

Communitarisation of Private International Law Rules on Party Autonomy in European Union

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Abstract

The Party Autonomy is an authorization of the parties to agreeably choose the applicable law and International competent Court in order to regulate the mutual rights and obligations within Private International Law. In the field of Private International Law, Party Autonomy is a complete and approximate decisive fact. Unlike other binding circumstances Party Autonomy is party's subjective choice of law which potentially indicates to selected law (lex voluntatis). The lex voluntatis application occurs only if parties agreeably use the opportunity of choosing the applicable law. Party Autonomy is a manifestation of the decisions of legal entities to take advantage of this opportunity.

Key words: party autonomy, Private International Law, European Law, communitarisation.

I. Introduction

The Party Autonomy produces legal effects as well as any other statement of will (regardless its substantive or procedural character), although pointing to the applicable law of domestic or foreign country. The chosen law is applicable in its total (including imperative and dispositive rules). ¹Party Autonomy in Conflict of Laws is a primarily specific solution in contractual relations with foreign element, by which the parties themselves determine the contractual statute. In some areas of conflict of laws, which do not belong to the Contract Law, the Party Autonomy to determine the applicable law has limited effects. Thus, German law recognizes the effects of Party's Autonomy in the matter of conflict of laws in testimonial inheritance of real estate located abroad, in issues of general marriage effects, in determination of law applicable to non-contractual liability for damage compensation,² while the Swiss Federal Act of Private International Law, provides the Party Autonomy as a collision solution in: testamentary inheritance, for substantive effects of marriage, the acquisition and loss of property rights in movable property, non-contractual liability for damages, material effects of spouses and persons cohabiting.³

A. Party Autonomy and the Development of Private International Law

Rules of Private International Law have created a doctrine that was later, very cautiously accepted by jurisprudence.⁴ In the abundance of scientific debate first major standpoint of issue of Private International Law are contained in the works of post-glossators (commentators).

¹ M. Stanivuković, M. Živković, *Private International Law-general part*, (Belgrade, 2004), 148.

² According to the art 25, para 2 of Introductory Act of German Civil Code for real estate located in Germany, testator may chose one of the disposal forms of the German Law in case of death. See also art 14, and art 42.

³ According to the art 52 of Federal Act on Private International Law, applicable law in matrimonial property regime is the one chosen by the spouses; See also art 92, section 2 and 95, art 104, art 132.

⁴ H. Perelman, *Juristische Logik als Argumentationslehre*, 1979, 91.

The introduction of collision Party Autonomy in the area of Conflict of Laws is related to the name of the French theorist Charles Dimulen who continued the work of commentators.

In his extensive commentary of the entire Code of Civil Rights Dimulen address the question of contractual statute, indicating the greatest importance of *lex loci solutionis*. However, the theory is traditionally emphasizes the contribution of the theorist in the decision of a matrimonial property regime, by which evaluation of rights and obligations highlights the will of the parties as the need to resolve the conflict statute. Dimulen in the dispute, held that only the Paris statute should be applied as it is in that area of application of this statute was the first joint residence of spouses, justifying it by qualification of marital property regime as tacit agreement that should be evaluated by legal norms of the first residence of the parties.⁵ In the theory of Private International Law, Dimulen is considered as the creator of Party Autonomy in resolving of statute conflict even though he has primarily relied on this principle to justify the application of the Statute of Paris in all the contracts that has been concluded in the city area.⁶

The first codifications of Private International Law mostly take statutory theory studies. Austrian General Civil Code (ABGB) provides various collision solutions to determine the contractual statute depending on the contractor's origin or on the place of the conclusion of the contract. The Code refers to the *lex autonomiae* only if the contract is concluded in domestic country between foreigners or abroad between foreigners and domestic nationals.⁷

The influence of the party's autonomy to determine the applicable law was, in the XIX century concern of eminent theorist of German origin, Carl Friedrich von Savinji whose work laid the foundations for the solutions of Conflicts of Laws referring to the right that a juridical aspect has the closest relationship with.⁸ Savinji assumes that any legal relationship should be localized to the territory of the country and to determine that place by induction method. Savinji recognizes only indirect importance to the Party Autonomy for resolving conflicts of law, and only if the parties determine the venue of the contract.

Italian theorist Pasquale Stanislavo Mancini brings the idea of nationality in Private International Law. Accordingly, each state would have to recognize the specificity of rights, culture, habits and morals that bind a person to a nation state.⁹ Mancini states that this principle applies in the strict sense of the imperative rules while the dispositive law also applies the principle of free will and autonomy of the parties, on the basis that such relationships as the contractual relations, parties can mutually subject it under certain to some applicable law. Mancini modern teaching on conflict of law which is based on three guiding principles: the nation, sovereignty and autonomy of the will, to a large extent contributed to the acceptance of collision law characters of Party Autonomy.

Doctrinal teachings had a significant influence to the adoption of normative acts of individual countries to the point of successful codification of private international law. The collision legal autonomy accepts case law and some national laws with the time distance,¹⁰ so that the authority of the parties, as their subjective right to make a choice of applicable law, takes on the character of the primary modes of circumstances in determining the law applicable to contracts in most comparative Private International Law. Development trends of modern European, Community law go towards expanding the scope of application of party autonomy.

⁵ Batiffol/Lagarde, *Droit international privé*, I, 378. Dimulen has given such advice in the litigation of de Ganey spouses in 1525.

⁶ Emergence of party autonomy some theorists associate with the period of liberal capitalism. Seein M. Rockomanovic, „Will of the individual and the determination of the applicable law in the relations of Private International Law”, Collection of papers, Faculty of Law, Nis 2005, 61-71.

⁷ Para 34-37.

⁸ Savinji presented different approach in resolving conflict of laws in: *System des heutigen Roemischen Rechts*, (1849.volumes VIII).

⁹ Batiffol /Lagarde, (no. 5), 268.

¹⁰ *American Trading Co. C. v. Quebec Steamship Co* (Grands Arrêts de la jurisprudence française de dip, 3, in 1998, 83 ff). The Court of Cassation for the first time will accept autonomy as a crucial fact which indicates the applicable law.

B. *Lex autonomiae* - Mutually Selected Applicable Law

The principle of Party Autonomy, which authorizes the parties to make a choice of the applicable law, is the generally accepted collision method of resolving conflicts of law for contractual relations in contemporary Private International Law. Contractual relations are regulated by the National law, so that the focus is on the property and legal sanctions and not on personal sanctions, thus conflict of laws resolving is not in the service of broader principles and general social goals, as in the case of statutory terms.

