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THE LAW APPLICABLE TO CROSS-BORDER TRAFFIC ACCIDENTS

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ABSTRACT

The victims of cross-border traffic accidents are interested in knowing the courts in which they can bring their claim and the law that is applicable in the matters concerning such a claim. There are considerable cross-country differences in the laws on the liability for traffic accidents, and the domestic legal regimes apply either the fault-based or strict liability principle in settling the extra-contractual liability claims arising from traffic accidents.

The aim of this study is to examine the law applicable to the cases of cross-border traffic accidents. The legal framework applicable to the cross-border traffic accidents in the EU encompasses the choice-of-law rules of the Rome II Regulation (Rome II), the Motor Insurance Directive (MID), and the Hague Convention on the Law Applicable to Traffic Accidents (the Convention). The MID has an exclusive focus on the insurance coverage for the losses resulting from the accidents caused by the vehicles operating in the EU. At the same time, Rome II and the Hague Convention address the factors that should be considered in order to determine how to handle the claims arising from a cross-border accident. The MID has a proper alignment with the ideal standard of a sound system for the choice of law. There are some areas of overlap between Rome II and the Hague Convention, and Rome II seems to be a better choice-of-law system than the Convention. Rome II is more effective in sealing the loopholes that could subject accident victims to the detrimental effects of a bias towards the local law and the local litigants of the place of a cross-border accident.

Legal certainty and consistency are essential for EU citizens. *Lex loci damni* suffers few and limited exceptions, which makes it the perfect choice-of-law in the author's opinion. Governing the applicable law to cross-border traffic accidents is the main advantage of Rome II Regulation. But as long as Rome II Regulation and the Hague Convention coexist in Member-States, the applicable law in case of a cross-border traffic accident will be difficult to predict for citizens and so will be the outcome and the time period of the case.

Keywords: Cross-border, Traffic accidents, Rome II Regulation, the Hague Convention, Motor Insurance Directive

LIST OF ABBREVIATIONS

MID – Motor Insurance Directive

Rome II – Rome II Regulation

the Convention – Convention of 4 May 1971 on the Law Applicable to Traffic Accidents (the Hague Convention I)

INTRODUCTION

In case of cross-border traffic accidents, the party that suffers injuries or material damage is interested in knowing the courts in which they can bring their claim and the law that is applicable in the matters concerning such a claim. In cross-border traffic cases, it is common for the claimant to be able to start negotiations with the defendant only immediately before the case handling deadline expires. Expiring is most often the case when the overall deadline is particularly short or when it is unclear how the deadline can be suspended or interrupted. Gathering information about an accident in a foreign country can be a significant time-consuming task for the defendant. It can also lead to a problem that if it takes a lot of time and money to make up for your losses, people may lose motivation to do so. The rules of Private International Law address the concerns of the parties who suffer injuries from cross-border traffic accidents and, therefore, these rules coordinate the legal systems of different countries.

Polish jurist Marcin Piotr Czepelak argues that theoretically, private international law offers three possible solutions to the problems arising from cross-border traffic accidents. First, regardless of the legal cause of action, the underlying circumstances are the same, and a single legal system is enough to cover the factual matrix of the cross-border accident cases. Thus, in such a case, the same law should address a plaintiff's claim.[1]

Second, actions could be categorised for the purpose of conflict laws so that contract-based claims could be distinguished from tort-based claims. However, there is a tendency of applying only one law to these two kinds of claims, and do to so, an accessory connecting factor is used to subordinate one type of claim to the other.[2] For instance, in the event of a cross-border traffic accident in which an injured party makes both a contract-based and a tort-based claim, and there is a manifestly close connection between the two claims, the law of the contract would be applied to the alleged tort.

Third, it is conceivable that if a case has different aspects, different laws can be applied to the case as long as these laws have the same practical consequences. However, the application of different laws can be problematic if these laws are based on varying concepts of what constitutes

[1] Czepelak, M. (2011). Concurrent Causes of Action in the Rome I and II Regulations. *Journal of Private International Law,* 7(2), 393–410.
[2] Ibid.

contracts, torts, and restitution.[3] Considering the differences in the approaches to addressing cross-border traffic accidents, settling the claims is likely to be complicated.

In Europe, the European Union law has regulations that contain the rules of private international law, and the Rome II Regulation is one set of these regulations.[4] The Rome II Regulation provides for the law that should be applied in non-contractual obligations. International Conventions also provide the rules that guide the choice of the law applicable to the claims arising from cross-border accidents. In particular, the Hague Convention of May 1971 on the Law Applicable to Traffic Accidents provides guidance on how to deal with the claims arising from extra-contractual liabilities.[5]

There are considerable cross-country differences in the laws on the liability for traffic accidents, and the domestic legal regimes apply either the fault-based or strict liability principle in settling the extra-contractual liability claims arising from traffic accidents. In most countries in Europe, the strict-liability principle is applied in the cases in which motor accidents result in personal injury. Still, in other countries such as England, liability is determined by the fault-based principle, the idea that the party responsible for harm should bear the claims arising from an accident. In the countries with the strict-liability legal regimes, there are variations in the type of people who can receive compensation for the injuries suffered in road accidents, and these variations reflect the differences in, among other things, the vulnerability of accident victims and the position of victims at the time of accidents. [6]

Further differences in the legal regimes on the liability for accidents are in the nature and extent of the damages that accident victims can be paid, the significance that contributory negligence pays, and the limitation period for bringing accident-related claims. Given the differences in the accident-liability legal regimes, the outcome of a case could turn on the applicability of the law to a given situation.[7]

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[3] Ibid.
[4] 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 Regulation). OJ L 199/40, 31.07.2007
[5] Hague Conference on Private International Law, Convention on the Law Applicable to Traffic Accidents, 4 May 1971, The Hague
[6] Papettas, J. (2012). *Choice of Law for Cross Border Road Traffic Accidents*. Retrieved from https://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58306/20121219ATT58306EN.pdf, 20 March 2020
[7] Ibid.

