

Aida Gugu Bushati*

Nada Dollani **

ALBANIAN PIL ACT AND ITS IMPLEMENTATION IN JUDICIAL PRACTICE

I. Introduction

The main rules of Albanian private international law are regulated by the Law on Private International law Act of 2011 (Law 10.428 of 2 June 2011) (PILA)², Civil Procedures Code (Law no.8116 of 29 March 1996) (CPC) and by a number of bilateral and international agreements³. The Albanian PILA constitutes the main body of rules governing civil and commercial relations with foreign elements. The law incorporates the general principles of private international law and it offers solutions quite similar to the ones found in the EU regulations⁴ and Private International Codes of other countries in Europe. The Albanian PILA is coexisting with the provisions of CPC which unfortunately did not go under changes to create harmony between the legal acts. Although CPC is not the main source of law for private international law issues, it is still applied by the Albanian judges also on the cases involving foreign elements.

The application of the Albanian PILA is still at an earlier stage and it is premature to discuss about solid jurisprudence of the Albanian courts in this field. At present the jurisprudence is limited to issues on determination of international jurisdiction by the Albanian courts relying on PILA provisions. Hence our discussion in this paper will be limited to international jurisdiction issues. Nevertheless a general overview of the

* Martin Barleti University, Tirana.

** PhD, Associate Professor, Faculty of Law, University of Tirana.

2) 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 "On the law applicable to contractual obligations"; and Regulation (EC) 864/2007 of the European Parliament and the Council "On the law applicable to non-contractual obligations.

3) Albanian is a member of The Hague Conference on Private International law, United Nations, Council of Europe, and it has concluded bilateral agreements with countries of the region in the area of cross border cooperation in civil and criminal matters.

4) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, on the law applicable to contractual obligations (Rome I), *OJL* 177 of 4 July 2008.

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007, on the law applicable to non-contractual obligations (Rome II), *OJL* 199 of 31 July 2007.

Albanian PILA will be presented as well.

II. Albanian PILA structure and contents

The new Albanian PILA has brought quantitative and qualitative changes as compared to the old law of 1964 on foreigner's rights⁵. New civil law institutes have been introduced and the existing ones have been improved, adapting them or broadening their content in conformity with the new developments of private international law. The international jurisdiction of the Albanian courts have been established following to a large extend the solutions offered by Brussels I Regulation⁶.

The Albanian PILA is divided in three main parts: The first part regulates the general provisions affecting choice of law rules and procedural rules, the second part defines the law applicable as far as the substantive institutes of civil and commercial law are concerned, while the third part defines rules related to the determination of the jurisdiction of the Albanian courts in the adjudication of judicial cases with foreign elements. However unlike many PIL laws of the European countries, rules of international civil procedure are left with the Civil Procedure Code (recognition and enforcement of foreign judgment and arbitration).⁷

As mentioned above, the Albanian PILA introduces for the first time some general principles of private international law, it has added other connecting factors, and it offers detailed rules on choice of law for contractual and non contractual obligations, family matters, determination of international jurisdictions and so forth⁸.

II.1 General Provisions of PILA

The general provisions of Albanian PILA provides under chapter I provides for the scope of application of the Albanian PILA, the position of international agreements vis-à-vis the provision of this law as well

5) The Albanian PILA of 2011 replaced the old Law On the enjoyment of civil rights by foreigners and on application of foreign laws", Law No 3920 dated 4 December 1964, which remained in forced for long time even after the fall of communism.

6) Regulation (EC) No 44/2201 of the European Parliament and of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), *OJL* 12 of 16 January 2001.

7) Civil Procedure Code, adopted as Law No 8116 dated 29.03.1996, as amended; see consolidated publication of the Official Publication Center of Albania, 2010. Note that a separate law about domestic and international arbitration is being drafted, which will replace the respective provisions of the Civil Procedure Code on those subjects.

8) See A. Bushati. "Albanian Private International Law". Yearbook of Private International Law, A. Bonomy G. P. Romano SELP, Vol XV 2013-2014, pg.509

certain principles of private international law. However it must be underlined that some important general principles of private international law are missing, or not well defined.

Article 3 of the PIL Act covers “renvoi”. It explicitly provides the possibility of referral to another private international law (*renvoi*) according to which the latter is applied when according to Albanian law, the law of another state should be applied. In cases when the private international law rules of that state refer back to Albanian law, the rules of Albanian law are applied, and when a third country rules are referred the rules of the third country will apply. In both situations when referral is made back to the Albanian law or to the third state law, the understanding of the provision should be that the reference is made to the material law and not to the private international law rules.

