Application of the Matrimonial Property Regimes Regulation: Croatian Perspective

Vrbljanac, Danijela

APPLICATION OF THE MATRIMONIAL PROPERTY REGIMES REGULATION: CROATIAN PERSPECTIVE

Danijela Vrbljanac[1]

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Summary: I. Introduction. II. International element. III. Jurisdictional rule of Article 6(c). IV. Temporal scope of application. V. Hypothetical case on temporal scope of application. VI. Conclusion

Abstract: Regulation 2016/1103 has been in force in EU Member States participating in enhanced cooperation for more than 2 years. The paper looks into Croatian case-law on the application of Regulation 2016/1103 and scrutinizes issues with which Croatian courts were confronted in applying this recent piece of EU private international law source. These issues include the temporal scope of application of Regulation 2016/1103, the notion of international element, the existence of which is the prerequisite for applying Regulation 2016/1103 as well as the question whether jurisdictional rule referred to in Article 6(c) of Regulation 2016/1103 may be applied when the defendant is not the spouse.

I. INTRODUCTION

The puzzle of EU private international law sources in the area of family and succession law was recently complemented by two pieces of legislation governing private international law aspects of cross-border couples' property regimes. These are Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (hereinafter: Regulation 2016/1103)[2] and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (hereinafter: Regulation 2016/1104)[3], often referred to as the Twin Regulations.

The more than a decade long path to the adoption of these sources was marked with difficulties which resulted in the enactment of these instruments in the framework of the

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[1] Danijela Vrbljanac, PhD is an Assistant Professor at the Chair of International and European Private Law, University of Rijeka, Faculty of Law, Croatia

[2] Regulation 2016/1103, OJ L 183, 8 July 2016, 1–29.

[3] Regulation 2016/1104, OJ L 183, 8 July 2016, 30–56.

enhanced cooperation mechanism[4]. Still, they represent a remarkable step forward in bringing more clarity and certainty to cross-border couples faced with the breakdown of their relationship and the need to divide their assets[5].

Since the Twin Regulations have been in force for more than two years, the purpose of the paper is to analyse case law of Croatian courts on these instruments. In total, four judgments on the application of Regulation 2016/1103 were found. Based on the issues the Croatian courts were confronted with in proceedings resulting in the said judgments, the paper is divided into three parts: international element, jurisdictional rule of Article 6(c) and temporal scope of application. Since the question on the temporal ambit raised in the judgments is a rather straightforward one, the author tried to anticipate a connected, more complex issue which may arise in a hypothetical case in the final part of the paper.

At this time, no judgments were found on Regulation 2016/1104. However, due to the fact that provisions of Regulation 2016/1103 which are subject to scrutiny have their equivalent in Regulations 2016/1104, the outlined analysis may also serve for the purposes of the latter Regulation.

II. INTERNATIONAL ELEMENT

In a case before the Commercial Court in Rijeka, the plaintiff with an address in Italy, N.D., instituted proceedings against her husband M.M. with an address in Croatia. She sought from the court to establish that she, together with the defendant, was the owner of the share in the company M.M. d.o.o. registered in Croatia to N.D.'s name. The Commercial Court in Rijeka dismissed the plaintiff's claim by the judgment rendered on 16 May 2019. Upon the plaintiff's appeal, the High Commercial Court of the Republic of Croatia, abolished the first-instance decision and returned the case for retrial with instructions to determine the content of Italian substantive law, in particular as to whether the regime of separate property, opted for by the parties, encompassed solely the property located in Italy[6]. In the retrial, the Commercial Court in Rijeka[7] established that N.D. and M.M., when concluding marriage in Italy, opted for the matrimonial regime of separate property[8] pursuant to Article 215 of Italian Civil Code. The Court correctly dismissed the plaintiff's claims asserting that the regime of separate property included only the property located in Italy. Furthermore, the Court was correct in its conclusion that Regulation 2016/1103 was not applicable since the proceedings were instituted prior to 29 January 2019. Instead, it founded its jurisdiction on Article 46 of the 1982 Croatian PIL Act (*Zakon o rješavanju sukoba zakona s propisima drugih zemalja*

[4] On the adoption of the Twin Regulations, see E. Kavoliunite Ragauskeine, 'The Twin Regulations, Development and Adoption', in L. Ruggeri, A. Limantė, N. Pogorelčnik Vogrinc eds., *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 25-37.

[5] See European Commission, 'Commission goes ahead with 17 Member States to clarify the rules applicable to property regimes for Europe's international couples', 2 March 2016, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_16_449 (last visited 29 April 2022).

[6] Decision of the High Commercial Court of the Republic of Croatia Pž-4707/2019-2 of 1 December 2020.

[7] Judgment and decision of the Commercial Court in Rijeka 5 P-97/2021-44 of 26 November 2021.