The thesis begins with an overview of the two main supranational legal acts applicable to cross-border traffic accidents in the first chapter – the Rome II Regulation and the Hague Convention on the Law Applicable to Traffic Accidents. Also, an overview of Motor Insurance Directive is added, as a relevant legal act while analysing the law applicable to cross-border traffic accidents. The second chapter concentrates on comparative views of different authors ideas and articles on supranational legal acts in-depth, as focusing on three different key elements of these acts: general rules applicable, freedom of choice rules and liability clauses. Third chapter analyses these views and the author gives suggestions on what to change in legislation to handle cross-border traffic accidents more efficiently and how to simplify choosing the applicable law in the Member States in such cases.

Aim of the study

The aim of this study is to review the Rome II Regulation, the Hague Convention on the Law Applicable to Traffic Accidents and Motor Insurance Directive, and to analyse and make suggestions on how can the legislation be improved in regards to the cross-border traffic accidents.

Research question

How should the legal framework be reformed so that the applicability of law on cross-border traffic accidents would be easier and more transparent?

How should the legal framework be reformed so that the handling of such cross-border traffic accidents would be more efficient and unambiguous?

Method of research

The research will be made using comparative and analytical methods, which helps to understand the differences between the Rome II Regulation, the Hague Convention on the Law Applicable to Traffic Accidents and Motor Insurance Directive.

1. SUPRANATIONAL LEGAL ACTS APPLICABLE TO CROSS-BORDER TRAFFIC ACCIDENTS

1.1 The Rome II Regulation

The Rome II Regulation (hereinafter "Rome II") is one of the most widely applied supranational legal acts for cross-border damage cases. However, it does not have specific rules on how to handle traffic accidents, and if it is to be relied upon to determine what law to apply, its general rules provide the guidance on how to do so. Article 4 of Rome II stipulates the general rule according to which the law applicable to an accident is one of the places in which the accident has resulted in direct damage, and indirect damage should not be used as a basis for deciding the kind of law to apply. Given that direct damage occurs in the place in which an accident has occurred, the applicable law under the general rule of Rome II will almost always be the law of the location of an accident. The outcome of applying the general rule results in a right balance between addressing the interests of the parties to a cross-border accident, ensuring the uniform application of the rule, and ensuring the predictable handling of cross-border accidents.

Despite the effectiveness of the general rule in balancing several needs, it is inflexible because it fails to consider the circumstances in which it would be inappropriate to apply the *lex loci damni* principle – the principle of using the law of the place in which direct damage has occurred.[8] For instance, in the case in which an accident has caused someone to suffer damage, and the person shares a common habitual residence with the person who is liable for the accident, a different law than the one that Rome II stipulates is applicable to the accident, and applying Rome II would not be an effective way of addressing the interests of the parties to the accident.[9] To correct the rigidity of the general rule, Article 4(2) of Rome II allows an exception to this rule, and it provides that in the event the parties to an accident have the same habitual residence, the law of the state of their residence is applicable to the accident. Article 4(3) recognises the circumstances in which it could be difficult to resolve a cross-border accident in accordance with the provisions of Article 4(1) and Article 4(2), and it provides an additional exception to the rules in these provisions. In particular, Article 4(3) provides that where the circumstances of an

[8] Papettas, J. (2012), *supra nota 6*, 7.
[9] Ibid., 7.

accident make it clear that the tort related to the accident has a manifestly closer connection to a different country than the one to which Article 4(1) or Article 4(2) refers, the law of this country will be applicable. The exception provided for in Article 4(3) can only be invoked successfully if the high threshold of close connectivity has been satisfied.

Under Article 14 of Rome II, there are circumstances in which the parties to an accident can decide the law that should be applied to the accident. Article 14 allows the parties in non-commercial engagements to make *ex-post* agreements. In addition, the article allows the parties in commercial engagements to make *ex-ante* agreements although it is rare that parties would make *ex-ante* agreements relating to traffic accidents because such accidents usually involve the parties who lack an acquaintance with each other.

If the parties to a non-commercial engagement decide to make an *ex-post* agreement, they must ensure that the agreement is not prejudicial to the rights of third parties. Also, if the agreement relates to an accident and the elements of the accident are situated in at least one EU Member State, the agreement should not undermine a community provision that supersedes any agreement between individuals.[10] Article 15 of Rome II delineates the scope of the law that should be applied to cross-border accidents. Under Article 15, the things that the designated law should determine are, among others: the basis and extent of liability, the grounds for exempting a party from liability, the existence, the nature and assessment of damages, the party that should receive compensation, liability for the acts of another person, and the rules of prescription and limitation, including rules related to the interruption and suspension of a period of prescription or limitation and commencement.

By providing the parties with the right to choose the law governing their non-contractual obligations, Rome II offers a novel principle that is not available in some EU jurisdictions. Whereas the wording of the articles at hand might be difficult to understand, the framework is abstract enough, so that it could be applied in different scenarios that could arise in cross-border disputes.

[10] Ibid., 7.

