The law applicable to tort claims brought by secondary victims: the Florin Lazar v. Allianz SPA and Germanwings cases

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I. The Florin Lazar v. Allianz SpA Case (C-350/14)

A. Facts and Question of Law

On 10 December 2015, the ECJ decided for the first time which law is to apply according to the Rome II Regulation for a claim in damages brought by a family member of a victim who had lost his or her life in an accident. A young woman, a
Romanian national residing in Italy (hereinafter: the primary victim), had died in a road traffic accident in Italy. The vehicle that had caused the accident could not be identified. The father of the young woman, Mr Florin Lazar, a Romanian national residing in Romania (hereinafter: the secondary victim), requested compensation for his own material and immaterial harm following the death of his daughter. Under Italian law, in cases in which the identity of the driver that caused the accident remains unknown, any eventual award of compensation is provided by a guarantee fund, which is to designate an insurer, in the present case Allianz SpA. Mr Lazar thus brought a claim in damages against Allianz SpA before the district court in Trieste, Italy.

In the majority of European jurisdictions, in cases such as these, close family members are entitled to recover certain pecuniary loss (in particular loss of financial support or maintenance) and damages relating to non-pecuniary harm which they suffer following the death or, as we are witnessing now in more and more jurisdictions, severe injury of a loved one (in case of death referred to as bereavement damages).1 Bereavement damages, however, remain unrecognised, for example in German and Dutch law. In the past, divergences between national laws with regard to liability for bereavement damages often led secondary victims to bring their case to the highest courts to seek the application of their desired liability law.2

In the Florin Lazar v. Allianz SpA case, when it comes to determining the applicable law, the first approach to consider was that claims brought by secondary victims ought to be assessed under Italian law, since the accident occurred in Italy and the primary victim lost her life there. A second, alternative approach was to apply Romanian law instead, given that the secondary victim had his domicile, or habitual residence, there and had to live with the consequences of the accident in

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Romania. Both jurisdictions provide damages for bereavement. Those granted in Italy are arguably the most generous in Europe.3

In favour of the first approach one can argue that the injury of the primary victim is simultaneously the source of the harm suffered by the secondary victim. The view of this approach is that the place of injury suffered by secondary victims should be the same as that applied to primary victims. Actions of both primary and secondary victims are thus to be governed by the same law.4

On the other hand, in favour of the second, alternative approach, it could be argued that in cases such as the one argued before the ECJ, the loss of a loved one represents an injury to a personality right (i.e. a subjective right) of the secondary victim. In some jurisdictions (such as Italian and Swiss), bereavement damages are granted on the grounds that the loss of a loved one (i.e. of the primary victim) may entirely change the life of close family members and consequently have the effect of injuring the secondary victims in their personality rights.5 The accident would then at the same time injure the primary victim in his or her life and the secondary victim in his or her personality rights. For the secondary victim, the place of injury may then be determined autonomously, with the result being that the place of injury will be located at his or her domicile or habitual residence.6

3 Comp. M. WENTER, Die Ansprüche nahe Angehöriger von Unfallopfern im italienischen Schadensrecht, zfs 2012, 1; G. CHRISTANDL/ D. HINGHOFER-SZALKAY, Ersatzansprüche für immaterielle Schäden aus Tötung nahe Angehöriger – eine rechtsvergleichende Untersuchung, ZfRV 2007, 44, 58 ff.; see for Romania Art. 1391(1) and (2) of the Romanian Civil Code (Codul civil).


