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CENTER FOR
PRIVATE INTERNATIONAL LAW
OF THE HAGUE CONVENTIONS

18th Regional Conference on Private International Law
- Celebrating the First 20 years (2003-2023) -

Private International Law and International Organizations - achievements and challenges -

Conference Proceedings

Niš, 2024.

Deutsche Gesellschaft für Internationale Zusammenarbeit
Faculty of Law University of Niš
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ON THE COMPLEMENTARITY OF GLOBAL HAGUE AND REGIONAL EUROPEAN UNION - UNIFICATION OF PRIVATE INTERNATIONAL LAW

A. Introduction – Unification of private international law by the Hague Conference and by the EU: two interconnected development paths

I am honoured and delighted to have been invited to take part in this anniversary conference, and grateful to Prof. Sanja Marjanovic and her colleagues, as well as Prof Crista Jessel Holst and the GIZ foundation,for making this conference – once again – possible!

What a great vision Professor Mirko Živkovic had, twenty years ago, to initiate these regional conferences on private international law! I have always admired these meetings as extraordinary opportunities to build bridges between scholars and practitioners of private international law from South-East Europe and, beyond, with other fellow European specialists in the field.

Since this is a jubilee conference, it is perhaps appropriate to refer to another international law conference jubilee. This year, the *Institut de droit international* commemorates 150 years since it was founded in 1873 by some of the most eminent jurists of the time, including Pasquale Mancini and Tobias Asser. Mancini and Asser were the driving forces behind the idea of a European codification of private international law, an idea which the *Institut* embraced, and started working on right away[1].

So, in a way the founding of the *Institut de droit international* in 1873 also marks the birth of European efforts to unify private international law.

[1] Session de Genève, 1874, Résolution sur l'Utilité d'un accord commun des règles uniformes de droit international privé, https://www.idi-iil.org/app/uploads/2017/06/1874_gen_01_fr.pdf.

Twenty years later, on Asser's initiative - inspired by Mancini, as he always stressed - the Dutch government convened a conference of European states on private international law. The Hague Conference of 1893 became the first of six conferences on private international law organized before the Second World War. But it would take until 1955 before the Hague Conference on Private International Law (Hague Conference, HCCH) became operational as a *permanent* intergovernmental organization.

Shortly afterwards, in 1958, the European Economic Community was created. As a follow-up to Article 220 of the Treaty of Rome establishing the EEC, the six original Member States agreed to negotiate an instrument to ensure "... the simplification of formalities, to which the reciprocal recognition and enforcement of judgments are subject ...". The result was the 1968 Brussels Convention, which was essentially intended for use *within* the Community, leaving relations with *third* countries to *national law*.[2]

The idea of a multilateral convention on the recognition and enforcement of judgments was in fact an old idea of Asser's, for whichhe was called a*visionnaire*, a visionary of the Brussels Convention.[3]Asserhad already passed away when the 1925 Hague Conference adopted a brief model multilateral agreement on the recognition and enforcement of judgments. It then took several decadesbefore, in 1965a Convention on Choice of Court Agreements saw the light of the day and, in 1971, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters was first signed. These, and other Hague Conventionshad a great impact on the 1968 Brussels Convention. The Jenard report is full of references to the 1971 Convention in particular.

So, was there to be a future for both instruments, the Brussels and the Haguejudgments Convention? The instruments were perfectly compatible and could have happily coexisted.The reality was different, however. The European countries got fully absorbed in their enthusiasm for the Brussels Convention, and then its extension to the United Kingdom, Ireland, and Denmark, and as a result they lost interest in the Hague Convention. More generally, the common regulation of private international law relations with third countries was not a priority for Europe at the time: the focus was solely on European integration.

[2] See G Droz, *La compétence judiciaire et effets des jugements dans le marché commun (*Etude de la Convention de Bruxelles du 27 septembre 1968), Dalloz, Paris (1972), stressing the decisive role of integration into the European Community for the scope and structure of the Convention.

[3] H Laufer, La libre circulation des jugements dans une union judiciaire - Une idée géniale de T.M.C. Asser, visionnaire de la Convention de Bruxelles, Peter Lang, Berne (1992).

Following the lifting of the Iron Curtain in 1989, globalization brought a new dynamic. The Centenary Session of the Hague Conference in 1993 adopted the *Convention on Protection of Children and Cooperation in respect of Intercountry Adoption*(Hague Adoption Convention), which succeeded in building a bridge between what we would now call the "global South" and the "global North". In that same year, the HCCH began preparatory work on a "mixed convention" on civil and commercial judgements.[4] The hope was that this would lead to an instrument of similar global importance as the Hague Children's Conventions. However, the negotiations broke down, mainly on economic rivalry between Europe and the United States, centred on disagreement over the rules governing the jurisdiction of the courts.

The negotiations were further complicated by the Treaty of Amsterdam, concluded in 1997 and entered into force in 1999, which opened the door to a transfer of legislative powers in matters of private international law from the Member States to the European Union (EU). This could not leave indifferent an organization in which the European States have always played such an important role. In response, therefore, the Hague Conference developed a two-pronged strategy. First, it embarked on a rapid expansion of the organization with major countries such as Brazil, Russia, South Africa, and India, to strengthen the organization's global reach. Secondly, it revised its Statute to allow the European Union to join the organization. In addition, consensus as a negotiating method was now formally introduced.

B. Emergence of a common principle of governance: global problems should preferably be dealt with at global level, regional problems at regional level

The years 2005-2007 marked a turning point. The EU joined the Hague Conference as a member alongside its Member States. This accession had a twofold effect. First, it profoundly altered the dynamic between the Union and its Member States within the HCCH, where the Union previously had only observer status, whereas it now became the spokesperson for the EU, coordinating the views of its Member States. Secondly, it created a new relationship with the other Member States of the Conference, third States from the EU's point of view. Indeed, membership of the Conference has given the EU a global forum in which to act as a global player in the field of private international law.

[4] "Some Reflections of the Permanent Bureau on a general convention on enforcement of judgments" (Prel. Doc. No 17 of May 1992, in Hague Conference on Private International Law, *Proceedings of the Seventeenth Session*, Tome I, First Part (1995), p. 231).

This new political and institutional configuration has laid the foundations for the emergence of *a common principle of governance*, gradually to be shared by the European Union, its Member States, and the Hague Conference. In simple terms, the principle is as follows: global private international law issues should preferably be dealt with at global level, regional issues at regional level, while some issues are best dealt with at national level.

This emerging principle resembles what Paul Beaumont has called "reverse subsidiarity", "the idea that in areas of Union competence... the Union should not act internally if the objectives cannot be sufficiently achieved by Union legislation and can be better achieved by an international treaty".[5] The principle referred to here encompasses this idea but takes as its starting point the nature of the private international law issues - global, regional, national - and the level of governance best suited to deal with them - global, regional, national. There are 'ifs' and 'buts' to this principle, but we can recognise it in the evolution of events since the beginning of this century.

It took some time, however, before the principle became apparent. The fate of the *Convention on the law applicable to certain rights in respect of securities held with an intermediary* (adopted in 2002, signed in 2006) seemed to contradict this principle. Initially, the EU took an active part in the negotiations on this instrument. When the Convention was adopted, the European Commission proposed to sign it. But at that stage, signature was blocked by certain EU Member States. So, despite the entry into force of the Treaty for the United States, Switzerland and Mauritius, and the possibility of participating in a global arrangement, the EU is still stuck in a regional arrangement for what is undoubtedly a global issue arising in an eminently global financial market.

Yet this disappointing result seems rather the exception. During the subsequent negotiations at The Hague on the 2005 *Convention on Choice of Court Agreements*–the issue of choice of court, its conditions and its effects unquestionably being a global issue - the EU showed the way forward. It was the EU that brought the Convention into force in 2015. The negotiations also proved that solutions found at global level could lead to improvements at European level. In its 2003 *Gasser* judgment, the CJEU had stated that the Brussels I regulation required strict compliance with the *prior tempore potior*

[5] P Beaumont, "International Family Law in Europe - The Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity" Rabels Z 2009, p.509. See also P Beaumont "Respecting Reverse Subsidiarity as an excellent strategy for the European Union at The Hague Conference on Private International Law - reflections in the context of the Judgments Project". Europejski Przegląd Sądowy, 2016 (10), pp. 13-17. http://www.czasopisma.wolterskluwer.pl/european-judiciary-review

iure rule[6]. But this allowed a malicious party to get out from under the choice of forum and approach a court of its own choice, notably using the "Italian torpedo". At the Hague, the negotiators rejected this approach and preferred respect for party autonomy over the *prior tempore* rule[7]. This rule in the Convention, in turn, paved the way for the adoption of a similar rule at the EU level when the Brussels I Regulation was recast in 2012.[8]

A second noteworthy point regarding the Brussels I recast is this. The EU would have been free to introduce in the recast a rule allowing the court of a Member State to decline jurisdiction in favour of a court of a *third* State not also bound by the Convention, if that third court had been chosen by the parties to an exclusive choice of court agreement but was seised *after* a court of the Union had been seised.[9] However, Brussels I recast refrained from introducing such a rule. This self-limitation by the EU leaves more room for the Choice of Court Convention and thereby encourages third States to join this Convention.

After the Choice of Court Convention came the negotiations on the *Convention on the Recovery of Child Support and Other Forms of Family Maintenance* (Maintenance Convention) and its 2007 *Protocol on the Law Applicable to Maintenance Obligations*. The recovery of child support, in particular, was recognized very early on as a global problem[10], and it was up to the HCCH to find a solution adapted to current circumstances. But here one of the limitations of the common principle of governance became apparent.

It was clear from the outset of the negotiations that it would be impossible to reach global agreement on the rules of jurisdiction of the courts. The main reason was the requirement in United States law for a minimum of contacts between the defendant and the forum, which excludes the forum based solely on the habitual residence of the maintenance creditor, even though this is considered an essential forum by many other States. So, no (direct) rules on jurisdiction of the courts appear in the 2007 Convention.

Therefore, understandably, the EU decided to fill this gap, leading to *Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law,*

[6] CJEU C-116/02, 9 December 2003, *Gasser v. MISAT*, ECLI: EU :C:2003:65

[7] Choice of Court Convention,Art 6

[8] Brussels I Recast, Art 31

[9] Choice of Court Convention, Art26 (6) (a).

[10] See the United Nations Convention on the Recovery Abroad of Maintenance of 1956 and the Hague Conventions on the Law Applicable to Maintenance Obligations towards Children of 1956 and on the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children of 1958. These three instruments are replaced by the 2007 Maintenance Recovery Convention.

recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation). However, first, the Regulation does not address the question of applicable law but refers to the 2007 Hague Protocol.[11]

Secondly, the Regulation does not provide unilaterally for the recognition and enforcement by the EU Member States of maintenance decisions given in third countries not also bound by the 2007 Maintenance Convention. Again, this leaves room for the Maintenance Convention as an instrument of global governance and encourages third States to join the 2007 Treaty.

The 2019 *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (Judgments Convention) offers another example. Indeed, in a resolution on the revision of Brussels I adopted in 2010, the European Parliament had already explicitly stated the essence of the common governance principle. In its resolution, Parliament warned against giving the revised Regulation a reflexive effect because "*the problem is a global one* and the solution should therefore also be sought, in parallel, within the framework of the Hague Conference, through the resumption of negotiations on the Convention on International Judgments". Parliament asked the Commission to try to "breathe new life into this project..." and, interestingly, urged "the Commission to study the question of the extent to which the 2007 Lugano Convention could serve as a model and inspiration for such a convention on international judgments".[12]As we know, that did not happen, as the 2019 Convention does not deal with the original jurisdiction of the courts, but only with the effects of a foreign judgment.

The view that the multilateral Hague Conventions should provide the framework for cooperation in the field of private international law with third States, appears very clearly in the Commission's Communication of 4 May 2021 to the Parliament and Council "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention":

"The Commission takes the view that the European Union should not give its consent to the accession of the United Kingdom to the 2007 Lugano Convention. For the European Union, the Lugano Convention is a flanking measure of the internal market and relates to the EU-EFTA/EEA context. In relation to all other third countries the consistent policy of the European

[11] Maintenance Regulation, Chapter III. Art. 15, with effect on the rules of Chapter IV on recognition and enforcement of decisions

[12] European Parliament report A7-0219/2010, par. 15, "Application of the Regulation within the international legal order". Emphasis added.

Union is to promote cooperation within the framework of the multilateral Hague Conventions. The United Kingdom is a third country without a special link to the internal market. Therefore, there is no reason for the European Union to depart from its general approach in relation to the United Kingdom. Consequently, the Hague Conventions should provide the framework for future cooperation between the European Union and the United Kingdom in the field of civil judicial cooperation"[13].

In it's communication, the Commission announced its intention to propose EU conclusion of the 2019 Judgments Convention and suggested that the UK should do the same. Indeed, the EU joined the 2019 Convention on 29 August 2022, and the UK signed the Convention on 12 January 2024 with the intention to ratify the instrument before the end of the year.

The European Union – at the time still counting the UK among its members – played a leading role in the negotiations on the Judgments Convention. It was the first to accede to the Treaty, which entered into force on 1 September 2023 between the EU and Ukraine[14].

More implicitly, the emerging common governance principle has manifested itself in *Council Regulation (EU) 2019/1111 of 25 June 2019 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility as well as international child abduction* (Brussels II ter Regulation).

The 2003 Brussels II bis Regulation had distanced itself from both the 1980 *Convention on the Civil Aspects of International Child Abduction* (Child Abduction Convention) and the 1996 *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*(1996 Convention).In particular, it strengthened the child return mechanism in relations between EU Member States and reduced the powers of the court of the Member State of refuge. The CJEU had strengthened this policy even further.

The Brussels II ter Regulation, on the other hand, represents a clear return to the worldwide sources, the 1980 and 1996 Conventions. The rigorous priority return mechanism, although not abolished, has been very much mitigated.[15]

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[13] Document (2021) 222 final, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0222

[14] On that same date Uruguay, as the first non-European State, deposited its instrument of ratification of the Convention.

[15] See in particular Articles 29(3), (5) and (6), limiting the forced return mechanism to cases where the court of habitual residence is seised of an application for examination of the

Similarly, the Proposal of 31 May 2023 for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in respect of the protection of adults[16] is explicitly intended to *supplement* the 2000 *Convention on the International Protection of Adults* (Protection of Adults Convention), and not to replace it with a European variant.[17]

C. Implementation of the principle: drafting aspects

The implementation of the emerging principle that private international law issues should preferably be dealt with at the corresponding level of governance has, for both the Hague Conference and the European Union, policy as well as drafting implications. First, a word about the drafting implications.

1. HCCH

For the Hague Conference, the principle implies that drafting should focus on global issues and provide ample opportunity for regional private international law cooperation. Except for the Hague Securities Convention, all Hague Conventions leave room for regional arrangements, both earlier and later, on the same subject matter in principle without limitation. However, there are two main exceptions to this rule.

First, as a condition for any regional deviation from its rules, the Convention may require a certain degree of integration within the region. Thus, the 1996 Convention allows Contracting States to adopt different rules, but only in respect of children habitually resident in those States, and provided that they do not affect their obligations to third Contracting States.[18] A similar rule is found in the Protection of Adults Convention.[19]

The second exception is that, where Hague Conventions implement global human rights standards, divergent regional agreements cannot devi-

merits of custody rights (and not before, as the CJEU decided in its judgment in Case C-211/10 PPU (Povse)), and above all Article 56(4) to (6), which reopens the possibility of exceptionally invoking the ground for refusal in Article 13(1)(b) of the Child Abduction Convention at the stage of enforcement of a decision by the court of the Member State of origin.

[16] https://eur-lex.europa.eu/resource.html?uri=cellar:28ff9588-007b-11ee-87ec-01aa75ed71a1.0010.02/DOC_1&format=PDF

[17] See recitals 7-8, 18-23 and 64 of the proposal for a Regulation. It is even proposed that the text of the Convention be attached to the Regulation, see Art. 4, see also Articles 5-8, 27, 59 and 65-66.

[18] Article 52(2)

[19] Article 49(2)

ate from these standards. The Child Abduction Convention allows Contracting States to derogate from the Convention to limit, but not relax, restrictions on the return of children.[20] This Convention thus reinforces the rule on the non-return of abducted children contained in article 11 of the *United Nations Convention on the Rights of the Child* (CRC). Similarly, the Adoption Convention only authorizes post-Convention arrangements between Contracting States aimed at improving the application of the Convention in their mutual relations and only authorizes derogations from its procedural rules, not its substantive rules.[21] The Convention thus gives concrete form to and reinforces Article 21 of the CRC.

On the other hand, existing regional arrangements may set limits to the drafting of global instruments. The 2015 Principles on Choice of Law in Commercial Contracts illustrate this point. The question of the law applicable to contractual obligations is a global issue. However, the pre-existence of *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations* (Rome I) and the 1994 *Inter-American Convention on the Law Applicable to International Contracts*[22], both of which also allow the parties to choose the applicable law, prevented the conclusion of a binding global instrument containing universally applicable conflict of laws rules: "unification universelle sur unification universelle ne vaut"[23]. The Principles therefore took the form of a non-binding instrument.

2. EU

For the European Union, developing the principle of governance according to the nature of the problem will mean: focusing on issues of particular interest to the Union's economies and societies and, where global instruments already exist, implementing or supplementing those instruments. Conflicts with global treaties must be avoided and the limits that the global instrument may set to regional unification must be respected.

Thus, both the Brussels II ter Regulation and the Maintenance Obligations Regulation do not deal with applicable law but refer to the global Hague instruments in this area.[24] In addition, Brussels II ter introduces new, more precise provisions to clarify its application in relation to the Child Abduction

[20] Article 36

[21] Article 39(1)

[22] The Convention only entered into force between Venezuela and Mexico.

[23] "Universal unification uponuniversal unification does not work", G Droz, "Regards sur le droit international privé comparé", *Recueil des cours,* t 229. 1991 IV, p. 390.

[24] However, whereas the Regulation on maintenance obligations contains an explicit provision to this effect, see note 11, the Brussels Iiter Regulation only sets it out in a recital (92).

Convention and the 1996 Convention.[25] The Commission's recent proposal for the protection of adults is very clearly grafted onto the Protection of Adults Convention, which is even attached to the proposed Regulation.

As regards the other existing Hague Conventions, the EU instruments respect their continued application by the EU Member States that are party to them but block the possibility of future ratifications. This is sometimes questionable. For example, *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and the acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession* might well have encouraged those EU Member States that are not yet party to the widely ratified 1961 *Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions* to accede to that Convention rather than provide for its own rule .[26]

D. Implementation of the principle: policy aspects

If we look to the future, what would be the *policy* implications of this principle of governance at the appropriate level - global, regional, national - for private international law issues – global, regional, national? Of course, these levels of governance are not static: some problems of private international law first arise at national level, and then take on a regional dimension. And those that initially arise at regional level will tend to become global.

From this perspective, which global issues require global regulation of private international law, and which regional problems rather require a regional approach?

1. HCCH

First a word about global issues. It has rightly been observed in relation to the Judgments Convention that it "falls within a framework in which human rights and the objectives of sustainable development constitute an important normative element of international law".[27] Indeed, this comment applies more generally to the Hague Conventions, for some even more obviously than to the Judgments Convention. It also provides guidance for the future work of the HCCH, because by aligning with this framework, the Con-

[25] Arts. 96 and 97, respectively.

[26] Art. 27; cf. art 75 (1).

[27] M. Dotta, "Grounds for Refusal", in M. Weller et al, *The HCCH 2019 Judgments Convention*, Hart (2023), pp.71-85 (p.71).

ference will find global norms and values that its work can, and often should, serve.

As far as human rights are concerned, the *Resolution on Human Rights and Private International Law* adopted by the Institute of International Law in 2021[28] is an important reminder that these two branches of law are not separate silos but complement each other.

This can be seen most clearly in the interaction between the Hague Conventions on the international protection of children and the UN Convention on the Rights of the Child. This multilateral UN treaty, which has been almost universally ratified, identifies a series of cross-border legal problems, many of which give rise to issues of private international law which call for solutions at the global level. This is precisely what, among others, the 1980, 1993, 1996 and 2007 Hague Conventions offer[29].

Less noticed but nonetheless important: the Hague Conventions on civil procedure - those of 1965 on the service of documents abroad, of 1970 on the taking of evidence abroad, of 1980 on international access to justice, the Choice of Court Convention of 2005, and the Judgments Convention of 2019 - can all be linked to Article 14(1) of the 1966 UN *International Covenant on Civil and Political Rights*. Although this provision does not explicitly refer to cross-border situations, there is no doubt that it applies to such cases. The European Court of Human Rights has confirmed this for the comparable Article 6 of the European Convention on Human Rights.[30] These Hague Conventions help to ensure that borders do not impede access to justice across the vast field of civil and commercial law.

A similar point applies to Article 23 of this Covenant concerning the right to marry and found a family of 1966[31] and the comparable provisions of the European (art. 12), American (art. 17) and African (art. 18) Human Rights Conventions. Once again, whilst these articles do not address in so many words the application of this right beyond national borders, it is inconceivable that they would not apply to such situations.

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[28] https://www.idi-iil.org/app/uploads/2023/09/2023_150-DECLARATION-EN.pdf, Rapporteur F Pocar.

[29] See articles 9-11 and 35 (1980 and 1996 Conventions), 22 (1996 Convention), 20-22 (1993 Convention) and 27 (2007 Convention). Recital 9 of the Second Optional Protocol to the CRC on the sale of children, child prostitution and child pornography refers to the 1980, 1993 and 1996 Conventions.

[30] ECHR, 13 October 2009, *Selin Aslı Öztürk v. Turkey*, §§ 39-41: any person having a legal interest in the recognition of a judgment given abroad must be able to apply for it (concerning the recognition of a divorce judgment given abroad).

[31] Supplemented by art. 10(1) of the UN *International Covenant on Economic, Social and Cultural Rights*.

Questions of private international law relating to the recognition of a foreign marriage or divorce (non-recognition of a divorce may stand in the way of a new marriage!), as well as their effects in terms of property and inheritance, abound throughout the world. These are problems already addressed by several Hague Conventions, but to date with limited success in terms of ratifications. Interestingly, however, the European Union has used the *Convention on the Recognition of Divorces and Legal Separations*(1970), the *Convention on the Law Applicable to Matrimonial Property Regimes*(1978), and the *Convention on the Law Applicable to Succession to the Estates of Deceased Persons* (1989) as models for the European regulations in these areas.[32]

Since these are all global PIL issues, which become more pressing with increased worldwide mobility of persons and families,the Hague Conference might well consider in turn to use these EU Regulations as stepping stones for renewed efforts to address these issues at the global level.

Private international law also plays a role in the achievement of the Sustainable Development Goals (SDGs).[33] In fact, in cross-border situations,the Hague Conventions contribute, or have the potential to contribute, to SDG 16.3: *Promoting the rule of law at the national and international levels and ensuring equal access to justice for all.*

The preamble to the Judgments Convention contains, perhaps, an implicit reference to the UN Agenda 2030 where the Contracting Parties express their willingness "*to promote effective access to justice for all and to facilitate, at the multilateral level, rules-based trade and investment, as well as mobility, through judicial cooperation*". This corresponds not only to SDG 16.3, but also to SDG 17.10:" *Promote a universal multilateral trading system*[34]*,*and *10.7: Facilitate...mobility..."* However, the explanatory report to the Convention makes no explicit reference to the 2030 Agenda, or to the UN Guiding Principles on Business and Human Rights, or to the many UN instruments on the environment and climate change. This does not mean that the Convention does not serve the objectives of these instruments.[35] However, it does suggest that awareness of the importance of private international law

[32] Namely, the Brussels II Regulation, *Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes* and the 2012 Succession Regulation, above C.

[33] See R Michaels V Ruiz-Abou-Nigm and H van Loon,*The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law*, Intersentia, Cambridge, 2021.

[34] See also SDGs 2a, 7a and 10b.

[35] See *The Private Side...* (n.33), passim.

in achieving the SDGs and, more generally, the global framework referred to above, is still in its infancy.

Because of its very restricted indirect jurisdiction ground for tort matters[36], the Judgments Convention will have a limited effect on the recognition and enforcement of foreign judgments relating to environmental damage and climate change. The 2030 Agenda calls for urgent action to combat pollution[37], climate change[38] and biodiversity loss[39]. The United Nations General Assembly Resolution of 28 July 2022, *The human right to a clean, healthy, and sustainable environment*[40], affirms this call. All this strengthens the case for a global private international law instrument on environmental issues, including climate change. Considerable preparatory work has already been done, and the rules developed by the EU in this area could also inspire such a project.[41]

2. EU

Let us now look at regional issues. What regional PIL issues stand out which the EU should or could address. First, as we have already seen, we must admit that it is not possible to solve all problems of private international law of a global nature at the global level. In such cases, a solution must be found at the regional level.

In this context, however, the *Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parentage and the creation of a European parentage certificate*[42]raises questions. The challenges of private international law on parentage are an intrinsically global problem. It is true that no global regime is yet in force in this area. But the Hague Conference is working on this, and it would be wise to await the completion of this global work before the EU begins its own work on the subject. At the very least, the Union's work should be very carefully coordinated with that of The Hague.

[36] Art. 5 (1) (j) A judgment shall be entitled to recognition and enforcement if ...the judgment relates to a non-contractual obligation arising out of death, personal injury, damage to or loss of tangible property and the act or omission directly causing the damage was committed in the State of origin, irrespective of where the damage occurred.

[37] SDGs 3.9, 6.3, and 14.1

[38] SDG 13

[39] SDG 14

[40] Resolution A/Res/76/300, *A_RES_76_300-EN* - PDF

[41] See our study "Principles and Building Blocks for a Global Legal Framework for Civil Litigation in Environmental Matters" in *Uniform Law Review*, 23 (2), 2018, pp. 298-318.

[42] *Com (2022) 694 final*, of 7 December 2022

An example where regional rules of private international law are desirable but not currently envisaged is provided by the Commission's Proposal for a *Directive on the duty of care of companies with regard to sustainable development*.[43] This is an area where the EU has shown leadership and where it could go further than is possible at global level. However, as GEDIP has pointed out, the absence of private international law rules weakens the proposal. For example, the proposed directive also applies to non-EU companies with a turnover in the EU, but it does not offer the possibility of bringing an action against such a company before the court of a Member State, potentially resulting in an uneven level playing field. [44]

There are at least two other major areas of potential activity for the EU in private international law. One is the question of jurisdiction of EU Member States' courts over persons domiciled in third countries, which is currently left to the national systems of the Member States. The other is the codification of the general part of private international law at Union level. These two issues are, as such, also relevant at global level. All countries face the question of how far the jurisdiction of their courts extends in relation to foreign-based companies and persons. However, the outcome of negotiations on the HCCH judgment project suggests that a global agreement on direct grounds of jurisdiction is currently out of reach. There are therefore good reasons to try to harmonize these rules within the EU framework, with the exception of exclusive choice of court agreements, which should be left to the Choice of Court Convention. As for the codification of the general part of private international law, this would ideally be a task for the HCCH, but this is not currently feasible, however, given its more advanced stage of PIL codification and more limited number of members, the EU might wish to start developing such a general part, benefiting from the results of GEDIP's current work in this area.

E. Conclusion

The work of both the HCCH and the EU on private international law has its common origin in the efforts of the pioneers of the nineteenth century, foremost among whom were Mancini and Asser. The Hague Confer-

[43] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937 of 23 February 2022.

[44] Recommendation of the European Group for Private International Law/ Groupe européen de droit international privé on the proposal for a Directive of 23 February 2022 on corporate sustainability due diligence, Recommendation-GEDIP2022E.pdf (gedip-egpil.eu), following its Recommendation to the Commission of 8 October 2021Recommandation-GEDIP-Recommendation-EGPIL-final-1.pdf (gedip-egpil.eu).

ences, later the international organization The Hague Conference, began largely as a project of European countries on European legal systems, and remained so for a long time. The development of the HCCH into a global organization was stimulated by the Treaty of Amsterdam, which enabled legislative activities by the EU in the field of private international law. This in turn led to the Hague Conference accelerating the expansion of its global reach and allowing the EU to join the organization. The EU has thus emerged as a global player within the framework of the HCCH, which has become the privileged forum for the EU to negotiate its private international law relations with third States. This has given the EU a global perspective that it might not have gained otherwise.

We are thus witnessing a development whereby the EU is cooperating within the HCCH with third countries in an attempt to resolve global problems. As a result, with a few exceptions, it only acts internally to solve such problems if this objective cannot be achieved at global level. This has implications for the drafting of Hague and EU instruments. The Hague instruments should leave room for regional codification, which is indeed the case. Conversely, EU instruments should preferably deal with issues of particular interest to the EU. This requires the HCCH and the EU to think in terms of governance policy about the best level, global or regional, at which issues existing or arising at each level, global or regional, can be addressed.

According to the Declaration adopted on 2 September 2023 by the Institute of International Law on its 150th anniversary, "the moral, legal, economic and other challenges of our times are increasingly taking planetary dimensions".[45] It would undoubtedly be desirable for the EU and the HCCH to explore together, with other interested parties, what should be the role of private international law in responding to major global problems such as environmental degradation, climate change and the loss of biodiversity. It would undoubtedly be desirable for the EU and the HCCH, together with other interested parties, to explore and consider together what role unification of private international law should play in addressing major global issues such as cross-border pollution, climate change and biodiversity loss.

[45] See above, fn28

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THE CENTENNIAL OF THE HAGUE ACADEMY AND OUR REGION

This paper presents the slightly extended content of a presentation delivered at the 18th Regional Private International Law Conference in Niš, which traces the historical presence of The Hague Academy of International Law in the consciousness of the South Slavs region, particularly during the period from 1918-1991 when the region existed as the State of Yugoslavia. The paper explores how diplomats and scholars in this newly formed State, emerging from the aftermath of World War I, enthusiastically embraced and participated in the establishment and activities of The Hague Academy. The Academy aimed at promoting and facilitating "a thorough and impartial examination of the problems arising from international juridical relations." The early relationship was marked by a shared trust in international law as an instrument for peacebuilding.

Subsequent events reveal a pattern of interactions with the developing branches of Public and Private International Law becoming pivotal for long-lasting peace in Europe. During this period, a majority of international law professors from the region attended The Hague Academy, contributing not only as attendees but also as professors and researchers. The relationship reached a culmination during the breakup of Yugoslavia, a defining moment that unexpectedly amplified the activities of the Academy. This shift offered new topics for discussion and research, including secession and dissolution, recognition of new States, division of property, debts and archives, international criminal courts and tribunals and more.

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The presentation draws on the writings of several Yugoslav scholars on The Hague Academy throughout the years, books published during the 75th and 100th jubilee of The Hague Academy, and research from Recueil des cours.

Keywords: *The Hague Academy of International Law, Yugoslavia, Private International Law.*

1. Introduction

Today, I would like to discuss The Hague Academy of International Law. While it may not be considered a traditional international organisation -- it was established as a Dutch not-for-profit foundation[1] -- its international purpose and structure are evident. In every respect, be it its administration or the continuously evolving composition of its faculty and attendees, it embodies an international essence and demonstrates meticulous organization. The auditorium of The Hague Academy sees representation from more than one hundred countries every year, as students from around the world gather to listen to The Hague lectures.[2]

The idea for the Academy's organization can be traced back to the Second Hague Peace Conference of 1907. It is attributed to the German jurist, Ludwig von Bar.[3] He envisioned the Academy as an advisory body comprising eminent legal scholars who would offer guidance to States in arbitration cases.[4] On 2 September 1912, a Consultative Committee consisting of ten members from the Institute for International Law, including individuals like Tobias Asser, Ludwig Von Bar, Louis Renault and the Yugoslav ambassador in Paris, Milenko Vesnić, recommended the establishment of an academy aimed at promoting and facilitating "a thorough and impartial examination of the problems arising from international juridical relations."[5] Vesnić also

[1] The Foundation named The Hague Academy of International Law was established by notarial deed on 27 January 1914 with its headquarters in the municipality of the Hague. Art. 1 of the Statutes of the Foundation, https://www.hagueacademy.nl/statutes/.

[2] Thouvenin, J-M, *Préface*, 100e Anniversaire Académie de droit international de La Haye/100th Anniversary The Hague Academy of International Law 1923-2023 (hereinafter : 100e anniversaire), (ed. S. Cartier), The Hague: The Hague Academy of International Law, 2023, pp. 11-12.

[3] Joor, J, *The Hague Academy from a Historical Perspective*, 100e anniversaire, (ed. S. Cartier), The Hague: The Hague Academy of International Law, 2023, p. 15.

[4] *Ibid*., p. 22.

[5] Dupuis, R. J, Livre jubilee/Jubilee Book 1923-1973, Leiden: The Hague Academy of International Law, 1973, p. 27. Joor, op.cit., p. 26. This wording was included in the original

participated in the five sessions of the Consultative Committee that drafted the Statutes of the Academy in January 1914.[6]

Tobias Asser is acknowledged as the Academy's founding figure, not only for his involvement in this initiative but also because he donated a portion of the Nobel Peace Prize money for the Academy's founding. Sadly, he didn't live to see his vision for the Academy realized, as he passed away in 1913.[7] The inaugural ceremony, originally scheduled for 1 October 1914, was postponed due to the outbreak of the First World War, and the first group of students didn't attend the lectures until 1923.

How many individuals in this room have had the opportunity to attend The Hague Academy at least once during their lifetime? Please show your hands. I trusted that a significant number of you would, as this institution is and has always been a hothouse for nurturing future international law scholars.

2. Back to the beginnings: turning the yellowed pages of Arhiv and Anali

The Hague Academy released a commemorative book to mark its 100th anniversary which I received as a gift this summer. I used this book as a reference while preparing today's presentation. However, I believed it would be interesting to cross-reference the information by consulting local law journals for additional insights into the Academy's history and activities from a local perspective.

2.1. Curatorium

Let's explore the pages of the Archive for Social and Legal Sciences and Annales, the publications of the Faculty of Law at the University of Belgrade. In the 1930 issue, professor Živojin Perić writes about The Hague Academy of International Law. He informs us that this educational institution was established in 1921 with support from the Carnegie Endowment for International Peace and holds the status of a university.[8] Lectures are conducted

statutes of the Foundation. The statutes were changed in 2018, so that now this part of Article 2 reads: "with the aim of promoting in-depth scientific research on issues relating to international legal relationships…" Art. 2 of the Statutes of the Foundation, https://www.hagueacademy.nl/statutes/.

[6] Dupuis, *op.cit.,* p. 28.

[7] Daudet, Y, *Propos conclusifs, l'Academie demain*?, 100e anniversaire, (ed. S. Cartier), The Hague: The Hague Academy of International Law, 2023, p. 200.

[8] The purpose of the Foundation is to be a centre for the advanced study of and research

annually in July and August by professors from both Dutch and international backgrounds, selected for each session by the Academy's Curatorium, a body comprising twelve distinguished jurists specializing in international law. Among its members is D. Anzilotti, the president of the recently established Permanent Court of International Justice and a professor at the University of Rome. The Curatorium is responsible for overseeing the Academy's academic direction, including the selection of scholars and topics for instruction.[9] According to the former Dutch Minister of Foreign Affairs and President of the Academy's Administrative Board, the Curatorium has consistently been the driving force and the heart of the Academy.[10]

In the present day, the Academy's Statute stipulates that the Curatorium must consist of a minimum of seven members and no more than nineteen. Furthermore, it specifies that there can be no more than one representative from the same country serving on the Curatorium simultaneously.[11] This group of academics from around the world convenes biannually to establish the curriculum and select lecturers well in advance of the courses. On certain occasions, invitations are issued as early as four or five years in advance of the summer course.

Throughout the century of the Academy's existence, only ten individuals have held the position of president of the Curatorium. These notable figures include Boutros-Ghali, a former UN Secretary-General, Nicolas Valticos, who served as a judge at the European Court of Human Rights, and Robert Ago, a judge at the International Court of Justice. The current president of the Curatorium, in office since 2017, is Yves Daudet, an emeritus professor at Paris I University Pantheon-Sorbonne.[12]

It is worth noting that from 1923 to 2022, there were only eight female members of the Curatorium in comparison to ninety male members. The appointment of the first women did not occur until as late as 2005. Presently, out of the nineteen current Curatorium members, five are women.[13]

on international public and private law and related sciences, with the aim of promoting in depth scientific research on issues relating to international legal relationships by conducting educational and research activities and any other activity that could contribute towards achieving this objective. Art. 2 of the Statutes of the Foundation, https://www.hagueacademy.nl/statutes/.

[9] Joor, *op.cit.,* p. 27.

[10] Bot, B, *A profound Impact on my Life*, 100e anniversaire, 100e anniversaire, (ed. S. Cartier), The Hague: The Hague Academy of International Law, 2023, p. 146.

[11] Art. 6 of the Statute, https://www.hagueacademy.nl/statutes/.

[12] 100e anniversaire, (ed. S. Cartier), The Hague: The Hague Academy of International Law, 2023, Annexes, p. 204.

[13] Joor, *op.cit.,* p. 81.

This gender imbalance has led to the characterization of the Curatorium as a "men's club".[14]

It is also worth noting that the Academy does not have and has never had the status of a university.[15] The original plans for its establishment did assume a permanent university, but these were abandoned early on for an institution which would only offer courses during the summer months, to be taught by a changing group of international experts.[16]

2.2. The Secretary-General

An important figure of The Hague Academy is its Secretary-General. According to Article 8 of the Academy's Statutes, the Curatorium appoints the Secretary-General through a secret ballot for a six-year term. The Secretary-General holds responsibility for scientific and educational matters, operating under the authority of the Curatorium. Since the establishment of the Academy, there have been only nine individuals who have held the position of Secretary-General. Traditionally, the Secretary-General has been a French citizen, with only two exceptions. Notably, Genevieve Bastid-Burdeau, who served as Secretary-General from 1999 to 2004, was the sole woman to have held this position.[17]Since 2017, the position of Secretary-General is held by Professor Jean-Marc Thouvenin, who is a professor of Public International Law at the Paris Nanterre University.

2.3. The Academy Building

Professor Perić highlights that the Academy is housed within the iconic Peace Palace (Palais de al Paix), which is also the seat of the Permanent Court of Arbitration and the Permanent Court of International Justice.[18] However, in 1933, a separate academy building with an auditorium was put in use, serving the Academy and housing the Library's book depot for the subsequent

[14] *Ibid*.

[15] Daudet, *op.cit.,* p. 198.

[16] Joor, *op.cit.,* 24.

[17] It has been pointed out that the position of Secretary-General of the Hague Conference for Private International Law has never been held by a woman. Keyes, M, *Women in Private International Law*, Research Handbook on Feminist Engagement with International Law, (eds. S. Harris Rimmer, K. Ogg), Camberley and Northampton: Edward Elgar Publishing, 2019, p. 117.

[18] Perić, Ž, *Association des auditeurs et anciens auditeurs de l'Académie de Droit international de la Haye, A.A.A. Bulletin No. 7, Novembre 1929,* Arhiv za pravne i društvene nauke, knjiga trideset sedma, 1930, p. 241. The Permanent Court of Arbitration was founded by the Convention on Pacific Settlement of International Disputes 1899, and the Permanent Court of International Justice was established by the Covenant of the Leage of Nations of 28 June 1919.

seventy years.[19] In 2005, both the book depot and the Academy building were demolished, making way for the construction of a new modern, and spacious Library and Academy building, which was completed and opened in 2007.

The Hague Conference on Private International Law played an important role in instigating this construction project. The conferences and meetings organized by the Hague Conference, taking place every four years and attended by the representatives of member states as well as non-governmental organizations, were frequently held in the Academy building. As the Hague Conference's membership grew over the years, the original Academy building could no longer provide adequate accommodations. Consequently, A.V.M. Struycken, a Dutch professor of Private International Law and one of the Conferences' delegates, proposed the renovation of the building. It is worth noting that the 22th Diplomatic Session of the Hague Conference, during which the Judgments Convention was adopted, took place in the Academy's building.

2.4. The Attendees

Professor Perić then discusses the audience of the Academy, which mainly comprises graduate students and experienced law professionals, particularly those with "established social standing". The Academy is specially intended for civil servants working in foreign ministries and legal practitioners.[20] In 1929, there were 433 attendees including 93 females.[21]

In its 100 years of existence, the Academy has had tens of thousands of attendees following its summer courses. Between 1992 and 1998, the number of participants at The Hague Academy declined from 600 to slightly over 500. However, starting in 2009, the participant count began to increase once more and consistently surpasses 650. Notably, the number of participants in Public Law courses consistently exceeded the number of participants in

[19] Joor, *op.cit., p.* 44.

[20] *Ibid.*

[21] Thirty-three countries were represented, twenty-one from Europe, nine from Americas, two from Asia and one from Africa. The composition was as follows: 64 attendees from Germany, , 41 from Poland, 26 from the US, 26 from Italy, 19 from France, 14 from the UK, 9 from Egypt, 9 from Romania, 8 from China, 8, from Greece, 8 from Hungary, 6 from Belgium, 6 from Switzerland, 4 from Chile, 4 from Cuba, 3 from Austria, 3 from Russia, two from Free city of Dancig, 2 from British Indies, 2 from Sweden, 2 from the Czech Republic and one attendee per the following countries: Albania, Argentina, Bulgaria, Canada, Columbia, Costa Rica, Denmark, Spain, Mexico, Urugvay and Yugoslavia. Other attendees (157 of them) came from the Netherlands. Perić, *op.cit*., p. 242.

Private Law courses.[22] The number of participants in the Private Law sessions remained consistently around 250.[23]

In 2021, as a response to the pandemic, all courses were conducted online. To address the challenge of accommodating participants from various international time zones, two broadcasts were scheduled per day. This innovative approach allowed for an unprecedented participation of approximately 1200 attendees.[24]

This summer (2023), the Academy was attended by 348 attendees in public international law and 315 attendees in Private International Law. Additionally, 114 online attendees were registered for the former and 69 for the latter, which makes a total of 462 public and 384 private international law students.

In 1923, there were 35 women among the attendees, constituting approximately 10% of the total. By 1929, when Professor Perić wrote his note, the percentage of female participants had increased to 21%. Remarkably, in 2019 and 2020 female participants outnumbered their male counterparts, becoming the majority in both summer and winter courses. The first female from Yugoslavia to attend the academy was Anka Gođevac. She additionally achieved the distinction of becoming the first woman to earn PhD in international law in Yugoslavia.[25]

Winter courses were introduced in 2019.[26] They closely follow the structure and format of the Summer courses. However, one notable difference is that there is no distinct period dedicated to public and private law in the Winter courses.[27] Public international law lectures are somewhat more prominent compared to private law lectures.[28]

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[22] Joor, *op.cit.,* p. 79.

[23] *Ibid.*, p. 69.

[24] *Ibid.,* p. 85. Legerman, M, *The Evolution of the Secretariat of the Academy*, 100e anniversaire, (ed. S. Cartier), The Hague: The Hague Academy of International Law, 2023, p. 182.

[25] Djajić, S, *Standing Alone but Standing Tall: A Female Perspective of International Law from the Interwar Yugoslavia*, Legal Issues of International Law from a Gender Perspective, Gender Perspectives in Law (Vol. 3), (eds. I. Krstić, M. Evola, M.I. Ribes Moreno), New York: Springer, 2023, Cham. pp. 200-224.

[26] Joor, *op.cit.,* p. 81.

[27] *Ibid*., p. 85.

[28] Nishitani, Y, *The Recueil des cours and Private International Law*, General Part and Family Law, 100e anniversaire, 100e anniversaire, (ed. S. Cartier), The Hague: The Hague Academy of International Law, 2023, p. 124.

2.5. Participation of Yugoslav Students

In his brief note, Professor Perić advocates for increased participation of Yugoslav lawyers in the Academy, specifically encouraging civil servants from the Ministry of Foreign Affairs. He believes that this would bring a two-fold advantage to the country: attendees would enhance their legal knowledge while establishing connections that would serve the cause of peace and their country's interests.

He notes that the sole attendee from Yugoslavia that year was V. Pavlaković, an attaché at the Yugoslav consulate in the Hague. Over the first seven years of the Academy's operation, there was only one other attendee from Yugoslavia, Stevan Ćirković, an attaché at the Ministry of Foreign Affairs, who received a scholarship from Carnegie in 1926.[29] Anka Gođevac attended the Academy in 1930. In 1933, following the publication of professor Perić's note, Ilija Pržić, a future professor of Public International Law at Belgrade University, received a scholarship from Yugoslav Rotary club to attend the Academy.[30]

Several post-war attendees who wrote about the Academy in domestic legal periodicals include Smilja Avramov,[31] Vojin Dimitrijević,[32] Stevan Đorđević,[33] Milenko Kreća,[34] Budislav Vukas,[35] and Momir Milojević.[36] In

[29] Đajić, S., Ćirković, S, *(1899-1991) – Biografija jednog međunarodnog pravnika*, Srpski godišnjak za međunarodno pravo (3. izdanje), (ed. D. Dimitrijević), Beograd: Srpsko udruženje za međunarodno pravo, 2023, pp. 13-26.

[30] Pržić, I, *Haška akademija za međunarodno pravo*, Arhiv za pravne i društvene nauke, 45, 1934, p. 177.

[31] Avramov, S, *Dvadeset i četvrti kurs na Haškoj akademiji za međunarodno pravo*, Anali Pravnog fakulteta u Beogradu (B), 2 (3–4), 1953, pp. 509–512

[32] Dimitrijević, V, *Predavanja na Haškoj akademiji za međunarodno pravo u toku 1963*, Anali Pravnog fakulteta u Beogradu (B), 11 (3–4), 1963, p. 574.

[33] Đorđević, S, *Haška akademija za međunarodno pravo u 1964 i plan rada za 1965,* Anali Pravnog fakulteta u Beogradu (B), 12 (4), 1964, pp. 495–497. Đorđević, S, *Haška Akademija za međunarodno pravo u 1968. godini*, (B), 16 (2), 1968, pp. 294–295. Stevan Đorđević participated in the Center for Scientific Research of the Hague Academy in 1962 and 1966. Trkulja, J, *Sećanja*, Anali Pravnog fakulteta u Beogradu, 69 (1), p. 294.

[34] Kreća, M, *Letnji kurs Haške akademije za međunarodno pravo u 1976. godini*, Anali Pravnog fakulteta u Beogradu (B), 24 (6), 1976, pp. 765–770.

[35] Vukas, B, *Rad Centra za studije i istraživanje međunarodnog prava i međunarodnih odnosa Haške akademije za međunarodno pravo u 1967. godini*, Zbornik Pravnog fakulteta u Zagrebu, 18 (1), 1968, pp. 102-108. Vukas, B, *Haška akademija za međunarodno pravo u 1968. godini*, Zbornik Pravnog fakulteta u Zagrebu, 19 (1), 1969, p. 107.

[36] Milojević, M, *Haška akademija za međunarodno pravo u 1968. godini,* Anali Pravnog fakulteta u Beogradu (B), 17 (3–4), 1969, pp. 503–505.

1964, S. Đorđević noted that the Academy had held courses annually since 1923, except for the interruption from 1940-1946.

Ms Chloe Bachelor from the Secretariat of the Hague Academy compiled the following statistics regarding the participation of scholars from the Socialist Republic of Yugoslavia in the summer programs of The Hague Academy throughout the years.

Yugoslav attendees 1958 – 1991:

	Year	Public	Private
1.	1952	4	
2.	1953	9	
3.	1954	11	
4.	1955	13	
5.	1956	13	
6.	1957	8	
7.	1958	6	6
8.	1959	7	5
9.	1960	6	4
10.	1961	7	2
11.	1962	5	3
12.	1963	13	2
13.	1964	7	3
14.	1965	3	3
15.	1966	5	4
16.	1967	5	3
17.	1968	6	2
18.	1969	3	5
19.	1970	7	3
20.	1971	2	3
21.	1972	2	0
22.	1973	2	0
23.	1974	3	2
24.	1975	4	4
25.	1976	5	3
26.	1977	5	1
27.	1978	4	8
28.	1979	3	2
29.	1980	5	2
30.	1981	6	7
31.	1982	5	4
32.	1983	3	2
33.	1984	2	6
34.	1985	2	0
35.	1986	6	5
36.	1987	3	5
37.	1988	0	4
38.	1989	4	4
39.	1990	7	6
40.	1991	4	3

Compiled by: Chloé Batchelor <c.batchelor@hagueacademy.nl>

Total participants: 331 (average per year: 8.27)

Total Public participants: 157 (average per year: 3.9)

Total Private: 116 (average per year: 2.9)

Notably, between 1952 and 1991, the total number of participants amounted to 331. Out of those 116 attended the courses in Private International Law. It is important to note that no data is accessible for the years preceding the Second World War nor for the years 1947-1951. This can be compared with the data for the period since 2010 available at The Hague Academy website:[37]

Attendees of the Summer Courses (since 2010)

	Public International Law	Private International Law
Croatia	16	10
Serbia (including Kosovo)	11+3	10
North Macedonia	6	5
Slovenia	7	2
Bosnia and Herzegovina	5	2
Montenegro	1	0

Total participants: 78 (average per year: 5.57)

Total Public participants: 46 (average per year: 3.28)

Total Private: 29 (average per year: 2.,07)

These numbers show that, compared to the Yugoslav period, the number of student participants from the region has slightly declined in recent years.

I'd also like to provide an explanation for why the recording of data for Public and Private International Law was separated, commencing in the year 1958.

In the inaugural year of the Academy, 1923, the curriculum predominantly focused on public international law. It encompassed a blend of lecture series dedicated to the fundamental principles of international law, as well as discussions on current and emerging topics.[38] In the following year, general courses in Private International Law were introduced, offering insights into both the civil law system, taught by A. Pillet and the common law system, instructed by H. Bellot, in the two sessions. This development was succeeded by a series of courses devoted to exposition of national conceptions of Private International Law from various countries. Those lectures included W. Simons from Germany (1926), G. Diena from Italy (1927), G. Streit from Greece (1927), A. Kuhn from the USA (1928), J. Péritch from Yugoslavia (1929),

[37] Nationalities of the Attendees of the Summer Courses (since 2010), https://www.hagueacademy.nl/represented-nationalities-summer-courses/.

[38] Joor, *op.cit.,* p. 36.

J. Trias de Bes from Spain (1930), S. Daneff from Bulgaria (1930), A. Makarov from Russia (1931), F. Pontes de Miranda from Brasil (1932), J. Sulkowski from Poland (1932) and E. Fabre-Surveyer from Canada (1935).[39]

Subsequently, the focus shifted from a national approach to a regional and universal perspective on private international law.[40] In the early days of the Academy, it was not uncommon for lectures to encompass both fields, with notable lectures such as Rolin, Diena, Nolde, Fedozzi, and Niboyet.[41]

In 1958, a strict division of courses was introduced, with the first period dedicated to private international law and the second to public international law.[42] The inaugural General Course in Private International Law, taught by B.A. Wortley, took place in 1958.[43] This arrangement remained in place until 2011 when the order was reversed, and public international law lectures were scheduled prior to private international law lectures.[44]

However, even after this division, some scholars continued to interweave both fields in their lectures, as they regarded private international law as an integral part of public international law.[45] The demarcation between these two branches of law often remained ambiguous.[46] Additionally, there were specific subjects that necessitated examination from both perspectives, such as sovereign immunity, reciprocity, the rights of aliens, intellectual property protection and various other topics.[47]

2.5.1. Alumni Association

In professor Perić's note regarding The Hague Academy, it was mentioned that there existed an Alumni Association which played an active role in coordinating social activities for the Academy's attendees during their stay in The Hague. This served to bring them together and foster friendships.[48] In

[39] Vitta, E, *Cours Général de droit international privé*, Recueil des cours, 162, 1979, p. 191 fn. 1.

[40] Nishitani, *op.cit.,* p. 120.

[41] *Ibid*., p. 124.

[42] Joor, *op.cit.,* 38.

[43] *Ibid*., p. 55. Nishitani, *op.cit.,* p. 116, 118.

[44] Joor, *op.cit.,* 81.

[45] Nishitani, *op.cit.,* p. 125.

[46] Cordero-Moss, G, *The Recueil des Cours and Private International law, Business Law and Arbitration*, 100e anniversaire, (ed. S. Cartier), The Hague: The Hague Academy of International Law, 2023, p. 133.

[47] Nishitani, *op.cit.,* p. 125.

[48] Association des Auditeurs et Anciens Auditeurs de l'Académie de Droit international de La Haye/Association of Attendees and Alumni of the Hague Academy of International Law,

1933, Dr. Ilija Pržić was elected as one of five members on the board of the Alumni Association. The AAA (Alumni Association of the Academy) operated as an international network and was partly structured into national groups.

In 1962, Professor Borko Nikolajević,[49] who served as the president of the Yugoslav group of the global AAA, organized a congress for this organization in Dubrovnik.[50] One of the notable contributions of the Association was the publication of a yearbook, nowadays known as the Hague Yearbook of International Law.[51] The Association was officially disbanded in 2017.[52]

2.5.2. Diploma of the Academy

The famous diploma exam was introduced in 1949.[53] Obtaining the Diploma from the Academy remains a difficult task. Among the Yugoslav and the successor States candidates, only two succeeded in making it to the finish line: Željko Matić from the Zagreb Faculty of Law in 1960 and Andrijana Mišović from the Belgrade Faculty of Law in 2016.[54]

2.5.3. Professors

More than thousand scholars, judges and diplomats taught at The Hague Academy. Their lectures have been compiled from year one into a remarkable collection, a veritable "green wall"[55], which is a unique monument[56] comprising more than 430 volumes of *Recueil des cours*.

It is noteworthy that, much like the Curatorium, the initial teaching faculty at the Academy consisted solely of men. The participation of female lecturers has historically been limited and has only started to see an increase in recent decades.[57]

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often denominated by the acronym AAA. Perić, *op.cit.*, p. 242.

[49] Professor of International Commercial Law at the Belgrade Faculty of Law, co-author with professor Bartoš of the book Legal Status of Aliens. Bartoš, M., Nikolajević, B, *Pravni položaj stranaca (savremena shvatanja međunarodne prakse u FNRJ),* Beograd: Naučna knjiga, 1951.

[50] Radojković, M, *In memoriam: Dr Borko Nikolajević (1913-1964),* Anali Pravnog fakulteta u Beogradu, 12 (1), 1964, p. 140.

[51] Annuaire de l'Association des Auditeurs et Anciens Auditeurs de l'Académie de Droit International de La Haye = Annual of the Association of Attenders and Alumni of the Hague Academy of International Law, in 1988 renamed to: Hague Yearbook of International Law.

[52] Joor, *op.cit.,* p. 77.

[53] *Ibid*., p. 58.

[54] Awarded Diplomas since 1950, https://www.hagueacademy.nl/awarded-diplomas/.

[55] Thouvenin, *op.cit.,* p. 11.

[56] Kolb, R, *Recuieil des cours*, 100e anniversaire, (ed. S. Cartier), The Hague: The Hague Academy of International Law, 2023, p. 95.

[57] Joor, *op.cit.,* p. 81.

2.5.4. Scholars from the former Yugoslavia

Scholars from the former Yugoslavia and the succession States have occasionally been invited to serve as lecturers. Milovan Milovanović, professor of the Belgrade Faculty of Law, one of the leading Serbian jurists, and prime minister of Serbia,[58] was asked to deliver a course at the Academy in the early stages of its establishment[59] but did not live to see it fully realized.[60] During the era of the Kingdom of Yugoslavia, four distinguished professors had the privilege of addressing attendees from the Academy lectern: professor Živojin Perić from the Belgrade University Faculty of Law delivered a special course in Private International Law in 1929.[61] Subsequently, Professor Milorad Stražnjicki from the Zagreb University, also presented a special course on Private International Law.[62] They were followed by Juraj Andrassy, who delivered a special course on Public International Law in 1937,[63] and Đorđe Tasić, who presented a special course on Public International Law in 1938.[64] Finally, professor Stražnjicki was invited back to teach another special course on Public International Law in 1939.[65]

During the period of Socialist Yugoslavia, five professors lectured at the Academy: Professor Juraj Andrassy, presented a special course in Public International Law,[66] professor Milan Bartoš, offered a special course in Public International Law,[67] Professor Natko Katičić, taught a special course in

[58] Milovanović was educated in Belgrade and in Paris. He was the first Serb to take the degree of Doctor of Law in Paris and received a gold medal for his doctoral thesis. He represented Serbia at the 1907 Hague Peace Conference and was appointed a member of the Permanent Court of Arbitration thereafter. Encyclopaedia Britannica, 1922, p. 946.

[59] Dupuis, *op.cit.,* p. 26.

[60] *Ibid*., p. 26.

[61] Péritch, J, *Conception du droit international privé d'après la doctrine et la pratique en Yougoslavie*, Recueil des cours, 28, 1929. Péritch studied law in Paris from 1888-1891.

[62] Straznicky, M, *Les Conférences de droit international privé depuis la fin de la guerre mondiale*, Recueil des cours, 44, 1933. Straznicky received his doctorate in law at the University of Zagreb, but studied law also in Vienna, Berlin and Leipzig. He abandoned his professorship in 1929 to pursue a career in diplomacy.