1.2 The Hague Convention on the Law Applicable to Traffic Accidents

The basic choice-of-law rule of the Hague Convention on the Law Applicable to Traffic Accidents (the Convention) is that the law applicable to a cross-border traffic accident is the law of the place in which the accident has occurred. Also known as *lex loci delicti commissi.* The Convention overcomes the Rome II Regulation in case of traffic accidents in the Contracting States of the Hague Convention.[11] Papettas notes that the application of the Hague Convention's basic rule in the same outcome as the application of Article 4(1) of Rome II because the damages in a cross-border traffic accident will almost always arise in the place of the accident. The basic rule is subject to a cascade of the exceptions provided for in Articles 4, 5, and 6.[12]

Under Article 4, the law of the state of the registration of a vehicle is applicable to the claims of a driver, an owner, or another person who controls a vehicle and the claims of the passenger-victims of a vehicle involved in the accident and who habitually reside in the country in which the vehicle is registered. In addition, the law of the state in which a vehicle is registered is applicable to the claims of the people outside the vehicle if these people are habitual residents of this state. The exception in Article 4 is applicable to all cases of accidents involving a single vehicle and in the accidents involving more than one vehicle as long as the vehicles have been registered in the same state.[13] In the event the vehicles involved in a cross-border traffic accident are registered in different states, the basic rule of the Convention becomes applicable.

Article 5 of the Convention provides that the law that Article 3 or Article 4 has designated as applicable to the claims of a passenger is also applicable to the claims of the damages to property if this property was in the vehicle belonging to the passenger at the time of an accident. If other goods that do not belong to this passenger were in the vehicle at the time of the accident, Article 3 or 4 is used to determine the law applicable to the claims of the damage to these goods. These articles are also applicable to the claims of the damage to the other goods being ferried by a vehicle that has been involved in an accident. If there is a claim of the damage to the goods that are outside the vehicle that has been involved in an accident, the law of the state in which the accident has occurred will be applicable to this claim. However, if this claim relates to the

[11] The Hague Convention on the Law Applicable to Traffic Accidents is in force in Austria, Belarus, Belgium, Bosnia & Herzegovina, Croatia, Czech Republic, France, FYR Macedonia, Latvia, Lithuania, Luxembourg, Montenegro, Morocco, the Netherlands, Poland, Serbia, Slovakia, Slovenia, Spain, Switzerland, and Ukraine.
[12] Papettas, J. (2012), *supra nota* , 15.
[13] Ibid., 15.

property of a victim who was not in the vehicle at the time of the accident, the law of the place in which the vehicle is registered would be applicable to this claim.[14]

Under Article 6, if a vehicle is either unregistered or registered multiple times, the law of the place of the habitual stationing of the vehicle will substitute the law of the place in which the vehicle is registered. In addition, the exception in Article 6 applies to the circumstances that necessitate the application of Articles 4 and 3 if, in addition to these circumstances, the owner, driver, or the person controlling a vehicle is not a habitual resident of the state in which a vehicle has been registered. Under Article 9 of the Convention, cross-border accident victims can bring a direct action against insurers if the law designated by Article 3, 4, or 5 of the Convention, the law of the state in which a vehicle is registered, or the law governing the insurance contract allows them to do so.[15]

As evident from above, the Convention, unlike Rome II, does not provide the parties to an accident the freedom of choice regarding applicable law, as there are mandatory provisions that govern the specific applicable law. For example, if two cars would have an accident in Latvia and the vehicles would be registered in Lithuania, the Convention would select the Lithuanian law because of the country that the vehicles are registered in Lithuania. On the other hand, Rome II would settle the Latvian law because of the place of accident was Latvia. The main rule may be quite similar, but the exceptions of the main rule are different.

[14] Ibid., 15.
[15] Ibid., 15.

1.3 The Motor Insurance Directive

Once the freedom of movement principle took effect for EU citizens, it became possible to travel across the borders of Member States more easily, leading to the more frequent crossing of borders and in turn, to the growth of cross-border road traffic accidents. Motor Insurance Directive (MID) created to help victims on minimising the damage or the impact on them when an accident occurs. It was established in 2009 to handle cross-border traffic accidents and to supplement Rome II and the Convention, especially in disputes of cross-border accidents.

The additional measures provided for under the MID are a robust framework that eliminates the potential hurdles that could stand in the way of accident victims who have suffered losses in a foreign state and who want to be compensated for these losses.[16] Article 3 of the MID is a choice-of-law rule that requires all EU member states to take appropriate measures to ensure that insurance contracts cover, in accordance with the laws of the other member states, the losses or injuries caused in the territories of these states. Article 14 is also a choice-of-law rule that requires member states to ensure that in the compulsory motor insurance policies a single premium guarantees either the insurance coverage mandated by the law of the member state or if a vehicle is domiciled in another member state whose law requires higher insurance coverage, the coverage mandated by the law of this other member state. MID is effective in designating the law to be used to determine the appropriate insurance coverage.

MID has additional measures designed to address the problems that arise when a traffic accident cause losses to a person who is not a habitual resident of the place in which the accident has occurred. One such measure is that all insurers with operations within the EU have to ensure that they have a claims representative in each member state other than the one in which they have received their operational license as declared in Article 21. Also, this representative must be able to settle claims on behalf of the insurer and to examine cases in the language of the state from which they operate. Victims have a right to take direct action against an insurer and to bring such action in the courts of the country of their habitual residence.

Papettas notes that the Motor Insurance Directive is a consolidation of the rules of the past Motor Insurance Directives. These directives are an outcome of the 30-plus years of the progressive

[16] Ibid., 9.

harmonisation of the scheme of compulsory insurance for third parties. MID has two underlying objectives. First, it seeks to ensure that motor insurers have a level playing field and, therefore, promote the market for insurance services. Second, it seeks to ensure that people, goods and vehicles can move freely within the EU, and it does so by ensuring that a single premium for an insurance policy covers the entire EU territory and that accident victims' interests are protected regardless of the place of the occurrence of the accident.[17]

Under MID, each EU member state has to ensure that there is insurance coverage for the civil liability of the vehicles in its territory. This insurance also has to cover the losses in the territories of the other members of the EU. MID provides that any vehicle-based in the territory of a member of the EU must have the insurance coverage for the third party losses that could result from the operation of the vehicle, and the insurance must cover the passengers, pedestrians, cyclists and other non-motorized road users as stated in Recital 22.

