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## **THE HAGUE CONVENTION 2005 AND BOSNIA AND HERZEGOVINA**

### **INTRODUCTION**

In international business, as well as the business of internal (national) character, the parties are free to determine which court will have jurisdiction to solve possible disputes. When it comes to BH, the rules on choice of court agreements are contained in the Act on Resolving Conflicts of Laws with Legal Provisions of Other Countries in Certain Relations (hereinafter: the PIL Act BH)<sup>1</sup>. This Act specifies the conditions under which the parties may agree on the jurisdiction of a foreign court, or the jurisdiction of the court in BH. The PIL Act BH, however, is silent with regard to the effects of the choice of court agreement. More precisely, it does not give an explicit answer to the question whether the court chosen in accordance with the prorogation agreement has exclusive or competitive jurisdiction. This fact may reflect the work of the courts in the process of recognition and enforcement of foreign court judgments, which may ultimately lead to a distortion of the principle of legal certainty of the parties.

The Convention of 30 June 2005 on Choice of Court Agreements entered into force in October 2015.

Unlike the PIL Act BH, the Hague Convention 2005 is explicit when it comes to determining the effects of choice of court agreement, specifying that the court, upon whose jurisdiction the parties agreed, has exclusive jurisdiction. This is manifested in the way that any other court shall suspend or dismiss proceedings in favor of the chosen court. In the first part of the paper the author gives a brief historical overview of the Hague Convention 2005 and the review of the legislative framework of Private International Law in BH. In the second part, we compared the most important provisions of the Convention with the respective provisions of the PIL Act BH, thus pointing out the obvious differences that exist between them, which particularly refer to the scope of application, the effects of choice of court agreement, as well

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1) Official Gazette of the SFRY No. 43/1982, 72/82, Official Gazette of the Republic of Bosnia and Herzegovina, No. 2/92, 13/94.

as implied choice of court agreement defined in the PIL Act BH. The third part deals with the conditions for the recognition and enforcement of foreign judgments brought by the chosen court, defined according to the Hague Convention 2005 and PIL Act BH. The fourth part analyzes the significance of BH accession to the Hague Convention, from the viewpoint of the EU integration process. The paper ends with the concluding remarks.

### **I The Hague Convention 2005 – historical background**

The proposal for regulating the area of jurisdiction and recognition of judgments in civil and commercial matters was given by the late American professor AT Mehren in early nineties<sup>2</sup>. It was concluded that the Hague Conference on Private International Law was the most convenient framework for the project to be carried out. In this regard, in 1996 the project has been officially included in the work program of the Conference<sup>3</sup>.

Initial idea was that document should take the form of “mixed” convention, in terms of dividing grounds for jurisdiction into three categories.<sup>4</sup>

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Although this approach was adopted by the working group, it became clear that a satisfactory document will not be adopted in time. Therefore, the nineteenth session of the Conference in June 2001 called into question the continuation of the work in terms of the adoption of the Convention. Thanks to the informal working group, the work on preparation of the document was continued in 2002. The final text of the Convention was adopted on the twentieth session of the Conference in June 2005<sup>5</sup>.

Although this was not the first attempt to structure the rules whose aim was to overcome legal uncertainty in the field of recognition and

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2) Hartley, T., Dogauchi, M., Convention of 30 June 2005 on Choice of Court Agreements Explanatory Report, <https://www.hcch.net/en/publications-and-studies/details4/?pid=3512&dtid=35>, pp. 25.

3) Hartley, T., Dogauchi, M., *ibid.*

4) Hartley, T., Dogauchi, M., *ibid.*

5) Schulz, A., The Hague Convention of 30 June 2005 on Choice of Court Agreements, *Journal of Private International Law*, Vol. 2, issue 1, 2006., pp. 243-244. Beaumont, P., Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status, *Journal of Private International Law*, vol. 5, issue 1., 2009., pp.125-159.

enforcement of foreign judgments in civil and commercial matters<sup>6</sup>, the Convention 2005 is considered the first successful project in this area.

The substantial reasons why the 1971 Convention was deemed unsuccessful, besides conclusion of Brussels and Lugano Conventions, and unusual and complex form of this Convention, was that it missed to ascertain rules giving exclusive jurisdiction to the chosen court, which is believed to be crucial for litigants.<sup>7</sup>

Those who worked on the adoption of the Hague Convention set themselves a difficult task. In terms of prorogation agreements, the Hague Convention 2005 should achieve the success that has made New York Convention in respect of arbitration awards.<sup>8</sup>

Whether the Convention will achieve success at the international level, and eventually create conditions for choice of court agreements to become an alternative to commercial arbitration agreements, remains to be seen<sup>9</sup>.

## **II Private International Law in Bosnia and Herzegovina – short historical overview**

The provisions on prorogation of international jurisdiction and respective provisions on the recognition and enforcement of foreign court judgments are contained in the Act on Private International Law in Bosnia and Herzegovina.<sup>10</sup> Thanks to the constitutional division of competences, regulation of private law relations, including the area of private international law, is not under the jurisdiction of the State of BH, but rather in competence of the lower administrative and territorial units -

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6) See also Convention on the recognition and enforcement of foreign judgments in civil and commercial matters, *concluded 1 February 1971, hereinafter: 1971 Convention*). This Convention entered into force in 1979, and currently has five contracting states. Maja Stanivuković, Haška konvencija o izboru nadležnog suda – kritička procena, Zbornik radova Pravnog fakulteta u Novom Sadu, 3/2012, pp. 123.