Despite internal regulation of private legal relations the Party Autonomy has increasingly only theoretical significance, at the international level its gaining importance. The reason for this is the fact that National law to be applied in a particular case must be determined in terms of conflict of laws, and it is usually not enough understandable for the business world, and therefore is not suitable for business transactions. Therefore, the rules of conflict of laws meant to alleviate the plight of the contracting parties and provide a solution, referring to the law applicable to each specific legal relationship. Collision principles are national and extend the domain of unequal regulation, particularly in the areas of contract law in which the unification is not achieved. It is understandable that a large number of comparative legislation gives to Party Autonomy collision- legal character and courts and arbitration applies the will of parties as the criterion for the application of certain national or unified law.

Application of substantive Party Autonomy to the contract will incorporate dispositional norms of a particular legal system. Contrary to the view that the parties have the ability to affect only the dispositional norms and not the imperative legal norms of applicable law which choice depends on the legally collision norms objectively formulated¹¹ are those that will give to the Party Autonomy the collision legal character, thus of the party's will statement usually means a collision legal reference to the applicable law.¹² Collision Party Autonomy, as a purposeful method of determining the applicable law, especially in contracts, is leading to the application of the chosen law, which means that exclude the application of state law that would otherwise be applicable if there was not the choice of law. At the same it doesn't come to adjustments in the application of collision norms, but it comes to the choice of the applicable law *lex voluntatis*, to be implemented in its entirety. The Statement of Will appointing to the Applicable Law is the sort of collision solution of conflicts of law for the court or arbitration to decide the dispute on the rights and obligations of the parties. Parties mutually consent about the law by which will be dealt with potential or already created litigation, in compliance with the rule, keep in mind the realization of a common goal, achieving the interests that was the reason for establishing a mutual obligations.

International character of the contract subject can be considered as link whole facts that from one side includes more legal orders, and from the other side the whole of legal norms that are yet to determine. This concept leads to the application of the mechanism of Private International Law which indicates the applicable national law.

1. Theory and practice agree that the parties' agreement of applicable law choice is an independent legal entity *sui generis* the contract that is different from the host contract for purposes of determining the applicable law. Different views regarding the issue of determining the applicable law to assess the validity of the parties' agreement. In most, comparative law accepts that the applicable law for the parties' agreement is the law of the state that parties choose for the contract itself.

Swiss Federal Act on the PIL provides: " The choice of law must be explicit or safely derive from the provisions of the contract or the circumstances and moreover the applicable law is the one that is chosen."¹³

¹¹ Substantive conception of the nature of prevails in Latin America under the influence of well-known lawyer Bustamante. The Bustamante Code does not recognize collision legal character of the party autonomy, but the law applicable to contractual relationships determines by the peremptory norms according to the location of conclusion and execution of contracts.

¹² K. Sajko, *Private International Law*, (Zagreb, 2005), 142.

¹³ Art 116, section 2; art 27, section 4 of The German Law of Private International Law; art 57 of The Italian Law of Private International Law.

Determination of the applicable law for the evaluation of validity of the parties' agreement is the subject of doctrinal discussions with authors who express their opinion that this method cannot resolve the conflict of laws, based their remarks on the lack of grounds, accordingly on the existence of a putative basis (*putative lex causae*) to assess the validity of the agreement on the Choice of Laws. In theory and practice prevails the argumentation that *putative lex causae* is a positive right that objectively exists, regardless of whether his election was legally valid.¹⁴

2. Frames of Party Autonomy in Conflict of Laws are set by peremptory norms. Laws of the country of the court answer the question of when the parties can make the choice of applicable law.

Conflict of Laws norms, which authorizes the parties to choose the applicable law, and at the same time limits the choice according to certain criteria leads to the limited autonomy of the will. Setting the framework of Party Autonomy is an exception in comparative law, in contrast to the earlier period. Legislative, judicial and arbitral practice confirmed the commitment of unlimited autonomy in terms of parties' freedom of choice of the applicable law of any state for the assessment of the dispute. Although the protagonists in limited and unlimited Party Autonomy call to the fact that the parties so provide greater legal certainty and achieve objectivity, there is no doubt that the legislative restrictions exist in, for the country, major contracts. Such is, for example, the case of the Public Contracts autonomy of the will with a foreign element, since it is only theoretical.¹⁵

3. Private International Law *legis fori* determines the scope of parties' autonomy and according to the forum right assess the issue of connexity, that is whether the choice of law is conditional upon the existence of a connection between the main contract and the chosen law or in this respect doesn't exist any limitations. The modern codification of Private International Law does not require connexity so that the parties in the choice of the applicable law must not have in mind the connection of the contractual relationship and the choice of law, which means that parties may consider some other neutral law as applicable.¹⁶ Few countries stipulate connexity, in the selection of rights process, such as the case with the Polish law, which provides that the parties may choose the applicable law if it is related to the contractual relationship. This provision is elastically interpreted by theorists.

4. Regarding the time by the parties may agree on the selection of the applicable law and the possibility of changes to a committed choice of comparative Private International Law are directed towards giving the parties a possibility to express the collision autonomy of the will even later. The effect of subsequent changes already committed choice of the applicable law may begin from the moment of change or of the conclusion of the contract-*ex nunc* or *ex tunc* in accordance with the party's agreement.

In this sense it would be more appropriate to subsequent selection effects *ex tunc* as it would the entire duration of the contract be subject of one applicable law.¹⁷ Subsequent choice of applicable law or change of chosen law, should not be detrimental to the rights and interests of a third party or legal validity of the legal work.¹⁸

5. Will of the parties may be filed expressly in writing or oral consent. In accordance with that party may bring a special clause in the contract, enter into a separate agreement or to determine the applicable law by accessing general business conditions, typical of a business association agreement which contains a provision on the applicable law. In practice, the law considers that the parties can conclude a tacit agreement on choice of law. European modern codifications, such as the Swiss Federal Act on Private International Law, determine the choice of law must be explicit or safely derive from the provisions of the contract or the circumstances; except that the applicable law is the chosen one.¹⁹ Therefore, in certain circumstances, the applicable law may be determined and based on tacit will of the parties.

¹⁴ Batiffol/Lagarde, 573; F. Vicher, „Antagonism in Field of Contracts“, (Receuil de Cours, II, 1974, 46) ; Varadi, Bordaš, Kneževich, *Private International Law*, (Novi Sad, 2003, 376).

¹⁵ Ph. Fouchard, „Le responsabilité des constructeurs en droit international privé“ (French report on Egyptian days, 12-16 May 1991) Association Capitant no.20.

