and juridical persons. The jurisdiction of the Albanian courts cannot be transferred by an agreement to the foreign jurisdiction. In order for this to happen there should be a clear coonection of the obligation with a foreigner citizen, a foreign and an Albanian citizen, or a juridical person without domicile or residence in the Republic of Albania. The deviations from the normal rules should be directed by international agreements that are already ratified by the Republic of Albania. In the case when the parties do not come from the same country they can be able to execute a choice of jurisdiction clause in their agreement specifying that any kind of dispute which will arise from the contract will be judged by the court jurisdiction of the country that parties have chosen. Parties in their agreements are able to apply a choice of law. Through this choice of law, any kind of dispute that might rise will be established in agreement with the law of the country that parties have chosen, or there might be a combined jurisdiction clause and choice of law. The close connection between these two was evidented by the assumption that the clause in a choice of jurisdiction when there is a lack of an effective choice of law clause it can be taken as an implied choice of the legal system under which the court or arbitrator operated. The article 45 of the law "On Private International Law" ensures that[121]: "a contract shall be governed by the law that is chosen by the parties". This way parties can choose the applicable law for all the contract or just partly. If the parties will choose the jurisdiction that will be dealing in solving their

[120] https://www.euralius.eu/ Civil Procedure Code of the Republic of Albania
[121] Article 45 of the law no. 10428 gives the chance to the parties to choose the applicable law in a contract

disputes, which will arise from the contract, so automatically will be assumed, that the law of that place will be governing the contract. In terms of the contract, the choice of the parties must be expressed, or shown in a rational certainty, or according to the case conditions. Parties are free anytime to choose another kind of law to lead their contract. Any kind of further change in the applicable law after the parties have signed the contract, the rights of the third parties and the formal validity of the contract will not be affected. In the case when another real connection is highlighted not the same as the one chosen by the parties, the applicable law that parties have selected will jurisdiction issues of "domicile", that was used meanwhile the concept of "habitual residence" was not part of the Albanian legislation. By the Civil Code of the Republic of Albania is provided that[122]: "domicile can be stated to be a place in where a person is connected. This can be as a cause of his job because he is taking a specific type of service, his property is in this place and he has to accomplish a couple of interests". In addition, the Albanian Civil Code determines the domicile of the adults and the domicile of the infants. It is provided that "any person can require a domicile of his choice in the moment that the age of majority is contained" and also "a person cannot have more than one domicile at the same time". When a child is not still fourteen years old his domicile place is one of his parents, and in the case when his parents are not domiciled in the same country than the child should have as his domicile place the country where the parent with whom he lives is. In the articles 14 and 15 of the Law No.10129, date 11.05.2009 "On Civil Status"[123] there is a kind of obligation for the parties in order to be shown as registered and declared as domiciled in the country in the ''Civil Status Office''. The Albanian Civil Code states that: "the residence of a person is assumed to be where he is performing his work or different kind of tasks, maybe following a certain school, or different kind of programs, where he is having a health treatment or where he is suffering a sentence in jail and similar situations to the mentioned ones". In each of these cases, the residence must be proved but there is no requirement of registration in the ''Civil Status Office''. Even thought mentioned as being in the same place, ''domicile'' and ''habitual residence'' have differences. Someone might have just one ''domicile'', connected to the completion of a

[122] Article 12 of Civil Code of the Republic of Albania http://euralius.eu

[123] Articles 14, 15 of the law no. 10129 ''On Civil Status'', www.academia.edu

legal procedure of registration, and at the same time, he might have more than one place of residence without a demand of registration. When we have to deal with the ‘’free movement of the persons’’, ‘’capital’’ and ‘’goods’’ there was the need to use a more adaptable criteria as the “habitual residence” because it has been distinguished as an alternative to nationality and as being free of the difficulties related with domicile, such as those concerning ‘’intention’’, ‘’origin’’, and also
‘’dependency’’. The habitual residence is has been seen as a accurate relationship that exists in between the person and the place. The law “On Private International Law”, gives primacy to the parties autonomy and it started to apply even in non-contractual obligations. However, also the autonomy has its own limits as the law itself includes different restrictions such as the applicable law, which is selected by the parties, as the major applicable law shall cannot be applicable in the cases when it comes into conflict with the public order of the state, where it will be applied. Restricted choice of law of party autonomy includes also:

- Contract of Carriage
- Insurance Contract
- Matrimonial Property Regimes[124] Succession and Torts.

3.1.2. Connecting Factors

The Private International Law rules insures different factors connecting a person with a legal system. Mostly applied are:

- ‘’Nationality’’
- ‘’Domicile’’
- ‘’Habitual residence’’

Nationality will represent the political status of a specific persona person’s political status, whereby he or she owes devotion to a particular country. Except for the cases of naturalization, it is strongly connected to the place of birth of the person or on

[124] Sonila Omari, E drejta familjare, Tirana 2008, pg. 46

his/her parentage. Firstly, nationality was adopted in France in 1803 as a connecting factor by the Code Napoleon, in preference to domicile, that has generally predominated in Europe before then. Even in the Albanian Law No.3920, date 21.11.1964 "on the enjoyment of civil rights by the foreigners and the foreign law enforcement" where the nationality connecting factor was generally used in the arising in real term and so would create a legal fiction. The concept of "habitual residence" was the main topic of the Hague Conference[125] on Private International Law. This phrase arises in a different number of international conventions but as a matter of policy, the Hague Conventions do not determine the notion, to eleminate inflexibility. Still, the phrase is now largely applied in the domestic legislation. Habitual residence in the international field shows in a number of private international acts and also has been used as principal or subsidiary connecting factor in EU legislation concerning conflict rules which include: Three of Rome Regulations that deal with contractual and non-contractual obligations and as well as with the cases of divorce and separation.

As claimed by the Article 12 of current Albanian Private International Law legislation is provided that[126]: "the habitual residence of a natural person is the place where a person has decided to reside in the most period of time,even in absence of a registration,permit or a dispute authorization to reside. In order to determine the habitual residence the court should take into account the circumstances of personal professional nature which shows a stable connection with this country or the intention of person to create such connections". Habitual residence is a adaptable connecting factor, as it should be found on a close and stable connection with a state. In one hand this helps in enlarging the field of jurisdictional criteria but also it can be really hard to prove. In order to prove the habitual residence there are different factors such as:
''regularity'', ''intention'', ''reasons of personal or professional nature'', ''duration'' that should be considered. Applying the criteria of "habitual residence" doesn't eliminate the nationality connecting criteria. When deciding on issues related to matrimonial matters in respect of the law governing formal validity of will, the nationality will be used as an

[125] Hague Convention had a big positive impact in Albania since Albania became part of it
[126] Art. 12, law no. 10426 of 2011 ''On Private International Law''

alternative of the criteria of domicile. The criteria of the most real connection has been ruled by the Law No. 10426, dating in 02. 06. 2011 “On Private International Law”. This criteria found its application in different issues of private international law[127]. The second paragraph of the Article 12, ensures that “ the court should determine the most real connection applicable criteria, by being based in the factual circumstances”. In applying this criteria the Albanian Courts should analyse the connection that exists between Albania and the greater interest. This way it has been decided if Albania has the closest connection in the relationship characterized by the foreign element. The criterion that is provided by the Albanian Private International Law leads cases such as:

- The foreigner having two or more nationalities, the national law shall be the law of his habitual residence.
- In the case when the foreigner will not have his habitual residence in none of the countries that he posseses also the nationality than the law that will apply will be the one that is more connected.