7) Preliminary Document No 7 of April 1997 for the attention of the Special Commission of June 1997 on the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matter, Report drawn up by Catherine Kessedjian, pp. 7-8, [https://assets.hcch.net/upload/wop/jdgm\\_pd7.pdf](https://assets.hcch.net/upload/wop/jdgm_pd7.pdf), 12.11.2015.

8) Stanivuković, M., op. cit., pp. 123-124. Teitz, L.E., The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration, TDM 5 (2006), [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com), 22.12.2015.

9) See also Garnett, R., The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?, *Journal of Private International Law*, Vol 5, issue 1, 2009., pp. 161-180.

10) The Act on Resolving Conflicts of Laws with Legal Provisions of other Countries in Certain Relations. See *infra* fn. 12.

entities: the Federation of Bosnia and Herzegovina and the Republic of Srpska.

Constitution of Bosnia and Herzegovina<sup>11</sup> has made the division of competencies between the state and entity level. The initial concept of this constitutional act is the enumeration of the competencies of the institutions of Bosnia and Herzegovina (Article III/1.) with presumption of competencies in favor of entities (Article III/3.a). According to it, the area of private law relations, including private international law issues is not in competence of the institutions of Bosnia and Herzegovina but rather in competence of the institutions of lower state authority levels<sup>12</sup>. After dissolution of Yugoslavia, The Act on Resolving Conflicts of Laws with Legal Provisions of other Countries in Certain Relations (hereinafter: PIL Act)<sup>13</sup> was taken over into the legislation in Bosnia and Herzegovina and is currently applicable unchanged in both of its entities.

Although at the time it was passed, PIL Act was considered one of the most modern codifications of private international law<sup>14</sup>, today we can say that this Act has lost pace with time, primarily due to the fact that it does not contain some of the institutes of private international law which are already deeply ingrained not only in the relevant instruments of the EU, but also in contemporary international and national laws in this area. The abovementioned also refers to provisions on choice of court agreement.

## **II Choice of Court Agreement – comparison between the Hague Convention 2005 and respective provisions from PIL Act in BH**

The Hague Convention 2005 shall apply in relations between the Contracting States if there are three conditions cumulatively fulfilled:<sup>15</sup>

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11) Dayton Peace Agreement was signed in Paris on 14, December, 1995. More on the constitutional structure of B&H and division of competencies see Trnka, K., Constitutional Law, Faculty of Law University in Bihać, Sarajevo, 2000, pp. 324 – 325. Bieber, F., Post -War Bosnia Ethnicity, Inequality and Public Sector Governance, Palgrave Macmillan, New York, 2006., pp. 40, 46-47, 56-62. Friedman, F., Bosnia and Herzegovina, A polity on the brink, Routledge, 2004., pp. 62. Nystuen, G., Achieving Peace or Protecting Human Rights, Martinus Nijhof Publishers, 2005., pp. 72- 74. Mansfield Morawiec A., Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina, Columbia Law Review, Vol. 103, No. 8. (Dec., 2003) pp. 2062.

12) Federation of Bosnia and Herzegovina, Republic of Srpska and District Brcko.

13) Official Gazette of SFRY, No. 43/1982, 72/82, Official Gazette of B&H, No. 2/92, 13/94.

14) Stanivuković, M., Živković, M., Međunarodno privatno pravo, Službeni glasnik, Beograd, 2013., pp. 38-42.

15) Hartley, T., Dogauchi, M., pp. 39.

- parties have concluded an exclusive choice of court agreement;
- it is a dispute with an international element, and
- it is a dispute in the field of civil and commercial matters.

PIL Act BH also leaves room for parties to prorogate jurisdiction of a foreign court provided that at least one of them is a foreign citizen or a legal entity with its head office abroad and the dispute is such that under the provisions of this Act or of another Act it is not within exclusive jurisdiction of the court in BH.<sup>16</sup>

The parties may agree that a Court in BH shall have jurisdiction, if at least one party is a citizen of BH<sup>17</sup> or legal entity with its head office in BH<sup>18</sup>.

### **2.1. Scope of application and exclusions from scope**

The Hague Convention defines the “international element” in two ways, namely: for the purposes of applying the provisions on jurisdiction and with regard to the provisions on the recognition and enforcement of foreign court judgments. In the first case, the dispute is considered to be international unless the parties are resident<sup>19</sup> in the same Contracting State, and unless the relationship between the parties and all other elements relevant to the dispute in question, other than the location of the chosen court, are connected only with that State<sup>20</sup>. In the context of the abovementioned, international element exists, and the Convention shall be applied for example, in the dispute between BH citizen who resides in Germany and a citizen of BH, with residence in BH, assuming of course that the BH is party to the Convention.<sup>21</sup> Even if both of the parties are BH nationals with residence in BH, but the contract is made in Croatia, it is supposed to be performed there, and the parties to the contract choose a court in Croatia, the Convention provisions on jurisdiction could be applied. Contrary, if all the elements of the legal relationship except the location of the chosen court are connected to one state, such a case would not be deemed international for

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16) Article 49 par. 1 PIL Act BH.

17) Federation of BH or Republic of Srpska.

18) Article 49 par. 2 PIL Act.

19) It is interesting that „residence“ rather than „habitual residence“ is accepted as a final solution in the Convention to determine the existence of international element.

