

# Contractual Obligations under the Private International Law in Albania.

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## Abstract

This theoretical and practical part is related to the analysis and studies of the contractual obligations under the private international law.

This work is divided into three parts, where respectively, the first part deals with the general part of the contractual obligations; the second part deals with the specific contracts, which are actually found also in a general regulation under law No. 10428, dated 02.06.2011 "Private International Law"; and the third part deals with the international and national jurisprudence aspect.

This work as based on the *ex-positio sinkronik system* aims at giving a minimum contribution in the application of the international private law and clarifies the omission, collision and legal problematic aspects in practice.

At the end of this work, there are our conclusions which serve as a deduction over the analysis and studies done to this part of the private international law.

**Keywords:** contractual obligations; private international law; contractual freedom; international Jurisprudence

## Autonomy Criteria of the Will under the Private International Law

In the doctrine of the obligations law, there exist some constitutional principles which are formed with the passing of centuries from different authors, who are absolutely necessary and well-searched for the existence of this law. One of these principles is the autonomy principle of will, *lex voluntatis*. This principle makes one of the fundamental principles of the private law. Appearance of such principle in the obligatory law consists in the contractual freedom and non-formal character of the judicial actions<sup>1</sup>.

Contractual freedom means that every party on the contract is free to define not only with whom it wishes to enter in contractual agreement but also the content of the contract. This principle is sanctioned from Article 660 of the Civil Code<sup>2</sup>, which defines that the parties on the contract define freely its content, within the established limits from the legislation in power. So we can conclude that it is noticed that the contractual freedom may be limited only by law. What also comes out of it is that even

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<sup>1</sup> Right of Obligations and Contracts. Prof.Dr. Ardian Nuni etc., Pg. 11. Tirana 2008.

<sup>2</sup> Civil Code of Republic of Albania.

the contractual freedom, like any other freedom in the field of civil law, for as long as it is exercised in an organized government society, cannot by *apriority*, be completely absolute and unlimited.

The freedom and autonomy of the privates comes out in a double-folded aspect: in a negative and positive aspect, which we shall analyze, because such analysis will help us in the autonomic sense of the contractual will on the international law.

Contractual freedom and autonomy in the negative aspect, shows that no one can be taken away his/her own belonging, or he/she is obliged to execute obligations in favor of others *against* or *despite* his/her own will. As a principle, every person is obedient to his own will and he is not obliged, but only when law allows such a thing, from the will of others. In this negative meaning, contractual autonomy is present in the general concept of the contract such as: an agreement to *dare, facere or praestare* a judicial wealth agreement<sup>3</sup>.

In the positive aspect, contractual freedom and autonomy shows that privates may through an act of their will, create, change or deplete a wealth agreement. Under the function of this aspect, the parties have the right to choose between the different types of contracts that are more adaptable to their goal, to define freely the content of the contract, as well as they may have a *atypical* contract.

A consequence of the principle of the will autonomy is that a good part of the norms of the rights over obligations are of a *ius dispositivum (non-obligatory)* but oriented character, in the sense that the parties through agreement may define different regulations from those that are foreseen in them<sup>4</sup>.

After analyzing in a general way the concept of the will autonomy from the obligatory law viewpoint, now let's focus on the international aspect of this substantive principle.

Under the international law, the basic problematic over which it has developed even different doctrines, it has been that which law will be applicable and accepted in order to regulate the contractual obligations. Such a doctrine is positioned in three groups, where some support the law on the place where the contract is signed (*lex loci actus*), some others the law on the place of its execution (*lex loci solutionis*) and others the law of the parties will (*lex voluntatis*).

