

Tena Ratković*

PRIVATE INTERNATIONAL LAW ASPECTS OF SUCCESSION – THE CROATIAN EXPERIENCE**

SUMMARY

This paper presents a comparison between private international law of succession in Croatian law and the Regulation No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession - Succession Regulation. The comparison is based on demonstration of jurisdictional rules, rules on applicable law, recognition and enforcement and the issue of *bona vacantia*. A special emphasis is put on the case law of Croatian courts, which is limited, but does provide a basic scheme of the system. The comparison shows the inadequacy of Croatian solutions that will soon be abolished due to entry into force of the EU Succession Regulation.

Key words: private international law of succession, Succession Regulation/ Regulation No 650/2012, Croatian law, *bona vacantia*.

INTRODUCTION

The European Union (hereinafter: EU) has recognised the importance of both disseminating information on the internal succession laws of Member States¹⁾ and of regulating the private international law of succession.²⁾ The value of regulating succession matters in their private international law aspect lies in ensuring “[t]he proper functioning of the internal market [which] should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications. In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and legatees, of other persons close to

* LL.M. (Aberdeen), Faculty of Law University of Zagreb.

** This paper is the result of the workshop “Cross-Border Litigation in Europe” organised as a part of the Lifelong Learning Programme of the European Union (the Jean Monnet Scheme) by the University of Aberdeen (UK) on 30-31 May 2013.

1) The European Commission co-financed the creation of a web site that provides information on succession in the EU Member States <http://www.successions-europe.eu/> (European Commission Program JLS 2007-2013, *Project JLS 2007/CJ/2007-1/32*).

2) 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 acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ 2012 L201/107 (Succession Regulation). For the history of the legislative process see: P. Terner, Perspectives of a European Law of Succession, *Maastricht Journal of European & Comparative Law (Maast. J. Eur. & Comp. L.)*, 14/ 2007, 147-178.

the deceased and of creditors of the succession must be effectively guaranteed.”³⁾

Whereas the EU is constantly bringing new legislation in the field of private international law, in the Republic of Croatia, prior to accession to the EU, the private international law, including that of succession, was regulated by an older piece of legislation. The Act on Resolution of Conflicts of Laws with the Provisions of Other Countries in Certain Matters⁴⁾ (hereinafter: Croatian Private International Law Act, Croatian PIL Act) stems from 1982 and has been transposed into the Croatian legal order in 1991. However, it is still applicable in succession matters since the EU Succession Regulation only applies after 17 August 2015.⁵⁾ It will be shown that its provisions are detached from modern trends both in the jurisdictional and the applicable law sphere. However, the Act is currently being revised, but it has still not entered the Parliamentary procedure.

This paper will present the private international law of succession in the Republic of Croatia and a parallel will be drawn to the EU Succession Regulation. Firstly, the Croatian legal sources will be presented. Secondly, the jurisdictional rules in succession matters will be demonstrated – in the EU law and in the Croatian law. A due regard will be paid to the current regime that differentiates between jurisdiction for movable and immovable property of domestic or foreign nationals whereas the Succession Regulation mainly focuses on habitual residence. After that, the rules on the applicable law will be presented looking at the Succession Regulation and then the main connecting factor that is momentarily in force in Croatia – *lex patriae* of the deceased. The rules on jurisdiction and enforcement will also be briefly discussed. All the chapters will contain a limited overview of Croatian case law. An interesting issue of *bona vacantia* will also be tackled before the concluding remarks that will comment on compatibility of Croatian law to the EU Succession Regulation.

1. Croatian Legal Sources

The main act regulating private international law of succession is the Croatian PIL Act, ie its Articles 30 and 31 on the applicable law and the jurisdictional rules set in Articles 71-73. However, the general rules from the same Act are applicable to matters of succession as well. Primarily, the provisions on public policy (Article 4), *fraus legis*⁶⁾ (Article 5), *renvoi*⁷⁾ (Article 6), non-unified

3) Preamble to the Succession Regulation, Recital 7.

4) Official Gazette of Ex SFRY Nos. 43/1982, 72/1982, OG of the Republic of Croatia No. 53/1991.

5) Except from some rules on examination of admissibility, certain Commission's duties and designation of a Committee to assist the Commission.

6) Evasion of law mechanism is even allowed under the Succession Regulation as stated in Recital 26 of its Preamble.

7) The Croatian rule says that the foreign private international rules “should be taken into consideration” and that remission should be to the internal law. The doctrine finds that this wording is not obligatory, ie that the foreign private international rules should only be applied when appropriate. K. Sajko, *Međunarodno privatno pravo*, 5th ed., Narodne novine, Zagreb, 2009, 203.

legal systems⁸⁾ (Article 10), persons with more than one nationality (Article 11) and stateless persons (Article 12). The rules on recognition and enforcement of judgments set in Articles 86-96 of the Croatian PIL Act are equally applicable to matters of succession.

Additionally, some provisions on succession of foreigners can be found in the provisions of substantive law. The Act on Succession⁹⁾ requires reciprocity when it comes to foreigners' right to inherit. Reciprocity is presumed until proven otherwise as it was stated by the Supreme Court of the Republic of Croatia which held that "as far as the reciprocity in succession in certain states, the practice starts from a presumption that the reciprocity in succession matters exists with all the states – until the opposite is proven."¹⁰⁾ Additionally, such reciprocity can either be legal or factual reciprocity.¹¹⁾ An interesting case on proving reciprocity and its relation to the right to a fair trial occurred before the Constitutional Court of the Republic of Croatia.¹²⁾ The case concerned an applicant who was a national of the Hashemite Kingdom of Jordan and who was to inherit some property in a matter brought before a Croatian court. The court sought a declaration from the Ministry of Justice on the issue of reciprocity in inheritance between Croatia and Jordan which it was unable to obtain between 1994 and 2003 although the declaration was sought on several occasions in 1995, 1999 and 2000. The Constitutional Court held that the applicant's right to a fair trial was breached and she was awarded reimbursement. The Court noted that although it can be held that the main reason for such a lengthy procedure lies in the conduct of the Ministry, this cannot exonerate the state according to the European Court of Human Rights' case law since the states have to organise their judicial system appropriately in order to ensure that the right to a fair trial is safeguarded.¹³⁾ It is unclear from the facts of the case why such a declaration was sought altogether, that is in which manner the presumption of reciprocity was rebutted.¹⁴⁾ The case shows how the requirement of reciprocity may cause unnecessary hardship notwithstanding the existence of the presumption. Now as an EU Member State, Croatia needs to abolish any such requirement towards EU citizens since their procedural position should be equal to the one of domestic citizens.¹⁵⁾ When it comes to the

8) The rule differs in phrasing from the Succession Regulation which is more detailed, but the reasoning behind the both is the same – application of either the rules of a non unified system itself or the internal law that is most closely connected to the issue.

9) Act on Succession, OG Nos. 48/2003, 163/2003, 35/2005, Article 2/2.

10) Judgment Rev 3341/1993-2 of the Supreme Court of the Republic of Croatia of 23 June 1994.

11) Đ. Vuković/E. Kunštek, *Međunarodno građansko postupovno pravo*, Zgombić i partneri, Zagreb, 2005, 150 and 476.

12) Judgment U-III/A/1335/2004 of the Constitutional Court of the Republic of Croatia of 8 December 2004.

13) Eg *Buchholz v Federal Republic of Germany* (1981) 3 EHRR 97; *Guincho v Portugal* (1985) 7 EHRR 223.

14) According to Poznić, the presumption of reciprocity may not only be rebutted by a party, but the court may also rebut the presumption based on its knowledge of lack of reciprocity with the relevant state. See: B. Poznić, O priznanju i izvršenju stranih sudskih i arbitražnih odluka, *Anali Pravnog fakulteta u Beogradu (Ana. Prav. Fak. u Beog.)*, 6/83, 1064-1065 as referred in Varady *et al.*, *Međunarodno privatno pravo*, 10th ed., 2008, Faculty of Law, University of Belgrade, Belgrade, 556.