Renvoi is excluded for a certain category of provisions (Article 3/2): the status of legal persons; the choice of applicable law; the form of the legal transaction; issues related to maintenance obligations; and contractual and non-contractual obligations.

Article 7 of the PIL Act contains a provision on public policy. This provision is similar to the public policy provision of the old law (art. 26 of the 1964 law). According to this rule, a foreign law will not apply when the effects of applying it are openly in violation of public order or might bring consequences that are openly incompatible with the fundamental principles defined in the Constitution or in Albanian law.

Thus, in a case of incompatibility, another appropriate provision belonging to the law of that state is applied, and when that is absent, Albanian law is applied. This provision instructs courts to examine whether the application of those rules in the specific case would lead to consequences that are incompatible with the fundamental principles of Albanian legislation. In any case public policy clause should be used in very limited cases and it should not prohibit the Albanian court to apply the foreign law even in the cases it offers a different regulation compared to the Albanian law. Albanian PILA does not contain a general provision on overriding mandatory rules.

Unlike the private international law of some other countries of the region, the Albanian PIL Act does not provide a general provision for the principle of closet connection or the so called escape clause.⁹ In a

9) See article 2 of the Macedonian Act on Private International Law and Article 2 of Slovenian Act, D. Babic/Ch. Jessel-Holst (Note7) pg. 50 and 118.

rather unclear (broaden) formulation, paragraph 2 of article 12 of the PIL Act (habitual residence and closest connection) provides that for the purpose of this law the closest connection is determined by the court according to the factual circumstances. However, specific provisions on contractual and non-contractual obligations do contain clear provisions on the principle of closest connection. For example, paragraph 3 of article 46 (applicable law in the absence of choice) says that when it is clear from all the circumstances that the contract is obviously closely related to a country rather than the one of paragraphs 1 and 2, the law of that country will apply.¹⁰

There is no classification provision under PILA which can determine the application of the Albanian law for choice of law rules or for the determination of certain legal concepts; however a functional application is regulated in cases when there are states with more than one legal system (see article 4 of PILA).

II.2 Choice of law provisions

1. Connecting factors

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The determination of international jurisdiction and law applicable to cases with foreign elements is based on connecting factors, which are factual and legal circumstances that serve to determine the connection between the legal civil/commercial relationships with foreign elements with the applicable law of a state. In addition to the frequently used connecting factors such as citizenship (*lex nationalis*) or *lex rei sitae*, the PIL has introduced habitual residence as one of the most used connecting factors. Other connecting factors such as, *lex loci actus*, *lex loci solutionis* and *lex loci commissi delicti* are used as well.

Habitual residence has been introduced by the new PIL Act as a connecting criterion for both conflict of laws rules and for the determination of jurisdiction. The law defines separately habitual residence of natural and legal persons (Article 12 habitual residence of natural persons) and habitual residence of legal person (article 17 habitual residence of legal persons) in chapter II of the PIL Act (subjects of law).

According to the Albanian PIL Act, the habitual residence of a natural person is the country where he has decided to stay predominantly even in the absence of registration or permission to stay. In determining such country the professional and personal circumstances of the per-

10) See article 46 of the Albanian PIL Act.

son should be taken into accounts that show a sustainable connection with this country or an intention to establish such a connection.¹¹ It will remain for the Albanian judges to clarify further the concepts of “predominantly”, or “sustainable connections” and the “intention to do so” used in the definition.¹² At present there are no such decisions from the Albanian courts.

The habitual residence of a legal person or person without legal personality will be the country where the central administration of the legal person is located. The habitual residence of a legal person performing business activities is where his central business activity is conducted. In cases of the conclusion or performance of a contract by a branch or agency, the law of the country where the branch or the agency is located will be applied.¹³

2. Contractual and non contractual obligations

The provisions of the PIL Act on choice of law for contractual obligations are drafted in line with the provisions of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Albania’s PILA is based on the fundamental principle of party autonomy.

Article 45 of the PIL Act of 2011 maintains party autonomy¹⁴ as the primary connecting factor for determining the applicable law for contracts, providing that a contract shall be governed by the law chosen by the contracting parties (para. 1 of article 45). Parties choose, of their own free will, the applicable law for all or a particular part of the contract, giving the parties the possibility to choose different law for different parts of the contract (*depeçage*) (para. 1 of article 45). The law provides also for the implicit choice of law rules saying that if the parties have designated the jurisdiction it is presumed that they have chosen the applicable law of the forum for the regulation of contracts (para.1 of article 45). Parties are free to change the law applicable to the contract, even after the conclusion of contract, but such a law, does not affect the formal validity of the contract or the rights of the third parties (para.3 article 45).

