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INTRODUCTION

Dear Reader;

We are glad to present you the third edition of our South East European Law Journal, the only regional journal in the SEE that is published in English Language

It is our firm belief that such publications are a living matter and as such need to develop, transform and be improved constantly. In the past period we have gathered sufficient information on the processes, capacities, strengths and weaknesses of our edition which gave us the incentive to undergo the process of its transformation. In this process we have analysed the unique capacity of the editions to provide a specific insight in the overall regional context within both, the EU and regional legislations, its specific capacity to unify and initiate collaboration among young academics from the region, as well as its specific format, lack of the practitioner's perspective, increasing its visibility etc.

In that sense the Editorial Board of the Journal as well as the team from the Centre for SEELS had thus joined their forces and built on the original idea of the SEE LJ, developing it further which had in the end resulted with a project proposal for the Erasmus + Jean Monnet Associations call that was submitted in early 2016. We are now glad to inform you that the project was awarded officially in September 2016.

The project will entail production of four editions of SEE LJ in the upcoming period and 24 EU Law days which will be held in the region within the member faculties of SEELS. The project also entails overall automatizing of the production of the SEE LJ which will be acquired through the creation of a multi-level web site, and its opening to the legal practitioners of the SEELS region. We are confident that this will contribute to the quality of the publication and will increase its visibility and popularity. Thus the new editions of the SEE LJ which will be published in 2018 will have a new and we hope, improved format which will attract more contributors, researchers, authors and readers to our side.

Having said that we are glad to present you this edition of the SEE LJ which is the last to be published in this format. Additionally it is also an edition that the SEELS network is publishing individually, as the previous two editions were financially supported by the GIZ Open Regional Fund for South East Europe – Legal Reform Office.

This edition is keeping the old structure and format, thus publishing the papers of young academics from several SEE countries. As it was before, the issue encloses papers sourcing from various legal disciplines. The new SEE LJ will be an e-format edition which will be opened for legal practitioners and academics alike and will be published on the newly constructed SEE Law Journal web site.

At the end of this valuable process of transformation it only remains that we express our gratitude to all of our collaborators who made these editions possible, to all authors who had given their contribution, and finally to our readers for staying with us in these past years. We are dedicated to produce a publication

which will realize its full potential and wish that you will stay with us on this journey. Finally we hope that you will find this issue interesting and an insightful read. It is our firm belief that our efforts to improve our publication will keep our audience and that we will be able to initiate dynamic exchanges with all interested parties in the period to come.

Sincerely;

Prof. Dr. Goran Koevski
Faculty of Law "Iustinianus I" Skopje
Editor in Chief

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INTELLECTUAL PROPERTY RIGHTS AS FOREIGN DIRECT INVESTMENTS IN THE TRANSITIONING COUNTRIES – THE MACEDONIAN EXAMPLE

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ABSTRACT:

It is well understood that economic growth results either from the accumulation of factors of production or from the improvements in technology or both. The establishment of foreign direct investments is particularly

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[1] Ana Pepeljugoska, LL.M., PhD Candidate University Ss. Cyril and Methodius Faculty of Law "Iustinianus I" Skopje, Attorney at law"Certain Data Privacy Issues in the Cloud Computing Environment from a Macedonian Perspective – A Comparative Analysis of Legislation", *ZEuS vol. 1/2016, Nomos 2016*; "How to protect Trade Secrets: Fitting the legal framework of the intellectual property law", *SEE Cluster of Excellence Series of Papers, vol. 1, 2015*– Peer Reviewed Article; „Arbitrability of intellectual property disputes", together with Valentin Pepeljugoski, PhD, *Kopaonik school of natural rights 28th edition, December 2015*; "Jurisdictional issues, conflict of laws or alternative dispute resolution of disputes that related to the infringement of the intellectual property rights on the social media platforms", *Iustinianus I Law Review vol. 11, July 2015*, Skopje – Peer Reviewed Article; *Protection of intellectual property rights on social media*, CEEPE Skopje, Skopje 2013- Peer Reviewed Book (ISBN 978-9989-2983-302)

[2] Professor Valentin Pepeljugoski, Ph.D., Attorney at law, Peer Reviewed Text Books: *Copyright Law 2nd Edition (Авторско Право)*, Praven Fakultet Justinijan Prvi- Skopje, Skopje 2015, together with Jadranka Dabovikj Anastasovska (ISBN 978-608-4655-59-6); *Intellectual property law (Право на интелектуална сопственост),* Praven Fakultet Justinijan Prviv - Skopje, Skopje 2012, together with Jadranka Dabovikj Anastasovska (ISBN 9989-759-60-X); *Agreements of the autonomous trade practice (Договори на автономната трговска практика)*, Praven Fakultet Justinijan Prvi- Skopje, Skopje 2012, together with Jadranka Dabovikj Anastasovska, Goran Koevski, Nenad Gavrilovikj (ISBN 978-608-4655-14-5), *Intellectual Property Law: International legal sources*, SS. Cyril and Methodius University in Skopje Iustinianus I Faculty of Law (144582-TEMPUS-2009-MK-JPCR), Skopje 2012 (ISBN 978-608-4655-20-6), ed. Mirjana Polenk-Akimovska, *Patent Law (Патентно право)*, Macedonian lawyers association, Skopje 2011 (ISBN 978-9989-2523-6-5).

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Co-Author of Intellectual Property Manuals published by the State office for Industrial property in the year 2013 (ISBN 978-608-4628-16-3; ISBN978-608-4628-12-5)

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important because is both a source of capital and provider of knowledge. To encourage the generation of a new knowledge dissemination, the developing countries are making intersection between the international investment law and the intellectual property protection. Underlying this, many investment treaties include the intellectual property among the enumerated examples that constitute "investments". Still, the intellectual property rights as foreign direct investments remain one of the most controversial issues of the investment law. Due consideration should always be made for the public interest of the Host State while balancing with the interests of the investor in reaping the potential of its investment. Consequently, despite their significant role, the intellectual property rights as foreign direct investments are not the only factor influencing the investment rate of the transitioning countries. Following the trends in the region, the Republic of Macedonia also became part of the "race to the bottom" in attracting the foreign direct investments. However, the underlined Macedonian concept undergoes constant critique in the public and unfortunately discloses very little about the role of the intellectual property rights.

Key words: economic growth, emerging markets, foreign direct investments, intellectual property rights, technology transfer

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INTRODUCTION

The international economic integration is moving towards markedly stronger intellectual property protection. Therefore it is no surprise, in the context of the economic globalization, that the creation of knowledge and its adaptation is increasingly essential for achieving economic growth.[1] Expansions in market access come through trade liberalization, deregulation of investment and licensing restrictions, privatization of state-owned enterprises and various tax reforms. Additionally, the channels thorough which the globalization affects the economies include among other, the foreign direct investments.[2]

On the other hand, the global system of intellectual property rights has underwent a profound changes in the last century. It is fair to conclude that the intellectual property rights represent today`s dominant asset, especially for the companies that are established in technologically advanced countries and wish to invest in the developing countries.[3]

The brief overview of the globalization process suggests that the transitioning, such as in the Republic of Macedonia, have strong and growing interests in attracting foreign direct investments. In this context the intellectual property rights are essential element for maximizing the benefits of expanded market access and promoting dynamic competition. Therefore the transitioning countries` policy should be aimed at promoting political stability and economic growth, encouraging flexible labor markets and building labor skills, continuing to liberalize markets and developing forward – looking regulatory regimes in services, investment, intellectual property and competition policy.[4]

This paper will focus on the issues of whether the intellectual property rights can be classified as investments under the international conventions and the investment treaties. Furthermore, the authors will explain

[1] The knowledge is an example of public good (unlike intellectual property rights which are impure public goods) and as a confirmation of this Thomas Jefferson stated “Knowledge is like a candle. Even as it lights a new candle, the strength of the original flame is not diminished”, Accessed 19 April 2016 https://jmhanthology.wordpress.com/2009/06/01/knowledge-is-like-a-candle/.

[2] Maskus, Keith, “The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer” (Prepared for the Conference “Public-Private Initiatives After TRIPS: Designing a Global Agenda” Brussels, July 16-19, 1997), 2.

[3] In accordance with the United Nations Conference on Trade Development (UNCTAD) data over 80% of the global royalty payments for transfer of technology were made from the subsidiaries to their parent companies in regards to the explicit sale of technology. What makes the foreign direct investments especially important is that unlike trade in goods, where the developing countries try to glean whatever information they can from the products and services imported or import capital goods that embody modern technology, foreign direct investments involves explicit trade in technology. In fact it is commonly argued that multinationals rely heavily on intangible assets (such as intellectual property rights) to successfully compete with local firms who are better acquainted with the Host Country environment. – Saggi, Kamal, “Trade, Foreign Direct Investment, and International Technology Transfer: A Survey” in Microfoundations of International Technology Diffusion, World Bank, 2004, 17-18.

[4] Maskus, Keith, “The Role of Intellectual Property Rights”, 1-2.

their role in the process of attracting foreign direct investments and the key issues that arise when investing in the intellectual property rights. The paper analyses the example of the Republic of Macedonia and its foreign direct investment policy. Inevitably throughout the paper, the role of the intellectual property rights in linking transitioning countries to an information – based global economy is considered.

1 Defining the Intellectual Property Rights

In general, the intellectual property represents the creations that arise from the intellectual activities in the industry, the science, the literature and the art. Generally speaking, the intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Those rights do not apply to the physical object in which the creation may be embodied, but instead to the intellectual creation as such.[5]

The key point of the protection of the intellectual property rights is the possibility to regulate in a balanced way the rights of the intellectual property right holders and the interest of the society. The success of the efforts to establish the norms for protection of the intellectual property depends largely on the perceived impact which the adoption of such norms may have upon a country`s economic and political development. There are two contrasted positions: the one of the industrialized countries and the one of the less developed nations. Namely, the industrialized countries are generally perceived as exporters of intellectual property and therefore relay upon the economic rights which inhere in "property" to defend the strong protection standards. Contrary, the less developed countries, often fail to provide strong protection of the intellectual property rights on the general excuse that they tackle the "common heritage of mankind".[6]

2 Copyright and related rights

Copyright refers to particular forms of creativity, by protecting the expression of ideas and not the ideas themselves. The subject matter of the copyright law is to protect every creation in the literary, scientific and artistic domain, regardless of the mode or form of expression. The copyright laws usually do not provide a comprehensive list of types of works protected by copyright, but all national laws practically provide protection of the following: literary works, musical works, artistic works, maps and technical drawings, photographic works, film works, computer programs, multimedia programs etc.[7]

The only criteria which is required in order for a work to enjoy a copyright protection is the criteria of originality.

[5] Анастасовска Д., Јадранка and Пепељугоски, Валентин, *Право на интелектуална сопственост*, Скопје: Правен факултет Јустинијан Први, 2008, 19.

[6] D`Amato, Anthony, *International Intellectual property Anthology*, Cincinnati: Anderson Publishing Co., 1996, 25.

[7] Law on copyright and related rights of the Republic of Macedonia, (*Official Gazette of the Republic of Macedonia 115/10, 140/2010, 51/2011, 24/2011, 147/2013, 154/2015*), Article 12 (2); Berne Convention for the Protection of Literary and Artistic Works of 1886, Article 2 (1).

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The criteria of originality is not defined by the lawmakers, but it should be always viewed in an objective sense. This especially due to the fact that the criteria of originality is not connected with the artistic value or the quality of the work involved. The ideas in the work do not need to be new, but the form, be it literary or artistic, in which they are expressed must be original creation of the author. Exceptions to the general rule are made in the copyright laws by specific enumeration.[8]

The initial ownership of the work belongs to the individual who creates the work at his own instance and expense. This individual is always natural person and is referred to as "the author". However if the work has been created as a result of a joint work of several people then they are all considered to be the authors of the work and are referred as "co-authors".[9] It is to be noted that the moral rights always belong to the author of the work, whoever the owner of the copyright may be.

Unlike the copyright law, the related rights law has rapidly developed over the last 50 years. The related rights are grouped around the copyrighted works and refer to the rights of intermediaries in the production, recording or diffusion of works. The scope of the related rights covers the rights of: performers, producers (phonogram producers, film producers), broadcasting organizations, publishers and makers of databases.[10] The related rights differ from copyright regarding the holders of the right, the subject of protection and the duration. Nevertheless in most cases they are regulated in the same laws with copyright. [11]

2.1 Industrial Property Rights

When defining the industrial property rights, the modern doctrine and practice, include the set of rights which are stipulated in the Article 1 of the Paris Convention for the Protection of Industrial property.[12] Namely, under this article, the subjects of protection of the industrial property rights are: patents, utility models, industrial designs, trademarks, trade name, geographical indications and unfair competition. However, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) implements the rights of know-how, trade secrets, topography of integrated circuits.[13] Recently huge efforts are put in incorporating the domain names, trade dress,

[8] Law on copyright and related rights of the Republic of Macedonia (*Official Gazette of the Republic of Macedonia 115/10, 140/2010, 51/2011, 24/2011, 147/2013, 154/2015*), Article 16; Bern Convention, Articles 2 (3) (4); WIPO Copyright Treaty, Articles 2 and 3; TRIPS Agreement, Article 9 (2).

[9] Hochberg D., Elizabeth and Koenigbauer M., Fabian and Hoch B., Allison, *E-Z Review for Intellectual property*, Law Review Publishing, 2004, 45; Анастасовска Д., Јадранка and Пепељугоски, Валентин, *Авторско Право*, Скопје: Правен факултет Јустинијан Први, 2006, 104.

[10] Анастасовска Д., Јадранка and Пепељугоски, Валентин, *Право на интелектуална сопственост,* 233.

[11] Henneberg,Ivan, *Autorsko Pravo*, Zagreb:Informator 1996, 159.

[12] The Paris Convention dates from 1883 and it has been amended in Madrid 1891, Brussels 1900, Washington 1911, Hague 1925, London 1934, Lisbon 1958, Stockholm 1967 and 1979.

[13] Пепељугоски, Валентин, *Заштита на правата од индустриска сопственост од нелојална конкуренција*, Скопје: Академик, 2004, 19.

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new plant varieties etc. in the scope of the industrial property rights.

The main characteristic of these rights is the possibility to group them in two major groups, depending whether they are registered in order to enjoy protection or not. The group of the registered industrial property rights is consistent of: patents, utility models, industrial designs, trademarks, trade name, geographical indications, domain name and topography of integrated circuits. On the other hand the second group is composed of: know-how, trade secrets, trade dress. These rights are only protected through the mechanisms for protection against unfair competition.[14]

3 Qualification of the Intellectual Property Rights as "Investment"

The first question that needs to be addressed when analysing the intellectual property rights in the field of the international investment law is whether they can actually qualify as an "investments". Namely, it is often assumed from economic point of view, that the direct investments involve: transfer of funds, longer – term projects, regular income, participation of the person transferring funds in the project management and a business risk.[15] On the other hand, the definition of the intellectual property rights as direct investments, from a legal point of view still remains a challenge.

According to the prevailing opinion in theory, a good starting point of the evaluation would be the Article 25 of the ICSID Convention[16]. This especially, if we take into account the fact that in the light of the protection provided under the ICSID arbitration, the vast majority of investment agreements refer to this dispute settlement mechanism. Among these advantages, the most obvious lies in the enforcement mechanism attached to the arbitral decisions of the ICSID that requires member states signatories of the Convention to consider these arbitral decisions as having the same force as judgements of their own courts.[17] In addition, "this simple procedure eliminates the problems of recognition and enforcement of foreign arbitral awards, which subsists in domestic laws and under international conventions" and also "it is the only enforcement option mandated as of right". [18]

In order to have access to ICSID arbitration the requirements of the Article 25 of the ICSID Convention[19] must be met, respectively "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of

[14] Ibid, 19.
[15] Carlos A. Primo Braga and Carsten Fink, "The Relationship Between Intellectual Property Rights and Foreign Direct Investment", *9 Duke J.C.I.L*, (1998):163.
[16] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter: ICSID Convention), Washington DC, 18.03.1965.
[17] Articles 53 and 54 of ICSID Convention.
[18] Ibrahim Shihata, "Towards a Greater Depoliticization of Investment Dispute: The Roles of ICSID and MIGA", *1:1 ICSID Rev 1* (Spring 1986):8.
[19] Which sets forth the jurisdictional requirements for a dispute before the ICISD.

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another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally". However, the main issue here lies in the fact that even thought this Article refers to the notion of "investment", it does not provide a definition for the term, and its interpretation is subject of the parties` intention. [20]

The absence of the definition of investment does not mean that there was no attempt to define the term.[21] In fact several attempts were made during the negotiations of the Convention and the formula that was finally adopted was a broad and open-ended reference to "investment" without limitation, combined with specific procedural mechanisms which allowed each state to create an individualized definition of "investment" after the Convention was ratified.[22]

In regard to this, two different approaches have been adopted to define the meaning of "investment" under the ICSID Convention:

- The 'Typical Characteristics Approach' – According to a strict application of this approach as far as the underlying consent to arbitration recognizes the activity or asset as an investment, the ICSID Convention imposes no further jurisdictional limit. The more subtle perspective embraces the reasoning of the *Salini*[23] case. In the cases that followed it is accepted that where the evidence of one or more hallmarks of "investment" is weak, a tribunal may approach the issue from a holistic perspective and determine whether there is other evidence in support of the hallmarks of "investment" which is strong as to off-set the weakness in other hallmarks of investment.[24]
- The 'Jurisdictional Approach' – This approach is an alternative and more restrictive approach which is rooted in the lack of definition in the ICSID Convention. It often requires that all the established hallmarks of "investment" must be

[20] Камиловска З., Татјана, *Арбитражно право,* Скопје: Правен Факултет Јустинијан Први - Скопје, 2015, 57.

[21] Contrary to this the Report of the Executive Directors on the ICSID (Report 1993) at p. 28 states that: "no attempt has been made to define the term investment given the essential requirements of consent by the parties and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes that they would or would not consider submitting to the Center (Article 25(4))", http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/03/14/000333037_20130314125619/Rendered/PDF/758520AR0Box370nual0report00PUBLIC0.pdf, Accessed 25 April 2016.

[22] Julian D. Mortenson, "The Meaning of 'Investment': ICSID`s *Travaux* and the Domain of International Investment Law", *Harvard Law Review, vol. 51, no. 1,* (Winter 2010): 280.

[23] ICSID, *Salini et. Al v. Morocco,* Decision on Jurisdiction, 23 July 2003, ICSID Case No. ARB/00/, 42 I.L.M. 609 (2003).

[24] ICSID, *Malaysian Historical Salvors Sdn,Bhd v. The Government of Malaysia,* Award on Jurisdiction, 17 May 2007, ICSID Case No. ARB/05/10, para 70.

present before a contract can even be considered as an "investment".[25]

Applied to intellectual property investments the *Salini* test amounts to taking into account that: Intellectual Property (IP) is susceptible to be invested for a certain duration[26]; it is likely to generate profit and return on regular basis[27]: IP and more precisely Intellectual Property Rights - IPRs share the unique and constant risk of infringement by third parties not privileged in their use[28]; investment often represents a substantial commitment[29]; such assets have a significant potential to contribute to the Host State`s development[30].

On the basis of the previous analysis under the "typical characteristic approach", which is more appropriate when assessing the intellectual property investment operations, the intellectual property assets are likely to be considered as investments under the ICSID Convention.[31] However, according to the "jurisdictional approach" all criteria have to be satisfied/meet, for there to be an "investment". Taking into consideration that the *Salini* criteria are non-binding guidelines whose aim is to help in the asserting the existence of an "investment", the tribunals may however, decide to give more or less importance to one of these criteria or analyses them in light of other relevant treaties or factual circumstances.[32]

It is therefore fair to assume that the intellectual property investments are susceptible, similar to any other assets and depending on the features of the operation at stake to qualify as "investments" under the ICSID Convention.

3.1. The Notion of "Investment" in the Republic of Macedonia

Having in mind the new trends in the region[33], the Republic of Macedonia is also enforcing a campaign for attraction of new foreign direct investments and supporting the expansion of the foreign companies with already established operations.[34]

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[25] Vanhonnaeker, Lukas, *Intellectual Property Rights as Foreign Direct Investments,* Cheltenham, UK, Northampton, MA, USA: Edward Elgar Publishing Limited, 2015, 25.

[26] It is important in such regard to differentiate intellectual property rights as such, from the usefulness of the intellectual property protected by such a right, especially with the forms of intellectual property rights such as patents that have a statutory date of termination - Mortenson, "The Meaning of 'Investment'", 271.

[27] The rationale put behind most intellectual property rights is to provide the inventor with a legal monopoly over its invention, so that they can license it and generate revenue that would compensate the costs of the inventing process. This income thus constitutes and incentive to engage in creative work - Mortenson, "The Meaning of 'Investment'", 272.

[28] Ibid.

[29] There are certain costs associated with the registration and maintenance of the intellectual property rights.

[30] It does not necessarily require physical presence of the investment within the Host State`s territory.

[31] Vanhonnaeker, Lukas, *Intellectual Property Rights*, 24-26.

[32] It is important to note that some investment operations can be rather complex involving different kinds of assets, amongst which IP. Confronted with such complex operations, arbitral tribunals need to benefit from a certain degree of flexibility to assess whether these operations can qualify as investments - Ibid 27.

[33] Битраков, Константин, „Лажните придобивки од слободните економски зони"- http://respublica.edu.mk/blog/2016-03-18-09-59-33, Accessed 07 May 2016..

[34] http://www.investinmacedonia.com/index.php/about-us, Accessed 12 April 2016.

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Beside the "definition" provided in the ICSID Convention, the foreign direct investments in the Republic of Macedonia are defined as investments of legal and natural persons from abroad in domestic business entities with whom it is acquired long-term interest and where, the foreign investor owns at least 10% of the total business entity's value.[35] In accordance with the official data from the Central Bank of the Republic of Macedonia, which are also confirmed by the State Statistical Office of the Republic of Macedonia[36], until the year of 2007, the foreign direct investments were classified as moderate (average 3.3% of the GDP)[37]. Starting from 2007 until this day the foreign direct investments are intensified (8.5% of the GDP) and are characterized as a source for financing the deficit in the current account (covering 87% average form the gap in the current account in the last 10 years).[38] Despite the optimistic view of the foreign direct investments, it is important to point out that in accordance with the Interbrend Study for the top Brands in 2015 there is no foreign direct investment in the Republic of Macedonia stemming from the top 10 Brands on the list.[39] We can only assume that the reason for this is found not only in the intellectual property regime, but also in other factors which will be discussed below.[40]

The specific domestic regime of the foreign direct investments, beside the general definition provided above, is prescribed in the Law on Foreign Currency Performance[41], Article 2 that defines the foreign direct investments as "investments with which the investor is aimed at establishing permanent economic link and/or to establish the management right with the company or the other legal entity in which it makes the investment". The following are considered as foreign direct investments:

- to establish a company or to increase the share capital of a company fully owned by the investor, to establish subsidiary or to acquire full ownership of the existing company;
- participation in a new or already existing trade company if the investor holds or acquires more than 10% share in the charter capital of the company, or more than 10% of the voting rights;

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[35] Republic of Macedonia – State Statistical Office, *Statistical review: National Economy and Finances, "Foreign Direct Investments in the Republic of Macedonia, 2003-2007"*, 8-11. http://www.stat.gov.mk/Publikacii/3.4.9.01.pdf , Accessed 12 April 2016.

[36] http://www.stat.gov.mk/Publikacii/3.4.9.01.pdf, Accessed 12 April 2016.

[37] http://www.nbrm.mk/WBStorage/Files/STATISTI%5EKI-PRILOG_4-20070.pdf; http://www.tradingeconomics.com/macedonia/foreign-direct-investment, Accessed 12 April 2016.

[38] http://www.nbrm.mk/WBStorage/Files/WebBuild/er_Prezentacija_14_10_14.pdf , Accessed 12 April 2016.

[39] http://interbrand.com/wp-content/uploads/2015/12/BGB2015-report.pdf, Accessed 19 April 2016.

[40] http://respublica.edu.mk/blog/2016-05-03-11-47-12, Accessed 07 May 2016.

[41] *Official Gazette of the Republic of Macedonia no. 34/2001, 49/2001, 103/2001, 54/2002, 32/2003, 51/2003, 81/2008, 24/2011, 135/2011, 188/2013, 97/2015, 153/2015, 23/2016.*

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- long-term loan with a maturity of five years or more, respectively a loan from the investor that is intended for the trading company and its wholly owned;
- long-term loan with a maturity of five years or more, respectively a loan intended for establishing lasting economic relations if granted among economic stakeholders.

Under the Article 8 of the Law on Foreign Currency Performance, the direct investments of the non-resident persons in the Republic of Macedonia are free; the non-resident persons are obliged in the time period of 30 days of the day of making the capital transaction to report the foreign direct investment in the Ministry of Economics of the Republic of Macedonia. In accordance with the Article 9 of the same Law, the transfer of the revenue and the financial assets gained by selling the ownership share in the direct investment as well as the transfer of the share from the liquidation mass is free under the condition that the non-resident person registered the direct investment and fulfilled all legal obligations on the basis of taxes and other expenses in the Republic of Macedonia.

In theory, the coverage of the Intellectual Property Rights in the investment treaties can be done in a several ways, either by explicitly enumerating the kind of Intellectual Property Rights that are covered[42] or by using a broader terminology that targets under the notion of "investment" every kind of asset. In light of this and according to the Macedonian Model Bilateral Investment Treaties (BITs) and International Investment Agreements (IIAs), the notion of "investment" explicitly includes the Intellectual Property Rights such as, copyrights, patents, industrial designs and models, trademarks, business secrets, copyrights, technical processes, know-how and good will.[43]

However it is important to point out that even if expressly included, the Intellectual Property Rights must fulfil other treaty requirements and present real characteristics of an investment. This perquisite is often set forth by the treaty itself, namely: the term "investment" means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party including in particular … Intellectual Property Rights.[44] According to this provision in conjunction with the Article 2 of the Law on Foreign

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[42] The German 2008 Model BIT, The French 2006 Model BIT – available at http://www.italaw.com/, Accessed 12 May 2016.

[43]Example the Draft Agreement between the Government of the Federal republic of Germany and the Republic of Macedonia for Encouragement and Reciprocal Protection of the Investments- available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/3118, Accessed 12 May 2016 and also other BITs of the Republic of Macedonia, available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/124 Accessed 12 May 2016.

[44]Agreement between the Macedonian Government and the Finish Government on the Promotion and Protection of the Investments http://investmentpolicyhub.unctad.org/Download/TreatyFile/1195, Accessed 12 May 2016.

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Currency Performance the mere possession of the Intellectual Property Rights or the fact that Intellectual Property is involved in a commercial operation in a given Host Country (Republic of Macedonia) does not automatically qualify it as an investment. In this way, if the Intellectual Property is not applied in a substantive way in the business operations and is not committed to an investment with expectation of gain or without any risk component, it likely will not qualify as an investment.[45]
Furthermore, the investment needs to have a financial value[46], which represents an important condition in the sense of the Intellectual Property Rights. In this manner a link between the investment and the domestic Intellectual Property laws is created. In other words, the value is not a quality deriving from natural causes but the effect of the legal rules which creates rights and give protection to them.[47] Therefore if interest in "investing" Intellectual Property Rights under the Article 35 of the Law on Trading Companies[48], for the entrance of non-monetary asset, an official evaluation made by licensed evaluator is necessary in order to determine the monetary value of the entered asset. Especially when we are discussing the qualification of the Intellectual Property Rights, respectively the industrial property rights, it is important to emphasize that they should also enjoy protection for the territory of the Republic of Macedonia, and not only the investor state. The opposite situation would require grant of the appropriate Intellectual Property protection before classifying it as an "investment". Under these circumstances the investor would be faced with a significant danger by being at mercy of the state authority which would lead to a situation undermining the rationale behind the existence of the corpus of rules and principles of the international investment law. Moreover in light of the lack of the legal certainty such a hypothesis would constitute an unreasonable hindrance to investments.[49]

4 Key Problems Associated with the Intellectual Property Investments

When discussing the Intellectual Property Rights as foreign direct investments, the main concern is the balance of the interest between the foreign investors and the Host State, especially in the transitioning countries such as the Republic of Macedonia. It is well know that the foreign investors are embedded in benefit-oriented approach and are not necessarily willing to transfer their technology and even less willing to see their technology

[45] Vanhonnaeker, Lukas, *Intellectual Property Rights,* 14.
[46] Article 2 (1) of the Law on Foreign Currency Performance : participation in a new or already existing trade company if the investor holds or acquires more than 10% share in the charter capital of the company, or more than 10% of the voting rights.
[47] Stockholm Chamber of Commerce (SSC), Mr X (United Kingdom) v. The Republic (Central Europe), Final Arbitral Award, rendered in 2003, Case 49/2002, 2004:1 *Stockholm Arbitration Report* 141 (2004):158. – a requirement of compliance with domestic law refers to the validity of the investment and not to its definition.
[48] *Official Gazette of the Republic of Macedonia no.* 28/2004, 84/2005, 71/2006, 25/2007, 87/2008, 17/2009, 23/2009, 42/2010, 48/2010, 8/2011, 21/2011, 24/2011, 166/2012, 70/2013, 119/2013, 120/2013, 187/2013, 38/2014, 41/2014, 138/2014, 88/2015, 192/2015, 6/2016, 30/2016, 61/2016.
[49] Vanhonnaeker, Lukas, *Intellectual Property Rights*,16.

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being mandatorily taken from them. On the other hand, the developing countries are focused on acquisition of technology and knowledge.[50]

In the field of international investment law, this complex question and the ongoing debate is concretized by the controversies surrounding the question of performance requirements and the mandatory transfers of technology on the investors.[51]

The general prohibition of performance requirements, or the "Host Country operational measures"[52] under International Investment Law relates to the prohibition against the imposition on foreign investors of various constrains such as level of production, export, restrictions on sales or purchases, mandatory transfer of technology etc. [53] Due to their nature, the performance requirements still remain controversial since it is considered that they have impeding effect on the efficient allocation of the resources. However, in some cases the performance requirements may be seen as essential to achieve development objectives and present economic and social benefits. Therefore from the point of view of the developing countries the imposition of such requirements enhances the value of the foreign investment and additionally stimulates the growth of their domestic economy by diverting the foreign direct investments to certain predetermined sectors and industries. [54] Even though the performance requirements have certain benefits for the Host State it is more than evident that on a long term basis they could be detrimental for the Host State. Therefore, some BITs contain the preferable solution called "umbrella clause" which seeks to guarantee the observation of obligations assumed by the Host State vis-à-vis the investor, or to guarantee the mutual obligations of each side toward the investment[55].[56]

In light of the Intellectual Property investments, some Host State also impose certain requirements as to the obligation on technology transfer and dissemination.[57] However, there are two main obstacles in regards to this matter: the prohibition of technology transfer and the lack of precision on this topic in the IIAs.