Also, each EU member state must operate an information centre accordingly to Article 23 of the MID. This centre maintains a register of all the vehicles that operate in a state, the insurers of these vehicles, and the details of the claims representatives who represent these insurers in the other EU member states. The MID provides that there must be adequate arrangements for ensuring that accident victims can easily access the information in the information centre any time they need it. The requirement of the measures to help accident victims in their efforts to obtain compensation is another way in which the MID addresses the potential bias towards local laws and local litigants.

Although MID is much less flexible when it comes to the discretion of the parties and their options concerning applicable law, it offers a simple solution to the increasing growth of traffic accidents in the Member States. It obliges to take all appropriate measures to ensure that vehicles would be covered by insurance. As a result of this, EU citizens can travel stress-free around the Member States and in most cases do not have to worry about figuring out the applicable law in case of an accident. As evident from the brief insight to these applicable acts previously mentioned, the main governing rules concerning choice-of-law, applicable mandatory law and liability clauses are quite similar. To further understand the differences, the author focuses on the

[17] Ibid., 8.

different views and loopholes of these acts by comparing these rules in detail in Chapter 2 to see how these clauses of general nature are applied specifically to traffic accidents.

2. COMPARATIVE VIEWS ON THE LEGAL FRAMEWORK APPLICABLE TO TRAFFIC ACCIDENTS

2.1 General rules applicable

Article 4 of Rome II provides that the law applicable to a cross-border accident is the law of the location in which the accident has resulted in direct damage. If this article is evaluated within the lenses of Laycock and Korn's suggestion for the appropriateness of a choice-of-law system, it initially appears that it falls short of a good standard for choosing the applicable law. A cursory look at the article suggests that it favours the local law above all other laws and, therefore, it is hardly consistent with the constitutional principle of territorial jurisdiction. Damages will almost always occur in the place in which an accident has occurred, and Article 4 requires that only the local law should be applied. However, when one considers the fact a different person other than the citizens or habitual residents of a place could be involved in an accident, it becomes apparent that Article 4 does not favour a local law or the local residents of a place. Under Article 4, a foreigner could find themselves the subject of a law of a different country than their own, and this scenario fits Laycock's suggested standard of a good choice-of-law system. In fact, if a person understands Article 4 and they decide to drive their vehicle into a foreign country, they would effectively behave in the manner that Laycock envisages. Besides Article 4, Rome II offers several exceptions that make it consistent with Laycock and Korn's suggestions. [18;19]

Article 4(2) of Rome II is an exception that frees people of the burden of submitting themselves to foreign law. Under Article 4(2), if the habitual residence of the parties to an accident is the same, the law of their country of residence is applicable. For various reasons, people could have apprehensions about being punished under the laws of foreign countries, and perhaps this is why Laycock and Korn have argued against the undue bias towards a local law. Article 4(2) allows people to be subjected to the laws with which they are comfortable and therefore minimises the chances that an undue preference for the local laws or the local litigants could prejudice the interests of the people who have been involved in accidents in foreign countries.

[18] Korn, H. L. (1983). The Choice-of-Law Revolution: A Critique. *Columbia Law Review*, 83(4), 772-973.
[19] Laycock, D. (1992). Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law. *Columbia Law Review*, 92(2), 249-337.

An additional exception to Rome II's general rule (Art. 4(3)) is that if the circumstances of a cross-border accident are manifestly closer to another country, different than the one in which the parties to the accident have a habitual residence or the one in which damages have occurred, the law of this other country is applicable. Article 4(3) effectively mitigates the situation in which there could be a loophole that would allow an excessive bias towards local laws or local litigants and, therefore, it meets the standard of a good rule for a choice of law.

The Hague Convention general rule is *lex loxi delicti commissi* (the general rule is the "internal law of the state where the accident occurred"). This general rule has much more complex exceptions compared to the Rome II general rule. These exceptions are all connected to the "legal domicile" of the vehicle. Exception (a) is related to one-car accidents, for example, if a driver crashes into a rock or the driver crashes into a cyclist, then the law of the registration (or habitual residence) will be applied. Exception (b) is related to accidents involving more than one vehicle, and the parties involved have a common "legal domicile", for example, they have the same habitual residence or registration in the same country.

International law scholar and professor Symeon C. Symeonides considers Rome II to be a unification and federalisation of the EU member states' laws, and he recognises its drafters' pragmatism in deciding that a rules-based system based on the "*lex loci delicti*" principle was a politically viable approach to unifying these laws (*Lex loci delicti* was the predecessor rule of *lex loci damni*, used in the European countries pre-Rome II).[20] However, Symeonides faults this pragmatism and argues that it is one reason Rome II is not flexible enough to free the *lex loci* rule of unnecessary arbitrariness and to enhance the workability of the whole system. One thing that attests to the arbitrariness of this rule is that some aspects of the common-domicile expression are too broad, but others are too narrow.[21]

In addition, the "manifestly closer" exception provided for under Article 4(3) is framed in geographical terms that have no relation to an overarching principle and worded in an all-or-nothing language that undermines its application on an issue-by-issue basis and makes it useful only in the easiest cases. According to Symeonides, balancing legal certainty and flexibility is a tough call, but Rome II focuses too much on certainty and may find it difficult to achieve it. In

[20] Symeonides, S. C. (2008). Rome II and Tort Conflicts: A Missed Opportunity. *The American Journal of Comparative Law*, 56(1), 173-222.
[21] Ibid.