¹⁶ More about connexity Varadi, Bordash, Kneževich, op.cit, 373.; Sajko K, op.cit.,146. In business practice, the jurisdiction of the arbitration is most frequently negotiated and makes the Switzerland and France choice of law.; Eizner B., *Private International Law*, 1956, Zagreb, 105.

¹⁷ Lando, *The Conflict to Laws of Contracts – General Primciples*, 189 Receuil des Cours (1984) VI,317.

¹⁸ Swiss PIL Code (art.116.s.3); Italian PIL Code (art.57.s.1.); German PIL Code (art.27.s.2 p.2.).

¹⁹ See article 116.s.2; German PIL (art.27.s.3); Austrian PIL Code (art.35.s.1).

It must be derived, unambiguously, from the contract or the circumstances of the case such as contracting authority of a particular court or arbitration, place of enforcement of contract, joint place of the contract conclusion, the use of specific language in the contract, reference parties to a certain statutory provisions of the law, trade usage or general business terms and conditions of specified state, the language in which the agreement is made, the contracted currency etc.

6. Parties may determine the applicable law by the Party Autonomy to the whole contract or only of a part of it, as well as for different law applicable to the particular issues or parts of the contract. In fact, the parties can affect so. These issue is known as “Splitting of the contract” by selecting different legal frameworks in respect to different parts of the contract, or by selecting different applicable laws. Comparative Law contains provisions that generally accept partially collision reference to applicable law and based on the principle *maiores ad minus*.

The issue of “splitting of the contract” for the theory of Private International Law is disputed field of divided opinions, starting from the fact that this breaks one of the contracting entity and creates legal uncertainty,²⁰ to the view that in relation to the contract procedure law often differs from the material law and the law applicable to the form often differs from the law applicable to the content, so the “splitting of the contract” is entirely justified. The doctrine is consistent in that particular collision reference should refer to the individual sections of the contract, which can be separated from other units and by which are defined the specific issues of the contractual relationship.

C. The Limits of Party Autonomy

Collision effects of parties statement is mostly excluded in reference to the contracts regulated in a unique way by the sources of International law. Literature states international codification of the rights and obligations of the contracts of international transportation and primarily the Convention on Contracts for the International Carriage of Goods by Road.²¹ The effect of applicable law determined by the statement of will is limited in relation to third parties in the mediation agreement, the dealer agreement, and the contract of assignment.²² The Party Autonomy is excluded by substantive regulations even in stock business, keeping in mind that these are the specific tasks performed in special circumstances and are subject to special formalities.

1. Collision Party Autonomy produces actions and has limitations according to the law of the state who's Private International Law applies.²³ International transactions and legal matters with a foreign element are largely regulated by norms that must always be applied regardless of the will of the parties. For example, collision autonomy of the will is doubtful in public contracts on the performance of investment projects with elements of foreign.²⁴ Contracting authority, approval or ratification of such contracts, as well as budget authority, are acts separable from contract concluding process. Contrary to this process, managed by the law applicable to the contract, the mentioned acts are subordinated to the national law of state of capital works.

2. In the modern Private International Law theory all the more topical is the question whether collision Party Autonomy will might be accepted in the field of non-contractual liability for the damages, as it is the area cogent rights. The parties to the tort cannot agree on its disposition of something else than what the law requires. Traditionally, tort liabilities are subject to the law of adverse action- *lex loci delicti commissi* and the adverse effects *lex loci damn* so that the principle of the parties, until recently, was unknown to the conflict of laws in tort liability. Modern doctrine believes that there is room for collision legal autonomy in collision law of delict, and that the parties may after the occurrence of an adverse event to choose the law for evaluation of their non-contractual relationship.²⁵

²⁰ O. Lando, „The Conflict to Laws of Contracts – General Principles“, (189 Recueil des Cours ,1984,VI, 317); A.Schnitzer, *Handbuch des internationalen Privatrecht*, 1958, 626.

²¹ Adopted in Geneva in 1955.

²² According to The Hague Convention on the law applicable to mediation and representative contracts, party autonomy can be conveyed by ordering party and intermediary or representative.

²³ Opposite, A. Schnitzer (n 20) 627-632.

²⁴ Ph. Fouchard, (n 15), 20.

²⁵ A positive attitude towards collision-legal autonomy in tort supported by Dutch doctrine: Th.M. De Boer “Choice of Contract Law and Tort in the Netherlands”, (CCA Voskuil and Jawad, Hague-Zagreb-Ghent Essays 8 1991, 52). English and Scottish Law Commission in its report took also a positive attitude.

Party's autonomy in some sense precedes the unilateral choice of applicable law by the injured party in the selection of favorable right.²⁶ Comparative legislation sets collision rules with alternative decisive facts (*lex loci delicti and the lex loci damni*) which allow the application of law more favorable to the injured party. Parties' ability to determine the applicable law by their choice and exclude legislative collision solution, is not known in most national laws of collision. Federal Act on the Swiss Private International Law is in this respect one of the exceptions²⁷ limiting the parties autonomy to choose the applicable law after an adverse event, and only if that law is Swiss law. Case law has long stood on the notion that we should not accept the collision autonomy in the field of tort. It is a small number of countries whose jurisprudence accepts a different solution.²⁸

The revolution in this respect brings the building of communitarian law and the adoption of the EU Regulation on the law applicable to non-contractual obligations in the communitarization process of European collision law (Rome II).

3. Party Autonomy in Conflict of Law suffer some limitations with respect to certain issues of conflict of laws in the process of resolving the dispute at the competent state courts. When it comes to contractual disputes that are entrusted to arbitration resolving it is much broader. The principle of party's autonomy, accepted by most modern legal systems, represents a framework and assumption of different trends of substantive law by the international commercial arbitration. It can be a tool for the selection of a national law and can be the basis for deciding *ex aequo et bono*, according to *lex mercatoria* or the application of general principles recognized by the enlightened people in accordance with the tendency of removing the brake to the free development of economic life. Various forms and content of the autonomy of the will depends on whether the parties have experience in business and in resolving the disputes in international commercial arbitration, on the economic situation in which the parties are, on expert and professional relations with a foreign partner in signing and execution of the contract, etc. The concept of unlimited party autonomy is particularly justified in the field of arbitration. In foreign arbitration the Party Autonomy means freedom to choose non-national rules, which the parties may agree before or after the dispute has arisen, by providing compromise clauses in the contract or by the conclusion of a separate compromise.²⁹ Arbitration agreement entered the line of formal legal affairs as the expression of the need for legal certainty.³⁰

The arbitration decision within International Chamber of Commerce in Paris, on the occasion of one investment dispute was the fact that: "Silence of the parties on the issue of the applicable law leads to the assumption that they recognized it is not necessary to pre-determine the applicable law by which the court ruled on one or the other issues raised in this case.