15) Eg Case C-122/96 *Stephen Austin Saldanha and MTS Securities Corporation v Hiross Holding AG* 1997 [ECR] I-05325.

active succession capacity – the capacity to be a testator – although the issue is not regulated, it is thought that foreign nationals have the same capacity as domestic ones and no reciprocity is needed.¹⁶⁾ The Act on Property and Proprietary Rights¹⁷⁾ allows foreigners to inherit real estate in Croatia under the requirement of reciprocity¹⁸⁾ and therefore provides a solution parallel to the one in the Act on Succession. However, the area where the property is situated can be declared an area that cannot be owned by foreigners in order to protect interest and safety of the Republic of Croatia.¹⁹⁾ If such a property is to be inherited by a foreigner, he/she will have the right to reimbursement according to rules on expropriation. Such a property will be acquired by the Republic of Croatia that will become a debtor for the reimbursement.²⁰⁾ Still, these rules are not applicable to the EU citizens, neither to natural nor legal persons.²¹⁾

Special rules on acquiring immovable property by foreigners can be found in the Act on the Protection of Nature²²⁾ that prohibits them to acquire real estate in specially regulated parts of nature such as national parks, strict reserves, parks of nature etc. However, this restriction is not applicable to EU citizens according to Article 358a/2 of the Act on Property and other Proprietary Rights. The Act on Agricultural Land²³⁾ also restricts ownership of foreigners, but this is inapplicable to matters of succession.²⁴⁾ Therefore, if a foreigner is to inherit a farmland in Croatia, he/she can do it under the same conditions as the Croatian citizen.

In addition to the substantive law and the private international law, there are a few bilateral and multilateral agreements relevant to the succession matters with an international element. When it comes to the bilateral agreements, Croatia is a signatory to a number of bilateral agreements on legal assistance and on recognition and enforcement of decisions in civil matters.²⁵⁾ These agreements take precedence over multilateral agreements as a form of the *lex specialis*. Additionally to the bilateral agreements, Croatia is a signatory to three multilateral

16) I. Medić Musa, Kolizijski aspekti nasljeđivanja s međunarodnim obilježjem, *Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, 4/2006, 358.

17) Act on Property and Other Proprietary Rights OG Nos. 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 129/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 143/2012, Article 357/1.

18) Judgment Gž 424/03-2 of the County Court in Varaždin of 10 April 2003 confirms that for succession of real estate, the foreigners need not seek approval from the Ministry of Justice, unlike for the other ways to acquire real estate. The Court held: 'According to that provision of law, foreign nationals have the same rights in the Republic of Croatia as the domestic nationals, under condition of application of the principle of reciprocity. Thus, it is decisive whether there is reciprocity concerning succession of real estate between the Republic of Croatia and Slovenia.'

19) Act on Property and Other Proprietary Rights, Article 358/1.

20) *Ibid.*, Article 358 b.

21) *Ibid.*, Article 358 a.

22) OG Nos. 70/05, 139/08, 57/11, Article 113.

23) OG No. 39/13, Article 2/3.

24) Before such a provision was included into the legislative text, it was considered that in case of inheritance, the property would be expropriated by the State in the same manner as with the real estate under the Act on Protection of Nature. I. Medić Musa, 359-360.

25) K. Sajko, 47-54.

conventions in this field. Firstly, there is the Convention providing a Uniform Law on the Form of an International Will of 26 October 1973.²⁶⁾ Secondly, there is the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.²⁷⁾ When it comes to the mentioned two conventions, it is clear why they are important in matters of succession since they directly regulate form of wills which is indubitably part of the law of succession. However, there is another, maybe not so obviously relevant multilateral agreement, Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.²⁸⁾ The court practice has shown that this Convention may be found very useful for avoiding legalisation of eg succession certificate issued and certified by an authorised court officer²⁹⁾ or successor's declaration concerning succession.³⁰⁾ The Succession Regulation expressly states that no legalisation shall be required regarding documents issued in a Member State in context of that Regulation.³¹⁾

Looking at the private international law of succession, the requirement of reciprocity seems to be a bit problematic. As seen in the case law, it can produce unnecessary prolongation of the proceedings and thereby unwanted costs. Still, the presumption of reciprocity and proving either factual or legal reciprocity should serve the aim of facilitation of determining how the Croatian nationals are treated in the relevant foreign country. However, the reciprocity requirement is of no importance towards EU nationals due to general prohibition of discrimination based on nationality.³²⁾ When it comes to legal sources on the international level, Croatia is the signatory to the most important international treaties in this area³³⁾ and has concluded numerous bilateral treaties.

26) OG of the Ex SFRY, Int'l Treaties and Other Agreements No. 10/1962. Croatia succeeded to the Convention via a Notification on Succession, OG Int'l Agreements No. 03/1995.

27) OG of the Ex SFRY, Int'l Treaties and Other Agreements No. 10/1962. Croatia succeeded to the Convention via a Notification on Succession, OG Int'l Agreements No. 4/1994.

28) OG of the Ex SFRY, Int'l Treaties and Other Agreements No. 10/1962. Croatia succeeded to the Convention via a Notification on Succession, OG Int'l Agreements No. 4/1994.

29) Judgment Gž-6263/08-2 of the County Court in Zagreb of 23 November 2008. As an obiter dictum the court said that "one has to bear in mind that declarations of heirs, regarding succession, are to be deemed public documents under Articles 1 and 2 of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents [...] and shall thus be exempted from legalisation."

30) Judgment Gž-4123/12-2 of the County Court in Zagreb of 20 June 2012.

31) Succession Regulation, Article 74. The Succession Regulation in its Article 59 also prescribes that all authentic instruments will have the same evidentiary effect in another Member State as in the Member state of origin, as long as such effects are not manifestly contrary to the public policy of that state.

32) Treaty on the Functioning of the European Union OJ C 326, 26. October 2012, Article 18.

33) There are two more conventions negotiated in the Hague Conference that were not as successful: Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons so far ratified only by Czech Republic, Slovakia and Portugal and Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons that has only been ratified by Netherlands and thus has not entered into force yet. http://www.hcch.net/index_en.php (5 June 2013).

2. Jurisdiction

2.1. The Succession Regulation

The EU Succession Regulation aims to unify the private international law of succession “without having too significant an effect on the internal succession laws of EU Member States.”³⁴⁾ It still has a wide scope of application since it encompasses jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession³⁵⁾ and the creation of a European Certificate of Succession. The Regulation will apply from 17 August 2015 according to its Article 84 and it does not apply to UK,³⁶⁾ Ireland and Denmark that have not taken part in the adoption of the Regulation.

When it comes to jurisdiction, the unified solution seemed like a big step to take due to divergence in national laws. Some flexibility was thus suggested in the Regulation.³⁷⁾ The general forum is the place of the habitual residence of the deceased at the time of death.³⁸⁾ The unified rule was needed to diminish negative and positive jurisdictional conflicts.³⁹⁾ However, some flexibility was also necessary so subsidiary jurisdiction as well as *forum necessitates* were included in the Regulation. According to Article 10, the place where the deceased’s assets are situated will have jurisdiction if the deceased was either a national of that state, had his or her habitual residence in that state in the last five years or if none the above, the location of the assets will suffice for jurisdiction over those assets. The EU courts will also have jurisdiction if the jurisdiction cannot be based otherwise, the case is sufficiently connected to that Member State and the proceedings cannot be initiated or conducted in a third state.⁴⁰⁾ The court seised under general or subsidiary jurisdiction rules may decline jurisdiction in favour of the court of the chosen law on the motion of one of the parties and if the judge is satisfied that “the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets.”⁴¹⁾

34) R. Frimston, The European Union Succession Regulation (EU) No. 650/2012, *Private Client Business (P. C. B.)*, 6/2012, 213.

35) For more information see: J. Fitchen, “Recognition”, Acceptance and Enforcement of Authentic Instruments in the Succession Regulation, *Journal of Private International Law (Jour. P. I. L.)*, 2/2012, 323-358.