Rome II, the EU has passed up an opportunity to exploit a rich codification experience and a sophisticated modern law for managing conflicts. Notwithstanding its shortcomings, Rome II is a major political feat in the unification and equalisation of the EU members' laws on the difficult subject of tort conflicts, and subsequent improvements could make it an effective legal regime.[22]

Notably, both the Hague Convention and Rome II Regulation have the "legal domicile" in common, but at the same time, this is a major difference between these two acts. Like the Convention, under the "legal domicile" it is meant the habitual residence of the vehicle, but under the Rome II, under the "legal domicile" it is meant the habitual residence of the parties.

2.2 Freedom of choice rules

Choice of law is a number of rules used to select which supranational act to use in a traffic accident case. Choice of law questions most likely arise in cases where the victim and the accused are from different states. As in this topic, the question is that which law is applicable, the Convention or the Rome II in case of cross-border accidents where the parties' are from different states and have an accident in a third state. A term that also goes with the choice of law rules is "forum shopping" which means that one the parties' might be interested in having their case handled in the court where they could have a favourable judgement.

2.2.1 Choice of law rule in the Rome II Regulation

Under Article 14 of Rome II, the parties in an accident have the freedom to choose the law that should apply to an accident, and they can exercise this freedom before or after an accident. By allowing accident parties to choose the laws they prefer, Article 14 reduces the chances that accident victims could be subjected to the laws of a jurisdiction in which there is an excessive bias towards the local laws or the local litigants and, therefore, it is yet another way in which Rome II adheres to the principles of a good choice of law system and prevents forum shopping. Article 14 also prohibits the exercise of parties' freedom in a manner that could undermine the rights of other people. By qualifying the parties' freedom to choose the law that should be applied to an accident, Article 14 seals the loopholes whose exploitation could subject other

[22] Ibid., 180.

people to the harm that would result from the bias towards local laws and local litigants. This may be especially important in cases of cross-border traffic accidents.

Professor Thomas Kadner Graziano insists that by allowing the parties to an accident to choose the applicable law both *ex-post* and *ex-ante,* Article 14 offers a modern approach that is centred on parties' freedom of choice. Article 14 also clarifies that parties have the freedom to agree on the law applicable to their contractual and extra-contractual engagements, and it sets out the circumstances under which the parties can agree on applicable law. Thus, Article 14 makes Rome II effective in creating a certain and predictable legal regime on torts. Professor also notes that the impact of the accident parties' freedom of choice will depend on the interpretation of Article 14. For instance, the parties to an agreement are not supposed to choose an applicable law in a manner that undermines the rights of third parties, and Graziano singles out insurers as one of the third parties for whom the interpretation of Article 14 could have significant implications. If the parties to an agreement have insurance cover, they are likely to be cautious when selecting the law that should be applied to a cross-border accident. The parties could, for instance, refuse to invoke their freedom of choice of if doing so is likely to risk their insurance cover. A reasonable and careful interpretation of Article 14 could transform the parties' freedom of choice into a significant rule of tort. [23]

According to Hay, it appears that the rationale for Article 14 is to encourage insurance companies to cooperate in cases involving cross-border traffic accidents. Hay notes that a commercial trader faces different circumstances. The trader can anticipate that his deals would create tort claims, and he might prefer that a foreseeable law govern these claims. Article 14 (b) recognises this preference and allows the free negotiation of a choice of law agreement before an accident occurs. Hay also suggests that the merchants who are parties to on-going relationships need to be assured of the law applicable to the tort claims arising from these relationships, and while Article 14(b) attempts to respond to this need, it does not offer the guidance on how to deal with the usual case in which the parties to an agreement tend to treat the choice of courts and choice of laws as general provisions of the agreement.[24] Hay argues that in this case, it is arguable that an agreement on the choice of law could be deemed to be "freely negotiated" in the

[23] Graziano, T. K. (2009). Freedom to choose the applicable law in Tort–Articles 14 and 4 (3) of the Rome II Regulation. In J. Ahern, William Binchy (Eds.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (113-132). Brill Nijhoff.

[24] Hay, P. (2007). Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation. Retrieved from http://www.simons-law.com/library/pdf/e/690.pdf, 16 March 2020.

manner that Article 14(b) requires. It is possible that in such a case, there could be a gap that could allow the use of contract law to determine whether an agreement that falls under the general provisions is consistent with the requirements of Article 14(b).[25]

Mo Zhang argues that Rome II shows how legal certainty can be enhanced by allowing parties to choose the law to be applied to a non-contractual obligation. A choice of law agreed by the parties to engagement is a fair measure of the extent to which the law is certain and predictable, and Rome II proves that this measure could be applied to non-contractual obligations in much the same way it has historically been applied to the contractual obligations.[26] On the other hand, Zhang adds that the transformative impact of Article 14 of Rome II is that it has blurred the traditional boundaries between contractual and non-contractual obligations as well as those between consensual and non-consensual obligations.[27]

The author agrees that legal certainty is a key element in society nowadays. In a rapidly changing world, citizens are in need of reassurance and knowledge that they are protected by law in case of such accidents. Rome II provides a good and fair choice of law rule to parties involved, so the law is certain and predictable. It offers freedom of choice under Article 14 and makes Rome II flexible when dealing with cross-border traffic accidents, which makes it perfect for the citizens.

