

Zlatan Meškić*

PRIVATE INTERNATIONAL LAW ON STAGE - ART. 36 OF THE SUCCESSION REGULATION ON STATES WITH MORE THAN ONE LEGAL SYSTEM AS A MODEL FOR PIL REFORMS IN SOUTH EAST EUROPE

Private International Law on Stage – the conference

Usually at this place of the conference proceedings, some final remarks and conclusions of on the three main topics of the conference should be presented. However, some of the biggest names of PIL presented their paper at the conference, at the Faculty of law in Zenica, and submitted their papers with conclusions in these conference proceedings. There is no need or space left for additional conclusions. In addition, the topic of states with more than one legal system is a very important topic for Bosnia and Herzegovina who belongs to the group of only three states in Europe with such complex legal system and Art 36 of the Succession Regulation brings some important changes with regards to this question of EU PIL. In the first part, the paper will focus on the obligation of (potential) candidate states to harmonize their national PIL with EU law even before becoming member of the EU. In the second part it will focus on the question how to harmonize the national laws of (potential) candidate states with the EU PIL provisions on states with more than one legal system (“multi-unit states”).

275

I. The obligation to harmonize the PIL of the SEE countries with EU law

In 2004, under the Stabilization and Association Process, EU has concluded the so-called European partnership¹ with all countries in the region. Croatia was granted the candidate status in 2004, signed the accession treaty in December 2011², and its accession to the EU was finalized on 1 July, 2013. Status of candidate countries is granted to

* Associate professor, Faculty of Law, University of Zenica.

1) Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilization and association process, *OJ EU 2004, L 86/1*.

2) *OJ EU 2012, L 112*.

Macedonia (December 2005³), Montenegro (December 2010)⁴, Serbia (2012⁵) and Albania (2014)⁶. Bosnia and Herzegovina has applied for membership in the EU and a positive decision has been adopted by EU Council in September 2016, meaning that B&H will most probably get the candidate status in 2017. Bosnia and Herzegovina currently has the potential candidate status.

The obligation to harmonize legislation of SEE countries with the EU is already defined in the “harmonization clause” contained in all of the Stabilization and Association Agreement signed between the SEE countries, Member States and the EU. The harmonization clause in the every SAA has almost an identical wording. In the SAA signed between B&H and the EU⁷ it obliges B&H to “ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*. Bosnia and Herzegovina shall ensure that existing and future legislation will be properly implemented and enforced. The reference to the *acquis* comprises not only existing EU law at the time of the conclusion of the SAA, but also provisions on EU level which are adopted after the ratification of the SAA. Otherwise, B&H would at the time it becomes a full member of the EU (which could take several years) be at the standard of legislation of 2008.

Consequently, the scope of application *ratione temporis* of the harmonization clause for the SEE countries comprises the existing and future PIL of the EU. The harmonization clause provides that the approximation of laws shall be conducted „gradually“. The meaning of this term is further explained in Art 70 (4) SAA, stating that „Approximation shall, at an early stage, focus on fundamental elements of the internal market *acquis* as well as on other trade-related areas. At a further stage Bosnia and Herzegovina shall focus on the remaining parts of the *acquis*“. Therefore, the question if the harmonization with the EU PIL is one of the primary obligations depends on the closeness of the EU PIL to the EU internal market regulation. In previous association agreements it was expressly formulated that the harmonization shall begin with areas such as customs law, company law, financial services,

3) Conclusions of the European Council, 15th–16th December 2005, Brussels.

4) Conclusions of the European Council, 16th–17th December 2010, Brussels.

5) Conclusions of the European Council, 1st–2nd March 2012, Brussels.

6) Conclusions of the European Council, 26th and 27th June 2014, Brussels.

7) SAA signed on 16th June 2008; *OJ of Bosnia and Herzegovina* No. 5/08, „international agreements“.

intellectual property law, labor law etc.⁸ Although such express listing of areas is left out of the harmonization clauses of the SAAs, these areas correspond to the chapters of the SAA and the judicial cooperation in civil matters is not mentioned anywhere in the SAA. This only means that harmonization with EU PIL does not need to be fulfilled in the first stage of the harmonization process and not that there is no obligation of its transposition at all.⁹

However, the question remains open whether in the pre-accession periods the candidate states shall transpose regulations into their national laws, considering that the most important sources of PIL of the EU are adopted in the form of regulations. Arguments against the transposition of regulations into national laws arise from their character. Regulations are directly applicable and therefore the legislation of the SEE states will be in line with them as soon as they become Member States. In addition, according to established practice of the ECJ, the transposition of regulations into national legislation is not allowed.¹⁰ On the other hand, it seems unreasonable that the obligation from the harmonization clause only applies to directives, where the Member States often agreed only on a minimum common content, while regulations as legal acts with a stronger legal effect, would be excluded from the obligation to harmonize national laws with EU law before the accession to the EU.

The SEE states took several different approaches towards this problem. They have already put a lot of effort to reform their Private International Law Codifications that are three decades old or older.¹¹ One

8) A. Lazowski, in A. Ott/K. Inglis (ed.), *Handbook on European Enlargement: A Commentary on the Enlargement Process*, 2002, 636.

9) See T. Deskoski/V. Dokovski, "Latest Developments of Macedonian Private International Law", *Collection of Papers from IXth Private International Law Conference-Recent Trends in European Private International Law*, Skoplje 2011, 2; Z. Meškić, „Integracija Evropskog kolizionog prava u nacionalne kodifikacije Međunarodnog privatnog prava u regionu- nalozi primarnog prava EU“, *Collection of Papers from IXth Private International Law Conference-Recent Trends in European Private International Law*, Skoplje 2011, 112, 121; J. Alihodžić, *Razvoj Evropskog međunarodnog privatnog prava: Pravci reforme zakonodavstva u Bosni i Hercegovini*, Tuzla 2012, 238; On the contrary, I. Kunda, "The Question of an Appropriate Method: Incorporation of the Community Instrument, Invitation to Join the Lugano Convention or a New Convention?", *Collected Papers from the VIIth Private International Law Conference-Enlargement of the European Judicial Area to CEFTA Countries*, Novi Sad 2010, 59.

