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di *Marco Bona e Giulia Oberto*

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'ROME II', APPLICABLE LAW AND DIRECT RIGHT OF ACTION UNDER DIRECTIVE 2009/103/EC: A NEW REVOLUTIONARY PERSPECTIVE FOR CROSS-BORDER ROAD TRAFFIC ACCIDENTS?

MARCO BONA
Lawyer (Turin Law Society), Ph.D. Comparative Private Law at Trento University, MB.O Law

GIULIA OBERTO
Lawyer (Turin Law Society), MB.O Law

ABSTRACT

This paper addresses the issue of applicable law in relation to direct actions under Directive 2009/103/EC and a ground-breaking order rendered in February 2019 by Trento District Court in a case concerning a cross-border road traffic accident, furtherly confirmed by this Court in a order issued on 4 March 2020. In particular, Article 18 of Directive 2009/103/EC imposes on Member States to grant any party, injured as a result of a road traffic accident caused by a vehicle covered by insurance, a direct right of action against the insurance undertaking the coverage of the person responsible against civil liability. This particular action should be granted by each Member State also in relation to the following "cross-border" accidents: a) accidents occurred in a Member State to injured parties resident in another Member State; b) according to Article 20 (1) subject «to the legislation of third countries on civil liability and private international law», also accidents occurred to injured parties resident in a Member State in third countries whose national insurer's bureau have joined the green card system whenever such accidents are caused by the use of vehicles insured and normally based in a Member State. Accordingly, one may argue that in the case of a person resident in Member State "A" and injured in Member State "B" (caused by the use of vehicles insured and normally based in a Member State), this claimant, whenever he sues in the Member State where he resides, derives his direct right of action against the foreign insurer directly from his national law implementing the above directive, hence the applicable law is the law of Member State "A". This solution may be consistent with the following clauses provided by 'Rome II' Regulation: Article 15 that, by standing in favor of the "all or nothing approach", prevents national judges from giving rise to any form of "dépeçage" (issue-by-issue approach to applicable law) which would otherwise occur if a different law should apply in addition to the law of Member State "A" granting the direct action which is the basis of the proceedings before this Member State; Article 27, that states that 'Rome II' Regulation shall not prejudice the application of provisions of Community Law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations, where Article 18 of Directive

2009/103/EC imposes on Member States to grant the right to direct action, Article 20 (1) of the same directive, by extending the direct right of action to cross-border accidents, refers «to the legislation of third countries on civil liability and private international law» only in relation to accidents occurred in third countries belonging to the green card system, and, under the same directive (see recital 32), injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled, and this action is granted by the Member State of their domicile. This peculiar conclusion about the interpretation of 'Rome II' Regulation in combination with Directive 2009/103/EC was adopted by the twin orders issued by Trento District Court with reference to a direct action brought, on the ground of Italian law implementing the above directive, by the family members of a motorcyclist killed in Croatia, who were all resident in Italy, against the French insurance undertaking the coverage of the French motorist who, by driving his camper, hit the said motorbike. These twin orders are not definitive, but they deserve full attention being them the first judicial provisions adopting the above theory.

Summary. - 1. The issue: the applicable law in road traffic accidents. - 2. The Trento case. - 3. Applicable law: the parties' positions and arguments. - *3.1. The claimants' perspective.* - *3.2. The defendant's perspective.* 4. The Trento District Court's innovative twin orders. - 5. Is the "Trento reasoning" undermined by the EU Court of Justice's judgment in da *Silva Martins* (case C-149/18)? - 6. What's next?

1. The issue: the applicable law in road traffic accidents.

One may argue that the notorious judgment rendered by the **Court of Justice** of the **European Union** in ***Florin Lazar v. Allianz SpA***[1] in relation to **Article 4** of the **Regulation (EC) No 864/2007** of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('**Rome II**')[2] provides for a

[1] Court of Justice, Fourth Chamber, 10 December 2015, Case C-350/14, ECLI:EU:C:2015:802.

[2] On this Regulation see *ex plurimis* following publications: M. BONA, «*Roma II» e sinistri stradali mortali: il Paese di residenza delle vittime secondarie non determina la legge applicabile*, in *Responsabilità civile e previdenza*, 2016, no. 3, pp. 829-851; M. BONA, *Disapplication of Austrian Law Denying Compensation for Bereavement Damages: A Judgment by Italian Supreme Court on the Notion of "Public Policy"* (2015) 26 *European Business Law Review*, Issue 4, pp. 509-529; F. MOSCONI e C. CAMPIGLIO, *Diritto internazionale privato e processuale, Parte generale e obbligazioni*, Volume I, 7° ed., Milanofiori Assago, 2015, p. 439; R. PLENDER & M. WILDERSPIN, *The European Private International Law of Obligations*, 4th ed., London, 2015, pp. 447-803; M. BONA, *Sinistri mortali occorsi in Italia e congiunti-attori residenti all'estero: quali risarcimenti con «Roma II»?*, in *Responsabilità civile e previdenza*, 2015, no. 1, 198-241; G. VAN CALSTER, *European Private International Law*, Oxford, 2013, pp. 151-182; P. ROGERSON, *Conflict of Laws*, 4th ed., Cambridge, 2013, 335-376; P. JANUSZ, *Applicable Law*, in *Guide to Accidents Abroad*, S. Crowther (ed.), Bristol, 2013, pp. 135-152; S. TONOLO, *Obbligazioni*, in G. CONETTI, S. TONOLO, F. VISMARA, *Manuale di diritto internazionale privato*, Torino, 2013, pp. 289-296; M. DI FABIO, *Le obbligazioni non contrattuali*, in U. VILLANI, M. DI FABIO, F. SBORDONE, *Nozioni di diritto internazionale*

choice-of-law rule (the law of the place of the accident) that is capable of solving all issues related to the determination of the applicable law in relation to cross-border personal injury and death cases including road traffic accidents; clearly the applicable law resulting from such rule would remain subject to the restrictions provided by **Article 26** («***Public Policy of the forum***») of this Regulation enabling a national judge to disapply a foreign law, which would require him to deny or significantly limit the redress protection, hence to discriminate between victims, if such denial or restriction is in contrast with the public policy of his own forum.