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[50]Nunnenkamp, Peter; Spatz, Julius (2003): Intellectual property rights and foreign direct investment : the role of industry and host-country characteristics, Kiel: Working Papers, No. 1167,177.

[51] Vanhonnaeker, Lukas, *Intellectual Property Rights*, 123.

[52] The terminology is used by UNCTAD and it is defined as an exhaustive list of categories – UNCTAD, "Host Country Operational Measures" in *UNCTAD Series on issues in international investment agreements*, New York and Geneva:United Nations, UNCTAD/ITE/IIT/26, 2001, 8-9.

[53] Schokkaert, Jan and Heckscher, Yvon, *International Investment Protection: Comparative Law Analysis of Bilateral and Multilateral Interstate Conventions, Doctoral texts and Arbitral Jurispprudence Concerning Foreign Investments,* Bruylant, 2009, 214.; Newcombe, Andrew and Paradell, Luis, *Law and Practice of Investment Treaties: Standards of Treatment,* Kluwer Law International, 2009, 417.

[54]Sornarajah, Muthucumaraswamy, *The International law on Foreign Investment, 3rd Edition,* Cambridge Univeristy Press, 2010, 205.

[55]The BITs of the Republic of Macedonia also contain such "umbrella clauses". http://investmentpolicyhub.unctad.org/IIA/CountryBits/124#iiaInnerMenu, Accessed 13 May 2016.

[56] Vanhonnaeker, Lukas, *Intellectual Property Rights*, 133.

[57] Newcombe and Paradell, *Law and Practice of Investment Treaties*, 428.

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Unlike the performance requirements, the prohibition of the transfers of technology does not contradict with the TRIPS Agreement. Nevertheless the wording of the TRIPS Agreement implies that a more favourable approach should be adopted towards technology transfers and that such transfers should be encouraged for development purposes. In light of this, the Articles 7[58], 8[59] and 66(2)[60] of the TRIPS Agreement, besides providing for legally binding rights protecting Intellectual Property, consists in recognizing the critical role of the Intellectual Property Regulations for developing countries, while advocating a flexible protection at stake. Indeed, as specified, while the TRIPS Agreement encourages technology transfers it does not strictly regulate that matter. Thus, if a Host State is willing to secure the technology transfer through performance requirements in principle it would not violate the TRIPS` obligations. However it must still do so in conformity with other eventually applicable TRIPS provisions such as the Article 31 governing the issuance of the compulsory licenses if the Host State opted for that channel for transfer of the technology at stake.[61]

When it comes to the lack of precision on the topic of mandatory technology transfer, there are very few IIAs that are precise enough on this matter. Due to the lack of precision in such circumstances, the investor might be confronted with the interpretation in favour of mandatory transfers of technology by application of TRIPS compatible interpretation with the recognized critical role that technology plays in the development process of the country.[62]

5 The Role of the Intellectual Property Rights in Encouraging Foreign Direct Investments

It is important to note that a foreign direct investment embodies two distinctive assets: capital and technology or some intangible advantage. While the capital for financing the foreign direct investment may come from the Host Country or from the global financial markets, it may also be raised on the local capital markets. The royalties and license fees[63] are the most direct measures

[58] Article 7 of TRIPS Agreement: The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

[59] Article 8 of TRIPS Agreement: (1)Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. (2) Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

[60] Article 66 (2) of TRIPS Agreement: Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

[61] Vanhonnaeker, Lukas, *Intellectual Property Rights*,149.

[62] Vanhonnaeker, Lukas, *Intellectual Property Rights*, 152.

[63] The data from the World Bank for the year 2014 indicate that the payments for use of Intellectual Property Rights is 60

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available of international earnings on patents, trademarks, copyrights and trade secrets. [64] On the other hand the various means by which the Intellectual Property Rights influence the foreign direct investments are subtle and complex.

Although the vast majority of authors argue that the strong Intellectual Property Regime is proportional with the foreign direct investment rate, it must be emphasized that strong Intellectual Property Rights alone are not sufficient for generating strong incentive for firms to invest in a country. [65] The countries that have a strong system of protection of the Intellectual Property sometimes suffer from insufficient dissemination of the newly produced knowledge and tolerate the monopoly power of the holders of the Intellectual Property Rights.[66] Therefore, in the more advanced stages of their development, the local innovators and foreign investors will request strengthening of the Intellectual Property Regime. It is advisable that the national authorities fully support their calls.[67] Proponents of stronger Intellectual Property protection in developing countries often invoke, implicitly or explicitly, the dynamic efficiency hypothesis. It suggests that stronger protection would lead to more resources committed to building up the indigenous R&D capability of the developing country firms, while inducing a higher rate of technology transfer from developed countries to the developing countries.[68] The basic principle of these ideas is that the Intellectual Property Rights should take on different levels of importance in different sectors with respect to encouraging foreign direct investments. Investment in a lower technology goods and services (textiles and apparel, electronic assembly, distribution and hotels), depends relatively little on the strength of the Intellectual Property Rights and relatively much on the input costs and market opportunities. Investors with a product or technology that is costly to imitate, may also pay little attention to local Intellectual Property Rights. Firms with products and technologies (pharmaceuticals, chemicals, software etc…) which are easier to copy are more concerned with the ability of the local Intellectual Property system to deter imitation.[69]

From economic point of view, the commitment to a long-term operation in a certain Host State is conditioned upon the likelihood of whether the investment will raise its expected profit. So the investor has several options in

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million USD, whereas the receipts is 80 million USD, http://wdi.worldbank.org/table/5.13, Accessed 13 May 2016.

[64] Maskus, Keith, "The Role of Intellectual Property Rights", 8.

[65] Maskus, Keith, "The Role of Intellectual Property Rights",13, Saggi, Kamal, "Trade, Foreign Direct Investment, and International Technology Transfer", 38.

[66] Leveque, Francois and Meniere Yann, *The Economics of Patents and* Copyright, Berkley: The Berkley Electronic Press, July 2004, 14-16, Accessed 03 May 2016, www.cerna.ensmp.fr/PrimerForFree.html.

[67] Joseph E. Stiglitz, "The Economic Foundations of Intellectual Property Rights", *Duke Law Journal, vol.57:1693,* (2008): 1693-1724.

[68] Ibid.

[69] Maskus, Keith, "The Role of Intellectual Property Rights", 16; Maskus, Keith and Fink, Carsten (ed.) , Intellectual Property and Development, Lessons from Recent Economic Research, Washington: A co-publication of the World Bank and Oxford University Press, 2005, 54-56.

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choosing how to service the foreign market: export of the good, local production, license or franchise, joint venture involving joint production or technology – sharing agreement.[70] In light of the above mentioned the developing countries should insist on improving the Intellectual Property Regime over time. This is due to the fact that in accordance with the policy of encouraging foreign direct investments, the developing countries should attract modern technologies and encourage their own innovation. Even though the economists are not sure what would be the effect of the strong Intellectual Property protection on the technology transfer, the prevailing legal opinion is that the technology diffusion (transfer) is strengthened under stronger Intellectual Property Regime if the transfer is made through foreign direct investment rather than through imitation. Therefore, the developing economies should remove the impediments to inward the foreign direct investments, especially due to the fact that this is in line with the TRIPS Agreement and in joint interest of the investor and the Host State (developing country).[71]

Seen in a proper policy context, the Intellectual Property Rights are an important component of the entire regulatory system which includes, taxes, investment regulations, production incentives, trade policies and competition rules.[72]

CONCLUSION

It is undisputed that with the growth of international transactions, the Intellectual Property Rights investments are increasing their importance. In this global context this has led us to the analysis of two distinct legal regimes: international investment law and international Intellectual Property Law.

In light of the both legal regimes the first question that arose was the necessity of defining the Intellectual Property investments, respectively whether the Intellectual Property Rights can be classified as "investments" under the ICSID Convention. This question gains its importance not only because it provides interaction between the international investment and Intellectual Property Law, but also in regards to the BITs and IIAs and the status of the Intellectual Property Rights protection. After analysing this question in regards to the legal system of the Republic of Macedonia, the authors reached the conclusion that the Intellectual Property Rights are to be considered as "investments" in today's transnational trade context.

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[70] Maskus, Keith, "The Role of Intellectual Property Rights", 15.

[71] Maskus, Keith, "The Role of Intellectual Property Rights", 17-19.

[72] For instance the Republic of Macedonia is giving to the foreign investors also the following benefits: lowest flat tax on profit (10%), lowest flat tax on income (10%), fast company registration, 0% tax on reinvested profit, free access to large market (650 million customers), macroeconomic stability, low inflation, abundant and competitive labor (502EUR month average gross salary), excellent infrastructure and transportation etc. http://www.investinmacedonia.com/, Accessed 14 May 2016.

Hence, starting by the premise that the Intellectual Property Rights are “investments”, the key issues that may arise in regards to the Intellectual Property Rights investments were tackled. Respectively, in light of the TRIPS Agreement and its liberal position of technology transfer, the analysis has shown that even though the International Investment Law and Intellectual Property Law sometimes overlap, nevertheless they remain two separate regimes with own priorities. This is due to the fact that the International Investment Law is relatively new legal branch and so far has only sporadically focused on the broader trade, which only recently includes the Intellectual Property Rights. To make things even more difficult, there is almost no case law that deals with the Intellectual Property investment issues presented in this paper, which only illustrates the grate power of disposal vested in the arbitral tribunals to settle any such questions. In this view the priority of the Intellectual Property protection should always be to encourage the foreign direct investments. Adopting the stronger, to a certain extent, Intellectual Property regime is the first indicator that the developing countries are oriented towards a more business-friendly environment which is always an incentive to invest. The role of the Intellectual Property Rights in this context was and still is, to facilitate trade through exploitation of ideas and creations by those who valuate them most. It is therefore very important for the developing (emerging) economies to recognize the necessity of considerable attention for Intellectual Property Rights investments. In such way the Host States will be engaged in two beneficial processes for the public interest: trade liberalization and linking their Intellectual Property systems with those of the developed countries.

The fundamental message here is that the Intellectual Property Rights can be effective means of attracting foreign direct investments only if the Investment Law and the Intellectual Property Law work in the same direction. The Intellectual Property Rights should be seen as part of the whole global portfolio. In order for the entire system to work, we also need to strengthen other elements of this portfolio and redesign the Intellectual Property Regime, to overcome the shortcomings of the system. This especially if we take into account that the final goal of both Investment Law and Intellectual Property Law is to find the right balance; namely overprotection stifles more than stimulates the incentive to invest. Doing so we will increase the benefits and reduce the costs which will ultimately expand the efficiency of the developing countries’ economies.

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PERCEPTION OF THE ICTY IN BOSNIA AND HERZEGOVINA - THE TRIBUNAL BETWEEN LAW AND POLITICS

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ABSTRACT

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the United Nations Security Council in 1993 to contribute to the restoration and maintenance of international peace and security, and punish perpetrators of serious violations of international humanitarian law. The ICTY was tasked with eliminating impunity for atrocities and delivering justice to victims. Although the contribution to reconciliation was not its primary objective it was expected that its decisions and judgments would support the reconciliation process in the former Yugoslav Republics.

Expectations were high twenty-two years ago when it was established – victims were hoping that each and every perpetrator of war crimes would be prosecuted and tried. Today, the perception of the ICTY's achievements among the citizens of Bosnia and Herzegovina is a negative one for different reasons – long procedures, low or high sentences, failure to make an ethnic balance in prosecution strategies. In addition, many citizens see it as a politically motivated court under the influence of the international community and do not trust its impartiality.

This paper investigates the current perception and aims to prove that the citizens of Bosnia and Herzegovina, regardless of their ethnicity, tend to perceive the ICTY as a political tribunal rather than an institution delivering justice. It discusses different aspects of such a negative perception affecting reconciliation and acceptance of facts established by the ICTY. It also provides an overview of the role of transitional justice in reconciliation efforts.

Key words: history writing, justice, perception, reconciliation, transitional justice, victims.

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INTRODUCTION

Twenty years after the war in the former Yugoslavia many legal professionals, scholars, media, politicians and victims are still discussing the contribution that the International Criminal Tribunal for the Former Yugoslavia (ICTY) has made to restore the peace and bring reconciliation among the former warring parties. Despite the fact that the ICTY has achieved success in bringing to justice and trying individuals responsible for gravest crimes – genocide, war crimes and crimes against humanity, there is significant dissonance between its achievements and their perception, and it will take more time to have its legacy seen as such having an important role in peace building and reconciliation[3].

If the primary goal of reconciliation is to ensure the return of displaced persons to their homes to live in peace with their neighbours of different ethnicity, it can be stated that the reconciliation has been achieved. However, it takes much more than the return to the pre-war homes to consider it successful - as long as the individuals who committed serious war crimes are living in those communities facing their victims every day, reconciliation will not be fully achieved. Advocates of international war crime trials believed that holding individuals accountable and establishing a historical record would help the reconciliation[4]. Victims had the same expectations, but in many cases justice has not reached them or it is perceived as disproportional to their suffering.

In addition to the general perception that the ICTY has failed to deliver justice to victims, the fairness of the ICTY trials has been widely discussed in the former Yugoslav republics, primarily Bosnia and Herzegovina, Serbia and Croatia. Although the Serbs have been most vocal about their negative perception of the ICTY, other ethnicities tend to be dissatisfied too - Bosniaks see it as a politically motivated tribunal due to the low sentences against war crime perpetrators and lenient approach of the Tribunal to some defendants, while Croats believe that it is too lenient with Serb perpetrators of war crimes committed in Croatia and it failed to sufficiently investigate and try for crimes against Croats[5].

For example, recent judgments in the cases against Radovan Karadzić[6] and Vojislav Seselj[7] have triggered opposite reactions in BiH, Croatia and Serbia – Bosniaks and Croats are dissatisfied with the Tribunal's decisions in both cases, while Serbs celebrate Seselj's acquittal and the fact that Karadzic has not been sentenced to life but to 40 year-imprisonment[8]. Legal professionals and even

[3] Kerr, Rachel. "Lost in Translation? The ICTY and the Legacy of War Crimes in the Western Balkans." *Policy Brief No. 19*, July 2012.,p. 19.

[4] Ibid

[5] *See* survey results presented in the chapter on the Perception of the ICTY by citizens of BiH

[6] *Prosecutor v. Karadzic, Trial Judgment.* IT-95-5/18-T (ICTY, March 24, 2016).

[7] *Prosecutor v. Vojislav Šešelj, Trial Judgment.* IT-03-67 (ICTY, March 31, 2016).

[8] *See Večernje novine* – a summary of reactions from the region to Šešelj's acquittal at http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html

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some of the participants in the proceedings have also questioned the court's motives[9]. Many defence attorneys see the trials as unfair, and criticism of the fairness has also come from academics, who were nevertheless, more careful about the strong negative qualifications[10].

Another important issue that will be discussed in this paper is the acceptance of facts established by the ICTY for writing recent history of the countries in the region. It is often argued by scholars that courts should not write definitive historical accounts of mass human rights violations[11]. However, the decisions and documents of the ICTY hold the keys of our recent history with millions of pieces of evidence collected in the past 20 years about the events from the period 1991-1995[12]. Yet, different parties do not agree about the "established facts" and have a different understanding of our joint history.

Justice for Peace

The United Nations Security Council, in its Resolution 827 of 25 May 1993[13] establishing the ICTY, assigned to the Tribunal an important role - contribution to restoration and maintenance of international peace and security in the region still at war. Justice was meant to support the peace negotiations or potentially be traded for peace.

In its early days the ICTY was involved in serious political struggles to bring indictees before the Tribunal in parallel with the efforts of the ICTY Office of the Prosecutor to conduct investigations, and file indictments but also to achieve the lasting peace[14]. Such a struggle often required a "carrot and stick" approach[15] using the

:598282-REAKCIJE-NA-PRESUDU-SESELjU-Hrvatski-vrh-u-soku-Mira-Markovic-Ko-ce-mu-vratiti-godine or Aljazera Balkans - reactions on the ICTY Judgment against Karadžić at http://balkans.aljazeera.net/vijesti/reakcije-iz-rs-na-presudu-karadzicu

[9] Edina Rešidović, Defence Attorney from Bosnia and Herzegovina, expressed her doubts about the criteria for selection of the cases and defendants, indicating that there might have been some political influence in their prosecution strategies (for more details please see her interview for the Justice Report at http://www.justice-report.com/bh/sadr%C5%BEaj-%C4%8Dlanci/re%C5%A1idovi%C4%87-istorija-balkana-u-haagu). Anto Nobilo, and Branko Šerić, Croatian Defence Attorneys have also questioned impartiality of the ICTY and potential political influence on its decisions (for more details please see their comments given to *Večernji list* following pronouncement of the Judgment against Šešelj http://www.vecernji.hr/hrvatska/nobilo-u-medunarodnom-pravu-nije-rijesen-problem-intelektualnih-zacetnika-zlocina-1072654)

[10] Ford, Stuart. "*Fairness and Politics and the ICTY: Evidence from the Indictments*." Carolina Journal of International Law (N.C. J. INT'L L. & COM. REG.) 39, br. 1 (2013): 45

[11] Wilson, Richard Ashby. "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia." *Human Rights Quarterly* (University of Connecticut School of Law; University of Connecticut) 27, no. 3 (August 2005): 908-942.

[12] ICTY. *Press.* October 7, 2007. http://www.icty.org/en/press/tribunals-launch-archiving-study (accessed June 10, 2016).

[13] United Nations Security Council. "Resolution 827." May 25, 1993.

[14] Carla del Ponte, Chuck Sudetic. *Gospođa tužiteljica.* Buybook, 2008.

[15] In an article for Washington Post, Michael Scharf, who took part in the creation of the ICTY Statute as a legal advisor of the US Department of State, said that an indictment against Milosevic would be a "useful tool in their efforts to demonize the Serbian leader and maintain public support for NATO's bombing campaign against Serbia, which was still underway when the indictment was handed down". *See* Scharft, Michael. *Indicted For War Crimes, Then What?* October 3, 1999.

ICTY to make the regional politicians cooperate with the international community in pursuit for peace and stability in the former Yugoslav republics[16].

In its first years the ICTY was too weak to make a substantial impact on the conflict, primarily because it lacked real support of those who had established it[17]. Even its deterrent purpose, which was meant to contribute to peace, did not work as the atrocities continued even after its establishment. The ICTY was a response to the atrocities with a low commitment of the international community and a compensation for the lack of military intervention[18].

There is very little evidence that the deterrent purpose of the ICTY had any impact during or shortly after the conflict. The 1995 Srebrenica genocide and crimes committed in Kosovo in 1999 proved that the ICTY was too weak in its early years and was not taken seriously by the warring parties. The fact that the international community included Slobodan Milosević as a central figure in the peace negotiations and one of the major signatories of the Dayton Peace Agreement[19] certainly diminished the deterrence role of the ICTY[20].

Justice for Victims

Although the victims were not the primary concern of the founders of the ICTY at the time of its establishment[21], with the first investigations and indictments they became an important factor in the pursuit for justice and reconciliation[22]. While they were grieving for their family members their eyes were directed towards the ICTY with hope that they would see justice for their loss and suffering. Justice was needed for their satisfaction although it could not bring their loved ones back or completely eliminate their war trauma. Being the key players in investigations and trials as witnesses, the victims were hoping that their testimonies would bring the perpetrators to justice to be adequately punished for their crimes. Expectations were high at the beginning but with the first convictions and sentences many of the victims realized that the proceedings before the ICTY might not deliver their measure of justice or what they thought was just, as compared with their suffering[23].

The meaning of the word "justice" is not universal and it is "understood so differently by victims, perpetrators, and observers and critics of the ICTY and international

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http://www.washingtonpost.com/wp-srv/WPcap/1999-10/03/031r-100399-idx.html (accessed September 2015).

[16] Ibid

[17] Vinjamuri, Leslie. "*Case Study: Justice, peace and deterrence in the former Yugoslavia*." ECFR Background Paper (European Council on Foreign Relations), November 2013.

[18] Ibid

[19] The General Framework for Peace in Bosnia and Herzegovina reached at Wright-Patterson Air Force Base near Dayton, Ohio, US in November 1995 and formally signed in Paris on 14 December 1995.

[20] Ibid

[21] *See* UN Security Council Resolution 827 of 25 May 1993 „"Convinced that in the particular circumstances of the former Yugoslavia the establishment as an *ad hoc* measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace",

[22] ICTY. *About the ICTY - Office of the Prosecutor - History.* n.d.http://www.icty.org/en/about/office-of-the-prosecutor/history (accessed January 6, 2015).

[23] Orentlicher, Diane F. *That Someone Guilty Be Punished - The Impact of the ICTY in Bosnia.* Open Society Institute, 2010.

criminal justice generally, that finding common ground is virtually impossible”[24]. While many of the victims expected that trials would bring the satisfaction of seeing perpetrators of crimes against them and their loved ones punished, some wanted public acknowledgment of their suffering or their recognition as victims.[25] In any case, very few of the victims agree that sentences pronounced against war crime perpetrators are satisfactory and proportional to their suffering. [26] Indeed, no sentence can compensate for the loss of family members, home and property or years spent in exile.

In his talk with students, the ICC Prosecutor, Mr. Luis Moreno-Ocampo, said “... there will never be enough justice. Never, I know. We can work a lot, but our output will never be enough.”[27] It is obviously not only the victims who do not believe in absolute justice - judges and prosecutors can only do their best to deliver some justice but even to them it may seem insufficient.

From the legal point of view, the Tribunal’s primary task was to establish facts and individual criminal responsibility, prosecute suspected war criminals and make sure they were adequately sentenced[28]. The former ICTY Prosecutor, Carla Del Ponte, used to say that she fought for justice for victims[29], however, regardless of such public expressions of sympathy the Prosecution focused mainly on the evidence often forgetting the expectations of the victims. For the Prosecution, the victims were often just a tool to achieve conviction. Victims lacked information about prosecution strategies and selection of cases, which resulted in general disappointment and dissatisfaction on all three sides.[30] On the other hand, ICTY investigations were crucial in the search for missing persons. According to the International Commission on Missing Persons, out of approximately 31.500 missing persons in Bosnia and Herzegovina, around 70% of them have been accounted for[31]. Many of those were identified in relation to or as a result of the ICTY investigations aimed at bringing war crime perpetrators to justice.

[24] From a written interview with Mr. David Schwendiman who served as an international prosecutor at the Special Department for War Crimes of the Prosecutor’s Office of Bosnia and Herzegovina. In this role, he investigated and prosecuted war crimes committed during the 1992-95 conflict. From late 2007 until the end of 2009, he was one of four Deputy Chief Prosecutors of Bosnia and Herzegovina and oversaw the Special Department for War Crimes.

[25] Ibid

[26] Orentlicher, Diane F. *That Someone Guilty Be Punished - The Impact of the ICTY in Bosnia.* Open Society Institute, 2010. p. 51

[27] Centre for Interdisciplinary Postgraduate Studies, University of Sarajevo. *Talks with Luis Moreno-Ocampo.* Edited by Janja Bec-Neumann. Sarajevo: Centre for Interdisciplinary Postgraduate Studies, University of Sarajevo, 2008. p. 69

[28] "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia." The Hague, September 2009.

[29] Kandic, Natasa, interview by Andrew Herscher. *Evidence, Justice, and Truth* The Journal of the International Institute, (2007).

[30] Orentlicher, Diane F. *That Someone Guilty Be Punished - The Impact of the ICTY in Bosnia.* Open Society Institute, 2010. p. 128

[31] International Commission on Missing Persons. *Bosnia and Herzegovina.* 2015. http://www.icmp.int/where-we-work/europe/western-balkans/bosnia-and-herzegovina/ (accessed October 2015).

While waiting for justice the victims were discouraged by long proceedings, numerous and exhausting testimonies, inability to claim compensation through criminal proceedings both before the ICTY and national judiciary. They were repeatedly summoned to testify about the same incidents and many of them did no live enough to see the war crime perpetrators punished or have lost faith that the justice will reach them.

Yet, most victims would agree that it was necessary to establish the ICTY regardless of it imperfections and it was the only institution which could provide some justice[32].

Five years after the drafting of the ICTY Statute a more important role in the criminal proceedings has been assigned to the victims by the Statute of the International Criminal Court (ICC). Unlike the proceedings before the ICTY, the ICC procedures allow victims to take a more active role by, for example, intervening before the Pre-Trial Chamber when the Prosecutor requests an authorization to continue with an investigation at his own initiative.[33] Victims may also participate during the challenging of jurisdiction of admissibility.[34] Victims may also intervene if their ‘personal interests’ are affected during the trial.[35]

Justice for Reconciliation in Bosnia and Herzegovina

Reconciliation implies interethnic and political tolerance in a socio-political context, while on a personal level it is a relationship between a victim and a perpetrator, apology and forgiveness[36]. It should involve restoring trust of citizens in each other and in the state itself[37].

The ICTY was not created with the goal of ensuring reconciliation – it was tasked by the UN Security Council with restoration and maintenance of peace and punishment of those who are found guilty of mass atrocities committed in the former Yugoslavia in the period 1991-1995[38]. At the time of its establishment and its early years it was clear that the entire caseload could not be dealt with by the ICTY and that national judiciaries would need to take over a part of that burden.[39] With the establishment of the Court and Prosecutor’s Office of

[32] Orentlicher, Diane F. *That Someone Guilty Be Punished - The Impact of the ICTY in Bosnia.* Open Society Institute, 2010.
[33] Schabas, Willian A. *An Introduction to the International Criminal Court.* Cambridge University Press, 2001.
[34] “Rome Statute of the International Criminal Court.” adopted on July 17, 1998 and entered into force on July 1, 2002. Article 19 (3)
[35] Ibid, Article 68 (3)
[36] Rosulnik, Marusa. *The Role of Justice in Reconciliation in Bosnia and Herzegovina.* August 2008. http://mirovna-akademija.org/rma/en/essays/english/9-2008-crs3/12-the-role-of-justice-in-reconciliation-in-bosnia-and-herzegovina.
[37] Tolbert, David. *Can international justice foster reconciliation?* April, 10 2013. http://www.aljazeera.com/indepth/opinion/2013/04/20134107435444190.html. (accessed April 2015)
[38] United Nations Security Council. "Resolution 827." May 25, 1993.
[39] The ICTY Completion Strategy initiated to ensure that the Tribunal completes its mission successfully, timely and in coordination with domestic legal systems of the countries of the Former Yugoslavia. The Completion Strategy includes a three-phase plan endorsed by the UN Security Council Resolutions 1503 and 1534. For more details please see http://www.icty.org/en/about/tribunal/completion-strategy or a list of relevant UN Resolutions at http://www.icty.org/en/documents/statute-tribunal)

Bosnia and Herzegovina in 2002 and 2003[40] and their respective War Crime Departments it was assumed that the joint efforts of international and national criminal justice would ultimately result in reconciliation among the former warring sides. However, not only have the war crime trials failed to encourage and support reconciliation, they have even hardened the rhetoric of the local politicians. Convicted war criminals from Republika Srpska are celebrated as heroes and they are also becoming highly involved in the political and social life. The latest example were protests of the ruling party and opposition in RS, where both protesting parties had family members of war criminals – Ratko Mladić's son was supporting the ruling party, while Radovan Karadzić's daughter was speaking to supporters of the opposition. It is just another proof that the politicians are still manipulating with the people's war time sentiment for their political purposes and they are competing to be close to the war criminals or those who are still in trial before the ICTY to show their "patriotism". Decisions in war crime cases, particularly those rendered by the ICTY dealing with high-profile defendants, often prompted reactions of political leaders who saw their chance to gain some political goals either condemning or supporting such decisions. Thus, instead of promoting reconciliation war crime prosecutions often bring instability and wake up old hostilities. Even 20 years after the war emotions are high about what happened, and unfortunately, full reconciliation has not been achieved.

According to Eric Gordy[41], the reconciliation process involves different levels - communication among institutions, communication within institutions, communication between institutions and the public, communication among different publics, and activities aimed at fact-finding, restitution and retribution[42]. Gordy further argues that reconciliation has not been achieved in the region mainly because the reconciliation efforts should include not only political institutions but also social and cultural institutions, which have been left out of the process and the process has remained confined to political institutions. Political elites, though necessary for the reconciliation process, do not constitute reconciliation – it is a far broader process that should involve social and cultural levels too[43].

In an interview to Al Jazeera, Sir Geoffrey Nice, the former Senior Trial Attorney at the ICTY, commented on expectations that criminal trials would lead to reconciliation. He found it odd that the international courts were set up using the term reconciliation, "because you don't have criminal trials to bring reconciliation. You

[40] The Court of BiH was established by the adoption of the Law on the Court of BiH on 3 July 2002. The Prosecutor's Office of BiH was established by the adoption of the Law on Prosecutor's Office of BiH on 29 October 2003.

[41] Eric Gordy is a Senior Lecturer in Southeast European Politics at the School of Slavonic and East European Politics, University College London. He is a political and cultural sociologist concentrating on Southeast Europe, especially the states of the former Yugoslavia.

[42] Gordy, Eric. *Southeast European Stataes, the EU and "reconciliation*." October 6, 2015. http://www.recom.link/southeast-european-states-the-eu-and-reconciliation/ (accessed August 2015)

[43] Ibid

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don't seek to reconcile by a criminal trial the rapist with a victim, the burglar with a householder"[44]. He added that over time people stopped talking about reconciliation as they probably realized that "you need justice system behind whatever else happens to bring about reconciliation but you don't ask the justice system to do it itself"[45].

Justice is still a subject of manipulation in the region, a currency for trade and achievement of political goals that, in addition to different understanding of justice by victims and other parties in criminal proceedings before the ICTY, there is a political factor preventing full reconciliation[46]. It is often argued in the media that reconciliation is not in the interest of the local politicians as war time suffering is always a winning card when their goals cannot be achieved by other means. Social transformation and reconciliation have not been included in any agenda[47] aimed at bringing prosperity to Bosnia and Herzegovina and making it closer to the EU values and standards.