10) ECJ, 10 October 1973, 34/73 -Variola, [1973], 981.

11) Albanian Law on enjoyment of civil rights by foreigners and application of foreign law, *Official Gazette of the Republic of Albania*, No. 3920/64; The successor states of former Yugoslavia still apply an almost unchanged version of the Yugoslav Private International Law Act (The Act on Resolving Conflicts of Laws with Legal Provisions of other Countries in

of the most important motives for reform was to bring their private international law provisions in accordance with the EU Law described above. A comprehensive and detailed analysis of the legislative activities is given by Dr. Christa Jessel-Holst earlier in this publication. Here only short remarks on the influence of the EU PIL on the legislative reform will be given. Macedonia was the first of the ex-Yugoslav states¹² that was able to present a result of its reform process, the Macedonian Private International Law Code of 2007.¹³ The reform of the rules on applicable law was based on PIL of the EU (e.g. provisions from the Rome Convention¹⁴ and the amendments based on the Rome II Regulation¹⁵), the rules on jurisdiction, recognition and enforcement did not transpose any provisions from the Brussels I¹⁶ directly.¹⁷ However, the reform did bring new grounds for exclusive jurisdiction and provisions on the procedure for recognition and enforcement which are similar to the Brussels I. It is expected that Macedonia will have a completely new Private International Law Code enacted in 2016, because the draft on the new Code is finished in 2015. The New Private International Law Act of Montenegro has been enacted in 2014¹⁸ and it is the first Private International Law Code in the region that comprehensively imple-

Certain Relations, *Official Journal of the Socialist Federal Republic of Yugoslavia*, No. 43/82 and 72/82).

12) Except for Slovenia that is not in the focus of this analysis because it is already a member of the EU.

13) Private International Law Act of the Republic of Macedonia, *Official Gazette of the Republic of Macedonia*, No. 87/07 and 156/10); German translation of the version of 2007 by Christa Jessel-Holst, *IPRax* 2008, 158.

14) Rome Convention on the law applicable to contractual obligations, *OJ EU* 1980, L 266/1; Z. Meškić, „Private International Law in Consumer Contracts“, Ch. Jessel-Holst/G. Galev (ed.), *Civil Law Forum for South East Europe*, 2010, 565.

15) 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), *OJL* 199/40; T. Deskoski/V. Dokovski, „Latest Developments of Macedonian Private International Law“, *Collection of Papers from IXth Private International Law Conference-Recent Trends in European Private International Law*, Skoplje 2011, 2.

16) Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation or Brussels I), *OJ* 2001 L 12/1.

17) T. Deskoski, „The New Macedonian Private International Law Act of 2007“, *Yearbook of Private International Law* 2008, 441.

18) Official Gazette of Montenegro 2014 No. 1, 6 and 11. German translation by Ch. Jessel-Holst, *IPRax* 2014, 556.

mented PIL EU Regulations.¹⁹ Very similar provisions can be found in the Draft of the Private International Law Act of Serbia that is currently in the legislative procedure. The difference between the Draft of the PIL Act of Serbia and the abovementioned acts is that the Serbian Draft did not rely on the structure of the Yugoslav PIL Act, but used the structure of the Swiss and Belgian PIL Act as a model.²⁰ Albania is the second state from the SEE region that adopted a new Private International Law Act in 2011.²¹ Provisions on the exclusive jurisdiction, the form of the jurisdiction agreements as well as the special jurisdiction were under strong influence of the Brussels I. However, it seems that the legislator has put a stronger emphasis on keeping the provisions short than making a correct transposition.

Bosnia and Herzegovina is the only state that never officially started a revision of its Private International Law Code, because according to the current constitutional division of competences between the state and its territorial units (the entities, Federation of B&H and the Republic of Srpska, and the District Brčko), it might result in the adoption of two or three different Private International Law Codes, enacted on the entity level and in District Brčko, and thereby cause additional conflicts of laws.²² Consequently, in B&H, Serbia and Croatia, an almost unchanged version of the Yugoslav Private International Law Act (The Act on Resolving Conflicts of Laws with Legal Provisions of other Countries in Certain Relations – the PIL Code) is still applicable. The important exception for Croatia is of course that it is a Member State of the EU and therefore EU PIL Regulations apply in many areas.

19) M. Kostić-Mandić, „Osvrt na novo međunarodno privatno pravo Crne Gore”, *Nova Pravna Revija* 2/2011, 73; M. Kostić-Mandić, “Uticaj Prava Evropske unije na novo Međunarodno privatno pravo Crne Gore sa posebnim osvrtom na oblast mjerodavnog prava”, *Strani Pravni Život* 3/2011, 345

20) M. Živković, „Rad na novom Zakonu o međunarodnom privatnom pravu republike Srbije-početne dileme i aktuelno stanje“, *Collected Papers from the VIIIth Private International Law Conference-Enlargement of the European Judicial Area to CEFTA Countries*, Novi Sad 2010, 175.

21) Act on Private International Law (Act No. 10 428 of 2.6.2011, *Official Gazette of the Republic of Albania* No. 82/2011 from 17.6.2011); the analysis is based on an unofficial and unfinished translation of the Act in English with many thanks to prof. *Nada Dollani* for the help in this matter.

22) Z. Meškić, „Četiri osnovne slobode kao ustavni osnov za harmonizaciju entitetskih privatnopravnih propisa Ustavno-pravni razvoj Bosne i Hercegovine (1910-2010)“, *Zbornik radova Pravnog fakulteta Univerziteta u Tuzli* 2011,355; J. Alihodžić, *Razvoj evropskog međunarodnog privatnog prava – pravci reforme zakonodavstva u Bosni i Hercegovini*, Tuzla 2011, 221.