[8] For more on family property regimes, see R. Garetto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin, M. V. Maccari 'Italy', in L. Ruggeri, I. Kunda, S. Winkler eds., *Family Property and Succession in EU Member States, National Reports on the Collected Data* (Rijeka: University of Rijeka, Faculty of Law, 2019), 356-390.

u određenim odnosima) which is a general jurisdiction rule[9]. It established that Italian law was applicable based on Article 36(1) of the 1982 Croatian PIL Act[10] since the spouses were Italian citizens.

Even though the Commercial Court in Rijeka reached a correct conclusion on the existence of the cross-border element and, as well as international jurisdiction and applicable law, in one of the sentences it was briefly mentioned that Regulation 2016/1103 could not be applied since the parties were not an 'international couple'. This formulation might demonstrate difficulties with which the courts and other authorities are sometimes confronted in determining whether a particular case has an international or cross-border element and whether Regulation 2016/1103, along with other private international law sources, should be activated. This fact is corroborated by the research conducted on the implementation of the Succession Regulation in the Republic of Croatia and Slovenia from which it stems that the consensus on whether particular succession proceedings have an international element does not always exist among Croatian and Slovenian practitioners[11].

Regulation 2016/1103, as well as Regulation 2016/1104, states in Recitals 1 and 14 that it applies in cases having cross-border implications without giving explanation of the term cross-border. The Twin Regulations thus follow the example of the majority of EU family and succession private international sources which do not elaborate on the matter[12]. In the Rome III Regulation proposal, the European Commission provided a general and vague explanation that conflict of laws means situations in which there are aspects of the case which take it outside the domestic social life of one country and which may involve several legal systems[13]. In doctrine, it is indicated that a cross-border nature of couple's property relations derives from an intrinsic element, i.e. personal, objective and territorial[14]. Examples of a cross-

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[9] Article 46(1) of the 1982 Croatian PIL Act, NN 53/91, 88/01:

The court of the Republic of Croatia has jurisdiction if the defendant is domiciled or has its seat in the Republic of Croatia.

For the translation of the former Croatian 1982 PIL Act, see Ž. Matić, 'The Yugoslav Act Concerning Private International Law with Introduction' 30 *Netherlands International Law Review* 2, 220-239 (1983).

[10] Article 36(1) of the 1982 Croatian PIL Act:

The law governing the personal relations and statutory matrimonial property regime of spouses is the law of the state of which they are citizens.

[11] S. Aras Kramar, M. Turk, K. Vučko, 'Završno izvješće o provedenom istraživanju o primjeni Uredbe o nasljeđivanju u Hrvatskoj i Sloveniji', 2019, available at https://www.hjk.hr/Portals/0/ForumUpload/dokumenti/Zavrsno%20izvjesce_hrv.pdf (last visited 22 April 2022), 11-16.

[12] This is also for true for sources not regulating private international law issues in the field of family and succession, such as the Brussels I bis Regulation (OJ L 351, 20 December 2012, 1–32), Rome I (OJ L 177, 4 July 2008, 6–16) and Rome II (OJ L 199, 31 July 2007, 40–49) Regulations. Only two sources define a cross border element. These are European Order for Payment Regulation (OJ L 399, 30 December 2006, 1–32) and European Small Claims Procedure Regulation (OJ L 199, 31 July 2007, 1–22) which state in Article 3 that a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised. These definitions, due to the particularities of the proceedings they refer to, are of little relevance for understanding cross-border element for the purpose of the Twin Regulations.

[13] Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 104 final, Brussels, 24 March 2010, COM(2010) 105 final, 2010/0067 (CNS), 6.

[14] A. Rodriguez Benot, 'Article 1, Scope', in I. Viarengo, P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples, A Commentary* (Cheltenham: Edward Elgar, 2020), 20.

border element include couples with different nationalities, domicile or habitual residence, property located in another country,[15] marriage which was concluded in another country[16] or a case might concern a couple residing in a country other than that of their nationality[17]. Even when all other elements are connected to a single country, a cross-border element might appear due to the fact that creditors or debtors, third parties, are in a different country or countries[18]. However, there are more problematic scenarios in which the existence of an international element might be questionable. For instance, if the couple holds shares in a company incorporated abroad or formerly had an international element in their relationship while they worked abroad, but no longer do so[19].

Even when a case involves an international element, it will not necessarily be relevant enough to integrate a private international law dimension into a particular legal relationship[20]. In *E.E.*, the CJEU had a chance to discuss the existence of an international element in a succession case[21]. It clarified that the case involving a deceased, national of one Member State, residing in another Member State at the date of his or her death but who had not cut ties with the first of those Member States, in which the assets making up his or her estate were located, while his or her successors had their residence in both of those Member States, fell within the scope of the concept of 'succession with cross-border implications'.