36) The main reasons against opting in were disagreements on administration of the estate and claw-back. See: P. Beaumont/P. McEleavy, *Anton’s Private International Law*, W. Green, 3rd ed., Edinburgh, 2011, Ch. 24.127.

37) “Green Paper - Succession and wills COM/2005/0065 final, Ch. 3.-3.1.; P. Tierney, 165-166.

38) Succession Regulation, Article 4. For justifiability of habitual residence as a jurisdictional criterion see: A. Duraković, Jedinstveno međunarodno nasljedno pravo u Europskoj uniji, *Aktualnosti građanskog i trgovačkog zakonodavstva i prakse*, 11/2013, 245.

39) Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (Succession Regulation Proposal), COM/2009/0154 final - COD 2009/0157, Ch. 4.2.

40) Succession Regulation, Article 11.

41) Succession Regulation, Article 6/1.

The parties are also allowed to conclude a choice of court agreement but their right is limited because it only allows for choice of court accompanied by choice of law⁴²⁾ since “[t]he rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law.”⁴³⁾ The agreement needs to be in writing, dated and signed by the parties. Parties can also expressly agree on jurisdiction of the court of the chosen law state after seising it.⁴⁴⁾ The Regulation also allows parties to the proceedings that were not party to the choice of court agreement to submit to the chosen jurisdiction, ie appear in the proceedings without contesting jurisdiction.⁴⁵⁾

Jurisdictional rules in the Succession Regulation include several objective connecting factors: habitual residence, nationality and location of the assets. They provide a reasonably wide jurisdiction to the EU national courts in succession matters as long as some connection to the state exists. The habitual residence of the deceased should ensure a “close and stable connection with the State concerned taking into account the specific aims of this Regulation.”⁴⁶⁾ Lack of habitual residence will either lead to subsidiary jurisdiction based primarily on the location of the assets or to *forum necessitatis* based on the lack of another appropriate forum. The rest of the Chapter II of the Regulation that is dedicated to jurisdiction in succession matters deals with procedural issues such as limitation of proceedings (Article 12), acceptance and waiver (Article 13), seising of the court (Article 14), examination as to jurisdiction (Article 15) and admissibility (Article 16), *lis pendens* (Article 17), related actions (Article 18) and security measures (Article 19). The *lis pendens* rule differs significantly from the Croatian one. The Succession Regulation prescribes the first come first served rule and the Croatian court can only stay the proceedings if foreign court was the first seised, if there is no exclusive domestic jurisdiction and in case of reciprocity.⁴⁷⁾ The EU *lis pendens* rule is easier to apply, but it still has its deficiencies when applied strictly in choice of court agreements.⁴⁸⁾ Although the rules differ, the outcome will often be the same when the exclusive jurisdiction is not given to the Croatian courts since the third requirement, the reciprocity, is presumed.

42) Succession Regulation, Article 5.

43) Preamble to the Succession Regulation, Recital 27.

44) Succession Regulation, Article 7/1/c.

45) In a case on interpretation of submission to a jurisdiction under the Brussels I Regulation the Court of Justice of the European Union held that submission even overrides the choice of court agreements. This case might be useful in the context of the Succession regulation. See: Case 150/80 *Elefanten Schuh GmbH v Pierre Jacqmain* ECR [1981] 01671, paras 10-11. In that case, the

46) Preamble to the Succession Regulation, Recital 23.

47) Croatian PIL Act, Article 80.

48) The same rule in the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ 2001 L12/1 (Brussels I Regulation) invoked some criticism when applied to choice of court agreements since it produced uncertainty and disregard of parties' expectations. See: R. Fentiman, Access to Justice and Parallel Proceedings in Europe, *Cambridge Law Journal (Camb. L. J.)*, 2/2004, 312-314; P. Břiza, Choice-Of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way Out of the Gasser-Owusu Disillusion?, *Journal of Private International Law (Jour. P. I. L.)*, 3/2009, 537-563.

2.2. Croatian Law

Domestic jurisdiction and the procedure are regulated by the Act on Succession.⁴⁹⁾ It is worth noting that the public notaries may act as the first instance court's commissioners⁵⁰⁾ and may thereby be considered courts under the Succession Regulation.⁵¹⁾ In private international law matters of succession, as already mentioned, the general rules on recognition and enforcement of foreign judgments are applicable, whereas there is a separate set of jurisdiction rules for succession. The rules differ depending on whether the property is movable or immovable and where it is located as well as on the fact whether the testator is a domestic national or a foreigner or a stateless person. The rules on jurisdiction encompass the jurisdiction for administration of the estate, succession disputes and creditors' claims.⁵²⁾

For immovable property situated in Croatia, the exclusive jurisdiction is given to Croatian courts notwithstanding whether the deceased person is a domestic or a foreign national.⁵³⁾ According to Article 71/2, Croatian courts may have jurisdiction for the immovable property of a Croatian national situated abroad, if foreign courts have no jurisdiction. In practice that will mean that the court has to check foreign rules on jurisdiction in order to determine its own jurisdiction. Exactly that was done in a case concerning a deceased person domiciled in Croatia who had immovable property in Bosnia and Herzegovina. According to then applicable rules in Bosnia and Herzegovina, their court would only have jurisdiction if the person was domiciled there. Therefore, the Croatian court concluded that it can be seized on the matter.⁵⁴⁾

If the property is movable, there is always elective jurisdiction for the property of Croatian testators situated in Croatia according to Article 71/3. For the property situated abroad, there is subsidiary jurisdiction of Croatian courts if the organ of where the property is situated has no jurisdiction according to its law or refuses to conduct the proceedings. An interesting case occurred in practice in which the movables of a deceased Croatian national were situated in France.⁵⁵⁾ According

49) Act on Succession, Articles 174-239.

50) *Ibid.*, Article 176.

51) Recital 20 of the Preamble to the Succession Regulation reads: 'This Regulation should respect the different systems for dealing with matters of succession applied in the Member States. For the purposes of this Regulation, the term 'court' should therefore be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession by delegation of power by a court. All courts as defined in this Regulation should be bound by the rules of jurisdiction set out in this Regulation. Conversely, the term 'court' should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of succession, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions.'

52) Croatian PIL Act, Articles 71/4, 72/3 and 73/3.

53) Croatian PIL Act, Articles 71/1, /2/1 and 73/1.

54) Judgment Rev 165/1993-2 of the Supreme Court of the Republic of Croatia of 24 January 1995.

55) Judgment Gž-5781/10-2 of the County Court in Zagreb of 9 November 2010.

to the French law, the French court would only have jurisdiction if the deceased person was domiciled in France or one of the parties was a French national.⁵⁶⁾ It is clear from the case that the deceased was domiciled in Croatia at the time of death, but it is unclear whether one of the parties was a French national as well as a Croatian national. The main problem is that the court did not investigate whether the foreign court has jurisdiction but concluded rather surprisingly that the Croatian court has jurisdiction invoking Article 30 of the Croatian PIL Act that designates the applicable law. However, even though the facts are not completely clear on the question whether one of the heirs who was a party in the proceedings held French nationality alongside the Croatian one, it is questionable what would the court conclude if the person really did have double nationality. Namely, Article 11/1 of the Croatian PIL Act states that “[i]f a person who is a citizen of the Republic of Croatia also has the nationality of another state, for the application of this Act he is considered to have only nationality of the Republic of Croatia.” Having that in mind, it is plausible that the Croatian court would completely disregard the foreign nationality. The phrasing of Article 71/3, is inconclusive but it would be purposeful to apply the foreign rules in the same manner the foreign court would apply them since the aim is to establish whether the foreign court could be seised under its own rules. Therefore, the Croatian court should look at the facts the same way the French court would and the Croatian rule on the primacy of domestic nationality should be disregarded.

