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ODNOS LITISPENDENCIJE I ISKLJUČIVE UGOVORENE MEĐUNARODNE NADLEŽNOSTI U PRAVU HAŠKE KONFERENCIJE I BOSNE I HERCEGOVINE**

SAŽETAK: Predmet rada se odnosi na analizu ostvarivanja volje ugovornih strana u pogledu nadležnosti suda u pravu Haške konferencije i Bosne i Hercegovine. Ostvarivanje volje ugovornih strana može biti ograničeno institutom litispendencije koja onemogućava istovremeno vođenje dva postupka između istih stranaka za isti tužbeni zahtjev zasnovan na istom činjeničnom stanju, dajući prednost prvom pokrenutom, bez obzira na ugovorenu međunarodnu nadležnost. Ugovaranjem nadležnosti ugovorne strane odlučuju koji će sud riješiti njihov spor što je za njih izuzetno važno. Na osnovu analize Haške konvencije o sporazumima o izboru nadležnog suda dolazi se do zaključka da se daje prednost postupku pred izabranim sudom, s tim da postoje određeni izuzeci kada se neće primijeniti sporazum stranaka. U pravu Bosne i Hercegovine primjenjuju se pravila litispendencije koja mogu onemogućiti primjenu sporazuma stranaka.

Ključne reči: litispendencija, nadležnost, sporazum, ugovorena nadležnost, prekid postupka

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UVOD

Ugovaranje u svim pravnim porecima podložno je određenim ograničenjima i zastupa se mišljenje da se zakonske obaveze ne mogu ugovorom derogirati, već nakon izvršenja zakonske obaveze ugovorna strana može tražiti regres od ugovarača. Suverenost, kao najviša i nedjeljiva vlast na određenoj teritoriji, dovela je do nastanka, opstajanja i dovest će do budućeg postojanja međunarodnog privatnog prava. Ugovaranjem isključive međunarodne nadležnosti određenog suda, ugovorne strane žele da se sporazum o nadležnosti realizira i postupak provede pred ugovorenim sudom. U određenim slučajevima pojedina stranka odstupa od sporazuma i pokreće postupak pred sudom čija nadležnost nije ugovorena, iako je ugovorena nadležnost drugog suda. Pravilo litispendencije onemogućava vođenje ova dva paralelna postupka, što dovodi do nemogućnosti vođenja postupka koji je kasnije pokrenut. Primjena litispendencije, ukoliko je prvi postupak pokrenut pred sudom čija nadležnost nije ugovorena, onemogućava vođenje postupka pred izabranim sudom. Posljedica je nemogućnost da se postupak vodi pred izabranim sudom, što govori o uticaju litispendencije na ostvarivanje volje jedne ugovorne strane odnosno volje tuženog. Predmet istraživanja rada je pravo Haške konferencije zbog njenog značaja za međunarodno privatno pravo i pravo Bosne i Hercegovine (BiH) kao domaće pravo.

PRAVO HAŠKE KONFERENCIJE

Haška konferencija je najstarija međunarodna pravna institucija u Hagu.[1] Prva Haška konferencija održana je 1893. godine na inicijativu Tobijasa M. C. Asera (Tobias M. C. Asser, dobitnik Nobelove nagrade za mir 1911. godine).[2] Haška konferencija ne samo da je najstarija i najefikasnija,[3] nego je i najuspješnija organizacija (što proizlazi iz stepena raširenosti njenih konvencija), koja se bavi pravnim ujednačavanjem na polju međunarodnog privatnog prava i procesnog međunarodnog privatnog prava.[4]

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[1] Van Loon, H. (2007). The Hague Conference on Private International Law. *Hague Justice Journal,* 2 (2), 4.

[2] *Ibid*.

[3] Basedow i dr. (Hrsg.), Aufbruch nach Europa, *75 Jahre Max-Planck-Institut für Privatrecht*, 2001, 785, 788, citirano prema: Wagner, R. (2011). Značaj Haške konferencije za međunarodno privatno pravo za međunarodnu saradnju u građanskim stvarima. *Nova pravna revija,* 2 (2), 46.

[4] Schack, Internationales Zivilverfahrensrecht, 5. izd. (2010), Rn. 72, citirano prema: Wagner, R. (2011). *Op. cit.*, 46.

Katri (Khatri) poredi međunarodnu parnicu sa paukovim nitima i probleme oko niti, koji su tako međusobno isprepleteni da naprave mrežu.[5] Učešće stranke u međunarodnoj parnici je analogno ulasku insekta u paukovu mrežu i zarobljavanju.[6] Dužnost suda je da se ne zarobi u mnoštvu pravnih propisa koje na strani suda predstavljaju mrežu u koju se sud može zarobiti. Iako primjer sa paukom može izgledati banalan, on u pravom smislu oslikava probleme sa kojima se stranke susreću.

Rad se odnosi na Hašku konvenciju o sporazumima o izboru nadležnog suda (Konvencija 2005). Važno je napomenuti da već postoji Haška konvencija o priznanju i izvršenje stranih presuda u građanskim i trgovačkim stvarima iz 1971. godine (Konvencija iz 1971. godine).[7] Ratificirale su je samo Kipar, Holandija i Portugal i nikada nije postala aktivna, jer nijedna od stranaka nije deponovala bilateralni sporazum kao što je predviđeno Konvencijom.[8]

Neuspjeh Konvencije iz 1971. godine nije prekinuo, ali je usporio aktivnosti Haške konferencije za međunarodno privatno pravo. Kako slijedi iz njenog statuta, zadatak Haške konferencije je da radi na „kontinuiranom ujednačavanju pravila međunarodnog privatnog prava".[9] Nakon neuspjeha Konvencije iz 1971. godine, trebalo je da prođe duži vremenski period da se ova konvencija „zaboravi" kako bi se ponovo usvojila konvencija koja bi uređivala materiju procesnog međunarodnog privatnog prava. Dugoročni cilj je da se stvori međunarodni pravni režim za sporazum o izboru nadležnog suda sličan onom osnovanom za arbitražni sporazum, stvoren od strane Njujorške konvencije iz 1958. godine.[10] U 1992. godini, Sjedinjene Američke Države (SAD) su zatražile pregovore za konvenciju o nadležnosti, priznanju i izvršenju stranih sudskih presuda. Interes SAD je evidentno potaknut potrebom da se osigura pravna struktura za podupiranje rasta globalnog tržišta.[11] Također,

[5] Khatri, B. (2016). *The effectiveness of the Hague Convention on Choice of Court Agreements in making international commercial cross-border litigation easier – A critical analysis*. Victoria: University of Wellington, 3.

[6] *Ibid.*, 3.

[7] *Ibid.*, 7.

[8] *Ibid.*, 7.

[9] Čl. 1. novog Statuta identičan je s paralelnim propisom u izvornom Statutu, citirano prema: Wagner, R. (2011). Značaj Haške konferencije za međunarodno privatno pravo za međunarodnu saradnju u građanskim stvarima. *Nova pravna revija,* 2 (2), 45.

[10] Jones Day (2015). *The Hague Choice of Court Convention Takes Effect, and With It Greater Certainty for International Transactions*. Washington: Jones Day, 1.; Moore, C., Jedrey, N., Rodgers, K. (2016). Hague Convention on Choice of Court Agreements Enters into Force. *Business Law Review,* 37 (1), 2.

[11] V.: Nanda, V. (2007). The Landmark 2005 Hague Convention on Choice of Court Agreements. *Texas International Law Journal,* 42 (3), 775.

SAD nisu stranka bilateralnih niti multilateralnih sporazuma o priznanju i izvršenju presuda, što se smatra nedostatkom za priznanje i izvršenje presuda SAD u inostranstvu.[12] U junu 2005. godine, na 20. sjednici Haške konferencije o međunarodnom privatnom pravu dogovoren je definitivni tekst Konvencije, a koji je na plenarnoj sjednici usvojen 30. 6. 2005. godine.[13] Konvencija 2005 predstavlja kompromis[14] između kontinentalnog prava i *common law*.[15] Zanimljivo je da SAD nisu ratifikovale Konvenciju 2005 iako su bile inicijator za njeno donošenje. Trenutno se Konvencija primjenjuje u 32 države.[16]

Osnove sporazuma o izboru nadležnog suda

Konvencija 2005 određuje da je sporazum o izboru isključivo nadležnog suda[17] sporazum koji zaključe dvije ili više strana i koji ispunjava formalne uslove te, za potrebe odlučivanja u sporovima koji su nastali ili bi mogli nastati u vezi s određenim pravnim odnosom, određuje sudove jedne države

[12] V.: Nanda, V. (2007). The Landmark 2005 Hague Convention on Choice of Court Agreements. *Texas International Law Journal,* 42 (3), 775.

[13] Laguardia, D. H. R., Falge, S., Franceschi, H. (2012) *The Hague Convention on Choice of Court Agreements A Discussion of Foreign and Domestic Points*. Preuzeto 11. 3. 2017. sa: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2012/07/The-Hague-Convention-on-Choice-of-Court-Agreemen__/Files/View-full-article-The-Hague-Convention-on-Choice__/FileAttachment/LaguardiafalgefranceschiarticleHague-Conventionon__.pdf, 3.

[14] Ispitivanje liste zabranjenih osnova nadležnosti koje države ugovornice ne mogu koristiti otkriva druga područja kompromisa u nadležnosti. „Uzajamni kompromisi" su evidentni u čl. 18. Nacrta iz 1999. godine, gdje su četiri zemlje odustale od različitih osnova *egzorbitantne* nadležnosti koje su trenutno priznate u njihovim državama. Na primjer, SAD i Velika Britanija odrekle su se prolazne nadležnosti, Njemačka je napustila nadležnost samo na osnovu činjenice da je tuženi imao imovinu prisutnu u forumu, a Francuska je napustila nadležnosti samo na osnovu nacionalnosti tužitelja.

Strane države ne vole primjenu prava konkurencije SAD zbog širokih mogućnosti koje se odnose na kreiranje pravila dok osnov za nadležnost uključuje tzv. „efekat" test. U cilju sprečavanja izvršenja SAD antitrust presuda, doneseni su zakoni u stranim državama uključujući Australiju, Belgiju, Kanadu, Francusku, Njemačku, Holandiju, Norvešku, Švedsku, Južna Afriku i Veliku Britaniju. Zbog ovih različitih mišljenja, SAD su uspjele da antitrust pravo ne bude pokriveno Konvencijom 2005. (V.: Adler, M., Zarychta, M. C. (2006). The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band. *Northwestern Journal of International Law & Business,* 27, (1), 20, 25, 26.)