In particular, in *Lazar* the Court of Justice addressed the reading of Article 4 (1) of 'Rome II' in relation to the claims for bereavement damages brought by the relatives of the primary victim deceased in a road traffic accident[3]. The Court's position was basically

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privato, *Parte generali e obbligazioni*, Napoli, 2013, pp. 129-191; F. MARONGIU BUONAIUTI, *Le obbligazioni non contrattuali nel diritto internazionale privato*, Milano, 2013, p. 79; R. GARNETT, *Substance and procedure in private international law*, Oxford, 2012, pp. 348-357; J. PAPETTAS, *Direct Actions Against Insurers of Intra-Community Cross Border Traffic Accidents: Rome II and the Motor Insurance Directives*, *Journal of private international law*, 2012, vol. 8, no. 2, pp. 297-321; I. KUNDA & C. M. GONÇALVES DE MELO MARINHO, *Practical Handbook on European Private International Law*, 2011, 33-47, in *www.ec.europa.eu*; A. DICKINSON, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, *Updating Supplement*, Oxford, 2010; F. MOSCONI e C. CAMPIGLIO, *Diritto internazionale privato e processuale*, *Parte generale e obbligazioni*, Volume I, 5° ed., Milanofiori Assago, 2010, pp. 427-505; R. PLENDER & M. WILDERSPIN, *The European Private International Law of Obligations*, 3rd ed., London, 2009, pp. 435-781; *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*, J. AHERN & W. BINCHY (eds), Leiden/Boston, 2009; I. PRETELLI, *La legge applicabile alle obbligazioni non contrattuali nel Regolamento «Roma II»*, in *Diritto internazionale privato e cooperazione giudiziaria in materia civile*, A. BONOMI (ed), Torino, 2009, pp. 409-475; B. DOHERTY, *Accidents Abroad*, London, 2009, 242 e ss.; A. MALATESTA, *Il nuovo diritto internazionale privato in materia di obbligazioni non contrattuali: il regolamento (CE) "Roma II" entra in vigore*, in *Danno e resp.*, 2008, 12, pp. 1206-1212; P. FRANZINA, *Il regolamento n. 864/2007CE sulla legge applicabile alle obbligazioni extra contrattuali («Roma II»)*, in *Le nuove leggi civili commentate*, 2008, pp. 971-1056; A. DICKINSON, *The Rome II Regulation*, Oxford, 2008; A. RUSHWORTH & A. SCOTT, *Rome II: Choice of law for non-contractual obligations* [2008] *Lloyd's Maritime and Commercial Law Quarterly* 274.

[3] The request for preliminary ruling was made in the civil proceedings between Mr Lazar, who was resident in Romania, and the Italian insurance company Allianz SpA concerning compensation in respect of material and non-material damage he had sustained as a result of the death of his daughter in a road traffic accident which had occurred in Italy. The action against the above insurer was issued under Article 283 (1) of the Italian Private Insurances Code, stating that, where it has not been possible to identify the vehicle which caused the accident, the Guarantee Fund for Road Accident Victims (*Fondo di garanzia per le vittime della strada*) is to pay compensation for the damage caused as a result of the use of vehicles through the intermediary of designated insurance companies. The mother and grandmother of the victim, both Romanian nationals residing in Italy, also intervened in the proceedings seeking compensation for the material and non-material damage they sustained on account of her death. According to the referring court (Trieste District Court), since the applicants had claimed compensation for harm they personally suffered on account of the death a member of their family, it was important to know whether this constituted "damage" within the meaning of Article 4 (1) of the Rome II Regulation, or an indirect consequence of a tort or delict within the meaning of the same provision. Trieste Court outlined that under Italian law, the damage resulting from the death of a family member is treated as having been suffered directly by the family member and, in particular, is deemed to amount to an infringement of his personal rights.
In those circumstances, the Trieste District Court decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling: « *(1) How is the term "the [place] in which the damage occurs" within the meaning of Article 4(1) of [the Rome II Regulation] to be interpreted in the*

that the damages, which are sustained by the relatives of a person killed by an accident occurred in the Member State of the court seised, must be classified as «*indirect consequences*», whilst the applicable law should be determined on the basis of «*where it is possible to identify the occurrence of direct damage*»[4].

In a comment to *Lazar* judgment[5] it was outlined that:

- the Court of Justice's conclusion retains some lack of coherence between **'Brussels I' Regulation**[6] (now **'Brussels I-*bis*' Regulation**[7]) and 'Rome II' where, with the aim of protecting the victims as "weaker parties", the former regulation provides for the *forum actoris* in relation to the victims' direct actions against insurers;
- *Lazar* may be construed as not providing a definitive solution for the case where the victim died in a State other than the one where the accident occurred, since it is possible to argue that the infringement of the right to life takes place where the primary victim dies and such damage cannot be simplicity qualified as (*rectius*, degraded to) an "indirect damage" of the physical injuries caused by the accident[8];
- Article 4 (1) of 'Rome II' may not always be decisive, first of all with regard to the victims' **direct actions** provided by the **Motor Insurance Directive (M.I.D.) against insurers and compensation bodies**:

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context of a claim for compensation for material and non-material damage brought by the close relatives of a person who has died as a result of a road traffic accident which occurred in the State of the court seised, where those family members are resident in another EU Member State and have suffered the damage itself in that other Member State? (2) For the purposes of the application of Article 4(1) of [the Rome II Regulation], do the material and non-material damage sustained, in their State of residence, by the close relatives of a person who has died as a result of a road traffic accident which occurred in the State of the court seised constitute "damage" within the meaning of the first part of Article 4(1) of that regulation, or "indirect consequences" within the meaning of the second part of that provision?».

