

# The Impact Of Rome I Regulation In Albanian Private International Law

*Dr. Ilda Mucmataj*

Faculty of Law, University of Tirana

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## Abstract

In terms of globalization, the economic activities have overcome national boundaries of states. So due to people's mobility and their frequent relations in private field, the number of private international actions has increased as well, and gives in this way the importance of private international law. The conflict of law rules in the national law were not unaffected by European integration. So, the developments that took place in the European Union in the field of private international law over the past years had a large impact on the national conflict of laws rules in Albania, especially on the conflict of laws rules of certain specific areas of law. The aim of this article is to analyze the interaction between European Union law and the Albanian conflict of laws rules in the area of contractual obligations. So on one hand, I have presented a general analysis on the main provisions of the EC Regulation No. 593/2008 of The European Parliament and of the Council of 17 June 2008 on the Law applicable to contractual obligations, known as (Rome I), as the role of the European Union is becoming increasingly active in PIL. While, on the other hand I have presented a short introduction of the historical development of APIL and its characteristics and then I have given a comparative view of Albanian Private international Law relating to the contractual obligations with the focus on party autonomy provisions. The article concludes with a short conclusion.

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**Keywords:** Applicable law, harmonization, contractual obligation, private international law, domestic law

## Introduction to the Albanian Private International Law.

Private International Law consists of the rules of law which govern legal relationships of private law nature (family law, inheritance law, contract law, company law etc.) featuring an international aspect. In other words, Private International Law covers the part of the law that deals with private law cases with a cross-border (foreign) element. The foreign element

can be situated in each from the component of a legal relationship, in object, subject or content.<sup>19</sup> If the foreign element is situated in one or more than one of these components, the relationship is characterized by the international character. This discipline is part of a national law, so each state has its own rules of Private International Law. Furthermore, PIL is also a legal discipline currently undergoing transformation.<sup>20</sup>

In the general context PIL covers three types of questions. The first question governed by PIL, is which court has jurisdiction to deal with a case with international element. The second question is related to the “the choice of law”, is about what internal private law has to be applied to this case. And then, the third question concerns the recognition and enforcement of judgments.

The third question, actually is governed by the Civil Procedure Code of the Republic of Albania,<sup>21</sup> while the first two one are governed by Private international Act.

The sources of PIL discipline in Republic of Albania, include: International Agreements, Treaties and ratified Conventions in respective fields in the context of International Sources of law, and the Constitution, Laws and Normative Acts in the context of Internal sources of law.

Anyway, according to the article 122/2 of the Constitution of Republic of Albania: “An International Agreement ratified by law, has priority over the domestic laws that doesn’t agree with”.

In a chronological order, the first provisions that govern private legal relationships characterized by the foreign element in the Republic of Albania are included in the Zogu Civil Code (1929). Then, the special law governing Private International Law was the Law No. 3920, date 21.11.1964 “On the enjoyment of civil rights by the foreigners and the foreign law enforcement”. This law stayed in force until 2011, time when the Law No. 10428 date 02/06/2011 “On Private International Law” entered in force. Each of the legal framework reflects the legal, economic, historical and social characteristics and development of the state.

According the Law No. 3920, date 21.11.1964 “On the enjoyment of civil rights by the foreigners and the foreign law enforcement”, the contractual obligation were governed by the articles 17, 18, 20.

In interpretation of the Article 17 and 18 of the Law we can clearly notice that the first applicable criteria applied in contractual obligations is the party autonomy in order to choose the applicable law. This applicable criteria

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<sup>19</sup> Kuci H., Bilali A., “*E Drejta Nderkombetare Private*”, General Part, 2008, p. 162.

<sup>20</sup> Kuipers J.J., “*EU law and Private International Law. The Interrelationship in Contractual Obligations*”, 2012, p.2

<sup>21</sup> Articles 393-399, included in the Third Title, IX Chapter of Civil Procedure Code, of Republic of Albania approved by law no. 8116 date 29.03.1996 (reviewed).

takes advantage in relation with the other applicable criteria's.<sup>22</sup> Anyway, the doctrine of APIL establishes that, the party autonomy is not unlimited. Party autonomy is limited by the imperative norms of the country where the contract is concluded or is foreseen to be performed, or by mandatory rules provided by the article 26 of the law.<sup>23</sup>

While, in absence of the choice of law rules, according article 18(1) the contractual obligations shall be governed by the law that in the special circumstances is more real connected with these obligations. Concretely,