In the third paragraph of Article 8 is stated that in cases when parties nationality is not understandable, the applicable law of the habitual residence will be applied.

In the second paragraph of Article 9 is stated that in cases when parties habitual residence is not clear, the applicable law will be the law of the place that has more elements that connect. When there will be a type of contract that contain the foreign element the parties can easily choose the law that will apply. This type of contracts will be guided by the criteria that is provided by the Article 46 of the Private International Law. At the end, the law that can be applied can be the one that has more close to the parties.

‘’Carriage contract’’, ‘’non-contractual damage rules’’, ‘’product liability’’, ‘’unjust enrichment’’ include really almost identical rules. When treating the Albanian Private International law the connection doctrine has an enormous role to play and more

[127] Ilda Mucmataj, Lorenc Danaj- The development of private interational law, Academicus International Scientific Juornal, 2014

specifically the case in which we do not have a choice in the law. Since the date 02.06.2011, the Albanian Private International Law is governed by the Law No.10428 "On Private International Law". Article 89 of the law contains characteristics of the international application of private law and it regulates the jurisdiction of the Albanian courts and the applicable law. Even though the new law did introduce new solutions, the fundamentals did not change. The law has governed situations that were not treated by the previous law and has developed the applicable criteria. There are new elements applied such as[128]:

- ''Habitual residence''
- ''The most real connection''

Present applicable criteria have been refined, such as:

- ''Party autonomy''[129].

In regardance to disputes characterized by the foreign elements, jurisdiction decided by the courts is found on:

- Party autonomies (means that parties have already shown their will by having an agreement between them when presenting the case before the court).

Law No. 10426 "On Private International Law" in defining the party autonomy concludes that parties shall have between them an agreement which defines the chosen jurisdiction and the applicable law. But, this is not unlimited because of the most important reason that it is subject to a couple of restrictions like, ''public order clauses'', ''mandatory rules'' or the ''requirement of a reasonable relationship between the choice of law and contract''. Defendants court of residence will serve as a basis standart for general jurisdiction in connection with the lawsuits against the defendant. The regulation

[128] Neshat Ngucaj conference with the title ''Albanian legal reforms and European integrations'', 2013

[129] One of the most important criterias improved by the new law

on private international law has created more elasticity to the concept in use as a general rule of the international jurisdiction the criteria of the habitual residence of the defendant.

By the Article 71 in the Private International Law is provided that[130]: "In the moment when the party has the habitual residence in the Republic of Albania, the courts of this country will have jurisdiction in resolving private legal disputes containing the foreign elements". By the new law "On Private International Law" the closest connection has been concluded to be a very important criteria in the settlement of a dispute that is characterized by a foreign element with the country where this conflict will be settled. It can be stated that this law has opened a possibility to the courts of Albania to have jurisdiction in resolving conflicts defined by the foreign elements. This new door has been opened by making improvements in the applicable connection criteria. This is what makes our law similar to other legal systems of the conflict of law in the European Union countries, as the law itself presents as a reference the Regulation (EC) No.593/2008 of the European Parliament and the Council "on the Law Applicable to Contractual Obligations" (Rome I Regulation) [131] and the Regulation (EC) No.864/2007 of the European Parliament and the Council "on the Law Applicable to Non-Contractual Obligations" (Rome II Regulation)[132].

The rules which have to do with the international civil procedure such as the recognition anf the execution of the decisions of foreign courts are out of competition of this law, so they are still regulated by the Civil Code. This concept stands in a striking contrast not only with European law, but also with the structure used by other legislation. The law is divided into 11 chapters, where the first chapter (Articles 1-7) provide the general principles, the second chapter (Articles 8-17) provide the subject of the law, chapter three (Articles 18-20) legal actions, chapter four (Articles 21-32) has provisions on marriage and family, chapter five (Articles 33-35) contains provisions in governing inheritance, chapter six (Articles 36-44) contains provisions concerning property, chapter seven (Articles 45- 55) contractual relations, chapter eight (Articles 56-70) contractual

[130] Article 71 of the law ''On Private International Law'' in Albania, the new version of the year 2011
[131] Rome I Regulation, https://eur-lex.europa.eu/
[132] Rome II Regulation, https://eur-lex.europa.eu/

obligations, chapter nine (articles 71-81), the jurisdiction of the Albanian courts, chapter ten (Articles 82-86) procedural provisions and chapter eleven (Articles 87- 89) Transitional Provisions. International jurisdiction is regulated in the context of the Albanian Law. This concept stands in stark contrast, not only with European law, but also with the structure used by other legislations. Albanian courts have international jurisdiction if the respondent has his usual residence in Albania, unless otherwise provided (Article 71 of the AL)[133]. Unlike the regional codes, Albania uses ordinary residence as a connecting factor for international jurisdiction. Eliminating residence is not a correct approach as it not only contradicts Albanian legal tradition, but also with EU acts and rules used in the countries of the region. The best solution would be for the law to foresee both options. The exclusive jurisdiction of the Albanian courts exists when it comes to:

(i) the real immovable property rights in Albania,
(ii) the decisions of the organs of commercial companies when residency of the company is in Albania,
(iii) the establishment or closure of legal persons, or the decisions of their bodies,
(iv) the validity of the registration in the registers of state bodies or the Albanian courts,
(v) the validity of the registration of intellectual property rights that have been or are being implemented in Albania,
(vi) the enforcement of the executive titles in Albania.

