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ENFORCEMENT OF CHOICE OF COURT AGREEMENTS GRANTING INTERNATIONAL JURISDICTION TO ALBANIAN COURTS

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Abstract This paper aims to critically analyse the formal and substantive validity of choice of court agreements in favour of Albanian courts. The provisions of the Albanian Private International Law and their implementation by Albanian courts are in the focus. However, considering that the Albanian Private International Law provisions are approximated with the EU acquis communautaire and since the provisions on choice of courts agreements are drafted in terms that are fully compatible with the Council Regulation 44/2001 of December 22, 2000 "On Jurisdiction, Recognition and Implementation of Judicial Decisions in Civil Matters and Trade" (Brussels I Regulation), the interpretation of the Albanian law provisions is also done in the light of the case law of the Court of Justice of the European Union. After a thorough analysis of the Albanian Private International Law provisions concerning choice of court agreements and of the Albanian case law, the paper concludes that they are not always interpreted and applied correctly and that the rich case law of the Court of Justice of the European Union can provide valuable guidance.

Keywords
choice of court agreement, formal validity, Albanian private international law, jurisdiction, substantive validity

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1 Introduction

In the context of the Albanian state commitments and obligations for the approximation of the Albanian legislation with the *acquis communautaire* arising from the Stabilization and Association Agreement between the Republic of Albania and the EU[1], the new Law No. 10 428, dated 02.06.2011 "On private international law" was approved (hereinafter: the Albanian PIL). As it is stated in its footnote, this law is drafted entirely in approximation with Regulation (EC) no. 593/2008 of the European Parliament and the Council "On the law applicable to contractual obligations" and Regulation (EC) no. 864/2007 of the European Parliament and the Council "On the law applicable to contractual obligations". While in the law itself there is no such a similar statement regarding its approximation with the Council Regulation 44/2001 of December 22, 2000 "On Jurisdiction, Recognition and Implementation of Judicial Decisions in Civil Matters and Trade" (hereinafter: Brussels I Regulation), the Explanatory Report of the European Integration Commission of the Albanian Parliament, dated 31.05.2001 "On the draft law "On the Private International Law", stipulates that the law is fully compatible with the Brussels I Regulation.

The Albanian PIL allows the prorogation of the Albanian courts' jurisdiction through a valid choice of court agreement. A choice of court agreement leads on the one hand to the prorogation of jurisdiction and on the other hand to the derogation from another jurisdiction (Briggs, 2013: p. 76). Derogation from the jurisdiction of Albanian courts in favour of a foreign jurisdiction is regulated by the Code of Civil Procedure (hereinafter: the CCP), which stipulates that "The jurisdiction of the Albanian courts cannot be transferred by agreement to a foreign jurisdiction, except when the case relates to an obligation between foreigners or between a foreigner and an Albanian citizen, or a legal person without domicile or habitual residence in Albania, as well as when these exceptions are provided for in international agreements ratified by the Republic of Albania." While the prorogation is regulated by Article 73 of the Albanian PIL, which is drafted in terms similar to Article 23

[1] Art. 6 and 70 of the Law No. 9590, dated 27.7.2006 " On the ratification of "The Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part" – Protocols – Declarations - OJ L107, 28.4.2009, published in the Albanian Official Journal no. 87/2006, p. 166.

para. 1 and Article 24 of the Brussels I Regulation (now Article 25 para. 1 and Article 26 para. 1 of the Brussels I Recast Regulation.

Similar to the Brussels I Regulation, Article 73 of the Albanian PIL does not explicitly provide for the independent character of the choice of court agreement. Nevertheless, it is logical that a choice of court agreement under the Albanian PIL should be treated as independent of the main contract, otherwise legal certainty would be compromised (Case C-269/95, *Benincasa v Dentalkit*, 1997). The Brussels I Recast Regulation included explicit wording as to the severability of choice of court agreements as a reflection of the established practice of the CJEU (Ratković and Zgrabljić Rotar, 2013: p. 259).