If we are to analyze the Albanian legislation, more specifically law No.3920, dated 21.11.1964, in Article 17 of it, it's sanctioned the right of participant parties in a contractual judicial agreement (with foreign elements) to choose the law which will judicially regulate such agreement. Further, the disposition defines that "the chosen legislation from the contractors is applicable only if for such cases there comes out clearly the will shown from them. Thus, there derives a prevalence of this principle against other principles, such as that of the common nationality of contractors and

<sup>3</sup> Private Law, Francesco Galgano. Pg. 229, "Luarasi" Publishing House, 1992

<sup>4</sup> Right of Obligations and Contracts. Prof. Andon Sallabanda. 1962.

that of the birthplace or execution of the contractual obligations<sup>5</sup>. But it must be mentioned that this will has as its only limitation, its own judicial norms imperative to the state in the territory of which is foreseen that a contract is signed or executed.

New legislation, so law No. 10 428, dated 2.6.2011, explicitly foresees this principle under its Article 45<sup>6</sup>. *Da lege lata*, the leagla clause implements under its *corpusin* the principle *lex loci contratus*. The parties showing their will in the form foreseen under *lex specialis*, may define the applicable law for all the *in omnibus* contract or for a special part of it (singular). If there comes out from the will expressed from the parties that there is a jurisdiction foreseen for solving disputes that come out of the contract, it is supposed that the law of that country is chosen for the contract adaptation. It derives from the latter that in such situations it will be applicable the *lex fori*. Disposition defines the substantial conditions that an agreement must have, in order for it to be valid and proper for the parties' will, to be expressed in it. One among such conditions is also finding out explicitly and in a written way, while choosing the law. So parties must specify in a special statutory clause such fact into their contract. The parties by consensus and through bilateral agreement among them may agree that at any time the contract is regulated by another law, different from the one defined at the beginning of the contract, and that such a change if done after the signing of the contract, does not violate *ad vaeditatem* and *ad substanciam* the contract or the rights of third people.

### **Regulatory Law of the Contract Transformation**

In order to firstly analyze the contractual transformations, we think that it is of great importance to clarify the transformation of the contract. What do we mean by transformation?

Civil Code and the obligation and contracts doctrine gives us numerous examples regarding this issue, but for methodological reasons we shall analyze the *cedim* institution as one of the most typical cases foreseen by our civil legislation, and also foreseen under Article 53 of the law for private international law. At first, we shall deal with the doctrinal aspect of such notion and then later we shall see which law is applicable in case of a legal collision.

It may happen that the rights and obligation pass on from one person to the other, and may be changed because of the *universal or particular succession*<sup>7</sup>. In the case of *universal succession*, the transition of rights and obligations of the creditor or debtor from one person to another is done in general, through a single action in relation to his whole wealth or part of it. A cause for something similar may be for example the joining of some commercial societies. In such cases, the wealth of one party is transferred in total to the third one, including his own assets and else. On the *particular succession*,

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<sup>5</sup> Maks Qoku, "Private International Law", Pg.260, 2013

<sup>6</sup> Law No.10 428, date 2.6.2011 "Private International Law"

<sup>7</sup> Obligations and Contracts, Mehdi J. Hetemi. Tirana, Luarasi.

the rights and obligations of a defined obligation agreement are transferred from one of the parties to a third person, through special actions that are detached from the other part of the creditor or debtor's wealth. In this aspect, we may find ourselves in front of credit cedim or undertaking the obligation, which are dealt with in another matter and are not actual object of this theme.

We can conclude that synthesis is a new judicial action, which again has a contractual nature and that it will undergo its regulatory law, which in turn means that from the effects viewpoint, as well as from the *ad vaeditatem*, it will undergo the law of the main contract<sup>8</sup>.

If we shall make a *strictu sensu* interpretation, focusing only at the law we are studying, we must then focus on Article 53<sup>9</sup> which deals with the legal substitution. From the technical legislative viewpoint and from the viewpoint of the logical rules of syntax and morphology, the disposition is not very clear. The basic idea that is transmitted concerns all those cases, whereby on the basis of a contractual obligation, the creditor has the right against the debtor, and a third person is obliged to clear the credit or has already cleared it under the fulfillment of this obligation, law, which regulates the obligation of the third person to clear the creditor, then the *mutatis mutandis* is being applied even for the definition of the measure and cause of why the third person has the right to exercise against the debtor the same rights the creditor had against the debtor, *according to the law that regulates their relationship*.