The agreement on the determination of jurisdiction in favor of the Albanian courts is provided by Article 73 of the AL, which lists some necessary requirements for the form of the agreement. The law provides for a tacit prorogation in cases where the defendant does not contradict the jurisdiction of the Albanian court. Cases of special jurisdiction are regulated in Articles 74-81 of the AL(for the declaration or disappearance of a person, marriage, spousal relationships, parents and children, paternity and

[133] Aida Bushati ''The Albanian Private International Law'', 2016, pg.88

parenthood, adoption, removal or restriction of the ability to act, guardianship and other cases). AL, unlike other European or regional laws, does not provide for lis pendens. Litigation allows parallel adjudication, which means that it allows the courts to adjudicate a case, even though it is being tried by a foreign court. This issue should be addressed within the possible changes of AL. The general principles are regulated in the first chapter of the AL. According to the renvoi principle provided for in Article 3 of the AL, if referring to the law of another state, the referral also extends to the private international law of that State. If the law of another state refers again to Albanian law, the substantive provisions of Albanian law apply. In cases where foreign law refers to the right of a third country, the law of the third country shall apply. However, the referral is ruled out in some cases, for example, on the status of a legal person, the choice by agreement of the applicable law, the form of a legal act, the maintenance obligation, contractual obligations, or non-contractual obligations. If the referral is made to the right of a state with several territorial units, each of which implements its legal system, then it will be the law of the state that will decide which legal system will be applied. In, for example, Article 114 of the law of international law of Montenegro[134]. The lack of such regulation applies the principle of closer interconnection (Article 4 of the law). The determination of the closest connection is at the discretion of the court, which decides according to the circumstances of the case (Article 12/2 AL). Albania has no general exclusion clauses, as were examples from the countries of the region. However, special exclusion clauses appear in relation to the applicable law on contractual obligations, as well as on contractual obligations and in the area of marriage and family relations. Foreign law does not apply if its implementation would result in a violation of Albanian public policy (public order) or if it manifests non-compliance with the fundamental principles of the Constitution and Albanian law. In such cases, another appropriate provision of the law of a foreign country will be applied, and when this is lacking, the Albanian law shall apply (Article 7 of the AL).

A very important case in the Albanian Private International Law is the one of the date 08.05.2014 from the High Supreme Court with the claimant Irini Perperidhu (Greek

[134] Internation Private Law Act- Applicable law (Montenegro)

citizen) and the defendant Elton Xhani[135]. The claimant claims from the defendant the amount of 4000 euro as a compense for the caused damage. He is based on the Articles 445, 450, 608, 640 of the Civil Code and on the Articles 31, 32/a, 202, 206 of the Code of the Civil Procedure[138]. The Court of Tirana has decided that has no competence on this case with the no.3678, date 20.03.2014. The claimant has sued a case law against the court decision and has raisen these arguments:

- The decision is against the law and unfair.
- The Court of Tirana is competent as the defendant lives in Sauk (part of Tirana)
- The object of this contract is located in Tirana.
- The Court of Tirana has jurisdiction in solving this case, based on the Articles 71 and 80 of the Law No.10428, date 02.06.2011 "On Private International Law" and so on it should be judged by an Albanian Court[136].

The High Supreme Court of Albania has noticed that the claimant Irini Perperidhu (Greek citizen), pretends to have a commercial activity in Thesaloniki, Greece and during the process of this commercial activity she gave to the mother of the defendant (who passed away) some furnitures that she was suposed to pay monthly. The money that she had already paid were all written and signed on a document and what was left was the amount of 4000 euro. As a result the claimant presented the case to the Court of Tirana asking from the defendant the amount of 4000 euro. By the court it has been done the procedural change from Lumturi Xhani who passed away to her son and at the same time legal inheritor Elton Xhani.

The Court of Tirana has argumented that we have to do with a case that contains the foreign element and according to the parties agreement the payments shall be done in Greece. From the defendant side is stated that the Albanian courts have no jurisdiction according to the Articles 73/3 and 80/b of the Law No.10428, date

[135] Albanian Supreme Court, case law no.00-2014-1905, decision 182 (legal base on the Law no.10428, date.2.6.2011 ''On the Private International Law''. [138] https:euralius.eu

[136] www.gjykataelarte.gov.al

02.06.2011 “On Private International Law”.

The claimant complains against this decision.

By the High Supreme Court is noticed that the Court of Tirana did not respect correctly the Law No.10428, date 02.06.2011 “On Private International Law”. Referring to this law the case has foreign elements as the claimant is a foreign citizen.

The Article 37 of the Code of the Civil Procedure in Albania predicts that[137]:

- Jurisdiction of the Albanian Courts in the cases with foreign elements is regulated by the law.

Meanwhile the law “On Private International Law” predicts that this law establishes rules in relations containing the foreign element and the Article 71 of this law predicts that the Albanian Courts do have jurisdiction in solving cases with foreign elements, if the defendant part has his/her habitual residence in the territory of the Republic of Albania.

By interpreting this Articles we come to the conclusion that the Albanian Courts have jurisdiction because the defendant has his habitual residence in Sauk, Tirane. Also the defendant did not present to the court any kind of signed contract that shows that the Greek Courts will be capable in solving their disagreement. Such a contract would be available just if it would have been signed by the parties.

Under these circumstances the court decision with the No.3678, date 20.03.2014 of the Court of Tirana has been taken in applying the law not correctly and in this way it has to be resend again to the same court ofr judgment.

[137] Law no. 8116, date.29.03.1996 ‘’Code of Civil Procedure in Albania’’, https:euralius.eu

3.2. Albanian Private International Law and its implementation in the judicial practice

3.2.1. Introduction

When regarding to Albanian private international law we should mention that its main rules are managed by the 2011's Act law, specifically the ''Code of Civil Procedure'', and in the meantime by the international and bilateral agreements[138]. The rules main body of civil and commercial matters containing the foreign features, are established by the Albanian PILA. The Law itself has incorporate private international law general conventions, by offering similar solutions to the European Union legal systems and in Private International Codes of other European countries[139]. Private international law of Albanian law is coexisting with the provisions of the Civil Procedures Code, which even though is not the fundamental source in the private international law matters, is still applied by the Albanian judges in containing foreign elements cases.

3.2.2. Albanian PILA contents and structure

We can definitely say that the new Albanian PILA has brought to the Albanian legislation both qualitative and quantitative changes in comparison to the old law of 1964[140]. There have been new civil law institutes introduced and at the same time the old ones where improved, by being adapted to the private international law recent developments. By following the solutions offered by ''Brussels I Regulation'', the international jurisdiction of the Albanian courts has been created. For the Albanian PILA we can claim that it is categorized in three main elements:

The first element will regulate the general provisions that affect the choice of law rules and procedural rules.

[138] The PIL Act, published at the Official Gazette of the Republic of Albania no. 82/2011, is approximated with the Regulation (EC) 593/2008 of the European Parliament and the Council

[139] Albania is a member of the European Parliament

[140] The Albanian PILA of 2011 replaced the old law ''On the enjoyment of civil rights by foreigners and on application of foreign laws'', law which remained in force for a long time even after the fall of communism.

The second element will define which law will be applicable.

The third part will define the rules connected to the jurisdiction in cases including the foreign element.

The Albanian PILA renewed some of the most important principles of private international law by adding new connecting factors including contractual and noncontractual obligations and as well as family matters[141].