- the sales of immovable property contract, shall be governed by the law of the country where the immovable are situated,
- the sales of movable property contracts and enterprise contracts shall be governed by the law of the country of the domicile of the seller or the domicile of the entrepreneurs,
- the carriage contracts shall be governed by the law of the country where the sender or the carrier is domiciled in the time of the conclusion of the contract,
- the insurance contract shall be governed by the law of the country where the insurer is domiciled in the time of the conclusion of the contract, by this rule is excluded the insurance of immovable property, which shall be governed by law of the country where the property is situated.
- the services contracts, shall be governed by the law of the country where the service provider is domiciled, in the time of the conclusion of the contract,
- the trade representation contracts and commissions contracts, shall be governed by the law of the country where the person for whom the representative person or commissions inured legal action is domiciled, in the time of the contract conclusion.

So, if the parties don't choose the applicable law that will govern their contract, according to all the circumstances of the case corresponding better the specific obligations, the special criteria for each of these obligations should apply. This provision provides an unlimited list of contracts types, in the context that not all the types of the contracts are listened in the content of this provision.

The law, by using the terminology "other contracts" also provide a general rule for the contracts types that are not explicitly included in this article. So, the other contracts that are not included in the above group of contracts, in the absence of choice of the law rules by the parties, shall be governed by the law of the country where both of the parties have their

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<sup>22</sup> Kalia. A., "*E Drejta Ndwrkombwtare Private*", Sejko, p. 260.

<sup>23</sup> Kalia. A., "*E Drejta Ndwrkombwtare Private*", Sejko, p. 261.

domicile or their place of central administration. In absence of this applicable criteria, the contracts shall be governed by the law of the country where the contract is concluded.

According to article 18 of the Law No. 3920/1964, the time of the contract conclusion takes a specific importance. This line is also supported by the doctrine of Albanian Private International Law, which argue that the most important moment for a contract, is the moment of contract conclusion.<sup>24</sup> The moment of the contract conclusion also takes advantage in the case where the contracting parties have the same nationality in the moment of the contract conclusion. In the scenario that one or both of the parties change nationality after the conclusion of the contract, the contract shall be governed by the law of the nationality that parties had in the time of contract conclusion.<sup>25</sup>

The law 3920/1964 gives a great importance to the relations that derives from the Individual employment contracts, because the special nature and the great practice importance of this contract, the legislator has foreseen it to be governed in a separate provision, not included in the Article 18 of the law, which as we saw above includes a list of unlimited types of contracts.

According the article 20 of the law, which governs the Individual employment contracts, in the absence of the law chosen by the parties, the contract shall be governed by the law of the country in which the employee habitually carries out his work in performance of the contract.

For the labor relations of the employee of the enterprises of the carriage, for the railway carriage and road carriage the applicable law shall be the law of the country where the enterprise has its central administration, while for river carriage and air carriage the applicable law shall be the law of the country where the vehicle of transport are registered, for the maritime carriage the applicable law shall be the law of the country whose flag becomes transportation.

Of course, all three provisions 17, 18 and 20 of the law no. 3920/1964 that provides the applicable law in contractual obligation have in consideration the principle of “*favor negotii*”, that means that where it appears from the circumstances, the contract shall be governed by the law of the country with which the contract is more closely connected.

### **The impact of Rome I Regulation on the actual Law No. 10428/2011 “On Private International Law” according to freedom of choice.**

Social changes in our country, membership in International Organization and adherence to various International Conventions, dictate the

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<sup>24</sup> Kalia. A., “*E Drejta Ndwrkombwtare Private*”, Sejko, p. 264.

<sup>25</sup> Mandro B. A., Walker G., Kalia A. “*E Drejta Nderkombetare Private*”, 2005, p. 333.

need of creation of a new legal framework which reflects the development of legal institutions of international law.

Actually, the Republic of Albania is part of Hague Conference “On Private International Law” since 2002, with the law No. 8867, date 14.03.2002. In the statute of the Hague Conference, is established the purpose of the contracting states to unify the rules of Private International Law. With the passing of time, Republic of Albania has gradually ratified several Convention of Hague Conference. In this context in order to fulfill the obligation raising from the membership of Hague Conference “On Private International Law” and also in order to fulfill the obligation raising from the Stabilization and Association Agreement, the new law No.10426 date 02.06.2011 “On Private International Law” was adopted.