5 See e.g. the case of the Swiss Federal Supreme Court of Justice 22.4.1986, BGE 112 II 220: “Der Unfall hat die bisherigen Lebensverhältnisse des Klägers geradezu umgestürzt. Die eheliche Gemeinschaft ist weitgehend zerstört […]. Der Kläger, der an der Pflege seiner Ehefrau intensiv Anteil nimmt, hat ausserhalb seiner Berufstätigkeit im Krankenheim kaum mehr Zeit für sich. Eine zusätzliche Belastung ergibt sich daraus, dass Frau X. ihren Zustand wenigstens teilweise realisiert.” [The accident has entirely destroyed the previous lifelong relationship enjoyed by the plaintiff. The companionship of marriage has been largely eliminated […]. The plaintiff, who devotes his time intensively to caring for his wife, has hardly any time to himself apart from his work in the nursing-home. The fact that Mrs X is at least partly aware of her condition merely adds to the burden he has to bear]. The Swiss Federal Court held that under such circumstances the secondary victim in suffers injury in his personality rights which are explicitly protected under Arts. 28 and 28a of the Swiss Civil Code and Art. 49 of the Swiss Code of Obligations.

6 For the localisation of personality rights (for the purpose of international jurisdiction) at the place of the victim’s habitual residence, see the cases ECJ 25.10.2011, C-509/09 (eDate Advertising GmbH v. X) and C-161/10 (Olivier Martinez and Robert Martinez v. MGN Limited), paras. 48 and 49: “the impact […] on an individual’s personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests […]. The place where a person has the centre of his interests corresponds in general to his habitual residence”. Secondary victims might expect that the law of their habitual residence apply to their claim for bereavement damage, see Th. KADNER GRAZIANO (note 4), at 311 with reference to the case of the tragic accident in the Mont Blanc Tunnel.
B. The Decision of the ECJ

The ECJ opted for the first approach, submitting all damage (i.e. initial damage and damage suffered by secondary victims) to the law of the place where the event of their common cause of action had taken place (in this case Italy). The Court thereby refused to localise the injury suffered by the secondary victim autonomously, so as to afford different treatment of primary and secondary victims. In its reasoning, the ECJ relied upon three central arguments.

Firstly, the ECJ refers to the wording of Art. 4(1) of the Rome II Regulation. This provision states that the applicable law is generally the law of the country in which the damage occurs, provided that this place can be localised; in the case of traffic accidents, localisation of the damage is usually without any major difficulties. This law then applies “irrespective of the country or countries in which the indirect consequences of that event occur”, including – according to the ECJ – damage suffered by a secondary victim. The Court held that “[t]he damage sustained by the close relatives of the deceased, must be regarded as indirect consequences of the accident […], within the meaning of Art. 4(1) of the Rome II Regulation.”

Here, the reasoning of the ECJ remains rather formal. As we have seen, it would also have been conceivable to localise the direct damage from the perspective of the secondary victim – namely at his domicile. By way of an example, according to the Swiss Federal Supreme Court, a secondary victim who suffers an injury to one of his or her subjective rights (such as the right to one’s health or bodily integrity, or any other personality right or property right) suffers direct damage (as opposed to a victim who suffers pure economic loss as a result of injury to a primary victim). This is so regardless of the length of the chain of causation between the damaging act and the injury suffered by the secondary victim.⁷ The Swiss Federal Supreme Court hereby avoids difficult distinctions between direct and indirect damage and instead focuses on the violation of subjective rights.

Secondly, the ECJ refers to Art. 15(f) of the Rome II Regulation. According to this provision, “[t]he law applicable to non-contractual obligations under this Regulation shall govern in particular […] persons entitled to compensation for damage sustained personally.” Indeed, it may very well be inferred from this provision that if the primary victim suffers an injury to an absolute right, the secondary victim may also claim compensation for the damage sustained personally, regardless of the chain of causation.