[63] Andrassy, G, *La souveraineté et la Société des Nations*, Recueil des cours, 61, 1937. Andrassy received his doctorate in law at the University of Zagreb.

[64] Tassitch, G, *La conscience juridique internationale*, Recueil des cours, 65, 1938. Tassitch was professor of law at the University of Belgrade.

[65] Straznicky, M, *Jurisprudence de la Cour suprême de plébiscite du bassin de la Sarre*, Recueil des cours, 69, 1939.

[66] Andrassy, J, *Les rélations internationales de voisinage*, Recueil des cours, 79, 1951.

[67] Bartoš, M, *Le statut des missions spéciales de la diplomatie ad hoc*, Recueil des cours, 108,

Private International Law,[68] Dr. Milan Šahović, delivered two special courses in Public International Law,[69] and Đuro Ninčić, provided a special course in Public International Law.[70]

Following the dissolution of Yugoslavia, two Croatian professors, Degan[71] and Vukas[72] taught special courses in Public International Law. In 2023 a Serbian professor, Maja Stanivuković, delivered a special course in Private International Law.[73]

For reference, Brill, the publisher of *Recueil des cours*, provides a list of authors that can be used as a search tool. All authors of Collected Courses, over one thousand, are listed in a separate entry at the website of Brill.[74] *Recueil des cours* contains a bibliographical note on each author.

2.5.5. The format of general courses

It is worth noting that no professor from the region had the opportunity to teach the prestigious general course of The Hague Academy,[75] whether in private or in public international law.

The General Course format evolved into a significant platform for the discussion of methodological and doctrinal issues,[76] where renowned professors exchanged their views. From a common law perspective, notable fig-

1963. Bartoš obtained his doctor of law diploma in Paris in 1927. He was professor at the Belgrade University and a diplomat. He was a member of the Permanent Court of Arbitration and the International Law Commission.

[68] Katičić, N, *Le droit international privé de la Yougoslavie dans le domaine des rapports familiaux et successoraux,* Recueil des cours, 131, 1970. Katičić studied law at the University of Zagreb and University of Vienna.

[69] Šahović, M, *Codification des principes du droit international des relations amicales et de la coopération entre les Etats,* Recueil des cours, 137, 1972. Šahović, M, *Rapports entre facteurs matériels et facteurs formels dans la formation du droit international*, Recueil des cours, 199, 1986. Šahović received his doctorate in law at the University of Belgrade.

[70] Ninčić, Đ, *Les implications générales juridiques et historiques de la Déclaration d'Helsinki*, Recueil des cours, 154, 1977, pp. 43-102. Ninčić was a Yugoslav diplomat. He received his doctoral degree from the University of Belgrade.

[71] Degan, V., Đ, *Création et disparition de l'État (à la lumière du démembrement de trois fédérations multiethniques en Europe)*, Recueil des cours, 279, 1999.

[72] Vukas, B, *States, Peoples and Minorities*, Recueil des cours, 231, 1991.

[73] The course was delivered in July-August 2023 on Property Rights of Individuals After Changes of Territorial Sovereignty.

[74] Peace Palace Library search engine, https://referenceworks-brillonline-com.peacepalace.idm.oclc.org/browse/the-hague-academy-collected-courses.

[75] Kolb, *op.cit.,* p. 101.

[76] Nishitani, *op.cit.,* p. 118.

ures such as R.H. Graveson in 1963, A.A. Ehrenzweig in 1968, W.L.M. Reese in 1976, Cavers in 1980, Juenger in 1983, R.J. Weintraub in 1984, L. Brilmayer in 1995 and Symeonides in 2016 contributed to these discussions. From a civil law perspective, luminaries like G. Kegel in 1964, R. de Nova in 1966, D. J. Evrigenis in 1966, W. Wengler in 1961, H. Batiffol in 1973, Y.E. Loussouarn in 1973, O. Kahn-Feund in 1974, J.F. Lalive in 1977, E. Jayme in 1982, B. Audit in 1984, P. Lagarde in 1986, F. Rigeaux in 1989, F. Visher in 1992, J.D. Gonzalez Campos in 2000, Andreas Bucher in 2010, M. Bogdan in 2011, J. Basedow in 2013, and H. Muir-Watt in 2018, all contributed to these discussions.[77]

Before World War II, some of the notable individuals who addressed general questions included Bartin in 1930 and 1935, Lewald in 1929, 1936, and 1939, Arminjon in 1928 and 1933, Pillet in 1925, Niboyet in 1927, 1932 and 1935) and several others.

Although many professors were invited to teach both a special and a general course, no professor, except for Hans Kelsen (in 1932 and 1953), has been called upon to teach a general course more than once.[78]

Inaugural lectures at The Hague Academy also served as platforms to address significant topics and new developments in Private International Law. One such lecture was presented by Hans van Loon in 2015 on "The Global Horizon of Private International Law".

For over a decade, the Curatorium has made efforts to include at least one course on arbitration in each session, acknowledging the increasing importance of this subject.

2.5.6. Language

Initially, the courses at The Hague Academy were intended to be taught in French, although the Curatorium had the option to select a different language.[79] From 1923 to 1939, all lectures at The Hague Academy were conducted exclusively in French.[80] However, following World War II, in 1947, a course on the International Protection of Human Rights was taught in English by Hersh Lauterpacht.[81] In the same year, B.A. Wortley delivered the first lecture on Private International Law in English.[82]

[77] *Ibid*., p. 118.

[78] Kolb, *op.cit.,* p. 103.

[79] Joor, *op.cit.,* p. 27.

[80] Nishitani, *op.cit.,* p. 115.

[81] Joor, *op.cit.,* p. 55.

[82] Nishitani, *op.cit.,* p. 116.

2.5.7. Scholarships

In 1924, the Netherlands became the first country to offer scholarships for participants of the Summer Courses at the Hague Academy. In 1926, the Academy itself decided to provide its own scholarships.[83]

During the existence of the SFRY, many students benefited from the Dutch government scholarships that was granted through the Yugoslav Committee for Cultural Cooperation and International Connections[84], based on a bilateral treaty on cultural cooperation between Yugoslavia and the Netherlands.

Donations for scholarships have been made possible, and this option has been incorporated into the Academy's statutes, with the specific regulations entrusted to the Curatorium. Today, the Scholarships Regulations are made available on the Academy's website.[85]

In 1998, the Academy received support from thirty-six countries and twenty-one private organisations in the form of donations. It also had 14 individual funds, many of which were established by former members of the Curatorium and former judges of the International Court of Justice. However, following the economic crisis of 2008, the number of donor countries decreased to fourteen.[86]

2.5.8. Yugoslavia in the Centennial publication

In celebration of the jubilee, a publication titled 100th Anniversary has been released. Our region is referenced in four distinct locations within this book:

"On 28 June 1914, the European order collapsed with major consequences for the whole world. On that day, the Austrian heir to the throne, Franz Ferdinand, lost his life in an attack by a Serbian nationalist, after which a chain of political, diplomatic and military procedures was set in motion, which, like a self-sustaining mechanism, quickly led to catastrophe."[87]

"The Permanent Court of Arbitration, which after a very productive start had seen its activities decline in the 1920s and almost out of cases in the first decades after World War II, saw the number of cases explode after 1990. The same was true of the International Court of Justice. The average

[83] Joor, *op.cit.,* 67.

[84] Đorđević, 1968, *op.cit.,* p. 295.

[85] Scholarship Regulations, https://www.hagueacademy.nl/scholarship-regulations/.

[86] Joor, *op.cit.,* p. 79.

[87] *Ibid*., p. 28.

annual number of cases the Court of Justice judges dealt with tripled in the period of just over two decades after 1989. In addition to the quantitative change, the cases before the Court also had become very varied, with environmental and human rights issues, topical and at times very complex, such as, for example, the various conflicts linked to the break-up of Yugoslavia."[88]

Speaking of *Recueil des cours*, how the authors were sensible towards important questions, one of the topics mentioned is the succession of States after the dissolution of the former Yugoslavia ("la succession d'États depuis la dissolution de l'ancienne Yugoslavie").[89] It is added that certain topics are ostensibly absent, such as the law of armed conflict, despite the war in Bosnia ("malgré la guerre de Bosnie (1992-1995)….)."[90] Speaking of the crisis that the international law has witnessed during the last hundred years, Professor Yves Daudet, who was Secretary-General of the Academy from 2005 to 2017 and has since then been President of the Curatorium mentioned that there were also violations of the UN Charter, expressly mentioning Kosovo, probably referring to the 1999 aggression against the Federal Republic of Yugoslavia ("[i]l y eut aussi, émanant de divers cotes, de violations de la Charte, de natures et degrés variables au Kosovo, en Irak, en Libye ou en Syrie.").[91]

3. Conclusion: Future of The Hague Academy and our Region

The future of the Hague Academy holds both hope and challenges. The expectation is that international law will continue developing and that The Hague Academy will continue its mission for another century.

Professor Yves Daudet outlines the Perspectives of the Academy of Tomorrow. He emphasizes that the Academy's task is to instil the spirit of universalism among its attendees, while respecting their cultural, historical, political and religious differences. The goal is to prepare individuals who will engage in international dialogue and negotiation at the global level, and this requires an open-minded approach.[92]

Professor Daudet recognizes a shift in the global balance of power, with Europe on the decline, and Asia's increasing prominence. This shift has several implications for the Academy. Firstly, orientation towards Asia, Africa and Latin America. In terms of general courses, there is a move from Eurocen-

[88] *Ibid*., p. 66.

[89] Kolb, *op.cit.,* p. 96.

[90] *Ibid*.

[91] Daudet, *op.cit.,* p. 190.

[92] *Ibid*., p. 192.

trism towards a more global perspective. The Academy should invite professors from these regions to diversify its general course offerings.[93] Regarding special courses, there should be a focus on special systems, regional visions or local practices that adapt general international law to specific contexts.[94] That does not mean abandoning the study of general international law. Secondly, adaptation to new needs: the Academy should remain adaptable and responsive to the evolving needs expressed by professors and attendees, as well as those anticipated by the Curatorium and the Secretary-General. Thirdly, the establishment of "branches" of the Academy in Africa, Asia and Latin America to ensure broader international representation and accessibility.

Overall, The Hague Academy is expected to adapt to changing global dynamics, embrace new topics, and remain a hub for the study of international law while upholding its core values of diversity, dialogue, and the exchange of ideas among a culturally diverse group of participants.

These developments and shifting perspectives imply that scholars of Private International Law from the region, who aspire to be part of and contribute to the work of The Hague Academy will encounter greater competition now, and in the future, compared to their predecessors from former Yugoslavia. The altered geopolitical landscape, coupled with the Balkanization and noticeable orientation of the regional PIL scholarship towards reception and adoption rather than critical and creative contribution, substantially diminishes the likelihood of achieving the remarkable results of Yugoslav jurists, professors and diplomats from the previous century. Regarding student participation, there is an urgent need to institute state and privately funded scholarships that will provide a stable foundation for the continued nurturing of competent international lawyers from the region.

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[93] *Ibid*., p. 193.

[94] *Ibid*., p. 194.

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TWO FACES OF HABITUAL RESIDENCE – A MASTERPIECE OF THE HCCH AND A CHALLENGE

Abstract: *Habitual residence, a pivotal concept in private international law, was conceptualised by the Hague Conference on Private International Law. In an effort to reconcile two disparate legal systems, one favouring nationality as a connecting factor, the other domicile, the Conference proposed a third, neutral option: habitual residence. Guided by the age-old Latin maxim that every definition is perilous – omnis-definitiopericuloseest, the Conference refrained from defining habitual residence, leaving its interpretation to judicial practice. Over time, habitual residence has evolved into a crucial criterion for determining the applicable law and international jurisdiction in the majority of the Conference's conventions. This paper meticulously traces the evolution of habitual residence across the three periods of the Hague Conference: the first – from its inception to the adoption of the Statute (1893-1951); the second – from the adoption of the Statute to the European Union's accession (1951-2007); and the third – from the European Union's accession to the present day (2007-).*

Keywords: *Habitual residence, the Hage Conference, a masterpiece, a challenge.*

1. Introduction

The genesis of habitual residence and its application in private international law can be traced back to the pioneering work of the Hague Conference on Private International Law. This pivotal term was first employed as early as 1896 in the Hague Convention on Civil Procedure. However, there are assertions that its origins predate this; specifically, it was initially used in a bilateral agreement between France and Prussia in 1880.[1] The author posits that it is a French rendition of the German phrase 'gewöhnliche Aufen-

thalt', encapsulating a precise legal concept.[2] In literal translation, it denotes a permanent place of residence. However, the habitual residence has a broader scope, particularly through the contributions of the Hague Conference on Private International Law.

Simultaneously, we can trace the dynamic evolution of habitual residence through three distinct periods. The first period is related to the work of the Conference before the Second World War, more precisely from the beginning of work in 1893 to 1951. Out of a total of seven adopted conventions in that time frame, four mention habitual residence. The second period began with adopting the Statute when the Conference established its bodies and became a permanent intergovernmental institution. It lasted until the accession of the European Union to the Conference in 2007. The habitual residence was used in almost every Convention or Protocol adopted from 1951 to 2007, marking a significant period of its development. The third period began in 2007, when the first regional organisation of an economic nature, the European Union, joined the Conference and continues to this day, reflecting the ongoing evolution of this concept. In that period, three instruments were adopted in which habitual residence is used, which will be discussed later.

Throughout these three periods, we can observe the evolution of habitual residence as a decisive factor for determining the applicable law, a crucial aspect in the field of private international law. This determination also extends to the jurisdiction of the court and other authorities when it comes to conventions dealing with the procedure. Notably, habitual residence is not defined in any instrument of the Hague Conference. However, due to its increasingly frequent use, it became clear that judicial practice needs specific instructions, which began to appear in the explanatory reports given with the conventions over time, highlighting the practical implications of this concept.

2. The first period of The Hague Conference - from its inception to the adoption of the statute(1893–1951)

The first conference in The Hague was held in 1893 at the initiative of the Dutch government. Thirteen countries accepted the invitation.[3] Three more meetings were held until 1904, and six conventions were adopted in that time frame, so that period is rightly called "la belle époque"[4] of the

[2] *Ibid.*

[3] Lipstein, K., *One Hundred Years of Hague Conferences on Private International Law*, International & Comparative Law Quarterly, 42(3),1993, p.557.

[4] Van Hoogstraten, M. H., *The United Kingdom Joins an Uncommon Market: The Hague*

HCCH. Of those six conventions, the 1896 Civil Procedure, 1902 Guardianship Convention, 1905 Civil Procedure Convention, and 1905 Deprivation of Civil Rights Convention stand out as significant milestones in the development of the concept of habitual residence.

The Convention on Civil Procedure in 1986, in Article 15, which regulates free legal aid, first mentioned habitual residence. Namely, a certificate or declaration of low financial status must be taken from the competent authorities of the foreigner's habitual residence. The Convention does not provide any definition of habitual residence. Still, it distinguishes between this term and current residence, considering that in the continuation of the same article, it says that if the certificate is not issued by the authority of the foreigner's habitual residence, it will be issued by the authority of his current residence. Based on this, we can conclude that under habitual residence, the authors of the 1986 Convention considered a more permanent place of residence, but different from domicile, bearing in mind that it is mentioned earlier in the text of the Convention. Although borrowed from German law, where it represented a legal issue, habitual residence was not defined in the 1986 Convention. This is how the customary stay entered private internationallaw through the back door, only to become the main criteria in most Hague conventions half a century later.

The Convention on the Guardianship of Minors from 1902, signed by 14 states, was a significant step in the practical application of habitual residence. It was the first instrument to provide for the use of habitual residence as a criterion for determining the applicable law, albeit in a subsidiary role.[5] This means that the right of habitual residence of minors is applied only when guardianship is not organised or cannot be organised according to the national law of the child. The remaining two conventions of the first period use the habitual residence as a jurisdictional criterion for issuing a certificate of the low financial status of a foreigner[6] and as a subsidiary criterion of the applicable law.[7]

The "old conventions" mentioned all share the common feature of using national law as the main criterion for determining the applicable law, with

Conference on Private International Law, International & Comparative Law Quarterly, 12(1),1963, p.150.

[5] More about the 1902 Guardianship Conventionsee. Marjanović,S. Đ.,C*hildren Protection in the Hague Conventions on Private International Law,*doctoral dissertation defended atthe University of Niš, Faculty of Law, 2014, pp. 12-20.

[6] 1905 Civil Procedure Convention.

[7] 1905 Deprivation of Civil Rights Convention.

habitual residence playing a relatively minor role.[8] International jurisdiction typically rests with national authorities, and local authorities can only act when national authorities are unresponsive. This can be attributed to the fact that the member states of these conventions are continental European countries, reflecting the attitudes of their creators towards the selection of binding points. The context in which these conventions were established should also be taken into account – a period when large empires were striving to maintain their colonial dominance, and the use of *lex nationalis* was expected in that context. Nevertheless, their significance is notable as they paved the way for habitual residence to become a significant point of connection in private international law. Over time, it has evolved into a modern and widely accepted point of attachment, serving as a link between the countries of the European continent and those of the Anglo-Saxon legal system within both the framework of the Hague Conventions and European Union law. Consequently, habitual residence has been incorporated into many national codifications of private international law.

3. The second period of The Hague Conference - from the adoption of the statute to the european union's accession (1951–2007)

In the second period of HCCH, the concept of habitual residence emerges as a pivotal factor. It not only becomes an unavoidable criterion of jurisdiction (both direct and indirect) and applicable law but also frequently appears as a criterion of the area of application of an instrument or as one of the additional conditions for the application of domestic law.[9] This underscores the profound significance of habitual residence, which is found in as many as 26 instruments of the second period, including 25 conventions and one protocol. While it's impractical to delve into each convention, we will focus on those that marked a significant shift in the understanding and application of habitual residence.

[8] At one time, the old conventions were described as follows:„... „Let nationality be our connecting factor; a man's status was to be governed by his national law as long as he lived and wherever he went."..." Van Hoogstaten.M. H. (1963). *op.cit*,.p.151.

[9] E.g. Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages or Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.

3.1. Convention of 15 June 1955 on the law applicable to international sales of goods

Habitual residence assumes the role of a criterion for determining the applicable law.[10] This convention, while lacking a direct definition of habitual residence, is noteworthy for being the first to allude to the habitual residence of a legal person (albeit indirectly, through the mention of the seller's habitual residence, who may be a legal person). In essence, this convention serves as a cornerstone for the concept of the habitual residence of a legal entity, as well as the rule that the habitual residence of a legal entity is deemed to be the location of its representative office if the contract is concluded within the scope of that office's operations. This approach will have profound implications on subsequent Hague Conventions, EU regulations, and national codifications worldwide.

3.2. Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants

This Convention, crucially, pertains to the safeguarding of infants' persons and property. Article 1 empowers the judicial and administrative authorities of the state where the infant habitually resides to enact all necessary measures for their protection. These measures are to be in accordance with the laws of the country of the child's habitual residence, as dictated by its internal law.[11] However, it's important to note that the jurisdiction to implement protective measures for the infant is primarily influenced by the stance of the state of their nationality.

Like the previous Hague Conventions, the 1961 Convention does not define habitual residence, although other instructions can be found in its text, such as the concept of infant. This again means that it is left to the courts and other competent authorities to interpret the concept of habitual residence by being "inspired by the very spirit of the Convention, i.e. the best interest of the child".[12] However, we can find some guidelines for determining habitual residence in the Explanatory Report for the first time. Thus, as one of the determining elements, the effective centre of the infant's life is mentioned,

[10] Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, art.2 and3.

[11] Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, art. 2.

[12] Steiger, W., Rapport explicatif, w: *Actes et documents de la Neuvième session (1960), t. IV: Protection des mineurs*, 1961,p. 11.

which should be especially valued in other places where the child resides. As another element, the length of stay in a place is indicated, which is also of great importance for the competent authority (but it should not be decisive, for the simple reason that even an extended stay in a place, for example, a sanatorium or an educational institution, cannot be a habitual residence if the infant still has strong and severe ties to another place). In the end, the authors state that deciding on the place of residence of infants must be subordinated to enabling the maximum protection of the child's interests, a principle of utmost importance.[13]

3.3. Convention of 1 June 1970 on the recognition of divorces and legal separations

Habitual residence, in addition to nationality,[14] is a criteria of indirect jurisdiction in the Convention on the Recognition of Divorce and Legal Separations. It is a complex norm that allows for alternative solutions, and one cannot talk about the possible advantage of one of them, for example, the law of habitual residence over nationality. The Convention introduces a third criterion, domicile. In cases where the country of origin uses the concept of domicile as a criterion of jurisdiction in divorce and legal separation, the term 'habitual residence' from Article 2 is understood to include domicile. [15]

The Explanatory Report's authors make a significant assertion, stating that „habitual residence would have to be defined only about two questions of pure fact: living within the territory of the State in question and doing so more or less permanently. In the case of several residences in different countries, it will not always be possible to decide which is the habitual residence without going into the question of intent to see which of the residences is habitual or the most habitual of them."[16] This marks the first time that the element of intention has been attributed to habitual residence, a crucial development in this field.

3.4. Convention of 25 October 1980 on the civil aspects of international child abduction

Habitual residence in this Convention has multiple roles. First of all, it represents a criterion for choosing the applicable law, according to which it

[13] *Ibid*., 14.

[14] Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, art. 2.

[15] *Ibid*.,art. 3, para. 1.

[16] Bellet. P., Goldman. B., *Convention on the Recognition of the Divorces and Legal Separations - Draft Adopted By the Eleventh Session and Explanatory Report (English Translation)*, The Hague: Permanent Bureau of the Conference,1971, p.11.

will be assessed whether the right to care has been violated,[17]and then determines the jurisdiction of the Central Executive Authority to which the injured person or institution submits a request for the return of the child, as well as the competent court that should resolve the issue of custody rights. At the same time, the habitual residence, in most cases, also determines where the child should be returned. However, this is not strictly defined by the Convention, given that there may be cases where the person whose right to care has been violated by removal or detention does not live more in the country of the child's habitual residence.[18]

The Hague Convention on the Civil Legal Aspects of International Child Abduction does not contain any closer description of the habitual residence nor guidelines that would guide the courts when deciding on this, which was later characterised as the most significant omission of this Convention.[19] However, valid arguments in support of opposing opinions can be read in the literature.[20] The Explanatory Report attached to this Convention states that it is a "long-established" concept within the Hague Conference that refers to pure facts, distinguishing it from the domicile concept.[21] It does not contain anything that could help determine the child's habitual residence because it does not consider the concept of habitual residence as a disputed issue and, therefore, does not deal with it separately. However, it later turned out that it was not such a naive, implicit matter because the habitual residence „created complicated questions regarding interpretation for judges".[22] Thus,

[17] That is, whether it is a wrongful removal or retention.

[18] Pérez-Vera, E.,*Explanatory Report on the 1980 Hague Child Abduction Convention*, Netherlands: HCCH Publications, 1982, pp. 459-460.

[19] Silberman. L., *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*,IILJ Working Paper, 5,2005, p. 14.

[20] Gallagher, E., *A House Is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence*, NYUJ Int'l L. & Pol., 2014, p.498.The author believes that defining the Habitual place of residence in this Convention would perhaps make the job easier in some cases, but because of that, many children who fall under the so-called atypical cases remained unprotected. The refusal to define habitual residence has allowed the courts to do what is best for the child in each particular case by allowing them to consider all the relevant facts. In this way, courts create standards that best suit each legal system.

[21] Pérez-Vera. E. *op.cit.*, p.445. However, the idea that it is a well-known term has met with numerous criticisms. Among other things, it is stated that before the Hague Convention on the Civil Aspects of International Child Abduction, there were not many cases in which the courts had to determine habitual residence, and that the idea that the two words «habitual» and «residence» are quite sufficient to understand this concept, unsustainable. See about that.Schuz, R., *Disparity and the Quest for Uniformity in Implementing the Hague Abduction Convention*, J. Comp. L., 9, 3., 2014, pp. 6-7.

[22] Silberman, L. J., *Cooperative Efforts in Private International Law on Behalf of Children:*

there is no agreement whether, when determining the child's habitual residence, the emphasis should be on the child or whether the intentions of his parents/guardians should be taken into account, or primarily the intentions of the parents/guardians. Even within the same country, in the USA, there are three different views: according to the first, the emphasis is strictly on the child;[23] according to the second, only the intention of the parent/guardian is taken into account,[24] while the third approach is a combination of the previous two. [25]

These differences come to the fore, especially regarding family relocation, because the factual circumstances may indicate different types of relocation - permanent, temporary, for a certain period, etc. The problem is whether the habitual residence,which refers to the place where a person has his or her permanent home, is lost immediately after the move, if it is a move for an indefinite period, or if a certain period elapses. In addition, in the case of temporary relocations, it is unclear whether the previous habitual residence is retained or a new one is acquired. Finally, it is questionable whether it is possible to acquire habitual residence in the new country in case of relocation for a determined period. The answers depend, as a rule, on the interpretation of the intention as a subjective element, given that, a stay of six months can be characterised as a habitual residence, while a stay of three years in a new country does not have to be an obstacle to keeping the old one habitual residence.

Therefore, it is evident that the claim that the use of habitual residence is a "well-known establishment" is debatable because it opens the way for the courts to interpret this term as they see fit. The consequence is that the reason for refusing to return the child is most often stated as the child not having a habitual residence in the country that requested the return.However, despite these differences in interpretation, we firmly believe that it was the 1980 Convention, a pivotal legal instrument, that brought the concept of habitual residence to the forefront of legal science and practice.

3.5. Convention of 1 August 1989 on the law applicable to succession to the estates of deceased persons

The purpose of thisconvention is to standardise the rules on the governing law for the inheritance of the property of deceased persons. It does

The Hague Children's Conventions, Paris: Martinus Nijhoff., 2006, p. 346.

[23] Case Freidrich v. Freidrich, 983 F. 2d 1396, 125 ALR Fed. 703 (6th Cir. 1993), INCADAT HC/Udf 142.

[24] Case Ruiz v. Tenorio, 392 F.3d 1247 (11zh Cir. 2004), INCADAT HC/E/Usf 780.

[25] Case Feder v. Evans-Feder, 63 F.3d 217 (2d Cir. 1995), INCADAT HC/E/Usf 83.

not regulate the form of disposition, testamentary capacity, matters related to marital property, or property transfer in another way.

The Convention does not define the concept of habitual residence in more detail, but we find a more detailed explanation in the Explanatory Report. As stated, „the habitual residence is determined by a more equal weighting of a range of elements. Essentially, it is the place of belonging of the de cujus. A person can have only one habitual residence because it is the centre of his living, the place with which he is most closely associated in his pattern of life. His family and personal ties are essential to determining this place.The intention appears to play a more muted role as an element in habitual residence than it traditionally has done in domicile, and this is why lawyers who are accustomed to working with domicile as a connecting factor hesitate before accepting the term, habitual residence as an equivalent, but finally, accept it as a possible alternative. It is a regular physical presence, enduring for some time, and a stronger association than 'ordinary' or 'simple' residence, of which the de cujus may have had two or more. However, the manifest hopes and plans of the de cujus are also elements that may be legitimately considered by the person who would have to know which State is the habitual residence."[26] Therefore, to say that an individual has a habitual residence in a place, in addition to his regular presence, his circumstances, such as family, hopes and plans, are also important.

3.6. Convention of 29 May 1993 on protection of children and cooperation in respect of intercountry adoption

Habitual residence in this Convention is one of the conditions for applying the Convention. The Convention does not define the concept of habitual residence, nor does it determine how it is determined. However, over time, several problems arose in connection with habitual residence, precisely within the scope of the Convention, such as determining the habitual residence of workers on the so-called temporary work abroad who appear in the role of adoptive parents. The question of the habitual residence of persons whose centre of life is in one country but living in a neighbouring country and the question of adoption by persons who changed their habitual residence during the adoption procedure is open. In addition to the questions mentioned above regarding the habitual residence of potential adopters, two doubts arose regarding the habitual residence of the child, i.e. adoptee. The first concerns the habitual residence of a child who was born in a coun-

[26] Waters. D. W. M., *Explanatory Report on the 1989 Hague Succession Convention. Proceedings of the Sixteenth Session (1988), tome II – Succession to estates*, applicable law,The Hague: Permanent Bureau of the Conference, 1988, p. 549.

try shortly after his mother arrived in that country. It is debatable whether this is an attempt to abuse the mother and the child, in the sense of deliberately moving them immediately before giving birth, to a member state so that the Convention can be applied. It is a matter of selling the child or some other (illegal) behaviour that could cause harm to the child. Another doubt relates to the situation when a child is adopted who temporarily lives in the country of habitual residence of the potential adopters. The main problem is whether it is a domestic or international adoption, which will directly depend on whether the child has kept his former habitual residence or acquired a new one in the country where he temporarily but currently resides, which is at the same time the country of habitual residenceof potential adopters. For this reason, specific rules for determining habitual residence to apply this Convention have crystallised over time:

- no single factor is determinative;
- the various factors must be weighed and, depending on the specific circumstances;
- each factor will not always be given the same relative weight in the determination of habitual residence and
- greater caution is necessary when the time spent in the country is relatively short.[27]

4. The third period of The Hague Conference - from the European Union's accession to the present day (2007–)

The habitual residence appears in three instruments of this period:the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, and the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

Habitual residence is the criterion of indirect jurisdiction in the first-mentioned instrument. The Convention provides a "partial"[28] definition of habitual residence. In Article 9, it is clarified that the request for recognition

[27] Note on Habitual Residence and the Scope of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Retrieved May 21, 2024, from https://assets.hcch.net/docs/12255707-4d23-4f90-a819-5e759d0d7245.pdf.

[28] Borrás, A., & Degeling, J., *Convention of 23 november 2007 on the international recovery of child support and other forms of family maintenance. Explanatory report*, URL: https://assets.hcch. net/upload/expl38. p(дата звернення: 31.01. 2021), 2009, p.73.

of a decision is to be submitted through the central authority of the contracting state where the applicant resides to the central authority of the state of recognition.This provision excludes „mere presence" from the definition of residence. Therefore, „mere presence" is not considered residence because residence implies a stronger connection between the individual and the territory. In this context, habitual residence is seen as a more significant link than residence, which can sometimes be to the detriment of the Convention's purpose.[29]

The Protocol on the Law Applicable to Maintenance Obligations confirms that habitual residence is a more stable concept than residence. The mere presence of a temporary nature is insufficient to determine the governing law for maintenance obligations.[30] The length of stay in a particular place is emphasised, so a stay, e.g., for education or some temporary activity, is not considered a habitual residence.[31]

Regarding the third-mentioned instrument, in which habitual residence is one of the criteria for indirect jurisdiction, it is interesting that its third article, which contains definitions of specific terms, states the following: „An entity or person other than a natural person shall be considered to be habitually resident in the State – (a) where it has its statutory seat; (b) under the law of which it was incorporated or formed; (c) where it has its central administration; or (d) where it has its principal place of business." (article 3, paragraph 2). The criteria based on which the subject's habitual residence is determined are alternatively set so that it can be any of these places. The Explanatory Report states that the criteria are not set hierarchically, nor are they mutually exclusive, which means that if the subject has, by Article 3, a habitual residence in several countries at the same time, any of those places can be considered his habitual residence, for application of this Convention.[32]

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[29] The US delegation suggested that residence be defined to include habitual residence but exclude mere presence. This would facilitate the recognition and enforcement of maintenance decisions. About that see: Proposal by delegation of the United States of America, regarding Chapter I (Scope and definitions) of Preliminary Document No. 16. Retrieved May 21, 2024, from https://assets.hcch.net/upload/wop/comments38_us.pdf.

[30] Bonomi. A., *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations: Explanatory Report*, The Hague: The Permanent Bureau, 2013, p. 49.

[31] *Ibid.*

[32] Garcimartín, F., & Saumier, G.,*Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matter*, 2020, p. 77.

5. Conclusion

Much more space would be needed to at least approximate the contribution of the Hague Conference to the development of habitual residence as a point of attachment. However, due to the limitations regarding the scope of the work, we were forced to mention only the most significant conventions, which, in a way, represented a kind of guide to the interpretation of the Habitual residence. The very fact that habitual residence is used in over 30 instruments of the Hague Conference, that today it dominates the international private law of the European Union, as well as that it represents an unavoidable binding point in numerous national systems of private international law, speaks in favour of the fact that it is genuinely a masterpiece The Hague Conference. As far back as 1893, it predicted that the notions of domicile and citizenship would be overcome in the modern world and far from representing the closest connection between one person and one territory.

We will not find a definition of this term in any of the conventions. Namely, the Hague Conference resisted the challenge of defining it over the years, although today, such definitions can be found in domestic codifications. It may seem that the opportunity to adopt a unique definition of this often-used criterion of applicable law and judicial jurisdiction was missed. However, practical experience demonstrates that doubts related to the determination of habitual residence can be overcome, and the lack of a formal definition does not negate its significance as a point of attachment.

Summary

Habitual residence is a concept created by the Hague Conference on Private International Law. To reconcile two polarised legal systems, one of which preferred nationality as a connecting factor and the other, which used domicile, the Hague Conference offered a third, neutral solution: habitual residence. Guided by the old Latin maxim that every definition is dangerous – omnis definitio periculose est, the Conference did not define habitual residence but left its interpretation to judicial practice. Over time, habitual residence has become a necessary criterion for determining the applicable law and international jurisdiction in most of its conventions.

Today, habitual residence is the decisive connecting factor in the PIL of the EU and the national PIL systems of an increasing number of states. Perhaps the most significant thing is that in recent national codifications of PIL, uniform solutions have been offered regarding the status, family, inheritance and obligation law. All this is thanks to the habitual residence. We can

talk about the beginning of the creation of unified Private International Law, made by the states through their national codifications. In the outcome, this could result in establishing "International Private International Law", with the remaining minor differences of a national character. So, it would not be wrong to call the habitual residence a kind of masterpiece of the Hague Conference.

On the other, the unequal interpretation of habitual residence represented one of the biggest challenges for the Hague Conference. There seem to have been no problems until 1983, when the Child Abduction Convention entered into force. It became apparent that specific dilemmas arose regarding determining a person's habitual residence. Also, some other questions were raised, starting with its constituent elements, methods of acquisition, and loss, through to whether it is possible for a person to have no habitual residence at all or even to have more than one habitual residence.

In addition to the general concept of habitual residence, the Hague Conference also created its particular forms: habitual residence of a legal entity, habitual residence of a child and habitual residence of the de cujus. The paper describes the development of habitual residence through the three periods of the Hague Conference: the first – from the foundation to the adoption of the Statute (1893-1951); the second one – from the adoption of the Statute to the accession of the European Union (1951-2007) and the third one – from the accession of the European Union until the present day (2007-).

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INTERNATIONAL PROTECTION OF ADULTS: FROM CATERPILLAR TO BUTTERFLY?!

Abstract: *Within the last few decades age pyramid has (undoubtedly) turned upside down. Instead of becoming younger society is growing older. Intertwined with increasing globalization and mobility, ageing society requires significant transformations in almost all sectors of society, particularly with regard to social protection. Due to freedom of movement of persons within the European Union, but also globally, international protection of vulnerable adults is certainly gaining its momentum. All the more so because currently, neither at the EU level, nor at the global level, there is a generally or at least widely accepted private international law regime for the international protection of vulnerable adults. The Hague Convention on International protection of Adults, which entered into force in 2009, is currently in force in only 15 states (out of which 12 Member States). Since it is impossible to ascertain exact reasons for the lack of ratifications, and having in mind several gaps which need to be mitigated in order to enhance legal certainty, one of the possible steps forward is to enact EU legislation to improve further the protection of vulnerable adults among member states, based od the HAPC. On that track, Proposal was presented in May 2023. The aim of this article is to establish whether this Proposal delivers what is promisses, i.e. complete, simplified and more efficient international protection of vulnerable adults.*

Keywords: *international protection of adults, Hague 2000 Convention, Proposal for Regulation, human rights.*

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1. Introduction

Within the last few decades society is growing older. Consequently, there are more and more adults in need of protection. Based on limited data available, in between 2015 and 2020 there was an overall increase of 18% in the number of protective measures adopted across eight Member States.[1] „At the same time, NGO's and medical/social care organizations have perceived and increase in the number of persons in need of protective measures and an increase in their cross-border mobility."[2] Based on over 70% of the legal practitioner respondents, difficulties they face with regard to cross-border protection of adults refer to: language barriers and uncertainty regarding the validity of legal documents, legal uncertainty and varying rights from one Member State to another, difficulties in identifying which country has jurisdiction, lengthy legal proceedings and the non-recognition of foreign protective measures, (non)availability of legal aid to meet the costs of legal representation abroad, etc.[3] All this difficulties directly impact legal certainty and diminish the advantages of international mobility of adults.[4]

Although there is a *lacuna* in addressing the problems of adults (especially elderly) as a group, it does not mean that they are not protected at all. Since the protection of vulnerable persons is regarded today as a human-rights concern,[5] in 2006 United Nations introduced the Convention on the Rights of Persons with Disabilities (CRPD),[6] which is ratified by the EU and all of its Member States.[7]Its purpose is to „promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all

[1] Adriaenssens, L., Borrett, C., Fialon, S., Franzina, P., Rass-Masson, N., Sumner, I., *Study on the Cross-Border Legal Protection of Vulnerable Adults in the EU. Final Report*, European Commission, 2021., p. 12.

[2] *Ibidem*.

[3] *Ibid*., p. 13-14.

[4] See: European Law Institute, *The Protection of Adults in International Situations*. *Report of the European Law Institute*, 2020, pp. 9-12.Retrieved January 12, 2024, from https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Protection_of_Adults_in_International_Situations.pdf .

[5] Franzina, P., Long, J., *The Protection of Vulnerable Adults in EU Member States. The added value of EU action in the light of The Hague Adults Convention*, Protection of Vulnerable Adults, European Added Value Assesment (ed. C. Salm), European Added Value Unit, 2016, p. 124.

[6] The United Nations Convention on the Rights of Persons with Disabilities, Treaty Series 2515 (2006):3.

[7] See: MacKay, D., *The United Nations Convention on the Rights of Persons with Disabilities*, Syracuse Journal of International Law and Commerce, 34, 2007, pp. 323-331.

persons with disabilities, and to promote respect for their inherent dignity".[8] However, only some of the EU Member States adapted their substantial law accordingly.

Same is happening with the only private international law instrument for the protection of the vulnerable adults–Hague Convention on the International Protection of Adults (CIPA),[9] which was designated to protect vulnerable adults when in cross-border situations, which has been ratified by a very few states (among them only 12 member states). Instead, majority of states, including a number of EU Member States still rely on their own legal framework, with differing tools for the protection of vulnerable adults.

Due to the small number of ratifications, limited practical effects and the paradigm shift from traditional paternalistic approach to supported decision making, Commission proposed the adoption of new legislation[10] with the aim of improving the operation of CIPA between Member States as well as harmonizing the CIPA's solutions with the obligations under the CRPD.

This article consists of two parts. The first part will include an analysis of the CIPA's framework, while the other will be focused on the Commission's proposal. The hypothesis of this article is that even though the Commission's Proposal brings many improvements, and certainly unveils „a butterfly" for vulnerable adults, without systematic protection of all elderly adults as a group we are only half way through.

2. From Caterpillar ...

So, what does the CIPA offer? According to the Preamble of the HAPC, respect for the „dignity" and „autonomy" of vulnerable adults „are to be primary considerations". Thus, the preservation and enhancement of existing freedoms and capacity of the vulnerable adult is a guiding principle of the whole text. It provides for „the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests".[11] As any other private international law instrument, it determines the state whose authorities have

[8] Article 1. of the CRPD.

[9] Convention of 13 January 2000 on the International Protection of Adults. Retrieved February 21, 2024, from https://assets.hcch.net/docs/c2b94b6b-c54e-4886-ae9f-c5bbef93b8f3.pdf .

[10] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults, COM(2023) 280 final, Brussels, 2 June 2023.

[11] Art. 1. of the CIPA.

jurisdiction to take measures directed to the protection of the persons or property of the adult, which law is to be applied by such authorities in exercising their jurisdiction and the conditions for recognition and enforcement of such measures of protection in all contracting states.[12] Finally, it establishes cooperation between authorities of the contracting states in order to facilitate operation of the Convention.

Dealing with cross-border cases, CIPA shows a great potential of upholding the interests of incapacitated adults across the globe.[13] However, due to the modest number of ratifications it remains more of a potential than reality.[14] Thus, despite the fact that different CIPA's provisons leave room for the interaction between Contracting and Non-member States,[15]the picture remains globally unsatisfactory.[16]

Since the aim of this article is to establish whether the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults[17]delivers what is promisses (i.e. complete, simplified and more efficient international protection of vulnerable adults), non-disputable content of the Convention will be left outand the focus will be put on the challenges in application of the Convention and the weaknesses of the Convention.

2.1. Challenges in the application of the Convention

The first challenge relates to para. 1. of art. 1 which clearly, although not expressly refers to vulnerability. Instead, it speaks of(permanant or temporary)[18]„impairment or insufficiency of personal faculties" of the adult

[12] See: Clive, E., The New Hague Convention on the Protection of Adults, Yearbook of Private International Law, 2, 2000, pp. 1-23, Frimston, R. Ruck Keene, A., van Overdijk, C., Ward, A.D., *The International protection of Adults*, Oxford University Press, 2015.

[13] Bumbaca, V., *The Hague Convention on the protection of adults – plea for and practice of an „adult" approach*, Yearbook of Private International Law (eds. A. Bonomi, I. Pretelli, G.P. Romano), Lausanne: Verlag Dr.Otto Schmidt and Swiss Institute of Comparative Law, 23, 2021/2022, p. 365.

[14] Long J., *Rethinking Vulnerable Adults' Protection in the light of the 2000 Hague Convention*, International Journal of Law, Policy and Family, 27 (1), 2013, p. 52.

[15] Art. 15 paras. 1-2, art. 18 in relation with art. 15 and art. 19 in relation to art. 13 para. 2.

[16] Frimston, R., *The 2000 Adult Protection Convention – sleeping beauty or too complex to implement?*, The Elgar Companion to the Hague Conference on private International Law (eds. T. John, R. Gulati, B. Köhler), Edward Elgar Publishing, 2020, p. 226.

[17] *Op. cit*., note 10.

[18] Lagarde, P., *Report of the Special Commission*, Proceedings of the Eighteenth Session 30

and, consequently „not beeing in a position to protect (his or her) interest". According to the Explanatory report, „the adults whom the Convention is meant to protect are the physically or mentally incapacitated,[19] who are suffering from an „insufficiency" of their personal faculties, as well as persons usually elderly, suffering from an impairment of the same faculties, in particular suffering from Alzheimer's disease".[20] Emphasis on „personal faculties" clearly shows that the intention of the legislator was to exclude protection in cases caused by external factors which require public/police measures of protection. However, from the wording of the Convention, it is not clear does it include cases which (in certain jurisdictions) in itself may be a cause of legal incapacity,like prodigalityor drug addiction, gambling addiction, social isolation and illiteracy and other forms of inability to protect it's own interests,[21]which do not necessarilyimply medical condition nor coincide with incapacitation. According to Lagarde Report, „the impairment or insufficiency of the adult's faculties should arise from a „disease", thus all this other cases are excluded.[22]

Second challenge is the question of „capacity". Although the Convention avoids using the term „capacity", in many countries the imposition of protective measures is conditional upon incapacitation. Judging by the available protection measures (and the fact that not all of them are conditioned by incapacitation),[23] there is no symmetry between the protection of the vulnerable adult and his or her incapacitation.[24] In other words, the protection of vulnerable adult does not necessarily imply the limitation of his or her legal capacity.[25] However, it is only a part of explanation why the legislator avoided use of the term „adult with incapacity" or „incapacitated adult" and used the factual description instead. The other part is the fact that the

September to 19 October 1996 (ed. The Permanent Bureau of the HccH), The Hague: SDU, 2, 1998, para. 9.

[19] Although there were opinions that the Convention should only cover „those who lack decision-making capacity". Such opinions are grounded in common law, where protective measures are available only for those who lack capacity. Lagarde, P., Explanatory Report for the Convention on the International Protection of Adults, The Hague: Hague Conference on Private International Law, 2017, p. 44.

[20] Lagarde (2017), *op. cit*., p. 44.

[21] Long (2013), *op. cit*., pp. 63-64.

[22] Lagarde (1998), *op. cit*., para. 9.

[23] See art. 3 of the CIPA.

[24] Long (2013), *op. cit*., p. 64, Salm, C., *Protection of Vulnerable Adults*, European Added Value Assesment, European Added Value Unit, 2016, p. 50.

[25] Long (2013), *op. cit*., p. 64.

term „capacity" may have different meaning. It may imply legal capacity (the ability to bear and exercise rights equally with other adults) but also mental capacity (decision-making skills of the individual in question).[26] Given that many legal systems have moved from status-based approach to functional approach to capacity, even in cases in which capacity may be affected person can still remain full legal personality in other areas.[27] Thus, person will be deprived of the legal capacity in respect of certain decisions while in all the other areas will be treated as legally capable.

Next challenge is use of the syntagma „interests of the adult". This fraze is used scarcely in the Convention,[28] although, according to the text of the preamble „affirming the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations". It is obvious that, unlike the 1996 Hague Convention,[29] CIPA has not opted for the „best interests of the adult", since „according to the Drafting Committee, the reference to the „best" interests of the vulnerable adult did „not add much of substance to the text" and „could be awkward in the event of the conflict between the interests which are equally respectable and best".[30] Some argued that it is because in case of children the interests of children should prevail over the competing interests of their parents, while there is no such competition in case of vulnerable adults.[31] And yet, the principle of the „best interests" of the vulnerable adult is implemented in many national laws.[32] In any case, when deciding on the interests of the adult the decision-maker is expected to think what is the best cause of action for that particular adult (a patient-centered

[26] Frimston (2020), *op. cit*., p. 227. Also: UN Committee on Rights of Persons with Disabilities, General Comment No. 1 - Article 12: Equal recognition before the law, 2014.

[27] Frimston (2020), *op. cit*., p. 228.

[28] In its preamble, art. 1 para. 1, 7 para. 1, art. 8 para. 1 and art. 15 para. 1.

[29] Convention on 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental responsibility and Measures for the Protection of Children. Retrieved February 21, 2024, from https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf .

[30] Long (2013), *op. cit*., p. 58.

[31] *Ibid*., p. 59.

[32] In some of them (e.g. England and Wales) there is even a statutory checklist for the determination of the best interests of the adult. See: Joyce, T., *Best Interests. Guidance on determining the best interests of adultswho lack capacity to make a decision (or decisions) for themselves (England and Wales)*, Leicester: The British Psychological Society, 2007. Dunn, M.C., Clare, I.C.H., Holland, A.J., Gunn, M.J., *Constructing and reconstructing „best interests": An interpretative examination of substitute decision-making under the Mental Capacity Act 2005*, Journal of Social and Welfare Family Law, 29 (2), 2007. Retrieved January 12, 2024, from https://doi:10.1080/09649060701666598 .

approach), although the decision-making in different legal systems may take different paths. If the determination is based on the „best interests of the adult", than it is more probable that the inspiration is taken from the determination of the best interests of the child,[33] in which case the determination includes „both the current and future interests of the adult, weighing them up and deciding which course of action is, on balance, the best course of action for that particular adult".[34] Such analysis relies predominantly on objective factors. If the determination is based on substituted decision-making,[35] than the decision-maker, basically, „tries to make a choice that the person themselves would have made, if they had the capacity to do so".[36] Thus, the subjective factors prevail. However, in most cases it is very difficult to draw a clear line between the two.[37]

One of the often-raised challenges is the determination of habitual residence of the adult. Despite being a part of the Hague system since its introduction as a subsidiary criterion, in 1905,[38] it still poses problems. On one side, „it is attractive exactly due to the fact that it is not a rigid, legal concept, but instead a flexible factual concept that provides for flexibility and thus caters for every situation".[39] On the other side, „its content still causes doubts and tends to vary depending on the situation and factual circumstances at hand."[40]Some are worried that the concept might not be entirely appropriate for the incapacitated adults (e.g. coma patient), since it is not clear whether the „habit" in habitual implies some awareness by the person of his surroundings, or whether the „habit" may be on the part of other persons who regu-

[33] See: Medić, I., *Najbolji interes djeteta u europskim prekograničnim predmetima*, Prekogranično kretanje djece u Europskoj uniji (ed. M. Župan), Osijek: Pravni fakultet, 2019, pp. 9-60.

[34] Joyce (2007), *op. cit.*, p. 7.

[35] *Ibid*., p. 7 - „The use of substituted judgment as a framework for decision-making could, potentially, also lead to abuse. It makes it possible for a decision-maker to state that the wishes or preferences they are expressing are those of the person who lacks capacity, whereas they might, in fact, be the views of the decision-maker instead."

[36] *Ibid*., p. 7.

[37] Birchley, G., *The theoretisation of „best interests" in bioethical accounts of decision-making*, BMC Medical Ethics, 22 (68), 2021. RetrievedJanuary 12, 2024, from https://doi.org/10.1186/s12910-021-00636-0.

[38] Long (2013), *op. cit.*, p. 65.

[39] Curry-Sumner, I., *Vulnerable Adults in Europe. European added value of an EU legal instrument on the protection of vulnerable adults*, Protection of Vulnerable Adults, European Added Value Assesment (ed. C. Salm), European Added Value Unit, 2016, p. 63.

[40] Limante, A., *Establishing habitual residence of adults under the Brussels II a regulation: best practices from national case-law*, Journal of Private International Law, 14 (1), 2018, p. 161.

larly see him lying in one place.[41]Despite some proposals for a definition in a future European instrument,[42] it is not likely to happen. Although, so far, the European Court of Justice (ECJ) has been focused mainly on the clarification of the possible criteria for the determination of the habitual residence of the child,[43] there are more and more frequent clarifying interventions regarding the notion of habitual residence of the adult.[44] And these clarifications will have to suffice.[45] According to the recent judgements, nature of the habitual residence remains „functional", and as such „allows the valorisation of all the factual and of intentional elements characterising a complex situation in order to adapt such a notion to the specific legal context and scope of the act in which it is inserted".[46] Implementing a quantitative or qualitative definition to the concept in the Convention would challenge its interpretation in the various other Conventions (and Regulations)[47] in which it is used.[48] Also, practice shows that the number of difficult cases is rather limited and that courts and other authorities are becoming more familiar with the concept.[49]

Ex lege power of representationis not explicitly adressed, since it is not a measure of protection[50] and it hasn't been granted by the adult. However,

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[41] Ruck Keene, A., *Part II, The cross-border protection of adults: Hague 35*, The International Protection of Adults (eds. R. Frimston, A. Ruck Keene, C. van Overdijk, A.D. Ward), Oxford University Press, 2015, p. 111-118.

[42] *Ibid*.

[43] C-523/07 *Applicant A*, ECLI:EU:C:2009:225; C-497/10 PPU *Mercredi v. Chaffe*, ECLI:EU:C:2010:829; C-376/14 PPU *C v. M*, ECLI:EU:C:2014:2268, C-499/15 *W and V v. X*, ECLI:EU:C:2017:118, C-111/17 PPU *OL v. PQ*, ECLI:EU:C:2017:436, C-512/17 *HR*, ECLI:EU:C:2018:513; C-393/18 PPU *UD v. XB*, ECLI:EU:C:2018:835.

[44] Case 452/93P *Pedro Magdalena Fernández v. Commission of the European Communities*, ECLI:EU:C:1994:332, C-90/97 *Swaddling v. Adjudication Officer*, ECLI:EU:C:1999:96, C-168/08 *Laszlo Hadadi v. Csilla Marta Mesko*, ECLI:EU:C:2009:474, C-289/20*IB v. FA*, ECLI:EU:C:2021:561, C-462/22*BM v. LO*, ECLI:EU:C:2023:553.

[45] For a Guidelines, see: Schuz, R., *Habitual Residence: Review of Developments and Proposed Guidelines*, Laws, 12 (62). Retrieved January 12, 2024, from https://doi.org/10.3390/laws12040062. Boiché, A., *A Spouse Can Only Have One Habitual Residence for the Application of Article 3 Brussels II-bis*, European Forum, 6 (3), 2021, pp. 1339-1343.

[46] Ricci, C., *Habitual Residence as a Ground of Jurisdiction in Matrimonial Disputes Connected with the EU: Challenges and Potential*, Civil Procedure Review, 11 (1), 2020, 175.

[47] Added by the author.

[48] Curry-Sumner (2016), *op. cit*., p. 63 and Lagarde (2017), *op. cit*., p. 56.

[49] Franzina, Long (2016), *op. cit*., p. 159.

[50] Surveys show that protection by operation of law is available only in seven Member States and in three of these States it covers more or less the same scope as other types of representation. See: Adriaenssen*et al.* (2021), *op. cit*. p. 11.

it does not mean that it left out of the scope of the Convention and, consequently, Proposal for Regulation.[51] Competent authorities of the Contracting State may, in cooperation between the authorities of Contracting Parties, give effect to *ex lege* representation in accordance with their own law.[52]

2.2. Weaknesses of the Convention

Based on the case law of the Contracting States, several weaknesses of the HACP have been identified. In this text, they will be addressed in line with their appearance in the Convention.

The first (and maybe the most obvious) weakness is limited geographical scope. With regard to jurisdiction, it means that the Convention applies only to adults which are habitually resident at the territory of Contracting State. In cases where the adult concerned does not have habitual residence in a Member State, it leaves some room for the application of national rules on international jurisdiction.[53] Although such approach is common for the Hague Convention, it is not in line with the recent EU trends.[54] With regard to recognition and enforcement, both are based on the principle of reciprocity, providing for recognition and enforcement of measures taken in Contracting States only. It means that prior to the ratification of the Convention by all Member States two tracks of recognition and enforcement within the EU will remain.

Next weakness is related to jurisdiction. Convention attributes primary jurisdiction (to take protective measures) to „the judicial or administrative authorities of the Contracting State of the habitual residence of the adult",[55] which jurisdiction changes in case of a change of the adult's habitual residence.[56] Thus, the shift of jurisdiction is immediate, which may cause difficulties in some cases, for example, in case of an adult who retains a good degree of autonomy which allows him to move freely. It may happen that the adult

[51] More about this topic see in: European Association of Private International Law (EAPIL), *Position paper in response to the European Commission's public consultation on an EU-wide protection for vulnerable adults*, 2022. Retrieved March 5, 2024, from https://eapil.org/wp-content/uploads/2022/04/Position-Paper-29.03.22.pdf .

[52] Conclusions and Reccomendations of the Special Commission (SC) on the practical operation of the Convention of 13 January 2000 on the International Protection of Adults, 15 November 2022, p. 5. Retrieved January 12, 2024, from https://assets.hcch.net/docs/06db03d0-812c-42fb-b76d-4e6e05a91b3b.pdf .

[53] Curry-Sumner (2016), *op. cit.*, p. 60.

[54] *Ibid.*, p. 59-60.

[55] Art. 5 para. 1 of the CIPA.

[56] Art. 5 para. 2 of the CIPA.

exercised his free movement rights without the knowledge of his guardian. According to art. 12 of the CIPA „measures taken in application of articles 5 to 9 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures". Consequently, if (due to change of circumstances) modification of the protection measure is needed, the lack of rules providing for the continuing jurisdiction of the authorities of the state of former habitual residence of the adult leaves the guardian with one option only - to seek protection of the adult from the authorities of the Contracting State of the adult's new habitual residence. Since they will need some time to make an informed decision, this may result in a temporary gap in the protection of the adult.

Also, although the Preamble emphasizes autonomy of the adult as a primary consideration, such claim it is rather difficult to accepting relation to jurisdiction. According to art. 8 para. 2(d) of the Convention, adult is given the possibility to choose (in writting) the State whose authorities will take measures directed at his protection. However, „the authorities chosen by the adult to take protective measures in the event of his or her incapacity cannot claim jurisdiction merely on the ground of that choice".[57] They may acquire jurisdiction only upon a request of the state having jurisdiction for the merits of the case or on an application by the authority of another Contracting State, which is conditioned by their assessment of the interests of the adult.[58] In relation to art. 16 of the Convention, the absence of any possibility for an adult to choose in advance the state whose authorities should have jurisdiction over his or her protection leads to the divergence between *forum* and *ius* in case of granted powers of representation. It may be mitigated by reference to para. 2 of art. 15 but it is dependent on the discretion of the competent authority, thus running counter predictability requirement.

Next weakness is the enforcement of foreign protective measures. It may be difficult due to the weakness for the provision of evidence abroad of the powers granted to a representative of a vulnerable adult. According to art. 38, CIPA does establish a certificate designed to prove representative's capacity but practice shows that they are rarely issued.[59] Also, contrary to contemporary trends which imply automatic enforceability and procedural rules for enforcement, according to art. 25 of the CIPA measures taken and

[57] Franzina, Long (2016), *op. cit.*, p. 161.

[58] Art. 8. par. 1. of the CIPA.

[59] Franzina, Long (2016), *op. cit.*, p. 161.

enforceable in one Contracting State will[60] be declared enforceable or registered for the purpose of enforcement in other Contracting State, according to the procedure provided in that State. National procedures vary, not only in content but also in length, and may result in a temporary gap in the protection of the adult.