[15] Min, Y. T. (2013). *Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005*. Singapore: Singapore Academy of Law, 1.

[16] https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 3. 9. 2020.

[17] Čl. 3. st. 1. t. a) i c) Konvencije 2005.

ugovornice ili jedan ili više posebnih sudova jedne države ugovornice, čime je isključena nadležnost svih drugih sudova. Formalni uslovi ovog sporazuma su da se sporazum mora zaključiti ili dokumentirati:

1) u pisanom obliku, ili

2) bilo kojim drugim sredstvom priopštavanja koje omogućava dostupnost informacija, tako da se mogu upotrijebiti i poslije.

U Konvenciji 2005 sadržano je pravila o materijalnoj valjanosti sporazuma. Ona propisuje da se ništavost sporazuma određuje na osnovu prava države izabranog suda.[18] Sukob prava ne pokriva formalnu valjanost sporazuma o nadležnosti suda, jer su uslovi za formalnu valjanost propisani čl. 3. st. 1. t. c) Konvencije.[19] Formalna punovažnost prorogacionog sporazuma ocjenjuje se odvojeno od punovažnosti ostalih odredaba ugovora i to prema uslovima za formalnu punovažnost sadržanim u čl. 3. t. b).[20] Materijalna punovažnost prorogacionog sporazuma se također cijeni odvojeno i određena je mjerodavnim pravom za ugovor (to jest za sporazum o nadležnosti).[21]

Dužnosti suda koji nije izabran

Kompromis između kontinentalnog prava i *common law* predstavljao je jedini put za donošenje Konvencije 2005, iako je isti teško postići. Pod uticajem slučaja *Gaser* (*Gasser)*[22] u kojem je sud dao prednost litispendenciji

[18] Čl. 5. st. 1. Konvencije 2005.

[19] V.: Musseva, B. (2016). Opposibility of Choice-of-Court Agreements against Third Parties under The Hague Choice-of-Court Convention and Brussels Ibis Regulation. *Anali Pravnog fakulteta u Zenici,* 9 (18), 75.

[20] Stanivuković, M. (2012). Haška konvencija o izboru nadležnog suda – kritička procena. *Zbornik radova Pravnog fakulteta u Novom Sadu,* 46 (3), 129.

[21] *Ibid*.

[22] Presuda Suda pravde EU od 9. 3. 2003. godine, *Erich Gasser GmbH v. MISAT-a SRL*, C-116/02, EU:C:2003:657.

U ovom predmetu, Sud pravde Evropske unije je u presudi odlučio da se: „čl. 21. Briselske konvencije o nadležnosti, priznanju i izvršenju sudskih odluka u građanskim i trgovačkim stvarima mora tumačiti tako da sud pred kojim je pokrenut drugi postupak i za čiju nadležnost se tvrdi da je temeljena na prorogacijskom sporazumu, mora ipak prekinuti postupak dok se sud pred kojim je pokrenut prvi postupak ne oglasi nenadležnim. Ta činjenica nije takva da dovodi u pitanje primjenu pravila sadržanog u čl. 21. Konvencije, koje se temelji jasno i isključivo na hronološkom redoslijedu pokretanja postupaka pred odnosnim sudovima. Čl. 21. Briselske konvencije mora se tumačiti tako da se ne može otkloniti njegova primjena kada je trajanje postupka pred sudovima države ugovornice u kojoj se nalazi sud pred kojim je postupak prvi pokrenut prekomjerno dugo. Tumačenje prema kojem primjena tog člana treba biti otklonjena zbog vremena trajanja postupka, bilo bi očigledno protivno kako tekstu i duhu, tako i ciljevima Konvencije."

u odnosu na isključivu ugovorenu međunarodnu nadležnost, bilo je značajno Konvencijom osigurati da sporazum o izboru nadležnog suda proizvede pravno dejstvo. Međutim, američka doktrina *forum non conveniens*[23] nije u cijelosti izostavljena. Preovladava mišljenje da Kovencija isključuje *forum non conveniens,*[24] ali se sa istim ne može u cijelosti složiti. Tačno je isključenje doktrine *forum non conveniens* u njenom izvornom obliku, ali osnovi za neprimjenu sporazuma o izboru isključivo nadležnog suda ostavljaju široku diskreciju sudovima. Konvencija 2005 daje prednost izabranom sudu, ali omogućava sudu koji nije izabran da odluči o valjanosti sporazuma o izboru nadležnog suda. Nije izričito propisana litispendencija, već se putem dužnosti suda koji nije izabran želi omogućiti realizacija sporazuma.

Prema Konvenciji 2005 sud države ugovornice koji nije izabrani sud suspendira ili prekida postupak na koji se primjenjuje sporazum o izboru isključivo nadležnog suda, osim ako:[25]

1) je sporazum ništav na temelju prava države izabranog suda,

2) stranka nije imala poslovnu sposobnost za sklapanje sporazuma na temelju prava države suda pred kojim je pokrenut postupak,

3) bi priznanje valjanosti tog sporazuma predstavljalo očitu nepravdu ili bi bilo očito u suprotnosti s javnim poretkom države suda pred kojim je pokrenut postupak,

4) sporazum zbog vanrednih razloga, na koje stranke ne mogu uticati, nije moguće razumno izvršiti, ili

5) je izabrani sud odlučio da o predmetu neće raspravljati.

Iako je namjera Konvencije 2005 bila da omogući postupanje suda koji nije izabran kada izabrani sud ne može postupati, sud koji nije izabran ima zadatak da u određenim slučajevima cijeni pravne standarde koji su podložni

[23] Doktrina *forum non conveniens* daje sudu diskreciono pravo da odbaci slučaj ako smatra da će stranom sudu biti više pogodno ili odgovarajuće da riješi slučaj. Svrha doktrine je da spriječi *forum shopping,* pri čemu tužilac traži najpovoljniji forum, bez obzira na vezu slučaja i tog foruma. Ova doktrina se često primjenjuje od strane sudova u zemljama anglosaksonskog prava, te efikasno blokiraju pristup za oštećene strance bez obzira na meritum predmeta. Pretpostavka je da će se prikladnije provesti u državi tužitelja. Međutim, statistike SAD pokazuju da u gotovo svim slučajevima kada je odbijen *forum non conveniens* od američkih sudova nije pokretan postupak u alternativnom forumu, ostavljajući oštećene bez ikakve štete pred licem pravde. (Gerrity, R. (2016). *Mining for Justice in Home Country Courts: A Canada-UK Comparison of Access to Remedy for Victims of Human Rights Violations*. Preuzeto 19. 3. 2017. sa: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882826, 11.).

[24] Van Loon, H. (2016). The 2005 Hague Convention on Choice of Court Agreements – an introduction. *Anali Pravnog fakulteta u Zenici,* 9 (18), 22.

[25] Čl. 6. Konvencije 2005.

različitim tumačenjima. Različita tumačenja naročito su moguća kod ocjene očite nepravde i javnog poretka. Konvencija 2005 ne daje bilo kakav prioritet izabranom sudu za utvrđivanje valjanosti sporazuma o nadležnosti.[26] Nužno je bilo dati prioritet izabranom sudu da odluči o valjanosti sporazuma, osim kada je sporazum ništav ili rušljiv. Posebno je diskutabilno ovlaštenje suda koji nije izabran da postupa u predmetu ako bi priznanje valjanosti sporazuma predstavljalo očitu nepravdu ili bi bilo očito u suprotnosti s javnim poretkom države suda pred kojim je pokrenut postupak. Pored toga što sud koji nije izabran ima mogućnost da različito cijeni pravne standarde, protivno je volji stranaka da se valjanost sporazuma cijeni prema pravu države pred kojim je postupak pokrenut. Stranke ugovornice su ugovorile nadležnost suda određene zemlje sa svim posljedicama koje iz ugovara proizlaze, a između ostalog i ocjenu valjanosti sporazuma prema pravu države izabranog suda. Moguće je da su stranke baš željele nadležnost izabranog suda iz razloga što postupa po pravilima koji omogućuju brzo i efikasno postupanje. Negativne posljedice posebno može imati stranka koja je učinila ustupke kod glavnog ugovora radi ugovaranja nadležnosti suda određene države. Na primjer, stranka A i stranka B zaključe sporazum o izboru isključivo nadležnog suda u državi X za sve sporove koji proizlaze iz kupoprodajnog ugovora. Stranka A je pristala na duži rok isplate potraživanja od stranke B, ali pod uslovom da se ugovori nadležnost suda u državi X. Interes stranke A za državu X jeste što se parnični postupak zasniva na raspravnom načelu, što omogućava ekonomično i brzo završavanje eventualnog spora. Stranka B smatra da isporučena roba ima materijalne nedostatke i pokrene postupak pred sudom države Y. U parničnom postupku države Y primjenjuje se istražno načelo. Sud pred kojim je postupak pokrenut smatra da sporazum o izboru isključivo nadležnog suda za stranku B predstavlja očitu nepravdu jer će izabrani sud države X primijeniti raspravno načelo i neće se utvrditi materijalna istina u postupku. Stoga, u određenoj mjeri mehanizam koordinacije Konvencije prihvata paralelne postupke.[27] Vođenje paralelnih postupaka ne omogućava realizovanje volje stranaka i može negativno uticati na povjerenje stranaka prema Konvenciji 2005.

[26] Weller, M. (2016). *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*. Preuzeto 21. 3. 2017. sa: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2827711, 22.

[27] Weller, M. (2016). *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, *Op. cit.*, 22.

PRAVO BOSNE I HERCEGOVINE

Pravila litispendencije u BiH, kao i ostala pravila međunarodnog privatnog prava, uslijed protoka vremena ne odgovaraju savremenom procesnom međunarodnom privatnom pravu. Nisu rijetki slučajevi kada dolazi do litispendencije u BiH.

Razlog za pojavu litispendencije jeste što se međunarodna nadležnost u pravilu utvrđuje kao konkurentna, što ostavlja mogućnost da za spor može biti nadležan i sud neke druge države. Spor može da ima veze sa BiH i sa drugom državom, tako na primjer tuženi ima imovinu u BiH, ali ima prebivalište u stranoj državi, a predmet spora je povrat duga po osnovu zajma. U ovom slučaju parnica se može voditi u BiH, ali i u drugoj državi. Zabranom dvostruke litispendencije sprječava se da se dva puta sudi o istoj stvari (*ne bis de eadem re sit actio*), što bi moglo dovesti do različitog sudovanja i donošenja različitih sudskih odluka čime bi se ugrozila pravna sigurnost.[28]

Kod postupanja sudova u slučaju kada postoji litispendencija, potrebno je napraviti razliku kada postoji sporazum o izboru isključivo nadležnog suda i kada takav sporazum ne postoji.