For an opinion in favour of the application of the law at the domicile of the secondary victim in the Lazar case, see P. MANKOWSKI, Anmerkung zu EuGH, Urteil vom 10.12.2015, JZ 2016, 310 at 311 f.⁷

⁷ See e.g. BG 11.3.1986 (G. c. Confédération Suisse), BGE 112 II 118, consid. 5.e: “La personne qui est elle-même victime d’une atteinte à un droit absolu […] est donc directement lésée et peut demander réparation de son dommage à celui qui l’a causé. Peu importe à cet égard que la chaîne causale soit plus ou moins brève, que l’atteinte soit immédiate ou qu’elle frappe par contrecoup une personne qui était en relation avec la victime immédiate.” [The person who is himself the victim of an infringement of an absolute right […] is thus directly harmed and can demand that his harm be compensated by the person who caused it. It does not matter for these purposes whether the chain of causation is long or short, or whether the damage is caused to someone directly or rebounds from the immediate victim so as to hurt someone in relation with the immediate victim]. See also P. MANKOWSKI (note 6), at 311.
provision that the law applicable to claims by primary victims needs to first be determined and that only once this determination is made this same law subsequently applies in order to determine who, and in particular which secondary victims, may be deemed to be “entitled to compensation”.

The same reasoning has previously been applied when interpreting Art. 8(6) of the Hague Convention on the Law Applicable to Traffic Accidents and Art. 8(6) of the Hague Convention on the Law Applicable to Products Liability, both of which have similar wording to that of Art. 15(f) of the Rome II Regulation.8

Thirdly, the ECJ refers to recital 16 of the Rome II Regulation, according to which the applicable law shall be foreseeable to both parties. The Court stresses that it should avoid a situation in which “the tort or delict is broken up into several elements, each subject to a different law according to the places or the persons other than the direct victim who sustain damage” (at No. 29).

It is indeed true that, were the place of injury suffered by secondary victims to be determined autonomously (i.e. based on their domicile), then the law applicable to their claims would hardly be foreseeable, neither before nor shortly after the accident. Accidents that, at first sight, appear to be purely internal events could then present a wide variety of surprises and uncertainty with respect to which is the applicable law. A car accident in Geneva, Brussels or London between two cars registered in Switzerland, Belgium or London respectively, with drivers and passengers all domiciled in the same country, could nevertheless have worldwide implications regarding the applicable law, depending on the secondary victims’ domicile(s). The solution chosen by the ECJ leads, on the contrary, to the application of the same law to damage claims brought by both primary (should they have survived the accident) and secondary victims, hereby avoiding such a predicament. Arguments relating to foreseeability of the applicable law, simplicity and consistency thus all favour the application of the same law for both primary and secondary victims, which is indeed the solution favoured by the ECJ.9

C. Conclusions Regarding the Interpretation of Art. 4(1) and Arguably also of Art. 4(2) of the Rome II Regulation

The Lazar decision thus clarifies that, under the Rome II Regulation, the law applicable to actions brought by secondary victims is not to be determined independently and autonomously. Instead, the law that would apply to a claim brought

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8 E.W. ESSEN, Rapport explicatif, in Conférence de La Haye de droit international privé, Actes et documents de la onzième session, 7 au 26 octobre 1986, Tome III, Accidents de la circulation routière, p. 200, 213 on Art. 8(6); see also Proposition du Règlement du Parlement européen et du Conseil sur la loi applicable aux obligations non-contractuelles (Rome II), Bruxelles 22.7.2002, COM(2003) 427 final, Exposé des motifs, Art. 11 g), p. 25 f.; comp. Th. KADNER GRAZIANO (note 4), at 312 with further references. For the opposite point of view, see P. MANKOWSKI (note 6), at 311.

9 Compare W. WURMNEST, EuGH: Bestimmung des anwendbaren Rechts für mittelbare Schäden aus Verkehrsunfällen, Anmerkung zu EuGH, Urteil vom 10.12.2015, LMK 2016, 376926; Th. KADNER GRAZIANO (note 4); for a critical appreciation, see P. MANKOWSKI (note 6), at 312.
by the primary victim also applies to actions brought by secondary victims. Following the *Lazar* decision, this is clearly the case in situations where an action brought by the primary victim is determined according to Art. 4(1) of the Rome II Regulation and, consequently, where the *law of the place of the accident* applies.