20) The Hague Convention 2005, Article 1, par. 2 .

21) See also the example given in the Report to the Convention, Hartley, T., Dogauchi, M., op. cit., pp. 39

the purpose of the provisions on jurisdiction in the Convention.<sup>22</sup>

For the purpose of applying the conventional rules on jurisdiction, it shall be deemed that the legal entity is a resident of the State in which it has statutory seat or under whose law it was incorporated or where it has its central administration or where it has its principal place of business.<sup>23</sup> This provision has alternative character, and it will be deemed that the case is international if, in relation to other contracting party, any of the abovementioned connecting factors is located in another state.

Regarding the recognition and enforcement, it is considered that there is a foreign element, if it comes to the recognition and enforcement of foreign judgment.<sup>24</sup>

Consequently, the judgment related to the case that was not international according to the Convention receives “international prefix”, if it becomes the subject of recognition or enforcement in another Contracting State. *Hartley* and *Dogauchi* emphasize the practical significance of such provision, because the defendant might move assets to another Contracting State<sup>25</sup>.

Unlike the Hague Convention 2005, the PIL Act BH stipulates that the parties may agree on the jurisdiction of a foreign court, if at least one of them is a foreign citizen or a legal entity with its head office abroad, while on the other side parties may agree that a court in BH shall have jurisdiction if at least one of them is BH citizen or legal entity with its headquarters in BH.<sup>26</sup> According to the provision of the PIL Act BH, it is clear that two foreign entities can not prorogate the jurisdiction of the court in BH, and the two nationals can not prorogate the jurisdiction of a foreign court.<sup>27</sup> It is evident that the Hague Convention 2005 and PIL Act BH refer to different concepts of “foreign element”, in such a way that the first instrument opts for the concept of residence, while the later chooses citizenship (in case of natural persons). Had BH accedes to the Convention, the number of situations in which jurisdiction of the courts

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22) The Hague Convention 2005, Article 1, par. 2.

23) The Hague Convention 2005, Article 4 (2).

24) The Hague Convention 2005, Article 1, par. 3.

25) Hartley, T., Dogauchi, M., *ibid.*

26) Article 49 (1), (2) PIL Act BH.

27) See also Grušić, U., *Dejstvo prorogacionih sporazuma u evropskom, engleskom i srpskom pravu*, in: *Međunarodno privatno pravo i zaštita stranih investitora*, podgorica, 2008., pp.238.

in BH can be prorogated or derogated would certainly be increased.<sup>28</sup>

Of course, BH may protect its interests by limiting the jurisdiction of its courts (based on an exclusive choice of court agreement) in case that, except for the location of the chosen court, there is no connection between BH and the parties or the dispute.<sup>29</sup>

According to Article 2 of the Hague Convention 2005, consumer and employment contracts are excluded from the scope of the Convention.<sup>30</sup> The Convention shall not be applied to status, capacity, family law and succession matters, insolvency issues as well as carriage of passengers or goods, maritime matters, anti-trust/competition issues, nuclear liability, personal injury, damage to tangible property, immovable property, legal persons, intellectual property issues, except copyright and related rights, validity of entries in public registers, and arbitration and related proceedings<sup>31</sup>. However, these issues are not excluded from the scope of the Convention if they appear merely as a preliminary question and not as an object of the proceedings.<sup>32</sup>

The provisions on choice of court agreement from the PIL Act BH will not be applied in matters concerning jurisdiction issues from articles 61 to 70 of this Act.<sup>33</sup> This means that issues such as: immovable property disputes, matrimonial matters, disputes for the establishment or contest of paternity or maternity, disputes over the guardianship and upbringing of children, granting permits a minor to marry, probate process concerning immovable estate of the deceased, adoption or termination of adoption, matters of guardianship, and pronouncing missing person to be dead can not be resolved before the chosen court, but rather before the court/s in BH, since these issues are within exclusive jurisdiction of the courts in BH.

It is interesting that Convention provides that proceedings are not excluded from the scope of the Convention by the mere fact that a State,

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28) See also Grušić, U., Krivokapić, Đ., *Zašto Srbija treba da pristupi Haškoj konvenciji o sporazumima o nadležnosti suda*, Collection of Papers, IX Private International Law Conference: Recent Trends in European Private International Law – Challenges for the National Legislations of the South East European Countries, Skopje, 2011., pp. 226-227.

29) The Hague Convention 2005, Article 19.

30) The Hague Convention 2005, Article 2 (1).

31) The Hague Convention 2005, Article 2 (2), (4).

32) The Hague Convention 2005, Article 2 (3).

33) Article 49 (3) PIL Act BH and article 47 PIL Act BH.

including other state organizational units, is a party thereto.<sup>34</sup> The required condition is that a public authority acts in a matter which is civil or commercial.<sup>35</sup> Contrary, if a public authority acts in its sovereign capacity, such the proceedings will fall outside the scope of the Convention. The state as a party to civil relations is equal with other natural and legal entities. When, for example, in administrative proceedings the governmental agency assesses the liability for taxation of plumbing contractor incorporated under the law of another State, the revenue office acts from a position of state authority. It gives an order. But when it comes to repair the water supply system in the building of the revenue office, there is no discrepancy between the governmental agency (revenue office) and other users of plumbing services. It cannot force the craftsman to accept the job, nor can it unilaterally set the fees. Everything is a matter of agreement.<sup>36</sup>

If BH accedes to the Convention, the state, as well as other state organizational units would be able to conclude an agreement on the jurisdiction of a foreign court.<sup>37</sup> This feature is particularly interesting given the increased number of foreign entities appearing as investors and partners to the projects of public interest in BH. It would certainly contribute to legal certainty and predictability, which is of great importance for the parties to the contract, which in turn can have a positive impact on attracting foreign capital to BH.

