The localization of torts pursuant to Art. 4 of the Rome II Regulation between "*lex loci damni directi*", common habitual residence and escape clause

La localizzazione del fatto illecito ai sensi dell'Art. 4 del Regolamento Roma II tra "*lex loci damni directi*", residenza abituale comune e clausola d'eccezione

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Abstract: The Italian Supreme Court has clarified the interpretation of Art. 4 (1) of Rome II, reaffirming that in road traffic accidents, the applicable law is that of the place where the primary victim sustained physical injuries, as the *lex damni* coincides with the *lex loci actus* identifying a peculiar *lex loci damni directi*. However, if both the direct victim and the person claimed to be liable share a common habitual residence, the law of that residence applies as an exception. Since the European Commission's Report on Rome II did not raise significant issues or propose reforms about Art. 4, it is preferable for case law to remain consistent, ensuring the principles of Rome II are applied as an "*acte claire*".
Keywords: traffic accidents, direct damage, *lex damni*, common habitual residence, Rome II.

Riassunto: La Corte di cassazione italiana si è pronunciata sull'interpretazione dell'Art. 4 (1) Roma II, ribadendo che in ipotesi di sinistri stradali il luogo del danno è quello in cui la vittima primaria subisce lesioni personali, poiché la *lex damni* e la *lex loci actus* coincidono integrando una peculiare *lex loci damni directi*. Tuttavia, se la vittima diretta e il presunto responsabile hanno una residenza abituale comune, si applica tale legge quale eccezione alla regola generale che, pertanto, ha portata residuale. Non essendo emerse particolari problematiche sul tema dalla Relazione sull'applicazione di Roma II, in mancanza di proposte di riforma in merito, è auspicabile che l'elaborazione giurisprudenziale si mantenga uniforme nell'applicazione dei profili che rendono Roma II un "*acte claire*".
Parole chiave: sinistri stradali, danno diretto, *lex damni*, residenza abituale comune, Roma II.

I. Introduction

1. The Italian Court of Cassation[1] has recently been confronted with questions of interpretation regarding the scope of application of Art. 4 of the Rome II Regulation[2] in two separate cases, both concerning road traffic accidents, and focusing respectively on its first and second paragraphs. These cases share the Court's firm position in reaffirming the general principles held by the prevailing orientation. Confirming the firmness of the hermeneutic positions developed by European case law, the Report on the application of the Rome II Regulation, recently published by the European Commission, did not highlight any particular problems in the application of the paragraphs that make up Art. 4, not even for the purposes of the advisability of a possible revision of the Regulation. Consequently, there are no valid reasons for national Courts to deviate from the consolidated interpretation lines.

2. The Supreme Court decided in conformity with the CJEU's interpretation in a case which involved a claim for non-pecuniary damages made by the injured party in a traffic accident that occurred in Slovenia, before the Court of Trieste against the insurance company and the liable party. The latter argued for the applicability of Slovenian law, which would lead to the prescription of the right enforced. However, the trial Court applied Italian law and, after confirming the exclusive liability of the defendant, ordered the payment of an amount calculated on the well-known "Milan Tables"[3]. The insurance company filed an appeal to the Court of Cassation against the confirmation of the first-instance judgment by the appellate Court, which merely recalculated the amounts based on the updated Tables introduced in the meantime. The company reiterated its objection regarding the applicability of Slovenian law instead of Italian law.

3. The case was then reassigned to another Section of the same appellate Court to be treated in a public hearing, given the interpretative relevance of the legal issue raised by the applicant. Indeed, the insurance company argued that the first- and second-instance Courts had misinterpreted the European private international law, where Art. 4 (1) of Rome II establishes the place of the damage as the connecting factor for determining the applicable law in cases of non-contractual liability. According to this provision, the place of the damage is where the injured party, the primary and direct victim, directly sustained physical personal injuries. In contrast, the judges of first- and second-instance had identified the place of damage where permanent after-effects and the period of temporary disability were localized. In essence, the place of direct damage was interpreted to be as the place where the patient-injured person was treated, since the time and place of the perpetration of the physical injury were not considered relevant, but only the subsequent moment when the concrete and real physical damage suffered by the injured party was discovered and ascertained.

4. However, such a reconstruction is questionable in that, by not taking into account the consolidated jurisprudence, it changes the ontological consistency of the criterion of the spatial localization of the damage laid down by the European private international law. In fact, the connecting factor in

[1] This is the decision of Cass. of December 23rd, 2024 no. 34017.

[2] 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), *OJ L* 199, 31.7.2007, pp. 40-49.

[3] Since the decision of Cass., civ., June 7th, 2011 no. 12408, in *Corriere giur.*, 2011, p. 1075 ff. with comment of M. Franzoni, "Tabelle nazionali per sentenza, o no?", *ivi*, p. 1085 ff. e *Danno resp.*, 2011, p. 943, and M. Hazan, "L'equa riparazione del danno (tra R.C. Auto e diritto comune)", *ivi*, p. 946 ff., the Tables of Milan have had a sort of national vocation and now are used by most Italian Courts for the liquidation of compensation for non-pecuniary damage on the basis of equitable criteria pursuant to Art. 1226 of the Civil Code and Art. 2056 of the Civil Code. The criterion used by the Court of Milan in drawing up its own tables (the first introduction was in 2009) is based on the average value of the point, calculated on the basis of compensation previously decided for similar cases by the same Court (Trib. Milano, July 11th, 2022 no. 6059, in *Danno resp.*, 2022, p. 625 ff.). See on this issue F. Sartori, "Sull'ammissibilità di un'eterointegrazione tra legge straniera e lex fori in materia di risarcimento del danno non patrimoniale", *Riv. dir. int. priv. proc.*, no. 2, 2023, pp. 314-336, p. 328 ff.; F.D. Busnelli, "Responsabilità aquiliana e diritto giurisprudenziale positivo", *Danno resp.*, 2022, p. 572; M. Franzoni, "Le tabelle milanesi sul danno parentale", *Danno resp.*, 2022, p. 548.

question, instead of having an objective nature, since it is linked to the place where the injury to the personal or patrimonial sphere was suffered as direct damage, would take on a subjective nature, resulting from the variability of the place where the treatment is supplied, thus favoring the phenomenon of the transportation of the injured party to the place of treatment, whose system provides for a more favorable compensation regime.

5. Therefore, the Supreme Court, according to the prevailing interpretation, has decided to follow the objective criterion of the place where the direct damage occurred, that is the place in which the victim was injured. Consequently, the applicable law is the Slovenian one, as the road traffic accident occurred in Slovenia. This is the interpretation developed by the European case law[4], now constant on such issues, so that, in such cases, involving the identification of the place of the direct damage, Rome II Regulation can be qualified as an "*acte claire*"[5]. For this reason, in the absence of any margin of uncertainty that would justify a reference for a preliminary ruling to the Court of Justice of the European Union on this issue, the Court of Cassation referred the case to another Section of the same Court of Appeal to decide the dispute, on the basis of the correct applicable law identified pursuant to Art. 4 (1) of Rome II[6].

II. The connecting factor of the place where the direct damage occurred

6. The decision deserves attention in the part in which it fully reconstructs the legal and jurisprudential context surrounding the issue of the localization of non-contractual damage. Specifically, the normative references from which it is necessary to begin the examination are Art. 2 and Art. 4 of Rome II Regulation. The former establishes that the "damage shall cover any consequence arising out of tort/delict", while the latter establishes the general and residual rule. According to Art. 4, indeed, "unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict, shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".