## International Jurisprudence

### Preceding Comments Summarized for the Jurisdiction of the Court in this Aspect

After years of silence, for more than 10 months the European Justice Court gave two separate decisions in relation with the interpretation of the Convention<sup>10</sup> of Roma 1980, over the law on employment international contracts. In the meantime that the Roma Convention is not the main source of the private international legislation for the obligations within the European Union; it was in fact substituted by Regulation No. 593/2008<sup>11</sup>, Article 8, which contains new special dispositions on employments contracts; anyway, the decisions of *Koelzsch*<sup>12</sup> and *Voogsgeerd*<sup>13</sup> have an indisputable, material importance for two reasons:

<sup>8</sup> Civil Law, Obligations, Gerard Leiger. Papirus, 2008

<sup>9</sup> Law No.10 428, dated 2.6.2011 "Private International Law".

<sup>10</sup> *Convention on the Law Applicable to Contractual Obligations*, Roma, 19, 1980, in *G.U.U.E. C 334. 30*, 2005, pg. 1 (consolidated version)

<sup>11</sup> Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008 on application of law for contractual obligations (Rome I), in *G.U.U.E., L 177* July 4, 2008

<sup>12</sup> ECJ, 15 March 2011, Case C-29/10, *Heiko Koelzsch v. Etat du Grand-Duché de Luxembourg*

<sup>13</sup> ECJ, 15 December 2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*,

*At First*, Roma Convention dispositions are applicable in all closed contract prior to 17 December 2009<sup>14</sup>, and *secondly* both the criteria of the relation interpreted from the Court, in relation to the decisions we are talking about, are assimilated by the new Regulation even word for word (this is regarding the business place criteria of the business, through which the employee is employed) or with changes through which the Court aimed exactly at “reconcile’ itself with (usual work place criteria). Therefore the detailed review of Article 6 of the Roma Convention may be used as the guidelines for the application of Article 8 of the Roma I Regulation.

The fact that, not earlier than 2011 the Court decided for the first time to address the issue of interpretation of Roma Convention, regarding the issues of employment contracts (even though it was since 1991<sup>15</sup> which that was in power) may be explained with the late introduction to enter in power of two protocols signed in Brussels in 1988, which give jurisdiction to interpret the above-mentioned Convention<sup>16</sup>.

The need for a uniform interpretation of the dispositions of the private international legislation in Roma Convention has always been confirmed from the Italian authors<sup>17</sup> and has always been one of the strongest arguments to support the need to transform the Convention in a Regulation of the European Union<sup>18</sup>. Reading of the *Koelzsch* dhe *Voogsgaerd* decisions confirms the stability of such position, putting out front the contribution of the efforts of the Court, in order to clarify the issue of the international convention’s employment, may also serve to achieve a greater assurance of the legislation, in regulating the private legal agreements between countries in Europe.

### **Importance that the Court attributes to the Basis for Jurisdiction regarding the Employment Contracts**

The two already mentioned decisions are more than consistent with the flow that the European Union has chosen to create an organic system of norms for the coordination of legal systems, which is considered as a standardization of the basis for jurisdiction and rules for decision recognition, as well as an adaptation of common, interconnected criteria for the identification of law that is applied in cases that introduce common elements with a series of different legal systems. In the meantime, now that many

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<sup>14</sup> This what in fact Article 29 of the Regulation (EC) 593/2008 foresees.

<sup>15</sup> Italy has already now implemented Convention in 1984, through law No. 975, of December 18, 1984.

<sup>16</sup> Article 6 of the first protocol (89/128/CEE), in both interpretative instruments took effect on 1 August 2004. On 6 October 2009, the Court exercised its jurisdiction for the first time, trying an interpretation of Article 4 of Roma Convention. cf. Case C-133/08, ICF, in *Raccolta*, pg. I-9687

<sup>17</sup> Like it is for ex. R. Luzzatto, *L’interpretazione della convenzione e il problema della competenza della Corte di giustizia delle Comunità*, in T. Treves (edited by), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Padua, 1983, pg. 57 et seq.