When foreigners and movables situated in Croatia are in question, Croatian courts have jurisdiction, except if in the state of the deceased⁵⁷⁾ the court does not have jurisdiction as to the administration the movable property of a citizen of the Republic of Croatia, ie reciprocity is requested and everything said above on proving reciprocity applies. Even when the Croatian court has no jurisdiction in succession matters of a deceased foreign citizen, according to Article 72/4 of the Croatian PIL Act, the court may decide on measures to safeguard the estate as well as for the protection of the right to an estate which is in the Republic of Croatia. This is allowed under Succession Regulation whose Article 19 gives jurisdiction to issue protective measures to the courts of a Member State that has no jurisdiction as to the substance. However, there is no certainty that the Court of Justice of the European Union (hereinafter: CJEU, Court) will apply the criterion of the location of the assets in its interpretation of the Regulation which the

56) http://ec.europa.eu/civiljustice/publications/docs/report_conflicts_france.pdf (4 June 2013).

57) The deceased's state is the state of his/her nationality. If a non-unified system is in question, the problem will be resolved by application of Article 10 that reads: 'If the law of a state the legal order of which is not uniform is to be applied and the rules of this Act do not refer to specific area of jurisdiction in that state, the applicable law shall be determined according to the rules of that legal order. If the applicable law of the state the legal order of which is not uniform cannot be found in the way provided in paragraph 1 of this Article, the law of the area in that state which is most closely connected is to be applied.'

Croatian courts need to.⁵⁸⁾

As to administration of the movable property of a deceased stateless person, a person whose nationality cannot be determined or a person who has the status of refugee, the court of the Republic of Croatia has jurisdiction if the movable property is situated on the Croatian territory or if the deceased person was domiciled there at the time of death.⁵⁹⁾ For those of them that are not domiciled in Croatia, the rules on foreigners apply accordingly by regarding the country of domicile as their state of nationality.

In addition, no provision of the PIL Act regulates the choice of court agreements for succession matters particularly, which means that the general rule of Article 49 would be applied in case the parties to the succession dispute wanted to conclude a prorogation agreement.⁶⁰⁾ The conclusion is drawn from the wording of the relevant article that expressly excludes its application to marital matters, parental responsibility and parentage and maintenance. The rule allows the choice of a foreign court if at least one of the parties is a foreign citizen or has its seat abroad and the matter in question is not subjected to exclusive jurisdiction of domestic courts. Thus, in no case can a foreign court be prorogated in respect to immovable property of either a domestic or a foreign citizen situated in Croatia. A Croatian court may be prorogated if at least one of the parties is Croatian. It is worth mentioning that the parties are not allowed to conclude a prorogation agreement in internal disputes according to Article 178 of the Act on Succession. This should be of no importance for prorogation in cross border disputes since the legislator gave more freedom to the parties of a dispute with than without an international element. When compared to the Regulation, the freedom given to the parties is limited in both cases, just in a different manner. The only provision on submission agreement in the Croatian PIL Act states that when the jurisdiction of the domestic court depends on the defendant's consent, the consent is given by entering a plea on merits without contesting the jurisdiction. The wording as it stands gives no room for application of the provision to succession matters since jurisdiction does not depend on consent in succession matters. Therefore, with the entrance into force of the Succession Regulation, submission will be ascertained under Article 9 and established when the prerequisites have been fulfilled,

58) In Case C-523/07 *Proceedings brought by A.* [2009] ECR Page I-02805 para 47, OP 3 decided regarding protective measures in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 OJ 2003 L338/1 (Brussels IIbis Regulation), the Court held that the measure needs to be urgent, it must be taken in respect of persons in the Member State concerned and it must be provisional. Urgency is already a part of the text of Brussels IIbis, unlike the Succession Regulation. However, urgency should also be deemed as a prerequisite. The Court could follow the same logic and state that the measure needs to be taken in respect of the persons or assets in that Member State and it needs to be provisional.

59) The commentators of the Act state that there is an error in the provision and that it should be read that both the property and the domicile are within Croatia. M. Dika/G. Knežević/S. Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Nomos, Belgrade, 1991, 241. Unfortunately, the author of this paper was unable to find any case law relevant to the issue.

60) *Ibid.*, 233.

ie when there was a choice of court and not all of the parties before the court were the parties to the agreement but they still submit to the chosen court's jurisdiction.

Looking at the rules on jurisdiction altogether, they provide a wide platform for jurisdiction of Croatian courts. For Croatian nationals, they secure a forum even if the property is situated abroad providing a version of *forum necessitatis*. The rule is comparable to the EU one, but they are constructed differently since the whole jurisdictional scheme is different. Foreigners, on the other hand, are much less protected, especially having in mind that there is a requirement of reciprocity for movable property. This system is very different from the EU one that puts much less emphasis on the nationality of the deceased and the feature of the property. The main connecting factor for jurisdiction is the habitual residence of the deceased at the time of death and it encompasses jurisdiction for the whole of the property,⁶¹⁾ whereas the Croatian rules lead to fragmentation of jurisdiction. Since habitual residence was only introduced in the Croatian system as a connecting factor through international agreements,⁶²⁾ its application was not a very common one. On the other side, the habitual residence is very often used in EU legislation which could lead to some problems in its interpretation in the first few years of the EU membership. Thankfully, the Succession Regulation gives some guidance on weighting the factual circumstances in determination of the habitual residence of the deceased in its Preamble.⁶³⁾ Lastly, the Succession Regulation puts emphasis on the nationality of the deceased and the location of the assets in its rules on subsidiary jurisdiction whereas in the Croatian PIL Act these are the main criteria to base jurisdiction.

2.3. Case law examples

Example 1

Case designation: Supreme Court of the Republic of Croatia, application for the revision, Rev 3341/1993-2 of 23 June 1994.

Subject of the procedure: Revision of the procedure concerning the right to inherit the right to use a tomb.

Basic facts: The case presents the facts vaguely, but it is clear that it dealt with the succession of a tomb and a tomb place by a foreign citizen. One of the grounds for revision concerned the foreigner's right to inherit.

The applied law and provision: Article 5 of the Act on Succession.

The Court's decision: The Court confirmed the lower court's reasoning and

61) Succession Regulation, Article 4. However, some fragmentation is possible for the assets situated in a third state if it may be expected that the decision will not be recognised and enforced in that state (Article 12 of the Succession Regulation).

62) The PIL Act does not contain habitual residence as a connecting factor for any of the matters, but Croatia is a signatory to some Hague Conventions so it is bound to apply connecting factors contained therein. For conventions ratified by the Republic of Croatia see http://www.hcch.net/upload/statmtrx_e.pdf.

63) Preamble to the Succession Regulation, Recitals 23 and 24.

the right to use the tomb was inherited by the foreign heir since “as far as the reciprocity in succession in certain states, the practice starts from a presumption that the reciprocity in succession matters exists with all the states – until the opposite is proven. The opposite not only was not proven but the applicant does not allege it (there is no information in the case file).”

Possible decision under the EU law: The reciprocity is not asked for in the EU law and is surely abolished towards EU citizens. When it comes to third state residents, the situation is not as clear since the application of the Regulation is universal, but the Regulation does not encompass the question whether a foreigner can inherit property in a Member State.

Example 2

Case designation: Supreme Court of the Republic of Croatia, application for the revision, Rev 165/1993-2 of 24 January 1994.

Subject of the procedure: Revision of the proceedings where the main issue was determination of jurisdiction for immovable property situated abroad.

Basic facts: The dispute concerned the property of a deceased Croatian citizen situated abroad, in Bosnia and Herzegovina. Both lower instance courts decided they had no jurisdiction since the property was situated abroad.

The applied law and provision: Article 71/2 of the PIL Act.

The Court’s decision: The Court did not confirm the lower courts’ decisions but quashed them and sent for re-trial since it applied Article 71/2 of the Act that gives jurisdiction to the court of the Republic of Croatia only if according to the law of the state where the immovable property is situated, its organ does not have jurisdiction. Looking at the rules in Bosnia and Herzegovina, the Court decided to overturn the lower courts’ decision since “according to law of Bosnia and Herzegovina, the Court in that case would have jurisdiction with respect to property of the deceased that had his domicile in that state if the immovable property was situated in the then SFRY.” The deceased had no domicile in the foreign state which meant that the Croatian courts should have jurisdiction.