Litispendencija ukoliko nije ugovorena isključiva nadležnost suda

Ukoliko nije ugovorena isključiva nadležnost suda, prekid postupka je rješenje koje je normirano Zakonom o rješavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima (ZRSZ).[29] Sud u BiH prekinut će postupak na zahtjev stranke ako je u toku spor pred stranim sudom u istoj pravnoj stvari i između istih stranaka, i to:[30]

a) ako je prvo pred stranim sudom pokrenut postupak po odnosnom sporu,

b) ako je u pitanju spor za čije suđenje ne postoji isključiva nadležnost suda u BiH,

c) ako postoji uzajamnost.

Iz uslova koji su predviđeni za prekid postupka, proizlazi da postoje četiri uslova, s tim da se sva četiri kumulativno moraju ispuniti. Dužnost stranke je da ukaže na postojanje ranije pokrenutog postupka pred stranim

[28] Huseinbegović, A., Haubrich, V. (2017). Litispendencija prema građanskom procesnom pravu Evropske unije. *Revija za pravo i ekonomiju*, 18, (1), 12. Van Loon, H. (2016). The 2005 Hague Convention on Choice of Court Agreements – an introduction. *Anali Pravnog fakulteta u Zenici,* 9 (18), 22.

[29] *Službeni list SFRJ*, br. 43/1982. i 72/1982, koji se primjenjuje u BiH.

[30] Čl. 80. ZRSZ.

sudom, jer po odredbama ZRSZ sud na ove činjenice ne pazi po službenoj dužnosti.[31] Također ni po odredbama zakona o parničnom postupku ne postoji ova dužnost, već je dužnost suda da u toku cijelog postupka po službenoj dužnosti pazi da li već teče druga parnica o istom zahtjevu među istim strankama pred sudom u BiH.[32]

Teret dokazivanja da je pred stranim sudom ranije započeta parnica, kao i u vezi sa uzajamnosti, pada na stranku koja je podnijela zahtjev za prekid pred našim sudom.[33] Ukoliko bude sporno pitanje uzajamnosti, potrebno je da sud od Ministarstva pravde BiH zatraži mišljenje da li postoji uzajamnost sa stranom državom. Iako je primarno teret dokazivanja na strankama, potrebno je da sud poduzme radnje u cilju pravilnog utvrđivanja ovog spornog pravnog pitanja, kako ne bi došlo do nepotrebnog prekidanja postupka ili da sud ne prekine postupak pa da u drugim slučajevima strana država primjeni mjere retorzije. U ZRSZ nije normirano do kojeg trenutka u razvoju postupka stranka može ukazati sudu da je ranije pokrenut postupak u stranoj državi. Stranka je dužna, ukoliko to želi, da odmah po saznanju da je pokrenut postupak u stranoj državi, zahtijeva od suda prekid postupka. Nije dužnost stranke da obavijesti sud da je pokrenut postupak, već je ostavljeno da stranka odluči da li će obavijestiti sud. Međutim, ne može se dopustiti da stranka ovo pravo zloupotrijebi i da nakon što je postupak proveden zahtijeva prekid postupka. Zato je stranka dužna odmah po saznanju da je pokrenut postupak pred stranim sudom obavijestiti sud u BiH, ali najkasnije na pripremnom ročištu ili na glavnoj raspravi prije izvođenja dokaza. Ukoliko su dokazi izvedeni i potrebno je samo zaključiti glavnu raspravu i donijeti odluku onda se gubi smisao prekida postupka. Trebalo bi prekinuti postupak i kada su dokazi izvedeni ili zaključena glavna rasprava, samo ako stranka nije ranije saznala da je pokrenut postupak u stranoj državi i da ove činjenice dokaže. Omogućavanje isticanja prigovora litispendencije i nakon zaključena glavne rasprave treba biti izuzetak, korišten samo u rijetkim slučajevima, usmjeren u cilju nedonošenja dvije suprotne presude i poštovanja stranog pravosuđa. Nakon donošenja prvostepene presude ne postoji mogućnost prekida postupka. Do ovog zaključka se dolazi

[31] Prema odredbi čl. 80. ZRSZ sud će prekinuti postupak na zahtjev stranke.

[32] Čl. 27. st. 5. Zakona o parničnom postupku pred Sudom BiH, *Službeni glasnik BiH*, br. 36/04, 84/07, 58/13. i 94/16. (u daljem tekstu: ZPP BiH); Čl. 67. st. 5. Zakona o parničnom postupku FBiH, *Službene novine FBiH*, broj 53/03, 73/05, 19/06. i 98/15. (u daljem tekstu: ZPP FBiH); Čl. 60. st. 5. Zakona o parničnom postupku RS, *Službeni glasnik RS*, br. 58/03, 85/03, 74/05, 63/07, 49/09. i 61/13. (u daljem tekstu: ZPP RS); Čl. 159. st. 5. Zakona o parničnom postupku BD BiH, *Službeni glasnik BD BiH*, broj 28/18. (u daljem tekstu: ZPP BDBiH).

[33] V.: Muminović, E. (2008). *Procesno međunarodno privatno pravo*. Sarajevo: Pravni fakultet Univerziteta u Sarajevu, 43.

zbog necjelishodnosti provođenja postupka i donošenja presuda nakon koje će sud prekinuti postupak, a sud je vezan za svoju presudu čim je donesena.[34] U Brčko distriktu Bosne i Hercegovine (BD BiH) zakonodavac je normirao da je sud vezan za svoju presudu čim je otpremljena,[35] što suštinski ne mijenja vezanost suda za presudu.

Postojanje identiteta stranaka i predmeta spora

Za postojanje identiteta stranaka i predmeta spora potrebno je sljedeće:[36]

a) identitet stranaka (*identitas personarum*) jer u obje parnice stranke moraju biti iste, ali nije bitno da u obje parnice imaju istu stranačku ulogu. Tužitelj iz prve parnice može imati ulogu tuženog u drugoj parnici;

b) predmet spora u obje parnice mora biti isti (*cadem res*). Predmet je isti ukoliko je tužbeni zahtjev (kao određujući element za utvrđenje identiteta tužbe u parnici, odnosno u obje parnice) isti. Dva tužbena zahtjeva su identična (*identitas rei*) ukoliko se njima ostvaruje isti pravozaštitni cilj te ukoliko pravosnažnost odluke iz prve parnice svoje dejstvo proteže i na predmet odlučivanja u drugoj parnici. Pored identičnosti tužbenih zahtjeva, potrebno je da se oni zasnivaju na istoj činjeničnoj osnovi.

Okolnost da je prvo pred stranim sudom pokrenut postupak po odnosnom sporu

Prvi uslov normiran ZRSZ je u suprotnosti sa zakonima o parničnom postupku u pogledu momenta značajnog za litispendenciju. U zakonima o parničnom postupku u BiH za litispendenciju pravno relevantan je momenat dostavljanja tužbe na odgovor tuženom, odnosno vrijeme kada parnica počinje[37] dok ZRSZ normira da je pred stranim sudom pokrenut postupak.[38] Ovo se može prepisati redatorskoj grešci zakonodavca ali isto tako može biti jasno razgraničavanje i lakše utvrđivanje za sud da je postupak pokrenut pred stranim sudom. Za domaći sud lakše je utvrditi, čime se osigurava pravna sigurnost, da je pred stranim sudom samo pokrenut postupak nego da sud utvrđuje da je pred stranim sudom parnica počela teći. Pokretanje postupka se utvrđuje samo postojanjem prijemnog štambilja stranog suda da je tužba predata. U

[34] Čl. 164. st. 1. ZPP BiH; čl. 197. st. 1. ZPP FBiH; čl. 197. st. 1. ZPP RS.

[35] Čl. 317. st. 1. ZPP BDBiH.

[36] Čalija, B., Omanović, S. (2000). *Građansko procesno pravo*. Sarajevo: Pravni fakultet Univerziteta u Sarajevu, 195.

[37] Čl. 34. st. 1. t. 3) ZPP BiH; čl. 67. st. 1. t. 3) ZPP FBiH; čl. 67. st. 1. t. 3) ZPP RS; čl. 190. st. 1. t. 3) ZPP BDBiH.

[38] Čl. 80. st. 1. t. 1) ZRSZ.

pogledu prihvatanja momenta za međunarodnu litispendenciju, da li je to momenat početka parnice ili pokretanja postupka, kao i koje se pravo primjenjuje za utvrđivanje kada je postupak pokrenut pred stranim sudom, postoje različita mišljenja.[39] Smatramo da je potrebno postupati u skladu sa ZRSZ, a ne u skladu sa pravilima parničnog postupka, s obzirom da se radi o specijalnom propisu u odnosu na opšti koji je imao u vidu specifičnost međunarodne nadležnosti. Vrijeme pokretanja postupka pred stranim sudom ocjenjivat će se po pravu države tog suda.[40]

Spor za čije suđenje ne postoji isključiva nadležnost suda u BiH

Zaštita interesa domaće države i mogućnost priznanja strane sudske odluke izražava se kroz ovaj uslov. Ukoliko postoji isključiva nadležnost suda u BiH, onda je odmah jasno da je nepotrebno prekinuti postupak kada strana odluka ne može da proizvede pravno dejstvo. U ovom slučaju sud ne temelji svoju odluku na bilo kojim pretpostavkama za postupak pred stranim sudom, jer postojanje isključive nadležnost suda u BiH može jasno da utvrdi.

Uzajamnost

Uzajamnost kod litispendencije se odnosi na koji način postupa strani sud kada je pred sudom u BiH ranije pokrenut postupak između istih stranaka u istoj pravnoj stvari, odnosno da li pravosuđe druge države uvažava pravosuđe BiH. Kod utvrđivanja da li postoji uzajamnost potrebno je utvrditi da li ona postoji samo kod uvažavanja ranije litispendencije pred stranim sudom, ili je potrebna uzajamnost i kod priznanja i izvršenja stranih sudskih odluka, prije nego što sud prekine postupak. Zastupljeno je mišljenje da je uzajamnost potrebna i kod priznanja i izvršenja, jer uvažavanje ranije pokrenutog postupka pred stranim sudom zasniva se na mogućnosti priznanja i izvršenja odluke koja će biti donesena u postupku pred stranim sudom.[41] Ukoliko bi se cijenila samo uzajamnost kod litispendencije, a zanemarila kod priznanja i izvršenja, mogla bi nastati pravna situacija da domaći sud nakon što je proveden postupak pred stranim sudom odbaci tužbu, dok se strana odluka ne bi mogla priznati u BiH, što je svakako nedopustivo.

