

**TRANSNATIONAL LITIGATION
AND THE
EVOLUTION OF THE LAW OF EVIDENCE**

Croatian national report

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Introduction. Brief outline of Croatian procedural law

Historical overview

The Republic of Croatia belongs to the circle of European continental legal culture. Its procedural law carries strong resemblance to the law of surrounding countries - especially to the Austrian law, with which it shares the same roots and same sources of inspiration. During the XIX and in the first half of XX century, Croatia was administratively and legally divided into several areas, each having its own laws, but in general, in spite of all divisions, the same traces of common Austro-Hungarian legacy could be found. For example, until 1918 Istria and Dalmatia were under direct Austrian rule and subject to unrestricted application of Austrian laws. Therefore, in these parts of today's Croatia, Austrian Civil Procedural Code of 1895. (*Zivilprozessordnung*) applied in all civil suits. Continental parts of Croatia (Croatia proper) had its own legislation, but this legislation also derived its features out of Austro-Hungarian tradition of this era. More precisely, until the First World War in Croatia proper - the core of contemporary Croatian state - civil

procedural law was regulated by the Provisory Civil Procedural Statute for Hungary, Croatia and Slavonia of 1852.¹

After the World War I and the foundation of the Kingdom of Serbs, Croats and Slovenes (later: Kingdom of Yugoslavia) most parts of Croatia, although under new rule, continued to apply the same procedural legislation. The unification of procedural law took place in 1929, when Code on Judicial Process in Civil Suits was enacted. This new procedural code governed the procedure in civil suits in whole Yugoslavia, but - although it contributed to harmonization of judicial process and defined the court structure and distribution of jurisdiction - did not introduce major changes in the design of judicial procedure. The same could be said for procedural legislation enacted after World War II - the Code of Civil Procedure of 1956 and 1977. Both laws maintained the basic approach of earlier legislation, though some elements were added in order to stress "socialist" nature of new laws and emphasize some inquisitorial traits of the procedure. However, in practice these elements were neglected and - unlike some other socialist legislation - did not prevail upon traditional structure of judicial procedure. Therefore, after declaration of independence of Republic there was no imminent urge to reform Croatian procedural law immediately. By the series of laws on adoption and conformization of previous Yugoslav legislation into legal system of the Republic of Croatia, the Code of Civil Procedure of 1977 was, subject to only minor changes, taken over as Croatian law. There are already some plans to reform Croatian national civil procedural law and enact new legislation, but this seems - at this point - a long term task which have to be done with ultimate care and after careful examination of necessary improvements.

Major features of Croatian civil procedural law

Croatian civil procedural law is, according to its self-understanding, a mixture of adversary and inquisitorial features. The slight emphasis is given to the adversary elements, although a general evaluation would depend on the point of view: whereas common-law lawyers and legal scholars could say that Croatian civil procedure is a type of strong inquisitorial process, compared to the civil procedure of the Eastern European countries (at least before democratic reforms which took place in that countries in last few years) one could categorize it as relatively strong adversary type of procedure. In this respect it is also not very different from the prevailing type of civil procedure in Western European countries - especially from the civil procedure as existing in Austria and Germany - countries which permanently provided inspiration and model solutions for civil procedural issues.

The adversary and inquisitorial elements come best to the expression in the different stages of procedure. Croatian theory of civil procedure draws the major line of separation between the opening and closing stages of the proceedings (commencement and termination of civil action), on one side, and the stage of hearings and collection of relevant process material (evidence, legal rules), on the other side. Leaning upon Western theory and dependent on the mentioned division of process stages, Croatian legal scholars make the distinction between principles of dispositive and **ex officio** actions, and the adversary and inquisitorial principles in the narrow sense.²

The principles of dispositive and **ex officio** actions define the role of judge and the role of parties as to the commencement, maintaining and termination of proceedings in civil suits. In

¹See Triva, Belajec, Dika, *Gradansko parnično procesno pravo*, Zagreb, 1986, p. 32.

²See Triva, Belajec, Dika, op. cit., pp. 99-109; pp. 138-145.

Croatian civil process prevalent is the principle of dispositive action, i.e. the parties have in this stages decisive and, in certain instances, exclusive initiative. Croatian civil procedure strictly obeys to one of the basic principles of Roman law - principle **nemo iudex sine actore**. It means that there should be no civil suit, unless it was commenced by an authorized party. The courts and judges cannot initiate a civil action **ex officio**; there are no exception to this basic rule. The parties also define the claims to be decided upon, and the court can decide only within the general frames of claims and counterclaims presented by the parties (**ne eat iudex ultra et extra petita partium** - the judge cannot try the issues not specified by the parties).³

The parties have also right to terminate the proceedings. The plaintiff can terminate the proceeding by filing a notice of dismissal, or by waiving his claim; the defendant can terminate the proceedings by admitting the claim; both parties can terminate the proceeding by reaching a judicial settlement. In some of this cases, the parties' actions lead imminently to the termination of the proceedings⁴; in some cases, issuing of a court order (or even a judgment⁵) is necessary. The court acts at party's or parties' instance, but he may only inquire whether procedural conditions for it have been fulfilled, and cannot discard the will of the parties on the discretionary basis. The only **ex officio** power the court has is provided for in the Art. 3, par. 3 of the CCP. According to that Article, the court should reject any request of the party or parties if it is contrary to the mandatory provisions of law or public morals. In general, as to these issues, the judges have considerably passive role (subject to their natural power to conduct the proceedings in such manner as it deems proper, to decide the suit by issuing a final judgment, or to dismiss the case on procedural grounds), whereas the parties have the decisive, active role: they are, as in the Roman say, **domini litis**, "the masters of the suit".