3.2.2.1. General Provisions of PILA

General provisions are provided under the first chapter which specifies the scope of application the Albanian PILA, and as well as the position of international agreements[142]. There are missed some important general features of private international law; actually in the third article of PILA "renvoi" are covered. It also provides the possibility to refer to another private international law. In case a state will refer back to the Albanian private international rules, the rules of the Albanian law are applied. However, when it refers to the law of a third country, the rules of that third country will apply. Renvoi will be excluded for a certain category of provisions such as:

- ''The status of legal persons''.
- ''The choice of applicable law''.
- ''The form of the legal transaction''.
- ''Issues related to maintenance obligations''.
- ''Contractual and non-contractual obligations''.

It has been mentioned in the 7th Article of the PILA, that a provision, similar to the provisions of old law public policy corresponding to the 26th article of the 1964 law. In accordance to this rule, the foreign law will not apply in the cases when the results of its application are against the public order or might cause different issues. PILA's second paragraph of Article 12 defines that court will choose the closest connection in accordance

[141] Sonila Omari, Family Law, 2008, pg. 45

[142] A. Bushati ''Albanian Private International Law'', Yearbook of Private International Law 2013-2014, pg. 509

to the circumstances of the case. The third paragraph of article 46 related to the law applicable in the absence of choice confirms that when it is obvious that the contract is more tightly connected to a country rather than the one of paragraph one and two, the law of that country should be applied.

3.2.2.2. Choice of law provisions

When deciding whether the international jurisdiction and applicable law contain the foreign elements or not, there is a base taken into the connecting factors, that are actually factual and legal circumstances detrmining the connection between the legal civil/commercial relationships with the foreign elements and the applicable law of a state[143]. According to the PIL, the habitual residence has been used mostly in the connecting factor. Habitual residence has been introduced as criteria for conflict of law rules and determination of jurisdiction. The Albanian law separates the habitual residence of natural from legal persons, firstly in article 12 which deals with the habitual residence of natural persons and then in article 17 dealing with the habitual residence of legal persons[147]. A natural persons habitual residence is the place where the person is staying mostly even if he doesn't have a registration or stay permission. In order to determine such country, person's professional and personal conditions should be taken into consideration. Albanian judges can then explain further on the concepts of "predominantly", or "sustainable connections" and the "intention to do so". On the other side, a legal persons habitual residence will be the place of central administration. When a legal person has a business activity, the habitual residence will be the country where the business activity is performed. When there is a case of a branch or agency contract, the applicable law will be the one where the agency is located.

[143] A. Tartari ''Connecting criteria in private international law'', Journal ''Avokatia'' 2013 [147] Article 17 of Albania PIL Act

3.2.3. Contractual and non-contractual obligations

PIL Act provisions on the choice of law for contractual obligations are designed by considering the provisions of the Rome I Regulation., while Albania's PILA is depending on the principle of party autonomy. In the 45th article, the party autonomy is introduced as the fundamental connecting factor, as a contract will be guided by the law chosen by the contracting parties[144] , in building the applicable law for contract. Parties will then choose willfully the applicable law for a distinct part of the contract or for all of it, allowing the parties to select different law for several sections of the contract. The law also provides implicitely the choice of law rules by specifying which of the parties have designed the jurisdiction, and by presuming the choice of the forum applicable law for the regulation of contracts. The parties can change the applicable law of the contract, even after concluding contracts, but this law, cannot influence the validity of the contract or the rights of the third parties. The party self-rule can be restriced when the components of contract are related to a different state from the state chosen by the agreement[145]. Finally, the regulation of a contract is provided by the law that parties will choose. When there is a lack of a choice of law, the 46th article proves different prospects for applicable law depending on different connecting criteria. And the first connecting factor to choose the applicable law is the habitual residence of the party that performing the contract. The contracts that have not been described in the first paragraph of article 46, are going to be governed by the law of the state in where the party that fulfills the service has his ordinary domicile by the time that the contract has started to apply. In the third paragraph or Article 46, the exception clause is introduced into the contractual obligations. When the contract is going to be closely connected to another law which is different from the defined one, the law of that place will apply. Therefore, it established as a secondary fundamental connecting factor for contractual obligations the "closest connection" principle. After the answer proposed by the ''Rome I Regulation'', the ''Albanian PIL Act'' presents a particular choice of law rules for the named ''protected contract'': ''consumer'',

[144] In compliance with article 3 of Rome I Regulation; Article 45 of PIL Act

[145] T.C Hartley ''Mandatory Rules in international contracts:the common law approach'', Vol 268, pg. 348 [150] https://eur-lex.europa.eu/

‘’individual employment’’, ‘’carriage and insurance contracts’’. Renvoi is excluded in contractual obligations.

3.2.4. Non-contractual obligations

Albanian PIL Act provisions on choice of law rules for non-contractual obligations reflect the solution provided by the norms of the Rome II Regulation[150]. The applicable law to a non-contractual obligation deriving from non-contractual damage such as tort will be the law of the place where the damage has occurred. This is explained in the 56th article of Albanian PILA. In the second paragraph of the same article, it is explained that when the person who claims his responsibility and the person experiencing from damage have their habitual residence in the same country, the country’s law shall apply. Furthermore, the third paragraph of the article 56 ensures that when by all circumstances another place is more connected to the case, the law of that place will apply[146]. The Albanian PIL Act ensures for ‘’ex ante’’ and ‘’ex post’’ party autonomy to determine the applicable law for non-contractual relations:

- ‘’Applicable after the event that has brought the damage’’ .
- ‘’Applicable before the event that has brought the damage’’.

The choice of law must be revealed, decided case by case and should not oppose the Rome II Regulation. In liability for damages that come from products, the law proposed several solutions found by combining several connecting factors. By the article 63[147], the law of the country of the habitual residence of the person will be applied, sustaining the damage, the law of the country where the product was acquired and law of the country where the damage occurred. There are three potential options applicable in the case when the product is purchased in that country. The most important element of the choice of law system represented by the article 63 of PILA is the marketing requirement. When it cannot be able to perceive the marketing of the product in another

[146] Article 56 of Albanian PILA, third paragraph considered as an exemption

[147] Article 63 of Albanian PILA considers the law applicable the law of the country of the habitual residence of the person who sustains the damage

state than the state where the law of his habitual residence will apply. In the third paragraph of the 63th articl on product liability cases, the closest connection principle is applied. According to this paragraph when it is clear from all the circumstances that the non-contractual obligation is more tightly connected to another country than the law of that country will be applied. In the case of non-contractual obligations renvoi is excluded, and hence in all cases the law is refering to the substantive law of the other country.