Also, the Albanian PIL does not explicitly mention whether Article 73 refers to exclusive choice of court agreements, whereby it means an agreement that chooses the courts of only one jurisdiction to the exclusion of all other courts for each party. (Keyes and Marshall, 2015: p. 351-352; Case C-23/78, *Meeth v Glacetal*, 1978*)*. An exclusive choice of court agreement entails positive and negative effects, meaning that on one hand, it obliges the parties to litigate before the chosen court, and on the other hand, it obliges the non-chosen courts to decline jurisdiction and thus, excluding the application of the *lis pendens* rule (Keyes and Marshall, 2015: p. 353-355). While a non-exclusive choice of court agreement is considered any agreement that is not exclusive and which distinguishes from it only in the negative effect, meaning that the non-chosen court applies the *lis pendens* rule (Keyes and Marshall, 2015: p. 362-363).

In interpreting Article 23, para. 1 of the Brussels I Regulation, which is equivalent to Article 73 of the Albanian PIL (Kruger, 2008: p. 120) asserts that a choice of court agreement is considered exclusive in relation to general and special jurisdiction, but this "exclusivity" is nevertheless of a lower degree compared to the exclusive jurisdiction under Article 22 of the Brussels I Regulation. Similarly, Magnus (Magnus, 2016: p. 583; Gutmann, 2009: p. 351) contends that "neither by agreement nor by submission can the parties oust a court's exclusive jurisdiction under Article 24 (referring to Brussels I Recast Regulation)." The same would be true for the choice of court agreements under the Albanian PIL, which are considered inadmissible under Article 72 of the Albanian PIL, which concerns exclusive jurisdiction.

The Albanian PIL does not provide for any restriction regarding the domicile or habitual residence of the parties who can conclude a choice of court agreement. A basic requirement is that the legal relationship for which the parties have concluded a choice of court agreement must fall within the scope of application of the Albanian PIL *i.e.*, be a civil legal relationship with a foreign element.

For a choice of court agreement to be enforced, it must be valid in substantive and formal terms. The aim of this article is to critically analyze the legal requirements for the enforcement of choice of court agreements under the Albanian PIL. Respectively, Section 2 analyzes the legal requirements for the substantive validity of choice of court agreements, while Section 3 addresses the formal validity requirements. The discussion takes into consideration mostly foreign authorities, since domestic authority on the topic is scarce, and the Albanian case law, as well as the practice of the Court of Justice of the European Union (hereafter: CJEU), since as it was stated above, the Albanian PIL provisions are drafted in terms that are fully compatible with the Brussels I Regulation. After an in-depth and critical analysis of the validity requirements of choice of court agreements, the article ends with some brief conclusions in section 4.

2 Substantive Validity Requirements of Choice of Court Agreements

The Albanian law does not stipulate which is the applicable law for assessing the substantive validity of a choice of court agreement. The law of the main contract should not apply *a priori* to the choice of court agreement, as this is a separate contract. Similarly, the Brussels I Regulation did not expressly regulate the applicable law in such a case, leaving room for different interpretations (Ratković and Zgrabljić Rotar: 2013, p. 252-256). The Brussels I Recast Regulation (2012), Article 25(1), however, expressly provides that the substantive validity of a choice of court agreement is determined under the law of the Member State the courts of which are prorogated by the parties. Taking into consideration this amendment brought by the Brussels I Recast Regulation, the authors would suggest that the applicable law for assessing the substantive validity of a choice of court agreement prorogating Albanian courts should be Albanian law. In particular, the Albanian courts should take into account the provisions of the Albanian Civil Code on the invalidity of legal actions, respectively articles 92-111, as well as article 663, which stipulates the requirements for the existence of a contract, such as consent, legal cause and object.

The existence of parties' consent for the prorogation of jurisdiction is also emphasized by the CJEU (before the 2012 amendments, which explicitly define the applicable law), in Case C-24/76, *Estasis Salotti v Ruewa*, 1976. According to the CJEU:

Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated (C-24/76, *Estasis Salotti v Ruewa,* 1976, para 7).