Advocates of war crime trials believed that ensuring individual accountability as opposed to collective guilt and the establishment of a historical record would lead to reconciliation[48]. The ICTY has been relatively successful in achieving both – highly positioned perpetrators have been tried for their crimes and many of them adequately punished, while a huge repository of facts has been created[49]. However, the legacy of the ICTY is often seen as insufficient to drive the reconciliation – it has already contributed to reconciliation by establishing facts that can be hardly denied, but the drivers of reconciliation should be sought in the society. On the other hand, although the ICTY was not meant to be a driver of the reconciliation, it was expected to promote it by getting closer to the affected communities and explaining its role and decisions. The ICTY has failed to communicate adequately with the victims and their families, it has failed to explain its decisions and unintentionally created the feeling of injustice. Its decisions often cause political turmoil and instability in the region rather than bringing reconciliation.

As long as indictments and judgments are counted based on ethnicity of perpetrators, justice will be seen as a privilege of some people and inaccessible to others and there will always be those who will feel deprived of it. Having in mind this variety of expectations and perceptions, it is difficult to expect international and

44 Nice, Geoffrey, interview by Saša Delić. *Recite Al Jazeeri* Al Jazeera Balkans. June 22, 2015.

45 Ibid

46 Steinberg, Richard H. *Assessing the Legacy of the ICTY.* ICTY Secretariat, Outreach Program, 2011. p. 147

47 Gordy, Eric. *Southeast European Stataes, the EU and "reconciliation.*" October 6, 2015. http://www.recom.link/southeast-european-states-the-eu-and-reconciliation/ (accessed August 2015)

48 Kerr, Rachel. "Lost in Translation? The ICTY and the Legacy of War Crimes in the Western Balkans." *Policy Brief No. 19*, July 2012.

49 United Nations Mechanism for International Criminal Tribunals. *Archives of the International Criminal Tribunals.* n.d. http://www.unmict.org/en/about/archives-international-criminal-tribunals (accessed June 11, 2016).

national criminal justice to reconcile all those different perceptions of justice. Reconciliation is a process of recovery of the entire society and criminal justice is just a part of it. Criminal justice strives to ensure that perpetrators are punished for their crimes and that victims are heard and treated with respect – all other aspects of justice should be in focus of the state and entire society.

Finally, reconciliation does not mean oblivion, on the contrary, it involves the culture of remembrance and memories, and facing the past and crimes committed by "others" but also "our own crimes"[50]. If the justice system and transitional justice do not bring any progress in the reconciliation process, we can only hope that new generations, free from the burden of war-time suffering, will find a joint way to reach the truth and reconcile.

History Based on the ICTY Judgments

There has been an extensive discussion between the scholars and the lawyers whether courts could write historical accounts of atrocities and human rights violations having in mind that they use different modes of thinking and inquiry[51]. Many would agree that the ICTY's historical records are exhaustive, containing facts established based on the witness statements and documentary evidence. The ICTY archives contain a huge depository of facts that will be available for historians, sociologists and other academics to provide a detailed account of the past events in the former Yugoslavia. Yet, there is a question whether they are adequate to help the people of the former Yugoslavia understand what happened in the period 1991-1995. Is the courtroom perspective adequate to present the facts for interpretation by the historians? There are still no definite answers to these questions. Nevertheless, the ICTY archive and evidence used in the proceedings remain a valuable source of information of what had happened. Although some authors challenge the value of court records to be used by historians due to the questionable credibility of witnesses, historical account based on evidence from the court proceedings may not solely rely on the witness statements – documentary evidence and intelligence may be valuable sources for history writing as well. Whether their interpretation for the court purposes is adequate for historians is another issue that may require a deeper analysis.

Law and history involve different perspectives and modes of reasoning – while the law examines specific persons and their alleged criminal acts, history looks from a wider perspective of a cultural context, social patterns and shared public practices and beliefs[52]. Law has its own rules and procedures but the lack of regard for the context makes it partial in terms of the historical records[53].

[50] Milekić, Sven. "Pomirenje, prokleto nek' je!" *Coalition for RECOM.* December 7, 2015.

[51] Wilson, Richard Ashby. "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia." *Human Rights Quarterly* (University of Connecticut School of Law; University of Connecticut) 27, no. 3 (August 2005): 908-942.

[52] Ibid, p. 913

[53] Wilson, Richard Ashby; Wardak, Ahmad Wais; and Corin, Andrew. "Surveying History at the International Criminal

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In his speech delivered on 12 May 2001 in Sarajevo[54], the then ICTY President, Judge Claude Jorda, underlined the role of an international tribunal in the creation of historical record:

> *"It is not the mission of the International Tribunal to analyse all of the historical, political, sociological and economic causes which converged to give rise to the war. Instead, it must review what happened only from the specific angle of the criminal responsibility of the perpetrators. Finally, the International Tribunal alone cannot accomplish all the work of memory required for the reconstruction of a national identity."*

With this statement Judge Jorda supported the theory that the absolute truth could not be found in the courtrooms and the establishment of the historical record would require more than court files. Furthermore, he reminded of the original mandate of the Tribunal - to fight impunity and hold accountable those who had committed atrocities. Talking about the ICTY's contribution to the establishment of facts from the 1991-1995 conflict in the former Yugoslavia, Judge Fausto Pocar said that judicial truth did not always cover the whole truth and it depended on the way the prosecution was conducted and the quality of witnesses providing evidence in a case[55]. Yet, the authority of the tribunal to establish facts beyond any reasonable doubt has to be respected and such facts have also been assessed and accepted by the International Court of Justice in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro of 26 February 2007.[56].

The ICTY Chambers recognized that they could provide only the judicial truth leaving it up to the historians and social psychologist to further interpret facts established in the court proceedings.

> *"The Trial Chamber leaves it to historians and social psychologists to plumb the depths of this episode of the Balkan conflict and to probe for deep-seated causes. The task at hand is a more modest one: to find, from the evidence presented during the trial, what happened during that period of about nine days and, ultimately, whether the defendant in this case, General Krstić, was criminally responsible, under the tenets of international law…"*[57]

As further pointed out in para 2 of the *Krstić* Judgment, it is the task of the Tribunal to establish individual responsibility for incidents that defendants are charged

Tribunal for the Former Yugoslavia." *Research Papers* (Human Rights Institute) Paper 6 (2010).

54 Jorda, Claude. "The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina." May 12, 2001.

55 ICTY Outreach Program. "Legacy of the ICTY in the Former Yugoslavia." The Hague: ICTY Outreach Program, 2013. p. 66

56 *Bosnia and Herzegovina v. Serbia and Montenegro.* (International Court of Justice, February 26, 2007).

57 *Prosecutor v. Radislav Krstic.* IT-98-33-T (ICTY, August 2, 2001). p. 1 para 2

with if the court found them guilty beyond any reasonable doubt of the crimes under the ICTY Statute.

Judgments and trial documents will probably continue to be subjects of disputes with regard the use of the court records for history writing. Most people would agree that the facts established by the ICTY do not present ultimate or absolute truth but the judicial truth, which will not be accepted equally by all sides in Bosnia and Herzegovina for a while[58]. The quality of evidence rendered in the trials varies depending on the objectives it is expected to achieve - evidence provided by Prosecution and Defence is carefully selected for them to present and prove their cases and may not reflect what actually happened[59]. Nevertheless, the high standards of establishing facts beyond any reasonable doubt used by the ICTY give us sufficient reason to regard the facts established by the ICTY as credible accounts of past events to be further evaluated and analysed by historians.

As far as historians from the region are concerned, it is highly unlikely that in the near future they will reach the common grounds for writing history. Each party to the conflict will continue to have its own views and actors with their own interpretation of the facts and events, however, over time it may be expected that historians, social psychologists and members of academia from all parties to the 1991-1995 conflict will get together to review their joint history objectively.

In historiography, historical revisionism means reinterpretation and revision of the historical records either for legitimate scientific re-examination of existing knowledge or illegitimate denial of the historical facts and distortion of facts to make them look better, while the denial of facts related to a crime is referred to as - *negationism*[60]. In objective and emotionless communities, a history based on the ICTY facts should be taught in schools and at universities, and anything else could be defined as revisionism.[61] But Bosnia and Herzegovina is far from being emotionless and objective about its recent past. Even 20 years after the war all three major ethnicities have their own history books with different perception of the same events. Can the ICTY facts bring those perceptions closer to each other or it will take generations to start learning history from the same textbooks and have common understanding of their joint history?

While scholars deal with the value of the ICTY facts trying to establish whether facts from courtrooms can be used to write history having in mind that their analysis and interpretation are performed only from the legal point of view, the public in the region will only weight the facts based on their own perception of the truth (rather imposed perception). Strong revisionism fed by nationalism and

[58] ICTY Outreach Program. "Legacy of the ICTY in the Former Yugoslavia." The Hague: ICTY Outreach Program, 2013. p. 66
[59] Nice, Geoffrey, interview by Lana Pasic. *Insight into the Hague Tribunal and Trends in International Justice* Balkanalysis.com, (April 14, 2013).

[60] ICTY Outreach Program. "Legacy of the ICTY in the Former Yugoslavia." The Hague: ICTY Outreach Program, 2013. p. 29
[61] Ibid

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political aims is still in place and it will die out only when the truth is recognized and verified by all sides, when some form of justice is delivered to the victims and when the citizens become less prone to political manipulation as a result of poverty and social vulnerability. Srebrenica genocide is still being denied regardless of the ICJ Judgment in the case of Bosnia and Herzegovina v. Serbia and Montenegro[62] - although the ICJ found that atrocities had been committed in the UN Safe Area, the legal qualification of genocide has not been accepted and approved by most ethnic Serb politicians. On 31 March 2010 the Parliamentary Assembly of the Republic of Serbia adopted the Srebrenica Declaration[63] condemning a "crime" committed in Srebrenica thus avoiding to recognize the legal qualification of genocide. Repeated denial of Srebrenica genocide also comes from the President of Republika Srpska who, in addition to the failure to qualify it as a genocide, constantly questions the numbers of killed Bosniaks in Srebrenica.

Unfortunately, the denial of war crimes and genocide does not come only from the politicians, it is very often found among the citizens as well. In his essay on the legacy of the ICTY derived from the conference *Assessing the Legacy of the ICTY* convened in The Hague in 2010[64] Refik Hodzić, the then ICTY Liaison Officer in Bosnia and Herzegovina, told a story of a lawyer he knew who had wanted to visit the former notorious camp in Omarska. When he went to Prijedor and asked the citizens there for a direction to the site of the former Omarska camp, not a single person he had asked acknowledged the existence of the camp. They said, "*What camp? There was never a camp here. I don't know what you are talking about*"[65]. Refik Hodzić rightly asked whether it was possible that citizens of Prijedor did not know about the camp where more than 5000 people from their municipality had been detained and around 1300 killed.[66] Facts established by the ICTY will remain denied and approved depending on the ethnic and political environment. The truth and justice may be reached not only in the courtrooms but also through non-judicial mechanisms offered by three pillars of transitional justice[67]. It remains to be seen whether those who control the truth-telling process in Bosnia and Herzegovina will allow impartial and independent account of our recent history. Without strong efforts of the State, national institutions, academia, media and civil society focusing on the truth telling and reconciliation, the war-time events in the former Yugoslavia will continue to be perceived differently and will remain the main instrument of political manipulation for many years to come.

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[62] *Bosnia and Herzegovina v. Serbia and Montenegro.* (International Court of Justice, February 26, 2007).

[63] National Assembly of the Republic of Serbia. "Declaration of the National Assembly of the Republic of Serbia Condemning the Crime in Srebrenica." March 31, 2010.

[64] Steinberg, Richard H. *Assessing the Legacy of the ICTY.* ICTY Secretariat, Outreach Program, 2011.

[65] Ibid p. 116

[66] Ibid

[67] Ministry of Human Rights and Refugees of Bosnia and Herzegovina. "Transitional Justice Strategy for Bosnia and Herzegovina - Draft." 2012.

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Prospects of Transitional Justice in Bosnia and Herzegovina

Over the past 22 years it has become obvious that the trials will not be sufficient and that additional mechanisms will be required to ensure full recovery of the society.

Transitional justice is a discipline aimed at assisting post-conflict societies to face their violent past, systematic violations of human rights and international humanitarian law.[68] It should enable the victims of war crimes to find satisfaction, redress and reparation outside court proceedings, thus alleviating consequences of atrocities and human rights violations from the past.[69] It is clear that not all the war crime suspects will be prosecuted and tried. Justice is more than punishment of perpetrators. It is also the recognition of facts, exclusion of war crime perpetrators from public life, history books, property claims, and search for missing persons. None of these issues will be resolved by courts. Transitional justice involving the Civil Society and the State can offer actions that would supplement judicial efforts to deliver justice.

The State plays an important role in ensuring the mechanisms of transitional justice to redress injustice and alleviate the war trauma. It is one of the tasks set before Bosnia and Herzegovina on its way to EU integration. In this regard, the Council of Ministers of Bosnia and Herzegovina established a working group for the development of a strategy, which has drafted a strategic document covering the period 2012-2016[70]. The Draft Strategy on Transitional Justice of Bosnia and Herzegovina aims at setting an acceptable platform for effective and realistic mechanisms to redress injustice, restore lack of trust in judicial institutions and deter from future violations of human rights and war crimes[71]. It is a comprehensive document covering non-judicial mechanisms of delivering justice, truth-seeking and truth-telling, reparations and memorials, vetting and institutional reforms. However, three years after the completion of its drafting process it has not been adopted yet, which is another sign that facing the past is still an issue that will not easily find a consensus among all the parties in Bosnia and Herzegovina.

One of the mechanisms of transitional justice is the establishment of a truth commission. As a truth seeking and truth telling body, the truth commission would pay more attention to victims, it would use various sources such as verdicts, documentation from investigations and trials, NGOs' documentation to be organized around events from the period 1991-1995 and used as a public platform for victims to be heard[72]. The idea of establishing a truth commission was born back in 1997 but at that time the ICTY opposed it arguing that it would affect its

[68] Popovic, Dragan. *Vodič kroz tranzicijsku pravdu u Bosni i Hercegovini.* UNDP, 2009. p. 12

[69] Ibid

[70] Ministry of Human Rights and Refugees of Bosnia and Herzegovina. "Transitional Justice Strategy for Bosnia and Herzegovina - Draft." 2012

[71] Ibid

[72] Kandic, Natasa, interview by Andrew Herscher. *Evidence, Justice, and Truth* The Journal of the International Institute, (2007).

efforts[73]. Only in 2001 did the ICTY President, Judge Jorda, announced a change of the ICTY policy regarding the truth commission at a conference establishing the Truth and Reconciliation Commission for BiH.[74] He reminded that the ICTY would make sure that this national initiative did not affect the mission of the ICTY but also acknowledged that it would complement to the Tribunal's work[75]. Following the conference in Sarajevo, a law was drafted to support the establishment of the Truth and Reconciliation Commission but no specific results came from this effort.[76] Another initiative occurred in 2005 but it stopped in 2007 because the initiators, three speakers of the Parliament of Bosnia and Herzegovina and an NGO called the "Dayton Project" were criticized for the lack of transparency and communication with the victim associations[77]. In the meantime, *ad hoc* commissions were established, mainly under the pressure of the international community such as the Srebrenica Commission, established by the RS Government and tasked with the investigation of Srebrenica genocide and the fate of missing persons.[78]

In 2008 at the Fourth Regional Forum of Transitional Justice, the Coalition for RECOM, gathering civil society organizations, was established to advocate for the creation of a regional commission for the establishment of facts about war crimes and other serious violations of human rights committed in the former Yugoslavia between January 1, 1991 and December 31, 2001[79]. Its aim is to contribute to the process of dealing with the past and help citizens accept the facts about atrocities against all victims and restore confidence among individuals, peoples and the states in the region[80]. Unlike all other past attempts for the creation of truth commissions and laying foundations for transitional justice, the Coalition for RECOM is still active.

Transitional justice will have a role to play as long as there are victims who are still experiencing the consequences of atrocities, it will be there until minimum trust and reconciliation are achieved within the society[81] and as long as there are war crime suspects living in their communities among the victims of their crimes.

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73 Popovic, Dragan. *Vodič kroz tranzicijsku pravdu u Bosni i Hercegovini.* UNDP, 2009. p. 55

74 Jorda, Claude. "The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina." May 12, 2001. http://www.icty.org/en/press/icty-and-truth-and-reconciliation-commission-bosnia-and-herzegovina (accessed September 2015)

75 Ibid

76 Sabic-El-Rayess Amra and Massimo Moratti. *International Centre for Transitional Justice: The Case of Bosnia and Herzegovina.* 2009. https://www.ictj.org/sites/default/files/ICTJ-DDR-Bosnia-CaseStudy-2009-English.pdf.

77 Ibid

78 Popovic, Dragan. *Vodič kroz tranzicijsku pravdu u Bosni i Hercegovini.* UNDP, 2009. p. 60

79 *See* http://www.recom.link/about-us-2/sta-je-rekom/

80 Coalition for RECOM. "Amendments to the Statute." October 28, 2014.

81 Hodzic, Refik, interview by GlobalX. *Srebrenica je najprofitabilnija moneta najljigavijim manipulatorima* (July 6, 2015). http://globalx.ba/intervju-refik-hodzic-srebrenica-je-najprofitabilnija-moneta-najljigavijim-manipulatorima/ (accessed October 2015)

Although for the victims there is no alternative to court proceedings and holding individuals accountable for atrocities and violations of international humanitarian law, transitional justice can offer complementary mechanisms to provide redress and justice to those who will not see perpetrators of crimes against them or their family members punished.

Perception of the ICTY by citizens of BiH – survey results

In August 2015 a survey was conducted with the aim of showing the perception of the ICTY among the citizens of Bosnia and Herzegovina. A total of 207 persons from the legal community and general population answered 20 questions related to the work of the ICTY. It has confirmed the hypothesis that in Bosnia and Herzegovina the ICTY is perceived as a political tribunal regardless of the ethnical background of the respondents. Majority of the respondents saw it as a tool of the international community and western powers for the achievement of political goals in the Balkans. Such an opinion is partly framed by the media and local politicians who use the war crime prosecutions for political manipulation. The responsibilities for such a perception also lay with the ICTY who failed to explain its decisions in an adequate manner as to make them understandable to the victims and the public. The lack of a more aggressive outreach, created space for daily manipulation with victims' sentiment and the needs of the media for sensations.

As expected, the perception varies significantly between the different ethnicities – while Bosniaks tend to be more positive about the work of the ICTY, Serbs and Croats are unsatisfied with its decisions. Though the differences in the perception exist, it is apparent that no one is absolutely positive about the ICTY's achievements. It can be explained with initial high expectations that have not been met to the extent and in a manner that was expected by the victims and the public.

As far as justice for the victims is concerned, none of the respondents believed that the ICTY had delivered justice to the victims – they either think justice has just partly reached the victims (53.4%) or it did not reach them at all (46.6%). As discussed above, generally there is a different understanding of justice by the victims. Yet, most victims agree that justice has not been delivered for different reasons – low sentences, acquittals, early release from serving sentences, treatment of convicted war criminals as heroes by opposite sides or absolute impunity, which is still present. The negative perception of justice includes all the war crime proceedings, both international and national, therefore, disappointments are general and are not only caused by the ICTY but by war crime trials in general. Expectations from the ICTY were higher because most victims initially believed in its impartiality. Dissatisfaction with the judgments, sentencing and length of proceedings, but also the influence of the politicians and media, unfortunately resulted in the negative perception of the ICTY. Not only are the victims critical of the ICTY in terms of justice serving, there are also legal professionals who share the opinion that the ICTY was not sufficiently sensitive to victims. With the resolution of

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cases the victims find peace even if they are not fully satisfied with the outcome. The length of proceedings before the ICTY and the length of investigations before national courts leading to impunity in many cases, have had the highest impact of the victims' perception of (in)justice and success of the judiciary to serve it. On the other hand, expectations were raised that every war crime perpetrator would be prosecuted and punished, which was a political failure, as it was absurd to say that each and every atrocity would be tried[82].

Reconciliation is another issue that is often discussed in the context of war crime prosecutions. When asked whether trials before the ICTY could contribute to the reconciliation in the region majority of respondents (55.5%) said "partly", 31.9% said "no", while only 12.6% of respondents believed in reconciliation as a result of the ICTY trials. Though it is generally agreed that the reconciliation may be just one of the outcomes of the criminal proceedings and the ICTY was not expected to pursue reconciliation through its trials – its primary goal is to hold accountable those who are alleged to have committed atrocities during the 1992-1995 war, the expectations were different. Reconciliation entails more than criminal trials. It requires efforts of the entire society and the State to hold honest and open discussions to reconcile their truths and admit that other sides have their victims too. There can be no reconciliation without accountability, yet there is no empirical evidence that holding people accountable would promote peace and stability[83].

The survey results show that 38% of the respondents believe that facts established by the ICTY can be used for history writing, 36% said "no" and 28% stated that they could be used only partially. The total result was rather balanced. Surprisingly, responses of individual ethnicities, particularly Serbs who would be expected to say "no" to the ICTY facts, were also balanced – 40.4% of the Serb respondents said that the ICTY facts could be used to write history, 46.8% said "partly" and only 12.8% said "no". Croats were more against the established facts than other ethnicities with 25% of respondents who said "yes", 40.6% said "partly" and 34.4% said "no".

A research conducted by the UNDP in 2010[84] obtained slightly different results on a sample of 1600 respondents. When asked whether relevant facts about the conflict in Bosnia and Herzegovina were established, 69.3% of the respondents said "No", while only 30.7% of the respondents believed that the relevant war-related facts were established. One of the reasons for such a discrepancy may be the time difference between the two surveys. In any case, the dispute about the facts is still ongoing and different versions of the truth will continue to exist for all three sides.

[82] Schwendiman, David, interview by Glorija Alic. (November 2015).
[83] Ibid
[84] UNDP. "Facing the Past and Access to Justice from the Public Perspective." 2011.

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The results shown above would have been even more in the favour of the political qualification of the Tribunal, had the judgments against Karadzić and Seselj been pronounced before the survey was completed. Both judgments have created numerous reactions on all sides none of which being satisfied with the decision. Again, the ICTY was accused of making decisions with bias and based on political motives.[85]

CONCLUSION

The perception of the ICTY in Bosnia and Herzegovina and in the region has been to a great extent negative due to various reasons. Firstly, the ICTY is seen as a judicial institution in the control of the western powers, being used as a tool to achieve political goals.[86] Its political nature is also found in its prosecution strategies and trials against the war crime perpetrators belonging to one ethnicity more than to the others.[87] Its judgments and sentences are often criticized as being politically motivated. All three major ethnicities are almost equally dissatisfied though for different reasons.

However, most critics including the victims, politicians and the media agree that this region, and even the world, would have been completely different without the ICTY. It is generally recognized that the ICTY was needed to support peace, punish the perpetrators and deter potential perpetrators of war crimes. Being the first international criminal tribunal after the World War II trials, it sent a message to the whole world that atrocities would not go unpunished, which was further reiterated by subsequent establishments of other *ad hoc* tribunals, internationalized courts, and the ICC. With all its imperfections it punished some of the most serious perpetrators of genocide, crimes against humanity and war crimes and made them accountable for their crimes.

The ICTY is not an isolated body – it was established by a political body, the UN Security Council preceded by a strong political and diplomatic campaign, initially to support the peace effort. Its creation involved world political and diplomatic powers who have maintained their influence on the ICTY at least in terms of funding and extension of its mandate. For that reason, it cannot be completely devoid of a political influence. This fact is clear even to those who keep criticizing the ICTY about its political nature. Yet, the ICTY should have been aware that every single decision it made would have a political impact on the former Yugoslav countries. Even nowadays, 20 years after the war, any international or local action involving war crime trials causes political turmoil.

Victims are a core to the process – they provide evidence but they should not be just a tool to reach the convictions. They deserve an explanation why some cases are prosecuted while others are not, why sentences are high

[85] See media reports following the Judgments of the ICTY against Radovan Karadzic and Vojislav Seselj at Balkan Insight http://www.balkaninsight.com/en/article/croatia-reacts-angrily-to-vojislav-seselj-acquittal-03-31-2016, http://www.balkaninsight.com/en/article/karadzic-verdict-mixed-reactions-reflect-divided-society-03-24-2016

[86] *See* Survey results presented in chapter on the *Perception of the ICTY by citizens of BiH*

[87] Ibid

in some cases while they are low in others, they need to understand why the prosecution enters plea agreements and offers lower sentences, they need to know why it takes the Tribunal years to complete the cases. They need to be told publicly and in a way that can be understood. The general public needs to be better informed as well. The media must know more. This is what the ICTY was not very good at. As long as there is a slight doubt about the best practices of the ICTY, local politicians will use war crimes as one of the most sensitive issues in this country to create instability whenever they need it. Peace and reconciliation in Bosnia and Herzegovina and in the region will remain fragile as long as there are those who believe that they have not received their measure of justice whatever their understanding of justice is and as long as every decision of the ICTY shakes the region dramatically and reminds of the old hostilities. Therefore, the ICTY and all other international courts and tribunals must be better at talking to the public and explaining their work.

Historical records will most likely be written by the future generations, who will grow up free from the burden of war crimes and victimization within their families and communities. For the time being, there will remain three versions of the truth on the events from the past war. Children will continue to be divided according to their national groups by learning about recent history based on the perception of their ethnic group. The ICTY depository of evidence has a huge historical value, however, it is widely questioned mainly because of the lack of trust into the Tribunal's impartiality. Disputes about the historical value of facts established in courtrooms may be valid to a certain extent, but it remains undisputable that the ICTY has created the records that will provide a valuable insight into the war time events in addition to the facts that may be additionally established by truth commissions or other independent bodies. Although the ICTY might have not covered all aspects of the past war, it created a repository of documentary evidence and witness statements that will serve for future consideration of the history of the former Yugoslav countries.

As far as the reconciliation is concerned, the tribunals dealing with war crimes must always have in mind that their acts may shake the communities where the crimes happened. Reconciliation will not be fully achieved as long as there is doubt about the validity and fairness of the war crime trials. It is not suggested here that the prosecutions and trials should be governed by the potential political impact of their decisions, but they should have it in mind when creating their outreach policies and strategies – full understanding of legal processes and communication with victims and the public, is the only way to restore the trust in the law and judiciary and move towards the recovery of the communities and interethnic tolerance.

Reconciliation will happen when the politicians will stop using the war crime prosecutions and trials for political manipulation of citizens. It will happen when all parties to the conflict will stop celebrating war crime convicts as heroes and when they will stop denying responsibility of

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their war-time military and political authorities. It will happen when the victims from all former warring parties acknowledge that they have received at least some justice in any form – be it through criminal proceedings, reparations or truth-telling processes.

Transitional justice has an important role in addressing complementary and alternative ways of delivering justice and truth to the victims and entire society. The draft Transitional Justice Strategy for Bosnia and Herzegovina has envisaged three pillars to reach this goal – establishment of facts and truth-telling, reparations and memorials, and institutional reforms. It is supposed to initiate an open and productive dialogue aimed at preventing future manipulations with the past, giving satisfaction to the victims and establishing professional and credible public institutions. It should make the former Yugoslav states and societies face their past violations of human rights and war crimes perpetration. Despite the fact that the Transitional Justice Strategy has not been adopted yet, there is a great potential in the non-governmental organizations, both national and international, dealing with the transitional justice, to pursue this issue further and put pressure on national institutions to initiate the process that may heal the society twenty years after the war and bring peace to the victims. Currently, there is low awareness of the potentials of the transitional justice among the citizens, therefore, an outreach campaign would be needed to gather citizens, NGOs and academia around the initiatives of the transitional justice.

Finally, despite the generally negative perception among the citizens, most people would agree that the ICTY's contribution to the elimination of impunity is its greatest achievement. It has indicted 161 persons for serious violations of international humanitarian law, mainly highly ranked political and military officials from the war time. Not only has it combated impunity through prosecutions and trials in The Hague, but it also helped the development of the national judiciaries and transferred its knowledge and practices to the national judges and prosecutors in order to introduce international charging and trial standards in the national justice systems and to help them deal with as many cases as possible. It has overseen this process at the national level and helped with advice and resources. Such support has to a great extent contributed the development of jurisprudence in war crime trials at various national levels.

At the global level, one of the most important achievements of the ICTY, along with other international tribunals, is the message that during or following a conflict accountability for atrocities may be expected, which was not the case before the establishment of the ICTY as the first *ad hoc* international tribunal, which later paved the way to the creation of the ICC. In addition to its deterrence role, it has sent the message to the world that atrocities will not be tolerated and that those who commit serious violations of international humanitarian law will be held accountable for their offences.

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ALBANIAN CERTIFICATION OF SUCCESSION AND ITS APPROXIMATION TO EU REGULATION NO. 650/2012

UDC 347.65/.68:340.137(496.5:4-672EU)

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ABSTRACT

This paper provides an overview of the Albanian inheritance law and the nature of the certificate of succession in Albania which is issued only by the public notary where the deceased had his habitual residence at the time of death or, where most of the property is situated. The Certificate shall be issued upon application by the applicant. The applicant has to be the legitimated person. The application shall contain all the information to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified, and shall be accompanied by all relevant documents either in the original or by way of copies which satisfy the conditions necessary to establish their authenticity. Regulation (EU) No 650/2012 aims to create a European Certificate of Succession. The European Certificate of Succession is the new authentic act created by the Regulation directly applicable in all participating Member States. The Certificate shall not act as a substitute for the internal documents used for similar purposes in the Member States. This paper provides an overview of the Albanian certificate of succession and the approximation of this regulation into the actual legislation. In accordance with the EU regulation the national private law should allow any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, to make such declarations in the form provided for by the law of the State of his habitual residence before the courts of that State or before other authorities which are competent to receive declarations under national law. The main focus of this paper is the analysis of the Albanian Certificate of Succession upon the perspective of European Certification of Succession.

Key words: certification of succession, disinheritance, inheritance, public notary

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INTRODUCTION

In accordance with Albanian law, inheritance is the way of acquiring ownership/property rights and obligations upon the death of the person.[2] For a legal relationship to arise out of inheritance, first, the death of a person should be verified;[3] and second, that the deceased had property rights and obligations. It is of minor importance whether at the moment of death this individual has had legal or testamentary heirs. In the absence of legal or testamentary heirs, all the individuals' property rights and obligations should pass to the state.[4] The state does not take obligations beyond the value of the property acquired by inheritance.[5]

Albanian inheritance law does not differentiate nor discriminates on the grounds of gender. Nor does it differentiate those children born from marriage, those born out of wedlock, nor adoptive children.[6] This law fully complies with the principle of equality and non-discrimination. A principle that has its source in Article 18 of the Constitution of the Republic of Albania, according to which all are equal before the law and no one can be discriminated on the grounds of gender, social origin or social status. Similarly, the Albanian Civil Code applies the principle of equality in inheritance between spouses and children.[7] The Albanian Civil Code includes all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.[8] The rights of heirs, legatees and other persons close to the deceased and of creditors of the succession are effectively guaranteed. The civil code does not deal with questions relating to matrimonial property regimes.