[39] V.: Dika, M., Knežević, G., Stojanović, S. (1991). *Komentar Zakona o međunarodnom privatnom i procesnom pravu*. Beograd: Nomos, 256, 257.

[40] Čolović, V. (2012). *Međunarodno privatno pravo*. Banja Luka: Panevropski univerzitet Apeiron, 271.

[41] V.: Dika, M., Knežević, G., Stojanović, S. (1991). *Op. cit.*, 258.

Litispendencija ukoliko je ugovorena isključiva nadležnost suda

U slučaju kada je ugovorena isključiva nadležnost suda, potrebno je razlikovati da li je ugovorena nadležnost suda BiH ili je ugovorena nadležnost suda druge države.

Ugovorena isključiva nadležnost domaćeg suda

Isključiva nadležnost suda u BiH ukazuje da vođenje postupka u stranoj državi ne utiče na postupak u BiH. Sporno je da li je samo isključiva zakonska nadležnost našeg suda osnova za postupanje suda u BiH bez obzira na postupak pred stranim sudom ili isti efekat ima i isključiva ugovorena nadležnost suda u BiH. Odgovor na ovo pitanje daje čl. 47. ZRSZ, koji propisuje da isključiva nadležnost domaćeg suda postoji kada je to zakonom izričito određeno. Dakle, iz činjenice da ovaj član pominje samo isključivu nadležnost određenu zakonom, može se zaključiti da termin „isključiva nadležnost" obuhvata samo zakonsku isključivu nadležnost.[42] Također, ako se sagledaju odredbe ZRSZ kojima se izričito predviđa isključiva nadležnost domaćih sudova ili drugih organa, koje sve sadrže riječ „isključiv", one nigdje izričito ne pominju da će prorogirani sud imati isključivu nadležnost.[43] Iz ovoga proizlazi da ugovaranje isključive nadležnosti domaćeg suda nije prepreka da sud prekine postupak i sačeka odluku prvopostupajućeg stranog suda.[44] Ugovorena isključiva međunarodna nadležnost nema dejstvo na terenu litispendencije.[45]

Neproizvođenje punog pravnog dejstva sporazuma o isključivoj nadležnosti našeg suda ukazuje na mogućnost ponavljanja slučaja *Gasser* u pravu BiH. U BiH ne postoje bilo koje odredbe koje bi zaštitile ugovornu stranku kada se nadležnost zasniva na sporazumu o izboru isključivo nadležnog suda. Nakon slučaja *Gasser* u pravnoj doktrini se zastupa mišljenje da je najlakši način za rješavanje ovog problema putem određivanja da se sporazumom o nadležnosti određuje isključiva međunarodna nadležnost.[46] Samo određivanje da se sporazumom o nadležnosti određuje isključiva međunarodna nadležnost, ne može proizvesti odgovarajući pravni učinak bez normiranja na koji način

[42] Grušić, U. (2007). Dejstvo prorogacionih sporazuma u evropskom, engleskom i srpskom pravu. *Anali Pravnog fakulteta u Beogradu*, 55 (2), 156–179, 175.

[43] *Ibid*., 175.

[44] *Ibid*.

[45] Varadi, T., Knežević, G., Bordaš, B., Pavić, V. (2016) *Međunarodno privatno pravo*, 15. izd. Beograd: Pravni fakultet Univerziteta u Beogradu, 503.

[46] Lando, O., Nielsen, P. A. (2008). The Rome I Regulation. *Common Market Law Review,* 45, (6), 1693.

će sud postupiti u slučaju isključive ugovorene međunarodne nadležnosti. Dakle, pravo BiH ne sadrži ni minimum odredbi kojima bi se osiguralo dejstvo sporazuma o izboru nadležnog suda u BiH, kao što je to na primjer slučaj kod Konvencije 2005. Evidentno je da pravo BiH treba da slijedi pravo Haške konferencije, ali i da izričito normira da ugovorena isključiva nadležnost suda u BiH onemogućuje prekid postupka u korist postupka u stranoj državi, bez obzira da li je postupak pred sudom strane države prvo pokrenut, odnosno treba da izjednači učinke zakonske i ugovorene isključive međunarodne nadležnosti našeg suda. Za razliku od Haške konferencije, potrebno je izostaviti mogućnost da sud pred kojim je prvo pokrenut postupak cijeni valjanost sporazuma o izboru nadležnog suda.

Ugovorena isključiva nadležnost stranog suda

Drugi slučaj kod ugovorene isključive nadležnosti u vezi sa litispendencijom je ugovaranje isključive nadležnosti stranog suda. Da bi stranke mogle ugovoriti nadležnost suda druge države potrebno je da je bar jedna od njih strani državljanin ili pravno lice sa sjedištem u inostranstvu, a nije u pitanju spor za koji postoji isključiva nadležnost suda u BiH na osnovu zakona,[47] niti bračni spor, spor za utvrđivanje ili osporavanje očinstva ili materinstva, spor o čuvanju, podizanju i vaspitanju djece, spor o zakonskom izdržavanju djece, spor o zakonskom izdržavanju između bračnih partnera i između bivših bračnih partnera, spor o lišenju i vraćanju roditeljskog staranja, produženju roditeljskog staranja, stavljanju roditelja u položaj staraoca u pogledu upravljanja dječijom imovinom, oglašenju djeteta rođenim u braku, kao i prilikom odlučivanja o drugim stvarima koje se odnose na lično stanje i odnose između roditelja i djece, i davanju dozvole za stupanje u brak.

Za predmet rada je relevantan slučaju kada je postupak prvo pokrenut pred sudom BiH, ali je ugovorena nadležnost suda druge države. Ukoliko je postupak prvo pokrenut pred stranim sudom, onda nije sporno da će sud u BiH prekinuti postupak. Međutim, sporno je postupanje domaćeg suda ako je prvo pokrenut postupak pred sudom u BiH.

U okviru apsolutne nadležnosti sud ispituje da li rješavanje spora spada u sudsku nadležnost i da li je za rješavanje spora nadležan sud u BiH. Do ovog postupanja suda dolazimo pravilnim tumačenjem zakona koji normiraju parnične postupke u BiH, s tim da nije posvećeno dovoljno pažnje privatnopravnim odnosima sa elementom inostranosti, te se i zakonska rješenja razlikuju. Prema odredbama ZPP BiH, ZPP FBiH i ZPP BDBiH kada sud u toku postupka utvrdi da za rješavanje spora nije nadležan sud u BiH, po službenoj dužnosti oglasit će se nenadležnim, ukinut će provedene radnje u

[47] Čl. 49. st. 1. i 3. ZRSZ.

postupku i odbaciti tužbu.[48] Prema ZPP RS kada sud u toku postupka utvrdi da za rješavanje spora nije nadležan sud u RS, po službenoj dužnosti oglasit će se nenadležnim, ukinut će sprovedene radnje u postupku i odbacit će tužbu.[49] Tumačenje elementa inostranosti ne može biti vezano za entitet već samo za BiH, jer mora se praviti razlika između spora sa elementom inostranosti i međuentitetskim elementom. Spor sa elementom inostranosti je spor kod kojeg pored BiH postoji zainteresovanost i druge države za njegovo rješavanje, dok je spor sa međuentitetskim elementom kada za rješavanje spora postoji interes oba entiteta, ili jednog entiteta i BD BiH. Pravilno prepoznavanje ovih elemenata uslovljava dalje postupanje suda i od ključne je važnosti. Kada postoji element inostranosti i sud utvrdi da nije nadležan, sud u BiH oglasiti će se nenadležnim, ukinut će provedene radnje u postupku i odbaciti tužbu, dok u slučaju kada postoji međuentitetski element primjenjivat će se pravila o stvarnoj i mjesnoj nadležnosti, te kada sud utvrdi da nije stvarno ili mjesno nadležan oglasit će se nenadležnim i predmet dostaviti nadležnom sudu na dalje postupanje. U sudskoj praksi nalazimo različita mišljenja kako će sud u entitetu Republika Srpska (RS) postupiti kada je mjesno nadležan sud u entitetu Federacija Bosne i Hercegovine (FBiH). Prema jednom mišljenju sud treba izričito da primjeni odredbu koja je navedena u ZPP RS, i to da se oglasi nenadležnim, ukine provedene radnje u postupku i odbaci tužbu.[50] Drugo mišljenje jeste da sud ne treba da postupi na ovaj način već da se oglasi mjesno nenadležnim i predmet dostavi mjesno nadležnom sudu u FBiH,[51] koje mišljenje je potrebno prihvatiti iz već navedenih razloga.[52]

Sporno je pitanje šta se podrazumijeva pod „u toku postupka'', da li je to samo postupak po redovnom pravnom lijeku ili obuhvata i postupak po vanrednom pravnom lijeku. Zauzet je stav da na sudsku nadležnost u revizijskom postupku vrhovni sud ne pazi po službenoj dužnosti, već samo ako revizija na nju ukazuje.[53]

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[48] Čl. 4. st. 3. ZPP BiH; čl. 16. st. 3. ZPP FBiH; čl. 16. st. 3. ZPP BDBiH.

[49] Čl. 16. st. 3. ZPP RS.

[50] Odluka Okružnog suda u Bijeljini, br. 83 0 Mal 030434 16 Gž od 9. 9. 2016. godine.

[51] Odluka Okružnog suda u Bijeljini, br. 83 0 Mal 025415 17 Gž od 12. 10. 2017. godine.

[52] U prilog ovom mišljenju je i odluka Vrhovnog sud FBiH, br. 53 0 Mal 000936 07 Rev od 23. 9. 2008. godine iz vremena dok je prema pravu FBiH, oglašavanje nenadležnim bilo vezano za entitet, kao što je sada u RS. Prema mišljenju Vrhovnog suda FBiH, iako je zakonom bilo propisano da će se sud u FBiH oglasiti nenadležnim, ukinuti provedene radnje u postupku i odbaciti tužbu ako nije nadležan sud u FBiH, tako sud neće uraditi ako je nadležan sud u RS ili BD BiH.

[53] Zaključak Građanskog odjeljenja Vrhovnog suda FBiH sa sjednice od 3. 11. 2008. godine, citirano prema: Čizmić, J. (2009). *Komentar Zakona o parničnom postupku Federacije Bosne i Hercegovine*. Sarajevo: Privredna štampa, 77.