Final identified weakness is poor cooperation and communication among the authorities of the Contracting States.[61] According to the provisions of Chapter V of the CIPA, cooperation is channeled mostly through the Central authorities in the Contracting States, in a very light manner.[62] Direct communication is not envisaged although, in the meantime, it has become a standard in family matters,[63] which protection of vulnerable adults *de facto* often turns out to be.[64] In order to make it more efficient, direct judicial communication should be made a standard with regard to the proceedings, while indirect communication *via* Central Authorities should be used as assistance.

Last but not least, absence of a supranational court which would be authorized to interpret the Hague conventions leads to differing results in interpretation of CIPA provisions across the Contracting States and, consequently, decrease in legal certainty and deterring from free movement.

3. ... to Butterfly?!

Since the cross-border mobility of adults (including those who require support with decision-making) is growing by the day, and the EU cannot itself become a party to the CIPA (Arts. 53 and 54 make clear that the convention is only open to states),[65] one of the possible steps forward was to

[60] Upon request by an interested party.

[61] Franzina,Long (2016), *op. cit*., p. 148-157.

[62] Art. 32 para. 1 of the CIPA: „When a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the adulst so requires, may request any authority of another Contrecting State which has information relevant to the protection of the adult to communicate such information."

[63] See: Hague Conference on Private International Law, Direct Judicial Communication, The Judges newsletter 15, 2009, p. 8. Kreeger, J. L., *The International Hague Judicial network – A Progressing Work*, Family Law Quarterly, 48 (2), 2014, pp. 221-234. Lortie, P., *Direct Judicial Communications and the International Hague Network of Judges under the Hague 1980 Child Abduction Convention*, Private International Law in the Jurisprudence of European Courts – Family at Focus (ed.M. Župan), Osijek: Faculty of Law, 2015, pp. 135-157.

[64] Either through ex-lege representation or powers of representation granted to the family member.

[65] Art. 53 para. 1 – „The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law on 2 October 1999." Art. 54.

use its internal competencies (based on Art. 81 para.2 of the TFEU)[66] and to enact the EU legislation to improve further the protection of vulnerable adults among Member States, based on the CIPA. Since the Convention does not prevent Contracting States from furthering their cooperation,[67] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults was presented in May 2023.[68]

3.1. Added value of the Proposal for a Regulation ... in matters relating to the protection of adults

So, in a nutshell, what this Proposal brings? As it has been explained in the Memorandum attached to the Proposal, „the added value of the proposed Regulation is simplification and modernization of the rules included in the Convention for the EU's circumstances and the strengthening of cooperation among Member States in the area of the protection of adults".[69] The Proposal aims to ensure consistency with the existing policy provisions in this area, as well as with other Union policies. Therefore, proposed Regula-

para. 1. – „Any other State may accede the Convention ...".

[66] Art. 81 para. 2 TFEU – „For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between member States of judgments and of decisions in extrajudicial cases;
(b) the cross-border service of judicial and extrajudicial documents;
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
(d) cooperation in taking of evidence;
(e) effective acces to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
(g) the development of alternative methods of dispute settlement
(h) support for the training of the judiciary and judicial staff."

[67] Art. 49 of the CIPA – para. (2) „This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of adults habitually resident in any of the State parties to such agreements, provisions on matters governed by this Convention."; para. (3) „Agreements to be concluded by one or more Contracting States on matters within the scope ofthis Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.".

[68] *Op. cit.*, note 10.

[69] COM(2023) 280 final, 31. 5. 2023., p. 2.

tion incorporates some rules from the CIPA and makes them directly applicable in relations between Member States. According to recital (10) of the Proposal, „the interpretation of the rules laid down in this Regulation should be guided by its objectives that are to enhance the protection of fundamental rights of adults in cross-border situations, including their right to autonomy, access to justice, right to property, right to be heard, right to free movement and equality". In other words, Proposal is to be interpreted in line with the European Convention on Human Rights (ECHR)[70] and, with regard to persons with disabilities, in line with the CRPD.

With regard to jurisdictional rules, Proposal relies on CIPA's rules on jurisdiction and the same rules apply to a case involving Member States and third countries that are Contracting Parties to the Convention. On top of that, Proposal adds a new jurisdictional ground. It allows for the choice of jurisdiction made by the adult,[71] without the need for any further proceedings. However, exercise of such jurisdiction is made conditional upon three cumulative conditions: the state of mind of the adult at the time of the choice, interests of the adult and the authorities of the adult's habitual residence.[72] Such solution leaves some room for the assessment whether a jurisdiction of a chosen court, at the time the court is seized, is still in the best interests of the adult.[73] It may be particularly useful if there is a big time-gap between the choice and seizing of the court and the situation of the adult is significantly altered. Although it may be inferred from para. 2 of art. 6, Proposal explicitly states that the jurisdiction of a chosen court is not exclusive, thus, it does not prevent authorities having jurisdiction under the CIPA to exercise

[70] Convention for the protection of Human Rights and Fundamental Freedoms (1950). Retrieved March 10, 2024, from https://www.echr.col.int/documents/d/echr/convention_ENG .

[71] Art. 6 of the Proposal. See: European Association of Private International Law (EAPIL), *Position paper in response to the European Commission's public consultation on an EU-wide protection for vulnerable adults*, 2022. Retrieved March 5, 2024, from https://eapil.org/wp-content/uploads/2022/04/Position-Paper-29.03.22.pdf .

[72] Art. 6. para. 1 – „ …the authorities of a Member State other than the Member State in which the adult is habitually resident shall have jurisdiction where all of the following conditions are met:

(a) the adult chose the authorities of that member State, when he or she was still in a position to protect his or her interests;
(b) that the exercise of jurisdiction is in the interest of the adult; and
(a) that the authorities of the Member State having jurisidiction under the jurisdictional grounds set in CIPA (arts. 5 to 8) have not exercised their jurisdiction.

[73] Recital (20) of the Proposal.

their jurisdiction.[74] Thus, where the authorities of the habitual residence of the adult have already exercised their jurisdiction, the authorities designated through the choice of the adult should abstain from exercising their jurisdiction. Finally, since the Regulation complements CIPA, „the mechanisms established by the Convention giving priority to certain certain grounds of jurisdiction, limiting the effects of certain measures, and setting up exchange of information between the authorities of the habitual residence and the authorities with subsidiary or concurrent jurisdiction, should therefore also apply in the EU to authorities exercising their jurisdiction according to the choice made by the adult".[75]

With regard to the applicable law, Proposal fully incorporates the rules laid down by the CIPA. Art. 8 of the Proposal explicitly refers to the whole Chapter III of the Convention. However, as in the CIPA, there are no specific rules for ex-lege powers of representation. Also, advance medical directives which are not combined with the power of representation are neither covered by the CIPA nor by the Proposal.

With regard to recognition and enforcement, the recognition of measures taken in other Member States is also governed by the Proposal. It allows for simplified enforcement procedures within the EU, in a way that it abolishes the declaration of enforceability that is still required under the CIPA. List of grounds for refusing the recognition of a measure is exhaustive. Focal point, here as well, is „interest of the adult" assessed through the human rights-based approach. When assessing whether a measure taken in another Member State is manifestly contrary to public policy, the authorities of a Member State where recognition is sought must take into account arts. 3, 9, 29 and 19 of the CRPD.[76] Also, the adult must have been given the „effective and genuine" opportunity to express his or her views, except in cases of urgency or absolute inability to express his or her views.[77] Finally, as in parental responsibility cases,[78] later measure will prevail.

In line with other recent Regulations, Proposal also includes authentic

[74] Art. 7 of the Proposal.

[75] Recital (21) of the Proposal.

[76] Recital (15) of the Proposal.

[77] Recital (27) of the Proposal.

[78] See Art. 39 para 1(e) of the Council Regulation 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in mattrimonial matters and the matters of parental responisibility, and on international child abduction (recast), OJ L 178, 2. 7. 2019.

instruments[79] directed to the protection of adults.[80] They are supposed to have the same (or the most comparable) evidentiary effects in other Member States as they have in the the State of origin. In order to facilitate their circulation within the EU, they have to be attested, i. e. accompanied by a certificate from Annex II of the Proposal given by the competent authorities in the Member State of origin.

Also, the Proposal contains necessary rules on: cooperation between the Competent Authorities, establishment of the European Certificate of Representation, establishment and interconnection of protection registers, digital communication and data protection. They represent a major modernization compared to the older rules of the CIPA.

Main improvements with regard to cooperation include better regulation of the tasks of Central Authorities as well as of competent authorities. Proposal also envisages direct communication between competent authorities and associated forms (set out in Annex VIII) that facilitate this communication.[81]Better communication and cooperation is envisaged also in connection with contemplated cross-border placement of the adult.[82]

A major innovation is the introduction of a European Certificate of Representation which will supersede the certificate under the art. 38 of the CIPA.[83] The Certificate can be issued for use by representatives who, in

[79] See: Chapter VI of the 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, OJ L 7, 10.1.2009., Chapter V of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of the authentic instruments in matters of succession and of the creation of a European Certificate of Succession, OJ L 107, 27. 7. 2012., Chapter IV of the Regulation (EU) No 1215/2012 of the European parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012., Chapter V of the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016., Chapter V of the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016., Chapter IV-Section IV of the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2.7.2019.

[80] Chapter V of the Proposal.

[81] Art. 27 of the Proposal.

[82] Art. 21 of the Proposal.

[83] Same as in Art. 62 para. 2 of the Regulation (EU) No 650/2012 of the European Parliament

another Member State, need to invoke their powers to represent a vulnerable adult. The issuing authority is the competent authority[84] or authority which has access to information on the source measure or the source powers of representation. Regime of the Certificate resembles the one already established for succession matters,[85] with the exception of the Register which is not envisaged for succession matters.

Finally, Proposal contains detailed rules on relation between the Proposal and the CIPA. With some exceptions (in order to ensure a smooth coordination with the Contracting States of the CIPA which are not Member States), the basic factor that triggers the application of the Proposal is the vulnerable adult's habitual residence in the territory of a Member State.

3.2. Unmet expectations

Apart from improvements, are there any unmet expectations in this Proposal? In short, yes. It is obvious that the Proposal addresses all the weaknesses displayed by the CIPA and brings it in line with recent private international law standards. However, it doesn't address any of the challenges: vulnerability, capacity, interests of the adult or determination of habitual residence. There were expectations that the Proposal might (or maybe should) explicitly address cases which (in certain jurisdictions) in itself may be a cause of legal incapacity (prodigality, drug addiction, gambling addiction, and other forms of inability to protect it's own interests),[86] which do not necessarily imply medical condition nor coincide with incapacitation but, however, require some form of protection. Thus, it remains a matter of a national law.

The same with capacity, which proves to be a source of a huge dissatisfaction. Namely, the European Disability Forum,[87] as well as some other civil societies are putting the pressure on the Commission to amend the proposal in line with the content and wording of the CRPD in order to push forward those Member States which are still relying on the traditional protective or substitute decision making approach instead of the human rights or sup-

and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of the authentic instruments in matters of succession and of the creation of a European Certificate of Succession, OJ L 107, 27. 7. 2012., issuance of this Certificate is not mandatory (Art. 34. para. 2 of the Proposal).

[84] The one that has taken the measure or confirmed powers of representation.

[85] Compare with Chapter VI of the Regulation 650/2012.

[86] Long (2013), *op. cit.*, pp. 63-64.

[87] European Disability Forum („EDF"), Re: Proposed EU Regulation on the protection of adults. Opinion, 2023. Retrieved January 15, 2024, from https://www.edf-feph.org/content/uploads/2023/11/Legal-Opinion-Vulnerable-Adults.pdf .

portive decision making approach. Their main concerns are: the recognition of deprivation of legal capacity across the Union, lack of explicit mention of the recognition of supported decision-making mechanisms and facilitated cross-border placement in institutions (particularly residential and psychiatric institutions).

Art. 12 of the CRPD stipulates that every person, regardless of their mental capacity, has legal capacity.[88] Although the Proposal expressly states in its recitals that „the interpretation of the rules laid down in Regulation should be „guided by its objectives that are to enhance the protection of fundamental rights and freedoms"[89] and that „rights safeguarded in the UNCRPD are to be protected both in national and cross-border cases",[90] according to the released UN's experts Opinion „the core of the proposed Regulation does not comply with the UNCRPD".[91] Therefore they require revisiting of certain articles of the Proposal, *in concreto* arts. 2, 3, 13 and 21 of the Proposal. Forceful elimination of guardianship or other forms of substitute decision from the text of the Convention in order to avoid legitimation of legal incapacitation, still present in many national laws, doesn't seem to be the right path. It would mean departing from the principle of neutrality. Whether it is desirable or whether there is a real need for such an approach is debatable. It won't speed up the process of substantial law changes at the Member States level but it might complicate things on the CIPA - Proposal level. Proposal is already advanced enough to allow the respect and advancement of human rights of vulnerable adults in international arena as well as organic growth of the CIPA in the same direction.[92]

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[88] On the conflicting interpretations of art. 12 of the CRPD, see: Stelma-Roorda, H.N., Blankman, C., Antokolskaia, A changing paradigm of protection of vulnerable adults and its implications for the Netherlands, Family & Law, February 2019. Retrieved February 2, 2024, from https://DOI:10.5553/FenR/.000037.

[89] Recital (10) of the Proposal.

[90] *Ibid*.

[91] Quinn, G., Mahler, C., Joint Submission from the UN Special Rapporteur on the rights of persons with disabilities (G. Quinn) and the Independent Expert on the enjoyment of all human rights by older persons (C. Mahler), 2023. Retrieved January 10, 2024, from https://www.ohchr.org/sites/default/files/documents/issues/disability/olderpersons/Annex-Joint-Submission-Towards-Greater-Coherence-International-Law.pdf .

[92] For other possible routes for managing overlapping Treaties see: Rolland, S.E., Ruck Keene, A., Study. Interpreting the 2000 Hague Convention on the International protection of Adults Consistently with the 2007 UN Convention on the Rights of Persons with Disabilities, 2021. Retrieved January 12, 2024, from https://www.ohchr.org/Documents/issues/Disability/hague-CRPD_Study.docx .

Finally, with regard to habitual residence, it would have been useful to have a guidance „how to deal with situation where the adult concerned is not free to leave the place where he or she is cared for, or the situation where the adult in question did not choose voluntarily to settle in the particular place where he or she lives".[93] It could have been given through recitals, like in Succession Regulation.

4. Conclusion

One of the most important, and the most difficult, of the issues involved in adult protection matters is how to strike a balance between the right to personal autonomy, self-determination and protection. Even today, legal systems take very different approach from each other to promote the personal autonomy and self-determination of adults who do not have full decision-making capacity or (as s result of an impairment or insufficiency in their personal faculties) can no longer fully protect their interests. Nonetheless, we can observe a major paradigm shift, from paternalism and a substitute decision-making approach to autonomy and supportive decision-making human rights based approach.[94] Persons with impairments in decision-making capacity today are perceived as actors and recognized members of society, instead of as objects of protection.

When it comes to international protection of adults, the Convention on the International Protection of Adults (CIPA)[95] and the Convention on the Rights of Persons with Disabilities (CRPD),[96] together with the EU's Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of the adults[97] „will ultimately result in a basic regime of universal character, coupled by a special regime that would improve the latter at a regional level".[98]

[93] European Law Institute, *The Protection of Adults in International Situations. Report of the European Law Institut*, 2022. Retrieved January 12, 2024, from https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Protection_of_Adults_in_International_Situations.pdf .

[94] Stelma-Roorda, H.N., Blankman, C., Antokolskaia, A changing paradigm of protection of vulnerable adults and its implications for the Netherlands, Family & Law, February 2019. Retrieved February 2, 2024, from https://DOI:10.5553/FenR/.000037.

[95] *Op. cit*., note 9.

[96] *Op. cit*., note 6.

[97] *Op. cit*., note 10.

[98] European Association of Private International Law (EAPIL), *Position paper in response to the European Commission's public consultation on an EU-wide protection for vulnerable adults*, 2022. Retrieved March 5, 2024, from https://eapil.org/wp-content/uploads/2022/04/

They provide legal certainty and human rights-based approach with regard to jurisdiction, applicable law and recognition and enforcement of measures of protection of vulnerable adults taken in another Contracting/Member State. However, they all have their limitations. The most obvious one is their personal scope of application, limited in a way that covers only the most vulnerable among the adults.

There is still a huge void in the (national and international) protection of adults in general, in particular those adults who (still) don't need protection due to vulnerability(as determined by the CIPA) but may (and often do) need it for other reasons (e.g. age). Despite the fact that parts of the world are progressively ageing (in particular, the Northern hemisphere elder law has attracted little attention, almost to the point of neglect.[99] On one side, it may be due to plurality of concepts regarding the old age (chronological, social and physiological)[100] but, on the other side it may be due to the fact that government institutions have not yet adapted to the shift in the age distribution of the population.[101]To this day, „the UN Principles and the General Comment on the Economic, Social and Cultural Rights of Older Persons[102] constitute the only internationally agreed human rights instrument addressing the needs of all older people".[103]Even the text of the ECHR,[104]does not contain any explicit reference to „older persons". Thus, age in itself does not justify any special status of older persons in the proceedings before the ECtHR, although the Court takes into account elderly's „limitied physical mobility, decreased information processing and problem-solving skills that are often

Position-Paper-29.03.22.pdf .

[99] Doron, I.: *From National to International Elder Law*, The Journal of international Ageing, Law & Policy, 1 (43), 2005, p. 44.

[100] Social being the most important one. More about the construction of ageing as a social problem see in: Fredvang, M., Biggs, S., *The rights of older persons. Protection and gaps under human rights law*, Brotherhood of St Laurence and University of Melbourne Centre for Public Policy, Melbourne, 2012, pp. 6-7.

[101] Henchuan, S., Rodríguez-Piñero, L., *Ageing and the protection of human rights: current situation and outlook*, Economic Commission for Latin America and the Caribbean (ECLAC) – Project Document, 2011, p. 15.

[102] General Comment No. 6 of the Committee on Economic, Social and Cultural Rights of Older Persons (1995). Retrieved March 13, 2024, from https://www.refworld.org/legal/general/cesr/1995/en/28739.

[103] Doron, Mewhinney (2007), *op. cit*., p. 7.For the non-binding instruments, see: Doron, I., Mewhinney, K. (eds.)., *The Rights of Older Persons: Collection of International Documents*, International Federation of Ageing (IFA), Jerusalem, 2007.

[104] *Op. cit*, note 70.

related to declining memory capacity and weakened evaluation skills"[105] or, in other words, their vulnerability. However, derivative protection of elderly based on the rights enshrined in the ECHR does not allow the establishment of comprehensive age-specific standards that will lead to a better protection of all elderly at the national and international level. Thus, there is an urgent need for legally binding international instrument which will establish standards for the protection of their specific needs, as well. Only when this is achieved, we will be able to claim that we have a satisfactory system for the, national and international, protection of all adults.

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PUBLIC POLICY EXCEPTION UNDER THE 2019 HCCH JUDGMENTS CONVENTION

Abstract: *This paper provides an analysis of the refusal of recognition and enforcement of foreign judgments on public policy grounds within the framework of the Hague Judgments Convention. Paper examines general public policy exception clause, which is provided in Art. 7(1)(c) of Convention and specific exceptions,that may in some situations, if conditions are fulfilled, also constitute public policy, which are provided in Art. 7(1)(a), (b), (e) and (f), 7(2), and 10 of the Convention. Further, given that the European Union is contracting party to the Convention, paperassesses how the public policy exception has been applied in the law of the European Union and analyses relationship between two regimes. Paper specifically observes whether andto what extent two regimes are complementary and potential issues that could arise in its practical application. Aim is to examine whether diversity between approaches on regional and international level can ultimately lead to discrepancies in practice, which could restrict the reciprocal enforcement of judgments and do they have the potential to undermine the desired uniformity established by the Convention.*

Keywords: *"Public Policy Exception", "Recognition and Enforcement", "HCCH", "2019 Judgements Convention".*

1. Introduction

Judgments Convention is a significant development of contemporary private international law, whichhas great importance for international cooperation in civil and commercial matters, because it establishes minimum international standards for the global circulation of judgements.It is a „game-

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changer"[1] that promises to revolutionize free movement of judgements by ensuring that judgments made in one country signatory are recognized and enforced in another.

Convention is based on three-pillars: scope, eligibility and refusal,[2]which make it an instrument that is capable to harmonize legal standards for recognition and enforcement, streamlining the process and by preventing any review of the merits of the foreign judgments[3], leading us in a new era of global judicial cooperation.

This paper focuses on the public policy as ground for refusal of recognition and enforcement of foreign judgments in the Judgments Convention. Convention provides a general public policy exception clause in Art. 7(1)(c), as well as specific exceptions in Art. 7(1)(a), (b), (e) and (f), 7(2), and 10 of Convention. Paper further examines the public policy exception in law of the European Union, given that European Union is contracting party to the Convention.

The core values that constitute European public policy include those fundamental principles established in primary European Union law and in the European Convention on Human Rights. Paperanalyses how public policy exception has been interpreted in the case law of CJEU and ECHR. Finally, the relationship between two regimes is examined,are they complementary and potential issues of interpretation that could emerge in their practical application. Consideration is also given to possible approaches for addressing some of the issues that may arise.How this Convention might navigate the balance between the expectation of uniformity, the flexible nature of the public policy exception, the trend towards specifying applications of this exception in international conventions, and the maintained sovereignty of States.

2. Public Policy Exception in Judgements Convention

Because of the modest and flexible nature of the Judgments Convention,in some aspects, it lacks self-sufficiency. Namely, for the foreign judgement to be recognized under Convention regime, the requested State shall confirm that judgment is eligible for recognition, by establishing that the jurisdictional requirements (filters) set out in Article 6 (for judgements on rights in

[1] JudgementsConvention is often described as game-changer by Secretary General of HCCH, Mr. Christophe Bernasconi.

[2] Cardoso C.J, *Implementing the Hague Judgments Convention*, New York UniversityLaw Review, 97 (5), 2022, p. 1519.

[3] Art. 4, para. 2, of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2 July 2019 (in further text: „Judgements Convention").

rem in immovable property) and Article 5 for all judgements, are fulfilled. If a judgment was made by court that had jurisdiction according to one of the filters, the contracting States to the Judgments Convention are under the obligation to allow the recognition and enforcement of that judgment, safe for a number of exceptionsi.e.,exhaustive grounds for refusallisted in Art. 7, when the requesting court may refuse to recognize judgement.[4]

Convention adopts term „may"similarly as its model New York Convention. Therefore, it is suggested that it should be interpreted similarly, i.e. that it provides discretion to each Contracting State to choose from discretionary refusal, mandatory refusal, refusal with limited discretion or any combination of the three. Degree of discretion will depend on judge of the country where enforcement is sought, because it is related to constitutional issue of delimiting judicial power. [5]

Also, burden of proof is left to the country of enforcement, who is to decide either the burden of proof is on a party resisting recognition or to provide for an *ex officio* review. This is the case because it is closely related to other procedural matters, and Convention leaves the procedure for recognition and enforcement to the legal framework of the requested State. Convention does not prevent recognition under national law.[6]

Traditionally, public policy exception is provided as a ground for refusal of recognition in Art. 7 (1) (c) of Convention. It can be considered as an inherent limit for the obligation of uniform interpretation, which protects domestic legal order by preventing foreign decisions that are incompatible with the fundamental principles of domestic law from having effects in particular state. It therefore defines the outer limits of tolerance of national law and represents a "safe zone" from the application of foreign law and recognition of foreign judgments which are manifestly contrary with domestic public policy.

Convention strives to strike a balance between two conflicting interests. Namely, a decision of a foreign court is an act of a foreign State and its recognition in another state can only be allowed if it is in accordance with the basic principles of justice. For these reasons, every country wants to protect its legal order from foreign decisions that are unacceptable for it, by requiring high threshold of "manifest incompatibility" with the requested

[4] Poesen, M., Is specific jurisdiction dead and did we murder it? An appraisal of the Brussels Ia Regulation in the globalizing context of the HCCH 2019 Judgments Convention, Uniform Law Review, 26 (1), 2021, p. 10.

[5] Jang, J., The Public Policy Exception Under the New 2019 HCCH Judgments Convention, Netherlands International Law Review, 2020, p. 102.

[6] Art. 15 of the Judgements Convention.

State's public policy. On the other hand, the reasons of international cooperation and the freedom of movement of people, goods, services and capital dictate that states minimize barriers that would limit or unnecessarily complicate movement of judgements. States are not isolated, they are connected with common interests and values, and they strive to coordinate with each other within international or regional organizations. Some states may adopt a common public policy, such as the public policy established by European Union for its member states.[7]

2.1. General exception clause

General Public Policy Exception Clause contained in Art. 7(1)(c) provides that recognition and enforcement may be refused if it would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State.

This broad exception covers three different subsections: manifestly incompatible with the public policy of the requested State, incompatible with fundamental principles of procedural fairness and infringements of security or sovereignty.

2.1.1. Important features

Some important features of public policy exception under Convention regime may be distinguished from the wording of Art. 7 (1) (c).

First, relevant is public policy of the state where enforcement is sought. Second, the public policy should qualify as international public policy.[8] Sometimesit may be difficult to ascertain what constitutes international public policy because "few subjects are more vague, more difficult to seize and more controversial than that of the existence, contents and function of a public policy which would be 'really' or 'truly' international."[9] International public policy is a subset of national public policy, distinguished by a specific source of obligation rooted in international law, that the concerned state must uphold. Purely international public policy exists if obligation that arises under fun-

[7] Jang, J, *op.cit.* p. 98.

[8] *Ibid.,* p. 100.

[9] Lalive,P.*Transnational (or Truly International) Public Policy and International Arbitration,* Comparative Arbitration Practice and Public Policy in Arbitration, Kluwer Law International 1987, (Sanders, P., ed.), p. 259.

damental rule of international law would be infringed, if such judgment was recognized or enforced.[10]

Third, there should be a link between case and requested state and that connection exists if request for enforcement is sought. Fourth is the request that recognizing foreign judgement would cause harmful consequence to the fundamental legal principles of the State where enforcement is sought. In order for the public policy exception to be applied, it is necessary that the effects of violation of procedural principles are incompatible with the state of recognition, it is not enough that the rules of procedure of the state of decision and the state of recognition differ. [11]

Fifth, from the wording of the Art. 7 (1) (c) it is clear that Convention adopts division into substantive and procedural public policy. Sixth, the foreign judgement may be refused recognition only if the effects of this judgement are contrary to domestic public policy. Seventh, court of the country where recognition is sought shall examine if conditions are met and there shall be no review on merits, meaning that there shall be no re-examination of facts and laws. Namely, to recognize a decision means to give a foreign court decision the effect of a *resiudicata* that it has in the country where the decision was made.[12] The adjudicated matter is considered to be finally resolved and the same matter cannot be reinitiated.

On the other hand, in order to decide if substantive public policy would be violated by recognizing or enforcing a foreign judgment, court of the country where recognition is sought must look into the merits.[13] However, this substantive investigation is limited by the fact that public policy intervenes only to confirm and end a public policy violation limit. The public policy clause is an exception and as such must be interpreted narrowly and strictly, it requires that the limits of its application be determined. Finally, if a separate part of judgement cannot be recognized due to violation of public policy or for other reasons, the remaining part of the judgment may be.

To sum up, effects of foreign judgement shall be "manifestly incompatible with the public policy of the requested State", which is a high threshold,

[10] Hoško, T., Public Policy as an exception to free movement within the internal market and the European judicial area: A Comparison, CYELP 10, 2014, p. 198.

[11] Kostić-Mandić,M. , *Priznanje i izvršenje stranih sudskih odluka u novom međunarodnom privatnom pravu Crne Gore*, Zbornik radova Udruženja pravnika Crne Gore, 2015, p. 10.

[12] Bogdan, M., *Concise Introduction to EU Private International Law: Third Edition*, Europa Law Publishing; 3rd edition, 2016, p. 71.

[13] Stanivuković, M., Živković, M., *Međunarodno privatno pravo opšti deo*, Službeni glasnik, 2023, p. 461.

intended to ensure that judgments are recognised and enforced by other States signatories, unless there is a compelling public policy reason not to do so in a particular case. This high threshold is similar in other international instruments, so case law under the New York Convention[14] may be utilized to provide guidance to courts on situations where the breach is substantial enough to trigger the application of Art. 7(1)(c).

2.1.2. Infringements of security or sovereignty

State Security and sovereignty is broad description of what may, in some situations, beconsidered as public policy, provided that the general features for the application of public policy exception are fulfilled in particular case. [15]

Purpose of including explicit reference to state security and sovereigntyin Art. 7(1)(c) was to prevent narrow interpretation, that might exclude these interests, because theymay not always qualify as the fundamental policy of the State where enforcement is sought.[16]

Also, 1965 Service Convention explicitly mentioned state sovereignty and security, so there were concerns that if it wasn't included in the wording of Convention, it could lead to *a contrario* interpretation.[17]

This provision should be read in conjunction with all other provisions regarding State actions and immunities in the Convention. The States that demanded that all of these clauses are included also intended to guarantee that they could use their sovereignty as a component of their public policy at the level of recognition and enforcement.[18]

It should be mentioned that there are views in doctrine stating that in some situations concept oftransnational public policy can sublimate state sovereignty. Also, courtsof some countries (for example, Australian Courts and Supreme Court of India) have rejected to apply transnational public policy, based on the pre-eminence of state sovereignty and by contending that

[14] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (New York Convention).

[15] Jang, J, *op. cit.* p. 104.

[16] Trakman,L., *Aligning State Sovereignty with Transnational Public Policy*, Tulane Law Review, 93 (2) 2018, p. 207-268.

[17] Jang, J, *op. cit.* p. 104.

[18] Kessedjian, C., *Comment on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil orCommercial Matters Is the Hague Convention of 2 July 2019 a useful tool for companies who are conducting international activities?*, NIPR, *2020, p.,* 32.

"international" concept of public policy is "unworkable" and have applied narrow concept adopted inthe enforcement state.[19]

The examples of infringements of state security and sovereigntythat may constitute public policy is refusing to recognize foreign decisions in order to safeguard the forum's national security, preserving public health and the environment from the importation of dangerous goods, enforcing state sanctions imposed on trade with foreign nations,[20] or violation of a UN sanction in the one Member State, which, if simply international public policy is not applied, may result in enforcement in another Member State.[21]

2.1.3. Procedural unfairness

According to Art.7(1)(c) procedural unfairness is considered as a subcategory of the public policy. This means that a judgment must be "manifestly incompatible" with the public policy of the state where recognition is sought and that the specific proceedings leading to the judgment shall be incompatible with fundamental principles of procedural fairness.[22] For instance, that would be the case when the right to a fair trial is guaranteed by the constitution, making it unconstitutional to acknowledge a foreign judgment obtained through proceedings that violated these fundamental principles.

There is anoverlap with specificdefences which can also be invoked for certain aspects of procedural public policy. This includes Art. 7(1)(a) concerning notice, Art.7(1)(b) addressing fraud, and Art. 7(1)(e) and (f) pertaining to conflicts of judgments. Additionally, Art. 7(2) focuses on parallel proceedings, while Art. 10 deals with non-compensatory damages.

There were some concerns raised in doctrine that treating procedural unfairness as a sub-set of public policy can dilute other procedural protections guaranteed by Convention.[23] However, that would not be the case because this overlapping is designed to ensure that parties undergoing recognition and enforcement proceedings receive sufficient procedural safeguards, regardless of the specific manner in which these issues are dealt with in the requested State.

[19] Trakman, L., *op.cit.*231. For instance, this approach has been taken by Supereme Court of India.

[20] *Ibid.,*p. 223.

[21] Beaumont, P., Johnston, E., *Can Exequatur Be Abolished In Brussels Whilst Retaining a Public Policy Defence*?, 6, 2010, JPIL, p.259.

[22] Born, G.,*The Hague Convention on Choice of Court Agreements: A Critical Assessment*, University of Pennsylvania Law Review 169 (8) 2021, para. 2122.

[23] *Ibid.* This Concern was raised in relation to Choice of Court Convention, but same issue may arise under Judgements Convention.

2.2. Specific exceptions

Convention provides specific exceptions in Art. 7(1)(a), (b), (e) and (f), 7(2), and 10, which may also constitute public policy if conditions are met.

2.2.1. Parallel Proceedings

The Convention deals with the issueof parallel proceedings in Art.7(1) (e) and (f) and Art.7(2).

The issue of inconsistent judgements mayarisein situations when more thanone court has jurisdiction over a dispute and parallel or multiple proceedings are being brought in front of these courts, which may result in multiple judgements.[24]

Art.7 (1)(e) provides that recognition may be refused ifthe judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; The judgement of the requested court does not need to be given prior to competing judgement and it does not have to be based on the same subject matter.[25] Art.7 (1) (f) deals with cases when both conflicting judgements are from foreign States and provides that recognition may be refused if the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.Art. 7 (2) addresses situationswhere proceedings are still pending in the requested State when recognition or enforcement of a judgment given in another State is sought. This is because *lis pendens* in another State cannot be invoked as a ground for refusal. Recognition and enforcement may be refused if following three conditions are cumulatively met: the proceedings pending in the requested State shall be between the same parties on the same subject matter; the court of the requested State was seized before the court of origin and there is a close connection between the dispute and the requested State.

2.2.2. Non-Compensatory damages

Public policy is also resorted to in cases when the nature of damages awarded is unacceptable, because they are significantly different from the type of damages provided for in domestic law[26] or for that form of relation-

[24] Garcimartín, F., Saumier, G.,*Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, Hague Conference on Private International Law, 2020, p. 122.

[25] *Ibid.,* p. 123.

[26] Kostić, M., *Međunarodno privatno pravo*, Pravni fakultet Podgorica, 2017,p. 105.

ship such sanctions cannot be considered in civil law. For instance, damages in civil law are fundamentally different from the system of punitive damages, which has primary purpose punishment and general prevention, and where, punishing offenders and suppressing similar behaviour is left to criminal and administrative sanctions.[27]

Therefore, Art. 10 (1) of Convention contains public policy provision relating specifically to the punitive damages, which provides that "recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered" and provides the territorial distribution of powers to impose them. Each Contracting State has the freedom to recognize and enforce non-compensatory damages according to its national law.

It should be also noted that the court of the country where recognition is sought, is not bound by characterization of the damages as compensatory or non-compensatory, from the court of the origin, although it may serve as a point of reference.[28] So, in some situations it may be difficult to establish the difference between compensatory and non-compensatory damages, i.e. should the damage be characterized in accordance with the law of the country where enforcement is sought or there should be autonomous interpretation.

According to the Explanatory Report, refusal of enforcement on the basis of public policy could operate only when it is obvious from the judgment that the award appears to go beyond the actual loss or harm suffered.[29] In that respect, in addition to punitive damages, "in exceptional cases, damages which are characterised as compensatory by the court of origin could also fall under this provision". According to legal writings, under Convention, refusal of enforcement of a foreign judgment is therefore allowed in so far

[27] It is incompatible with the fundamental principles and with the basic goals of the system of compensation for damages, to make a decision that in the relationship between the parties in one tort, the injured party can in addition to compensatory, the injured party can receive punitive damages, that have as goal punishment and general prevention. For these reasons, the enforcement of the part of the foreign judgment ordering the company that filed the complaint to pay punitive damages, in addition to compensatory damages and costs, cannot be allowed, because it is contrary to the public policy. Case: *Northon I, Oregon Partnership v. Mansei Kogyo Co,* Judgement of the Supreme Court of Japan, 1997, Stanivuković, M., *Praktikum za međunarodno privatno pravo*, Pravni fakultet, Centar za izdavačku delatnost, Novi Sad, 2004, p.245.

[28] Jang, J, *op. cit.* p. 110.

[29] *Ibid.*, p. 109.

as it concerns punitive damages or damages that are otherwise excessive.[30] The Explanatory Report states that autonomous interpretation should be applied, because it is the most appropriate for the International Convention.

Whether the punitive nature of damages is a pre-condition for accepting a possible violation of public policy, was one of the questions addressed in the recent CJEU preliminary ruling in *Real Madrid Club de Fútbol, vEE, Société Éditrice du Monde SA.*[31] Courtheld thatin absolutely exceptional cases, recourse may be to the public policy clause, even where the decision imposing a penalty relates to compensatory damages[32] and solely in connection with other arguments concerning fundamental rights that constitute public policy in the Member State in which enforcement is sought.[33]

[30] Garcimartín, F., Saumier, G, *op.cit.*p.132.

[31] The following outlines the pertinent facts of the case. The newspaper Le Monde published an article by journalist E.E., alleging that football clubs Real Madrid and FC Barcelona had hired Dr. X. Fuentes, who was known for running a doping ring in the cycling world. The article's extract, featured on the front page, included a drawing captioned «Doping: first cycling, now football», showing a cyclist in Spanish colors surrounded by football players and syringes. This story was widely shared, especially by Spanish media. Le Monde published a denial letter from Real Madrid but did not comment further. Subsequently, Real Madrid and a member of its medical team filed a lawsuit for damages in front of a Spanish court. The lawsuit resulted in an order from the Spanish court that the defendants in the main proceedings pay EUR 300,000 to Real Madrid and EUR 30,000 to the member of its medical team. The court also ordered that its decision be published in the newspaper Le Monde. Recognition and enforcement of this judgment were sought in France. The Paris Court of Appeal held that recognition or enforcement of the judgments imposing those penalties was at variance to an unacceptable degree with French international public policy by interfering with freedom of expression. In its preliminary ruling, the CJEU held that the court must refuse or revoke a declaration of enforceability of that judgment where enforcement of that judgment would give rise to a manifest breach of the freedom of expression guaranteed in Article 11 of the Charter. Such a breach exists where enforcement of the judgment gives rise to a potential deterrent effect, which exists if the overall sum the payment is manifestly unreasonable, having regard to the nature and the economic situation of the person concerned. For instance, that sum is several dozen times the standard minimum salary in the Member State in which enforcement is sought, or it would represent a manifest threat to the financial stability. The court of the Member State in which enforcement is sought may take account of the seriousness of the wrong and the extent of the harm only in determining whether, even though the overall sum of a penalty is a priori manifestly unreasonable, it is appropriate for counteracting the effects of defamatory statements.

[32] Case C - 633/22, *Real Madrid Club de Fútbol, AEvEE, Société Éditrice du Monde SA*[ECLI:EU:C:2024:127] para. 149.

[33] In reaching its decision Court followed the reasoning fromthe Case C-302/13,*flyLAL-Lithuanian Airlines*[EU:C:2014:2319]para. 56-58.

3. Public Policy Exception in Brussels Regime

The free movement of judgments is often referred as the fifth freedom of EU, which, togetherwith the four basic freedoms[34] ensuresoperation of Internal market.

Brussels Regime[35] operates within a limited number of relatively similar European countries, linked by both an integration project and common judicial and legislative organs (i.e., the Court of Justice of EU and the EU Parliament, Council and Commission).

If recognition and enforcement of judgement made in one EU country is sought in another member state, the Brussels Regime applies. Judgment made in one member state is automatically considered recognized in another, without any procedure.[36] The judgement should be in "civil and commercial matter" and the party seeking recognition should provide copy of judgement by which its authenticity can be established and certificate issued on a standard form by the court of origin.[37] Therefore, no formalities such as legalization are required. However, court may request an official (certified) translation of the decision. The rules are the same regardless of whether the party requesting the recognition and enforcement procedure has nationality or residence within a member state.[38] Interested party may request a separate declaratory decision, that would establish once for all purposes, that there are no grounds for refusing recognition[39].

Decision of a court of the Member state recognizing judgement from non-member state cannot be subject to Brussels Regime.[40]

On the recognition and enforcementof judgements made in third countries that are not EU members, Judgements Convention applies, if that third country is also a party to Convention. If a non-member state is not a party to Judgement Convention,national rules apply.[41] Therefore, this is the area

[34] Hoško, T., *op.cit.* p. 212.

[35] Brussels Regime consists of Brussels Convention, Brussels Regulation and the Brussels I Regulation (recast).

[36] Art. 36, para 1, of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) (in further text: „Brussels I Regulation (recast)").

[37] Art. 37oftheBrussels I Regulation (recast).

[38] Bogdan,M., *op. cit.p.*72

[39] Art. 36, para. 2 of the Brussels I Regulation (recast).

[40] Bogdan,M., *op. cit*. 71. C-129/92, *OwensBank v Bracco*[1994] ECRI-00117.

[41] Kostić, M., *op.cit,* p.201.

where importance of Judgements Convention is highlighted, because if third country is signatory of Judgements Convention, EU member states have the obligation to recognize judgement,[42] safe for the exceptionsexplicitly provided in Convention.

Grounds for refusal of recognition are set exhaustively in Art. 45 of Convention,[43] and public policy, as most general reason for refusal, is provided in that article. This means that EU Member States have not yet achieved completealignment in core principles, essential values and human rights protections to fully eliminate the public policy exception. Member States may avail themselves of the negative function of the public policy to prevent the unwanted effects of a foreign judgment by avoiding its application or recognition and enforcement.[44]

Term "European public policy" refers to public policy of the European Union and Council of Europe, established in first line by the European Convention on Human Rights. It is somewhat difficult to precisely define what constitutes EU public policy, but in principle we can say that Primary Sources of EU Law, and undoubtedly, the four basic freedoms of movement of persons, goods, capital and services, which aim to ensure a common market, are part of the fundamental principles of the EU, as well as many other fundamental values. EU law is a component of national laws ofitsmemberstates.[45]It follows that freedom of Member States to define their public policy is limited.[46]

The *Krombach*is a landmark case where CJEU provided some guidance to Member States on the application of public policy exception. Namely, three cumulative conditions must be met: a significant discrepancy between the rule applied in the state of origin and a rule in the state of recognition, a resulting violation of a fundamental principle in the state of recognition and enforcement due to this divergence, and thatthis violation of a fundamental

[42] Art. 4, para. 1. of the Judgements Convention.

[43] The refusal is mandatory, as set out in Case C-80/00, *Italian Leather SpA v WECO Polstermöbel GmbH & Co*[2000] ECR I-04995.

[44] Hoško, T., *op. cit*., p. 195.

[45] Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I 03055.

[46] In the EU, there were even proposals to abolish the possibility of invoking the public policy exception clause between member states, for the reason that human rights guaranteed by the ECHR provide sufficient protection. Nevertheless, it turned out that even in the countries of Europe who share the same legal tradition and have same basic values, exceptions are possible. It is recognized that some countries have specific values that must be respected, despite the fact that they represent a restriction on the freedom of movement of judgments. Beaumont,P., Johnston, E.*, Can exequatur be abolished in Brussels (I) whilst retaining a public policy defence?*, Journal of Private International Law, 6 (2) 2010, p. 277.

principle constitutes a "manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought".[47]

According to this formula, it is not for the CJEU to define the content of the public policy of a Member State, it is nonetheless required to review the limits within which the courts of a Member State in which enforcement is sought may have recourse to the concept of public policy.[48] Judges are not free to refuse recognition at their own discretion, in relation to the individual concept of public policy in enforcing state, because of the strict interpretation of public policy exception by CJEU. They "close their doors" only when the application of foreign law violates some fundamental principle of justice, morality, some deep-rooted value.[49] Also, it should be noted that CJEU can change the limits within which the courts of the member states may resort to their legal order and can find that excessive use is against the regulation.[50]

The criteria for applying the public policy exception, as established by the case-law of the CJEU, can be summarized as follows:

First is that recognition of such judgement wouldresult in the *manifest breach* of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order. Public policy exception cannot be invoked solely on the ground that that there is a discrepancy between the applicable laws and from reviewing the accuracy of the findings of law or fact made by the court of the Member State of origin, due to the prohibition on the review on substance.

Second, public policy exception shall not be applied to jurisdiction, because it would undermine the mutual trust between the member states.[51] Judgement made in member state shall be recognized even if due to Art. 6 it was given on national jurisdiction ground deemed exorbitant in Member state where recognition is sought. [52] Third, use of public-policy is precluded if party invoked some other more specific objection from Art.45.

Fourth, the institute of public policy must be interpreted strictly "because it represents an obstacle to free movement of judgements and a

[47] Case C-7/98, *Dieter Krombach v André Bamberski*[2000] ECR I-01935.

[48] *Ibid*., para. 23.

[49] Chong, A., *The public policy and mandatory rules of third countries in international contracts*, Journal of Private International Law, 2 (1) 2006, p. 29.

[50] Bogdan, M., p. 73.

[51] Art. 45, para. 3.oftheBrussels I Regulation (recast).

[52] Bariatti, S.,*Cases and Materials on EU private international law*, Hart publishing, Oxford and Portland, Oregon, 2011, p.165.

simplified recognition and enforcement mechanism, as one of the basic goals of the convention." Recourse to the public policy clause should only be made in *exceptional cases.* The idea behind the Brussels Regime is based on mutual trust... Member states have given up the right to apply the provisions of their internal laws in order to simplify the procedure of recognition and enforcement in the EU.[53]

This classic formula should be supplemented by two elements which further restrict the interpretation of the concept of public policy within EU.[54]

The first element relates to fundamentalrights. The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights provide a complementary framework for safeguarding the fundamentalvalues of the EU and its Member States in civil and commercial contexts. This complementarity fosters mutual trust between Member States, particularly in situations where EU law may not be applicable. Human rights are the most important part of the institute of public policy, and if the recognition of foreign decisions was possible without this exception, it would give primacy to the freedom of movement of judgments over fundamental rights. As stated byECHR in *Loizidou* case[55] European Convention on Human Rights is a "constitutional instrument of the European public policy (*ordre public*)."[56]

In this context, it should be noted that there are scholarly views that the refusal to enforce judgment may amount to an interference with the applicant's right to a fair hearing Art. 6 (1) of the ECHR.[57]

Thesecond element is mutual trust. This suggests that rejecting or not enforcing a judgment from a Member State undermines the mutual trust in

[53] Beaumont,P., Johnston, E, *op. cit.,* p. 251.

[54] Case C - 633/22,*Real Madrid Club de Fútbol, AEvEE, Société Éditrice du Monde SA* [ECLI:EU:C:2024:127] para. 47.

[55] *Loizidou v. Turkey,* Application no. 15318/89, Judgement from 18 December 1996.

[56] Kramberger Škerl,J., *European public policy (with an emphasis on exequatur proceedings),* Journal of Private International Law 7 (3), 2011,p. 463.

[57] There is an open question whether the right to a fair hearing and to effective legal protection, embodied in Article 6(1) of the ECHR, actually requires that the foreign judgment is enforced. The European Court of Human Rights has until now, so far as is apparent, recognised such a right only in relation to enforcement in the State where the judgment was made. Whether Article 6(1) of the ECHR also makes the recognition and enforcement of foreign judgments obligatory can remain an open question here, since theBrussels I Regulation confers a corresponding right in any case.In any event, Article 6(1) of the ECHR would not lead to any result other than an appropriate application of the regulation consistent with respect for human rights.C-420/07, *Apostolides*[EU:C:2008:749], para.52; See also: Kinsch, P., Enforcement as a Fundamental Right, Nederlands Internationaal Privaatrecht , No 4, 2014,p. 543.

judicial administration among EU Member States, which is fundamental for functioning of Brussels Regime. This trust stems not just from legislative decisions by EU institutions but is rooted in primary law.

4. Relationship between regimes

Relationship between Brussels Regime and Judgements Convention is an evolving and multi-faceted one. [58] However, primacy of EU Instruments is provided in Art.23 (4) which states that Convention "shall not affect" the application of rules of Regional Economic Organization that is party to Convention, if the rules were adopted before conclusion of Convention or after Convention was concluded, to the extent that they do not affect obligations under Art. 6 towards Contracting states that are not members of EU. [59]

That means that, after the Convention is concluded, EU cannot adopt a rule, allowing for the circulation among its Member States of judgments on aright *in rem* over immovable property situated in another Contracting State.[60]

This point is confirmed in case law of CJEU, who found, in *Kadi* case that it has the authority to assess whether EU law, which incorporates international law, aligns with other EU legislation, thereby adopting a distinctly dualist approach in its perspective on the international legal framework.[61]

5. Potential issues in interpretation

Judgements Convention requires mandatory recognition of judgements made in all countries signatories,which makes it reasonable to question to what extent public policy exception can protect country where recognition or enforcement is sought, from foreign judgementsthat are incompatible

[58] In the context of relationships between regimes it should be also stated that there are views, expressed by Prof. Hartley, that the Brussels Regulation, rather than the New York Convention, served as the model for the Hague Convention. Hartley, T. *Is the 2005 Hague Choice-of-Court Convention Really a Threat to Justice and Fair Play? A Reply to Gary Born*, [Electronic version], 2021, Retrieved July 2024 from https://eapil.org/2021/06/30/is-the-2005-hague-choice-of-court-convention-really-a-threat-to-justice-and-fair-play-a-reply-to-gary-born/.

[59] Sender, P. M., *The 2019 Hague Judgments Convention: its conclusion and the road ahead. In Asian Academy of International Law,* Sinergy and Security: the Keys to Sustainable Global Investment: Proceedings of the 2019 Colloquium on International Law (Ed.),Asian Academy of International Law Limited, p. 8.

[60] Garcimartín, F., Saumier, G, *op.cit.*, p. 167.

[61] Joined cases C-402 & 415/05P,*Kadi & Al Barakaat Int'l Found v Council & Comm'n* [2008] ECR I-6351, paras. 287-290.

with its fundamental values, specially having in mind that countries worldwidecan have different standards in the rule of law.

The question arises when will the violation of fundamental principles be manifest enough to allow reliance on the public policy exception, and would it be sufficient to protect legal order of the country of enforcement from serious denials of justice. For instance, refusing recognition on public policy grounds insituations that might involve corruption or bribery is extremely difficult in recognition procedure, because there could be difficulties in obtaining evidence, language, cost, risks of official interference etc.

There is a lack of predictability and legal certainty in the operation of public policy exception. Hence, it remains to be seen how public policy exception, "notion to fit all intentions and applications",[62] due to its variability in space and time, will operate in practice of the courts of the countries signatories[63], who have different legal traditions and standards, and no single body that would resolve issues of interpretation that may arise in practice.

Harmonization of approaches can be very difficult task on global level[64], because there are fundamental discrepancies in perception of fundamental values and required level of procedural safeguards, which might undermine the desired uniformity established by the Convention.

A solutionto some issues may be found in fact that Contracting parties may consider the practical operation of specific HCCH instruments at the regular convening of Special Commission. The Special Commission can issue authoritative recommendations and advice on uniform interpretation of the Convention and its support can be significant in interpretation of public policy exception in the context of Judgements Convention.

6. Conclusion

Public Policy Exception is widely accepted as a ground for the refusal of therecognition and enforcement of foreign judgments in national legislations and in international legal instruments. Paper analyzed Public Policy Exception under 2019 Hague Judgments Convention, followed by its analysis under Brussels Regime. The paper examines the relationship between the

[62] Hoško, T., *op. cit*., p. 211.

[63] At the moment of writing this paper, Judgements Convention is signed by the United States, North Macedonia, Israel, Costa Rica, Russia, Montenegro and, most recently, the United Kingdom, and it entered into force between the EU Member States (excluding Denmark), Ukraine and Uruguay.

[64] Trakman,L., *op. cit*., p. 224.

two regimes, specifically investigating their complementarity and the interpretative challenges that may arise in practical implementation, with the aim to question if the diversity between approaches on regional and international level could potentially undermine desired uniformity intended by the Convention.

Summary

Public Policy Exception is generally accepted as a ground for the refusal of the recognition and enforcement of foreign judgments in national legislations and in international legal instruments. Even though it has some common characteristics, its content is diverse and depends on the law of requested State. Namely, each state has its own set of fundamental values that constitute public policy and they naturally differ. However, some states may adopt a common public policy, such as the public policy established by European Union for its member states.

In this paper, we firstly analyze regime for refusal of recognition and enforcement of foreign judgments on public policy grounds in the Hague Judgments Convention. Convention provides a general reservation clause in Article 7(1)(c), as well as specific reservations in Articles 7(1)(a), (b), (e) and (f), 7(2), and 10 of Convention. In some cases, specific reservations may also be considered as procedural public policy, if conditions are fulfilled. Therefore, we examine weather this overlap can cause interpretation problems in practice, especially having in mind that Article 13 of Convention leaves the procedure to law of the requested State.

Then, given that the European Union is contracting party to the Convention, we examine the public policy exception in law of the European Union. On EU level, public policy has mostly negative function and there were attempts to restrict its application only to exceptional cases. The core values that constitute European public policy include those fundamental principles established in primary European Union law and in the European Convention on Human Rights. We proceed to analyze how public policy has been interpreted in the case law of CJEU and ECHR.

Analysis finally considers the relationship between two regimes. Specifically, it examines whether they are complementary and potential issues of interpretation that could emerge in its practical application. Consideration is also given to possible approaches for addressing and resolving any issues that may arise.

Aim is to examine whether diversity between approaches can ultimately lead to profound policy discrepancies, which could restrict the reciprocal enforcement of judgments, and do they have the potential to undermine the desired uniformity established by the Convention.

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WHEN TO SERVE ABROAD – THE HAGUE AND EU THE PERSPECTIVE

1. Introduction

The service of judicial and extrajudicial documents in civil and commercial matters is of key importance for the proper initiation, conduct and conclusion of legal proceedings where one of the parties is in a country other than the country of the court seised. The movement of the consequent judgment also depends on service because deficiencies there may amount to a ground for refusal of enforceability/enforcement or for review. The service influences other institutes of private international law, such as access to certain instruments (for example the European) or grounds of jurisdiction.

The proper service guarantees the claimant access to justice and the defendant the right to a fair trial by giving him an opportunity to be heard. From the point of view of the functioning of the state, service is a condition for sound administration of justice, provided in a timely manner, which builds trust in the judicial system - a key factor in protecting the rule of law.

Traditionally, in the continental legal systems service is considered an expression of state sovereignty.[1] Therefore, each country can carry out service on its own territory, and when it is necessary to serve abroad- that foreign country must agree and cooperate. In this regard, during the years bilateral and multilateral treaties are concluded. The most important multilateral treaties are those adopted within the framework of the Hage Conference of Private International Law - the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention).[2]

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[1] Hau, W. in Encyclopedia of Private International Law, 2017, p. 4238.

[2] https://www.Hague Conventionch.net/en/instruments/conventions/full-text/?cid=17

In parallel, within the EU Member States are faced with the challenge of how to combine this traditional national approach with mutual trust, and the need to improve and speed up the transmission and service of judicial and extrajudicial documents. This is an important cornerstone of judicial cooperation in civil matters of cross-border implications developed pursuant to Art. 81 of the Treaty on the Functioning of the European Union (TFEU).

The legal framework regarding the service of judicial and extrajudicial documents in civil and commercial matters in the EU builds on the achievements of the Hague Convention. However, applying three regulations and elaborated further by the practice of the Court of Justice the EU (CJEU), the EU law gradually goes in directions that to some extent depart significantly from the model of the Hague Convention.

This article aims to examine one of the main questions, which over time finds different answers, namely - when a document in a civil and commercial matters should be served abroad. The focus will be on the solutions of the Hague Convention and the new Service of Documents Regulation.[3] The goal is to compare these solutions and to assess which direction is more justified to be followed - the path of the Hague Convention or the Service of Documents Regulation.

2. Instruments

The cross-border service of judicial and extrajudicial documents in civil and commercial cases is governed by national sources, sources of classical international law (bilateral and multilateral treaties) and by instruments of EU law.

The national framework is traditionally focused on the means of service within the respective country. It also contains rules for situations in which the addressee of the document is not personally or territorially connected to the state, has no known address, as well as rules governing unsuccessful service attempts.

The different treaties mainly govern the transmission of the documents, i.e. the cooperation between countries so that a document that concerns a pending case in one country can reach its addressee in another country. The general regulation in this regard is contained in the bilateral legal

[3] Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast).

aid treaties, as well as in the consular conventions, incl. in the Vienna Convention on Consular Relations.[4]

The need for specific, more detailed regulation of cross-border service was recognized at the dawn of the creation of the Hague Conference of Private International Law. The topic is covered by the three Civil Procedure Codes (from 1896,[5] 1905[6] and 1954[7]). Building upon them, the Hague Convention of 1965, still applicable today, was drawn up and adopted, currently binding 84 states. The scope of the convention concerns mostly the means of transmitting documents between states, not the service itself. The service is not defined. However, a remedy is provided in favor of the defendant if it does not appear (Articles 15 and 16).

Within the framework of EU law, service is subject to regulation in primary law - Article 81 TFEU, Article 47 of the Charter of Fundamental Rights of the European Union (Charter)[8] in relation with Article 6 of the European Convention of Human Rights (ECHR).[9] On a secondary law level three regulations are dedicated to the service of documents – Regulation 1348/2000[10], 1393/2007[11] and the currently applicable one – Service of Documents Regulation. The first regulation was inspired by and built upon the Hague Convention of 1965. Further development expanded of the means of service, simplified the rules for translation and communication between the participants in the procedure using standard forms, and adapted to the modern technologies for communication. The most significant amendment that follows from the practice of the CJEU concerns the answer to the question posed in the article - when a document must be served in another Member State. Service issues are also raised by the other instruments of the EU law (e.g. Regulation Brussels Ia[12] in relation to the suspension and grounds for refusal of enforce-

[4] https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

[5] https://www.hcch.net/en/instruments/the-old-conventions/1896-civil-procedure

[6] https://www.hcch.net/en/instruments/the-old-conventions/1905-civil-procedure-convention

[7] https://www.hcch.net/en/instruments/conventions/full-text/?cid=33

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT

[9] https://www.echr.coe.int/documents/d/echr/convention_ENG

[10] 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.