The picture of the proceedings becomes different when it comes to the second set of issues - to the issues of distribution of powers as to the collecting of relevant "process material". "Process material", as defined by Croatian legal theory, encompasses everything what is necessary for the court to decide upon the claims specified by the parties, i.e. 1) facts in issue; 2) evidence; 3) empirical and scientific rules, rules of logic; 4) legal rules. Regarding most of this items, the judge has considerably active role. Judicial activism is relatively limited only when it comes to the facts in issue: in principle, judges must try the relevant facts presented by the parties and only these facts. The court may not also try the undisputed facts. However, there are exceptions to this rule. Firstly, the judge has the freedom to decide whether some fact alleged by a party is relevant or not, and may disregard the irrelevant factual statements. Moreover, the judge may take into account the notorious facts, though not presented by the parties (this does not apply to the private knowledge of the judge). But, most importantly, the judge may also inquire the facts not presented by the parties, if he deems that parties - by not expressing such facts - intend to reach illegal results, i.e. to

³ See Art. 2 of the Croatian Code of Civil Procedure 1976 (as amended by 1995 - hereinafter: CCP).

⁴In the case of reaching a judicial settlement, the court has to write down its contents into the file, and edit a transcript thereof to the parties. Such extract from the court record which contains the settlement constitutes an executory title. Thereby, the case is dismissed without any need for subsequent court order. Should such order be made, it would have only declaratory meaning. For provisions on judicial settlement, see Art. 321-324 CCP.

⁵If plaintiff waives his claim, or if defendant admits the claim, the court has to issue a special sort of judgement - judgement on the grounds of waiver or judgement on the grounds of admittance (the former existing since 1990 amendments to the CCP). The peculiarity of this kind of judgements is that they may not be appealed neither on the grounds of inaccurate or false factual determinations, nor on the grounds of mistaken application of substantive law; on the other hand, according to the legal theory, these judgements may be appealed for the reasons of fraud, deception or forced statement (since these judgements are based on the unilateral declaration of will of either party).

dispose of claims contrary to the mandatory provisions of law or public morals (Art. 7/4 CCP related to Art. 3/3 CCP). Ultimately, if some facts in issue have to be inferred from other facts ("evidential facts"), for these facts apply the same rules as for the evidence, i.e. the judge may find these facts even against the will of the parties.⁶

The role of judge is even more active regarding the other sources of process material - evidence, empirical rules and legal rules, both in purely domestic cases and in the cases involving transnational aspects. These issues will be discussed in the following sections of this report.⁷

Croatian law of evidence

Brief outline. Evidence to be taken

Croatian law of evidence has, at least in theory, strong inquisitorial traits. Although parties have right and (unsanctioned) duty to propose and present evidence, the judge has liberty to order taking of any evidence which he deems relevant for the process of adjudication, whether or not parties have proposed taking of such evidence. Judge may order taking of evidence against the will of either party, and even if parties consented that such evidence shall not be taken. In practice, however, judges rarely use this power, and limit the scope of evidence-taking to the evidence adduced by the parties.⁸ But, any taking of evidence, whether done on the proposal of a party or *ex officio*, has to be ordered by the court, and the judge may (and frequently does) reject the motion for taking evidence which he deems irrelevant or inadmissible.

The evidence-taking process itself is firmly in the hands of the judge, and this is the fact which immediately draws the attention of spectators used to the other methods of evidential process (mainly lawyers from common-law countries). Not only that judge has to decide which evidence shall be taken⁹ - he also conducts the process of evidence-taking. Moreover, he decides on the time, place and methods of adducing the evidence, and chooses the way in which evidence shall be obtained. The judge is also active in interrogating the witnesses - he has the right to start the questioning, and parties may only supplement his interrogation by adducing additional questions. In general, there is no process of cross-examination before Croatian courts of law. After all - since Croatian law does not have the jury trials - judge has to evaluate the evidence and decide whether relevant facts have been proved or not. These are the basic inquisitorial features of Croatian civil procedural law - but these features may seem strange only to the lawyers having roots in other legal cultures, whereas they are familiar to the most parts of the European Continent.

Proof taking. Measures available to obtain evidence.