3.2.4.1. Marital and Family Issues

Provisions connected to marital and family issues containing the foreign elements include the ‘’form and conditions of marriage’’, ‘’personal and property relations’’, ‘’divorce’’, family issues such as ‘’maintenance obligations’’, ‘’adoption’’, ‘’custody of children’’ and ‘’parental relations’’. The essential demands of marriage will be ruled by the national law, meanwhile the form of the marriage is ruled by the ‘’lex loci celebrationis’’[148]. Foreign and stateless persons entering into a form of marriage in the territory of the Republic of Albania must provide the substantial conditions for mariage according to the Albanian Family Code. There are certain impediments to a marriage given by the Albanian Family Code applied, like:

- ‘’ Existence of a previous marriage’’.
- ‘’ Existence of a blood relationship’’
- ‘’Minority, being under 18 years old’’

These kinds of obstacles establish the essential circumstances of marriage by the Albanian public policy. However, public policy is more expansive and it is not restricted only in what is mentioned above. Article 25 of the PIL Act regulated the conflict rules for divorce. The primary conflict rules is the common lex patriae[149], which consists in the law of nationality of the spouses[150]. Thus, the law of the spouse’s nationality regulates the

[148] A. Bushati and E. Qarri ‘’Albanian Private International Law in Family Matters’’, 2015 , pg. 15

[149] Ardian Kalia ‘’Private International Law’’, 2013, pg. 211

[150] Mirela Zupani ‘’Private International Law in the Jurisprudence of European Court- Family at Courts, University of Osijek, 2015, pg. 357

dissolution of a marriage by the time of the submission of the lawsuit. Also in the old law of 1964 the same criteria was provided by article 7. In the cases when we deal with different nationalities of the spouses, the law that regulated the termination of the marriage will the law of the country in where the spouses have their habitual residence at the moment when the legal action has started. In the third paragraph of this article there is an exception provided. According to this paragraph, in the cases when the law does not allow the termination of the marriage, it is done in agreement with the Albanian law, if the one who requests it is an Albanian citizen when getting married. The personal relations between spouses are generally being arranged by the law of the common nationality. In this case, there will be two alternative criterias applicable. Firstly, if the spouses do not have the common nationality, their common habitual residence law country will apply. Secondly, in the cases when the law is not able to be determined by virtue of the previous law, the closest connection country law will be applicable. According to the law of 1964, article 8 assumed the nationality of the spouses as the main connecting criteria, and in the cases of different nationality, the ''lex fori'' would be applicable[151]. The law of the country that controls personal relations of the partners determines also the marital property regime. In case that there will be a modification to the property regime that will not affect the rights earned before by the spouses. Spouses are able to choose to apply the law of the following states[152] by a notarial agreement between them or any other kind of similar act issued by a public organ:

- ''The citizenship of one of the partners''.
- ''The ordinary habitual residence of one of the partners''.
- ''The place where the immovable property is situated''.

According to the article 26 of the PIL Act there are connecting factors defining the law applicable to maintenance obligations[153]. These connecting factors are directed by the law of the country in where profiting from the obligation has his habitual residence. In cases when both parties have the same habitual residence, the law of that state will be

[151] Article 8 of the Law of 1964

[152] Sonila Omari ''Family Law'', 2008, pg. 46

[153] Article 26 of the law no. 10428, date 02.06.2011

applicable. When the marriage was terminated or proclaimed invalid in the Republic of Albania, or when the decision for its dissolution or declaration as invalid has been recognized in the Republic of Albania, Albanian law will be applicable. In defining the law applicable to the relationship between parents and children the habitual residence will be the connecting factor. There is a priority given to the nationality but the best interest of the children will prevail. Article 30 of the PIL Act contains rules for the applicable law to the conditions for the initiation and termination of an adoption. First of all the main connecting factor will be the one on nationality. Anyways, the circumstances for adoption and its termination are governed by the law of the country whose citizenship/nationality the adopting persons have at the moment of adoption[154]. Identical criteria was assumed by the law of 1964 in article 10. The law of the countries habitual residence will apply in cases when the adopting persons have different nationality. Last part in this article had many changes from article 10 in the old law. The later article in the new law gives the change of applying the ‘’lex fori’’ based on the application of the principle of ‘’favor negotii’’ considering always the interest of protection of the adopting person.

3.2.5. Succession Law

In the fifth chapter of PIL Act, the institution of inheritance is regulated. The applicable law that governs inheritance dealing with movable property has been given by the article 33, as a rule, the law of the citizenship of the testator at the moment of death[155]. When dealing with immovable objects, the law applicable is the law of the place where the objects themselves are located. Article 33 deals and regulates issues concerning the law of the citizenship of the testator. The capacity in making a disposition by will has been managed by article 34 and the law of the country whose citizenship the testator has at the moment of making, changing or revoking the will, will be considerated. In order for this will to be valid by the law there should be the following criterias met:

[154] In relation to the Act of 1964, the new PIL Act has made a more correct and complete regulation regarding to the nationality criteria

[155] Article 33 of Albanian PIL Act

- ‘’The states law in where the disposition by will has been made by the testator’’.
- ‘’The states law whose citizenship the testator possess right by the time of making his will or the one that he has by the time of his death’’.
- ‘’The states law in where this testator has his habitual residence either by the moment of making the disposition by will or by the time of his death’’.
- ‘’The states law in where the immovable property his being located’’.

The provision found modifications after the provisions of the Hague Conventions in 1961, even thought Albania became part of the Convention recently. The same criteria were found in the law of 1964, in the first paragraph of article 15.

3.2.6. Property Rights and Rights on Intellectual Property

The intellectual property rights and other kind of property rights in general are included in the PIL Act. As the general connecting factor also the new PIL ACT same as the old one uses the ‘’lex rei sitae’’. The ‘’acquisition’’, ‘’transfer’’, ‘’loss and possession of real rights’’ are generally governed by the law of the country where these objects are being located. The destinations country law will regulate the real rights over objects in transit. Rights over transport vehicles are being governed by the law of the country to which the vehicles pertain are registered. Property rights are being governed by the law of the country where registration was sought. In the case of registered property rights, the law of the place that has registered the right will regulate them.

3.2.7. Jurisdiction issues under the jurisprudence of Albanian Courts

The Albanian courts will have the jurisdiction disputes dealing with the foreign elements, in the case when the defendant has his habitual residence inside the Republic of Albania. The habitual residence has been a connecting factor used also in the article 16 of the old PIL of 1964. The article 65 of the Albanian PIL Act, is identical to the article 8 of the Rome II, stating that the applicable law of non contractual obligations deriving

from IP rights is the law of the state in which the protection is claimed[156]. The jurisdiction is controled by articles 71-81 of the Albanian PIL Act. Habitual residence is regulated by the articles 12 and 17 of the Albanian PIL Act defining the jurisdiction of the Albanian courts in the article 71[157]. Domicile is not used anymore in the issues of jurisdiction as a connecting factor. The law ensures, ''special jurisdiction'', ''prorogation of jurisdiction'', ''exclusive jurisdiction''. According to the article 72 of PILA the cases when the Albanian courts have exclusive jurisdiction are in cases including property rights and other related rights, immovable objects, rent issues, and also rights stemming from the use of immovable property for compensation, if they are situated in the Republic of Albania, same with cases that include decisions of the bodies of commercial companies, if the company has its habitual place of residence in the Republic of Albania.