A more elaborate interpretation of international element by the CJEU was given in *Hypoteční banka,* a case concerning Brussels I bis Regulation. It involved a company governed by Czech law and established in Prague which brought an action before the Czech court and sought payment from Mr Lindner, a German national, based on the mortgage loan granted to Mr Lindner. The contract between the parties conferred jurisdiction to 'the local court of the bank'. At the time of the conclusion of the contract, Lindner was domiciled in the Czech Republic. However, when the proceedings were instituted, his domicile became unknown[22]. The CJEU highlighted the need to differentiate between the jurisdictional criteria in Brussels I bis Regulation from the elements which bring a cross-border element into a relationship. Even when Brussels I bis Regulation does not recognise a certain element as relevant for establishing international jurisdiction, that element could still be a decisive criterion making the dispute an international one. Referring to Mr. Lindner's foreign nationality, the CJEU explained that nationality is not one of the jurisdictional criteria prescribed by Brussels I bis

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15 Ibid. 20.

16 H. Peroz, E. Fongaro, *Droit international prive patrimonial de la famille* (Paris: Lexis Nexis, 2017), 1.

17 M. J. Cazorla González, M. Soto Moya, 'Main Concepts and Scope of Application of the Twin Regulations', in L. Ruggeri, A. Limantė, N. Pogorelčnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 50. See Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 104 final, Brussels, 24 March 2010, COM(2010) 105 final, 2010/0067 (CNS), 6. See F. G. Viterbo, 'Article 1, Scope', in L. Ruggeri, R. Garetto eds., *European Family Property Relations, Article by Article Commentary on EU Regulations 1103 and 1104/2016* (Napoli: Edizioni Scientifiche Italiane, 2021), 9-10.

18 A. M. Sanchez-Moraleda, 'The Questions of the Primary Matrimonial Regime and the Application of Regulation 2016/1103', 12 *Cuadernos de Derecho Transnacional* 1, 260 (2020).

19 J. Gray, *Party Autonomy in EU Private International Law, Choice of Court and Choice of Law in Family Matters and Succession* (Cambridge: Intersentia, 2021), 72.

20 H. Peroz, E. Fongaro, n 15 above, 1.

21 Judgment of 20 July 2020, *E.E.*, C-80/19, EU:C:2020:569.

22 Judgment of 17 November 2011, *Hypoteční banka*, C-327/10, EU:C:2011:745.

Regulation, but could, nonetheless be a circumstance making the dispute international in its nature. If one applied argument *a maiori ad minus*, they might reach a conclusion on the minimum threshold of international element relevance which would trigger application of private international law sources. The minimum threshold conclusion would require that, although it is not necessary that the assessment of the cross-border element is based only on jurisdictional criteria prescribed in the Regulation, it is required that the elements underlying the jurisdictional criteria are considered while deciding if the dispute is an international one.

It is an unrewarding task to try to establish in advance the degree of relevance a foreign element must have so that the court or other authority has to resort to provisions of private international law. If the minimum threshold conclusion extracted from the *Hypoteční banka* is translated to the area of property relations of international couples, that would mean that whenever a cross-border element in a case is present through a fact underlying one of the jurisdictional criteria or connecting factors, such as habitual residence and nationality of the spouses or partners or the place of the conclusion of the marriage or registration of partnership[23], one of the Twin Regulations should be applied. If the European legislator deemed these elements were important enough for a particular legal relationship to indicate the state with which the relationship is closely connected to, then it would perhaps be safe to say that they have the power to transform a domestic relationship into an international one.

Some scholars are of the opinion that an international element might derive from an external element, i.e. when the parties involved agree to submit their dispute to a foreign court or legal system under Articles 7 and 22 in a purely domestic situation[24]. If the external element appears in the form of prorogation of jurisdiction, the dispute will have an international character. If the parties to a purely domestic case decide to submit their dispute to a foreign court, once it is seised, the foreign court will have to reach for its rules on international jurisdiction to determine whether it has competence or not, since it will be confronted with the claim between parties from abroad. Therefore, that statement holds true for an external element in view of the choice of court. On the other hand, if parties decide to choose the applicable law of a foreign country and all other elements of their relationship are connected to one country, the existence of an international element is disputable. Traditionally, party autonomy, in contractual situations involving an international element must be distinguished from party autonomy in purely domestic situations. If there is an international element present, and parties are allowed to choose the applicable law, they can choose the entire legal system of a particular country to govern their legal relationship, including the mandatory rules of the chosen law[25]. On the other hand, if no international element exists, parties may only derogate from dispositive provisions of the law which the relationship is connected to[26].

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[23] These are jurisdictional criteria and connecting factors Arts. 6, 7 and 22 of the Twin Regulations.