⁶In practice, however, judges rarely use their powers; moreover, since parties have control over the facts they allege, they may indirectly bar the court from taking the evidence they regard as unpleasant or unwanted: they may either not allege a fact, or - if it is once alleged - the opposite party may agree with the factual statement and in such a manner stop the evidential efforts of the court (as already mentioned, the court may find only *disputed facts*).

⁷For more details, see Dika/Uzelac, "*Zum Problem des richterlichen Aktivismus in Jugoslawien*" (The Problem of Judicial Activism in Yugoslavia), *Zbornik Pravnog fakulteta u Zagrebu*, 40:4/1990, pp. 391-416 /a national report at IXth World Conference on Procedural Law (Coimbra & Lisbon, 25-31 August 1991).

⁸See *supra*, n. 6.

⁹The general rule is contained in the Art. 7, par. 3 of the CCP: "*The court may also adduce the evidence not previously proposed by the parties, if such evidence is relevant for the case.*" A similar rule is to be found in Art. 220/2 CCP: "*The court has to decide which evidence will be taken to prove the relevant facts.*"

Judicial evidence, broadly defined as information by which facts tend to be proved in the court of law, takes different forms in judicial practice. The classifications of evidence may differ, but a general division, accepted by Croatian legislation and major theorists, distinguish the following types:

- 1.) real evidence;
- 2.) documents;
- 3.) witnesses;
- 4.) expert witnesses;
- 5.) testimony of parties.

Although the judge is entitled to adduce (upon proposal of a party/the parties or *ex officio*) any type of evidence, the possibility of obtaining it and the measures he has at his disposal are different.

Real evidence and documents

As to the real evidence and documents¹⁰, court may - irrespective of the will of a party/the parties - issue a court order requiring their presentation in the court of law. Moreover, the court may order the inspection of the real evidence on the ground¹¹.

If one of the parties claims in its depositions that a fact may be proved by a specific document or real evidence, it has to be submitted to the court instantly (documents in foreign language have to be submitted jointly with an authorized translation). However, if such document is in the possession of some state or public authority, and the party cannot apprehend it on its own initiative, the court will issue an obligatory order on its presentation.¹² If party claims that such document or thing is in the possession of a third party (whether individual or legal person), the court shall in the first place ask the opinion of this person. The judge may issue an order on its presentation only if such person has a legal obligation to present it or if it is common for that person and the requesting party. In that case, the court order is compulsory and may be executed if third person refuses to obey to it. However, if a party claims that a relevant document or thing is in the possession of its adversary, the court may request the opposite party to present it. Nonetheless, no compulsory measures may be implemented against that party if it refuses to present the requested material. Instead of mandatory means, the judge is entitled to evaluate the significance of such refusal and may, according to his free opinion, draw conclusions as to the existence or nonexistence of disputed facts.¹³

Witnesses

¹⁰Under Art. 229 CCP, the rules on the presentation of documents (Art. 232 to 234) apply in an appropriate way to presentation of real evidence.

¹¹A judge (usually the sole judge or president of the senate) may be empowered to inspect the real evidence on the ground, if such real evidence cannot be produced in court without considerable costs, and it is not necessary to present it before full tribunal (if a judicial senate tries the case). See Art. 228 CCP.

¹²See Art. 232 CCP.

¹³See Art. 233-234 CCP; see also Triva/Belajec/Dika, op. cit., pp. 424-425.

If a judge issues an order on obtaining a witness testimony, this order is obligatory for everyone, though some exceptions exist to this general rule.

First aspect of obligation to witness is obligation to appear before a court of law - even if there exist justified reasons to refuse testimony (privileges). Absolute privileges (privileges which cannot be waived) concern obligation to preserve state or official secrets, and such privileges can be discarded only by authorization to testify given by competent authority¹⁴. Relative privileges (privileges which apply only if claimed by the witness) are lawyer-client privilege (legal professional privilege); religious confessional privilege (confessions made to the priest); common professional privilege (applies to any profession if there exist professional duty to preserve some communication as secret, e.g. relationship doctor-patient). In the above mentioned cases, the witness may decline testimony as such¹⁵. There is also a privilege against self-incrimination - the witness may refuse to answer particular questions (but not refuse to testify at all), if his answer would cause him grave disgrace, considerable loss of property or would make subject to criminal prosecution him, his spouse or his close relatives.¹⁶ Some categories of witnesses may not refuse to answer particular questions on the grounds of loss of property: these are so called "official witnesses" (*testes rogati*)¹⁷; witnesses who have to witness on actions which they undertook as legal predecessors or representatives of the parties; persons who have to witness the facts concerning property rights caused by marital or family ties, or facts concerning birth, marriage or death; persons which have the legal duty to report certain facts (commitment of crime, dangerous diseases etc.)¹⁸

If a duly summoned witness does not appear before the court, the judge may issue an order inviting the police to apprehend him and bring him before the court of law. In addition to this, he could be fined. The judge could also fine a witness if he/she refuses to testify or refuses to answer particular question, and the judge deems that there are no legitimate reasons for such refusal¹⁹. If witness continues to refuse testimony even after paying the fine, the judge may order his imprisonment. The term of imprisonment lasts until witness accepts to testify, or until his testimony becomes obsolete, but in no instances may last more than a month. An appeal against such decision (i.e. on fine and imprisonment) suspends execution thereof only if it also attacks the court's decision not to accept the reasons for refusing to testify. The court may also decide that a witness should bear the costs of his default. However, the court has also the right to pardon a witness and abolish the previous decision if the witness subsequently accepts to testify or prove legitimate grounds for his default. Army and police officers may not be imprisoned if they do not appear as witnesses and refuse to testify, but a notice on their refusal should be forwarded to their superiors, which could impose disciplinary sanctions²⁰. In any case, the parties may initiate a separate action against a witness and claim payment of damages²¹.