Possible decision under the EU law: Under the EU law, the habitual residence is the main connecting factor for jurisdiction which would also lead to Croatian courts since the file implies that the deceased was habitually resident in Croatia. However, the examination as to admissibility would be much simpler since there would be no examination of foreign law.

Example 3

Case designation: County Court in Zagreb, appellate decision, XXXIV Gž-6263/08-2 of 23 October 2008.

Subject of the procedure: Appeal against the decision rejecting legalisation

of the succession declaration of the first instance court in Bremen, Germany.

Basic facts: Three residents of Germany applied to the Municipal Court in Zagreb for legalisation of a succession declaration issued by a court official in Bremen. The first instance court rejected the application since such declarations are not susceptible to legalisation.

The applied law and provision: Article 2 of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

The Court's decision: The Court confirmed the lower court's reasoning and the legalisation was rejected since "the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents that is applied in relations between the Republic of Croatia and the Republic of Germany determines that the Convention applies to all public documents made in the territory of one Contracting State that has to be applied in another Contracting State, among others those documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server. Since under Article 2 every Contracting State is freed from legalisation of documents to which the Convention applies and that is to be applied in its territory, the first instance court correctly rejected the application since it seeks legalisation of a declaration that was issued and certified by a verified court official in the Republic of Germany [...]."

Possible decision under the EU law: According to Article 75 of the Succession Regulation, existing conventions take precedence over the Regulation. In any case, the Succession Regulation prescribes in its Article 74 that no legalization will be necessary for the purposes of the Regulation.

Example 4

Case designation: County Court in Zagreb, appellate decision, 15 Gž-5781/10-2 of 9 November 2010.

Subject of the procedure: Appeal against the succession decision of the Municipal Court in Zagreb based on the wrong application of the PIL Act.

Basic facts: Three residents of Zagreb applied to the County Court in Zagreb for the revocation of a decision on succession since the Municipal Court in Zagreb was not the one to decide on movable property situated in France.

The applied law and provision: Article 71/3 of the PIL Act.

The Court's decision: The Court accepted the Croatian court's jurisdiction and rejected the allegations of the appeal since "according to Article 71/3 of the PIL Act the court of the Republic of Croatia has jurisdiction as to the administra-

tion of the movable property of a deceased citizen of the Republic of Croatia if the movable property is situated on the territory of the Republic of Croatia or if according to the law of the state where the movable property situated a foreign organ refuses to administer the property. Since according to Article 30 of that Act the jurisdiction is to be given to the state organ of the deceased's nationality, the allegations of the appealing party are unfounded.”

Possible decision under the EU law: According to Article 4 of the Succession Regulation, the whole of the succession is to be decided by the court of the habitual residence of the deceased as a general rule. The facts of the case are insufficient to conclude what was the habitual residence of the deceased, but it is seen that he had an address in Zagreb at the time of death. If his habitual residence was in Zagreb, the outcome would be the same.

3. The Applicable Law

3.1. The Succession Regulation

In order to secure that the forum and the applicable law coincide, habitual residence of the deceased at the time of death is the main connecting factor for applicable law in the Succession Regulation.⁶⁴⁾ It applies to the whole succession, accepting the unity of the succession estate, notwithstanding whether it is the law of a Member State or not. There were some concerns about choosing the habitual residence since it can be manipulated easily resulting in a misuse of law and it can be unpredictable resulting in legal uncertainty.⁶⁵⁾ Thankfully, an escape clause was introduced as well as a limited choice of law rule which makes the Regulation more flexible.⁶⁶⁾ The escape clause leads to application of manifestly more closely connected law what is evident from all the circumstances of the case and relates to a point in time – time of death of the deceased. The escape clause will be only exceptionally applied what is evident from the word “manifestly”⁶⁷⁾ in Article 21/2.

The choice of law, same as the choice of court, is limited. The party can only choose the law of her or his nationality at the time of making the choice or the time of death. The formal prerequisites (for the revocation and modification as well) are also set by the Regulation, and the substantive validity is governed by the chosen law, ie the *lex causae*.⁶⁸⁾ The limited choice is primarily a response to problems of reserved shares present in many Member States since this way the heirs' legitimate expectations will not be endangered.⁶⁹⁾ Since the parties can only choose the court if coupled with choice of the same law, nationality limits the choice of court in the same manner. The choice can still be overridden by public

64) Succession Regulation, Article 21.

65) P. Beaumont/P. McElaevy, Ch. 24.131.

66) *Ibid.*, Ch. 24.133.

67) *Ibid.*, Ch. 10.181-10.183 with relation to the Rome I Regulation.

68) Succession Regulation, Articles 22/2-4.

69) Preamble to the Succession Regulation, Recital 38.

policy of the forum according to Article 35 of the Regulation.

The scope of *renvoi* is very restricted; it applies only if the applicable law is of the Non-Member State and if it remits to the law of a Member State or of a third state that would apply its internal law.⁷⁰⁾ Additionally, according to Article 34/2 of the Succession Regulation *renvoi* is excluded where the escape clause was applied (Article 21/2) or there is a choice of law (Article 22) or in case of formal validity of a disposition upon death (Article 27/1/b) and declaration concerning acceptance or waiver (Article 28), as well as in case of some special rules regarding certain assets (Article 30). There may be a clash between the unity estate principle and the scission principle through application of *renvoi* and it is still unsure how will they work together.⁷¹⁾ Similarly, the public policy exception is quite restricted, since it will rarely have an opportunity to be applied due to the Regulation's general aim to apply the law of the forum.⁷²⁾

3.2. The Croatian Law

Firstly, it is worth noting that Croatian PIL Act accepts the doctrine of the unity of the succession estate meaning that the law applicable will govern matters related to all of the estate, notwithstanding it being movable or not and notwithstanding where the property is situated.⁷³⁾ However, due to applicability of *renvoi* to succession matters, the applicable law could adopt the principle of scission which will then be applied before Croatian courts as well.⁷⁴⁾ Under the existing regime, the law applicable to succession is the law of nationality of the deceased at the time of death.⁷⁵⁾ In case of stateless persons and persons with more than one nationality, the basic rules from Articles 11 and 12 of the PIL Act apply.⁷⁶⁾ This leads to application of Croatian law if the person holds both the Croatian and a foreign nationality as was confirmed in case law.⁷⁷⁾ In that particular case the deceased person was a Croatian national and the opposite party alleged, but did not prove, that the deceased had a Canadian nationality as well. The court noted that

70) Succession Regulation, Article 34.

71) R. Frimston, 214.

72) It is plausible that the mere lack of reserved shares in the applicable law might lead to breach of public policy. See: A. Durakovic, 248-249.

73) T. Varady, 341.

74) *Ibid.*, 244.

75) Croatian PIL Act, Article 30.

76) Article 11: 'If a person who is a citizen of the Republic of Croatia also has the nationality of another state, for the application of this Act he is considered to have only nationality of the Republic of Croatia. If a person who is not a citizen of the Republic of Croatia has two or more foreign nationalities, for the application of this Act he is considered to have the nationality of that state of which he is citizen and where he is domiciled. If the person referred to in paragraph 2 of this Article is not domiciled in any of the states of which he is a citizen, for the application of this Act he is considered to have the nationality of that state of which he is a citizen and with which he is most closely connected.' Article 12: 'If a person has no nationality or his nationality cannot be established, the applicable law shall be determined according to his domicile. If a person referred to in paragraph 1 of this Article has no domicile or that domicile cannot be established, the applicable law shall be determined according to his residence. If the residence of the person referred to in paragraph 1 of this Article cannot be established, the law of the Republic of Croatia shall be applied.'