The Civil law recognizes the right of inheritance by will to dispose some or all of his/her assets. Through making a will, the decedent chooses to pre-determine the heirs benefitting part or all of his property. Upon the declaration of a partial or total invalidation of the will, the property will be transferred in accordance with the procedure determined by the law of inheritance. Under these circumstances, the legislation foresees the inheritance to pass to its legal heirs in equal shares. The only exception to the general rule is for the deceased spouse who benefits half of the inheritance if called in inheritance with others who are not of the first row.[9] If there are no heirs up to the first three rows except for the spouse, all the property is derived by inheritance to the

[2] Article 317 of Civil Code.
[3] Article 330 of Civil Code
[4] Article 366 of Civil Code
[5] Article 377of Civil Code
[6] Article 362 of Civil Code.
[7] Article 362 of Civil Code.
[8] Nertila Sulce, Legal Inheritance in France and in Albania: Common Elements and Comparative Aspects of Succession Traditions, Social and Natural Sciences Journal, 2014, Volume 8, No 2, 12; Nertila Sulce, Development of Testamentary Inheritance Institution in Albania, Mediterranean Journal of Social Sciences, 2015, Volume 6, No 3, 39.
[9] Article 361 of Civil Code.

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surviving spouse.[10] This procedure acts as a legal safeguard to protect the living spouse.

For legal inheritance to be implemented, a call is made on the basis of blood cognation between the heirs and the decedent. The heirs of the closest blood cognation exclude from the inheritance the heirs of the furthest blood cognation. So, if a person dies leaving heirs of the first row and the second, but the property does not have a will, the heirs of the first row will automatically exclude from the inheritance heirs of the second row. The heirs of the first row inherit the property in equal shares.

The ascendant may decide to *disinherit* someone, i.e. not to leave that person anything. Disinheritance is the act of a person, perhaps through creating a will, which has the effect of depriving an heir of property that would have been distributed under the laws of intestacy. To achieve this aim, the ascendant must have written a will or a document. By *inherit,* a word derived by Latin means "to make someone an heir." By adding the Latin prefix '*dis'*, meaning "not," you take away the inheritance altogether. Legally, the just causes for which ascendants may disinherit their heirs are: a) heir has attempted to take away the life of ascendant, b) heir has accused ascendant of any capital crime, c) child has refused sustenance to the parent, having the means to afford it, and d) child neglected to take care of a parent that became insane.[11] Especially, if the heir used any act of violence or coercion to hinder a parent from making a will. Unworthiness of the parent or of another person born earlier does not exclude a child or one born after him from inheritance; i.e. when they inherit themselves and/or when they come to inheritance by substitution. In such an event, the unworthy parent cannot enjoy the rights of usufruct and administration, which the law grants to parents over the property of their children, over the inherited share transferred to his children.[12] Exemption to in-eligibility of an unworthy parent is when the testator has the right to authorize an unworthy person to inherit, provided that the pardon is made expressly by notarial act or will, or the pardon, although it is not expressly made, the decedent notes in the will that has recognized the unworthiness and still assigns him as heir.[13] The unworthy heir has the obligation to return the fruits and any other income received from the inherited property after the inheritance process takes place.[14]

If an heir does not want to accept an inheritance, he or she can formally disclaim the assets within three months of the testator's death (unless the heir is underage, which in that case they cannot disclaim until they reach the age of majority).[15] The disclaimer becomes permanent and the assets will then pass to the contingent beneficiary.[16] An

[10] Article 361 of Civil Code.
[11] Article 322 of Civil Code.
[12] Article 323 of Civil Code.
[13] Article 324of Civil Code.
[14] Article 325 of Civil Code.
[15] Article 333 of Civil Code.
[16] Article 339 of Civil Code

heir might want to disclaim an inheritance if it would be burdensome to own (like an undesirable piece of real estate), or if the legatee did not need the inheritance and felt it would be more helpful to the contingent beneficiary. As a general rule, acceptance is effective within 3 months through the making of a formal declaration. Failure to make the declaration within the required period can result in the heir losing the inheritance. The time runs from the moment when the heir is in position to accept the inheritance, from the moment of death, or from the opening of the will.[17] The inheritance can be accepted informally by any act that shows acceptance, for example, behaving as an heir by administering the estate. The act simply protects the inheritance, it does not necessarily constitute its acceptance.[18]

Applicable Law

Since its transition from Communism, Albanian nationals and non-citizens cross-borders for economic reasons and own estates in various countries. Owning property in various states triggers the application of multiple national inheritance laws thereby creating a conflict of laws. It was therefore essential that Albanian nationals and non-citizens attained autonomy on the governing law on inheritance after death. In its Law no. 10428, dated 2.6.2011 "On Private International Law", Albania has approximated its law on inheritance together with the certificate of inheritance in line with the EU Regulation No 650/2012.

Albanian inheritance law allows the parties to manage their estate before death by deciding on the applicable inheritance law. In accordance with private international law,[19] the effective law applicable is governed as follows**:** 1) Inheritance of movable property is governed by the law of the State in which the testator, at the time of death, has his habitual residence; 2) Inheritance of immovable property is governed by the law of the State in whose States' territory the immovable thing is situated in; 3) The testator may choose as applicable law to his inheritance a specific states' law. The choice of law has effect only if at the time of his designation or death, the decedent was a national of that State or had his habitual residence.[20] The choice of law cannot have the effect of depriving an heir of the right to legal reserve, derived by applicable law; and 4) Election, revocation or amendment of the applicable law are made according to the form and

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[17] Article 335 of Civil Code.

[18] Article 338 of Civil Code**.**

[19] Law no.10 428, dated 2.6.2011 "On Private International Law".

[20] Recital (38) of Regulation (EU) No 650/2012: This Regulation should enable citizens to organize their succession in advance by choosing the law applicable to their succession. That choice should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share; Magdalena Pfeiffer, Choice of Law in International Family Law and Succession Law, The Lawyer Quarterly, Volume 2, No 4, 2012, 292.

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rules applicable to the revocation of a testamentary disposition.[21]

As a general rule, the connecting factor for the purposes of determining the applicable law should be the habitual residence of the deceased at the time of death. In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence.[22]

With regard to the determination of the law applicable to the succession, the authority dealing with the succession may in exceptional cases – where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State – arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected.[23]

Example: an Albanian citizen (the deceased) had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with the other State. With regard to the determination of the law applicable to the succession, the closest connection should not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex. In order to simplify the lives of heirs and legatees habitually resident in a State other than that in which the succession is being or will be dealt with, the national private law should allow any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, to make such declarations in the form provided for by the law of the State of his habitual residence before the courts of that State.[24] Such mechanism is not applicable in accordance with private international law.[25]

[21] Article 33 of Law no.10 428, dated 2.6.2011 "On Private International Law"**.**

[22] Regulation (EU) No 650/2012 , on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[23] *Ibid,* Recital (25) of Regulation (EU) No 650/2012.

[24] Recital (32) of Regulation (EU) No 650/2012 , on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession

[25] Law no.10 428, dated 2.6.2011 "On Private International Law".

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Albanian Certificate of Inheritance

If the party choses Albanian law as his/her applicable law, a Certificate of Succession shall be issued by the Public Notary which has competence to deal with matters of succession.[26] The certificate of succession has to be issued only by the public notary where the deceased had his habitual residence at the time of death or, where the most of property is situated.[27] Notary in the Republic of Albania performs legal activity in the service of natural and legal persons through editing acts and performing notarial deeds in compliance with the Constitution and the legislation in force. The notary shall, in practicing his/her profession, be objective, not bias and subject only to the law.[28] For purposes of exercising his functions, the notary is equivalent to a civil servant and enjoys protection in accordance with the law.[29] The notary, upon the request of the applicant, has the right to provide information held, in particular, in the real estate registers, the civil status registers and registers recording documents and facts of relevance for the succession or for the matrimonial property regime, where the notary would be authorized, under the law, to provide such information. The Certificate shall be issued upon application by the applicant.[30] The applicant has to be the legitimated person.[31] The application shall contain all the information to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified, and shall be accompanied by all relevant documents either in the original or by way of copies which satisfy the conditions necessary to establish their authenticity.[32] Upon receipt of the application the notary shall verify the information and declarations and the documents and other evidence provided by the applicant.[33] Notary shall carry out the enquiries necessary

[26] Law no 7829.data 01.06.1994 "On Notary", added by Law no131 data 29.04.2013.
[27] Article 348 of Civil Code.
[28] Article 1 of Law no 7829.data 01.06.1994 "On Notary".
[29] Article 4 of Law no 7829.data 01.06.1994 "On Notary".
[30] See article 65 of Regulation (EU) No 650/2012.
[31] Article 53 (1b) of Law no 7829.data 01.06.1994 "On Notary", added by Law no131 data 29.04.2013.
[32] The listed information: details concerning the deceased: surname, given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address at the time of death, date and place of death; details concerning the applicant: surname given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relationship to the deceased, if any; details concerning the representative of the applicant, if any: surname, given name(s), address and representative capacity; the intended purpose of the Certificate; a declaration stating that, to the applicant's best knowledge, no dispute is pending relating to the elements to be certified; other information which the applicant deems useful for the purposes of the issue of the Certificate.
[33] Article 53 of Law no 7829.data 01.06.1994 "On Notary", added by Law no131 data 29.04.2013*: The notary shall, being officially informed by written request from interested persons: a) check his territorial powers in compliance with the provisions of the Civil code; b) send a request to the National Chamber of Notaries, whereby attaching a copy of the request of the interested persons and a copy of the death certificate of the testator. Upon receiving such a request, the National Chamber of the Notaries shall, within 3 days, check with the National Register of Testaments and National Register of Certificates of Inheritance whether the testator has made a*

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for that verification of its own motion where this is provided for or authorized by law, or shall invite the applicant to provide any further evidence which it deems necessary.[34]

The public notary shall not issue the Certificate in these particular cases: (a) if the application is not conform with the law;[35] (b) if the elements to be certified are being challenged; (c) the Certificate would not be in conformity with a decision covering the same elements; or (d) the certification of succession may not be issued by him being outside the local jurisdiction.[36] The notary shall take all necessary steps to inform the beneficiaries of the issue of the Certificate within 5 days of application, setting out the reasons for the refusal of issuing the certificate of inheritance.[37]

The Certificate shall contain the following information for the purpose for which it is issued:[38] (a) the name and address of the notary (the competed authority); (b) the reference number of the file; (c) the elements on the basis of which the notary considers itself competent to issue the Certificate; (d) the date of issue; (e) details concerning the applicant: surname, given name(s), gender, date and place of birth, civil status, nationality, identification number, address and relationship to the deceased, if any; (f) details

testament and/or the legal or testamentary inheritance certificate has been issued by any other notary. Within 3 days of receiving the response from the National Chamber of Notaries, the notary shall:

a) Guide the interested person to the notary having issued the inheritance certificate or with whom the testament has been edited, as appropriate; b) proceed with issuing the legal or testamentary inheritance certificate in compliance with the provisions of the Civil code and register it with the National Register of the Inheritance certificates.

Upon issuing the testamentary inheritance certificate, the notary shall check whether the dispositions of the testator in the will are valid in compliance with the provisions contained in the Civil Code.

Where the disposition in the testament is not valid, the notary shall, upon grounded decision, declare the invalidity of the testament and proceeds with issuing the legal inheritance certificate. If only a part of the dispositions in the testament are declared invalid, the legal inheritance certificate shall be issued only for that part of the provisions in the testament that are declared invalid.

[34] See article 66 of Regulation (EU) No 650/2012 , on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[35] Article 23 of Law "On Notary" changed by law 10491, data 15.12.2011.

[36] Article 318(1) of Civil Code (changed by law 121/2013); see Directive 86/653 date 18 December 1986.

[37] Article 41 of Law "On Notary*": A notary refuses to edit every act the content of which is in open violation of the requirements of law. The refusal is done by a reasoned decision of the notary and is made known to the interested party within five days from the day of submission of the request for the editing of the act. The persons who have asked for the editing of the act or who are directly interested may, within five days from the day of notification of this decision, file an appeal before the court of judicial district in the territory of which the notarial office operates, which within five days from the submission of the complaint decides about the case.*

[38] Article 53 (1) of Law no 7829.data 01.06.1994 "On Notary", added by Law no131 data 29.04.2013; article 68 of Regulation (EU) No 650/2012 , on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

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concerning the deceased: surname, given name(s), gender, date and place of birth, civil status, nationality, identification number, address at the time of death, date and place of death; (g) details concerning the beneficiaries: surname, given name(s) and identification number; (h) information concerning a marriage contract entered into by the deceased or, if applicable, a contract entered into by the deceased in the context of a relationship deemed by the applicable law to such a relationship to have comparable effects to marriage, and information concerning the matrimonial property regime or equivalent property regime; (i) the law applicable to the succession and the elements on the basis of which that law has been determined; (j) information as to whether the succession is testate or intestate, including information concerning the elements giving rise to the rights and/or powers of the heirs, legatees, executors of wills or administrators of the estate; (k) if applicable, information in respect of each beneficiary concerning the nature of the acceptance or waiver of the succession; (l) the share for each heir and the list of rights and/or assets for any given their;[39] (m) the list of rights and/or assets for any given legatee; (n) the restrictions on the rights of the heir(s) and, as appropriate, legatee(s) under the law to the succession and/or under the disposition of property upon death; (o) the powers of the executor of the will and/or the administrator of the estate and the restrictions on those powers under the law to the succession and/or under the disposition of property upon death.[40]

The notary shall keep the original of the Certificate of Succession and shall issue one or more certified copies to the applicant and to any person demonstrating a legitimate interest.[41] The notary (issuing authority) shall keep a list of persons to whom certified copies have been issued.[42] The certification shall be rectified by the notary, at the request of any person demonstrating a legitimate interest or of its own motion, in the event of a clerical error.[43] The notary shall without delay inform all persons to whom certified copies of the Certificate have been issued.

If an heir does not want to accept an inheritance, he or she can formally disclaim the assets within three months and not more than six months of the testator's death. After registering the waiver from the inheritance, the notary shall ex officio issue a new inheritance certificate which he shall make known to all the persons that under Article

[39] Article 348 of Civil Code (canged by law no 121/2013).
[40] Article 343 of Civil Code (canged by law no 121/2013).
[41] See article 70 of Regulation (EU) No 650/2012, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.
[42] Article 348 of Civil Code (canged by law no 121/2013).
[43] Article 53 (2) of Law no 7829.data 01.06.1994 "On Notary", added by Law no 131 data 29.04.2013:*The notary may, ex officio or upon the request of any person having a legitimate interest, correct the spelling mistakes any time in terms of demarcating the traits or any evident irregularity in the inheritance certificate. The notary shall immediately inform all persons, to whom, under Article 53/1 of this law, a certified copy of the inheritance certificate has been issued, about any correction of mistakes.*

53/1 of this law, were provided with a certified copy of the initial inheritance certificate. In the new inheritance certificate, the notary shall reflect the changes in the circle of heirs, their respective traits, as well as, data on the waiver act from the inheritance. After issuing the new certificate of inheritance, the notary shall make the respective note in the initial inheritance certificate and subsequently in the National Register of Inheritance Certificates.[44]

The European Certificate of Succession

Inheritance laws become quiet complex when cross-border elements are incorporated. Albania has approximated its law on inheritance and the details to be incorporated under the Albanian Certificate of Succession in line with the European Regulation 650/2012, creating uniform rules on jurisdiction, applicable law, and most importantly recognition of enforcement decisions and acceptance and enforcement of authentic national instruments on succession. The European Certificate of Succession is the new authentic act created by the Regulation directly applicable in all participating Member States. [45] Articles 62-73 of the regulation define the rules of a European Certificate of Succession which shall be issued for use in another Member State. The Certificate shall not substitute the internal documents used for similar purposes in the Member States, it aims to adopt uniform rules whereby heirs, legatees, executors and administrators exercise their rights on the estate by proving their status in other EU countries. The Regulation respects the instruments found within the internal laws of the Member States, it expands the discipline of uniformity extending to the testamentary pacts, but this happens as long as these pacts are properly qualified (as a provision for death) supports the will or common testament.[46] It excludes from its scope the other tools (but mostly those of a contractual nature), not recognizing a justification of removing them completely from the relevant discipline. This maintained approach in the regulation comes from the fact that those pacts with a contractual nature belonging to the *inter vivos* relationships (amongst living). For this purpose their arrangement cannot be governed by this regulation. It is implied that the Regulation leaves it upon the applicable law the assessment of the legality of contractual agreements between parties.[47]

The law applicable to inheritance as a whole shall be the law of the State in which the deceased had his habitual

[44] Article 53 (3) of Law no 7829.data 01.06.1994 “On Notary”, added by Law no 131 data 29.04.2013.

[45] Jonathan Fitchen, ‘Recognition’, Acceptance and Enforcement of Authentic Instruments in the Succession Regulation, Journal of Private International Law, 2012, Volume 8, No 2, 324; Regulation entry into force: 17 August 2015.

[46] Jennifer Bost, Nothing Certain About Death and Taxes (and Inheritance): European Union Regulation of Cross-Border Successions, 27 Emory International Law Review Volume 27, Issue 2 (2013) 1145.

[47] Csongor Istvan Nagy, What Functions may Party Autonomy have in International Family and Succession Law? An EU Perspective, NIPR, 2012, Volume 30, No 4, 577.

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residence at the time of death.[48] A person may choose as the law to govern his inheritance as a whole, the law of the State whose nationality he possesses at the time of making the choice or at the time of death.[49] The applicable law, pursuant to Article 21 or 22, shall govern in particular: (a) the causes, time and place of the opening of the succession; (b) the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner; (c) the capacity to inherit; (d) disinheritance and disqualification by conduct; (e) the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy; (f) the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors, without prejudice to the powers referred to in Article 29(2) and (3).[50]

Example 1 Decedent AB was a national of a Member State "A", with a previous residence in Member State "B" (countries, which the material wealth are calculated to be divided within the inheritance).The interested parties are free to benefit from using the jurisprudence of the court in any of these two Member States. The possibility of submitting simultaneous claims in two different courts in not excluded. Article 22 provides a useful forecast especially for those cases in which the exception of article 21 (2) of the Regulation applies. Especially for those that even though are transferred abroad, continue to have a significant connection with the country of origin. There are certain advantages and disadvantages connected to the wide discretion given to the testator on the choice of law. It avoids interpreting the prevalence of one nationality in relation to another; legitimizes the actions of all those heirs, which could be affected by the application of the law of a country or another (the law of the place of residence or place of last habitual residence).

In accordance to recital 49 of the Regulation, agreement as to succession is a type of disposition of property upon death, in which the admissibility and acceptance vary amongst the Member States. This Regulation should determine which law is to govern the admissibility of such agreements, their substantive validity and their binding effects between the parties, including the conditions for their dissolution. Pursuant to Article 25 of the Regulation, an agreement as to succession shall be governed, as regards its admissibility, its substantive validity and its

[48] Article 21of regulation; Angelique Devaux, The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not? The International Lawyer, Volume 47, Number 2, page 232; Iveta Rohova and Klara Drlickova, Habitual Residence as a Single Connecting Factor under the Succession Regulation, International Journal of Law and Politics, 110.

[49] Article 22of regulation; Christian Hertel, European Certificate of Succession-content, issue and effects, ERA Forum, October 2014, Volume 15, Issue 3, 393-407, 401.

[50] Article 23 of regulation.

binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded. Article 3(b) defines an 'agreement as to succession' to mean an 'agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement'. It shall be excluded from the scope of this Regulation: property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2).[51]

The following elements contribute to the validity of dispositions of property upon death:(a) the capacity of the person making the disposition of property upon death to make such a disposition; (b) the particular causes which bar the person making the disposition from disposing in favour of certain persons or which bar a person from receiving succession property from the person making the disposition; (c) the admissibility of representation for the purposes of making a disposition of property upon death; (d) the interpretation of the disposition; (e) fraud, duress, mistake and any other questions relating to the consent or intention of the person making the disposition.[52]

When issued, the Certificate should contain the following elements: the deceased's and heirs marital status, property regime, and the will's essential elements (or the act of inheritance).[53] Once issued, other EU countries shall

[51] Article 1(2) of regulation

[52] Article 26 of regulation.

[53] Article 68 of regulation: The Certificate shall contain the following information, to the extent required for the purpose for which it is issued: (a) the name and address of the issuing authority; (b) the reference number of the file;(c) the elements on the basis of which the issuing authority considers itself competent to issue the Certificate;(d) the date of issue;(e) details concerning the applicant: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relationship to the deceased, if any;(f) details concerning the deceased: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address at the time of death, date and place of death;(g) details concerning the beneficiaries: surname (if applicable, surname at birth), given name(s) and identification number (if applicable);(h) information concerning a marriage contract entered into by the deceased or, if applicable, a contract entered into by the deceased in the context of a relationship deemed by the law applicable to such a relationship to have comparable effects to marriage, and information concerning the matrimonial property regime or equivalent property regime;(i) the law applicable to the succession and the elements on the basis of which that law has been determined; (j) information as to whether the succession is testate or intestate, including information concerning the elements giving rise to the rights and/or powers of the heirs, legatees, executors of wills or administrators of the estate;(k) if applicable, information in respect of each beneficiary concerning the nature of the acceptance or waiver of the succession;(l) the share for each heir and, if applicable, the list of rights and/or assets for any given heir; (m) the list of rights and/or assets for any given legatee; (n) the restrictions on the rights of the heir(s) and, as appropriate, legatee(s) under the law applicable to the succession and/or under the disposition of property upon death; (o) the powers of the executor of the will and/or the administrator of the estate and the restrictions on those powers under the law applicable to the succession and/or under the disposition of property upon death.

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recognize the Certificate without requiring a special procedure for action producing the following effects: 1) the person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate shall be presumed to have the status mentioned in the Certificate and/or to hold the rights or the powers stated in the Certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate;[54] 2) a person mentioned in the Certificate as the 'authorized' person to dispose of such property in favour of another person, and that other person shall, if acting on the basis of the information certified in the Certificate, be considered to have transacted with a person with authority to dispose of the property concerned.[55] This will be seen as a relative presumption as long as interested persons contest the validity of the certificate by providing proof of the contrary, while benefiting from its cancellation.[56] On the other hand, no one will be able to ascertain the validity of the European Certificate of Succession using in bad faith those facts that take away the status of being beneficiaries as confirmed on the certificate.[57]

According to Article 1 of Regulation (EU) 650/2012, shall be excluded from the scope of this Regulation questions relating to the disappearance, absence or presumed death of a natural person. The European legislator has not had the intention to intervene in domestic matters regarding registration upon death. With such decision it avoids to make a distinction between a persons' declaration of civil dead as equivalent in legal consequence to natural death. The European Legislator had no intention to change the substantive national rules on succession, its aim under this Regulation is to ensure that cross-border succession becomes less complex, to the contrary, from 17 August 2015, easier and faster procedures on succession will take place between EU Member States overcoming the old procedure which required as a condition the element of validity and legitimacy.

The Phenomenon of Simultaneous Death

There might be instances when two or more persons die simultaneously and under the circumstances it cannot be determined who had died first. This situation causes difficulties as to the law of succession and effects the rights of heirs. These circumstances are known as the phenomenon of simultaneous death (joint death) known as *commorientes*. In relation to the phenomenon of simultaneous death, the European legislator has actively been involved. Where two or more persons whose successions are governed by different laws die in

[54] Mariusz Zalucki, New Revolutionary European Regulation on Succession Matters. Key Issues and Doubts, Revista de Derecho Civil, 2016, Volume 3, No 1, 166.

[55] Article 69 of this regulation; Matteo Pollaroli, EU Regulation no. 650/2012 and Access to New Forms of Intergenerational Transfer of Wealth, 406-407.< http://virgo.unive.it/ecf-workflow/upload_pdf/008_Pollaroli.pdf>

[56] Article 71 of this regulation.

[57] Article 69(3)+(4) of regulation.

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circumstances in which it is uncertain in what order their deaths occurred, and where those laws provide differently for that situation or make no provision for it at all, none of the deceased persons shall have any rights to the succession of the other or others.[58] Consequently, the law of inheritance (intestacy) or testacy fully applies.[59] This event (natural death) gives rise to a legal fact producing legal consequences beyond the individual natural event for each of the deceased (testator).

This interference by the European legislator is performed although any adjustment of legal consequences deriving from a legal fact is imposed by law, when there is no evidence to prove the opposite of what was predicted by domestic legislation. In some countries' legislations this legal fact with consequences to inheritance is included in statutory regulation governing civil death. In this regard, the author disagrees, believing this fact should be considered a natural death for each person. The fact of natural death is taken as a joint phenomenon for these people and not simply a legal fact of a natural individual character. However, the author agrees with the overall adoption of such provision together with the provisions governing civil death since in this case a court decision is needed to regulate the legal consequences of the heirs' deriving from such a natural fact.[60] The legislator considers them all as 'the testator' (although one of them could have been for a few minutes 'the heir').

CONCLUSION

In accordance with Albanian legislation, the Certificate of Succession must be issued only by a public notary where the deceased had his habitual residence at the time of death or where the most of property is situated. Notary in the Republic of Albania performs legal activity in the service of natural and legal persons through editing acts and performing notarial deeds in compliance with the Constitution and the legislation in force. The notary shall, in practicing his profession, be objective, not bias and subject only to the law. For purposes of exercising his functions, the notary is equivalent to a civil servant and enjoys protection according to law. The notary shall keep the original of the Certificate of Succession and shall issue one or more certified copies to the applicant and to any person demonstrating a legitimate interest. The certificate shall be rectified by the notary, at the request of any person demonstrating a legitimate interest or of its own motion, in the event of a clerical error. As Albania aspires to integrate to the European Union, the elements inserted into the Certificate of Succession are approximated with the EU Regulation 650/2012.

[58] Article 32 of Regulation (EU) 650/2012; also see Article 20 of Albanian Civil Code.

[59] Valentina Kondili, Civil Law (textbook), Tirana, 2008, pg.123.

[60] As envisaged in the legislation of some countries.

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THE NEGOTIORUM GESTIO INSTITITUTE ACCORDINT TO ALBANIAN INTERNATIONAL PRIVATE LAW AND ROME II REGULATION, CONFLICT OF LAW RULE

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ABSTRACT

Europeanization of private international law of the European Union member states is a *Condition Sine Qua Non* for the well-functioning of the European common market. In this frame, the creation of a unified group of rules for determination of the applicable law in potential cases that may arise is a necessity. But the greatest challenge refers to the countries like Albania that inspires to be part of the European Union in the near future.

The *Negotiorum Gestio* institute is one of the civil law institutes that have its own regulation in the material civil legislation framework in the EU member states. But the development of European Private International Law has shown that the institute needs a harmonised regulation in the conflict of laws. Rome II Regulation "On the Law Applicable to Non-contractual Obligations" provides the rules for the applicable law, and determines the connecting factor that will be taken into consideration in a conflict of law situation within the meaning of *Negotiorum Gestio* institute. *In Haec Verba*, Albanian material civil legislation has a qualitative legal framework regarding the *Negotiorum Gestio* institute. In this line is *Mutatis Mutandis* the Private International Law that provides as Rome II Regulation, the applicable law in the contest of legal collision.

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EU Legislator in the field of Rome II Regulation has been a sort of inspiration for Albanian Legislator in deduction of the Private International Law. But the main questions that may arise are like: Is the concept of *Negotiorum Gestio* defined like in Albanian material civil legislation, also in ECJ jurisprudence? Are the connecting factors that are used in the Rome II Regulation the same with those that provides Private International Law in Albania? Can we discuss for a harmonized approach of Albanian Private International Law with Rome II Regulation?

Problematic discussions like these will be synthesized in a deduction regarding respective interferences and bilateral recommendations that might urge to be taken into consideration in the near future.

Key Words *Negotiorum Gestio*, Private International Law, European Private International Law, Conflict of Law, Rome II Regulation.

1 Analyse of *Negotiorum Gestio* institute under civil legislation of Republic of Albania

1.1 *Historical Background of Negotiorum Gestio institute in the Roman law*[3]

All those relations that created unfounded liabilities on an agreement between the parties, in the classic law, were thought to be born of *Variae Causarum Figurae*[4]. In the Justinian Law it was spoken about obligations *Quasi Ex Contractu Nascunter* which were *Quasi Contractus*[5]. The main characteristic of this character is that unlike obligations, it has nothing to do with meeting of the mind theory[6], therefore, there is no preliminary agreement between them, but *Quasi Contractus* were contingent liability that differed profoundly from offenses, but who resembled slightly to contracts as they were created on the basis of presumed reconciliation of will of the parties in the liabilities relations. In this category were included *Inter Alia*: *Negatiorum Gestio, Indebiti Solution, Pollicitatio, Votum* and *Communion Incidens*[7].

Negotiorum Gestio or incompetence to conduct foreign affairs was a *quasi-contract* that arises between the incapable or unauthorized representatives and persons

[3] Analysis of *NegotiorumGestio* institute beginning with the Roman law, in our opinion, reflects an aspect of great importance regarding the material civil law in Republic of Albania and also has a great influence in the meaning that Rome II Regulation has given to the institute. Thus, the reflection of civil material legislation from the Roman Law, to conclude with the developments of the material civil legislation in the Republic of Albania and in the European Union regarding the European International private Law, will contribute in a more detailed meaning of the regulations that the “Private International Law” and the Rome II Regulation contain, regarding the conflict of law rule in situations where the *NegotiorumGestio* institute is invoked.

[4] Prof.Asoc.Dr. Mandro, Arta. Roman law, Tirana: Emal, 2007. Pg.401

[5] Ibid

[6] Consensus ad Idem

[7] Dr. Olldashi, Enkeleda. Roman law, Tirana: Mediaprint, 2011. Pg.211

whose work was done without prior arrangement, i.e., was conducted at the initiative of the incompetent, but that was useful for them[8]. Incompetence should have the following elements[9]: **(i)** the work undertaken by an unauthorized person should be definitely a work of third parties, **(ii)** the work should be undertaken at the initiative of the incompetent, the expressed or silent mandate lacked **(iii)** the action taken should be definitely in favour of the person who belonged to such action in fact. The usefulness of action was assessed objectively but it was required that the owner evaluate subjectively the usefulness of the action taken, **(iv)** the work undertaken by an unauthorized person should be conducted in such a way that he wanted *Dominus Negati* (retribution of his expenditures).