If however, BH has an interest in not applying this Convention to a specific matter, it may declare that it will not apply the Convention to that matter. Of course, such a declaration should not be broader than

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34) The Hague Convention 2005, Article 2 (5).

35) Hartley, T., Dogauchi, M., op. cit., pp. 47.

36) Nikolić, D., Uvod u sistem građanskog prava, Centar za izdavačku delatnost Univerziteta u Novom Sadu, 2006., pp. 123. Similar example was given in Hartley, T., Dogauchi, M., op. cit., pp. 47.

37) Unlike countries in the region, such as Serbia and Croatia, whose Acts on public-private partnership and concessions (Act on public-private partnership and concessions in Serbia, Article 60, Official Gazette, No. 88/2001, and Act on public-private partnership in Croatia, Article 31(3), Narodne novine, No. 152/14) contain provisions on the exclusive jurisdiction of the national courts in a situation where the parties did not agree upon arbitration to resolve disputes, the corresponding legislation in BH does not contain provisions on the exclusive competence of national courts, in a situation where the parties have not agreed on arbitration to settle the dispute. The dispute resolution is categorized in part of the respective Acts relating to the content of the contract in question. See for example Article 26, par. 1 (j) of the Act on Concessions of BH (Official gazette BH, No. 32/2002), and Article 13, par. 3 (lj) of the Act on public-private partnership in Republic of Srpska (Official gazette RS, No. 59/2009).

necessary.<sup>38</sup>

## 2.2. Effects of the Choice of Court Agreement

The Convention shall apply to exclusive choice of court agreements.<sup>39</sup> The agreement has to satisfy criteria from Article 3 of the Convention.<sup>40</sup> From the standpoint of BH, it is especially interesting to consider the provision of Article 3 (b) of the Hague Convention 2005. Specifically, it stipulates that the choice of court agreement which designates the courts of a Contracting State or one or more specific courts of a Contracting State is considered to be exclusive unless the parties have determined otherwise. However, it should be noted that the word “state” can have different meanings with respect to a Contracting State in which there are more territorial units, which, given the scope of the Convention, have different legal systems. In fact, as previously stated in the paper, BH is a complex state consisting of two entities and Brcko District. Assuming that the BH acceded to the Convention, the above provision should be considered in conjunction with Article 25 of the Hague Convention 2005, which determines the application of Convention provisions with respect to States having non-unified legal system.

According to these provisions, a choice of court agreement can refer either to the courts in BH in general, or to one or more specific courts in BH. In both cases, the choice of court agreement would be regarded to be exclusive for the purposes of the Convention.

However, any reference to the court or courts in BH shall be deemed to indicate, if appropriate, the court or the courts of a specific territorial unit (Federation of BH, Republic of Srpska and Brčko District).

It is clear that the parties can prorogate the jurisdiction of the Municipal Court in Sarajevo or the Municipal Court in Tuzla, as the courts located within the same territorial unit in BH, in which case the jurisdiction of the chosen court would be considered to be exclusive for the purposes of the Convention. However, it is disputed whether the jurisdiction would be deemed exclusive if the parties opt for the Municipal Court in Tuzla or the respective court in Bijeljina, as the courts

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38) The Hague Convention 2005, Article 21 (1).

39) The Hague Convention 2005, Article 3.

40) There must be agreement based on the consent of the parties; requirements concerning the form have to be fulfilled; the choice has to be exclusive; choice of court agreements has to be in favor of the courts of a Contracting State; the designation of the court has to be in connection with a particular legal relationship; agreements are deemed exclusive if the chosen courts were in the same state.

operating in different territorial units.<sup>41</sup>

We believe that the answer to this question depends on the context, or the application of specific provisions of the Convention. Thus, with regard to the provision of Article 3 (b) of the Convention, the jurisdiction of the chosen court(s) in the given example is deemed to be exclusive, since both of the courts are located in the same Contracting State.<sup>42</sup>

The court or courts of a Contracting State, designated in the exclusive choice of court agreement, are obliged to settle the dispute.<sup>43</sup> The chosen court cannot decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another state.<sup>44</sup> This applies, however when it comes to the court<sup>45</sup> in another, and not in the same state.<sup>46</sup>

In case of BH, “State” should be considered in relation to the provision on Contracting States with non-unified legal system. Thus, “the court in another state” in this context could refer to “the court of another territorial unit” within the same country.<sup>47</sup> For example, if the parties designated that the courts in FBH shall have exclusive jurisdiction to decide a dispute, pursuant to the provision of Article 5 (2) of the Convention, the Court in FBH would not be able to decline to exercise jurisdiction, based on the fact that the dispute should be resolved in a court of another entity. If, however, choice of court agreement referred to “the courts in BH”, according to Article 5 (2) of the Convention, the Court in FBH could refuse to resolve the dispute in favor of the court from Republic of Srpska.<sup>48</sup> The provisions of the Hague Convention 2005 shall not affect rules on the internal allocation of jurisdiction among the courts of a Contracting State.<sup>49</sup>

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41) The given situation is not comparable to examples cited in the Hartley/Dogauchi Report, (pp. 51, 55-57).