77) Judgment Rev 244/03-2 of the Supreme Court of the Republic of Croatia of 6 April 2005.

notwithstanding the foreign nationality being proved or not, the law applicable to succession would be Croatian due to application of Article 11/1 of the PIL Act. This provision is identical to Article 2 of the Croatian Act on Nationality⁷⁸⁾ and application of either of them can lead to discrimination against EU citizens and be contrary to the CJEU's judgment in *Garcia Avello*.⁷⁹⁾ Therefore, Croatian judges will have to be careful while applying the mentioned provision. They will need to set it aside when the effect of its application is discriminatory, meaning that it may not be applicable at all when EU citizens are parties to the procedure. It may be the best solution to exclude its application towards EU citizens in the new Act. However, this would influence the Act on Nationality so its change would also be necessary.

The question of the scope of applicable law is not expressly regulated in any of the provisions of the PIL Act. The doctrine emphasises that the scope covers all the issues that might occur in succession matters such as who is and can be a heir, order of succession *ex lege*, size of the inheritance share, reserved share, gifts and claw-back, relationship between successors, legacies, waiver of and exclusion from succession etc.⁸⁰⁾ The scope of application of the applicable law is comparable to the one in the Succession Regulation that "should govern the succession from the opening of the succession to the transfer of ownership of the assets forming part of the estate to the beneficiaries as determined by that law."⁸¹⁾ However, the Regulation is flexible with respect to the form of declaration concerning the acceptance or waiver of the succession, legacy or of a reserved share or a declaration designed to limit the liability of the person making the declaration since it introduced an alternative connecting factor – either the law otherwise applicable to succession or the habitual residence of a person making the declaration.⁸²⁾ The flexibility is also shown in the Croatian private international law since Article 7 of the PIL Act refers to either *lex causae* or the place where the declaration was made, when it comes to its form.

Regarding the capacity to make a will, it is currently governed by the law of nationality of the person making a will at the time it was drawn up.⁸³⁾ Due to possible changes in nationality of the deceased, the rule may lead to several laws applicable to succession – one law to the succession as a whole and another to the capacity to make a will. If the deceased made several wills, this may prove to be problematic if he/she changed the nationality in the meantime. The problems are even more pressing for a person holding more than one nationality since according to Article 11 such a person will be deemed a national of a state in which he/she is domiciled or to which he/she is most closely connected. Therefore, the tes-

78) OG Nos. 53/1991, 70/1991, 28/1992, 113/1993, 4/1994, 130/2011.

79) Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613.

80) M. Dika/G. Knežević/S. Stojanović, 107; T. Varady, 345.

81) Preamble to the Succession Regulation, Recital 42 and Article 23.

82) Succession Regulation, Article 28.

83) Croatian PIL Act, Article 30/2.

tator might make a will being capable under one and not under the other nationality which might lead to invalidation of the will if he/she was domiciled in the state under which law there was no capacity. Examples such as this one show that both rules may lead to very unfavourable results that diverge from the legitimate expectations of the relevant person. The commentators of the PIL Act stressed already in 1991 that the lack of *favor testamenti* with regard to the capacity to make a will is diverging from modern trends and that inclusion of an alternative connecting factor or a rule that would not allow loss of once acquired capacity would be a more preferable solution.⁸⁴⁾

Another question that arises is the law applicable to substantive validity of a will other than capacity to make it. Questions such as fraud, duress, mistake and representation are governed by the same law as capacity in the Succession Regulation.⁸⁵⁾ This should be accepted in Croatian law as well since mentioned issues are closely connected to capacity and should be governed by the same law. Another option would be to apply *lex causae*, the law governing succession, which is also the one of nationality, but the relevant time differs and nationality of the deceased may change. The Croatian rule on capacity differs from the one in the Succession Regulation which refers to the law which would govern the succession if the testator died the day he made the disposition or to the law chosen by the testator.⁸⁶⁾ Such a rule is basically a reference to either the chosen law or the law of the state where the deceased was habitually resident when the will was drawn up.⁸⁷⁾

The form of will is governed by the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. There is thus a number of alternative connecting factors: the place where the testator made the will; nationality of the testator, either at the time when he made the disposition or at the time of his death; the place in which the testator had his domicile, either at the time when he made the disposition or at the time of his death; the place in which the testator had his residence, either at the time when he made the disposition or at the time of his death and so far as real estate are concerned, of the place where they are situated. It is worth noting that the Convention has “habitual residence” as the connecting factor whereas the Croatian PIL Act prescribes “residence”. Having in mind that the international treaties have primacy over the Act,⁸⁸⁾ the relevant connecting factor should actually be interpreted as “habitual residence”. In addition, the Croatian PIL Act introduced an additional connecting factor for the formal validity of wills as allowed by Article 3 of the Convention – Croatian law, ie the *lex fori*. In a case that came to the Supreme Court of the Republic of Croatia, the court quashed the decision of two lower

84) M. Dika/G. Knežević/S. Stojanović, 104.

85) Succession Regulation, Article 26.

86) Succession Regulation, Article 24.

87) Preamble to the Succession Regulation, Recital 51.

88) Croatian PIL Act, Article 3.

courts since they did not apply the mentioned rule appropriately.⁸⁹⁾ In that case, the will was drawn up by a Croatian national in Switzerland and both the Municipal Court and the County Court failed to test whether the will is valid according to Swiss law since it was invalid under then applicable Croatian Act on Succession. The Supreme Court revoked the decision and the matter had to be re-tried since “the substantive law is incorrectly applied even when the substantive rule that is applicable to a relevant case is not applied.”⁹⁰⁾ Once the Succession Regulation comes into force in Croatia, the applicable law to the form of wills will still be governed by the same Convention since its precedence over the Regulation is given in Article 75/1.

The Regulation will substantially change the choice of law of succession in Croatia since the main connecting factor will change. Application of habitual residence will be new to Croatian practitioners and this is surely the impact that will be felt. The judges need to be more sensible to EU citizens already now, even though the Regulation is not yet applicable due to the general prohibition of discrimination in the Treaty.

3.3. *Bona Vacantia*

One question that is sometimes posed in academic writings is which law is applicable to an estate without an heir, ie caducary estate or *bona vacantia*, that occurs in lack of heirs or if they waive their inheritance rights. In Croatia, similarly to many other states, in case of *bona vacantia*, the estate will pass to the city or the county. The provision states that the city or the county has the same status as an heir but cannot waive of the succession of property.⁹¹⁾ This is not sufficient to give a definitive answer to the question whether the state has a status of a forced heir for some authors.⁹²⁾ The issue is in its nature a characterisation one – whether the matter is succession or occupation/confiscation.⁹³⁾ The Croatian private international law does not solve the question directly, but it prescribed that “[t]he law of a foreign state shall be applied in accordance with its meaning and notions”⁹⁴⁾ which is the basis for the characterisation in context.⁹⁵⁾ Therefore, when the law applicable considers its state a forced heir, the matter will be one of succession. If it is an occupational right under the applicable law, the state will appropriate the estate situated on its territory. This might be difficult to apply when there is immovable property situated outside the territory of the state that considers itself an

89) Judgment Gzz 28/1992-2 of the Supreme Court of the Republic of Croatia of 5 May 1993.

90) *Ibid.*

91) Act on Succession, Article 6.

92) M. Dika/G. Knežević/S. Stojanović, 107; I. Medić Musa, 370.

93) An English judgment *Re Maldonado's Estate* [1953] 2 All ER 300 is a good example of how this issue can be seen as a classification one. It concerned movable assets in England and the law applicable to succession was the Spanish law under which the passing of the movable property to the state when the deceased person has no relatives was considered to be a succession issue whereas the English law considered it to be confiscatory in nature. The court classified the issue in the context of the law applicable, ie the Spanish state inherited the property.

94) Croatian PIL Act, Article 9.