Based on incompetence's, mutual not identical obligations were created. The unauthorized person was forced to perform well the work undertaken and to submit all the benefits derived from the action taken to *Dominus Negoti*[10]. The latter had to accept delivery of the benefits profited. The action taken may be material (repairs, plantation work), or legal (sale, rent); in the second case with modern terms can be talked about represented direction[11]. In any case, a translational mutual act was needed to pass sales consequences to the ownership of the proprietary[12]. If the owner knew the activity of the head of works and did not oppose to him, then we have a silent mandate. It didn't matter if the administrator of works believed he had received a mandate. If someone undertook the work on his behalf, it wasn't about management of works (for example: a partner who not only cared for his own interests but also for other partners')[13]. For protection of *Dominus*, it was awarded a lawsuit against management of works (*Actio Negotiorum Gestiorum*) which was direct, while the interest of the *Negotiorum Gestor* can be done with the same lawsuit, but that was considered *Contraria*[14]. Funeral of a third (*Funeraria*) was a special characteristic of *Negotiorum Gestio*. In this case the *Negotiorum Gestor* had the right to require of persons close to *De Cuius* all expenses incurred in this case, through an *Actio Funeraria*[15].

1.2 *Meaning of NegotiorumGestio under material civil legislation of Republic of Albania*

Negotiorum in Gestio is an institute of civil law, which from the historical point of view has been provided and regulated by specific provisions in the Albanian civil law in 1929 in the Civil Code of Zog[16], then the Law No. 2359, dated 15.11.1956 "On Legal Actions and

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[8] Ibid
[9] Ibid
[10] Prof.Asoc.Dr. Mandro, Arta. Roman law, Tirana: Emal, 2007. Pg.402
[11] Ibid
[12] Ibid
[13] Dr. Olldashi, Enkeleda. Roman law. Tirana: Mediaprint, 2011. Pg.212
[14] Borkowski, Andrew and du Plessis Paaul. Roman law. Tirana: UET Press, 2004. Pg. 412
[15] Ibi
[16] The Civil Code has entered into force on 1 of April 1929.

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Obligations"[17], followed by the Civil Code of 1981[18], and recently with the Civil Code of 1994[19].

Negotiorum Gestio institute or otherwise known as *gestion d'affaires* has been explicitly foreseen in the Albanian civil legislation in the Civil Code of 1929, respectively provided from Articles 1136 to 1140.Article 1136 cites, *"He that without being obligated, undertake the management of a job of another, is forced to proceed and complete the work he started until the interested person is able to take care of it himself. The administrator undertakes all obligations, which would result to him, if there was a message, expressed by the interested".*

In 1956 the Law on Legal Actions and Obligations[20], Article 33 cites sources of obligations. Among these sources are also mentioned legal actions, particularly contracts[21]. Contracts as the main legal actions are an important source of incurrence of liabilities, but they are not the only legal action arising from obligations[22]. As sources of obligations are also other legal actions which are not contracts. These other legal actions are unilateral legal actions. In the legal literature of the time it was accepted that in the Soviet law, the unilateral legal action is the source of the rise of obligation, but it is a source that is very rarely and less important as the contract[23]. L.V.J.D in Chapter XXI provides the activity in the benefit of another person's institute without his order (*Negotiorum Gestio*)[24]. In this historical context, this institution should be understood as the performance of a work or of a legal action by a person called the *Negatiorum Gestor*, which voluntarily acts to stop a harm threatened to property interests of another person, without the order of the later. Having researched the literature of the time, we deduce that the institute continued to be part of the Albanian civil legislation although in the Soviet Civil Code it wasn't adjusted, but literature and legal science acknowledged its existence[25].

Analysing the Civil Code of 1981[26] we do not find an adjustment of the *Negotiorum Gestio* institute explicitly. Soviet legislation influence in drafting Albanian civil legislation and the socio-economic conditions circumstances of our country in this period were dictated by a non-liberalist and totally totalitarian spirit. We as authors believe that the feelings of society cooperation that characterized socialist society were transcribed in

[17] With the Law No.2359, of 15.11.1956 "On Legal Actions and Obligations" and with Decree No. 2083, of 06.07.1955 "On the ownership", at that time, were reflected clear characteristics of the soviet law, which took their complete form with the Civil Code of 1981.

[18] Law No. 6340, of 26.06.1981, entered into force on 01.01.1982 (The Civil Code of 1981).

[19] The Civil Code of the Republic of Albania has entered into force on 01.11.1994.

[20] Acronym used hereinafter for the Law No. 2359, of 15.11.1956.

[21]Prof. Dr. Sallabanda, Andon. Obligation law, (general part).Tirana, 1962.Pg.237.

[22] Ibid

[23] Ibid

[24] Ibid

[25] Ibid

[26] In this Code the Legislator incorporated the elements of the Germanic law, model that was followed originally by soviet legislators. The main characteristic was that the private law, in a wide plan, was absorbed by public law.

Chapter IX[27] of the Code and were involved in the concept of obligations arising from unjust enrichment, although in our opinion unjust enrichment institute and *Negotiorum Gestio* institute are independent institutes of one-another with distinguishing qualities and features between them.

Civil legislation in force, i.e. the Civil Code of 1994 adjusted the *Negotiorum Gestio* institute in Articles 648-552, obviously from a *Prima Facie* look, has carried the characteristics of the Civil Code of 1929. In these five provisions, this institute was adjusted expressively. With *Negotiorum Gestio* according to current legislation it is understood the performance of a work or of a legal action by a person called the *Negotiorum Gestor*[28], who voluntarily acts to stop a harm threatened to propriety interests of another person, without the order of the later[29]. The reason for the existence of the legal and civil *Negotiorum Gestio* institute corresponds to the needs for protection from the legal beneficial and humane actions of persons who act according to the requirements of reason and take over the protection of the interests of others, in conditions when the latter are unable to care for themselves[30]. So the institute of the obligatory right is marked by a pronounced influence of sound social moral[31]. Thus, those responsible and who follow a reasonable purpose in protecting the interests of other persons, who are not able to do these themselves, are evaluated morally and legally[32]. Law recognizes the *Negotiorum Gestor* of another, a certain protection within the limits prescribed by law[33]. As an example of *Negotiorum Gestio*, would be the case when someone who does not live at home currently, during a violent storm, the roof of the house is completely or partially destroyed. In this case a neighbour adjusts the roof, as long as the owner is unable to do himself, he is acting morally, but also legally valid[34]. With these actions of the *Negotiorum Gestor*, may be expenses, so it is fair that the person in whose interests the *Negotiorum Gestor* operates be forced to pay these costs, although lacking his message. Through this institute it is intended to protect legally those good deeds of people who do not conform their behaviour simply by a negligent attitude (see only their work), but in their activities are guided by good conscience and reasonable goals. It is understood that managing other's works has legal value only under the conditions provided by law[35]. Article 649 of the Civil Code stipulates that the person concerned must fulfil the obligations that *Negotiorum Gestor* has undertaken on his behalf, to exclude the administrator of the obligations he

[27] Articles: 350-351, Civil Code of 1981.
[28] If we refer to French version *gestiond'affaires,* from translation to English, we understand the management of others busines. So it makes sens to adopt also the word *administrator* for the *Negotiorum Gestor*.
[29]Prof.Dr.Nuni,Ardian; Ma.Mustafaj, Ilir; Ma.AsimVokshi.The Law of Obligations I. Tirana, 2008. Pg. 171
[30] Ibid
[31]Prof. Dr. Sallabanda, Andon. Obligation law (general part).Tirana, 1962.Pg.239.
[32] Ibid
[33] See: Article 649, of actual Civil Code.
[34]Prof. Dr. Nuni, Ardian; Ma.Mustafaj, Ilir; Ma.AsimVokshi. The Law of Obligations I. Tirana, 2008. Pg. 172
[35] Ibid

has taken on his own behalf and pay beneficial and necessary costs, from the day it is made, where appropriate, to compensate the damage they may have suffered as a result of management, provided that the actions performed by the administrator should not have been banned by the person concerned. When the *Negotiorum Gestor*, except management of works, has had to exercise a profession, he is entitled to receive in accordance with certain prices or fees associated with such activities[36]. In the exercise of the activity of *Negotiorum Gestio*, the *Negotiorum Gestor* has the right to carry out legal actions on behalf of the person concerned, to the extent that the interest of the latter is supplemented appropriately[37]. The Code provides[38] that the *Negotiorum Gestor* is subject to the same obligations arising from an ordering contract. The court, taking into account the circumstances which have affected the *Negotiorum Gestor* to take over the management, may reduce compensation for damage caused by his fault. Elaborated further on the provisions of the Code[39], it is provided that the person concerned, by adoption of the activities of the *Negotiorum Gestor*, may withdraw his right to claim damages from the *Negotiorum Gestor*, according to *ut supra* disposition. For this purpose, the person concerned should be given a reasonable period.

The activity for the benefit of another person without mandate has similarities with unjust enrichment[40] also in those places where it is envisioned as a separate institution, the jurisprudence has tried to apply the criteria of unjust enrichment. In both these institutions, a person takes something or avoids a reduction in property of another person. However, the two above institutions are different from each-other[41]. At the unjust enrichment, the wealth of one party at the expense of reducing the wealth of the other party is not done with the purpose of the person who has suffered a reduction of his wealth, but often it is the result of an error, whereas in the case of the management of the other's affairs, the *Negotiorum Gestor* acts consciously to avoid a damage that threatens the interests of someone else's property[42]. According to the unjust enrichment, the compensation is made only to the extent of enrichment, whereas at the affairs management of the other, the range of compensation may include costs for avoidance of damaging consequences, payment for actual occupation as well as any damage which might have been caused to the *Negotiorum Gestor*[43]. So, in the second case the amount of compensation may be greater.

[36]Skrame, Olti. Commentar of the Civil Code II.Onufri, 2012. Pg. 159.
[37] Article 650 of theCivil Code
[38] Article 651 of the Civil Code
[39] Article 652 of the Civil Code
[40] The reason why we are analysing the differences between these civil institutes, is that it will have a great impact on the analyse of the Rome II Regulation. Because the jurisprudence of ECJ has also stated that the unjust enrichment and *Negotiorum Gestio* are similar institutes but not identical, they have major differences in their legal corpus.
[41]Prof. Dr. Sallabanda, Andon. Obligation Law (general part).Tirana, 1962. Pg.242.
[42]Prof.Dr. Nuni,Ardian; Ma.Mustafaj, Ilir; Ma.AsimVokshi. The Law of Obligations I. Tirana, 2008. Pg. 173
[43] Ibid

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The management of the other affairs must be distinguished from the promise for the other obligations, provided by the Civil Code[44]. In the second case, the person that has promised to another party that a third person shall execute a bond, or shall perform an action in his favour, is bound to compensate the other party, if the third person refuses to execute the obligation or perform the promised action. So, in this case, the obligation lies in what the debtor assumes that a third person, who is not a party to the legal relationship of obligation, will execute an obligation or perform an action on behalf of the other party (creditor) and in the lack of acceptance by the third person, the promising part is obliged to compensate the damages caused to the other party, whereas the other's affairs management, *Negotiorum Gestor* acts to stop a damage that threatens the property interests of third parties.

1.3 *Negotiorum Gestio and legal collision under the Private International Law*

The civil and legal *Negotiorum Gestio* institute was analyzed in detail under national material and procedural legislation. In the entirety of private relations between parties we can discern relationships with foreign element or cross-border element as recognized otherwise. Economic and social developments have induced further developments in the Republic of Albania civil law; private international law therefore recognized a re-dimensioning of the Law No.3920 of 1964 "On Enjoyment of Civil Rights by Foreigners and Implementation of Foreign Law ". Now, the law on private international law[45] inspired by developments of the EU legislation[46] in the context of the institute of *Negotiorum Gestio* has provided explicitly in his II Section that carries the title "Special rules", rules for determining the law in the case of *Negotiorum Gestio*. Namely, Article 69 of the law defines the criteria for determining applicable law in the case of *Negotiorum Gestio* relations with foreign elements. Initially, the legislator has characterized *Negotiorum Gestio* as an *Obligations Quasi Ex Contractu Nascunter*, which in our opinion is in line with the character that the Civil Code gives to this institute. The element that presents difficulty is determination of the applicable law if the person who manages the affairs of another person is in Albania, while the person who benefits is in one of the countries of the European Union. *What will be the applicable law in this case for the regulation of civil and legal relationship of obligation created between the parties?*

Cases exactly like this, but not only, have inspired the legislator to investigate and deduct in connection criteria

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[44] Article 697 of Civil Code

[45] Law No. 10428, dated 02.06.2011 " For the International Private Law"

[46] Design and renovation of the international private law in Albania, *et al* came as an effect of re-dimensioning of the social-economic framework and the development of the private relation between the parties. But the focus of our research paper is on the private international law in relation with Rome II Regulation. So we will see that the Rome II Regulation conflict of rule criteria is adopted by Albanian Legislator in the Private International Law. The harmonization is quite obvious regarding the creation of a unified group of rules in respect of *Negotiorum Gestio* institute in the purview of private international law.

for the determination of the applicable law, as enshrined in Article 69 of the law. The first linkage criteria for determining the applicable law in the case of *Negotiorum Gestio* refers to the existing relationship between the parties. If the parties have had a previous relationship between them and the *Obligations Quasi Ex Contractu Nascunter* that derives from the management of the other party's affair is relevant to this relationship, it will be applied the law that regulates the legal relationship between the parties. The second connecting factor for determining the applicable law, if it cannot be determined as the first criterion, refers to the usual residence of the parties. Thus, if the parties have habitual residence in the same state where the event from which the damage derives happened, (*Lex Loci Delicti Commissi*), the law of this state is applied. Third connecting factor for determining the inapplicable law, if it cannot be determined under the second criteria, is referred to the *Locus Regit Actum* principle. It derives that the law of the State in which the act was committed will be applied. The fourth connecting factor, which in our opinion is an exceptional clause, which has given flexibility to the rules of legal collisions in private international law according to the *Negotiorum Gestio*; it is the principle of the closest connection. Thus derives that it is clear from all the circumstances of the case that the obligation which flows from management is manifestly more closely connected with another country, different from that analyzed in *Ut Supra*, the law of that State will be applied.

2 Analyses of *Negotiorum Gestio* institute under Roma II Regulation[47]

2.1 The Autonomous Concept of Negotiorum Gestio

Chapter III of Rome II Regulation covers unjust enrichment, *Negotiorum Gestio* and *Culpa in Contrahendo*. The Regulation prescribes that the concepts dealt with in Chapter III are of neither contractual nor tortious character[48], which seems to imply a nature *Sui Generis*. The Commission[49]has taken the view that respective uniform conflict rules must take into account the divergences in the substantive rules of the Member States and avoid technical terms. Thus, the ambit of Chapter III as a whole must be constructed autonomously, even though this is expressly stated with regard to *Culpa in Contrahendo* only[50]. Accordingly, it will be the task of the ECJ to enliven the autonomous concept behind the mere term of an act performed without due authority in connection with the affairs of another person[51]. Yet, since the final version of what is now Article 11 mirrors the structure of Article 10 (unjust enrichment), the

[47] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter-Rome II).

[48]Recital: 29 of the Rome II Regulation; Article 2(1) of the Rome II Regulation.

[49] In its Proposal for a regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, ('RomeII'), COM(2003) 427 final, 21.

[50] See: Recital 30 of Rome II Regulation.

[51] Case of ECJ, C-47/07 P, Masdar (UK) vs. Commission of the European Communities.

differentiation between both concepts has lost significance to some extent [52].

2.2 Scope of Application

2.2.1 Requirements of an obligation arising out of Negotiorum Gestio

1. Relationship between Agent/Intervener and Principal Caused by Unauthorized Intervention - Apart from demanding an act performed without due authority in connection with the affairs of another person, the regulation does not offer any definition of *Negotiorum Gestio*. With regard to Article 9(4) of initial proposal[53], which dealt with *Negotiorum Gestio*, the Commission had initially distinguished between measures of 'assistance' and measures of 'interference'. Measures of assistance were described as 'one-off initiatives taken on an exceptional basis by the "agent"', who acted in order to preserve the interests of the "principal"'. Those were contrasted with 'measures of interference in the assets of another person, as in the case of payment of a third party debt'[54]. However, while these explanations may still serve as exemplification, the distinction has become obsolete: It reflects the discarded differentiation in article 9(4) of the proposal between *Negotiorum Gestio* in general and actions performed without due authority relating to 'the physical protection of a person or of specific tangible property'. Nevertheless, it can be derived that *Negotiorum Gestio* is a relationship between agent/intervener and principal caused by an intervention affecting the affairs of the principal without due authority.

2. Benevolence of the Agent/ Intervener or Performance of a duty of the Principal - The wording of Article 11 leaves open the question whether Article 11 requires benevolence, i.e. that the agent/intervener was motivated to intervene by his intention to further the interests of the principal, which requires the knowledge of the agent/intervener that his action was going to affect another's affairs[55]. Even though this is not expressly stated, the Commission initial description of measures of 'assistance', the traditions of the Member States[56] and the definition of benevolent intervention provided by the DCFR[57](V- 1:101: Intervention *to benefit* another) affirm

[52] There is, however as we have explained *ut supra*, a relevant difference between Art.10(3) and Art. 11(3).

[53] In its Proposal for a regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, ('RomeII'), COM(2003) 427 final.

[54] In its Proposal for a regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, ('RomeII'), COM(2003) 427 final.

[55] Rushworth A, and Scott A, 'Rome II: Choice of Law for Non-Contractual Obligations'. LMCLQ, 2008. Pg. 274, 288. A mere mistake about the identity of the true principal does not seem to be relevant in any case.

[56] Von Bar, Christian. Benevolent Intervention in Anothers Affairs. Principles of European Law. (March 2006). Pg.54.

[57] Von Bar, Christian. Draft Common Frame of Reference (DCFR) Outline Edition, Sellier European Law Publishers 2009, *et al.*

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such requirement in principle[58]. Accordingly, substantive rules addressing the case of someone knowingly affecting another's affairs solely to advance his own interests fall outside the scope of article 11[59]. However, there remains some incertitude as to the possibility that the agent/intervener acts to promote not only the interests of the 'principal' but his own interests as well. The cases may be rare. Rushworth and Scott[60], for example, argue that someone who discharges another's debt secured by an encumbrance to the prayers property acts purely selfishly. Yet, it does not seem necessary to *a priori* exclude claims, say, of the adolescent, who repairs the car he has usurped for a joyride. Finally, it is contended that benevolence is redundant where the agent/intervener acts in order to perform a duty of the principal where this performance is in public interest[61].

3. Justified and Unjustified Benevolent Intervention - Amongst the legal orders of the Member States one can find the differentiation between justified and unjustified benevolent intervention[62]. Criteria may be whether the intervention was reasonable/ unreasonable, contrary or in accordance with the principal's actual or assumed will and/or his interests. Since it does not seem functional to develop an autonomous standard of jurisdiction, unjustified benevolent intervention should be assumed as falling within the ambit of Article 11[63].

4. Kinds of Obligations Covered - Article 11 comprises obligations between the agent/intervener and the principal but not the claims of third parties against agent/intervener or principal[64]. In spite of the wording of paragraph 2 ('event giving rise to the damage',) the conflict rule for *Negotiorum Gestio* not only encompasses claims of the principal against the agent/intervener for the compensation of damages (this is even disputed with regard to bodily injuries and damages to physical

[58] As assumed by: -Dickinson A, The Rome II Regulation The Law Applicable to Non-Contractual Obligations (OUP 2008), para.11.05;

-Rushworth/ Scott. LMCLQ 2008. Pg. 274, 278;

-*Wendelstein*, *Christoph.* Zeitschrift für das Privatrecht der Europäischen Union. GPR 2014, 46, 47.

[59] See also:
-Rushworth/Scott, LMCLQ 2008. Pg. 274, 278;
-Professor Dr. Heinrich Dörner, Art. 11 Rome II, in Nomos Handkommentar Bürgerliches Gesetzbuch (7th ed.2012), para.2;
-Huber, Peter and Ivo, Bach. Art 11 Rome II, in Rome II Regulation (Huber ed., 2011), para. 2;
-Jakob, Dominique and Picht, Petter. Art 11 Rome II, in Europäisches Zivilprozess- und Kollisionsrecht (Rauscher ed., 2011) para. 13;
- Thorn, Karsten. Art.11 Roma II, in Bürgerliches Gesetzbuch (Plandt ed., 73th ed. 2014), para.2

[60] Rushworth/Scott, LMCLQ 2008, 274, 278

[61] Cf. V.-1:102 DCFR.

[62] Von Bar, Benevolent Intervention in Anothers Affairs (2006). Pg.61, *et seq.*

[63] See also:
-Dickinson. The Rome II Regulation (2008). para.11.07;
-Plender R, and Wilderspin M. The European Private International Law of Obligations (3rd ed, Sweet and Maxwell 2009). para. 25-019;
-Rushworth/Scott. LMCLQ 2008. Pg. 274, 278;
-Wendelstein. Das Statut der GeschäftsührungohneAftrag in Nothilfefällen, Zeitschriftfür das Privatrecht der Europäischen Union-GPR 2014.

[64] Dickinson. The Rome II Regulation (2008), para.11.05

property[65]). Caused by the intervention but also claims to recover benefits received as well as antipodal claims of the agent /interveners against the principal for the reimbursement of expenditure[66].

2.3 The Applicable Law

2.3.1 *Order of Priority of the Connecting Factor*

Article 14 (Freedom of Choice) takes priority over Article 11 with regard to a subsequent choice of law agreement. Spickhoff discusses as an example of a possible tactic subsequent choice of law agreement the situation of a medical treatment of an unconscious patient who lets the continuation of the treatment happen after having recovered consciousness and legal capacity. Furthermore, Article 11 is not applicable to non-contractual obligations arising from an infringement of an intellectual property right (Article 13). If no effective choice of law has been entered into, Article 11(1) by way of secondary connection refers to the law that governs ‘a relationship existing between the parties, such as one arising out of a contract or a tort/delict, if there is a close connection between this relationship and the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person. In case those requirements are not met, paragraph 2 identifies as applicable law, the law of the country in which both parties have had their habitual residence when the event giving rise to the `damage' occurred. If neither the requirements of paragraph 1 nor those of paragraph 2 are met, paragraph 3 refers to the law of the country in which the act was performed'. Finally, paragraph 4 prescribes that 'where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country' shall be applied. This escape clause supersedes all other connecting factors of Article 11. Still, the question, whether the non-contractual obligation is manifestly more closely connected with another country, can only be answered in comparison to the country whose law otherwise would be applicable according to Article 11(1)-(3). Hence, the la which is *prima facie* applicable pursuant to Article 11(1)-(3) has to be determined first.

2.3.2 *Special Relationship between the Parties*

1).General Requirements/Kinds of Relationships Covered - According to Article 11(1) a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another which 'concerns' (is closely connected with) a relationship existing between the parties shall be governed by the law that governs that relationship. In principle the parties to the relationship concerned must be identical with the parties to the non-contractual obligation (intervener/agent and person with

[65]Wendelstein. Das Statut der GeschäftsührungohneAftrag in Nothilfefällen, Zeitschriftfür das Privatrecht der Europäischen Union-GPR 2014.

[66]Rushworth/Scott. LMCLQ 2008. Pg. 274, 278

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regard to whose affairs the intervention was carried out - principal)[67]. However, the underlying *ratio* of paragraph 1 seems to be also applicable to certain multi-party constellations, i.e. when somebody pays another's debt. Article 11(1) specifies contract and tort/delict as examples of a relevant 'relationship'. While the English and the corresponding French wording are broad enough to cover mere factual relationships, the German text speaks of a `legal relationship' (Rechtsverhältnis). Anyway, since Article 10(1) relies on the technique of secondary connection, the closely connected relationship must be of a kind for which there is a distinctive conflict rule. This can be said for relationships that as such may give rise to rights or duties[68] and the rights/obligations resulting from them. Accordingly, paragraph 1 seems to also cover relationships in the field of the law of succession or family law, for example, maintenance obligations[69]. However, the Commission - in consideration of the secondary connection technique - has argued that non-contractual (tortious) obligations arising out of family relationships, matrimonial property regimes or succession are excluded from the scope of the Regulation according to Article 1(2) (a) and (b)[70]. Joint Property qualifies as a relationship in terms of paragraph 1 between the joint proprietors[71]. The secondary connection may also apply to an assumed but in fact void contract. However, if the intervener attempted to fulfil an assumed contractual obligation owed to the principal while the contract in fact was void, regard is to be had to Article 12(1) (e) Rome I (cf. Article 27). Given our general considerations, according to which the requirements of Article 11(1) be met by a relationship that can give rise to obligations and therefore is subject to a distinctive conflict rule, an obligation arising from unjust enrichment (cf. Article 10) theoretically could constitute a legal relationship in terms of the conflict of rule for obligations arising from unjust enrichment nor an obligations arising from unjust enrichments amounts to a relationship in terms of Article 11(1) Thus, (only) in case there is another relationship 'concerned', Article Article11 (1) will apply in unison.

2). Contract. - If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another concerns a contractual relationship, it shall be subject to the law that governs the contract. This can understood as referral to the Rome I Regime (Articles 3 et seq. Rome I[72]). The secondary connection may especially become relevant if the performance exceeds what the intervener/agent was

[67] Cf. Légier, Gerard. Le règlement 'Rome II' sur la loi applicable aux obligation non contractuelles, La SemaineJuridique- Edition generale 2007. Pg. 13, 28.

[68] Junker, Art 10 Rome II, in Münchener Kommentarzum BGB Vol.10 (Rebman, Säcker and Rixeckereds, 5th ed. 2010), para.16.

[69] Cf. the considerations in that direction by Huber/Bach, Die Rom II-VO, IPRax 2005, 73, 80; Thorn, Art.11 Rome II, in Palandt, para.5.

[70] In its Proposal for a regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, ('RomeII'), COM(2003) 427 final

[71]Thorn, Art.11 Rome II, in Palandt, para.5.

[72] As on December 2009, cf. Art 28 Rome I Regulation.

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obliged to according to his contract with the principal[73]. If, by contrast, the performance was intended to fulfil an assumed but in fact void contract, Article 12 (1) (e) Rome I applies (cf. Article 2).

3). Voluntary Payment of Another's Debt - There is no express provision for multi-party constellations, especially the situation that somebody pays another's debt. The question, whether the obligation is fulfilled, is governed by the law applicable to the obligation[74] (cf. Article 12(1) (b) Rome I). A payment carried out by a third party typically raises the question of legal subrogation, which is addressed by Article 19 and Article 15 Rome I. If the payer was under no obligation to satisfy the creditor, his payment may also raise the question of unjust enrichment. However, it has been contended that an obligation resulting from unjust enrichment does not amount to a relationship in terms of Article 11(1). If a payment has been carried out purely voluntarily, which means especially without regard to a relationship in terms of paragraph 1 (typically a contract) between the debtor and the payer, paragraph 1 *prima facie* does not apply[75], since the obligation satisfied does not itself constitute a relationship between the two. However, the underlying *ratio* of Article 11 (1) is that a claim based on *Negatiorum Gestio* should be subject to the law that governs the legal relationship with regard to which the benevolent intervention was carried out. Insofar the claims of the purely voluntary payer against the debtor should be subject to the law that governs the satisfied obligation[76]. This obligation is 'concerned' insofar as the payer wanted to fulfil it and the respective defendant is a party to it. There should not be great concern as to whether this result can still be achieved by way of a broad teleological interpretation of Article 11(1)[77], because otherwise it can be based on Article 11(4)[78].

4). Tort/Delict - The secondary connection with regard to tort/delict is delicate. Some scholars point out that a relationship of benevolent intervention may be more significant than the one resulting from tort or delict[79]. Insofar one has to bear in mind that a benevolent intervention may amount to a defence with regard to tort[80]. That an intervention was aimed at the prevention of hazards, for example, may be taken as a reason to change the standard of care owed towards the principal[81]. By contrast, some authors consider whether all obligations between agent/intervener and principal resigning from benevolent intervention can be understood

[73]Cf. also Brière, Carine. Le règlement (CE) n° 864/007 du 11 julliet 2007 sur la loi applicable aux obligationisnon contractuelles ('Rome II'), J.dr.int. 2008. Pg. 31, 50.

[74]Einsele, Das Kollisionrecht der ugerechtfertigenBericherung, JZ 1993, 1025, 1026.

[75] As concluded by Benecke, Auf demWegzu 'Rom II', RIW 2003, 830, 832.

[76]Sonnentag, ZVglRWiss 105 (2006), 256, 305.

[77]As assumed by Nehe, IPRax 2012, 136, 139.

[78]As assumed by [78] Junker, Art 10 Rome II, in Münchener Kommentarzum BGB Vol.10 (Rebman, Säcker and Rixeckereds, 5th ed. 2010), para.8.

[79]Thorn, Art.11 Rome II, in Palandt, para.5.

[80] Dickinson, The Rome II Regulation (2008), para.11.08

[81]Cf. §680 BGB (German Civil Code)

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as *a priori* falling within the ambit of Article 11[82]. Namely *Wendelstein* suggests a characterization of claims for damages resulting from bodily injury and violation of physical property as tortious[83]. Others discussions whether harmonious results can be achieved by a contrariwise secondary connection according to Article 4(3) with regard to tort-based obligations between intervener and principal[84]. However, while the latter thought may be plausible as to justified benevolent intervention, it seems less compelling with regard to unjustified benevolent intervention. By contrast, the secondary connection according to Article 11(1) would seem perfectly adequate with a view to substantive rules addressing the case of someone knowingly affecting another's affairs solely to advance his own interests. Yet, it has been already contended that such rules fall outside the scope of Article 11 altogether. If the tortfeasor preserves goods after having deprived the victim of them, potential obligations of the victim to reimburse expenses resulting from benevolent intervention of the tortfeasor concern their tortious relationship in terms of Article 11(1).