2.2.2 Choice of law rule in the Hague Convention

The basic choice of law rule of the Hague Convention on the Law Applicable to Traffic Accidents (the Convention) is that the law applicable to a cross-border traffic accident is the law of the place in which the accident has occurred. This basic rule creates the potential of a bias towards local laws and litigants and, therefore, it goes against the standard suggested by Laycock and Korn. However, since the Hague Convention has a cascade of exceptions to the basic rule, this rule alone cannot be used to evaluate whether the Hague Convention is an appropriate choice-of-law system. Under Article 4, the law of the state of the registration of a vehicle is applicable to the claims of a driver, an owner, or another person who controls a vehicle and the claims of the passenger-victims of a vehicle involved in an accident and who habitually reside in the country in which the vehicle is registered. In addition, the law of the state in which a vehicle

[25] Ibid.
[26] Zhang, M. (2009). Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law. *Seton Hall Law Review*, 39, 861-917.
[27] Ibid.

is registered is applicable to the claims of the people outside the vehicle if these people are habitual residents of this state. The exception in Article 4 is applicable to all cases of accidents involving a single vehicle and in accidents involving more than one vehicle, as long as the vehicles have been registered in the same state. [28] In the event the vehicles involved in a cross-border traffic accident are registered in different states, the basic rule of the Hague Convention becomes applicable. While Article 4 reduces the chances that the cross-border accident victims would suffer the detriment of a bias towards local laws and litigants, it does not do much to ensure that the people in control of the vehicles involved in accidents are protected from this detriment.

Article 5 of the Hague Convention provides that the law that Article 3 or Article 4 has designated as applicable to the claims of a passenger is also applicable to the claims of the damages to property if this property was in the vehicle belonging to the passenger at the time of an accident. If other goods that do not belong to this passenger were in the vehicle at the time of the accident, Article 3 or 4 is used to determine the law applicable to the claims of the damage to these goods. These articles are also applicable to the claims of the damage to the other goods being ferried by a vehicle that has been involved in an accident. If there is a claim of the damage to the goods that are outside the vehicle that has been involved in an accident, the law of the state in which the accident has occurred will be applicable to this claim. However, if this claim relates to the property of a victim who was not in the vehicle at the time of the accident, the law of the place in which the vehicle is registered would be applicable to this claim. Article 5, just like Article 4, does not do a good job of ensuring that the need to protect the interests of one party does not expose the other party to the risk of the adverse outcome of a bias towards local laws and litigants.[29]

2.2.3 Choice of law rule in the Motor Insurance Directive

The choice of law rules of the MID only address the issues of insurance coverage, and this means that the same action between two parties is likely to create disputes on the applicable law. Unless Rome II is superior to the MID's choice of law rules, issues related to insurance coverage are supposed to be handled under the MID and other issues would be left to Rome II. Ultimately, a complex situation would arise, and the courts would have to decide the issues that fall within

[28] Papettas, J. (2012), *supra nota 6*
[29] Ibid.

the purview of the MID and those to which Rome II should be applied.[30] One of the overarching goals of the MID and Rome II is to simplify the handling of cross-border accidents. However, given that applying MID alone is not an effective way of handling these accidents, it appears that these legal regimes fall short of realising their implied goals.

Besides the complexities that result from the application of MID and Rome II, these two regimes could designate different laws depending. Under the general rule of Rome II, the place of damage determines the law that should be applied to the claims arising from an accident, but it is difficult to know in advance if the parties to an accident will have the same habitual residence or if the circumstances of the accident will be manifestly close to another law. Thus, there is uncertainty about whether the exceptions to Rome II's general rule will be invoked. The MID does not give accident victims the option of handling accident claims in the manner that Rome II does. While Rome II allows accident victims to choose the law that should be applied to insurance contracts, it does not have a mandatory requirement that victims should make this choice. In the MID, on the other hand, there is a mandatory requirement of the law that should be applied to insurance contracts. Specifically, the MID requires that if the insurance coverage in the location of the accident is higher than the coverage in the habitual location of the car that has caused an accident, the law of the habitual location of the car should be applied to insurance contracts. Rome II gives courts the discretion to consider whatever rules of safety and conduct were in place in the location of an accident, and it empowers them to treat these rules as factual matters and to apply them to the maximum extent possible. If the courts exercise this discretion, the interpretation of the facts of a cross-border accident could vary with the significance of these rules in determining the liability for accidents.[31]

There is also a considerable level of variation in terms of the rationale for the choice of law rules of the MID and Rome II. The rationale for Rome II's choice of law rules is to designate the applicable law in certain and predictable ways while addressing the interests of all the parties. The rationale for the MID's choice of law rules, on the other hand, is to address the challenges that hinder the free movement of people and vehicles within the EU and to ensure that regardless of the place in which an accident occurs, the victims receive consistent and comparable treatment. In most of the instances in which the European Court of Justice has had to handle

[30] Papettas, J. (2012). Direct Actions against Insurers of Intra-Community Cross-Border Traffic Accidents: Rome II and the Motor Insurance Directives. *Journal of Private International Law,* 8(2*)*, 297–321.
[31] Ibid.

difficult cases, the outcomes of the cases have turned on the rationale for the choice-of-law rules of the legal regimes on cross-border traffic accidents, and this means that these regimes are likely to result in different outcomes.[32]

[32] Ibid.

3. COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK APPLICABLE TO TRAFFIC ACCIDENTS

The inherent tension between the choice of law rules of the MID, Rome II and the Hague Convention can be resolved by looking at the choice of law theory. There are two premises of the contemporary theories of the choice of law.[33] The first premise is that when a court is adjudicating a dispute that has resulted from a multistate transaction, the court faces a choice between legal rules, not a choice between different jurisdictions. The second premise is that a court's decision should reflect the outcome of the analysis of the policies expressed in the choice of law rules.[34] States have a legitimate interest in having their rules applied to disputes with other states as long as the application would support the policies that motivated these rules. There is no consensus on how to assign weights to the claims made by competing states and how to balance states' competing claims to the right to exercise regulatory authority, but the broad agreement on the premises of the contemporary choice of law theories provides a common ground on how to determine the appropriate way to handle the tension between competing choice of law rules.[35]

The common premises of the choice of law theories have resulted from the changes to the approaches to dealing with the choice of law problem.[36] The classical approach to handling this problem entailed the determination of the limits to a state's power to define private rights.[37] As this approach proved untenable, the traditional theorists started framing the choice of law problems as territorial tensions that required a new solution.[38] The first steps towards reframing the choice of law problems eventually paved the way for the emergence of a revisionist paradigm that considered these problems nothing more than a special need to interpret statutes differently and to apply the common-law jurisprudence in a new area[39]. Under this new paradigm, all courts had to do was interpret a local statute in order to determine the extent to

[33] Alexander, G. S. (1979). The Concept of Function and the Basis of Regulatory Interests Under Functional Choice-of-Law Theory: The Significance of Benefit and the Insignificance of Intention. *Virginia Law Review,* 65(6), 1063-1091.
[34] Ibid., 1065.
[35] Ibid., 1066.
[36] Borchers, P. J. (1992). The Choice-of-Law Revolution: An Empirical Study. *Wash. & Lee L. Rev.*, 49, 357.
[37] Healy, J. J. (2008). Consumer protection choice of law: European lessons for the United States. *Duke J. Comp. & Int'l L.*, 19, 535.
[38] O'Hara, E. A., & Ribstein, L. E. (2000). From politics to efficiency in choice of law. *The University of Chicago Law Review 67, No.* 4, 1151-1232.
[39] Kramer, L. (1996). Choice of Law in Complex Litigation. *NYUL Rev.*, 71, 547; Whytock, C. A. (2009). Myth of Mess-International Choice of Law in Action. *NYUL Rev.*, 84, 719.

which it could accommodate the circumstances of the cases that came before them.[40] However, the choice of law cases was a different affair altogether.[41] In these cases, the courts had to contend with a conflict of law problem that not only necessitated the consideration of a local statute but also mandated the examination of a foreign rule that seemed to be at odds with the local statute. In the cases whose circumstances necessitated the comparison of a local statute with a foreign one, the courts had to examine the extent to which the foreign statute was consistent with the circumstances of these cases. Framing this new paradigm that all courts had to do was interpret a local statute in order to determine the extent which it could accommodate circumstances of the cases that came before them is a real breakthrough, because it does not only make courts decisioning easier, it makes the whole system much more logical.

In the new paradigm, the choice-of-law problem has transformed into an issue of interpreting incompatible statutes.[42] This paradigm considers legislation as a social instrument that facilitates the realisation of the ends that lawmakers have in mind. In interpreting statutes, therefore, there is a need to pay attention to the goals that a statute was intended to achieve.[43] If a statute has a rule, the meaning of the rule is only clear to the extent that its purposes can be understood and its application in particular circumstances can be evaluated.[44]

From a functional perspective, a choice of law rule should presume the functional relevance of the rule to the prevailing socio-economic circumstances.[45] However, an excessive focus on the functionality of a rule could prevent the consideration of the evolution of the purposes of the rule. In order for a court to determine how to apply a choice of law rule, it ought to consider the historical changes in the rationale for the rule and to consider how its interpretation of the rule

[40] York-Erwin, G. G. (2009). The Choice-of-Law Problem (s) in the Class Action Context. *NYUL Rev.*, 84, 1793.
[41] Symeonides, S. C. (2007). The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons. *Tul. L. Rev.*, 82, 1741; Symeonides, S. C. (2007). Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis. *Willamette L. Rev.*, 44, 205-228
[42] Green, M. S. (1994). Legal Realism, Lex Fori, and the Choice-of-Law Revolution. *Yale LJ*, 104, 967-984
[43] Dane, P. (1987). Vested Rights," Vestedness," and Choice of Law. *The Yale Law Journal*, 96(6), 1191-1275.
[44] Yonover, G. J. (1996). The Golden Anniversary of the Choice of Law Revolution: Indiana Fired the First Shot. *Indiana Law Review*, 29(4), 1201-1212.
[45] Symeonides, S. C. (2009). Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should. *Hastings LJ*, *61*, 337-361.

could affect the ability of the rule to continue fulfilling its purposes in the light of social changes in the future.[46]

In its attempt to solve the problem of cross-border traffic accidents, the Hague Convention draws heavily on the tenets of private international law, but it falls short of a good standard for addressing the monumental problem it seeks to solve. The Rome II and MID are legal frameworks that seek to correct some of the shortcomings of the Hague Convention, and they do so by creating flexibility in the choice of the law applicable to cross-border traffic accidents. Although these frameworks represent some excellent steps forward, there is room to improve them and enhance their resilience to the emerging challenges. [47]

Considering that the Convention lacks the possibility for the parties involved in the traffic accident to decide upon applicable law by mutual consent – the Convention remains far away from the Rome II from the point of this rule in author's opinion.