As in this decision, also in several other decisions (Case C-25/76, *Segoura v Bonakdarian*, 1976; Case C-784/79, *Porta Leasing GmbH v Prestige International SA*, 1980) taken before the Brussels I Recast Regulation (2012), the CJEU suggests a narrow interpretation of the requirements set forth in the Brussels I Regulation, (regarding the validity of a choice of court agreement), given that the purpose of the provision is to ensure that the parties' consent exists and that it is clear and correctly expressed.

Briggs (Briggs, 2013: p. 79) supports this form of narrow interpretation, suggesting the reference only to the formal requirements of the Brussels I Regulation and is sceptical of the amendments brought by the Brussels I Recast Regulation in 2012, in relation to its express provisions for the law of the country where the court is located, as the law applicable to the substantive validity of a choice of court agreement. Briggs however, does not suggest another law but only asks for a narrow and direct interpretation of the requirements of the Brussels I Recast Regulation as a lower and uniform standard for the validity of a choice of court agreement (in form and content). In this analysis, reference is made to the rich jurisprudence of the CJEU regarding the interpretation of the requirements of the Brussels I Recast Regulation, because in the case C-150/80, *Elefanten Schuh GmbH v Jacqmain*, 1981, the CJEU stated that the formal requirements provided for in Article 25 of the Brussels I Regulation are exhaustive (Stone, 2014: p. 177). Unfortunately, there is a lack of Albanian case Law in this regard.

3 Formal Validity Requirements of Choice of Court Agreements

Article 73 of the Albanian PIL (*lex specialis)* provides for the following formal requirements of the validity of a choice of court agreement in favour of the jurisdiction of the Albanian courts:

(i) the agreement must be concluded in writing;
(ii) the agreement is concluded orally, but confirmed in writing;
(iii) the agreement is in accordance with international trade usages, which the parties are or ought to be aware of;
(iv) the agreement is shown by the parties entering an appearance without raising jurisdictional objections.

In interpreting this provision, it can be concluded that the above formal criteria are not cumulative, but the fulfilment of one of them is sufficient to make a choice of court agreement valid in formal terms.

3.1 The "in writing" requirement

The choice of court agreement must be made in writing, thus expressing the clear consent of the parties to designate jurisdiction (*Decision of the Civil Panel of the High Court of the Republic of Albania no 47,* 17.02.2016). This agreement is usually included in the main contract as a separate clause, but in today's world, many contracts are linked by reference to previous contracts, thus not repeating the general conditions, but only changing their special conditions. In such cases, when a choice of court clause exists in the first contract, but not in the contracts that make reference to the first, taking into account the practice of the CJEU (Case C-24/76, *Estasis Salotti v Ruewa*, 1976, paras. 9 and 12), it is suggested that it should be considered valid, only if the reference in the general terms of the first contract is express and therefore likely to be evidenced by the party showing ordinary care.

In the C-387/98, *Coreck Maritime* (2000) case regarding the validity of a choice of court clause pursuant to Article 17(1) of the Convention of 27 September 1968, the CJEU held that:

1. It does not require that a jurisdiction clause be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause states the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen, or which may arise between them. Those factors, which must be sufficiently precise to enable the court seized to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case.

In another situation, where the term of the main contract, which includes a choice of court agreement, has expired but the parties nevertheless have continued to perform the contract with conclusive actions, a question that arises is whether the choice of court agreement can be considered valid. The CJEU has answered this question in the C-313/85, *Iveco Fiat v Van Hool* case (1986) holding that:

Where a written agreement containing a jurisdiction clause and stipulating that the agreement can be renewed only in writing has expired but has continued to serve as the legal basis for the contractual relations between the parties, the jurisdiction clause satisfies the formal requirements in Article 17 if, under the law applicable, the parties could validly renew the original agreement otherwise than in writing, or if, conversely, one of the parties has confirmed in writing either the jurisdiction clause or the set of terms which has been tacitly renewed and of which the jurisdiction clause forms part, without any objection from the other party to whom such confirmation has been notified (para. 10).