7. According to the well-established interpretation[7], the place where the damage occurs, under Art. 4 (1) of Rome II, is to be understood as the place where the direct damage suffered by the main victim occurs and, in case of injuries to the personal or patrimonial sphere, such a place coincides with the place where the damage to the personal sphere was suffered or where the patrimonial damage occurred, as specified in Recital 17[8]. As a result, in all cases where the direct damage is relevant for determining the applicable law, as typically happens in road traffic accidents cases, the *lex damni* is identified with the *lex loci actus*, despite the fact that Art. 4 of the Rome II Regulation clearly establishes the irrelevance of the place where the event that caused the damage occurred. This peculiarity is deducted logically, not

[4] See the decision of the Court of Justice of European Union, 10th December 2015, case C-350/14, *Florin Lazar c. Allianz Spa*.

[5] See point no. 14 of the decision under comment.

[6] *Ibidem*.

[7] See F. Mosconi / C. Campiglio, *Diritto internazionale privato e processuale*, I, 11ª ed., UTET, Milano, 2024, p. 492 ff.; S. Armellini / B. Barel, *Diritto internazionale privato*, 2ª ed., Giuffrè, Milano, 2024, p. 421 ff.; G. Van Calster, *European Private International Law. Commercial Litigation in the EU*, 4ª ed., HART, Oxford, 2024, p. 336 ff.; P. Franzina, *Introduzione al diritto internazionale privato*, 2ª ed., Giappichelli, Torino, 2023, p. 261 ff.; A.L. Calvo Caravaca / J. Carrascosa González, "El reglamento «Roma II»: reglas generales sobre determinación de la ley aplicable a las obligaciones extracontractuales", *Revista Crítica De Derecho Inmobiliario*, no. 712, 2009, pp. 835-908, p. 838.

[8] For a detailed analysis of the topic see A. Malatesta, "Il nuovo diritto internazionale privato in materia di obbligazioni non contrattuali: il regolamento (CE) "Roma II" entra in vigore", *Danno e responsabilità*, no. 12, 2008, pp. 1206-1212, p. 1209 f., who specifies how the place where the damage occurs, in the event of injuries to the personal or patrimonial sphere, is "il luogo ove si realizza direttamente l'effetto diretto della condotta illecita", i.e. the so-called place of injury in the terminology proposed by G. Hohloch, "The Rome II Regulation: an Overview. Place of injury, habitual residence, closer connection and substantive scope: the basic principles", *Yearb. Priv. Int. Law*, vol. 9, 2007, pp. 1-18, p. 7; L. de Lima Pinheiro, "Choice of Law on Non-Contractual Obligations between Communitarization and Globalization. A First Assessment of EC Regulation Rome II", *Riv. dir. int. priv. proc.*, 2008, pp. 5-42, p. 17.

only juridically, from the direct nature of the damage suffered by the primary victim, that is the person directly and immediately harmed in their own personal or patrimonial sphere.

8. Since in these cases the direct damage takes place at the moment and place where the damaging event occurs[9], the law of the place of the damage and the law of the place where the event that causally triggered the damage cannot but coincide, thus identifying as a peculiar connecting factor, a sort of *lex loci damni directi* arising from the blending of the criteria of both *lex damni* and *lex loci actus*. This choice is justified by the objective and factual nature inherent to the ontological consistency of the criterion under consideration, which allows, therefore, the achievement of the goal of ensuring predictability of the applicable law balancing the interests of the person claimed to be liable and those of the injured party[10]. In contrast, interpreting such a law in the sense that the applicable law is that of the place where the injured person is treated shifts this balance in favor of the injured person. Consequently, it fosters the phenomenon of *lex shopping* towards the "care" legal system with higher compensation limits, preventing the liable party from predicting the applicable law, in disregard of the *rationale* behind the European Regulation as highlighted in Recitals 16 and 17 of Rome II.

9. The judgement, then, examines the ruling of the Court of Justice in *Lazar*[11] as it was invoked in the appeal in Cassation. The reference may appear inappropriate since the case concerned the different hypothesis of damage suffered by the close relatives of the direct victim. In particular, the Court of Justice was called to qualify the damage suffered by the relatives of the primary victim, dead in a road traffic accident, such as "direct damage" or as "indirect consequence"[12]. The latter interpretation was preferred. On the basis of this precedent, the Court of Cassation further states that "non può dubitarsi che le indicazioni rinvenienti dal Regolamento e dalla citata sentenza CGUE offrano criteri chiari e univoci che consentono di dirimere la questione posta"[13], notwithstanding the fact that in the present case the person directly jeopardized by the harmful event is the only one to have made the claim for compensation. Furthermore, in the former case there was a territorial diversity between the place where the primary victim was injured and the residence of the relatives, while in the latter case the territorial diversity is between the place of the harmful event suffered by the primary victim and the place of treatment, to which the primary victim was transported in a very short time and where the harmful consequences emerged.

10. In any case, the European ruling provides interpretative principles that can be applied to the case at hand. Pursuant to an autonomous interpretation of Art. 4 of Rome II[14], the connecting factor for determining the place of the damage should be identified as the "luogo in cui si è determinato l'evento lesivo, in quanto unico elemento in grado di costituire criterio certo e univoco nei suoi riferimenti spaziali e temporali"[15]. On the other hand, only the place where the direct damage occurred is objectively

[9] See *infra Lazar* case.

[10] Recital 16 of Roma II Regulation.

[11] See *Lazar* case, on the qualification of the damage suffered by the immediate family members of the direct victim, which the Court has recognized as having the nature of an "indirect consequence", as such irrelevant pursuant to Art. 4 (1) of Rome II, since it concerns subjects other than the person who has directly suffered the damage to his or her personal or patrimonial sphere. See P. Franzina, *op. cit.*, p. 263.

[12] See point no. 20 of *Lazar* case.

[13] "There can be no doubt that the indications deriving from the Regulation and from the aforementioned CJEU ruling offer clear and unequivocal criteria which allow the question posed to be resolved". See point no. 7 of the decision under comment. The decision said that it cannot be doubted that the indications derived from the Regulation and from the abovementioned CJEU ruling offer clear and unambiguous criteria that allow the questions posed to be resolved.

[14] See point no. 21 of *Lazar* case. The need for an autonomous interpretation of the concrete notion of "non-contractual obligation" emerges from Recital 11 of the Rome II Regulation. See on the topic R. Ruoppo, "Regime generale di diritto internazionale privato", in P. Perlingieri / G. Perlingieri / G. Zarra, *Istituzioni di diritto privato internazionale e europeo*, Edizioni Scientifiche Italiane, Napoli, 2024, pp. 353-357, p. 353 ff. On the need for an autonomous interpretation of the notion of "damage" see O. Boskovic, "La Localisation du Dommage en Droit International Privé, *Rapport Général*", in O. Boskovic (ed.), *Localisation of Damage in Private International Law*, Brill Nijhoff, Leiden, 2024, p. 23.