42) Assuming of course, that BH acceded to the Convention, unless it has made a declaration that the Convention shall extend only to one of its territorial units according to Article 28 (1) of the Convention. Hartley, T., Dogauchi, M., op. cit., pp. 51 -53.

43) The Hague Convention 2005, Article 5 (1).

44) This provision is particularly important bearing in mind that the *forum non conveniens* and *lis pendens* doctrine used to relativize the importance of choice of court agreements, thus influencing the legal certainty of the parties. The Hague Convention 2005, Article 5 (2).

45) And not the arbitration. Hartley, T., Dogauchi, M., fn. 155, op. cit., pp. 55 - 57.

46) Hartley, T., Dogauchi, M., op. cit., pp. 55.

47) See also Hartley, T., Dogauchi, M., op. cit., pp. 57.

48) Cf. Hartley, T., Dogauchi, M., *ibid.*, pp. 57.

49) The Hague Convention 2005, Article 5 (3).

In case of BH, the provision of Article 5 (3) b) of the Convention regulates the situation when the prorogation agreement provides for the exclusive jurisdiction of the court in one of the entities in BH, and that court under the internal rules of the territorial unit has no real or territorial jurisdiction. Prorogation agreement in this case shall not have the effects according to the provisions of the Convention, but in accordance with appropriate provisions belonging to the legal system of the entity / district concerned.

The provision of Article 6 is one of the key provisions of the Convention, bearing in mind the intention of strengthening the party autonomy concerning prorogation of jurisdiction in compare to the provisions on parallel proceedings. Indeed, if the proceedings had been initiated in the Contracting State other than that of the chosen court, that court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies. There are a number of exceptions from this rule.<sup>50</sup>

According to PIL Act BH, it is not clear whether the prorogation agreement gives exclusive or non-exclusive (competitive) jurisdiction to the chosen court. While prorogating international jurisdiction, the parties may designate that the choice of court agreement shall be deemed exclusive, implying the prorogated exclusive jurisdiction of the court, which differs from the exclusive jurisdiction according to the PIL Act BH.<sup>51</sup> However, if the parties have not determined the effect of the prorogation agreement, it depends on the interpretation whether choice of court agreement would be deemed exclusive or non-exclusive. Legal theory was standing on the point that, if the parties did not expressly determine the effect of choice of court agreement, it shall be considered exclusive.<sup>52</sup> Provision on choice of court agreement under Article 49 of the PIL Act BH should be observed in correlation with the provision on parallel proceedings. According to article 80 of the PIL Act BH, the court in BH shall on the application of one of the parties suspend its proceedings, if proceedings involving same cause of action and between the same parties are brought in the foreign court. This would be the case if the foreign court before which proceedings related to respective cause of action are brought, is the court first seized, provided the cause of action is not under the exclusive jurisdiction of the

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50) The Hague Convention 2005, Article 6 (a-e).

51) Dika, M. (et.al.), Komentar Zakona o međunarodnom privatnom i procesnom pravu, Nomos, Beograd, 1991., pp. 187.

52) *Ibid.*

courts in BH. However, it is not clear from this provision whether it is about exclusive jurisdiction according to PIL Act in BH, or it also refers to prorogated exclusive jurisdiction. According to article 47 of the PIL Act BH, exclusive jurisdiction of the courts in BH exists only when it is explicitly provided by this or another Act. It is therefore evident that the term “exclusive jurisdiction” means only exclusive jurisdiction from article 47 of the PIL Act, which would mean further on, that the Court in BH shall, despite the exclusive jurisdiction of the court in BH, suspend its proceedings and wait until the foreign court before which the proceedings are brought reach a decision on its jurisdiction.

### **2.3. Tacit Choice of Court Agreement**

In accordance with the provisions of the PIL Act BH, prorogation can be explicit and tacit. If the plaintiff filed a suit in the court whose jurisdiction is not prorogated, and the defendant has not contested to jurisdiction of that court, it can be concluded that the defendant consented to jurisdiction of that court. In favor of the aforementioned speaks the provision of Article 50 of the PIL Act BH, according to which it shall be considered that the defendant consented to jurisdiction of courts in BH if he submitted a reply to the suit or appealed against a payment order, or addressed the main issue without objection as to such jurisdiction.<sup>53</sup>

Since the PIL Act BH does not contain a provision on deadlines for filing objections to the jurisdiction, we consider that in accordance with Article 19 (1) of the Civil Procedure Act,<sup>54</sup> the court could decline to exercise jurisdiction, if the objection was filed no later than in reply to the suit.

The practice of the courts in Bosnia and Herzegovina (Federation of Bosnia and Herzegovina) is in accordance with this provision. Thus, for example, the decision of the Cantonal Court in Tuzla states that: “... as the jurisdiction of the chosen court is prorogated jurisdiction in accordance with the law, and the plaintiff did not use his contractual right to launch the procedure before the chosen court, ... that the defendant did not contest the jurisdiction before addressing the main issue ... or no later than in reply to the suit, but during the preliminary hearing ... the first instance court was correct when it rejected a complaint concerning jurisdiction of the Municipal Court in Tuzla”.<sup>55</sup>

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53) Dika, M. (et.al.), op. cit., pp. 183.