If the Albanian law was to be applied in the above-mentioned scenario, by taking into account the above decision of the CJEU and Article 80(1) of the Albanian Civil Code, according to which "A legal action can be carried out in writing, orally and with any other type of presentation of will", it can be concluded that Albanian courts, as well would have to consider the choice of court agreement formally valid, regardless the expiration of the term of the main contract.

A choice of court agreement included in the act of incorporation of a commercial company should also be considered to meet the "in writing" requirement and thus be formally valid (Stone, 2014: p. 176; Case C-214/89, *Powell Duffryn v Petereit*, paras. 13-14).

3.1.1 Choice of court agreements determining more than one jurisdiction

It may happen that the parties in their agreement choose two or more jurisdictions for the resolution of disputes between them, where one of them is the Albanian judicial jurisdiction. This type of choice of court agreement, being non-unique, is considered by some authorities as non-exclusive and problematic since it creates the possibilities for parallel proceedings, thus leading to uncertainty (Keyes and Marshall, 2015: p. 356). Others, however, suggest that this type of choice agreement is exclusive (Fawcett, 2001: p. 239–240), as long as it excludes the jurisdiction of any other courts besides the chosen ones for both parties (*Kurz v Stella Musical GmbH*, 1992, Ch 196, 203–204).

In the authors' opinion, if the will of the parties for the choice of two jurisdictions is unconditional from any subsequent action of the parties, the court chosen by the plaintiff shall have jurisdiction. This is because since both parties expressed their will for both jurisdictions, the choice of one jurisdiction by one of the parties cannot be opposed by the other party. If the will is conditional, then the court must analyze the condition. If the condition is unenforceable, then the norms of private international law shall apply.

In the Albanian judicial practice, several cases dealing with the choice of more than one jurisdiction are recorded. One of them deserves special attention. In the *AP v AV* case (*Decision of the Civil Panel of the High Court no. 337,* 26.06.2012), the parties had provided in the main contract that:

This contract shall be governed by and construed in accordance with the laws of Texas, without reference to its conflict of laws. Any dispute under this agreement may be resolved by the state and federal courts located in Dallas County, Texas and the Judicial District Court of Tirana (Albania), and the parties hereby consent[2] to the personal jurisdiction and venue of these courts.

When a dispute arose between the parties, AP filed a lawsuit before Albanian courts against AV. The latter objected to the jurisdiction of the Albanian courts. The Court of the Judicial District of Tirana with decision no. (none), dated 16.04.2012 decided

[2] In the English version it is stated "the parties may consent."

to reject AV's request to decline jurisdiction. AV filed a special appeal before the High Court, which decided to overturn the decision of the Tirana Judicial District Court and decline the jurisdiction of the Albanian courts on this case, reasoning, among others, that:

The contracting parties have conditioned the jurisdiction of each court that will consider the disputes …with the grant of their mutual consent. In these conditions, where one of the parties does not consent to the jurisdiction of the court where the plaintiff has filed his lawsuit, then the case cannot be in the jurisdiction of this court. ... AV did not give any consent by presenting in writing at the hearing the reasons why the Albanian jurisdiction was not selected consensually, and claiming that the American jurisdiction should be respected, while the parties have not even discussed yet the court to which they will jointly address for the resolution of disputes (*AP v AV*, *Decision of the Civil Panel of the High Court no. 337,* 26. 6. 2012).