Ukoliko tuženi istakne prigovor međunarodne nadležnosti, domaći sud će se oglasiti međunarodno nenadležnim i odbaciti tužbu kada utvrdi da je takav sporazum punovažan, odnosno postupit će kao da je međunarodno nenadležan, iako u datom slučaju postoji zakonski osnov za njegovu međunarodnu nadležnost.[54] Ovako će sud postupiti samo na osnovu prigovora tuženog, jer izostanak prigovora tuženog uz podnošenje tužbe od strane tužioca tumači se kao odricanje stranaka od sporazuma o nadležnosti.[55]

Tuženi može putem prigovora međunarodne nenadležnosti dovesti do oglašavanja suda u BiH međunarodno nenadležnim i odbacivanja tužbe, na koji način pravo BiH omogućuje da volja ugovornih strana bude realizovana. Odbacivanjem tužbe prestaje litispendencija što dovodi do dužnosti postupanja stranog suda čija je međunarodna nadležnost ugovorena.

Pasivnost tuženog može dovesti do prešutnog ugovaranja nadležnosti suda u BiH. Ukoliko tuženi nije istakao prigovor nenadležnosti, smatra se da je izričiti izbor suda derogiran kasnijim prešutnim izborom. Kad nadležnost suda u BiH zavisi od pristanka tuženog da sudi sud u BiH, smatra se da je tuženi dao pristanak podnošenjem odgovora na tužbu, odnosno prigovora na platni nalog, a nije osporio nadležnost ili se upustio u raspravljanje.[56] Treba smatrati da nadležnost zavisi od pristanka tuženog u sporovima u kojima je moguća prorogacija nadležnosti.[57]

ZAKLJUČAK

Konvencija 2005 jedan je od instrumenata u okviru Haške konferencije kojom se uređuje područje međunarodnog privatnog prava. Za ostvarivanje volje ugovornih strana potrebno je da se zakonom uredi odnos litispendencije i sporazuma o izboru isključivo nadležnog suda u pravu BiH. Radi se o institutima koji se u određenim slučajevima isključuju i primjena litispendencije onemogućava ostvarivanje volje ugovornih strana. Može se reći da je Konvencija omogućila da se volja ugovornih strana ostvari u slučaju postojanja litispendencije. Međutim, postojanje mogućnosti da sud koji nije izabran ne suspendira ili ne prekine postupak u određenim slučajevima ostavlja prostora za bojazan da ugovorna volja stranaka neće biti ostvarena. Iako slučajevi u kojima se ne primjenjuje sporazum o izboru isključivo nadležnog suda

[54] Stanivuković, M., Živković, M. (2010). *Međunarodno privatno pravo.* Beograd: Službeni glasnik, 202.

[55] *Ibid.*, 202.

[56] Čl. 50. ZRSZ.

[57] Odluka Višeg trgovinskog suda Srbije, br. Pž. 3065/05 od 3. 10. 2005. godine.

ostavljaju široku ocjenu neizabranom sudu, za očekivati je da će neizabrani sud u izuzetno rijetkim slučajevima nastaviti sa postupkom odnosno utvrditi da postoje slučajevi koji utiču na neprimjenu sporazuma o izboru nadležnog suda.

Za razliku od Konvencije 2005 pravo BiH normira litispendenciju koja može biti prepreka da se realizuje volja ugovornih strana. Jedan od uslova za prekidanje postupka na zahtjev stranke ako je u toku spor pred stranim sudom u istoj pravnoj stvari i između istih stranaka, jeste nepostojanje isključive nadležnosti suda u BiH. Ključno je da li isključiva ugovorena nadležnost dovodi do istih posljedica kao isključiva nadležnost propisana zakonom. Ako proizvodi iste posljedice, sud u BiH neće primijeniti pravilo o litispendenciji. Odgovor na ovo pitanje daje čl. 47. ZRSZ, koji propisuje da isključiva nadležnost domaćeg suda postoji kada je to zakonom izričito određeno. Dakle, iz činjenice da ovaj član pominje samo isključivu nadležnost određenu zakonom, može se zaključiti da termin „isključiva nadležnost" obuhvata samo zakonsku isključivu nadležnost. Na ovaj način se dolazi do zaključka da odluka suda u BiH uslijed primjene pravila o litispendenciji može dovesti do neprimjene sporazuma o izboru suda.

Drugačija je situacija kada je ugovorena nadležnost suda strane države. Tuženi može istaći prigovor međunarodne nenadležnosti u kojem slučaju će se sud u BiH oglasiti nenadležnim, ukinuti provedene radnje i odbaciti tužbu, bez obzira na vrijeme pokretanja postupka u odnosu na stranu državu. Na ovakav način se omogućava ostvarenje volje ugovornih strana.

Pravila o postupanju neizabranog suda sadržana u Konvenciji 2005, ukazuju na značaj ratifikacije ove Konvencije od strane BiH. Ukoliko bi BiH ratifikovala Konvenciju, sudovi bi istu primjenjivali u slučajevima propisanim Konvencijom, što bi uticalo na ostvarivanje volje ugovornih strana u slučajevima kada je ugovorena isključiva nadležnost suda u BiH. Ovo je posebno značajno jer se u skorije vrijeme ne očekuje donošenje zakona na državnom nivou koji bi uredio pitanja međunarodnog privatnog prava.

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THE RELATIONSHIP BETWEEN *LIS PENDENS* AND EXCLUSIVE INTERNATIONAL JURISDICTION BASED ON A CHOICE OF COURT AGREEMENT IN THE LAW OF THE HAGUE CONFERENCE AND BOSNIA AND HERZEGOVINA**

ABSTRACT: The subject of the paper refers to the analysis of the exercise of the will of the contracting parties regarding the jurisdiction of the court in the law of the Hague Conference and Bosnia and Herzegovina. The exercise of the will of the contracting parties may be limited by the institute of lis pendens, which makes it impossible to conduct two proceedings between the same parties simultaneously for the same claim based on the same facts, giving priority to the first one, regardless of agreed-upon international jurisdiction. By agreeing on the jurisdiction, the contracting parties decide which court will resolve their dispute, which is extremely important for them. Based on the analysis of the Hague Convention on Choice of Court Agreements, it is concluded that preference is given to proceedings before the chosen court, with certain exceptions when the agreement of the parties will not apply. The law of

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Bosnia and Herzegovina applies the rules of lis pendens which may prevent the application of the agreement of the parties.

Keywords: lis pendens, jurisdiction, agreement, contracted jurisdiction, stay of proceedings

INTRODUCTION

In all legal systems, agreements are subject to limitations and the position that legal obligations cannot be derogated by an agreement is supported, but that after fulfilling their legal obligations, a contracting party may ask for regress. Sovereignty, as the highest and indivisible authority in a given territory, has led to the formation and preservation, and will lead to the future existence of international private law. By making an agreement regarding the exclusive international jurisdiction of a specific court, the contracting parties wish for the choice of court agreement to be realized and for the proceedings to be conducted before the chosen court. In certain situations, one of the parties deviates from the agreement and initiates proceedings before a court whose jurisdiction was not agreed upon, despite the agreement on the jurisdiction of another court. The lis pendens institute prohibits conducting these two parallel proceedings, which leads to the inability to conduct the proceedings that were initiated at a later date. The application of the lis pendens doctrine, if the former proceedings were initiated before a court whose jurisdiction was not chosen via agreement, disallows the later proceedings to be conducted before the chosen court. The consequence is the inability to conduct proceedings before the chosen court, which speaks to the influence of lis pendens on executing the will of one of the parties, that is, the will of the defendant. The subject of the paper is the law of the Hague Conference because of its importance to international law and the domestic law of Bosnia and Herzegovina.

THE LAW OF THE HAGUE CONFERENCE

The Hague Conference is the oldest international legal institution in The Hague.[2] The First Hague Conference was held in 1893, at the initiative of Tobias M.C. Asser (recipient of the Nobel Peace Prize in 1911).[3] The

[2] Van Loon, H. (2007). The Hague Conference on Private International Law. *Hague Justice Journal,* 2 (2), 4.

[3] *Ibid*.

Hague Conference is not only the oldest and most efficient,[4] but also the most successful organization (which stems from the degree of distribution of its conventions), that deals with legal unification in the field of international private law and procedural international private law.[5]

Khatri compares international litigation to spider silk strands and the complexities surrounding the strands, that are so intertwined as to form a web.[6] The participation of a party in international litigation is analogous to an insect entering a web and becoming trapped.[7] It is the duty of the court not to get caught in the multitude of legal provisions that represent the web to the court and that can entrap it. While the example of the spider web may appear banal, it demonstrates the issues faced by the parties in the truest sense.

This paper deals with the Hague Convention on Choice of Court Agreements (Convention 2005). It is important to note that the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters from 1971 exists (Convention from 1971).[8] It was ratified only by Cyprus, the Netherlands and Portugal and it never became active because none of the parties submitted the bilateral agreements, as was stipulated by the Convention.[9]

The failure of the Convention from 1971 did not put an end to the activities of the Hague Conference on Private International Law, but it did retard them. Pursuant to its Statute, the purpose of the Hague Conference is to "work for the progressive unification of the rules of private international law".[10] After the failure of the Convention form 1971, a significant amount of time was needed for this convention to be "forgotten" and a new convention dealing with the subject matter of procedural international private law to be adopted. The long-term goal is to create an international legal system for agreements on the choice of the jurisdiction of the court, similar to the one founded for

[4] Basedow and others (Hrsg.), Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht, 2001, 785, 788, cited according to: Wagner, R. (2011). Značaj Haške konferencije za međunarodno privatno pravo za međunarodnu saradnju u građanskim stvarima. *Nova pravna revija,* 2 (2), 46.

[5] Schack, Internationales Zivilverfahrensrecht, 5 ed. (2010), Rn. 72, cited according to: *Ibid.*, 46.

[6] Khatri, B. (2016). *The effectiveness of the Hague Convention on Choice of Court Agreements in making international commercial cross-border litigation easier – A critical analysis*. Victoria: University of Wellington, 3.

[7] *Ibid.*, 3.

[8] *Ibid.*, 7.

[9] *Ibid.*, 7.