[15] "Place where the harmful event occurred, as the only element capable of constituting a certain and univocal criterion in its spatial and temporal references". See point no. 8 of the decision.

ascertainable and unambiguously identified. Furthermore, such a place would turn out to be the same for all those who are entitled to claim damages, since it is independent of personal connecting factors such as, for example, the habitual residence or domicile of the secondary victim. It follows that for anyone claiming compensation in relation to the same harmful event, the same law will be applicable, thus complying not only with the requirements of uniformity and predictability within the European system, but also with the basic consistency of the compensation mechanism. Indeed, under Art. 15 of Rome II, the law thus identified will govern several inherent aspects including, in particular, the existence, nature and assessment of damage or the remedy claimed[16], persons entitled to compensation for damage sustained personally[17], as well as the rules regarding prescription and limitation[18]. Furthermore, pursuant to Art. 3 of Rome II, the law identified under the European framework has universal application, meaning it applies even if it is the law of a third State.

11. The judgement of the Court of Cassation also underscores the assertion, albeit incidental, of the Court of Justice that, especially in the case of road traffic accidents, it is "normally possible" to locate the arising of direct damage[19]. It is evident that the "normal possibility" of identifying the place where the damage arises, in the case of a road traffic accident, implies that the damage is to be understood as direct damage consisting of the injury *ex se* considered, while excluding any impairments such as future potential temporary or permanent disability[20].

12. The reference to the notion of direct damage under EU law means that, with regard to road traffic accidents cases, the connecting factor is the "luogo in cui il [suddetto] sinistro stradale si è consumato con la determinazione dell'evento lesivo, indipendentemente dal luogo anche diverso in cui abbiano a manifestarsi, nel tempo, le menomazioni conseguenti"[21]. Therefore, even in the judgment *Lazar*, the damage suffered by the primary victim (the direct damage) was linked to the injuries that had caused the tragic fatal consequences, that is the injuries immediately following the accident, and not the damage-consequence that resulted from the injuries, in that case the death of the victim, which well might have occurred in a different place and time from those of the harmful event[22].

13. In essence, the interpretation offered by the Court of Justice is the only one that makes it possible to ensure the achievement of the objective foreseeability in the identification of the applicable law referred as set out in Recital 16, "avoiding the risk that the tort or delict is broken up in to several elements, each subject to a different law according to the places or the persons other than the direct victim who sustained damage"[23].

14. From a systematic point of view, such an interpretation is also consistent with the case law developed in relation to the identification of the competent Court in case torts under Art. 5, no. 3 of Brussels I[24], now Art. 7 no. 2 of Brussels I-*bis*[25].

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[16] Art. 15 (1) lett. c) Rome II.

[17] Art. 15 (1) lett. f) Rome II.

[18] Art. 15 (1) lett. h) Rome II.

[19] See point no. 25 of *Lazar* case.

[20] See point no. 8 of the decision under comment.

[21] See point no. 10 of the decision under comment: it is the "place where the said road accident occurred with the determination of the injurious event, regardless of the place, even different, where the consequent impairments have to manifest themselves over time". In accordance with this, see Trib. Ivrea March 26th, 2024 no. 381, Trib. Trieste April 18th, 2023 no. 217.

[22] See point no. 11 of the decision under comment.

[23] See point no. 29 of *Lazar* case, in which it is specificized that in this way "at the same time avoiding the risk that the tort is broken down into several parts subjected to a different law depending on the place where subjects other than the direct victim suffered damage".

[24] Regulation (EC) no. 44/2001 of the European Parliament and of the Council of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *GU L* 12 of 16th January 2001, pp. 1-23. For a detailed analysis of the topic see Cass., September 29th, 2022 no. 28427, par. 1.2 ff.

[25] Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *GU L* 351 of 20th December 2012, pp. 1-32. The above-mentioned need for coordination emerges from Recital 7 of the Rome II Regulation.

In particular, the prevailing orientation on jurisdiction establishes that road traffic accidents are "*per definitionem* a local affair" [26], so that, in order to identify the proper *forum*, only factual data must keep into account, regardless of the consequences of the event. Indeed, according to this provision, since 1976[27] the European case law has stated that the place where harmful event occurred must be interpreted as the place where the harmful event giving rise to the damage occurred or as the place where the damage occurred. This is the principle of ubiquity that allows not to distinguish the tortfeasor's activity and its consequences, favoring in this way the victim in choosing the judge he prefers, also according to the principle of proximity towards a sort of *favor actoris*.

15. Therefore, Brussels I-*bis* Regulation grants jurisdiction to the Court of the "place where the harmful event occurred or may occur", to be meant as the "luogo in cui è sorto il danno, ossia in cui il fatto causale, generatore della responsabilità da delitto o quasi delitto, ha prodotto direttamente i suoi effetti dannosi nei confronti della vittima immediata, dovendosi avere riguardo non solo al "luogo dell'evento generatore del danno", ma anche al "luogo in cui l'evento di danno è intervenuto" e non rilevando invece il luogo dove si sono verificate o potranno verificarsi le conseguenze future della lesione del diritto della vittima"[28].

16. It follows that while Art. 4 (1) of Rome II considers only the *lex damni* to be applicable, "irrespective of the country in which the event giving rise to the damage occurred", Art. 7 no. 2 of Brussels I-*bis* also attributes jurisdiction to the Court of the place where the event giving rise to the damage occurred (*lex loci commissi delicti*)[29]. These laws can come, however, to coincide in road traffic accident cases where the law of the damage, to be understood as direct damage, is necessarily identified with the *lex loci actus*, since the *actus* is the injury to the personal or patrimonial sphere of the injured party. Therefore, in road traffic accidents the applicable law pursuant to Art. 4 of Rome II is the *lex loci damni directi*.

17. From the perspective of domestic law, the interpretation under consideration cannot even deemed in conflict with the Italian Constitution or with public policy under the Art. 16 (1) of Law no. 218 of May 31st, 1995[30].

18. From the first point of view, the now consolidated approach holds that the risk of a differential compensation between citizens living in the same State, depending on whether the accident occurs in that same State or elsewhere, finds reasonable justification in the fact that, in the case of road traffic accident occurring abroad, the case must be governed by the rules of private international law. This is

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[26] For a detailed analysis see R. Ruoppo, *op. cit.*, p. 354 f. In general, see *ex multis* U. Magnus, *Art. 7*, in U. Magnus / P. Mankowski (eds.), *Brussels I Regulation*, 2nd revised ed., Otto Schmidt, Köln, 2023, pp. 108-359, p. 277.

[27] See, for example, CJEU 30th November 1976, *Handelskwekerij G.J. Bier BV v. Mines de Potasse d'Alsace SA*, 21/76, [1976] ECR p. 1735 ff., p. 1746 ff.; 7th March 1995, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, C-68/93, [1995] ECR I-415, I-460 par. 20; 10th June 2004, *Rudolf Kronhofer v. Marianne Maier*, C-168/02, [2004] ECR I-6009, I-6029 ff., par. 16. Since the case law relating to the issue of tort is so broad that it cannot be appropriately dealt with in this work, it would be better to refer to authoritative doctrine for a more in-depth examination. *Ex multis*, see U. Magnus, *op. cit.*, 2023, p. 259 f.

[28] This is the place where the damage arose, that is, where the causal fact, generating liability for tort/delict or near-delict, directly produced its harmful effects on the immediate victim. This requires consideration not only of the "place of the event giving rise to the damage", but also of "the place where the event of damage occurred", and not relevant instead the place where the damage-event occurred or may occur, while disregarding the location where the future consequences of the violation of the victim's rights have occurred or may occur. See Cass. September 29th, 2022 no. 28427, April 29th, 2022, no. 13593, February 9th, 2021, no. 3125, June 12th, 2019, no. 15743, February 1st, 2019, no. 3165, January 13th, 2010, no. 357, May 19th, 2009, no. 11532, May 5th, 2005, no. 10312, December 13th, 2005, no. 27403, February 11th, 2003, no. 2060, May 22nd, 1998, no. 5145.