[11] 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), and repealing Council Regulation (EC) No 1348/2000.

[12] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of

ment, Regulation Brussels IIb[13] as regards the grounds for refusal, Regulation 1896/2006[14] in the context of the minimum requirements for service, including no applicability if the defendant is not found, etc.). These last regulations and aspects are beyond the scope of the article.

3. When to serve abroad?

The answer to this question presupposes a review of the legal framework at the national level and at the level of the Hague Convention and EU law. The starting position is that, on the one hand, the defendant's right to know about the proceedings against him must be protected and he must be given an opportunity to defend himself. On the other hand, the defendant should not be allowed, by hiding, to block or unduly hinder the process, because in this way the right of the plaintiff to access to justice will be limited. These considerations to one degree or another are reflected at the normative level.

3.1. National law

At the national level, the regulation of service aims to provide the addressee with an actual opportunity to receive the document (personal service or service to a certain circle of close individuals). Then, to ensure access to court for the plaintiff, other types of service are used - the so-called substitute service (service to persons or in a way that contains a probability that the addressee will receive the document) and the so-called fictitious service (delivery in such a way that the probability of the addressee learning about the delivered document is practically null).

Also, the national sources stipulate when a given document must be served abroad.

For example, in Bulgaria the general principle is personal service (Article 38(1) CPC). However, the service may be effected through other person and by placing the documents to the file of the case or by sticking on the notification (Article 38(2) CPC). The final solution is the public notification in the State Gazette (Article 38(3) CPC).

12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[13] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).

[14] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

3.2. Hague Conventions

The Hague Convention aims to create appropriate means to ensure that judicial and extrajudicial documents be served abroad (see preamble). The emphasis is on the means of service, not the service itself, which is not defined. The specified delivery methods must, as highlighted in the preamble, bring to the notice of the addressee the documents in sufficient time. Thus, the Hague Convention aims to improve the organization of mutual judicial assistance and for that purpose, to simplify and speed up the procedure.

In this context, the provisions of Article 1, paragraph 1 of the Hague Convention provide that it applies in all cases ... *where there is occasion to transmit a* ... document for service abroad. The key question that this provision poses is who determines whether there is an occasion to transmit in another country - the law of the court seised or the Hague Convention. The answer that prevails is that whether a document must be served abroad is given by *lex fori* - i.e. only if the law of the court, which hears the claim, requires the document to be served in another country and it is the contracting party, then the methods established in the Hague Convention will be applied. Conversely, if national law provides for other methods of service (e.g. to a representative who is located in that country, or in the case of an address - by sticking), they prevail, and it may not be necessary to serve abroad in compliance with the Hague Convention.

This view is based on arguments from the history of the adoption and application of the Hague Convention, as well as from a comparative law perspective.

Already in the report to the draft convention from 1964, it is explicitly stated that .... *the issue of whether the Convention should be applied in a particular case is indeed determined by the law of the court seized*[15]. In the same sense are the statements made during the diplomatic session on the acceptance of the Hague Convention from 1964.[16] Subsequently, in 1989 the Report of the Special Commission on the Application of the Hague Convention stated that ...*The principle that the forum is to decide this question [i.e., whether documents should be transmitted for service abroad] under its own law was broadly accepted, although the danger of permitting domestic service upon a person who had not been expressly designated as an agent to receive service of process was recognized*[17]. The conclusions and recommendations of

[15] Report of the 1964 SC (op. cit. note 25), p. 81, HCCH, Practical Handbook on the Operation of the Service Convention, 2016, p. 15.

[16] Op. cit.

[17] Report on the work of the Special Commission of 1989 on the operation of the Hague

the special commission from 2003 explicitly emphasize the optional nature of the Hague Convention[18]. In this sense are the interpretations that are given in the 2014 Practical Handbook.[19]

From a comparative legal point of view, two leading court decisions are of great significance - one from the Netherlands, the other from the USA.

The first one is *Segers and Rufa BV v. Mabanaft GmbH* ("*Mabanaft "*) by the Supreme Court of the Netherlands (Hoge Raad).[20] In the given case, the appeal against the decision of the Court of Appeal in the Hague was served on the opposite party - a German company - through its lawyer in the Hague. This possibility existed under the civil procedure law of the Netherlands which allowed the service of notice required upon appeal of a lower court judgment to be made upon the attorney at whose office the addressee had elected domicile in the lower court proceedings.[21] The respondent did not appear, and a default judgment against it was issued. Hoge Raad held that the *issue of whether a document needed to be transmitted abroad for service must be determined according to the law of the forum.*

The other one is *Volkswagen Aktiengesellschaft v Schlunk* ("*Schlunk*")[22] by the Supreme Court of the United States. This case was brought by Mr. Schlunk against Volkswagen USA and its parent company - Volkswagen Germany for product (car) damages. The lawsuit against the German parent company was filed through the Volkswagen USA, which under the laws of the state of Illinois, where the case is pending, appears as an agent for service in Illinois, even though it had not been expressly appointed for such a purpose. Thus, according to the law of the seised court, service abroad was not necessary, which is why the Hague Convention did not apply. This issue came to Supreme Court of the United States, who ruled that *if the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention*

Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters", p. 5, https://assets.Hague Conventionch.net/docs/e8456534-1ba4-4bc9-ade8-bcf3a7b85c5d.pdf

[18] Report on the work of the Special Commission of 2003, https://assets.Hague Conventionch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf

[19] HCCH, Practical Handbook on the Operation of the Service Convention, 2016, p. 13.

[20] *Segers and Rufa BV v. Mabanaft GmbH,* 28 I.L.M. 1584, 1585 (1989). *Segers and Rufa BV v. Mabanaft GmbH*, HR 27 June 1986, *NJ* 1987, p. 764; *RvdW* 1986,

[21] HCCH, Practical Handbook on the Operation of the Service Convention, 2016, p. 13.

[22] 486 U.S. 694 (1988). 486 U.S. 694; 108 S. Ct. 2104 (1988); I.L.M. 1988, p. 1093, annotated in: Am. J. Int'l L. 1988, p. 816; IPRax 1989, p. 313.

applie. Thus, bcause the service was effected within the United States, the Hague Convention did not apply.[23]

The described interpretation is adopted by the Supreme Court of Victoria and New Southwest in Australia,[24] Canada,[25] as well as, despite some contradictions,[26] in Germany. There, since 1994, there has been even a decision of the German Constitutional Court, which expressly accepted that the Hague Convention applies only when domestic law requires service abroad.[27] The German Bundesgerichtshof has also shared the same view,[28]

From what has been stated so far, stems that the Hague Convention does not define the concept of service, i.e. does not set any formal requirements for it, nor does it govern the conditions for ordinary service. The Hague Convention does not determine when a given document must be served in a country other than the country of the court deciding on the merits. This answer is given by the law of the court seised. Essentially, the Hague Convention mainly regulates the transmission of documents[29]. If, according to the law of the court seised, the service must be carried out in another country, a party to the Hague Convention, then its system must be followed. Afterwords, it provides an alternative options for service through Central Authorities (Articles 2-6), diplomatic and consular representatives (Articles 8-9) or direct service (Article 10), and allows the states to agree on other methods for transmission of documents (Article 11), i.e. to conclude other bilateral or multilateral agreements, incl. to adopt acts at EU level. Thus, the Hague Convention retains the possibility to use national service (e.g. substitute or even fictitious). At the same time, in order not to excessively limit the rights of the addressee of the document, the Hague Convention provides remedies in Articles 15 and 16. They apply if the defendant fails to appear when the summons or other equivalent document should have been sent abroad to be served under the Hague Convention.

[23] HCCH, Practical Handbook on the Operation of the Service Convention, 2016, p. 14-15.

[24] *Nieuwersteeg* v. *Colonia Versicherungen AG*, HR 2 February 1996, NJ 1997, p. 26 and HCCH, Practical Handbook on the Operation of the Service Convention, 2016, p. 16.

[25] HCCH, Practical Handbook on the Operation of the Service Convention, 2016, p. 16.

[26] *Drucksache des Bundestags* Nr. 8/217 of 22 March 1977, p. 41 and Geimer, G. Neuordnung des internationalen Zustellungsrechts, Vorschlage fur eine neue Zustellungskonvention, 1999, p. 180.

[27] BVerfG, 7 December 1994, *NJW* 1995, p. 649.

[28] *BGH*, NJW 1999, 1187 (1188), *Fleischhauer*, IPRax 2000, 12 ff. and *BGH*, NJW 1999, 2442 (2443).

[29] HCCH, Practical Handbook on the Operation of the Service Convention, 2016, p. 22.

3.3. Regulations

3.3.1. Old Regulations

The repealed Regulations 1348/2000 and 1393/2007 provided that they apply where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there (Article 1, para.1). This language, apparently borrowed from Hague Convention, justified the interpretation that it was not EU law, but the law of the Member State where the case was pending, to determine whether a document had to be served abroad. Only if this law provides for service abroad then the Regulation establishes the way this is to happen,[30] As a result, the possibility of applying national methods of service that have a fictitious nature (e.g. the previously known in France institute of the so-called *remise au parquet*) remained. The legal theory argued against such an interpretation, stating that it is incompatible with EU law, mainly because it is a violation of Art. 6 of the ECHR and of Art. 47 Charter and that it affects addressees who live in another EU Member State in a discriminatory manner,[31]

3.3.2. Case law of CJEU

The EU Court clarified and gave an answer to the problem that arose in the application of the repealed Regulation 1393/2007.

In case C-325/11 *Adler* of December 19, 2012 the CJEU had to decide on a case where claimants residing in Germany seised the Polish court who asked them to communicate to it a representative in Poland authorized to accept the service of judicial documents. The Polish court also inform the claimants

[30] Dominelli, S. Current and Future Perspectives on Cross-border Service of Documents. Aracne. 2018, p. 50, Мусева, Б. Проблеми при връчването на съдебни и извънсъдебни документи по граждански и търговски дела според Регламент 1348/2000, Регламент 1393/2007 и българския гражданско процесуален кодекс. – в: Международното частно право и някои правила от част седма на ГПК в светлината на общностното право. С. Силеа, 2008, с. 30, Musielak/Voit, Zivilprozessordnung: ZPO, 19. Auflage 2022, EuZustVO, Art. 1 Anwendungsbereich, Rn. 3, LG Hamburg, 12.03.2013-335, unalex DE-3196, Cass. Civ. sez.19-05-2014 – 10945, unalex IT-760.

[31] Heiderehoff, B. Fiktive Zustellung und Titelmobilität**.** - IPRax, 2013, №4, p. 313, Roth, H. Remise au parquet und Auslandszustellung nach dem Haager Zustellungsübereinkommen von 1965 – IPRax, 2000, Nr. 6, p. 487, Lindacher, W. Europäisches Zustellungsrecht- Die VO (EG) Nr.1348/2000Fortschritt, Auslegungsbedarf, Problemausblendung – Zeitschrift für Zivilrecht, 2001, Nr. 2, p. 189, Stadler, A. Neues Europäisches Zustellungsrecht - IPRax, 2001, Nr. 6, 514-516, Bajons, E. Internationale Zustellung und Recht auf Verteidigung, In: Wege zur Globalisierung des Rechts; Festschrift für Rolf Schutze zum 65. Geburtstag, Münich: C.H. Beck, 1999, p. 55.

that in case they failed to do so, any documents addressed to them would have been added to the file case and deemed to be effectively served as established by the Polish Code of Civil Procedure (Article 1135). The claimants refused to comply with the court's request. Consequently, the court's notice about the date of the hearing and the counterparts' briefs were included in the file and deemed to have been effectively served. The claimants did not appear to the hearing, the claim was eventually dismissed and lacking any challenge, the judgment became final. Afterwords, the claimants requested a trial to resume due to not receiving judicial documents, in violation of the EU non-discrimination laws. The District Court refused, stating Polish law complied with EU law. The Regional Court overturned this, finding Polish procedure violated EU regulation. The District Court disagreed and halted proceedings to seek clarification from the CJEU on whether serving documents in such a manner is permissible under EU law. CJEU established that the applicability of the Regulation is determined autonomously and independently of the national law of the court seised. Point 25 of the judgment explicitly stated that ..... *where the person to be served with the judicial document resides abroad, the service of that document necessarily comes within the scope of Regulation No 1393/2007 and must, therefore, be carried out by the means put in place by the regulation to that end, as provided for by Article 1(1) thereof*. Hence, the Regulation answers both the question of "whether" and the question of "how" it should be served in another Member State if the addressee of the document lives there. Therefore, as follows from the operative part of this judgment, national provisions on fictitious service are inadmissible which provide, that *judicial documents addressed to a party whose place of residence or habitual abode is in another Member State are placed in the case file, and deemed to have been effectively served, if that party has failed to appoint a representative who is authorised to accept service and is resident in the first Member State, in which the judicial proceedings are taking place.* The only two exceptions where the Regulation would not apply are: a) to service of a document on the party's authorised representative in the Member State where the proceedings are taking place regardless of the place of residence of that party and b) where the address of the person to be served with the document is not known.

Following the *Alder* judgement, Article 1135 of the Polish Code of Civil Procedure was amended. The Bulgarian CPC contains a provision identical to the one of the former Article 1135 of the Polish Code of Civil Procedure (Article 40(1)). Unfortunately, it has not amended yet.

As explained, the mandatory application of the Regulation is correct if the addressee of the document's lives/habitually resides in another Member State and his or her address is not unknown.

The concepts of *living*, *having a place of residence* or *habitual residence*, as well as the *address is unknown* raise numerous subsequent questions regarding their exact content and the obligations of the court and/or the parties in connection with their establishment. Unsurprisingly, some of these issues also end up at the CJEU. They will be analyzed below in connection with the assessment of the presence of a known (unknown) address.

3.3.3. Service of Documents Regulation

The new Service of Documents Regulation preserves the existing legal norms while providing some linguistic amendments without, however, legislating against the outcomes given by the EU Court in the *Adler* case.

More specifically, Article 1, paragraph 1 of the Regulation provides that it applies to the cross-border service of judicial and extrajudicial documents in civil or commercial cases. Recital 5 specifies that such cross-border service should be considered as service from one Member State to another Member State. Based on this wording, it is assumed that the European legislator clearly states that service within the EU is only to be carried out pursuant to the Regulation[32].

In the Commission's proposal, which started the negotiation process for the adoption of the new Regulation, it was explicitly proposed to provide for a clarification that it applies to service of judicial documents on persons domiciled in a Member State other than the one where the judicial proceedings take place (Art. 1, par. 1, b. "a" of the proposal). As the Commission points out, in *doing this, the Regulation tries to put an end to the current bad practice in which defendants in another Member States are served in the territory of the Member State of origin through alternative or fictitious methods of service of documents, as permitted by the procedural law of the Member State of origin, irrespective of the information on the foreign address of the defendant at the disposal of the court or judicial authority seised with the proceedings. With the new scope wording, courts would not be able to carve such situations out of the scope of the Regulation by simply qualifying the service of the documents as 'domestic'.*[33] During the negotiations, this issue turned out to be quite controversial, probably also due to the use of the term "domicile", that is new for this Regulation, which, when applying the Brussels Ia Regulation for natural persons, has a different content in different Member States (Article 62) and can lead to ambiguities in view of the scope of the Service of Documents Regulation.

[32] Richter, J. Internationale Klagezustellung nach der neugefassten EuZustVO – IPRAX, 2022, Nr. 5, p. 434.

[33] COM (2018) 379 final, c. 13.

Thus, there is no provision in the final text of the Service of Documents Regulation that explicitly specifies when a document must be served in another Member State. At the same time, Recital 7 clarifies this issue by emphasizing the values that the European Commission wanted to uphold in its proposal. Pursuant to it, where an addressee has no known address for service in the forum Member State but has one or more known addresses for service in one or more other Member States, the document should be transmitted to such other Member State for service under this Regulation. This situation should not be construed as domestic service within the forum Member State. The prohibitions on treating such service as domestic and in particular the application of fictitious methods of service to it, such as service by posting an announcement on the court notice board or by depositing the document in the court file, are expressly included es examples. It is worth noting that the precise content of the concept of "known address" is again crucial, which will be analyzed below.

The new version regarding the application of the Regulation is supposed to be interpreted in relation to the repealed Regulation and the practice of the CJEU. The idea set by the Commission to ensure the application of the regulation when serving a person who lives in another Member State, by limiting the extension of "domestic" service for similar scenarios, should also be taken into account. Thus, it can be concluded that from the presented legal framework at the level of EU law, service must take place in another Member State whenever the addressee of the document lives there. The methods of service are those established in the Regulation. National methods of service are inadmissible, which have the effect of excluding the obligation to serve the documents to the other Member State.

3.3.4. Follow up Questions

From the analysis above it became clear that the existence of a "known address" is of key importance for service in another Member State under the Regulation. This concept poses many questions, the most important of which can be reduced to two: what is an unknown address (here reduced further to the question of whether it is related to a formal registration in a given country or to the place where the person actually resides) and is the court obliged to make efforts to look for an address in another Member State (if yes, what should it actually do (*ex officio* or with the assistance of the parties).

Two decisions of the Court of the EU shed light on these questions.

The first one – C-327/10 *Hypoteční banka*[34] – refers to a situation in

[34] CJEU in *Hypoteční banka* C-327/10, ECLI:EU:C:2011:745.

which a defendant - a natural person - had a last known place of residence (address) in the Czech Republic, but at the time of the initiation of the case in this country, this person no longer resided in that place, accordingly, the court seised accepted that his domicile and current address are unknown (points 2 and 36). The CJEU gave an answer to the question of whether the seised court can continue the proceedings in order to avoid a situation of denial of justice for the claimant if it not be possible to determine the defendant's domicile. Such a possibility is established in the former Brussels I Regulation (Art. 26, par. 2) and in the Brussels Ia Regulation (Art. 28, par. 2). According to CJEU, these provisions, which are identical, should be understood in the sense that a court having jurisdiction pursuant to that regulation may reasonably continue proceedings, in the case where it has not been established that the defendant has been enabled to receive the document instituting the proceedings, only if all necessary steps have been taken to ensure that the defendant can defend his interests. To that end, the court seised of the matter must be satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant (point 52).

The second case – C-292/10 *G*[35] – concerns a matter relating to tort brought in Germany against an individual who had an address in the Netherlands, but when served, the documents were returned marked 'Unknown at this address". The court hearing the case in Germany made an inquiry to the Consulate of the Kingdom of the Netherlands in Munich. It stated, that the person was not listed in any population register in the Netherlands (point 29). Attempts were also made to deliver the documents to different addresses, which were also unsuccessful. In this context, the German court summoned the defendant under its national law by publishing the document for the initiation of the proceedings in the court according to Art. 185-188 of the German Code of Civil Procedure. The question addressed to CJEU is whether this national provision, applicable when the defendant's whereabouts in the Union territory are not known and it cannot otherwise be established where he is currently residing, contradicts Art. 6, par. 1 TEU in connection with Art. 47, par. 2 of Charter, as well as other provisions of EU law.

In its answer, the CJEU stared from the understanding that proceedings leading to the delivery of judicial decisions have to take place in such a way that the rights of the defence are observed (point 47). However, this right must be implemented with due regard to the applicant's right to bring an action before a court to rule on the merits of his claim (point 48), which in practice means that it may be subject to restrictions (point 49). This restric-

[35] CJEU in C-292/10 *G,* ECLI:EU:C:2012:142.

tion, on its part, is only permissible if it corresponds to the objectives of public interest, which in this case is assumed to be the need to avoid situations of denial of justice that a claimant would face should it not be possible to determine the defendant's domicile (point 50).

Hence, referring to the previous judgment – C-327/10 Hypoteční banka a.s. - The CJEU accepted, referring again to Art. 26, par. 2 of the Brussels I Regulation (art. 28, par. 2 of the Brussels Ia Regulation) that the court could reasonably continue the proceedings only if all necessary steps have been taken to ensure that the defendant can defend his interests. To that end, the court seised of the matter must be satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant (point 55). As an additional argument, the CJEU also uses the practice of the ECHR under Art. 6, paragraph 1 of the ECHR, which does not preclude 'summons by public notice', provided that the rights of those concerned are properly protected[36]. All this, however, again, is only possible if all inquiries required by the principles of diligence and good faith are undertaken to locate the defendant.

Several conclusions follow from these judgments of the CJEU. Service must take place in the Member State where the person actually resides in order to have an effective opportunity to defend himself. If, in the course of the proceedings, it is established that the person does not reside at the address indicated in the case (or at the address at which he is formally entered in the population database), but is in another Member State, the court seised has no right to directly proceed to national (fictitious) service. It is required first to ensure that efforts are made to discover the actual address/domicile/residence of the defendant as required by the principles of diligence and good faith. How exactly (gathering information from relatives, neighbours, employer, diplomatic/consular representation, use of telephone, e-mail, modern communication technologies, etc.) and exactly who (the court alone or with the help of the parties/other state authorities) should undertake those efforts is a matter left to national procedural law. EU law sets the framework - discovering the addressee of the document and making efforts that are not formal, but possible, logical and with the potential to give him an effective opportunity to familiarize himself with the documents to be served.

In addition, according to Art. 7 of the Service of Documents Regulation, Member States are obliged to provide assistance in determining an unknown address at the request of another Member State in, choosing one of the following ways:

[36] ECtHR Decision of 10 April 2003 in the case of Nunes Dias v. Portugal, Recueil des arrêts et decisions 2003-IV.

- providing for designated authorities to which transmitting agencies may address requests on the determination of the address of the person to be serve[37];
- allowing persons from other Member States to submit requests, including electronically, for information about addresses of persons to be served directly to domicile registries or other publicly accessible databases by means of a standard form available on the European e-Justice Portal;
- providing detailed information, through the European e-Justice Portal, on how to find the addresses of persons to be served.[38]

Member States shall provide information on which means of assistance they have chosen incl. indicate the relevant authorities and their contact details (Article 7, par. 2, b. "a" and "b"). Member States also specify whether the authorities of the Member State addressed submit, on their own initiative, requests to domicile registries or other databases for information about addresses in cases where the address indicated in the request for service is not correct (Art. 7, par. 2, b. "in "). All information in this regard is available and accessible on the European e-Justice Portal in the section "European Judicial Atlas on Civil Matters", respectively in the part entitled "Service of documents (recast)".[39]

The introduced uniform obligation to provide assistance in the search of an unknown address is a novelty. It is dictated by the desire of the European legislator to better protect the right of access to a court of the addressee of the documents in civil and commercial cases with cross-border implications. Essentially, this new provision extends the scope of the Service of Documents Regulation, insofar as it does not allow the court seised to assume that the address of a person is unknown and to apply its national rules for service before the assistance in address enquiries in another Member State has been used.

The possibility of assistance in finding an address does not exhaust the efforts that could potentially be made with a view to complying with the principal diligence and of good faith. This is an additional option which, because it exists, can reasonably be expected to be used.

[37] For example the *bailiff* in Belgium, Lithuania, and Luxembourg, the district court in Czechia and Slovakia, the Ministry of Interior in Croatia.

[38] For example, Central Population Register in Austria, the mayor of a municipality, town or city in Poland, or the registration authorities in Germany.

[39] https://e-justice.europa.eu/38580/BG/serving_documents_recast

4. Conclusion

The conclusion of EU law is that the answer to the question of whether a document must be served in another Member State is given by the Regulation (except in the case of an unknown address and service to a representative), and not by the national law of the court seised. This interpretation is the opposite of what exists in the Hague Convention. This begs the question, which resolution is better?

From the brief explanation above, it can be seen that EU law in the last more than 20 years has developed in a direction that protects the right to a fair trial to a greater extent. Considering actual residence instead of formal registrations and access to substituted and fictitious service arguably provides more effective access to justice for the defendant. The involvement of the court and the parties in searching for an address, when there are clues in this direction, also contributes to a better sound administration of justice.

Is it possible that the development within the framework of EU law, built on the Hague Convention, will affect its development? From the point of view of ensuring the right to a fair trial, this would be a positive result. Since the Hague Convention unites a much larger number of states, as well as since amending a convention is a very complex and difficult process, positive legal development in this direction can hardly be expected. A step forward would be for the solutions withheld at the level of EU law to be used as a model for the development of national procedural law. With the help of new technologies and the traces that individuals leave in electronic environments, ascertaining of whereabouts is likely to become easier over time.

The law cannot and should not remain indifferent, and the court should not look for the simplest and easiest way to start, conduct and conclude its case as if the people don't move, as if the case has no international element and regardless of whether the defendant will be able to defend himself effectively.

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: THE NORMATIVE CROSSROADS IN BOSNIA AND HERZEGOVINA

Abstract: *The recognition and enforcement of foreign court judgments in Bosnia and Herzegovina (BH) is primarily governed by the Private International Law Act of 1982, which was inherited from the former Yugoslavia. Additionally, there are many bilateral agreements in force in BH that deal with international legal assistance. As BH is a candidate for EU membership, it is important to consider the relationship between the relevant provisions of the Brussels I Recast Regulation and the law of third countries including BH. This will help to create a normative solution for mutual recognition of foreign court decisions. The authors will focus on the exorbitant bases of jurisdiction in the national systems of individual EU member states and the possibility of recognizing such decisions in BH.*

Keywords*: Recognition and Enforcement, BH PIL Act, Brussels I Regime, Hague Convention 2019, exorbitant grounds of jurisdiction.*

1. Introduction

Bosnia and Herzegovina is at a normative crossroads in terms of its legislative activity in the area of recognition and enforcement of foreign court judgments. It is still primarily regulated by the provisions of the Law on the Resolution of Conflicts of Laws with the Regulations of Other Countries in

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Certain Relationships (further in the text: BH PIL Act), which was passed back in 1982 in the former Yugoslavia[1] and adopted into the legal system of Bosnia and Herzegovina, after its independence in 1992.[2] Due to political reasons, it seems quite likely that the existing BH PIL Act will be the basic source of law for some time to come.[3] It is therefore important to chase alternative ways of modernizing the rules of private international law in Bosnia and Herzegovina. In the first part of the paper, the authors analyze internal and international sources in the field of recognition and enforcement of foreign court judgments and the possibilities offered by these legal sources in terms of preventing the effect of judgments in BH based on the exorbitant grounds of jurisdiction of foreign courts. Analyzing the provisions of the Brussels I Recast regime, in the second part of the article, the authors point out that this Regulation does not apply to defendants from third countries, but the national rules of the EU member states, including the exorbitant grounds of jurisdiction, which they especially explain using the example of *forum arresti* of Dutch law. Finally, the conclusion contains proposals for overcoming the problem of recognition of such decisions in Bosnia and Herzegovina through the mechanisms of bilateral cooperation, the extension of the Brussels I Recast regime to defendants from third countries, and accession to the Hague Convention from 2019.

[1] Stanivuković, M., Živković, M., *Međunarodno privatno pravo – opšti deo*, Službeni glasnik, 2010., p. 38; Šaula, V., *Osnovi međunarodnog privatnog prava Republike Srpske*, Pravni fakultet Univerziteta u Banjoj Luci, 2011., p. 56; Katičić, N., Matić, Ž., Sajko, K., *Teze za Zakon o međunarodnom privatnom pravu i postupku sa obrazloženjem*, Prinosi, br. 3/70, p. 3-40; Katičić, N., Matić, Ž., Sajko, K., *Teze za Zakon o međunarodnom privatnom pravu i postupku*, Prinosi, br. 6/73, p. 1-84; On this Law and need for its change see in: Alihodžić, J., Duraković, A., *Zakon o međunarodnom privatnom pravu u Bosni i Hercegovini – retrospektiva i perspektiva normativnog uređenja*, Zbornik radova Pravnog fakulteta u Tuzli, br. 1, 2023, p. 53-72; Alihodžić, J., *Razvoj evropskog međunarodnog privatnog prava:pravci reforme zakonodavstva u Bosni i Hercegovini*, OFF-SET, Tuzla, 2012, p. 219 – 223.

[2] *Ibid*., p. 219.

[3] On the impossibility of carrying out reform in this area and alternative ways of modernizing the rules of private international law in Bosnia and Herzegovina: Alihodžić, J.,Meškić, Z., Duraković, A., *Accepting EU Private International Law Standards into the Legal System of Bosnia and Herzegovina: What Can be Done While Waiting for Godot?* LeXonomica – Journal of Law and Economics, Vol. 11, No 2, 2019, p. 151-174.

2. Recognition and Enforcement of Foreign Court Judgments in Bosnia and Herzegovina

The recognition and enforcement of foreign court judgments in BH is carried out in accordance with the system of limited control of judicial acts,[4] which implies that the competent authorities will examine whether the foreign judgment meets the requirements prescribed by law.[5] Besides judgments *stricto sensu*, the notion of judgment also includes court settlements concluded before a foreign court, and decisions of other authorities that are equated with a court judgment and a settlement in the country where they were made. Following definition from Article 86, recognition will occur on the assumption that the conditions from article 87 – 92 of the BH PIL Act are met.[6]/[7] Finally, the same provisions are applied to the enforcement of a foreign court decision, with the obligation of the applicant to submit also a certificate of its enforceability under the law of the country in which it was made.[8] Given the complex constitutional organization of Bosnia and Herzegovina,[9] the courts responsible for the recognition and enforcement of foreign court judgments are the Cantonal Courts in the Federation of Bosnia and Herzegovina,[10] regional courts in the Republic of Srpska[11] and the Basic Court of Brcko District.[12] Pursuant to the provision of Article 101 of the BH PIL Act, if no special decision has been made on the recognition of a foreign judgment, any court may decide on the recognition of that decision in the procedure as a preliminary issue, but with effect only for that procedure. It is

[4] Muminović, E., *Procesno međunarodno privatno pravo*, Pravni fakultet Univerziteta u Sarajevu, 2006., p. 83-84.

[5] Article 86-96 BH PIL Act.

[6] In Bosnia and Herzegovina, the system of assumed reciprocity is accepted. Alihodžić, J., *Princip „pretpostavljenog" reciprociteta u funkciji efikasne realizacije međunarodne pravne pomoći u zemljama regiona*, Zbornik radova „Regionalna saradnja u oblasti građanskog sudskog postupka sa međunarodnim elementom", Banjaluka, 2009., p. 189-204.

[7] The provisions of Article 93 - 95 of the BH PIL Act are not relevant for this area, since they refer to the issue of the personal status of domestic and foreign citizens.

[8] Article 96 BH PIL Act. Dika, M., Knežević, G., Stojanović, S., *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Nomos, Beograd 1991., p. 317.

[9] Alihodžić, J., (2012), p. 219 – 221.

[10] Article 28. paragraph 2. point e) Law on Courts in FBH, Official Gazette FBH No. 38/2005, 22/2006, 63/2010, 72/2010-correction., 7/2013, 52/2014 i 85/2021.

[11] Article 31. paragraph 3. point d) Law on Courts RS, Official Gazette RS No. 37/2012, 14/2014-decision of CC, 44/2015, 39/2016 – Decision of CC, 100/2017.

[12] Article 21. paragraph 4. point f) Law on Courts Brčko District, Official Gazette BD BH, No. 18/2020 – consolidated version.

important to note that this law does not contain a provision that would prevent the recognition of foreign court judgments based on exorbitant grounds of jurisdiction. However, there are opinions that the recognition could be refused even if there was no exclusive jurisdiction of the domestic court, if the assumptions for the jurisdiction of the foreign court were absurd, by appealing to public order.[13] However, bearing in mind the wording of Article 91 BH PIL Act, which stipulates that a foreign court decision will not be recognized if it contradicts the Constitution of Bosnia and Herzegovina and the established foundations of social order,[14] it is unlikely that in practice there would be a refusal to recognize a foreign court decision based on exorbitant grounds of jurisdiction.[15] For the sake of legal certainty and uniform judicial practice in Bosnia and Herzegovina on this matter, it would be good during the eventual reform of the BH PIL Act to introduce an explicit rule that prevents the recognition and enforcement of a foreign court decision based on exorbitant grounds of jurisdiction. Such a provision is foreseen in the reform laws of Montenegro[16] and North Macedonia.[17] Although the BH PIL Act is considered the basic source of law in this area, its application will not occur if a specific legal issue that falls within the scope of this law is regulated by another law or international convention.[18] Given that a significant number of bilateral agreements on international legal assistance in civil (and criminal) matters[19] are in force in Bosnia and Herzegovina, some of which contain provisions on mutual recognition and enforcement of court judgments

[13] Dika, M., Knežević, G., Stojanović, S., *op. cit*., p. 292.

[14] Authors adjusted the original text of the provision.

[15] In practice, the activity of the competent court or other body in BH is limited to checking whether for that specific legal matter that was resolved by a foreign decision there is the exclusive jurisdiction of authorities in Bosnia and Herzegovina.

[16] Article 145 of the PIL Act of Montenegro („ Official Gazette of Montenegro", No. 1/2014, 6/2014 – correction., 11/2014 – correction., 14/2014 i 47/2015) states: „A foreign court decision will not be recognized if a foreign court has based its international jurisdiction on facts that the law of Montenegro does not provide for establishing the international jurisdiction of a Montenegrin court to resolve the same dispute".

[17] Article 161 of the PIL of Republic of North Macedonia (Official Gazette of RNM No. 32 from 10.2.2020) states: „A foreign court decision will not be recognized if the foreign court based its jurisdiction on circumstances that are not provided for by this or other law to establish the jurisdiction of a court or other body of the Republic of North Macedonia to resolve that type of dispute with an international element."

[18] Article 3. BH PIL Act.

[19] On bilateral agreements in force in BH: http://www.mpr.gov.ba/organizacija_nadleznosti/medj_pravna_pomoc/bilateralni_ugovori/Konvencije.aspx?langTag=bs-BA, page access 12.10.2023.

between contracting states, as well as a certain number of agreements that directly regulate recognition and enforcement of court judgments in civil and commercial matters, these bilateral agreements will have priority in application in relation to the relevant provisions of the BH PIL Act. Some of these contracts were adopted into the legal system of Bosnia and Herzegovina by notification of succession after the dissolution of Yugoslavia,[20] while some were concluded by Bosnia and Herzegovina after gaining independence.[21] Therefore, when it comes to bilateral agreements from the former Yugoslavia, it is important to check with the Ministry of Justice of Bosnia and Herzegovina the issue of its validity.[22] For the purposes of this paper, it is important to conduct research on whether some of them contain a rule that enables the refusal of recognition and enforcement of the foreign judgment based on exorbitant jurisdiction.[23] Thus, some agreements previously concluded by the former Yugoslavia, which were adopted into the legal system of Bosnia and Herzegovina by notification of succession,[24] contain a provision that prevents the recognition and enforcement of the foreign judgment on the basis of exorbitant jurisdiction.[25]

[20] http://www.mpr.gov.ba/organizacija_nadleznosti/medj_pravna_pomoc/bilateralni_ugovori/default.aspx?id=939&langTag=bs-BA, page access 12.10.2023.

[21] http://www.mpr.gov.ba/organizacija_nadleznosti/medj_pravna_pomoc/bilateralni_ugovori/ugovori/default.aspx?id=3813&langTag=bs-BA, page access 12.10.2023.

[22] Živković, M., Marjanović, S., *Nekoliko pitanja u vezi s primjenom međunarodnih ugovora u međunarodnom privatnom pravu Republike Srbije*, Pravni vjesnik, god. 35, br. 3-4, 2019., p. 280.

[23] It is also important to point out that the aforementioned bilateral agreements on international legal assistance in civil (and criminal) matters have a rather uneven approach to the regulation of certain issues of international/cross-border cooperation, which has the consequence that some of them do not contain a section on the recognition and enforcement of foreign judicial decisions at all.

[24] The authors received information about the validity of the contracts listed in this text, which contain the rule on refusing to recognize judgments made on the basis of exorbitant jurisdiction, from the competent Ministry of Justice of Bosnia and Herzegovina on November 10, 2023.

[25] Article 3 of the Convention between the Government of the SFRY and the Government of the French Republic on the Recognition and Enforcement of Court Judgments in Civil and Commercial Matters ("Official Gazette of the SFRY - International Agreements and Other Agreements", No. 7/72) reads: Decisions made by the court of one contracting party are recognized or declared enforceable in the territory of the other party:

a) if the court of origin was competent according to the law of the requested state or based on the convention in force between the contracting parties; Article 57 a) of the Agreement between the SFRY and the People's Republic of Hungary on Mutual Legal Assistance ("Official Gazette of the SFRY - International Agreements and Other Agreements", No. 3/68) reads: "Decisions from Article 56, paragraph (1) point a) and b) of this Agreement are recognized and will be enforced under the following conditions: a) if according to the law of the contracting

These agreements are particularly important for Bosnia and Herzegovina, bearing in mind that Brussels I Recast regime excludes third-country defendants from its scope of application, which will be discussed in detail in the next part of the paper.

3. Brussels I Recast Regulation Regime and Bosnia and Herzegovina

The recognition and enforcement of foreign court judgments in the European Union is regulated by Regulation (EU) 1215/2012 of the European Parliament and the Council of December 12, 2012 on jurisdiction, recognition and enforcement of foreign court judgments in civil and commercial matters (further on: Brussels I Recast Regulation).[26] The regime of the Brussels I Recast Regulation provides for a double standard regarding the application of the rules on the international jurisdiction of courts in civil and commercial matters. Namely, relations that have an inter-EU character are carried out in accordance with the rules of the Regulation. On the other hand, if it is a defendant with a domicile/seat outside the EU, the Brussels I Recast Regulation opens the door to national rules of private international law, including exorbitant grounds of jurisdiction.[27] The latter raises the question of whether the judgments of EU member state courts based on exorbitant grounds of jurisdiction could be recognized in third countries, including Bosnia and Herzegovina. The answer to this question depends on the legislative solutions of the state of recognition. If the state of recognition is not a party to the multilateral or bilateral convention which excludes the possibility of recognizing a judgment resulting from the "exorbitant jurisdiction" of that

party in which enforcement is requested, the court of the contracting party where the decision was made could act in that matter..."; Article 51 a) of the Agreement between the Federative People's Republic of Yugoslavia and the Romanian People's Republic on Legal Assistance dated October 18, 1960 ("Official Gazette of the FNRJ" - supplement No. 8/61, entered into force on October 1, 1961), reads: "Court decisions from Article 50 shall be recognized and enforced under the following conditions: a) if the law of the contracting party in which recognition or enforcement is requested does not exclude the jurisdiction of the court of the contracting party where the decision was made in that matter.

[26] OJL351, 20.12.2012, p. 1–32.

[27] Article 6 paragraph 1 Brussels I Recast Regulation reads: „If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State".

Article 6 paragraph 2: „As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State".

court, it is important to have a rule in the PIL Act which prevents recognition of such judgments.[28] BH PIL Act does not contain such a rule. However, assuming that the bilateral agreements with France, Hungary and Romania are still in force,[29] the recognition and enforcement of court judgments based on exorbitant grounds of jurisdiction from these countries could be prevented. In relation to other EU national legislations, the system of recognition and enforcement in BH remains "unprotected". Examples of exorbitant jurisdictional grounds could be: citizenship of the plaintiff, acquisition of property, performance of work, domicile or habitual residence of the plaintiff, submission initiating proceedings during the defendant's temporary stay on the territory of a certain country, jurisdiction that is unilaterally determined by the plaintiff (e.g. on the invoice) without the consent of the defendant, jurisdiction based on the finding of the defendant's product on the territory of a country, where that product caused damage, even though the defendant could not foresee that the product would be found on the territory of that country, imposition of a temporary or protective measure in order to decide on the merits, enforcement or registration of the judgment with the aim of establishing jurisdiction with regard to additional claims, etc.[30] To illustrate the problem in practice, we will use the example of the exorbitant ground of jurisdiction from Dutch law based on the issuance of an order for the seizure of the debtor's property in order to decide on the merits (*forum arresti*).[31] The main purpose of the seizure of the debtor's property, which can be carried out over any form of property (money in bank accounts, shares in companies, claims against third parties, etc.) is to ensure the enforcement of

[28]For example, the PIL Act of Montenegro and North Macedonia has such a provision.

[29] V. supra f.n. 22. See also: Živković, M., Marjanović, S., *op. cit*., , p. 280.

[30] Stryven, O., *Exorbitant Jurisdiction in the Brussels Convention*, (Electonic version) Jura Falconis Jg. 35, 1998-1999, Nummer 4, https://www.law.kuleuven.be/apps/jura/public/art/35n4/struyven.pdf, Retrieved 20.10.2023. Hacker, E., *Defining Exorbitant Jurisdiciton*, (Electronic version) from: https://ssrn.com/abstract=2047113, Retrieved 20.10.2023.

[31]Before the reform of the Code of Civil Procedure from 2001, the international jurisdiction of courts in the Netherlands was determined by the transposition of internal rules on local jurisdiction to cases with an international element, in accordance with the decisions of the Supreme Court of the Netherlands (HR 24.12.1915, NJ (1917), 417; HR 5.12.1940, NJ (1941), 313.) This principle of determining jurisdiction was satisfactory until there was an increase in the volume of international legal relations. The 2001 reform brought a number of useful changes, including a new set of rules on direct international jurisdiction of Dutch courts, but with this reform the Dutch legislator did not completely renounce the transposition of internal rules on local jurisdiction when resolving disputes with an international character. In this way, the principle of *forum arresti* is retained when determining the international jurisdiction of the Dutch court. Van Lith, H., *International Jurisdiction and Commercial Litigation, Uniform Rules for Contract Disputes*, T.M.C. Asser Press, 2009., p. 124.

the judgment that will be made. However, the imposition of such a protective measure can also mean the establishment of the international jurisdiction of the Dutch court to resolve the dispute on its merits.[32] The ILA Principles on Provisional and Protective Measures in International Litigation[33] stipulate that the purpose of imposing these measures is to increase the protection of creditors in view of the international risk caused by differences in legal systems, procedures and practices. The goal is to stop the debtor from preventing the enforcement of the judgment by transferring assets, especially from bank accounts.[34] However, unlike the Dutch legislator who justifies the jurisdiction of the court to decide on the merits on the basis of *forum arresti,*[35] the ILA Principles on temporary and protective measures explicitly state in point 10 that "jurisdiction for the imposition of temporary and protective measures should be independent of the jurisdiction for resolving disputes on the merits",[36] and that the fact that the court has determined a temporary and protective measure does not in itself mean that it is also competent to resolve the dispute on the merits, regardless whether the claim is related to the value of the seized property or not.[37] Although *forum arresti* is not explicitly mentioned in the list of exorbitant grounds of jurisdiction in the Draft Convention on the Recognition and Enforcement of Decisions from 1968, "... it was reasonable to assume that the recognition of a decision ren-

[32] Conservatory arrest of assets in the Netherlands; obtaining security, putting pressure and/or creating jurisdiction, https://www.vantraa.nl/en/know-how/conservatory-arrest-of-assets-in-the-netherlands-obtaining-security-putting-pressure-and-or-creating-jurisdiction/, Retrieved 25.10.2023.

[33] International Law Association: The Helsinki Principles on Provisional and Protective Measures in International Litigation, Rabels Zeitschrift fÜr Ausländisches und Internationals Privatrecht, Bd. 62, H. 1, 1998, str. 128-130.

[34] Juenger, F.K., *The ILA Principles on Provisional and Protective Measures*, The American Journal of Comparative Law, Vol. 45, No. 4, Symposium: Civil Procedure Reform in comparative Context, 1997., p. 941.

[35] Conservatory arrest of assets in the Netherlands; obtaining security, putting pressure and/or creating jurisdiction, https://www.vantraa.nl/en/know-how/conservatory-arrest-of-assets-in-the-netherlands-obtaining-security-putting-pressure-and-or-creating-jurisdiction/, Retrieved 25.10.2023.

[36] International Law Association: the Helsinki Principles on Provisional and Protective Measures in International Litigation, Rabels Zeitschrift fÜr Ausländisches und Internationals Privatrecht, Bd. 62, H. 1, 1998, p. 128-130.

[37] Point 21 International Law Association: the Helsinki Principles on Provisional and Protective Measures in International Litigation, Rabels Zeitschrift fÜr Ausländisches und Internationals Privatrecht, Bd. 62, H. 1, 1998, p. 128-130. Nygh, P., Provisional and Protective Measures in International Litigation – The Helsinki Principles, Rabels Zeitschrift fÜr Ausländisches und Internationales Privatrecht, Bd. 62, H. 1, 1998, p. 115-122.

dered on this basis would also be excluded (in disputes between residents of the States of the Common Markets – authors' remark)".[38] This basis for establishing international jurisdiction is not applied in relation to defendants from EU member states, in accordance with the Brussels regime of recognition and enforcement of court decisions in civil and commercial cases.[39] In relation to defendants from third countries, the application of the *forum arresti* rule comes into play when invoking other grounds does not result in the jurisdiction of the Dutch court, so it should be understood as a rule of "last resort".[40] Thus, the jurisdiction of the Dutch court can be established on this basis with the cumulative fulfillment of several conditions: that the defendant (debtor) does not have a known domicile in the Netherlands, that the jurisdiction of the Dutch court cannot be based on another basis, that the property of the debtor that is the subject of the seizure, is located in the Netherlands, that in accordance with Article 767 of the Dutch Code of Civil Procedure there is no other way to obtain an enforcement order/enforceable title in the Netherlands, or that there is no agreement between the parties on the exclusive jurisdiction of a foreign court (e.g. a court in Bosnia and Herzegovina).[41] The condition from Article 767 should be understood in such a way that the *forum arresti* rule does not apply if there is a concluded agreement between the Netherlands and another state that regulates the issue of mutual recognition and enforcement of court judgments.[42] Since there is no such bilateral agreement between Bosnia and Herzegovina and the Netherlands, it is clear that the jurisdiction of the Dutch court may be established in accordance with the *forum arresti* rule. However, given the interpretation of the Supreme Court of the Netherlands in the *Gazprombank case* from 2014 and by fulfillment of the conditions explained in it,[43] there is the possibility

[38] De Winter, L.I., *Excessive Jurisdiction in Private International Law*, International and Comparative Law Quarterly, Vol 17., No. 3, 1968., p. 715.

[39] Pellis, L., Forum Arresti: Aspecten van rechtmachtscheppend (vreemdelingen-) beslag in Europa, 1993, pp. 7-15, cited according to: Van Lith, H., International Jurisdiction and Commercial Litigation, Uniform Rules for Contract Disputes, T.M.C. Asser Press, 2009., p. 137.

[40] O*p. cit*., p. 136.

[41] In this context, the mere existence of such an agreement in favor of the jurisdiction of a foreign court is sufficient, regardless of the possibility of its enforcement in the Netherlands. Van Lith, H., *op. cit*., p. 138.

[42] Van Lith, H., *op. cit*., p. 137.

[43] HR 26. 9. 2014., ECLI:NL:HR:2014:2838. When assessing the possibility of recognizing a foreign court decision, the Dutch Supreme Court took into account the following criteria:

(i) the jurisdiction of the court that issued the judgment that is acceptable according to international standards;

(ii) the foreign decision was made in accordance with a legal procedure that ensures

of the recognition of the court judgment from BH in the Netherlands. Consequently, this would eliminate applying the *forum arresti* rule to establish the competence of the Dutch court to decide on the merits. If this were not the case, and the Dutch court makes a decision on the merits based on exorbitant jurisdiction, the question arises of the possibility of its recognition in Bosnia and Herzegovina. The question is particularly important for the reason that the value of the seized property, on the basis of which the *forum arresti* jurisdiction is based, does not necessarily coincide with the amount/value of the claim from the decision on the merits, which is why the need for recognition and enforcement on the debtor's property would arise in Bosnia and Herzegovina. This example shows how necessary it is to have a protective rule in domestic (BH) legislation, which would prevent the recognition of such decisions based on exorbitant grounds of jurisdiction.[44]

4. Concluding remarks

Possible normative actions, which would prevent the effect of "exorbitant judgments" of EU member states in Bosnia and Herzegovina, can be divided into four groups. *First*, when the legal and political conditions for this are met in Bosnia and Herzegovina, the reform of the BH PIL Act should provide for a provision preventing the recognition of judgments made by the foreign courts on the basis of exorbitant jurisdiction. *Second*, a regional convention that would regulate the issue of mutual recognition and enforcement of foreign court judgments, informally named the "Sarajevo Convention",[45]

compliance with fundamental procedural principles;

(iii) recognition of the foreign decision is not contrary to Dutch public policy; and

(iv) the foreign decision does not conflict with a decision of a Dutch court between the same parties or with a previous decision made by a foreign court between the same parties in a dispute with the same subject matter, provided that the previous decision is recognized in the Netherlands or meets the conditions for recognition. If the above conditions are met, the request for recognition is generally allowed. However, it is important to emphasize that in this system, developed in judicial practice, the foreign judgment is not declared "enforceable", but a new judgment corresponding to the foreign judgment is pronounced in the proceedings before the Dutch court.

[44] Of course, there remains the possibility that, depending on the circumstances of the specific case, the domestic court applies the public policy exception, and possibly refuses to recognize such a court judgment, which is based on an exorbitant ground of jurisdiction.

[45] Meškić, Z., Radončić, Dž., *Brussels I Recast and the south-east Europe*, Revija za evropsko pravo, Vol 15 (1), 2013, p. 55-80.; Meškić, Z., *Regional Convention on Jurisdiction and the Mutual Recognition and Enforcement of Judgments in civil and Commercial Matters (Sarajevo Convention) – A Perspective of Bosnia and Herzegovina*, Liber Amicorum Gašo Knežević, Univerzitet u Beogradu – Pravni fakultet, Udruženje za arbitražno pravo, 2016, pp. 242-264.

did not result in success, although it had the potential to achieve the success that the Lugano Convention once achieved.[46] *Third*, in accordance with the EU's external competence regarding the conclusion of bilateral agreements with third countries as well as the practice of the Court of the EU,[47] EU member states lost the possibility of concluding bilateral agreements with third countries in areas that are internally regulated by binding EU acts.[48] Despite this, in certain areas of private international law and with the fulfillment of certain conditions, there is a possibility for member states to conclude bilateral agreements with third countries, even if the specific area is regulated by regulations at the EU level.[49]/[50] In the context of the external jurisdiction of the EU,[51] and the practice of the Court of the EU,[52] it is important to consider the issue of bilateral cooperation between individual EU member states and third countries in the field of recognition and enforcement of foreign court decisions in civil and commercial cases. The position of the Court of the EU in the aforementioned ERTA decision is unequivocal when it says that "... every time the Community, in an effort to implement a common policy envisaged by the Treaty, adopts provisions establishing common rules regardless of the form they took, the member states no longer have the right to, acting individually or even collectively, assume obligations towards third countries".[53] The area of recognition and enforcement of foreign court

Alihodžić, J., Meškić, Z., Duraković, A., *op. cit*. p. 166. Jessel- Holst, C., *The Reform of Private International Law Acts in South East Europe, with Particular Regard to the West Balkan Region*, Anali Pravnog fakulteta u Zenici, Br. 18, God. 9, 2016, p. 142-143.

[46] The Convention of Lugano on Jurisdiction and the Recognition and enforcement of judgments in civil and Commercial Matters, Official Journal of the European Communities, L 319, 9, 1988. o zaključenju ove konvencije v više u : Alihodžić, J., (2012)*op. cit*., p. 52-55.

[47] ERTA, Case 22/70, Commission v. Council, 1971, ECLI:EU:C:1971:32. V. i Opinion 1/03, E.C.R. (2006) ECLI:EU:C:2006:81 i Opinion 1/13 OJ EU C 462, 22.12.2014, p. 4.

[48] Alihodžić, J., (2012)*op. cit*., p. 46 -50.

[49] Alihodžić, J., *Uticaj vanjske nadležnosti Evropske unije na sklapanje međunarodnih ugovora država članica u oblasti Međunarodnog privatnog prava – osvrt na Uredbu EZ br. 664/2009 i njen značaj za BiH*, Anali Pravnog fakulteta u Zenici, No. 6, year 3, 2010., p. 86-88.

[50] Proposal for a Decision of the European Parliament and of the Council on an authorization addressed to France to negotiate a bilateral agreement with Algeria on matters related to judicial cooperation and Commercial matters (COM/2023/65 final), and Proposal for a Council Decision on an authorization addressed to France to negotiate a bilateral agreement with Algeria on matters related to judicial cooperation concerning family law matters (COM/2023/64 final).

[51] Article 3(2) Consolidated Version of the Treaty on the Functioning of the EU (Official Journal of the European Union C 326/47.

[52] ERTA.

[53] ERTA, paragraph 17.

judgments in civil and commercial matters at the EU level is covered by the Brussels I Recast regime. However, this Regulation does not contain a comprehensive set of rules regarding the recognition and enforcement of court decisions against defendants from third countries. In addition, the Regulation explicitly excludes the application of the rules on the international jurisdiction of the court in relation to defendants from third countries. Since the EU has not used its internal competence to enact regulations in this area, all EU member states are, according to the interpretation of the ERTA decision, free to enter into bilateral relations with third countries in the area of recognition and enforcement of foreign court decisions in civil and commercial matters (Article 4(j) and 81 TFEU).[54] This may result in the multiplication of differences between national legal systems in the area of recognition and enforcement of court judgments.[55] However, on the other hand, it is also an opportunity for Bosnia and Herzegovina to improve its own system in this area through bilateral agreements with some member states. This particularly refers to the possibility of refusing to recognize a judgment based on exorbitant grounds of jurisdiction, such as those based on forum arresti principle. Similar effects would be provided by the possibility of extending the rules of the Brussels I Recast Regulation regime to defendants domiciled/seated outside the EU.[56] Research conducted by the Asser Institute and the Erasmus School of Law showed that there is interest in such an initiative, where 44% of respondents (legal practitioners) declared that the rules on international jurisdiction should be fully unified at the EU level even in situations relating to defendants from third countries. Among the reasons cited in support of this position is certainly the fact that such rules would prevent the application of exorbitant grounds of jurisdiction, which would ultimately facilitate the system of recognition and enforcement of judgments in this area.[57] *Fourth*, there is a possibility of considering Bosnia and Herzegovina's accession to the 2019 Hague Convention on the Recognition and Enforcement of Court Judgments in Civil and Commercial Matters (hereinafter HC 2019[58]),

[54] Alihodžić, J., Meškić, Z., Duraković, A., *op. cit*., p. 168.

[55] Wilderspin, M., Vysoka, L., *The 2019 Hague Judgments Convention through European lenses*, The Netherlands Journal of Private International Law, 2020/1, p. 34-49.

[56] Burkhard Hess 'Reforming the Brussels IRegulation: Perspectives and Prospects' (2021) MPILux Research Paper Series 2021 (4) [www.mpi.lu], page access 24.10.2023.

[57] Kramer, X., Ontanu, A., de Rooij, M., Themeli, E., Hanemaayer, K, *The application of Brussels I (Recast) in the legal practice of EU Member States, Synthesis Report*, (Electronic version) from https://www.asser.nl/media/5018/m-5797-ec-justice-the-application-of-brussels-1-09-outputs-synthesis-report.pdf, Retrieved 26.10.2023.

[58] HC 2019 was adopted on July 2, 2019, and entered into force on September 1, 2023. Many papers have already been written about the importance and potential effects of HC 2019 in

which defines jurisdictional filters,[59] i.e. rules on indirect international jurisdiction, the fulfillment of which, along with assuming that the conditions for recognition from Article 7 HK 2019 are met,[60] makes the judgment of the country of origin become eligible for recognition.[61]

Summary

Future legislative action in the area of recognition and enforcement of foreign court judgments in civil and commercial matters in BH is conditioned by various factors. Among them, the political ones dominate, especially when it comes to the lack of consensus for implementing the reform

the context of achieving international cooperation and legal security, and most of the authors of different countries, with minor or major objections, declared themselves in favor of joining this instrument, although there were also those who were not satisfied with the final solution of this document. Brand, R., The Hague Judgments Convention in the United States: A "Game Changer" or a New Path to the Old Game?, 82 University of Pittsburgh Law Review, 2021, p. 847, (Electronic version) from http://ssrn.com/abstract=3747078, Retrieved 21.10.2023. Van Loon, H., *Towards a Global Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Netherlands International Law Review, No. 1, 2020. Rumenov, I., Implications of the new 2019 Hague Convention on recognition and enforcement of foreign judgments on the national legal systems of countries in South Eastern Europe, EU and Member States – Legal and Economic Issues, vol. 3, 2019, p. 385 – 404. Brand, R., Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead, Netherlands International Law Review, Volume 67, Issue 1, May 2020, p. 3-17; Weller, M., The Jurisdictional Filters of the HCCH 2019 Judgments Convention, Yearbook of Private International Law XXI (2019/2020), 2020., p. 279. Schack, H., *HAVÜ Nein danke! Zur weltweiten Urteilsanerkennung und zum Jurisdiction Project der Haager Konferenz für IPR*, Zeitschrift für Europäisches Privatrecht (ZEuP), 2023, p. 285-289.