11) This definition was modelled after the Private International Law of Belgium. See Art. 4 of the *Code de droit international privé*, Dossier No. 2004-07-16/31, of 16 July 2004.

12) A. Tartari. “Connecting criteria in private international law”. *Journal ‘Avokatia’* (2013) pg. 141.

13) See article 17 of the Albanian PIL Act.

14) In compliance with article 3 of Rome I (note 5).

Parties' autonomy can be limited when all important elements of contract are linked to a country other than the country chosen by the agreement. In this case the choice of law by the parties does not affect the implementation of the provisions of the law of that country that cannot be avoided by the agreement (para. 4 article 45). Limitation to the party autonomy is intended to protect the ordinary mandatory rules from being avoided in a purely domestic situation¹⁵. Although the Albanian PIL Act has failed to define the mandatory rules, legal doctrine has given many definitions about them.¹⁶ Finally, the existence and validity of a contract or of one of its conditions is regulated by the law chosen by the parties (para. 5).

In the absence of a choice of law, article 46 establishes other possibilities for applicable law based on different connecting criteria. The first connecting factor for choosing applicable law is the habitual residence of the party in charge of performing the contract.

Contracts that have not been specified in article 46 (para. 1), or when the elements of the contract include the characteristics of more than one contract foreseen above, will be regulated by the law of the country in which the party who is to fulfil the service that characterizes the contract has his ordinary domicile at the time the contract is entered into. The characteristic performance notion will be the performance for which the payment is due.¹⁷

Article 46 (para.3) introduces the exception clause (*clause d'exception*) into the contractual obligation part of the PIL Act. According to this paragraph, when it is clear from all the circumstances that the contract is obviously connected with a law different from law determined in the paragraphs 1 and 2 of the article, the law of that country will apply. Thus, it establishes as a secondary main connecting factor for contractual obligations the "closest connection" principle.

Following the solutions offered by the Rome I Regulation, the Albanian PIL Act introduces specific choice of law rules for the so called

15) This formulation is borrowed by the Rome I Regulation Art 3, para 3 and 4. An interpretation of article 3 of Rome I Regulation can be found at G. P. Calliess. "Rome Regulations Commentary" 2nd Ed, (2015) pg. 105.

16) T.C. Hartley. "Mandatory Rules in international contracts: the common law approach". in *Recueil des Cours* vol. 268 (1997), pg. 348.

17) J.F. Garcimartin. "The Rome I Regulation: Much ado about nothing?", in *The European Legal Forum* (E) 2008/2, pg. 61-80.

protected contract,¹⁸ namely consumer contracts, individual employment contracts, contracts of carriage and insurance contracts (articles 48 and 52). *Renvoi* is excluded in contractual obligation.

3. Non-Contractual Obligations

The provisions of the Albanian PIL Act on choice of law rules for non-contractual obligations mirror the solutions offered by the rules of the Rome II Regulation.¹⁹ The law applicable to a non-contractual obligation that derives from non-contractual damage (for example, torts, traffic accidents) will be the law of the country where the damage has occurred, notwithstanding the country in which the event happened and notwithstanding the country or countries in which the indirect consequences (such as financial consequences) of this event occurred (article 56).

In cases when the person who claims that he is responsible and the person who has suffered damage have their habitual residence in the same country, the law of that country will be applied (article 56 para. 2).

Furthermore, paragraph 3 of this article provides that when it is clear from all the circumstances of the case that the non-contractual damage is obviously more closely related to another country than that which is indicated in the above-mentioned paragraphs, the law of that country is applied. An obviously closer connection with another country may be based on an agreement that has previously existed between parties, such as a contract that was closely related to the non-contractual damage in question (para. 4).

The Albanian PIL Act provides for *ex ante* and *ex post* party autonomy for determining the applicable law for non-contractual relations (article 57):

(1) by agreement entered into after the event that has caused the damage;

(2) by agreement freely entered into before the event that has caused the damage, when all the parties pursue a commercial activity (para. 1). The choice of law should be expressed or verified with reasonable certainty by all the circumstances of the case and should not violate the

18) P. Stone. *EU Private International Law* (2nd ed.), 2010.

19) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) *OJ L* 199/49 of 31 July 2007.

rights of third parties (para. 2).²⁰

Concerning liability for damages that derive from products, the law has provided various solutions based on the combination of two or more connecting factors. According to article 63, the applicable law will be the law of the country of the habitual residence of the person sustaining the damage, the law of the country the product was purchased and law of the country where the damage occurred. Three possible options can only be applicable if the product *was marked in that country*. The marketing requirement is the most important element of the cascade system of the choice of law offered by article 63 of PILA. The law of the habitual residence of the producer is chosen in cases when he could not reasonable foresee the marketing of the product in the other country. The closest connection principle is also applied in product liability cases (para. 3 article 63). That paragraph indicates that when it is clear from all the circumstances of the case that the non-contractual obligation is obviously more closely connected to another country; the law of that country will be applied.²¹ *Renvoi* is excluded for non-contractual obligations, and thus in all cases the law refers to the substantive law of the other country.²²

4. Marital and Family Issues

The provisions related to marital and family issues cover marital relations with foreign elements, including the form and conditions of marriage, personal and property relations, divorce, family issues such as maintenance obligations, child adoption, custody of children and parental relations²³.

The substantive requirements of marriage are governed by the national law (the law of citizenship) of each spouse at the time of marriage (article 21 para. 1), while the form of the marriage is governed by the *lex loci celebrationis* (art 22). Foreign or stateless persons who enter into a marriage in the territory of the Republic of Albania must fulfil the substantial conditions for entering into marriage according to the Albanian Family Code (article 21 para. 2). Certain impediments to a marriage provided by the Albanian Family Code are applicable, such as:

20) Fully approximated with article 14 of Rome II (note 5).

21) Fully approximated with article 5 of Rome II (note 5).

22) See article 3 paragraph 2 of the Albanian PIL Act.

23) A, Bushati and E. Qarri. "Albanian Private International Law in Family Matters" (2015); Mirela Zupan. "Private International Law in the Jurisprudence of European Courts- Family at Focus", University of Osijek , (2015) pg 357.

- (1) the existence of an earlier marriage;
- (2) consanguinity;
- (3) being a minor under 18 years of age (allowed only in very particular situations).

These impediments constitute examples of Albanian public policy in the field of substantive conditions for marriage. But it is clear that the role of public policy is much broader and is not limited to only the application of the impediments mentioned above.

The conflict rules for divorce are regulated by article 25 of the PIL Act. The common *lex patriae* (the law of nationality) of the spouses is the primary conflict rule. Thus, the dissolution of a marriage is regulated by the law of the spouse's nationality at the time of the submission of the lawsuit. The same criterion was also provided by article 7 of the old law of 1964.

In cases when spouses have different nationalities, the dissolution of the marriage is regulated by the law of the state in the territory of which the spouses have their habitual residence at the moment of filing of the lawsuit. There is an exception to this rule provided in paragraph 3 of this article. According to it, when the law does not permit the dissolution of the marriage, it is done in compliance with the Albanian law, if the one who seeks it is an Albanian citizen or was an Albanian citizen at the moment the marriage was entered into.

The personal relations of the spouses are regulated by the law of the common nationality of the spouses. There are two subsidiary connecting criteria that apply as alternatives. First, if the spouses do not have a common nationality, the law of the country where they have their common habitual residence applies. Second, if the applicable law cannot be determined by virtue of the previous rule, the applicable law will be the law of the state with which the spousal relations had the closest connection. Article 8 of the old law of 1964 provided the nationality of the spouses as the main connecting criterion, and in the cases of different nationality, the *lex fori* was applicable.

The marital property regime is determined by the law of the state that regulates personal relations of the spouses. A change of the property regime does not affect the rights previously earned by the spouses (article 24 para. 1). By a notarial agreement between them or another equivalent act issued by a public organ, spouses may chose to apply the

law of the following states:

- (1) whose citizenship one of the spouses has;
- (2) in which one of the spouses has his ordinary domicile/ habitual residence;
- (3) in which the immovable property is located.

Article 26 of the PIL Act provides the connecting factor for determination of the law applicable to maintenance obligations. They are governed by the law of the state in which the person who has the right to benefit from the obligation (the creditor) has his habitual residence at the moment when he seeks it (para. 1). When the debtor and the creditor have the same nationality and the debtor has his habitual residence in that state, the law of this state applies (para. 2). The third alternative provides that in cases when the creditor does not benefit from this right according to paragraph 1 or 2, Albanian law is applied (para. 3). In case the marriage was dissolved or declared 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, maintenance obligations are regulated by the law of the state where its dissolution was sought or where it was declared invalid (para. 4).²⁴

Habitual residence is the connecting factor for determining the law applicable to the relationship between parents and children. However, priority has been given to the nationality if this might be more favourable, taking into consideration that the best interest of the child prevails (article 29).

The law applicable to the conditions for the creation and termination of an adoption is provided in article 30 of the PIL Act. The primary connecting factor is the *lex nationalii*. Thus, the conditions for adoption and its conclusion are regulated by the law of the state whose citizenship/nationality the adopting persons have at the moment of adoption (para. 1). The same criterion had been provided also by the old law of 1964, specifically described in its article 10.