The reform of the PIL Acts of the SEE countries shows that every state decided to transpose at least some provisions of the PIL Regulations of the EU. However, none of the states decided to transpose whole EU Regulations into their Acts, although they did transpose most of the provisions from the Rome I²³ and II Regulations. The SEE states used Brussels I as a model for some questions of jurisdiction, but at least not directly for recognition and enforcement, considering that those provisions are developed specially for internal free movement of judgments within the EU. The new drafts, as well as the enacted PIL Code of Montenegro, also strongly took into consideration the Brussels II bis Regulation²⁴ and the Succession Regulation²⁵.

Consequently the SEE states used the PIL Regulations of the EU as a model for the reform of certain provisions, but did not transpose entire regulations. This approach may be seen as corresponding to the gradual harmonization requested by the harmonization clause of the SAAs or as a result of voluntary harmonization. In any case, it is supported by the legal science in the region. Most authors consider the transposition of certain provisions as advisable, on the one hand because they regard that particular provisions of providing for good solutions,²⁶ and on the other hand because the judiciary should get used to the application of the most important provisions of PIL EU law before accession.

23) 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 EU 2008, L 177/6*.

24) 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, *OJ 2003, L 338, I-29*.

25) 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, L 201, 107–134*.

26) Foremost I. Kunda, "The Question of an Appropriate Method: Incorporation of the Community Instrument, Invitation to Join the Lugano Convention or a New Convention?", *Collected Papers from the VIIth Private International Law Conference-Enlargement of the European Judicial Area to CEFTA Countries*, Novi Sad 2010, 60; J. Alihodžić, *Razvoj evropskog međunarodnog privatnog prava – pravci reforme zakonodavstva u Bosni i Hercegovini*, Tuzla 2011, 237; Z. Meškić, „Integracija Evropskog kolizionog prava u nacionalne kodifikacije Međunarodnog privatnog prava u regionu- nalozi primarnog prava EU“, *Collection of Papers from IXth Private International Law Conference-Recent Trends in European Private International Law*, Skoplje 2011, 112, 121; See with regards to the Rome II regulation V. Bouček, „Uredba Rim II – Komunitarizacija evropskog međunarodnog deliktneog prava – drugi dio: Opće poveznice deliktneog statute uredbe Rim II i harmonizacija hrvatskog mpp-a“, *Zbornik radova Pravnog fakulteta u Splitu 2008*, 503; T. Deskoski, „The New Macedonian Private International Law Act of 2007“, *Yearbook of Private International Law 2008*, 450.

II. Provisions of EU PIL as a model for the regulation of the question of states with more than one legal system

1. The current legal provision on multi-unit states in the PIL Codes in SEE

The starting point for the reform of the provision on the problem of multi-unit state is of course the ex-Yugoslav PIL code that is still applicable in B&H. Beside the term “the law of the state” (eg. Art. 32 (1)PIL Code), the PIL Code also uses the terms the „law of the place“ (eg. Art. 18 (1)PIL code) or even just „law“ (Art. 19PIL Code). This could, at first sight, create the impression that the legislator wanted to adequately use the terminology depending on the fact if it wanted the conflict rule to directly refer to the law of the territorial unit within one complex state or to the state as a whole. However, many exceptions prove the opposite, such as the „law of the country where the property is situated” in Art. 21 of the PIL Code the “law of the country of the debtor’s domicile” in Art. 26 of the PIL code or “law of the country in which both spouses have their domicile” in Art 36 (2) of the PIL code. In all three of the abovementioned cases, the conflict rule was capable of directly referring to the legal system within one multi-unit state and not just to the “law of the state”. Therefore, the legislator wanted in Art. 10 of the PIL code and not in any other provision to regulate the question of states with more than one legal system in a comprehensive manner.

281

According to Art 10 of the PIL Code, the legislator decided to give priority to the direct-reference model and the indirect-reference model is applicable in cases only when the conflict rules of this code do not refer to a specific legal system in that state. Therefore if there is no direct reference by the conflict rules *lex fori*, the rules on the internal conflicts of laws *lex causae* shall apply. If the applicable law cannot be determined neither by the direct nor by the indirect reference, the principle of the closest connection shall solve the problem. Thereby a very clear, but not strict,²⁷ order of steps when solving the problem of state with more than one legal order is established: 1. direct reference; 2. indirect reference and 3. the closest connection.²⁸

From the perspective of Bosnia and Herzegovina, of particular im-

27) M. Stanivuković/M. Živković, *Međunarodno privatno pravo – opšti deo*, Beograd 2008, 315.

28) E. Muminović, *Međunarodno privatno pravo*, Sarajevo 2008, 92; M. Dika/G. Knežević/S. Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Beograd 1991, 42.

portance is the discussion on the capability of the nationality as a connecting factor to directly refer to a territorial unit. The nationality is technically seen capable of referring to a particular unit within a complex state, if nationals of that state beside the nationality of the central state also have the nationality of the territorial unit. Nevertheless, many problems can occur that cannot be solved by direct reference such as the double nationality of the territorial units, the lack of obligation for the nationals to have a nationality of the territorial unit and the non-existence of a nationality of some the territorial units.²⁹ As a good example how the direct referral on the grounds of nationality can lead to wrong results is the nationality of the entities in B&H. Namely, the District of Brčko is a territorial unit in B&H that has its own legislation in private law, eg its own Code on obligations, Family law etc. The nationals of B&H who are residents of District Brčko, do not have an additional nationality of District Brčko, because such nationality does not exist.³⁰ On the other hand, if residents of District Brčko want to use their election rights as nationals of B&H, they need to choose the nationality of one of the other two territorial units of B&H, the Federation of B&H or the Republic of Srpska.³¹ Consequently, the residents of District Brčko usually do have a nationality of a territorial unit beside the nationality of B&H, namely they are nationals of one of the entities. That means that if a foreign PIL refers to the law of B&H on the ground of nationality, it will never refer to the law of District Brčko, even in cases when the person in question has his domicile in District Brčko. If the foreign court would in such case, instead of a direct referral to the territorial unit, take into consideration the rules on internal conflict of law of B&H, called the The Act on Resolving Conflicts of Laws and Jurisdiction in Status, Family and Succession Matters of Bosnia and Herzegovina³²,

29) M. Živković, „Primena kolizione norme međunarodnog privatnog prava na pravo države sa nejedinstvenim pravnim područjem“, *Zbornik radova Pravnog fakulteta u Nišu*, br. 22 (1982), 478.