<sup>18</sup> In this viewpoint, look at the Commission’s Green Paper «on the conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization,» Brussels, 14 January 2003, COM(2002) 654 final, pg. 15.

initiatives from the EU lawmakers based on the new competences according to Article 81 TFUE<sup>19</sup> contain important structural elements for the construction of an European and private international legal system, Koelzsch and Voogsgeerd decisions show the potential that the Court has in the harmonization and stability of this new system<sup>20</sup>.

This is true according to at least two perspectives. From this viewpoint, the Court has been indirectly answering the suspicions that come from the immediate application, in the EU legal system of Roma Convention and of the new Regulation No. 593/2008, offering an evaluative system of interpretation for the first, which precedes the new dispositions of the Roma Regulations I<sup>21</sup>, and may unify the conflict of legal systems in the field of employment contracts. From another viewpoint, the Court gave shape to the principle of continuity between the work to unify the international procedural civil law of EU (starting back from the Brussels Convention of 1968<sup>22</sup>) and to unify the international private laws over obligations.

A similar principle has been already confirmed in the Preface of the Roma Convention<sup>23</sup> and it discovered itself later in the osmotic relationships of this Convention and the version that was followed by the Brussels Convention, which in its 1989 text, established new special basis for the jurisdiction of the law on employment, inspired directly from Article 6 of Roma Convention<sup>24</sup> and later confirmed by Brussels Regulation I<sup>25</sup>. In the *Koelzsch* decision, adapting the position that the *Attorney General* expressed in his

<sup>19</sup> Based on this disposition, the Union «will develop the judicial cooperation in civil cases that have cross-border implications» that may be applied by approving some measures that aim at guaranteeing the, among others, «compliance of the rules in power in the Member States, regarding the conflict of laws and jurisdiction» (Art. 81, No. 2, Letter c). Norm, which corresponds with Art. 65 of TEC-it (ex-Art. 73 M presented by the Amsterdam Treaty in 1997) in this way, gives to the Union the special jurisdiction to approve, now through common legislative procedures, its international private uniform system of the law, annulled Art. 220 of the original Roma Convention has given, for such purpose, the international convention dispositions between member states. Brussels Convention of 1968, as well as Roma Convention of 1980 used in Art. 220 (Later Article 293) of TEC, as their regulatory foundation: are in regard to the effects produced in this last norm (which was not officially annulled up to the Lisbon Treaty) from entering into power of the new EU competences for judicial cooperation in civil cases

<sup>20</sup> For a authoritarian reflection over the interpretative role of the Court regarding cases that are included in the so called «freedom, security and justice field»

<sup>21</sup> I mean both of them, a wide interpretation of the criteria of the permanent place of work and in the great reduction of the sphere of the application of the country criteria, where the worker is engaged

<sup>22</sup> Brussels Convention over the Competences and application of decisions over the civil and commercial cases, Brussels, 27 September 1968, in GUCE C 27 of 26 January 1998, pg. 1,.

<sup>23</sup> «High Contractual Parties (...) concerned to continue in the field of private international law, the issue of joining rights, which is already done within the Community, especially in the field of jurisdiction and application of decisions (...): cf. Roma Convention Preamble, cit. in point 1.

<sup>24</sup> Cf. Art. 5, No. 1 of Brussels Convention, changed by 26 May 1989 Convention, related to the acceptance of the Kingdom of Spain and that of the Republic of Portugal.