[4] In particular, the Court of Justice delivered the following rule: «*Article 4(1) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), must be interpreted, in order to determine the law applicable to a non-contractual obligation arising from a road traffic accident, as meaning that the damage related to the death of a person in such an accident which took place in the Member State of the court seised and sustained by the close relatives of that person who reside in another Member State, must be classified as 'indirect consequences' of that accident, within the meaning of that provision*».

[5] See M. BONA, «*Roma II» e sinistri stradali mortali: il Paese di residenza delle vittime secondarie non determina la legge applicabile*, quoted, pp. 829-851.

[6] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[7] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[8] As to this issue paragraph 25 of *Lazar* does not seem entirely clear: «[…] *In the present case, the damage is constituted by the injuries which led to the death of Mr Lazar's daughter, which, according to the referring court, occurred in Italy. The damage sustained by the close relatives of the deceased, must be regarded as indirect consequences of the accident at issue in the main proceedings, within the meaning of Article 4(1) of the Rome II Regulation*». Was the overlap between the place of the injuries and the place of death the basis of the Court's *ratio decidendi*?

- in particular, as to these special actions, the application of 'Rome II' should be coordinated with the **Directive 2009/103/EC** of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability;
- in fact, this directive may be construed as directly and autonomously addressing the issue of private international law or, alternatively, as solving the topic of applicable law by providing for a system under which cross-border victims, who choose to issue one of the M.I.D. actions before the jurisdiction of the Member State where they are resident, benefit from the application of the law of this State, which is the one that, under Directive 2009/103/EC, must grant, with its own internal law implementing this EU law, the direct right of action;
- hence, the M.I.D. may be construed as leading to a different approach to the issue of applicable law with regard to its direct actions; under this approach Article 4 of 'Rome II' would not be the relevant normative reference for the purposes of determining the law applicable to such actions, while the conflict of laws should be solved on the ground of the **"M.I.D. system"** according to **Article 27** of **'Rome II'** (or alternatively **Article 16**).

That Article 4 of 'Rome II' may not always be decisive is now confirmed by Trento District Court's orders envisaging, for the first time in judicial statements, an alternative and pioneering route to the determination of the applicable law in relation to such direct actions.

2. The Trento case.

The case giving rise to the court order here under scrutiny concerned a **fatal road traffic accident** occurred in Croatia in July 2015 because of a violent collision between a motorbike, registered in Italy and driven by a young Italian citizen residing near Trento (Italy), and a van, registered in France, driven by a French citizen and insured by a French insurance company. As a result of the collision between the above vehicles, the Italian motorcyclist died.

The family members of the deceased - his parents and two brothers - pursued civil proceedings against the camper's French insurance company only before the Court of

Trento (Italy), being this the *forum actoris* according to Articles 11 (1) (b) and 13 (2) of the Regulation 1215/2012/EU, and recital 32 of Directive 2009/103/EC[9].

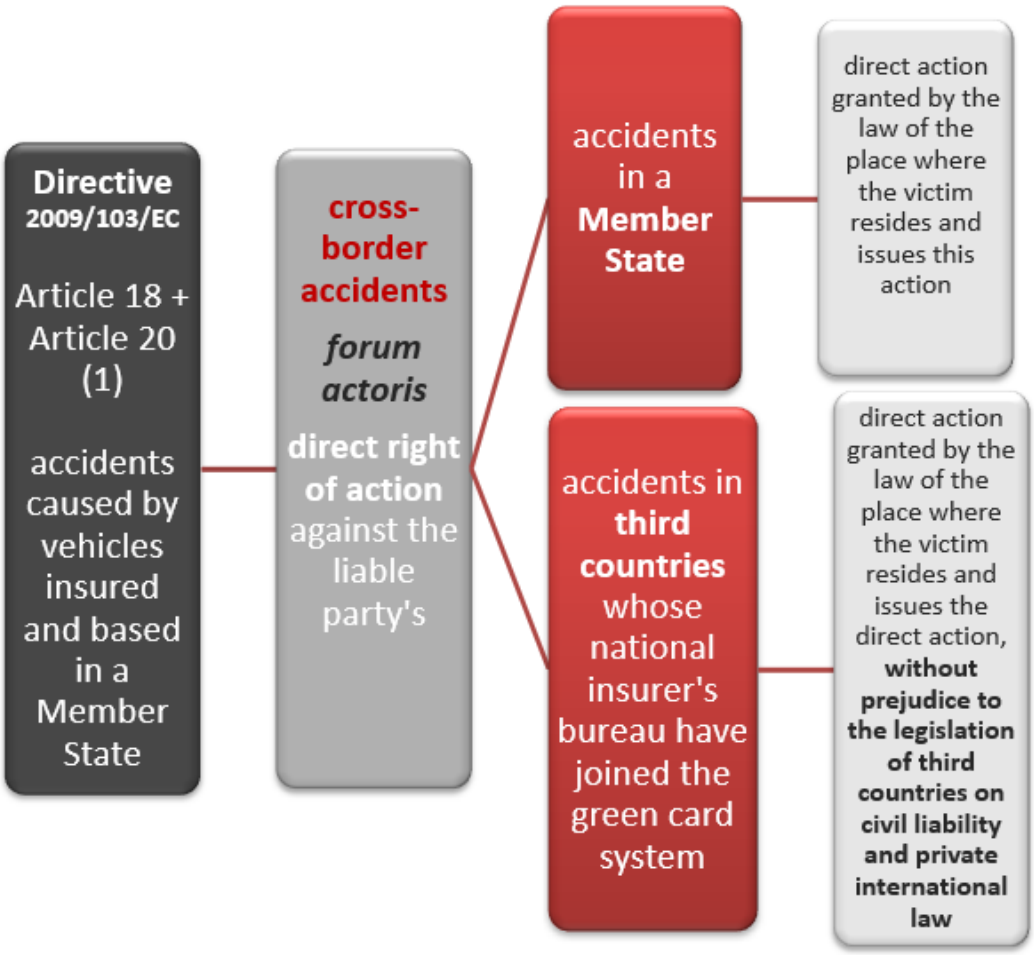
3. Applicable law: the parties' positions and arguments.