[10] Article 1 of the new Statute is identical to the parallel provision in the original Statute, cited according to: Wagner, R. (2011). *Op. cit.*, 45.

arbitration agreements by the New York Convention from 1958.[11] In 1992, the United States of America requested talks for a convention on the jurisdiction, recognition, and enforcement of foreign judgements. Evidently, the interest of the US was sparked by the need to secure a legal structure to support the growth of the global market.[12] Further, the US was not party to any bilateral or multilateral agreements on the recognition and enforcement of judgements, which was an obstacle to the recognition and enforcement of US judgements internationally.[13] In June of 2005, at the 20th session of the Hague Conference on Private International Law, the final text of the Convention was agreed upon and adopted at the plenary session held on June 30th, 2005.[14] Convention 2005 is a compromise[15] between continental and common law.[16] It is interesting to note that the US did not ratify Convention 2005, despite being its initiator. The convention is currently in force in 32 countries.[17]

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[11] Jones Day (2015). *The Hague Choice of Court Convention Takes Effect, and With It Greater Certainty for International Transactions*. Washington: Jones Day, 1.; Moore, C., Jedrey, N., Rodgers, K. (2016). Hague Convention on Choice of Court Agreements Enters into Force. *Business Law Review,* 37 (1), 2.

[12] See: Nanda, V. (2007). The Landmark 2005 Hague Convention on Choice of Court Agreements. *Texas International Law Journal,* 42 (3), 775.

[13] *Ibid*., 775.

[14] Laguardia, D. H. R., Falge, S., Franceschi, H. (2012). *The Hague Convention on Choice of Court Agreements A Discussion of Foreign and Domestic Points*. Retrieved on 11.03.2017. Available at: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2012/07/The-Hague-Convention-on-Choice-of-Court-Agreemen__/Files/View-full-article-The-Hague-Convention-on-Choice__/FileAttachment/LaguardiafalgefranceschiarticleHagueConventionon__.pdf,3.

[15] Researching the list of prohibited grounds of jurisdiction that cannot be used by the contracting states reveals others areas of compromise in jurisdiction. Mutual compromise is observable in Article 18 of the Draft Convention from 1999, wherein four states gave up different grounds of *exorbitant* jurisdiction that were recognized domestically. For example, the US and Great Britain renounced jurisdiction based on the presence of the defendant in the state, Germany renounced jurisdiction when the defendant only had property in the state, and France renounced jurisdiction based only on the nationality of the defendant.

Foreign states are not partial to the application of US competition law because of the wide-ranging possibilities relating to the creation of rules while the grounds for jurisdiction include the so-called "affect" test. Other countries have instituted laws with the aim preventing the enforcement of US antitrust judgements, including Australia, Belgium, Canada, France, Germany, the Netherlands, Norway, Sweden, the Republic of South Africa and Great Britain. Because of this divergence of opinion, the US managed for antitrust law not to be covered by Convention 2005. (See: Adler, M., Zarychta, M. C. (2006). The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band. *Northwestern Journal of International Law & Business,* 27, (1), 20, 25, 26.).

[16] Min, Y. T. (2013). *Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005*. Singapore: Singapore Academy of Law, 1.

[17] https://www.hcch.net/en/instruments/conventions/status-table/?cid=98, 3. 9. 2020.

The foundations of a Choice of Court Agreement

Convention 2005 stipulates that an exclusive choice of court agreement[18] is an agreement concluded by two or more parties that meet the formal requirements and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the court of one contracting state or one or more special courts of one contracting state to the exclusion of the jurisdiction of any other courts. The formal requirements of this agreement are that it must be concluded or documented:

1) in writing, or

2) by any other means of communication which renders information accessible so as to be usable for subsequent reference.

Rules on the material validity of an agreement are contained in Convention 2005. It stipulates that an agreement can be made null and void under the law of the contracting state designated in the agreement.[19] Opposability of laws does not cover the formal validity of a choice of court agreement, as the requirements for formal validity are prescribed by Article 3, para. 1, point c) of the Convention.[20] The formal viability of a prerogative agreement is assessed separately from the viability of the other provisions of an agreement, according to the conditions for formal viability contained in Article 3, point b) of the Convention.[21] The material viability of a prerogative agreement is also assessed and is determined by the competent law for contracts (that is, for the choice of court agreement).[22]

The obligation of the court that is not chosen

A compromise between continental and common law was the only way for Convention 2005 to be enacted, even though one is hard to reach. Under the influence of the *Gasser* case[23], wherein the Court gave precedence to lis

[18] Article 3, para. 1, points a) and c) of Convention 2005.

[19] Article 5, para. 1 of Convention 2005.

[20] See: Musseva, B. (2016). Opposability of Choice-of-Court Agreements against Third Parties under The Hague Choice-of-Court Convention and Brussels Ibis Regulation. *Annals of the Faculty of Law in Zenica,* 9, (18), 75.

[21] Stanivuković, M. (2012). Haška konvencija o izboru nadležnog suda-kritička procena. *Annals of the Faculty of Law in Novi Sad,* 46 (3), 129.

[22] *Ibid*, 129.

[23] Judgement of the Court of Justice of the EU, from 09/03/2003, *Erich Gasser GmbH v MISAT-a SRL*, C-116/02, EU:C:2003:657.

In this case, the Court of Justice of the EU ruled that: "Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction

pendens as opposed to exclusively chosen international jurisdiction, it was important for the Convention to secure that a choice of court agreement has legal affect. However, the US doctrine of *forum non conveniens*[24] is not entirely left out. The prevailing position is that the Convention eliminates *forum non conveniens25*, but that position is not entirely correct. It is correct that the fundamental form of the *forum non conveniens* doctrine is excluded, but the grounds for not enforcing an exclusive choice of court agreement provide the courts with wide discretionary powers. Convention 2005 gives the chosen court precedence, but allows the court not chosen to decide on the validity of the choice of court agreement. Lis pendens is not explicitly prescribed, but the aim is to enable the realization of the agreement via the obligations of the non-chosen court.

Pursuant to Convention 2005, the court of a contracting state not chosen suspends or dismisses the proceedings to which the exclusive choice of court agreement applies, unless[26]:

1) the agreement is null and void under the law of the State of the chosen court;

2) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

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has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction. That fact is not such as to call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised. Article 21 of the Brussels Convention of 27 September 1968 must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long. An interpretation whereby the application of that article should be set aside in such a situation would be manifestly contrary both to the letter and spirit and to the aim of the Convention."

[24] "The doctrine of forum non conveniens (FNC) provides the court the discretion to dismiss the case if it deems a foreign court would be the more convenient or appropriate forum to hear the case. The doctrine's purpose is to prevent forum shopping, whereby a plaintiff seeks out the most advantageous forum, without regard to the case's connection to that forum. This doctrine has been frequently invoked by courts in common law countries, effectively blocking access for foreign victims regardless of the merits of the case. The assumption is it will be refiled in the more appropriate host country court. However, United States statistics indicate almost all cases rejected for FNC by US courts are never refiled in an alternative forum, leaving victims with no recourse to justice." (Gerrity, R. (2016). *Mining for Justice in Home Country Courts: A Canada-UK Comparison of Access to Remedy for Victims of Human Rights Violations*. Retrieved on 19.03.2017. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882826, 11).

[25] Van Loon, H. (2016). The 2005 Hague Convention on Choice of Court Agreements – an introduction. *Annals of the Faculty of Law in Zenica,* 9 (18), 22.

[26] Article 6 of Convention 2005.

3) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

4) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

5) the chosen court has decided not to hear the case.

Despite the aim of Convention 2005 being to enable the actions of the court not chosen to act when the chosen court cannot, the non-chosen court has the task to, in certain cases, assess legal standards that are subject to different interpretations. Different interpretations are particularly possible when assessing manifest injustice and public policy. Convention 2005 does not give any precedence to the chosen court for determining the validity of a choice of court agreement.[27] It is necessary to give precedence to the chosen court to determine the validity of a choice of court agreement, unless the agreement is null or void. It is particularly problematic to give authority to a non-chosen court to conduct proceedings wherein accepting the validity of an agreement would be a manifest injustice or would be manifestly contrary to the public policy of the state of the court before which the proceedings were initiated. Asides from the fact that the non-chosen court has the ability to differently interpret legal standards, it is against the will of the parties for the validity of the choice of court agreement to be interpret in accordance with the standards of the state before which the proceedings were initiated. The contracting parties had agreed on the jurisdiction of a court of a specific country, with all the consequences that the agreement entails, including assessing the validity pursuant to the standards of the state of the chosen court. It is possible that the parties wanted the jurisdiction of the chosen court specifically because it conducts proceedings according to rules that enable expedient and efficient proceedings. Negative consequences could particularly be felt by the party that made concessions in the main agreement in order to negotiate the jurisdiction of court of a specific state. For example, parties A and B conclude an exclusive choice of court agreement in country X for any disputes arising from a sales contract. Party A agreed to a longer deadline for making financial claims against party B, under the condition that they agree upon the jurisdiction of a court in country X. The interest of party A in country X is that civil proceedings are conducted pursuant to the principle of party presentation (Verhandlungsmaxime), which allows for a quick and fast conclusion to a potential dispute. Party B believes that the delivered goods have material shortcomings and initiates proceedings before the court of country Y. Civil proceedings in country Y are conducted

[27] Weller, M. (2016). *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*. Retrieved on 21.03.2017. Available at: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2827711, 22.

according to the principle of judicial investigation (Untersuchungsmaxime). The court before which the proceedings were initiated believes that the exclusive choice of court agreement is a manifest injustice against party B, as the chosen court of country X will apply the principle of party representation and the material truth will not be determined in the proceedings. Thus, to a certain extent, the mechanism of coordination of the Convention accepts parallel proceedings.[28] Conducting parallel proceedings does not enable the realization of the will of the parties and may negatively affect the trust of the parties in Convention 2005.

THE LAW OF BOSNIA AND HERZEGOVINA

The rules of lis pendens in Bosnia and Herzegovina (BiH), as well as other rules of international private law, do not correspond to modern procedural international private law due to the passage of time. The occurrence of lis pendens is not rare in BiH.

The reason for the occurrence of lis pendens is that international jurisdiction is defined as competitive as a rule, which opens up the possibility that a court of another country may also have jurisdiction in a dispute. The dispute may be connected to BiH and another country, so, for example, the defendant owns property in BiH, but resides in a different country, and the subject of the dispute is the return of a loan. In this case, the proceedings may be conducted in BiH, but also in a different country. Prohibiting double lis pendens prevents the same subject matter to be adjudicated twice (ne bis de eadem re sit actio), which could lead to different court proceedings and different judgements, which would, in turn, jeopardize legal security.[29]

When regarding the actions of courts in situations where lis pendens occurs, it is necessary to make a disctincition between cases where an exclusive choice of court agreement exists and where it does not.

