Statute of limitations in Private International law

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Abstract

1. Determining the law applicable by the Albanian courts in the review of legal-civil disputes with foreign elements
2. Brief overview of the institute of statute of limitations in international law
3. Efforts to unify the institute of statute of limitations in international law

Keywords: Statute, limitations, Private International Law.

Introduction

The statute of limitations of the lawsuit, as a legal fact with extinctive consequences, extinguishes the right to sue if it is not exercised within the deadline set by law. In other words, when the right to sue is extinguished, due to the statute of limitations, the holder of the subjective substantive right can no longer realize, by means of the coercive force of the state, the restoration of this right.
The notion of statute of limitations is well known and enshrined in all legal systems. In different legal systems there are important legal differences related to different factors, which determine the scope of application of this institute, determine the types of lawsuits that are subject to or not subject to statute of limitations, the period of the statute of limitations, reasons for suspension and termination of prescription etc.
It is understandable that the statute of limitations of the lawsuit extinguishes only the right to sue and not the subjective right, which even when the right to sue, in its material sense is extinguished, it continues to survive mirroring a natural right of the debtor, who is not obliged by law to fulfill the obligation, unless he does so voluntarily.
Given that the institute of statute of limitations of the lawsuit is not the same in different legal systems, in order to resolve certain civil legal relations, it is necessary, first of all, to determine the applicable law for their resolution. However, in adjudicating lawsuits, it is necessary to determine the applicable law for resolving legal-civil disputes, which have foreign elements. In relation to these issues, the provisions made in law no. 10428, dated 02.06.2011 "On Private International Law" (LDNP)[1]. This law determines the rules for the law applicable in legal-civil relations, which have foreign elements, as well as the jurisdiction and procedural rules of the Albanian courts for legal-civil relations with foreign elements[2].

[1] Official Gazette N°82/2011.
[2] Article 2, law no. 10428, dated 02.06.2011 «On Private International Law».

1. Determining the law applicable by the Albanian courts in the review of legal-civil disputes with foreign elements

The LDNP consists of two main parts: on one hand, it contains the comprehensive and systematic regulation of norms related to the applicable law and, on the other hand, it contains norms on the international jurisdiction of the Albanian courts. It also contains some procedural norms for the adjudication of these relations.

The LDNP provides that the statute of limitations is regulated by the law of the country which regulates the said claim[3]. This means that the law governing a lawsuit or a right must also regulate its statute of limitations[4]. The rule provided in Article 20, regulates the statute of limitations for issues, which are not covered by Articles 47 and 58 of the LDNP. The law applicable to the contract or non-contractual obligation will also regulate the issues regarding the statute of limitations. In case we are dealing with a lawsuit, which derives from non-contractual obligations, then the law applicable to those relations, which is determined according to Articles 45, 46 and 56 of the LDNP, respectively will also apply to issues of prescription. In cases when a party will file a lawsuit for declaring the legal action invalid, then the statute of limitations for this lawsuit will be regulated by the applicable law of the said legal action. The applicable law on the formal validity of a legal action is determined by Article 18 of the LDNP and if it turned out to be Albanian law, because the legal action was performed in Albania, then the 5-year statute of limitations would apply to the lawsuit in question. The issue of the applicable law on statute of limitations does not stand on its own, but is closely related to the applicable law on the lawsuit under consideration[5]. The applicable law according to the connection criterion will also regulate the beginning of the statute of limitations, its termination, the cases of its termination and suspension. The issue of waiving the statute of limitations will also be regulated by this applicable law[6].

There is a significant difference between the civil law and common law systems in setting the statute of limitations. In the civil law system, prescription is treated as an institute of substantive law, according to this provision, the statute of limitations extinguishes the right to sue in its material sense. It is a substantial term which is used as protection by the defendant against the exercise of a material right by the plaintiff. Whereas, in the common law system, the statutes of limitations are also called restrictive deadlines, as they prohibit the filing of a lawsuit and are considered by them as an institute of procedural law. Given the above, the question may arise as to what would be the applicable law for a relationship for which the applicable law is the law of a common law system state. In these cases, can the Albanian court apply

[3] Article 2, law no. 10428, dated 02.06.2011 "On Private International Law".