3.2.7.1. Prorogation of jurisdiction

The article 73 of PILA controls the prorogation of jurisdiction. By the law is needed specificly an oral agreement between the parties. This oral agreement must complete some crietrias such as found on written evidences, or in forms used in the international commerce. By the provision there is a part providing silent consent of the defendant in the case when he shows without opposing the international jurisdiction, even when he is defended by the lawyer, or when the court has described the change to oppose and that is proved in the minutes of hearing. The exclusive jurisdiction situation is not excluded by the provision.

3.2.7.2. Special jurisdiction

Articles from 74 to 80 of the PIL Act regulate the special jurisdiction of the courts in Albania in cases of family and civil matters. These matters include the ''death of someone'', ''marriage'', ''relationships between partners'', ''parents'' and ''children'', ''maternity'', ''adoption'', ''waiver or limitation of the capacity to act'', and

[156] Article 8 of he Rome II Regulation was taken into consideration in the case of the article 65 of Albanian PIL ACT

[157] Habitual residence according to the Albanian law is the place where a person is living for a permanent time for different purposes.

‘’custody’’, ‘’joint claimants’’, ‘’torts’’, ‘’actions of branches’’, or ‘’maintenance creditor’’, ‘’action of intestate testamentary successions’’ [158]. The persons habitual residence or the Albanian citizenship gives special jurisdiction to the courts.

3.2.7.3. Jurisprudence of Albanian Courts – Jurisdiction issues

Albanian judges play an essential role in the evolution of the legal doctrine in private international law and this for the main fact that there is an absence of a consolidated legal tradition in this field. The law started to be applied by the judges for the complaints submitted after the law entered into force. Only some cases that have been addressed to the High Court after 2011 were decided based on the old law. For the High Court is was difficult to be limited based on the old law. At the same time, even when applying the new law there were difficulties. PILA provisions have been modeled according to the EU regulations, but this cannot be used as a reference by the judges in Albania if they are not reflected to the Albanian law, or neither to quote them in the domestic law. During the estimation stage in the legislation of a country like Albania that is in the integration stage in the EU judges play an essential role. In the meantime is required also reference to the Court of Justice in cases when provisions are identical or even similar.

The HC Decision no. 238, dated 07.05.2015[159] and HC decision no.22 dated 19.01.2011[160] are examples of direct references to EU Regulations. Albanian courts determine both the international jurisdiction of both Albanian or any other court[161]. The article 45 of the PILA has been wrongly interpreted by the court. In this article has been specified that in the case when parties have chosen the jurisdiction it indicates that they chosen also the applicable law. Different views have been expressed while drafting the Rome I regulation[162]. The implicit choice of law is made in the case when parties have agreed on the exclusive jurisdiction of the forum. What was incorrectly stated by the

[158] Articles from 74-80 of Albanian PIL Act covering all special jurisdictions
[159] HC Decision no.238, date 07.05.2015
[160] HC Decision no. 22, date 19.01.2011
[161] www.academicus.edu.al
[162] A. Lazowski ‘’Approximation of law’’ 2011, pg. 631

Albanian courts is that the article 45 as long as ensures for the assumption of the choice of law in contractual relationships. In the practice of the Albanian courts some inconsistencies are noticed when it comes to the jurisdiction isseues that are connected to the employment contracts specified by foreign Ambassies that have Albanian employees. In a case the Albanian High Court has followed the most recent case law of CJEU, allowing Albanian jurisdiction in cases coming to light out of an employment contract with a foreign consulate, while another High Court decision opposes the Albanian jurisdiction by giving immunity to the Ambassy, even though the dispute concers ‘’ius gestioni’’ and not ‘’iure imperii’’. Albanian courts have faced problems in determining the international jurisdiction regulated by the article 80 (c) “for actions concerning claims that arise from tort/delict where the place where the harmful event or the damage occurred is situated in the Republic of Albania Special Jurisdiction”[163]. Precontractual actions have been involved in this case that by the courts were eligible as requests that result from the torts. This had as a base the domestic law and the article 80 (c) of PILA applies[164]. The conclusion was correctly made by the courts. The line was made in accordance to the Court of Justice of the EU. Another decision, dated 30.05.2013[170], the Court allowed international jurisdiction to the Albanian court based on article 80 (b) [165] special jurisdictions in issues related to a contract “for actions concerning a contract or claims that arise from a contract where the place in which the obligation was performed or should have been performed is located in the Republic of Albania”[166]. The article 37 of the ‘’Civil Code’’ and the article 80/b of the law of the new law gives international jurisdiction to the Albanian courts. It has been stated that Albania would be the place of the performance of the contractual obligation but the goods should have to be delivered in Albania. By the Albanian PILA the place of the performance of obligation has not been determined in the way that Brussels I stipulates. By having as a base the article 7 of Brussels I Regulation, the Court of Justice extended the place of performance. By the court was stated that the

[163] The law applicable will be the law of the country where the harmful event has occurred

[164] Article 80 (c) of Albanian PILA was adopted according to the Article 7 (2) of Brussels I Regulation [170]

HC Decision no. 331, date 30.05.2013

[165] Article 80(b) dealing with the special jurisdiction

[166] Albanian courts have jurisdiction as long as the obligations of the contract was performed or should have been performed in the territory of the Republic of Albania

performance of obligation should be decided according to the conflict of rules that define the essential law of contract. In the paragraph 1(b) of article 7 dealing with the sales of goods and provision of services[167] there are provisions transferred from the Brussles Convention to the Brussels I Regulation. In the case of Albania the courts could not succed in following the scheme provideded by the ECJ decision and reference to article 80(b) was not totally balanced. Albania courts also interpret the provisional jurisdiction that is another PILA provision. By article 81 is stated that ''Albanian courts have jurisdiction with regard to measures for securing a lawsuit if such measures are to be executed in the Republic of Albania or if the Albanian courts have international jurisdiction for the object of the proceeding''[168]. And this is a reflection of article 35 of Brussels I. In the cases when the old law left spaces on provisional jurisdiction, the Albanian court referred to the Brussels I Regulation. Article 81 has been interpreted in the light of CJEU jurisprudence[169] while applying this provision. Albanian courts should consider the limits set by CJEU. Albanian PILA did not contain any provision on provisional jurisdiction. The following issues are underlined:

1. Article 81 of PILA will be applicable in those cases when the sassed court for provisional measures does not have jurisdiction.
2. Article 81 of PILA includes also provisions of granting or protective measures. These provisions demand ''inter alia'', the ''real existence of a connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the state of the court before which those measures are sought''[170].

The new PILA replaced the law of 1964 that was really restricted in terms of originality and institutions[171]. Albanian PILA defines the international jurisdiction of the Albanian Courts, the choice of law rules, for civil and commercial issues.