95) K. Sajko, 184.

heir. Therefore, it is thought that inheritance of movable *bona vacantia* should be governed by the law applicable to succession, ie the *lex patriae* of the deceased. On the other hand, the immovable property should be governed by the law of the state where it is situated.⁹⁶⁾ This implies that the movable property is inherited by the state whereas the immovable property is acquired via occupation. The same solution is found in some bilateral treaties on legal assistance concluded by Croatia.⁹⁷⁾ In the EU, the question is dealt with in a different manner. According to Article 33 of the Succession Regulation, Member States are allowed to appropriate estate situated in their territory as long as the creditors may seek satisfaction from the assets of the estate. This rule does not distinguish between movables and immovable property, the only relevant condition is that the creditors have an opportunity to seek their claims. Still, the problem of classification will have to be resolved by national law.

3.4. Case Law Examples

Example 1

Case designation: Supreme Court of the Republic of Croatia, application for the protection of legality, Gzz 28/1992-2 of 5 May 1993.

Subject of the procedure: The public prosecutor started the protection of legality proceedings since the lower courts failed to apply the conflict of law rules properly.

Basic facts: The deceased was a Croatian citizen with a temporary residence in Switzerland. While there, she made a will which was invalid under Croatian law, but the lower instance courts did not check whether it conforms to Swiss rules on formal validity. The property was transferred to the Croatian state at the end since there were no heirs disposable.

The applied law and provision: Article 31 of the Croatian PIL Act.

The Court's decision: The Supreme Court quashed the decision and sent the case for a re-trial since the conflict of law rule on formal validity of the will was not properly applied, ie not all the alternative connecting factors have been checked.

Possible decision under the EU law: The Succession Regulation does not prescribe anything new under the conflicts rule on formal validity in its Article 27 which means that the will is going to be valid if it is valid under any of the alternative laws referred to in Article 31 of the PIL Act.

96) I. Medić Musa, 368-370; M. Dika/G. Knežević/S. Stojanović, 108.

97) Eg Treaty Between Federative People's Republic of Yugoslavia and People's Republic of Bulgaria on Mutual Legal Assistance of 23 March 1956 (Notification on Succession, OG Int'l Agreements No. 04/2002), Article 20; Treaty Between Federative People's Republic of Yugoslavia and People's Republic of Romania on Mutual Legal Assistance with Bulgaria of 18 October 1960 (Notification on Succession, OG Int'l Agreements No. 01/2005) Article 46.

Example 2

Case designation: Supreme Court of the Republic of Croatia, application for the revision, Rev 1583/1993-2 of 15 November 1995.

Subject of the procedure: Revision of the procedure regarding a foreigner's capacity to make a will.

Basic facts: The deceased was an US citizen but the Croatian courts failed to apply the law of Illinois as the law of nationality and applied the Croatian law. Under domestic law the deceased was not capable to make a will since he was not of sound mind. The decision was appealed.

The applied law and provision: Article 30 of the Croatian PIL Act.

The Court's decision: The Court checked the prerequisites for capacity to make a will in the law of Illinois. Upon discovering that its "requirements for capacity to make a will are equal to prerequisites of the domestic law", the court was satisfied with the proven invalidity of the will.

Possible decision under the EU law: Under the Succession Regulation, the capacity to make a will is governed by the law that would be applicable to the succession as a whole if the person died on the day of making the will. If the parties would not have made a choice of law, the law of habitual residence would be applicable. It is unclear from the case where did the deceased have his habitual residence and is thus difficult to find the applicable law.

Example 3

Case designation: Supreme Court of the Republic of Croatia, application for the revision, Rev 244/03-2 of 6 April 2005.

Subject of the procedure: Revision of the procedure is being asked on several grounds one of which is incorrect application of the conflict of laws rule on succession.

Basic facts: The deceased had Croatian nationality at the time of death so the Croatian law was applied to succession. However, the applicants claimed that she was a Canadian citizen as well what the lower court failed to ascertain. The nationality of the deceased is crucial since the nationality is the main connecting factor.

The applied law and provision: Article 11 and 30 of the Croatian PIL Act.

The Court's decision: The Court decided to confirm the lower court's judgment since the foreign nationality is irrelevant in the Croatian private international law if it exists alongside the Croatian nationality. The Court concluded that "the law of the Republic of Croatia would be applicable even if the deceased had the Canadian nationality alongside the Croatian one what is evident from Article 11/1 of the above mentioned Act that prescribes that if a person who is a

citizen of the Republic of Croatia also has the nationality of another state, for the application of this Act he is considered to have only nationality of the Republic of Croatia.”

Possible decision under the EU law: The Succession Regulation would influence the outcome of this case since the law of habitual residence would be primarily applied and double nationality would be irrelevant. The facts of the case are insufficient to reveal where the deceased had her habitual residence. However, multiple nationalities may be “used” in case of choice of law of nationality when a person might choose law of any nationality he or she possesses under Article 22/1/b of the Succession Regulation.

4. Recognition and Enforcement of Decisions

4.1. Succession Regulation

General objective of the Succession Regulation is mutual recognition and enforcement of decisions issued in Member States.⁹⁸⁾ The method to obtain that goal is to be governed by previous legislation dealing with similar issues - Brussels I Regulation.⁹⁹⁾ Therefore, the system of recognition and enforcement of decisions in succession matters is quite similar to the ones in civil and commercial matters.

Article 39 of the Regulation provides for automatic recognition of decisions. In order to obtain recognition one has to produce an authentic copy of the decision as well as an attestation by the competent authority in the state of origin. The recognition can only be rejected based on very limited grounds that are equal as in the previously mentioned regulation.¹⁰⁰⁾ The court of recognition cannot in any case review the case as to the substance, but may stay proceedings if an appeal procedure is pending in the state of origin.¹⁰¹⁾

The enforcement procedure also resembles the one from the Brussels I Regulation.¹⁰²⁾ The interested party applies for the declaration of enforceability and in the first instance the other party cannot make submissions. Once the decision is granted, either party may appeal it on the same grounds as in the case of refusal of recognition in 30 days from service (or sixty days if the person against whom

98) The Succession Regulation also deals with recognition and enforcement of authentic instruments and court settlements and creates a European Certificate of Succession which are left out from this paper. For more on the Certificate see: F. Sturm, ”Das Europaeische Nachlasseugniss : zum Vorschlag der Kommission vom 14. Oktober 2009” in H. Sikirić *et al. Liber amicorum Krešimir Sajko*, Faculty of Law University of Zagreb, Zagreb, 2012, 309-336.

99) Preamble to the Succession Regulation, Recital 59.

100) According to Article 40 of the Succession Regulation, a decision shall not be recognised in another Member State only if such recognition is manifestly contrary to that state’s public policy, if the decision was given in default of appearance, if it is irreconcilable with a decision given in proceedings between the same parties in that Member State, if it is irreconcilable with a previous decision issued in another Member or third state between the same parties and regarding the same cause.

101) Succession Regulation, Articles 41 and 42.

102) Succession Regulation Proposal, Ch. 4. 4.

the enforcement is sought has its domicile in another Member State).¹⁰³⁾ After that, the parties may only contest the decision in a procedure designated by the relevant Member State.¹⁰⁴⁾

4.2. Croatian Law

Croatian PIL is, naturally, much stricter in its approach to recognition and enforcement. The reason is simple – there is no presumption of mutual trust towards foreign courts as in the European Union and consequently the Succession Regulation.¹⁰⁵⁾ Decisions coming from abroad firstly need to be recognised in order to have the same effect as Croatian judgments under Article 86 of the PIL Act.