[4] Heinz-Peter Mansel, "Prescription". Encyclopedia of Private International Law. Edited by Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio. Vol 2: Cheltenham and Northampton: Edward Elgar, 2017. 1368-1380.

[5] Commentary on the Law on Private International Law. Konrad Adenauer Stiftung. Christa Jessel-Holst; Argita Malltezi; F. Tafaj; A. Gugu; E. Qarri; F. Caka. N. Dollani. Tirana 2019. Pages 248-249.

[6] Commentary on the Law on Private International Law. Konrad Adenauer Stiftung. Christa Jessel-Holst; Argita Malltezi; F. Tafaj; A. Gugu; E. Qarri; F. Caka. N. Dollani. Tirana 2019. Page 249.

the procedural rules of the foreign state, since for the prescription of the lawsuit, in the concrete case, the foreign law is the law that regulates it.

I think, that in these cases, the Albanian courts for the trial of the case will apply only the norms of Albanian procedural law *lex fori*, as the procedural norms belong to public law and cannot be bypassed by the application of foreign law. In all cases, the trial of court cases with foreign elements before the Albanian courts is done according to the Albanian procedural law[7]. In this case, the Albanian courts apply the principle *lex fori regit processum*. According to this principle, Albanian courts apply their domestic procedural law even when reviewing or making decisions regarding international disputes[8]. This principle, although not expressly provided for in the Brussels Regulation, is confirmed by the jurisprudence of the European Court of Justice (ECJ)[9].

An issue that requires more in-depth analysis in relation to the above, based on Article 82 of the LDNP is the definition of applicable law to distinguish between procedural and substantive issues, or even more broadly to determine the applicable law on special type of civil legal relationship. If the court manages to determine the right type of legal relationship, its characteristics, then based on the principle "*lex fori regit processum*" it can be determined that for procedural matters, the applicable law is *lex fori*.

Although the Albanian legislation does not have legal norms, which explicitly define which cases will be considered procedural or material, nevertheless, the case law has maintained a consolidated position in their definition. Material norms create, define and regulate the rights and obligations of the parties in the legal-civil relationship. Procedural norms regulate the procedural activity, procedural relations between the subjects of law and through them the realization and execution of the substantive law is guaranteed[10].

After characterizing the legal relationship or factual situation, the question arises which will be the applicable law for determining the binding criterion. By binding criterion will be understood that element of a legal relationship, which is used by the conflict norm to determine the law, norm or jurisdiction, which must be applied in a concrete case[11].

Although in international legal doctrine it is mostly accepted that, in these cases, the connecting criterion should be determined by *lex fori*, there are also opinions that the first step (in those cases where there is no other connection with the law of the place of trial other than the place of trial), the application of *lex causae* is more reasonable

[7] Article 82, law N°10428, dated 02.06.2011 "On Private International Law".

[8] Jessel-Holst, Ch., Malltezi, A., Tafaj, F., Dollani, N., Gugu, A., Qarri, E., Caka, F.: *Commentary on the Law on Private International Law. Konrad Adenauer Stiftung*, Tirana, 2019, page 840.

[9] Case C-119/84, P. Capelloni and F. Aquilini v./ J.C.J. Pelkmans – Judgment of the Court (Fourth Chamber) of 3 October 1985 – P. Capelloni & F. Aquilini v J.C.J. Pelkmans.

[10] Jessel-Holst, Ch., Malltezi, A., Tafaj, F., Dollani, N., Gugu, A., Qarri, E., Caka, F.: *Commentary on the Law on Private International Law. Konrad Adenauer Stiftung*, Tirana, 2019, page 840.