Furthermore, actions brought by secondary victims should likewise be examined under the law that would be applicable to an action brought by the primary victim if that law is determined pursuant to Art. 4(2) of the Rome II Regulation, i.e. where the primary victim and “the person claimed to be liable […] both have their habitual residence in the same country at the time when the damage occurs”. Even if the secondary victims may live in a different country, their damage claims should, in this manner, be governed by the law of the country in which both the primary victim and the person alleged to be liable have their habitual residences. The second and third arguments invoked by the ECJ, and mentioned above (B), are applicable here, as is the overriding objective of assessing primary and secondary victim claims by the same law.\(^{10}\)

**D. Consequences for the Interpretation of Art. 4(3) of the Rome II Regulation?**

The question which may now be raised is whether the law that would be applicable for an action by a primary victim would also be relevant for claims brought by secondary victims when this law is not determined according to Art. 4(1) (designating the law of the place of the accident) or Art. 4(2) (designating the law of the country of the habitual residence of the person alleged to be liable and of the primary victim), but by Art. 4(3) of the Rome II Regulation. According to this provision:

> “[w]here it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”

This issue can be illustrated with (and may indeed need to be resolved in) the tragic *Germanwings* case, which has not yet been brought before the courts.\(^{11}\)

\(^{10}\) W. Wurmnest (note 9). It would also be possible to reject the application of Art. 4(2) here because “the person claimed to be liable” and the secondary victim do not “have their habitual residence in the same country at the time when the damage occurs”, and reach the same conclusion through application of Art. 4(3) instead, for the reasoning regarding Art. 4(3) see below D. and II.

\(^{11}\) Lawyers for families of British victims have recently announced plans to bring an action against the flying school based in Arizona, USA, where the co-pilot was trained, available at <www.theguardian.com/world/2016/mar/23/germanwings-crash-flight-school-legal-action-uk-victims>. 

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II. The Germanwings Case

A. Facts and Applicable Law According to the Montreal Convention

In March 2015, on a flight from Barcelona to Düsseldorf, an Airbus belonging to the German airline Germanwings crashed in the southern French Alps. 144 passengers from 17 countries, four crew members, the pilot, and the co-pilot who had intentionally caused the accident lost their lives. Close family members of the victims are now claiming compensation for the material and immaterial harm they have suffered following the deaths of their loved ones.12

In the European Union (and for example, Switzerland), claims by air crash victims are governed by the “Convention for the Unification of Certain Rules for International Carriage by Air”, concluded in Montreal on the 28th May 1999 (the Montreal Convention).13 Art. 17(1) (Death and injury of passengers […] provides that:

“The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

Furthermore, according to Art. 21(2):

“The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 113,100 Special Drawing Rights if the carrier proves that: (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.”


Art. 17(1), in connection with Art. 21(2) of the Montreal Convention, thus provides a system of strict liability for the carrier up to an amount of 113,100 Special Drawing Rights (approximately 146,000 EUR or 160,000 CHF). Beyond this threshold, claims in compensation are to be governed by Art. 21(2) of the Montreal Convention, under which the air carrier’s liability is fault-based with a presumption of fault. Given that in the Germanwings case, the co-pilot of the aeroplane has caused the crash intentionally the airline does not benefit from any of the exonerating factors outlined under Art. 21(2) letters (a) and (b).

The Montreal Convention thus, in principle, contains an autonomous, internationally unified system of liability at the substantive law level. Art. 29 of the Convention confirms this finding by stating that:

“[i]n the carriage of passengers […], any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention.”

However, this is to apply:

“without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.”

The question of who is entitled to compensation under the Convention, and for which damage, is therefore largely left to whichever law is applicable pursuant to the private international law rules of the forum (except that the Convention definitively excludes punitive damages). In EU Member States, the question of whether secondary victims are entitled to damages, and if so to what damages, is thus left to the law that is applicable according to the Rome II Regulation.