[29] As known about the discipline that unites the two provisions, the jurisprudential elaboration is in any case reciprocally valid considering a systematically coherent interpretation between the two rules. See C. S. Adesina Okoli / E. Roberts, "The operation of Article 4 of Rome II Regulation in English and Irish courts", *Journal of Private International Law*, 15, 3, 2019, pp. 605-625, p. 610 f.

[30] Law 218/1995, 31st May 1995 no. 218, of reform of the Italian system of private international law, UG no. 128 of 3rd June 1995, Ord. Suppl. no. 68.

because the presence of an element of transnationality, that is, the localization of the road traffic accident abroad, is sufficient *ex se* to inherently determine the applicability of the conflict-of-law rules and, in this context, the Rome II Regulation[31].

19. With regard to the public policy exception, it should be considered that for the purposes of private international law it assumes an internationalist connotation qualifying it as that set of fundamental principles, derived from the law and from the developments of constitutional and ordinary case law that integrate the living law. These principles characterize the domestic legal system at a given historical period and underpin the protection of fundamental human rights, as they constitute the common denominator across different legal systems. Based on this ontological consistency, public policy serves as a mechanism for safeguarding the internal harmony of the national legal system in the face of the entry of values incompatible with these inspiring principles[32].

20. In the present case, Slovenian law, as the applicable law identified pursuant to Rome II, provides compensation for personal injury under both the moral and dynamic-relational damage, in the same way as Italian law does. Therefore, the applicability of this law does not appear censurable in this respect. Furthermore, neither the potential provision of shorter limitation periods nor a lower assessment of non-pecuniary damage, compared to what would result from the application of Italian law, can constitute valid reasons for invoking the public policy exception. In fact, such circumstances pertain "sul piano delle modalità con cui la tutela è apprestata nel diritto straniero che la norma di diritto internazionale privato rende applicabile, senza potersi apprezzare quale ragione di negata tutela e, dunque, in contrasto con i principi sovraordinati di rango costituzionale o di ordine pubblico internazionale"[33]. Consequently, the potentially different amount of the damages according to Italian or Slovenian law is irrelevant for the purposes of applying the public policy exception[34], especially in light of the fact that "la regola generale di integralità della riparazione ed equivalenza al pregiudizio cagionato al danneggiato" does not have "copertura costituzionale, purché sia garantita l'adeguatezza del risarcimento"[35].

21. Therefore, notwithstanding the fact that less than an hour after the accident occurred in Slovenia the injured person had been brought back to Italy for treatment, the applicable law to the present case is the Slovenian law, as the law of the place in which the direct damage occurred to the primary victim. On the other hand, the length of time between the injury to the physical integrity caused by the accident and the injured party's return to Italy is irrelevant, since "è solo al primo univoco momento che la disciplina europea affida il ruolo di elemento di collegamento ai fini della determinazione della legge applicabile"[36].

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[31] See point no. 15.1 of the decision under comment.

[32] See Cass., February 6th, 2024 no. 3448, in *Foro it.*, 2024, 3, I, p. 771 ff.; March 7th, 2023 no. 6723, in *Riv. dir. int.*, 2023, 2, p. 553 ff.; Cass., u.s., December 30th, 2022 no. 38162, in *Riv. dir. int.*, 2023, 1, p. 274 ff.; Cass., u.s., May 8th, 2019 no. 12193, in *Riv. dir. int.*, 2019, 4, p. 1225 ff.; Cass., September 30th, 2016 no. 19599, in *Dir. fam. pers.*, 2017, 2, I, p. 297 ff.; Cass., August 22nd, 2013 no. 19405, in *Resp. civ. prev.*, 2014, 1, 144, with note from F. Persano.

[33] See the point 15.2 of the decision: "These circumstances highlight the ways in which protection is provided in foreign law, applicable according to private international law rules, without considering them as a denied protection and, therefore, in contrast with the higher principles of the Constitution or of international public order". On this issue see F. Mosconi / C. Campiglio, *op. cit.*, p. 300 ff.; S. Armellini / B. Barel, *op. cit.*, p. 88 ff.; G. Conetti / S. Tonolo / F. Vismara, *Manuale di diritto internazionale privato*, Torino, 5th ed., 2024, p. 66 ff.; P. Franzina, *op. cit.*, p. 201 ff.; Bertoli, *Nozioni di diritto internazionale privato e processuale*, Torino, 2023, p. 95 ff.; F. Salerno, *Lezioni di diritto internazionale privato*, Milano, 2022, p. 100 ff.; G. Carella, *Fondamenti di diritto internazionale privato*, 2nd ed., Torino, 2021, p. 173 ff.

[34] Cass., February 6th, 2024 no. 3448 cit., June 25th, 2021 no. 18286, August 21st, 2018 no. 20841. On this issue see also F. Sartori, "La quantificazione del risarcimento del danno non patrimoniale nel prisma del diritto internazionale privato", *Riv. dir. int. priv. proc.*, no. 1, 2025, pp. 100-127, p. 114 ff.

[35] Italian Const. Court, 194/2018, 235/2014, 303/2011, 199/2005, 369/1996, 420/1991: "The general rule of full compensation and equivalence to the prejudice suffered by the injury" does not have "constitutional coverage, provided that the adequacy of the compensation is guaranteed".

[36] See the point 16 of the decision under comment: "It is only to the first unambiguous moment that the European discipline entrust the role of connecting factor for determining the applicable law".

The judgment, therefore, quashing the contested ruling on the point, referred the case to another Section of the same Court of Appeal, so that it would comply with the theoretical-applicative determinations noted.

III. The relevance of common habitual residence

22. The Court would have reached different conclusions if the primary victim and the person claimed to be liable had had a common habitual residence[37] as in such a case, pursuant to Art. 4 (2) of Rome II, the law of that State (the so-called *lex domicilii communis*[38]) would have had to be applied. A recent order from the Court of Cassation[39] has examined this hypothesis, highlighting the existence of some judgements that cast doubt on whether the appropriate applicable law for such cases can be deemed to be that indicated by par. 2.

23. The case concerned a claim for compensation filed before the Court of Milan by the Dutch relatives of a victim, also Dutch, of a traffic accident that occurred in Italy and was caused exclusively by another Dutch citizen. In the first instance, after establishing the exclusive liability of the injurer, Italian law was deemed applicable on the basis of complex reasoning. Initially, Dutch law was deemed applicable, qualified as *lex loci damni* due to the place where the damage occurred to the relatives resident in the Netherlands, but then this was considered contrary to Italian public policy "laddove escludeva il risarcimento del danno da perdita del rapporto parentale"[40], in violation of Art. 8 ECHR and Art. 7 of the EU Charter of Fundamental Rights, with the consequent application of Italian law. The Italian Central Office (so-called UCI) filed an appeal before the Court of Appeal, alleging the incorrect application of Art. 4 (1) of Rome II, given that both the liable party and the primary and secondary victims were resident in the Netherlands. Therefore, the correct normative reference should have been identified in par. 2 of the same article. The Court of Appeal, referring to the *Lazar case*, held, instead, that the applicable law was the Italian law on the basis of a constitutionally oriented interpretation of the Rome II Regulation. In particular, since the direct damage occurred in Italy as the place where the primary victim suffered the personal injuries, and the place where the indirect consequences suffered by the relatives occurred was irrelevant, the applicable law could only be the Italian law. The judges of second instance continued by highlighting that, under a different interpretation, "sarebbe divenuto irrilevante lo Stato in cui si verifica il danno, in contrasto con il Considerando 16 del regolamento volto a favorire la prevedibilità delle decisioni e a scongiurare il rischio di frammentazione della legge applicabile in base alla diversa residenza delle vittime secondarie"[41]. Moreover, according to this approach, a strict application of the Regulation would have led to a "possibile disparità di trattamento nella liquidazione del danno allo straniero, se residente all'estero al pari dell'offensore, per la lesione di diritti inviolabili della persona", thereby highlighting the consolidation of an interpretative minority orientation which "nega ogni rilevanza al luogo di residenza del danneggiato, dovendo farsi riferimen-