The stricter approach is firstly seen in the fact that the applicant not only has to produce the decision, but a declaration of its finality as well.¹⁰⁶⁾ The reasons to deny recognition are also wider. Same as in the Succession Regulation, the recognition can be rejected due to its contrariness to public policy, due to an already existing irreconcilable judgment and if the decision was given in default of appearance and in breach of the right to defend.¹⁰⁷⁾ Even more, if the procedure involving the same cause of action and the same parties is pending in Croatia, the court of recognition will stay the procedure until the decision is issued.¹⁰⁸⁾ Only after the decision will the court finish the recognition procedure - if the Croatian court issues a decision on merits, the foreign decision will not be recognised by virtue of Article 90/1. The stricter approach is seen through two additional reasons for refusal of recognition – lack of reciprocity which is treated in the same way as already explained and exclusive jurisdiction of Croatian courts. The latter can become an impediment for recognition and enforcement of foreign judgments on domestic immovable property.¹⁰⁹⁾ A case confirming this concerned real estate situated in Croatia that was administered before Bosnia and Herzegovina's court which led to non-recognition and thus non-enforcement of the judgment.¹¹⁰⁾ The outcome is very unfavourable for the parties in such situation since they have to reinstitute the proceedings before the Croatian court that has jurisdiction which is both time and money-consuming and will be abolished between the EU Member States once the Succession Regulation comes into force. EU trends tend

103) Succession Regulation, Articles 48 and 49.

104) Succession Regulation, Article 51.

105) Succession Regulation Proposal, Ch. 4. .4.

106) Croatian PIL Act, Article 87.

107) Croatian PIL Act, Articles 88, 90, 91. However, there are two differences when compared to the Succession Regulation in case of irreconcilable judgments. Both pieces of legislation acknowledge two types of such judgments – those issued in the state of recognition and those issued in a third state. The first difference concerns the decision issued in a third state – under Croatian law, the decision needs to be already recognized in Croatia. Under the Succession Regulation it needs to be recognised or susceptible to recognition in the state of recognition. The other difference is that in the Croatian PIL Act, the identity of the parties and the claim is sought in both cases, whereas for the Succession Regulation only identity of the parties suffices if the decision is issued in that state. See: M. Dika/G. Knežević/S. Stojanović, 296.

108) Croatian PIL Act, Article 90/2.

109) *Ibid.*, Article 80/1/2.

110) Judgment Gž-4123/12-2 of the County Court in Zagreb of 20 June 2012.

to abolish this ground for refusal of recognition since the national courts have to trust each other and jurisdictional criteria, even if misapplied, cannot be grounds for refusal.¹¹¹⁾

In order to enforce a foreign decision, the appellant must produce the same documents as for recognition, as well as a declaration of enforceability of the state of origin. Enforcement can be refused on the same grounds as recognition. Both the decision on recognition and the decision on enforcement may be appealed.¹¹²⁾

The rules on recognition and enforcement will partially survive even after the Succession Regulation comes into force since decisions issued in non-Member States will still be recognized and declared enforceable under Croatian PIL Act. It has already been shown that the requirement of reciprocity may produce “negative consequences”¹¹³⁾ and there is a tendency of abolishing this requirement,¹¹⁴⁾ it may thus be purposeful to eliminate it from requirements for recognition and enforcement.

4.3. Case Law examples

Example 1

Case designation: County Court in Bjelovar, appellate decision, Gž-544/03-2 of 28 August 2003.

Subject of the procedure: Appeal against the decision rejecting an entry to the public real estate registry of the Municipal Court in Grubišno Polje.

Basic facts: The entry to a public registry was sought before the Municipal Court based on a foreign succession decision issued by the court in Bečje, the Republic of Serbia. The court decided incidentally that there can be no recognition since the immovable property situated in Croatia is exclusively to be dealt with by Croatian courts. This decision was appealed.

The applied law and provision: Article 71/3 of the PIL Act.

The Court’s decision: The Court confirmed the lower court’s decision since “it is necessary to conduct a recognition procedure for foreign decisions” before the entry to the public registry. In this particular case the “requirements for recognition are not fulfilled since there is exclusive jurisdiction of the courts of the Republic of Croatia.”

Possible decision under the EU law: Prerequisites for an entry to a public registry are left out from the scope of the Succession Regulation according to Article 1/2/l as well as recognition and enforcement of foreign judgments outside the EU.

111) Case C-7/98 Dieter Krombach v André Bamberski [2000] ECRI-01935, paras 29-34.

112) Croatian PIL Act, Articles 96 and 102.

113) Đ. Vuković/E. Kunštek, 477.

114) M. Dika/G. Knežević/S. Stojanović, 306.

Example 2

Case designation: County Court in Zagreb, appellate decision, 34 Gž-4123/12-2 of 20 June 2012.

Subject of the procedure: Appeal against the decision rejecting recognition and enforcement of the succession decision of the Municipal Court in Cazin, Bosnia and Herzegovina.

Basic facts: Three residents of Bosnia and Herzegovina applied to the Municipal Court in Zagreb for recognition and enforcement of a succession decision in their favour. Since the decision dealt with immovable property situated in Croatia, the decision was rejected recognition and enforcement since the exclusive jurisdiction of Croatian courts for immovable property situated in Croatia is an obstacle for recognition and enforcement. The decision was appealed to the County Court.

The applied law and provision: Article 72/1 of the Croatian PIL Act.

The Court's decision: The Court confirmed the lower court's reasoning and the recognition and enforcement was rejected since "for the administration of the immovable property of a deceased alien [...] the Croatian court has exclusive jurisdiction [...] and the rules on exclusive jurisdiction cannot be altered by parties' agreement, the first instance court correctly rejected the application [...]."

Possible decision under the EU law: The third country's decision is to be recognised and declared enforceable under the national law since the EU law does not regulate this. The Succession Regulation only deals with recognition and enforcement within the EU.

CONCLUSION

The present Croatian private international law of succession differs significantly from the EU rules on the same matter. The main connecting factor for both the applicable law and the jurisdiction is nationality as traditionally excepted in matters of personal status, succession and family law. On the other hand, the Regulation opted for habitual residence, a connecting factor that is becoming more and more significant in all of the EU private international law. In jurisdictional issues, the Regulation aims at abolishing fragmentation and puts very little emphasis on situation of the property and the nationality of the deceased which is completely opposite to Croatian law. On the other hand, the issue of bona vacantia is not resolved either by Croatian or EU law. It would be advisable to clearly state what the rules on bona vacantia are and the solution proposed in the doctrine, ie splitting the law applicable to movable and immovable property seems viable. The recognition and enforcement is, of course, stricter in Croatia than it will be between the Member States.

Due to differences, there will be changes to the Croatian private international law of succession. Firstly, the jurisdictional scheme will change from nationality and assets' location centred to the habitual residence as a focus. Not only will the main connecting factor change, but the system as well. Choice of court rules will be directly regulated for succession. The main connecting factor for the applicable law will also be changed – instead of nationality the courts will apply the law of the last habitual residence of the deceased. Autonomy of the parties, ie the choice of law in succession will also present a novelty for Croatian citizens. The rules on recognition and enforcement will only partially be changed since decisions coming from third states will still be under the current regime. The legislator should thus be careful when amending the current Act – abolishing the requirement of reciprocity should be the first step to take. These are only the larger changes while there will be smaller adaptations as well. Thankfully, there is still time to adapt to the new changes and adjust the relevant laws

MEĐUNARODNI PRIVATNOPRAVNI ASPEKTI NASLJEĐIVANJA - ISKUSTVA REPUBLIKE HRVATSKE

SAŽETAK

Ovaj rad prikazuje usporedbu hrvatskog međunarodnog privatnog prava nasljednih odnosa s Uredbom o nadležnosti, mjerodavnom pravu, priznanju i ovrsi odluka i prihvaćanju i izvršavanju javnih isprava u nasljednim stvarima i o uspostavi Europske potvrde o nasljeđivanju. Usporedba se temelji na prikazu pravila o nadležnosti, kolizijskih pravila, priznanja i ovrhe, te problema odšasne imovine. Posebna pozornost je dana sudskoj praksi hrvatskih sudova, koja jest ograničena brojem, ali omogućuje osnovni prikaz sustava. Usporedba dočara-va neprikladnost hrvatskih rješenja koja će uskoro zamijeniti odredbe Uredbe o nasljeđivanju.

Ključne riječi: međunarodno privatno pravo, Uredba br. 650/2012 o nasljeđivanju, hrvatsko pravo, *bona vacantia*