B. Determining which Persons Are Entitled to Compensation Pursuant to Art. 4 of the Rome II Regulation

Assuming that the primary victim had his or her habitual residence for example in Germany, an action for damages brought by him or her against the airline Germanwings, with its seat in Cologne, would be governed by German law, pursuant to Art. 4(2) of the Rome II Regulation.

If the reasoning of the ECJ in the Lazar case is also applied to Art. 4(2) – as suggested above – the same law (i.e. German law) would also be applicable to an action brought by secondary victims for damages. This law is then to apply irrespective of the latter’s habitual residence.

C. A Case for Art. 4(3) of the Rome II Regulation?

The next question then is: Which law would apply to damage claims brought by a primary or a secondary victim if the primary victim did not have his or her habitual residence in the country in which the respondent airline had its seat (i.e. Germany), for example if the primary victim had his or her habitual residence in Spain or Switzerland?

1. The Law that Would Be Applicable to Any Action Brought by a Primary Victim

Regarding actions brought by primary victims, the starting point for this analysis would be Art. 4(1) of the Rome II Regulation. This provision would lead to the law of the place of the accident. Given that in the Germanwings case the plane crashed in France, Art. 4(1) would lead to French law. Art. 4(2) would not apply here since the airline had its seat in Germany and the victims had their habitual residence in other countries. Art. 4(3) of the Rome II Regulation then provides that:

“[w]here it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 […] the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”

The primary victims were in a contractual relationship with the airline. Given that the tort that deprived the passengers of their lives was closely connected with the contract of carriage, the law of the place of the accident would thus be displaced by the law governing this contract (accessory connecting mechanism or rattachement accessoire). Thus, the question becomes “which law governs the contract between the primary victim and the airline?”

The airline and the passenger formed a contract of carriage. In the Member States of the EU, the law applicable to this contract would be determined by the Rome I Regulation. Even if the passengers were to have concluded the contract for purely private purposes, this contract would not be governed by the rules on consumer contracts found in the Rome I Regulation (Art. 6). The reason is that, according to Art. 6(4)(b) of the Rome I Regulation, the rules governing consumer contracts do not apply to a contract of carriage “other than a contract relating to package travel”.

The law applicable to a pure contract of carriage is instead governed by Art. 5(2) of the Rome I Regulation, which reads:

“To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties […], the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not
met, the law of the country where the carrier has his habitual residence shall apply.”

In the absence of a choice of law clause, a contract of carriage between the airline and a passenger who had his or her habitual residence in Spain would thus be governed by Spanish law (first sentence of Art. 5(2) of the Rome I Regulation), bearing in mind that the flight departed from Barcelona and that the victim had his habitual residence in Spain.

A contract of carriage between the airline and a passenger living in Switzerland would, on the other hand, be governed by German law. The reason for this is that neither the place of departure nor the destination of the flight related to Switzerland and therefore, pursuant to the second sentence of Art. 5(2) of the Rome I Regulation, “the law of the country where the carrier has its habitual residence [i.e. German law] shall apply.”

Pursuant to the second sentence of Art. 4(3) of the Rome II Regulation, the law governing the contract of carriage between the passenger (i.e. the primary victim) and the airline could also govern any damage claim brought by a primary victim in tort or delict. For any claim brought by a primary victim, the law governing the contract of carriage (in this scenario: Spanish or German law respectively) could, should, and arguably would thus replace the law of the country where the crash had occurred (i.e. French law).

2. The Law Applicable to a Claim Brought by a Secondary Victim: a Case for the First Sentence of Art. 4(3)

What consequences would this have for claims brought by secondary victims? There is no contract of carriage between the airline and secondary victims. With respect to these parties, the result is that the second sentence of Art. 4(3) of the Rome II Regulation (according to which the law governing a contract between the parties also applies to tort claims between them, provided that there is a close link between the contract and the tort) arguably does not apply here.15

Instead, in an action between these parties, the exception found in the first sentence of Art. 4(3) of the Rome II Regulation could apply. It reads:

“Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 […], the law of that other country shall apply.”