[59] The jurisdictional filters on which the system of recognition and enforcement of foreign court judgments under the HC 2019 regime is based are regulated by Article 5 and 6 of the Convention. Đorđević, S., *Kratak osvrt na Hašku konvenciju o priznanju i izvršenju stranih sudskih odluka u građanskim ili trgovačkim stvarima iz 2019*, Zbornik radova „Usklađivanje pravnog sistema Srbije sa standardima EU", Kragujevac, 2021, p. 411. Weller, M., *The Jurisdictional Filters of the HCCH 2019 Judgments Convention*, Yearbook of Private International Law 2019/2020, 2020, p. 279 – 308.

[60] Jovanović, M., *Thou Shall (Not) Pass – Grounds for Refusal of Recognition and Enforcement under the 2019 Hague Judgments Convention*, Yearbook of Private International Law 2019/2020, 2020, p. 309 - 332.

[61] In the context of the recognition of judgments based on exorbitant grounds of jurisdiction, the provision of Article 17 HC 2019 is of particular importance according to which a State may declare that its courts may refuse to recognize or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

of the BH PIL Act. When it comes to legal reasons, one should keep in mind the fulfillment of obligations from the European integration process, including potential solutions in the field of recognition and enforcement of foreign court judgments in civil and commercial matters. In this context, the authors of this text offer several solutions: reform of the BH PIL Act including the provision on the exorbitant jurisdiction of the foreign court, conclusion of bilateral agreements, extension of Brussels I Recast Regime to third-country defendants and/or accession to HC 2019.

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THE PRACTICAL IMPLICATIONS OF HCCH CONVENTIONS IN ALBANIA: DISSOLUTION OF MARRIAGE AND ITS CONSEQUENCES

Abstract: *The HCCH Conventions on family matters are the most important instruments of the HCCH, embracing a great number of Contracting States in several important elements for cross border family disputes. Albania is a member of the HCCH, and HCCH Conventions are directly applicable in the Albanian legal system. The interplay of Albanian private international law and HCCH Conventions has raised several concerns in practice. Concerns have been raised regarding the application of the lis pendens rule for family matters in line with Article 12 of the HCCH (1970) Divorce Convention, or jurisdiction matters on issues involving parental responsibility as provided by Article 5 of HCCH (1996) Child Protection Convention. The discrepancies between jurisdiction rules as provided by the HCCH Conventions and national legislation, affects the free circulation of judgments on family matters. Albanian courts are encouraged to apply the HCCH Conventions whenever applicable and preserve the main principles envisaged by private international law, such as the best interests of the child or avoiding incompatible judgments.*

Keywords: *divorce, jurisdiction, lis pendens, transfer of jurisdiction, recognition of judgments.*

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1. Introduction

For more than a century, the Hague Conference on Private International Law (HCCH) has been, and continues to be, a great example of the tangible benefits that multilateralism can yield for family relations around the globe. It improves the day-to-day lives of people and enhance certainty and predictability for cross-border on a highly difficult area, such as international family relations. The HCCH Conventions in family law matters are among the most successful HCCH Conventions, with numerous Contracting States across the globe.[1] The HCCH Conventions have had a great influence on European Union (EU) private international family law and on private international family law of States across the globe, but the reverse effect is also noted.[2] Albanian legislation on private international law on family matters is a vivid example of such influence. Albania is an active member of the HCCH, since 2002, and it has ratified around 17 HCCH Conventions.[3] The HCCH Conventions once ratified become integrated part of the Albanian legal system and they serve as source of law for solving family cases with foreign elements. The proper implementation of the HCCH Conventions becomes more eminent in the edge of EU integration of the country.[4]

However, several shortcomings of the HCCH private international law regime are also noted. Not all HCCH Conventions have been globally embraced, and few of them require treaty relations between the Contracting States. Most HCCH Conventions designate ministries or other administrative authorities as the central authority of the Conventions, rather than courts, although efforts have been made by the HCCH to create direct communication mechanisms between courts.[5] The uniform implementation of Conventions is also hampered by disparities in the ways in which the Conventions

[1] Baker, H., Groff, M, *The impact of Hague Conventions on European family law*, European Family Law. Vol I. Family law in e European perspective (ed. J. Scherpe), Edward Elgar, 2016, p. 145.

[2] *Ibid.*, p. 146.

[3] https://www.hcch.net/en/states/hcch-members/details1/?sid=18, (last access on April 10, 2024).

[4] Albanian is candidate country for EU membership. It has the obligation to approximate legislation with EU legislation including the international conventions which EU is a member.

[5] For a deeper analysis of the mechanism on direct communication between courts see:Lortie, Ph,*Direct judicial communications and the international Hague network of judges under the 1980 Child Abduction Convention*, Private International Law in the Jurisprudence of European Courts – Family at Focus (ed. M. Župan), Osijek: Faculty of Law Osijek Josip Juraj Strossmayer University of Osijek, 2015.

are understood and applied in different Contracting States.[6]

This paper will briefly discuss the interplay between HCCH Conventions and Albanian national legislation in cross-border family law cases. It will analyse the position of HCCH Conventions within the Albanian legal system and their practical implications. The Albanian jurisdiction will serve as a source of inspiration for the issues analysed in this paper.

2. Dissolution of marriage and its consequences – legal overview

Albania is experiencing a high degree of migration. Almost 1/3 of Albanians are living and working in EU countries or North America.[7] Some have migrated permanently but maintain strong ties with Albanian and some share their life between several countries. For such people, a divorce may have global implications. For spouses with significant assets, the division of property is a real challenge. But while money is divisible, children are not. The determination or choice of the appropriate jurisdiction may prove crucial for proper safeguarding of litigants' interests.[8] This fact has exposed the Albanian courts with many challenges when rendering divorce judgments with foreign elements. As there is always an interplay between national and international law, judges are often perplexed on what to decide.

2.1. Divorce and its consequences under national law

Divorce in Albania is governed by the Family Code of 2003 (AFC).[9] AFC has a liberal approach regarding divorce. There are three grounds for divorce: the divorce by spouses' mutual consent (Art. 125 of AFC[10]); divorce

[6] For a deeper analysis see: Schuz, R,*Comparative Law and the Work of The Hague Conference on Private International Law in relation to Family Law,*IusComparatum, 2, 2022,pp. 6-27 [Retrieved from, International Academy of Comparative Law: aidc-iacl.org].

[7] *How migration, human capital and the labour market interact in Albania*, European Training Foundation, 2021, p. 13.

[8] Olejniczak-Michalska, A,*Jurisdiction in divorce cases with an international element*,[Electronic version], 2024, Retrieved March 16, 2024, from https://codozasady.pl/en/p/jurisdiction-in-divorce-cases-with-an-international-element.

[9] Family Code of the Republic of Albania is approved by law No. 9062, dated 8.5.2003, Official GazetteNo. 49 (2003); amended by law No. 134/2015, dated 5.12.2015, Official GazetteNo. 220 (2015).

[10] According to Art. 125 of AFC, when spouses agree on the dissolution of marriage, they submit to the court for approval, together with the request, a settlement agreement that stipulates the terms for the dissolution of the marriage. Spouses are obliged to submit to the court an agreement for the regulation of the parental responsibility after the dissolution of marriage.

by unilateral request upon the irretrievable breakdown of the matrimonial life caused by circumstances foreseen by the law (Art. 132 of AFC[11]); divorce by unilateral request upon a *de facto* separation for a period of at least three years (Art. 129 of AFC[12]).

Divorce can be obtained only through a judicial decision rendered by a court. A court decision is necessary to dissolve the marriage even in the case of consensual divorce. The claim requesting the dissolution of the marriage may also contain other requests, such as the request for parental responsibility, request for child maintenance, as well as for the division of matrimonial property. The court must adjudicate the claim for dissolution of marriage together with the other requests with one exception, which is the division of matrimonial property. The court may separate the division of matrimonial property requests for obvious reasons (the complication of the process) and that is becoming a rule in practice(Art. 138 of AFC).[13]

2.2. Divorce and its consequences under Albanian private international law

Cross-border divorce is governed by Albanian law "On private international law" of 2011 (PILA),[14] HCCH Conventions ratified by Albania and other relevant national legislation such as AFC and the Albanian Civil Procedure Code[15] (ACPC).

[11] According to Art. 132 of AFC, either spouse can request the dissolution of marriage when, due to continuous quarrels, maltreatment, severe insults, adultery, incurable mental illness, lengthy penal punishment of the spouse or due to any other cause constituting repeated violations of marital obligations, a joint life becomes impossible, and the marriage has lost its purpose for one or for both spouses.

[12] According to Art. 129 of AFC, either spouse can request dissolution of their marriage when they have lived separately for a period of 3 years.

[13] In practice the court always separates the matrimonial property proceeding as they are more complicated and may delay the divorce proceedings.

[14] Law No. 10 428, dated 2.6.2011 "On private international law", Official Gazette No. 82 (2011).

[15] Civil Procedure Code of the Republic of Albania, adopted by Law No. 8116, dated 29.3.1996, Official Gazette No. 9,10,11 (1996); amended by Law No. 8431, dated 14.12.1998, Official Gazette No. 30 (1998); Law No. 8491, dated 27.5.1999, Official Gazette No. 20 (1999); Law No. 8535, dated 18.10.1999, Official Gazette No. 29 (1999); Law No. 8812, dated 17.5.2001 Official Gazette No. 32 (2001); Law No. 9062, dated 8.5.2003, Official Gazette No. 49 (2003); Law No. 9953, dated 14.7.2008, Official Gazette No. 122 (2008); Law No.10 052, dated 29.12.2008, Official Gazette No. 205 (2008); Law No. 49/2012, dated 19.4.2012, Official Gazette No. 53 (2012); Law No. 122/2013 dated 18.4.2013, Official Gazette No. 67 (2013); Law No. 160/2013, dated 17.10.2013, Official Gazette No. 180 (2013); Law No. 114/2016, dated 3.11.2016, Official Gazette No. 219 (2016); Law No. 38/2017, dated 30.3.2017, Official Gazette No. 98 (2017).

PILA determines international jurisdictions of the Albanian courts for divorce and its consequences under Art.75 of PILA and applicable law to divorce and its consequences under Arts. 25 – 29 of PILA.[16] The recognition of foreign divorces is governed by ACPC (Arts. 393-396), which is applicable to all foreign court judgments.

The HCCH Conventions play an important role in the dissolution of marriage in Albania. The HCCH Conventions has influenced the PILA and most of the solutions provided there in are in line with the HCCH Conventions. PILA provides for the habitual residence as a connecting factor in family matters, however the latter is a secondary connecting factor, while nationality remains the main one.[17] Hidden in the provisions of the PILA, the best interest of the child becomes the general rule that governs both issues of court jurisdiction and applicable law concerning child personal and property protection[18].

The position of the international conventions in the Albanian legal system is provided by Art. 116 of the Albanian Constitution[19] and Art. 2 of PILA. Both acts stipulate that international law have priority over national legislation, and it is directly applicable when its content and purpose allow to do so (Art. 122 of the Albanian Constitution). As stated above, Albania has ratified the most relevant HCCH Conventions in the field of family law.[20]

[16] Bushati Gugu, A., Qarri, E, *Albanian Private International Law in Family Matters*, Private International Law in the Jurisprudence of European Courts – Family at Focus (ed. M. Župan), Osijek: Faculty of Law Osijek Josip Juraj Strossmayer University of Osijek, 2015, p. 367.

[17] But there are also cases in which habitual residence is the main connecting factor. As an example, Art. 29 of PILA has been drafted under the influence of HCCH 1996 Child Protection Convention. Art. 29 of PILA, that governs the law applicable to parental responsibility, provides for two alternative connecting factors: child nationality or child habitual residence; that are alternatively applicable based on the child's best interest principle.

[18] Art. 29 (relations between parents and children) of PILA stays that: Relations between parents and children are governed by the law of the country where the child has his habitual residence, or the law of the nationality of the child if that is in the child's best interest.

[19] The Constitution of the Republic of Albania, approved by law no. 8417, dated 21.10.1998.

[20] Hague Convention of 1 June 1970 On the Recognition of Divorces and Legal Separations, ratified by Law No. 109/2012, Official Gazette No. 157 (2012) (Konventa e Hagës "Përnjohjen e divorcit dhe ndarjeve ligjore"); Hague Convention of 2 October 1973 On the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, ratified by Law No. 10398, dated 17.3.2011, Official Gazette No. 34 (2011) (Konventa e Hagës "Për Njohjen dhe Zbatimin e Vendimeve në Lidhje me Detyrimet Ushqimore"); Hague Convention of 2 October 1973 On the Law Applicable to Maintenance Obligations, ratified by Law No. 10397, dated 17.3.2011, Official Gazette No. 34 (2011) (Konventa e Hagës "Për Ligjin e Zbatue shëm për Detyrimet Ushqimore"); Hague Convention of 25 October 1980 On the Civil Aspects of International Child Abduction, ratified by Law No. 9446, dated 24.11.2005, Official Gazette No. 97 (2005) (Konventa e Hagës "Për Aspektet Civile të Rrëmbimit Ndërkombëtartë Fëmijës";

Recently Albania has signed the HCCH Maintenance Protocol[21] but it has not taken any action to ratify the HCCH Adult Protection Convention.

2.3. Divorce and its consequences under HCCH Conventions

As mentioned above Albanian is a member of the most important HCCH Conventions on family matter,[22] the content of which can be summarised below:

The Hague Convention on Recognition of Divorces and Legal Separations (HCCH 1970 Divorce Convention) aimsat regulating the recognition in a Contracting State of a divorce or legal separation obtained in another Contracting State. The HCCH 1970 Convention determines that recognition of divorce or legal separation is conditioned by the existence of some links between the spouses and the state of divorce or legal separation.[23] To ensure this link between the forum and the parties (spouses) the HCCH 1970 Divorce Convention provides for two connecting factor: habitual residence and nationality under certain conditions. Only these decisions are eligible for free circulation under the Convention.

The Divorce Convention has 20 Contracting States, including Albania. The Convention applies only to relations between those Contracting States that has declared the acceptance of the accession made by the acceding State. The Convention does not apply to divorces granted by non-Contracting States

Hague Convention of 29 May 1993 On Protection of Children and Co-operation in Respect of Intercountry Adoption, ratified by Law No. 8624, dated 15.6.2000, Official Gazette No. 18 (2000) (Konventa e Hagës "Për Mbrojtjen e Fëmijëved he Bashkë punimin për Birësimet Jashtë Vendit"); Hague 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, ratified by Law No. 9443, dated 16.11.2005, Official Gazette No. 96 (2005) (Konventa e Hagës "Mbi juridiksionin, ligjin e zbatueshëm, njohjen, zbatimin dhe bashkëpunimin në lidhje me përgjegjësinë prindërore dhe masat për mbrojtjen e fëmijëve"); Hague Convention of 23 November 2007 On the International Recovery of Child Support and Other Forms of Family Maintenance, ratified by Law No. 63/2012, dated 31.5.2012, Official Gazette No. 72 (2012) (Konventa e Hagës "Për rivendosjen ndërkombëtare të detyrimit ushqimor ndaj fëmijëve dhe formave të tjera të mbështetjes për anëtarët e tjerë të familjes").

[21] Albania has signed the HCCH MaintenanceProtocol in February 2024: https://www.hcch.net/en/instruments/conventions/status-table/?cid=133 (last access on April 10, 2024).

[22] Albania is also a member of the HCCH Convention of 25 October 1980 On the Civil Aspects of International, which do have impact on the divorce cases regarding establishing the habitual residence of the child, but it is not part of the analysis in this paper.

[23] Baker and Groff, *op.cit.*, p. 146; D. Coester-Waltjen, Divorce and personal separation.In *Encyclopaedia of Private International Law* (Vol. 1), Edward Edgar, 2017, p. 547.

or Contracting States that have not accepted Albania.[24] Unfortunately, the states with which Albania has more family relations have not accepted it. In this case, the ACPC provisions on recognition of foreign court decisions will apply instead.

The HCCH Conventionon the International Recovery of Child Support and Other Forms of Family Maintenance (HCCH2007 Child Support Convention) aimsat creating an effective, accessible, and simple system for the international recovery of maintenance obligations. The Convention creates a simple and fast-track system for the recognition and enforcement of maintenance decisions.[25] The bases for recognition and enforcement of maintenance decisions of other Contracting Parties are broad (Art. 20), the principal bases are the habitual residence of either the respondent or the creditor in the State of origin where proceedings were initiated[26]. For the purposes of recognition and enforcement, a decision includes a settlement or agreement concluded before, or approved by, a judicial or administrative authority (Arts. 3(e) and 30).

The HCCH Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (HCCH 1996 Child Protection Convention) governs issues of jurisdiction, recognition and enforcement and applicable law on parental responsibility and protective measures. The Convention distinguishes between the protection of the child within his family (parental responsibility *ex lege*) and the institutional protection (measures taken by administrative and judicial authorities). The Convention applies to all children who have their habitual residence in one of the Contracting States of the Convention (Art. 5.1), regardless them being a national of a non-Contracting State.[27] The Convention also applies to undocumented immigrant children, refugee children who, due to problems in their

[24] Art. 28 of the HCCH 1970 Divorce Convention. The accession of Albania has been accepted by 5 Contracting States, namely: Czech Republic, Finland, Slovakia, Switzerland, and United Kingdom. The Convention has practical application with Switzerland and UK.

[25] Beaumont, P, *International family law in Europe – the maintenance project, the Hague Conference and the EC: A triumph of reverse subsidiarity*, Rabel Journal of Comparative and International Private Law (Rabelsz), 73 (3), 2009, pp. 509-546, p. 514.

[26] *Outline of the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*. [Electronic version]. Retrieved March 26, 2024, from https://assets.hcch.net/docs/70cda9de-283c-4892-80ec-292daec4f667.pdf.

[27] Lagarde, P,*Explanatory Report of the HCCH 1996 Child Protection Convention*.[Electronic version], 1996,Retrieved March 20, 2024, fromhttps://assets.hcch.net/docs/5a56242c-ff06-42c4-8cf0-00e48da47ef0.pdf.

country, have moved to one of the Contracting States of the Convention, as well as to children whose habitual residence cannot be determined (Art. 6). The Convention is based on the habitual residence of the child as a connecting factor to determine both jurisdiction and applicable law (the unity of jus and forum).

Albania has ratified the Convention with the reservation of Art. 55.1(a).[28] The applicable law determined by of the Convention applies regardless of whether it is the law of a Contracting State of the Convention or not (Art. 20).

With the aim to promote the best interest of the child, the Convention has established a mechanism of cooperation between the Central Authorities of the Contacting States, including courts. Initially a request to recognise and enforce child protection measures is exchanged between Central Authorities. After the examination of the compliance of the request with the Convention's requirements, the receiving Central Authority initiates judicial or administrative procedures.[29]

3. Interplay between HCCH Conventions and national legislation

In cross border divorce proceedings, Albanian court are obliged to apply both international and national law. Disparities and confusions between these sources are noticed with the frequently used of HCCH Conventions such as: HCCH 1970 Divorce Convention, HCCH 1996 Child Protection Convention or HCCH 2007 Child Support Convention.[30]

3.1. Stay, decline or transfer – trilemma

In cross-border divorce cases before Albanian courts, the disputes often reflect similar issues regardless of which party initiates the proceedings. These cases typically involve Albanian nationals who have their habit-

[28] According to this reserve, Albania has exclusive jurisdiction to take measures for the protection of the property of the child that is situated in Albania.

[29] Arts. 31 and *seq*. of HCCH 1996 Child Protection Convention. The importance of direct communication under the Convention is discussed by Lortie, *op. cit*.

[30] In a recent case concerning the child maintenance obligation, the first instance court did not apply the HCCH 2007 Child Support Convention, but reference was made to the HCCH 199 Child Protection Convention. See: Albanian High Court Decision, Civil Chamber,No. 00-2023 4581, dated 8.11.2023. In another case the court referred to HCCH 1996Child Support Convention in relation to USA which is only a signatory partyof the Convention. See status table of the Convention (https://www.hcch.net/en/instruments/conventions/status-table/?cid=70): See Albanian High Court Decision, Civil Chamber, No. 00-2023-2782, dated 31.5.2023.

ual residence in a foreign country. There are two common scenarios: *First seizure*: In this situation, an Albanian national residing in a foreign country initiates divorce proceedings in an Albanian court. They may choose to do so for various reasons, such as convenience, familiarity with Albanian legal procedures, or a desire for a specific outcome that they believe they can achieve more easily in Albania. This scenario brings into consideration the possibility of the Albanian courts to decline and/or transfer the jurisdiction, when children or properties are involved. In the case of child protection, the court's primary concern should be the best interests of the child.

Second seizure: Alternatively, the dispute may be brought before the Albanian courts as a court second seized. This means that divorce proceedings have already been initiated in the courts of the country where one or both spouses have their habitual residence. However, for various reasons, such as dissatisfaction with the length of the proceedings or a desire for a different legal outcome, one of the parties may choose to bring the case to Albanian court as well.[31] In the second scenario, *lis pendens* issue arises where the same matter is pending before another court, the Albanian court must carefully consider whether to stay, or not the proceeding. The court should prioritize the efficient resolution of the dispute and the preservation of the parties' rights to access to justice.

3.2. The (un)resolved issue of Lis' alibis pendens on family matters - does it really matter?

The *lis pendens* provision whenever applicable aims to avert the bringing of contending proceedings and therefore the possibility of irreconcilable judgments, thereby avoiding conflicts in the recognition and enforcement process.[32] To produce such effect the rule should be mandatory, living no discretion to the court second seized. In theory, this should provide legal certainty to the parties.[33] The (EU) rules, representing the Roman school of thought, typically follow the priority order of the court first seized as man-

[31] This is particularly the case with divorce proceedings brought before the Italian courts, due to the Italian system which allows legal separation before the final decisions of divorce. See Italian Divorce Law: Law No. 898, dated 1 December 1970 "Disciplina dei casi di scoglimento del matimonio", amended.

[32] Janečková, P,*Lis pendens as the solution of jurisdictional conflicts*, Humanities and Social Sciences Review, 07(01), 2017, pp. 357–362.

[33] Bantekas, I. *The pitfalls oflis pendens in transnational matrimonial jurisdiction disputes before English courts*, [Electronic version], 2014, Retrieved March 20, 2024, from https://bura.brunel.ac.uk/bitstream/2438/12704/1/Fulltext.doc.

datory solution,[34] while common law systems apply versions of the forum non convenient doctrine.[35]

The HCCH Conventions provide different solutions as to the priority order and the flexibility of *lis pendens* rules. For example, under the HCCH 1970 Divorce Convention there is no such as explicit principle of the court first seized, although the priority order is implied.[36] The purpose of Art. 12 of HCCH 1970 Divorce Convention is to reduce, if not to eliminate entirely incompatible decisions being given.[37]

In interpreting Art. 12 of the HCCH 1970 Divorce Convention, the High Court of Albania (HCA) has held in several decisions that *"this provision does not have a mandatory character and does not authorize the interruption of proceedings initiated before the Albanian courts, neither by interrupting proceedings nor by suspending them, because the parties have brought the same dispute before a foreign court which may eventually have declared jurisdiction, but it is left as a possible alternative to the court depending on the legal issue being adjudicated before it."*[38] *Moreover (former) Art. 38 of the ACPC prohibited the stay of proceedings as an option for the Albanian court.*[39] Reference to Art.12 of the HCCH 1970 Divorce Convention was made regardless of whether the convention was applicable in that case.[40]

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[34] See Art. 20 (*lis pendens* and depended actions)of Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2.7.2019, pp. 1–115 (Regulation Brussels II Recast).

[35] McClean, D,*Transfer of Proceedings in International family cases*, Journal of Private International Law,19 (1), 2023,pp. 1–24, p. 2.

[36] See Art. 12 of HCCH 1970 Divorce Convention. Bellet, P., Goldman, B,*Explanatory Report of the Hague Convention on the Recognition of Divorces and Legal Separations*,[Electronic version], 1971, Retrieved March 16, 2024, from, from https://assets.hcch.net/docs/99ce43e1-b580-4009-9b75-5d88fa4e12f2.pdf, p. 25.

[37] *Ibid*., p. 25.

[38] Albanian High Court Decisions, Civil Chamber, No. 94, dated 23.3.2016; No. 172, dated 24.4.2014; and No. 612, dated 26.11.2014.

[39] According to (former) Art. 38 of ACPC, Albanian court does not terminate or suspend the proceedings, when the latter or another issue related to it is being adjudicated by a foreign court.

[40] This is mostly the situation with divorce cases with Italy. The accession of Albania to the Convention has not been accepted by Italy. According to Art. 28 of the HCCH 1970 Divorce Convention such accession is necessary for the Convention to be applied in divorce cases with Italy. See the Status Table of the Convention: https://www.hcch.net/en/instruments/conventions/status-table/?cid=80.

The adoption of the new Art. 38 of the ACPC[41] which allowed for the stay of the proceedings in favour of the foreign court did not change much the jurisprudence of HCA for obvious reasons.[42] The stay of the proceedings is at the Albanian court's discretion. It may be ordered; however, only when certain conditions are met: the foreign court is the court first seized, the decision issued in other country will be recognized in Albania and the stay of the proceedings must appear to be "necessary" in the circumstances "for the proper administration of justice Art. 38 para. 1 (b) and (c) of ACPC."[43] Art. 38 of ACPC applies if both the Albanian court and the foreign court have jurisdiction to the matter of the case and the foreign court is the court first seized (*prior temporis*), otherwise *lis pends* rule will not apply. The court first seized is determined by reference to the ACPC, which means that would be enough that the registration date of the claim is earlier than the one brought before the Albanian court.[44]

Moreover, Albanian court may face difficulties in applying Art. 38 of ACPC for family matters because neither the EU Regulation,[45] nor the CJEU jurisprudence has cast lights in these regards.[46] The conditions provided by Art. 38 of ACPC are complex even for civil and commercial matters, as they expose the court to an unknown legal regime.[47]

[41] Law No. 38/2017 amending Art.38 of ACPC. This provision has been copied after Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast),OJ L 351, 20.12.2012, p. 1–32(Regulation Brussels I Recast), Art. 33 (*lis pendens* with third countries), but it is applicable also for family matters as ACPC applies for all type of proceedings. According to Art. 38 para. 1 of ACPC: When the same claim, between the same parties, with the same cause and subject of the lawsuit is being considered simultaneously by a court of a foreign country and the Albanian court, the latter may suspend the proceedings on this dispute when: a) The lawsuit has been filed before in time in the court of a foreign country; b) The decision of a court of a foreign country can be recognized and / or enforced in the Republic of Albania; c) The Albanian court is satisfied that the suspension is necessary for the proper administration of justice.

[42] In the recent judgments the HCA did not stay the proceedings arguing that the language of the Art. 38 is flexible.

[43] The interpretation of Art. 38 is based on the interpretation of Art. 33 ofBrussels I Recast Regulation. For a deeper analysis of Art. 33 see Franzina, P, *Lis pendens involving a third country under the Brussels I-bis regulation: anoverview*, Rivista di diritto internazionale privato e processuale, L(1), 2014,pp. 23-42.

[44] Kola (Tafaj), F, *Lis pendens ndërkombëtare në juridiksionin gjyqësor shqiptar si risi në ligjin procedural shqiptar,* Jeta Juridike, 3, 2017.

[45] Brussels II Recast Regulationdoes not regulate *lis pendens* between EU and third countries.

[46] Burdová, K,*EU international family law and third states*, Bratislava Law Review, 1(1), 2017,pp. 143-147, p.144.

[47] Although these cases relate to EU countries, again by not being a member of EU and not

Should the Albanian courts ever apply the *lis pendens* rule and is this important for the fate of the proceedings? In the authors view this is an issue not to be neglected each time is requested by the parties, although we are aware of its complex nature. It is true that the language of Art. 12 of HCCH 1970 Divorce Convention *perse* does not help much, but the spirit of the HCCH 1970 Divorce Convention surely does. If we go back to *reason détre* of the *lis pendens,* which is the elimination of incompatible decisions, most of the scenarios brought before the Albanian courts would fit in. The results observed in the practice show that in most of the cases someone is left in *a limbo* family status (different matrimonial status in Albania and abroad, different responsibility rights over children and different amount of alimony).[48]

Lis pendens with mandatory priority order is ensured under HCCH 1996 Child Protection Convention, Article 13 and it is directly applicable to Albania.[49] In this regard a foreign court might have jurisdiction as the court of the habitual residence of the child (Art. 5 of the Convention), while the Albanian court will have jurisdiction as a divorce court under special circumstances as provided by Art.10 of the HCCH 1996 Child Protection Convention.[50] This situation is known to the HCCH 1996 Child Protection Convention which provide a solution under Art. 13. This is more an issue of concurrent jurisdiction rather than a purely *lis pendens* one.[51] For example, if a divorce proceeding is underway in Albania and the Albanian courts have been asked to decide on parental responsibility of the child, the authority of the state of the habitual residence of the child which was asked to decide on the custody ought to abstain from deciding on this request until the Albanian court assume jurisdiction. If the Albanian court is a divorce court based on Art. 75 of PILA

applying same rules as a Member State, it is difficult for any court including the Albanian court to predict the results in the court first seized.

[48] See for example: Decision of the First Instance Court of Tirana, No.2680, dated 2.4.2019.

[49] See Art. 13 of HCCH 1996 Child Protection Convention and its Explanatory Report, Lagarde, *op.cit*., p. 571.

[50] According to Art. 10, para.1 of HCCH 1996 Child Protection Convention: Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

[51] Lagarde, *op.cit*., p. 571.

but does not satisfy the condition of Art. 10, as the court first seized it has to decline or transfer the jurisdiction to another authority which is subsequently seized.[52] The issue of the transfer of the proceedings will be discussed below as it is very important for deciding on both parental responsibilities.

3.3. Decline or transfer the jurisdiction

Albanian court as a "divorce court" is often asked to decide not only on divorce of the spouses but also on its consequences, i.e., the parental responsibility over children that in most of the case are either born or live abroad. In this case the interplay of PILA, ACPC and HCCH (1996) Child Protection Convention will come into place. Art. 75 of PILA determines the international jurisdiction of the Albanian court for divorce cases when (a) one of the spouses is or was an Albanian citizen *(shtetas*) at the time of marriage, (b) has the habitual residence in the Albanian at the time of divorce.[53] Jurisdiction according to Art. 75 of PILA is not limited to divorce but also to the consequences that arise from the dissolution or annulment of marriage.[54] Art. 75 of PILA represents the unity character of the divorce process which mean that court once assume jurisdiction based on any of the factors listed above will decide also on child custody and matrimonial property regime.[55] While the court has no dilemma as to separation the proceeding or even decline jurisdiction on the division of property,[56] it has not been decisive as to the separation or declining the jurisdiction for child custody of children having their habitual residence in a foreign country.

Art. 5 of HCCH 1996 Child Protection Convention determines that: *The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property. Subject to Article 7,[57] in case of a change*

[52] *Ibid.,* p. 571.

[53] Art. 75 para.1 of PILA: The Albanian courts have jurisdiction in matters relating to marriage if: a) one of the spouses is an Albanian citizen or was at the time the marriage was entered into; b) the spouse against whom the lawsuit is brought, or the plaintiff in a case for dissolution of a marriage, has his habitual residence in the Republic of Albania; c) one of the spouses is stateless and has his habitual residence in the Republic of Albania.

[54] Art. 75 para. 3 of PILA: Jurisdiction according to point 1 of this article also extends to the consequences that arise from the dissolution or annulment of the marriage, from the marital property or from the temporary measures which have been taken by the courts in such cases.

[55] Kola Tafaj, F, *Juridiksioni i gjykatave shqiptare në shqyrtimin e çështjeve me elementë të huaja, Komentari i Ligjit për të Drejtën Ndërkombëtare Private*, Tiranë: Ombra GVG, 2019, p. 773.

[56] Albanian High Court Decision, Civil Chamber, No. 00-2018- 1191, dated 06.11.2018.

[57] Art. 7 of the HCCH 1996 Child Protection Convention determines the new habitual

of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

There is no doubt that the convention has priority over national law,[58] and the best interest of child is a predominant consideration. Thus, the court should apply Art. 5 of HCCH 1996 Child Protection Convention instead of Art. 75 of PILA. By doing so, the court must decline jurisdiction for parental responsibility. Nevertheless, the Convention provides for two options of divorce court to adjudicate parental responsibility: (i) the transfer to[59] or a request for transfer of jurisdiction to be made by the court of divorce provided that the divorce court would qualify as "*better place court*"[60] as exceptional situation[61] and (ii) the divorce court adjudicates measures related to the protection of person and property of the child under certain conditions[62] and limitation[63].

residence of the child gainedas a result ofa wrongful removal. The provisions determine the condition when such a new residence is obtained and what is the role of the court in which the child is moved as provided by Art. 11 of the Convention.

[58] Arts. 116 and 122 of the AC and Art. 2 of PILA: International agreements ratified by law have priority over the provisions of this law when its provisions are incompatible with them.

[59] Art. 8 of the HCCH 1996 Child Protection Convention.

[60] Art. 9 of the HCCH 1996 Child Protection Convention.

[61] In CJEU Case C-211/10PPU, *Doris Povse v Mauro Alpago* [2010] ECLI:EU:C:2010:400, Advocate General Sharpstown, emphasised "By way of exception", do not require, in my view, that the circumstances must be exceptional before the provision may be applied. Rather, they allow a court having jurisdiction to derogate from the general rules of jurisdiction and to transfer the case, or a part thereof, to the court of another member state, with which the child has a particular connection, if it considers that the latter court is better placed to hear the case and that the transfer will be in the best interests of the child – a situation which will, in principle, be exceptional. There is nothing exceptional in the fact that one of spouse decide to divorce before home country court rather in the court of their habitual residence.

[62] Para. 1 of Art. 10 of HCCH 1996 Child Protection Convention: Without prejudice to Arts. 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

[63] Para. 2 of Art. 10 of HCCH 1996 Child Protection Convention: The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

The history of the Convention shows that there had been frequent discussion on the special role of the divorce court primarily based on reasons of "judicial economy", something that is also supported by Contracting States national legislation,[64] Albania being one of them.[65] However, there are several practical problems with these provisions.

First, for the transfer to be successful, it needs that the court making or accepting the request for the transfer of the jurisdiction for parental responsibility be "a better placed court". The term better placed court has been elaborated by the CJEU, stating that the transfer of the case must provide a genuine and specific added value to the examination of the case taking into consideration *inter alia*, the rules of the procedures applicable in that Member State.[66]

The Albanian court as a divorce court will find it hard to fulfil this test.[67] The divorce court is not in the best position to and does not have sufficient access to information to hearing the case in the best interest of the child. This would be discriminatory for the child whose parents began matrimonial proceedings as it allows their fate to be decided upon by a court in a state other than the court of their habitual residence while other children would have their right decide upon by the court closed to them, that of their habitual residence.[68]

In the second situation, the availability of the divorce forum is subject to the conditions as provided by Art. 10 of the HCCH 1996 Child Protection Convention; one of his parents that has responsibility for the child must have the habitual residence in the state of the forum, and the jurisdiction should be accepted by both parents. The best interests of the child must be preserved. The divorce court is unavailable if proceedings for and order relating to children are already pending before the court with jurisdiction under the convention, the court of habitual residence of the child.[69]

3.4. Recognition and enforcement

The recognition and enforcement of divorce judgements in Albanian would again require the application of both HCCH Conventions and national

[64] McClean, *op.cit.*, p. 2.

[65] See Art. 75 of PILA.

[66] CJEU Case C-428/15-D, *Child and Family Agency v J. D.*[2016] ECLI:EU:C:2016:819.

[67] For example, Art. 6 of AFC provides for the right of child to be heard. But this is an almost universal rule that is found in many legislations, as provided by UN Children Rights Convention.

[68] McClean, *op.cit.*, p. 2.

[69] Lagarde, *op.cit.*, p. 563.

law. Recognition and enforcement of judgements is regulated by Arts. 393 of ACPC *et seq*., if the HCCH Conventions does not apply. Disparities might arise again regarding: (i) the eligibility criteria for the decisions to be circulated and (ii) the grounds for refusal. The eligibility requirement means that for a judgment to be recognised and enforced it should be issued: (a) *by a court or administrative authority* (b) *that have jurisdictions under the Conventions*.

(i) a) The HCCH 1970 Divorce Convention does not give a definition of divorce or legal separation; therefore, these notions should be interpreted as they cover all types of divorces and legal separation, including divorces or legal separations resulting from legislative, administrative, or religious acts.[70] In Albania only divorce obtained by a foreign court decision is recognized, living with unclear possibility of recognition of extra-judicial divorces. However, if HCCH 1970 Divorce Convention applies, the Albanian court should recognise even the extra judicial divorces. The question that arises is if the extra-judicial divorce obtained in Italy or Greece, through Civil Register Official Act (Italy) or notary deed (Greece) can be recognised in Albania. ACPC regulates only the recognition of foreign court decisions, as a result it can be applied for the recognition of divorces obtained abroad by court decision. Can the term "court decision", provided by Art. 393 of ACPC, be interpreted in the sense that it covers also "extra-judicial" divorces (administrative or notarial divorces)?

Indeed, the recognition of extra judicial divorce has been accepted also by the Court of Justice of the EU (CJEU). The CJEU has decided that the notion 'court' and 'judgement' provided by Regulation Brussels II Recast should be broadly interpreted, in the meaning that they comprise also extra-judicial divorce act and extra-judicial divorce authorities if certain conditions are fulfilled[71]. By denying such recognition, Albanian citizens and Albanian families living in EU countries are left in limping family status.[72]

Although the Convention is silent, it results from the Explanatory report that if the receiving State does not recognize the type of marriage that has been dissolved, then this State can refuse to recognize the divorce.[73] For example, in case of same-sex or polygamous marriages that are not fore-

[70] Bellet and Goldman B., *op.cit*., p. 6.

[71] See CJEU Case C-646/20, *Senatsverwaltung für Inneres und Sport* (GC). [2022] ECLI:EU:C:2022:879.

[72] There are several European jurisdictions that provide for extra-judicial divorce, such as: Italy, France, Spain, Portugal, Greece, Estonia and Danmark. As can be noticed in many of these jurisdictions a large number of Albanian nationals and families. See: *How migration, human capital and the labour market interact in Albania*,*op. cit*., p. 13.

[73] Bellet and Goldman B., *op.cit*., p. 8.

seen under the Albanian legislation,[74] Albanian court can refuse to recognize the dissolution of such type of marriages.

The same would apply for HCCH 1996 Child Protection Convention[75] which states that no distinction is made in this connection based on whether the authorities having jurisdiction over child protection are judicial or administrative authorities or for HCCH 2007 Child Support Convention which states that the recognition chapter shall apply to a decision rendered by a judicial or administrative authority in respect of a maintenance obligation.[76]

(i) b)The HCCH Conventions provide for both direct and indirect jurisdiction rules. Direct jurisdiction rule is provided under HCCH 1996 Child Protection Convention, while indirect jurisdiction rule is included in HCCH 1970 Divorce and HCCH 2007 Child Support Conventions. Having said that any direct or indirect jurisdiction rule of national private international law rules that are in line with the HCCH Conventions would render the judgment more flexible for recognition and enforcements and *lis pendens* rule easier applicable.

As mentioned above the indirect jurisdiction rules provided by the HCCH 1970 Divorce Convention determines that recognition of divorce or legal separation is subject of two connecting factors: habitual residence and nationality under certain conditions. Only these decisions are eligible for free circulation under the Convention.[77] On the other hand, the Albanian rules on direct jurisdiction provide the nationality of one of the spouses as a main connecting factor and the habitual residence of the defendant as the second option under Art. 75of PILA for divorce. Although the Albanian court will be obliged to rely on the indirect jurisdiction rules (that are different from national ones) because of the application of the HCCH 1970 Divorce Convention, providing courts with two different grounds of jurisdiction might create problems in practice.[78] The same arguments remain also for maintenance obligation. The indirect jurisdiction filters are also provided under the HCCH

[74] See Art. 7 of AFC stating that marriage is concluded between a man and women of age 18 years.

[75] Lagarde, *op. cit.,* p.561.

[76] Borrás, A., Degeling J, *Explanatory Report of the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*. [Electronic version]. 2013, Retrieved April 4, 2024, from https://www.hcch.net/en/publications-and-studies/details4/?pid=4909.

[77] Baker and Groff, *op.cit*., p. 146; Coester-Waltjen, *op.cit*., p. 547.

[78] Art. 394 (a) requires that a foreign court decision to be recognised should be rendered by a competent court which in our case has to be determine by reflexive rules of jurisdiction as determined by PILA.

2007 Child Support Convention. The judgment to be recognised under the convention should be rendered by the court of the habitual residence of the creditor, and this is applicable for both children and spouses. PILA makes a different qualification of the international jurisdiction of the Albanian court depending on the specific requests. If the claim for maintenance is auxiliary to a divorce claim, Art. 75 of PILA would apply, and if it arrives as a separate request, Art. 80 Art. 75 of PILA is not fully in line with the Convention.

(ii) ACPC provides for grounds of non-recognition like the ones of the HCCH Conventions. In general, the grounds of non-recognition include (see table 1):

- no sufficient links between the claimant and the court that has rendered the judgment;
- the respondent was not given adequate notice of the proceedings-due process;
- incompatible with a previous decision;
- public policy ("ordre public").

Table 1. Grounds of Refusal

Grounds of non-recognition	
Albanian Civil Procedure Code	HCCH Conventions
Art. 394 ACPC: all types of court decisions: - lack of jurisdiction of the court that has granted the decision; - the defendant was not given notice of the proceedings; - an incompatible decision of the Albanian courts; - a pending case in the Albanian courts; - public policy.	**HCCH 1970 Divorce Convention** **Arts. 7, 8, 9, 10:** - at the time the divorce was obtained both spouses were nationals of a country which does not provide for divorce; - the respondent was not given adequate notice of the proceedings; - incompatible with a previous decision determining the matrimonial status; - public policy.

	HCCH 1996 Child Protection Convention **Art. 23:** - the child was not provided the right to be heard - the decision interferes with a person's parental rights - public order - incompatible with a later decision taken in a non-Contacting state of child's HR Reserve – not to recognize the measures taken to protect the property of the child that are incompatible with any measure taken by its authorities in relation to that property (Art. 55.1(b).
	HCCH 2007 Child Support Convention **Art. 22:** - public policy ("ordre public"); - decision obtained by fraud in connection with a matter of procedure; - proceedings pending before an authority of the State addressed and those proceedings were the first to be instituted; - incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State; - the respondent has neither appeared nor was represented in proceedings in the State of origin, under certain conditions; - violation of Art. 18.

Similar grounds of non-recognition help Albanian judges to have a better understanding of the language of the Conventions and at the same time make the judgments recognised and enforced even if Conventions do not apply. Nevertheless, one the most problematic grounds of non-recognition

remain the public order clause under which the court has a wide discretion[79].

4. Conclusions

The HCCH regime of private international law was established to facilitate dispute for family cases with cross-border elements, either by establishing direct rules to be applied in the national system or by influencing national law. Nevertheless, as explained in this article, the interplay between HCCH Conventions and national law does not always yield the desired results in practice. Judges are left with options, and their tendency is to apply national law over the conventions. Even though this attitude is recognized in international regimes and often justified by economic and forum affiliation related to the parties involved, it cannot be tolerated at the expense of general principles of private international law, such as the *best interest of the child or avoidance of irrevocable judgments*. National judges should apply the conventions and ensure its proper implementation whenever applicable. Fostering cooperation and mutual acceptance under HCCH auspice is something that should be also promoted by HCCH and the EU in the framework of the EU integration of Albania.

Summary

This article provides an in-depth examination of the interaction between the HCCH Conventions and Albanian national legislation concerning cross-border family law cases, particularly divorce and its consequences. It highlights the significant influence of HCCH Conventions on Albanian law, emphasizing the importance of international law in resolving family disputes with foreign elements. The paper discusses the challenges faced by Albanian courts in rendering judgments with foreign elements and analyzes the application of HCCH Conventions in the Albanian legal system.

The first section introduces the role of HCCH Conventions in enhancing international family relations and outlines their influence on Albanian legislation. Despite their benefits, the text acknowledges shortcomings in the HCCH private international law regime, such as inconsistent implementation and reliance on administrative authorities rather than courts.

The second section provides a legal overview of divorce and its consequences under both Albanian national law and private international law.

[79] Albanian courts have refused to recognise foreign court decisions that grant rights not foreseen under Albanian substantive law on grounds of public order. See Albanian High Court Decisions, Civil Chamber, No. 34, dated 27.10.2009; No. 179, dated 2.4.2015; and Appellate Court of Vlora Decision, No. 115, dated 12.9.2012.

It discusses grounds for divorce under the Albanian Family Code, jurisdictional issues, and the influence of HCCH Conventions on cross-border divorce proceedings.

The third section delves into the interplay between HCCH Conventions and Albanian national legislation, focusing on practical challenges faced by Albanian courts in handling cross-border divorce cases. It explores issues such as the *lies pendent* principle, jurisdictional dilemmas, and the recognition and enforcement of foreign judgments.

Overall, the text highlights the complexity of cross-border family law cases and the importance of harmonizing national legislation with international conventions to ensure effective resolution of disputes involving foreign elements. It underscores the need for further research and collaboration to address the challenges posed by globalization and international mobility in family law matters.

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Hague Convention of 29 May 1993 On Protection of Children and Co-operation in Respect of Intercountry Adoption, ratified by Law No. 8624, dated 15.6.2000, Official Gazette No. 18 (2000) (Konventa e Hagës për Mbrojtjen e Fëmijëve dhe Bashkëpunimin për Birësimet Jashtë Vendit").

Hague 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, ratified by Law No. 9443, dated 16.11.2005, Official Gazette No. 96 (2005) (Konventa e Hagës Mbi juridiksionin, ligjin e zbatueshëm, njohjen, zbatimin dhe bashkëpunimin në lidhje me përgjegjësinë prindërore dhe masat për mbrojtjen e fëmijëve").

Hague Convention of 23 November 2007 On the International Recovery of Child Support and Other Forms of Family Maintenance, ratified by Law No. 63/2012, dated 31.5.2012, Official Gazette No. 72 (2012) (Konventa e Hagës për Rivendosjen Ndërkombëtare të Detyrimit Ushqimor ndaj Fëmijëve dhe Formave të Tjera të Mbështetjes për Anëtarët e Tjerë të Familjes").

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Case C-211/10PPU, *Doris Povse v Mauro Alpago* [2010] ECLI:EU:C:2010:400.

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EVALUATION OF TURKISH COURT PRACTICE REGARDING THE HAGUE CONVENTION ON CHILD ABDUCTION

Abstract: *The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("Convention") aims to secure prompt return of children who were wrongfully removed to, or retained in a Contracting State, in violation of the rights of custody or access under the law of another Contracting State. However, it is possible to refuse the return of the child. The reasons for the refusal of return are set out in Articles 12, 13 and 20 of the Convention. Among these, the most frequently invoked exception is stipulated under Article 13/1-b, often called as the "grave risk" exception. Türkiye is a party to the Convention as of 2000. In the twenty-three years following its entry into force, there is a high volume of Turkish case-law related with the Convention as Turkish citizens historically tend to form cross-border families especially within Europe. In our paper, the recent Turkish court decisions are reviewed and Turkish court practice is evaluated in light of two very recent sources published by the Hague Conference on Private International Law; Guide to Good Practice 2020 on Article 13/1-b, and Conclusions and Recommendations by the Eighth Meeting of the Special Commission dated October 2023. How the Turkish courts construe "habitual residence" of the child; the importance given to hearing of the child and his/her opinion in invoking the "child's objection" as a separate ground for refusal; and certain problems in implementation of "grave risk" exception are especially set forth, and conclusions as to Turkish practice are drawn.*

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1. Introduction

The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("Convention" or "Hague Convention") is an international treaty that provides a civil remedy to parents seeking the return of a child wrongfully removed or retained across international borders. The Convention is based on an assumption that it is harmful to children to be unilaterally taken from their country of habitual residence, and seeks to deter such actions.

The Convention applies to children under 16 years of age who have their habitual residence in a Contracting State if they have been wrongfully removed by their parents[1] to another Contracting State or retained in a Contracting State which is not their habitual residence. The purpose of the Convention is to ensure that a child who has been wrongfully "removed" or "retained" within the meaning of the Convention is returned as soon as possible to the Contracting State of habitual residence.

In order for the Convention to apply, both countries (the one the child was removed from, and the one the child has been brought to) must be "Contracting States", i.e. both must have adopted the Convention.

Turkey is a party to the Hague Convention since 2000. The Convention has 103 State Parties, including the United States of America, Australia, Canada, Russia, and many European countries such as Albania, Bosnia, Bulgaria, Croatia, Germany, Greece, Montenegro, Netherlands, North Macedonia, Serbia. Therefore, the Convention is applied widely in Türkiye and there is a mass amount of case-law and doctrine.

Turkey has enacted a law on the procedures and principles regarding the implementation of the Convention: Law No. 5717, "Law on the Legal Aspects and Scope of International Child Abduction". Additionally, the Circular No. 65/2 is issued by the Ministry of Justice in accordance with this Law. These serve as a guideline for the judges and practitioners.[2]

[1] The Convention can be applied not only if the child is abducted by the mother or father, but also if the child is abducted by persons such as grandparents who are likely to have custody rights in the future. Giray, F. K, Milletlerarası Özel Hukukta Kaçırılan veya Alıkonan Çocukların İadesi, İstanbul: Beta Yayıncılık, 2010, p.27.

[2] For a Turkishsummary of theConvention and itsimplementation in Türkiye, see, Özdemir, F B, *Uluslararası Çocuk Kaçırma ve Kaçırılan Çocukların İadesi,* Marmara Üniversitesi Hukuk

Recently, the Hague Conference issued two publications concerning the Convention. In 2020, the Guide to Good Practice on Article 13/1/b[3] ("Guide to Good Practice") and the Conclusions and Recommendations of the Eighth Meeting of the Special Commission ("Special Commission Report") on the practical operation of the Convention held in October 2023.[4]

In this paper, we aim to evaluate recent case-law of the Turkish courts concerning the Convention especially in the light of recent materials published by the Hague Conference.

2. Conditions for the Applicability of the Hague Convention

The purpose of the Convention is to secure the return of the child who has been displaced wrongfully to a Contracting State as soon as possible and to ensure the rights of custody and of access under the law of a Contracting State are effectively respected in the other Contracting States.

The conditions required for the Convention to be applicable can be listed as follows:

The applicant had custody rights that were infringed by the alleged removal or retention,

The applicant essentially was exercising his/her custody rights at time of removal or retention,

The applicant was habitually resident in a Contracting State at the time of the removal or retention,

The abducted child has not yet reached the age of 16.[5]

If all these conditions are fulfilled, the person who has custody rights of the child may request the return of the child to the country of his/her habitual residence within the framework of the Convention.

Fakültesi Hukuk Araştırmaları Dergisi, 25(2), 2019, pp. 1164-1189.

[3] https://www.hcch.net/en/news-archive/details/?varevent=725

[4] https://www.hcch.net/en/publications-and-studies/details4/?pid=8488

[5] Foropinions on the moment to be taken as basis in terms of thecondition taht thechild has not reachedtheage of sixteensee Giray 210, op. cit., p. 32 ff. The 2nd Civil Chamber of the Court of Cassation, in its decision numbered E.2006/17627-K.2007/12722 and dated 27.09.2007, ruled that the child could not be returned since the child was 16 years old at the time of the return request and that the child was outside the scope of the Convention in accordance with Article 4 of the Convention. In its decision dated 13.11.2013 and numbered E.2013/2-1772-K.2013/1557, the Court of Cassation General Assembly of Civil Chambers ruled that "*... Onur, one of the children whose return is requested, was born on 27.04.1996 and has reached the age of 16 as of the date of the examination and has left the scope of the Convention in accordance with Article 4 of the Convention*.".

2.1. Infringement of Custody Rights

It is important to note that, in order for the Convention to be applicable, it is not necessary for there to be a judicial or administrative decision concerning the right of custody between the child and the parent requesting the return. The fact that the right of custody has arisen by law is sufficient for the return of the child under the provisions of the Convention (Art. 3).[6]

As a matter of fact, this point is clearly emphasized in the decision of the 2nd Civil Chamber of the Court of Cassation dated 27.9.2007 and numbered E.2006/17627-K.2007/12722. The relevant part of the judgment is as following: "*According to the Child Abduction Convention, it is not necessary to have a decision on custody or the right to establish personal relations taken by the authorities of the country of habitual residence of the child who is wrongfully taken from one contracting state to another or wrongfully retained in the country of the other contracting state, nor is there any obligation to recognize and enforce such a decision in the state where the child is wrongfully taken or wrongfully retained*."

2.2. Habitual Residence

In determining whether the conditions for the application of the Convention have been fulfilled, the country of habitual residence of the child is of great importance. Whether the child has been wrongfully relocated or retained cannot be determined without determining the child's habitual residence.

The Convention does not define the term "habitual residence", so it is open to the courts in each Contracting State to do so. It is intended to be a fact-based determination, avoiding legal technicalities. The issue of how to determine the habitual residence of the child is highly discussed in the doctrine[7] and in practice. Although there is not a binding definition on habitual residence, in international doctrine and court practices, there is an understanding that is accepted as the definition of habitual residence.[8] It is important to note here that when determining the habitual residence of the child, it is not correct to interpret the country in which the child has lived for more days as the habitual residence. In other words, the child's place of residence should not be determined solely on the basis of finger counting,[9] and the

[6] Giray, 2010, *op. cit.,* p. 91.

[7] For opinions on the determination of the habitual residence of the child see Giray, 2010, *op. cit*., p. 74; Akıncı, Z., Demir Gökyayla, C, *Milletlerarası Aile Hukuku*. Ankara, 2010, p. 215; Çelikel, A., Erdem, B., *Milletlerarası Özel Hukuk*, İstanbul, 2020, p. 299-300.

[8] Akıncı/Demir Gökyayla,*op. cit.*, p. 215.

[9] Çelikel/Erdem, *op. cit*., p. 300.

child's age and maturity should also be taken into consideration, and it should be examined whether the child maintains social life relationships and adapts to the environment in which he/she currently lives[10].

According to case law, "i*n determining the habitual residence within the meaning of Article 4 of the Convention, only the child shall be taken as a basis and it shall be examined where he/she established his/her social environment and continued his/her social life in the days immediately preceding the date of the alleged abduction or retention, and if the child who is the subject of the return case is a minor and therefore lives dependent on his/her mother, the habitual residence of the mother and the habitual residence of the child shall be the same place on the date immediately preceding the date of the abduction or retention.[11]*

An interesting example was brought before Istanbul Civil Court of Appeal,[12] where the child, who was born in 2013 in Turkey, was brought to Turkey by his parents in 2016. The mother refused to leave Turkey and the child was requested to be returned to USA by his father. It is determined by the Court that due to numerous change of jobs by his father, the child lived in Moscow, Vienna, New York and Atlanta since his birth. As he was born in Turkey, lived in different countries and cities since his birth and at an age still in need of his mother, his habitual residence was not accepted as to be in USA but in Turkey.

In another case before Antalya Civil Court of Appeal,[13] the child was born in 2014 in Sweden. He was brought to Turkey when he was 3 months old and mostly stayed with his father's family in Turkey. The court concluded that the child is habitually resident in Turkey, not in Sweden and denied his return to Sweden.

3. Return Procedure and the Role of Central Authorities

The initiation of the return process under the provisions of the Convention depends primarily on the filing of a return request. The mechanism established by the Convention ensures that the request for the return of the child can be made easily and that this request can be evaluated and finalized quickly.[14]

[10] Şanlı, C., Esen, E., Ataman – Figanmeşe, İ., Milletlerarası Özel Hukuk, İstanbul, 2021, p.204.

[11] Court of Cassation General Assembly of Civil Chambers, dated 22.10.2010 and numbered E.2010/2-628-K.2010/693.

[12] İstanbul Civil Court of Appeal, 10th Civil Chamber, E. 2018/1708 K. 2018/965 T. 3.7.2018.

[13] Antalya Civil Court of Appeal, 2nd Civil Chamber, E. 2020/1870 K. 2020/1661 T. 20.11.2020.

[14] Akıncı/Demir -Gökyayla, *op. cit*., p. 246.

The Convention requires each Contracting State to designate a so-called "*central authority*" for the return mechanism to function. The central authority is the office or person through which each country carries out its duties under the Convention. Under the Convention, the central authorities have direct contact with each other and act in co-operation for the return of the child. The central authority designated by Turkey under the Convention is the Directorate General for Foreign Relations and European Union within the Ministry of Justice.