[24] A. Rodriguez Benot, n 13 above, 20.

[25] Y. Nishitani, 'Party Autonomy in Contemporary Private International Law — The Hague Principles on Choice of Law and East Asia' 59 *Japanese Yearbook of International Law*, 300 (2016).

[26] H. L. E. Verhage, 'The Tension between Party Autonomy and European Union Law: Some Observations on Ingmar GB Ltd v Eaton Leonard Technologies Inc', 51 *The International and Comparative Law Quarterly*, 1, 135 (2002). See also P. Mankowski, 'Article 3, Freedom of Choice', in U. Magnus, P. Mankowski eds, *Rome I Regulation*, (Cologne: Otto Schmidt, 2017), 228-233; F. Ragno, 'Article 3 Freedom of Choice', in F. Ferrari ed,, *Concise Commentary on the Rome I Regulation* (Cambridge: Cambridge University Press, 2nd ed, 2020), 60.

From this distinction, it follows that the choice of foreign law cannot constitute, *per se*, an international element.

III. JURISDICTIONAL RULE OF ARTICLE 6(C)

In the case before the Municipal Court in Pazin, permanent service in Buje[27], M.L.K., the plaintiff with an address in Piran, Slovenia, instituted the proceedings seeking the declaration that the contract for the maintenance until death (*ugovor o dosmrtnom uzdržavanju*)[28] was null and void and that she was the co-owner of one half of the real estates located in Istria, Croatia. The defendant was S.G., with an address in Piran, Slovenia, with whom M.L.K.'s former, late husband I.K., with an address in Momjan, Croatia concluded a maintenance until death contract. Along with S.G., who is not related to any of the parties, the defendants were also M.L.K.'s and I.K.'s daughters, L.K. with an address in Kopar, Slovenia and A.M. with an address in Ljubljana, Slovenia, as universal successors of late I.K. M.L.K. claimed that real estates located in Istria, Croatia, that were transferred to S.G., were part of the community of spouses' assets (*bračna stečevina*) as the default matrimonial property regime and sought one half of her co-ownership of real estates to be recorded in land registry. The plaintiff also sought that paintings and other works of art she created, which were transferred to S.G. based on the maintenance until death contract, be handed to M.L.K. since they formed personal assets (*vlastita imovina*) based on Article 39(3) of the Croatian Family Act (*Obiteljski zakon*)[29], which rather than part of the community of spouses' assets[30].

The Municipal Court in Pazin, permanent service in Buje, characterised the proceedings as a matter of matrimonial property regime by referring to definition of matrimonial property regime in Article 3(1)(a) of Regulation 2016/1103. The Court explained that defendant S.G. was a third party and a maintenance creditor to whom late I.K. allegedly transferred a part of matrimonial property. The Municipal Court in Pazin, permanent service in Buje declared it had jurisdiction based on Article 6(c) of Regulation 2016/1103 since S.G. was the respondent and her habitual residence was in Momjan, Istria[31].

The Court correctly concluded that the proceedings at issue were covered by the material ambit of Regulation 2016/1103 considering its main purpose was to establish whether property with regards to which a late husband made *inter vivos* dispositions was

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[27] Judgment and decision of the Municipal Court in Pazin, permanent service in Buje P-1262/2019-53 of 24 August 2020.

[28] Under Article 586(1) of the Croatian Civil Obligations Act *(Zakon o obveznim odnosima*, NN 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021), the contract for the maintenance until death obliges one party (maintenance debtor) to support the other party or a third party (maintenance creditor) until his death, and the other party undertakes to transfer all or part of his property to him during his life.

[29] Croatian Family Act, NN 103/15, 98/19.

[30] For more on family property regimes in Croatia, see M. Bukovac Puvača, I. Kunda, S. Winkler, D. Vrbljanac, 'Croatia', in L. Ruggeri, I. Kunda, S. Winkler eds, *Family Property and Succession in EU Member States, National Reports on the Collected Data* (Rijeka: University of Rijeka, Faculty of Law, 2019), 68-92.

[31] Additionally, the Court cited Article 10 of Regulation 2016/1103 as the basis for jurisdiction. As for applicable law, the Court briefly mentioned Article 26(3)(b) without much consideration. The Court established in the judgment that the contents of the Croatian and Slovenian law on matrimonial property regime were virtually the same.

part of community of spouses' assets and therefore belonged, in one half, to his former wife. Furthermore, in cases of matrimonial property regimes, not all proceedings will be conducted between spouses, including future or former spouses. Third parties will also appear as parties to the proceedings[32]. The definition of 'matrimonial property regimes' referred to in Article 3(1)(a) of Regulation 2016/1103 supports this by explaining that the concept encompasses a set of rules concerning the property relationships between the spouses and their relations with third parties. However, the issue is whether the jurisdiction of the court may be based on the habitual residence of the defendant who is not one of the spouses pursuant to Article 6(c) of Regulation 2016/1103. The only place in both Twin Regulations in which the term 'respondent' is used is point (c) of Article 6, which contains jurisdictional rules applicable in cases in which concentration of jurisdiction rules from Articles 4 and 5 cannot be applied and spouses did not choose the competent court. All other jurisdictional criteria in Article 6 refer to either both spouses or one of the spouses.

