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Marital Property Agreements in Croatian Theory and Practice

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1. Introduction

The default matrimonial property regime in Croatia is a community of property regime in which assets acquired during the marital union are considered as community of property. The assets that spouses have acquired on the basis of their work during the marital union or the assets that have been derived from such property represent the matrimonial community of property, co-owned in equal parts. In addition to community of property, spouses can have personal property, which is assets acquired by inheritance or gift, or personal assets that had been acquired before the marital union. Spouses are co-owners of community of property, while personal property is each spouse's own property.[1]

Spouses are co-owners of their community of property in equal parts *ex lege,* unless they have agreed otherwise. Although the title itself belongs to one spouse only, the other spouse is also an owner of the spouses' community of property, although an unregistered one. If there is a dispute between the spouses regarding their co-ownership, the spouse who is not the title holder shall prove before the courts that they are a co-owner of the appertaining item registered in a public register (e.g. the land register).[2]

Croatian family law grants spouses the option to conclude marital property agreement and modify or change the default matrimonial property regime. A marital property agreement based on unrestricted autonomy of spouses has been introduced into Croatian family leg-

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[1] Alinčić *et al.*, pp. 2014–2518.

[2] Matrimonial property regime for spouses and partners in informal relationships is the same under the Croatian family law. Compare: Rešetar, Lucić, pp. 15–17.

islation more than twenty years ago. Until today, the marital property agreement has been regulated by just a few provisions, leaving the door open to extensive autonomy of spouses with minimum restraints. Notwithstanding the huge contract freedom, it is clear that marital property agreements in Croatia are not made often.[3]

Considering the small number of marital property agreements concluded in the Republic of Croatia and their sparse legal regulation, Croatian courts are not often in position to decide thereon and their validity. However, case law includes several interesting judicial decisions that have opened up particular questions relating to marital property agreements, their content and validity.

In order to comprehend the current legal regulation of marital property agreement in the Republic of Croatia, the paper first shows its history. Then it presents the applicable provisions of the Family Act, which govern marital property agreement in Croatia. Finally, it presents three cases pertaining to marital property agreements dealt with by Croatian courts.

The exiguous case law immediately reveals flaws in the regulation of marital property agreements in the Republic of Croatia. Therefore, the conclusion revolves around those flaws, so that they can serve as guidelines for future research and legislative amendments.

2. The History of Marital Property Agreement in Croatia

The history of marital property agreement in Croatia begins with the post-World War II period, when the 1946 Marriage Act was in force. The Act was applied on the territory of the Federal People's Republic of Yugoslavia and thus on the territory of today's Republic of Croatia as well.[4] According to that Act, marital property agreements were governed by only one provision, stipulating that spouses could enter into such agreements and contractually regulate their rights and liabilities if the agreements were not contrary to the law. (Art. 10 of the 1946 Marriage Act). Marital property agreements were subject to the general rules of civil law and their form was not prescribed. Spouses could agree upon disposal of matrimonial property and its division, and could enter into various agreements in compliance with civil law (a deed of gift, loan agreement, purchase agreement or an agreement on the utilisation of an item belonging to only one spouse). Spouses could even agree that their own property shall be incorporated into their matrimonial property.[5]

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[3] Official statistical data about marital property agreements are not available in Croatia; however, information about the frequency of marital property agreements is provided for research of some authors. Čulo, Šimović, pp. 1029–1068, Majstorović, pp. 221–222, Hrabar, p. 57.

[4] Official Gazette of the Federal People's Republic of Yugoslavia, no. 29/1946.

[5] Prokop, pp. 53–54.

In line with the 1946 Marriage Act, spouses were not permitted to conclude a contract that was contrary to the regulations governing their matrimonial property relations or other laws. Hence, they were not allowed to enter into an agreement that would replace the default legal regime (community of property) with a separate property regime. Furthermore, it was not permitted to limit the community of property regime to only one kind of assets (e.g. real or movable property). Spouses were in a position to waive neither their part of matrimonial property nor their maintenance rights. In general, maintenance could not be the scope of a marital property agreement. Spouses were not allowed to agree upon the division of their future matrimonial property or, in other words, property that had not been acquired at the moment of conclusion of the agreement. Lastly, spouses were not permitted to waive their right to division of matrimonial property after the dissolution of marriage or agree upon the dowry or mehr.[6]

Majstorović drew the conclusion that despite the formal possibility to enter into a marital property agreement, the 1946 Marriage Act granted only little autonomy to spouses. Consequently, Majstorović stresses that this was a completely different concept of a marital property agreement from the current one that is based on broad contractual freedom and spouses' autonomy.[7]