30) Based on the example of Z. Meškić/S. Đorđević, *Međunarodno privatno pravo I – opšti dio*, Kragujevac/Zenica 2016, in edition.

31) Art. 27a of the Act on nationality of the Federation of B&H, *OJ of the FB&H No. 43/01 i 22/09, 80/11*; Art. 30 of the Act on nationality of the Republic of Srpska, *OJ of the Republic of Srpska, No. 59/14*.

32) *Sl. list SFRJ, br. 9/79, 20/90*; Taken over in the legal system of B&H by the Regulation with the effect of act no 2 in 1992 (*OJ of the Republic of Bosnia and Herzegovina, No 2/1992*), which was later confirmed by the Act on the confirmation of the regulations with the effect of act (*OJ of the Republic of Bosnia and Herzegovina, No 13/1994*).; In the entity Republic of Srpska confirmed by Art. 12 of the Constitutional act for the implementation of the Constitution of the Republic of Srpska (*OJ of the Republic of Srpska, No 21/1992*); V. Šaula, *Osnovi Međunarodnog privatnog prava Republike Srpske*, Banja Luka 2011, 198 i dalje.

it would rightly conclude that on the grounds of domicile the law of District Brčko is applicable.³³ This example shows that before directly referring to a multi-unit state on the grounds of nationality, we need to be informed about the concept and meaning of the nationality of the territorial units in that state. The process of obtaining such information is contrary to the scope and aim of the principle of direct reference. Therefore the legal science of the SEE states considers nationality as generally incapable of directly referring to the legal order of a territorial unit within a multi-unit state.³⁴

Consequently, the starting point for the reform of the PIL Codes in the region was the principle of direct referral. The newly adopted PIL Code of Montenegro in its Art 5, as well as the Art 8 of the draft PIL Code of Macedonia have kept the same wording of the Art 10 of the Yugoslav PIL Code. Art 32 of the Serbian PIL Code changed the wording of the Art 10 of the Yugoslav Pil Code, in order to make it more clear and understandable, but the essence remained the same. Firstly, one needs to establish whether the conflict rules of the *lex fori* refer to a territorial unit within the complex country, if not, secondly, the rules of that state on the local conflict of laws apply, and if there are no such rules, thirdly, the principle of the closest connect shall help to determine the applicable law of a territorial unit within the country.

Considering that there is still no sign of a Rome 0 Regulation, that would regulate the general questions of the EU PIL on the applicable law, the only way to find out if the EU legislator has adopted a general stand to this problem is to check the provisions of every single EU PIL Regulation on the question of the the applicable law in complex states. This research will be conducted by examining a) what is the primary rule set by the EU Regulations; and b) what are the reserve options; and

33) Although the Act on Resolving Conflicts of Laws and Jurisdiction in Status, Family and Succession Matters of Bosnia and Herzegovina was originally created to resolve internal conflicts of laws between the republics of Yugoslavia, it is legally taken over in the law of B&H and should at least *per analogiam* be applied in B&H; E. Muminović, „O uzajamnom odnosu načela najuže veze, autonomije volje i favorabilnosti mjerodavnog prava u vezi s potrebom zakonodavnog djelovanja države Bosne i Hercegovine u materiji međunarodnog privatnog prava“, *Godišnjak Pravnog fakulteta u Sarajevu* 1999, 235; V. Šaula, *Osnovi međunarodnog privatnog prava Republike Srpske*, Banja Luka 2011, 198; J. Alihodžić, *Razvoj evropskog međunarodnog privatnog prava – pravci reforme zakonodavstva u Bosni i Hercegovini*, Tuzla 2011, 224.

34) E. Muminović, *Međunarodno privatno pravo*, Sarajevo 2008, 91; M. Živković, „Primena kolizione norme međunarodnog privatnog prava na pravo države sa nejedinstvenim pravnim područjem“, *Zbornik radova Pravnog fakulteta u Nišu*, br. 22 (1982), 479; T. Varadi/B. Bordaš/G. Knežević/V. Pavić, *Međunarodno privatno pravo*, Beograd 2012, 202.

c) conclusions for the Rome I Regulation³⁵ as a role model for SEE states. Particular attention will be brought to the problem of the choice of applicable law. The following analysis focuses on EU Regulation due to space reasons. The Hague Conventions are as well an important role model for the reform of the PIL Codes in the SEE region, but will not be dealt with in detail in this paper, apart from the Hague Protocol of 2007³⁶.

2. The primary method of reference to multi-unit states in the EU Regulations

The EU PIL seemed in the earlier EU Regulations to favor the principle of direct referral to the territorial unit within the complex state. Art 22 (1) of the Rome I Regulation and Art 25 (1) of the Rome II Regulation solely contain the principle of direct referral. The formulation is almost identical in both regulations, providing that „Where a State comprises several territorial units, (in respect of contractual obligations/each of which has its own rules of law in respect of non-contractual obligations), each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.” The same provision could already be found in Art 19 of the Rome Convention of 1980.³⁷ The provision is practical and clear, considering that both Regulations also exclude *renvoi*, meaning that a referral to a complex country excludes the obligation to consider its “international” conflict rules as well as their “interstate” conflict rules³⁸. It is, however, questionable if an exclusion of *renvoi* should be interpreted as an exclusion of the obligation to consider the “interstate” conflict rules, as will be discussed further below.³⁹ The EU legislator did not feel the need to provide for a reserve solution for the case that the connecting factor used in the conflict rule is not capable of referring directly to a territorial unit within the complex state, leaving thereby a couple of situations uncovered. On the other hand, the Rome III Regulation on the law ap-

35) More commonly called the “General part of EU PIL“; eg G. Reichelt (Hrsg.), *Europäisches Gemeinschaftsrecht und IPR - ein Beitrag zur Kodifikation der Allgemeinen Grundsätze des Europäischen Kollisionsrechtes*, Wien 2007.