[11] Decision N°56, dated 20.02.2014 of the Civil College of the High Court of the Republic of Albania, §11.5; .Decision N°392, dated 30.09.2015 of the Civil College of the High Court of the Republic of Albania.

than the application of *lex fori*[12].
The consolidated practice of the Albanian High Court has rightly concluded that the "binding criterion" is assessed according to Albanian law (*lex fori*) and the principle of "*perpetuario iuridiction*"[13].
Based on the express provisions of the LDNP, we must note that this law determines the scope of its application, regarding the regulating the obligations arising from contracts. According to it, the law applicable to contracts regulates, among others, "*various ways of extinguishing obligations, as well as the statute of limitations and the decadence*"[14].
Point ç of article 47.1 of LDNP, provides that the law applicable to the contract will regulate the ways of extinguishing the obligations, the statute of limitations and the decadence. If the applicable law for the contract would be the Albanian legislation, then the extinguishment of obligations, the applicable rules for prescription and decadence will be done according to the provisions of the Albanian Civil Code and the relevant laws of the place of trial. In any case, this point of the law will apply to both aspects of substantive law and procedural law[15].
The question arises on what would be the applicable law for non-contractual obligations, as well as the applicable law to regulate the statute of limitations and decadence for legal relations deriving from them (from non-contractual obligations).
The determination of the applicable law for legal relations arising from non-contractual obligations in our international law is also regulated by the LDNP. Based on article 56 of this law, "*1. The law applicable to a non-contractual obligation is the law of the State in which the damage occurred, regardless of the State in which the event that caused the damage occurred and regardless of the State or states in which the indirect consequences occur, unless otherwise provided in the provisions of this chapter.* " Points (1), (2) and (4) of this provision also provide for other cases, which we must keep in mind to determine the applicable law. Article 57 of the LDNP also provides for the rules that give the parties the right to choose the applicable law on non-contractual obligations.
In other words, in order to determine the applicable law of the Albanian courts on non-contractual obligations, the provisions made in Articles 56 and 57 of the LDNP must be taken into account. Only after we have determined the applicable law for the settlement of these legal-civil relations, then the courts will have to apply and interpret correctly, even the provisions of Article 58 of the LDNP, which explicitly provides that the applicable law on non-contractual obligations , among others, also regulates: "***ë) the manner in which an obligation can be extinguished and the rules of prescription, including the rules of commencement, termination and suspension of prescription and decadence.***"

[12] Jessel-Holst, Ch., Malltezi, A., Tafaj, F., Dollani, N., Gugu, A., Qarri, E., Caka, F.: *Commentary on the Law on Private International Law. Konrad Adenauer Stiftung*, Tirana 2019, page 841.
[13] Decision N°392, dated 30.09.2015, Decision N°67, dated 10.03.2016, Decision N°238, dated 07.05.2015, Decision N°68, dated 10.03.2016, Decision N°331, dated 30.05.2013 of the Civil College of the High Court of the Republic of Albania.
[14] Article 47.1(ç), law N°10428, dated 02.06.2011 "On Private International Law".
[15] Jessel-Holst, Ch., Malltezi, A., Tafaj, F., Dollani, N., Gugu, A., Qarri, E., Caka, F.: *Commentary on the Law on Private International Law. Konrad Adenauer Stiftung*, Tirana 2019, page 591.

All situations provided by Article 58, letter LDNP are matters of substantive law under Albanian legislation. This regulation of our legislation, borrowed from the Rome II Regulation, has brought radical changes for some countries, especially for those of legal systems, where the issue of prescription and decadence is considered a procedural issue[16]. In these cases, the applicable law may be the law chosen by the parties to the legal relationship, which means that they may choose as applicable law, the law of a state, which is part of the legal system, where the rules for prescription and decadence of lawsuit, provide for them in the procedural law. If the Albanian court, based on the provisions of the LDNP, will accept that the applicable law, in this case will be the foreign procedural law of this state, would it mean that the applicable law for the settlement of the dispute in question would be the procedural law of this state and that the trial of this case by the Albanian court would be done based on the procedural norms of the law of this foreign state?