Pursuant to the Croatian 1978 Matrimonial and Family Act[8], spouses' autonomy with respect to their marital property agreement was somewhat broader. Indeed, spouses were for the first time permitted to detach their earnings in marriage from their community of property. Thus, spouses were given an opportunity to classify their earnings as separate property. At that time, a marital property agreement had to be concluded in writing and the spouses' signatures authenticated (Article 279 of the 1978 Matrimonial and Family Act). Majstorović deems such autonomy a huge step forward in this light, since such an option allowed greater economic independence of spouses.[9]

Yet, such a legal regulation resulted in certain issues. For instance, was it possible to categorise earnings as separate property if one spouse was unemployed? The relevant literature regarded a marital property agreement made in such circumstances as immoral, and mentioned that the weaker spouse should be protected and the agreement annulled.[10]

Despite the possibility of concluding such a marital property agreement and its partial deviation from the default community of property regime, there were no examples of such con-

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6 *Ibid.*

7 Majstorović, p. 139.

8 Official Gazette, no. 11/1978, 45/1989, 51/1989, 59/1990.

9 Majstorović, pp. 142–143.

10 R. Sudžum according to Majstorović, pp. 142–143.

tracts in practice. There were agreements on the classification of separate property of spouses, but such agreements were not considered marital property agreement.[11]

The 2003 Family Act[12] provided spouses with broad autonomy concerning contractual arrangement of matrimonial property relations. It was a poor regulation of marital property agreements with only three provisions, which opened up the possibility of regulating marital property agreement in a totally unrestrained fashion.

A marital property agreement was defined as a legal transaction of spouses with respect to the regulation of their current and future property (Article 255, paragraph 1, of the 2003 Family Act). Hence, spouses were given an opportunity to fully modify the default community of property regime without any restrictions, and to adapt it to their own needs and interests.[13]

Article 255, paragraph 2, of the 2003 Family Act provided that the provisions of marital property agreements on property administration or disposal shall have legal effect regarding third parties if they are registered in land or public registers that require such registration for the acquisition of rights.

According to Article 255, paragraph 3, of the 2003 Family Act, a marital property agreement shall be made in writing, and the signatures of spouses shall require authentication by a notary public. Pursuant to Article 257 of the 2003 Family Act, it was forbidden to contract foreign law under a marital property agreement.

Article 256 of the same Act dealt with marital property agreement made by spouses deprived of legal capacity.

Unrestricted formulation of marital property agreements implies that every agreement entered into by spouses that is not contrary to applicable legal regulations and the principles of family law was permitted. Accordingly, it was permitted to fully neglect the default regime of community of property, agree upon different shares of spouses in the matrimonial property, change the status of particular assets (community of property or separate property), administer the matrimonial property, divide it etc.[14]

Based on the historical overview of marital property agreements in the Republic of Croatia, we can divide their development into three stages: the first stage refers to the period from 1946 to 1978, the second one to the period from 1978 to 2003, and the third one to the period from 2003 to today. All stages are characterised by a gradual broadening of the freedom of

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11 Majstorović, p. 144.

12 Official Gazette, no. 116/03, 17/04, 136/04, 107/07, 57/11, 61/11, 25/13, 05/15.

13 Majstorović, pp. 168–170.

14 Majstorović, pp. 193–208.

contractual regulation of matrimonial property relations. The first stage was marked by highly restricted autonomy, based on which spouses could not freely amend the default matrimonial property regime (community of property). In the second stage, they were permitted to do so, but only to a certain extent, or more precisely, only in the part referring to their earnings or income. Furthermore, such a possibility was hardly used in that stage. The third stage is marked by broad freedom and vast autonomy in the contractual regulation of matrimonial property relations.

The third stage commenced with the adoption of the 2003 Family Act and is still going on since the 2015 Family Act, which is currently in effect, but has not introduced any new developments in this regard.

3. Marital Property Agreement in the 2015 Family Act

Under the Croatian legal system, only three provisions regulate marital agreement, Articles 40, 41 and 42 of the 2015 Family Act.

According to Article 40, paragraph 1, of the 2015 Family Act, marital property agreements may regulate property relations between spouses with respect to existing or future property. Marital property agreements may be concluded before marriage, during marriage and after dissolution of marriage.

Article 40, paragraph 2, of the 2015 Family Act states that the provisions of a marital property agreement on property administration or disposal shall have legal effect regarding third parties if they are registered in land or public registers that require such registration for the acquisition of rights.

According to Article 40, paragraph 3, of the 2015 Family Act, an agreement shall be made in writing, and the signatures of the spouses require authentication.