<sup>25</sup> Regulation of the Council (EU) of 22 December 2000, No. 44/2001, related to jurisdiction, recognition and execution of judicial decisions in civil and commercial cases, in GUUE L 12, pg. 1.

extended arguments<sup>26</sup>, the Court re-confirmed the position expressed already on the first decision by interpreting Roma Convention<sup>27</sup> and declared that by interpreting Article 6, paragraph 2, a) of this Convention, it cannot take into consideration its jurisprudence over similar notions to Article 5,1 of Brussels Convention, again in relation to the employment legislation<sup>28</sup>. By doing so, the Court tests its capacity to contribute actively, by creating a convenient interpretative relationship, for the unification of the international procedural law and the legal systems conflict of the EU into an organic legal system that may manage all cross-border cases.

### **The Court favors such Interpretation “oriented toward the core” of Conflicts of Legal Articles.**

Hermeneutic work of the Court in regard to the notion of “the place where the employee regularly does his job” according to Article 5/1 of Brussels Convention, which as we have seen in the *Koelzsch* decision, was widened exactly with the similar expression of Article 6 of the Regulation 593/2008, and is a clear manifestation that the Court favors the development of the so-called “fundamental methods” of solving conflicts of laws in system<sup>29</sup> of the international private legislation of EU.

In particular, the Court’s interpretation gives a central role to the deeply fundamental objectives that the authors of Roma Convention have followed during the compilation of the connective criteria. In this case, these purposes must protect the employee as the weak contractual party, and more specifically, in order to guarantee that where possible, the rules of protection of the government employment, where the employee does his/her own economical and social duties, will regulate the contract and be applicable in the contract (look at *Koelzsch* decision, sec. 40 and 42)<sup>30</sup>.

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<sup>26</sup> «The place where the worker usually does his job» in compliance with Art. 5, No. 1 of the Brussels Convention, accepting that that was comparable in analogy, with the respective criteria of the relation held in Art. 6, No. 2, Letter a) of the Roma Convention, based on both such systematic and theological interpretation. According to the *General Attorney’s* thought, this result will not be excluded either from a literal interpretation or a historical interpretation of the disposition being mentioned: cf. the conclusions of the *General Attorney*, Verica Trstenjak, introduced on 16 December 2010, Case C - 29/10, section 52-81, not published yet in *Raccolta*, but ready on the internet page of the Court: <http://curia.europa.eu>

<sup>27</sup> Cf. ECJ, 6 October 2009, Case C-133/08, ICF, cit., Paragraph 22

<sup>28</sup> Paragraph 33 of *Koelzsch* Decision

<sup>29</sup> For the reconstruction of the genesis of the «material» method of the conflicts of laws from the American authorities of the case, according to the author, this method makes one of the different instruments for the coordination between the used systems now in the context, from the European conflict of the legal systems, cf... P. Picone, cit, pg. 487 and pg. 489.

<sup>30</sup> Less obvious, but not least based upon, is the qualification on the direction of the material objectives of the law-makers of the Union, of the harmonization of the forum and IUS, which the *General Attorney* Trstenjak, uses as the basis for its teleological of Art. 6, paragraph 2, a) of Roma Convention (along with the conclusions of *General Attorney* Verica Trstenjak, cit., Paragraph 80 et seq.) and which is concretely connected to the principle of continuity between the work of the union in the private sector of the international law.

In the decisions signed, the principle of *favor laboris*<sup>31</sup>, which is the reason for including Article 6 in the Roma Convention, furthermore acts not only as a criteria for the interpretation of key words that express the connective criteria in Letter a and b of paragraph 2 of the norm under discussion, but overall as an instrument for the coordination of both criteria, not any more as an alternative objective<sup>32</sup> but in a very hierarchal way (*Voogsgaerd decision, paragraph 34*). It is exactly here, where we can see the second final step that the Court undertook during the interpretation process of the Article 6 paragraph 2 of the Roma Convention.

This evolution in the interpretation is based on two considerations. In one of them, the mechanical identification of the law applicable over the employment contract based on the spatial position of the service of the employee, is already unpleasant, because of some professional ciphers which stay at a grey area, as they continue work in a series of countries, and it is still possible to identify an initial relationship (meaningful, according to the terminology used from the Court: *Koelzsch decision, paragraph 44*) with one of them.