[167] Article 7, paragraph 1 (b) Brussels I Regulation

[168] Article 81 of Albanian PIL Act

[169] Article 81 of Albanian PIL Act, giving jurisdiction to the courts on the substantive matters

[170] Aida Bushati, Nada Dollani '' Albanian PIL Act and its implementation in judicial practice'', 2014, pg.15,

[171] Albanian PIL of 1964 did not contain any provision on provisional jurisdiction

Meanwhile issues such as: ‘’the recognition and the enforcement of foreign judgments’’ are still being managed by the Civil Procedure Code[172]. The habitual residence of the parties has been used as the most common connecting factor in applicable law and jurisdiction. The most important factor in choosing the applicable law in contractual relations and also as a choice in non-contractual relations is the party autonomy. The application of the mandatory rules limits the party autonomy. Our law doesn't define all the general principles of private international law. In the case when the defendant has his habitual residence in Albania, and the courts of the country have jurisdiction. Albania suffers an absence in private international law, and the legal doctrine is not very expanded. In the new PILA provisions of both Rome I and Rome II Regulation were borrowed. Although not explicitly mentioned, provisions of jurisdiction in Albanian PILA are similar to the one contained in Brussels I. The jurisprudence of the CJEU and the doctrine at EU level is very necessary as well as the right application of Albanian PILA by national judges.

3.3. Causing non-contractual damage according to Albanian law

By Albanian Civil Code in matters dealing with non-contractual liability they are to be considered as fault or without fault liability. In Albania, being a transit country legal investments are needed and their excecution in practice[173]. The legal responsibility in compensating the caused damage appears in the combination of the rights of persons, who had their dignity violated and in opposition to the Constitution of the Republic of Albania, especially in the section of speeches freedom. In case when there is no contract between the parties damage will appear in the moment that it has been caused. In the moment when the damage is caused, the author should be in charge for[174]. There are different perspectives evaluating liability. Firstly, the moral sense is influenced by the harmful action and it is connected to the moral liability. Secondly, the action is under judgment, as in the case where the compensation should be provided to the injured party. Very

[172] Civil Procedure Code, adopted as law no. 8116, date 29.03.1996, as amended Official Publication Center of Albania, 2011, https:euralius.eu

[173] Armantia Levanaj ‘’Non-contractual damages according to Albanian Law’’, University of Tirana, Faculty of Law, pg. 5

[174] Dr. Rustem Gjata ‘’Non-contractual obligations’’, MUZA, Tirana, 2010

important to mention are matters concerning the causing damage and the actions that need to be taken in terms of provisions as well as implementation in practice. In these cases it is needed to inspect the elements that have caused the noncontractual damage. In order to have a more efficient evidence of implementation issues and concept evolution, there should be a reference to some of the practice issues of Albania and European Union countries[175].

3.3.1. Historical development of causing non-contractual damage.

Eastern European countries and especially Albania suffered a lot of changes as a consequence of changing the political system. European influence felt also in Albania especially in the institute of causing damage. By the Civil Code 1981[176] the relevant provisions were reduced and nothing new was brought. The Section 3364 of the ‘’Civil Code’’ states that: “The person who at fault and unlawfully causes a material damage to another, is obliged to compensate the damage caused.” By reformulating the provision, the meaning of liability was not meant to change, but ‘’material damage’’ was planed to avoid any prevarication concerning the meaning of the damage that may be paid in the event causing it. Sections from 608 to 647 of the Civil Code provide the liability arising from causing unlawful damage. The person who has created the damage has the obligation to recompense the injured persn in restoring its previous conditions. By the law there are provided some provisions when charging a person with responsibility. The first chapter of Albanians Constitution provides the law principles[177]. The most important component is the ‘’respect for the dignity of the persons’’[178]. Also the freedom of expression and press are provided in the Consitution. By the Strasbourg
Court in the case of a public person should be “a lower minimum level of fulfillment of Article 8” than for a common person. In cases when a person has been hurt in a public or private place or if the damage has been caused during his working hours matching the

[175] Albanian legislation kept as a model in non-contractual obligation issues Rome II Regulation
[176] Civil Code of 1981
[177] Article 3 of the Constitution of the Republic of Albania, unpan1.un.org
[178] One of the most important principles in the Constitution of Albania

Article 3 Constitution of the Republic of Albania[179] there is no tolerance measure. Also causing non-contractual damage, as the infringement of the later will be considered as a damage by the Albanian law. Article 625 produces only the consequence of the damage, by not considering legal reasons or situations that lead to that effect. Non-contractual liability has been stated by ''Civil Code'' Article 608 as follows[180]: "A person who unlawfully and at fault causes damage to another person and his property is obliged to compensate the damage caused. The person who caused the damage is not liable if he proves that he is innocent. The damage is considered to be illegal when it is a consequence of interests and others rights breach or violation, which are protected by judicial order or good morals". There are two liabilities that cause the non-contractual damage, at fault or without fault. Civil Code provides a theoretical and legal division. There are four elements known by the doctrine of causing damage. These elements are: fault, damage cause, casual connection and the unlawful actions[181]. The injured party must prove that there is a damage caused. Albanian jurisprudence supports this fact. The damage must be clear, legitimate and direct. Lawyers among themselves have discussed about direct and indirect damage. The subject should provide not only direct but also indirect damage. There are two types of damage that can be caused: moral and property damage. Moral damage is non-financial damage in the form of biological and existential damage. In order to be able to get compensation as a result of non-financial damage caused to entity should define these elements[182]:

- Injured party personality.
- The interests of the violated person.
- The activities that the injured party performs.
- What kind of impact the illegal action and inaction will have on the personality of the injured part.

[179] Article 3 of Constitution of Albania, https://www.osce.org/

[180] Article 608 of the Civil Code of Albania, ''Liability for casuing the damage''. www.cclaw.al

[181] Dr, Rustem Gjata ''Non-contractual obligations'', MUZA, Tirana 2010, pg. 35-36

[182] Dr. Rustem Gjata ''Non-contractual obligations'', MUZA, Tirana 2010, pg. 139-140

- The changes in the status of the injured party in matters regarding family and social relationships.