The actual law “On Private International Law” also, entered in force in order to fulfill the new needs of the society, which are nowadays characterized by the intensification of international transactions, intensification of the movement of the goods and also the intensification of movement of services and persons. In contrast to the law No. 3920, date 21.11.1964 “On the enjoyment of civil rights by the foreigners and the foreign law enforcement”, the law “On Private International Law” has covered a larger field of institutes and application criteria in accordance with the new development of private international law. Moreover, this law has introduced new applicable criteria’s and also has improved the existing ones. The articles of the law are more like European standards, within the efforts of the Republic of Albanian to membership in the European Union.

In this context as result of the transpose of rules from EU legislation, the first page of the law has included as footnotes the 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) and the 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).

The contractual Obligation are introduced in the articles 45-55 of the chapter VII of the Law No. 10428/2011. The first thing that we can notice, is the importance that the law gives to the party autonomy in order to choose the applicable law. This principle was governed even by the previous law 3920/1964 as we have seen above, but this rule is more detailed and covers more situation in the actual law. Furthermore, the article 45 of the Private International law in force presents the general features of the rules of Rome I Regulation.

The Rome I Regulation has replaced the Rome Convention of 19th June 1980 on the Law Applicable to Contractual Obligations, which may

conveniently be referred to as the Rome Convention 1980.<sup>26</sup> So, preserving the basic principle of the Rome Convention that contractual parties may choose the law governing their transaction (*lex voluntatis*), the Rome I Regulation introduces structural changes in the default rules. According to Article 3, the autonomy of the parties is quite wide: the choice of applicable law may be express or tacit, the latter if demonstrated with reasonable certainty by the circumstances of the case, such as the choice of court clause, reference to the specific national legal instrument, use of the form contract typical of certain national legal system, use of terms typical for certain national legal system, etc. Furthermore, the *lex voluntatis* may capture the whole or only a part of the contract and it may occur or be altered at any time. However, subsequent choice of another applicable law may not adversely affect formal validity of the contract or third party“ rights. Additionally, the parties“ choice of law to govern their contract, which at the time the choice was made was solely connected to a single country (intra-state situations), does not operate as a choice of law but merely as a choice of contract terms. This means that legal provisions in the country of sole connection, which are not derogable by agreement (*ius cogens*), always apply.<sup>27</sup> Also according article 12 of the Rome I Regulation, the freedom of choice in the applicable law<sup>28</sup> includes issues such as the interpretation of the contract, performance of the contract, prescription and limitation of actions, consequences of breach of obligations or nullity of the contract and will also apply if a contractual dispute arises.

While, according to article 45 of Albanian Private International Law, a contract shall be governed by the law chosen by the parties. By their choice the parties can select the law applicable to the whole or to part only of the contract. If the parties have designated a jurisdiction for the resolution of disputes deriving from the contract, it is presumed that they have chosen the law of that country for the regulation of the contract. The choice of the law shall be made expressly or clearly demonstrated by the terms of the contract or other circumstances of the case. The parties may at any time agree to subject the contract to a law other than that which was determined at the beginning of the contract. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice the formal validity of the contract or adversely affect the rights of third parties.

Where all other elements relevant to the situation at the time of the choice of law are located in a country other than the country whose law has been chosen the choice of law by the parties shall not prejudice the

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<sup>26</sup> Stone P., “*EU Private International Law*” 2010, p. 8.

<sup>27</sup> Kunda I., Goncavles de Melo Marinho M.C., “*Practical Handbook on European Private International Law*”, 2010, p. 152.

<sup>28</sup> Collier J.G., “*Conflict of Laws*”, 2006, p.193.

application of the provisions of the law of that other country which cannot be derogated from by the agreement. Also, the existence and validity of a contract or of any of its conditions shall be governed by the law applicable to the contract.

We also may notice that both the instruments, provides certain restrictions on the (*lex voluntatis*) principle. So, the applicable law chosen by the parties as a main applicable law, shall not be applied if it comes into contradiction with the public order of the state where it will be applied.<sup>29</sup> While, in the Republic of Albania, Public Policy restrictions are provided by the article 7 of Private International Law. Rome I contains three terms that deal with public policy. These are provisions of the law which cannot be derogated from by agreement (Articles 3(3), 3(4), 6( 2), 8(1), and 11(5)(b) of Rome I); overriding mandatory provisions (Article 9 of Rome I) and public policy (Article 21 of Rome I).