The exception found in the first sentence of Art. 4(3) has the objective of designating the law of a country that clearly has a closer link to the facts of the case than the country whose law would be applicable under Art. 4(1), in particular if the

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15 Here again, it could very well be argued that the applicable law is to be determined by who is the primary victim, given that he or she has a contractual relationship with the defendant, and that the law that would be applicable to a claim brought by the primary victim also applies to the secondary victim. The proposal in this paper achieves the same outcome through application of the first sentence of Art. 4(3) of the Rome II Regulation.
application of the law of the place of the accident would lead to completely fortuitous or arbitrary results. The rationale behind such an exception clause is apparent in the Germanwings case: the site where an aeroplane on an international flight crashes is indeed often absolutely fortuitous and arbitrary, especially (but not solely) for long-distance flights.

For primary victims, the accessory connection mechanism found in the second sentence of Art. 4(3) avoids the application of a wholly arbitrary law to proceedings, since it is the law governing the contract of carriage which applies (above, C.1.).

For secondary victims, the same result could be achieved if, as in the Lazar case, the law applicable to a claim brought by a secondary victim were not determined independently and autonomously, but by applying the very same law to (potential) actions by both primary and secondary victims. This result could be achieved via the exception clause in the first sentence of Art. 4(3) of the Rome II Regulation.

In the Germanwings case, the application of the first sentence of Art. 4(3) of the Rome II Regulation would lead to the application of Spanish law for any claims brought by secondary victims whose loved one had his or her habitual residence in Spain at the time of the accident, since a claim by the loved one (i.e. the primary victim) would have, according to Art. 4(3), been governed by Spanish law (see reasoning above). The claims of family members of victims who had lived in Switzerland would, on the other hand, be governed by German law (given that Switzerland, where these primary victims had their habitual residence, was neither the country of departure of the flight nor of its destination, and given that the airline was established in Germany).

The appropriateness of this solution can be illustrated by looking at a scenario inspired by a case that the French Cour de Cassation had to decide some years before the entry into force of the Rome II Regulation: a French travel agency had organised a tour of Cambodia. During an excursion on the Mekong, a canoe carrying French tourists capsized. Four tourists were killed, others were injured. The victims’ relatives brought an action against the travel agency for compensation

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17 Several central policy arguments used by the ECJ in the Lazar case are also relevant here: the aim of achieving a systematic interpretation of the Rome II Regulation in harmony with Art. 15(f) of the Rome II Regulation; achieving foreseeability of the applicable law both for prospective claimants and defendants in accordance with recital 16 of the Rome II Regulation; determining the law most adequate to decide the claims of both first and secondary victims; and avoiding frictions and predicaments that may result if different laws were applied to their actions.

18 See above C. 1.

of their material and immaterial harm due to the loss of their loved ones. French law provided damages for bereavement (*tort moral*), but the law of Cambodia did not.

Today, the Rome II Regulation would apply and actions of *primary victims* who had survived the accident would be governed by French law pursuant to Art. 4(2) of the Rome II Regulation (if both the defendant company and the victims were resident in France). If on the contrary the company had been established in France and the primary victims in another country, the accessory connecting mechanism in the second sentence of Art. 4(3) of the Rome II Regulation could apply, resulting in the application of the law governing the contract of carriage also to any damage claim of these victims in tort.20

From the primary victim’s and the respondent’s point of view, applying the law of the country of their common habitual residence – if they have their habitual residence in the same country – or – if they have their habitual residence in different countries – the law that governs their contract of carriage, would be more adequate than applying the law of a far-away country in which the primary victims spent only a small amount of time on holiday.