3.1. The claimants' perspective.

As a first pleading in relation to applicable law the plaintiffs supported the direct application of Italian law by relying on the following arguments:

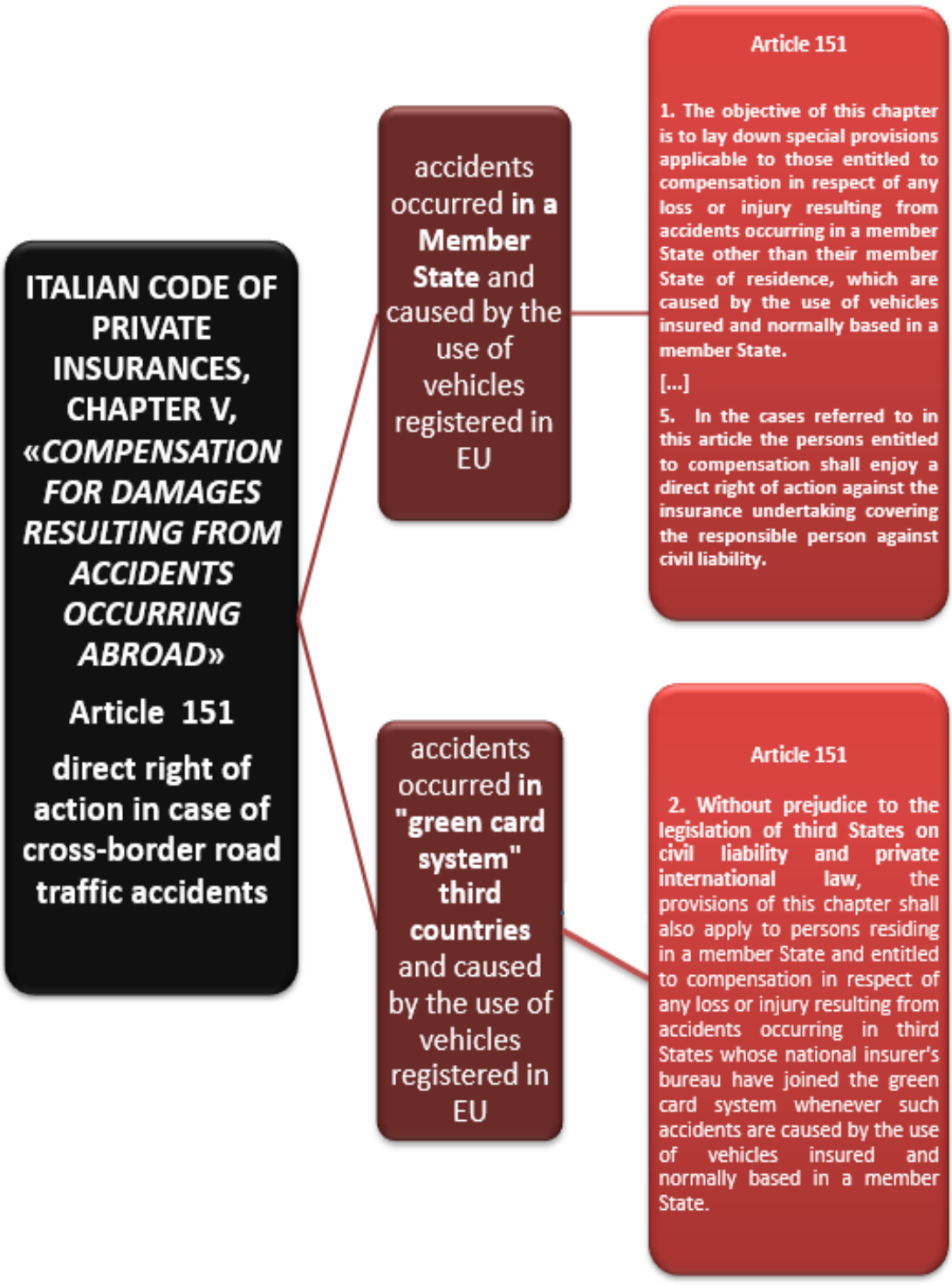
- pursuant to **Article 18** of **Directive 2009/103/EC**, «*Member States shall ensure that any party injured as a result of an accident caused by a vehicle covered by insurance as referred to in Article 3 enjoys a direct right of action against the insurance undertaking covering the person responsible against civil liability*»; this provision, as confirmed by **Article 20 (1)** and the historical background of this direct action in relation to cross-border accidents[10], also applies to the case of «*accidents occurring in a Member State other than the Member State of residence of the injured party*» as well as, even though for this third case only «[w]*ithout prejudice to the legislation of third countries on civil liability and private international law*», to «*injured parties resident in a Member State and entitled to compensation in respect of any loss or injury resulting from accidents occurring in third countries whose national insurer's bureau have joined the green card system whenever such accidents are caused by the use of vehicles insured and normally based in a Member State*»;

[9] The claimants are represented by MB.O lawyers Marco Bona and Giulia Oberto, authors of this article.
[10] The direct right of action – now provided by Article 18 of – was first introduced by Article 3 of Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive), specifically for the protection of the «*injured parties entitled to compensation in respect of any loss or injury resulting from accidents occurring in a Member State other than the Member State of residence of the injured party which are caused by the use of vehicles insured and normally based in a Member State*» (Article 1). As made it clear by Article 1 of the Fourth Motor Directive this directive, hence the direct right of action too, also applied to «*injured parties resident in a Member State and entitled to compensation in respect of any loss or injury resulting from accidents occurring in third countries whose national insurer's bureau as defined in Article 1(3) of Directive 72/166/EEC have joined the Green Card system whenever such accidents are caused by the use of vehicles insured and normally based in a Member State*», in this second case «[w]*ithout prejudice to the legislation of third countries on civil liability and private international law*».