36) Protocol on the law applicable to maintenance obligations, Concluded on 23 November 2007.

37) *OJ C 27, 26.1.1998, p. 34.*

38) M. Altenkirch, in P. Huber (ed.), *Rome II Regulation – Pocket Commentary*, Munich 2011, Art 25 Rome II, 421.

39) V. Schröder, *Die Verweisung auf Mehrrechtsstaaten im deutschen Internationalen Privatrecht*, Tübingen 2007, 148.

plicable to divorce and legal separation does use nationality as a subsidiary connecting factor (e.g. in Art 5 (1) c and Art 8 (c) of the Rome III Regulation) and nationality is the main example of a connecting factor that does not refer to a territorial unit within the state, but to the state territory as a whole. Nevertheless, Art 14 of the Rome III Regulation follows the principle of direct referral as the primary solution. This is insofar surprising as the common habitual residence of the spouses and the common nationality of the spouses are the primary and the secondary connecting factors used respectively, both for the permissibility of the choice of the applicable law and the law applicable in the absence of a choice. And in the case when the spouses have their habitual residence in different territorial units of the same state, the common habitual residence of the spouses is unable to refer directly to one territorial unit within that complex. That means that both are, at least in certain situations, unable to directly refer to a particular territorial unit. Consequently, the choice of the EU legislator to provide for the principle of direct referral as the first option in Art 14 of the Rome III Regulation, speaks in favor of the argument that the EU legislator does prefer the principle of direct reference independently of the capability of the connecting factors to directly refer to a territorial unit in every situation.

The Art 36 of the Succession Regulation brings a real shift in the legislative policy, as it sets the principle of indirect referral as the primary solution of the problem. Namely, Article 36 (1) provides that “the internal conflict-of-laws rules of that State (which comprises several territorial units) shall determine the relevant territorial unit whose rules of law are to apply.” One may argue, that the reason for the change of course in EU PIL lies within the fact that in Art 34 of the Succession Regulation, *renvoi* is for the first time introduced to EU PIL, while it was excluded by Art 20 of the Rome I regulation, Art 24 of the Rome II Regulation and Art 11 of the Rome III Regulation. The question if the obligation of *renvoi*, that comprises the application of the private international law rules of the *lex causae*, should be followed by a parallel obligation to apply the provisions on the internal conflict of laws of the *lex cause*, and if the *argumentum a contrario* is also true, cannot be answered in a short manner. The most important argument in favor of such argumentation is that both instruments, *renvoi* and the principle of indirect referral to the law of the complex state, aim at the international harmony of decisions. Indeed, the EU Succession Regulation is the first PIL EU Regulation to give the international harmony of decisions priority over the harmo-

ny of decisions within Member States.⁴⁰ Namely, usually in uniform instruments on conflict of laws *renvoi* is excluded, because there is a fear of endangering or lowering the uniformity achieved by the uniform instrument, if non-uniformed conflict rules of a non-party to that instrument would be applicable.⁴¹ However, *renvoi* and the application of the internal rules on conflicts of laws also serve different purposes, as for example *renvoi* also aims at the extending of the application of the *lex fori*, when referring back to the domestic law.⁴² Nevertheless, there are further arguments in favor of a parallel regulation of both institutes. The application of foreign rules on internal conflict of laws, takes away from the practicability and the predictability of the result achieved by the exclusion of *renvoi*.⁴³ When observing the issue from a substantive aspect, the decision if you, by applying *renvoi*, want to leave the designation of applicable law to foreign conflict rules, is comparable to the decision if you want your own law to decide on the internal conflict of laws within a foreign state.⁴⁴

Following these arguments, an exclusion of *renvoi* should not mean an exclusion of the obligation to consider the foreign rules on internal conflicts of laws.⁴⁵ The greatest concern is that the direct-reference model endangers the international harmony of decisions. Here again, the indirect-reference model follows the same goal as *renvoi*.⁴⁶ Namely, if the same case would have been decided before the court of the foreign state which law we should apply, that court would on the ground of its own private international law come to the conclusion to apply domestic law and then apply its internal conflict-of-laws rules in order to determine the applicable law of a particular territorial unit. A direct reference to the law of a particular unit does not mean that we apply the substantive law of that unit excluding its rules on internal conflict of laws.⁴⁷ This conclusion stays the same irrespective if the rules for

40) A. Dutta, *Münchener Kommentar BGB – Internationales Privatrecht I*, München 2015, Art. 34 EuErbVO, para. 1.

41) *Ibid.*

42) F. Eichel, „Interlokale und interpersonale Anknüpfungen“, in S. Leibe/H. Unberath (Hrsg.), *Brauchen wir eine Rom 0-Verordnung?: Überlegungen zu einem Allgemeinen Teil des europäischen IPR*, Jena 2013, 403.

43) *Ibid.*

44) G. Kegel/K. Schurig, *Internationales Privatrecht*, München 2004, 417.

45) V. Schröder, *Die Verweisung auf Mehrrechtsstaaten im deutschen Internationalen Privatrecht*, Tübingen 2007, 148.

46) *Ibid.*

47) J. V. Hein, *Münchener Kommentar BGB-Internationales Privatrecht I*, München 2015,

internal conflicts of laws are on the state level or on the level of the territorial unit, as long as they are applicable in the territorial unit until our private internal law referred to. By respecting the internal conflict-of-law rules of the territorial unit we contribute to the international harmony of decisions. Clearly, if we follow this argument, the direct-reference model only makes sense when the state does not have rule on internal conflicts of law, because otherwise the direct reference model becomes just a longer way to apply the indirect-reference principle.⁴⁸ This is also a very strong argument in favor of the indirect-reference rule as a primary solution and the use of the direct-reference model only as a subsidiary solution. The question of further consideration of rules for solving internal conflicts of laws, even after the applicable law of the territorial unit has been determined by the direct referral of the conflict rule *lex fori*, the so called „internal *renvoi*“, has not been discussed in legal theory in SEE states so far. On the other hand, in Germany the prevailing opinion is that in such case the interstate rules for internal conflicts do need to be considered.⁴⁹ This is another important and open question for the Rome I Regulation and also for the further reform of the PIL in SEE states. Following the principle of international harmony of decisions, there are stronger arguments in favor of consideration of the rules for internal conflicts of the complex state referred to, regardless of the method of reference to the law of that multi-unit state. There is nothing in the wording of any of the EU PIL Regulations or the Art. 10 of the PIL Code of B&H that would prohibit or even speak against the consideration of foreign rules on internal conflicts of laws.