The person requesting the return of the abducted child may submit an application for the return of the child to the central authority of any Contracting State (Art. 8). The Convention thus relieves the person requesting the return of the child from the burden of travelling to the Contracting State where the child was abducted and applying for return to the authorities of that State. The person requesting the return of the child may apply to the central authority of the Contracting State in which he/she is resident and request the return of the child. For instance, if a child whose habitual residence is in Turkey is abducted to a foreign Contracting State, the application for the return of the child may be made to the Chief Public Prosecutor's Office of the place where the child's habitual residence is in Turkey [Circular No. 65/2, Art. II (A)(2)]. Moreover, under the Convention, central authorities may not charge any costs for applications submitted to them [Art. 26(2)].[15]

The central authority receiving the request for the return of the child shall promptly forward it to the central authority of the Contracting State to which the child was taken (or retained) by abduction. When the central authority of the Contracting State to which the child has been abducted or retained receives the request for the return of the child, it shall, if necessary, attempt to locate the child. In practice, the abductor conceals the child in order to prevent the return of the child, and therefore it may be difficult to locate the child, even with the assistance of police authorities. Once the child has been located, this central authority shall attempt to secure the return of the child by persuading the abductor [Art. 7(c)].[16] If the abductor cannot be persuaded to return the child, the central authority of the country to which the child was abducted shall apply to the competent judicial or administrative authority of that country for a decision on the return of the child [Art. 7(f)]. In the case of children who have been abducted to Turkey, an applica-

[15] Şanlı/Esen/Ataman – Figanmeşe,p.205.

[16] For mediation practice in child abduction cases see Öztekin – Gelgel, G, *25 Ekim 1980 Tarihli Uluslararası Çocuk Kaçırma ve Hukuki Yönlerine İlişkin Lahey Sözleşmesi Çerçevesinde Arabuluculuk Uygulaması,* Public and Private International Law Bulletin, 37 (2), 2017, pp. 621.

tion shall be made to the Family Courts[17] for a decision on the return of the child (Law No. 5717, Art. 6).[18]

The judicial or administrative authority to which the application is made must decide on the return of the child immediately. This authority shall only decide whether or not to return the child; it shall not decide on custody. The Convention does not decide which parent should have guardianship or custody of the child. Instead, it leaves that decision to the country of the child's habitual residence, if the child is ordered to be returned.

Decisions on a request for return may be appealed.[19] In accordance with the Convention, when a decision is finalized to return a child, it must be executed immediately, and the child shall be returned. In the case of children who have been abducted to Turkey, if the child is not returned despite the return order of the Family Court, the order shall be enforced by force.[20]

4. Denial of Return of the Child to His/Her Habitual Residence

The Convention relates to judicial cooperation and, as a rule, the child should be returned immediately to the habitual residence. However, it is possible to refuse the return, although it is exceptional. Situations that prevent the return of the child are stated in an extremely limited manner in the Convention. The Convention sought to prevent the courts from confusing the return mechanism with the decision on the child's custody by preventing them from investigating the best interests of the child in general.[21] The reasons for the refusal of return are set out in the articles 12, 13 and 20 of

[17] The 2nd Civil Chamber of the Court of Cassation, in its decision numbered E.2007/17942-K.2007/16493 and dated 26.11.2007, stated that the family courts are competent in the cases arising from the Convention, and found it contrary to the procedure and the law to decide on the merits of the case while the domestic court should have made a decision of lack of competence.

[18] Şanlı/Esen/Ataman Figanmeşe *op. cit*., p.206.

[19] In its decision numbered E.2014/2-1518-K.2014/844 and dated 05.11.2014, the Court of Cassation General Assembly of Civil Chambers concluded that the Chief Public Prosecutor's Office, which filed a return case on behalf of the central authority, should also request an appeal on behalf of the central authority when appealing the decision rendered in the return case, and that the appeal request not submitted on behalf of the central authority is invalid; and that the appeal request submitted by the Dutch lawyer working in a law office in the Netherlands on behalf of the mother requesting the return of the child should be rejected on the grounds that the foreign lawyer does not have the authority to represent and therefore appeal the judgment in this case in accordance with Article 35(1) of the Attorneys' Act No. 1136.

[20] Akıncı/Demir Gökyayla, *op. cit*., p. 272.

[21] *Ibid.*, p. 281.

the Convention. These may be listed as follows:[22]

Consent to or subsequent acquiescence[23] to the removal or retention, (Art. 12)

The custody right was not being effectively exercised (Art. 13/1/a)

Grave risk of physical or psychological harm to the child in case of return (Art. 13/1/b)

Child's objection to being returned if he/she is at a sufficient age and degree of maturity (Art. 13/2)

Breach of fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Art. 20)

If the period from the wrongful removal or retention of the child to the date of receipt of the application to the judicial or administrative authorities of the contracting state exceeds one year, the court may reject the request for the return of the child, in addition to the reasons listed above, on the grounds that "the child has adapted to his/her new environment"(Art. 12).[24] Absence of application within one year following the wrongful removal or retention of the child is not a time limit that violates rights. However, the passage of this one-year period will play an important role in the evaluation of the extradition request.[25]

In deciding the return of the children to their habitual residence, there are two issues which are of significance in recent court practice. One is sufficient level of scrutiny; i.e. whether the court conducts satisfactory examination in determining the existence of these grounds, or refrains from a thorough examination for the sake of a rapid decision. Second issue is whether the young age of the child obliges the court to return the child to his/her mother. Among the grounds for denial of return, most applied and discussed are child's objection and grave risk of harm to the child. Therefore, these will be further explained with case-law examples below.

[22] In its decision dated 13.11.2013 and numbered E.2013/2-1772, K.2013/1557, the Court of Cassation General Assembly of Civil Chambers ruled that any of the reasons for refraining from return listed in Articles 13 and 20 of the Child Abduction Convention are sufficient for the rejection of the return application independently and that the court examining the return application should examine these exceptions ex officio.

[23] The time elapsed from the date of abduction to the date of receipt of the application for the return of the child by the competent judicial or administrative authorities of the country to which the child was abducted is of importance for the decision on the return of the child [Art. 12 (1)]. The request of return shall be made within one year from the date of removal or retention, otherwise, it may mean that there is subsequent acquiescence or that the child is settled in his/her new environment.

[24] Şanlı/Esen/Ataman – Figanmeşe, *op. cit.*, p.209.

[25] Akıncı/Demir Gökyayla, *op. cit.*, p. 209.

4.1. Sufficient Level of Scrutiny

While the purpose of the Convention is to ensure prompt return of the child to his/her habitual residence, allegations that there is a ground for non-return should be carefully examined. This is stated in the Guide to Good Practice as follows: "*the exceptions serve a legitimate purpose, as the Convention does not contemplate an automatic return mechanism. ... This means that while the purpose of the Convention is to address the harmful effects of international child abduction by ensuring the prompt return of the child to the State of habitual residence where any custody / access and related issues should be resolved, there may be exceptional circumstances allowing for the non-return of the child.*" (paras. 27-28).

As a matter of fact, many decisions of Turkish family courts of first instance are annulled by the Court of Cassation due to lack of sufficient scrutiny of the alleged claims of relevant parties.

For example, the decision of a family court to return children to Austria was annulled because it was given without inviting the father taking the children to Turkey to the hearings; thus without examining any evidence that could have been submitted by the father; without hearing the children and without taking the opinion of experts.[26]

Another decision of a family court was annulled because it did not refer to an expert report from a panel comprising of a psychologist, a pedagogue and a social worker on the possible effects of return to the child.[27]

In another case before the Court of Cassation, a law suit had been initiated against the father before a Turkish criminal court accusing him of sexual harassment towards the child where the father had not been condemned because of lack of sufficient proof. Nevertheless, the family court decided to return the child to this father but the Court of Cassation annulled the decision of the family court on the ground that the case file decided by the criminal court had not been requested nor reviewed by the family court.[28]

4.2. Young Age of the Child

Until 2012, it was widely accepted by the Turkish courts that young age of the child may constitute a sole reason for the child not to be separated from his/her mother. However, in *Ilker EnsarUyanik v. Turkey*[29] case,

[26] Samsun Civil Court of Appeal, 4th Civil Chamber, E. 2018/210 K. 2018/1228 T. 23.5.2018.

[27] Court of Cassation 2nd Civil Chamber, E. 2021/8603 K. 2021/7898 T. 1.11.2021.

[28] Court of Cassation, 2nd Civil Chamber, E. 2022/1492 K. 2022/2946 T. 28.3.2022.

[29] İlker Ensar Uyanık v. Turkey, no. 60328/09, 3.5.2012. See, Giray, F. K, *Avrupa İnsan Hakları*

the European Court of Human Rights ("ECHR") decided that although there is no doubt that a child's very young age is an important criterion in determining his/her interests, it could not in itself be a sufficient ground in denying the return of the child.[30]

Therefore, recent decisions of the Court of Cassation are in line with this judgment. Although, family courts of first instance still decide to deny return of the child solely based on his/her young age, such decisions are consistently annulled by the Court of Cassation.[31]

4.3. Grounds for Denial of Return of the Child to His/Her Habitual Residence

4.3.1. Child's objection to being returned

According to the Hague Convention Art. 13/II, "*The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.*"

It is noted in the Special Commission Report "*that the 'child objection' exception under Article 13(2) of the 1980 Child Abduction Convention is separate from Article 13(1)(b)*" (para. 38).

Furthermore, Turkey is a party to the UN Convention on the Rights of the Child. According to Article 12 of the UN Convention, "*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child".*[32]

Indeed, statements of the child are heard and taken into consideration in Turkish court practice and they may constitute a sole basis for denial of return.[33] It is also crucial for decisive authorities to bear in mind that the

Mahkemesinin Aile İçi Uluslararası Çocuk Kaçırma İhtilaflarına İlişkin Seçilmiş Kararları, Public and Private International Law Bulletin. 35 (2), 2015, pp. 195-197.

[30] Akıncı/Demir Gökyayla, *op. cit*., p. 287.

[31] Court of Cassation 2nd Civil Chamber, E. 2021/3172 K. 2021/3190 T. 19.4.2021; Court of Cassation 2nd Civil Chamber., E. 2021/5111 K. 2021/5698 T. 5.7.2021.

[32] Art. 12 : "*1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

[33] In its decision numbered E.2013/2-1772-K.2013/1557 and dated 13.11.2013, the Court of Cassation General Assembly of Civil Chambers concluded that the child, born in 1999,

party wrongfully takes away the child can manipulate the child's feelings by fulfilling all the child's wishes until the process for return is completed[34]. Certain examples may be given from recent case-law. In a case before Izmir Civil Court of Appeal**,** the child was born in 2009 in the Netherlands. He came to Turkey in 2018 with his father and did not go back to the Netherlands. Although, there are not any reasons for denial of return of the child, the Court denied his return, taking into consideration the statements of the child before an expert and before the judge where he talked about his problems about living in the Netherlands with his mother; and where he stated that he is happy and he wants to continue living his father in Turkey. The Court based its decision on Art. 12 of the UN Convention as the child is 11 years old, a student of fourth grade at elementary school; so, he is mature enough to be heard and to affect the decision of the judicial authorities in matters relating to his life.[35]

In another case before Kayseri Civil Court of Appeal, the child, born in 2012 in Germany, was brought to Turkey by her mother when she was 8 years old. She testified before a panel of experts and before the judge where she stated that she didn't want to go back to Germany; she wanted to stay with her mother and that her father used to beat her mother in her presence while they had been in Germany. Although there were no other reasons for denial of return, the Court decided to deny the child's return based on Art. 13/II as the child is at a sufficient age and degree of maturity to take her views into account.[36]

However, if the statements of the child are inconsistent and there are other facts to prove to the contrary, Turkish courts decide opposite of the child's statement. For example, in a case before Sakarya Civil Court of Appeal, two children, born in 2009 and 2011 in the Netherlands, were brought to Turkey by their father in 2017. During the procedure for their return initiated by their mother, children were heard by experts and they stated that they wanted to stay with their father in Turkey. However, the experts noticed that the children missed their mother and they were not settled in their new envi-

whose return was requested, was capable of forming his/her opinions independently of his/her parents due to his/her age at the time of the hearing, and that the child stated that he/she wanted to stay with his/her mother in Türkiye, and since it could not be proved that staying with his/her mother was contrary to the principle of the best interests of the child, the request for return of the child should be rejected.

[34] Özel, S., Erkan, M., Pürselim, H. S., Karaca, H. A, Milletlerarası Özel Hukuk, İstanbul, 2023, p. 294.

[35] İzmir Civil Court of Appeal, 2nd Civil Chamber, E. 2020/1609 K. 2020/1754 T. 25.12.2020.

[36] Kayseri Civil Court of Appeal, 2nd Civil Chamber, E. 2020/741 K. 2020/622 T. 22.9.2020.

ronment in Turkey. Furthermore, the director of the elementary school was heard and stated that although the children were registered at their school, they didn't regularly attend the classes. So, the Court decided on the return of children to Netherlands contrary to their statements.[37]

4.3.2 Grave Risk of Harm to the Child

Article 13(b), which provides the most frequently cited defense available under the Convention, stipulates that a court is not required to order the return of a child to his or her state of habitual residence if "*there is a grave risk that his or her return would expose the child to physical or psychological harm*."

This ground has been discussed frequently also by the Turkish courts since the entry into force of the Convention.[38] Below, we will give examples from recent case-law especially in the light of the Guide to Good Practice.

General considerations such as age of the child, reaching puberty, need of a mother, possibility of negative effects on the child if he/she is taken away from his/her mother are not construed as grave risks.[39] Also, in a very recent case from 2023, the father's claim that the children are under a grave risk of harm because the mother is living with her boyfriend in Austria has been rejected and the children are returned to Austria.[40]

On the other hand, an ongoing war is deemed to constitute a reason for grave risk of harm. In the case before the Court of Cassation, the mother's request of return was denied on the ground of grave risk of harm first because of the ongoing war in Ukraine[41]. However, it must be noted that a country's being constantly in conflict or having certain security issues is not sufficient for denial of return as in the case of Israel in the beginning of 2000s. In the decision of the Sarıyer Family Court numbered E.2004/683-K.2004/929 and dated 25.10.2004, which was upheld by the decision of the 2nd Civil Chamber of the Court of Cassation numbered E.2005/469-K.2005/5045 and dated 29.3.2005, the interpretation of the Sarıyer Family Court within the framework of Article 13(b) of the Convention upon the opposition to the request

[37] Sakarya Civil Court of Appeal, 2nd Civil Chamber, E. 2019/36 K. 2019/35 T. 21.1.2019.

[38] Forfurtherinformation, see, Saatçioğlu, O C, *Uluslararası Çocuk Kaçırmanın Hukuki Veçheleri Hakkında Sözleşme Madde 13/1-b Hükmü Kapsamında "Ev İçi Şiddet" Olgusu: Eleştirel Bir Değerlendirme,* Public and Private International Law Bulletin, 41(1), 2021, pp. 1–40.

[39] Court of Cassation 2nd Civil Chamber, E. 2022/7603 K. 2022/6922 T. 12.9.2022.

[40] Court of Cassation 2nd Civil Chamber, E. 2022/11535 K. 2023/694 T. 23.2.2023.

[41] Court of Cassation 2nd Civil Chamber, E. 2023/2327 K. 2023/1264 T. 23.3.2023. Furthermore, in this case, the child had been attacked and severely injured by a nephew of the mother in Ukraine.

for the return of the child to Israel on the grounds of security issues in Israel was as follows: "*Lastly, the objection of the defendant's attorney based on Article 13/b of the Convention that the conditions for return are not met due to the war environment in Israel, and the objection of the defendant's attorney that the normal daily life such as education, training, trade, travelling and so on is still continuing in Israel, that the disorder and conflicts in the country are in certain regions, and that these conflicts are not a new situation but have been going on for many years and that the parties have continued their lives in Israel despite this, these objections have not been deemed appropriate. Furthermore, it has not been proved that there is a grave risk that the return of the child would expose him/her to physical or psychological danger or otherwise put him/her in an intolerable situation, and it is understood that there is no reason for refusal stated in this article*".

There are two interesting recent examples where the child's return has been denied. First example concerns health condition of one of the siblings. In a case before Ankara Civil Court of Appeal, two children, born in 2013 and 2015, were brought from Austria to Turkey. One of these children was diagnosed with osteoporosis (loss of bones) and should be under strict treatment. The return of children was denied because *"Turkey's health system is superior to that of many European countries and many foreign patients prefer to be treated in Turkish hospitals"* and *"the mother, being an housewife, can spend more time with and better take care of the sick child"*[42]. The risks associated with the child's health have been dealt with in the Guide to Good Practice. It is stated that "*In cases involving assertions associated with the child's health, the grave risk analysis usually should focus on the availability of treatment in the State of habitual residence of the child and not on a comparison between the relative quality of care in each State*" (para. 62). Therefore, we see that Turkish court's decision clearly conflicts with the Guide because the court made a comparison between health systems and furthermore the comparison depends not on an objective scientific document but on the probably subjective opinion of the Turkish judge.

Second example concerns separation of siblings, an issue also dealt with in the Guide to Good Practice. In a case before Sakarya Civil Court of Appeal, the child, born in 2017 in Austria, was brought to Turkey by her mother in 2018. The father frequently visits his family and the couple had another child in 2018 who is born in Turkey. After the birth of the second child, the father requests the return of the first child. The court denies his return on the ground of grave risks which are the young age of the child, his need of

[42] Ankara Civil Court of Appeal, 1st Civil Chamber., E. 2018/3184 K. 2019/275 T. 5.3.2019.

his mother's care, busy working hours of the father in Austria, and the possible psychological harm on the child if he is separated from his mother and his newborn brother.[43] However, it is stated in the Guide that "*In some cases, a separation of siblings may be difficult and disruptive for each child. ... the separation of the siblings resulting from the non-return of one child (regardless of the legal basis for the non-return) does not usually result in a grave risk determination for the other child"* (para. 74). Although certain other grounds are cited as grave risks in the decision, they are general considerations not accepted by Turkish courts and it is obvious that the determinant factor was the separation of siblings in denial of return.

It is stated by the Hague Conference in the Special Commission Report that the interpretation and application of the exceptions shall "*not include a comprehensive 'best interests assessment'*" (para. 17). However, these two case-law examples show that the grave risk exception is not being applied as restrictively as expected.

5. Conclusion

It is very important that the central authorities and the officials assisting these authorities correctly understand the nature of the duty assigned to them by the Convention. The Convention is certainly not of a criminal nature and is not a Convention that foresees punishment for the party who wrongfully removes or retains the child. The duty of the central authority is, first, to mediate for the return of the child, and after the child is found, to try to persuade the party that wrongfully removed or retained the child to return the child through peaceful means. If the return of the child cannot be achieved through peaceful means, a lawsuit for the return of the child should be filed. The authority that will evaluate the allegations and decide on the return of the child is the family court.[44]

There is a high volume of case-law related with the Convention as Turkish citizens historically tend to form cross-border families especially within Europe. As there is a growing trend of intellectual migration towards Europe these days, number of cross-border families will continue to rise. As a matter of fact, the Convention is being effectively applied. In line with recent publications of the Hague Conference, hearing of the child is performed and the child's views are taken into consideration. In line with ECHR decisions, young age of the child doesn't in itself constitute a basis for keeping the child with his/her mother. Further, the "child objection" exception is treated sep-

[43] Sakarya Civil Court of Appeal, 2nd Civil Chamber, E. 2020/1140 K. 2020/878 T. 6.11.2020.

[44] Çelikel, A., Erdem, B, Milletlerarası Özel Hukuk, İstanbul, 2020, p.306.

arately than the "grave risk" exception. However, the restricted application of grave risk may be questioned in light of recent case-law examples. Unfortunately, the threshold of the grave risk exception is not as high as expected.

Summary

Turkey is a party to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction since 2000. The Convention has 103 State Parties. The Convention is applied widely in Turkey and there is a mass amount of case-law and doctrine. Recently, the Hague Conference issued two publications concerning the Convention. In 2020, the Guide to Good Practice on Article 13/1/b ("Guide to Good Practice") and the Conclusions and Recommendations of the Eighth Meeting of the Special Commission ("Special Commission Report") on the practical operation of the Convention held in October 2023.In this paper, we aimed to evaluate recent case-law of the Turkish courts concerning the Convention especially in the light of recent materials published by the Hague Conference and reached following conclusions: In line with recent publications of the Hague Conference, hearing of the child is performed and the child's views are taken into consideration by Turkish courts. In line with ECHR decisions, young age of the child doesn't in itself constitute a basis for keeping the child with his/her mother. Further, the "child objection" exception is treated separately than the "grave risk" exception. However, the restricted application of grave risk may be questioned in light of recent case-law examples. Unfortunately, the threshold of the grave risk exception is not as high as expected.

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*HCCH CONVENTIONS AND THE BILATERAL TREATIES IN THE SERBIAN PRIVATE INTERNATIONAL LAW (FAMILY RELATIONS) - EVERYTHING EVERYWHERE ALL AT ONCE?****

Abstract: *Currently, thirteen Hague conventions on Private International Law bind the Republic of Serbia. Concurrently, numerous bilateral treaties which are in force in the Republic of Serbia regulate various Private International Law matters, completely or partially corresponding to the relevant HCCH conventions. Most of these bilateral treaties stem from the period of former Yugoslavia, when they were tailored to fit the frequent PIL relations mostly with the states which later became EU Member States. On the other hand, the conflict clauses in the relevant Hague Conventions adopted in the family law matters are often neutral in respect of their priority over other corresponding international treaties binding the same Contracting States. Some of these clauses merge their neutrality with the possibility to declare the primacy of the specific Hague convention. Yet, when the other state is an EU Member State, this clause does not seem to leave an escape, which generates further perplexity. Consequently, the international treaties hierarchy labyrinth expands, imposing the systemic integration as part of the law of treaties and International Public Law. However, the International Public Law's systemic integration patchwork does not match up with the Serbian bilateral PIL treaties when they amalgamate with the HCCH conven-*

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tions. In effect, it prevents the rational and efficient outcome, especially in cross-border family matters, where the Serbian bilateral treaties are to be systematically applied with the 1996 Hague Children Protection Convention, the 2007 Hague Maintenance Protocol or the 2007 Hague Child Support Convention. In this regard, the authors of this paper strive to disentangle the IPL and PIL's nodus regarding the relevant Serbian bilateral PIL treaties and the corresponding Hague conventions in family law matters. Thus, the paper addresses the following dilemmas: can States tacitly manifest their intention to supersede the prior treaty, especially when the joint declaration on the posterior convention's priority cannot be anticipated due to the legal or factual obstacles; are the bilateral treaties always in compliance with the lex specialis rule or may they reverse it in certain cases?

Keywords: *compatibility clauses, gentleman's clause, lex specialis, systemic integration, HCCH conventions, bilateral PIL treaties, cross-border family relations.*

1. Introduction

In terms of the Serbian Private International Law, the entry into force of the 2007 Hague Maintenance Obligation Protocol in 2013,[1] and the 1993 Hague Intercountry Adoption Convention[2] in 2014, followed by the Hague Children Protection Convention[3] in 2016, and most lately, by the 2007 Hague Child Support Convention in 2021,[4] raised the specific issue of their hierarchy (and relation with) the bilateral PIL treaties binding Serbia in the corresponding matters.

Before addressing the core of the problem, it is necessary to point out several facts, which are pivotal for further discussion. Hence, we have to return to the time of former Yugoslavia. The HCCH conventions in force in Serbia stem from two periods. The first one began in 1930 when the King-

[1] Protocol on the Law Applicable to Maintenance Obligations, *Official Gazette of the RS* - International Agreements, 1/2013,

[2] Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *Official Gazette of RS* - International Agreements, 12/2013.

[3] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, *Official Gazette of RS* - International Treaties, 20/2015.

[4] Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, *Official Gazette of RS* - International Agreements, 4/2020.

dom of Yugoslavia ratified the first Hague Convention (1905 Convention relative à la procédure civile[5]) as well as several bilateral PIL treaties (with the Great Britain, [6] the USA,[7] Switzerland,[8] and the Netherlands[9]). This period persisted until the end of the Second World War. Afterwards, two differently named states were established subsequently, following relevant constitutional changes (FPRY and SFRY), known in plain English, as Yugoslavia. This period lasted further on until the dissolution of the SFRY in the 1990s. In this period, the former Yugoslavia ratified the following HCCH conventions: the 1954 Civil Procedure Convention,[10] the 1961 *Apostille* Convention,[11] the 1961 Form of Wills Convention,[12] the 1971 Traffic Accidents Convention,[13] the 1973 Products Liability Convention,[14] the 1980 Access to Justice Convention,[15] and the 1980 Child Abduction Convention,[16] as the last one, ratified in 1991.

Meanwhile, former Yugoslavia entered into numerous bilateral PIL treaties to which we refer as the so called "old" bilateral PIL treaties (e.g. with

[5] *Official Gazette of the Kingdom of Yugoslavia*, 100/1930.

[6] Agreement on trade and navigation between the Kingdom of Serbs, Croatians and Slovenians (SCS) and the United Kingdom of Great Britain and Ireland, *Official Gazette*, 46/1928. Convention between the Kingdom of Yugoslavia and Great Britain on the arrangement of mutual assistance in conducting proceedings in civil and commercial matters pending or which may be pending before the respective judicial authorities, *Official Gazette,* 116/1937.

[7] Trade agreement between Serbia and the United States of America, *Serbian Official Gazette*, 268/1882.

[8] Convention on settlement and consular relations between Serbia and Switzerland, *Official Gazette*, 83/1888.

[9] Agreement on trade and navigation between the Kingdom of Yugoslavia and the Kingdom of the Netherlands, *Official Gazette of the Kingdom of Yugoslavia*, 85-XXXVII/32.

[10] Convention on Civil Procedure, *Official Gazette of the FPRY – International Treaties and other Agreements,* 6/1962.

[11] Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents, *Official Gazette of the FPRY – International Treaties and other Agreements,* 10/1962.

[12] Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, *Official Gazette of the FPRY – supplement,* 11/1962.

[13] Convention on the Law Applicable to Traffic Accidents, *Official Gazette of the SFRY – supplement* 26/1976.

[14] Convention on the Law Applicable to Products Liability, *Official Gazette of the SFRY – International Agreements,* 8/1977.

[15] Convention on International Access to Justice, *Official Gazette of the SFRY – International Treaties* 4/1988.

[16] Convention on the Civil Aspects of International Child Abduction, *Official Gazette of the SFRY – International Treaties,* 7/1991.

the Kingdom of Greece, Romania,[17] Czechoslovakia,[18] Poland,[19] Hungary,[20] Austria, Belgium, France, Bulgaria,[21] Cyprus,[22] Italy, the USSR,[23] Algeria,[24] Iraq,[25] Mongolia,[26] Iran,[27] Japan,[28] Norway,[29] etc).[30] Multiple bilateral treaties regulating different Private International Law issues had been concluded with some of these States, which later became the EU Member States: two

[17] Agreement on Legal Assistance between the FPR Yugoslavia and the Romanian People's Republic (1960) - (Official Gazette of the FPRY - Supplement International Treaties 8 /1961)

[18] Agreement on the Regulation of Legal Relations in Civil, Family and Criminal Matters between the SFR Yugoslavia and Czechoslovakia SR (1964) - (Official Gazette of the SFRY - Supplement International Treaties 13 / 1964

[19] Agreement on Legal Relations in Civil and Criminal Matters between the FPR Yugoslavia and PR Poland (1960) - (Official Gazette of the FPRY - Supplement International Treaties 5 /1963)

[20] Agreement on Mutual Legal Relations between the SFR Yugoslavia and the People's Republic of Hungary (1968), amended (1986) - (Official Gazette of the SFRY – Supplement International Treaties 3 /1968; with amendments – Official Gazette of the SFRY – Supplement International Treaties 1 / 1987)

[21] Agreement on Mutual Legal Assistance between the FPR Yugoslavia and the People's Republic of Bulgaria (1956), Official Gazette of the SFRY – Supplement International Treaties 1/1957.

[22] Agreement on Legal Assistance between the SFRY Yugoslavia and the Republic of Cyprus (1984), Official Gazette of the SFRY – Supplement International Treaties 2/1986).

[23] Agreement on Legal Assistance in Civil, Family and Criminal Matters between the FPR Yugoslavia and DPR Algeria (1982), Official Gazette of the FPRY, Supplement International Treaties 2/1981.

[24] Agreement on Legal Assistance between the SFRY Yugoslavia and the Republic of Cyprus (1984), Official Gazette of the SFRY – Supplement International Treaties 2/1986.

[25] Agreement on legal and judicial cooperation between SFRY and the Republic of Iraq (1986), Official Gazette of the SFRY – Supplement International Treaties 1/1987.

[26] Agreement on Legal Assistance in Civil, Family and Criminal Matters between the Socialist Federal Republic of Yugoslavia and the Mongolian People's Republic (1981), *Official Gazette of the SFRY - Supplement International Treaties*, 7/1982.

[27] Agreement between Yugoslavia and Iran on Mutual Exemption from Cautio iudicatum solvi, *Official Gazette of the FPRY - Supplement International Treaties*, 2/1957.

[28] Agreement on trade and navigation between FPR Yugoslavia and Japan, *Official Gazette of the FPRY* - Supplement, 7/1959.

[29] Agreement on reciprocal recognition of the diplomatic-consular form of marriage between Yugoslavia and Norway, *Official Gazette of the FPRY - International Treaties and other agreements*, 6/1958.

[30] The full list of all bilateral PIL treaties binding Serbia, with their original texts, is available at the official web site of the Ministry of Justice of the Republic of Serbia, https://www.mpravde.gov.rs/sr/tekst/25261/bilateralni-sporazumi-u-gradjanskim-stvarima-.php.

of them with Greece (on international judicial assistance;[31] and recognition and enforcement[32]); three with Austria (on legal assistance,[33] recognition and enforcement of the maintenance decisions,[34] and recognition and enforcement of the decision of chosen courts[35]); four with France (on extract of the civil status registries and legalization;[36] recognition and enforcement;[37] conflict of laws in family matters;[38] and the treaty on the simplified application of the 1954 Hague Convention[39]); three with Belgium (on legal assistance,[40] recognition and enforcement of maintenance decisions,[41] extract of civil registries and legalization of public documents[42]); three with Italy (on legal and

[31] The Convention on Mutual Legal Relations between the FPR Yugoslavia and the Kingdom of Greece (1959), Official Gazette of the FPRY - Supplement International Treaties 7/1960.

[32] Agreement on Mutual Recognition and Enforcement of Court Decisions between the SFR Yugoslavia and the Kingdom of Greece, Official Gazette of the SFRY, Supplement International Treaties 6/1960.

[33] The Convention on Mutual Legal Relations between the FPR Yugoslavia and the Republic of Austria (1954), Official Gazette of the FPRY - Supplement International Treaties 8/1955.

[34] Agreement on mutual recognition and enforcement of decisions on maintenance between FPR Yugoslavia and the Republic of Austria (1961), Official Gazette of the SFRY, 2/1963.

[35] Agreement on mutual recognition and enforcement of decisions of chosen courts and settlements concluded before the chosen courts in commercial matters between the FPR Yugoslavia and the Republic of Austria (1960), Official Gazette of the SFRY, 5/1961.

[36] Convention on Issuing Documents on Personal Status and on Exemption from Legalization between SFR Yugoslavia and the Republic of France, Official Gazette of the SFRY - International treaties and other agreements, 3/1971.

[37] Convention on the recognition and enforcement of court decisions in civil and commercial matters between the SFR Yugoslavia and the Republic of France (1971), Official Gazette of the SFRY - Supplement, 7/1972.

[38] Convention on Jurisdiction and the Applicable Law in the Matters of Personal and Family Law between the SFR Yugoslavia and the Republic of France (1971) - (Official Gazette of the SFRY - Supplement International Treaties 55/1972.

[39] Agreement on Facilitating the Application of the Hague Convention on Civil Procedure of March 1, 1954 between the SFR Yugoslavia and the Republic of France, Official Gazette of the SFRY - Supplement International Treaties and other agreements, 21/1971.

[40] Agreement on legal assistance in civil and commercial matters between the SFR Yugoslavia and the Kingdom of Belgium, Official Gazette of the SFRY - Supplement International Treaties and other agreements, 7/1974.

[41] Convention on the recognition and enforcement of court decisions on maintenance between the SFR Yugoslavia and the Kingdom of Belgium, Official Gazette of the SFRY - Supplement International Treaties and other agreements, 45/1976.

[42] Convention on Issuing Extracts from Registers and Exemption from Legalization between the SFR Yugoslavia and the Kingdom of Belgium, Official Gazette of the SFRY, 55/1972.

judicial protection of the citizens,[43] legal assistance,[44] trade and navigation[45]). Except from treaties with Algeria, Cyprus and Iraq, all other bilateral PIL treaties in this period were concluded while Yugoslavia still did not have a separate statutory act on Private International Law as a *lex generali*. The PIL Act was enacted in 1982, and came into force on January 1st 1983.[46] This piece of legislation still applies, but only in Serbia and Bosnia and Herzegovina.

The second period of the HCCH conventions ratifications began during the existence of FRY. In this period, a treaty was concluded with Croatia.[47] Following the dissolution of the FRY and, afterwards, the dissolution of Serbia and Montenegro Union (2006), the 1970 Taking of Evidence Convention[48] and 1965 Service Convention[49] were ratified in 2010. This period still lasts and it has so far resulted in the ratifications of the earlier mentioned 1993 Adoption Convention, the 2007 Hague Protocol, the 1996 Children Protection Convention and the 2007 Child Support Convention. At the same time, Serbia has entered into bilateral PIL treaties primarily with the neighbouring States - Bosnia and Herzegovina,[50] Slovenia,[51] North Macedonia,[52] Montenegro,[53] but

[43] Convention between the Kingdom of the SCS and Italy on the legal and judicial protection of the respective citizens, Official Gazette of the Kingdom of Yugoslavia, 42/1931, but its provisions in civil matters were replaced by the Agreement cited in the next ft.

[44] Convention on mutual legal assistance in civil and administrative matters between the FPR of Yugoslavia and the Italian Republic, Official Gazette of the SFRY - International treaties and other agreements, 7/1974.

[45] Convention on trade and navigation between the FNR of Yugoslavia and the Italian Republic, Official Gazette - Supplement, 14/1956.

[46] Act on Resolving Conflict of Laws with the Regulations of other Countries, *Official Gazette of the SFRY*, 43/82 and 72/82 - corr., *Official Gazette of the FRY*, 46/96 and *Official Gazette of the of the RS*, 46/2006.

[47] Agreement between the FR Yugoslavia and the Republic of Croatia on legal assistance in civil and criminal matters (1997), Official Gazette of the FRY - International treaties, 1/1998.

[48] Convention on Taking of Evidence Abroad in Civil and Commercial matters, *Official Gazette of the RS – International Treaties* 1/2010 and 13/2013.

[49] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *Official Gazette of the RS – International Agreements* 1/2010 and 13/2013.

[50] Agreement between the Republic of Serbia and Bosnia and Herzegovina on Amendments to the Agreement on Legal Assistance in Civil and Criminal Matters (2005), Official Gazette of the Serbia and Montenegro - International treaties, 6/2005, as amended (2010), Official Gazette of the RS - International Treaties, 13/2010.

[51] Agreement between the Republic of Serbia and the Republic of Slovenia on legal assistance in civil and criminal matters (2011), Official Gazette of the RS - International Treaties, 9/2011.

[52] Agreement between the Republic of Serbia and the Republic of Macedonia on legal assistance in civil and criminal matters (2012), Official Gazette of the RS - International Treaties, 5/2012.

[53] Agreement between the Republic of Serbia and Montenegro on legal assistance in civil

also with Belorussia,[54] Turkey,[55] and the most lately - with the UAE.[56] In this paper, we will focus on those "old" bilateral PIL treaties binding for Serbia and certain EU Member States in family relations since all of the EU States apply the 1996 Hague Children Protection Convention, the 2007 Hague Maintenance Protocol and the 2007 Hague Child Support Convention.[57] Although those "old" bilateral PIL treaties under the title "legal assistance" may associate only to the legal assistance *stricto sensu*, the most of the "old" bilateral PIL treaties of this type regulate also some of the rules on cross-border family relations and succession, sometimes followed by the provisions on general regime of recognition and enforcement. While regulating conflict of laws, international jurisdiction and/or recognition and enforcement, these bilateral treaties are, to the certain extent, intertwining especially with the 2007 Hague Maintenance Protocol and the 1996 Hague Children Protection Convention, as well as with the 2007 Hague Child Support Convention but to a lesser extent due to the express *lex favorabilis* rule.

2. Types of the provisions on compatibility clauses envisaged in the relevant HCCH conventions and one hypothetical case

Before we dive into the troubled waters of the Private International Law and International Public Law melting point, one should bear in mind that these bilateral PIL treaties bind Serbia and the relevant EU Member State since the socialist period of the former Yugoslavia. In order to analyze the law of the treaties rules as the intersection of PIL and IPL regarding the hierarchy of successive international treaties, it is necessary to take a look on the types of the provisions on the hierarchy between the relevant HCCH conventions and other international treaties. While regulating the conflict-of-laws alone (the 2007 Hague Maintenance Protocol), or in conjunction with direct international jurisdiction and/or recognition and enforcement (the

and criminal matters (2009), Official Gazette of the RS - International Treaties, 1/2010.

[54] Agreement between the Republic of Serbia and the Republic of Belarus on legal assistance in civil and criminal matters (2013), Official Gazette of the RS - International Treaties, 13/2013.

[55] Agreement between the Republic of Serbia and the Republic of Turkey on mutual legal assistance in civil and commercial matters (2015), Official Gazette of the RS - International Treaties, 15/2015.

[56] Agreement on legal and judicial cooperation in civil and commercial matters between the Republic of Serbia and the United Arab Emirates (2023), Official Gazette of the RS - International Treaties, 7/2022.

[57] The full list of all bilateral PIL treaties binding Serbia is available at the official web site of the Ministry of Justice of the Republic of Serbia, https://www.mpravde.gov.rs/sr/tekst/25261/bilateralni-sporazumi-u-gradjanskim-stvarima-.php.

2007 Hague Child Support Convention, or the 1996 Hague Children Protection Convention), all three of the relevant HCCH conventions have introduced express provisions on their relations to the other treaties. These provisions are usually referred to as the conflict clauses[58] or compatibility clauses.[59] With exception of the 2007 Hague Child Support Convention, the 2007 Hague Maintenance Protocol and the 1996 Children Protection Convention share an identical idea on this issue. The only difference is whether these two HCCH convention regulate their hierarchical relation regarding prior or subsequent successive treaty.

According to the 1969 Vienna Convention on the Law of Treaties (VCLT), the question of conflicts between earlier and later treaties is covered by article 30, having in mind different scenarios - where there are identical parties to the treaties, and the other of non-identical parties. Having in mind the subject matter of this paper, only the first scenario is relevant. In international law, the interplay between successive treaties concerning the same subject matter hinges on the principles of *lex posterior derogat priori* (later law prevails over earlier law) and *lex specialis derogat legi generali* (special law prevails over general law). When successive treaties involve the same parties, the principle of *lex posterior* generally governs, dictating that the later treaty takes precedence.[60] However, if the earlier treaty exhibits a special character in relation to the later one, the *lex specialis* principle prevails, granting priority to the more specific treaty.

This interplay is further nuanced by Article 59 of the Vienna Convention on the Law of Treaties (VCLT), which addresses the termination of treaties. According to Article 59, when the parties to an earlier treaty are also parties to a later treaty on the same subject matter, the earlier treaty survives

[58] The term *conflict clauses* is used in the Fragmentation Report, Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi. Study Group of the International Law Commission, *Fragmentation of International Law: difficulties arising from the diversification and expansion of International Law, Document A/CN.4/L.682 and Add.1,* finalized by Mr. Martti Koskenniemi, 13 April 2006, pp. 268-271, available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (further on: Fragmentation Report);

[59] The term *compatibility clauses* i used e.g. in Blanca Noodt Taquela, M., *Applying the Most Favourable Treaty or Domestic Rules to Facilitate Private International Law Co-Operation*, Collected Courses of the Hague Academy of International Law, Vol. 377, Brill|Nijhoff, 2015, pp. 208-248; but also Lagarde, P., *Explanatory report on the 1996 HCCH Child Protection Convention, Proceedings of the Eighteenth Session (1996)*, *tome II*, *Protection of children.* Hague: HCCH, 1996, 601.

[60] Fragmentation Report, paras 223-323; Murphy, S. D., Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project, Temple International & Comparative Law Journal, Vol. 27, Issue 2, 2013, p. 295.

only if its provisions are compatible with those of the later treaty. This provision implies a presumption that when states conclude a subsequent treaty incompatible with an earlier one, they intend to terminate or modify the earlier treaty unless evidence suggests otherwise. The application of these principles, however, is not mechanical and requires careful consideration of the context, including: party intent,[61] treaty interpretation[62] and the nature of the treaties.[63]

Ultimately, resolving potential conflicts between successive treaties necessitates a nuanced approach that considers the specific circumstances of each case and aims to balance the principles of *lex posterior* and *lex specialis* with the overarching goal of maintaining coherence and stability within the international legal system.

Hence, when two states have concluded two treaties on the same subject matter but have not addressed their mutual relationship, the standard practice is to interpret the treaties as compatible with each other,[64] reflecting the principle of harmonization,[65] a cornerstone of systemic integration in international law. The principle of harmonization reflects a presumption that states, acting in good faith, do not intend to create conflicting legal obligations. Therefore, unless a clear intention to derogate from an earlier treaty is evident, interpreters strive to find an interpretation that upholds the validity and effectiveness of both treaties. This approach promotes stability and predictability in international law by ensuring that treaty obligations are interpreted in a way that minimizes conflict and maximizes their mutual compatibility.

[61] Fragmentation Report, para. 230.

[62] Murphy, S. D., op. cit., p. 296; Fragmentation Report, para. 58, 229.

[63] Fragmentation Report, paras 61, 65, 79, 223.

[64] Czapliński, W., Danilenko, G., Conflicts of norms in international law, Netherlands Yearbook of International Law, vol. XXI, 1990, p. 13; Aust, A., Modern Treaty Law and Practice, Cambridge, Cambridge University Press, 2000, p. 174; Pauwelyn, J., Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law, Cambridge, Cambridge University Press, 2003, pp. 240-244; Jenks, C. W., The conflict of law-making treaties, British Yearbook of International Law, Vol. 30, 1953, pp. 427-429.

[65] Harmonization seeks to avoid conflict and promote coherence within the international legal system by interpreting seemingly conflicting norms in a way that renders them compatible. A common method for achieving harmonization is to examine party intent. This involves analyzing the treaty texts to discern the states' objectives and understanding of their obligations. By considering various interpretations of the treaty language, legal practitioners and scholars can determine whether a reading exists that allows both treaties to operate concurrently without contradiction. This process often requires considering the broader context of the treaties, including their purpose, subsequent practice, and relevant rules of international law, as highlighted by Article 31 of the VCLT.

The 2007 Hague Maintenance Protocol, as the first ratified HCCH convention by Serbia as an independent state, envisages that "this Protocol does not affect any other international instrument to which Contracting States are or become Parties, and which contains provisions on matters governed by the Protocol, unless a contrary declaration is made by the States Parties to such instrument".[66] This provision regulates the relation between the 2007 Maintenance Protocol with both prior and subsequent international successive treaty by the *neutral* clause. This type of compatibility clause points to the "clauses which are not expressly oriented in the direction of maximum effectiveness",[67] as Professor Tequela refers to them in her lecture given at the Hague Academy. However, in this paper we plead for the use of the term *gentleman's clause*, in order to succinctly and concisely illustrate the notion of this type of compatibility clauses as being neutral. The 1996 Hague Children Protection Convention regulates its relations with prior and subsequent international successive treaties introducing the same *gentleman's clause*.[68] On the other hand, the 2007 Hague Child Support Convention envisages the most effective rule (*lex favorabilis)* stating that the other treaty has priority under certain conditions which makes the specific treaty most favourable in the same matter.[69]

However, the 1996 Hague Children Protection Convention and the 2007 Hague Maintenance Protocol provide the clause authorising the States who are contracting parties of the relevant HCCH convention (the 2007 Hague Maintenance Protocol[70] or the 1996 Hague Children Protection Convention[71]) and concurrent international treaty to negotiate on the priority of the HCCH convention in question, and to give express declaration on its priority. However, if these declarations have not been given, the *gentleman's clause* is set in stone. The *gentleman's clause* does not give *a priori* primacy to the anterior international successive treaty. Instead, the Contracting States are authorised to interpret the treaties in force between them as being coordinated (or not contrary to one another).[72] The aim of these clauses is to prevent the treaty from being interpreted in the sense that it would supersede previous treaties.[73] This type of compatibility clause leaves the door open for

[66] Article 19 (1) of the 2007 Hague Maintenance Protocol.

[67] Blanca Noodt Taquela, M. (2015), 218-227.

[68] Article 52 of the 1996 Hague Children Protection Convention.

[69] Article 52 of the 2007 Hague Child Support Convention.

[70] Article 19 (1) of the 2007 Hague Maintenance Protocol.

[71] Article 52 (1) of the 1996 Hague Children Protection Convention.

[72] Blanca Noodt Taquela, M. (2015), 223.

[73] *Ibid*, 219.

the systemic integration approach when dealing with the issue of hierarchy of international treaties. This approach stems from IPL, where it is firmly incorporated, as *the sedes materiae rule* of its Law of Treaties.

Systemic integration is a legal principle that promotes the interpretation of international law as a unified and coherent system, emphasizing the interconnectedness of the international legal system. It proposes that different parts of international law, such as treaties, customary law and general principles of law, as well as different sub-regimes in international law can and should be interpreted and applied in a way that promotes coherence and avoids conflict.[74] This principle is seen as a tool to address the increasing fragmentation of international law, characterized by the proliferation of specialized treaties and institutions.

One of the key manifestations of systemic integration is the interpretation of treaties in light of other relevant rules of international law. One of the main arguments of the Fragmentation Report was that the VCLT is well suited to deal with the complexities of the ever-growing body of international norms and the proliferation of international courts and tribunals.[75]

Article 31(3)(c) VCLT[76] is often cited as embodying this principle, stating that "*there shall be taken into account, together with the context… any relevant rules of international law applicable in the relations between the parties*".[77] This means that when interpreting a treaty, one should consider other relevant rules of international law, even if those rules are not explicitly mentioned in the treaty. Therefore, when interpreting a treaty, this provision requires interpreters to consider the broader normative environment of international law, even if the treaty itself does not explicitly refer to other rules. The rationale behind Art. 31(3)(c) VCLT is that the relationship between divergent rules of international law "can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole".[78] Having that in mind, it is not a coincidence that Martti

[74] Fragmentation Report, para. 1(1); Kwiecień, R., General Principles of Law: The Gentle Guardians of Systemic Integration of International Law, Polish Yearbook of International Law, 2017, p. 236.

[75] González Hauck, S., Systemic Interpretation in International Law, Doctoral Dissertation, University of St. Gallen, School of Management, Economics, Law, Social Sciences and International Affairs, 2019, pp. 5-7.

[76] Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331.

[77] McLachlan, C., The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention, International and Comparative Law Quarterly, Vol. 54, Issue 2, 2005, p. 280; Murphy, S. D., Murphy, S. D., op. cit., pp. 295-296; Kammerhofer, J., Systemic Integration, Legal Theory and the ILC, Finnish Yearbook of International Law, Vol. 19, 2008, p. 158.

[78] Fragmentation Report, para. 414.

Koskenniemi (within the Study Group of the International Law Commission) chose the VCLT as the conceptual framework for analyzing the fragmentation of international law.[79]

The principle is rooted in the idea that international law is not a collection of isolated rules, but rather a single system with interconnected parts.[80] As such, systemic integration helps reduce the risk of fragmentation, which occurs when different parts of international law develop in isolation from each other, potentially leading to conflicting or inconsistent rules.[81] This principle has been invoked by scholars and tribunals to support the idea that international courts should consider the jurisprudence of other international courts and tribunals, even if they are not bound to reach the same conclusions.[82] Systemic integration is seen as a way to ensure that different areas of international law work together harmoniously.[83]

It allows for the interpretation of specific rules within a broader legal context,[84] promoting unity and coherence in the application of international law and avoiding conflicts between different norms.[85] By considering the broader legal landscape, systemic integration encourages a holistic and integrated approach to legal interpretation.[86] Having in mind such character-

[79] Fragmentation Report, para. 17.

[80] McLachlan, C., op. cit., p. 280.

[81] Peters, A., The refinement of international law: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law, Vol. 15, Issue 3, 2017, pp. 692-693.

[82] Declaration of Judge Greenwood was that: "International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions," Ahmadou Sadio Diallo (Republic Guinea v. Democratic Republic Congo) (compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), Judgment, 2012 ICJ Rep. 324 (June 19, 2012), Declaration of Judge Greenwood, para. 8.

[83] McLachlan, C., op. cit., p. 280.

[84] "The trend has been to widen the use of Article 31(3)(c) of the VCLT to the point where it has become an important method to avoid the negative effects of the much-lamented fragmentation of international law and to limit the potential risk of norms, 'regimes' or tribunals entering into conflict with each other", Kammerhofer, J., op. cit., p. 158.

[85] Ziegler, K. S., Beyond Pluralism and Autonomy: Systemic Harmonisation as a Paradigm for the Interaction of EU Law and International Law, Yearbook of European Law, Vol. 35, 2016, p. 669; Milanović, M., Norm Conflict in International Law: Whither Human Rights?, Duke Journal of Comparative & International Law, Vol. 20, 2009, pp. 72-74.

[86] Rachovitsa, A., The Principle of Systemic Integration in Human Rights Law, International

istics, there is a famous metaphore in percieving systemic integration as a master key to a large building, with which access to all rooms is achievable.[87]

However, systemic integration in international law does not inherently resolve all conflicts between norms.[88] It is not a "one-size-fits-all" tool or a "universal panacea".[89] It primarily acts as a means of conflict prevention by encouraging the interpretation of legal instruments in a way that considers and accommodates different objectives, interests, and values within the wider international legal system,[90] perceiving international law as a cohesive system with interconnected parts.

It is also important to stress out that systemic integration aims to harmonize the interpretation of legal rules, but it doesn't necessarily dictate a specific outcome for that interpretation.[91] Interpretation alone cannot resolve genuine conflicts between norms, a point acknowledged by scholars and the International Law Commission (ILC).[92] When genuine conflicts arise, additional legal techniques are needed to determine which norm prevails. There are several factors which contribute to the limitations of systemic integration in fully resolving norm conflicts: 1) the positions of the parties involved might be too divergent, 2) there might be a significant clash of interests, 3) attempting to harmonize the norms could lead to sacrificing the interests of the weaker party. In such situations, systemic integration might not be sufficient to bridge the gap between conflicting norms.[93]

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and Comparative Law Quarterly, vol. 66, 2017, p.559.

[87] Campbell McLachlan has attributed this metaphor to ICJ Judge Xue Hanqin; McLachlan, C., op. cit., p. 281. Scholars have referred to this rule as the 'master-key' to the house of international law; Peters, A., Fragmentation and Constitutionalization, In A. Orford and F. Hoffmann (eds), The Oxford Handbook of the Theory of International Law, Oxford University Press, 2016, p. 1012, 1025.

[88] Andenas, M., Ruben Leiss, J., Article 38(1)(d) ICJ Statute and the Principle of Systemic Institutional Integration, University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2016-20, 2016, p. 16, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2869655

[89] McLachlan, C., The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention, International and Comparative Law Quarterly, Vol. 54, Issue 2, 2005, p. 318.

[90] Murphy, S. D., op. cit., p. 307.

[91] Fragmentation Report, para. 419.

[92] McLachlan, C., op. cit., p. 318; Pauwelyn, J., op. cit., p. 272; Milanović, M., Norm Conflict in International Law: Whither Human Rights?, Duke Journal of Comparative & International Law, Vol. 20, 2009, p. 73; Kammerhofer, J., op. cit., p. 165; Fragmentation Report, para. 410.

[93] For example, if a conflict arises between a treaty obligation and a Security Council resolution, the resolution generally takes precedence due to Article 103 of the UN Charter, which emphasizes the primacy of obligations under the Charter; Milanović, M., Norm Conflict

The systemic integration approach is tailored to fit the same type of international treaties - the one dealing with substantive rules, as the usual type of legal provisions in all matters except for Private International Law (e.g. Environmental Law, Human Rights Law, Trade Law, Law of the Sea, European Law, Investment Law, International Refugee Law, International Criminal Law etc). These *special regimes* were discussed in the Fragmentation Report.[94] The systematic approach could be also described as the "pick and choose" principle. However, the systemic integration approach does not seem to lead to an efficient and justified result when operating with considerably different Private International Law rules. Moreover, as we will see, it may raise serious concerns in some cases.

Let us test this approach on the example of the Serbian bilateral PIL treaty with Romania (1961) since the latter is also an EU Member State, while Serbia is an EU Candidate State. At the same time, Serbia and Romania are bound by both the 2007 Hague Maintenance Protocol and the 1996 Hague Children Protection Convention. The hypothetical scenario goes like this: the child, a Romanian national, was born in a relationship of a Serbian-Romanian couple. The family moved from Romania to Serbia (Vojvodina). The relationship deteriorated, so the rights of custody, rights to access and the maintenance obligation arise before the Serbian court. The systemic integration approach, aligned with the *gentleman's clause* in the 2007 Hague Maintenance Protocol and the 1996 Hague Children Protection Convention, would lead to the following result: bilateral treaty envisages the direct international jurisdiction (*forum nationalis* of the child or *forum domicili/residendi* of the parties; depending on the circumstances of the case),[95] resulting in the international jurisdiction of the Serbian court regarding all the claims. Subsequently, the issue of applicable law for all three issues arise. Conflict-of-laws rules in the bilateral treaty refer to the State of the child's nationality in terms of right of custody, rights to access and the maintenance obligation.[96] In accordance with *ius sanguinis* principle, the child has double nationality (Romanian and Serbian). Now, the Serbian judge has to turn to the 1982 PIL Act in order to resolve the positive conflict of nationality, since all the bilateral PIL treaties binding Serbia had left this issue out. In accordance with the principle of exclusivity of the Serbian nationality,[97] the child is exclusively a Serbian

in International Law: Whither Human Rights?, Duke Journal of Comparative & International Law, Vol. 20, 2009, pp. 78-79.

[94] Fragmentation Report, para. 8, 15, Chapter II (C) paras 161-171.

[95] Article 27 of the Agreement.

[96] Article 26 of the Agreement.

[97] Article 11 (1) of the 1982 PIL Act.

national; thus, the substantive rules of 2005 Serbian Family Act[98] will apply to the merits of the case. The rights of custody is given solely to the mother by the judgment, while the father enjoys the rights to access, as arranged by the same judgement. Besides, the child is entitled to child support in a certain amount which the father has to pay every month. As the father resides in Romania, the issue of recognition and enforcement will have come to the fore. Its provisions prescribe no *ipso iure* recognition. Therefore, the control mechanism tackle the typical grounds for non-recognition in respect of the decision on the rights of custody and the rights of access.[99] Therefore, the control mechanism tackles the typical grounds for non-recognition: indirect international jurisdiction; judgment is no longer subject to the appeal; public policy exception; *res judicata* encompassing the judgment which is contrary to the previous judgment rendered between the same parties and on the same cause of action; the right of defence). In terms of the child support, the authors plead for application of the 2007 Hague Child Support Convention as the most favourable treaty. So far, so good. However, one may discuss that, in the light of the best interest of the child principle, the connecting factors of rules on international jurisdiction and applicable law in the relevant bilateral treaty *in abstracto* differ significantly from those envisaged in the 2007 Hague Maintenance Protocol and the 1996 Hague Children Protection Convention. By ways of explanation, the best interest of the child is promoted and protected in both HCCH conventions by the territorialism principle, thus referring to the habitual residence of the child as the primary connecting factor in terms of international jurisdiction and applicable law.[100] Concerning the latter, when the issue of parental responsibility (rights of custody and rights of access) has to be decided on the merits of the case by the court, the best interest of the child coincides with the principle of parallelism of *forum* and *ius*. However, this principle is not an example of the *l'art pour l'art* maxim's admittance in Private International Law. The parallelism principle is subordinated to the best interest of the child principle and the preservation of the

[98] Family Act, *Official Gazette of the RS,* 18/2005, 72/2011, 6/215.

[99] Arts. 50-58 of the Agreement.

[100] Article 5 of the 1996 Hague Children Protection Convention, as a rule on general international jurisdiction in parental responsibility matters. Lagarde, P., Explanatory Report, *Proceedings of the Eighteenth Session (1996)*, tome II, *Protection of children,* The Hague, 1996, 553-555. In the 2007 Hague Maintenance Protocol, the application of the law of the state in which the creditor has his/her habitual residence is the general rule in Article. However, the child support is regulated under the special regime of conflict-of-laws rules in Article (cascade or reversed cascade mechanism of conflict-of-laws rules). Bonomi, A., Explanatory Report, 29-31, 33-40, available at: https://assets.hcch.net/docs/44d7912f-ce6d-487e-b3ac-65bbd14fe1b2.pdf

closest connection principle in both HCCH conventions.[101] On the other side, the bilateral treaty promotes the nationality principle as *in abstracto* tuned connecting factor to promote the best interest of the child who shares the ties with both states of the bilateral treaty. Still, the circumstances of this particular hypothetical case have convinced us that when the nationality and the habitual residence of the child coincide and refer to the same State, the conflict between the personal connecting factor (nationality) and the territorial connecting factor (habitual residence) with regard to protection of the best interest of the child turns into a whiter shade of pale.