²⁶ P. Bourel, "Du rattachement de quelques délits spéciaux en droit international privé" (RCAD, 1989, Volume II, 214, 284).

²⁷ Art132.

²⁸ A positive attitude has Belgian and Dutch case law but as an exception from the rule of *lex loci delicti commissi*. Specific in this respect is the decision of the French Court of Cassation in the case Rojo versus Caron in which precisely the party's choice of applicable law has constituted a primary solution of resulting conflict of laws. It was as follows: "motorcycle driven by Mr. Caron, and a car driven by Mr. Rojo collided in Djibouti and in this clash Ms. Caron suffered serious bodily injuries therefore initiated proceedings in French Court for the indemnity with reference to the provisions of French law. By the first instance decision her request was approved and prosecutor appealed to it claiming that the court misapplied the French law because under the provisions of Article 3 of the Hague Convention on the law applicable to road traffic accidents should apply the law of the State in which the accident occurred. All interested parties were French citizens and the court applied French law even though according to the Hague Convention should apply the law of the state where the accident occurred, given the decisive factor of tacit autonomy of the parties on the relevance of the French law. The Court decided that the parties, regarding the request by which are free to choose the applicable law different from the law to which International Convention of collision provisions directs."

²⁹ J. Perovic, "Contract on International Commercial Arbitration", (Belgrade 2002).

³⁰ S. Perovic, "Form of the arbitration agreement and the means of proof", (40 years of STA in PKJ Yugoslavia in Belgrade 1987, 2-27).

After all, if it is given the authority to act as a friendly mediator, as the agreement determines, the arbitral tribunal doesn't have to decide on the law that will govern the contractual relations between the parties. On that basis, to resolve questions raised by the dispute, the arbitral tribunal shall apply the widely recognized general principles of autonomous commercial law without particular reference to a system of specific law collision norms."³¹

II. Party Autonomy in the European Union Instruments

Harmonization of legal norms in the field of Private International Law of the European Union is characterized by partial approach. Before the harmonization of substantive contractual law and tort occurred adjustment of the Private International Law of the Member States.

To unification of European Private International Law significantly contributed the previous activity of the Hague Conference on Private International Law in adoption of a series of international treaties in the sphere of private legal relations with an international element.³²

It should be noted that other conventions are influential in the subject matter of Private International Law, such as the European Convention on Nationality and especially the Convention for the Protection of Human Rights and Fundamental Freedoms.³³ A major influence to the construction of the European collision law provisions had the adoption of national collision norms. Unification of EU law in general, and thus the unification of Private International Law, is derived from the provisions of the Treaty of Rome on establishing the European Community, even since its adoption has been more than half a century ago. It is primarily about the unification of Commercial Statutory Rights and the rules of the exequatur on court and arbitration decisions.³⁴ In the area of the Contract Law collision in 1980 the Rome Convention on the law applicable to contractual obligations with the purpose of standardizing collision solutions in the contractual obligations of the member States, was adopted. Along with the Convention, the two Protocols on its interpretation were signed. Protocols were enforced in 2004, which enabled certain courts of the Member States to seek the interpretation of the Convention by the Court of the European Communities.³⁵ Until the adoption of the Regulation Rome I, the Convention is applied regardless of whether a party has a residence or head office in the Contracting State, so that was enough to resolve the dispute in one of the Contracting States. Rome Convention is applied in the cases of all the member states, some of which are fully accepted convention solutions regarding acts of the internal private international law, while others regulated the implementation of the convention by the internal private international law.³⁶

The Convention foresaw modern collision solutions for contractual obligations, along with which is, for interpretation of the Convention, drafted a report by the eminent theorists of private international law Giuliano and Lagarde, and listed along with the convention in the Official Journal of the European Community.³⁷

Rome Convention has regulated the question of the law applicable to contractual relations, while the notion of the contractual relationship has been determined in the spirit and meaning of the Convention.³⁸ Relative to other international agreements the Convention provides that it "does not affect" the collision solutions for contract obligations in specific areas that are regulated by special acts of the European Community or by National Law of the Member States, as well as the implementation of international treaties in which the State is Contracting State, or is about to be.³⁹ Convention decisions have had to apply regardless of whether the terms refer to the governing law of a Contracting State or to the law of a third country.⁴⁰

³¹ S. Jarvin, observation of the case of CCI no.3267 (collection of ICC arbitral awards 377).

³² European Convention on Information on Foreign law (1968), European Convention Abolishing the Requirement of Legalization of documents issued by diplomatic or consular agents (1971), European Convention on State Immunity (1972), European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and restoration custodial relationship (1980), European Convention on bankruptcy (1990).

³³ Convention (1950) is in force, nearly in all European countries.

³⁴ Art. 54, (g) and 220.

³⁵ Art2 of First Protocol and art 3, section 1.

³⁶ Belgium, Denmark, Luxembourg, Germany, UK.

³⁷ M. Giuliano, P.Lagarde, „Report on the Convention on the Applicable Law to Contractual Obligation“, (O.J.C. 282.1980).

³⁸ A.V. Disedy, J.H.C. Morris, *Conflict of Laws*, (Oxford, II, 2000, 1204).

³⁹ Art. 20 and art. 21.

⁴⁰ Art. 2.

Pursuant to the provisions of the Rome Convention, the contractual statute related to a series of questions, such as the moment of contract conclusion, the legal validity or the validity of certain provisions of the treaty, as well as the issues of treaty interpretation, fulfillment of contractual obligations, consequences of partial or complete failure to fulfill contractual obligations, different types of termination of contractual obligations, the contract null and void.⁴¹ According to the law applicable to contractual relations or under a contractual statute, a legal presumption and burden of proving in the field of substantive legislation, should be evaluated.⁴²

The Convention excluded the application of *renvoi* institution i.e. responding and directing to further right with respect to all choice of law cases.⁴³ As regards the application of the Convention in countries with non-uniform legal system is stipulated that any legal area should be considered as a state in the process of determining the applicable law.⁴⁴

The decisive fact for determination of the applicable law according to the Rome Convention is the Party Autonomy and the right of typical contractual obligations holder.

The parties may choose the law applicable to contractual obligations in the explicit or tacit way so that the choice of the applicable law will be derived from the terms of the contract and the circumstances of the case.⁴⁵ In doing so, it should take into account the fact that the court jurisdiction or arbitration of a certain county is agreed, application of legal terms of a specific law, etc..