Even if the introduction of *renvoi* has influenced the switch from direct to indirect reference in internal conflicts of laws, the EU legislator did not restrict the application of Art 36 of the Succession Regulation only to cases where we could have a potential application of the *renvoi* rule from Art 34 of the Succession Regulation. Namely this would be the case only when a law of the Member State refers to a law of a third state. That means that Art 36 of the Succession Regulation is applicable also to internal EU references between the laws of the Member States, where no *renvoi* is possible. This is currently only possible, if in a case before a court in one Member State, the Succession Regulation refers

Art 4 EGBGB, para. 195.

48) In this sense also Th. Rauscher, *Internationales Privatrecht*, Heidelberg 2012, 96.

49) V. Schröder, *Die Verweisung auf Mehrrechtsstaaten im deutschen Internationalen Privatrecht*, Tübingen 2007, 136, with further references; Also J. V. Hein, *Münchener Kommentar BGB-Internationales Privatrecht I*, München 2015, Art 4 EGBGB, para. 195.

to the law of the UK or Spain. When looking at the legislative procedure of the Succession Regulation, it becomes obvious that there was a change from the direct reference that was contained in the Commission's Proposal for a Succession Regulation, to the method of indirect reference, and this decision was strongly influenced by Spain, who requested respect for their own legislation on internal conflict of laws.⁵⁰

Even before the change to the indirect-reference model, there has been one exception to the domination of the principle of direct reference. Namely, the EU Maintenance Regulation⁵¹ in its Art 15 refers on the applicable law to the Hague Protocol 2007 on Maintenance Obligations. In Art 16 (2) of the Hague Protocol 2007, the principle of indirect referral is provided as the primary rule.⁵² Consequently, the Rome I-Rome III are following the method of direct referral, whereas the Succession Regulation and the Maintenance Regulation provide for the method of indirect-referral.

Finally, the change introduced by the Succession Regulation already made its influence to the newly adopted Regulation on matrimonial property⁵³ and the Regulation on property consequences of registered partnerships⁵⁴ that both provide for the indirect-reference model as the primary rule. The provisions of both regulations on "states with more than one legal system" are almost identical to the one in the Succession Regulation. Both regulations are adopted within the enhanced cooperation mechanism, whereas the previous proposals from 2011 both provided for a direct-reference model as a primary rule.⁵⁵ Both regula-

50) G. Christandl, "Multi-Unit States in European Union Private International Law", *Journal of Private International Law*, 2/2013, 231.

51) 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*, p. 1–79.

52) G. Christandl, "Multi-Unit States in European Union Private International Law", *Journal of Private International Law*, 2/2013, 229.

53) 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 2016 L 183/1*.

54) 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 2016 L 183/30*.

55) Art. 25 of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, *COM/2011/0126 final*; Art. 20 of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, *COM/2011/0127 final*.

tions exclude *renvoi* (Art 32 of the Regulation on matrimonial property and the Regulation on the property consequences of registered partnerships), supporting thereby the argument that from the perspective of the EU legislator the indirect-reference rule as a primary method does not depend on the applicability of *renvoi*.

3. The subsidiary references to multi-units states in accordance with EU Regulations

The EU PIL regulations did not adopt a general provision that is applicable in case the primary method of reference is not successful in determining the applicable law of the unit within the complex state. There is no uniform approach that could be used as a model for the Rome 0 Regulation.

Rome I and Rome II Regulation do not provide for any subsidiary method. It is true that nationality is not a connecting factor used in these Regulations and that almost all of the connecting factors used in the Rome I and II Regulations will be able to designate the exact unit within a complex state, whose law is applicable. There is at least one situation left unregulated by the provisions of the Rome I and II, and that is the case when the parties agreed on the law of a complex state as the applicable law and did not refer to a particular legal order of a territorial unit within that state. It was obviously left to the jurisprudence to find an appropriate solution in these cases. As the main rule, the will of the parties shall be honored to the extent possible.⁵⁶ The choice of applicable law by the parties that refers to the complex state without designating the territorial unit within that state should not be considered as invalid. Consequently, we need to try to find out if other clauses in the contract or circumstances of the case indicate that the will of the parties was to choose a concrete territorial unit within that state. If not, we should accept the referral to the law of that state as valid and then apply the provisions on the internal conflict of laws of that state. If the complex state does not contain provisions on the internal conflict of laws, we can either use the objective connecting factor from the EU Regulation, that would be applicable if there has not been a choice of law, or use the principle of the closest connection, in order to determine the unit within the complex state referred to by the choice of law. Another possible problem occurs when the principle of closest connection within the exception clause is applied (e.g. Art 4 (4) Rome I or 4 (3)

⁵⁶ D. Martiny, *Münchener Kommentar BGB-Internationales Privatrecht I*, München 2015, Art 22 Rom I-VO, para. 6.