This decision of the Civil Panel of the High Court is controversial regarding the interpretation of the choice of court clause of the main agreement. In a logical and purposive interpretation of the choice of court clause (Article 7), it appears that it is not conditioned by the grant of any other mutual consent. Furthermore, the way the clause has been interpreted by the High Court has made the choice of court agreement *de facto* invalid, as long as it is considered non-binding on the parties (Kola Tafaj and Çinari, 2015: p. 134). Since the plaintiff filed his lawsuit before one of the courts that was freely agreed upon between the parties in the choice of court clause, respectively the Albanian court, this latter should have enforced the choice of court clause and exercised its jurisdiction over the dispute.

3.1.2 Asymmetric choice of court agreements

A choice of court agreement can also be asymmetric (unilateral). In other words, it may provide for the right of one party to choose between two jurisdictions, while the other party has the right to resort to only one jurisdiction (Keyes, 2020: p. 35). The CJEU in the C-22/85, *Anterist v Credit Lyonnais* (1986) case has not considered a choice of court asymmetric *i.e.*, for the benefit of only one of the parties, "where all that is established is that the parties have agreed that a court or the courts of the Contracting State in which that party is domiciled are to have jurisdiction."

In practice, asymmetric clauses are mainly justified by economic risk factors that can be assumed by the party in whose favour the unilateral clause is set. Common law countries generally consider this clause valid, giving priority to the principle of parties' autonomy instead of the principle of equality between the parties, while civil law countries tend to consider it invalid, thus giving priority to the principle of the equality of the parties instead of parties' autonomy (Kola Tafaj and Çinari, 2015: p. 153).

For instance, the French Supreme Court has considered asymmetric choice of court agreements invalid. This is the case of *Ms. X v Banque Privée Edmond de Rothschild* (2012) where the parties agreed that:

Potential disputes between the client and the Bank shall be subject to the exclusive jurisdiction of the Courts of Luxembourg. The bank also reserves the right to refer to the jurisdiction of the court of the client's residence or any other court that has jurisdiction.

The French Supreme Court reasoned among others that the clause, which is by nature entirely in favour of one party (one-sided), is only in the interest of the bank and is therefore contrary to the objectives and purpose of choice of court clauses set out in Article 23 of the Brussels I Regulation (*Ms. X v Banque Privée Edmond de Rothschild*, 2012). Russian courts also generally consider the unilateral choice of court agreements to be invalid (*RTK v Sony Erikson*, 2012). Meanwhile, the Albanian courts seem to have prioritized the principle of party autonomy and considered asymmetric choice of court agreements valid (*Decision of the Civil Panel of the High Court of the Republic of Albania, no. 71, dated 27. 2. 2014*).

Another problem concerning the enforcement of asymmetric choice of court clauses arises when the parties agree to designate one jurisdiction for the lawsuit of one party and another jurisdiction for the lawsuit of the other party. The question that arises in such cases is whether the court that is adjudicating the lawsuit of the plaintiff has jurisdiction to decide on a counterclaim brought by the other party.

The CJEU addressed such question in the Case C-23/78, *Meeth v Glacetal,* where it held that:

where there is a clause conferring jurisdiction such as that described in the reply to the first question the first paragraph of Article 17 of the Convention cannot be interpreted as prohibiting the court before which a dispute has been brought in pursuance of such a clause from taking into account a set-off connected with the legal relationship in dispute (para. 9).

In conformity with the practice of the CJEU and with an expanded interpretation of Article 55 of the Albanian CPC, the authors are of the opinion that Albanian courts can extend their jurisdiction over the counterclaim (when the court does not have direct jurisdiction over the latter) if it meets the other criteria of its acceptance. (*Decision of the Civil Panel of the Albanian High Court No. 235, dated 14. 9. 2016*).

3.2 The 'oral but confirmed in writing' requirement

The choice of court agreement contains the intention of the parties to designate a certain jurisdiction for the resolution of disputes between them. This agreement does not necessarily have to be in writing, but it is sufficient that the parties have verbally agreed on such a fact and this agreement can be proven in writing. For example, a typical form of this agreement would be the minutes of a meeting in which the parties have agreed to settle a dispute in a particular jurisdiction.

