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CROSS-BORDER FAMILY MATTERS - CROATIAN EXPERIENCE PRIOR TO EU ACCESSION AND FUTURE EXPECTATIONS¹

Abstract: This paper provides a comparison of the EU *acquis* with Croatian legislation and practice prior to EU accession, focusing on the area of private international family law. The authors contribute to a framework of cross-border family issues which are regulated by EU rules, entailing divorce, parental responsibility and maintenance issues. In addition to legal norms prior to EU full membership, the authors present an analysis of Croatian court rulings. Conclusions of this research point to possible obstacles and problems in the future application of EU rules to Croatian practice. The authors particularly deal with the following: new criteria of international jurisdiction, ensuring the maximum protection of minors, and safeguarding the best interest of a child.

Key words: jurisdiction – applicable law – recognition and enforcement, international family law; EU regulations, best interest of a child

1. INTRODUCTION

Full membership in the European Union has significantly altered many parts of the legal order of the Republic of Croatia, private international family law being just one of them. The purpose of this paper is to detect most significant changes that the Croatian legal framework and practice face due to the application of the EU *acquis*. This overall aim would be achieved through a step-by-step analysis. The first step relates to setting a framework of cross-border family issues which are regulated by the EU *acquis*. Within issues falling within the scope of *ratione personae* of EU rules, research would further on provide a full picture of rules pertaining to the Croatian legal framework prior to EU accession. In addition to legal norms, the paper would give an analysis of Croatian court rulings prior to EU accession. The paper would also provide a comparison of solutions offered by Croatian legislation and accepted practice to provisions and solutions accepted in the EU legal *milleu*. On the basis

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of steps taken, conclusions of this research would finally point to possible obstacles and problems in the future application of EU rules.

2. EUROPEAN UNION – EU PRIVATE INTERNATIONAL FAMILY ACQUIS

EU private international family legislation has evolved since the Treaty of Amsterdam.² Today it comprises several sets of legal sources. There are three regulations intended directly for cross border family relations,³ whereas other pieces of the *acquis* not addressed purely to this subject matter are applied to issues pertaining to international family law as well. The list of such indirect constituents of the international family *acquis* is formed through family regulations directing to them. For example, according to Regulation No 2201/2003, the hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.⁴ Other examples can be found as well, i.e., Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Service of documents);⁵ Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits;⁶ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims;⁷ Council Decision No 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters⁸ is, according to the Maintenance Regulation, to be used by central authorities;⁹ Council Directive No 200/52/EC of the European Parliament and of the Council of 21 May 2008 is applicable on certain aspects of mediation in civil and commercial matters.¹⁰

Similarly, some of the instruments of European international family law in a wider sense are also formal *fontes iuris*, as regulations directly relating to family matters point to them.

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- 2 For more details, see: Andrae, M. Internationales Familienrecht, Nomos, 2014; Župan, M., European judicial cooperation in cross border family matters, in Drinoczi, T., Takacs, T. (eds.) Cross-border and EU legal issues: Hungary – Croatia. Osijek-Pecs, 2011, 621-647.
 - 3 Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility which revokes Regulation (EC) No 1347/2000, *OJ L* 338, 1-29; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, referring to both children and spouses *OJ L* 7, 10.1.2009, 1-79; Council Regulation (EU) No 1259/2010 of 29 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ L* 343, 29.12.2010.
 - 4 *OJ L* 174, 27.6.2001.
 - 5 *OJ L* 324, 10.12.2007, p. 79. This replaced the Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (*OJ L* 160, 30.6.2000, p. 37.) which is applied to the service of documents (proceedings instituted pursuant to Regulation No 2201/2003, see Art. 18(2) and Art. 11(2) of Regulation No 4/2009).
 - 6 *OJ L* 124, 8.6.1971, p. 1. This should apply according to note 41 of the Preamble of Regulation No 4/2009.
 - 7 *OJ L* 143, 30.4.2004, p. 15. This should be applied according to Art. 68(2) of the Maintenance Regulation on maintenance obligations issued in a Member State not bound by the 2007 Hague Protocol.
 - 8 *OJ L* 174, 27.6.2001, p. 25.
 - 9 See Art. 50(2) of the Maintenance Regulation No 4/2009.
 - 10 *OJ L* 136/3, 25.4.2008.

For example, these are the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters;¹¹ the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children;¹² the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; Protocol on the Law Applicable to Maintenance Obligations.¹³

2.1. DEFINING THE SCOPE OF APPLICATION OF THE RELEVANT EU PRIVATE INTERNATIONAL FAMILY LAW ACQUIS

2.1.1. DIVORCE AND PARENTAL RESPONSIBILITY

The scope *ratione materiae* of Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter referred to as: “Brussels II bis”)¹⁴ includes matters of divorce, legal separation or marriage annulment, the attribution, exercise, delegation, restriction or termination of parental responsibility, which implies, in particular: rights of custody and rights of access; guardianship, curatorship and similar institutions; the designation and functions of any person or body having charge of the child’s person or property, representing or assisting the child; the placement of the child in a foster family or in institutional care; measures for the protection of the child relating to the administration, conservation or disposal of the child’s property. The Regulation applies to these matters regardless of the nature of the court or tribunal. Section I lays down the provisions on jurisdiction in divorce, i.e., alternative application of a variety of combinations of habitual residence criteria/and alternatively common nationality of the parties is prescribed.¹⁵ Section II lays down provisions on parental responsibility, which generally comes under the jurisdiction of the courts of the Member State of the habitual residence of a child. Exceptions to the rule are found in certain cases of lawful relocation; if the spouses accept the jurisdiction of the court adjudicating on the divorce to decide on matters of parental responsibility, or parents agree to bring the case before the courts of another Member State the child has a close connection with. If the child’s habitual residence cannot be established, the courts of the Member State where the child is present shall have jurisdiction. If none of the Member States courts has jurisdiction according to the aforementioned rules, each Member State may apply its national legislation. Transfer of a case to a court of another Member State is possible if justified by the best interest of the child. Brussels II *bis* provides a set of rules

11 See Art. 18(3) of Regulation No 2201/2003 and Art. 11(3) of Maintenance Regulation No 4/2009.

12 See Articles 60-62 of Regulation No 2201/2003.

13 See note 8 of the Preamble to the Maintenance Regulation No 4/2009.

14 Mankowski, P., Magnus, U., eds., Brussels II bis Regulation. European Commentaries on Private International Law. Sellier, 2012; Medić-Musa, I., Komentar Uredbe Bruxelles II bis u području roditeljske skrbi, Pravni fakultet u Osijeku, Osijek, 2012; Sikirić, H., Bračni predmeti prema Uredbi Vijeća (EZ) br. 2201/2003 od 27. studenoga 2003. o nadležnosti i priznanju i ovrši odluka u bračnim predmetima i predmetima roditeljske odgovornosti i o ukidanju Uredbe (EZ) br. 1347/2000, in: Korac Graovac A., Majstorović, I., (eds.) Europsko obiteljsko pravo. Narodne novine, Zagreb, 2013.

15 Ní Shúilleabháin, M., Cross-Border Divorce Law: Brussels II Bis; Oxford - Oxford Private International Law Series, 2010, 8-10.

that upgrade the Hague Child Abduction Convention, but only with respect to relations among Member States.¹⁶ The courts are required to act expeditiously in proceedings on the application, subject to exceptional situations; the judgment is to be issued no later than six weeks after the application is lodged. The courts of the Member State which the child has been abducted to can refuse to return the child only if there is a serious risk that the return would expose the child to physical or psychological harm. Nevertheless, a judge must order the return if it is established that adequate arrangements have been made to ensure the protection of the child after his or her return. If a court has issued a non-return order, within one month of the date of the non-return order it must transfer the case file to the competent court of the Member State in which the child was habitually resident prior to removal. At that point, the requesting state may still deliver a judgement on the return of a child and such judgment has to be enforced!

Brussels II *bis* provides for automatic recognition, whereas the grounds to refuse recognition of judgments relating to matrimonial matters and matters of parental responsibility are severely restricted. Recognition may be refused if it is manifestly contrary to the public policy; if the respondent was not served with the document which instituted the proceedings sufficiently early to arrange for his or her defence; and if recognition is irreconcilable with another judgment. Regarding parental responsibility matters two additional grounds are provided for: the child was not given an opportunity to be heard and a person claims that the judgment infringes his or her parental responsibility if it was issued without such person having been given an opportunity to be heard. Abolition of *exequatur* is preserved under this Regulation regarding judgments on the rights of access to and the return of a child.

As far as applicable law is concerned, divorce matters are regulated by Rome III only if Member States are parties to such enhanced cooperation.¹⁷ Regarding parental responsibility, the Hague Convention of 1996 is applied.¹⁸ The Council has issued several decisions encouraging Member States to accede to this Convention.¹⁹ The overall aim of such actions was to reach the point that each Member State is a party to the Convention, resulting with common applicable law rules relating to parental responsibility rights under Brussels II *bis*. Applicable law for protective measures is domestic law (*lex fori*). For the establishment and termination of parental care, the law of the habitual residence of the child applies; in the case of a change of habitual residence of the child the new habitual residence of the child applies.

16 Schuz, R., *The Hague Child Abduction Convention: A Critical Analysis*. Hart Publishing, Oxford, 2013, 19-25.

17 Campuzano Díaz, B., *Uniform Conflict of Law Rules on Divorce and Legal Separation via Enhanced Cooperation*, in Campuzano Díaz, B. et al., (eds.) *Latest developments in EU private International law*, Cambridge Intersentia 2011, p. 26.

18 For more details, see: Župan, M., *Roditeljska skrb u sustavu Haške konvencije o mjerama dječje zaštite iz 1996.*, Rešetar, B. (ed.), *Pravna zaštita prava na (zajedničku) roditeljsku skrb*, Osijek 2012, 199-222.

19 Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, Official Journal L 048, 21/02/2003; Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law, 11. 6. 2008. OJ L 151/36.