Lis pendens when an exclusive choice of court agreement does not exist

If an exclusive choice of court agreement is not concluded, staying proceedings is a solution regulated by the Law on Resolving Conflicts of Law

[28] Weller, M. (2016). *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*. Retrieved on 21.03.2017. Available at: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2827711, 22.

[29] Huseinbegović, A., Haubrich, V. (2017). Litispendencija prema građanskom procesnom pravu Evropske unije. *Revija za pravo i ekonomiju*, 18 (1), 12.

with Regulations of Other Countries (hereinafter: LRCL)[30]. A Court in BiH will stay proceedings at the request of a party if proceedings on the same cause of action are being conducted before a foreign court between the same parties, provided[31]*:*

a) That the foreign court is first seized of proceedings involving the same cause of action;

b) That the proceedings are other than those in which a court of BiH has exclusive competence;

c) That reciprocity is provided for.

From the conditions prescribed for staying proceedings, it emerges that there are four conditions and the four conditions must be cumulatively met. It is the obligation of a party to bring attention to the fact that proceedings were already initiated before a foreign court, because, pursuant to the provisions of the LRCL, the court does not attend to these facts ex officio.[32] Further, the court does not have this obligation according to the provisions of the Civil Procedure Law, but has the ex officio obligation to know if other proceedings on the same cause of action between the same parties are in progress before a court in BiH while the proceedings last.[33]

The burden to prove that proceedings had been previously initiated before a foreign court, as well as regarding reciprocity, falls to the party submitting the request to stay the proceedings.[34] If reciprocity is in question, the court needs to request an opinion from the Ministry of Justice of BiH on whether there is reciprocity with the foreign country. Despite the burden of proof primarily being placed on the parties, it is necessary for the court to take action in order to correctly assess this legal issue, so that the proceedings would not be stayed unnecessarily or so that the court does not stay the proceedings and the foreign country applies measures of retorsion to other cases. In the LRCL, it is not regulated up to which point in the proceedings a party may bring attention to the fact that proceedings were initiated in a foreign country previously. A party is obligated, if they so wish, to request from

[30] *Official Gazette of the* SFRY, no. 43/1982 and 72/1982, which is applied in BiH.

[31] Art. 80 of the LRCL.

[32] Pursuant to Art. 80, the court shall stay proceedings at a request of a party.

[33] Art. 27, para. 5 of the Civil Procedure Law Before a Court in BiH, *Official Gazette of the BiH*, no. 36/04, 84/07, 58/13 and 94/16 (hereinafter: CPL BiH); Art. 67, para. 5 of the Civil Procedure Law of the FBiH, *Official Gazette of the FBiH*, no. 53/03, 73/05, 19/06 and 98/15 (hereinafter: CPL FBiH); Art. 60, para. 5 of the Civil Procedure Law of the RS, *Official Gazette*, no. 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13 (hereinafter: CPL RS); Art. 159, para. 5 of the Civil Procedure Law of the BD BiH, *Official Gazette BD BiH,* no. 28/18 (hereinafter: CPL BDBiH).

[34] See: Muminović, E. (2008). *Procesno međunarodno privatno pravo*. Sarajevo: Faculty of Law of the University of Sarajevo, 43.

the court to stay proceedings as soon as they are made aware that proceedings have been initiated in another country. The parties are not obligated to inform the court of proceedings that were initiated, but it is left up to their discretion. However, a party cannot be allowed to abuse this right and ask for proceedings to be stayed after they have been conducted. For this reason, a party is obligated to inform the court in BiH of other proceedings as soon as they are made aware of them, but they must do it at the latest at the preliminary hearing or main hearing before evidence is presented. If the evidence was presented and all that is left is for the main hearing to be concluded, staying the proceedings loses purpose. The proceedings should be stayed after evidence is presented or the main hearing is concluded only if a party was not previously made aware that proceedings were being conducted in a foreign country and the party should need to prove these facts. Allowing an objection based on lis pendens after the conclusion of a main hearing should be an exception, used only rarely, with the purpose of not having two conflicting judgements and honouring foreign courts. After a final judgement has been made, the proceedings cannot be stayed. This conclusion stems from the facts that there is no purpose to conducting proceedings and issuing judgements after which a court would stay the proceedings, and the court is bound to its judgement as soon as it is issued.[35] In the Brčko District of Bosnia and Herzegovina (BD BiH), the legislation regulates that a court is bound to a judgement as soon as it is dispatched, which institutes no essential changes.[36]

The existence of the identity of the parties and the subject of the dispute

For the existence of the identity of the parties and the subject of the dispute, the following is required[37]:

a) the identity of the parties (*identitas personarum*), becuse in both proceedings the parties must be the same, but it is not obligatory for them to have the same role in the proceedings. The plaintiff in the first proceedings may be the defendant in the second;

b) the subject of the dispute in both proceedings must be the same (*cadem res*). The subject of the dispute is the same when the claim (as the essential element for determining the identity of the legal motion in the proceedings, that is, in both proceedings) is the same. Two claims are identical (*identitas rei*) when they purport to achieve the same legal goal and if the

[35] Art. 164, para. 1, CPL BiH; Art. 197, para. 1, CPL FBiH; Art. 197, para 1, CPL RS.

[36] Art. 317, para. 1, CPL BD BiH.

[37] Čalija, B., Omanović, S. (2000). *Građansko procesno pravo*. Sarajevo: Faculty of Law of the University of Sarajevo, 195.

legal effect of the first proceedings extends to the subject of adjudication in the second proceedings. Asides from the claims being identical, they must also be grounded in the same factual basis.

Situations where the foreign court is first seized of proceedings involving the same cause of action

The first condition stipulated by the LRCL conflicts with laws on civil proceedings in an element important to lis pendens. In the laws on civil procedures for lis pendens in BiH, the moment when the claim is served to the defendant is legally relevant, that is, when the litigation start[38], while the LCRL stipulates that a foreign court is seized.[39] This could be attributed to editorial oversight by the legislators, but it could also be a clear delineation and with the purpose of more easily establishing that a foreign court is seized. It is easier for domestic courts to determine, which provides legal security, that a foreign court is seized than to determine that the proceedings before the foreign court are in in progress. Initiating the proceedings is determined only by the existence of a stamped record of the foreign court that a claim has been submitted. Regarding the moment relevant to international lis pendens, whether it is the moment when litigation has started or the proceedings have been initiated, there are differing opinions.[40] I believe it is necessary to act in accordance with the rules of the LCRL and not in accordance with the rules of civil procedures, as the LCRL is special legislation that accounted for the specificities of international jurisdiction, as opposed to general legislation. The time when the foreign court is seized will be assessed pursuant to the laws of the court's country of origin.[41]

A dispute for which there is no exclusive jurisdiction of a court in BiH

Protecting the interests of the home state and the possibility of accepting the judgment of the foreign court is reflected in this condition. If the exclusive jurisdiction of a court in BiH exists, it is clear that proceedings should not be stayed when the foreign judgement can have no legal effect. In this case, the court does not base its decision on any assumptions related to the proceedings conducted before the foreign court, as the existence of the exclusive jurisdiction of a court in BiH can be easily determined.

[38] Art. 34, para. 1, point 3) CPL BiH; Art. 67, para. 1, point 3) CPL FBiH; Art. 67, para. 1, point 3) CPL RS; Art. 190, para. 1, point 3) CPL BDBiH.

[39] Art. 80, para. 1, point 1) LCRL.

[40] See: Dika, M., Knežević, G., Stojanović, S. (1991). *Komentar Zakona o međunarodnom privatnom i procesnom pravu*. Beograd: Nomos, 256, 257.

[41] Čolović, V. (2012). *Međunarodno privatno pravo*. Banja Luka: Pan-European University APEIRON, 271.

Reciprocity

Reciprocity regarding lis pendens refers to the manner in which a foreign court acts when a court in BiH is first seized of proceedings between the same parties regarding the same cause of action, that is, whether the foreign judiciary recognizes the judiciary of BiH. When assessing if reciprocity exists, it is necessary to determine whether reciprocity exists only with recognizing prior lis pendens before a foreign court, or if reciprocity should exists when recognizing and executing foreign court decisions, before the court stays the proceedings. The preeminent position is that reciprocity is required for recognizing and executing foreign court decisions, as recognizing proceedings initiated earlier before a foreign court is based on the possibility of recognition and execution of the decision that will be issued in the proceedings before the foreign court.[42] If reciprocity would only be assessed regarding lis pendens, it could occur that a domestic court dismisses a claim after the proceedings had been conducted before a foreign court and the foreign decision could not be recognized in BiH, which is certainly unacceptable.

Lis pendens when an exclusive choice of court agreement exists

When an exclusive choice of court agreement exists, it is necessary to distinguish between situations when a court in BiH has jurisdiction and when a foreign court has it.

An exclusive choice of court agreement when a court in BiH has jurisdiction

The exclusive jurisdiction of a court in BiH indicates that the proceedings being conducted in a foreign state do not affect the proceedings in BiH. The only disputable issue is whether the exclusive jurisdiction of a BiH court provided by national law is grounds for conducting the proceedings before a court in BiH, regardless of the proceedings conducted before a foreign court, or does an exclusive choice of court agreement favouring a BiH court have the same affect? The answer to this question can be found in Art. 47 of the LCRL, which stipulates that exclusive jurisdiction of a domestic court exists when so explicitly provided by law. Thus, based on the fact that this Article only refers to exclusive jurisdiction provided by law, it can be concluded that the term "exclusive jurisdiction" encompasses only exclusive jurisdiction

[42] See: Dika, M., Knežević, G., Stojanović, S. (1991). *Komentar Zakona o međunarodnom privatnom i procesnom pravu*. Beograd: Nomos, 256, 257.

provided by law.[43] Also, if the provisions of the LCRL that explicitly prescribe the exclusive jurisdiction of domestic courts or other bodies are examined, that contain the word "exclusive", they never explicitly mention that the prorogued court shall have exclusive jurisdiction.[44] From this, it stems that an exclusive choice of court agreement favouring a domestic court is not an obstacle for the court to stay proceedings and wait for the decision of the first-instance foreign court.[45] Agreed-upon exclusive international jurisdiction has no effect in the field of lis pendens.[46]

Not producing the full legal effect of an exclusive choice of court agreement favouring a BiH court indicates the possibility of repeating the *Gasser* case in the law of BiH. In BiH, there are no provisions that would protect a contracting party when jurisdiction is based on an exclusive choice of court agreement. Following the *Gasser* case, the position that the easiest way for solving this issue is to stipulate that a choice of court agreement determines exclusive international jurisdiction is supported in jurisprudence.[47] But only stipulating that a choice of court agreement determines exclusive international jurisdiction cannot produce the appropriate legal effect, without regulating in which manner a court is to act when exclusive international jurisdiction is agreed-upon. Thus, the law of BiH does not contain the base minimum of provisions that would secure the effect of a choice of court agreement favouring a court in BiH, as is the case, for example, with Convention 2005. It is clear that the law of BiH should follow the law of the Hague Conference, but also explicitly regulate that the exclusive jurisdiction of a BiH court based on a choice of court agreement disallows staying proceedings in favour of proceedings conducted in a foreign country, regardless of the fact whether the proceedings in the foreign country were initiated first, i.e., equate the legal effects of exclusive jurisdiction as provided by law and exclusive jurisdiction of a BiH court based on a choice of court agreement. Unlike the Hague Conference, it would be necessary to prevent the court first seized to assess the validity of the choice of court agreement.