An analogous rule conferring jurisdiction to the Member State in which the 'respondent' has habitual residence may be found in Article 3(1)(a), third indent of Brussels II bis Regulation[33], whereas fifth and sixth indents mention the 'applicant'. In *Mikolajczyk*,[34] the action for annulment of marriage was brought by the third party relying on jurisdictional rule from Article 3(1)(a), fifth indent of Brussels II bis Regulation. The CJEU ruled that the fifth and sixth indents of Article 3(1)(a) must be interpreted as meaning that a person, other than one of the spouses who brings an action for annulment of marriage, may not rely on the grounds of jurisdiction set out in those provisions. The reasoning behind is the objective of the jurisdictional rules at issue, which is to protect the interests of spouses and to establish a flexible rule dealing with the mobility of spouses, particularly in situations in which one spouse leaves the country of common habitual residence, while at the same time ensuring there is a genuine link between the party concerned and the Member State exercising jurisdiction[35]. Such decision was somewhat criticised in doctrine[36]. If the same approach of taking into account the objective of the provision is accepted, the *ratio* of Article 6 and its jurisdictional rules has to be traced back to the legislative proceedings of enacting Regulation 2016/1103. The Explanatory Memorandum in the Proposal of the Regulation 2016/1103 states that jurisdictional criteria in Article 6 include the habitual residence of the spouses, their last habitual residence if one of them still resides there or the habitual residence of the respondent and that these widely used criteria frequently coincide with the location of the

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[32] L. Ruggeri, 'Article 17, Lis pendens', in L. Ruggeri, R. Garetto eds, *European Family Property Relations, Article by Article Commentary on EU Regulations 1103 and 1104/2016* (Napoli: Edizioni Scientifiche Italiane, 2021), 172.

[33] Brussels II bis Regulation, OJ L 338, 23.12.2003, 1–29.

[34] Judgment of 13 October 2016, *Mikołajczyk*, C-294/15, EU:C:2016:772.

[35] Judgment of 13 October 2016, *Mikołajczyk*, C-294/15, EU:C:2016:772, paragraphs 49-50.

For more on *ratio* of the fifth and sixth indent of Article 3(1)(a) of Brussels II is Regulation, see V. Tomljenović, I. Kunda, 'Uredba Rim III: treba li Hrvatskoj?', in I. Kunda ed, *Obitelj i djeca: europska očekivanja i hrvatska stvarnost/Family and children: European expectations and national reality* (Rijeka: Faculty of Law in Rijeka/ Croatian Comparative Law Association, 2014), 225.

[36] A. Borras, 'Article 3', in U. Magnus, P. Mankowski, *Brussels IIbis Regulation* (Cologne: Otto Schmidt, 2017), 95.

spouses' property[37]. There is no mention of jurisdictional criteria referring to anyone else but the spouses. Furthermore, Recital 35 indicates that jurisdictional rules are set in view of the increasing mobility of citizens and in order to ensure that a genuine connecting factor exists between the spouses and the Member State in which jurisdiction is exercised. In line with the need for a genuine link between the competent court and spouses, the doctrine has supported that interpretation of Article 6(c) as to refer to other defendants, not just spouses, would not be satisfactory from the perspective of proximity and predictability[38]. However, there are contrary views according to which, since the Regulation's scope encompasses proceedings instituted by third parties or directed against third parties, Article 6(c) does not only encompass spouses[39]. Perhaps the most convincing argument towards limiting interpretation of Article 6(c) to spouses would be that otherwise, jurisdiction might be conferred to court which is not closely connected to spouses and their property regime. In the case at hand before the Municipal Court in Pazin, permanent service in Buje, interpreting Article 6(c) to apply beyond defendants who are spouses, did not have negative results from the perspective of achieving a sufficient connection between the court and the dispute. However, understanding Article 6(c) in such an extensive manner might not lead to appropriate results in all situations.

IV. TEMPORAL SCOPE OF APPLICATION

Out of four available decisions of Croatian courts on Regulation 2016/1103, two of them concern the temporal ambit of Regulation 2016/1103. This should not come as a surprise, since the Regulation entered into force relatively recently.