¹⁴See Art. 236 CCP.

¹⁵See Art. 237 CCP.

¹⁶See Art. 238 CCP; see also Triva/Belajec/Dika, op.cit., pp. 428 etc.

¹⁷*Testes rogati* are the persons who had been invited as witnesses of the inception of some legal affairs before the dispute arised (e.g. witnesses of the last wills, witnesses of the conclusion of marriage etc).

¹⁸Art. 239 CCP; see also Triva/Belajec/Dika, pp. 429-430.

¹⁹ If necessary, the judge may examine the parties before deciding on that issue; see Art. 240/1 CCP. The decision that a witness did not have reasons to refuse the testimony may be appealed only jointly while attacking the decision on fining or imprisonment of the witness (240/2).

²⁰ Art. 248 CCP.

²¹Sec Triva/Belajec/Dika, op. cit, p. 432.

The witness may be requested to make an oath, either before or after taking a stand in the court (sc. *promissory* or *assertory* oath). The current CCP provides for a "civil", rather than a religious oath. Moreover, although a false testimony is a criminal offense, the criminal law does not encompass a qualified offense of perjury (false sworn testimony); the terms of punishment are generally the same although the criminal court may take the fact that a false testimony was not given under oath as a mitigating circumstance (or vice versa).

Expert witnesses

The court regularly appoints expert witnesses **ex officio**. Although the judge may give parties the opportunity to propose certain expert witness and must give parties opportunity to object to the appointment of particular expert witnesses, he is in no case bound by parties' suggestions. Even if an expert witness is appointed upon suggestion of a party/the parties, he/she has to remain neutral and independent of the parties. An expert witness may be challenged, but only if there exist grounds which could impede his impartiality (basically, the list of grounds is same as for the challenge of judges).

Appointed expert witnesses also have duty to appear before the court to perform requested activities and to give their opinion. An expert witness may invoke the same privileges as other witnesses, but in addition to this, he may petition his discharge on any other "legitimate ground". If a duly summoned expert witness does not appear before the court, he may be fined, but cannot be imprisoned. Instead of that, the court may, upon a parties' petition, order him to compensate the costs caused by his default.²²

Testimony of the parties

Because of their position in the process, the factual statements of the parties may never be treated equally as other, impartial means of proof. However, if there is no other way to establish certain facts, the judge may use parties' testimony as supplementary source of evidential information. But, the parties are not bound to appear before the court, and no compulsory measures, neither fine nor imprisonment, may be imposed if they refuse to testify.²³

(For some other issues of Croatian law on evidence, such as the standard and burden of proof, see infra 3.2.).

Transnational aspects of litigation

Jurisdiction of Croatian courts in transnational cases

Rules on jurisdiction of Croatian courts in transnational cases (defined under Croatian law as "cases involving an international element"²⁴) are mostly contained in the Conflicts of Law Act 1983

²²See Art. 250-263 CCP; see also Triva/Belajec/Dika, pp. 433-439.

²³See Art. 269 CCP.

²⁴"Cases involving an international element" (or, "cases with an international characteristic) are, according to legal doctrine and jurisprudence, cases in which there is either an subjective or objective "transnational" element, or if the "transnational" element is contained in the mutual rights and obligations. See Dika/Knežević/Stojanović, **Komentar zakona o međunarodnom privatnom i procesnom pravu**, Beograd, 1991.

(hereinafter: CLA), Art. 46 to 79²⁵. This statute was enacted in 1983, thereby replacing the provisions of the CCP relating to the jurisdiction in "transnational" cases (hereinafter: "international jurisdiction"), i.e. Art. 28 to 32; 70/5; 88/1 CCP etc.²⁶ However, there are still a few other statutes and a number of international conventions (both bilateral and multilateral) encompassing rules on international jurisdiction.²⁷

The general criteria set forth for determining the jurisdiction of Croatian courts are the criteria of domicile (for natural persons) or seat (for legal persons) of the defendant²⁸. The statute provides for some ancillary (subsidiary) criteria if the defendant has no domicile (no permanent residence); if both parties are citizens of the Republic of Croatia; and in the cases of multy-party litigation.²⁹

Except for these general grounds for exercise of international jurisdiction, there are numerous other specific grounds relating to the particular types of disputes. Among other grounds, here is the table of the most important:

1. For torts cases (compensation of extra-contractual damages)
 - if damages occurred on the Croatian territory³⁰;
2. For claims which do not concern rights in rem
 - if defendant's property³¹ or the objects claimed in the law suit are situated in the Republic of Croatia,³²

²⁵Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima (Službeni list - Official Gazette of SFRY 42/82 and 72/82; Narodne novine - Official Gazette of Republic of Croatia, 53/91). Subject to some amendments, this former Yugoslav federal law has been adopted as a part of Croatian legislation after dissolution of Yugoslavia in 1991.