- in relation to cross-border road traffic accidents, **Italian law** faithfully implements the above rules of Directive 2009/103/EC at Chapter V («*Compensation for damage resulting from accidents occurring abroad*») of the Italian Code of Private Insurances, where Article 151, implementing the directive and according to it, expressly distinguishes between cross-border road traffic accidents occurred in a Member State and the ones occurred in third countries whose national insurer's bureau have joined the green card system; in particular, in relation to the former case, Article 151, paragraph 1, provides for the right to direct action (set by paragraph 5) without referring to the issue of applicable law/international private law; on the contrary, as to the latter case, paragraph 2 grants the direct action provided by paragraph 5 saved for «*the legislation of third countries on civil liability and private international law*»[11].

[11] There are not official translations of the Code of Private Insurances from Italian into English. Nevertheless, a reliable English version is provided by IVASS - the Institute for the Supervision of



- pursuant to the above-mentioned provisions (relevant for the purposes of Article

Insurance, and available at *https://www.ivass.it/normativa/nazionale/primaria/CAP_EN.pdf?language_id=3.*

27 of 'Rome II'), the direct action issued by the claimants against the French insurance undertaking the coverage of the French driver clearly has its legal basis in the Italian law (Article 151 of the Code of Private Insurances) and it is actually granted by this special substantive law, that refers to private international law only in relation to accidents occurred in third countries;

- consequently, being the Italian law the legal basis of the direct action, this law should apply to and govern all other issues, including limitation law, liability issues (obviously without prejudice to the principle stated by Article 17 of 'Rome II') and *quantum* issues, this according to the **"all or nothing approach"** which characterizes **Article 15** of **'Rome II'** that clearly precludes "***dépeçage***" (an "issue-by-issue" approach to the choice of law)[12];

[12] In private international law the French terms "*dépeçage*" (or "*morcellement*") means the joint application of norms from different legal systems. In other words, "*dépeçage*" occurs where different issues within the same proceedings, dispute or case are governed by the laws of different jurisdictions: "*dépeçage*" is «*the process of cutting up a case into individual issues, each subject to a separate choice-of-law analysis*» (see *ex plurimis Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 n.1 (7th Cir. 1996)). Accordingly, it is the result of issue-by-issue analysis in choosing the law to be applied to a transnational case. The US model (see *Restatement of the Law, Second: Conflict of Laws*, 1971-2005) is clearly based on a "*dépeçage*" approach, since it provides expressly that the choice-of-law determination has to be made for each issue of the case; consequently, different laws may apply to different issues of a case. This "splitting" of a case into its various component issues may give rise to fair solutions, but it may also significantly increase the burden on courts and on the involved parties. On the contrary, even though under some restrictions (see, in particular, Articles 16, 17 and 26), 'Rome II' model is based on an antipodal approach under which "*dépeçage*" is prevented by the "all or nothing approach" provided by Article 15 unless imposed by mandatory rules or to the extent that the applicable foreign law goes against the public order of the *forum*.

- this conclusion is not undermined by the *Lazar* judgment, because in this 2015 precedent the Court of Justice referred to the interpretation of Article 4 (1) of 'Rome II' only, while it did not consider the specific issue of the direct right of action granted by Articles 18 and 20 of Directive 2009/103/EC as this latter scenario was not raised by either the referring national court or by the parties in the main proceedings.

Alternatively, according to Article 267 of the Treaty on The Functioning of The European Union, the claimants asked the Trento Court to refer the case to the Court of Justice for a preliminary ruling on the following two issues:

- whether, with reference to the direct action brought, against the insurer of the civil liability, by an injured person in a road traffic vehicle accident occurred in a Member State other than that of his domicile and caused by the use of a vehicle insured and normally stationary in such Member State, Article 18 («*Right of direct action*») of Directive 2009/103/EC, whereby «*Member States shall ensure that persons injured as a result of an accident caused by an insured vehicle* […] *may avail themselves of a right of direct action against the undertaking which ensures the civil liability of the person responsible for the accident*», should be construed - in the perspective of **Article 27** («*Relationship with other provisions of Community law*») and/or **Article 16** («*Necessary implementing rules*») of **Regulation (EC) no. 864/2007** ('Rome II'), and in the light of the prohibition of *dépeçage* provided by Article 15 («*Scope of applicable law*») of the same regulation, in any event without prejudice to the provision of Article 17 («*Safety and conduct rules*») of the same regulation - as leading to the application of the law of the Member State (in this case also the victim's domicile) where the injured party has sued the insurer, this in consideration of the circumstance that the right to bring such direct action is provided by and depends on the law of that Member State implementing the aforementioned Articles 18 and 20 (1) of Directive 2009/103/EC and, therefore, the injured person exercises the right to this action and sues directly on the basis of the law of this Member State;
- whether, with reference to the direct action provided by Article 18 («*Right of direct action*») of Directive 2009/103/EC and brought, against the insurer of the civil liability, by an injured person in a road traffic vehicle accident occurred in a Member State other than that of his domicile and caused by the use of a vehicle

insured and normally stationary in such Member State, Article 15 («*Scope of applicable law*») of Regulation (EC) no. 864/2007 ('Rome II'), providing for the prohibition of *dépeçage*, should be construed – taking into consideration its scope and without prejudice to the provision of Article 17 («*Safety and conduct rules*») of the same regulation - as leading to the application of the law of the Member State (in this case also the victim's domicile) where the injured party has sued the insurer, this in consideration of the circumstance that the right to bring such direct action is provided by and depends on the law of that Member State implementing the aforementioned Article 18 of Directive 2009/103/EC and, therefore, the injured person exercises the right to this action and sues directly on the basis of the law of this Member State.