Before answering this question, we must state that the LDNP, which is in accordance with international acts, recognizes that the parties to a legal relationship can choose in their free will (when the law allows) judicial jurisdiction as well as applicable law of settlement of legal-civil dispute. In this sense, the parties to this legal relationship, if they have chosen as applicable law, the law of the foreign state, in which the regulation of statute of limitations and decadence is made by procedural law, then we think that the applicable law for dispute resolution regarding the prescription and decadence by the Albanian court will be done based on the procedural law of the foreign state.

This statement, which we made above, should not lead us to the wrong conclusion, that as the applicable law for the settlement of all legal-civil disputes by the Albanian court, will be made based on the procedural law of the foreign state, then these rules will also apply to the procedure for adjudicating the case by these courts.

The right answer should be that, even in these cases, the trial by the courts of cases with foreign elements before the Albanian courts is done according to the Albanian procedural law[17]. We must clarify that, in these cases, the regulation of statute of limitations and decadence issues, despite being determined by procedural law of the foreign state, those norms should not be considered procedural norms, as they regulate legal-material relations. Of course, they are binding on the Albanian court as applicable norms for resolving legal-civil disputes related to the statute of limitations and decadence, which are part of the substantive law. In this sense, if these procedural rules of the foreign state allow the parties to the legal-civil dispute to change the statute of limitations, then these norms are binding on the Albanian court.

The prescriptive (normative) nature of the legal norms on the statute of limitations provided by the Albanian legislation are binding only on Albanian citizens, while when it comes to relations with foreign elements, the statute of limitations should be determined by the applicable law for that legal relationship[18] (ie in this case by the

[16] *Commentary on the Law on Private International Law. Konrad Adenauer Stiftung*, cit. supra, page 638.

[17] Article 82, law N°10428, dated 02.06.2011 "On Private International Law".

[18] Gjilani, F. (1965) *Prescription of the lawsuit according to the legislation of R. P. Albania*, printing house "M.Duri", Tirana, pp.35-37.

procedural law of the foreign state).

As a rule, in Albanian substantive law, but also in those of other European countries, the norms governing the statute of limitations have a prescriptive nature. Thus, Article 116 of the Civil Code provides that is invalid any "*agreement of the parties to change the statute of limitations and any provision of this chapter*", while Article 126 of the Civil Code provides that: "*waiving the statute of limitations is allowed only after its term has passed*", a provision that reinforces the first rule, on the ordering nature of the statute of limitations, which cannot be derogated by the agreement of the parties. Here we must keep in mind that this rule applies only to the statute of limitations of the lawsuit and not to the decadence.

In cases where a discussion may arise, whether or not the norm of foreign law should be applied when it is in open contradiction with the norms of domestic legislation, does the court that adjudicates the case has the right to avoid the application of the norm of foreign law? The rule is that in cases where the parties to a civil-legal dispute have generally defined foreign law as applicable law, even though it makes arrangements completely contrary to the provisions of domestic law, the court of the place of trial must apply the norms of foreign law, determined by the free will of the parties to the dispute (under the conditions expressly provided by Article 57 of the LDNP). The only exception that can be made by not applying the norms of foreign law, is when foreign law is in clear contradiction with public order, or when the effects of its implementation, brings consequences which are clearly incompatible with the basic principles of defined in the Constitution and in Albanian law[19].

The ECJ, in its jurisprudence, has maintained the same position, stating that the legal norm that determines the statute of limitations for the claim for damages arising from accidents cannot be considered as a prevailing ordering norm, except when the national court deems, after a detailed analysis that, the domestic norm is so important that it justifies the non-applications of the foreign law[20].