If the adopting persons have different citizenship/nationality, the adoption will be regulated by the law of the state in which the adopting persons have a joint habitual residence (para. 2). However, in any case

24) This article was drafted after the international standards of The Hague Protocol of 2007, and reference was also made to the Belgian Code on Private International Law (note 8) Chapter V.

the adoption must not be one of the cases of prohibition of cross border adoption as determined by the Family Code (para. 3).²⁵ The last part of this article is slightly different from what was provided in article 10 of the old law. The later law has given the possibility of applying the *lex fori* based on the application of the principle of *favor negotii* considering the interest of protection of the adopting person.

4. Succession Law

Chapter V of the PIL Act regulates the institute of inheritance. The applicable law that regulates inheritance concerning movable property has been provided according to article 33 to be, as a rule, the law of the citizenship of the testator at the moment of death. So far as the inheritance of immovable objects is concerned, it has been provided that the applicable law is the law of the state where the objects are located. The capacity to make a disposition by will provided in article 33 is regulated by the law of the citizenship of the testator.

Article 34 of the PIL Act provides that the capacity to make a disposition by will is regulated by the law of the state whose citizenship the testator has at the moment of making, changing or revoking the will.²⁶

The form of the will is valid, if it meets the criteria of validity according to one of the following laws:

(1) the law of the state in which the testator has made a disposition by will;

(2) the law of the state whose citizenship the testator has at the moment of making a disposition by will or at the time of his death;

(3) the law of the state in which the testator, at the moment of making a disposition by will or at the time of his death, had an ordinary domicile or habitual residence; or

(4) the law of the state in which the immovable property disposed of by will is located (article 35). The provision was shaped after the provisions of the Hague Conventions on the Conflict of Laws relating to the Form of Testamentary Dispositions of 1961, although Albania joined the Convention only recently.²⁷

25) Again, this formulation has been drafted after the Belgian law (note 8), article 72.

26) The same criteria were found in the law of 1964, article 15/1.

27) Albania deposited its accession instruments on 25 October 2013, and the Convention will enter into force only in December 2014.

5. Property Rights and Rights on Intellectual Property

The PIL Act contains provisions on property rights in general, as well as particular categories of rights, including intellectual property rights. Following the tradition of the old law, the new PIL Act uses the *lex rei sitae* as the general connecting factor.²⁸ The acquisition, transfer, loss and possession of real rights are regulated by the law of the state where the objects are located.²⁹ Real rights over objects in transit are regulated by the law of the state of destination (*res in transitu*).³⁰ Rights over transport vehicles are regulated by the law of the state to which the vehicles pertain (where the vehicles have been registered).³¹

A revolutionary step marked in Albania's new private international law is the full coverage of choice of law rules for IP rights. The existence, validity, transfer and violation of intellectual property rights are regulated by the law of the state where registration was sought. Registered property rights are regulated by the law of the state that has given or registered the right.³² Rules about the applicable law for contractual³³ and non-contractual³⁴ obligations deriving from IP rights are part of the specific rules on contractual and non-contractual obligations of the PIL Act.

II.3 Jurisdiction issues under the jurisprudence of Albanian Courts

The PIL Act addresses the question of applicable law in civil and commercial matters as well as the question of jurisdiction and the procedures before the Albanian courts in disputes with foreign elements (article 1).³⁵ As a general rule, the Albanian courts have jurisdiction over the resolution of civil legal disputes with foreign elements, if the defendant has a habitual residence³⁶ in the Republic of Albania. The PIL Act has kept habitual residence as the basic connecting factor for de-

28) See article 16 of the old PIL of 1964 (note 1).

29) See article 36 of the Albanian PIL Act.

30) See article 39 of the Albanian PIL Act.

31) See article 41 of the Albanian PIL Act.

32) See article 42 of the Albanian PIL Act.

33) See article 44 of the Albanian PIL Act.

34) See article 65 of the Albanian PIL Act, which contains a formulation similar to that of article 8 of the Rome II (note 5), providing that the applicable law of non contractual obligations deriving from IP rights is the law of the state in which the protection is claimed and the applicable law cannot be derogated from by an agreement between the parties.

35) Jurisdiction is regulated by articles 71-81 of the Albanian PIL Act.

36) The definition of habitual residence is given in articles 12 and 17 of the Albanian PIL Act.

termining the jurisdiction of the Albanian courts (article 71). Domicile is no longer used as the connecting factor in the jurisdiction matters. The law provides for special jurisdiction, prorogation of jurisdiction, exclusive jurisdiction.