In a series of decisions, the CJEU has addressed such situations, where there was no written choice of court agreement between the parties, signed by both parties, but one of the parties sent a document to the other party in order to confirm a verbal agreement between them, specifying the agreed terms, which includes the choice of court clause, and the recipient has not objected to this confirmation document within a reasonable time after its receipt. In these circumstances, the CJEU has accepted the formal validity of the choice of court agreement, as an agreement concluded orally, but confirmed in writing (Case C-25/76, *Segoura v Bonakdarian*, 1976; C-71/83, *Tilly Russ v Nova*, 1984; C-313/85, *Iveco Fiat v Van Hool*, 1986; C-221/84, *Berghoefer ASA*, 1985). It should be noted that, if the parties conclude a verbal agreement referring to the general terms of another contract, which contains a choice of court clause, this is not the case of a choice of court agreement concluded orally and confirmed in writing (Case C-25/76, *Segoura v Bonakdarian,* 1976).

3.2 The requirement that the choice of court agreement be in accordance with international trade usages, which the parties are or ought to be aware of

In assessing the validity of a choice of court agreement based on this requirement, there is no specific applicable law. This requirement is also included in the Albanian law taking into account the Brussels I Regulation and refers to the choice of court agreements that are concluded in international trade in a form which conforms to a usage of which the parties are or ought to have been aware, and which in such trade is widely recognized and regularly applied by the parties to contracts of this kind connected with the trade in question (Stone, 2014: p. 174).

With regard to the application of this requirement, in the absence of a specific applicable law, as well as in the absence of Albanian judicial practice and doctrine, the jurisprudence of the CJEU becomes even more relevant. Two interesting CJEU cases, which we think are important to be addressed at this point are C-106/95, *MSG v Les Gravières Rhénanes* (1997), and the C-159/97, *Castelletti v Trumpy*, (1999) case.

In the *MSG v Les Gravières Rhénanes* case, the CJEU reasoned that:

A practice exists in a branch of international trade or commerce in particular where a particular course of conduct is generally followed by contracting parties operating in that branch when they conclude contracts of a particular type. The fact that the contracting parties were aware of that practice is made out in particular where they had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice (para 25).

While in the *Castelletti v Trumpy* (1999) case, the CJEU has held that:

The contracting parties' consent to the jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware. The existence of such a usage, which must be determined in relation to the

branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type. It is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States (para 3).

3.4 Choice of court agreements by entering an appearance without raising jurisdictional objections

Albanian law, the same as the Brussels I Regulation, provides for the possibility of presuming the existence of a choice of court agreement in favour of Albanian courts through entering an appearance, under certain conditions. According to Article 73(3) of the Albanian PIL:

The Albanian court in which a lawsuit is filed has international jurisdiction, if the defendant participates in the trial without raising claims on the lack of international jurisdiction, although he is represented in the process by a lawyer, or the court has clarified the possibility of objecting the jurisdiction and this clarification is recorded in the minutes of the judicial hearing.

A choice of court agreement by entering an appearance is a tacit agreement for determining jurisdiction and is only enforceable in cases where the parties can choose jurisdiction. In order for this type of agreement to be enforceable by the court, the defendant must be informed of the possibility of opposing the jurisdiction when he is not represented by a lawyer. Even though the law does not provide for the obligation of the court to inform the parties of such an opportunity in case they are represented by a lawyer, it is advisable for the court to inform the defendant of the possibility of objecting jurisdiction, regardless of the way of he is represented in the trial. If, after the respondent is given an opportunity to challenge the court's jurisdiction, and he does not make any objections, then his appearance in the trial is presumed as consent to that jurisdiction.

On the other hand, it cannot be considered a choice of court agreement by entering an appearance when the respondent appears in the process with the sole purpose of contesting jurisdiction (Briggs, 2013, p. 71-72). The Albanian PIL does not provide up to which procedural moment the defendant can raise objections to jurisdiction,

so that its submission is not considered as consent to that jurisdiction. This has been an issue also in the EU context.