2.3.3 *Common Habitual Residence (Paragraph 2)*

The common habitual residence rule in Article 11 (2) was obviously inspired by Article 4(2). Yet, Article 11(2) by contrast to Article 4(2) is a mere fall back provision. Paragraph 2 refers to the law of the country in which the parties have their common habitual residence at the time when the event giving rise to the 'damage' occurs on condition that the applicable law cannot be determined according to Article 10(1). This is the case when either there is no relationship in terms of paragraph 1 or the obligation arising out of the benevolent intervention does not 'concern' (is not closely connected with), such an existing relationship. For the purposes of paragraph 2, the term ‘parties’ means the intervener/agent and the person in connection with whose affairs the intervention was carried out (principal). The autonomous concept of habitual residence is (partly) defined in Article 23. Article 11(2) furthermore deviates from the general rule for torts insofar as it defines as the relevant moment the time when the event giving rise to the `damage' occurs. However, while the concept of *Negotiorum Gestio* may cover a claim of the principal against the intervener with respect to damages caused by the intervention, a benevolent intervention can also trigger a claim of the intervener for reimbursement of expenditure. Yet, thanks to an atrocious technique of definition, this may give rise to conceptual irritation[85] but does not constitute a technical problem: Article 2(1) declares that the term 'damage' shall cover

[82] Dickinson, The Rome II Regulation (2008), para.11.08
[83]Wendelstein, Das Statut der GeschäftsührungohneAftrag in Nothilfefällen, Zeitschriftfür das Privatrecht der Europäischen Union-GPR 2014.46, 47.
[84]Thorn, Art.11 Rome II, in Palandt, para.5.
[85] Wagner, G. Die neue Rom II-Verordnung, IPRax 2008, 1, 11, who recommends a ‘correlative interpretation’.

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any consequence arising out of *Negotiorum Gestio*[86]. In other words, expenditures qualify as 'damages' [sic] in terms of paragraph 2 as long as the obligation to reimburse them arises out of *Negotiorum Gestio* in terms of paragraph 1. Insofar, the relevant moment is when the intervener makes expenditures[87].

2.3.4 *Place where 'the Act' Was Performed (Paragraph 3)*

If the applicable law can be ascertained neither by way of the secondary connection technique employed by paragraph 1 nor by recourse to a common habitual residence in terms of paragraph 2, paragraph 3 gives relevance to the law of the country in which 'the act was performed'. There is some incertitude regarding the case that the place of execution differs from the place of effect, for example, an agent/intervener situated in state A makes a phone call to initiate the reparation of the roof of a house located in state B.

Especially with regard to its French version *(`pays danslequel la gestiond'affairess'estproduite'),* the wording of Article 11(3) is inconclusive, which calls for a teleological interpretation. In the given case only the location of the object or person that receives help seems to be significant, while the location of the person making the phone call could be anywhere and therefore is subject to possible manipulation. This consideration finds a backing in the process of law making: The phrasing chosen for the final version results from the abandonment of the differentiation between *Negotiorum Gestio* in general and `measures of assistance' (as envisaged by Article 9(4) of the initial proposal[88]. It was intended to abolish the privilege of the principal with regard to *Negotiorurn Gestio* in general (relevance of his habitual residence), which does not suggest the intention to privilege the agent/intervener beyond what was initially envisaged for 'measures of assistance'. Insofar the Commission had argued that the special protection deserved by an agent who 'acted in order to preserve the interests of the "principal"' (merely) `justifies a local connection to the law of the property or person assisted"[89]. Thus, it is the place of effect of the performance that matters". However, with special regard to the payment of another's debt via transnational money transfer, Heiss and Loacker prefer to give relevance to the place of execution and to disregard the place where the obligation was fulfilled[90]. The reference to the place of performance furthermore rises questions with regard to successive acts of a cross-border intervention, for example, a transnational transport of the victim of an accident.

[86]Brière, Le règlement (CE) n° 864/007 du 11 julliet 2007 sur la loi applicable aux obligationisnon contractuelles ('Rome II'), J.dr.int. 2008, 31, 39.

[87] Junker, Art 10 Rome II, in Münchener Kommentar zum BGB Vol.10 (Rebman, Säcker and Rixeckereds, 5th ed. 2010), para.1.

[88] In its Proposal for a regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, ('RomeII'), COM(2003) 427 final

[89] Ibid

[90]Heiss/Loacker, Die Vergemeinschaftung des Kollisionrechts der außervertragglichen Schuldverhältnisse durch Rom II, JBI 2007, 613, 643.

Insofar it seems to be reasonable to avoid *dépeçage*, i.e. to subject the whole benevolent intervention to one law only[91] - if one deems necessary by recourse to Article 11(4). One solution may be to ask where the benevolent intervention was substantially performed or had its centre of gravity. However, the more technical application of the law of the country in which the performance started seems to be suited best to promote legal certainty. Article 18 of the Commission's initial proposal[92] stipulated that a ship on the high seas which is registered in a state should be treated as being the territory of that state. However, this rule has been omitted without substitution in the final version of the Regulation. Accordingly, Article 11(3) seems to be inoperable with regard to measures of salvage in international waters' even if one assumes the saved ship as the place of performance. Albeit this technical question, the nearest suggestion for the most significant relationship are either the registration or flag state of the saved ship or its home port.

2.3.5 *Manifestly Closer Connection (Paragraph 4)*

According to the escape clause contained in paragraph 4, the law that is referred to by paragraphs 1, 2 and 3 is to be displaced if it is clear from all the circumstances of the case that non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with another country. The Regulation does not define a manifestly closer connection. The example given by article 4(3) a pre-existing relationship between the parties, such as a contract is irrelevant for the interpretation of paragraph 4, because paragraph 1 which precedes paragraphs 2 and 3 already gives a relevance to a relationship existing between the parties, such as one arising out of a contract or tort/delict. The broad scope of paragraph 1 therefore significantly curtails the relevance of Article 11(4). However, one has to bear in mind multi-party constellations, for example, when somebody voluntarily pays someone else's debt, since the obligation satisfied does not constitute a relationship between the payer and either the creditor or the debtor. If the ECJ will not follow a broad theological interpretation of paragraph 1 with regard to the requirement of a relationship between the parties, recourse should be had to paragraph 4 to achieve a secondary connection[93]. A displacement of the connection provided by paragraph 3 may be considered when the agent has preserved/improved goods in transit. With regard to benevolent intervention carried out successively in several states. In case of a benevolent intervention which was performed away from any country's territory and which does not fall within the ambit of paragraph 1 or 2 already, at least the *ratio* of paragraph 4 applies, even though one may dispute that the requirements of its wording- the law of a country other

[91]Contrary view Nehe, IPRax 2012, 136, 140.

[92] In its Proposal for a regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, ('RomeII'), COM(2003) 427 final

[93]As assumed in : Prütting, Hans; Wegen, Gerhard; Weinreich, Gerd. BGB Kommentar. See O. Fehrenbacher, para. 6. Luchterhand 2010.

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than the indicated in paragraphs 1, 2 or 3- are met[94]. The question may especially become relevant with regard to a ship on the high seas.

CONCLUSION

Based on the *ut supra* analyses, we have deduced some main characteristic of the Albanian material civil legislation and private international law in comparison with the EU legislation focusing on Rome II Regulation regarding *Negotiorum Gestio*.

Firstly, according to the definition of the *Negotiorum Gestio* institute, Albanian Legislator has characterized as *Quasi Ex Contractu Nascunter* that is in the same line with the jurisprudence and the doctrine of European Private International Law according to Rome II Regulation. So the material scope or the substantive legal framework is quite harmonized. *In haec Verba*, Europeanization of Private International Law is a process which is participating more and more within Albanian legal system. Because divergences among legal frameworks of member states in EU level for the purposes of the harmonization process are present.

Secondly, we pretend to have a unified group of norms, which contribute in determination of the applicable law regarding *Negotiorum Gestio* in Rome II Regulation also in the Albanian Private International Law.

Thirdly, Albanian Legislator is definitely inspired by EU Legislator and has determined the "proximity" principle as an escape clause to give more flexibility to the determination of the applicable law in the situation of a legal collision. The manifestly closet connection is a connecting factor that we have found also in other EU Regulations. So EU Legislator and the Albanian Legislator have had the same aim to achieve.

Finally, the creation of unified group of norms for determination of the applicable law in the conflict of law situations contributes in eliminating the *forum shopping* effect. Although it is questionable whether forum shopping affects *Negotiorum Gestio*, regarding the first connecting factor, the answer is positive.

Based on this modest scientific research paper, we as co-authors are aiming to provide a contribution in analysing the *Negotiorum Gestio* institute in comparison with European Private International Law as an ever evolving field.

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THE IMPORTANCE OF TRADEMARKS AS VALUE ASSETS FOR COMPANIES' DEVELOPMENT – MACEDONIAN AND COMPARATIVE PERSPECITVE

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ABSTRACT

Trademarks are treated as very important assets to the companies' portfolio. Nowadays, trademarks can have higher value then the value of a gross domestic product of many countries. Intellectual property rights in general, and trademarks in particular are an important segment of any business. In theory and in practice it is accepted that trademarks are characterized as intangible assets. In this paper the authors are arguing two main issues. The first part is analysing the models for measuring the value of a trademark. In the second part, the authors are arguing that one of the preconditions for using the economic value of a trademark is establishing an efficient system of registration of trademarks which will ensure legal certainty and legal protection. Furthermore, in the second part, the authors are observing the Macedonian model of trademark registration, in comparison with the global trends concerning trademark registration.

Key words: trademark value, asset, return from royalty method

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1 Trademarks as value asset for development of companies – models of valuation

1.1. Trademark as asset – comparative view

In general the trademarks are used for identification and personalization. As it is said by leading marketing experts in that filed the personality of trademarks „help consumers relate to the products" or companies.[3] Therefore generally it is accepted that „trademarks are important to the companies because they protect brands that enable consumers to identify the products of the company and to distinguish them from those of competing businesses"[4].

It is wide accepted that „at its essence, a trademark is an economic tool to help consumers to assess the quality of goods and services in making a purchase decision based on the reputation of the manufacturer or the seller".[5] Creating a brand and its establishment on the market, is highly competitive and it is very time consumptive. What takes even longer is the maintenance of the brand over time and staying relevant in the public eye.[6] In theory it is written that „a company's success in establishing a recognized trademark depends to a large degree, of course, on its reputation for quality products or services".[7] In connection with that issue, some authors are also underlining the extensive and costly advertising needed for development and maintaining of trademarks.[8] According to the U.S. Patent and Trademark Office (USPTO), a trademark is "a word, phrase, symbol or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others."[9] Under the Trademark Act of 1947 (the Lanham Act) a trademark is defined as „any word, name, symbol, or design, or any combination thereof, used in commerce to identify and distinguish the goods of one

[3] Creation of personality of brand means making that brand unique. In that sense, developing a brand's personality is about crafting the consumer's interaction with the brand. By doing that, the consumer's are having certain feeling when they use certain product or service. See: „Brand Personality", in „Trade Mark Advertising" (blog), available on http://www.trademarkads.com/services/branding/brand-personality, accessed on 15.8.2016 and „Personality trademark", available on http://www.callrid.com/guide/advertising/personality-trademark.html, accessed on 18.8.2016. For the historical background of the process of conceptualization of the trademark as property see: Bently Lionel, „From communication to thing: historical aspects of the conceptualization of trademarks as a property", in Dinwoodie Graeme, Janis Mark, (editors) „Trademark Law and Theory: A Handbook of Contemporary Research" Edward Elgar publishing Limited, 2008, pp. 3-42.

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[8] Ibid.

[9] Johnson Lisa, op.cit.

manufacturer or seller from those of another and to indicate the source of the goods"[10]. The legal protection of trademarks in USA can be traced in 1870 when first federal trademark regulation was passed by the Congress.[11] Legal protection for every organization's intellectual property includes not only knowing how to trademark a business name, but making sure to trademark a logo and trademark a slogan.[12]Trademark law has three main requirements[13] for establishing a valid trademark right: 1) a trademark can be any sign that is capable of being represented graphically, 2) the second requirement is distinctiveness, which means that customers are able to recognize a sign as being a trademark and distinguish it from other trademarks within an appropriately defined product category and 3) the third requirement concerns absolute grounds for refusal and, for example, guarantees that generic words or signs cannot be registered. There exist some examples of trademarks that appear to have indefinite remaining useful lives, such as the Coca-Cola trademark which is more than 120 years old, and the Coca-Cola Company may well continue to maintain the market for its sugary drinks for another 120 years.[14] With the same importance is the role of the trademark as asset. For the development of the companies, the role of the trademark as asset is playing a crucial role. Trademarks are part of the group of intangible assets[15]. An intangible asset is an asset that is not physical in nature.[16]

The theory in the group of *corporate intellectual property*, are including items such as patents, trademarks, copyrights and business methodologies, are intangible assets, as

[10] Elmore John, op.cit.

[11] In 1879 the U.S. Supreme Court found that legislation unconstitutional. Two subsequent attempts at federal trademark legislation provided littleprotecti on for the rights of trademark users. The movement for strong er trademark legislation began in the 1920s, and waschampion ed in the 1930s by Representative Fritz Lanham, of Texas. In 1946 Congress passed the act and named it theLanham Act aft er its chief proponent. Lanham stated in 1946 that the act was designed "to protect legitimate business andthe consumers of t he country." The Free Dictionary, available on http://legal-dictionary.thefreedictionary.com/Lanham+Act+of+1947, accessed on21.7.2016.

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[13] Dander Philipp, Block Joern, op.cit. For general characteristics of trademarks see also: Dinwoodie Graeme, Janis Mark, (editors) „Trademark Law and Theory: A Handbook of Contemporary Research" part I and part II, Edward Elgar publishing Limited, 2008

[14] Elmore John, op.cit.

[15] The most of intangible assets share a majority of the follow characteristic: 1) the assets must be identifiable, within the specific company or context, as well as identifiable in general sense, 2) the intangible assets can be legally owned, 3) the birth and development of the intangible assets must be able to be traced, 4) the intangible assets can be protected, 5) there should be some proof of its existence in the form of a contract, register, database, etc., 6) the intangible assets has a lifespan that can be determined and/or a specific lifespan that can be renewed (e.g. renewal of trademarks every 10 years), 7) the intangible assets have similar or comparable assets to be found elsewhere in the marketplace or in other companies and 8) the value of intangible assets can be quantified. See: Anson Weston, Drews David, „The Intangible Assets Handbook: Maximizing Value from Intangible Assets", American Bar Association, 2007, pp. 2-3. See also: Cohen Jeffery, „Intangible Assets: Valuation and Economic Benefit", John Wiley and Sons, 2011. . For certain aspects of intellectual property in the Republic of Macedonia see more: Дабовиќ Анастасовска Јадранка, Пепељуговски Валентин, „Право на интелектуална сопственост", Академик, 2012.

[16]Investopedia, available on http://www.investopedia.com/terms/i/intangibleasset.asp, accessed on 14.8.2016.

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are goodwill and brand recognition.[17] According to the Legal Dictionary, intangible asset is a „property that is right such as patent, copyright or trademark, or one that is lacking physical existence, such as goodwill"[18].

General topic covering the issue is known as „ propertization of trademark", for which there is no wider accepted definition. For one definition „ propertization of trademark" means „shift in trademark law away from confusion-based protection and towards a property-based regime that is focused only superficially on consumers"[19], while for other it means „move towards a civil law based system, "where the trademark itself is considered subject to property ownership," and away from the common law origins of the U.S. system"[20].A trademark is recognized on a reporting companies balance sheet as an intangible asset separate from the goodwill because it satisfies either of the following two tests under the paragraph 2-5-5 of the Accounting Standards Codification: 1) it arises from legal rights (a trademark is essentially a bungle of rights) or 2) it is capable of being sold, transferred, and licensed separate from other assets of the acquiring company.[21] According to the ranking done by Forbs the most valued brand in the world in 2016 is Apple with worth of 154 billion US dollars[22].

Table 1: Value of the trademark and company market capitalization

	Value of the trademark[23]	Company market capitalization (number of shares times share price)[24]
Apple	154	725
Google	82	375
Microsoft	75	334
Coca-Cola	58	177
Facebook	52	231
Toyota	42	239
IBM	41	159
Disney	39.5	178
McDonald's	39.1	94
General Electric	36	250
Total	618.6	2762

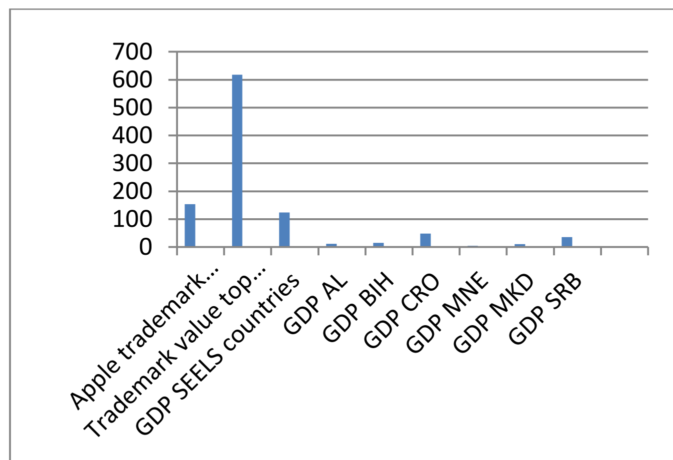
[17] Ibid.
[18]Legal Dictionary, available on http://legal-dictionary.thefreedictionary.com/Intangibles accessed on 14.8.2016.
[19] Karol Peter, „The Constitutional Limitation on Trademark Propertization", available on http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1556&context=jcl, accessed on 22.8.2016.
[20] Ibid.
[21] Elmore John, op.cit.
[22] „The World's Most Valuable Brands", Forbs, available on http://www.forbes.com/powerful-brands /list /#tab:rank, accessed on 15.7.2016.
[23] Ibid.
[24] „Global top 100 Companies by market capitalization", PriceWaterhauseCoopers, available on https://www.pwc.com/gx/en/audit-services/capital-market/publications/assets/document/pwc-global-top-100-march-update.pdf, accessed on 17.8.2016.

To illustrate the importance of the process of development of trademark and its treatment as an asset, (since there are no available data for the value of the Macedonian trademarks), we chose to make comparison between the value of the 10 top world's trademarks and the gross domestic product of the countries which are part of the South East European Law School Network. For the analysis we used data from Forbs (for the value of the trademarks), World Bank (for the gross domestic product of the selected countries) and PriceWaterhouse Coopers (for the market capitalization of the companies). The result of the comparison is very interesting. The value of the Apple ® is higher than the total gross domestic products of all SEELS member countries. The total value of the top 10 world's most valuable trademarks is 5 times higher than the total gross domestic products of all SEELS member countries. The value of the Apple ® in comparison to Macedonian gross domestic product is 15 times higher. Form those figures we can conclude that development of trademarks in the SEELS member countries and in the whole region can be very important for all stakeholder involved in the regional economy of South East Europe.

Table 2: Gross domestic product of SEELS member countries (in billions US dollars)[25]

Mk	10
Srb	36
Al	11
Bih	15
Mng	4
Cro	48
total	124

Table 3: Comparison between the chosen trademarks and gross domestic products of SEELS member countries



[25] World Bank, available on http://data.worldbank.org/data-catalog/GDP-ranking-table, accessed on 15.8.2016.

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1.2. Measuring the value of trademark – models which are prevailing

The measuring process of the value of the trademark is very important for many reasons. This process is characterized with many specifics.[26] This is coming from the nature of the trademark as intangible asset. Two methods are commonly used for value intangibles: 1) the residual technique (where identifiable intangibles such as patents have a finite economic life) and 2) the excess income method (where identifiable intangibles such as trademarks and unidentifiable intangibles such as commercial goodwill have a perpetual economic life).[27] In other words, the single most important element affecting a trademark's value or other intangibles with indefinite economic lives is the property's earning power.[28] The literature is identifying a myriad of reasons why analysts would be asked to value a trademark.[29] Those reasons often fall into one of three buckets: 1) valuation for transactional purposes other than tax compliance; 2) valuation for financial accounting purposes and 3) valuation for income tax and other tax compliance purposes.[30]To measure the value of the trademark, first very important step is to determine the indicators that inform about the trademark value which in general are including: the breadth of trademarks, clamed seniorities, and oppositions logged against others and oppositions received from rivals.[31] Three generally accepted valuation approaches are employed by valuation analysts to estimate the value intangible property, including trademarks which are 1) the cost approach, 2) the market approach and 3) the income approach. [32]The cost approach is less commonly used to estimate the value of trademarks than the other approaches.[33] This is because the concept of cost is ordinarily not the same as the concept of value.[34]

While using the cost method to estimate the cost spent to develop the trademark it is important that the calculation

[26] For more see: Block Jorn, Fisch Christian, Sander Philip, „Trademark Families: Characteristics and Market Value", Journal of Brand Management, 2012, aviable on http://papers.ssrn.com/sol3/ papers.cfm?abs tract_id=1989424, accessed on 2.9.2016.

[27] Pavri Zaer, op.cit. For valuation of intellectual property rights see also: European Commission, „Final Report form the Expert Group on Intelectual Property Valuation", 2013, aviable on https://ec.europa.eu/research/innovation-union/pdf/Expert_Group_Report_on_ Intellectual_Pr operty_Val ua tion_IP_web_2.pdf, accessed on 17.8.2016, pp. 12-22; and Chaplinsky Susan, „Methods of Intelectal Property Valuation", Univesrity of Virginia, aviable on http://faculty.darden.virginia.edu/cha plinskys/ PEPortal/Documents/IP%20Valuation%20F-1401%20_watermark_.pdf accessed on 18.8.2016.

[28] Ibid.

[29] Elmore John, op. cit.

[30] Ibid.

[31] Dander Philipp, Block Joern, op.cit.

[32] The value can be defined as „the present value of the future benefits to be delivered to the owner of the property". Therefore the valuation needs to quantify the future benefits and then calculate their present value. Gordon Smith, „Trademark Valuation", John Wiley and Sons, 1997, pp. 19-20. See also: Stefanovski Ljubisha, Rafajlovski Gjorgi and Naumovski Goce, „Trademark Valuation – Managing Intelectual Property for Strategic Marketing and Finanacial Benefits", conference paper, 2014, avialbe on https://www. researchgate.net/publication/288303763, accessed on 3.9.2016.

[33] Elmore John, op. cit.

[34] Ibid.

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of the cost, which usually is including: a) salary and remuneration of those who engage in trademark development, b) costs of project promotion, c) common costs for clerical staff and trademark professionals, d) raw material used in the development process and e) trademark development costs (fees, etc.).[35] Analysts may use more than one valuation approach, or more than one valuation method of a particular valuation approach, and then synthesize the results of the various analyses. [36]The most accepted model for measuring the value of trademark is the market approach.[37] It measures the present value of future benefits by obtaining a consensus of what others in the marketplace have judged it to be.[38] There are two requisites: 1) an active public market and 2) an exchange of comparable properties.[39]

Because the trademarks are associated with particular products and businesses, sales of trademarks are less common than licenses for their use.[40] The idea behind the market approach is that, by owning a trademark, a company is relieved of the necessity of having to pay someone else a royalty for its use.[41] It follows, therefore, that anyone wanting to obtain the right to this trademark would have to enter into a business arrangement with the original owner.[42] Such arrangements, akin to the licensing of patents, usually entail a royalty payment, generally a percentage of product sales.[43]

The theory behind the relief from royalty method is one of cost avoidance - that is, the value of the trademark is reflected in the trademark license royalty payments the trademark owner avoided having to pay by owning the trademark.[44] In this method, the analyst assumes the actual owner does not own the trademark and, therefore, must pay a hypothetical third party for a license to use it.[45] The hypothetical trademark royalty payment is calculated as a market-derived running royalty rate multiplied by the actual owner's projected revenue over the remaining useful life of the trademark.[46]

Because the relief from royalty method depends on applying the royalty rate to the projected revenue, it

35 Su Henung Kim, „A Study on Valuation on Trademarks", Indian Journal of Science and Technology, available on http://www.indjst.org/index.php/indjst/article/viewFile/77118/59930, accessed on 11.8.2016.
36 Elmore John, op. cit.
37 Gordon Smith, op.cit. pp.19.
38 Ibid.
39 Ibid.
40 As such, there exists a fair amount of publicly available information on trademark licensing, often collected from financial reports filed with the relevant institutions. This information allows the analyst to develop units of comparison for trademarks, most notably a royalty rate Elmore John, op. cit.
41 Pavri Zaer, op.cit.
42 Ibid.
43 The percentage will vary depending on a trademark's strength and visibility and, more specifically, on: a) the product's opportunities in the market, b) the product's integrity: does it do what it claims to do?, c) the security, if any, afforded by a patent, recognizing that most products in the development stage or in a yet-to-be established market have patents to guard against their unauthorized use by competitors and d) the security of supply of raw materials. Ibid.
44 For royalty and trademarks see also: Gordon Smith, op.cit., pp. 159-182, and Gordon Smith, Par Russell, „ Intellectual Property: Valuation, Exploitation and Infringement Damages 2011 Cumulative Supplement", John Wiley and Sons, 2011.
45 Elmore John, op. cit.
46 Ibid.

overlaps with the income approach, and some analysts will characterize this method as an income approach method.[47] The various income approach methods typically employ one or more of the following types of income analysis: a) Relief from Royalty Income, b) Profit Split (or Residual Profit Split) Income, c) Incremental Income and d) Residual (or Excess) Income.[48] Where possible, the primary approach to trademark valuation should be supported by one or both of the following: (1) carryover benefit of past advertising costs[49], or (2) gross profit margin differential[50].[51]

For the valuation of trademark it is important to explain the concept of *remaining useful life,* that reflects (RUL) [52] the period during which a trademark is expected to contribute directly or indirectly to the owner's or licensee's future cash flow. Determining the remaining useful life of a trademark is integral to determining its value under all three generally accepted valuation approaches. Using the cost approach, the RUL of the trademark is a consideration when estimating obsolescence factors, or using the market approach, the RUL of the guideline trademark assets is a factor of consideration for comparability when selecting and applying those guideline assets while using the income approach, the RUL directly influences the timing and duration of future cash flow expected to be generated by the trademark.[53]

Reilly and Schweihs (2013) explain that estimating the RUL of a trademark involves an analysis of a number of pertinent factors, 8 including the following:

1. The expected use of the trademark by the owner or licensee. Where use is closely tied to a particular product or service line, the life cycle of

[47] Ibid.

[48] Elmore John, op. cit. For income based measuring see also: Gream Matthew, „Trademark Valuation: review in January, 2004", available on http://matthewgream.net/Professional/IntellectualProperty/review_trademark-valuation-01-2004.pdf, accessed on 2.9.2016.

[49] This approach, which tries to compute the after-tax worth of future savings in advertising costs, is based on the following premises: a) the estimated cost of recreating the position enjoyed by the trademark's owner at the valuation date. (Remember, although advertising costs are usually a material and essential element in developing and maintaining a product trademark, there are exceptions. For instance, in the pharmaceutical industry, product advertising costs are minimal, but recognition and the significance of product symbols are maintained by a network of salespeople in direct touch with doctors), b) the product symbol in question is established and reliable and c) the establishment, albeit on a purely judgmental basis, of an estimated rate of decline in a trademarks recognition and significance in consumers' minds. Implicit in this approach is the assumption that advertising ceases immediately at the valuation date and that, without further advertising, the prominence of a recognized product in the minds of consumers starts to decline progressively. Elmore John, op. cit.

[50] This approach compares the gross profit margins of a product with an established trademark to a similar .no-name or generic product. The gross profit margin differential is a function of a trademarks reliability and public acceptance, which depends in turn on the products quality. Generally speaking, the greater the public acceptance, the larger the differential. Since the advent of generic products, however, particularly in the food and pharmaceutical markets, consumers have shown strong resistance to the often substantial costs associated with maintaining trademarks (through promotions, advertising and so on) Elmore John, op. cit.

[51] Pavri Zaer, op.cit.

[52] Elmore John, op. cit. For the concept of remaining useful life see also: Mellen Chirs, Evans Frank, „Valuation of M&A: Bilding Value in Private Companies", John Wiely and Sons, 2010.

[53]Elmore John, op. cit.

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the associated products or services should be considered,

2. The expected useful life of another asset or group of assets to which the useful life of the trademark may relate,

3. Any legal, regulatory, or contractual provision that may limit the useful life. A license to use a trademark, for example, generally restricts the useful life to the term of the license, though the option for renewal and the likelihood of exercising that option are also factors to consider,

4. The historical experience of the owner in extending the right to use the trademark and the licensee in renewing such right. Note that market participants would consider the highest and best use of the trademark when making assumptions regarding renewals or extensions,

5. The effects of obsolescence, demand, competition, and other economic factors,

6. Regular maintenance expenditures that would be required to support the expected future cash flow from the trademark. More than maintenance fees for the trademark registration, these expenditures typically include the advertising and marketing required to maintain the impression of the trademark in the mind of the consumers from whom the future cash flow depends.[54]

2 System of registration and protection of trademarks

2.1. Comparative aspects of the system of registration and protection of trademarks

In order a trademark to be registered, the proprietor should file for registration, however, there are number of absolute and relative objections that can be raised against trademarks registrations. The objections might include public policy, morality, and deceptiveness, other enactment of the rule of law, protected emblems and applications made in bad faith. In regard to the relative grounds as a part of the examination process of trademarks, a research is made to show if there is an

[54] In addition, Smith and Parr (2005) explain obsolescence as four distinct factors that influence the RUL of a trademark. These four types of obsolescence are presented with added commentary, as follows: 1. Functional obsolescence: Trademarks suited for specific purposes typically have shorter remaining useful lives than those suited for more general purposes because the risk of obsolescence increases at greater levels of specificity. A trademark associated with an iPad product will tend to have a shorter RUL than a trademark for Apple. 2. Economic or event obsolescence: The remaining useful life of a trademark may be affected by economic circumstances or events outside the course of normal trademark activities. Examples of such events include legislative action affecting the regulatory environment and natural disasters causing long-term disruptions in manufacturing or distribution. 3. Technological obsolescence: A trademark can suffer technological obsolescence when it is tied closely to a product or service with a high risk of being substituted for more technologically advanced products or services. The value of trademarks associated with Smith Corona typewriters rapidly diminished as computer-based word processors became commonplace. 4. Cultural obsolescence: Cultural issues may affect the trademark's remaining useful life. For example, a trademark may become obsolete because it is politically incorrect or offensive. Lay's retired its "Frito Bandito" trademark in the 1970s after complaints that the trademarked mascot invoked an unflattering "Mexican bandit" stereotype — replete with gold teeth and guns — to steal corn chips in Frito's advertisement. Ibid.