1. Exclusive jurisdiction

Notwithstanding the general rule, the law on private international law foresees in article 72 of PILA the cases in which the Albanian courts have exclusive jurisdiction: disputes involving property rights and other related rights, immovable objects, rent issues, as well as rights stemming from the use of immovable property for compensation, if located in the Republic of Albania; cases involving decisions of the bodies of commercial companies, if the company has its habitual place of residence in the Republic of Albania; cases regarding the establishment or winding up of legal entities and lawsuits regarding the decisions of their bodies, when the legal person has its headquarters in the Republic of Albania; cases regarding the validity of registration in the registries of courts or of Albanian state bodies; cases regarding the validity of registration of intellectual rights, so long as those registrations or applications for them are made in the Republic of Albania; and cases relating to the enforcement of executive titles in the Republic of Albania.

2. Prorogation of jurisdiction

Prorogation of jurisdiction is regulated by article 73 of PILA. The law requires that prorogation of jurisdiction is made by a written or oral agreement between the parties. The oral agreement should be based on written evidences, or in forms used in the international commerce, which is known to both parties. The law provide for tacit jurisdiction in an unclear formulation. The provision provide for silent consent of the defendant if he appears without contesting the international jurisdiction, even he is represented by a lawyer, or the court has explained about the possibility to contest and that is evidenced in the minutes of the hearing. Unlike the provision of Brussels Ia, our tacit jurisdiction does not have any limitation in its application. The provision does not exclude the exclusive jurisdiction situation, nor does it say in which kind of the proceedings the tacit consent is valid and when is the court obliged to inform about the possibility of challenging the international jurisdiction³⁷.

37) See article 26 of the Brussels Ia Regulation.

3. Special jurisdiction

Special jurisdiction of the Albanian courts has been provided in case of family and civil matters, such as the announcement of the disappearance or death of a person; marriage; relationships between spouses, parents and children; maternity; adoption; waiver or limitation of the capacity to act; and custody, joint claimants, torts, actions of branches, or maintenance creditor, action of intestate testamentary successions (articles 74-80 of the PIL Act). Special jurisdiction of the Albanian courts is given where either the person have their habitual residence or have Albanian citizenship.

III. Jurisprudence of Albanian Courts – Jurisdiction issues

In the absence of a consolidated legal tradition on private international law, the role of the Albanian judges became indispensable in developing a legal doctrine of a private international law in Albania. Albanian judges have started to apply the new private international law of 2011 only for the complaints submitted after the entering into force of the law, while few cases that have reached the High Court after 2011 were decided on based on the old law³⁸. However it was hard for the High Court to limit its decision based on the old law, although it argue that the old law applies, as consequence it ended up using both laws. It has interpreted the old law based on the principles of the new law³⁹.

On the other hand the modest jurisprudence of the Albanian courts shows that judges are faced with many difficulties while applying the new law.

Before illustrating the problems with some concrete cases, it is important to re-emphasize the fact that PILA provisions are modelled after EU regulations, however this is not enough to allow Albanian judges i.e, either to make reference to the provisions of the EU regulations which are not mirrored in the Albanian law, or to quote them in a domestic case. It is well accepted the fact that judges play an important role during the approximation phase of legislation of a country part of EU integration process, however the so called pro European interpretation of the national law approximating EU law, requires that Albanian judges, when it comes to similar or identical provisions, make reference to the Court of Justice of the EU interpreting these provisions⁴⁰. The

38) Transitory provision of Albanian PIL Act, article 87.

39) See HC Decision no. 630 dated 7.11.2013.

40) See HC Decision no. 238, dated 07.05.2015 and HC decision no.22 dated 19.01.2011.

direct references to EU regulations overcome the sovereignty principle and create a situation of legal uncertainty and will jeopardize the uniform interpretation of the national law⁴¹. One should not forget also to carefully look at the aim and the context of the EU legislation in question.

The issues of determining the international jurisdiction of the Albanian court or any other court have been decided by the Albanian courts. At present we could not get case law referring to choice of applicable law issues, however at this point it is interesting to mention the fact that some time the court refers to the provision determining the choice of law (eg. Article 45 of the law Freedom of Choice) in order to determine the international jurisdiction of the forum (HC Decision no. 337, dated 26.6.2012). This is wrong to the extent that no issues of qualification of legal concept are at stake. The court make also a wrong interpretation of article 45 of the PIL which stipulates that if the parties have determined the jurisdiction it implies that have chosen the applicable law, in this case the law of the forum. The implicit choice of law is a controversial known issue of EU private international law. Different views have been expressed while drafting the Rome I regulation. However the EU drafter has taken the decision that implicit choice of law is made when the parties has agreed on the exclusive jurisdiction of the forum. The contrary is not an issue of private international law and cannot as long as there is not such as implicit choice of jurisdiction⁴². However the Albanian courts incorrectly have stated that as long as Art 45 of PILA provides for the presumption of the choice of law in contractual relationships, it derives that also the presumption of jurisdiction, when the parties have chosen the applicable law to the contract, is a principle of private international law.⁴³

Some other inconsistencies in the Albanian court practice are noticed on the jurisdiction issues related to the employment contracts stipulated by foreign Embassies with Albanian workers. While in one occasion the Albanian High Courts follows the most recent case law of CJEU,⁴⁴ by

41) A. Lazowski "Approximation of laws" in A. Ott and K. Inglis "Handbook on European Enlargement" TMC Asser Press, 2001, pg 631.