2.1.2. MAINTENANCE REGULATION

By its *ratione materiae* Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, referring to both children and spouses (hereinafter referred to as: “Maintenance Regulation”) applies to maintenance obligations that arise from family relationship, parentage, marriage or affinity. Jurisdiction is in general with the court of the place where either the defendant or the creditor is habitually resident, or the court having jurisdiction for proceedings regarding the status of a person or parental responsibility, provided that jurisdiction is not based solely on the nationality of one of the parties. With the exception of minors, the Regulation allows for a choice of court agreements. Submission to the court without contesting its jurisdiction empowers the court with jurisdiction as well. Additional subsidiary jurisdiction is provided for when none of the parties resides in the EU, and jurisdiction rests with the courts of the Member State of the common nationality of the parties. Exceptionally, the *forum necessitates* principle enables the proceeding to be brought before the court of a Member State that is closely connected to the dispute.

Maintenance decisions issued by one Member State should be recognised in another Member State without any special procedure. Nevertheless, under this Regulation, recognition and enforcement of judgement are twofold. If the decision is taken by a Member State bound by the Hague Protocol, its recognition may not be opposed nor its enforceability subjected to declaration of enforceability. Where the decision is taken by a Member State not bound by the 2007 Hague Protocol, there is a traditional mechanism entailing a list of grounds for non-recognition, i.e., public policy excuse, the fact that a decision was taken in the absence of the defendant, the fact that a decision is incompatible with a decision made in a dispute between the same parties by the Member State where recognition and enforcement are sought for, or a decision is incompatible with an earlier decision in a dispute between the same parties and for the same actions by another Member State or a third country.

Regarding applicable law, Article 15 of the Regulation is directed towards the application of the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations. The Protocol’s main conflict of laws rule refers to the application of the law of the habitual residence of the maintenance creditor.²⁰ Subsequent conflict of laws rules of the Hague Protocol employ a “cascade” system based on subsidiary connections that serve special protection and favourisation of the creditors.²¹ Party autonomy is widely used in the Protocol, with its two forms, i.e., the parties to a proceeding choose *lex fori*, and a classical (though slightly narrowed) *lex autonomiae*, respectively.

3. CROATIAN LEGISLATION IN THE DEFINED SCOPE OF APPLICATION

The fundamental legal source for settling situations with a cross-border element is *The Law on Resolution of Conflict of Laws with Regulations of Other Countries in Certain Matters* (hereinafter

20 Bonomi, A., Explanatory Report to the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (The Hague, Permanent Bureau, 2009); www.hcch.com

21 Report of the Working Group on applicable law, HCCH, Prel. Doc. No 22 of June 2006, p. 5.

referred to as: "PIL Act").²² The PIL Act contains provisions on jurisdiction, applicable law, and recognition and enforcement. In a material field relevant to this paper, multilateral international conventions provide a legal framework as well. Primarily we speak of conventions enacted within the framework of the Hague Conference on Private International Law,²³ but also conventions enacted within the framework of the UN and the Council of Europe. Numerous bilateral agreements contain special provisions on international family matters as well. We mostly find them in contracts that Croatia succeeded from the former Yugoslavia. These are the agreements with Austria,²⁴ Belgium,²⁵ Bulgaria,²⁶ the Czech Republic,²⁷ France,²⁸ Greece,²⁹ Hungary,³⁰ Poland,³¹ Romania,³² Russia,³³ and Slovakia.³⁴ Several agreements have been concluded since Croatian

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- 22 Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima, Službeni list 43/82, 72/82, Ukaz o proglašenju Zakona o preuzimanju Zakona o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima, Narodne novine Republike Hrvatske, br. 53/91.
- 23 Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, in force in Croatia since 1 January 2010, and Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, overtaken by succession from Yugoslavia.
- 24 Sporazum između Jugoslavije i Austrije o uzajamnom priznavanju i izvršenju odluka o izdržavanju, 10.10.1961., 2/63. Popis dvostranih međunarodnih ugovora preuzetih sukcesijom, NN-MU br. 1/1997.
- 25 Konvencija o priznanju i izvršenju sudskih odluka o izdržavanju između SFRJ i Kraljevine Belgije, 12.12.1973., 45/76. Popis dvostranih međunarodnih ugovora preuzetih sukcesijom, NN-MU br. 11/1997.
- 26 Ugovor između FNRJ i NR Bugarske o uzajamnoj pravnoj pomoći, 23.3.1956., 1/1957; Popis dvostranih međunarodnih ugovora preuzetih sukcesijom, NN-MU 11/1997.
- 27 Ugovor o reguliranju pravnih odnosa u građanskim porodičnim i krivičnim stvarima između SFRJ i Čehoslovačke Republike, 20.1.1964., Službeni list SFRJ 13/1964; Popis dvostranih međunarodnih ugovora preuzetih sukcesijom NN-MU 11/1997.
- 28 Konvencija o priznavanju i izvršenju sudskih odluka u građanskim i trgovačkim stvarima između SFRJ i Republike Francuske, 18.5.1971.; Popis dvostranih međunarodnih ugovora preuzetih sukcesijom, NN-MU 4/1996.
- 29 Sporazum između FNRJ i Kraljevine Grčke o uzajamnom priznavanju i izvršenju sudskih akata – odluka, 18.6.1959.; Popis dvostranih međunarodnih ugovora preuzetih sukcesijom, NN-MU 4/1996.
- 30 Ugovor između SFRJ i NR Mađarske o uzajamnom pravnom saobraćaju, 7.3.1968., 3/1968. Ugovor o izmjenama i dopunama Ugovora između SFRJ i NR Mađarske o uzajamnom pravnom prometu iz 1968., 25.4.1986. 1/1987. Popis dvostranih međunarodnih ugovora preuzetih sukcesijom, NN-MU 13/1997.
- 31 Ugovor između Federativne Narodne Republike Jugoslavije i Narodne Republike Poljske o pravnom postupku i civilnim i krivičnim pitanjima, 6.2.1960. Službeni list SFRJ 5/763. Ugovor o sukcesiji dvostranih ugovora između Vlade Republike Hrvatske i Vlade Republike Poljske, 13.4.1995., 22.11.1999. NN – MU 09/1995, 15/1999.
- 32 Ugovor između Federativne Narodne Republike Jugoslavije i Rumunjske Narodne Republike o pravnoj pomoći, 18.10.1960. 8/1961; Popis dvostranih međunarodnih ugovora preuzetih sukcesijom NN-MU 1/2005.
- 33 Ugovor između FNRJ i SSSR o pravnoj pomoći u građanskim, porodičnim i krivičnim stvarima, 24.2.1962., Službeni list FNRJ 5/1963. See point 6. Protokol između Vlade Republike Hrvatske i Vlade Ruske Federacije o nastavku važenja bilateralnih ugovora 12.1.1998., NN – MU 04/98.
- 34 Ugovor o reguliranju pravnih odnosa u građanskim porodičnim i krivičnim stvarima između SFRJ i ČSSR, 20.1.1964. Službeni list SFRJ 13/1964. Ugovor između Republike Hrvatske i Slovačke Republike o sukcesiji dvostranih ugovora, 29.1.1997.

independency was reached in 1991; namely, with Bosnia and Herzegovina,³⁵ Macedonia,³⁶ Slovenia,³⁷ Yugoslavia³⁸ and Turkey.³⁹

Comparative research of the Croatian legal system is here provided for in respective fields of application of the Brussels II *bis* and the Maintenance Regulation. We place emphasis on rules of international jurisdiction and recognition and enforcement of foreign judgements. At a certain point, we examine the rules on applicable law as well.⁴⁰ The Croatian PIL Act provides for grounds of jurisdiction that clearly depart from the philosophy of the EU legislator. Nevertheless, in certain situations these rules can still be applied within the scope of application of the Brussels II *bis* Regulation, as it is open for residual grounds of jurisdiction.⁴¹ When we speak of maintenance obligations, national law is fully replaced by Regulation No 4/2009, the Hague 2007 Maintenance Convention and the Hague Protocol.⁴²

3.1. JURISDICTION AND APPLICABLE LAW

The Croatian court can hear a dispute containing a foreign element only if such jurisdiction is provided for by an internal law or international agreement.⁴³ When a court establishes that it has no jurisdiction in a particular dispute, the court shall declare lack of jurisdiction *ex officio* - on its own motion. According to Art. 81 of the PIL Act, a pertinent moment to evaluate the facts that form the basis of the court's jurisdiction in a case is the moment when the lawsuit started pending. A subsequent change of the facts is irrelevant from the point of jurisdiction, once it is properly established.⁴⁴

General rules of Articles 46-51 prescribe jurisdictional rules to entertain any kind of civil action with an international element, irrespective of its subject matter. If a legal relation is decided upon in non-litigious proceedings, the Croatian court shall have jurisdiction if the person in relation to whom the application has been submitted is domiciled in Croatia, and when there is only one person participating in the proceedings – if that person is domiciled in Croatia. If the Croatian

35 Sporazum između Vlade Republike Hrvatske, Vlade Bosne i Hercegovine i Vlade Federacije Bosne i Hercegovine o pravnoj pomoći u građanskim i kaznenim stvarima (područje primjene - Federacija BiH), 26.2.1996. NN-MU 12/1996; Sporazum između Republike Hrvatske i Bosne i Hercegovine o izmjeni Sporazuma između Vlade Republike Hrvatske, Vlade Bosne i Hercegovine i Vlade Federacije Bosne i Hercegovine o pravnoj pomoći u građanskim i kaznenim stvarima, 17.6.2002. NN-MU 05/2003.

36 Ugovor između Republike Hrvatske i Republike Makedonije o pravnoj pomoći u građanskim i kaznenim stvarima, 2.9.1994., 29.5.1995.; NN - MU 03/1995, 01/1997.

37 Ugovor između Republike Hrvatske i Republike Slovenije o pravnoj pomoći u građanskim i kaznenim stvarima, 7.2.1994., 19.8.1995.; NN - MU 03/1994, 01/1997.