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existence of an earlier trademarks. The fundamental principles for protection of the intellectual property are contained in the Paris Convention for Protection of Industrial Property[55] and the international registration procedure on trademarks is regulated by the Madrid Agreement[56] for the International Registration of marks and the Protocol related to the Agreement entitled as Madrid Protocol[57]. The trademark protection in the European Union is regulated by the new directive on trademarks. The new Trade Mark Directive[58] of the European Union was published in the EU Official Journal of 23 December 2015 and the new European Union Trade Mark Regulation[59] was published on 24 December 2015. The new Directive entered into force by mid-January and its transposition into national laws will be made within three years. The new Regulation will enter into force 90 days after its publication, i.e. on 23 March 2016. The grounds for the international registration of trademarks are settled differently depending which of the above mentioned instruments is applicable.

If the Madrid Agreement applies, the ground for international registration may be exclusively the national trademark registered by the office of the country of origin. On the other hand, if the Madrid Protocol is applicable, the basis for international registration may be either the national trademark registered in the office of the country of origin or the national application filed within the office of the country of origin.

Finally, if both instruments are applicable the ground for international registration may be only the national trademark registered in the office of the country of origin. For instance, a citizen of Macedonia, a person with residence on the territory of Macedonia and a legal person who has business establishment in Macedonia, may submit a request for international registration of trademarks. After submitting the application if it is submitted within 6 months since the date of filing the national application, the applicant has a right to request a claim for a right of priority based on national application in accordance with Article 4 of the Paris Convention.

However, after receiving a notice for international registration, every designated country within certain period can object the trademark. Namely, it can be objected within 12 months if the Madrid Agreement is applicable, or 18 months if the Madrid Protocol is

[55] Paris Convention for Protection of Industrial Property, Available at http://www.wipo.int/treat ies/en/text.jsp?file_id=288514.

[56] Madrid Agreement, Available at http://www.wipo.int/treaties/en/registration/madrid/.

[57] Madrid Protocol, Available at: http://www.wipo.int/treaties/en/registration/madrid_protocol/.

[58] EU Trademark Directive, Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CE LEX%3A32015L2436.

[59] EU Trademark Regulation, Available at https://euipo.europa.eu/tunnelweb/secure/webdav/guest/document_library/contentPdfs/legal_reform/regulation_20152424_en.pdf .

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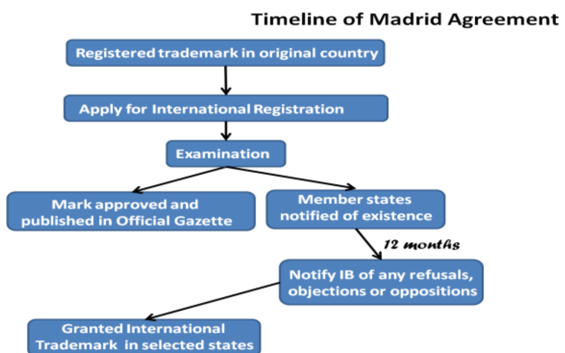
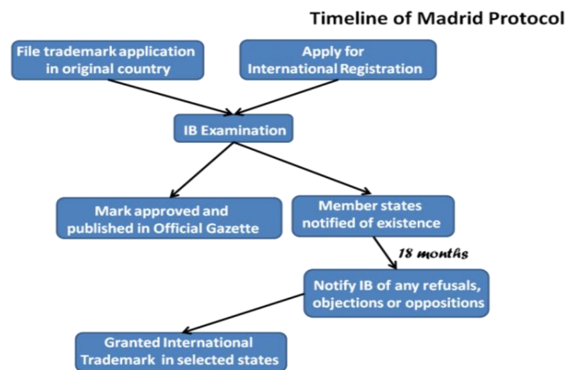
applicable. The following timelines[60] summarize the trademark registration process under the Madrid Agreement and the Madrid Protocol:





Furthermore, every registered trademark is published in the Official Gazette of the International Bureau and inscribed in the International Trademark Register. The protection of the trademark has validity for 10 years and could be extended unlimited number of times only if the proprietor pays the prescribed fees. The World Intellectual Property Organization (WIPO) provides a search engine for registered trademarks. Namely, every registered trademark can be found in ROMARIN[61] on the official WIPO website. When the trademark is registered a holder can require additional territorial extension but only for the goods and services for which the trademark has been registered and under the same terms as filing and application for the international trademark.[62] Thus, after the international registration the trademark does not automatically enter into force in each of the designated country but it is a subject of examination by each national office. That implies that each national office treats the international registration as domestic one and apply all rules and conditions for domestic registration of trademarks. However, not every trademark becomes registered. Opposition is a legal mechanism which is used by a party that wants to oppose a pending trademark application from being granted registration. Usually when filling an opposition, the party believes that its trademark is jeopardized by application for trademark in its pre-grant stage in the gazette, either in print or online. The rules regarding opposition period are from one to three months depending on the legislation concerned. There are many cases where post-opposition occurs, which means opposing the trademark after being registered. Typically, the party that lost the opposition case can appeal the

[60]What is the Madrid Agreement?, Hawk IP, available at http://www.hawkip.com/advice/what-is-the-madrid-protocol.
[61]ROMARIN Database, available at: http://www.wipo.int/madrid/en/romarin/.
[62] Madrid Agreement, Article 1, paragraph 3; Madrid Protocol, Article 2, paragraph 1.

decision to a higher authority whether in court or trademark office. Opposition proceeding can be raised either on absolute or relative grounds. Under absolute grounds the opponent can claim descriptiveness, geographically deceptive misdesciptivness, genericness, functionality, bad faith, fraud etc. Under relative grounds the opponent can claim priority, likelihood or confusion, bad faith, business name/domain, well-known mark etc. [63] Even though there are some exceptions from the above mentioned grounds, in most of the legislations those are the grounds for opposition. Regarding the submission, in many jurisdictions submissions are filled directly to the trademark office or registry. However, in the United States oppositions are filed to the Trademark Trial and Appeal Board[64]. This Board is deciding upon oppositions, cancellations and appeals of final refusals issued by United States Patent and Trademark Office. The opposition procedure within the EU is administered by the European Union Intellectual Property Office or formerly the Office for Harmonization in the Internal Market. The very practical effect of the opposition is to prevent a similar trademark to be registered, however, it is often used for leverage when the opponent seeks a coexistence agreement with the applicant, so the applicant is becoming more flexible regarding the agreement that defines the scope of use of the respective marks. As it can be seen the trademarks take an extensive use around the world.

In fact, when it comes to international registration, the Madrid system and its use continues to grow. To obtain trademark protection in multiple jurisdictions, applicants have the possibility to submit an application through the Madrid route. So the applicants have the opportunity to file many applications to every national office, according the Paris Convention, and multiple application according the Madrid Convention and Protocol. Nearly 47,000 applications were filed through the Madrid system in 2013, and the numbers keep growing in the upcoming years.

The registration and protection of trademarks is specific if observed from the EU perspective and its (non) EU member countries. Namely, after the so called “Brexit” and the referendum in the United Kingdom where it was decided that Britain will leave the European Union it might come to a certain consequences for the UK as well as for the EU market. The EU did not have a certain trademark registration and protection strategy if an existent member country leaves. Thus, the Council Regulation (EC) No 40/94 that created the European Union Trademarks does not have any provisions that are regulating the “exit” of an EU member state. One of the good solutions to this problem will be if the potential

[64]Trademark Trial and Appeal Board, http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab.

applicants file to both the UK Intellectual Property Office and the EUIPO and get a priority right in both institutions. However, there are numerous registered trademarks in the EUIPO that are valid in the UK according to its current membership status. Hence, the UK will have to find a legislative solution perhaps grant automatic conversion to the already registered trademarks.

Finally, if the UK decides to activate article 50 of the Lisbon Treaty[65], the Council of the European Union will have to issue guidelines and withdrawal agreement that will be a subject to a negotiation process and one of the question concerned will be the registration and protection of trademarks.

2.2 Registration and protection of trademarks in the Republic of Macedonia

The Macedonian legislator regulated the trademarks in the Law on Industrial Property (hereinafter: the IP Law). Besides the IP Law, every international treaty ratified in accordance with the Constitution is also applicable. Consequently, if certain issues are not regulated by international treaties, the IP Law shall be applicable.

The section that regulates the trademarks describes the subject of protection. Namely, as stipulated in article 175 of the IP Law, trademarks protect sign that can be shown graphically and is capable of distinguishing goods and services of different market actors. This section in its first articles also highlights the need for distinctiveness of the trademark as a key feature for its further use. Moreover, it stipulates the absolute[66] and relative grounds for refusal[67].

The trademarks can be registered by domestic and foreign physical or legal person. These two categories have an equal treatment when it comes to trademark registration. The trademark application will be considered complete if the applicant submits a request for recognition of a certain trademark, applicant information, description of the sign that need to be protected and a list of the goods and services that need to be protected.[68] Moreover, the registration requires a specific note for every product or service that will be registered. According the Nice Classification, there are 45 classes in total out of which 34 classes are related to products and 11 classes are related to services. The applicant should file a formal application to the Industrial Property Office in Skopje (hereinafter: the Office). Once it is submitted, the Office examines the admissibility and proceeds with examination phase. The office has right to ask the applicant to submit additional documents in relation with the sought protection within 60 days. However, if the application is contrary to some of the absolute grounds stipulated in article 177 of the Law, the office will issue a decision of refusal.[69]

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[65] Lisbon Treaty, article 50, Available at http://eurlex.europa.eu/legalcontent/en/TXT/?uri=CELEX%3A12007L%2FTXT.

[66] Law on Industrial Property, Article 177, Available at http://www.wipo.int/wipolex/en/text.jsp?file_id=175686

[67] Ibid, Article 178 of IP Law.

[68] Ibid, Article 181 of IP Law.

[69] Ibid, Article 192 of IP Law.

In theory and practice the priority right is a key element in the protection phase. Hence, the priority right is obtained at the moment of submitting of the application and it extends to future applications for same or similar goods or services. Furthermore, a legal or natural person that filed for protection to a member country of the Paris Union or WTO can obtain protection in the Republic of Macedonia if he requires priority right within 6 months from the first submission. Moreover, a person that exhibited goods or services at a fair in the Republic of Macedonia or other member country of the Paris Union or WTO can require priority right within 3 months from the first exhibition. As mentioned before, the priority right is the crucial element in the registration procedure and it serves to preserve the holder's right over its trademark.

The trademark protects the owner's rights over the goods and services, however, sometimes its registration is subject to objection by affected parties. The IP Law sets the criteria about who is eligible to file an objection.[70] The final phase is decision by the Office upon granting a registration. If the application fulfils all the legal requirements the Office will grant a registration and will sign the trademark in the central registry. In addition, it is published in the Official Gazette of the Republic of Macedonia within 90 days.[71]

The holder has the right to use the trademark in the everyday trade and to forbid its usage from third persons that are jeopardizing its rights. It also has right to use the symbol ® that refers to a registered trademark. However, it does not have the right to forbid usage of a trademark for certain goods and services that were put previously on the market by the holder itself.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets down minimum standards for the length of protection. According TRIPS the protection sought should not be less than 7 years.[72] However, the Macedonian legislator envisaged a protection of 10 years and an option for unlimited continuation. It is conditioned with continuous usage and formal filing before the protection expiries.

In case of a dispute between the holder and other interested party that filed a request for termination, the holder should prove trademark's usage.

Trademarks' usage can be also transferred to other persons. It is usually done with licensing agreements. Thus, the licensee has certain rights that are written in the central registry. In addition, the licensee rights can be waived only if the person who has the license signs a written consent. It also has the right to become trademark's holder in certain situations, for instance, if the

[70]Ibid, Article 197 of IP Law.
[71]Ibid, Article 203 of IP Law.
[72]TRIPS Agreement, Article 18, available at https://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm#2

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actual holder does not pay the fee envisaged for continuation.[73]

For a proper registration, the potential holder shall pay fees in accordance with the Law on Administrative Fees that has a detailed description of fees for protection of the intellectual creations. Even though the cost of the registration according the Law on Administrative Fees is not high proportionally with an average salary, an informal survey by the American Chamber of Commerce in Macedonia revealed that legal fees associated with properly registering and recording an existing trademark in Macedonia ranges between €300-400.[74]

The protection of trademarks within the country is secured by variety of institutions and agencies depending of the location of infringed products. The national legislative system authorizes the Custom officials, State Markets Inspectorate and Ministry of Internal Affairs to protect the infringed trademarks. In addition, the parties can always challenge the trademark in the regular courts. One of the key authorities is the Coordinative Body for Protection of the Intellectual Property Rights. (Hereinafter: IPR Coordinative body). Its role is to increase the intergovernmental cooperation in the area. The body is comprised of state institution representatives affiliated with intellectual property and its chair is a representative from the IPPO. Having in mind that the IPR Coordinative body is an intergovernmental organization, it does not have direct contact with the business community, however, it tries to increase the informal collaboration.

One of the most effective bodies in fighting the forgery is the Customs. The main focus is to block the transport of counterfeiting products out of Macedonian borders and to block the trade with unknown products. The Customs is working on the behalf of the original owners of the trademarks. Thus, every holder can file a formal request to the Customs to protect his trademark. After filing the submission the holder will be notified within one year upon his request. When suspicious products are sized, the holder has 10 days to prove the forgery. After the completion of 10 days, it is considered that the holder gave its consent for further usage of the products.

As mentioned above the third state body for protection the intellectual property rights is the State Market Inspectorate (Hereinafter: The Inspectorate). It is authorized to monitor the rights arising of the intellectual property on the Macedonian market. The Inspectorate can pursue investigation upon a request or *ex-officio*. It is also authorized to initiate a criminal procedure when strong evidences are disclosed. When it is established that there

[73]Law on Industrial Property, Article 218.

[74]Trademark Protection Guide, AmCham, available at: http://amcham.com.mk/wp-content/uploads/2014 /03/ TrademarkProtectionGuide2013.pdf.

are not enough evidences for initiating a court procedure, the holder can initiate as a separate party.

The last ring in protection of the intellectual property system is the judicial system. The judicial system is the last but most certain way of protection since it is independent and objective. Although a small number of cases in regard to trademarks are submitted to courts, it is the last instance for deciding upon cases. Among the business community there is general stance that the judicial system sometimes is slow and not efficient. Besides the primary courts, Appellate Court and the Supreme Court, the Administrative Court is also authorized to decide on issues regarding intellectual property. What is needed in cases of infringement is a fast reaction for the purpose of stopping any further breach. The holders can request interim measures and other measures for withdrawing or sizing the market products. A deception of consumers using someone else's trademark is a crime. According the Macedonian Criminal Code it is envisaged up to 3 years imprisonment, fine and confiscation. The responsible party should compensate the damage and pay fine up to 200% of the envisaged fine. In addition, the Macedonian legislation allows that any interested party can require from the Public Prosecution to file criminal charges against the offenders.

The Macedonian system for protection of trademarks is similar to the European model and as written above needs to be improved in terms of efficiency and effectiveness. Macedonia is one of the countries with middle level protection in regard to the intellectual property law.[75] Macedonian legislators are trying to move towards stronger protection and for that purpose the IPR Coordinative body was established, reforms in the Customs were undertaken etc.[76]

CONCLUSION

The intellectual property including the trademarks are playing crucial role to the companies' assets portfolio. We can freely place the trademarks as very valuable and desirable asset. In order to archive the best interest for any company in the process of measuring the value of the trademarks we have to start form two assumptions. First, we need to have efficient system of measuring the trademark's value. As it is described above, there are more ways to measure the value of the trademark. Among all of those models, the most preferable is the market approach. It measures the present value of future benefits by obtaining a consensus of what others in the marketplace have judged it to be. But, many authors are suggesting that more than one valuation approach should be used, and that should be done through synthesis of the results gained by the various analyses. Second, in order to make the trademarks eligible to be trade with, we need to have

[75]International Property Rights Index, page 19, Available at http://www.competere.eu/public/2013IRPI.pdf,.

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suitable legal framework. By the analysis done in the second part of this paper, we can conclude that the Macedonian legal framework regulating the intellectual property is following the paths set up by the European Union legislative. This means that Macedonian legislation is highly harmonized with the European one.

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INTERPRETATION OF CONTRACTS

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ABSTRACT

Interpretation in law can be defined as a process of determining the intended meaning of written documents. It is fundamental to the practice of law. Even though every legal system has its own rules on interpretation in order to avoid problems and difficulties in interpretation of parties' will, these problems still exist. They can appear also on a next level, in international legislation, whenever the meaning of a legal document must be determined. In the following pages, we refer to international and some national documents such as CISG, UNIDROIT, LANDO, DCFR, Law on Obligations and Draft Law on Obligations that regulate the matter of contract interpretation.

All of these principles have demonstrated that they are offering concrete solutions for possible problems in interpretation. That is a big step forward in harmonizing and unifying contract laws. Although their very nature is different, the main goal of all these documents is the same: to improve on imperfect contracts and to conserve on contracting effort.

Key words: meaning, compromise, harmonize, legal, party

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1 Defining the Main Terms

Contract

A contract, by definition, is an agreed statement of two or more parties with the corresponding legal effects, which establish, alter or repeal the corresponding legal obligations. [3]

Interpretation

Interpretation in law is analysis, explanation and elucidation of meaning of a term or group of terms which is not immediately obvious. For some legal theorists, interpretation is a central – even foundational – aspect of law.

According to a classification proposed by Jerzy Wróblewski one can speak of three kinds of interpretation.

- *Intepretatio sensu stricto* occurs in situations when there are doubts as to the meaning of the interpreted text (i.e., the rule *clara non sunt intepretanda* cannot be applied).
- *Interpretatio sensu largo*, on the other hand, is the process of understanding the text, both written and spoken.
- Finally, *intepretatio sensu largissimo* is the process of cognition and explanation of any cultural object. [4]

To explain why parties write such incomplete contracts, it is frequently suggested that many eventualities are hard to anticipate or describe in advance and that leaving out details saves time and effort[5]

The proper interpretation of contract is in the interests of contracting parties. The reasons are no doubt well-appreciated in at least a general sense: interpretation may improve on otherwise imperfect contracts; and the prospect of interpretation allows parties to write simpler contracts and thus to conserve on contracting effort.[6] Fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent.[7]

The authors explore the question of interpretation of contracts, through the domestic and international laws. First, they approach individual acts, single out the

[3]Trnavci,Genc. Obligaciono pravo, Bihać, Pravni fakultet Univerziteta u Bihaću, 2002, 123.
[4]http://ivr-enc.info/index.php?title=Interpretation_of_law 28.4.2011.
[5]This explanation for incomplete contracts was earlier emphasized by Williamson (1985). For discussion of it and of other reasons for incompleteness, see for example Hart and Holmstro¨m (1987), Hart and Moore (1999), and Tirole (1999).
[6]Shavell, Steven, On the Writing and the Interpretation of Contracts, Harvard Law School, http://www.law.harvard.edu/faculty/shavell/pdf/06-Shavell-InterpCont-JLEO.pdf
[7]A Principle established in case „Maser Consulting, P.A. v. Viola Park Realty“, LLC 936 N.Y.S.2d 693, 2012 WL 234081 N.Y.A.D. 2 Dept., January 24, 2012

relevant parts, analyse them, describe them, then compare them with each other, and finally bring the general findings.

From the very beginning, the authors resort inductive method, through its two forms. Predictive induction is analysis of a class of phenomena and transfer the reasoning to another class phenomenon. Its foundation is the similarity of the mentioned classes. On the other hand, through the universal induction, authors derive the conclusions derived from the exemplary class of phenomena to a universal class. Thus, the authors separate an example, yield the general findings, observe class phenomenon and highlight their similarities. After separation of class (es) of the occurrence, the authors describe them using descriptive method. All mentioned, is constantly monitored by the comparative method which the authors used to highlight the similarities and differences in the proposed solutions.

In defining the terms, the authors start from the legal lexicon, then the theoretical sources of domestic law using the works of domestic and authors from the region. In parallel with the theoretical approach, the authors consulted a legal text. In terms of international acts, most of the sources are based on the work of relevant journals. The hypothetical examples and case law, are taken from the online database. All sources used are listed at the end of the paper.

2 Interpretation of Contracts According to Convention on International Sale of Goods

2. 1. Articles related to Interpretation

The cardinal rule of contract interpretation is to ascertain and "give effect to the expressed intentions of the parties." [8]Interpretation in Convention on International Sale of Goods (in further text: CISG) is regulated by two articles. One of them is dealing with the interpretation of the Convention (Article 7) and another—with the interpretation of the statements and conduct of a party to a contract (Article 8). The difference between these two articles consists in the fact that the first one is addressed to the courts, and the second to the parties of the contract. On the other hand, it could be argued that both articles are directed to the courts since judgment is delivered by the courts, and both are also directed to the parties since it is them who must comply with the Convention.

2.2. The Good Faith

In view of sharply divided opinions, it was pretty difficult to find a compromise which was finally reached in including of Article 7(1)[9], a rule providing that in its application the Convention must be interpreted taking into account the need to observe good faith in international trade. The advantage of these Principles,

[8] The principle established in case „In re Motors Liquidation Co. 460 B.R. 603 Bkrtcy.S.D.N.Y.", November 28, 2011

[9] Article 7(1) of CISG :„In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

simply is that its language is clear and, therefore, the regulations are free from detailed digressions and exceptions so frequently found in the common law.[10]One of the authors of the CISG considers the concept of "good faith" one of the most controversial ones for the users of the CISG and stated that the controversy relates to the exact function of the concept, as well as it extends to its qualitative definition.

The problem regarding the role of the CISG provision on good faith started to be a point of a serious debate already in the early years after the adoption of the Convention. Since the effect of the compromise seemed to provide that the parties have no general duty to act in good faith, there was a disagreement that the principle of good faith may have on the behaviour of the parties to an international contract for the sale of goods, i.e. during the formation, performance, and termination of the contract of sale although the purpose of setting out the principle of good faith in civil law is to bring into economic relations fairness, justice, order and reasonableness.[11]

On the other hand, since interpretation of the Convention may indeed lead to application of the good faith clause, it might be argued that in such cases it was not the Convention, which was interpreted, but the contract. In this connection, it was submitted that interpretation of the two, however, couldn't be separated since the parties necessarily interpret the Convention also; after all, the Convention constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract[12].

2.3. Filling the Gaps

Article 7(2) CISG deals with questions concerning matters governed by CISG which are not expressly settled in it. A distinction should therefore be made between internal gaps, for which Article 7(2) provides directions, and external gaps, to which this provision does not apply[13].

But still, gaps are to be filled by resorting to the general principles upon which each convention is based.[14] Very similar situation is happening during the interpretation of contracts which will be explained in further text and also an argument that these two types of interpretation are not so separate as it seems. We also observe that the courts actively engage in the interpretation of contracts. The courts fill gaps in contracts, resolve conflicts and

[10] Zeller, Bruno, The UNIDROIT principles of contract law; is there room for their inclusion into domestic contracts? https://jlc.law.pitt.edu/ojs/index.php/jlc/article/viewFile/37/37

[11] Kull, Irene, Principle of Good Faith and Constitutional Values in Contract Law, Lecturer of Civil Law, University of Tartu. http://www.juridicainternational.eu/public/pdf/ji_2002_1_142.pdf

[12] Komarov, A.S., „Internationality, uniformity and observance of good faith as criteria in interpretation of CISG: some remarks on article 7(1)", 75. www.uncitral.org/pdf/english/CISG25/Komarov.pdf ;29.04.2011.

[13]Boele-Woelki, K."The limitation of rights and actions in the international sale of goods",UNIFORM LAW REVIEW,1999-3.626.

[14]Ferrari,F, "General Principles and international Uniform Commercial Law Conventions:A Study of the 1980 Vienna Sales Convention and the 1988 Unidroit Conventions", UNIFORM LAW REVIEW 1997-3.454.

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ambiguities of language, and sometimes replace the parties' express terms with the courts' terms[15]

2.4. Interpretation of Statements or Conduct of the Parties and a „Reasonable Person“

Article 8 regulates the interpretation of statements or conduct of the parties. Under this provision shall be construed objectively the meaning of statements or conduct of the parties as they are „reasonable person“[16]of the same properties realized in the same circumstances. In determining the reasonable intentions are taken into account all relevant circumstances of the case including the negotiations, practices which the parties are established and any subsequent conduct of the parties, and the primary goal is to „attempt to fulfil, to the extent possible, the reasonable shared expectations of the parties at the time they contracted“.[17]

However, it must be noted that according to Art. 6 the parties may prevent filling gaps in the manner prescribed by the Convention and excluding its application in the contract. [18]

In the first instance the real (subjective) intension of the parties' conduct which has legal relevance is determinative. The subjective intension of the party needs to be known or at least ought to have been known (to the other party). Well-settled rules of contract construction require that a contract is to be construed as a whole, giving effect to the parties' intentions. Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.[19]

Otherwise statements made by and/or conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances (Article 8(2) CISG). Determinative is the understanding of „a reasonable person of the same kind as other.in the same circumstances“. [20]

Since the term „reasonable person“ has to be interpreted in light of Article 7(1) CISG, can in good faith, in international trade, be determinative with regard to its interpretation. The place of Article 8 CISG in Part I of the

[15] Shavell, Steven, On the Writing and the Interpretation of Contracts, Harvard Law School http://www.law.harvard.edu/faculty/shavell/pdf/06-Shavell-InterpCont-JLEO.pdf

[16]A phrase frequently used in TORT and CriminalLaw to denot e a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparati-ve standard for determining liability.

[17] See Comrie v. Enterasys Networks, Inc., 837 A.2d 1, 13 (Del. Ch.2003).

[18]Bikić, Enes. „Tumačenje ugovora“, Revija za pravo i ekonomiju,Godina 9, Br.3, Mostar 2008, 189.

[19]Principle established in case“ MBIA Ins. Corp. v. Patriarch Partners VIII, LLC Slip Copy“, 2012 WL 382921 S.D.N.Y., February 06, 2012

[20] Schlechtriem, P. and Butler, P., “UN Law on International Sales“, Springer-Verlag Berlin Heidelberg 2009.55.

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CISG, the general provisions, but also the wording of 8 (1) CISG clearly indicates that Article 8 CISG is not only applicable in regard to statements concerning contract formation-and therefore, for the interpretation of contracts-and their revocation (Article 16 CISG), but for all legally relevant statement and conduct in Part II and III as well as conduct with legal effect such as the setting of deadlines, declaration of avoidance, statement of specification (Article 65 CISG), notice of non-conformity, deduction of price and the withholding of performance. Also party statement which lead to legal consequences or agreements with a content to which the CISG is not applicable (like, for example, statements in regard to set-off which lead to the retention of title, or the agreement of a penalty clause) should be governed by Article (CISG and not by subsidiary proper law of the contract.

2.5. Interpretation of Interpretation

Very special sort of problem is an „interpretation of articles on interpretation". Typical example is the situation with the principles of good faith and fair dealing or with the interpretation of standard „reasonable". The main differences are noticeable in comparison between the European and the Anglo-American system.

In common law, the concept of „general principles" is different from that applied in civil law. This is due, in part, to the „diverse notions and functions of the general principles" and, in part, to the different source from which general principles are derived. In fact, in civil law the source is the legislation, whereas in common law, the source is represented by case law. [21]

English contract law is increasingly isolated in its refusal to recognize a general duty of good faith. In the civil law subjective good faith, together with its objective counterpart, fair dealing, is a fundamental tenet of the law of contract, affecting every phase, from negotiation to performance and enforcement. [22]

American contract law has also embraced a general duty of good faith, though it begins only on conclusion of the contract and does not extend to pre-contractual negotiations. [23]And when it is about the standard of „reasonable"(time) for example, agreements to forbear [24]use this standard with its specific interpretation in American contract law. The interpretation of statements in regard to the formation of the contract is important in regard to the inclusion of trade clauses.

3 Interpretation of a Contract According to UNIDROIT Principles

3.1. Articles Regulating Interpretation of Contracts and the Good Faith

[21] Ferarri, F., 457-458.
[22]Goode, R.,"International Restatements of Contract and English Contract Law", UNIDROIT LAW REVIEW 1997-2.238.
[23] Ibid.
[24]Williston, S.,"A Treatise on the Law of Contracts", Thomson west 2008.863.

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All the provisions on interpretation of a contract in UNIDROIT Principles (formally UNIDROIT stands for: International Institute for the Unification of Private Law) are based on one simple principle and that is the principle of „good faith".[25]

Article 4.8

(Supplying an omitted term)

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

(2) In determining what an appropriate term is, regard shall be had, among other factors, to

(a) The intention of the parties;

(b) The nature and purpose of the contract;

(c) Good faith and fair dealing;

(d) Reasonableness. [26]

This principle has its origin in the Roman law, and it is difficult to translate in Orient. It has been replaced by that of „good morals", akin to „*bonos mores*" or „*bonus pater familias*". Common law tradition also is not familiar to concept of good faith. They replace it with the principle of reasonableness that differs from good faith in many important ways. Those who evoke reasonableness must show a „clean hand", i.e., they have to prove that they have acted in reasonable manner first. When the UNIDROIT Principles (the Principles) were published in 1994 they were considered to be "soft law" and hence not binding on the courts. However, these principles have demonstrated that they are offering concrete and worthwhile solutions and arguably are a move forward in harmonizing and unifying contract laws.[27]Courts have referred to the Principles on several occasions. It is specifically instructive to note the views expressed in Hideo Yoshimoto v. Canterbury Golf International Ltd., 14 where the New Zealand Court of Appeal found it necessary to refer to the UNIDROIT Principles and the CISG as they grappled with difficulties in interpreting a contract. Specifically the advantages of article 4.3 of the Principles were explained as allowing the court a more realistic approach in the interpretation of contracts. However, the court did not apply the Principles or the CISG for that matter, as they were not prepared to go beyond these declarations. The court commented: "But while this Court could seek to depart from the law as applied in England and bring the law in New Zealand into line with these international conventions, I do not think it would be permitted to do so by the Privy Council."[28]

[25]Good faith is an abstract and comprehensive term that encom passes a sincere belief or motive without any malice or thedesi re to defraud others. It derives from the translation of the Latin term *bona fide*, and courts use the two terms interchangeably.