42) O. Lando and P.A. Nielsen: "Rome I Regulation, Common Market Law Review", (2008). pg.45.

43) See HC Decision nr. 630, dated 7.11.2013, p. 10.

44) The HC Decision no. 679, dated 19.12.2013 follows the argumentation and refers in the reasoning part to the CJEU Judgement of 19 July 2012, *Ahmed Mahamdia v République algérienne démocratique et populaire*, ECLI:EU:C:2012:491.

granting Albanian jurisdiction in disputes arising out of an employment contract with a foreign consulate, while another High Court decision denies the Albanian jurisdiction by granting immunity to the Embassy,⁴⁵ although the dispute concerns *iure gestionis* and not *iure imperii*.

Albanian courts have been also faced with the question of determining the international jurisdiction based on 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”. The case involved pre-contractual actions (actions taken by one party prior to the conclusion of the agreement/contract) which according to the court were qualified as claims that arise from torts. The qualification claim was made based on domestic law, which helped the court to lead to the conclusion that no agreement was signed between the parties thus for article 80 (c) of PILA applies. The conclusion of the court was correct. It followed the line taken by the Court of Justice of the EU⁴⁶ however reference to the jurisprudence of the ECJ was missing. As we highlighted above, any reference to the CJEU jurisprudence would help the pro European interpretation of identical similar norms⁴⁷, and would have enriched the arguments of the court.

In another decision (HC Decision 331, dated 30.05.2013, the Court granted international jurisdiction to the Albanian court based on article 80 (b) special jurisdiction in matters 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”. The case involved the failure to fulfil the contractual obligation by one of the parties which sold machine different from the one specified in the contract.

The High Court, granted international jurisdiction to the Albanian court, based on the Article 37 of the Code of Civil and the Article 80/b of the law,” stating that the place of the performance of the contractual obligation was Albania (*lex loci executionis*) based on the contractual facts that goods have to be delivered in Albania. Albanian PILA does not determine the place of performance of obligation in the way the

45) See HC Decision no. 187, dated 8.4.2015.

46) ECJ Case C-334/00, Tacconi SpAv Heinrich Wagner Sinto Maschinenfabrik GmbH (2002) ECR I-7357 para 12 and 13.

47) See article 80 (c) of the Albanian PIL and Brussels I Regulation Article 7 (2).

Brussels Ia stipulates⁴⁸?

The issue of determining the place of performance based on article 7 of the old Brussels I Regulation has been discussed at length by the Court of Justice of the EU. At the beginning the court took the approach that performance of obligation should be determined based on conflict of law rules which determine the substantive law of contract (Tessili). Other elements such as identification of the concrete obligation in question (De Bloss) or the identification of principal obligation (Shanvai) have been discussed decided on by the Court of Justice. When the Brussels Convention was transformed into Brussels I Regulation the old provisions were coupled with other provision that can be found in article 7 para 1(b) sales of goods and provision of services.

The Albanian courts failed to follow the scheme provided by the ECJ decision, and reference to article 80 (b) was not fully grounded.

Another PILA provision interpreted by the Albanian courts is the provision on provisional jurisdiction. Article 81 (Jurisdiction in measures for securing a lawsuit) stipulates that: The 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.

This provision mirrors the provision of Brussels Ia recast (article 35). It practically emphasise the two situations when the Albanian courts might have international provisional jurisdiction. The first scenario and the simplest one is when the Albanian court has international jurisdiction on the substantive matter and the second and the most difficult when the measures are to be executed in Albania.

Albanian courts have been confronted with questions of granting provisional jurisdiction to Albanian court, prior to the adoption of the new law. In the absence of specific rules on provisional jurisdiction under the old law⁴⁹, Albanian court made reference to the Brussels I Regulation. There is no question that it was the right approach however, following the adoption of the new PILA it is recommended that Article 81 can be interpreted in the light of CJEU jurisprudence. It would be good that Albanian courts take into consideration, the limits set by CJEU while applying this provision. To sum up the jurisprudence, the

48) See article 7 para 1 (b) of the Brussels I (bis) Regulation.