However, let us now shake the kaleidoscope of the circumstances of our hypothetical case. If the rights of custody proceedings result in the deprivation of the parental rights of custody over a minor child and the child has to be placed in foster care, the deprivation of the rights of custody will still be decided by the rules of the bilateral treaty, while the foster care placement has to be decided by the rules of the 1996 Hague Children Protection Convention, since the bilateral treaty does not provide a rule for this situation. While the decision on the deprivation of the rights of custody will have to be submitted to the requirements of the bilateral treaty in order to be recognized in Romania (general regime of the recognition and enforcement), the foster care placement decision could produce effects in Romania *ipso iure*, in accordance with the 1996 Hague Children Protection Convention.[102] In addition, the guardianship issue in this case has to be decided pursuant to the bilateral treaty, since it does envisages a rule on this issue.[103] The same is true for the decision on child support. And there we are, being unwillingly dragged into in the scenario of the movie "Everything Everywhere All at Once!" Indeed, the judge who manages to swim through the dark and turbulent Private International Law waters and to match all the international treaties' puzzles should win the (judicial) Oscar. Otherwise, could we blame the judge if he/she turns the blind eye to the bilateral treaty, while hiding under the mechanism of the 1996 Hague Children Protection Convention and the 2007 Hague Maintenance Protocol regarding rights of custody and rights of access and the law applicable to maintenance obligations in this case? Apart from judicial instinct, may we come to the same result, but relying on some legal ground?

[101] Marjanović, S., *Legal Principles of the 1982 PIL Act and Filling the Legal Gaps in the Conflict of Laws Matter in Serbian Private International Law: A Different Perspective*, Annals of the Faculty of Law in Belgrade, No. 4/2024, 784-787.

[102] Article 23 (1) of the 1996 Hague Children Protection Convention.

[103] Arts. 30-32; and 50-58 of the Agreement.

3. Gentleman's clause and priority clause: the case of bilateral PIL treaties binding for Serbia and the EU Member States

The issues of coordination of the bilateral PIL treaties concurring the relevant HCCH conventions will result in a similar outcome of the application of other bilateral PIL treaties still in force in Serbia, but concluded within the period of former Yugoslavia. Even though the systemic integration approach could theoretically and practically work in the analyzed hypothetical case, it is rather questionable whether the outcome of this "treaties-puzzle" is efficient and justified. In other words, may we deviate from this type of "old" bilateral PIL treaties? The wording of the *gentleman's clauses* in the 2007 Hague Maintenance Protocol and the 1996 Hague Children Protection Convention does not seem to leave a way out since they refer to the express joint declaration on the priority of the HCCH conventions as necessary. Most of these States became EU members, bringing the issue on an even more perplexed level.

The Regulation 664/2009 of 7 July2009[104] and the Regulation 662/2009 of 17 July 2009[105] have established a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to maintenance obligations (falling now under the Brussels II ter[106] regime and the Maintenance Regulation[107]), as well as with regard to law applicable to contractual and non-contractual obligations (otherwise falling under the regulations Rome I[108] and Rome

[104] Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, *OJ L* 200, 31.7.2009.

[105] Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, *OJ L 200,* 31.7.2009.

[106] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), ST/8214/2019/INIT, *OJ L* 178, 2.7.2019.

[107] 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, *OJ L* 7, 10.1.2009.

[108] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June

II[109]). However, the negotiation process is quite long in these cases. The rare example when this was allowed is the bilateral PIL treaty between France and Algeria. It is not easy to find a similar situation which resulted in the Council's official authorization of France to negotiate the bilateral treaty in accordance with the Regulation 664/2009 of 7 July 2009. In 2023, the Council empowered France to negotiate a bilateral agreement with Algeria on matters related to judicial cooperation concerning family law matters.[110] Reading between the lines, it seems to us that a high number of French nationals residing in Algeria was one of the key factors for deciding on the authorization.[111] Moreover, Algeria will never become an EU State, while Serbia enjoys a candidate State status, as well as other states (without any anticipation of the outcome of enlargement). Even in the case of the France and Algeria bilateral treaty, it took the European Commission (regarding the Proposal) and the Council (regarding the decision) seven years to reach the decision, having in mind that the Algerian initiative was passed in 2016.[112] In fact, in 2012 Slovakia initiated negotiations with Serbia on the same issues, relying on the Regulation 664/2009.[113] Yet, Slovakia eventually quietly withdrew from the process. The European Council remained silent on this issue, most likely expecting the immediate application of the EU *acquis* following the enlargement. As time goes by, the question of when Serbia will become an EU member state turns into the question of whether Serbia will become a member. What to do in the meantime? Let us discuss some of the possible solutions.

3.1. Lex specialis rule

The principle of *lex specialis derogat legi generali* stand as a widely recognized maxim within legal interpretation and conflict resolution in interna-

2008 on the law applicable to contractual obligations (Rome I), *OJ L* 177, 4.7.2008.

[109] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L* 199, 31.07.2007.

[110] Procedure 2023/0027/CNS, COM (2023) 64: Proposal for a COUNCIL DECISION on an authorisation addressed to France to negotiate a bilateral agreement with Algeria on matters related to judicial cooperation concerning family law matters (Adopted act: 32024D0592).

[111] European Commission, Proposal for a Council Decision on an authorisation addressed to France to negotiate a bilateral agreement with Algeria on matters related to judicial cooperation concerning family law matters, Brussels, 8.2.2023 COM(2023) 64 final 2023/0027 (CNS).

[112] *Ibid,* p. 1.

[113] Ministry of Justice of the Republic of Serbia, the Department for international and European law, Document No. 018-05-3/13 of 19.02.2013, sent to the Council for Private International Law of the Serbian Government.

tional law.[114] It dictates that when a matter is subject to regulation by both a general standard and a more specific rule, the latter should take precedence over the former.[115] The relationship between the general standard and the specific rule, however, can be understood in two primary ways. First, the specific rule operates as an elaboration, update, or technical specification of the general standard. In this scenario, both the specific and general rules essentially aim toward the same objective. This concept aligns with the already mentioned principle of harmonization, which encourages interpreting seemingly conflicting legal rules in a way that maximizes their compatibility. In the second scenario, the specific rule acts as a genuine exception to the general standard, creating a conflict that needs resolution. The application of *lex specialis* often involves analyzing the intent of the parties involved, particularly through examining the treaty texts. This examination helps determine whether the special rule aims to *supplement* or *derogate* from the general law. The principle of *lex specialis* acknowledges the inherent hierarchy within legal systems, where more specific rules, often crafted to address unique circumstances, are deemed to better reflect the intent of the parties and offer more effective regulation. On the other hand, the rule of later law overrides prior law is also often used in order to resolve conflicts of norms.

By testing different approaches in the specific hypothetical case, we ended with two of them - *lex generalis and lex specialis* rule aligned with *lex posterior and lege priori* rule. Yet, the first issue we faced was an issue of successive treaties. In the case of Serbia, bilateral PIL treaties have no provisions on the scope of application *ratione materiae*, nor *ratione personae*.[116] Regarding the *ratione materiae* issue, one can come to this conclusion only after reading all the bilateral treaty's provisions. Besides, it should be borne in mind that the bilateral PIL treaties are fragmentary-oriented towards Private International Law matters, reminding us again of a "pick and chose" match. In most general terms, the bilateral PIL treaties binding Serbia could be classified in two groups: a) on legal assistance (often comprising some conflict-of-laws rules in family relations, status relations of natural persons,

[114] Koskenniemi, M., The ILC Report, Study on the Function and Scope of the Lex Specialis rule and the Question of 'Self-Contained Regimes', 4 ILC, 7 May 2004, ILC(LVI)SG/ FIL/ CRD.1, para. 21.

[115] Fragmentation Report, paras 56-59.

[116] With the exception of the bilateral PIL treaty between Serbia and Turkey, but this treaty is one of the newest, while we are discussing the "old socialistic" bilateral PIL treaties. Agreement between the Republic of Serbia and the Republic of Turkey on mutual legal assistance in civil and commercial matters dated June 5, 2013, *Official Gazette of the RS - International Agreements*, No. 15/2015.

and succession issues with or without corresponding rules on international jurisdiction, and the recognition and enforcement); and b) recognition and enforcement (introducing the general regimes, or special regimes). Except for the treaty with Turkey, no other bilateral PIL treaty envisages any of the compatibility clauses - even the bilateral treaty with Turkey relies on the *gentlemen's clause*.[117] Interpretation of the bilateral treaties as a *lex specialis* is deeply rooted in the Serbian legal system, almost as a Holy Scripture.[118] Even though the Fragmentation Report does mention bilateral treaties as an example of *lex specialis*, when comparing the bilateral PIL treaties and the two HCCH conventions in terms of their essence, we came to an unforeseen conclusion. Their essence is the scope of application *ratione materiae*, regardless of the number of contracting states. However, this approach is justified *only* when the same states are contracting parties of the concurrent bilateral PIL treaties and the relevant HCCH convention envisaging the gentleman's clause. So, when comparing the 1996 Hague Children Protection Convention and the 2007 Maintenance Protocol with the successive "old" bilateral PIL treaties binding for Serbia and some of the EU Member States, the latter appear to be *lex generali*. Although fragmentary-oriented, and despite the fact that the conclusion on their scope of application *ratione materiae* comes only as a result of interpretation of the whole bilateral treaty, their scope of application is much broader that those in the 1996 Hague Children Protection Convention and the 2007 Hague Maintenance Protocol. Moreover, the relevant HCCH conventions which regulate conflict of jurisdictions (with or without the conflict-of-laws rules) in certain family relations, could be *de facto* perceived as a network of bilateral treaties due to the system of objection to the accession of a new Contracting State.[119] When we follow this idea, we actually compare treaties binding the same states as two bilateral treaties - a bilateral treaty as a general one (*lex generalis*), and the HCCH conventions as a special one (*lex specialis*).

Even if one does not agree with this authors' interpretation, strictly adhering to the thesis that bilateral treaties are in fact *lex specialis*, then one must resort to a different method of interpretation and conflict resolution

[117] Article 24 of the bilateral PIL treaty with Turkey.

[118] Đorđević and Dimitrijević rely on the *lex posterior rule* regarding bilateral treaties. Đorđević, S., Dimitrijević, D., *Pravo međunarodnih ugovora* (Law of international treaties), Institut za međunarodnu politiku i privredu, Beograd, 2011, p. 216.

[119] E.g. Article 58 (3) of the 1996 Hague Children Protection Convention and Article 58 (5) of the 2007 Hague Maintenance Convention. However, the latter envisages clear provision *on most effective rule* which serves as a legal ground to circumvent the systematic integration approach in favor of the application of the most favourable regime (Article 52 of the 2007 Hague Maintenance Convention).

altogether. Namely, in such a constellation, one turns to the argument of the "fall", or decline in the value and relevance of the *lex specialis* maxim in favor of the *lex favorabilis* principle.[120] Therefore, the *lex specialis* principle is not always considered to be the appointed tool in norm-conflict resolution due to its conceptual vagueness,[121] but gives way to other technics and/or tools – in this specific case, the underrated most favourable rule principle, which serves more as a technique of interpretation, than a principle, in order to avoid the conflict of norms. This would be a value-oriented approach in the decision as to the selection of the issue of priority of treaties.[122]

3.2. Lex posterior rule

Lex priori is a general rule on the hierarchy of international treaties, while *lex posterior* is a special one. So, in the case of the "old" bilateral PIL treaties still binding Serbia and the EU Member State, while the same states are also bound by the 1996 Hague Children Protection Convention or the 2007 Hague Maintenance Protocol, do we actually have two States, bound by an "old socialistic" bilateral PIL treaty (*as general and prior*) and one of these two HCCH conventions (*as special and posterior*), demonstrating *de facto* (or even *de iure*) their joint intention to supersede *lex priori*? In other words, why would we prefer yesterday over tomorrow, when "old" bilateral PIL treaties do not introduce any privileged regime actually justifying its status of *lex specialis*, nor do they increase legal certainty (as a general legal principle), nor rely on i*n favorem victimae* principle or its alter ego - the best interest of the child (in cases involving children)? In fact, they are out-dated and fragmented. Let us bring to your attention once more the fact that at the time when most of these "old" bilateral PIL treaties were concluded with the specific EU Member State, the 1982 PIL Act as a *lex generalis* did not exist.[123] In these circumstances, the intention was to deviate from other national legislations partially regulating PIL matters or to fill in the gaps.

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[120] One may observe a trend towards rejecting the application of a specialized rule in favor of other interpretation techniques in some international sub-regimes, or their intersection, such as the intersection of international human rights law and international humanitarian law. Milanović, M., A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law, 14, 3, 2010, Journal of Conflict & Security Law, p. 460, 479.

[121] Lindroos, A., Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of the Lex Specialis, 2005, 74, 1, Nordic Journal of International Law, p. 27.

[122] Kolb, R., The Law of Treaties, Edward Elgar Publishing Limited, 2023, p. 214.

[123] With the exception of the bilateral PIL treaty concluded with Cyprus in 1988 and later on with Croatia in 1997.

Furthermore, conflict-of-laws rules and rules on direct international jurisdiction relating to the parents-children legal relations in some of these "old" bilateral PIL treaties became contrary to the Serbian public policy. Back in the 1992, the Constitution of the then FRY introduced the principle of equality in terms of the right of children born out of wedlock.[124] When the Convention on the rights of the child (CRC)[125] came into force at the international level in September 1990, the best interest of the child principle made its first steps towards integration in the international public policy principle. Therefore, the relevant provisions prescribed in the "old" bilateral PIL treaties with Bulgaria,[126] and Greece[127] became null and void (*ex nunc*). The reason could be found not only in the CRC, but in the EU Charter on Fundamental Human Rights.[128] The best interest of the child is a general principle of the EU law, deriving from the Treaty of the European Union.[129] Hence, when analyzing other "old" bilateral PIL treaties which survived this public policy test, in the majority of those treaties, the special protection of the children is tailored to fit it *in abstracto* by means of nationality as the primary connecting factor.

Finally, taking into consideration that the joint declaration on the priority of the relevant HCCH convention implies the long process of formal diplomatic negotiations, could we suppose that the States have already manifested their intention to supersede the prior treaty and apply the relevant HCCH convention even without providing this declaration? Otherwise, would the *gentlemen's clause* be too formal or too stringent, thus leading to over-

[124] "Children born out of wedlock enjoy the same rights as the children born in wedlock." Article 62(2) of the Constitution of the FRY, *Official Gazette of the FRY*, No. 1/92, 34/92 - Amendment I and 29/2000 - Amendment II-IX, Article 62(2).

[125] *Official Gazette of the SFRY - International Agreements*, No. 15/90 and *Official Gazette of the - International Agreements*, No. 4/96 and 2/97.

[126] Art. 38; applicable law on legal relations between the father and an illegitimate child.

[127] Art. 22; law applicable to legal relations between the father and his illegitimate child. Although not an EU Member State, it should be noted that bilateral PIL treaty with Russia also makes the discrimination between children depending on their parents marital or extra-marital status (Art. 27: law applicable to legal relations between the mother and her illegitimate child; Art. 28: direct international jurisdiction for disputes on legal relations between the mother and her illegitimate child).

[128] Article 24(2) of the EU Charter (Charter of Fundamental Rights of the European Union, *OJ C* 326, 26 October 2012).

[129] Article 6(3) TEU. See on details Goldner Lang, I., *The Child's Best Interests as a Gap Filler and Expander of EU Law in Internal Situations,* In K. Ziegler, P. Neuvonen and V. Moreno-Lax (eds.), Research Handbook on General Principles of EU Law, Edward Elgar Publishing, 2019, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3579335,* pp. 2-7.

regulation? In the case of the EU Member States, the formal initiative is most unlikely to ensue. Moreover, in its decision regarding France and Algeria, the European Commission emphasized the significance of multilateralism, embodied in HCCH conventions:

"However, while recognizing the exceptional economic, cultural, historical, social and political ties between France and Algeria, the Commission remarked that, in its judicial cooperation with third States, the EU broadly relies on the existing multilateral framework, such as the one created by the Hague Conference on Private International Law (HCCH). This ensures that the same legal framework applies to a large number of States with different legal backgrounds and offers considerable benefits. Therefore, the EU promotes the accession of its partner States – in particular, the Mediterranean countries such as Algeria - to the relevant international conventions in the civil justice area, many of which were drawn up by the HCCH."[130]

In this way, it seems that the European Commission has expressly articulated the EU's intention to *informally amend* the bilateral treaties of its Member States with third countries, while expecting that the third states will join those HCCH conventions which are part of the *acquis communautaire*.

4. Conclusion

With the fragmentation of international law, its "normative explosion", and ever-growing number of international treaties in an array of spheres, the probability of both conflict of norms and conflict of regimes increases significantly. Hence, number of legal orders and sub-regimes exist in a "normative jungle", leading to a growing need for the existence of a plethora of technics and tools to overcome problems of conflicts.

In the very specific (and even exotic) state of affairs of the intertwines of multilateral and bilateral treaties in Serbian Private International Law arena, we are faced with numerous problematic situations. Unfortunately, when faced with a situation where concurrent multilateral and bilateral treaties do not regulate their mutual relationship via different types of clauses, one must find the appropriate legal answer. Firstly, systemic integration provides us with the necessary tool for avoiding the conflict of norms altogether. Even though it encourages a more holistic approach to legal interpretation, it's not a guaranteed solution for *all* conflicts in international law. This is pain-

[130] European Commission, Proposal for a Council Decision on an authorisation addressed to France to negotiate a bilateral agreement with Algeria on matters related to judicial cooperation concerning family law matters, Brussels, 8.2.2023 COM (2023) 64 final 2023/0027 (CNS), pp. 1-2.

fully evident in the sphere of Private International Law and even more so in the specific situations of the intersection of the analyzed HCCH conventions and "old" bilateral PIL treaties involving cross-border family matters in the Republic of Serbia, specifically in cases when the other Contracting Party is an EU member State. When addressing the issue of conflicts of norms, the *lex specialis* and *lex posterior* rules are the most prominent. However, the application of the *lex specialis* rule does not always provide for an adequate solution. Therefore, one must turn to other technics and tools of conflict avoidance, conflict resolution and interpretation.

Even though the nucleus of this paper may seem as a local or regional issue, regarding a small number of countries emanating from the former Yugoslavia, it can also serve as a cautionary tale and/or constructive approach on the situation that when life gives you lemons – all you can do is to make lemonade. Additionally, the logic of problem-solving could be transferred to other parts of the world which face or could face a similar issue. Confronted with the legal problem of a strange combination of simultaneous existence of multiple international treaties between the same Contracting Parties that regulate the subject of family law relations in different ways, the authors attempted to find a more adequate legal solution than what would be achieved by following the usual footsteps. It cannot be stressed enough that this paper was more of a practical, then a pure theoretical mental acrobatic exercise, due to the specifics of the case of Serbia at hand. One way of academic discourse would be simply choosing to criticize the strategy of the Serbian government in persistently concluding bilateral PIL treaties envisaging the conflict-of-laws rules, rules on international jurisdiction or recognition and enforcement regimes which play a "puzzle-game" with the analysed HCCH convention instead of just applying HCCH conventions. However, that is a path not chosen, because such a negative approach would not give much needed practical answers. Therefore, one must find a way though the Gordian knot by a radicalization of arguments, in order to avoid the application of the "old" bilateral PIL treaties in favour of the HCCH conventions.

Summary

The "old" bilateral PIL treaties binding Serbia as a Candidate State of the EU membership, and the States which is a part of the EU, are fragmentary-oriented and old-dated. Besides, most of theme were concluded before the adoption of the ex-Yugoslav 1982 PIL Act as *lex generalis* (which is still in force in Serbia and Bosnia and Herzegovina). Their concurrent HCCH conventions, more precisely the 1996 Hague Children Protection Convention

and the 2007 Hague Maintenance Protocol, envisage the gentlemen's clause while introducing the possibility of joint declaration on the primacy of the relevant HCCH convention. When it comes to the "old" bilateral PIL treaties between Serbia and States which afterwards become a part of the EU, these bilateral treaties stem from the period of the FPRY and SFRY. The negotiation process in order to give joint declaration on the supremacy of the relevant HCCH convention in most unlikely to happen. Therefore, the authors try to set aside the usual criteria - number of contracting states and to take a deep look into the scope of application *ratione materiae* of these treaties. Then the bilateral PIL treaties appear as *lex generali* since their scope of application is much broader than the scope of application of the HCCH convention. This result is true only when comparing the treaties in the specific case - when both states are contracting parties of the "old" bilateral PIL treaty and the concurrent HCCH convention. Simultaneous application of the *lex specialis* approach and *lex posterior* rule, we came to the conclusion that these principles could solve the issue of the chaotic mosaic of the PIL rules in some cross-broader family relations. This mosaic as a result of the systematic integration approach is in these cases contrary to the best interest of the child principle and the legal certainty principle. However, if the gentlemen's clause should be formally followed, then the chaotic mosaic cannot be circumvented when needed for the sake of efficient and justified outcome.

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CONSIDERING THE APPLICATION OF THE EU PIL SYSTEM TO CLIMATE CHANGE LITIGATION

Abstract: *Climate change has progressively emerged as a critical global concern, involving various sectors and stakeholders. Internationally, both soft law guiding principles and hard law legislative instruments like the Kyoto Protocol and the Paris Agreement address climate change impacts. Within the EU, climate change goals are pursued through initiatives such as the European Green Deal, the European Climate Change Law and the Fit-for-55 Package. This regulatory backdrop imposes specific obligations on states and entities to mitigate climate change effects and invest sustainably, while impacting commercial contracts across various industries. The interplay between natural climate phenomena coexisting with human activities leads to potential disputes regarding environmental laws or contractual violations related to climate issues at national and international levels. This necessitates an important role for private international law. The paper discusses the typology of disputes related to climate change, including the prerequisites for applying the EU PIL, and the rules regarding jurisdiction and applicable law in this context. It highlights the complex and fragmented nature of the current EU PIL system concerning jurisdiction and applicable law, as it pertains to the specific case, resulting in both forum shopping and qualification shopping practices.*

Keywords: *Climate change litigation, dispute resolution, EU PIL, jurisdiction, applicable law.*

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1. Introduction

According to the IPCC Report 2023, human activities, primarily through GHG emissions, have clearly led to global warming, resulting in a global surface temperature increase of 1.1°C above pre-industrial levels in the period 2011–2020. There has been a continual rise in global GHG emissions, with disparities in historical and current contributions stemming from unsustainable energy usage, land use changes, and individual consumption patterns[1]. The substantial effects of climate change have prompted discussions on its origins, consequences, and possible solutions.

At international level, soft law guiding principles and recommendations[2] have been accompanied by hard law legislative instruments to confront climate change impact. The Kyoto Protocol[3], an international treaty extending the 1992 UNFCCC,[4] was adopted at COP3 on 11 December 1997 and entered into force on 16 February 2005. It operationalised the UNFCCC by committing industrialised countries and economies in transition to limit and reduce GHG emissions in line with agreed individual objectives. Subsequently, another international treaty on climate change, the Paris Agreement[5], was adopted at COP24 on 12 December 2015 and entered into force on 4 November 2016. Its overarching goal is to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels" and pursue efforts "to limit the temperature increase to 1.5°C above pre-industrial levels", which requires global GHG emissions to halve during the decade to

[1] Lee, H., Romero, J. (eds), *IPCC Climate Change 2023: Synthesis Report – Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Geneva, 2023, p. 4. Retrieved May 20, 2024, from https://www.ipcc.ch/report/ar6/syr/.

[2] E.g., OECD Guidelines for Multinational Enterprises 2011 Edition. Retrieved May 20, 2024, from https://www.oecd.org/daf/inv/mne/48004323.pdf; UN Human Rights Council Resolution (A/HRC/RES/17/4) of 16 June 2011 "Guiding Principles on Businesses and Human Rights". Retrieved May 20, 2024, from https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf; UN General Assembly Resolution (A/RES/70/1) of 25 September 2015 "Transforming our world: the 2030 Agenda for Sustainable Development". Retrieved May 20, 2024, from https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.

[3] Kyoto Protocol to the United Nations Framework Convention on Climate Change. Retrieved May 20, 2024, fromhttps://unfccc.int/resource/docs/convkp/kpeng.pdf.

[4] United Nations Framework Convention on Climate Change ("UNFCCC"). Retrieved May 20, 2024, from https://unfccc.int/sites/default/files/convention_text_with_annexes_english_for_posting.pdf.

[5] Paris Agreement. Retrieved May 20, 2024, fromhttps://unfccc.int/sites/default/files/english_paris_agreement.pdf.

2030 and CO^2 emissions to reach net zero by 2050 to restrain climate change. At EU level, climate change targets are currently pursued through the European Green Deal,[6] the European Climate Change Law[7] and the relevant Fit-for-55 Package.[8]

Due to the regulations mentioned above, states, public entities and private entities are now required to fulfil certain obligations in order to protect the environment and address climate change through adaptation and mitigation efforts.[9] Many countries have implemented national climate laws and regulations that impact various activities with environmental implications,[10] leading to a considerable rise in sustainable investments.[11]

In this context, natural climate phenomena, human activities affecting climate, violations of environmental laws and climate regulations as well as breaches of contracts can lead to various climate change disputes. The rise in climate change disputes in recent years has consequently sparked more conversations about dispute resolution issues.

Bearing this in mind, this paper aims to highlight the fragmentation and complexity of the EU PIL rules on jurisdiction and applicable law to climate change litigation when the forum is an EU Member State, allowing both forum shopping and qualification shopping practices. After this introduction (1.), the typology of climate change related disputes and their interplay with EU PILwill be discussed (2.) and an overview of the applicable EU PIL rules on jurisdiction and applicable law will be provided (3.), ending with some conclusions of the author (4.).

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[6] Retrieved May 20, 2024, from https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.

[7] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021, 1–17.

[8] Retrieved May 20, 2024, from https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal/fit-55-delivering-proposals_en.

[9] See in general Lackner, M., Sajjadi, B., Chen, W.-Y. (eds), Handbook of Climate Change Mitigation and Adaptation(3rded.), Cham: Springer Nature Switzerland AG, 2022, passim; Welfens, P., *Global Climate Change Policy. Analysis, Economic Efficiency Issues and International Cooperation*, Sustainable Development Goals Series 13, Cham: Palgrave Macmillan & Springer Nature Switzerland AG, 2022, passim.

[10] E.g., the Greek National Climate Law no. 4936/2022 (Government Gazette A 105). See also LSE Grantham Research Institute on Climate Change and the Environment, *Climate Change Laws of the World*. Retrieved May 20, 2024, fromhttps://climate-laws.org/.

[11] See GSIA, *Global Sustainable Investment Review 2020*. Retrieved May 20, 2024, from https://www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf.

2. Typology of climate change related disputes[12]

2.1. Definition of climate change related disputes

So far, there is no universal definition in legal texts or doctrine as to what may constitute a climate change related dispute. The following definitions can indicatively be considered as helping delineate the scope of such disputes:

The UNFCCC defines climate change as "[t]he change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods".

Based on the UNEP Global Climate Litigation Report 2020,[13] climate change related cases can be considered those that relate specifically to climate change mitigation, adaptation, or the science of climate change.

The ICC Report on Resolving Climate Change Related Disputes through Arbitration and ADR 2019[14] offers a broad description of climate change related disputes including "any dispute arising out of or in relation to the effect of climate change and climate change policy, the [...] UNFCCC and the Paris Agreement".

2.2. Categories of climate change related disputes

Despite dealing with the same issue, i.e., climate change, climate change related disputes are not homogenous, but they significantly vary. They can be broadly divided into the following general and special categories:

2.2.1. General categories

According to their aims, climate change related disputes can be divided into two main categories:

[12] Sub-chapters 2.1. and 2.2. of this paper depict the definition and the categories of climate change related disputes, as referred to by the author in her article Koumpli, V., *Climate change related disputes: Making the case for arbitration and mediation*, Yearbook of International Arbitration & ADR – Volume VIII (eds M. Roth, M. Geistlinger),Zurich/Vienna: Dike Verlag AG & NWV Verlag GmbH, 2024, pp. 50-53 [forthcoming].

[13] UNEP, *Global Climate Litigation Report: 2020 Status Report*, p. 7. Retrieved May 20, 2024, fromhttps://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y.

[14] ICC Commission on Arbitration and ADR,*Report on Resolving Climate Change Related Disputes through Arbitration and ADR*, 2019, p. 9. Retrieved May 20, 2024, fromhttps://iccwbo.org/climate-change-disputes-report.

'Strategic' climate change related disputes, where the parties bringing the case – usually NGOs and/or individuals – aim at a broad societal shift, such as creating awareness or affecting the behaviour of states, public entities or private entities, including 'Carbon Majors', i.e., large fossil fuel companies.

'Non-strategic' climate change related disputes, where the parties bringing the case aim at satisfying individual concerns[15].

'Strategic' climate change related disputes can be further subdivided into:

'In favour of regulation' or 'pro-regulation', where the parties bringing the case aim to enhance climate change mitigation and adaptation measures.

'Against regulation' or 'anti-regulation', where the parties bringing the case oppose to climate change mitigation and adaptation measures.[16] These also include the so-called 'Strategic Lawsuits Against Public Participation' (SLAPPs), namely, civil complaints or counterclaims filed by businesses, government bodies or elected officials against individuals or organisations opposing them on climate change issues, often based on defamation law as well as privacy, confidentiality and data protection rules.[17]

2.2.2. Special categories

According to their legal basis, climate change related disputes can be divided into the following categories:

'Climate rights' disputes, where the parties bringing the case assert that insufficient action to mitigate climate change violates their international and constitutional rights to life, health, food, water, liberty, family life etc.

'Domestic enforcement' disputes, where parties bring a case against states, public entities or private entities, including 'Carbon Majors', to force them meet set climate change goals and commitments.

'Failure to adapt' and 'impacts of adaptation' disputes, where parties either bring a case against states, public entities or private entities, including 'Carbon Majors', to force them to take the steps necessary to adapt to climate change severe effects, such as extreme weather events, or to request com-

[15] Peel,J., Osofsky, H., *Climate Change Litigation*, Annual Review of Law and Social Science, 16, 2020,pp. 21 et seq.

[16] Savaresi, A., Setzer, J., *Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation*, 2021. Retrieved May 20, 2024, fromhttps://ssrn.com/abstract=3787963.

[17] See in this respect Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), OJ L 2024/1069, 16.04.2024.

pensation for adaptation efforts that caused harm to them or their property.

'Fossil fuels permitting' disputes, where the parties bringing the case challenge the environmental permitting and review processes that they allege that overlook a project's climate change implications.

'Corporate liability and responsibility' disputes, where the parties bringing the case request compensation for their harm caused by GHG emissions from companies in the atmosphere.

'Climate disclosures and greenwashing' disputes, where the parties bringing the case allege that certain corporate statements about climate change are misleading. These cases involve plaintiffs bringing suits claiming that they relied on those statements to make financial decisions, as well as cases brought by governments enforcing securities disclosure and consumer protection laws, and NGOs challenging alleged 'greenwashing' campaigns.[18]

'Investor-state' disputes, i.e., disputes arising pursuant to bilateral or multilateral investor-state treaties pertaining claims brought by foreign investors for breach of investment protections, such as the fair and equitable treatment standard.[19]

'Contractual' disputes, i.e., disputes arising from commercial contracts. These may be further subdivided into: i) disputes arising from adaptation, transition or mitigation contracts which directly relate to the UNFCCC and pertain to transitions to new systems to adapt to or to mitigate the effects of climate change, and ii) disputes arising from contracts not related to adaptation, mitigation and transition (e.g., a contractor in charge of construction of a new deep-water harbour disagrees with the owner of the harbour over whether increased salinity of fresh water sources was induced by rising sea-levels, owing to climate change, albeit that other contributing factors may exist).[20] This category may include construction disputes relating to delays or breaches, contractual disputes between shareholders involved in the development of RES projects, disputes arising from contracts in the framework of Voluntary Carbon Markets etc.

'Inter-state' disputes, i.e., climate change related disputes between states, arising from international treaties (being the less frequent category of disputes in this field).

[18] Categories under a) to f) are described by UNEP, op.cit., pp. 13 et seq.

[19] See Restrepo Rodríquez, T., *Investment Treaty Law and Climate Change,* Cham: Springer Nature Switzerland AG, 2022, passim.

[20] Category under h) is described in the ICC Commission on Arbitration and ADR, op.cit., pp. 8 et seq.

2.3. The interplay between EU PIL and climate change related disputes

A large number of remedies are addressed against states. Such cases include – among others – The Hague District Court (*Rechtbank Den Haag*) judgment of 24 June 2015 in *Urgenda Foundation et al. v State of the Netherlands* and the German Federal Constitutional Court (Bundesverfassungsgericht) judgment of 29 April 2021 in *Neubauer et al. v Germany*[21]. In the first case, the Hague District Court accepted Urgenda's arguments, finding that the Government's existing pledge to reduce emissions by 17% by 2020 was insufficient to protect the lives of Dutch citizens. The judgment of the Hague District Court was appealed, but on 9 October 2018 the Hague Court of Appeal (*Gerechtshof Den Haag*) dismissed the appeal and upheld the judgment of the Hague District Court, confirming that the Government owed its citizens a duty of care to protect their rights to private and family life, in accordance with Articles 2 and 8 ECHR. The judgment of the Hague Court of Appeal was challenged before the Supreme Court of the Netherlands (*Hoge Raad*), which eventually, on 20 December 2019, upheld the judgment of the Hague Court of Appeal. In the second case, the German Federal Constitutional Court upheld a claim by young plaintiffs challenging the constitutionality of certain provisions of the German Climate Protection Law (*Bundes–Klimaschutzgesetz*) on constitutional and human rights grounds. More recently, on 9 April 2024, in the landmark case *Verein KlimaSeniorinnen Schweiz et al. v Switzerland*,[22] the ECtHR ruled that Switzerland is violating the human rights of the older women because the state is not taking the necessary steps to combat global warming. Specifically, the ECtHR found a violation of Article 8 ECHR safeguarding the right to private and family life, this being the first climate change litigation case in which an international court rules that state inaction violates human rights.

On the other hand, an augmented number of remedies are brought before national civil courts and are addressed against companies causing environmental damage due to GHG emissions, including insurance companies. Such companies operate worldwide, affecting various locations at the same time. They are involved in industries such as energy, resource extraction, manufacturing, and transportation, all of which have a notable impact on the environment.

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[21] Both retrieved on 20 May 2024 from https://climatecasechart.com.

[22] ECtHR Grand Chamber, *Verein KlimaS eniorinnen Schweiz and others v Switzerland*. 9 April 2024. Retrieved 20 May 2024 from https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-233206%22]}.

Such cases can cross into different legal jurisdictions and involve numerous parties and legal systems. They include – among others –the District Court Essen (*Essen Landesgericht*) judgment of 15 December 2016 in Luciano Lliuya v RWE AG and the Hague District Court (*Rechtbank Den Haag*) judgment of 26 May 2021 in Milieudefensie et al. v Royal DutchShell plc.[23]. In the first case, Lliuya, a Peruvian farmer, claimed against RWE, Germany's largest electric company, that it knowingly contributed to climate damage by emitting GHG, and was partly responsible for melting mountain glaciers near his town. The District Court Essen dismissed Lliuya's claim stating that it could not provide effective redress, because Lliuya's situation would be the same even if RWE stopped emitting and there was no 'linear causal chain' within the complex causal relationship between particular emissions and climate change impacts. The Higher Regional Court of Hamm (*Oberlandesgericht Hamm*), on 30 November 2017, recognised the complaint as well-pled and admissible, allowing the case tomove into the evidentiary phase on whether Lliuya's home is threatened by floods or mudslides and how RWE contributed. The case is still pending. In the second case, the Hague District Court in its judgment of 26 May 2021 found that Shell owed a duty of care to the plaintiffs to reduce emissions from the operation of its entire energy portfolio by 45% by 2030 relative to 2019 emission levels. The case represents a global first, with the court taking the unprecedented step of holding a company legally responsible for its individual contribution to global GHG emissions. Despite filing an appeal against the Hague District Court judgment, Shell has nonetheless announced its intention to increase the speed of its planned transition in line with the judgment.[24]

At EU level, EU PILhas a crucial role to play in resolving environmental disputes that extend beyond national geographic boundaries, by providing important legal tools for determining the jurisdiction, applicable laws, as well as, at a later stage, the recognition and enforcement of court decisions. The international element required to trigger the application of the EU PIL system can generally exist in a case when either claimants or defendants are from different jurisdictions, or various geographical locations are involved in the litigation[25]. Remarkably, in the *Milieudefensie et al. v Royal Dutch Shell plc*.case – where a Dutch NGO representing Dutch citizens sued Shell, a company based in the Netherlands at that time – the Hague District Court applied

[23] Both retrieved on 20 May 2024 from https://climatecasechart.com.

[24] Information retrieved on 20 May 2024 from https://www.shell.com/media/speeches-and-articles/articles-by-date/the-spirit-of-shell-will-rise-to-the-challenge.html.

[25] Van Calster, G., *Climate change litigation and private international law*, Lex&Forum, 3, 2023, pp. 588-589.

Rome II Regulation[26] on the law applicable law to non-contractual obligations, consideringthe global nature of the GHG emissions involved as reason enough to apply the Rome II Regulation, without needing further detailed considerations. This shows that referral to EU PIL rules can be made in any case of climate change litigation, given the international dimension of the subject matter of the dispute, namely, the global character of the GHG emissions.

3. EU PIL rules applicable to climate change litigation

The following two sub-chapters examine the EU PIL rules that can apply to climate change litigation, and in particular the respective rules on jurisdiction (3.1.) and applicable law (3.2.), aiming at highlighting their fragmented and complex nature, which allows both forum shopping and qualification shopping practices in this field.

3.1. EU PIL rules on jurisdiction

As per the internationally established legal principle, the place of domicile or habitual residence of the defendant represents the primary head of jurisdiction. This principle is embodied in Article 4(1) of Brussels I*bis* Regulation.[27] For this purpose, it is essential to note that a company's domicile is determined by its statutory seat, its central administration, or its principal place of business, as stated in Article 63(1) of Brussels I *bis* Regulation.

Thus, if the company or parent company of a group is domiciled in a country with strict environmental regulations (like the EU aims to have), there would be a strong motivation to file lawsuits in those courts despite the expenses involved. In general, climate change lawsuits against EU companies will target the parent company liable for its GHG emissions reduction policy. However, under the general domestic law of torts, it is possible that not every jurisdiction recognises a breach of a duty of care imposed on the parent company. A lawsuit filed before the courts of the domicile of the parent company might thus fail on the merits if, under the relevant applicable law, civil liability is limited to the GHG emissions of subsidiaries abroad.[28]

[26] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.07.2007, pp. 40-49.

[27] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, pp. 1-32

[28] Prévost, E., *Achieving Climate Change Justice: Some Private International Law Issues*, 2023, p. 17. Retrieved May 20, 2024, fromSSRN: https://ssrn.com/abstract=4450102 or http://

Additionally, beyond the fact that the main defendant (i.e., the parent company) can be sued at its place of domicile, other subsidiaries of the same group or counterparties involved in the emissions reduction plan and subsequently in the realisation of the alleged damage can be attracted to the same forum and in the same proceedings by virtue of the co-defendant theory.Article 8(1) of Brussels I*bis* Regulation provides, for instance, that a person domiciled in the EU may be brought before the courts of another EU Member State where a co-defendant is domiciled if "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".[29]

The tortious nature of emission reduction obligations does not prevent the claimant from suing before the courts where the harmful event took place or is expected to occur, as allowed by Article 7(2) of Brussels I*bis* Regulation. This gives the claimant the option to sue before the courts of either the place where the damage occurred or may occur, or the place of the event giving rise to the damage.[30] Any claimant in any jurisdiction could indeed allege that it suffered some kind of damage at its place of domicile or habitual residence and seize the competent courts of that place.

It is evident that there are many potential forums that the claimant may choose from. Certain jurisdictions may appear more attractive for pursuing climate change cases than others, due to their favourable legal approach towards the claimants and their claims from the point of view of substantive law. Issues such as financing opportunities, including third-party funding, and the availability of cost orders may also constitute critical elements in the context of forum shopping for climate change litigation.[31] So far, the claimants' strategy in the EU appears to be focussed on suing Carbon Majors in their home country under the *lex fori*. For example, in the *Milieudefensie et al. v Royal DutchShell plc.* case the lawsuit against Shell was brought in The Hague and based on Dutch law. Likewise, in the *Luciano Lliuya v RWE AG* case the lawsuit was brought at the place of the registered office of the defendant RWE in Germany, with German law applicable, although it concerned imminent damage in Peru.[32]

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dx.doi.org/10.2139/ssrn.4450102.

[29] *Ibid.*, p. 17.

[30] *Ibid.*, p. 18.

[31] Van Calster, G., *Climate justice litigation and private international law*, Lex&Forum, 3, 2023, pp. 585-586.

[32] Komnios, K., *The "climate trial": Procedural legal issues*, Lex&Forum, 3, 2023, p. 631 [in Greek].

On the other hand, it should be borne in mind that, based on the *forum non conveniens*-like doctrine outlined in Articles 33-34 of Brussels I*bis* Regulation, defendants in an EU court may resist jurisdiction of such court if a case is pending elsewhere. This may encourage knowledgeable corporate defendants to strategicallyseize a court in 'friendly' jurisdictions outside the EU, so that they can avoid a subsequent claim that will be brought against them, and this court would proclaim that they are not liable for whatever environmental or climate damage might have occurred.[33]

3.2. EU PIL rules on applicable law

Provided that the case is brought before a court within the EU, as described above, Rome II Regulation shall apply to tort events giving rise to damage which occur after 11 January 2009 – the events being relevant, not the damage.

Article 3 of Rome II Regulation confirms the universal character of its provisions, namely that the Rome II Regulation applies regardless of whetherit leads to the law of a non-Member State being applicable. Article 4(1) of Rome II Regulation introduces a general PIL rule,based on which the law of the country where the damage occurs (*lex loci damni*) shall be applicable,irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. Article 4(2) of Rome II Regulation introduces an exception to this rule in case both the claimant and the defendant have their habitual residence in the same country at the time when the damage occurs; in such case, the law of that country shall apply. According to the general escape clause of Article 4(3) of Rome II Regulation, when it is clear from the circumstances of the case that it is manifestly more closelyconnected with a country other than the one indicated by the above two provisions, the law of that country shallapply instead.[34]

Rome II Regulation includes specific rules for specific torts, such as product liability, unfaircompetition and acts restricting free competition, environmental damage, infringement of intellectual property rights, industrial action, as well as the three specific categoriesof *negotiorum gestio*, unjust enrichment and *culpa in contrahendo*, which relate to a contract.

According to Article 7 of Rome II Regulation, the law applicable to a non-contractual obligation arising out of environmental damage or damage

[33] Van Calster (2023), *op.cit.*, p. 589.

[34] Van Calster, G., *European Private International Law (4th ed.)*, Oxford et al.: Hart, 2024, pp. 325 et seq.

sustained by persons or property as a result of such damage shall bethe law determined pursuant to Article 4(1) of Rome II Regulation, i.e., the law of the country where the damage occurs (*lex loci damni*) – irrespective of the country where the event giving rise to the damage occurred and irrespective of the country or countries where the indirect consequences of that event occur – unless the party seeking compensation for damage chooses to base its claim on the law of the country where the event giving rise to the damage occurred (*lex loci delicti commissi*).

Recitals 24-25 relate to Article 7 of Rome II Regulation. According the them, 'environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit ofanother natural resource or the public, or impairment of the variability among living organisms. Moreover, regarding environmental damage, Article 174 of the Treaty, which provides that there should bea high level of protection based on the precautionary principle and the principle that preventive actionshould be taken, the principle of priority for corrective action at source and the principle that thepolluter pays, fully justifies the use of the principle of discriminating in favour of the person sustainingthe damage. The question of when the person seeking compensation can make the choice of the lawapplicable should be determined in accordance with the law of the Member State in which the court isseised. The choice allowed by Article 7 of Rome II Regulation clearly provides a favourable option for claimants, including thosefrom third countries, who can select the law of the place of central administration of the parent company as *lex loci delicti commissi*. This approach was used by the Hague District Court in the *Milieudefensie et al. v Royal DutchShell plc.* case.[35]

At this point, the potential impact of Article 17 of Rome II Regulation should be also taken into account. According to this, in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.[36] Such

[35] Van Calster, G., *Lexecologia. On applicable law for environmental pollution (Article 7 Rome II), a pinnacle of business and human rights as well as climate change litigation*, IPRax, 2022, pp. 447et seq.

[36] *Cf.* European Parliament legislative resolution of 24 April 2024 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)). Retrieved May 20, 2024, fromhttps://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html.Based on the provisions of the CSDDD, Member States should mandatorily implement corporate due diligence requirements in supply chains.

rules play a crucial role in judging the behaviour of the person liable,and their importance will depend on the specific conduct and the other surrounding circumstances, as well as the legal framework governing the non-contractual obligation inquestion.[37] If liability under the applicable law is strict, the conduct of the person liable may notfall to be assessed at all.

This 'conduct and safety rules' provision bears specific relevance in the context of environmental damage. However, it is unclear whether this could cover a 'permit defence' rule which Member States may adopt under the Environmental Liability Directive (EDL),[38] raising concerns about the application of foreign public law by courts in different jurisdictions. According to Article 8(4)(a) EDL, the Member States may allow the operator not to bear the cost of remedial actions taken pursuant to its provisions where such operator demonstrates that it was not at fault or negligent and that the environmental damage was caused by an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the EU specified in Annex III of the EDL, as applied at the date of the emission or event. It is argued that an environmental permit, as a much more extensive instrument than merely containing 'rules of safety and conduct', does not fall within the scope of Article 17 of Rome II Regulation, meaning that permits of the *lexloci delicti commissi*should not have any impact if the applicable law is the *lex loci damni.* Namely, it is debated whether environmental laws, even when they are part of the EU legislation, can be viewed as foreign public law and therefore may not be enforceable in a different jurisdiction.[39]

It is crucial to keep in mind that the Rome II Regulation provisions are not the only that may apply in climate change related disputes. In many cases, Rome I Regulation[40] on the law applicable to contractual obligations

[37] Dickinson, A., *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, OUP: Oxford, 2008, p. 641.

[38] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143 30.4.2004, pp. 56-75.

[39] See in this respect Van Calster (2023), op.cit., p. 591; idem. (2022), op. cit., pp. 447 et seq. See also Hübner, L., *Climate Change Litigation an der Schnittstelle von öffen tlichem Rechtund Privatrecht – Die ausländische Anlagengenehmigung, IPRax, 2022, p. 223;Álvarez-Armas, E., Le contentieux international privé en matière de changement climatique à l'épreuve de l'article 17 du règlement Rome II : enjeux et perspectives*, RDIA, 3, 2020, pp. 115 et seq.

[40] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, pp. 6-16.

could also be applicable, especially in matters concerning insurance. Thus, in the particular cases the *lex contractus* may be a relevant factor, also for limitations of liability. Additionally, when looking at Rome II Regulation, one should not solely concentrate on Article 7 thereof. There may be a more suitable legal option for a claimant that is hidden under a different qualification, such as unfair competition, product liability etc. For example, unjust enrichment or unfair competition areas may also be important avenues for climate change lawsuits. A practical approach in these situations is known as 'reverse engineering', where one first selects the most advantageous law for the claim and then shapes the claim strategically to match that chosen legal provision.[41]

4. Conclusion

The above analysis brought attention to the fragmentation and complexity of the current EU PIL framework in relation to the particular case of climate change related claims. Such framework at the moment promotes to a large extent both forum shopping and qualification shopping practices, especially among sophisticated claimants who are skilled in understanding the intricacies of the EU PIL system and know how to manipulate such system for their advantage. This can result in legal uncertainty and potential abuse of the particular rights by the claimants. Therefore, there is a question of whether a new uniform EU PIL framework is necessary to specifically address climate change cases.

Summary

Climate change has progressively emerged as a critical global concern, involving various sectors and stakeholders. Internationally, both soft law guiding principles and hard law legislative instruments address the phenomenon, imposing obligations on states and entities, while impacting commercial contracts across various industries. This leads to potential disputes regarding environmental laws or contractual violations related to climate issues.

The paper first discusses the typology of disputes related to climate change, including the prerequisites for applying the EU PIL. In *Milieudefensieet al. v Royal DutchShell plc*., the Hague District Court applied Rome II Regulation considering that the global nature of the GHG emissions involved as reason enough to apply the Rome II, without further considerations.

[41] Van Calster (2023), *op.cit*., p. 590.

Subsequently, the paper provides an overview the EU PIL rules regarding jurisdiction and applicable law in this context. According to Brussels I*bis*, the place of domicile or habitual residence of the defendant represents the primary head of jurisdiction. The tortious nature of emission reduction obligations does not prevent the claimant from suing before the courts where the harmful event took place or is expected to occurs, offering the option to sue before the courts of either the place where the damage occurred or may occur, or the place of the event giving rise to the damage. Moreover, various provisions of Rome II, as well as Rome I, may be applicable to a particular case depending on the qualification of the obligation in question, resulting in the potential application of different substantive laws accordingly.

The analysis brings attention to the fragmentation and complexity of the current EU PIL framework in relation to climate change litigation, which promotes both forum shopping and qualification shopping practices. Therefore, there is a question of whether a new uniform EU PIL framework is necessary to specifically address climate change cases.

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Abbreviations

CSDDD = Corporate Sustainability Due Diligence Directive

COP = Conference of the Parties to the UNFCCC

CO2 = Carbon dioxide

ECHR = European Convention on Human Rights

ECtHR = European Court of Human Rights

EDL = Environmental Liability Directive
GHG = Greenhouse gas
GSIA = Global Sustainable Investment Alliance
ICC = International Chamber of Commerce
IPCC = Intergovernmental Panel on Climate Change
NGO = Non-Governmental Organisation
PIL = Private International Law
SLAPP = Strategic Lawsuit Against Public Participation
UN = United Nations
UNCITRAL = United Nations Commission on International Trade Law
UNEP = United Nations Environment Programme
UNFCCC = United Nations Framework Convention on Climate Change

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*APPLICATION OF FOREIGN LAW IN TURKISH COURTS***

Abstract: *Turkish courts do not exclusively apply Turkish law. In other words, foreign law may be applied to private law transactions and relations involving a foreign element due to the conflict of laws rules. According to Article 2 of the Turkish Code on Private International and Civil Procedure Law numbered 5718, the judge shall ex officio apply the rules of Turkish conflict of laws and competent foreign law under these rules. However, the different treatment of foreign law as fact or law in various legal orders changes the consequences of the application of foreign law. As a rule, the judge knows and applies the law in accordance with the principle of iura novit curia.However, in cases where foreign law is applied, the judge cannot be expected to be familiar with every legal system other than their own. This paper aims to explain how to determine the content of foreign law and how to apply it in cases where foreign law is applied in Turkish courts.*

Keywords: *application of foreign law, law, fact, iura novit curia.*

1. Introduction

The globalising world has increasedrelations with foreign elements. Moreover, mass migration flows cause individuals to settle in a country other than their country of nationality or residence. This situation may lead to the application of foreign law, especially in personal and family law matters and transactions of the persons in question. Turkey has experienced many influxes due to its geographical location.The unexpected increase in the number of foreigners in Turkey has caused Turkish judges to encounter cases involving foreign elements.

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In private law disputes with a foreign element, the judge determines the applicable law through the conflict of laws rules. This determination either refers to Turkish law or to the law of foreign jurisdictions. The judge undoubtedly knows and applies their own law.In other words, in cases where the applicable law is determined as Turkish law, the Turkish judge will easily apply this law since the judge knows Turkish law. However, when the applicable law points to the law of a foreign country, the Turkish judge undergoes the problem of how to apply this law.

According to Article 2 of the Turkish Code on Private International and Civil Procedure Law numbered 5718, the judge shall *ex officio* apply the rules of Turkish conflict of laws and competent foreign law under these rules. Therefore, neither party to the case has the burden of proving the law applicable to the dispute involving a foreign element. Not expected to know the foreign law, the judge may seek the assistance of the parties regarding the content of the foreign law. However, this assistance cannot be characterised as burden of proof.

Moreover, The European Convention on Information on Foreign Law was signed in 1968 to facilitate judges' knowledge of the content of foreign law. Turkey is also a party to this convention. Pursuant to Article 1 of this convention the Contracting Parties undertake to supply one another, in accordance with the provisions of the present Convention, with information on their law and procedure in civil and commercial fields as well as on their judicial organisation.

The acceptance of foreign law as *law* or as *fact* leads to different legal consequences. In some legal orders such as Turkey and Switzerland, foreign law is applied as law. When foreign law is considered as law, the determination of the content of the foreign law is not imposed on the parties. However, in cases where foreign law is accepted as fact, the burden of proving the facts is placed on the parties.

This study aims to outline Turkish perspective on the determination of the content of foreign law in cases where foreign law is applied. The role of the judge and the parties in this determination is also within the scope of this study.In this context, the application of the conflict of laws rules, the application of the foreign law determined as a result of the application of these conflict of laws rules and finally the determination of the content of the foreign law will be discussed in the light of Turkish courts' decisions.

2. The Application of the Conflict of Laws Rules

In the continental European legal system, cross-border disputes are resolved by means of Savigny's method. In this method, various categories of law are linked to the legal order of a particular country through the medium of connecting factors.[1] In other words, conflict of laws rules are localisation-based rules that ensure the application of the law most closely related to the dispute.

The application of conflict of laws rules differs between legal systems. In this context, three systems can be mentioned[2].According to the first system adopted in the Anglo-American legal system, the conflict of laws rules are propounded by the parties.[3] In other words, the judge does not *ex officio* consider the conflict of laws rules, but expects for the parties to plead them. In this system, conflict of laws rules cannot be applied by the judge unless invoked by at least one of the parties.[4] When a party propounds foreign law, that party can make the application of conflict rules compulsory and binding, and it becomes the duty of the judge to determine the content of those conflict rules.[5]

According to the second system the judge applies the conflict of laws rules by its own motion. This system is recognised in the countries of continental Europe. If the dispute before the court has a foreign element, the judge *ex officio* applies the conflict of laws as they apply domestic law rules.[6] Irrespective of their source, whether stemming from domestic legislation, international treaties, or EU regulations, the conflict rules are an integral component of the domestic legal systems within these countries.[7]

Finally, a mixed system is applied in France, Sweden and Finland.[8] In French law, the application of conflict of laws rules is not regulated by an explicit statutory provision, but instead it is clarified by the case law of the

[1] Nishitani, Y.,*Treatment of Foreign Law-Dynamics Towards Convergence?- General Report,* Treatment of Foreign Law- Dynamics Towards Convergence? (Ed. Y. Nishitani), Switzerland: Springer, 2017, p. 7.

[2] Özel, S.,Erkan M., Pürselim H. S., Karaca H. A.,*Milletlerarası özel Hukuk (Private International Law*), İstanbul: On iki Levha, 2nd Ed., 2023, p. 150.

[3] Yöney, C.,*Yabancı Hukukun Uygulanması (Application of Foreign Law*), İstanbul: On İki Levha, 2018, p. 24.

[4] Nishitani, *op. cit.,* p. 15.

[5] Nishitani, *ibid.,* 15.

[6] Nishitani, *ibid.,* p. 12.

[7] Nishitani, *ibid.,* p. 12.

[8] Yöney, *op. cit.,* p. 31-32.

French Supreme Court (*Cour de Cassation*).[9] According to this jurisprudence, the application of the conflict of laws rules is determined depending on the nature of the subject matter of the dispute.[10] If the dispute is related to a right that can be freely disposed of (*droit disponible*) conflict of laws rules are generally applied at the invocation of the parties.[11] However, the judge has the discretion to apply the conflict of laws rules when deemed necessary.[12] On the other hand, if the subject matter of the dispute relates to a right that cannot be freely disposed of (*droit indisponible*), then the judge is required to *ex officio* apply the conflicts of law rules.[13] The rights that cannot be freely disposed of in this context relate to matters of personal status and family law.[14] Conversely, rights pertaining to areas such as commercial and civil contracts, non-contractual obligations, successions, or the legal status of a company are deemed to be freely disposed of.[15]

The system in continental European countries has been adopted in Turkish law. Article 2 of Private International Law and Procedural Law[16] (hereinafter PILA) deals with the application of foreign law. Article 2 states: "The judge shall *ex officio* apply the Turkish conflict of law rules and the applicable foreign law pursuant to these rules."[17]As Turkish private international law rules are mandatory, Turkish courts naturally apply these rules as a matter of official duty.[18] However, unlike the conflict of laws rules, the foreign element and the connecting factors shall be proved by the party claiming it.[19] Pursuant to article 25 of Civil Procedural Code[20] except for the exceptions provided by law, the judge may not automatically consider what has not been said by either party or the facts, and may not even act in such

[9] Corneloup, S.,*France – The Evolving Balance Between the Judge and the Parties in France,* Treatment of Foreign Law - Dynamics towards Convergence?, (Ed. Y.Nishitani), Switzerland: Springer, p. 158.

[10] Corneloup, *ibid.,* p. 159.