²⁶See Art. 108, p. 1 CLA. The only provision of the CCP regarding international jurisdiction which is still applicable is Art. 27. This article provides an ancillary criterium for determining international jurisdiction of Croatian courts, i.e. failing specific provisions of other national statutes or international instruments, the jurisdiction of Croatian courts may be also inferred from domestic rules on local jurisdiction.

²⁷See Warsaw Convention of 1929 (on unification of some rules on international air transportation); Vienna Convention of 1963 (on nuclear damages); COTIF 1980; CVR 1973 etc. Some bilateral agreements also contain jurisdictional provisions, like treaties with Algeria (1982); Austria (1954); Bulgaria (1956); Cyprus (1984); Czechoslovakia; France (1971); Greece (1959); Iraq (1986); Hungary (1968 and 1987); Mongolia (1981); Poland (1960); Rumania (1960); Soviet Union (1962) and others. See Dika/Knežević/Stojanović; op. cit., pp. 155-156.

²⁸**Actor sequitur forum rei**, see Art. 46/1 CLA.

²⁹See Art. 46, par. 2, 3 and 4:

"If the defendant is domiciled neither in the Republic of Croatia nor in any other state, the court of the Republic of Croatia has jurisdiction if the defendant is resident in the Republic of Croatia".

"If the litigants are citizens of the Republic of Croatia, the court of the Republic of Croatia has jurisdiction also when the defendant is resident in the Republic of Croatia."

"If there is more than one 'material' defendant, the court of the Republic of Croatia has jurisdiction also when one of the defendants is domiciled or has its seat in the Republic of Croatia".

Art. 46, par. 5 extends the application of the foregoing provisions to non-litigious proceedings (*Ausserstreitverfahren*).

³⁰Also applicable to cases against insurance companies - see Art. 53, par. 2 CLA. There are also some specific jurisdictional rules in torts cases provided by international conventions; see Dika/Knežević/Stojanović op. cit. pp. 197-198.

³¹This criterium is also known as **forum patrimonii**. It is not clear whether there has to be any connection between the defendant's property situated in Croatia and the object of plaintiff's claim. Dika pleads for a restrictive application of this criterium. See *ibid.*, p. 199.

³²See Art. 54, par. 1 CLA.

- if claim relates to obligations which occurred while defendant was resident in the Republic of Croatia;³³

3. For disputes regarding obligations which have arisen in the territory of the Republic of Croatia or had to be performed in its territory (*forum solutionis*)

- if defendant has its representative or agency in Croatia;
- if a company to which the discharge of defendant's business has been entrusted has its seat in the Republic of Croatia.³⁴

4. For disputes relating to property rights on real estates (immovables) and other rights *in rem* to immovables, including disputes regarding renting or leasing of immovables and disturbance of possession disputes related to immovables

- if the immovable is situated on the territory of the Republic of Croatia,³⁵

5. For the disturbance of possession disputes relating to movables;

- if disturbance has occurred on the territory of the Republic of Croatia,³⁶

6. For disputes regarding property rights and other rights *in rem* to ships and airplanes

- if such planes and ships are registered in a Croatian register;

There is also a number of provisions which determine international jurisdiction of Croatian courts in matrimonial and family disputes (both relating to validity of marriage; to property claims between spouses; to parental rights and duties; adoption etc); to inheritance; to guardianship; to personal status; to stateless persons etc.³⁷ For purposes of brevity, specific grounds in such cases cannot be discussed in this report.³⁸

The international jurisdiction of Croatian courts may also be agreed upon by the parties. Pursuant to Art. 49/1 CLA the parties may agree on the jurisdiction of the court of the Republic of Croatia if at least one party is a Croatian citizen or a legal person with its seat in the Republic of Croatia.³⁹ Such agreement is not allowed with regard to matrimonial and family cases and cases relating to personal status. On the contrary, the parties may also agree to derogate an otherwise existent jurisdiction of Croatian courts, if at least one of parties is a foreign citizen or a foreign legal person, and if exclusive jurisdiction of Croatian courts is not provided.⁴⁰ According to a dominant view, the default of the parties may be construed as a presumed agreement (*prorogatio tacita*).⁴¹ Some interpretative rules on the defendant's agreement (where such agreement is expressly provided by law) are set forth in the Art. 50 CLA.

³³See Art. 54, par. 2 CLA.

³⁴See Art. 55 CLA.

³⁵Art. 56 CLA. This is a case of exclusive international jurisdiction.

³⁶Art. 57 CLA.