The issue of when the defendant could raise an objection to jurisdiction was discussed before the CJEU when the defendant simultaneously with the objection of jurisdiction also made defence submissions on the merits of the case. The debate consisted of whether the defence submissions on the merits of the case should be considered or not as acceptance of the jurisdiction chosen by the plaintiff. The CJEU has already consolidated the practice about such an issue, holding that:

Article 18 of the Convention of September 27, 1968, allows the defendant not only to contest the jurisdiction but to submit at the same time in the alternative a defence on the substance of the action without, however, losing his right to raise an objection of lack of jurisdiction. (C-27/81, *Rohr v Ossberger*, 1981, para 8; See also: C-150/80*, Elefanten Schuh GmbH v Jacqmain*, 1981, para. 17).

According to the CJEU, if the party loses the procedural right to submit a defence on the merits if it does not do so at the first moment, which coincides with the objection of jurisdiction, this cannot be considered as giving consent to jurisdiction. In such a case, if the party would not submit the defence on the merits, but only the objection of jurisdiction, and the court dismissed its request, the party would lose the right to present the merits of the case. On the contrary, if the procedural legislation of that country provides for the consideration of jurisdiction as a preliminary stage, and the respondent freely chooses to submit the merits of the case, this can be considered as a manifestation of the party's willingness to accept jurisdiction (C-150/80*, Elefanten Schuh GmbH v Jacqmain,* 1981, para. 17). This also applies in the case of a counterclaim. If the plaintiff does not object to the jurisdiction of the court in relation to the counterclaim brought against him, although he is given the opportunity to object, this court will also have jurisdiction to consider the counterclaim (C-48/84, *Spitzley v Sommer Exploitation*, 1985, para. 27).

With the recent amendments to the Albanian Code of Civil Procedure (Law no 38/2017), according to which the defendant has a single procedural mean to submit the opposition to jurisdiction and the defence on the merits, which is the "Statement of Defense", the submission of both at the same time cannot be considered as giving consent to jurisdiction. On the other hand, referring to Article 73(3) of the Albanian

PIL, if the defendant participates in the trial without raising claims about the lack of international jurisdiction, although he is represented in the process by a lawyer, or the court has clarified about the possibility of opposing jurisdiction (this clarification is noted in the minutes of the hearing), then it is considered that the defendant has given consent and thus jurisdiction is determined by agreement between the parties. According to the purposive interpretation of Article 73(3) of the Albanian PIL, as well as in the function of the principle of judicial economy, the court should not take into consideration the objection of jurisdiction by the defendant in the following hearings after the first one (where he had the opportunity to oppose jurisdiction). Objection to jurisdiction by the defendant must be made at the earliest possible procedural moment, otherwise, his participation in the trial will be considered consent.

Concerning the above issue, the Albanian judicial practice appears to be unclear. In the case *RF v A* (*Decision of the Civil Panel of the High Court No. 164,* 07.12.2017), the plaintiff RF (Macedonian company) and the defendant A (Albanian company), there was a contractual relationship formalized with the distribution contract dated 11.12.1215. Article 12.1 of the Contract provided that:

The parties to the contract agree that this contract, all transactions carried out in support of the contract and all relations between the parties, will be interpreted and will be based on the legislation of the Republic of Macedonia 12.2 In the event of a dispute arising out of or relating to this contract, the parties to the contract will endeavour to find a solution amicably or by mutual agreement. In the event that they cannot reach an agreement, the relevant disputes will be resolved according to the arbitration rules of the International Chamber of Commerce, with a judge appointed according to the relevant rules. The arbitration shall be held in English. The judge will apply Macedonian substantive law and take a legal judgment (secondo diritto*).* The arbitration will take place in Geneva, Switzerland.