Material validity of choice of law agreement is subject to the selected applicable law.⁴⁶ For the issues of contractual capacity, the Convention in respect of contracting between persons who are in the same state if the natural person was capable according to the law of that State, provided that the natural person cannot invoke to his incapacity under the law of another state,⁴⁷ unless the other contractual party knew at the time of conclusion of the contract for its inability or was intentional.

Among the chosen law and the contract doesn't have to exist a connexity, and is allowed the so-called *splitting of the contract* so that the parties can subject the contract in whole under the applicable law or only the part of it.⁴⁸ As applicable law, the parties can only choose the law of a particular country, but it also provides the possibility of subsequent choice of the applicable law, whether as a change of already committed choice of the applicable law, or as a first choice of law.⁴⁹ In addition, any change of the applicable law must be in compliance with the Article 11a provision, so it cannot be prejudicial to any rights of third parties. The Convention allows the departure from the rules of chosen law, if those rules would be manifestly contrary to the Public Policy of the forum state.⁵⁰ In addition, the Convention bordered the field of application of the applicable law in relation to *compulsory regulations*. Namely, the party's choice of foreign law has no influence to the enforcement of law of the forum state that cannot be excluded by contract, that is to say, to the application of compulsory regulations.⁵¹ With the proviso that the effect can be produced by the compulsory regulations of the State with which the facts have the closest relationship, United Kingdom, Ireland, Luxembourg and Germany expressed a reservation. Solutions of the Convention does not limit only the application of the *lex fori* rule, which forcibly regulates the facts, regardless of the law applicable to the contract.⁵²

⁴¹ Art. 8, section 1; art. 10 of the Convention.

⁴² Art. 14, section 1.

⁴³ Art. 15.

⁴⁴ Art 19, section 1.

⁴⁵ Art 3, section 1.

⁴⁶ Art 8, section 1.

⁴⁷ Art 11.

⁴⁸ Art 3, section 1.

⁴⁹ Art 3, section 2.

⁵⁰ Art 15.

⁵¹ Art 3, section 3.

⁵² Art 7, sections 1 and 2.

The following restrictions are related to consumer and employee protection, meaning that these parties by the Choice of Law cannot be deprived of the protection given by the compulsory state regulations on the habitual residence of the consumer and the state whose law is applicable subsidiary in relation to the employee.⁵³ Finally, the Convention provides the limitation on compulsory *legis situs* rules regarding the form of the property contracts.⁵⁴

If the parties have not chosen the applicable law, the *lex rei sitae* shall be applied as the most closely connected.⁵⁵ For the contract of carriage of goods assumption is that it achieves the closest relationship with the state in which the carrier has its principal place of business at the time of conclusion of the contract, if it is a place of loading, unloading or principal business place of the sender thereby this presumption is rebuttable.⁵⁶ Subsidiary convention collision solutions in relation to consumer contracts are related to applicability of consumer regular residence law, and for the works contract will be applicable the law of the state where the work is done - *lex loci laboris*. If the employer does not perform regular work in one state or perform work on the open seas, the applicable law is the law of the state of the business residence in which the employee is employed.⁵⁷

Termination of contractual obligations is subject, according to the Convention, of the contractual ordinance.⁵⁸ Law applicable to the assignment of receivables includes evaluation of rights for the assignor and assignee obligations i.e. for the assignor and assignee and effects of assignment to the debtor.

The Convention for the first mentioned provides as applicable law the law applicable to their contract as well, while for the effects of assignment to the debtor intended application of the law applicable to the assignment of claim.⁵⁹ According to the law applicable to the assignment of claim have to appreciate the portability of claims, the existence and content of the claims, the relationship between the recipient and the debtor, the debtor's liberating effect of commitment, indicating a tendency of debtor protection.

For legal subrogation or authorization of a third party to demand a settlement as a new creditor of the debtor, the applicable law is the one that governs the obligation of third party to pay to the old creditor.⁶⁰ Contents of assignment of claims in cession, as well as in subrogation, and obsolescence issues are regulated by the law applicable to a claim itself.⁶¹ The compensation is subject to contractual statute, and only if the claims are subject to the same applicable law, whereas the opposite convention rules could be applied, or applied to internal national private international law of the Member States.

However, a combination of partial approach and collision solutions soon has shown to be poor, so that place an emphasis that collision legal access for certain sectors of contract law is inadequate. Namely, the Committee for Economic and Social Affairs on the subject "consumer in the insurance market" made the criticism that has been created unimaginable tangle of norms and guidelines on grading.⁶² The same applies to the Rome Convention by which collision legal solution stopped halfway.⁶³

A. Party Autonomy According to European Conflict of Law Rules after the Treaty of Amsterdam

⁵³ Art 5, section 2 and art 6, section 1.

⁵⁴ Art 9, section 6.

⁵⁵ Art 4, section 3.

⁵⁶ Art 4, section 4.

⁵⁷ Art 5, section 3 and art 6, section 2.

⁵⁸ Art 10, section 1 (d).

⁵⁹ Art 12, sections 1 and 2.

⁶⁰ Art 13 sections 1 and 2; Kropholler J., *Internationales Privatrecht*, (Tübingen, 4, 2001) 469.

⁶¹ M. Duitoit, „Commentaire de la loi du 1987“, (3, 2001,469).

⁶² C 95/79 sub. 2.3.1.2.3, and the Report of the Committee on law and the Internal Market of the European Parliament on the approximation of private and commercial law of the Member States of the November 16, 2001 (A5-0384/2001finaly) relating to the Commission Announcement on European Contract Law of July 11, 2001 (COM 2001 398 final) and insurance contracts (9/14) on that private international law is no longer a suitable instrument for the internal market, which is already integrated to such an extent.

⁶³ O. Lando, "European Contract Law Principles", in the working document of the General Directorate for Science Research of the European Parliament "investigation on rules of private law in the EU with regard to discrimination and the creation of the European Civil Code".

The problem of determining the contract statute within tort statute⁶⁴ is considered as the most interesting in doctrinal discussions. In the process of equalization of national rules, and communitarization of European Private International Law, the Commission of the European Union has given priority just to harmonization of rules on the law applicable to contractual and non-contractual obligations. To this purpose, the Commission has set up a group of experts who has prepared the draft convention on the law applicable to contractual and non-contractual obligations. The adoption of the Rome Convention on the law applicable to contractual obligations of the Member States has clearly expressed a difference of opinions regarding the collision regulation on non-contractual obligations.