The further alternative pleading raised by the claimants aimed at the disapplication of Croatian law, if held by Trento District Court as the law applicable to the proceedings, in relation to its provisions preventing or restricting the victims' right to full compensation, or at least just and adequate awards.

This scenario was supported by the claimants pursuant to Article 26 of 'Rome II' by outlining that:

- the application of Croatian law, because of its significant limits to the awarding of bereavement damages and secondary victims' psychiatric damages, would prevent the claimants from having access to full compensation in comparison to the redress protection usually granted both qualitatively and quantitatively by Italian law and case-law for analogous situations;
- this outcome would be contrary to the Italian public order under which the victims' right to full compensation for pecuniary and non-pecuniary damages arising from violation of fundamental rights is directly granted by the Constitution[13].

3.2. The defendant's perspective.

The French insurer opposed the claimants' theories and supported the application of the Croatian law as the law of the place where the accident took place, this mainly by relying

[13] See on the Italian approach to "public order" as a limit to the application of foreign law M. BONA, *Disapplication of Austrian Law Denying Compensation for Bereavement Damages: A Judgment by Italian Supreme Court on the Notion of "Public Policy"* (2015) 26 *European Business Law Review*, Issue 4, pp. 509-529.

on *Lazar* judgment as being it relevant in spite of the claimants' direct action's derivation from Italian law. However, the defendant conceded that the claimants' request for a preliminary ruling could be an alternative solution.

4. The Trento District Court's innovative twin orders.

The District Court of Trento, with the **order issued on 16 February 2019**, concluded for the direct application of Italian law, consistently with the first argument raised by the claimants: «*as to the applicable law this has to be Italian law: indeed, the Claimants enjoy a direct right of action in the case of cross-border accidents occurred in the European Union according to Article 151, paragraphs 1 and 5, of Italian Code of Private Insurances - implementing Article 18 («Direct right of action») of Directive 2009/103/EC - which does not refer neither to foreign law on civil liability nor to private international law, differently from Article 151, paragraph 2, of Italian Code of Private Insurances, which, referring to the accidents occurred in third countries whose national insurer's bureau have joined the green card system, expressively makes save the legislation of such third countries and private international law. Pursuant to Article 151, paragraph no. 5, of the Italian Code of Private Insurances, providing that «In the cases referred to in this article the persons entitled to compensation shall enjoy a direct right of action against the insurance undertaking the coverage of the responsible person against civil liability», the Plaintiffs shall enjoy the direct right of action against the insurance company of the person responsible against civil liability, this according to Italian law, being the foreign legislation applicable only in relation to accidents occurred in third countries not belonging to European Union, whose national insurer's bureau have joined the green card system*»[14].

[14] This is the order's original version in Italian: *«ritenuto quanto alla legge applicabile che essa va individuata nella legge italiana: invero, gli attori hanno diritto all'azione diretta per i sinistri transfrontalieri verificatisi nell'Unione Europea ai sensi dell'art. 151 co. 1 e 5 Cod. Ass. Priv. – attuativo dell'art. 18 ("Diritto di azione diretta") della direttiva n. 2009/103/CE -, il quale non rinvia né alla legislazione straniera in materia di responsabilità civile, né alle norme di diritto internazionale privato, e ciò diversamente dall'art. 151 co 2 Cod. Ass. Priv., il quale, nel disciplinare i sinistri occorsi in Stati terzi aderenti al sistema della carta verde, fa espressamente salve la legislazione di tali Stati e le norme di diritto internazionale privato. Alla stregua dell'art. 151 co. 5 Cod. Ass. Priv., secondo cui "Nelle ipotesi di cui al presente articolo gli aventi diritto al risarcimento possono agire direttamente contro l'impresa di assicurazione che copre la responsabilità civile del responsabile", va riconosciuto agli attori il diritto di agire direttamente nei confronti della compagnia assicuratrice del responsabile del sinistro, e ciò secondo la normativa italiana, risultando applicabile la legislazione straniera unicamente in relazione ai sinistri avvenuti in Stati terzi, non appartenenti all'Unione Europea, aderenti al sistema della carta verde"*». The translation into English is by the Authors of this article.

The reasoning behind this order is absolutely simple in its logic: the claimants are suing on the ground of Italian law which grants them the direct right of action, hence it is Italian law that should be the applicable law, since it is only in relation to road traffic accidents occurred in third countries (non-EU States) belonging to the "green card system" that reference has to be made to the common rules on private international law (firstly, Article 4 of 'Rome II')[15].

Trento Court has confirmed the above order in the same proceedings with a further **order issued on del 4 March 2020**: «[…] *the rule provided by Article 151, para. 1 and 5 of the Code of Private Insurances - implementing Article 18 («Direct right of action») of Directive 2009/103/EC* - […] *does not refer either to foreign law on civil liability or to private international law, differently from Article 151, paragraph 2, of Italian Code of Private Insurances, which, referring to the accidents occurred in third countries whose national insurer's bureau have joined the green card system, expressively makes save the legislation of such third countries and private international law. Pursuant to Article 151, paragraph no. 5, of the Italian Code of Private Insurances, providing that «In the cases referred to in this article the persons entitled to compensation shall enjoy a direct right of action against the insurance undertaking the coverage of the responsible person against civil liability», the Plaintiffs shall enjoy the direct right of action against the insurance company of the person responsible against civil liability, this according to Italian law, being the foreign legislation applicable only in relation to accidents occurred in third countries not belonging to European Union, whose national insurer's bureau have joined the green card system*»[16].