[37] For a detailed analysis on the habitual residence as connecting factor see A. Zanobetti, "La residenza abituale nel diritto internazionale privato", *Liber Amicorum Angelo Davì*, vol. 2, Editoriale Scientifica, Napoli, 2019, pp. 1361-1406. See also M. Ní Shúilleabháin, "Adult habitual residence in EU private international law: an interpretative odyssey begins", *Journal of Private International Law*, no. 1, 21, 2025, pp. 30-67, p. 32 ff. On the irrelevance of the person who caused the damage, for the purposes of Art. 4 (2) of Rome II, see A.L. Calvo Caravaca / J. Carrascosa González, *Las obligaciones extracontractuales en derecho internacional privado*, *El Reglamento «Roma II»*, Editorial Comares, Granada, 2008, p. 102.

[38] See U. Magnus, *Art. 4*, in U. Magnus / P. Mankowski (eds.), *Rome II Regulation*, Otto Schmidt, Köln, 2019, pp. 139-211, p. 177 ff.

[39] See Cass., sect. III, September 3rd, 2024, no. 23636, in *DeJure*.

[40] This was considered contrary to Italian public order "where it excluded compensation for damage from the loss of the parental relationship".

[41] "The State where the damage occurs would become irrelevant, in contrast with Recital 16 of the Regulation, aimed to promote predictability of decisions and to prevent the risk of fragmentation of the applicable law based on the differing residences of secondary victims".

to alla *lex loci damni*"[42]. Therefore, the Court of Appeal awarded compensation to the relatives based on the "Tables of Milan".

UCI thus filed an appeal before the Court of Cassation, complaining about the Court of Appeal's failure to apply Art. 4 (2) of the Rome II Regulation, on the alleged grounds of maintaining the approach that disregards the relevance of the place of residence of the injured party for the purposes of calculating the compensation.

In the light of the greatest interpretative value of the issues involved, the Court referred the case to a new hearing for consideration in a public session, which is the preferred venue for decisions that serve to provide guidance for national jurisprudence[43].

24. In the reconstruction of the different positions, one supported by the appellant and the other endorsed by the ruling of the second-instance judge, the order under review already suggests a subtle indication of the general principles of European private international law that should guide to the solution of the issue, linked, in particular, to the nature of the Rome II discipline. In fact, this is a regulation, and as such, pursuant to Art. 288 (2) TFEU, it has general applicability, is mandatory in all its elements, and is directly applicable. Therefore, no Member State may adopt domestic measures that limit the effectiveness of regulatory rules, nor may it apply them "incompletely or selectively"[44], nor may it certainly interpret the *rationale* of the regulation to be applied according to parameters other than those pertaining to European Union law. On the contrary, the national interpreter is required to respect the European legal framework in its completeness and comprehensiveness, as well as to follow the autonomous interpretation deriving from the European legal system itself in relation to the notions and concepts as defined by the European regulations and the case law of the Court of Justice[45]. As a consequence, the interpreter cannot disguise a true "disapplication" of a European Union law rule under the guise of a simple derogation from it, "poiché derogare rispetto alla legge del luogo di verificazione del sinistro per ragioni diverse da quanto previsto da norme o da regolamenti, è diverso dal derogare alla regola generale di un regolamento europeo in base ad una previsione in esso contenuta"[46]. Only the former hypothesis would constitute a violation of European law, while the latter falls perfectly within the physiology of the scope of the derogatory rule.

25. Moreover, the interpretation provided by the Court of Appeal, in addition to effectively disapplying Art. 4 (2) of Rome II, renders this provision inapplicable in all situations where the State of habitual residence of both the primary victim and the liable party, even if common, differs from the location of the accident, while conversely requiring the applicability of the habitual residence factor only when the location coincides with that where the accident occurred. It is clear that this argument distorts both the literal wording and the *rationale* of the European legal framework, as it demands additional and, above all, excessively restrictive requirements compared to those established by the Regulation, contrary to what is clearly and explicitly evident from the text of the relevant provisions[47], which require only the common habitual residence and no further conditions [48].

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[42] See Cass., sect. III, September 3rd, 2024, no. 23636 cit., in which the Court states that a strict application of the Regulation would have led to a "potential disparity in the treatment of compensation for a foreigner, if residing abroad like the tortfeasor, for the violation of the inviolable rights of the person", thereby highlighting the consolidation of an interpretative minority orientation which "denies any relevance to the place of residence of the injured party, having to refer instead to the *lex loci damni*".

[43] Cass., civ., August 1st, 2017 no. 19115, in *One Legale*.

[44] See Cass., sect. III, September 3rd, 2024, no. 23636 cit.

[45] See in general P. Bertoli, *Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale*, Giuffrè, Milano, 2005.

[46] Cass., sect. III, September 3rd, 2024, no. 23636 cit. underlines that there are different kinds of derogation and so, "derogating from the general rule for reasons other than those considered by the European legislator, at the time they legislatively provided for a derogation, is quite different from derogating from it by virtue of a normatively provided for derogation".

[47] However, in this way the European Union provision would be deprived of any useful effect. For a more in-depth analysis of this aspect, even about the substantial issue of the minimum amounts of insurance coverage pursuant to Directive 2009/103/EC, see D. Bocchese, "La Corte di giustizia si pronuncia sulla risarcibilità del danno morale subito dai familiari delle vittime di incidenti stradali", *DPCE online*, no.1, 2023, pp. 1411-1419, p. 1414 f.

[48] See U. Magnus, *op. cit.*, 2019, p. 182.

26. On the contrary, the literal, as well as systematic, interpretation of Art. 4 (2) of Rome II allows the achievement of that objective of predictability in decisions, in compliance with Recital 16, since the applicability of the law of the common habitual residence of the responsible and the victim enables both to rely on familiar rules which are closer to common reality according to the usual principle of proximity[49].

Therefore, having already suggested the theoretical guidelines that should underpin the future decision in the public hearing, it can be asserted that the Court, in light of the fundamental principles of European Union law and specially private international law, will reaffirm the necessity of interpreting Art. 4 (2) of Rome II as an exception to the general rule, that is, in a restrictive manner[50], but not for this reason in order to set aside European Union private international law.

This reconstruction, which seems to be the most correct from an hermeneutic point of view, is also endorsed by recent Italian case law, including in lower instances, which considers the exceptional provision of par. 2 to be applicable in the first place, where it exists, otherwise the general rule of par. 1 should be applied residually[51].

27. While the case law appears uncertain regarding the relationship between the first two paragraphs of Art. 4 of Rome II, legal doctrine[52] is almost unanimous in holding that the exception referred to in par. 2 must always prevail over the general rule in par. 1, provided that the conditions are met, and must therefore be applied *ex officio*[53].