One of the judgments was rendered in proceedings instituted by plaintiff Z.K. against defendant A.K. for determining matrimonial property before the Municipal Court in Slavonski Brod. The Municipal Court in Slavonski Brod declared it had no jurisdiction and dismissed the claim. It relied on Article 54(1) of the 1982 Croatian PIL Act according to which the Croatian court has jurisdiction for property claims if the property of the defendant or the object for which the proceedings are instituted is situated on the territory of the Republic of Croatia. The Municipal Court indicated that funds which were the object of the instituted proceedings were located in bank accounts in Austria. The plaintiff appealed against the decision on all the grounds of appeal prescribed by the provision of Article 353(1) points 1-3 of the Civil Procedure Act (*Zakon o parničnom postupku*)[40]. The County Court in Zagreb upheld the appeal and referred the case to the first instance court for a retrial[41]. The County Court in Zagreb explained that the Municipal Court did not establish the facts necessary for determining whether a Croatian court could be competent based on the 1982 Croatian

[37] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Brussels, 2 March 2016, COM(2016) 106 final,2016/0059 (CNS), 8.

[38] A. Bonomi, 'Article 6', in A. Bonomi, P. Wautelet eds, *Le droit europeen des relations patrimoniales de couple: commentaire des Reglements (UE) nos 2016/1103 et 2016/1104* (Bruxelles: Bruylant, 2021), 426.

[39] M. Makowsky, 'Artikel 6, Züstandigkeit in anderen Fällen', in R. Hüßtege, H.-P. Mansel eds, *BGB*, Vol. 6, *Rom-Verordnungen - EuErbVO – HUP* (Baden-Baden: Nomos, 3rd ed, 2019), 898.

[40] Croatian Civil Procedure Act, NN 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 123/08, 57/11, 148/11, 25/13, 28/13, 89/14, 70/19.

[41] Decision of the County Court in Zagreb Gž Ob 1137/2019-2 of 8 July 2020.

PIL Act, Articles 46,[42] 59[43] and 50[44]. The plaintiff indicated in the appeal that the Croatian court should declare itself competent based on provisions of Regulation 2016/1103. The County Court correctly held that the case did not fall into the temporal scope of application of Regulation 2016/1103, since the proceedings were instituted on 8 March 2017.

In the other judgment on temporal ambit, the Municipal Court in Pazin declared it had no competence in the proceedings instituted by plaintiff I.P. against defendant P.P. for establishing matrimonial property. The Court invoked Article 6 of Regulation 2016/1103 and indicated that the parties were Slovenian nationals residing in the Republic of Slovenia. Plaintiff I.P. lodged an appeal against the decision of the Municipal Court in Pazin objecting to the application of the Regulation on the grounds that the assets were acquired before the entry into force of the Regulation and that the application of the Regulation was excluded, given the subject matter of the dispute. The County Court in Zagreb dismissed the plaintiff's appeal as unfounded. It stated that the conclusion of the first instance court was correct. The County Court in Zagreb pointed out that, as to the question of the temporal application of the Regulation, the decisive factor was the date of the initiation of the court proceedings, in accordance with Article 69(1) of Regulation 2016/1103, and the issue of the time of acquisition of property was not decisive. As far as the subject matter of Regulation 2016/1103 is concerned, the issue cannot be decided by a court which has no jurisdiction[45].

The temporal scope of application of Regulation 2016/1103 is determined by the date of 29 January 2019. According to Article 69(1), the rules of jurisdiction apply to instituted proceedings, authentic instruments formally drawn up or registered and court settlements

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[42] Article 46 of the 1982 Croatian PIL Act:

The court of the Republic of Croatia has jurisdiction if the defendant is domiciled or has its seat in Croatia.

If the defendant is not domiciled in the Republic of Croatia or in any other state, the jurisdiction of the court of the Republic of Croatia exists if the defendant is resident in the Republic of Croatia.

If the parties are citizens of the Republic of Croatia, the jurisdiction of the court of the Republic of Croatia also exists when the defendant has residence in the Republic of Croatia.

If there is more than one "material" defendant, the court of the Republic of Croatia has jurisdiction if one of them is domiciled or has its seat in the Republic of Croatia.

When a dispute is resolved in a non-litigious procedure, the jurisdiction of the court of the Republic of Croatia exists if the person against whom the claim is brought is domiciled or has its seat in Croatia and when only one person takes part in the proceedings if that person is domiciled or has its seat in the Republic of Croatia, unless otherwise provided by this Act.

[43] Article 59 of the 1982 Croatian PIL Act:

As regards proceedings concerning the matrimonial property regime between spouses in respect of property situated in the Republic of Croatia, the jurisdiction of the court of the Republic Croatia also exists when the defendant is not domiciled in the Republic of Croatia, and the plaintiff is domiciled or resides in the Republic of Croatia at the time of filing the lawsuit.