38 Ugovor između Republike Hrvatske i Savezne Republike Jugoslavije o pravnoj pomoći u građanskim i kaznenim stvarima, 15.9.1997., 28.5.1998.; NN - MU 06/1998, 08/1998.

39 Ugovor između Republike Hrvatske i Republike Turske o pravnoj pomoći u građanskim i trgovačkim stvarima, 10.2.1999., 19.1.2003. NN - MU 15/2000, 01/2003.

40 Namely, although Brussels II *bis* does not relate to applicable law rules by its material scope of application, the Commission authorised Member States to accede to the Hague convention of 1996 which now presents a set of common rules for all of them. On the other hand, although by its scope of application the Maintenance Regulation relates to applicable law rules, it truly only directs towards the application of the Hague Protocol on Maintenance of 2007.

41 See Articles 6 and 7 and Art. 14.

42 Župan, M., Innovations of the 2007 Hague Maintenance Protocol, in Beaumont et al. (eds.) Cross border recovery of maintenance, Oxford-Portland, Hart 2014, 311 et seq.

43 Vuković, Đ., Kunštek, E., Međunarodno građansko postupovno pravo, Zgombić i partneri, Zagreb, 2005, 42-43.

44 Triva, S., Dika, M., Građansko parnično procesno pravo, Narodne novine Zagreb, 2005, 288 et seq.

PIL provides so, the Croatian court has exclusive jurisdiction. General jurisdiction of Croatian courts exists if the defendant is domiciled in Croatia.⁴⁵ By the exception to this rule, general jurisdiction exists if the defendant has residence in Croatia, under the following conditions: if the defendant is not domiciled in Croatia or in any other State or if the defendant is domiciled abroad but he or she resides in Croatia and both litigants are Croatian citizens (Art. 46 (2)(3)). There is a special subversion of a general jurisdictional rule embodied in a provision based on retorsion: if the court in a foreign state has jurisdiction in disputes against Croatian citizens on the basis of grounds of jurisdiction that do not exist in the provisions on jurisdiction of the Croatian courts, those grounds shall be applicable to the existence of jurisdiction of the court in disputes in which the defendant is a citizen of that foreign state. Such provision is intended to annul the repercussion of exorbitant grounds of jurisdiction employed towards Croatian citizens before foreign courts.⁴⁶ The litigants may not agree upon jurisdiction of a foreign or Croatian court in any of the respective family law disputes! The PIL Act prohibits an express prorogation agreement, but it is conceived that such prohibition relates to a tacit agreement as well.⁴⁷ When jurisdiction of the Croatian court is determined by provisions of the PIL Act on the assumption that a litigant has a Croatian citizenship, jurisdiction shall also exist for stateless persons having their domicile in Croatia. There is a problem regarding attraction of jurisdiction, as there is no rule authorising a court to decide upon maintenance in a divorce dispute matter! Nevertheless, such rule exists in domestic cases, where a court is obliged to decide *ex officio* on maintenance and parental rights and duties in the mere divorce proceeding.⁴⁸

Special jurisdictional rules are prescribed for divorce or marriage annulment in Articles 61-62 of the PIL Act. The Act provides for elective and exclusive criteria. Even if the defendant is not domiciled in Croatia, Croatian courts shall have jurisdiction in marital disputes (disputes for establishing the existence or non-existence of marriage, annulment of marriage or divorce) if both spouses are Croatian citizens, irrespective of where they are domiciled; or if the plaintiff is a Croatian citizen and is domiciled in Croatia; or if the spouses had their last domicile in Croatia, and the plaintiff was domiciled or resident in Croatia at the time of filing the action. Further elective criteria provide for jurisdiction of the Croatian court to a divorce dispute to which a plaintiff is a Croatian citizen and the law of the state whose court would have jurisdiction does not provide for the institution of divorce of marriage (Art. 63).

As far as exclusive jurisdiction is concerned, if the defending spouse is a Croatian citizen domiciled in Croatia, Croatian court's jurisdiction is exclusive. The Croatian court shall have jurisdiction in disputes referred to in Art. 61 of the PIL Act even when the spouses are foreign citizens who had their last common domicile in Croatia, or when the plaintiff is domiciled in Croatia, provided that in those cases the defendant consents to the jurisdiction of the Croatian court and that the jurisdiction is allowed by the legislation of the state whose citizens the spouses are. In terms of the law applicable to divorce, pursuant to Art. 35, the nationality criterion plays a dominant role.

Prior to the entry into force of the 1996 Hague Convention, the only rule of international jurisdiction in matters of parental care was provided for by the PIL Act, i.e., provision of Ar-

45 If there are several defendants in a lawsuit who are considered to be in a legal community as to the subject matter of the dispute, or their rights and obligations are arising from the same factual and legal basis, the court of Croatia shall have jurisdiction also when one of the defendants is domiciled in Croatia (Art. 46(4)).

46 Dika, M., Knežević, Stojanović, et al. Komentar zakona o međunarodnom privatnom pravu, Nomos, Beograd, 1991, 176.

47 See the commentary of Art. 49(3) and Art. 50 in Dika et al. Komentar zakona, op. cit., n. 45, 183.

48 Šarčević, P. (et al.) Family Law in Croatia, Wolters Kluwer, 2011, 123.

titles 66 and 69. The PIL Act provided for elective and exclusive jurisdiction. Special jurisdiction of the Croatian court is provided for in disputes on custody and child care and visitation rights of children under parental custody if both parents are Croatian citizens. Since decisions on parental care are not necessarily issued by the courts, but are often issued by a Social Welfare Authority (as prescribed to its jurisdiction by the Family Law Act)⁴⁹, provision of special jurisdiction in parental care disputed to Croatian courts by analogy refers to the competence of other bodies as well. When deciding on deprivation and restoration of parental rights, extension of parental rights, the appointment of a parent as a guardian in respect of management of the child's property, the declaration that the child was born inside marriage, and when deciding on other matters relating to personal status and relations between parents and children, pursuant to Art. 69, Croatian courts have jurisdiction even when the conditions of Art. 46(4) of the PIL Act do not exist, if the applicant and the person in relation to whom the application is submitted are Croatian citizens, or when only one person participates in the proceedings, if that person is a Croatian citizen. If the defendant and the child are Croatian citizens and if both are domiciled in Croatia, jurisdiction is exclusive.

The Hague 1996 Convention introduces very different requirements of international jurisdiction since its enactment in Croatia on 1 January 2010. The Hague 1996 Convention grants primacy to courts and authorities of the habitual residence of the child, with the overall intention of the Convention to make that forum a solely responsible forum for long-term measures to protect the child. As the child changes its habitual residence, he or she changes the jurisdiction of an authority that has power under the Convention to take action on the issue of parental rights and visitation contacts.⁵⁰ A change of habitual residence exceptionally does not lead to a change of jurisdiction - if the relocation of the child was illegal.⁵¹ The authorities of the new illegal habitual residence of the child can still take emergency protective measures, but these measures would cease as soon as the authorities of the regular place of habitual residence of the child undertake appropriate measures.⁵² As an exception, even illegal migration can lead to changes in international jurisdiction if certain conditions laid down by the Convention are met.⁵³ Supremacy of this criterion is therefore not absolute: the 1996 HC contains several additional criteria for international jurisdiction, but their use is severely restricted or conditional. We shall enumerate these provisions: the rule on the transfer of jurisdiction, jurisdiction of the state of the child's residence, jurisdiction of a state where the property of a child is situated for urgent interim measures authorities should undertake in respect of that property (Articles 11 and 12), additionally, the Convention opens up the possibility of attracting guardianship proceedings to a divorce dispute when the national law of the contracting state can decide on the requests in the same proceeding, and if such attraction is in the child's best interests.⁵⁴

In terms of applicable law, prior to the entry into force of the 1996 Hague Convention, provision of Art. 40 of the PIL Act included the determination of the applicable law for all of the issues in parent-child relationship.

49 Former Family Code (Obiteljski zakon) NN 116/03, 17/04, 136/04, 107/07, 57/11, 61/11, as well as the new Family Code of 2014, NN 75/14, 83/14.

50 See Art. 5 (2) compared to Art. 8 of Brussels II *bis*.

51 See Art. 7 (2) compared to Art. 10 of Brussels II *bis*.

52 See Art. 11(1) compared to Art. 20 of Brussels II *bis*.

53 See Art. 7 a) and b) compared to Articles 10 and 11 of Brussels II *bis*.

54 Dika et al. Komentar zakona op. cit., n. 45, 134-138.

Auxiliary criteria on special international jurisdiction of Croatian courts in maintenance obligations were found separately in terms of child support and in terms of other legal disputes regarding alimony and maintenance of spouses. Of significance to all maintenance categories was the jurisdiction of Art. 68, i.e., forum of assets, which could be used to charge maintenance debts. In terms of child support, provision of Art. 67 prescribed a total of four different situations to be applied with an exception to the general jurisdictional rule: if the child was filing the action and it was domiciled in Croatia; or if the plaintiff and the defendant were Croatian citizens, irrespective of where they were domiciled; or if the plaintiff was a minor and a Croatian citizen.

Jurisdiction in relation to other categories of the statutory obligation of support, i.e., the ones not mentioned in Art. 67(1), should lie with Croatian courts if the plaintiff was a Croatian citizen domiciled in Croatia. Pursuant to Art. 67(3), the Croatian court had jurisdiction to hear a case in disputes on a statutory obligation of support between spouses and between former spouses also if the spouses had their last common domicile in Croatia, and the plaintiff continued to be domiciled in Croatia at the time of litigation. In terms of cohabiting couples, there were no separate provisions and the doctrine suggested the use of the same terms prescribed in regard to marital spouses.

The regime of bilateral agreements that Croatia is a party to has a peculiarity; issues of parental care and the obligation of child support are governed by the general rule of "relations between parents and a child", what in technical terms follows the nomenclature of the PIL Act. However, in EU terms, these treaties are superseded by Regulations.