28. From the perspective of the court, there is a high likelihood that the application of par. 1 would result in the application of foreign law, corresponding to the law of the foreign location where the accident occurred. In contrast, it is more likely that the application of par. 2, when the condition of common habitual residence between the tortfeasor and the victim is met, would *de facto* lead to the application of the *lex fori*, including the safety and conduct rules under Art. 17[54]. This would, on the one hand, facilitate the Court's task, but, on the other hand, compromise the goal of predictability regarding the applicable law, as the derogation in par. 2, as outlined, takes precedence over the general rule in par. 1[55].

IV. Notes on the escape clause

29. The task of the court may become more complex when the situation described in Art. 4 (3) of Rome II applies. This paragraph establishes the so-called escape clause, which provides for the application of the criterion of a manifestly closer connection with another country when this is clearly evident from the totality of the circumstances of the case and leads to the application of the law of a

[49] The order continues by also addressing the issue of whether any differences in the liquidation of damages among legal systems are contrary to public order, as the right to full compensation for damages is not included in the list of inviolable rights established by national or supranational laws, as recognized since the ruling of the Supreme Court of 21st August 2018 no. 20841 cit.

[50] Thus R. Ruoppo, "The law applicable to non-contractual obligations", in P. Perlingieri / G. Perlingieri / G. Zarra, *Institutions of international and European private law*, Edizioni Scientifiche Italiane, Naples, 2024, pp. 360-365, p. 363.

[51] Trib. Firenze September 17th, 2024 no. 2833.

[52] For a detailed analysis see F. Mosconi / C. Campiglio, *op. cit.*, p. 495 ff.; S. Armellini / B. Barel, *op. cit.*, p. 422; P. Franzina, *op. cit.*, p. 263; M. Wasylkowsa-Michór, "Scope of application of the general rule in the Rome II Regulation", *Acta Iuris Stetinensis*, no. 2, vol. 30, 2020, pp. 89-106; U. Magnus, *op. cit.*, 2019, p. 178; C. S. Adesina Okoli / E. Roberts, *op. cit.*, p. 616 ff.; L. Sandrini, "Risarcimento del danno da sinistri stradali: è già tempo di riforma per il regolamento Roma II?", *Riv. dir. int. priv. proc.*, no. 3, 2013, pp. 677-714 p. 689; A. Malatesta, *op. cit.*, 2008, p. 1210; A.L. Calvo Caravaca / J. Carrascosa González, *op. cit.*, 2008, p. 85 f., 99 ff. e 109 ff. On the historical origins of the connecting factor of common habitual residence in identifying the law applicable to cases of non-contractual liability, and, in particular, on the contamination in the European system of the American model referred to in the well-known case Babcock v. Jackson, 1963, Court of New York, see A.L. Calvo Caravaca / J. Carrascosa González, *op. cit.*, 2008, p. 101 ff.; M.E. Solimine, "The Impact of Babcock v. Jackson: An Empirical Note", *Albany Law Review*, 56, no. 4, 1993, pp.773-794; W. Rayner, "Babcock v. Jackson: A New Approach to Tort in the Conflict of Laws.", *Western Law Review*, 3, 1964, pp. 150-159.

[53] U. Magnus, *op. cit.*, 2019, p. 183.

[54] See U. Magnus, *op. cit.*, 2019, p. 177.

[55] See L. Sandrini, *op. cit.*, p. 697 f.

country different from that identifiable under paragraphs 1 or 2[56]. Therefore, when such a connection exists, the criteria identified under the previous paragraphs must be considered inapplicable[57], meaning that the third paragraph should be interpreted as a special provision to be applied primarily when the requirements are met, including, in particular, the divergence of the law identified under par. 3 from that which would have been applied under the first two paragraphs[58].

30. The actual application of this escape clause is exceptional, as it requires a strong consistency of such a connection, which must be clear and manifestly closer. It follows that a mere closer connection cannot be considered sufficient for this purpose [59]. However, when these conditions are met, the court has no discretion regarding the appropriateness of applying the manifestly closer connection: this discretion is limited to assessing the significance of the connection[60], although this must be done using a "high standard" of scrutiny[61].

31. The rule specifies that such a connection may be, likewise, of an ancillary nature, that is, it may be based on a pre-existing relationship between the parties such as, for example, a contract that has a close connection with the tort. In this way, possible problems of coordination between the contractual and non-contractual facts are overcome, making it applicable a single law[62]. The reference to the ancillary connection constituted by the contract is intended merely as an example, since the flexibility [63] inherent in the rule permits the valid utility of a connecting factor of any nature, provided it is manifestly closer[64].

32. According to the prevailing view, the judge must apply this rule by examining the "proximity" of the elements based on the subjective and objective characteristics of the tort, regardless of the substantive content of the law identified[65]. This assessment must be carried out by the judge even in the absence of an express request from the parties. However, if the parties have sought to invoke it, the judge is not limited to the allegations made by the parties in determining the applicable law[66]. Some scholars[67] argue that this provision should be applied in cases of multi-localized torts, that is torts whose direct consequences manifest in multiple States, so that the overall scenario is governed by the law of the jurisdiction with which it has the manifestly closest connection. However, the prevailing view opts, in such cases, for the disaggregation of the case into a mosaic, meaning the application of different laws to each element of the tort, according to a distributive logic of the *lex loci damni* factor[68].

V. The 2025 Report of the European Commission on the application of the Rome II Regulation

33. In the Report issued by the Commission on January 31st, 2025[69], in the list of profiles to be

[56] See A.L. Calvo Caravaca / J. Carrascosa González, *op. cit.*, 2008, p. 120 ff.

[57] S. Armellini / B. Barel, *op. cit.*, p. 422; L. Sandrini, *op. cit.*, p. 689.

[58] For a detailed analysis see U. Magnus, *op. cit.*, 2019, p. 185 f. In this sense the par. 3 works as a "*mediation tool*" with respect to the other paragraphs of the Regulation; on this issue see M. Wasylkowsa-Michór, *op. cit.*, p. 95 ff.

[59] U. Magnus, *op. cit.*, 2019, p. 183.

[60] See U. Magnus, *op. cit.*, 2019, p. 195.

[61] For a detailed analysis on the topic see C. S. Adesina Okoli / E. Roberts, *op. cit.*, p. 619 ff.

[62] On this issue see S. Armellini / B. Barel, *op. cit.*, p. 422. According to M. Hellner, "Choice of Law by the Parties in Rome II: Rationale of the Differentiation between Consumer and Commercial Courts", *Oslo Law Review*, vol. 6, no. 1, 2019, pp. 67-71, p. 71, "Although the text does not explicitly say so, this would most likely lead to the application of the law that is applicable to the contract", also from the point of view of the purpose of this exception that is "to lessen the importance of the characterization of a rule as contractual or non-contractual". See also A. Dickinson, *op. cit.*, p. 344.

[63] See F. Mosconi / C. Campiglio, *op. cit.*, p. 496 f.; A. Malatesta, *op. cit.*, 2008, p. 1210.

[64] G. Van Calster, *op. cit.*, p. 340 f.

[65] F. Mosconi / C. Campiglio, *op. cit.*, p. 496.

[66] For a detailed analysis see A.L. Calvo Caravaca / J. Carrascosa González, *op. cit.*, 2009, p. 896.

[67] See P. Franzina, *op. cit.*, p. 265.