[26] UNIDROIT Principles

[27] Zeller, Bruno, The UNIDROIT principles of contract law; is there room for their inclusion into domestic contracts? https://jlc.law.pitt.edu/ojs/index.php/jlc/article/viewFile/37/37 , pg.115

[28] Ibid. pg.117

In its true sense, good faith has two functions: it serves both as a sword and a shield of justice. As a sword, good faith plays a „supplementing role" i.e., where there is a gap in the law, the court may use *analogia iuris* and decide to fill the gap in accordance with the principle of good faith. If it is used as a shield, the principle of good faith will restrict or derogate from provisions which could lead to performance contrary to good faith. In international commerce, good faith can lead parties to implicit agreement to apply provisions of the UNIDROIT Principles, as confirmed by the ICC International Court of Arbitration in Paris in 1996. [29]

Prudence dictates that the principle of good faith should only be called upon when one of the parties appears to be in bad faith. Evidence should be prominent, so the question is: what evidence is relevant? The answer is: any evidence that could influence the parties' thinking. Course of dealing, practices and conduct are evidence recognized under Article 4.3 of the UNIDROIT Principles and Article 8(3) CISG. The question though is how far will the court look for and apply the Principles in a way the promoters intended it to be used. Unlike the CISG, which is a convention and once ratified becomes part of domestic law the Principles are merely "voluntary" in character.[30]

4 Interpretation of Contract According to LANDO Principles

4.1. Articles on Interpretation, Principles of Reasonableness and Confidence

Interpretation of contract is regulated in LANDO principles (they were created by the self-styled Commission on European Contract Law set up by Ole Lando) in CHAPTER 5, articles 5.101.-5.107 (Ex.art. 7.101/101A-7.107):

It is sometimes very difficult to define the common intention, especially when a contract is signed by more than two parties. But however difficult this task may be, care must be taken not to confuse same or similar intention with common intention. To constitute common intention, it is necessary that intention of each party is known to the rest of them and shared by them. If the common intention does not differ from the literal meaning of the words, than words are to be given their normal meaning unless circumstances show that a special meaning should be attached to the words. Exception: particular customs or usage may vary the normal meanings of words. Additionally, technical words given their technical meanings, unless the context of the words of local usage would make the word mean something different. For example, a painting contract that says "all interior surfaces" are to be painted, would not mean

[29] Le Net, "Rules of Interpretation of Contracts under the UNIDROIT Principles and their Possible adoption in Vietnamese Law", UNIFORM LAW REVIEW 2002-4.1022.

[30] Zeller, Bruno, The UNIDROIT principles of contract law; is there room for their inclusion into domestic contracts? https://jlc.law.pitt.edu/ojs/index.php/jlc/article/viewFile/37/37 . pg.119

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literally all interior surfaces. Otherwise light fixtures, door knobs, window panes, etc. would need to be painted. [31]

Statements of will are to be interpreted reasonably in accordance to the principle of confidence and business usage. As long as the circumstances of individual case do not imply individualisation, statements should be understood in a common sense. Individualisation is proper in accordance with nature of acts, nature of parties and mutual behaviour of parties before and after closure of contract. Statements are interpreted in compliance with fear dealing. [32]

There is an exception of a rule that a contract is interpreted in accordance with the intention of the parties and individualisation of parties and their intents. This is not the case with the formulary contracts, made for mass closure of contracts that implies equal treatment of all clients, and this leads to objectification and depersonalisation of these contracts.

4.2. Formulary Contracts

In most of the contemporary laws, there are so called special rules for interpretation of formulary contracts. Formulary contracts, sometimes, cannot be vague only in respect of some provisions of the contract, but in general, when the safe-motivation for history cannot conclude to which type of contract belongs the vague provision. When resolving such disputes, the court must first assess which type of the contract it is, whether it is primary or not in this so-called mixed agreement, and then after the qualification it can make a final decision. In the case of formulary contracts there is an increased risk of ambiguity[33] concerning the contents of certain norms, because these are the accession or consent treaties and a party accessing such a contract does not pay attention to the fact that general provisions of bidders are also a part of the contract. [34]

4.3. Good Faith and Fair Dealing

Good faith is required in a wide range of situations, including contracts and business dealings, as well as during mediation**,** arbitration or settlement negotiations in a personal injury or similar tort case. [35]Good faith and fear dealing are the principles which imply that the parties in

[31]http://www.northeasternutahlitigationattorney.com/2006/04/primary-rules-of-contract.html 04.05.2011.

[32] Pravni leksikon,drugo izmijenjeno i dopunjeno izdanje, Savremena administracija, Beograd 1970.

[33] Ambiguous language is “that which is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.”, see Corral v. Outer Marker LLC 2012 WL 243318 E.D.N.Y., January 24, 2012

[34] Meškić, Z. and Brkić, A. „Zaštita potrošača od nepravilnih ugovornih odredbi-usklađivanje obligacionog prava BiH sa direktivom 93/13 EEZ“, Anali pravnog fakulteta Univerziteta u Zenici, 58.

[35] Deffinition by Rottenstein Law Group LLP, http://www.rotlaw.com/legal-library/what-is-good-faith/

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contractual relations, especially the parties, at the conclusion and execution of its obligation shall adhere to generally accepted moral rules, good practices and standards of conduct. [36]

Also, a contract may be interpreted within the context that it was made and with recognition of the matters to which the contract relates. If there is more than one contract relating to a matter, the contracts may be considered together if they were entered into by the same parties and can be viewed as relating to a single overall transaction. [37]

Article 5.106[38] may be considered an example of the principle „ut res magis valeat quam pareat" or „effet utile" which basically means the contract terms should be interpreted in a way to render it effective. The principle of „ut res magis valeat quam pareat" is defined in the cited award as interpretation which gives the terms useful effect, rather than render them redundant.[39]

5 Interpretation of Contracts According to Draft Common Frame of Reference

5.1. New solutions

DCFR contains the rules of interpretation of the contracts and other juridical acts separately.

Relevant articles concerning interpretation of contracts are 8:101.-8:10.

The subjective search for the parties' common intention overcomes even the literal meaning of the words (Article II.-8:101(1)). The DCFR commentary says that the combination of a subjective approach with an objective "fall-back" position "follow[s] the majority of laws of EU Member States". The commentary adds: "This is normal because the contract is primarily the creation of the parties and the interpreter should respect their intentions, expressed or implicit, even if their will was expressed obscurely or ambiguously. The DCFR contains the rule (Article II.8:101(2)) that says that if a party's particular subjective intention cannot be established for this purpose, then an objective construction is to be used (Article II.-8:101(3)(a)). It also adds one further qualification: where a third person has reasonably and in good faith relied on the contract's apparent meaning, and the question to be resolved involves that party, an objective approach is required (Article II.-8:101(3)(b)). However, this provision does not apply to an assignee: a person who by law has no better rights than a contracting party cannot claim whatever may be the benefit of an objective interpretation of the contract distinct from the meaning which would have applied as between the original contracting parties. The DCFR allows reference

[36] Trnavci,Genc,28.

[37]http://contracts.lawyers.com/contracts/Contract-Interpretation.html 05.05.2011.

[38] Article 5.106 (ex art. 7.106) - Terms to Be Given (Full) Effect An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not.

[39] http://www.cindemir.av.tr/GPOIC.html 05.05.2011.

to evidence of the parties' pre-contractual negotiations and their conduct subsequent to the conclusion of the contract, in order to help to ascertain their common intention (Articles II.-8:102(1)(a), (b)). [40]

The DCFR commentary observes that "not all the laws of the Member States allow evidence to be given of pre-contractual negotiations"; in fact, it appears from the comparative law notes that this refers to the jurisdictions of the United Kingdom and Ireland alone. The DCFR commentary states: "A better approach is not to exclude the evidence but to allow the court to assess it for what it is worth. Similarly with subsequent conduct." he Economic Impact Group states that DCFR Articles 8:104 and 8:107 "contain rules that parties generally prefer. These rules are thus likely to lower transaction costs". A rule about "linguistic discrepancies" between different language versions of a contract is found in both the PICC and the DCFR (Article II.-8:107), and is clearly necessary against the background for both instruments of international, cross-border and multi-lingual contracting. It may be for consideration whether the introduction of such a rule would be conducive to encouraging non-Anglophone parties to contract under Scots law. [41]

6 Interpretation of Contracts According to Law on Obligations

6.1. Articles related to interpretation of contract

In the currently applicable Law on Obligations, this topic is regulated by four articles under the title: “Interpretation of contracts” containing articles from 99 to 102.

The Law on obligations, as well as the most other contemporary legislation, adopted a mixed interpretation. According to this criterion in the interpretation of the controversial provisions the literal meaning of the expressions used should not be strictly taken into account, but there should be explored the common intention of the contractors and to understand how it fits the principles of the Contract Law (Article 99, paragraph 2).[42]

Even though, the greatest number of authors find that Law on Obligations adopts the mixed theory that opinion is not always supported what explains the following quotation:

“So, the Law on Obligations has adopted something wrongly called a mixed theory, though it is not a theory at all, because there is not any theoretical justification. Only practical reasons are able to explain this alchemic process, but not to justify it. According to comments of Law, the mixed theory seems to be a warning explains that finding the common intention of the parties ought to align with

[40] Scottish Law Commission, „Review of Contract Law Discussion Paper on Interpretation of Contract“, “Edinburgh, February 2011,16.

[41] Ibid., 25.

[42] A.Bikić,Obligaciono pravo-opći dio,106.

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objective criteria that Law constituted by its basic principles.” [43]

It is important to mention that that the principles of good faith and fair dealing also have a great role in interpreting of contracts. The importance of these principles have been stressed by legal scholars and judicial practice. [44]

For the general rules of interpretation can be said that ambiguous or obscure clause should be interpreted as to those more in favour of their valid effects. This is also valid for the interpretation of the entire contract, because it is assumed that the parties concluding a contract wanted it to be valid. Similarly, when interpreting a contract must take into account the mutual trust of the parties, diligence, and conscientiousness, and honesty. According to Art. 101 Law of Obligations vague provisions in the contract without compensation, must be interpreted in the sense that it is less difficult for the debtor, and onerous contract in the sense that it achieves an equitable relationship of mutual benefit. [45]

In addition to the aforementioned natural (subjective) and normative (objective) interpretation of the contract, it is necessary to mention the additional interpretation. Additional interpretation of the contract means the interpretation of an incomplete contract or a contract which contains certain gaps. Additional or qualified interpretation of the contract applies only after by natural or normative interpretation was established the existence of a contract. [46]

The process of filling gaps is done by judges by using dispositive rules of Law on Obligations. If those rules are not applicable, the judge must fill the gaps according to fundamental principles of additional interpretation. [47]

He is allowed to make a decision on hypothetical willingness, but he has to take into consideration the principles of good faith. Additional interpretation of the contract should not resulted by the extension of the contract opposite of the parties’ will. [48]

7 Interpretation of Contract According to Draft Law on Obligations 2006

It is very much clear that this Law is very much similar to the LANDO principles. They both put emphasis on the intent of the contractors rather than the literal meaning of terms.

In comparison with the existing Law on Obligations, where application of provisions and interpretation of disputable provisions is regulated with article 99, changes

[43] Morait, B., Obligaciono pravo, knjiga prva, Banja Luka 1997.190.
[44] Blagojević, B.T. and Krulj,V., Komentar Zakona o obligacionim odnosima, Beograd 1980, čl.99, 275;B.Vizner, Komentar Zakona o obveznim odnosima, Zagreb 1978, čl.99, 439.
[45] A.Bikić,ibid.107.
[46] Bikić, E., “Tumačenje ugovora prema Zakonu o obveznim odnosima“,Pravna misao, Časopis za pravnu teoriju i praksu, Godina 34.,Broj 1-2, Sarajevo, januar-februar 2003.48.
[47] Ibid.49.
[48] Ibid.50.

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have been made. Provision of Art. 99 existing Law on Obligations has been changed in the Draft of Law on Obligations in the sense that when interpreting the disputed provisions, the common intention of the parties should be explored and provision should be understood that it suits the purpose that the parties had in mind when signing the contract (Art. 135.st. 2 draft proposals), which means exactly as stated in Article 5:101. Principles. [49]

7.1. Old New Standards

The new draft, related to the interpretation of the contract has the new provision-Article 136 that says that when it is not possible to determine the common intention of the parties the contract should be interpreted in a way" a reasonable person" of the same properties in the same circumstances would understand it. Also, the new provisions of Article 137[50] entitled "The relevant circumstances in interpreting the contract" are setting forth the important criteria in the interpretation of the contract. [51]

Impossibility of determination of common intent is also regulated with LANDO principles, and it is very similar to the article 5.101 (3). Existing law on obligations does not have article defining impossibility of determination of common intent. Draft Law on Obligations regulates this situation the same way as LANDO principles do, and it is another improvement of this Law.

Unlike the Law on Obligations, the Draft Law lists the circumstances that should always be taken into account when interpreting a contract, not limited to provisions that are not individually agreed, and these are the circumstances under which the contract is concluded, including prior negotiations, conduct of parties during and after conclusion of the contract; the nature and purpose of the contract; interpretation that the contract sides have already applied to similar provisions and practices that are mutually established and meanings that are commonly given to terms and expressions in the relevant profession. [52]

In the case when the contract was made according to pre-printed content or when the contract is otherwise prepared and proposed by one party, the vague provisions shall be construed in favour of the other side. Ambiguous provisions in the free contracts should be interpreted in the sense that it is less onerous for the debtor, and toll

[49] E.Bikić,"Tumačenje ugovora", Revija za pravo i ekonomiju, Godina 9, Br 3, Mostar 2008.188.

[50] Article 137 (Circumstances relevant to contract interpretation): Particular attention in contract interpretation should be paid to:1. Circumstances of contract conclusion, including prior negotiations,2. Conduct of contracting parties, even after the contract was signed,3. Character and purpose of the contract,4. Interpretation that had been applied to similar provisions and the practice they established mutually,5. The meaning usually ascribed to the provisions and terms in the respective trade.

[51] Morait,B. and Bikić, A., Objašnjenja uz prijedlog nacrta zakona o obligacionim odnosima, Sarajevo 2006. 28.

[52] Meškić, Z. and Brkić, A. ibid..72.

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contracts in the sense that it achieves an equitable relationship of mutual obligations.

8 Discussion

8.1. Discrepancy in CISG

The CISG does not stipulate the legal consequences of a discrepancy between the actual but not discernible intention of the party making a statement and the objective meaning of that statement as determined through an Article 8 (2) CISG analysis. The consequences of incompatibility between the statements of the parties are incompatible are also not laid down in CISG. Domestic law decides upon the consequences of such defects of intension. For example, if German law is applicable, parties can challenge the contract according to paragraph 119 BGB, or the rules in regard to (express or hidden) intentions in accordance with paragraphs 154, 155 BGB are applicable. Standard terms and conditions do not form part of the contract unless they have clearly been incorporated during contract formation. In exceptional circumstances the CISG classifies, what according to German law would be defect of intension on a matter of interpretation. An example is the discrepancy between (internal) intention and incorrect formulation of that intention which results in an avoidable misunderstanding of the addressee in accordance with Article 8 (1) CISG.[53] Articles 8(1) and 8(2) CISG should exclude a heavy reliance on the (internal) intention (secret reservations) and its defects and therefore sham transactions should be valid. Furthermore, Article 27 CISG takes precedence over domestic law in regard to errors or delay in the transmission of the communication and Article 19(2) CISG regulates what constitutes an irrelevant defect in regard to a consensus between parties. [54]

Some experts find that his provision may serve as one of the most important guidelines for the purpose of the future European Civil Code. UNCITRAL built Art. 8 relying and the subjective approach (Paragraph 1 – interpretation is to be based on a speaker's "intent", but only "where the other party knew or could not have been unaware" of that intent). Article 8 Paragraph 2 introduces objective method of interpretation ("statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances"). The latter provision is used only when Paragraph 1 is not applicable. [55]

Article 8 Paragraph 1 applies to two different situations. First of all, it will determine the content of the agreement, when one party clearly expresses his intent and the other party is actually or supposedly aware of it (at the

[53] Schlechtriem P. and Butler, P., 56.
[54] Ibid.57.
[55] Moskwa, P."Interpretation of Commercial Contracts in the Future European Civil-Code-Objective and Subjective Method?"57. http://www.elsa.org/fileadmin/user_upload/elsa_international/PDF/SPEL/SPEL04_1_MOSKWA.pdf 29.04.2011.

conclusion of the agreement the intention of the former becomes the common intention of both parties). Secondly, Art. 8(1) will apply, when the acting party does not express his intent in an unambiguous and clear way but the addressee is aware of the real intent. Paragraph 1 has its roots in the approach taken by the creators of BGB – "wirkliche Wille" of a communicating party should be the main factor determining the meaning of the wording of the agreement. [56]

The criteria of a "reasonable person" in Article 8(2) is taken over from the common law system. This provision protects the party who attributes a reasonable understanding to the other party's condition. It also places an obligation on the parties to communicate in a clear way because the doubts are to be resolved against the one who prepares communication (the drafters of the CISG adopted the *contra proferentem* rule). Even though, Paragraph 2 is created as the supplementary mean of interpretation (only when Paragraph 1 is not applicable), the meaning of the majority of contracts will be determined according to the objective standard of interpretation (almost always when parties are involved in controversy as to their common intent). [57]

Article 8 of the CISG combines the elements of subjective and objective methods of interpretation. The court is obliged to start the process of interpretation by establishing the intent of an individual party (Art. 8 does not refer to the common intention of the parties). If there is no indication as to the "real intention" of the party, the court has to use the objective criterion of an understanding that a reasonable person would attribute to the statements and conduct of the party to the contract, in the equivalent circumstances. Paragraph 3 lists the auxiliary means of interpretation and (not directly) allows the use of the extrinsic evidence while determining the meaning of a contract (parole evidence is admissible). [58]

Article 8(3) is concerned with determining the intent of a party by allowing the contract negotiations which are the circumstances of the formation of the contract, to be taken into account and usages among the parties to be considered. The latter, however, includes, in contrast to Article 9(2) CISG traditions and practices which only exist locally, regional, nationally or among a certain group of people. Article 8 (3) CISG does have another function than Article 9(2) CISG. [59]

Article 8(3) CISG is not concerned with the supplementation of the contract or the content of usage, but rather with interpretation of party statements. In regard to the latter, the specific circumstances which are relevant are those important for the interpretation of behaviour of the parties or for determining what a

[56] Ibid.

[57] Ibid.58.

[58] Ibid.

[59] Schlechtriem, P. and Butler, P.57.

reasonable person in the shoes of the addressee would have understood the other party's statement meant. [60]

That also the subsequent behaviour of the parties can be relevant for the determination of their intent at the time of contract formation is rational but logically hard to justify because the meaning of a statement has to be certain when it becomes effective. That in Article 8(3) CISG „subsequent behaviour" is, therefore, to be understood as behaviour which allows for evaluating the party's intent at the time of making the statement. Where the subsequent behaviour stipulates a changed intent Article 29 CISG might be fulfilled.

Whether standard terms and conditions have incorporated into a contract has to be determined according to Article 8 CISG which in that way fulfils a certain control function.[61]

Sometimes the provisions of the CISG refer to rules of interpretation of the other acts. So the place of delivery is determined primarily by contract. If the contract did not say anything, the relevant rules of business customs and practices of the Parties will be applied first (Article 9 CISG), and then dispositive rules of the Convention. [62]

In commercial contracts with foreign element and without it, it is very important to take into account local and vocational customs and usage (code of conduct) in interpreting disputed contract provisions. International Chamber of Commerce (ICC) in Paris has brought several versions of so-called INKOTERMS[63] clauses, which represent a successful attempt to formulate rules and practices for the interpretation of terms in international trade. When using these terms must be very careful, because the same terms in commercial and civil contracts can sometimes have a different meaning. [64]

8.2. Nature of LANDO Principles

These principles are not made in binding form, they are not rules or directives, or conventions. Therefore, they, by their very nature are no legal force or national, international or community law. They are made by comparison of national legal solutions, and their strength lies in the rationality of the proposed provisions and the authority of their builder, and members of the Commission who have worked on their construction. The principles are an autonomous soft law so that their use is recommended only.

The principles are intended for legal entities of the European Union, i.e. natural and legal persons of Member States, as well as the relations between organs of the

[60] Ibid.
[61] Ibid.58.
[62] Trifković, M. Međunarodno poslovno pravo,Ekonomski fakultet Univerziteta u Sarajevu, Sarajevo decembar 2001.218.
[63] International Commercial Terms
[64] Trnavci, Genc.203.

Union. The principles can be used in interpreting and applying regulations passed in contract law at the Union level or adopted regulations in national law regarding the regulation of the functioning of the single market. [65]

After the analysing of rules of the interpretation of contracts in these instruments and noticing its intensions and differences, it is also possible to notice several very important similarities which they are based on. These common features are:

1. Interpretation of contracts by all legal systems compared means determination of common and not the actual intent of the parties.

2. Rule of contra *preferentum* means that in case of ambiguous language of the contract, contractual provisions will be interpreted in a manner favourable to the party that they were not drafted.

3. All legal systems contain a rule that contracts must be interpreted systematically, in the light and spirit of the whole contract in order to avoid contradiction.

4. Those provisions that can be interpreted in different ways are interpreted in the way that they remain in legal force. [66]

8.3. CISG vs UNIDROIT

Even though CISG had such a great success that it was considered that there was no need for further documents to be made on this area, the UNIDROIT Principles had its own roll because of the importance of the issues regulated by it, and because of the different nature of these two instruments. CISG has the binding nature and was adopted in the form of an international convention. On the other hand, the UNIDROIT Principles have non-binding nature and their intent was to "develop a set of norms best suited to accommodate the needs of the international commercial community"[67] These are to be considered at most as a sort of international restatement of contract law (Part I), Part II goes on to examine the content of the two instruments, while Part III investigates how and to what extent they may co-exist and possible even support each other in practice.[68] According to opinion of experts, Convention was the maximum that could be achieved at the legislative level, which caused UNIDROIT to abandon the idea of a binding instrument and instead to take another road for its own project. Yet even in cases

[65] Bikić,Enes. „ Harmonizacija evropskoga ugpvprnog prava" , Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, Mostar 2007., 565.

[66] Bikić, Enes. "Tumačenje ugovora", Revija za pravo i ekonomiju,Godina 9, Br.3, Mostar 2008, 180.

[67] Bayu Seto Hardjowahono, The UNIDROIT Principles and the Law Governing Commercial Contracts in Southeast Asia, UNIF. L. REV. (n.s.) 1005, 1005 (2002)

[68] Bonell, M.J.„ The UNIDROIT Principles of International Commercial Contracts and CISG- Alternatives or Complementary Instruments?", UNIFORM LAW REVIEW 1996/1, 27.

where the international sales contract is governed by CISG, the UNIDROIT Principles may serve on important purpose according to Article 7 (1) of CISG.[69] Provisions of UNIDROIT Principles help us understand the general principles of the CISG that guide courts and tribunals in resolving matters not expressly dealt with in the Convention. In addition, they provide support for solutions to open issues reached through an analysis of the Convention itself. [70]

In view of its intrinsic merits and worldwide acceptance, CISG was, off course an obligatory point of reference on the preparation of the UNIDROIT Principles.

To the extent that the two instruments address the same issues, the rules laid down in the UNIDROIT Principles are normally taken either literally or at least at substance from the corresponding provisions of CISG; cases where the former depart from the latter are exception. Perhaps the most significant example of such departures is that the UNIDROIT Principles impose upon the parties a duty to act in good faith throughout the life of the contract, including the negotiation process, while CISG, in contrast, expressly refers to good faith only in the context and for the purpose of the interpretation of the Convention as such. [71]

However, the principle of good faith is the basic principle on which interpretation of contract according to these two documents is based on. They do not set any rule of interpretation, but they establish a standard, a framework of interpretation.

Problems with interpretation may arise from the fact that the drafters of conventions use terminology which in domestic law has a specific meaning. According to Article 7(1) of the Vienna Sales Convention, the articles should be interpreted in autonomous manner; in construing them, one should, in other words, not resort to the meaning generally attached o certain expressions within the ambit of a particular legal system, unless the legislative history shows that that was the intention of drafters.[72]

Good faith enables the courts to interpret, set aside or modify the contract. It requires the courts to take account of the good faith factor when there is ambiguity or an unjust situation arises. However, the importance of good faith principle is not determined by its scope, but by how the courts interpret and apply it. The UNIDROIT Principles are trying by specifying - what is „good faith“, to cross the traditional border-line between law and fact. They do so by doing away with unrealistic doctrines such as the parole evidence rules of the cultural constraints of reasonableness test. [73]

[69] Ibid., 29.
[70]http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019277 , 04.05.2011.
[71] Bonell, M.J., 30.
[72] Ferrari,F. „ The relationship between international uniform contract law Conventions“, UNIFORM LAW REVIEW 2000-1, 73.
[73] Le Net, 1027.

Finally, thanks to the UNIDROIT Principles, which reflect the thinking of experts from different countries and legal systems, there is now something that the parties can finally rely on. It is not only the general principle of good faith, but concrete norms. Particularly helpful are Article 4.3, 4.6, 4.7, and the gap-filling proposals of provisions.

If the courts can be brought to refer to CISG and the UNIDROIT Principles, their judgments will become more convincing to foreign investors.

8.4. LANDO vs UNIDROIT

The year 1994 marked a turning point for two remarkable projects in the field if contract law. It was in that year that the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) gave its imprimatur to the publication of the Principles of International Commercial Contracts and the Commission on concluded its work on the first part of the Principles of European Contract Law.[74]The Commission on European Contract Law was from the outset aware of the work being conducted by the UNIDROIT Group and vice-versa. Moreover, as the two groups were dealing with the individual chapters at different times, it was inevitable that each group was influenced by the work of the other. [75]They, in fact, have many corresponding provisions.

Taking as a point of reference the UNIDROIT principles, about seventy of their articles have corresponding provisions in the European Principles. When it comes to interpretation of contracts, provisions which are also to be found in the European Principles are Article 4.1, 4.2, 4.3, 4.4, 4.5, and 4.7. [76]

UNIDROIT Principles contain rules on the interpretation in articles 4.1-4.8. According to these rules interpreter should establish a common intention of the parties taking into account all relevant circumstances as well in some other jurisdictions with only difference that it does not mention the principle of good faith as a criterion for the interpretation of the contract. According to Article 2.17. Validity of the so-called clauses of the Agreement (merger clause) is admitted. By this clause the parties shall conform to all their agreements contained in the contract and that no other document or evidence will not be recognized as an addition or modification of the contract. This clause is characteristic for English law. Unlike English law, the UNIDROIT Principles, however acknowledge the possibility of taking into account the additional conditions to the interpretation of the contract even though the contract contains a clause referred to. [77]

These two documents do have divergences. There are provisions in the UNIDROIT Principles which differ in

[74] Bonell, M.Joachim. „The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?, 1996/2, 1996, 229.

[75] Ibid. 233.

[76] Ibid. 235.

[77] Bikić,Enes. „Tumačenje ugovora", Revija za pravo i ekonomiju" Godina 9.Br.3, Mostar 2008. 187.

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content from their counterparts in the European Principles. There are issues addressed in the former which are not dealt with all in the latter and vice-versa.

While most of the divergences appear to be of merely technical nature, some others are of a „policy“ nature, i.e. they clearly reflect the different scope of the two instruments. The future existence of two similar sets of „Principles“ has led some commentators to make catastrophic forecasts. It was argued that the parties and arbitrators will be faced with two entirely equivalent and therefore competing instruments. But it is unlikely that there will be any real competition between the UNIDROIT Principles and the European Principles outside Europe. European Principles are designed primarily for use in the Member States of the European Community, while the UNIDROIT Principles were made to establish a balanced set of rules designed for use throughout the world. The other difference between these two instruments is that the UNIDROIT principles relate specifically to international commercial contracts, while the European Principles are to apply to all kinds of contracts, including transactions of a purely domestic nature and those between merchants and consumers.[78]

8.5. LANDO vs CISG

Significance of LANDO and UNIDROIT principles for the application of the Convention and other international legal conventions is debatable. On the one hand the task of these regulations is to be a help in the realization of a unified international law. The prevailing opinion gives them such a function. On the other hand, this extra function is considered to be very problematic. Partly LANDO principles are only given to the academic rank of scientific thinking. If the Convention in respect of its implementation leaves room for doubt, meaning "internal" emptiness of the Convention, the UNIDROIT Principles and the LANDO are "excellent evidence" of an internationally acceptable solution that should be accepted unless there are compelling reasons against it.

It is certainly true when they both agree that these works contain certain fundamental principles. If there are some differences among them, which is a very rare case, the UNIDROIT Principles have an advantage because they are made in accordance with international agreements. A Dutch decision is justified by applying the UNIDROIT Principles.[79]

[78] Ibid. 236-245.

[79] Bikić, A.194.

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CISG	UNIDROIT	LANDO	DCFR	LoO	DLoO
Art. 7 and 8	Art. 4.1-4.8	Art. 5.101-5.107	Art. 8:101-8:107	Art. 99-102	Art.135-140
7(1)- good faith	Principle of good faith and „reasonable“	Good faith and Fair dealing	8:101-subjective method	Principle of „equal value“	135(2)-„purpose“= 5:101 Principles
7(2)-filling the gaps-general principles		Intention of the parties	8:102-objective method	99-subjective method	„reasonable person“
8(1)-subjective method		Formulary contracts	8:103-good faith and „reasonable person“ -subsequent behaviour	99-objective method	-negotiations, circumstances, „subsequent behaviour“
		Effet-utile		Good faith and fair dealing	Pre-printed contracts
8(2)-objective method-„reasonable person“			8:104-negotiated terms	100-pre-prented contracts	Consumer contracts
		Autonomous „soft law“	8:105-contract as a whole	101-contracts without compensation	
8(3)-negotiations, circumstances, usages -subsequent behaviour	-technical nature - int.commercial contracts	-all kinds of contracts	8:106-interpretation which gives terms effect	Terms in favour of their valid effects	
9-business customs and practice			8:107-Linguistic discrepancies	Additional interpretation	
INKOTERMS	No real competition			Arbitration	
Int.convention -binding	-int. Restatement -non-binding				

Table 1: Parallel display of principles of interpretation

CONCLUSION

All international documents pertaining to the contract have chapters devoted to the interpretation of the contract. The UNIDROIT Principles, LANDO Principles, CISG, DCFR, or national laws such as the Law on Obligations and the Draft Law on Obligations are no exception either. All these documents have high importance in national and international law and it is therefore very important that they have provisions regulating this matter which is so sensitive that the slightest deviation from the regulations may cause far-reaching consequences for the parties. An extensive body of academic writing and reported case law has shown that all these documents are a practical solution to the interpretation and application of contracts. Although they have emerged in different circumstances, they still have many similarities and overlap in a big number of provisions. They have also provided potential solutions to national and international courts, which gives the courts more room for finding the best possible outcome in every case. One more advantage in all of these documents is that their language is clear and, therefore, the regulations are free from detailed digressions and exceptions so frequently found in the common law. They also allow parties to write simpler contracts and thus to conserve on contracting effort. International instruments like these were made to make a compromise and harmonize at least basic rules in order to make international contracting easier.

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