In terms of law applicable to maintenance, the PIL Act implemented different provisions depending on a kind of maintenance in dispute. Maintenance matters were dispersed in five different regimes:⁵⁵ two regimes of child support: a general collision norm for relations between parents and children (Art. 40) and in the case of adopted children, the overall collision norm for the effects of adoption (Art. 45); separate regimes for maintenance obligations between spouses enter the marriage regime effects (Articles 36, 37); maintenance obligations arising from an cohabitation community (Art. 39); maintenance obligations among other relatives (Art. 42).

In terms of child support, connecting factors of Art. 40 and Art. 45 were identical, so the argument for general provisions relating to parent-child applied by analogy when it came to the provision of Art. 45 as well. Provision of Art. 40 determined law applicable to relationships between parents and children by the law of the country of their common nationality. There was a significant departure from this rule in cases of double or multiple nationalities. Namely, according to Art. 11(2), Croatian citizens with more nationalities are considered Croatian citizens exclusively. Therefore, if both parents and a child had Canadian citizenship, and the father also had Croatian citizenship, Art. 11(2) would deprive application of their common nationality connecting factors!

Pursuant to Art. 40, if parents and children were citizens of different states, the law of the state in which they all had permanent residence applied. If parents and children were citizens of different states and did not reside in the same country, the Croatian law applies if a child or a parent were a Croatian citizen. The final subsidiary connecting factor to any other relation between parents and a child is to the law of the state whose citizen the child is.

In disputes on statutory maintenance between spouses, provision of Articles 36-38 applied. The rule referred to the common nationality of the spouses, secondarily to common residence

55 Varady, T., *L'obligation alimentaire en droit international privé - Yougoslavie*, in *L'obligation alimentaire de droit international privé*, Vol. 2, Paris, 1987. Institut de recherches juridiques comparatives (ed.), 142, n. 36.

as a subsidiary connection and there was an auxiliary rule which provided for the application of the last common residence. If none of these connecting factors could have been applied, Croatian law applied. In disputes on statutory maintenance between cohabiting partners, provision of Art. 39 was applicable. The rule was similar to the preceding rule in terms of spouses, although the legislature reduced the number of subsidiary connecting factors. In terms of support among other relatives, the legislator referred to the application of law of the nationality of the relative from whom maintenance was required.

3.2. RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

General solutions of the PIL Act are prescribed in provisions of Articles 86-92 of the Act. The legislator prescribes conditions and criteria that need to be examined in order to verify the reliability of the foreign decision and incorporate it into the domestic legal order. The process of exequatur is an *ex parte* procedure.⁵⁶ The effect equated to domestic legal orders is only with foreign decisions that have passed an exequatur procedure and are recognised. The court may recognise a foreign judgment, a court settlement, but also the decision of another authority which is in the country of origin equated to court decisions, and falls within the scope of Art. 1 PIL Act (Art. 86). Only those decisions that have become final in the state of origin are eligible to be recognised.

The legislator further predicts negative assumptions for recognition and enforcement of foreign decisions which follow the existence of procedural irregularities in the decision (Art. 88), the existence of exclusive jurisdiction of Croatian authorities to decide the case (Art. 89), the existence of a final court decision or already recognised foreign decision in the same subject matter (Art. 90(1)), the fact that in the same subject matter between the same parties there is an on-going litigation initiated earlier, when the court suspends the recognition of a foreign judgment until the finality of that judgement (Art. 90(2)), the public policy offence (Art. 91) and the lack of reciprocity (Art. 92).

One should note that there are numerous bilateral treaties that Croatia is a party to. The only multilateral agreement of significance here is the regime of the 1996 HC.

It may be decided upon recognition and enforcement of a foreign judgement in a course of the main proceeding or as a preliminary question in the course of the proceeding relating to some other matter. If we speak of the preliminary question procedure, recognition and enforcement may take place in any litigious, non-litigious or execution procedure. If there is no prior ruling on recognition and enforcement, the court may decide on it as a preliminary question, and such ruling produces effects only for the proceeding in question (Art. 101(5)). If recognition and enforcement are proceeded as a main question of a case, it is decided in a non-litigious procedure by the relevant first instance court (Općinski sud). In each of these procedures, the judge deciding on recognition and the procedure must limit the examination to formally prescribed conditions of Art. 86-96.

The PIL Act prescribes conditions for recognition and enforcement of a foreign judgement. Only judgements that have become final pursuant to the law of the country of origin are eligible for recognition and enforcement. The party asking for recognition and enforcement must submit a proof, i.e., a certificate issued by the competent foreign court or other authority

⁵⁶ Vuković and Kunštek, *Međunarodno gradansko postupovno pravo*, op. cit., n. 42, p. 478.

certifying that the judgment has become final. There is reported case law⁵⁷ where recognition of a foreign France divorce decision was rejected because the proponent omitted to submit a proof of the final foreign divorce decision and its official translation to Croatian. Jurisdiction of a court issuing a decision is not checked, but exclusive jurisdiction of the Croatian court is an absolute obstacle for recognition. It means that a foreign judgement decided in a case that falls under exclusive jurisdiction of Croatian courts would be rejected recognition pursuant to Art. 98(1). Exclusive jurisdiction in matters in focus of this research relate to marital disputes⁵⁸ and custody disputes.⁵⁹ Jurisdiction is not relevant and not questioned at all if recognition is requested of a status judgement that concerns only the nationals of the country of origin. The mere provision of Art. 92(2) does not state what kind of reciprocity is required, so it is interpreted that it is not a requirement for formal, but merely factual reciprocity.⁶⁰ It means we need no agreement on mutual recognition and enforcement with the state whose decision is in procedure for recognition in Croatia; we only need the fact that Croatian judgements are recognised in the concerned country of origin of the judgement at issue. It is sufficient that there is no proof that Croatian judgments have been denied recognition in the relevant state of origin without any grounded reasons. Reciprocity is not required for recognition of a foreign judgement on divorce, i.e., marriage annulment. The non-existence of reciprocity shall not be an impediment to the recognition of a foreign judgment rendered in a marital dispute or in a dispute for establishing or contesting paternity or maternity, or if the recognition or enforcement of a judgment is applied for by a Croatian citizen. The existence of reciprocity with regard to recognition of foreign judgments is presumed until the opposite is proved, and where there is doubt whether reciprocity exists, the federal authority for the administration of justice shall provide an explanation.

In a concrete exequatur case, often we are faced with the fact that the court of origin has decided on the merits of a divorce and of maintenance, so we have double standards for checking the reciprocity requirement. Here we apply "partial reciprocity":⁶¹ Reciprocity would be examined in the exequatur procedure only for that part of a decision that relates to maintenance and/or custody rights. The procedural deficiency most commonly consists of inadequate service of process notifying the defendant that the action against him or her starts pending. The exequatur court examines this occasion upon request of a party, not *ex officio*. Even if a party is inadequately informed about a procedure, but in the end, if that party takes part in the process and the merits, this objection of Art. 88(1) cannot be raised.⁶²

The Croatian legislator practiced a negative assumption of public order to remove the apparent opposition of both substantive and procedural injustice of a foreign decision to the domestic regime. Reasoning about control of violations of fundamental principles in decisions about child support lies in two key reasons: a) it is a dispute which is not under exclusive jurisdiction

57 Supreme Court No GŽ 2/1993-2 of 17 February 1993.

58 According to Art. 61(2) and Art. 89(2), in marital disputes where the defending spouse is a Croatian citizen domiciled in Croatia, the jurisdiction is exclusive. The rule should be read in conjunction to Art. 89/2 stating that if the defendant applies for recognition of a foreign judgment rendered in a marital dispute or if the party applies therefor, and the defendant does not object thereto, the exclusive jurisdiction of the Croatian court shall not be an impediment for recognition of that judgment.

59 In custody disputes pursuant to Art. 66/2, if the defendant and the child are Croatian citizens and if they are both domiciled in Croatia, the jurisdiction is exclusive.

60 Supreme Court No GŽ 3984/76 of 3 November 1976.

61 Vuković and Kunštek, *Međunarodno građansko postupovno pravo*, op. cit., n. 42, 397.

62 Vuković and Kunštek, *Međunarodno građansko postupovno pravo*, op. cit., n. 42, 362; Grbin, *Priznanje i izvršenje odluka stranih sudova*, Zagreb: Informator, 1980, p. 154; Dika et al. *Komentar zakona*, op. cit., n. 45, 290, reference 8.

of our courts, so it can happen that such jurisdiction is based on absurd facts, and b) violation of public order protecting the interests of the directions that have been violated, and to protect the public interest and the fact that the legal representative of the child in the decision-making negligently fails to take advantage of available resources to remedy procedural irregularities must not go against the child the maintenance decision relates to.⁶³

A typical case might be a situation where a foreign decision ordered child support in relation to the father whose paternity was not found properly and therefore lacks a proven legal ground of maintenance. Then it can be a situation in which the subject of recognition and enforcement is a judgment establishing paternity and support, but in terms of the first - status decision, we should intervene in order to protect the domestic process of public policy because the decision was made only on the basis of statements of the mother and the child's paternity that the court did not determine its truthfulness.⁶⁴ If a foreign decision would state a proven paternity of a child conceived in the process of medically assisted procreation as a legal ground of maintenance, this could be considered contrary to our public policy that explicitly in these cases prohibits the establishment of paternity (Art. 85 FLA). A similar situation would be if a legal basis for maintenance of a foreign child support order is established in relation to maternity or paternity of a child that is legally adopted, and our legal system bans establishing paternity or maternity in adoption (Art. 147 FLA).

If there is a final domestic judgement in the same subject matter, it would impede foreign judgement recognition, even if the foreign procedure was initiated earlier than the domestic one! If there are two parallel proceedings on the same subject matter between the same parties pending before a domestic and a foreign court, and a foreign proceeding was initiated earlier, the domestic court shall stay proceedings (upon request of parties) and wait for the outcome of the foreign proceeding. If in a relevant case the Croatian court would have exclusive jurisdiction or if there is no reciprocity, a foreign judgement would be denied recognition.