³⁷See Art. 59 to 73 CLA and relevant international conventions and treaties.

³⁸For detailed information on all these issues see Dika/Knežević/Stojanović, op. cit., pp. 207-248.

³⁹On criticism of such limitation on the prorogation of the jurisdiction of Croatian courts see Dika/Knežević/Stojanović, op. cit., pp. 179-180.

⁴⁰See Art. 49/1 CLA.

⁴¹See Dika/Knežević/Stojanović, op. cit., pp. 183-184.

Applicable rules of evidence in transnational litigation

When trying a "transnational" case, Croatian courts are bound to apply Croatian procedural law. There are virtually no exemptions from this rule: provisions of procedural law are, according to unanimous understanding of Croatian legal practice and doctrine, strict (cogent) law. Parties may not derogate from the application of the procedural provisions provided in CCP and other statutes, no matter whether they are otherwise entitled to agree upon the jurisdiction of a foreign court or submit their dispute to arbitration. In other words, the Croatian law does not allow parties' determination of the rules under which a Croatian state court should try the case (so called "conventional" procedure). If parties wish to apply some other procedural law, they have to (if possible) altogether exclude the jurisdiction of Croatian courts. Such limitation does not apply to arbitration: if jurisdiction of a Croatian arbitral tribunal is agreed upon, parties may modify the rules of procedure, or even provide for application of foreign law as to the procedure.⁴²

This is also applicable to evidence-taking process before Croatian court, at least in theory. However, this issue is not so simple. The rules on evidence contained in the CCP which may be regarded as "procedural law" are relatively scarce and by and large put emphasize on definition of particular evidential means. It is not even usual to speak about Croatian "law on evidence", since the major procedural principles relating to evidentiary process are so called principle of "free evaluation of evidence" (*freie Beweiswürdigung*) and the principle of "material truth" (*materielle Wahrheit*)⁴³. The both principles stress the need to "remove harmful forms" which would stay in way to accurate determination of facts⁴⁴; therefore, a consequence is to establish a system in which judges would be "free from formal, legal rules of evidence".⁴⁵ Therefore, there are not a lot of evidential rules which would have to be regarded as procedural law, and thus - as *lex fori* - be a binding limitation to the activity of a judge.

There are some standard exceptions to the principle that the court may and should employ all the methods of truth-finding it deems appropriate. In some cases, evidentiary methods are prescribed by law. On the one hand, some facts may be proven only by specific type of evidence; in some cases, taking of specific evidence is not allowed.⁴⁶ On the other hand, there are some rules which restrict the principle of the free evaluation of evidence (which includes free assessment of the probative value of any item of evidence), such as rules on "presumptive evidence" (*gesetzliche Vermutungen*)⁴⁷.

⁴²Such agreement would, however, lead to the application of Art. 97/3 CLA, which provides that arbitral awards made in the Republic of Croatia in which the procedural law of a foreign State was applied shall also be considered foreign award. The consequences of such "foreign" Croatian awards are disputable. There are different scholarly opinions regarding that problem, but the practical impact is insignificant: there are no known cases in which a Croatian arbitral tribunal applied foreign procedural law.

⁴³On principle of "material truth" and some critical remarks on it, see Uzelac, *Istina u sudskom postupku*, Zagreb, 1992.

⁴⁴See Triva/Belajec/Dika, op. cit., p. 128.

⁴⁵See *ibid.* p. 131.

⁴⁶According to Triva, the former exceptions are jurisdictional agreements (see Art. 70, p. 4 CCP), power of attorney (see Art. 97 CCP), submittance of a communication to post office (see Art. 113 CCP), contents of statements delivered by persons who do not speak official language of the court and the deaf persons (see Art. 245 CC) and arbitration agreement (see Art. 470 CCP); the latter exception is taking of evidence by parties' statements, which is not allowed at all in the preliminary action of safeguarding evidence (see Art. 272/2 CCP). See Triva/Belajec/Dika, op. cit., p. 134.

⁴⁷A classic example are authentic instruments (*öffentliche Urkunden*)- documentary evidence issued by a competent official body (or by a person with granted public authority, such as notary public), which provide

A separate issue is the issue of the required standard of proof. The Code of Civil Procedure provides only that "the court shall decide which facts have been proven on the grounds of conscious and careful examination of the each piece of evidence and the total of evidence as a whole, and on the grounds of the results of the entire proceedings" (Art. 8 CCP). Although there are no express provisions on the standard of proof⁴⁸, it is generally claimed that such standard of proof is - at least for the facts relevant to decide on the merits - certainty (beyond reasonable doubt) standard⁴⁹. For facts pertaining to procedural issues, such standard is, according to legal doctrine, probability (balance of probabilities).⁵⁰ In practice, however, it seems that the courts have reduced the rigor of the "certainty" standard, and even the "probability" standard⁵¹.