Article 42 of the Family Act prescribed only one limitation regarding the spouses' freedom to contract. It is forbidden to contract foreign law under the marital property agreement and it is thus prohibited to apply foreign law on matrimonial property relationships between spouses. However, this provision will be effective until the new Croatian International Private Act enters into force.[15]

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[15] The new International Private Act will enter into force in Croatia on 29 January 2019, the same day when Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes shall apply. According to the Article 22, paragraph 1, of the Regulation, the spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime. They should provide that that law is the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time

Article 41 deals with the marital property agreement made by spouses deprived of legal capacity. Such a marital property agreement could be made by a guardian of a spouse deprived of legal capacity and approved by a competent authority, as well as certified by notary public.

Taking account all three provisions dealing with marital property agreements, it can be concluded that the Croatian legal system allows spouses huge autonomy with minimum restraints.[16]

There are no special provisions under the 2015 Family Act prescribing an option for the court to override or modify the marital property agreement on account of unfairness, rights of a third party, or on any other grounds. However, according to the general principle under Article 4 of the Croatian Civil Obligations Act,[17] the spouses are obliged to conclude a marital agreement, which creates obligations, rights and liabilities, in accordance to the principle of good faith and fair dealing.

According to the general civil law, contracts can be a) annulled or b) voidable, depending on the requirements.

The general civil law prescribes reasons for declaring the nullity of a contract. Thus, the contract must meets the requirement of legality or, in other words, the contract must be concluded for a legal purpose. Any interested party may invoke nullity, while the matter of nullity the court examines ex officio according to Article 327, paragraph 1, of the Croatian Civil Obligations Act. According to Article 328 of the Croatian Civil Obligations Act, the right to invoke nullity does not lapse.

A valid and enforceable contract must be concluded by the parties with legal capacity and with intention to create a legal binding agreement. In some cases, contracts must comply with certain formalities, being in writing or with a public notice (Article 330 of the Civil Obligations Act).

The party who applied for declaring the contract null and void may request that the contract be annulled (Article 331, paragraph 1). After becoming aware of the cause for the voidability or after termination of duress, such a party is granted a one-year period to apply for the annulment. However, in any circumstances, this right shall expire within three years from the date of entering into a contract (Article 335).

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the agreement is concluded; or the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

16 Spouses are permitted to agree on maintenance, agreement should be scrutinised by the courts. However, maintenance is not under the scope of marital property agreement (Article 302 of the 2015 Family Act).

17 Official Gazette, no. 35/05, 41/08, 125/11, 78/15, 29/18.

Pursuant to Article 369 of the Croatian Civil Obligations Act, if, after entering into a contract, extraordinary circumstances arise that could not be envisaged at the time of conclusion of contract, making it excessively onerous for one party to perform, or if entering into the contract would lead to an excessive loss as a result of the performance, that party may request an amendment or even termination of the contract. An amendment or termination of a contract may not be applied for by a contracting party claiming the change of circumstances if that party should have taken such circumstances into consideration at the time of conclusion of contract, or if they could have avoided or overcome them. When a party requires termination of a contract, the contract shall not be terminated if the other contracting party provides for or agrees to an equitable change in the relevant clause of the contract. In case the court declares a contract to be terminated, it shall, upon an application of the other party, bind the party applying for the cancellation to compensate the other party with a reasonable amount for the damage suffered due to the termination. In compliance with Article 371 of the Croatian Civil Obligations Act, when ruling on amendment or termination of a contract, the court shall be guided by the principles of good faith and fair dealing, taking into account the purpose of the contract, the allocation of the risk resulting from the contract or from laws, the duration and effects of extraordinary circumstances, and the interests of both parties.[18]

Although the Family Act does not precisely regulate marital property agreements, the general principles of the law of obligations facilitate protection of spouses having entered into a flawed marital property agreement that can be legally contested or declared null and void. Yet, there is the issue of the appropriateness of law of obligations principles for resolving disputes relating to matrimonial property relations, including those based on a marital property agreement.

4. Marital Property Agreements in the Case Law of Croatian Courts

Poor regulation of marital property agreements by the Family Act and their rare conclusion results in few court proceedings initiated by spouses in regard to their marital property agreement. The problems appearing in sparse relevant case law relate to the issue of differentiating between marital property agreements and agreements on the division of matrimonial property, as well as to the issue of marital property agreement formulation.