In a situation when there are two procedures on same subject matter between the same parties and the same subject matter, and the domestic procedure was initiated earlier and is still pending, and the foreign procedure was initiated later but has ended with a final judgement before, the court will stay the recognition procedure until a final judgement is issued in a domestic case. If, in the end, a domestic judgement would not decide the issue on the merits, a foreign judgement would be recognised. If the domestic proceedings end up with a judgement on the merits, Art. 90(2) foresees that a foreign judgement is denied.

In general terms, there is no control over the law applied in the country of origin. The exception is made in regard to a decision on personal status (including marital status): if the Croatian law should have been applied pursuant to the PIL Act when deciding upon the personal status of a Croatian citizen, a foreign judgment shall be recognised even if a foreign law was applied, if that judgment does not substantially depart from the Croatian law that applies to such relation.

63 Dika et al. Komentar zakona, op. cit., n. 45, 303, reference 11; 304, reference 13.

64 Odluka Vrhovnog suda Slovenije No Pž 806/77 of 29 September 1977, Zbirka sodskih odluke, Book 3, Vol. 2, 1978, 137-139.

4. CASE LAW ANALYSIS

As no systematic publication of anonymized judgements is provided for in Croatia, case law analysis has been conducted on the basis of accessible published and unpublished judgments. case law can be grouped into several categories, which are presented below.

4.1. DIVORCE CASES

The first set of cases deals with the proceedings on divorce and the decision who the minor child will live with and how the contacts with the other parent would be arranged. The first of such cases⁶⁵ deals with the plaintiff who is a citizen of Croatia residing in Croatia, whereas the respondent resides in the Republic of Srpska. The minor child is a citizen of Croatia residing in Croatia. The court neither refers to the provisions on international jurisdiction nor questions it, but it merely accepts the jurisdiction. The court has jurisdiction over the divorce issue pursuant to Art. 61(2/2) of the PIL Act. The court issues a decision regarding the parental care, child's rights to visitation and maintenance in line with the *ex officio* duty deriving from the Family Law Act. The court applied the Croatian substantive law as law applicable to a case without any question to the choice of law rules.

In the second case,⁶⁶ facts of the case differ in comparison to the aforementioned. The plaintiff is a citizen of Croatia residing in Croatia; the respondent is a citizen of Hungary residing in Croatia. The minor child is a citizen of Hungary with permanent residence in Croatia. The Court does not refer to the provisions on international jurisdiction, but accepts jurisdiction over a case. Such jurisdiction is basically grounded; for the divorce, Art. 67 b of the PIL Act is applicable as the plaintiff is a citizen of Croatia and has permanent residence in Croatia. For a decision on parental responsibility, the Hague Convention of 1996 provides jurisdictional grounds as the habitual residence of the child is in Croatia. Regarding alimony, the court accepts the jurisdiction according to the interpretation of Art. 67(a) of the PIL Act. Croatian law is applied.

In the third case,⁶⁷ facts of the case are the following: the plaintiff is of unknown nationality with residence in Germany, and the respondent is a citizen of Croatia, permanently residing in Croatia. The minor child resides in Croatia as well. The procedure started by delivery of charges under domestic procedural law on 20 April 1999, but the court was informed that the procedure pertaining to the same matter was also initiated in Germany on 27 October 1998. International jurisdiction of a court for a divorce case is based on Art. 61(2) of the PIL Act. Since the respondent is a citizen of Croatia with permanent residence in Croatia, jurisdiction of the Croatian court is exclusive. However, for judgement on parental care, Croatian courts lacked international jurisdiction (at that time, Croatia was not a party to the Hague Convention of 1996 which would provide a proper ground of jurisdiction due to the habitual residence of the minor child in Croatia). The court applied the Croatian substantive law to all of the matters.

In the fourth case,⁶⁸ the subject of the proceedings is divorce and a decision which parent the minor child will live with, alimony and contact arrangements with the other parent. For a

65 Municipal Court in Beli Manastir, No P-633/03 of 13 February 2004.

66 Municipal Court in Beli Manastir, No P-367/12 of 25 February 2013.

67 Municipal Court in Zagreb, No P-901/98 of 26 September 2005.

68 Municipal Court in Zagreb, No P2-2035/09 of 16 September 2012.

divorce, the Croatian court has jurisdiction as both spouses are citizens of Croatia (Art. 61 the PIL Act). For parental care rights, Art. 66 provided sufficient grounds. Regarding alimony, the fact that the plaintiff is a citizen of Croatia residing in Croatia suffices grounds of Art. 67 of the PIL Act. The court applied the Croatian substantive law by default.

In a case of Zagreb Municipal Court,⁶⁹ facts were as follows: the spouses and a child were citizens of Croatia; the mother and the minor child resided in Germany whereas the respondent (the father) resided in Croatia. Croatian courts have exclusive jurisdiction over the matter of divorce because the respondent is a citizen of Croatia residing in Croatia. According to Art. 66 of the PIL Act, the Croatian court has jurisdiction over parental care rights. According to Art. 67 of the PIL Act, the Croatian court has jurisdiction over the alimony issue, because the plaintiff is a minor child and a citizen of Croatia.

In the fifth case,⁷⁰ in a divorce proceeding, a plaintiff was a citizen of Croatia residing in Croatia, the respondent is the US citizen residing in the United States. The minor child is a citizen of Croatia residing in Croatia. These are proper grounds for jurisdiction: the Croatian court has jurisdiction over the matter of divorce according to Art. 61(1), item 2, of the PIL Act because the plaintiff is a citizen of Croatia with permanent residence in Croatia. Due to the habitual residence of the minor child, the Croatian court has jurisdiction over parental care rights according to the Hague Convention of 1996. As to alimony, according to Art. 67 of the PIL Act, the Croatian court has jurisdiction because the plaintiff is a minor child and a citizen of Croatia. Regarding the law applicable to divorce, under the provisions of Art. 35(2) of the PIL Act, Croatian law and foreign (Californian) law, were applied, whereas regarding parental care rights and alimony, Croatian law was applied. The sixth case is rather similar, but it related to Germany.⁷¹

4.2. CASE LAW ON PARENTAL RESPONSIBILITY AND VISITATION RIGHTS

The second set of cases falls into a category where the court was called upon to decide on parental responsibility and visitation rights, or solely on maintenance issues.

In the first cases,⁷² the subject of the proceeding was a modification and rendering a new decision on visitation of the minor child and his father. The mother and the child are citizens of Croatia residing in Croatia. The father is a German citizen residing in Germany. The Court's decision does not point to any provision on jurisdiction, and there is no proper ground for jurisdiction in any of articles of general or special jurisdiction of the PIL Act. We should note that if at that time Croatia had been a party to the Hague 1996 Convention, jurisdiction would have been grounded because of the habitual residence of the child. The Court merely applied the Croatian substantive law.

In the second case,⁷³ the subject of the proceeding was establishment of paternity and alimony. The mother and the child, the plaintiffs, were citizens of Croatia permanently resident in Croatia. The respondent of unknown nationality (probably Swedish) resides in Sweden. The Court does not call for provisions on jurisdiction in its decision, but accepts the jurisdiction.

69 Municipal Civil Court in Zagreb, No 19 P2-2058/10 of 19 January 2012.

70 Municipal Court in Split, No III P-269/07 of 1 July 2011.

71 Municipal Court in Split, No III P-202/94 of 7 April 2009.

72 Municipal Court in Zadar, No R1-135/09

73 Municipal Court in Zagreb, No P2-527/07 of 23 January 2012.

Such jurisdiction can be grounded on provisions of Art. 67 of the PIL Act, because the plaintiff is a minor child permanently resident in Croatia. The Croatian substantive law was applied.

In the next case,⁷⁴ the subject of the proceeding was the realisation of parental care. The plaintiff (father) is a citizen of Croatia resident in Croatia. The respondent (mother) is a citizen of Italy residing in Bosnia and Herzegovina. Minor children were citizens of Croatia but not resident in Croatia. The Court declined its jurisdiction and dismissed the claim proposal in an extrajudicial procedure because it found that pursuant to Art. 46 (5) of the PIL Act, the Croatian court had no jurisdiction because the persons towards whom the request was made (the mother and the children) did not have permanent residence in Croatia.

In the following cases,⁷⁵ the subject of the proceedings was a maintenance claim. In a claim for the termination of an alimony obligation, the father (a plaintiff) was a citizen of Croatia while the defendant (the son) was a citizen of Croatia residing in Germany. The son has reached the age of majority but is regularly attending school. The Court did not call for provisions on jurisdiction in its decision, but the acceptance of the jurisdiction was justified in accordance with the provisions of Art. 67 of the PIL Act because the plaintiff and the respondent are Croatian citizens. According to Art. 40 (3) of the PIL Act, Croatian law was applied.

The next maintenance claim⁷⁶ related to illegitimate child alimony. The plaintiff was a minor child, a citizen of Croatia, residing in Croatia. The respondent is her father residing in Canada (probably a Serbian citizen). The court does not refer to the provisions on jurisdiction; its jurisdiction over this alimony claim could be based on the provisions of Art. 67 of the PIL Act because the minor child is a citizen of and domiciled in Croatia. The Croatian substantive law was applied by the court without regard to choice of law rules; however, it was justified by Art. 40 (3) of the PIL Act.

In the following cases the courts had to deal with parental care and maintenance in the course of the same proceedings. In the first case,⁷⁷ the subject of the proceeding was a modification of a former and a new decision on which parent the minor child will live with, how the contacts with other parents would be arranged and alimony. The plaintiff (father) was a citizen of Guatemala. The respondent (mother) was a citizen of Croatia permanently resident in Croatia. The minor child, of unknown nationality, resided in Croatia. The Court does not call for provisions on jurisdiction in its decision. In this factual situation, the jurisdiction of the court was not properly grounded regarding parental care. The court would, however, not lack jurisdiction if at that time the Hague 1996 Convention had been applicable in Croatia, as the habitual residence would suffice for establishing a valid ground of jurisdiction. The Croatian substantive law was applied by default, without regard to choice of law rules.