After the Treaty of Amsterdam, reform of European collision rules enacted significant changes in the field of applicable law determination.⁶⁵ The Rome I Regulation on the law applicable to contractual obligations, which replaced the Rome Convention on the law applicable to contractual obligations, for the first time introduced special rules for determining the law applicable to certain contracts. EU Regulations are immediately applicable in the Member States from the date of their enforcement and are not included into the internal legislature.

The Regulation No.593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations is a fundamental source of collision rules for all contract obligations in the EU. The Regulation entered into force on December 17th 2009, and it was the first time that rules for determining the law applicable to certain contracts were set strictly.⁶⁶

It replaced the Rome Convention which represented the international treaty and not a legal act of the European Union. According to the provisions of the Rome I Regulation for contractual relations is applicable the law primarily chosen by the parties (Article 3 (1) of the Regulation). Due to it an important role is given to the firmly established principle of a firmly established principle of party autonomy in the Private International Law of contractual obligations.⁶⁷ The Article 3 of Rome I Regulation, which determines the question of freedom of choice of applicable law, is not significantly different in the content compared to Article 3 of the Rome Convention.⁶⁸ According to the generally accepted interpretation of the provision the parties may choose any law even if it has nothing in common to the contract.⁶⁹ The only thing important is that the chosen law must be “the law in a technical sense and not general principles or any other set of non-binding rules”. Furthermore, the parties may stipulate that to the different parts of the contract will be applicable various laws that may be determined even after the main contract is concluded, if this choice does not affect the rights of third parties.⁷⁰

According to the Regulation, the choice must be explicit or (“clearly demonstrated by the terms of the contract or the circumstances of the case”). This wording is only slightly different from the Rome Convention, by which was determined that the choice must be explicit or must be (“*demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case*”). Formulation for governing tacit choice of applicable law was changed due to the inequity of practice in accordance to the Rome Convention. In interpreting this provision in relation to the other courts of EU countries is noticeable considerable flexibility of German and British courts.⁷¹

⁶⁴ P. Kahn, O. Freund, „Delictual Liability and the Conflict of Laws“, Collected Courses of the Hague Academy of International Law, 1968., II, 37.

⁶⁵ The Treaty of Amsterdam is concluded on October 02. 1997. As the Treaty of Amsterdam amending the Treaty on European Union, the Treaty on establishing the European Community (Consolidate Version of the Treaty on European Union and of the Treaty Establishing the European Community, 2006) as well as some of the related legal documents (OJ EC 1997 C -340/01).

⁶⁶ OJ L 177, 4.7.2008, p. 6-16.

⁶⁷ The preamble to Regulation (p.11)... “Freedom of parties to choose the applicable law should be a basic principle of the composition of collision rules for contractual obligations”.

⁶⁸ P. Lagarde, A.Tenenbaum, „De la convention de Rome au règlement Rome I“, (Revue critique de droit international privé, 97, 2008), 735; H. Heiss, *Party Autonomy, Rome I Regulation, the Law Applicable to Contractual Obligations in Europe*, (München,2009,1-17).

⁶⁹ This understanding of the autonomy of the parties is related to the judgment in the case Vita Food Products inc v Unus Shipping Co Ltd.

⁷⁰ Art 3, section 1 and art 3, section 2 of the Rome I Regulation.

⁷¹ Green Paper of 14 January 2003. on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, COM(2002) 654 final.

The wording that parties agreement on the competent court may be only one of the factors indicating to tacit choice of applicable law provides some guidelines on the tacit choice of law, but does not provide unambiguous guidance how to determine the existence of tacit choice.

In the absence of an explicit or tacit choice of applicable law the court shall determine the applicable law on the basis of Article 4 of the Regulation. This provision differs from what was provided by the Rome Convention, the most in that for certain types of contracts provides special and strict rules. Pursuant to Article 4 of the Rome I Regulation the court shall:

1. For certain types of contracts the applicable law is pre-defined by strict rules (para 1); therefore, the court will first determine the type of contract and if there is any specific provision to that contract the application of this provision will determine the applicable law. There are special rules for the contract of sale and the distribution agreement:

a) for the contract for sale of goods the applicable is the law of the country of the habitual residence seller;

b) for the distribution contract the applicable is the law of the country of the habitual residence of distributor;⁷²

2. Other contracts refer to characteristic transaction (para 2).

3. When it is apparent that the contract is more closely connected with another state than the one specified by section 1 and 2 the law of that State will apply (Article 3).

⁷² Unlike the Rome Convention Rome I Regulation provides special rules determining the law applicable to distribution agreements. Until the adoption of the Rome I Regulation national courts had no strictly defined collision rule, but it was necessary to determine which of the two parties perform typical transaction i.e. to which state the contract has the closest connection. In contrast, applying the Rome I Regulation courts must categorize the contract and then to submit it to certain strictly determined collision rule, without questioning what party) provides the characteristic obligation. The practice of European national courts saying that the courts of different countries observe different characteristic of transaction. Thus, French, English and Italian courts “centre of gravity” in the obligation sees a manufacturer by binding distribution primarily to the transfer of goods. On the other hand, German, Dutch, Austrian and Spanish courts determined the rights of retailer as the applicable declaring in favour of the fact that transfer of goods is not the meaning of distribution. Courts often investigated which elements of the contract are the most important for the parties to the economic purpose of the contract, and the dynamics of the execution of the contract. It should be noted that the courts proceed from the traditional understanding of the characteristic of transfer, according to which the characteristic of transfer is on the side of the contracting party which carries out the financial obligation. Bearing in mind that any distribution agreement must be followed by the contract of sale of goods wherein the distributor pays to the producer, and that is the focus of the relationship between dealer and manufacturer lies on the manufacturer. European legislator clearly stipulates by the Regulation that the center of gravity of distribution agreements is on the distributor, which is in accordance to the court practice that put emphasis on the dealer’s obligation, even before the adoption of Regulation. On the other hand, the distribution agreement is the most closely connected with the state of distributors in all its elements and is less likely to occur the activation of deviation clause and the application of other applicable law, which together lead to a uniform choice of law for contracts in the European Union. Remarks that could be put in relation to the decision of the Regulation in the field of distribution agreements rights are primarily the lack of a clear definition of the contract, which could be considered as an distribution agreement. When categorizing contracts courts cannot invoke to national law, and yet no other source of European law has no clear and unambiguous definition. Rome I Regulation establishes that it is just about a contract for services, but such qualification is without clear guidance on the content of the contract. In addition, by the distribution agreement is usually concluded additional contracts of sale of goods between retailers and manufacturers. Ownership of the goods to be distributed is transferred to a special sales contract. General collision rule of Rome I Regulation on such contracts is always the right of vendor as a carrier of characteristic contractual obligation (Article 4 (1) b). This situation is practice realistically brought to the same disputes has two different applicable laws - to the content of distribution contract applicable is the law of the State of a deals residence, and to the rights and obligations of the contract of sale applicable is the law of the state of manufacturers residence (as the seller in the contract). The court has the option to apply in such a case deviations clause from the Article 4 (3) of the Rome I Regulation, on the basis of which the strict rules of collision can be waived “if the circumstances of the case showed that the contract is manifestly in closer connection with another country”. EU court in a dispute *Intercontainer Interfrigo vs Balkenende and MIC* concluded that the court can apply the deviations clause when the circumstances indicate that the contract is more closely connected to the law of another state, which left discretionary space to the courts to decide what law is more closely connected to the contract, regardless of the introduction of the phrase “obviously closer connection”. Bearing in mind that each contract of sale between the retailer and the manufacturer is narrowly connected with the distribution agreement, there is a good foundation for the court to decide whether for the two mentioned contract is applicable the same law.