When a dispute arose between the parties (according to the plaintiff, the defendant had an unfulfilled accumulated obligation towards it) and failing an out-of-court settlement, the plaintiff filed a claim to the Tirana Judicial District Court, requesting fulfilment of the obligation arising from the distribution contract. The Court of the Judicial District of Tirana, with its decision no. 5203, dated 09.06.2017, decided to decline its jurisdiction in the third judicial hearing, based on the choice of court

clause. In relation to the plaintiff's objection that the defendant had accepted the jurisdiction of the court by entering an appearance, the Court held that "the jurisdiction provided for in the contract can be changed by the parties, but such agreement must always be confirmed in writing."

The plaintiff filed a special appeal against the decision of the Tirana Judicial District Court, mainly based on the fact that the Tirana Judicial District Court did not consider the defendant's appearance in court without opposing its jurisdiction as acceptance of jurisdiction (in the two first hearings). The decision of the Tirana Judicial District Court was upheld by the Civil Panel of the High Court, with the same argumentation (in relation to the claim for the jurisdiction of the Albanian court by entering an appearance). The High Court held that:

According to Article 73 of the Albanian PIL, which provides for cases where jurisdiction is determined by agreement: 1. Albanian courts have international jurisdiction even when the parties determine by agreement the international jurisdiction of Albanian courts. 2. Such an agreement must: a) be concluded in writing or orally, but with the latter being confirmed in writing; …" ... The Panel assesses that the jurisdiction provided for in the contract can also be changed by the parties, but such an agreement must always be confirmed in writing…. (*RF v A, Decision of the Civil Panel of the High Court No. 164,* 07.12.2017).

The above decisions, both of the Court of the Judicial District of Tirana and the Civil Panel of the High Court, especially their reasoning, draw our attention to some aspects of the implementation of Article 73 of the Albanian PIL. *First*, none of the courts has addressed the plaintiff's claim that the Albanian court has "acquired" international jurisdiction through the defendant entering an appearance in accordance with Article 73(3) of the Albanian PIL. The courts have assessed their international jurisdiction in accordance with paragraphs 1 and 2 of Article 73 of the Albanian PIL, ignoring the possibility of applying paragraph 3 of this article. *Secondly,* it would have been reasonable for the court, in relation to the claims of the plaintiff, to analyze the requirements for the application of Article 73(3) of the Albanian PIL, assessing (i) the manner in which the defendant was represented in court; (ii) the defendant's knowledge of the possibility of contesting jurisdiction; (iii) the possibility of assigning jurisdiction by agreement (appearance before the court); and (iv) the timing of the objection to jurisdiction. According to Article 73(3) of the Albanian

PIL, these clarifications must also be recorded in the record of the judicial hearing, from where a higher court will evaluate their correct application. Although the decisions reached by the courts could have been the same (*i.e.*, declining jurisdiction), the authors are of the opinion that the analysis of the requirements for the implementation of paragraph 3 of Article 73 of the Albanian PIL should not have been avoided by the courts.

4 Conclusions

For a choice of court agreement to give international jurisdiction to Albanian courts for the resolution of disputes with foreign elements, it must be valid, both in formal and substantive terms.

Albanian law does not explicitly state the applicable law for assessing the substantive validity of a choice of court agreement. However, in the spirit of the Brussels I Recast Regulation and referring to Albanian judicial practice, the applicable law for assessing the substantive validity of a choice of court agreement in favour of Albanian courts should be Albanian law. The Albanian courts should take into account in particular the provisions of the Albanian Civil Code on the invalidity of legal actions, respectively Articles 92-111, as well as Article 663, which stipulates the requirements for the existence of a contract, such as consent, legal cause and object.

The analysis of the Albanian case law shows that Article 73 of the Albanian PIL is not always interpreted and applied correctly by the Albanian courts. Therefore, it is recommended that for a proper application of Article 73 of the Albanian PIL and thus for correct enforcement of choice of court agreements by Albanian courts, valuable guidance found in the rich case law of the CJEU should be taken into account by the Albanian courts (considering that Article 73 of the Albanian PIL is drafted in conformity with Brussels I Regulation).

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