In the following case,⁷⁸ the court had to decide on a modification of the decision on which parent the minor child will live with and how the contacts with the other parent will be arranged, as well as on alimony. Both parents were citizens of Croatia, the plaintiff

74 Municipal Court in Zagreb, No R10-285/08 of 12 September 2008.

75 Municipal Court in Beli Manastir, No P-126/09 of 5 June 2009.

76 Municipal Court in Beli Manastir, No P-109/12 of 7 March 2013.

77 Municipal Court in Zagreb, No P2-536/10 of 7 December 2010.

78 Municipal Court in Split, No III R-15/07 of 31 May 2007.

(father) residing in Croatia and the respondent (mother) residing in Austria. The minor child, a citizen of Croatia, resided in Croatia and in Austria. Exclusive jurisdiction of the Croatian court is based on Art. 46 of the PIL Act because the parties are Croatian citizens. The Court applied the Croatian substantive law without regard to choice of law rules.

In the following two cases, the subject of the proceedings was a request for a new, modified decision on who the minor child will live with and how the contacts with the other parent will be arranged. Facts of the first case⁷⁹ are as follows: parents and the minor child were citizens of Croatia, parents were divorced and it was determined that the minor child would live with his mother. Later on, the mother changed her residence and moved to Norway, the father was neither asked about that nor gave his consent to move the child abroad. At the time of the proceeding, the minor child attended school in Norway and the father lived in the Republic of Croatia. The Court did not question its international jurisdiction but merely decided on a dispute. The Court had jurisdiction pursuant to Art. 66 of the PIL Act because both parents were citizens of Croatia. The Croatian substantive law was applied by default. There follow facts of the second case.⁸⁰ After the termination of marriage, the competent authority has decided that the child will live with the mother in Croatia. Without the consent of the father, the mother later moves with the child to Bosnia and Herzegovina and prevents the father from having contact with the child. The father seeks the return of the child in a special child abduction procedure and starts another procedure to modify the decision on parental responsibility, child care and visitation rights and imposition of urgent provisional measures to ensure contacts with the minor child. The child was a dual citizen of Croatia and Bosnia and Herzegovina, the father was a citizen of Croatia, the mother was a citizen of Croatia domiciled and permanently resident in Bosnia and Herzegovina. The mother objected to the court's jurisdiction; the objection was set aside by the court with reference to Art. 69 of the PIL Act empowering the court to decide in such issues if both parties were Croatian citizens. In this case, the Court applied the Croatian substantive law and justified the judgement by the UN Convention on the Rights of the Child.

4.3. CHILD ABDUCTION CASES

In all of the cases relating to the return of illegally removed or retained minor children Croatian courts applied the Hague 1980 Convention on the Civil Aspects of International Child Abduction. The first case⁸¹ facts are as follows: the plaintiff (father) is a citizen of Canada currently residing in France. The respondent (mother) is a citizen of Croatia residing in Croatia. Parties with a common minor child often changed residence because of their business; the last common residence was in Lyon, France. After the termination of an employment contract by mother's employer, the mother brought the minor child to Croatia where they resided. The request to return the minor child back to Lyon was rejected. The Court argued that the return does not represent child's return to its homeland, nor guarantees its permanent stay in that environment. The minor child has stability with his mother and the return to Lyon could lead to an unfavourable position and cause psychological trauma.

79 Municipal Court in Zadar, No R1-46/08 of 21 March 2008.

80 Municipal Court in Zadar, No R1-25/06.

81 Municipal Civil Court in Zagreb, No R10-27/11 of 6 April 2011.

In the second case⁸², the facts are as follows: the marriage of the plaintiff and the respondent ended by divorce with a final 2008 decision of a court in Bosnia and Herzegovina. The court ruled that the minor children (born in 2006 and 2008) would live with their mother. Spouses did not live together from the time prior to the birth of their younger child. In 2009, the mother moved with the children from their Bosnian permanent residence to Croatia. The children have Croatian citizenship. The court made use of the excuse of Art. 13 of the Child Abduction Convention as to the request to return minor children since it was found out that the separation of minor children from their mother and the environment in which they feel safe and well cared for would have adverse effects on their development, especially because the mother does not dispute the father's right to meetings and get-togethers with his children.

In the following case,⁸³ the divorce proceeding of parents was conducted in Switzerland, where a court decision assigned the mother with custody over the minor children and decided they should live in Switzerland. The Court also determined that the father, who lives in Croatia, will have adequate contacts with the children. After summer holidays, the father did not return children to Switzerland but retained them in Croatia and enrolled them in school in Croatia. The Court had to decide on a return request; it held a hearing of both children who expressed their wish to live with their father, and complained about an inappropriate lifestyle with their mother. The Court refused the request to return these minor children to Switzerland because it determined that it is not in the interest of the children. The Court explicitly referred to the wish of children to live with their father.

In the next child abduction case,⁸⁴ the facts of the case indicate that a marriage of the plaintiff and the respondent was divorced by a final court decision in Austria in 1995. The Court made a final decision to entrust the two minors, born in 1991 and in 1994, to their mother, and allowed visitation rights to the father. In 1997, the mother took her minor children, both Croatian citizens, to Croatia and looked after them so that the children were taken care of (both financially and socially), while the father actually and legally did not execute the right to care and custody of two minor children at the time of their removal. The Court refused the request to return the minor children because it was determined that the father actually and legally did not execute the right to care and custody of two minor children at the time of their removal, and that there is an obstacle for their return justified by Article 13 of the Convention.

In the next case,⁸⁵ a minor child lived with his mother in Bosnia and Herzegovina. The father, a Croatian national and of Croatian residence, felt the mother was not providing a child with sufficient health care and hence refused to return the child to the mother on one of the visitation occasions. The court refused the request to return the minor child. The court undertook an overall assessment of the merits, found out that the father was taking good care of the child and that the child was emotionally satisfied and successfully adapted to the new environment. The court emphasised that the return to the mother would not be in the child's best interest, as it would bring him in an unfavourable position. The court's decision does not explain the particular circumstances of the removal of a minor child.

82 Municipal Civil Court in Zagreb, No R10-143/10 of 14 October 2010.

83 Municipal Civil Court in Zagreb, No R10-599/12 of 11 October 2012.

84 Municipal Civil Court in Zagreb, No R1-1744/04 of 27 October 2004.

85 Municipal Civil Court in Zagreb, No R1-1696/06 of 17 November 2006.

In the next case,⁸⁶ the plaintiff (father) was a citizen of the USA residing in the USA. The respondent (mother) was a citizen of Croatia permanently resident in Croatia. They were married in Croatia in 2005, the minor child was born in Croatia in 2006. The family lived together in the USA since 2006. With the father's consent, the mother and the child went to Croatia. After they left, disturbances in relations between the spouses occurred and the mother and the minor child remained in Croatia. The court refused the request to return the minor child because it assessed that it was not kidnapping within the meaning of the Convention and that there were no contraindications that, after the divorce, the child should not continue to live with his mother.

In one of cases⁸⁷ the plaintiff (father) was a citizen of Italy and the respondent (mother) was a citizen of Croatia. The minor child born in 2009 was a dual citizen of Croatia and Italy, also had residence in Italy at the address of his parents. By the decision of 2011, the Court in Torino entrusted the care of a child to both parents. The mother illegally moved the child to Croatia where she declared his residence. Upon a return claim, the Croatian court accepted the request for the return of the minor child to Italy. The mother objected and asked the court to refuse the return on the grounds of Art. 13. The court undertook an assessment of the fact and concluded that the mother wrongfully took and kept the minor, that the return of the child to Italy would not pose any serious threat to the child, nor would it expose the child to abuse, neglect, or extraordinary emotional dependence, in the sense of Art. 13 of the Convention.

The court also ordered the return of the child wrongfully taken by its mother in the case that related to the Netherlands.⁸⁸ The case⁸⁹ that relates to the USA ended with a return order as well. The facts were as follows: the mother, a citizen of Croatia, and the minor born in 1996 (a Croatian citizen as well), lived with the child's father in Florida until 2002. The mother illegally moved the minor to Croatia. Upon the father's request, the court ordered the return of the minor. The court found no justified ground to refuse the return, as the mother acted contrary to the orders of the court in the United States and violated father's right to care that he had at the time of removal of the minor child.

4.4. RECOGNITION OF FOREIGN JUDGEMENTS

A number of decisions on recognition of foreign judgements have been analysed. Most of them refer to foreign divorce proceedings,⁹⁰ while some relate to a foreign certificate of obligation to pay alimony.⁹¹ Recognition of foreign court decisions was based on the provisions of Articles 87-92 of the PIL Act. The court examined if applicants filed the decisions in the original language with certified translations, as well as the confirmation of the competent court on the validity under the law of the state where the decision was made. Public policy was not raised in any of the cases.

86 Municipal Civil Court in Split, No I R-728/08 of 20 February 2009.

87 Municipal Civil Court in Split, No Rob-72/11 of 27 July 2012.

88 Municipal Civil Court in Zagreb, No R10-225/10 of 3 January 2011.

89 Municipal Civil Court in Zadar, No R1-159/03 of 27 October 2004.

90 Municipal Court in Split, No R1-608/12 of 5 February 2013, No I R-510/08 of 23 September 2008, R1-284/09 of 21 April 2009, No R1-441/11 of 14 September 2011, No R1-393/10 of 28 June 2010.