49) The Albanian PIL of 1964 did not contain any provision on provisional jurisdiction.

following issues might be taken into consideration:

1. Courts that have jurisdiction on the substantive matter have jurisdiction over provisional measures. This is also confirmed by our PILA

2. Article 81 of PILA applies in cases where the seised court for provisional measures does not have jurisdiction. Under that provision, the measures available are those provided for by the law of the State of the court to which application is made.

3. Granting of provisional or protective measures based on article 81 of PILA, requires inter alia, the existence of a real 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 sought⁵⁰.

IV. Conclusions

The new PILA replaced the old law of 1964 that was limited in terms of novelties and institutions. Recently Civil and commercial relations with foreign elements have been intensified in Albania. The PILA regulates most of these relations. It determines the international jurisdiction of the Albanian Courts, the choice of law rules, for civil and commercial issues. It does not cover the recognition and the enforcement of foreign judgments that continues to be dealt with by Civil Procedure Code. In addition to *lex nationalis*, habitual residence of the parties has been used as the most common connecting factors for both applicable law and jurisdiction. Domicile has been abolished in jurisdiction issues. In addition other connecting factors such as *lex rei sitae*, or closest connection are used under choice of law rules. Party autonomy to choose the applicable law in law of contract remain the predominant factor for choice of law in contractual relation and it is also an option in the non-contractual relation. Party autonomy is limited by the application of the mandatory rules. The law provides for some of the general principle of the private international law, but not all of them are listed or defined in our law. Albanian courts can have international jurisdiction when the defendant has habitual residence in Albanian and in other cases of exclusive and special jurisdiction. The law provide for prorogation and tacit jurisdiction.

Albania lacks a proper tradition in private international law, and the

50) ECJ Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line* (1998) ECR I-7091 and entry Brussels I (Convention and Regulation).

legal doctrine is under developed. This is also reflected in the process of drafting the new PILA where most of the provisions were borrowed from EU rules or other codes of EU member states. To a certain degree the PILA borrowed the provisions of Rome I and II Regulations in the framework of approximation of legislation process. Although not explicitly mentioned the same holds true for the jurisdiction part where the Albanian PILA provisions are similar to the one contained in Brussels I.

In the absence of consolidated legal doctrine and modest court practice, it is advisable that jurisprudence of the CJEU and scholarly doctrine at EU level is a must for comprehensive understanding and proper application of Albanian PILA by national judges.

ABSTRACT

The main rules of Albanian private international law are regulated by the Law on Private International Law Act of 2011 (Law 10.428 of 2 June 2011) (PILA), Civil Procedures Code (Law no.8116 of 29 March 1996) (CPC) and by a number of bilateral and international agreements. The Albanian PILA constitutes the main body of rules governing civil and commercial relations with foreign elements. The law incorporates the general principles of private international law and it offers solutions quite similar to the ones found in the EU regulations and Private International Codes of other countries in Europe. The Albanian PILA is coexisting with the provisions of CPC which unfortunately did not go under changes to create harmony between the legal acts. Although CPC is not the main source of law for private international law issues, it is still applied by the Albanian judges also on the cases involving foreign elements.

Keywords: Albanian Private International Law; EU Private International Law; Private International Law Reform.

ALBANSKI ZAKON O MEĐUNARODNOM PRIVATNOM PRAVU I NJEGOVA PRIMJENA U SUDSKOJ PRAKSI

SAŽETAK

Osnovna pravila albanskog međunarodnog privatnog prava su sa-
držana u Zakonu o međunarodnom privatnom pravu iz 2011. godine
(*eng.* PILA), Zakoniku o građanskim postupcima iz 1996. godine
(CPC), kao i brojnim bilateralnim i međunarodnim sporazumima. Al-
banski PILA obuhvata najveći dio pravila koja uređuju građanske i tr-
govačke odnose sa elementom inostranosti. Ovaj zakon usvaja osnovne
principe međunarodnog privatnog prava i daje rješenja koja su u većoj
mjeri slična onim sadržanim u EU uredbama i zakonima o međunarod-
nom privatnom pravu ostalih evropskih država. Albanski PILA koeg-
zistira sa odredbama sadržanim u CPC-u, koji nažalost nije inoviran
kako bi se stvorila harmonija između ova dva propisa. Iako CPC nije
glavni izvor prava za pitanja međunarodnog privatnog prava, ipak ga
albanske sudije primjenjuju i na slučajeve sa elementom inostranosti.

Ključne riječi: albansko međunarodno privatno pravo, EU međun-
arodno privatno pravo, reforma međunarodnog privatnog prava.