Based on the above, it can be concluded that the statute of limitations for the lawsuit according to our Civil Code is not determined by the prevailing ordering norms, i.e., those that can be qualified as such under Article 7 of the LDNP and that could prohibit the implementation of foreign law for the sole reason that the foreign law provides for shorter statute of limitations. In the Albanian doctrine, it has been already accepted in the past that the statute of limitations is differentiating deadlines set by the Albanian legislator for the positive effects they have in order to guarantee legal certainty and to provide protection from old lawsuits which are difficult to prove[21].

Thus, the norms that regulate the statute of limitations in the domestic legislation according to the Civil Code cannot be considered prescriptive norms, which can be classified as norms that protect public order. This means that, when the norms of foreign law are applicable norms for resolving legal-civil disputes in Albanian courts, they cannot be avoided with the argument that they are contrary to the norms of

[19] Article 7, law N°10428, dated 02.06.2011 "On Private International Law".

[20] Case C-149/18, Agostinho da Silva Martins v./ Dekra Claims Services Portugal SA. - Judgment of the Court (Sixth Chamber) of 31 January 2019 – A. da Silva Martins v. Dekra Claims Services Portugal SA.

[21] F. Gjilani, cit. supra, p.78.

domestic legislation, which regulate the statute of limitations as these norms are not norms of public order and are not included in the definition given by Article 7 of the LDNP. this conclusion is also in line with the provisions of the Rome I and Rome II Regulations and the jurisprudence of the ECJ mentioned above.

2. Brief overview of the institute of statute of limitations in different countries

Due to the reforms of recent years, some European countries have chosen a general statute of limitations ranging from two to six years.
Italy, for example, provides for a general statute of limitations of ten years, although many lawsuits expire after a period of five years.
The German example is more symptomatic. The law of 11 October 2001 reforming the obligations and modifying the German Civil Code (Bürgerliche Gesetzbuch (BGB)), entered into force on 1 January 2002, reduced the statute of limitations of general law from thirty years to three years[22]. However, longer periods are exceptionally predicted.
In England and Wales, the general limitation period is set at six years, although there are certain special periods shorter or longer. However, the Law Commission proposed, in 2001, to maintain a general statute of limitations of three years from the date the creditor could act[23].
On the other hand, other states provide longer statute of limitations, often close to ten years.
In Belgium, since the law of 10 June 1998, the Civil Code provides for different time limits depending on the nature of the lawsuit. If it is a lawsuit over real rights, the statute of limitations is thirty years[24]; on the other hand, it is ten years for personal lawsuits[25], and claims for compensation based on non-contractual liability are statute-barred after five years[26]. The new Belgian Civil Code, which was adopted on April 4, 2019 and which replaces the Civil Code dating back to 1804, has not changed these deadlines.
It is the same in Switzerland, where there is a general limitation period of ten years[27], accompanied by shorter deadlines in certain hypotheses. In Switzerland, the new federal law adopted by Parliament on 15 June 2018 and entered into force on 1 January 2020 has made changes to the provisions related to the statute of limitations. These changes have not led to a shortening of the statute of limitations, but have aimed at harmonizing these deadlines, removing some uncertainties and even, in some cases, extending some specific deadlines. However, the general ten-year term has not changed and remains in force[28].

[22] Cf. §195 of *Bürgerliche Gesetzbuch (BGB)* titled "*Regelmäßige Verjährungsfrist*", which provides that the general statute of limitation is three years.
[23] Cf. §5 (and §2) Chapter 58 of the *Limitation Act 1980.*
[24] Article 2262 of the Belgian Civil Code.
[25] Article 2262 *bis,* §1, first paragraph, of the Belgian Civil Code.
[26] Article 2262 *bis,* §1, second paragraph, of the Belgian Civil Code.
[27] Article 127 of the Swiss Code of Obligations (*Code des Obligations*).
[28] Blaise Carron, *Le nouveau droit suisse de la prescription -Présentation et analyse critique au*