91 Municipal Court in Split, No Ovr-2091/11 of 3 August 2011.

There is a reported case⁹² where a foreign German court did not fully reconsider whether the service of a document has been properly performed and recognition of such foreign decision is therefore rejected. There is also a reported case where parties claimed that delivery was insufficient, and it can be easily established that such deficiency really existed in the procedure. But that party still found out that there was an ongoing procedure against her and enrolled in the procedure. The court recognised that as an objection to Art. 88 such decision became irrelevant. There is also reported case law⁹³ on an exequatur of a foreign alimony decision where a defendant claims his procedural rights have been violated in a foreign procedure because he only has 3 days left to prepare his defence. The Croatian Code of Civil Procedure prescribes he should be given at least 8 days to prepare his defence. The Supreme Court examined the case and rejected his objection to recognition. Namely, he was really left with only 3 days in the first instance procedure in a foreign country, but he filed a complaint and the trial was repeated. In a repeated trial, he regularly participated in a discussion of merits what makes his arguments irrelevant from the perspective of Art. 88 of the PIL Act.

There is also a reported Constitutional Court case.⁹⁴ The applicant lodged a complaint against the decision of the Vukovar County Court No Gž-1298/05-2 of 31 May 2005, which rejected the applicant's appeal lodged against the decision of the Municipal Court in Vukovar No P-560/04 of 30 October 2004. This decision rejected as inadmissible the applicant's complaint for divorce, child custody, care and education: the trial court found that was adjudicated matter. The constitutional complaint related to a violation of the constitutional right of equality before the law, guaranteed by Article 14 § 2 of the Constitution. The applicant believed his right of access to a court, which is part of the basic human right to a fair trial guaranteed by Art. 29 (1) of the Constitution, was violated. In this case, the applicant's complaint for divorce was rejected as inadmissible because the court found that the applicant's claim was finally decided by the judgment of a foreign court recognised by the Municipal Court in Vukovar, and has legal effect as a final judgment rendered by the courts in the Republic of Croatia. Art. 333 of the Civil Procedure Act clearly obliges a court not to proceed in the matter that has already been decided upon. The constitutional court further clarified that procedural guarantees deriving from the Constitution are the subject of examination of a court conducting the exequatur procedure. The applicant also complained that he did not participate in a procedure in Sombor, but his constitutional claim was focused only on the proceeding in which his divorce petition was rejected because of *res judicata*! Therefore, the constitutional claim was rejected.

There is reported case law⁹⁵ relating to a child custody matter and a maintenance matter⁹⁶ where the party objected to recognition of a foreign judgement claiming that the facts of a case have not been properly determined by the court of origin. The Supreme Court clarifies that in the phase of recognition only conditions prescribed by the PIL Act are to be examined, and fact finding is not among them. The court has no power to modify the foreign judgement submitted to recognition. The court has no power authority to review the foreign judgement either on merits, law applied or established facts. In procedures for recognition and enforcement of foreign judgements, anyone with a legal interest in recognition may initiate the procedure.

92 Supreme Court, No Gž 12/1992-2 of 21 October 1992.

93 Supreme Court, No Gž 11/1990-2 of 25 October 1990.

94 Decision of the Constitutional Court No U-III / 3115 / 2005 of 30 October 2007.

95 Supreme Court No Gž 23/1993-2 of 15 October 1993.

96 Supreme Court No Gž 9/1991-2 of 19 February 1992.

5. CONCLUSIONS ON SIMILARITIES, DIFFERENCES AND DEVIATIONS OF THE CURRENT CROATIAN LEGISLATION AND PRACTICE FROM THE RULES AND PRACTICES OF THE ACQUIS APPLICATION

Extensive elaboration of the Croatian court legal system in PIL family matters has been conducted. Collection and elaboration of Croatian court practice has been conducted as well. Elaboration of collected court practice cases reveals that in most family related situations the existence of a foreign element has not been noticed by the court. In most cases, judges apply *lex fori* (both to determine jurisdiction and applicable law) to the case by default. Despite that strong “homeward” attitude, in most rulings the result is in conformity to the PIL Act! The structure of case law reflects the current Croatian migration situation: no extensive immigration has occurred yet and most international cases relate to Croatian nationals living abroad, or relate to Croatian national living in Croatia and seeking legal protection with the defendant being a foreign national. The structure of jurisdictional criteria of the PIL Act is based on the nationality or domicile which in the end in most cases results in proper and legally justified jurisdiction of Croatian courts. A symptomatic problem occurs with lack of proper jurisdiction in associated requests: the PIL Act does not acknowledge attraction of the maintenance issue or the parental responsibility issue to a divorce suit. Jurisdictional criteria should be examined separately for each request of a claim (divorce, parental rights, maintenance). Negligence of this PIL Act provision occurs for a reason that in the Croatian Family Law system a judge issuing a divorce order for a marriage with minor children must *ex officio* issue a decision on parental rights, visitation rights and maintenance. In many cases, the jurisdictional criteria for divorce do not comply with criteria for visitation of maintenance. Case law disclosed it was problematic with parental responsibility matters as in most cases there was no proper ground for jurisdiction.

Selected cases have been used to simulate the outcome of a result with a hypothesis that EU regulations have been applied to settle the case. Therefore, the same factual pattern is used as a hypothetical ground and EU regulations are applied thereto. The result in many situations is the same as it is currently in Croatian practice. EU regulations criteria are based on the habitual residence – it derives that in most of these cases the jurisdiction of the Croatian court is ensured. The applicable law criteria based on the habitual residence mostly lead to the application of *lex fori* as well. It derives that despite an enormous difference in criteria (for jurisdiction and applicable law) applied by Croatian vs. EU legislation, the practical result is rather similar.

Regulations No 2201/2003 and No 4/2009 will change the Croatian PIL system regarding divorce, parental obligations and maintenance. In most family issues, nationality and domicile were bases for jurisdiction prior to entry into the EU. If we take into consideration that nationality plays a minimal role in EU regulations, basically it is significantly kept only in Brussels II *bis* regarding divorce where it is in the function of general alternative jurisdictional criteria, it would be the most significant change a legal system could have. The current criteria for jurisdiction are easily established by the court – it takes a piece of paper proving someone’s nationality and it is mechanically established. Bearing in mind the long history of the current PIL Act, it would be hard for judges to start the fact-based finding and interpret law freely. So far, the PIL Act has given them no flexibility; from a methodological point of view, it relied on the mechanical application of provisions, so the judges have been neither taught to nor are really skilled at using open or flexible connecting factors or interpretation regarding PIL cases.

The court is sometimes reluctant to undertake fact-based finding regarding the domicile or the habitual residence.⁹⁷ The mere fact of the Croatian nationality is conceived strong enough, regardless of the fact that this connection to Croatia has vanished. The fact that proceedings should be placed to a forum really close to the parties, the forum that is the best to decide on a case, is fully underestimated in comparison to the fact that a person is a Croatian national. We might perceive that the *Hadady vs Mesko* case⁹⁸ could occur in front of our courts, only in the opposite sequence of submissions to the courts. There are evidenced cases of some other EU Member States that have shifted from the nationality to the habitual residence with regulations, where a court easily accepts the jurisdiction to a case of its national whose habitual residence was very doubtful!⁹⁹

The concept of habitual residence has been applied in the Hague Conference and the European national PIL Acts for decades. Its appearance in the Croatian PIL is rather slight: it appeared through Hague Conventions but it has never been really examined in practice. Ensuring uniformity of law application could be problematic as case law is not being published on a regular basis. There is another possible problem with false translations. Even in previous translations of the Hague Convention the term “habitual residence” was translated into Croatian in different ways; the most significant departure has been made with the translation of the Hague Child Abduction Convention as it says “the place where child regularly stays”.

Possible hardship for future application of EU regulations in this field lies in the fact that the scope of application of each regulation is rather narrow and focused; moreover, one should be very clear on both material and territorial scope of application of each instrument. As the EU has been gaining its competence slowly, new regulations have been enacted for new areas of regulation. That might place judges into an unfavourable position, as, evidenced by this research, judiciary was not keen to explore either the PIL Act or the existing bilateral or multilateral regimes!

There is another question on a proper division of the scope of application of respective regulations and conventions. It is even more problematic as both regulations employ a particular convention-based scheme: they point directly towards certain Hague Conventions (the most significant is directed towards the 1980 Child Abduction Convention and the 2007 Maintenance Convention). A positive element is that clear guidance would be provided for

97 In the still pending case, parties are Croatian nationals living in the USA for several years, married in Croatia, with a child born in the USA. They got permanent residence status (a Green Card) in the States. The mother filed a plea for divorce, parental care and maintenance in the USA. After several months, the father did the same before the Croatian court. The mother objected on the basis of Art. 80 PIL code on *lis pendens*. The court of first instance relied on Art. 60(3) stating that the Croatian court has exclusive jurisdiction over the case, what deprives the application of Art. 80. The court of first instance rejects the objection of *lis pendens*. Its finding is based on the fact that the father still holds Croatian citizenship and has proof that he has a domicile in Croatia. At this stage, the court fully neglects the fact that the domicile is obviously false as by definition it is a place where a person lives and intends to live permanently, but they have a Green Card for permanent residence in the USA! It is remarkable in this case that the court does not realise that he lacks jurisdiction to decide on parental care and visitation (due to the application of the 1996 Hague Convention); the court is not interested in further consequences of its procedure: parties would in the end come up with two parallel decisions, i.e., the father would not be able to enforce the Croatian order on visitation rights and maintenance in the USA and the mother would have difficulties in enforcing the USA court divorce order and inscribing her status in civil status records of married persons properly.

98 C-168/08 *Laszlo Hadadi v Csilla Marta Mesko*.

99 Vassilikakis and Kouris, in *Boele-Woelki, K., González-Beilfuss, C., eds., Brussels II bis Its Impact and Application in the Member States*, Antwerp, Intersentia 2007, 137.