Both the acts also provide protective limitations of party autonomy based on categories of protected persons or contractual arrangements, that includes Contract of carriage (Article 5 of Regulation Rome I and Article 50 of APIL<sup>30</sup>), Consumer contracts (Article 6 of Regulation Rome I and Article 52 of APIL), Insurance Contract (Article 7 of Regulation Rome I and Article 51 of APIL) and Individual employment contract (Article 8 of Regulation Rome I and Article 48 of APIL).

### **The impact of Rome I Regulation on the actual Law No. 10428/2011 “On Private International Law” according applicable law in absence of choice**

The limited use of party autonomy increases the practical importance of conflicts rules designating the applicable law in the absence of choice by the parties.<sup>31</sup>

In absence of the choice we can notice that the Albanian Private International Law No 10428/2011 differ from the law 3920/1964, because the field of the applicable criteria is more large, here are included a larger typology of contracts. The APIL also includes the “habitual residence” applicable criteria, in the moment of the conclusion of the contract. This criteria expresses also an impact of (Rome I) regulation, because such a criteria wasn’t established before by Albanian law. Such a criteria is more flexible that the domicile or citizenship criteria that were usually used in the law 3920/1964.

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<sup>29</sup> Article 16 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).

<sup>30</sup> With Albanian Private International Law we mean the Law No. 10428 date 02/06/2011 “On Private International Law”.

<sup>31</sup> Bogdan M. “*Concise Introduction to EU Private International Law*”, 2012, p.127.

In the absence of choice both the Rome 1 Regulation (Article 4) and APIL (Article 46) applies the same connecting factors, including these types of contracts:

- for the sales of goods contract, the law applicable is the law of the country of the seller's habitual residence,
- a contract for the provision of services the law applicable is the law of the country of the service provider's habitual residence,
- a contract relating to a right "*in rem*" in immovable property or to a tenancy of immovable property the law applicable is the law of the country where the property is situated,
- for the contract relating to a tenancy of immovable property concluded for temporary private use for a period of no more than six months, the law applicable is the law of the country of the landlord's habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country,
- a franchise contract, the applicable law is the law of the country of the franchisee has his habitual residence,
- a distribution contract shall be regulated by the law of the country where the distributor has his habitual residence,
- for the sale of goods in auction contract the applicable law is the law of the country where the auction takes place if such place has been determined,
- and if the contract is concluded within a multilateral system that includes or facilitates the union of the third parties, that buy or sell inters in financial instruments in accordance with the rules of relevant legislation and determined by one law, the applicable law will be that law.

This provision is not exhaustive because if we have to deal with a contract that is not included in the situations above, the point 2, 3, 4 of the Rome I Regulation and the point 2, 3 and 4 of the Article 46 of the APIL, the provision includes criteria such as:

- the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence,
- where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than indicated above, the law of that other country shall apply and
- where the law applicable cannot be determined as manifested in the situations above, the contract shall be governed by the law of the country with which it is most closely connected.



So we can conclude that the article 46 of APIL is identically like article 4 of Rome I Regulation, which shows the great impact of Rome I Regulation in the field of contractual obligation with foreign element governed by PIL. Moreover, the most real connection criteria, is also an impact of the Rome I Regulation in Albanian Private International Law because such a criteria wasn't included expressly in the law 3920/1964.

Another impact of the Rome I, in the Albanian Private International Law is the inclusion of the special rules for certain types of contract. As we explained above under the law 3920/1964 only the Individual employment contract has special rules in choosing the applicable law, while in the APIL in force the number of these contracts has been increased.

It means that both Rome I Regulation and APIL expressly stipulates specific rules for contracts for the carriage<sup>32</sup> of goods and passengers, consumer contracts, insurance contracts and individual employment contracts.

For the Individual Employment Contracts, both the Rome I Regulation (Article 8) and APIL (Article 48) applies the same connecting criteria. Furthermore, Rome I (Article 5) and APIL (Article 50) applies similar criteria's for contracts of carriage. While, for the Insurance contract the determination of the applicable law differ from the "risk", both the Rome I Regulation (Article 7) and APIL (Article 51), apply various criteria according to whether the insurance contract covers a "large risk" or "not a large risk". Also, both acts, Article 6 of Rome I Regulation and Article 52 of APIL provide similar applicable criteria relating the Consumer Contract. Moreover, we can notice that some categories of consumer contracts expressly listed in article 6(4) of the Rome I Regulation and in Article 52 (2) of APIL are excluded from this general rule.