Rome II). When the reference is made due to the principle of closest connection, it is possible to directly refer to a particular unit within a complex state. Considering that the closest connection principle in both regulations is used as an exception clause, or even more importantly, that it is in EU PIL used as the last option to solve internal conflict of laws, suggest that an indirect model of reference should have priority over the closest connection principle. Therefore in situation when the reference is made on the basis of the closest connection principle, we should first check the internal conflict-of-laws rules of that state.⁵⁷

None of the other EU PIL Regulations provides a solution for the situation when parties agreed on the law of a complex state and did not refer to a particular legal order of a territorial unit within that state. In addition, the choice of law is without any limitations permitted only under the Rome I and II Regulation, whereas the Rome III, the Succession Regulation and the Maintenance Regulation provide for a limited choice of law. The question arises, if the limitations on the choice of law apply also to the inter-local of conflict of laws.⁵⁸ The views in the literature so far seem to consider the application of the limitations on the applicable law to the choice of the legal order of a concrete unit within the complex state to be given.⁵⁹ This seems also to be suggested by the wording of the German text of Art 14 (c) Rome III Regulation, providing for the territorial unit chosen by the parties, or the closest connection in “absence of the possibility of choice” (“*Mangels einer Wahlmöglichkeit*”), whereas in English version the formulation is “in absence of choice” and the French “*en l’absence de choix*”. That also means that in case when the choice of law is permitted on the basis of the nationality of the respective person, e.g. the spouse in accordance with Art 5 (1)c of the Rome III Regulation or the deceased in accordance with Art 22 (1) of the Succession Regulation, it is not allowed

57) V. Schröder, *Die Verweisung auf Mehrrechtsstaaten im deutschen Internationalen Privatrecht*, Tübingen 2007, 117.

58) S. Leible/M. Müller, „A General Part for European Private International Law“, *Yearbook of Private International Law 2012/2013*, 148.

59) Ch. Budzikiewicz, „Anmerkungen zu den Art 5–16“, in O. Jauernig (ed.), *Kommentar zum BGB*, para. 2; W. V. Mohrenfels, *Münchener Kommentar BGB – Internationales Privatrecht I*, München 2015, Art. 14 Rom III-VO, para. 2; R. Süß, “Unteranknüpfung bei Staaten mit gespaltenem Rechtssystem”, in R. Süß, *Erbrecht in Europa*, para. 147; Differently P. Franzina, „The law applicable to divorce and legal separation under Regulation (EU) No. 1259/2010 of 20 December 2010“, *Cuadernos de Derecho Transnacional*, 2/2011, 119; F. Eichel, „Interlokale und interpersonale Anknüpfungen“, in S. Leibe/H. Unberath (Hrsg.), *Brauchen wir eine Rom 0-Verordnung?: Überlegungen zu einem Allgemeinen Teil des europäischen IPR*, Jena 2013, 414.

to choose the legal order of the particular unit within that state, but just the state as a whole.⁶⁰The only exception is the choice of the territorial unit to which the case has the closest connection, as this is the subsidiary rule in case when there are no internal conflict-of-laws rules and nationality is the connecting factor (Art 36 (2)b of the Succession Regulation, Art 16 (1)d of the Hague Protocol and Art 14 (c) of the Rome III Regulation).⁶¹

The subsidiary methods in the Succession Regulation, the Hague Protocol, the Regulation on matrimonial property and the Regulation on the property consequences of registered partnerships are very similar and use a combination of definitions and rules. In the absence of internal conflict-of-laws rules, they provide for direct referral of the habitual residence (Art 36 (2)a of the Succession Regulation; Art 16 (1) c of the Hague Protocol, Art 33 (2)a of the Regulation on matrimonial property and the Regulation on the property consequences of registered partnerships), the closest connection principle in case that nationality is the connecting factor (Art 36 (2)b of the Succession Regulation, Art 16 (1)d and e of the Hague Protocol, Art 33 (2)b of the Regulation on matrimonial property and the Regulation on the property consequences of registered partnerships) and the principle of direct referral in the case of any other connection factor as the last option (Art 36 (2)c of the Succession Regulation; Art 16 (1)a of the Hague Protocol, Art 33 (2) c of the Regulation on matrimonial property and the Regulation on the property consequences of registered partnerships).

The subsidiary provisions of the Rome III Regulation are somewhat different, because the Art 14 (a) Rome III Regulation follows the model of direct reference as the main rule. Firstly, and unnecessary, the subsidiary rule provides for the direct reference of the habitual residence (Art 14 (b) of the Rome III Regulation), that is already covered by Art 14 (a) of the Rome III Regulation. If nationality is the connecting factor, the internal conflict-of-laws rules shall be applicable, and in absence of such rules, the abovementioned choice of the parties, and finally the

60) R. Süß, “Unteranknüpfung bei Staaten mit gespaltenem Rechtssystem”, in R. Süß, *Erbrecht in Europa*, para. 147; Differently W. V. Mohrenfels (*Münchener Kommentar BGB – Internationales Privatrecht I*, München 2015, Art. 14 Rom III-VO, para. 3) who argues that in case there are no internal conflict-of-laws rules, the parties can choose freely. This view cannot be supported as Art 14 c) Rome III Regulation, allows the parties to choose only in case there are no internal conflict-of-laws rules. Consequently, the fact that there are no such rules cannot be used as an argument that Article 5 Rome III is not applicable to the choice of a territorial unit.

61) A. Dutta, *Münchener Kommentar BGB – Internationales Privatrecht I*, München 2015, Art. 36 EuErbVO, para. 9.

closest connection (Art 14 (c) of the Rome III Regulation). The choice by the parties is again raising the most questions, because an allowed choice done by the parties according to Art 5 of the Rome III Regulation is absolutely capable of referring directly to one territorial unit. On the other hand, if a direct choice of a territorial unit is done contrary to Art 5 of the Rome III Regulation, that choice will not be followed and the subsidiary rules of Art 14 of the Rome III apply. That leaves the choice of the parties in accordance Art 14 (c) of the Rome III Regulation without any scope of application.⁶² When using methods of interpretation this would usually be a strong argument against the interpretation of the Art 14 Rome III Regulation offered in this paper, but Art 14 Rome III Regulation already contains another provision without any independent scope of application, and that is the provision on direct reference of the habitual residence (Art 14 (b) of the Rome III Regulation). It may seem to the EU legislator that the use of provisions without an independent scope of application are a good tool for practitioners, because they repeat an important rule, but they do create confusion, because the methods of interpretation instruct us to try to give a provision any independent meaning if possible.