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[43] Grušić, U. (2007). Dejstvo prorogacionih sporazuma u evropskom, engleskom i srpskom pravu. *Annals of the Faculty of Law in Belgrade*, 55 (2), 156–179, 175.

[44] *Ibid*, 175.

[45] *Ibid*, 175.

[46] Varadi, T., Knežević, G., Bordaš, B., Pavić, V. (2016) *Međunarodno privatno pravo*, 15. ed., Belgrade: Faculty of Law of the University of Belgrade, 503.

[47] Lando, O., Nielsen, P. A. (2008). The Rome I Regulation. *Common Market Law Review,* 45 (6), 1693.

An exclusive choice of court agreement when a foreign court has jurisdiction

The other situation with a choice of court agreement regarding lis pendens is when a foreign court has exclusive jurisdiction based on a choice of court agreement. For parties to be able to agree to the jurisdiction of a court of a foreign country, it is necessary for at least one of them to be a foreign national or a legal entity with a register seat of business in the foreign country, and that the proceedings in question are not one for which there is exclusive jurisdiction of a BiH court as provided by law,[48] or are marital proceedings, or proceedings regarding the establishment or contesting of paternity or maternity, or proceedings regarding the care, upbringing of, and provision of guidance to children, or proceedings regarding the statutory maintenance of children, or proceedings regarding the statutory maintenance between spouses and former spouses, or proceedings regarding the deprivation and restoration of parental rights, or extending parental rights, or proceedings regarding granting the right of custody over children's property to parents, or recognizing a child born in a marriage as legitimate, as well as other matters concerning personal status and relationships between parents and children, and issuing a marriage licence.

For the purpose of this paper, situations wherein a court of BiH is first seized but a foreign court is chosen by a choice of court agreement are relevant. If a foreign court is first seized, then it is not in dispute that the court of BiH will stay the proceedings. However, the actions of a court of BiH are disputable when it is first seized.

Within the framework of absolute jurisdiction, the court assesses whether solving the dispute falls within the purview of a court's jurisdiction and whether a court in BiH has the competence to solve the dispute. These actions of the court stem from the correct interpretation of the laws that regulate civil proceedings in BiH, with the caveat that insufficient attention has been paid to private law relations with an international element, thus the legal solutions differ. Pursuant to the provisions of the CPL BiH, CPL FBiH and CPL BDBiH, when in the course of the proceedings a court determines that a court in BiH does not have jurisdiction for adjudication, it will ex officio declare that it has no jurisdiction, revoke all actions undertaken and reject the complaint.[49] Pursuant to the CPL RS, when in the course of the proceedings a court determines that a court in the RS does not have jurisdiction for adjudication, it will ex officio declare that it has no jurisdiction, revoke all actions undertaken and reject the complaint.[50] Interpreting the international element cannot be related to the

[48] Art. 49, paras. 1. i 3. LCRL.

[49] Art 4, para. 3. CPL BiH; Art. 16, para. 3. CPL FBiH; Art. 16, para. 3. CPL BDBiH.

[50] Art. 16, para. 3. CPL RS.

entity but only to BiH, as proceedings with an international element must be differentiated from proceedings with an inter-entity element. Proceedings with an international element are those proceedings where another state, besides BiH, is concerned with the proceedings being resolved, while proceedings with an inter-entity element are those proceedings where both entities have interest in resolving the proceedings, or one entity and BD BiH. Correctly recognizing these elements conditions the further actions of the court and is of key importance. When there is an international element and the court determines it does not have jurisdiction, a court in BiH will declare itself not competent, revoke all actions undertaken and reject the complaint; in situation where there is an inter-entity element, rules on subject matter and territorial jurisdiction shall be applied, then, when a court determines it does not have subject matter or territorial jurisdiction it will declare so and deliver the case to a competent court for further actions. In case law, we find differing opinions on how a court in the entity the Republic of Srpska (RS) is to act when a court in the entity of the Federation of Bosnia and Herzegovina (FBiH) has territorial jurisdiction. According to one position, the court should explicitly apply the provision of the CPL RS and declare itself not competent, revoke all actions undertaken and reject the complaint.[51] The other position is that the court should not act in this manner, but declare that it does not have territorial jurisdiction and deliver the case to the court with territorial jurisdiction in FBiH[52], and this position should be followed for the previously mentioned reasons.[53]

It is disputable what is defined as "in the course of the proceedings"; whether it is only proceedings undertaken under an ordinary legal remedy, or if it encompasses proceedings undertaken under an extraordinary legal remedy. The position taken is that the jurisdiction of the court in appeals proceedings is not the due care of the Supreme Court ex officio, but only if the appeal refers to it.[54]

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[51] Decision of the District Court in Bijeljina, no. 83 0 Mal 030434 16 Gž from 09.09.2016.

[52] Decision of the District Court in Bijeljina, no 83 0 Mal 025415 17 Gž from 12.10.2017.

[53] The decision of the Supreme Court of the FBiH, no. 53 0 Mal 000936 07 Rev from 23.09.2008, from the time when a court declaring itself not competent was tied to the entity pursuant to the laws of the FBiH, as is the case now in the RS, supports this position. According to the opinion of the Supreme Court of the FBiH, if it is prescribed by law that a court in FBiH shall declare itself not competent, revoke all actions undertaken and reject the complaint if a court in FBiH does not have jurisdiction, the court will not do so if a court in the RS or BD BiH has jurisdiction.

[54] Conclusion of the Civil Division of the Supreme Court of the FBiH from 03.11.2008, cited according to: Čizmić, J. (2009). *Komentar Zakona o parničnom postupku Federacije Bosne i Hercegovine*. Sarajevo: Privredna štampa, 77.

If the defendant makes an objection based on international jurisdiction, the domestic court will declare itself internationally not competent and reject the complaint when it determines that such an agreement is legally binding, that is, it will act as if it had no international jurisdiction even when there are grounds for its international jurisdiction in the given case.[55] The court will act this way only based on the objection of the defendant, as a lack of an objection from the defendant alongside the submission of the claim by the plaintiff is interpreted as if the parties have renounced the choice of court agreement.[56]

The defendant can utilize the objection based on international non-jurisdiction to obtain the declaration of the court regarding non-competence and a rejection of the claim; in this manner, the law of BiH enables the will of the parties to be realized. By rejecting the claim, lis pendens ends, which leads to the obligation of the foreign court whose jurisdiction was agreed upon to act.

The passivity of the defendant can lead to implicitly agreeing to the jurisdiction of a court in BiH. If the defendant has not submitted an objection based on non-jurisdiction, it is considered that the explicit choice on the court has been derogated by the later implicit choice. When the jurisdiction of a court in BiH is dependent on the consent of the defendant for the proceedings to be conducted in BiH, it is deemed that the defendant consented by lodging a reply to the claim or an objection to a payment order, without contesting jurisdiction, or if they have engaged in litigation.[57] It should be considered that jurisdiction depends on the consent of the defendant in proceedings wherein a prorogation of jurisdiction is possible.[58]

CONCLUSION

Convention 2005 is one of the instruments within the framework of the Hague Conference that regulates the field of international private law. In order to realize the will of the contracting parties, it is necessary to regulate the relationship between lis pendens and an exclusive choice of court agreement within the law of BiH. These are institutes that are mutually exclusive in certain situations and the application of lis pendens disallows the will of the contracting parties to be realized. It could be said that the Convention enabled

[55] Stanivuković, M., Živković, M. (2010). *Međunarodno privatno pravo.* Belgrade: Službeni glasnik, 202.

[56] *Ibid*.

[57] Art. 50 LRCL.

[58] Decision of the High Commercial Court of Serbia, no. Pž. 3065/05 from 03.10.2005.

the execution of the will of the contracting parties when lis pendens exists. However, the possibility that a court not chosen may not stay or not end proceedings in certain cases leaves open the option that the will of the contracting parties will not be honoured. Even though the cases wherein an exclusive choice of court agreement is not applied provide the non-chosen court with a wide range of assessments, it is to be expected that the non-chosen court will exceedingly rarely continue the proceedings or determine that there are cases which effect the application of a choice of court agreement.

Unlike Convention 2005, the law of BiH regulates lis pendens that can be an obstacle to realizing the will of the contracting parties. One of the conditions for staying proceedings at the request of a party if the proceedings are being conducted before a foreign court regarding the same cause of action and between the same parties is the non-existence of the exclusive jurisdiction of a court in BiH. The key question is whether exclusive jurisdiction based on an exclusive choice of court agreement has the same effect as exclusive jurisdiction provided by national law. If it has the same effect, then a court in BiH will not apply the rule on lis pendens. This question is answered by Art. 47 of the LRCL, which prescribes that exclusive jurisdiction of a domestic court exists only when so provided by law. Thus, from the fact that this article only mentions exclusive jurisdiction as provided by law, it can be concluded that the term "exclusive jurisdiction" only encompasses law-based exclusive jurisdiction. This further leads to the conclusion that a decision by a court in BiH, due to applying the rule on lis pendens, may lead to not implementing a choice of court agreement.

The situation is different when a foreign court is chosen by a choice of court agreement. The defendant may submit an objection based on international non-jurisdiction, in which case the court in BiH will declare itself not competent, revoke all actions undertaken and reject the complaint, regardless of the time when the proceedings were initiated in comparison to the foreign state. This allows the will of the contracting parties to be realized.

The rules on the actions of a non-chosen court contained in Convention 2005, stress the importance of BiH ratifying this Convention. If BiH were to ratify the Convention, the courts would apply it with regard to cases prescribed by the Convention, which would impact the realization of the will of the contracting parties when a court in BiH has exclusive jurisdiction based on an exclusive choice of court agreement. This is of specific importance because a new national law that would regulate issues of international private law is not expected to be instituted in the near future.

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