Croatian practitioners as case law of other EU Member States can be looked upon to ensure uniform interpretation.¹⁰⁰

The problem could particularly occur with the 1980 Child Abduction Convention, one of the rare examples of international treaties applied in Croatian practice. Brussels II bis introduces additional stricter rules and time limits for illegal removal among EU Member States. If we analyse cases regarding the return of the illegally removed child, we can observe the following: time limits within which the decisions are made are different, ranging from 3 days to 6 years. First-instance decisions are on average made within six months of the application submission. Second-degree decisions, in cases in which the appeals are submitted, are made within two months from filing the appeal. These facts, taken from a perspective of Brussels II bis provisions, reveal the core problem of short deadlines prescribed by the Regulation – to Croatian circumstances they sound as “normative opportunism”! Opinions of minor children were obtained in only one of the nine analysed cases. The children that were questioned aged 6-9 years. In other cases, opinions of children were not requested, usually because of the age of children (from 1 to 6 years). The proponent was heard in one of the six cases in which the request for the return of the minor child was refused. Interpretation of an exception of the provisions of Article 13 of the Convention is often misused. The courts have refused to allow the return of a child just on the basis of the provisions of Article 13 of the Convention judging that the return was negative for the child because it would expose the child to psychological harm or because the child has adapted to the environment he or she lives in. They find the reason for the application of these provisions in the attachment of the child to the parent he or she lately lives with but they also evaluate the emotional connection between the child and the parent he or she does not live with before the removal of the child. Judges used to evaluate the attitude of the parent the child lives with towards the maintenance obligation and contact with the other parent. In some cases, the return of the child is understood as a separation from the parent who forcibly retained the child.

It may be significant here to emphasise that the new Croatian PIL Act is under drafting. There was a common position among the scholars that we should try to make things as simple as possible and reduce multiplicity of legal sources. Therefore, where a regulation exists, national rules would be abandoned entirely. This stipulation makes the PIL Act rather thin - but truly very detailed! As the wording “For divorce and parental responsibility matters: Brussels II bis applies” is one sentence worth of many provisions!

Once regulations became valid legal sources, they have introduced completely new grounds of jurisdiction: prorogation in family matters, transfer of jurisdiction, declining jurisdiction if it is not in the best interest of a child, new methods of judicial cooperation, informal communication, and a strong central authority system which should be perceived as an important logistic tool to proper regulations functioning. These regulations may require additional implementing rules and measures; regarding Brussels II bis, it may be a national jurisdictional rule for parental obligations; regarding the Maintenance Regulation, Art. 19 imposes obligations towards national procedural grounds; regarding some new jurisdictional standards such as transfer of a case, there may be a need for additional procedural rules that enable smooth implementation of that provision; criteria in the sphere of the exequatur, it is Art. 43(1) of the Brussels II bis concerning rectification of certificates (exequatur declarations) that shall be decided by the law of the state of origin.

100 Sickerling, R., Iskustva njemačkog suca u primjeni Haških konvencija iz 1980. i 1996. godine, in Rešetar, B., Aras, S., ur. “Reprezivne mjere za zaštitu osobnih prava i dobiti djeteta u hrvatskom pravnom sustavu s europskim novinama”, Pravni fakultet Osijek, 2014, 227 et seq.

A possible obstacle could occur in parental responsibility cases where in the Croatian system most protective measures belong to the “public law” sphere. There is also significant ECJ case law on that matter that would be beneficial.¹⁰¹

A possible obstacle could occur in maintenance cases with understanding the division of the maintenance order from a status: in the Croatian system, maintenance could be ordered only if there is a certified legal ground for that legally prescribed obligation. The notion of “marriage” under Brussels II *bis* and the Hague 1996 Convention - neither of these instruments clearly defines if same-sex marriages are under its scope of application, or if it is only regarding the states that acknowledge such marriages? Despite strong activism of the non-governmental sector and the referendum that resulted in a new stipulation to the Croatian Constitution by defining marriage as a union of one man and one woman. It may be an issue for our judges to accept such family unions being under the scope of application of this instrument, both in terms of accepting jurisdiction to such case and recognising such divorce or maintenance orders.

Difficulties of the Member States that have joined full membership in 2004 have been reported in relation with lack of knowledge on regulations, lack of training, lack of literature in national language.¹⁰²

There is another issue of the Croatian Concordat with the Holy Seat. Several Member States also have international contracts with the Holy Seat (Spain, Italy, Portugal, Malta), and the issue has been dealt with by the Brussels II *bis* Art. 63. The problem may arise from the perspective of the right of defence in proceedings conducted under canon law.¹⁰³ The matter gained more attention after the judgment of the ECHR in Pellegrini case.¹⁰⁴

In the sphere of recognition of foreign orders, there has been a traditional system employed by PIL rules. By entering the system of regulations we would face variations of systems: on the one hand, we have a traditional system of the automatic exequatur in Brussels II *bis* (prototype in Regulation No 44/2001) for divorce matters, and we face the abolished exequatur for decision on contacts! It is similar with the Maintenance Regulation, as we have the abolished exequatur for certain decisions: ones that derive from the Hague Protocol states, while another set of rules applies to the states that have remained outside the Protocol. In the sphere of recognition and enforcement, the system would be made significantly flexible. One of the possible issues was the application of public policy exemption towards a maintenance decision regarding same-sex partners, but now set aside as Croatia has recently adopted a new legal framework.¹⁰⁵

Yet, another possible issue in the application of the “best interest of a child” standard could occur due to a different interpretation of the European Court of Human Rights and the EU Court of Justice in a series of cases.¹⁰⁶

101 See cases: C-435/06 (2007) ECR I-10142; C-523/07 OJ 2009 C 141/14. For more details, see: Boele Woelki, K., and Jäntera-Jaraborg, M., Protecting Children against Detrimental Family Environments under the 1996 Hague Convention and the Brussels II *bis* Regulation, in Boele Woelki et al. (eds.), *Convergence and Divergence in Private International Law*, Liber Amicorum Kurt Siehr, Eleven International Publishing, 2010.

102 Boele Woelki, K., Gonzales Beilfuss, C., *Brussels II bis*, op. cit., 23-40.

103 Rešetar, B., Brak u vjerskom obliku s učincima građanskog braka, in: Škalabrin, N. (ed.), *Franjo Herman i Kodeksi iz 1917. Sum cuique tribuere: zbornik radova*, Đakovo: Katolički bogoslovni fakultet u Đakovu Sveučilišta J.J. Strossmayera u Osijeku, 2008, 267-289.

104 Pellegrini v Italy, No 30882/96 of 20 July 2001, ECHR.

105 Zakon o životnom partnerstvu osoba istog spola, NN 92/14.

106 Beaumont, P., Walker, L., Post “Neulinger” Case Law of the European Court of Human Rights on the Hague Child Abduction Convention, in *A Commitment to Private International Law: Essays in Honour of Hans van Loon*. Permanent Bureau of the Hague Conference on Private International Law, Cambridge Intersentia, 2013, 17-30.

Despite all possible obstacles, adequate training and sufficient legal writings can assure proper application of EU regulations and standards in future Croatian practice. Although judiciary and practitioners would face new tasks, challenges, legal concepts and methodology, EU family regulations would in the end result in clarity in practice. Such motion would assure promotion of legal security, and even more, adequate legal protection of the most vulnerable and accomplishment of the overall principle of the best interest of a child.

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PREKOGRANIČNE OBITELJSKE STVARI – HRVATSKA ISKUSTVA PRETHODNO PUNOPRAVNOM ČLANSTVU U EU I BUDUĆA OČEKIVANJA

Sažetak

Ovaj se rad bavi usporedbom EU pravne stečevine s hrvatskim zakonodavstvom i praksom prethodno punopravnom članstvu u EU, s fokusom na područje međunarodnog privatnog obiteljskog prava. Autorice postavljaju zakonodavni okvir za prekogranična obiteljska pitanja regulirana u EU, uključujući razvod, roditeljsku odgovornost i obveze uzdržavanja. Autorice potom predstavljaju kako raniji hrvatski zakonodavni okvir, tako i sudsku praksu u ovom pravnom području. Zaključci ovog istraživanja ukazuju na moguće teškoće i probleme u budućoj primjeni EU prava pred nadležnim hrvatskim tijelima. Autorice pri tom posebno ističu problematku: novih kriterija međunarodne nadležnosti, osiguravanja maksimalne zaštite djece te zaštitu najboljeg interesa djeteta.

Ključne riječi: nadležnost – mjerodavno pravo – priznanje i ovrha, međunarodno obiteljsko pravo, EU propisi, najbolji interes djeteta

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GRENZÜBERSCHREITENDE FAMILIENANGELEGENHEITEN – KROATISCHE ERFAHRUNG VOR DEM EU-BEITRITT UND ZUKUNFTSERWARTUNGEN

Zusammenfassung

Diese Arbeit bietet einen Vergleich des EU-Besitzstandes mit der kroatischen Gesetzgebung und Praxis vor dem EU-Beitritt Kroatiens, mit einem Fokus auf Internationalem Familienrecht. Die Autorinnen skizzieren einen Rahmen für grenzüberschreitende Familienangelegenheiten, die durch EU-Vorschriften geregelt sind, einschließlich die Fragen wie Scheidung, elterliche Sorge und nachehelicher Unterhalt. Neben den Rechtsnormen, die vor der EU-Mitgliedschaft Kroatiens diese Fragen geregelt haben, präsentieren die Autorinnen eine Analyse der kroatischen Gerichtsentscheidungen. Die aus dieser Untersuchung gezogenen Schlussfolgerungen weisen auf mögliche Hindernisse und Probleme in der künftigen Anwendung der EU-Regeln in kroatischer Praxis hin. Insbesondere befassen sich die Autorinnen mit neuen Kriterien der internationalen gerichtlichen Zuständigkeit, der Gewährleistung des maximalen Schutzes der Minderjährigen und der Wahrung des besten Interesses des Kindes.

Schlagwörter: Gerichtsstand – anwendbares Recht – Anerkennung und Vollstreckung; Internationales Familienrecht, EU-Verordnungen, bestes Interesse des Kindes