54) Zakon o parničnom postupku FBH (Official Gazette FBH, br. 53/03, 73/05, 19/06).

55) The Decision of the Cantonal Court in Tuzla No. 03 0 Ps 004338 08 Pž from 25. 4. 2011.

It is evident that according to existing legal provisions, tacit prorogation of jurisdiction takes precedence over the explicit<sup>56</sup>.

The Hague Convention, however, excludes from its scope of application the tacit choice of court agreement<sup>57</sup>.

Furthermore, the Convention does not limit the ability of the chosen court to decide on the validity of the choice of court agreement by any deadline. Therefore, according to some authors, its provisions may affect the validity of the tacit prorogation, in terms of entering the nullity of an agreement in due time.<sup>58</sup>

### **III Provisions on Recognition and Enforcement**

According to the Hague Convention 2005, a judgment<sup>59</sup> given by a court designated in an exclusive choice of court agreement, shall be recognized and enforced in other Contracting States. Recognition or enforcement may be refused only on the grounds specified in the Convention<sup>60</sup>. The Convention prohibits a review of the merits of the judgment. The court addressed shall be bound by the findings of fact on which the court of origin (chosen court) based its jurisdiction. The exception from this rule refers to judgments given by default.<sup>61</sup>

A judgment shall be recognized only if it has effect in the state of origin. If the judgment is enforceable in the state of origin, the courts in other Contracting States are obliged to enforce it.<sup>62</sup> Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. However, this does not prevent a subsequent

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The decision has not been published.

56) Varadi, T. (et.al), *Međunarodno privatno pravo*, Pravni fakultet u Beogradu, 2010., pp. 509. Alihodžić, J., *Sporazum o prorogaciji nadležnosti kod ugovornih odnosa sa međunarodnim elementom: Retrospektiva i Perspektiva komunitarnog i zakonodavstva u BiH*, *Regional Legal Journal, GIZ*, 2012., pp. 19-27.

57) V. Hartley, T., Dogauchi, M., fn. 128, *op.cit.*, pp. 51.

58) Stanivuković, M., *op. cit.*, pp. 130.

59) Judgment means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court, provided that the determination relates to a decision on the merits which may be recognized or enforced under this Convention. Article 4 (1) of the Hague Convention 2005. The judgment also relates to the judicial settlements which shall be enforced under this Convention in the same manner as judgment. Article 12 of the Hague Convention 2005.

60) Article 8 (1) of the Hague Convention 2005.

61) Article 8 (2) of the Hague Convention 2005.

62) Article 8 (3) of the Hague Convention 2005.

application for recognition or enforcement of the judgment, when conditions are met.<sup>63</sup>

Provision on recognition and enforcement shall also apply in a situation when a case is transferred from the court in which the proceedings were brought to another court according to Article 5(3) of the Hague Convention 2005. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the state of origin<sup>64</sup>.

From the report, written by Hartley and Dogauchi follows that the judgment is subject to recognition or enforcement in accordance with the provisions of the Convention if, for example, the plaintiff institutes proceedings before the chosen court, and the defendant requests transfer to a court that has not been chosen. In doing so, the plaintiff objects, but the transfer to another court does occur. The court to which the case is transferred renders a judgment in favor of the plaintiff.<sup>65</sup>

So, despite the fact that the party, the plaintiff in this case, objected to the transfer of case to another court, and bearing in mind that the court to which the case was transferred finds for the plaintiff, such a judgment may be subject to recognition and enforcement.

Contrary, if the plaintiff institutes proceedings before the chosen court, the defendant requests transfer to a court that has not been chosen, and the plaintiff objects, but the court to which the case is transferred finds for the defendant, such a judgment does not have to be recognized or enforced against the plaintiff under the Convention.<sup>66</sup>

It is evident from the above that the provision of Article 8 (5) of the Convention applies only in situations where judgment is not reached by the chosen court. Assuming that BH is a Contracting State, it would mean that Article 8 (5) of the Act would not, for example, be applied in a situation where the parties agreed on the jurisdiction of the courts in FBH in general, and the Municipal Court in Sarajevo transferred the case to the Municipal Court in Tuzla, as it is considered that the judgment is brought by the chosen court, so the procedure of recognition or enforcement falls within the provisions of Article 8 (1) of the Conven-

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63) Article 8 (4) of the Hague Convention 2005.

64) Article 8 (5) of the Hague Convention 2005.

65) Hartley, T., Dogauchi, M., op. cit., pp.67.

66) *Ibid.*

tion.<sup>67</sup>

Recognition or enforcement of a judgment may be refused for the following reasons<sup>68</sup>:

- The agreement was null and void;
- A party lacked the capacity to conclude the agreement under the law of the requested state;
- Inappropriate notification of the document which instituted the proceedings or an equivalent document, including the essential elements of the claim;
- The judgment was obtained by fraud in connection with a matter of procedure;
- Public policy issues;
- Judgment is irreconcilable with a judgment given in the requested State between the same parties;
- Judgment is irreconcilable with earlier judgment given in another State between the same parties on the same cause of action;
- Exemplary and punitive damages.

In the part relating to the recognition and enforcement, the Convention contains provisions limiting recognition and enforcement of judgments given by a court of another Contracting State, provided that both parties were resident in the requested State, and that the relationship in question and all other relevant elements of the dispute, other than the location of the chosen court, were connected only with the requested State.<sup>69</sup>

In addition, the Convention provides for the possibility that its provisions do not apply to a specific matter in case of Contracting State which has expressed strong interest in that sense. However, matters thus excluded from the scope of application of the Convention must be clearly and precisely defined. Given these issues, the Convention does not apply in a Contracting State which has made a declaration, and in other Contracting States where an exclusive choice of court agreement

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67) *Ibid*, pp. 69.