Another important issue is the burden of proof in the civil procedure. Although legal doctrine developed a theory on burden of proof much earlier⁵², the express provision was added to the CCP only in the 1990 amendments. According to such provision, "if court, after hearing evidence (Art. 8) cannot establish some fact with certainty, the existence of such fact shall be judged under application of the burden of proof rules."⁵³ The burden of proof rules are, however, not fixed in the CCP. There is a doctrinal debate on the legal nature of such rules. Whereas some theorists associate these rules with procedural law, it seems that most of the scholars and legal practice deem those rules to be rules of substantive law.⁵⁴ Thereby, the burden of proof in a "transnational" litigation should be determined according to the rules of *lex causae*, not the *lex fori*, i.e. the Croatian judge would have to apply the applicable foreign law.⁵⁵

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Foreign law as an issue before Croatian courts

Joining the dominant Continental European tradition, Croatian legal system draws a clear line between factual and legal issues. The contents of legal rules, no matter whether they are the rules of domestic or foreign law, are deemed to be a part of **legal** issues in the case. Therefore, the same

conclusive evidence on the alleged facts and declarations of will, if issued within the limits of public authority of the issuing body. Counterproof is generally permitted. If there is a doubt that the instrument has been forged, there is a possibility to commence a special law suit to check the authenticity of the instrument (similar to the proceedings *inscription de faux* or *querela di falso* in some Roman countries). See Triva, op. cit., pp. 422-423. Pursuant to Art. 231 CCP, foreign authentic instruments, if duly authorized, have the same probative power as the domestic ones, unless there is no reciprocity or an international agreement provides otherwise.

⁴⁸The exception is Art. 221a, added by 1990 amendments of CCP. See supra, n. .

⁴⁹See Triva/Belajec/Dika, op. cit., p. 393.

⁵⁰Such conclusion is drawn from the construction of the statute, which in some places provides that court should asses a fact "in a swift and appropriate way" (CCP 40/3). See *ibid.* Such conclusion could also be drawn from the general wish to avoid having "a trial within a trial" on the existence of facts relevant only to application of procedural law.

⁵¹In practice, judges sometimes rely upon a mere allegation by a party, e.g. in assessing whether there are "legitimate grounds" for granting a permission to undertake belated action (*restitution in integrum*).

⁵²The theory was developed from the principle that a court may not refuse to render a final decision if it cannot form a decisive opinion on the alleged facts (prohibition of **non liquet** action; denial of justice). See Triva/Belajec/Dika, op. cit., p. 105 and 410.

⁵³Art. 221a CCP.

⁵⁴See Triva/Belajec/Dika, pp. 411-412.

⁵⁵Occasionally, the judge would also have to take into account the will of the parties. Under Croatian law, an agreement on shifting the burden of proof would be permitted, unless it imposes an unfair or unjust obligation on one of the parties. See *ibid.*

principles which are pertinent to the determination of applicable domestic legal rules have to apply to foreign law - in particular the principle *iura novit curia*. This is explicitly provided for in the Art. 13, par. 1 of the Conflicts of Law Act: "The court or another competent organ shall *ex officio* determine the content of the foreign law to be applied." The contents of legal rules are scholarly defined as, as already mentioned, a part of so called "process material" regarding which the court has exclusive inquisitorial powers; i.e. the parties may make proposals and inform the court on their legal construction, but that is in no way binding for the court.⁵⁶ In other terms, the court would have to possess the knowledge of the foreign law as if it is its own (domestic) law. Naturally, that is not very likely to be expected in most (or even majority) of the cases. Therefore, two auxiliary methods of determination of applicable rules of foreign law are provided for in the Art. 13/2 an 13/3 CLA. One method is the standard one, and regards the court: it may make inquiries about the foreign law from the Croatian Ministry of Justice⁵⁷. The other method recognizes the interest of the parties for a speedy and effective trial and fosters party initiative: under 13/3 CLA a party (parties) may submit to the court an official document (authorized instrument) on the content of the foreign law. Such document (*certificat de coutume*) would normally be issued by a competent foreign authority and accompanied by an authorized translation into Croatian language. According to doctrinal views, the court may also hear experts in order to determine the applicable rule of foreign law⁵⁸. However, in neither case these activities would be regarded as taking of evidence in technical sense: the foreign law (i.e. applicable foreign legal provision) has to be treated as a law, not as a fact. The consequence is that the burden of its determination may not be put onto parties. In any case, the court cannot discharge its duty to find the applicable foreign provision. Neither it may apply the Croatian law instead, although such proposals occurred with reference to the situation in which all efforts of the court to establish the applicable foreign legal norm remained fruitless.⁵⁹

How to obtain evidence from foreign sources?

There are very few rules of the domestic internal law on the obtaining evidence from foreign sources. The only explicit provision is Art. 184 CCP.⁶⁰ This provision has only subsidiary meaning - it applies "unless an international agreement does not provide otherwise". Therefore, to determine the particular way in which co-operation in evidence-taking has to be sought from a foreign court, one should refer to applicable multilateral and bilateral conventions to which Croatia is a party. These conventions include the conventions acceded to by former Yugoslavia: according to the Constitutional Act on Sovereignty and Independence of the Republic of Croatia, all international conventions to which Yugoslavia was a party will be applied in Croatia, "if they are not contrary to the Constitution and public policy of the Republic of Croatia, in accordance with the provisions of international law concerning succession of states".⁶¹ A number of international conventions

⁵⁶See Triva/Belajec/Dika, op. cit., p. 145.