## **Final Remarks**

The increase of free movement of goods, people and capital beyond the boundaries of one country brings the need of harmonization and the unification of national legislation. in this context, Rome I Regulation represents an integral part of the European Union to create a harmonized system of rules in the sphere of private international law. In addition to the rules on choice of law applicable to contractual obligations. So in other words, the Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) is a big step forward towards unification of private international law within the European Union. The harmonization process of

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<sup>32</sup> Up to Recital 22 of the Rome I Regulation, the term "carrier" refers to the party of the contract who undertakes to carry the goods, whether or not he perform the carriage himself or a third party, and the term "consignor" refers to any person who enters into a contract of carriage with the carrier.

the private international law rules will remove obstacles for businesses and consumers to enter into cross-border transactions. Removing obstacles would in principle also lead to some cost reduction and would in principle speed up legal proceedings.

Despite the fact that the Republic of Albania is not part of the European Union yet, the important role of the Rome I Regulation is evident in the domestic law; its impact lies all over the provisions of APIL which govern the contractual obligation. Actually, the APIL in force approximates the legal system of the conflict of laws to the European Union countries, because the law itself presents as a reference, on its first page, the Regulation (EC) No. 593/2008 of the European Parliament and the Council “On the Law Applicable to Contractual Obligations” (Rome I) and Regulation (EC) No. 864/2007 of the European Parliament and the Council “On the Law Applicable to Non-Contractual Obligations” (Rome II).

. The articles of the actual APIL are more like European standards, within the efforts of the Republic of Albanian to membership in the European Union.

Concretely, the Rome I Regulation has impacted the national PIL in providing concepts like: the habitual residence, the most real connection, consumer contracts, legal replacement, solidarity obligations, legal compensation, etc that weren't governed by the law No. 3920, date 21.11.1964 “On the enjoyment of civil rights by the foreigners and the foreign law enforcement”.

On the other hand concepts like: contractual obligations issues, are enriched with applicable criteria by the law “On Private International Law”. In this context should be highlighting the party autonomy principle. The Rome I Regulation has impacted the APIL in the main provisions relating the contractual obligation so as we mentioned above, both of the acts apply party autonomy as the guiding principle. Moreover, articles on specific contracts, such as consumer contracts or contracts for the carriage of passengers have also retained party autonomy within specified limits. In both cases, the limitation of party autonomy has been established to secure the better protection of consumers. Also, both of the acts provide the same applicable criteria according to the applicable criteria in absence of choice.

To conclude, we may say that as the APIL and EU Regulation are in the same line the adoption of Rome I Regulation should be welcomed by all the parties engaging in international transactions.

### **References:**

Bogdan M. “*Concise Introduction to EU Private International Law*”, 2012.

Civil Code of Republic of Albania, approved with Law No.7850 date 29/07/1994, changed with Law No. 8536 date 18/10/1999 changed with Law No. 8781 date 03/05/2001, Publication of Official Publication Center 2003.

Collier J.G, “*Conflict of Laws*”, 2006.

Hetemi J. M., “*E Drejta Nderkombetare Tregetare Afariste*”, 2007.

Kalia. A., “*E Drejta Ndwrkombwtare Private*”, Sejko,

Kuci H., Bilali A., “*E Drejta Nderkombetare Private*”, General Part, 2008.

Kuipers J.J, “*EU law and Private International Law. The Interrelationship in Contractual Obligations*”, 2012.

Kunda I., Goncavles de Melo Marinho M.C, “*Practical Handbook on European Private International Law*”, 2010.

Law No. 3920, date 21.11.1964 “On enjoyment of the civil rights by the foreigners and the execution of foreign law”.

Law No.10426 date 02.06.2011 “On Private International Law”.

Law No.10428 date 02.06.2011 “On Private International Law “.

Mandro B. A., Walker G., Kalia A. “*E Drejta Nderkombetare Private*”, 2005

Mosconi F., “*Diritto Internazionale Privato*”, Parte Generale e Contrati, Seconda Edizione.

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).

Semini M., “*E Drejta e Detyrimeve dhe Kontratave*”, Tirana 2006.

Stone P., “*EU Private International Law*” 2010.

The Constitution of Republic of Albania, changed with Law No. 9675 date 13/01/2007, changed with Law No. 9904 date 21/04/2008.