When it comes to determining the law applicable to a claim for compensation brought by a *secondary victim*, the starting point would be Art. 4(1) of the Rome II Regulation, designating the law of the place of injury. According to the ECJ’s ruling in the *Lazar* case, the relevant injury would be the one suffered by the primary victims in Cambodia. Art. 4(1) would thereby lead to the application of Cambodian law. Here again, however, the first sentence of Art. 4(3) could grant an exception whereby the law applicable to any claim brought by a primary victim could also be applied to claims brought by secondary victims in the same circumstances – a concept that would be fully in line with the rationale of the ECJ in the *Lazar* case and with the arguments set out above.

It goes without saying that Art. 4(3) of the Rome II Regulation is always applied on a case-by-case basis. Should the result under Art. 4(1) (i.e. the application of the law of the place of the accident) be more adequate than the result produced by the exception clause found in Art. 4(3), the latter should evidently not be applied (such a scenario may come about where the place of the accident is nearby, but the seat of the airline in question is located in a far-away country whose law would be applicable to the contract of carriage under the second sentence of Art. 5(2) of the Rome I Regulation).

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20 If their contract had been a *consumer contract* in the sense of Art. 6 of the Rome I Regulation, i.e. a contract relating to package travel within the meaning of Council Directive 90/314/EEC, and provided that the other requirements of Art. 6 of the Rome I Regulation were also fulfilled, and had their residence not been in France, their contract would then be governed by the law of the country where the consumers had their habitual residence.
III. Conclusions

The decision of the ECJ in the Florin Lazar v. Allianz SpA case brings much needed clarification regarding the law applicable to claims brought by secondary tort victims.\footnote{The Lazar decision does not necessarily exclude a secondary victim as “victim” from the scope of jurisdiction under Arts. 13(2), 11(1)(b) of the Brussels I Regulation (recast), comp. A. STAUDINGER, Indirekte Schadensfolgen aus einem Verkehrsunfall – Rom II-Verordnung, Anmerkung zu EuGH, Urteil vom 10.12.2015, NJW 2016, 466.}

The judgment may have consequences that reach far beyond the scenario submitted to the ECJ. In fact, the reasoning of the Court could very well be applied not only to cases in which the rights of primary and secondary victims are determined pursuant to Art. 4(1) of the Rome II Regulation, i.e. where the law of the country in which the accident occurred applies. This reasoning could, and arguably should, be used – and the same conclusions be reached – where the law applicable to a claim brought by the primary victim is to be determined by Art. 4(2) or Art. 4(3) of the Rome II Regulation, i.e. where the person alleged to be liable and the primary victim (but not necessarily the secondary victim) have their habitual residences in the same country or where the law applicable to an action brought by the primary victim is determined through the exception clause found in Art. 4(3).

The connecting factors in tort used in the Rome II Regulation are gaining more and more ground worldwide: Arguably all PIL systems apply the *lex loci delicti* rule in one way or another, either as a starting point in torts or as a subsidiary rule. Arguably all modern systems also provide exceptions to this rule under certain circumstances: many apply exceptions if both parties have their habitual residence in the same country; some use an accessory connection mechanism in torts similar to that found in the second sentence of Art. 4(3) of the Rome II Regulation;\footnote{See Art. 133(3) of the Swiss PIL Act providing: “When a tort breaches a legal relationship existing between the tortfeasor and the injured party, claims based on such tort are governed […] by the law applicable to such legal relationship”; similar provisions are to be found in Art. 20 of the Japanese PIL Act and Art. 3127 of the Civil Code of Québec.} others could achieve similar results by invocation of a general exception clause.\footnote{Comp. the Chapter on “Torts” with numerous references, in J. BASEDOW/ F. FERRARI/ P. DE MIGUEL ASENSIO/ G. RÜHL, *Encyclopedia of Private International Law*, Cheltenham, Edgar Elgar Publishing, Vol. 2 (forthcoming).} For these systems, the ECJ’s judgment (and the consequences that may be drawn from this judgment in cases like that of Germanwings) may be an interesting and valuable source of inspiration when it comes to determining the law applicable to claims brought by secondary victims. The decision in the Lazar case could thus be of interest well beyond Europe.