When the applicable law cannot be determined by the application of para 1 and 2 applicable will be the law of the state which has the closest connection with the contract (para 4).⁷³ Strict rules for certain contracts based on the principle of typical contractual obligation (a contract of sale) or the principle of immediate connection, while the third group of rules (franchise agreement and a distribution agreement) is not completely clear why the European legislator decided to just such a solution.

B. Party Autonomy in EU Private International Law Rules on Torts and Delicts

Party Autonomy is one of the basic principles of the Regulation on the law applicable to non-contractual obligations (Rome II) under the conditions prescribed by this act.⁷⁴ Principal subsidiary rule of Rome II Regulation refers to the law of the place of damage but provides two exceptions, and if damage perpetrator and the injured party have their habitual residence in the same country and, second, in the form of deviation clauses.

In accordance with a tendency to spread the parties autonomy in comparative Private

International law,⁷⁵ the Rome II Regulation gives the opportunity to the parties of non-contractual relations to submit it to the chosen. Autonomy of the will is designed as a primary collision solution, so it takes precedence over the general and particular collision solutions in all cases where the conditions are met. In determining the existence of an agreement the court, under the Regulation, must respect the intentions of the parties.⁷⁶ *Electio iuris* must be explicit or derived with reasonable certainty from the case circumstances. In addition, the agreement on the choice of the applicable law must be concluded after the occurrence of the event that caused the damage. By setting this condition ensures the protection of weaker parties (such as customers, employees and other persons.), of possible contractual relationship, and then non-contractual relations, too, and prevents the imposition of such a choice in the formulary contract.

This rule suffers an exception by which an agreement must be concluded *ante eventum* if all contractual parties carry out trade activity and, if such an agreement is the result of free negotiations. The agreement could not produce legal effects on third parties.⁷⁷

Under the influence of the Rome Convention, the Rome II Regulation limits the effect of choice of applicable law in cases where all the key facts of the case at the time of the occurrence of adverse events present in a country, other than the one whose right is selected. Instead of chosen laws, mandatory standards of that other state will apply. The choice of law applicable to cases with no foreign element is limited by a cogent legal framework of the EU, which means that it is insurmountable based on the agreement of the parties. In fact, when all the key facts of the case at the time of adverse events are present in one or more EU member states, the parties choice of law does not affect the application of the EU Law provisions or local regulations adopted in order to assume the EU Law to the law of court member state, in the case when those provisions cannot be eliminated by agreement.⁷⁸

Collision party's autonomy suffers limitations with regard to the type of non-contractual obligations. Public interests require its exclusion in causes of environmental damage, in relation to a violation of the competition, as well as infringement of intellectual property rights by applying the principle of territoriality.⁷⁹

⁷³ R. Zgribljic, "The law applicable to distribution contracts", (Economic Law, Zagreb, 2010, No. 3.782).

⁷⁴ OJ EU L 199/40.

⁷⁵ Art 35, section 1 Austrian Act on Private International Law; Art 39 of the Liechtenstein Law on Private International Law; Art 132 Swiss Act on Private International Law; Austrian, Liechtenstein and Dutch law does not recognize limitations of parties autonomy in the time of elections.

⁷⁶ Recital 31, of the Rome II Regulation.

⁷⁷ Art 14, section 1 of The Rome II Regulation.

⁷⁸ Art 14, section 3, of The Rome II Regulation.

⁷⁹ G.Kadner, „La responsabilité délictuelle en droit international privé européen“, (Helbing & Lichtenhahn/Bruylant/L.G.D.J. Bruxelles, 2004., 20-21.); Reinmann, „Codifying Torts Conflicts; The 1999 German Legislation in Comparative Perspective“, *Louisiana Law Review*, vol.60, nr. 4, 2000, 1297-1319.

C. Party Autonomy in EU Private International Law Rules on Inheritance

Draft of Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic documents in matters of inheritance and on the European certificate of inheritance, is the result of the efforts of the European Community to unify collision rules as well as rules on jurisdiction, recognition and enforcement of decisions in the field of inheritance (Regulation Rome V) by its legislative instruments.⁸⁰ In the process of communitarization of European collision law, unification activity after the adoption of the Rome I and Rome II Regulation was directed towards collision inherited legal matter, bearing in mind that the inheritance is excluded from the scope of application of most Regulations starting from Brussels I Regulation.⁸¹

The publication of this Regulation clearly confirmed commitment of the European legislator in determining collision solutions and techniques to determine the applicable law based on the principle of Communitarian *aquis*, to legal certainty and the need for fairness of resolving situations with a foreign element. The European legislator has proposed collision solutions in the matter of succession starting with the legacy system that knows the private international law of the Member States. The principle of autonomy of the will of the testator, until now, was dysfunctional with the collision hereditary rights, and the decedent did not have the opportunity of choice of applicable law. However, a positive attitude to the possibility of the decedent to express the autonomy of will is confirmed in some recent acts on private international law, such as the Belgian, Dutch and others.⁸²

After many discussions and proposals the European Commission recognized the possibility of the decedent expression of autonomy of the will and by the Draft Regulation stipulate that a person can choose his whole legacy as the applicable law of the state whose citizen is he.⁸³ At the same time it is not specified what is the kind of the inheritance, so it can be concluded that the collision autonomy is also permitted in the legal and testamentary inheritance. Limitations on proposed solution apply only to the national law of the decedent. The ability to assess the entire legacy according to the chosen law, means that the autonomy of the will is the primary collision solution, the principle allowed to all forms of inheritance.

Limitations of collision autonomy effects only to the national law of citizenship is undergoing additional comments and suggestions to what should be allowed the choice of another law which is in close, reasonable relation to the decedent or to his property.