If the greater part of the property is located in the Republic of Croatia, and the other part is located abroad, the court of the Republic of Croatia may decide on the property which is located abroad in the proceedings in which judgment is also given on the property in the Republic of Croatia, and only if the defendant agrees that the court of the Republic of Croatia renders the judgment.

[44] Article 50 of the 1982 Croatian PIL Act:

When the jurisdiction of the court of the Republic of Croatia depends on the defendant's consent, the defendant is considered to have given his consent by entering a plea or objecting to a payment order without contesting the jurisdiction.

[45] Decision of the County Court in Zagreb, 40 Gž Ob-123/2021-2 of 1 July 2021.

approved or concluded on or after 29 January 2019[46]. However, for the purposes of Chapter III containing rules on applicable law, the temporal scope of application is defined differently. Chapter III applies only to matrimonial property regimes of spouses who marry or who specify the law applicable to the matrimonial property regime after 29 January 2019[47]. Such a rule may be explained by the legitimate expectations of the parties, so that they may know in advance which law will be applicable to their matrimonial property regime[48].

There are four possible scenarios with respect to the issue whether Regulation 2016/1103 will be applied for determining applicable law. The most straightforward situations are if the marriage was concluded before 29 January 2019 and the applicable law for matrimonial property regime was either not wither or was chosen prior to this date, and the situation in which marriage was concluded on or after 29 January 2019 and the applicable law for matrimonial property was either chosen after that date or was not chosen at all. In the former situation, Chapter III will not apply. Instead, national private international law rules will apply. In the latter, Chapter III will be applicable. A slightly more complex situation occurs if marriage was concluded prior to 29 January 2019, but the applicable law for matrimonial property regime was specified after this date. The validity of the agreement will be subject to Regulation 2019/1103. The term 'specify' should be understood as the initial choice, as well as a subsequent amendment to that choice.[49] Since spouses may choose the applicable law before conclusion of the marriage[50], it may happen that spouses specified the applicable law for their matrimonial property regime before 29 January 2019, whereas the marriage was concluded after that date. In this case, the validity of the choice of law should be assessed in accordance with Regulation 2016/1103[51].

As far as rules on recognition and enforcement are concerned, pursuant to Article 69(1), if the proceedings in which the decision on the merits was rendered were instituted on or after 29 January 2019, provisions of Regulation 2016/1103 will be applied to recognition and enforcement of that judgment in another Member State participating in enhanced cooperation. However, Article 69(3) provides for an exception according to which, if the proceedings in the Member State of origin were instituted before 29 January 2019, decisions given after that date are to be recognised and enforced in accordance with Regulation 2016/1103 as long as the rules of jurisdiction applied comply with those set out in Chapter II. This exception is analogous to the one in Brussels I Regulation[52]. The *ratio* is to subject the

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46 Article 69(1) of the Regulation 2016/1103.

47 Article 69(3) of the Regulation 2016/1103.

48 G. Biagioni, 'Article 69, Transitional Provisions', in I. Viarengo, P. Franzina eds, *The EU Regulations on the Property Regimes of International Couples, A Commentary* (Cheltenham: Edward Elgar Publishing, 2020), 487.

49 Ibid, 488.

50 Article 22 of the Regulation 2016/1103 allows this possibility for future spouses. For more see N. Pogorelčnik Vogrinc, 'Applicable Law in the Twin Regulations', in L. Ruggeri, A. Limantė, N. Pogorelčnik Vogrinc eds, *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Cambridge: Intersentia, 2022), 118-125

51 See by analogy F. Dougan, J. Kramberger Škerl, 'Chapter 2, Model Clauses for Registered Partnerships under Regulation (EU) 2016/1104' in M. J. Cazorla González, L. Ruggeri eds, *Guidelines for Practitioners in Cross-Border Family Property and Succession Law, (A collection of model acts accompanied by comments and guidelines for their drafting)* (Madrid: Dykinson, 2020), 38. See also M. J. Cazorla González, M. Soto Moya, above n 16, 65

52 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), OJ L 12, 16 January 2001, 1–23. See Article 66.

judgments in which the jurisdiction was based on the rules compliant to jurisdictional rules in the Regulation to milder recognition and enforcement regime[53].

The time of acquiring the assets bears no relevance for temporal scope of application of any category of rules contained in Regulation 2016/1103, i.e. those on international jurisdiction, applicable law or recognition and enforcement. The issue whether particular assets form part of the matrimonial property regime is to be determined in accordance with the substantive provisions of the applicable law.