[11] Corneloup, *ibid,* p. 159.

[12] Nishitani, p. 13.

[13] Corneloup, *op. cit.,* p. 159.

[14] Corneloup, *ibid.,* p. 160.

[15] Corneloup, *ibid.,* p. 161.

[16] Law no. 5718 and dated 27.11.2007 (*Official Gazette*. 12.12.2007-26728).

[17] Tarman, Z. D.,*Turkey: The Treatment of Foreign Law in Turkey*, Treatment of Foreign Law - Dynamics towards Convergence?, (Ed. Y. Nishitani), Switzerland: Springer, p. 552.

[18] Tarman, *ibid.,* p. 552.

[19] Özel, *op. cit.,* p. 151.

[20] Law no. 6100 and dated 12.01.2011 (*Official Gazette*. 04.02.2011-27836).

a way as to remind them.Except in cases specified by law, the judge may not gather evidence spontaneously. Therefore, whether the necessary facts for the application of the conflict of laws rules have been established depends on the evidence provided by the parties.

3. 3. Application of the Foreign Law to Which the Conflict of Laws Rules Refer

Conflict of laws rules resolve the dispute by localising it to a particular legal order. In other words, conflict of laws rules are indicative rules.[21] Therefore, the treatment of foreign law indicated by the conflict of laws rules may have different legal consequences in terms of procedural law. There are different opinions and practices regarding the nature of foreign law.[22] In the systems where foreign law is accepted as "*fact*", foreign law is treated as fact that must be proven by the parties to the case.[23] Foreign law must be sufficiently pleaded and substantiated by the parties to enable the judge to apply it.[24] This system imposes an active role on the parties in ascertaining the foreign law. The reason for the application of foreign law as fact in the Anglo-American legal system is the idea that the judge can only apply the domestic law in their country as law.[25]

If the foreign law is accepted as "*law*", the foreign law to be applied shall be applied *suo moto* by the local judge.[26] In other words, foreign law is no different from local law in terms of application. This approach equates foreign law with *lex fori.*[27] In cases where foreign law must be applied, it is considered to be the "official duty" of the judge to make the necessary determination and apply the law determined. This is the approach adopted in the continental European legal system.

In Turkish private international law, foreign law is applied as "*law*". In other words, both the conflict of laws rules and the foreign law indicated by

[21] Şanlı, C., Esen, E., Figanmeşe-Ataman, İ., *Milletlerarası Özel Hukuk* (*Private International Law*), İstanbul: Beta, 10th Ed., 2023, p. 6.

[22] Yaşar, T. N.,*Türk Mahkemelerinde Yabancı Hukukun Uygulanması*, (*Application of Foreign Law in the Courts of Turkey)*, Public and Private International Law Bulletin, 33 (2), 2016, p. 79; Erkan, M., *Türk Milletlerarası Özel Hukuk Sisteminde Yabancı Hukukun Tatbiki: Olan vs. Olması Gereken*, Milletlerarası Özel Hukukta Güncel Konular Sempozyumu (Eds: B. Tiryakioğlu, M. Aygün, and al.), Eskişehir, 21-22 April 2016, p. 518.

[23] Nishitani, *op. cit.,*p. 18.

[24] Nishitani, *ibid.*p. 18.

[25] Erkan, *op. cit.,* p. 519.

[26] Erkan, *ibid.,* p. 518.

[27] Özel and al, *op. cit.,* p. 154.

these rules should be applied *ex officio* in the courts. Foreign law derives its application authority from the PILA. Nonetheless, the legitimacy of foreign law originates from the legal system to which it belongs. Since judges apply foreign law *ex officio*, they are not bound by the information and documents submitted by the parties.

4. Ascertainment of Foreign Law

4.1. In General

Since the foreign law indicated by the conflict of laws rules is applied *ex officio*, the problem of how to determine the content of this law comes to the fore. In Turkish substantive law, it is essential that the judge knows the law. According to the Civil Procedural Code of Turkey (art. 33), the judge knows the law and applies it *ex officio*. This fundamental principle (*iura novit curia*) in substantive law is not anticipated to be applicable to foreign law.[28] Therefore, the determination of the content of the foreign law unfamiliar to the judge should be subject to a special procedure.[29]

In accordance with the PILA, a judge is permitted to seek the parties' cooperation in ascertaining the substance of foreign law. However, since the judge will apply the foreign law *ex officio*, this assistance is not a duty imposed on the parties.[30] In the initial stage, the primary emphasis is placed on establishing the content of foreign law based on the judge's individual legal knowledge and their independent research.[31] Furthermore, the judge is required to apply the foreign law in the manner that it is practiced in the corresponding foreign jurisdiction.[32]

4.2. Conventions

The aim of the judge is to access accurate and sufficient information so as to resolve the dispute.[33] Judges use different methods to determine the pertinent articles of foreign law. In this context, the judge may obtain information on the applicable law from the relevant countries within the scope of bilateral and multilateral legal aid agreements to which the Republic of Tur-

[28] Şanlı and al., *op. cit.,* p. 75.

[29] Şanlı and al., *ibid.,* p. 75.

[30] Şanlı and al., *ibid.,* p. 75.

[31] Tarman, *op. cit.,* p. 556.

[32] Tarman, *ibid.,* p. 556.

[33] Tarman,*ibid.,*p. 556.

key is a party. Turkey[34] acceded to the *European Convention on Information on Foreign Law,*[35] commonly referred to as the 'London Convention,' which was signed in London under the Council of Europe's guidance.[36] This accession was aimed at simplifying and expediting the process of acquiring information about foreign law. Article 2 of the Convention mandates that every Contracting Party establish or designate a receiving agency responsible for executing the tasks specified in the Convention's provisions. The receiving and transmitting agency of Turkey is the Ministry of Justice. This convention has been referred to in many judgements of the Court of Cassation.[37] However, the information received in this context is limited and consists only of the translation of the relevant legislation.[38] Therefore, it is not sufficient to resolve the dispute. The fact that the legal legislation is not translated by lawyers causes semantic confusion.[39]

4.3. Other Sources

The Ministry of Justice, Turkish embassies and consulates abroad, and foreign delegations in Turkey are potential sources of assistance for the judge.[40] One of the methods used by the courts is to seek assistance from law faculties and/or court experts.[41] However, this system is not sufficient to resolve the dispute.In fact, faculty members provide translations of the relevant legislation.[42] This translation does not provide sufficient information about the foreign law that should be applied as *law.* In other words, foreign

[34] *Official Gazette.* 26.8.1975-15338. Turkey is a signatory to the supplementary protocol of the convention as well (*Official Gazette.* 14.4.2004-25433).

[35] https://rm.coe.int/1680072314 (accessed 8.11.2023), European Treaty Series No. 62.

[36] Tarman, *op. cit.,* p. 558; Tunçağıl, G. G., *MÖHUK Kapsamında Yabancı Hukukun Muhtevasının Tespitine İlişkin Hükmün Dğerlendirilmesi ve Bazı Hukuk Düzenleri ile Karşılaştırılması,* MÖHUK'ta Reform (Eds. S. Özel, M. Erkan, H. S. Pürselim), İstanbul: On İki Levha, 2023, p. 157; Erkan, M., Yöney, C., *MÖHUK Hayatta mı, Can mı Çekişiyor?*, MÖHUK'ta Reform (Eds. S. Özel, M. Erkan, H. S. Pürselim), İstanbul: On İki Levha, 2023, p.59.

[37] Civil Department (No: 2) of Court of Cassation E.2006/16427, K.2007/5497, T. 3.4.2007;Civil Department (No: 2) of Court of CassationE. 2009/3562, K. 2009/7289, T. 15.4.2009 (www.yargıtay.gov.tr).

[38] Erkan, *op. cit.,* p. 522.

[39] Erkan, *ibid.,* p. 552.

[40] Tarman, *op. cit.,* p. 559.

[41] Arslan, İ.,*Yabancı Unsurlu Özel Hukuk Uyuşmazlıklarında Yabancı Hukukun İçeriği Hakkında Bilgi Edinilmesinde Bilirkişinin Rolü, (The Role of Expert Witness in Obtaining Information on the Content of Foreign Law in Private International Law Cases),* TAAD, 13(51), July 2022, p. 324.

[42] However, for detailed information on the fact that in practice, legal experts in this field are not well funded, see Erkan and Yöney, *op. cit.,*p. 76.

law must be understood and applied in accordance with its meaning, nature, scope and interpretation in the country to which it belongs.[43]

5. Inability To Ascertain Foreign Law

According to the article 2 of PILA, if the provisions of the foreign law relevant to the dispute cannot be determined despite all investigations, Turkish law shall apply. However, if the judge directly applies Turkish law without any research on foreign law, the Court of Cassation will reverse the decision of the court of first instance as the foreign law is treated as *law.*[44] As a matter of fact, according to Article 371(1)(a) of the Civil Procedural Code, non-application or misapplication of the law is a ground for reversal.

6. Current Problems Faced By Courts

Determining the content of foreign law can take a very long time.The inability to ascertain foreign law within a reasonable timeframe can result in the trial not proceeding in a timely manner, potentially leading to a violation of the right to a trial within a reasonable period.[45] In the case of *Karalyos And Huber v. Hungary And Greece*[46] of the European Court of Human Rights

[43] Erkan, *op. cit.,* p. 523; Tanrıbilir, F. B., *5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanunun Uygulamasına Dair Sorunlar ve Öneriler,* MÖHUK'ta Reform (Eds. S. Özel, M. Erkan, H. S. Pürselim), İstanbul: On İki Levha, 2023, p. 12.

[44] See Civil Department (No:11) of Court of Cassation E. 2019/1537, K. 2019/3206, T.29.04.2019; Civil Department (No:18) of Court of CassationE. 2005/2899-K. 2005/4027, T. 21.4.2005: Şanlı and al.,*op. cit.,*p.68, footnote 113.

[45] Arslan, İ.,*Yabancı Unsurlu Özel Hukuk Uyuşmazlıklarında Makul SüredeYargılanma Hakkı İle Yabancı Hukukun İçeriğinin Temin Edilmesi Arasındaki İlişki (The Relationship Between The Right To A Fair Trial Within AReasonable Time And Ascertainment Of Content Of Foreign Applicable Law In Private International Law Cases),*Public and Private International Law Bulletin, 37(2), 2017, p. 60.

[46] Application no. 75116/01, 6.7.2004, https://hudoc.echr.coe.int/, accessed 9.11.2023. The lawsuit revolved around a civil claim in Hungary seeking compensation for the losses suffered by two Hungarian individuals due to a fire aboard a ship belonging to a Greek corporation. The Court determined that the duration of the legal proceedings was unduly prolonged, partly attributed to the uncooperative stance of the Greek authorities. They neglected to provide essential information regarding pertinent Greek legislation to the Hungarian court. The Court, concluding that the majority of the delays were attributable to the actions of the Hungarian state, ruled that Hungary had breached Article 6 of the European Convention on Human Rights. Nine years after the claim was filed, the details of the foreign applicable law had yet to be determined, and the legal proceedings were still in their initial stages before the Hungarian courts.For detailed information on the case, see, Den Heijer, M.,*Shared Responsibility Before The European Court of Human Rights,* Netherlands International Law

(*ECtHR)*, two criteria were taken into consideration in determining the "reasonable period". These are the behaviour of the judicial and administrative authorities participating in the activity of determining the content of foreign law and the importance for the parties of completing the proceedings within a reasonable time.

Another problem faced by Turkish judges is the personal status and family law cases of Syrians. Syrians living in Turkey have temporary protection status. In Article 91 of Law (No:6458) on Foreigners and International Protection; Temporary Protection is defined as the following[47]:

"*Temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection*."

Syrians are not recognised as *refugees* because Turkey has restricted the application of the 1951 Refugee Convention (Geneva Convention) to individuals who have become refugees as a result of events that took place in Europe.Turkish judges have difficulties in obtaining information on Syrian law, especially in cases concerning the personal status of Syrians and family law matters. Article 4 of the PILA stipulates that for *refugees*, the habitual residence shall be considered when nationality is accepted as the connecting factor. In some court decisions, Syrians have been recognised under this article even though they are not refugees[48]. In some judgements, the judge applied Turkish law on the grounds that they could not obtain information about foreign law despite all efforts due to the internal disorder in Syria.[49] In some court decisions, it is stated that the request for ascertaining the foreign law is forwarded to the Ministry of Justice and that it is not possible for the Ministry to meet this request.[50]

Yet another issue that needs to be underlined is the Turkish employees sent to foreign countries to work. Therefore, problems arise in obtaining

Review, 60(3), 2013, p. 423.

[47] Temporary Protection in Türkiye, en.goc.gov.tr, accessed 8.11.2023.

[48] Gaziantep Regional Courts of Justice, Civil Department (No: 2) E. 2017/1082; K. 2017/1014, T. 19.7.2017.

[49] Adana Regional Courts of Justice, Civil Department (No: 2) E. 2019/1641; K. 2021/894, T. 1.6.2021. "*Due to the state of war in Syria and the inability to determine the applicable law, the application of Turkish law in the case is in accordance with the procedure and the law*".

[50] Gaziantep Regional Courts of Justice, Civil Department (No: 2) E.2019/2107; K. 2019/2201, T. 23.12.2019, "*The Ministry of Justice, Directorate General for Foreign Relations and European Union Affairs responded to the request for the Civil Code of the Syrian Arab Republic, in particular its provisions on paternity, by stating that it was not possible to fulfil the request at this stage".*

the law of these developing countries where Turkish companies invest. In a judgment rendered by Ankara Regional Courts of Justice (No: 30),[51] it was ruled that an expert in the labour law of Papua New Guinea, the employee's habitual place of work, should be consulted.

7. Conclusion

Since the determination of foreign law is a time-consuming, difficult and costly task, judges tend to resolve the dispute by applying *lex fori.* In order to ensure the justice of private international law, the law most closely connected with the dispute should be applied. Obtaining foreign law only as a translation of the text of the law often leads to misapplication of foreign law. Although efforts are being made to ensure the flow of information between the legal systems of the member states of the European Union,[52] this issue should be addressed *globally.*

In the member states of the European Union, the flow of information can be easy. However, Turkey's location and the mass influx of asylum seekers necessitates the application of different legal systems in Turkish courts. Facilitating access to foreign law for parties and judges will be an incentive for the application of foreign law.[53] The use of foreign experts and lawyers as court experts may also prevent this problem.[54] In this context, developments in technology and artificial intelligence can also be used to prevent language dependency. However, all initiatives to be taken for the establishment of private international law justice should have a global dimension.

Summary

The application of conflict of laws rules differs between legal systems. In the Anglo-American legal system, conflict of laws rules must be asserted by the parties.In the continental European legal system, the judge applies the conflict of laws rules *suo moto*, without the parties having to raise them. According to the mixed system adopted by France,the application of the con-

[51] E. 2023/2643, K. 2023/3511, T. 21.09.2023. For a decision decreeing the need to obtain information about the law of Gabon and Iraq, see. Ankara Regional Courts of Justice (No. 30), E. 2023/2453, K. 2023/2804, T. 6.7.2023.

[52] European Judicial Network (EJN) serves as a connected group of representatives from various nations, working together to enhance collaboration in the field of criminal justice. https://www.ejn-crimjust.europa.eu/ejn2021/ContentDetail/EN/2/63, (accessed 9.11.2023).

[53] Erkan, *op. cit.,*p. 528.

[54] Erkan, *ibid.,* p. 528.

flict of laws rules is determined depending on the nature of the subject matter of the dispute. In Turkish law, the judge applies the foreign law *ex officio*.

Given that conflict of laws rules require the application of foreign law *suo moto*, the issue of determining the content of this law becomes prominent.Judges employ various methods to ascertain the relevant provisions of foreign law. They may acquire information on the applicable law from the respective countries through bilateral and multilateral legal assistance agreements in which the Republic of Turkey participates. Turkey ratified the European Convention on Information on Foreign Law. There are various ways of obtaining information about the content of foreign law outside of the Convention. The judge could seek support from the Ministry of Justice, Turkish diplomatic missions overseas, and international delegations within Turkey. Moreover, the judge may also consult law faculties or court experts. However, foreign law needs to be comprehended and implemented in line with its significance, characteristics, extent, and interpretation within its originating nation. If the provisions of the foreign law relevant to the dispute cannot be determined despite all investigations, Turkish law shall apply.

Determining the substance of foreign law can be a time-consuming process. Therefore, judges tend to apply the *lex fori.* This situation is detrimental to the justice of private international law. Aglobal step must be taken to achieve this justice.

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THE GAME CHANGER: THIRD-PARTY FUNDING IN CROSS-BORDER LITIGATION

1. Introduction

Third-party (litigation) funding - TPF or TPLF - is a financial arrangement where an entity that is not directly involved in a legal dispute (third party) provides funding to one of the parties involved in litigation or arbitration, with the understanding that they will receive a portion of any recovered sums should the case succeed, and nothing if it fails.[1] Currently, TPF is more prominent in commercial and investment arbitration, but its importance is noticeably rising in civil litigation, particularly in collective redress.[2] Historically, this type of funding by entities uninvolved in the dispute was labelled as maintenance or champers and deemed unlawful in common law countries.[3] TPF has typically been viewed with scepticism in Europe, especially in comparison to its more common use in common law jurisdictions like Australia,[4] the USA, and the United Kingdom.[5] In civil law countries, the costs of litigation are generally lower and punitive damages are not permit-

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[1] Also referred to as (alternative) litigation funding, litigation investment, third-party financing or legal finance.

[2] Kramer X. and Tillema I., "The Funding of Collective Redress by Entrepreneurial Parties: the EU and Dutch Context", *RevistaÍtalo-Española de DerechoProcesal*, Procesoscolectivos, Vol. 2, 165-181, Madrid 2021.

[3] Jackson R., "Review of Civil Litigation Costs: Preliminary Report", The Stationery Office, 2009, p. 160. Available at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf

[4] Legg, M., *The Rise and Regulation of Litigation Funding in Australian Class Actions*, 2021 (4), pp. 221-234.

[5] Lewis, J., *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?,* The Georgetown Journal of Legal Ethics, 2020, pp. 687-701.

ted, which may explain the lesser prevalence of TPF so far. Contemporary trends show restrictions against such funding arrangements relaxed or eliminated in some important jurisdictions,[6] while others ignore or prohibit such practices in civil litigation, through legislations or jurisprudence.[7]

The significance of TPFin international arbitration - and to a lesser degree, civil litigation[8] - has undeniably increased over the last decade across various sectors and procedural frameworks.[9] However, both the concept of TPF and the procedural and regulatory developments accompanying it remain controversial.[10] TPF in arbitration has long been the subject of polarized opinions. At one extreme, it's seen as highly detrimental, akin to an "arbitration antichrist," and on the other, it's hailed as exceptionally beneficial, "the best thing since sliced bread".[11] This range of opinions underscores the contentious nature of TPF within the arbitration community, reflecting deep divisions over its impact and utility.

Despite such divisive views on TPF, public debates have largely progressed from questioning the permissibility of TPF to discussing how to tackle specific concerns it raises. Under the absence of regulatory oversight, TPF expanded and evolved to a point where its use became too significant to ignore.[12] In 2021, the global litigation funding investment market was esti-

[6] In arbitration - Hong Kong and Singapore. International Council for Commercial Arbitration, "Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration", The ICCA Reports no. 4, [Electronic version], 2018, Retrieved January 7, 2024, from https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf, p. 5. (ICCA-Queen Mary Report).

[7] Hodges, C., Vogenauer, S., Tulibacka, M., *Costs and Funding of Civil Litigation: A Comparative Study,* COSTS AND FUNDING OF CIVIL LITIGATION, (ed. Hodges, C., Vogenauer, S., Tulibacka, M.), Oxford Legal Studies Research Paper No. 55-2009, [Electronic version], 2009, Retrieved December 13, 2023, from https://ssrn.com/abstract=1511714

[8] For the different judicial treatment of TPF in arbitration and civil litigation, see: Lin, Y., *Third Party Funding in Litigation and Arbitation: A DichotomyinChina'sPractice*, KluwerArbitration Blog, [Electronic version], 2023, Retrieved February 3, 2024, from https://arbitrationblog.kluwerarbitration.com/2023/04/24/third-party-funding-in-litigation-and-arbitration-a-dichotomy-in-chinas-practice/

[9] Haeri, H., HuelmoBaro, C., Gasparotti G., *Third-Party Funding in International Arbitration* in The M&A Arbitration Guide, Global Arbitration Review, [Electronic version], 2022, Retrieved January 3, 2024, from https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/4th-edition/article/third-party-funding-in-international-arbitration

[10] *Ibid*.

[11] Perry, S., *Third-Party Funding: The Best Thing Since Sliced Bread?,* Global Arbitration Review, [Electronic version], 2012, Retrieved January 3, 2024, from https://globalarbitrationreview.com/article/third-party-funding-the-best-thing-sliced-bread

[12] The number of litigation funders in EU is hard to determine, with at least 45 such

mated at USD 12.2 billion and projected to reach approximately USD 25.8 billion by 2030 with a compound annual growth rate of roughly 9% between 2022 and 2030.[13]

Defining TPF has been contentious, challenging groups and institutions like the ICCA-Queen Mary Task Force[14], UNCITRAL Working Group III[15] and European Commission and Parliament.[16] TPF evolved from historically dubious practices to a recognized means of enabling access to justice for those unable to afford litigation costs. It spans various forms, including commercial funding agreements and portfolio financing, beyond traditional legal support like contingency fees or specific types of insurance. This flexibility in application underscores TPF's role in diversifying legal finance, offering claimants and legal professionals novel mechanisms for pursuing legal actions, particularly in cases related to environment, health and safety and human rights.[17]

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funders known to operate in the Union. European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)). [Electronic version], 2020, Retrieved November 20, 2023, from https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.html#def_1_6, p. J.

[13] Custom Market Insights: Global Litigation Funding Investment Market 2024-2033. [Electronic version], 2024, Retrieved March 21, 2024, from https://www.custommarketinsights.com/report/litigation-funding-investment-market/For EU, see: Saulnier, J., Koronthalyova, I., Müller, K., European Added Value Unit, Directorate-General for European Parliamentary Research Services (EPRS), *Responsible private funding of litigation*, [Electronic version], 2021, Retrieved November 25, 2023, from https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf

[14] The ICCA – Queen Mary Task Force Report.

[15] See United Nations Commission on International Trade Law (UNCITRAL), Working Group III (Investor-State Dispute Settlement Reform), Forty-third session (Vienna, 5–16 September 2022), 'Possible reform of investor-State dispute settlement (ISDS), Draft provisions on procedural reform', Note by the Secretariat, 11 July 2022 (A/CN.9/WG.III/WP.219), draft provision E-1, [Electronic version], 2022, Retrieved January 16, 2024, from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp_219_-_draft_provisions_on_procedural_reform_.pdf

[16] Recommendations as to the content of the proposal requested: Proposal for a Directive of the European Parliament and of the Council on the regulation of third-party litigation funding. [Electronic version], 2021, Retrieved November 24, 2023, from https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf

[17] Cordina, A., Storskrubb, E., *The Future of Regulation of Third-Party Litigation Funding in Europe*, Conference Report, Erasmus University Rotterdam. [Electronic version], 2022, Retrieved December 16, 2023, from https://www.bjutijdschriften.nl/tijdschrift/tijdschriftmediation/2022/2/TMD_1386-3878_2023_026_002_005

2. Understanding Third-Party Funding

2.1. The Role of Third-Party Funding in Access to Justice

Access to justice is increasingly hindered by high litigation costs[18] ,,complex and lengthy procedures, decreasing public legal aid, and stringent conditions for cost exemptions, highlighting the growing necessity for external financing sources. Technological advancements and changes in the judicial system and society introduce both new challenges and opportunities.[19] Two conceptual trends are noticeable in that regard.[20] One is the emergence of private forms of financing litigation costs in light of the gradual decline of state legal aid systems in civil matters.[21] The second trend is policymakers' attempts to reform the rules on litigation costs to make them more predictable, transparent, and proportional. This includes various forms of legal expenses insurance, fixed recoverable costs, cost-shifting rules, increased use of costs as court sanctions[22] and even establishing the so-called litigation budget.[23]

Against this backdrop, there's a noticeable shift in litigation funding within Europe, moving from predominantly public to private sources. This shift is not merely a change in the source of funding; it heralds the rise of private entities and innovative business models, which introduce new approaches to overcoming the longstanding issue of financial obstacles to justice access. Within this evolving framework, TPF manifests in various forms. It encompasses a variety of arrangements other than 'archetypal' TPF provided by commercial funders[24], such as covering work carried out by legal counsel on a conditional fee or contingency basis and certain forms of

[18] Sahani, V. S., *Rethinking the Impact of Third-Party Funding on Access to Civil Justice*, DePaul Law Review, DePaul University, 69, 2020, pp. 612-622.

[19] Biard, A., Hoevenaars, J., Kramer X., Themeli, E., *Introduction: The Future of Access to Justice – Beyond Science Fiction*, New Pathways to Civil Justice in Europe (eds. A. Biard, J. Hoevenaars, X. Kramer, E. Themeli), Springer, [Electronic version], 2021, Retrieved November 21, 2023, from https://doi.org/10.1007/978-3-030-66637-8_1

[20] Ahmed, M., Kramer, X., *Global Developments and Challenges in Costs and Funding of Civil Justice*, Erasmus Law Review, no. 4, Rotterdam, 2021, p. 181.

[21] This group includes various models of private financing of costs, such as legal expenses insurance, third-party funding, contingency fee agreements, and damages-based agreements.

[22] Ahmed, M., Kramer, X., *op.cit,* p. 181.

[23] Tidmarsch, J., *The Litigation Budget*, Vanderbilt Law Review, 68(3), 2015, pp. 855-918.

[24] Article 3(a) of the *Proposal for a Directive of the European Parliament and of the Council on the regulation of third-party litigation funding*.

insurance – for both claimants and respondents.[25] TPF differs from contingency-fee arrangements and liability-insurance financing mainly in terms of the supporter's identity; unlike a liability insurer or the plaintiff's own counsel, the financier in TPF is a specialized entity created specifically to invest in lawsuits.[26] However, in a narrower sense, TPF often pertains to 'non-recourse' legal finance provided by a commercial funder under the terms of a funding agreement, typically to a claimant (or sometimes defendant) in return for a share of the amounts recovered in the proceeding. A more elaborate arrangement is 'portfolio financing',[27] whereby financing is provided in respect of a group or portfolio of claims held by a certain entity or entities, or to legal counsel working on multiple cases, usually on a conditional fee or contingency basis.[28]

Although TPF is beneficial, in that it promotes access to justice for certain litigants, selection process of potential cases for funding shows clear limitations.[29] TPF is not usually feasible where non-monetary relief, such as an injunction or declaration, is the main remedy sought. TPF is most readily obtained for high value cases with good prospects of success.[30] The success rate is an obvious way of testing the funder's selection process. This is often a matter of commercial confidence.[31] Commercial litigation, small business disputes, patent/IP cases, and construction disputes are less attractive to funders due to high costs, complex nature, or technical challenges, although exceptions exist, particularly in group actions and quick-resolution adjudications.[32]

The use of TPF generally does not impose additional financial burdens upon opposing parties.[33] However, where litigation funders have supported

[25] The ICCA-Queen Mary Report, p. 51.

[26] Wendel, W. B., *Paying the Piper But Not Calling the Tune: Litigation Financing and Professional Independence,* Akron Law Review, 52 (1), p. 8. [Electronic version], 2019, Retrieved January 27, 2024, from https://ideaexchange.uakron.edu/akronlawreview/vol52/iss1/1

[27] Portfolio financingisgaining in frequency in USA. Baker, T., ALI-ELI Webinar on Third Party FundingofLitigation, April 15th 2024 (*online*).

[28] *Ibid*.

[29] Jackson, R., *Review of Civil Litigation Costs: Final Report*, The Stationery Office, 2009, fn 96 p. 117. [Electronic version], 2009, Retrieved January 26, 20234, from https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf

[30] *Ibid*., p. 118.

[31] *Ibid*.

[32] Jackson, R., "Review of Civil Litigation Costs: Preliminary Report", The Stationery Office, 2009, pp. 161-163.

[33] Jackson, R., *Review of Civil Litigation Costs: Final Report*, p. 117.

or funded proceedings which are not successful, they should be jointly liable with claimants for any adverse costs they caused defendants to incur. Courts or administrative authorities should be granted adequate powers to ensure the effectiveness of such an obligation, and TPF agreements should not exclude responsibility for such adverse costs.[34] Does this go another way around – can funded party, provided it won the case, be granted the "reasonable costs" including the costs of litigation funder? The principle of 'costs shifting' is prevalent in arbitration in numerous jurisdictions and in general, the fact that a prevailing party has been funded has not been deemed relevant as a basis to deny the recovery of costs.[35]

Funders are not always driven solely by economic interests and profits. Occasionally, funders may aim to provide financial support to a party in a proceeding for political, ideological, or even personal reasons. A distinction is proposed between these two forms of litigation financing.[36] The first type is called disinterested or commercial litigation funding, where funders act as passive investors, not directly involved in the merits of the case, except to the extent and in the manner permitted by law and the financial litigation agreement. The second type is interested litigation finance, where the primary motive of the funders is not profit, but rather achieving a specific goal through the process.[37] These goals can be positive, aimed at fostering

[34] *Preambule the Proposal for a Directive of the European Parliament and of the Council on the regulation of third-party litigation funding,* para. 30

[35] In cases where the respondent has engaged in improper conduct, funded claimants might not only recoup arbitration costs but also the premium or success fee paid to their funders. This was exemplified in the Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd case of 2016, where the English High Court upheld an ICC arbitration decision in London. The court confirmed the claimant could recover both legal costs and the success fee from the funder due to the respondent's actions that necessitated funding. This precedent was further supported by the High Court in the 2021 case of TenkeFungurume Mining SA v Katanga Contracting Services SAS, where costs related to litigation funding agreements—including fixed and variable fees contingent on successful outcomes, plus compound interest—were awarded. These cases highlight the court's willingness to allow recovery of comprehensive costs related to litigation funding when the respondent's conduct justifies such measures. https://woodsford.com/wp-content/uploads/2023/02/LexGTDT-Litigation-Funding-2023-Full-book.pdf

[36] Wendel, W. Bradley (2019) "Paying the Piper But Not Calling the Tune: Litigation Financing and Professional Independence". Jeremy Kidd, To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma, 8 J.L. ECON. & POL'Y 613 (2012); Maya Steinitz, Whose Claim Is This Anyway? Third-Party Litigation Funding, 95 MINN. L. REV. 1268 (2011).

[37] In a case where Philip Morris challenged Uruguay's tobacco-control measures as expropriatory under a bilateral investment treaty, an arbitration panel upheld the regulations,

broader societal change, but the line between socially engaged financial support and vindictive or harassing actions is blurred and unclear.

2.2. Regulatory and Ethical Considerations

TPF is gaining popularity as it allows litigants to pursue claims without facing prohibitive costs, contributing to greater access to justice.[38] However, this trend has attracted scrutiny based on ethical concerns such as commodification of justice,[39] frivolous litigation, conflicts of interest between funder, funded party and lawyer of the funded party, and fee-splitting, especially in Europe, where regulatory landscape for litigation funding generally remains complex and unclear.[40]

The first concern is commodification of justice.[41] The majority of litigation financing is driven by profit. Critics of TPF who argue against the commodification of justice as immoral often overlook that the economic self-interest present in TPF can be compared to other accepted practices like insurance, contingency legal fees, venture capital, and bank loans, which similarly commodify aspects of risk and potential future gains.[42] These practices are widely accepted despite their commodification aspects because they provide critical services that manage risk, facilitate access to services, and drive economic growth, all within regulated frameworks that safeguard against abuse. This context helps mitigate concerns about the commodifica-

recognizing them as a legitimate exercise of state power—illustrating a scenario where interested litigation finance might support broader societal goals. Harv. L. Rev., *International Arbitration - Investor-State Dispute Settlement - Tribunal Holds That Uruguay's Anti-Tobacco Regulations Do Not Violate Philip Morris's Investment Rights*, 130 HARV. L. REV. 1986 (2017). https://harvardlawreview.org/print/vol-130/philip-morris-brands-sarl-v-oriental-republic-of-uruguay/

[38] C. Hodges, S. Vogenauer& M. Tulibacka, The Costs and Funding of Civil Litigation: A Comparative Perspective (2010). Lewis J., Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?", The Georgetown Journal of Legal Ethics, 2020, Vol. 33, p. 688.

[39] Radončić, Dž., *Third-Party Litigation Funding: Access to Justice or Commodification of Justice*, Proceedings of the Kopaonik School of Natural Law – Slobodan Perović, Belgrade, 2023, tom III, pp. 333-349.

[40] Cordina A., op.cit.

[41] W. B. Wendel, Alternative Litigation Finance and anti-Commodification Norms, 63 DePaul L. Rev. 655 (2014), p. 657. Available at: https://via.library.depaul.edu/law-review/vol63/iss2/16; Cordina A., op.cit., p. 274-275.

[42] Similarly, see: W. B. Wendel, Alternative Litigation Finance and anti-Commodification Norms, 63 De Paul L. Rev. 655 (2014). W. Bradley Wendel and Joshua P. Davis, Complex Litigation Funding: Ethical Problem or Ethical Solution?, 74 HASTINGS L.J. 1459 (2023). Available at: https://repository.uclawsf.edu/hastings_law_journal/vol74/iss5/8;

tion of justice in TPF, suggesting that, with proper regulation, it can similarly become a beneficial and accepted practice.[43]

The second major criticism of TPF focuses on potential conflicts of interest between the funder, the claimant, and the lawyer. These conflicts may arise from pre-existing relationships, the funder's economic interests, their control over procedural decisions, and frivolous litigation.[44] Notably, funders might be motivated by profit to the extent that they could influence the management of the case or opt only for high-value cases, side-lining important but less lucrative claims. Problems may occur if funders have relationships with lawyers or are competitors of the defendant.[45] Funders are often professional organizations that rely on the success of claims to sustain their business models, which motivates them to generally support meritorious and well-founded legal claims. This professional assessment can contribute to a more disciplined approach to litigation, potentially reducing frivolous lawsuits.[46] Some believe litigation finance can serve as a signal to courts and defendants, indicating the merit or lack thereof in legal claims.[47] Further safeguards can be provided by specific disclosure orders, and by ensuring that attorneys adhere to their ethical duties to maintain their independence.[48]

One recent case from the USA underscores the potential need differentiated levels of protection from funders interference with the merits of the process, depending on the profile of the funded party – sophisticated or not. In early 2023, Sysco, a major food distributor, and Burford, a leading litigation finance firm, initiated legal actions against each other in Illinois and New York. The conflict arose after Burford secured an injunction through arbitration, which barred Sysco from settling an antitrust claim without Burford's agreement. Sysco argued that the injunction, based on a clause in their funding agreement, was against public policy and should be annulled. Conversely, Burford maintained that as a sophisticated party, Sysco was

[43] Cordina A., *op.cit*., p. 275.

[44] Cordina A., *op.cit*., p. 275.

[45] Such was the notable Gawker Media case.https://content.next.westlaw.com/practical-law/document/Icdcf2f8a29b711e698dc8b09b4f043e0/Hulk-Hogan-Wrestles-Gawker-With-Third-Party-Litigation-Financing?viewType=FullText&transitionType=Default&contextData=(sc.Default)

[46] Marquais, O.,Grec, A., *Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore vs. France*, Asian International Arbitration Journal, 16 (1), SIAC, Wolters Kluwer, 2020, pp. 49-68, p. 53.

[47] Avraham, R.,Wickelgren, A.,*Third-Party Litigation Funding — A Signaling Model*, 63 DEPAUL LAW REV 2014, p. 256.

[48] Wendel, W. B. (2019), p. 48.

entitled to transfer settlement rights, and the injunction was essential to protect their contractual rights. Ultimately, Sysco and Burford settled privately, with Sysco assigning all its claim rights to Burford, eliminating any chance of Sysco settling the claims independently. This resolution left the enforceability of Burford's arbitral award untested in New York courts but supported the arbitrators' decision validating the injunction and Sysco's right to assign settlement rights.[49]

The views of legal theorists on TPF cover a broad spectrum of opinions, ranging from those who hail it as "likely the most important development in civil justice of our time"[50] to those who are sceptical and assume that litigation finance will encourage frivolous litigation and allow profit-seeking investors to dominate our civil justice system.[51] Scholarly and professional reviews are dominantly forward-looking; they primarily focus on the effects of litigation finance after a legal claim has been made and a party seeks funding. However, the impact of TPF on parties' behaviours *before* and *after* litigation cannot be overlooked.[52] Some authors argue that TPF serves as an enforcement mechanism, enhancing the likelihood that parties can effectively enforce their legal rights, thus influencing pre-litigation behaviour by reducing the probability that e.g. a contracting party will breach the agreement.[53] It aids liquidity - or risk-constrained litigants in initiating legal actions and supports them in securing better legal representation, developing stronger litigation strategies, and resisting financial pressures to settle for less than the full value of their claim.[54] Revealing both the existence of litigation funding and the identity of the funder – but not the entire content of Litigation Finance Agreement (LFA) - to the opposing side during the litigation can serve as a strategic advantage. If the funder is known for meticulously evaluating and investing in cases with a high likelihood of success, this disclosure may signal the strength of the case to the opposing party.

[49] For broadercomment, see: Baker, T.,*What Litigation Funders Can Learn About Settlement Rights From the Law of Liability Insurance*, Institute for Law and Economics, University of Pennsylvania Carey Law School, Research Paper n. 23-41, [Electronic version], 2023, Retrieved April 11, 2024, from https://ssrn.com/abstract=4638617

[50] Steinitz, M.,*Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1075, 2019.

[51] Kidd, J.,*To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613, 627–29, 2012; Rubin, P. H., *Third-Party Financing of Litigation*, 38 N. KY. L. REV. 673, 675, 2011.

[52] Bedi, S., Marra, W. C., *The Shadows of Litigation Finance*, 74 Vanderbilt Law Review 563, 2021, p. 570.

[53] *Ibid*., pp. 591-602.

[54] *Ibid.*

The balance of enabling access to justice through TPF while preventing potential conflicts of interest and ensuring fair outcomes for all parties involved remains a critical issue in the ongoing evolution of litigation funding, but given the multifaceted complexity of TPF, a "one-size fits all" approach could be inappropriate.[55] Certain concerns are largely unfounded, and those that are valid can be addressed through an appropriate regulatory framework, where transparency in the process is crucial for assessing the funder capital adequacy, funders' share in awarded sums, business models of funders, and determination of the absence of conflict of interest.

2.3. Charting the Course for a Sustainable Third-Party Funding

At the moment TPF is mostly unregulated, although the TPF landscape has witnessed significant evolution in the recent years. It's evident that the lack of regulation does not meet the challenges posed by the rapid development of this practices, despite the fact that the operation of TPLF as a distinct business model contributes to its robust self-regulation.[56]

In Europe, the TPF industry is most developed in England and Wales, the Netherlands, and Germany,[57] although the degree of acceptance varies within the judiciary.[58] In jurisdictions like the UK, where TPF has a longer history, there has been a shift from initial self-regulation, characterized by voluntary codes created by associations of third-party funders,[59] to the development of more formal codes of conduct for litigation funders.[60]

TPF found a welcoming environment in international and domestic arbitration, favoured for its alignment with party autonomy and the commercial interests of private entities.[61] Several arbitral institutions, such as

[55] Kramer, X., in Cordina, A.,Storskrubb, E., *The Future of Regulation of Third-Party Litigation Funding in Europe*, Conference Report, 2022, Erasmus University Rotterdam.

[56] Marquais, O.,Grec, A., *op.cit*., p. 59. For an economic analysis of law regarding the TPF, see: Cordina, A., Is *It All That Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation Funding in Europe*, Erasmus Law Review, 2021, no. 4, pp. 270-280.

[57] Stadler, A., *Third Party Funding of Mass Litigation in Germany: Entrepreneurial Parties – Curse or Blessing?*, Privatizing Dispute Resolution (eds. L. Cadiet, B. Hess & M.R. Isidro), 2019, pp. 209-231, p. 209. Also, Lohmann, U. et al, Litigation Funding 2024 (Germany): Trends and Developments, 2024, https://practiceguides.chambers.com/practice-guides/litigation-funding-2024/germany/trends-and-developments/O16152

[58] Cordina, A., *op.cit*., p. 271.

[59] Jackson, R., "Review of Civil Litigation Costs: Final Report", p. 119.

[60] For example, see. Code of Conduct for Litigation Funders for England and Wales, available at https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf

[61] Chatterjee, P., Singhania, A., Gel B., Third-Party Funding: Treading on Thin Ice, [Electronic

ICSID in 2022[62] and ICC in 2021,[63] have incorporated rules addressing TPF with a focus on disclosure requirements concerning the involvement and identity of funders.

In contrast, the European Parliament proposed a much stricter regulatory framework in its Resolution 2022.[64] Originating from ideas by German MEP Axel Voss,[65] the resolution suggests a European Directive to regulate third-party litigation funding. The Recommended Directive Proposal on responsible financing does not mandate the acceptance of the third-party funding (TPF) mechanism for Member States, but if they choose to do so, the directive proposal demands adherence to the specified minimum standards.[66] Where third-party funding activities are permitted, Member States are required to establish a system for the authorization and monitoring of litigation funders' activities within their territory. The *Recommended proposal of a directive* includes creating an authorization system for funders with capital requirements, setting up supervisory authorities, introducing a fiduciary duty towards clients, mandating specific terms for funding agreements, prohibiting influence on dispute management, capping funder profits at 40% of the award, preventing funders from limiting liability for adverse costs, and requiring the disclosure of complete funding agreements under certain conditions.[67]

The European Parliament report portrays a largely negative stance on TPLF, emphasizing its perceived drawbacks and potential for misuse rather

version], 2023, Retrieved February 27, 2024, from https://arbitrationblog.kluwerarbitration.com/2023/08/27/third-party-funding-treading-on-thin-ice/

[62] https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf

[63] https://iccwbo.org/news-publications/news/icc-court-releases-updates-to-its-note-ahead-of-2021-icc-arbitration-rules/

[64] European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)). https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.pdf

[65] REPORT with recommendations to the Commission on Responsible private funding of litigation, 25.7.2022 - (2020/2130(INL)). https://www.europarl.europa.eu/doceo/document/A-9-2022-0218_EN.html

[66] Recital 3 and 7 of the Proposal. This is evident from Article 4 of the Recommended proposal, which states that Member States may decide, in accordance with their national laws, whether to permit third-party funding agreements in connection with proceedings within their jurisdiction, for the benefit of claimants or intended beneficiaries residing within their territory.

[67] For detailed analysis pro et contra on disclosure obligations, see: Mandatory Disclosure Rules for Dispute Financing, Center on Civil Justice, New York University School of Law. https://www.law.nyu.edu/sites/default/files/CCJ%20Mandatory%20Disclosure%20Book.pdf

than its promotion.[68] This is not the EU's first regulatory attempt at TPLF - the Collective Redress Directive[69] allows member states to enable private TPF though without a clear stance on how much consumers should be able to lose from their compensation if the lawsuit succeeds.[70] TPLF in Europe, still developing, has shown no major abuses, suggesting that a proportional regulatory framework is more suitable than a complete ban.[71] Such frameworks should balance the need to prevent misuse without unduly hindering legitimate business models of funders or limiting access to justice. Given the dominantly procedural nature of rules on TPF, in the absence of harmonised procedural rules in the EU, many aspects of litigation costs regulation will still be regulated at the domestic level and the potential EU approach would likely be a piecemeal one.[72]

3. Controlling and Enforcing Litigation Funding Agreements in Cross-Border Context

Litigation funding represents a significant and modern development, transcending national boundaries to operate within an international framework.[73] Considering TPF in cross-border litigation raises several issues. Firstly, the fundamental dilemma is whether TPF, as a concept based on a LFA, is predominantly procedural or substantive in nature. The relationship between the funder and the funded party in the process appears as a contract of a predominantly substantive legal nature, which involves the provision of services. It seems evident that the rules governing the permissibility of financing litigation costs through third-party funds are of procedural nature, highlighting their application as procedural *lexfori*. The permissibility and conditions under which TPLF is allowed—in terms of obligations towards

[68] Meller-Hannich, C., Gsell, B., *Die Regulierung privater Prozess finanzierung in der EU Entschließung und EU-Richtlinienvorschlag: Legitime Ziele, überschießende Umsetzung?*, pp. 160-164. [Electronic version], 2023, Retrieved February 28, 2024, from https://anwaltsblatt.anwaltverein.de/files/anwaltsblatt.de/anwaltsblatt-online/2023-160.pdf

[69] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.409.01.0001.01.ENG

[70] Art. 10 in connection to the art. 12 (2) of the Collective Redress Directive (EU) 2020/1828n.

[71] Meller-Hannich C., Gsell, B., op.cit., pp. 160-164.

[72] Professor Van Calster in Cordina A. And Storskrubb E., *The Future of Regulation of Third-Party Litigation Funding in Europe*, Conference Report, 2022, Erasmus University Rotterdam.

[73] Hodges, C., Peysner, J., Nurse, A., *Litigation Fundings: Status and Issues*, Research Report, Centre for Socio-Legal Studies, Oxford and University of Lincoln Law School, 2012, p. 38.

the court and the opposing party, disclosure requirements, transparency, conflicts of interest, fiduciary duty, prohibition of influence on parties, and responsibility for adverse costs—are typically regulated by procedural law, which in turn impacts the content of litigation financing contracts and consequently, the substantive legal relationships between the financier and the funded party. Such approach is visible for arbitration rules and those rules which regulate TPF.[74] Power of the court or arbitral tribunal to order disclosure of the funding agreement seems crucial for the exercise of any form of control over procedural effect of third party funding arrangement.

The issue of confidentiality, especially in arbitral proceedings, necessitates careful consideration. Funders are typically not subjected to the same professional ethical rules as lawyers concerning the handling of confidential information and conflicts of interest. Consequently, concerns have been voiced[75] about the absence of legislative or professional restrictions preventing TPF from utilizing information from one party in a separate funded case for a different party.

Maintaining ethical standards in third-party legal funding is complex, especially in relation to attorney-client privilege and lawyer independence. Legal privilege ensures client confidentiality, prohibiting attorneys from sharing protected information with third parties like funders without clear consent from the client. This confidentiality is essential for maintaining the integrity of the legal process and safeguarding client interests from external pressures.[76] Additionally, the independence of lawyers is crucial in preventing undue influence from funders who have a financial interest in the case. Such funders might push for premature settlements or discontinuation of the case under unfavourable terms. Lawyers must act in their clients' best interests, avoid advising funders, take instructions solely from their clients, and avoid meeting funders without the client being present.[77] This situation presents a tension between the transparency needed by funders to evaluate a case and the lawyers' ethical necessity to protect client interests. In some jurisdictions, such as Turkey, Portugal, and Sweden, information held by a funder, unlike that held by a lawyer, is not protected by professional secre-

[74] E.g. ICC Arbitration Rules and VIAC Rules introduce a requirement of party disclosure of third-party funding arrangements. Lazić, M. , Savić M., *Third Party Funding and Access to Justice*, Revija Kopaoničke škole prirodnog prava, 2/2021, p. 137.

[75] *Ibid*., p. 141.

[76] Marquais O. and Grec A., "Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore vs. France", Asian International Arbitration Journal, Vol. 16 (1), SIAC, Wolters Kluwer, 2020, 49-68, p. 65-66.

[77] *Ibid*.

cy.[78] Consequently, a funder might be required, for example, by a court order, to disclose this information. Additionally, sharing information with a funder could be interpreted as waiving the secrecy typically granted, making the information potentially admissible as evidence. This risk can be mitigated by drafting a carefully worded confidentiality agreement.[79] Some civil law jurisdictions are exploring ways to extend privilege protections to include funders. Another approach to ensuring secrecy is for the funder to hire its own lawyers to review the case, thereby benefiting from the lawyers' professional secrecy protections.[80]

It seems that one of the crucial questions is how much autonomy do parties in funding agreement enjoy. Litigation investment is a complex form of economic activity that does not neatly fit into traditional categories such as commercial lending, insurance, joint ventures, venture capital, or alternative lawyer-client fee arrangements. It is better understood as a relational contract—a long-term commercial relationship where the parties' rights and obligations evolve over time and may be adjusted based on changing circumstances.[81] This approach recognizes litigation investment as involving shared ownership of a cause of action, viewed as an asset whose value can fluctuate based on the behaviour of the involved parties.[82] Civil law countries in Europe have taken a relatively *laissez-faire* stance towards this funding method, lacking specific legislation and having limited case law, thereby allowing industry stakeholders to define the regulatory framework. LFAs are typically confidential and seldom exposed to professional scrutiny,[83] which significantly complicates detailed analysis of TPF practices.

LFAs are increasingly recognized as *sui generis* contracts, which means they are unique and do not fit neatly into traditional contract categories. As such, general principles of contract law are applicable to LFAs.This flexibility does not necessarily guarantee adequate protection for claimants, who are often legal entities and thus outside the scope of consumer protection laws designed for natural persons.

[78] The ICCA Report, p. 137.

[79] This seems as an effective protection for secret information in Netherlands, Russia, Germany and Japan. The ICCA Report, fn 321 p. 137.

[80] *Ibid*.

[81] Sebok, A. J., Wendel, W. B., *Duty in the Litigation-Investment Agreement: The Choice between Tort and Contract Norms when the Deal Breaks Down*, (2013). Cornell Law Faculty Publications, p. 670.

[82] *Ibid*.

[83] Steinitz, M., Field, A., *A Model Litigation Finance Contract*, Scholarly Commons at Boston University School of Law, Boston University School of Law, 2014, pp. 711-771.

Along with classifying the contract as sui generis,[84] there are also suggestions to consider LFAs as composite contracts.[85] In some jurisdictions, qualification of the LFAs depends on the type of the funded case, e.g. in collective action cases the funder will usually have a much more active role in managing and steering the litigation. The agreements between the funder and the individual clients will then generally be structured as a contract for services rather than a mere funding agreement, including provisions that enable the funder to manage the litigation.[86]

The multifaceted nature of TPF was highlighted in the case before the UK Supreme Court[87], in which the Court challenged the legality of LFAs, holding that LFAs that allow funders to recover a percentage of damages are, in fact, damages-based agreements (DBAs) and enforceable only if they comply with the detailed legal regime for DBAs. This ruling, which overturned previous decisions by lower courts, casts doubt on the future of TPF, indicating a need for a thorough review of existing LFAs in light of this significant judgment. Until this moment, DBAs had generally been seen as agreements that only lawyers or other advisers – and not funders – would (or even could) enter into with claimants.[88] However, since then, draft legislation has been introduced to carve out opt-out collective proceedings from the effect of the judgment, the Competition Appeal Tribunal has approved funding agreements that provide for the funder's remuneration to be calculated as a multiple of the funds provided or a percentage of any damages to the extent enforceable and permitted by law, and the Ministry of Justice announced that the Lord Chancellor will introduce legislation to restore the litigation funding position that existed before PACCAR.[89]

[84] The parties' respective rights and obligations can be freely defined in the funding agreement, the sole limitation being violations of public policy. Given the lack of a statutory framework or specific legislation, the funding agreement should be comprehensive and should stipulate all aspects of the parties' relationship.Fremault, E., *Spotlights: structuring litigation funding agreement in Luxembourg*, Deminor Litigation Funding, [Electronic version], 2022, Retrieved March 4, 2024, from https://www.lexology.com/library/detail.aspx?g=9dc78bcb-0e06-41f8-84d0-08de7f05e635

[85] Marquais, O., Grec, A., *op.cit.,*p. 65.

[86] For Belgium, see: Spotlight: structuring litigation funding agreemens in Belgium, Deminor Litigation Funding, [Electronic version], 2022, Retrieved March 4, 2024, from https://www.lexology.com/library/detail.aspx?g=2975ff09-9b04-414a-ace4-9a8117677fa4

[87] R (on the application of PACCAR Inc. and Others) v. Competition Appeal Tribunal and Others. https://www.supremecourt.uk/cases/uksc-2021-0078.html

[88] Supreme Court deals blow to litigation funders in CAT, Slaughter and May, 2023. Available at https://www.lexology.com/library/detail.aspx?g=c1646ad0-7426-4c35-9ef3-4ceb9547c4c6

[89] Litigation Funding Agreements: Developments Since PACCAR, Cooley LLP, 2024. Available

The feasibility and enforceability of LFAs may be problematic if these agreements are considered contrary to public policy or illegal. The contractual autonomy in LFAs is restricted by mandatory rules that are typically contained in the procedural law of the jurisdiction where the case involving the litigation funder is being processed.

Just as the concept, nature, rights, and obligations arising from LFAs are not precisely defined, the status of litigation funders is also not clearly regulated. Are they financial services providers or legal services providers?[90] If they are perceived as the latter, they can first and foremost be considered as having duties to their client and to the court.[91] Litigation funders represent a new category of financial players that currently fall outside traditional financial service regulations. Given their growing influence in the justice system, it might be appropriate to view them as 'systemically important' to the judicial process, warranting specific regulatory oversight of their corporate governance. However, self-regulation has shown limited effectiveness in ensuring compliance and ethical behaviour.[92] This suggests a need for more robust, enforceable regulations to govern the activities of litigation funders to safeguard the integrity of the justice system.[93]

4. Conclusion

TPF is a swiftly expanding and largely unregulated practice that leaves no one indifferent, reflecting its wide array of potential benefits and concerns. As TPF continues to evolve globally, it is evident that the uncertainties and challenges inherent in its contractual frameworks must be systematically addressed through legislative amendments and judicial precedents. If these issues remain unresolved, TPF may only serve a limited and unpredictable role in the justice delivery system.

at https://www.lexology.com/library/detail.aspx?g=6f7041a6-1104-496e-8ed7-2ae46f01ad34

[90] Professor Van Calster in Cordina A. And Storskrubb E., „The Future of Regulation of Third-Party Litigation Funding in Europe", Conference Report, 2022, Erasmus University Rotterdam.

[91] *Ibid*.

[92] For example, in the United Kingdom, only a quarter of the funders belong to the Association of Litigation Funders, which enforces a self-regulatory code. The penalties under this code, such as a 500 GBP fine or expulsion from the association, are relatively mild and do not effectively deter misconduct. Uncharted Waters. An Analysis of Third-Party Litigation Funding in European Collective Redress; US Chamber Institute for Legal Reform, October 2019. Available at https://www.pf.uni-lj.si/media/analysis_of_tplf_funding_in_the_european_collective_redress.pdf

[93] https://www.amchameu.eu/system/files/position_papers/tplf_final.pdf

The necessity for flexible regulation is clear. Policymakers and legislators are urged to establish a specific regulatory framework for TPF, grounded in a comprehensive analysis of its pros and cons, supported by robust legal theory research. This regulatory framework should initially take a principled stance on the permissibility of TPF. The enforceability of Litigation Funding Agreements can be contentious, particularly if these agreements are deemed contrary to public policy or illegal. Given that the contractual autonomy in LFAs is often circumscribed by mandatory rules in procedural law, ignoring these complexities is not feasible. For the sake of legal certainty, predictability in legal relationships, and enhancing transparent access to justice, it is imperative to strike a balance. This balance must not stifle TPF where it can genuinely improve access to justice and level the playing field for parties with significant economic disparities.

Furthermore, resolving potential conflicts between funders and funded parties warrants attention. Given the expected professionalism of funders, it is likely that Litigation Funding Agreements will include a clause for choosing the governing law. Given that such contracts are often classified as sui generis, where general contract law rules apply, the determination of governing law for an LFA with a cross-border element, in the absence of a chosen law, would typically invoke conflict of laws rules, with the funder's characteristic performance as the relevant criterion, thereby applying the law of the funder's domicile. This approach underscores the importance of a nuanced and well-informed regulatory strategy to govern this complex field.

Summary

Third-Party Funding is rapidly expanding and largely unregulated, significantly impacting the legal landscape with its potential benefits and challenges. As TPF evolves globally, the need for a clear regulatory framework becomes apparent, especially to address the uncertainties in its contractual frameworks through legislative changes and judicial precedents. Without proper regulation, TPF might only serve a limited and unpredictable role in justice systems. A flexible regulatory approach is crucial. Policymakers and legislators are urged to create specific regulations for TPF, grounded in thorough analysis of its advantages and disadvantages. These regulations should clarify where TPF is permissible, ensuring legal certainty and transparent access to justice. This is vital, as the enforceability of Litigation Funding Agreements (LFAs) can be contentious, especially if these agreements conflict with public policy or legal norms. TPF is likely to remain a permanent fixture in the legal system, and ignoring it will not mitigate potential

negative effects such as disproportionate profits for funders, vulnerability of funded parties, and the risk of contract terminations. Issues such as the fundamental permissibility of TPF, conditions for its use, and court oversight fall within procedural law and are vital for maintaining fair legal processes. Moreover, addressing potential conflicts between funders and funded parties is essential. This emphasizes the importance of a well-informed regulatory strategy that can adapt to the complexities of TPF and ensure it continues to facilitate access to justice without compromising the fairness of the legal system.

Keywords: *Third-Party Funding (TPF), Litigation Funding Agreements (LFAs), cross border litigation, access to justice.*

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