4.1. Marital Property Agreement or Settlement

The spouses who initiated judicial proceedings due to their marital property agreement were married from 1998 to 2009. During the marriage, two children were born. The disputable

[18] Compare: Rešetar, Lucić, pp. 29–33.

marital property agreement was made in 2007, and its conclusion was assisted by attorneys-at-law. At the time of conclusion of the agreement, divorce proceedings were already underway. The marital property agreement regulated division of the matrimonial property, which included six real property assets, in a way that some assets were given to one and others to the other spouse. The contract also recognised the right of ownership over assets that were not comprised thereby, but those assets were not specified therein. After the conclusion of the agreement, the husband found out that his wife purchased two apartments in Zagreb, two apartments at the seaside, three apartments in Austria, and two suites in the Austrian ski-resort Nassfeld while they were still married. For that reason, the husband initiated court proceedings requiring annulment of the marital property agreement on the grounds that he was misled on at the time of conclusion of the agreement, since he did not know about all the real property his wife acquired while they were still married, and that the property concerned shall belong to their community of property pursuant to the Family Act.

The first instance court rejected the husband's application, stating that the agreement in question involves features of a settlement in accordance with civil law principles. According to Article 150, paragraph 1, of the Croatian Civil Obligations Act, a settlement between disputing parties to a legal transaction (act) is aimed at a compromise leading to dispute termination, accompanied with mutual respect for contractual rights and liabilities.

The second instance court, however, accepted the husband's appeal to the decision of the first instance court. The second instance court established that the agreement could not be regarded as a settlement according to civil law principles. On the contrary, it was a genuine example of a marital property agreement governed by the Family Act. On the other hand, due to the fact that the Family Act sets forth neither contestation nor voidability of marital property agreement, relevant provisions of the Civil Obligation Act shall apply.[19]

According to Article 284, paragraph 1, of the Croatian Civil Obligations Act, if a party is misled by the other party with the intention of persuading them to conclude a contract, the former shall be entitled to apply for contract annulment.

The ex-wife did contest the fact that she had purchased the respective real property assets in Croatia and abroad and that she had registered them as her own ownership, but she protested against deeming them as community of property, claiming that the funds invested in asset purchase had belonged to her parents.

The second instance court stressed that although the title itself belongs to one spouse only, the other spouse is also an owner of the spouses' community of property, though an unregistered

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[19] According to the Family Act, matrimonial property relations are subsidiarily subject to the Civil Obligations Act and the Act on Ownership and Other Real Rights.

one. If there is a dispute between spouses regarding their co-ownership, the spouse who is not the title holder shall prove before the court that they are a co-owner of the appertaining item that is registered in a public register (e.g. the land register).

The second instance court concluded its decision with the assertion that the controversial assets purchased during the marriage do represent community of property. Community of property is a rebuttable presumption. Therefore, it is the ex-wife who shall prove that the purchased assets belong to her personal property.

She is also obliged to prove how she obtained the concerned assets, so the burden of proof lies on her.

In that case, the second instance court held that the spouse's settlement on the division of matrimonial property does belong to the scope of family law and it cannot be completely resolved by applying only civil law principles. The second court's point refers to matrimonial property presumptions. Despite the fact that real property is registered as property of only one spouse, it shall be regarded as community of property if acquired during marriage. The burden of proof lies with the spouse who claims otherwise. [20]

4.2. Marital Property Agreement Form

The first case involving a dubious form of a marital property agreement was initiated by the spouses who concluded an agreement on the specification and division of matrimonial property on 25 March 1995. The agreement was made in writing, but not as a notarial act, which was stipulated by the then effective Notary Public Act.[21] The 1998 Family Act was also in force at that time and, for that purpose, it required authentication of signatures but not notarisation of the whole document.

The claimant subsequently contested the agreement on the specification and division of matrimonial property concluded on 25 March 1995, since it was not made as a notarial act as prescribed by the Notary Public Act.

The first instance court annulled the agreement due to its irregular form. However, the Supreme Court was of a different opinion.

The Supreme Court established that such regulation of matrimonial property relations was valid on the date when the agreement was made (25 March 1995). At that time, the Family Act did not set forth the obligation to conclude the marital property agreement in the form

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[20] Decision of County Court Zagreb, No. P-8018/09 Gž Ob-43/17. 24 January 2017.

[21] Public Notary Act, Official Gazette no. 78/93.

of a notarial act, but only a written form thereof if it concerned spouses' real property. Even though the 1993 Notary Public Act was in force at that time too, the Family Act was considered *lex specialis* and was to apply in that particular case.

The Supreme Court revised the decision of the first instance court and provided the following explanation: "The parties' agreement represents an agreement on the division of community of property and not a marital property agreement. In terms of such contracts, the Family Act envisaged the written form thereof only if they related to real property. Since the disputable agreement was concluded in writing and comprised both movable and immovable property, it shall be deemed as a duly concluded agreement."[22]

The second case also revolved around the agreement form. The respective agreement was made as an agreement on the division of matrimonial property on 18 January 2001. The ex-wife undertook to assign 50% of ownership of the company to her husband, and he was to compensate her for the assignment with DEM 50,000. The ex-wife undertook not to establish a company that would be dealing with the same business activity as her ex-husband's, and would thus not represent competition.