The general statute of limitations provided by the Spanish Civil Code was fifteen years, although the Code also provided for shorter or longer terms. Law 42/2015, which amended law 1/2000 of the Spanish Code of Civil Procedure, shortened the overall statute of limitations. Starting from October 7, 2015, the date of entry into force of the law, this term ranged from 15 years to 5 years. If the law does not provide for a specific statute of limitations, then this term is five years.
Luxembourgish law has statute of limitations very close to those of the French Civil Code before the latter was amended by shortening the statute of limitations, with a general statute of limitations of thirty years (both for lawsuits defending personal rights and those protect real rights)[29] and some shortened deadlines, including a ten-year deadline for trade matters.
Some laws have also set a "limit" or "ceiling" time limit beyond which action can no longer be raised. His starting point is usually fixed on the day of the event that creates the obligation. This term is fixed in Germany at ten years or thirty years, as the case may be.
In Belgium, this ceiling or limit period is twenty years from the date of the event causing the damage in the case of a non-contractual liability claim[30].
In the UK, the draft Law Commission also provides for the establishment of such a period, the duration of which would be ten years.
In some of the above states, discussions of legislative changes or reforms regarding the limitation period are the result of the influence of principles defined by both Unidroit and the Lando Commission.

3. Efforts to unify the institute of statute of limitations in international law

3.1. Proposals for international harmonization: the principles of Unidroit
The International Institute for the Unification of Private Law (Unidroit), which is an intergovernmental organization, has established the Principles Concerning International Trade Contracts, the version of which adopted in 2004 includes provisions relating to the statute of limitations. These principles, which are intended to apply only to contractual relations, have no binding legal force, as they are not enshrined in any instrument of international law.
According to the Unidroit Principles, the statute of limitations of a contractual obligation has no effect of extinguishing the right. Moreover, it can produce effects if raised by the debtor.
The principles choose a single statute of limitations of three years, a period which can be changed by agreement of the parties without being able to be reduced to less than one year.
They provide for a maximum term of ten years, which may be modified by agreement of the parties to the contract, without being able to be reduced to less than four years or extended beyond fifteen years.
The starting point for these deadlines is set on the day "*when the creditor knew or should*

regard des objectifs visés, in: *sui-generis* 2019, S. 318, URL: sui-generis.ch/112.
[29] Article 2262 of the Luxembourgish Civil Code.
[30] Article 2262 *bis,* §1, third paragraph, of the Belgian Civil Code.

have known the facts that enable him to exercise his right."
The statute of limitations may be suspended as a result of legal proceedings, arbitration proceedings or alternative dispute resolution methods. The same applies in the event of force majeure or the death or inability of the creditor to act.
Moreover, the recognition by the debtor of the creditor's right constitutes a reason for the termination and causes the beginning of a new statute of limitations of three years.

3.2. Directive 2014/104/EU on legal relations concerning damages arising from "antitrust" competition
EU member states were required to implement Directive 2014/104 / EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Directive")[31].
In general, the Directive sets out some minimum standards for the implementation of competition law across the EU. It covers a number of important issues, such as statute of limitations, information protection and disclosure. By requiring some form of harmonization, it is anticipated that the implementation of the Directive will lead to significant changes in a number of jurisdictions and that competition damages actions will be pursued more than ever before.
Member States must provide for a limitation period of at least five years. This will not begin to be executed until the infringement ceases and the plaintiff knows, or may be expected to become aware of the conduct and the fact that it constitutes a violation of competition law, the fact that the infringement caused him harm and the identity of the infringer. Limitation periods are suspended during an investigation and continue to last at least one year after the breach decision has become final or the proceedings have been terminated. This provision extends statute of limitations considerably in many Member States, as there have not been many forecasts on this issue before[32].

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[31] OJ L 349, 5.12.2014, p1 https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=en
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