[68] See F. Mosconi / C. Campiglio, *op. cit.*, p. 494.

[69] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) no. 864/2007 on the law applicable to non-contractual obligations (Rome II Regula-

kept under review with a view to possible future revisions of the Regulation, nothing appears that concerns Art. 4 in the strict sense. On the contrary, the Report highlights that the provision was specifically drafted to ensure legal certainty and predictability of the applicable law in most cases, emphasizing that "(…) The application of the general rule has been largely unproblematic, though some questions remain regarding the application of the rule to indirect victims, multi-party torts, and the localisation of damage in cases of purely financial/economic losses, especially in cases of financial market torts"[70].

34. For a more analytical discussion of these peculiar issues, the Report refers to the Commission Staff Working Document[71], issued on the same date. With specific reference to the examination of Art. 4 of Rome II, the Document addresses the issue of determining the applicable law in cases where the relatives of a road traffic accident victim are mere "indirect victims", that is, those who have suffered a so-called "rebound damage", which arises indirectly or mediated from the damage directly suffered by the primary victim. This may include non-pecuniary damage for the loss of the relationship with a family member who was the victim of a road traffic accident. In such cases, in accordance with the established approach of CJEU's case law since the aforementioned *Lazar* judgment, the applicable law is that of the place where the accident occurred, rather than the place of residence of the family members. This is because, despite the fact that the family members typically experience and continue to suffer distress in their place of residence, they are secondary victims, in contrast to the primary victim who directly sustained physical injuries from the accident.

35. It follows that for these secondary victims, there is no direct damage, but only "indirect consequences" which are deemed irrelevant under Art. 4 (1) of Rome II. Since the applicable law must be determined by reference to the place where the primary victim suffered the direct damage, in a claim for non-pecuniary damages brought by relatives for the death of a family member caused by the accident, the law of the place where the event occurred will apply, in accordance with the general rule in par. 1, regardless of the place of residence of the family members[72].

36. Greater application-related doubts have arisen with regard to par. 2 of the provision in question, particularly in relation to cases involving multiple parties, both victims and defendants, where only some reside habitually in the same place. The findings from the investigation conducted for the preparation of the Document reveal that some Member States apply the exception without particular problems, while other Member States consider it sufficient for only one party (either a responsible or a victim) to share habitual residence with another party, at most resorting to the application of the law identifiable under par. 3. Meanwhile, other Member States require that all parties involved have the same habitual residence[73].

37. In the absence of a uniform judicial interpretation, since the Court of Justice has never had the opportunity to rule on the matter, reference should be made to general principles, and the most stringent interpretation is likely the one that best fits the textual provisions, the *rationale*, and the objectives pursued, particularly in terms of legal certainty and predictability of the applicable law[74]. Indeed,

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tion), COM(2025)20 final, 31.01.2025, Brussels, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2025:20:FIN&qid=1738342646388.

[70] For a detailed analysis on the place of the damage in these hypotheses see O. Boskovic, *op. cit.*, p. 37 ff.; A. Davì, *op. cit.*, p. 307 ff.

[71] Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) no. 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation), SWD/2025/9 final, 31.01.2025, Brussels, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2025%3A9%3AFIN&qid=1738347041298 .

[72] See p. 3, par. 1.2.1. of the cit. Commission Staff Working Document.

[73] *Ibidem*. For a critical analysis see L. Sandrini, *op. cit.*, p. 697 f.

[74] See F. Mosconi / C. Campiglio, *op. cit.*, p. 495; P. Franzina, *op. cit.*, p. 264; A.L. Calvo Caravaca / J. Carrascosa González, *op. cit.*, 2008, p. 103 f.; P. Franzina, "Il regolamento Roma II sulla legge applicabile alle obbligazioni extracontrattuali", in A.L. Calvo Caravaca / E. Castellanos Ruiz (dir.), *La Unión Europea ante el Derecho del la Globalización*, Colex, Madrid, 2008, pp. 299-370.

excluding the law of habitual residence of a tortfeasor or a victim solely because it differs from that of the other parties would result in complete uncertainty for the first party in identifying the applicable law. In contrast, applying the general rule in such cases would resolve any uncertainty, as it would be easily predictable for all parties involved in the same claim.

38. The Document examines additional problematic aspects not even mentioned in the Report. In particular, it addresses the relationship between the Rome II Regulation and the Hague Convention on the Law Applicable to Traffic Accidents of 1971[75], the differing rules among Member States regarding the statute of limitations for claims arising from road traffic accidents, and the quantitative differences in the settlement of related compensations.

39. With regard to the first issue[76], both sources contain, as a general rule, a reference to direct damage: in particular, the Regulation generally provides that the *lex loci damni* is applicable, identifying the place where the accident occurred as the location of direct damage; on the other hand, the Convention, specifically dedicated to such cases, establishes the *lex loci commissi delicti* as applicable, that is certainly the place of the direct damage in road traffic accidents cases[77]. Further distinctions emerge regarding the regime of exceptions: as outlined, the Rome II Regulation provides for the exception of the law of the common habitual residence of the tortfeasor and the victim, while the Convention applies the law of the place of registration of the vehicle involved[78], or the law of the place of registration of all the vehicles involved if they are the same. The Regulation allows the parties involved to choose the applicable law, whereas the Convention does not grant such an option.

40. The coordination between the two sources is regulated in Art. 28 of Rome II where the prevalence of the conventional source governing conflicts of laws inherent in non-contractual obligations is affirmed, provided that it is already in force in the State in question at the time of the adoption of the Regulation. Conversely, the prevalence of the Regulation is sanctioned where the States involved, which are also parties to the Convention, are all Member States[79].

41. Given that many of the States parties to the Convention are at the same time Member States[80], the question of the relationship between the sources arises because the differences in discipline could encourage *forum shopping*. It has therefore been suggested that a more specific solution be found at the Hague Conference on Private International Law, since the possibility of intervening directly on the regulatory source to introduce an *ad hoc* provision specifically regulating the interrelation with the 1971 Convention is quite remote[81].

With regard to issues concerning the differing regulations among Member States on the statute of limitations for non-contractual damages and the settlement of damages, difficulties arise from the fact that these aspects are governed by the domestic law of the State whose law is deemed applicable. As such, achieving uniformity or harmonization of these rules is not feasible, at least for the time being. However, the Document[82] emphasizes that efforts can be expanded to increase the awareness of national

[75] See the Convention of 4th May 1971 on the Law Applicable to Traffic Accidents, entered into force on the 3rd June 1975, available at www.hcch.net.

[76] See M. Wasylkowsa-Michór, *op. cit.*, p. 102 ff.; M. Krvavac, "The Hague Convention on the law applicable to traffic accidents and Rome II regulation", *Зборник радова Правног факултета у Нишу*, 57(79), 2018, pp. 141-156.

[77] See L. Sandrini, *op. cit.*, p. 688 f.

[78] A. Malatesta, "La legge applicabile agli incidenti stradali nella proposta di regolamento (CE) Roma II", *Rivista di diritto internazionale privato e processuale*, no.1, 2006, pp. 47-66, p. 54.

[79] For a detailed analysis see F. Mosconi / C. Campiglio, *op. cit.*, p. 497 ff.; P. Franzina, *op. cit.*, 2023, p. 261; U. Magnus, *op. cit.*, 2019, p. 196 f.