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[15] Incidentally, this approach may find an additional argument in its favor in relation to direct actions brought against compensation bodies, where Article 10 (4) of Directive 2009/103/EC, which is relevant also for the purposes of Article 25, provides that «*Each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by the body, without prejudice to any other practice which is more favourable to the victim*».

[16] This is the Italian version: «[…] *il dato normative offerto dall'art. 151, co. 1 e 5 Cod. Ass. Priv. – attuativo dell'art. 18 ("Diritto di azione diretta") della direttiva n. 2009/103/CE – […] non rinvia né alla legislazione straniera in materia di responsabilità civile, né alle norme di diritto internazionale privato, e ciò diversamente dall'art. 151 co. 2 Cod. Ass. Priv., il quale, nel disciplinare i sinistri occorsi in Stati terzi aderenti al sistema della carta verde, fa espressamente salve le legislazioni di tali Stati e le norme di diritto internazionale privato. In particolare recita il co. 5 art. citi: " Nelle ipotesi di cui al presente articolo gli aventi diritto al risarcimento possono agire direttamente contro l'impresa di assicurazione che copre la responsabilità civile del responsabile"; di talchè va riconosciuto agli attori il diritto di agire direttamente nei confronti della compagnia assicuratrice del responsabile del sinistro, e ciò secondo la normativa italiana, risultando applicabile la legislazione straniera unicamente in relazione ai sinistri avvenuti in Stati terzi, non appartenenti all'Unione Europea, aderenti al sistema della carta verde*». It should be noted that the Trento Court has added that Croatian law could not apply anyway at least in the part where it precludes compensation for damages arising from the infringement of the inviolable rights.

5. Is the "Trento reasoning" undermined by the EU Court of Justice's judgment in *da Silva Martins* (case C-149/18)?

These Trento Court's twin orders do not seem to be weakened by the Court of Justice's judgment *da Silva Martins*[17] that, by an *obiter dictum*, has touched the very complex issue regarding the interactions between the system referred to in Directive 2009/103/EC and 'Rome II'.

In particular, the Court of Justice has apodictically stated that «*there is nothing in the wording or the objectives of Directive 2009/103 to suggest that it is intended to lay down conflict-of-law rules*» (point 38), since the directive «*is in fact limited to requiring Member States to adopt measures guaranteeing that the victim of a road traffic accident and the owner of the vehicle involved in that accident are protected*» (point 39).

Nevertheless, in delivering such picture, the Court of Justice did not conduct any particular search to support it; the above statements originate from the mere extrapolation and generalization of some remarks [18] made by the Court in the precedent *Ergo Insurance*[19].

In this latter judgment the Court of Justice had been called upon to deal with two different accidents caused by trucks with trailers and, more specifically, with the specific issue of the law applicable to the actions for indemnity (recourse actions) among the tractors' insurers and the trailers' insures; therefore the Court focused solely on some provisions of Directive 2009/103/EC[20]; in particular, it addressed Article 14(b) of this Directive[21]; the question was whether Article 14(b) should have been taken into account as a rule for determining the applicable law not only for the protection of road traffic accident victims,

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[17] *Agostinho da Silva Martins* v *Dekra Claims Services Portugal SA*, Court of Justice of the European Union, Sixth Chamber, 31 January 2019, C-149/18, ECLI:EU:C:2019:84.

[18] See in particular points 39 and 40 of "*Ergo Insurance*" judgment.

[19] "*ERGO Insurance" SE*, v "*If P&C Insurance" AS* (C-359/14), and "*Gjensidige Baltic" AAS*, v "*PZU Lietuva"UAB DK* (C-475/14), Court of Justice of the European Union, Fourth Chamber, 21 January 2016, ECLI:EU:C:2016:40.

20 See points from 17 to 19, referring to the Recital 26 of the Directive (concerning the insurance obligation), and to Articles 3 (concerning the general principle according to which each Member State shall take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance) and 4, related to the territorial scope of the compulsory policies of insurance against civil liability arising out of the use of vehicles

[21] Article 14 («*Single premium*») provides that: «*Member States shall take the necessary steps to ensure that all compulsory policies of insurance against civil liability arising out of the use of vehicles: (a) cover, on the basis of a single premium and during the whole term of the contract, the entire territory of the Community, including for any period in which the vehicle remains in other Member States during the term of the contract; and (b) guarantee, on the basis of that single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher*».

but also for the actions for indemnity of the insurer when an accident involves a towing vehicle and a towed one, used jointly[22].

In fact, as correctly pointed out by the Court of Justice in *Ergo*[23], Article 14(b) of the Directive 2009/103/EC does not lay down a special conflict-of-law rule with regard to the conflict-of-law rules laid down in the 'Rome I' and 'Rome II' Regulations regarding actions for indemnity between insurers and, therefore, it does not fulfil the conditions laid down in Article 23 of 'Rome I' Regulation and Article 27 of 'Rome II' Regulation respectively.

In *Ergo* the Court rightly established that Article 14 (b) of the directive deals «*with the territorial extent and level of coverage that the insurer is required to provide, so as to ensure adequate protection for the victims of road traffic accidents*»[24].

It is also true that that, in *Ergo*[25], the Court of Justice raised this conclusion on Article 14 (b) also by noting that, since the beginning, namely since the first one, the motor insurance directives pursue a general objective of ensuring the protection of road traffic accident victims by guaranteeing that they receive a minimum amount of insurance coverage, without providing rules on the conflict of Laws.

However, this short remark remains a general assumption that finds full confirmation in provisions like Article 14 (b), but it certainly deserves further thinking in relation to other provisions of the M.I.Ds system such as the ones on the direct right of action in cross-border cases, that, since the Fourth Motor Insurance Directive, have been added in later years under a more developed and broad vision of the RTA victims' rights (including, precisely, their right of direct action)[26].