⁵⁷Some bilateral and multilateral agreements provide for mutual obligations to inform the other party about valid legal acts and statutes. See...

⁵⁸See Triva/Belajec/Dika, op. cit., pp. 145-146.

⁵⁹See *ibid.*

⁶⁰"Unless an international agreement provides otherwise, the domestic courts have to communicate their requests for legal assistance to the foreign courts through diplomatic channels. The request and accompanying documents have to be written in the language of the requested state or have to be supplemented by an authorized translation thereof." The term *pravna pomoć* (legal assistance) includes any legally available and acceptable form of mutual aid between domestic and foreign court, including service of documents and subpoenas, supplying information, assisting in taking of evidence etc.

⁶¹Constitutional Act on Sovereignty and Independence of the Republic of Croatia, Art. 3, *Narodne novine* (Official Gazette), no. 32 (1991).

encompass some provisions relevant for this issue - in particular the Hague Convention on Civil Procedure of 1954, and Vienna conventions on diplomatic and consular relationships of 1961 and 1963; there are also separate bilateral agreements with Albania, Austria, Bolivia, Bulgaria, China, Czechoslovakia, France, Germany, Great Britain, Greece, Holland, Hungary, India, Iran, Iraq, Italy, Japan, Libya, Luxembourg, Mongolia, Norway, Poland, Rumania, Spain, Soviet Union, Sweden, Switzerland, Turkey and United States.⁶²

Judicial co-operation: Legal assistance to foreign courts

Analogous situation exists if Croatian courts are invited to provide assistance to foreign judicial authorities in taking evidence in Croatia. Once again, the primary source of law are applicable international instruments. However, there are some more rules on taking of evidence upon request of a foreign court. According to Art. 181 CCP, "the courts have to provide legal assistance to foreign courts in the cases provided for in international instruments, or if there is reciprocity in providing such assistance."⁶³ Therefore, if there are no applicable provisions in international conventions or bilateral agreements, the Croatian courts would still have to give an positive answer to a request made by a foreign court, unless there is no reciprocity in such matters between Croatia and particular foreign country. If there is doubt as to the existence of such reciprocity, the court may request a clarification of that issue from the Ministry of Justice.⁶⁴ There are no explicit norms on the presumed reciprocity comparable to the Art. 92/2 CLA, which provides, with regard to the recognition of foreign judicial decisions, that the reciprocity has to be presumed until the contrary is proven. However, it seems that the same attitude would be recommendable.

The other condition for providing aid to foreign courts is the compatibility with Croatian public policy (*ordre public*).⁶⁵ If a court considers some action required by a foreign court contrary to public policy, it should forward the matter to the Supreme Court of the Republic of Croatia, which is competent to deliver a final decision.

The competent courts for providing legal assistance, both internal and international, are Communal courts (*Opštinski sudovi*).⁶⁶ If a foreign court has sent the request (e.g. letter rogatory, letter of request) to another court, this court should apply the same rules as if the request was communicated by a Croatian court: it should forward the request to the competent judicial or other authority and return the notice thereof to the foreign authority which has communicated the request⁶⁷. Only if the court is not able to find the competent authority (or there is no such authority), it should return the request to the requesting authority.⁶⁸

The letters of request, both according to internal law, as according to international instruments, have to be drawn in the official language of the requested courts (Croatian language, or, where

⁶²See *ibid.* For the succession with regard to bilateral agreements (relations Croatia-Austria) see Bajons, "Der Einfluß der geänderten Staatsverhältnisse auf völkerrechtliche Übereinkommen und private Schiedsvereinbarungen", *Croatian Arbitration Yearbook*, 1:1994, pp.145-155.

⁶³For a similar wording, see Act on Judiciary (*Zakon o sudovima*, Narodne novine/Official Gazette, no. 3/94), Art. 11.

⁶⁴See Art. 181/1, last sentence.

⁶⁵Art. 181/2 CCP.

⁶⁶See Act on Judiciary, Art. 16, par. 1, p. 1 d) and e).

⁶⁷This is the only example in which domestic and other courts may communicate directly, and not via other state authorities (as a rule, through consular or diplomatic channels).

⁶⁸See Art. 179/2 CCP.

applicable, other language) or be accompanied by an authorized translation (translation made by an sworn-in court translator).

As a rule, Croatian courts have to apply domestic law while complying with the requests of foreign courts. However, a foreign court may specify the way in which it desires to have the request executed. In such a case, the competent Croatian court may apply the desired method or undertake specific actions, unless it would strike against public policy.⁶⁹

⁶⁹ Art. 182 CCP; an example is provided in Triva/Belajec/Dika, op. cit., p. 83.