V. HYPOTHETICAL CASE ON TEMPORAL SCOPE OF APPLICATION

An issue which may arise with respect to the application of Regulation 2016/1103 is the interrelation of rules on the choice of court agreement and the choice of law agreement due to their different temporal scope of application. Consider the following facts:

Ana, a Croatian national and Philipp, a German national met in 2014 in one of Austrian ski-resorts. For the first two years, they maintained a long-distance relationship. Ana was living in Croatia, and Phillipp was living in Germany. In 2016, Ana moved to Hamburg and they started living together. In May 2017, they married during holidays in Greece. After a short marital bliss, their relationship started to deteriorate. By February 2018, Ana moved out of their house in Hamburg and returned to Croatia. In March 2018 they divorced before the Austrian court. In February 2019, they decided to divide their assets which included a house in Hamburg, two apartments in Croatia and money on a joint bank account in a bank in Hamburg. During one of the meetings with their attorneys, they discussed the possibility of choosing the Croatian court as competent for discussing the division of their property.

According to Article 7 of Regulation 2016/1103, parties may choose the competent court. The choice of court party autonomy is limited to the courts of the Member State whose law is applicable pursuant to Article 22 or Article 26(1)(a) or (b), or the courts of the Member State where the marriage was concluded. Article 7 is a jurisdictional rule but links almost all of the potential jurisdictional bases which parties may choose to the applicable law. The issue which may arise is whether different temporal ambit of rules on jurisdiction and applicable law of Regulation 2019/1103 may affect negatively the party autonomy in choosing the competent court. In other words, are spouses who married before 29 January 2019 and did not specify the law applicable to their matrimonial regime or specified it before that date, provided that the proceedings were instituted on or after 29 January 2019, allowed to choose the competent court in the Member State whose law is applicable in accordance with Article 22 or Article 26(1)(a) or (b)? In the hypothetical case at hand, Ana and Philipp wish to choose the Croatian court as competent. In accordance with Article 22(1)(a), Croatian law may be chosen as applicable (if Chapter III were applicable *ratione temporis*) and therefore, pursuant to Article 7 parties may agree on the jurisdiction of the Croatian court. From the perspective of jurisdictional rules, these proceedings would fall into the temporal ambit of

[53] J. Kramberger Škerl, 'The application 'ratione temporis' of the Brussels I regulation (recast)' in D. Duić, T. Petrašević eds, *EU and Comparative Law Issues and Challenges: Procedural Aspects of EU Law* (Osijek: Faculty of Law Osijek, 2017), available at www.pravos.unios.hr/download/eu-and-comparative-law-issuesand-challenges.pdf (last visited 18 April 2022), 352.

Regulation 2019/1103 whereas the Regulation rules on applicable law would be inapplicable. For that category of disputes, there are two potential solutions. The first one allows the parties to agree on jurisdiction of courts in accordance with Article 7, as if Chapter III were applicable. Applicable law would be determined in accordance with the national conflict-of-laws provisions. The second possibility gives parties only the option of prorogating the jurisdiction of the court located in the Member State where the marriage was concluded, since this is the only jurisdictional base prescribed in Article 7 not linked to applicable law[54]. The first option seems to be a preferred one. First of all, by allowing spouses to agree on any of the competent courts in accordance with Article 7 does not undermine legal certainty. The different temporal scope of rules on jurisdiction and applicable law, reflect their different nature and operation. It is widely accepted to determine the temporal scope of application of the rules on applicable law considering the date of establishment of a legal relationship with the aim of protecting legitimate expectations of the parties.[55] As for the rules on jurisdiction, predictability is ensured by linking the temporal ambit to the date of commencement of proceedings. Second, even though Regulation 2016/1103 seeks to align the jurisdiction and applicable law, this is not ensured in all cases. Under Article 7 parties have a range of courts to choose from, which means that the European legislator's intention was not limiting the spouses' options solely to the courts of the Member State the law of which is applicable. Therefore, choosing the competent court of a Member State the law of which could potentially be applicable (as if Chapter III of Regulation 2016/1103 were applicable *ratione temporis*) and determining the law of potentially another state based on national conflict-of-laws provisions should not present a problem.

VI. CONCLUSION

Regulation 2016/1103, along with its Twin Regulation 2016/1104, completes the legal landscape of EU private international law sources in the area of family and succession law. At this point, Croatian case law in applying these instruments may not be plentiful. Nevertheless, Croatian courts were confronted with the application of Regulation 2016/1103 on several occasions and had a chance of discussing the different issues arising in connection with private international law aspects of matrimonial property regimes. Considering that the Twin Regulations are still novel instruments, generally the Croatian case law has demonstrated the correct application of the instruments. It will be interesting to follow further judicial developments concerning these and other issues and see how they will be resolved.

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[54] See D. Vrbljanac, 'The matrimonial property regime regulation: selected issues concerning applicable law. Working paper', in J. Kramberger Škerl, L. Ruggeri, F. G. Viterbo eds, *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working Paper* (Camerino: Università degli Studi di Camerino, 2019), 194-195.

[55] G. Biagioni, n 47 above, 487.