Secondly, since 1980, the importance of the aim for the protection of the employee as a weak party in the relationship, has changed in the EU system: you can no longer find an expression in the international conventions, even though they are sought and accepted by member states, but it is recognized in many secondary norms (including here Regulation I of Brussels and Roma) and corresponds with a value which is declared exactly in the legal system of the European Union

Both decisions therefore express an evolution in a perspective that is meaningful in the gradual reconstruction of the international private legal system of the European Union, which is actually being elaborated. In regard to the traditional method of Savigny, which is based on the spatial localization of the relationships<sup>45</sup>, “the fundamental method” mentioned earlier for the coordination of legal systems is gaining grounds, in which the end followed by the law-makers before the compilation of the connective criteria must, where possible, over-reign even during the interpretation and application of the norms over conflicts of laws.

Such new perspective made the Court to confirm that the criteria for the right kind of job “must be given a wide interpretation” (*Koelzsch, paragraph 43*) which includes cases where the employee does his job more than a state itself, being that the judge may use the case circumstances to identify the State in relation to the work done (same place, paragraph 44). Thus, the *Voogsgaerd* decision, made perfect the interpretative work,

<sup>31</sup> For a deeper exploration of the evolution and actual state of the favor principle for employees in the Roma Convention, and now, in the Regulation No. 593/2008, are referred, including extra bibliographic information, of the many studies by the part of R. CLERICI

<sup>32</sup> In the sense that the application of one or another criteria is based on the objective fact that work is done in only a State (letter a) or in a series of states (letter b), according to a mechanical identification of the place of relationship

giving the national judges, clear instructions as how to proceed in the construction of cases that include the employment contracts.

### **The Role of the closest Relationship Criteria in the Work Contract**

On the other side, it is more likely that relevant factors according to the Court, with the aim of fulfilling the relationship criterion for a regular employment or the place of business that employed the employee, could have suspicions that may not be important, or they might demonstrate that the work relationship is more closely related to a legal system than those who they refer to.

In such case, the judge may consider other elements to assure that the law in power in the State where the case is relevant, according to the last sub-paragraph of the Article 6, paragraph 2 of the Roma Convention (*Voogsgeerd decision, paragraph 51*) is applied for the contract. In his conclusions, the *Attorney General*, emphasizes how the logical basis for the last criterion of Article 6, paragraph 2, is to give the judge a certain *flexibility* for the application of Roma Convention, the flexibility of which is sought to preserve the principle of favoring an employee, and of all cases where the employee voluntarily decides the place of business in a state with laws that are less sharp for the protection of the employee.

For the fundamental purpose of protecting the employee as a weak party of the contract, the Court once more gives priority to the logical line of thought that national judges must follow, making it as such that they apply laws that give more protection to the employees.

### **Conclusions**

Going through a deductive-synthetic process, we may conclude over some important aspects that have been introduced in this theoretical and practical work over the contractual obligations, regulated according to the “International Private Law” of the Republic of Albania.

Initially this work dealt with the autonomy principle of will, as a substantial principle which makes the *corpus* of the regulation of contractual obligations, in *stipulations* that the parties make to each-other in order to create, change or destroy a certain judicial relationship.

Like other ways to get involved into the relationship of parties, we also treated the criterion of common nationality, and that of the place of the conclusion of the contract, as well as the principle of regulatory law for the transformation of the contract.

A special place was given to the synthetic analysis of special contracts which are so indispensable, because in such contracts are reflected the general principles covered in the first Chapter of this work.

In a chronological line it has been shown the clausal part (jurisprudence), as a constructive part, absolutely indispensable and well-sought in order to fulfill the analytical framework of the obligations in this aspect.

This work has been analyzed in two aspects, in that national and that international one, analyzing the decisions that are important for that law.

At the same time, the same methodology *mutatis mutandis* has been followed even in the historical part, which we didn't deal with separately, but it was rather included into different parts of this work, by analyzing certain moments that are distinct from the law which is actually in power and has substituted the previous law of year 1964.

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