68) Article 9 and 11 of the Hague Convention 2005.

69) Article 20 of the Hague Convention 2005.

designates the courts of the State that made the declaration.<sup>70</sup>

Assuming that all conditions, prescribed by the provisions of Articles 87-92 PIL Act BH<sup>71</sup> are cumulatively fulfilled, foreign judgment shall be recognized in the courts in BH. For the sake of argument, it is particularly interesting to consider the provision of the PIL Act BH which provides that the Court in Bosnia and Herzegovina shall refuse to recognize a foreign judgment, if it is related to particular issue for which there has been prescribed the exclusive jurisdiction of the courts in BH. The exclusive jurisdiction of the courts in BH, however, exists only if it is by PIL Act BH or another act explicitly specified<sup>72</sup>.

It is interesting, therefore, to consider the question of refusal to recognize foreign court judgment before the courts in BH, if there is prorogated jurisdiction of the court in BH, bearing in mind that PIL Act BH is ambiguous in terms of the effect of choice of court agreement. In other words, it is unclear whether prorogation agreement gives exclusive or competitive jurisdiction to a chosen court.

According to some authors<sup>73</sup>, the Court in BH could refuse to recognize a foreign court judgment which was, despite the choice of court agreement designating the courts in BH, brought by a court in another state. Such a jurisdiction of BH court/s would be deemed exclusive.

In this regard, Article 89, paragraph 1 of the PIL Act BH should be extensively interpreted in a manner that in addition to the exclusive jurisdiction according to the PIL Act BH or another Act includes also exclusive contractual jurisdiction. The same author claims that there is possibility of relying upon the institution of public policy to refuse recognition of a foreign court judgment, in a situation where there is a

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70) Article 21 of the Hague Convention 2005.

71) - Validity of a judgment (the judgment has an effect in the State of Origin);

- there is no exclusive jurisdiction of the courts in BH;
- there is no violation of the rights of defendant;
- there is no *res iudicata* issue;
- there is no inconsistency with the public policy in BH, and
- reciprocity.

72) Article 47 PIL Act BH.

73) Instead of the others see. Grušić, U., Dejstvo prorogacionih sporazuma u evropskom, engleskom i srpskom pravu, u Zborniku sa V konferencije o međunarodnom privatnom pravu: Međunarodno privatno pravo i zaštita stranih investitora, Pravn i fakultet Univerziteta Crne Gore, Podgorica, 2008., pp. 240.

choice of court agreement designating the Court in BH<sup>74</sup>.

If accepted in practice, this attitude would be contrary to the current practice of the courts in BH. Namely, the fact that the courts give priority to tacit over explicit prorogation of jurisdiction, clearly points the view that a choice of court agreement is not perceived in a way that a chosen court has exclusive (contractual) jurisdiction<sup>75</sup>.

#### **IV The Hague Convention 2005, BH and the European Integration Process**

Effects of accession of BH to the Hague Convention 2005 are necessary to be considered in terms of the European integration process.

By signing the Stabilization and Association Agreement between the European Union and Bosnia and Herzegovina (hereinafter: SAA<sup>76</sup>), BH has made a commitment in terms of harmonization of its legislation with the legislation of the Union, including the field of private international law.<sup>77</sup>

On the other hand, with deposit of its declaration in 2007, EU became a member of the Hague Conference<sup>78</sup>. It should be noted that the external competence of the EU to conclude international agreements with third countries, and join international organizations is defined by the practice of the Court of Justice of the EU (hereinafter: ECJ)<sup>79</sup>. In this regard, ECJ took the view that the EU, rather than Member State has an external competence to conclude international agreements pro-

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74) Ibid, pp. 240-241.

75) See. supra f.n. 54 and 55.

76) SAA entered into force 1.6.2015.

77) Article 70. SAA.

78) See Schulz, A., The Accession of the European Community to the Hague Conference on Private International Law, *International and Comparative Law Quarterly*, vol. 56, oct. 2007, pp. 940. Alihodžić, J., Razvoj evropskog međunarodnog privatnog prava: pravci reforme zakonodavstva u Bosni i Hercegovini, OFF-SET Tuzla, 2012., pp.56-60. De Witte, B., Thies, A., Why Choose Europe? The Place of the European Union in the Architecture of International Legal Cooperation, in: Van Vooren, B., (et.al), *The EU's role in Global governance, The Legal Dimension*, Oxford University Press, 2013., pp. 28. Kuipers, J.J., *The European Union and the Hague Conference on Private International Law – Forced Marriage or Fortunate Partnership*, in: de Waele, H., Kuipers, J., *the European Union's emerging international identity: views from the global arena*, Martinus Nijhoff Publishers, 2013., pp. 159. Kuipers, J., *EU Law and Private International Law, The Interrelationship in Contractual Obligations*, Martinus Nijhoff Publishers, 2012., pp.18.