The author agrees with Professor Graziano, who insists that by allowing the parties to an accident to choose the applicable law both *ex-post* and *ex-ante*, it offers a modern approach that is centred on parties' freedom of choice. Thus, Article 14 makes Rome II effective in creating a certain and predictable legal regime on torts.[48] Although Rome II and the Convention have some similarities, for example, Article 8 of the Convention and Article 15 of the Rome II Regulation, the general rule in the Hague Convention should be worded more precisely. In today's fast-changing world, keeping up with the changes is crucial – one possible solution would be to update the Convention, adding the rule to give the parties possibility to decide on applicable law by mutual consent. This would refresh the Convention and also give freedom of choice to the citizens of contracting parties of the Convention. This also would benefit citizens who sustain damage in a country where the Convention applies, both of the parties involved have their habitual residence outside of the contracting parties of the Convention. For example, if two Estonians with Lithuanian vehicle registration plates would have a traffic accident in Estonia, they might be interested in applying Estonian law, and not start arguing under Latvian law just

[46] Roosevelt, K. (1999). The Myth of Choice of Law: Rethinking Conflicts. *Michigan Law Review*, 97(8), 2448-2538; Von Mehren, A. T. (1977). Choice of Law and the Problem of Justice. *Law and Contemporary Problems*, 41(2), 27-43; Hill, A. (1985). The Judicial Function in Choice of Law. *Columbia Law Review*, 85(8), 1585-1647.
[47] Krvavac, M. *The Hague Convention on the Law Applicable to Traffic Accidents and Rome II*. https://scindeks-clanci.ceon.rs/data/pdf/0350-8501/2018/0350-85011879141K.pdf
[48] Graziano, T. K. (2009), *supra nota 23*

because the place where the damage occurred was Latvia. Solely adding this rule and opportunity, would make handling cross-border traffic accidents more efficient and unambiguous. Considered this, the author concludes that the Article 3 should be reformed by adding an exception to it: „Where the person claimed to be liable, and the sufferer both have their habitual residence in the same state when the damage occurs, the law of that state should apply."

Article 28 of Rome II creates only uncertainty with respect to its interaction with other international agreements and in particular the Hague Convention. For those Member States who are contracting parties of the Convention, the Convention will be applicable rather than Rome II. So for common understanding, the Rome II Regulation Article 28 should be reformed. It should say clearly that in case of cross-border traffic accidents where the damage occurred in a state which is contracting party of the Convention, but the parties involved habitual residence of the parties involved is in another state, they should have the freedom to choose the law of their habitual residence state. As of that, the author suggests rewording Article 28 (2) that: "However, this Regulation shall, as between the Member States, overrule conventions if such claims arise and the applicable law is under question."

Claims arising from traffic accidents that are not dealt through insurance, the percentage of such claims is very small. It would be another reason to use only Rome II because the majority of claims will be dealt under the Motor Insurance Directive. MID offers claims representatives in each Member State, and this would give claimants easy access to legal advice and claim handling, which will give claimants certainty that their claim will be handled and most likely they will get their damages reimbursed. This also is one point how handling cross-border traffic accidents are already more efficient and unambiguous than it was before the MID.

The author concludes that reforming or some kind of change is inevitable. MID is already a good solution and as most of the claims will never end up in the court – MID offers a fast and reliable solution to claim handling and citizens can freely travel around EU without worrying about the laws applicable if they are involved in a car accident. Rome II would be the best option if the abolition the Hague Convention would be an option, but as it is such a complicated system and it has many contracting parties, it seems to be almost impossible just to retire the Hague Convention so that there would be only one supranational legal act ruling the cross-border traffic

accidents. But as long as both supranational legal acts coexist, it is a perfect opportunity for forum shopping, this in response reduces the predictability of the applicable law.

CONCLUSION

The legal framework applicable to the cross-border traffic accidents in the EU encompasses the choice-of-law rules of the Rome II Regulation, the Motor Insurance Directive, and the Hague Convention on the Law Applicable to Traffic Accidents. The MID has an exclusive focus on the insurance coverage for the losses resulting from the accidents caused by the vehicles operating in the EU, while Rome II and the Hague Convention address the factors that should be considered in order to determine how to handle the claims arising from cross-border accidents and what law to apply. The exclusive focus of the MID could be one reason it has a spectacularly good alignment with the ideal standard of a good system for the choice-of-law.

By way of reviewing and analysing the Rome II Regulation, Motor Insurance Directive and the Hague Convention the Author concluded that the Rome II is significantly more preferable when it comes to just about all aspects of applicable law and choice-of-law rules, particularly due to its novel and contemporary approach, when compared to, for example, the Hague Convention. There are some areas of overlap between Rome II and the Hague Convention, and Rome II seems to be a better choice-of-law system than the Hague Convention. The superiority of Rome II over the Hague Convention arises from Rome II's apparent effectiveness in sealing the loopholes that could subject accident victims to the detrimental effects of a bias towards the local law and the local litigants of the place of a cross-border accident. Concerning the latter, the Hague Convention is the legal act that is most in need of reform, particularly when it comes to the wording of the general rule. Since the main focus is placed on determining where the accident occurred, and because the free movement principle allows people to cross Member State borders more easily, it may prove to be difficult to determine exactly where the accident occurred and what legislation to use in a specific case.

The author suggests two possible solutions:

1) Reforming the Hague Convention by adding an exception to Article 3 – Where the person claimed to be liable, and the sufferer both have their habitual residence in the same country when the damage occurs, the law of that state should apply.
2) Reforming the Rome II Regulation Article 28 – However, this Regulation shall, as between the Member States, overrule conventions if such claims arise and the applicable law is under question.

Legal certainty and consistency are important for EU citizens. *Lex loci damni* suffers few and limited exceptions, which makes it the perfect choice-of-law in the author's opinion. Governing the applicable law to cross-border traffic accidents is the main advantage of Rome II Regulation. But as long as Rome II Regulation and the Hague Convention coexist in Member-States, the applicable law in case of a cross-border traffic accident will be difficult to predict for citizens and so will be the outcome and the time period of the case handling.

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