The existential damage that comes evidenced by the Supreme Court as causing a damage to the lifes quality has been expressed as follows: "Existential damage caused by the illegal fact of third party violates the human rights of personality by damaging almost permanently expression and realization of the injured as a human, the appearance of his personality to the outside world, objectively shocking daily life and its ordinary activities, causing deterioration of the quality of life from change and disruption of equilibrium, behavioral habits of life, personal and family relations. Due to a such psycho-physical condition, the injured party cannot carry certain activities that characterize his being positively or positively could characterize in the future, forcing to be postponed to different solutions in life from those desired or expected in the withdrawal of the latter due to certification of the illegal fact. Existential damage, by not having the internal and sensory nature only, is objectively verifiable." The Civil Code in the article 608/221 provides that "person who caused the damage is not liable if he proves that there is no fault". By the article is shown that the guilt is assumed, and it belongs to the person who caused the damage. The person must prove that he doesn't have a fault for the damage caused to the injured party. On the other side the injured party should prove the damage and consequences whether moral or material than another person brought to it. Article 608 seems to give the essential conditions for causing non-contractual damage. By the French Cassation Court, it is taken into consideration the conduct of a good citizen, responsible and careful. The Civil Code in the article 609 expresses that[183]: "the damage should be the result of direct and immediate action or inaction of the person". By the law is required that the damage caused to a person should arside as a consequence of action and inaction of the subject in connection with pecuniary or non-pecuniary there is a real damage that has been caused to another person. This has been applicable for the only reason to put before the civil liability of law subject which violates the right. According to the article 608/224[184] "The damage is illegal when it is a consequence of breach or

[183] Article 609 of Albanian Civil Code, www.cclaw.al
[184] Articles 608/224 of Albanian Civil Code, www.cclaw.al

violation of the interests and rights of others which are protected by judicial order or good morals“. By this provision is understandable that the action and exceptions are made in violation with the law and legal order. The rights and interests of individuals are protected by the legal order or good morals. In order to seek for compensation of financial or non-financial damage there should be four elements excisting. There will not be damage compensation if one of the elements is not excisting.

3.3.2. Compensation of damage

The injured party is able to seek for compensation after providing the noncontractual damage. Seeking for compensation in economical terms means that the subject will have again the same economic and financial situation. Will the subject after monetary compensation gain back the same situation that he had before the damage was caused? This is considered to be subjective as many individuals may accept monetary compensation and some others not. By the judicial practice the non-financial compensation is not considered to be a full compensation, but at least the harmful consequences will be reduced. The person, being a subject of breaking the law has the obligation in not only compensating the damage, but also what the subject would have possessed if the harmful event wouldn't happen. Provisions dealing with non-pecuniary damage and its compensation in Albanian civil law, have been the subject of recent revisions, by law no. 17/2012[185] "On some amendments'' to Law no. 7850, dated

29.7.1994 "Civil Code of the Republic of Albania (as amended)." Section 647/a of Albanian Civil Code has been added by Section 3 of the Law no. 7850. This section specificly deals with the criteria of compensation in cases of non-financial damage. This compensation is not only monetary but also to the honor, personality or reputation of the injured party. It has been given to the court the authority in deciding the damage and its compensation. These criterias are taken into consideration:

(a) Manners, the form and also time of spreading the statement or commission of actions,

[185] Law no. 17/2012 ''On some amendments''

(b) In which degree the rules of professional ethics have been observed.
(c) Culpability including its form and degree.
(d) Different fact if the statements have been correctly referred to statements of the third person.
(e) Different facts if these statements are false or not as sometimes they can harm the reputation of the person.
(f) Different fact if statements that are related to issues of privacy of the injured person and their report with the public interest are real.

The court has made different interpretation and legal amendaments in cases dealing with compensation in non-contractual damage. Still there are specific legal improvements needed to be done in these cases.

CONCLUSION

This thesis fouces on the legislative history of the Rome II Regulation, relevant instruments and previous and current provisions. Starting firstly by torts and concepts. Another important point are also the elements of tort combining it with different cases from the European Court. These cases are treated and different conclusions have been achieved by the competent courts. European private international law is a field of law which evolved rapidly and with the changes that happen everyday in the world i think this is quite normal. I have tried to update informations in my thesis by referring to different books and also materials and articles that are published later in time in order to be more informed with the latest developments. I would like to state that definetly the Rome II Regulation has a very important place in the field of EU law itself. It gave an answer to a lot of cases that before were not clear to understand and define. Also in my thesis are mentioned briefly important aspects of Rome I Regulation and one really important aspect of it such as contractual obligations. In the part of contractual obligations i have combined it with non-contractual obligation, a term that we are familiar from the Rome II Regulation. Also I have chosen different cases from the European Court in order to make

it easier to understand the elements of different torts. I have continued further with different aspects of the Rome II Regulation and what i consider really important is damage and everything related to it. Damge itself is a consequence, something that comes in case that you do a kind of act. Important case treated in the section of damage is the one of *Florin Llazani.* The base of this case is the Article 2 of the Rome II Regulation. If i continue further with the place where the damage occurs and the law of the place where the damage occurs than there are important cases treated such as *Dumez, Marinar*i that have in their context the place where the harmful event occurred. Of course as we are know familiar with law there are a lot of exceptions that we face and that's what happens exactly also in the European Union Law and also in the cases of the law of the place where the damage occurs. I have treated also different elements such as the common habitual residence of the parties as an exclusion from the main rule and party autonomy as a right that parties do have. ''Applicable law in torts under European Union Law and Albanian conflict of law rules'' is concluded with the Albanian law, a law which by its history didn't have the chance to change much but nowadays the used law is considered to be more European by following the same criterias as followed by the EU countries. Firstly it is given a panorama of whats private international law in Albania looks like and since 2011 the private international law has been improved by brining up a new law that is closer to the criterias of the European Union as a country who has now the candidate status to the EU. Secondly, the Albanian PILA has been explained in details and at the same time its implementation into the judicial practice. The end of the third chapter gives a better definition to what is considered to be damage according to the Albanian legislation. Balkan has always been a very complicated area in politics. During years almost all countries located in Balkan have gone through different debates, a fact that has made the road of these countries even nowadays difficult to the one of the European Union even though they are part of it. This effected also other systems. The same thing it can be stated also about Albania, a country that suffered from a long dictatorship of 45 years. After that during 1990 faced emigration as a large number of population saw it more reasonable to live the country and build a new life abroad. Since then for so many years Albania has been considered to be in transition for its major changes. The most organized law regarding Private International Law dates in 2011 and that was made by the need of

accessing the EU. Until 2011 the law in power was the one of 1964 and in a time where lifes changes in seconds is very hard to apply a law which belongs to complety another system. In order to make the law of 2011 more clear and understandable there have been given Albanian cases involving the foreign elements. Now, what is being seen as something positive is that Albania is having more and more experts in the field of European Union Law and also Private International Law that is being seen as an important factor of the judicial sector of a country. As most of the population after 1990 had the chance to go abroad they saw it also as a possibility to continue with their studies in European countries and this way they were more informed about legal juridical systems that work in Europe. The law of the European Union even though is considered to be incrediably interesting to study. The cases that luckily are provided now by the European Court tought us a lot about how the law itself works, how can it be changed, competent countries and courts and as well as the applicable law.

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APPENDIX

LAW CASES:

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2. **Case R v Barnard**, 1837
3. **Case Coco v A N Clark**, 1969
4. **Case Argyll v Argyll**, 1967
5. **Case 288/11 Melzer v MF Global LTD**, 16 May 2013
6. **Case C-51/97 Reunion Europeenne SA and Others**, 27 October 1998
7. **Case C-350/14 Florin Lazar**, 10 December 2015
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