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[22] See point 33 of the judgment. In particular, the Supreme Court of Lithuania (Lietuvos Aukščiausiasis Teismas) referred the following question to the Court of Justice for a preliminary ruling: «*Does Article 14(b) of [Directive 2009/103] lay down a conflict-of-law rule, which ratione personae should be applied not only to the victims of road traffic accidents but also to the insurers of the vehicle responsible for the damage caused in the accident, for the purposes of determining the law applicable to the relations between them, and is this provision a special rule with respect to the rules on the applicable law laid down in [Rome I and Rome II]*?» (paragraph 34).

[23] See point 38 of the judgment.

[24] See points from 42 of the judgment. This is the principle set out by the Court: «*Article 14(b) of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability must be interpreted as meaning that that provision does not contain any specific conflict-of-law rule intended to determine the law applicable to the action for indemnity between insurers in circumstances such as those at issue in the main proceedings*».

[25] See points from 39 to 41 of the judgment.

[26] See, in particular, Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (Fourth motor insurance Directive) and Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC,

Having duly clarified the limited scope of the above statements made by the Court of Justice in *Ergo Insurance*, it appears that the above *obiter dictum* in *da Silva Martins* is incorrect or, at least, it may need to be verified in relation to the direct right of action system in cross-border accidents. This because, according to the perspective accepted by the Trento Court's orders, it may be possible to conclude that, as it also seems imposed by Article 15 of 'Rome II' Regulation (prohibition of *dépeçage*), the victim's Member State's law implementing Article 18 («*Direct right of action*») of the Directive 2009/103/EC, and granting such action, determines the applicable law, with the exception of transnational accidents occurred in third countries whose national insurer's bureau have joined the green card system (in relation to such accidents - differently from the accidents occurred in Member States - according to Article 20 the direct action is granted «[w]*ithout prejudice to the legislation of third countries on civil liability and private international law*»).

6. What's next?

There is not any doubt that the Trento District Court orders are revolutionary. Of course, they are not definitive and they may also be overruled in the future. However, they clearly show all the critical points arising from the **lack of legislative coordination**, at EU level, between, on one hand, the Motor Insurance Directives' system based on the direct right of action (in cross-border cases generally granted to the claimants by the Member State where they are domiciled and, on the ground of such action, sue) and, on the other hand, 'Rome II'.

The question of how to combine the M.I.Ds system (direct action + *forum actoris*) with 'Rome II' could have been resolved some time ago, more specifically by including in the regulation the reasonable rule that the European Parliament had once suggested during the works that brought to the adoption of 'Rome II': «*where the harmful event results in a claim for damages for personal injuries, the non-contractual obligation shall be governed by the law of the victim's country of residence*»[27].

In particular, the final Report adopted by the European Parliament at first reading in 6 July 2005 (P6_TA-PROV(2005)0284) contained, as also proposed by the Rapporteur

88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles.

27 Draft report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (COM(2003)0427 – C5 0338/2003 – 2003/0168(COD)) Committee on Legal Affairs 11 November 2004.

Diana Wallis, a specific rule for RTA claims involving damages to persons: «*In the case of personal injuries arising out of traffic accidents, however, and with a view to the motor insurance directive, the court seised and the liable driver's insurer shall, for the purposes of determining the type of claim for damages and calculating the quantum of the claim, apply the rules of the individual victim's place of habitual residence unless it would be inequitable to the victim to do so. With regard to liability, the applicable law shall be the law of the place where the accident occurred*» [Article 3 (2)].

Unfortunately the Parliament's wise proposal was not successful, however it remains undisputable that applying, for the purposes of determining recoverable losses as well as category of secondary victims entitled to claim and of assessing awards, the law of the Member State of the victim's place of habitual residence where the direct action is brought is a solution much more equitable and fair for the injured parties and even more practicable for insurers and courts[28]. It should also be considered that a rule like the one proposed by the European Parliament at first reading would not force national courts to contravene the basic principles of their own legal order, and to face the possibility of discrimination among their citizens, hence to address the issue of foreign law's compatibility with the internal public order.

It is not just by accident that the Trento District Court, put forth the alternative between, on one hand, the direct application of Italian law and, on the other hand, the undercompensation of the claimants (contrary to Italian public order) and the disapplication of Croatian Law, opted for the first and most straightforward solution.

If there is a moral, it is that 'Rome II' is far from providing certainties whenever the injured party-claimant is facing his national judges under the dark cloud of foreign law.

28 The final Draft Report adopted by the European Parliament, as the previous versions prepared by the Rapporteur Diana Wallis, was clearly inspired by a general philosophy that perfectly meets both the need for an higher level of certainty in relation to applicable law in the area of torts and the need to avoid injustice to the victims of wrongful harms. In particular, the Draft Report's aim to maximise «legal certainty while allowing courts to use their discretion in choosing the solution which best accords with the need to do justice to the victim and with the reasonable expectations of the parties» was indeed appreciable. This approach does not reduce the margins for bringing proper justice to victims. We surely face a rule that enables victims in personal injury and fatal accident cases to be compensated by properly taking into consideration the concept of full and fair compensation operating in the country where they sustain the losses. This approach avoids or, at least, significantly reduces the risk of leaving victims without a compensation considerable as appropriate and satisfying in the light of the social and economic background of his habitual residence. Therefore, the rule grants to victims an appreciable level of redress protection since persons injured are likely to receive at least the compensation they would receive if injured in their own country.

CONTATTI

Telefono: +39 011 511 1005
Fax: +39 011 515 0103
Email: info@mbolaw.it

SEDI

Via Giannone, 1
10121 Torino

Corso Lancieri d'Aosta n. 15/C
11100 Aosta

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