Willing choice of the applicable law provides also the Hague Convention on the law applicable to the succession in 1989., by which is in addition to the traditional focal contacts by rules of modern private international law, recognize a certain role to “psychological” linking through the freely expressed will of the testator.

D. Party Autonomy in EU Private International Law Rules on Family matters

The foundation of harmonization of laws across the European Union is focused primarily on certain areas of civil law (actual, contract, commercial, consumer protection law). The process of European integration initiates increasing activity and efficacy in the area of family law. By enforcing of the Amsterdam Treaty solutions from Brussels Convention was transformed in Brussels II Regulation which established the rules on jurisdiction and the recognition of judicial decisions in family matters. Very soon, this regulation has been replaced by Regulation Brussels II bis, but the rules regarding divorce remained intact. The same year it was announced that the Regulation will be amended by rules on jurisdiction and the recognition of decision with the rules determining the applicable law in family matters.⁸⁴ According to the author Kathrine Boele-Woelk rename the Brussels II to Rome III is a consequential to the amendment of Regulation content.

⁸⁰ 14722-09, COM (2009) 154 final.

⁸¹ OJ L 012 16, 1, Council Regulation on jurisdiction and the recognition of judicial decisions in civil and commercial matters (Brussels I Regulation from 2001.); Regulation on law applicable to non-contractual obligations (Rome II Regulation, 2007.); Regulation on implementation of European small claims procedure (2007); Regulation on law applicable to contractual obligations (Rome I Regulation in 2008.); Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Regulation from 2000. and 2003. OJ L 160 30.6; OJ L 338 23.12.)

⁸² Private International Law of Belgium (art.19); The law of succession with the Dutch foreign element (art 1) etc.

⁸³ Art 17, section 1.

⁸⁴ Proposal for a Council Regulation Amending Regulation (EC) No.2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters, Brussels 17 July 2006 COM (2006) 399 final, 2006/135 (CNS).

Terminological imprecision is even more evident when one takes into account the intensive work of the competent institutions of the EU on Regulation on the applicable law, jurisdiction and the recognition decision in property relations of the spouses and illegitimate partners that can be marked as Rome IV.⁸⁵

Actuality of the issue of harmonization of collision rules at the EU level in the family matters requires the attention of the legal public, which wasn't absent when the Draft Rome II Regulation of the European Commission on the law applicable to family matters saw the light of day. Discussion on the contents of the Proposal relates to the critique of its two basic elements: the first one refers to the determination of the applicable law that is left to the free disposition of spouse, and another which provides that collision rules on the law applicable to divorce with a foreign element should become a part of Community law.

The possibility of choice of applicable law based on a written spouse agreement (the selection is limited to the rights of the countries with which the spouses have the closest relationship) was unanimously accepted. However, collision rules provided for the case of the absence of an agreement by which spouses express their collision autonomy of the will (joint residence or last common residence if one of the spouses still domiciled there, or the law of the country whose citizens are the spouses, or the law of the court state) are exposed to harsh criticism and are the cause of rejection of legislation by all EU member states.⁸⁶ The argument for this attitude is the fact that by the acceptance of a number of collision rules spouses could divorce marriage according to a foreign law, not only in compliance with the Member States law, for the reason of support a general principle of *lex fori*, which will in future be considered. Opponents, however, believe that it is quite unfair that reasons of public policy should be a retreat for not enforcing foreign law, because it would mean the absolute lack of a common attitude for alignment of collision rules in any community instrument. Just the existing differences in national legislation increase the need to harmonize the rules of private international law in family relations with foreign elements.

The adoption of the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in alimony matters⁸⁷ defines a wide field of application of Community instruments, which refers to the support stemming from parenting, family and marital relations, and kinship (and adoptive relatives by marriage). Law applicable to the maintenance obligation under Article 15 of the Regulation is defined by implementation of the Hague Protocol on the law applicable to the maintenance rights and obligations, in 2007.

(For all countries except the UK and Denmark), which will replace the Hague Conventions in relations between its contracting states.⁸⁸

According to the Protocol creditors over 18 years their support obligations may by autonomy of the will to determine the applicable law at all times.⁸⁹ The choice is limited to the laws of the country of nationality or habitual residence of the creditor or the debtor at the time of the selection, and in the case of alimony between spouses to the chosen law on marital-property regime or divorce, or to the law applicable to the issue, based on collision norms. Protocol thus prevents abuses that can be occurred by contracting applicable law. If the *lex autonomiae* obviously unfair or brings to unreasonable consequences for either side, it will not be applied. This rule has a deviation in the case when the parties at the time of conclusion of the agreement were fully aware of the consequences of a made choice.⁹⁰ Hague Protocol introduces a possibility of choice of the applicable law by agreement, only for the specific case. This means that the creditor or the debtor has already submitted or plans to submit a lawsuit to the Court. In this case is possible to choose just the forum right. The provision applies when it comes to adults as parties, but also to the creditors under the age of 21 year.⁹¹

⁸⁵ K. Boele- Woelki, „To be, or not to be: Enhanced Cooperation in International Divorce Law within the European Union“, 783.

⁸⁶ Commission Press Release IP/06/997. 17 July 2006. ; Cuniberti, Commission's Proposal on Applicable Law to Divorce, internet presentation: [http:// conflictolaws.net/2010/commissions-proposal-on-applicable-law-to-divorce/](http://conflictolaws.net/2010/commissions-proposal-on-applicable-law-to-divorce/).

⁸⁷ Council Regulation (EC) No 4/2009 of 18 December on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7/1, 10.01.2009.

⁸⁸ The Hague Convention on the law applicable to the obligation to support children from 1956; Hague Convention on the law applicable to maintenance obligations from 1973 ; The Hague Convention on International Recovery of child support and other forms of support to the family 2007.

⁸⁹ Art 5 of Hague Protocol.

⁹⁰ Art 8 section 5.

⁹¹ Art 7.

When it comes to children the situation is much more sensitive. It is considered that the potential risk that the autonomy of the will, although very limited, can cause by a balanced advantages *lex fori*. Actual view is that this option is particularly suitable if the debtor filed a lawsuit to the court of his habitual residence or to the court of any other country. Since the effect of the agreement is limited to a specific procedure if it is subsequently applied to amend the decision of the same or any other court, the choice would not be applicable, and the applicable law should be determined on the basis of objective criteria.

However, if *in favorem creditoris* is the basic idea remains unclear why the Protocol does not introduce some possibilities, especially when it comes to the minor children as creditors. Here we have in mind particularly the *lex nationalis* of a child as categorically better, but there may be other solutions.