[80] They are France, Belgium e Austria (from 1975), Netherlands (from 1978), Luxembourg (from 1980), Spain (from 1987), Slovenia (from 1991), Czech Republic e Slovakia (from 1993), Latvia (from 2000), Poland and Lithuania (from 2002). For a detailed analysis see www.hcch.net.

[81] See J. Papettas, "Choice of Law for Cross Border Traffic Accidents", Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs - Legal Affairs, 2012, available at www.europarl.europa.eu/studies.

[82] See *amplius* p. 9 f. of the Document.

regimes on these matters by enhancing and improving the exchange of relevant information. In this regard, the European Commission has made available, through the *e-Justice* portal, fact sheets on the applicable law in each Member State, which are periodically updated through the European Judicial Network in civil and commercial matters[83].

42. Regarding the different levels of compensation for claims arising from road accidents, the European Commission's 2008 Report[84] had already noted significant differences in the settlement of damages, depending on whether the legal system in question provides for fixed or flexible criteria, while also taking into account the different costs of living among Member States.

43. The Document therefore highlights how in such situations the provisions of Recital 33 should apply and, thus, "According to the current national rules on compensation awarded to victims of traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention". However, this solicitation, as it is placed within the scope of a Recital[85], assumes a merely interpretative function aimed at guiding the Court in the application of the *lex causae*, addressing factual elements rather than of law, and, therefore, it does not introduce a case of *dépeçage*[86]. Furthermore, "this recital cannot be interpreted to override the wording of Art. 4 (1) where there is a conflict"[87]. Therefore, the quantification of damage remains governed by the national law identified as applicable under the Rome II Regulation, neither falling within the competence of the European Union nor constituting a factor of such importance as to admit an exception to the general rule.

44. This consideration is further supported by an examination of the historical *excursus* of the preparatory work for the Rome II Regulation[88]. Initially, the European Parliament[89] had proposed the inclusion of three amendments specifically relating to traffic accidents, proposing the application of the *lex fori* for the determination of the damages[90]. However, the Commission[91] expressed disagreement on this point, arguing that the proposal would encourage a fragmentation of the legal framework governing such cases[92]. Therefore, it suggested the need for more time to thoroughly consider the issue, deferring a more in-depth review to the time of the regulation's revision[93]. Subsequently, the Commission reaffirmed its position, asserting that this complex matter falls within the substantive civil law of each Member State, to be applied as the *lex causae*[94], excluding any interference from private international law, inclu-

[83] See www.e-justice.europa.eu.

[84] European Commission, Report *Compensation of Victims of Cross-Border Traffic Accidents in the Eu: Comparison of National Practices, Analysis of Problems and Evaluation of Options for Improving the Position of Cross-Border Victims*, Contract ETD/2007/IM/H2/116, available at www.europarl.europa.eu.

[85] On the legal value of the recitals, as interpretative tools of the mandatory provisions contained in the typical European legislative acts, see T. Klimas / J. Vaičiukaitė, "The Law of Recitals in European Community Legislation", *ILSA Journal of International and Comparative Law*, 2008, pp. 61-94, p. 63 ff.

[86] See L. Sandrini, *op. cit.*, 2013, p. 706; A. Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations*, vol. I, 2010, Oxford University Press, Oxford, p. 580 f.; J. Von Hein, "Article 4. And Traffic Accidents", *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*, 2009, Brill Nijhoff, Leiden, pp. 153-173, p. 163; in a partially compliant sense see S.C. Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity", *The American Journal of Comparative Law*, Winter, vol. 56, no.1, 2008, pp. 173-222, pp. 186, 193, 205.

[87] See p. 10 of the Document.

[88] For a detailed analysis see F. Sartori, *op. cit.*, 2023, p. 332 ff.; S.C. Symeonides, *op. cit.*, p. 173 ff.

[89] European Parliament Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (COM(2003)0427 – C5-0338/2003 – 2003/0168(COD)), Final A6-0211/2005.

[90] *Ivi*, p. 40 f.

[91] Commission of the European Communities, Amended proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations («Roma II»), COM(2006) 83 def, 21st February 2006.

[92] *Ivi*, p. 4.

[93] *Ivi*, p. 5.

[94] The European legislator has expressly qualified the rules on the burden of proof as substantial rules (Art. 22 of Rome II), thus attributing the relevant discipline to the *lex causae*, i.e. the substantive law applicable to the merits of the dispute, the scope

ding European Union law[95]. However, it also expressed a final hope for careful reflection on achieving greater consistency in the application of foreign law by the Courts of Member States[96].

45. In essence, the Commission chose not to specifically regulate road traffic accidents[97], emphasizing that the issues debated during the preparatory work actually have a general nature, irrespective of the specific subject matter of road traffic accidents. Therefore, the provisions of the Regulation already formulated can also apply in such cases, as they would still allow for balanced solutions for all the parties involved[98], including the interest of the legal system in ensuring a high level of legal certainty and predictability, while preventing the occurrence of *forum shopping* phenomena[99].

VI. Concluding remarks

46. Thanks to the plain interpretation of Art. 4 of Rome II, it is desirable that the established jurisprudential development on the various matters addressed by the provision remains consistent within the European judicial area.

Indeed, in case of interpretative doubts, it is necessary to refer primarily to the general principles of law and to the more specific ones typical of private international law, including European Union law, so as to restore the correct balance between general rule and exceptions, between literal, systematic and teleological interpretation, so as to give continuity to the original intentions pursued by the Regulation. From a different point of view, the regulatory nature of Rome II implies the possibility for the interpreter to make use of the general principles underlying the system of sources, which may well be of assistance in this work also hermeneutically.

Therefore, one can agree with the decision of the Supreme Court of last December where it states that there is no real need to invoke the help of the CJEU on these issues, but, as shown in this contribution, judges must pay great attention in interpreting the law to avoid falling into traps, or tricks, that can be always very dangerous mostly for the correct application of the law.

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of which may however be mitigated by the operation of the *lex fori*. For a detailed analysis of the topic see E. D'Alessandro, "Onere della prova e legge applicabile", *Giurisprudenza Italiana*, no.11, 2018, pp. 2516-2537.

[95] Commission of the European Communities, Opinion of the Commission pursuant to Article 251(2)(3)(c) EC on the amendments of the European Parliament to the common position of the Council on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), amending the Commission proposal, COM(2007) 126 def. 14th March 2007, p. 4, where said the Roma II is not the appropriate context in which to discuss this matter. Cass. August 21st, 2018 no. 20841 cit. has consistently stated that "Le ipotesi in cui è risarcibile il danno non patrimoniale, i limiti alla sua risarcibilità e la misura del risarcimento non costituiscono oggetto di competenza dell'Unione europea.", such as "The cases in which non-pecuniary damage is compensable, the limits to its compensability and the amount of compensation do not fall within the competence of the European Union"; in compliant sense see the decision of the Court of Justice of the January 23rd, 2014, case C-371/12, *Enrico e Carlo Petillo c. Unipol Assicurazioni Spa*, par. 30.

[96] Commission of the European Communities, Amended proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations («Roma II»), *cit.*, p. 5.

[97] A. Malatesta, *op. cit.*, 2006, p. 52.

[98] Commission of the European Communities, Amended proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations («Roma II»), COM(2006) 83 def. February 21st, 2006, cit., p. 7.

[99] Commission of the European Communities, Communication from the Commission to the European Parliament pursuant to Article 251(2)(2) EC concerning the common position adopted by the Council with a view to the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations («Roma II»), COM(2006) 566 def. September 27th, 2006, p. 2.