4. Conclusions for the Rome O-Regulation and the role model for SEE states

The change to the indirect-reference model is evident. However, it is still hard to conclude if we should consider that this provision will be generally introduce to all future regulations on applicable law, or if the EU legislator will simply provide for different options for contractual and non-contractual obligation on the one hand and for all other areas of PIL on the other hand. The indirect-reference rule does have a clear advantage, because of its contribution to the international harmony of decisions and the obligation to apply the rule on internal conflicts of laws *lex causae* even in the case when the direct-reference principle was applied. The EU model for direct reference leaves a legal gap in cases when parties have chosen a the law of a complex state as applicable, without determining the applicable law of a particular unit or when the escape clause refers to the law of the state with more than one legal system. Following the principle of international harmony of decisions, the rules for internal conflicts of the complex state referred to, need to

62) F. Eichel, „Interlokale und interpersonale Anknüpfungen“, in S. Leibe/H. Unberath (Hrsg.), *Brauchen wir eine Rom O-Verordnung?: Überlegungen zu einem Allgemeinen Teil des europäischen IPR*, Jena 2013, 415.

be considered regardless of the method of reference to the law of that multi-unit state.

In addition, we do have a set of subsidiary rules in the EU PIL that are identical in case when the indirect-reference model is the primary principle. The subsidiary provisions adopted so far do have the quality to serve as a model for the Rome 0 Regulation except for the direct-reference rule on habitual residence. Namely, the direct reference of the habitual residence is already covered by the direct-reference model as the last option in the subsidiary rules. The solution for the case when nationality is the connecting factor is very good, as it clearly supports the view that nationality cannot be used for a direct reference, even though in some states citizens do have the nationality both of the central state and the territorial unit. As previously shown on the example of District Brčko in Bosnia and Herzegovina, a direct referral on the basis of nationality can lead to wrong results. The closest connection principle provided by the EU Regulations in this situation allows taking into consideration the nationality of a territorial unit when determining the applicable law within one complex state. The subsidiary rule on cases when nationality is the connecting factor does, however, create problems when parties are willing to choose the applicable law on the basis of one of their nationalities, but cannot choose a particular unit within that state unless it has the closest connection to the case. This creates uncertainty as the closest connection will much later be established by the competent authority and parties in some cases can hardly foresee at the time of their choice which decision will be made later by that authority.⁶³

III. Final remarks

The lack of a Rome 0 Regulation does not only represent a problem for EU Member States, who now have to deal with different regulation of some basic institutes in every subject matter, but also to (potential) candidate states that are trying to fulfill their obligation to harmonize with EU PIL before the accession to the EU. This paper deals with the institute of multi-unit states and partly with *renvoi* and both institutes are now differently regulated in several EU regulations. When we consider how difficult it is to provide for a good commentary of domestic PIL provisions on these complex institutes of PIL, it is clear that the lack of a Rome-0 Regulation cannot be tolerated much longer. From

63) A. Dutta, Art. 36 EuErbVO, in Münchener Kommentar zum BGB, München 2015, para. 9.

the perspective of Bosnia and Herzegovina as a multi-unit state, it is obvious that the arguments in this paper mostly favor the principle of indirect-reference as a primary rule. But the argument is not and cannot be based on the principle of sovereignty, but only on the principle of international harmony of decisions.

ABSTRACT

Usually at this place of the conference proceedings, some final remarks and conclusions of on the three main topics of the conference should be presented. However, some of the biggest names of PIL presented their paper at the conference, at the Faculty of Law in Zenica, and submitted their papers with conclusions in these conference proceedings. There is no need or space left for additional conclusions. In addition, the topic of states with more than one legal system is a very important topic for Bosnia and Herzegovina who belongs to the group of only three states in Europe with such complex legal system and Art. 36 of the Succession Regulation brings some important changes with regards to this question of EU PIL. In the first part, the paper will focus on the obligation of (potential) candidate states to harmonize their national PIL with EU law even before becoming member of the EU. In the second part it will focus on the question how to harmonize the national laws of (potential) candidate states with the EU PIL provisions on states with more than one legal system (“multi-unit states”).

Keywords: States with more than one legal system; Multi-unit states; Stabilization and Association Agreement; Succession Regulation; Rome 0 Regulation.

MEĐUNARODNO PRIVATNO PRAVO NA SCENI - ČLAN 36. UREDBE O NASLJEĐIVANJU U DRŽAVAMA SA SLOŽENIM PRAVNIM PORETKOM KAO MODEL ZA REFORME MEĐUNARODNOG PRIVATNOG PRAVA U DRŽAVAMA JUGOISTOČNE EVROPE

SAŽETAK

Uobičajeno je na ovom mjestu u zborniku radova sa konferencije predstaviti određene završne napomene i zaključke koji se tiču sve tri glavne teme konferencije. Ipak, neka od najvećih imena međunarodnog privatnog prava su prezentirali svoje radove na konferenciji, na Pravnom fakultetu u Zenici, te su predali svoje radove sa zaključcima radi objavljivanja u ovom zborniku radova. Nema ni potrebe ni prostora za dodatne zaključke.

Osim toga, tema država sa složenim pravnim poretkom je veoma važna za Bosnu i Hercegovinu koja pripada grupi od samo tri države u Evropi sa tako složenim pravnim sistemom i čl. 36. Uredbe o nasljeđivanju donosi značajne izmjene u odnosu na ovo pitanje međunarodnog privatnog prava Evropske unije. U prvom dijelu, članak obrađuje obavezu (potencijalnih) država kandidatkinja da usklade svoje međunarodno privatno pravo sa evropskim pravom, čak i prije prijema u članstvo EU. U drugom dijelu rad se bavi pitanjem kako uskladiti nacionalno pravo (potencijalnih) država kandidatkinja sa propisima međunarodnog privatnog prava EU koje se odnose na države sa složenim pravnim poretkom.

Ključne riječi: države sa više pravnih poredaka; države sa složenim pravnim poretkom; Sporazum o stabilizaciji i pridruživanju; Uredba o nasljeđivanju; Uredba Rim 0.