79) ERTA, 22/70, Commission v. Council, 1971, E.C.R. 263. Opinion 1/13, OJ 2013/C 226/02, 14.10.2014.

vided that there is internal competence of the EU for the regulation of a particular legal issue, and that this competence was realized in terms of legislating the particular area by EU legal instruments, most often by regulations and directives<sup>80</sup>. Given that the above conditions are fulfilled in the sense that on the internal EU level international jurisdiction in civil and commercial matters is regulated by Brussels I Recast Regulation<sup>81</sup>, 1.4.2009. EU signed the Hague Convention 2005, and it is, as previously stated, in force in EU since October 2015. In this way, the Hague Convention 2005 became constituent part of European law<sup>82</sup>.

In addition to improving the existing legislative solutions referring to choice of court agreements, by joining the Hague Convention 2005<sup>83</sup>, BH would certainly meet the requirement from Article 70 of the SAA with regard to harmonization of respective legislation in BH with the legislation of the Union.

## **VI Concluding Remarks**

The Hague Convention on choice of court agreements 2005 is an important instrument for regulating areas of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters. Since the Convention provides for the exclusive jurisdiction of the chosen court to deal with cases which are not excluded from its scope of application, and consequently, the obligation of any other court to suspend or dismiss the proceedings, it certainly contributes to legal certainty among Contracting States in contracts with cross-border element. The provisions of the PIL Act BH concerning choice of court agreement are not as precise, especially when it is about the effects of the choice of court agreement. The PIL Act BH does not mention whether prorogation agreement gives exclusive or competitive jurisdiction to a chosen court. However, it is clear from the provision of Article 47 of the PIL Act BH that the exclusive jurisdiction of the court in BH exists only when it is explicitly provided by this or other Act. With regard to the rules on parallel proceedings, this means that prorogated jurisdiction of the court in BH is not an obstacle for the court in BH to suspend the

80) Opinion 1./03, 2006, I-01145. Alihodžić, J., op. cit., pp. 45.

81) Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ EU, L351/1, 20.12.2012.

82) Bouček, V., *Europsko međunarodno privatno pravo u eurointegracijskom procesu, i harmonizacija hrvatskog međunarodnog privatnog prava*, vlastito izdanje, Zagreb 2009., pp. 24.

83) BH is a Member of the Hague Conference on Private International Law from 7.6.2001.

proceedings and wait for the decision of the foreign court before which the proceedings was initiated earlier. Also, it is questionable whether the Court in BH could refuse to recognize a foreign court judgment given in another state between the same parties on the same cause of action, if there was choice of court agreement designating the court in BH. The above legislative solutions are contrary to the principle of legal certainty. Consequently, respective provisions from the PIL Act BH might be detrimental for the international business and attraction of foreign investments to BH.

With accession to the Hague Convention 2005, the existing legislation would certainly be improved, since this international instrument would have primacy in the application over the PIL Act BH. By joining the Convention, Bosnia and Herzegovina would achieve the benefit not only from the aspect of improving the respective legislation in BH. Due to the fact that the Hague Convention 2005 has been in force in EU Member States since October 2015, it represents a link between BH and EU Member States in the field of jurisdiction, recognition and enforcement of court judgments concerning the matters that enter the scope of application of the Convention. In fact, with its entry into force, the Hague Convention 2005 has become an integral part of European law, so in this context accession of BH to this Convention also means the fulfillment of obligations under the Stabilization and Association Agreement with respect to harmonization of BH legislation with *acquis communautaire*.

**ABSTRACT**

In October 2015, the Hague Convention on Choice of Court Agreements from 2005 entered into force. By comparing the relevant provisions of the Hague Convention 2005 with the corresponding provisions on choice of court agreements from Private International Law Act in Bosnia and Herzegovina (hereinafter: PIL Act BH), the author points out most of the shortcomings of the existing legislative solutions in BH, as well as the benefits that BH would certainly achieve had it made accession to the Hague Convention 2005. The later does not apply only to substantially improving the existing legislative solutions, but also to the fact that with accession to the Convention, BH would also fulfill its obligations under the Stabilization and Association Agreement in terms of harmonization of respective legislation with the relevant part of the *acquis communautaire*.

**Keywords:** the Hague Convention on Choice of Court Agreements, PIL Act, Bosnia and Herzegovina, exclusive choice of court agreement, recognition and enforcement.

## HAŠKA KONVENCIJA 2005 I BOSNA I HERCEGOVINA

### SAŽETAK

U oktobru 2015. godine je stupila na snagu Haška konvencija o prorogacionim sporazumima iz 2005. godine. Upoređujući relevantne odredbe Haške konvencije 2005 sa odgovarajućim odredbama o prorogacionim sporazumima sadržanim u Zakonu o međunarodnom privatnom pravu Bosne i Hercegovine (PIL BH), autorka ističe većinu nedostataka u postojećim legislativnim rješenjima u BiH, kao i prednosti koje bi BiH zasigurno ostvarila da je pristupila Haškoj konvenciji 2005. Posljednje navedeno se ne odnosi samo na sadržajno poboljšavanje postojećih legislativnih rješenja, nego i na činjenicu da bi, sa pristupanjem Konvenciji, BiH također ispunila svoje obaveze predviđene Sporazumom o stabilizaciji i pridruživanju koje se odnose na usklađivanje odgovarajućeg zakonodavstva sa relevantnim dijelom *acquis communautaire*.

**Ključne riječi:** Haška konvencija o prorogacionim sporazumima, Zakon o MPP-u, Bosna i Hercegovina, isključivi prorogacioni sporazum, priznanje i izvršenje.