After some time, the ex-wife submitted an application requiring the amount of DEM 50,000, whereas her ex-husband required damage compensation from her on the grounds of lost profit because she, contrary to their oral agreement, was operating the same type of business as he was.

The husband required damage compensation due to violation of the oral agreement, and referred to Article 71 of the then effective Civil Obligations Act, according to which *"any subsequent oral additions on non-essential terms that are not laid down in the contract shall be valid, provided it is not contrary to the purpose of the prescribed form."*[23]

Prior to the formal conclusion of the agreement, the spouses had agreed upon the DEM 50,000 payment liability, which had actually taken place before the conclusion of the agreement in a written form. The Croatian Supreme Court held that the spouses' oral agreement implied legal effects since it had been fully executed with the aim of regulating matrimonial property relations. On the other hand, the oral agreement made for the purpose of preventing the ex-wife from operating the same business as her husband was believed to imply no legal effects since it had been neither implemented in practice nor produced legal effects.[24]

The issues relating to the marital property agreement form or the form of an agreement on the division of matrimonial property arose from amendment of the mandatory form of mari-

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22 Supreme Court of the Republic of Croatia, Rev. No. 2414/1996, 26 May 1999.

23 Article 291, paragraph 3, of the Civil Obligations Act, which is in force today.

24 Supreme Court of the Republic of Croatia, Rev. No. 1069/2005-2, 8 June 2006.

tal property agreement in family law, as well as from application of other laws (Notary Public Act and Civil Obligations Act) to matrimonial property contracts. The 2015 Family Act prescribes that such contracts shall be made in writing and the signatures thereon authenticated. Nevertheless, there is still the possibility of contesting them based on law of obligations rules.

5. Open Questions Concerning Marital Property Agreement in Croatia

Although the legal regulation of marital property agreements is vague and the case law scarce, it is still possible to single out several burning issues.

The first issue refers to the time when a marital property agreement can be concluded. The relevant case law has disclosed that a marital property agreement concluded after marriage termination may be regarded as a parties' settlement. Settlement validity is assessed based on civil law rules, while the validity of a marital property agreement is subject to the family law regime.[25] The 2015 Family Act provides spouses with the option to enter into a post-divorce agreement, based on which they regulate their matrimonial property relations (Article 52, paragraph 1/3). According to Article 45 of the 2015 Family Act, spouses may regulate their post-divorce matrimonial property relations by means of an agreement. Unlike a marital property agreement, such an agreement requires no special form.[26] The 2015 Family Act does not specifically set out whether a marital property agreement can be concluded after divorce or not.[27]

As far as their form is concerned, there is a difference between a marital property agreement and an agreement on the division of matrimonial property. When it comes to the former, the signatures thereon need to be authenticated, whereas the latter does not require such authentication.

There is also the issue whether spouses need special protection both when they enter into a marital property agreement and when they enter into an agreement on the division of matrimonial property. In fact, both types of documents deal with family matters, which involves emotions, children and other family members. Such special protection would require more than signature authentication; for example, mandatory counselling on the legal consequences of agreement conclusion or spouses' property rights granted by family law.[28]

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[25] Decision of the County Court of Zagreb, No. P-8018/09 Gž Ob-43/17. 24 January 2017.

[26] Aralica, pp. 42–43.

[27] According to the Principles of European Family Law Regarding Property Relations between Spouses, issued by the Commission on European Family Law (CEFL), an agreement between the spouses or prospective spouses may be concluded at any time. Principle 4:10. Boele-Woelki *et al.*, p. 117.

[28] *Ibid.*, p. 126. According to principle 4:13, a notary or other legal professional should explain to each spouse their legal position and choices available. They should ensure that spouses understand the legal consequences of their

Sometimes, there might be a problem for a third party who is in a legal relation with one or both spouses when the party is not familiar with the fact that the spouses have made a marital property agreement. In such cases, the legal effects of the marital property agreement cannot affect the third party. Yet, if a third party was aware of the marital property agreement at the moment of entering into a legal relation with one or both spouses, or the agreement was publicly known, the agreement might affect the third party. This usually refers to spouses' creditors.[29]

In terms of Croatian family law, a marital property agreement can be annulled only on the basis of general contract law provisions. However, the specificity of the relationships between family members and partners requires a specific approach to the validation of marital property agreements. The court should be given an opportunity to modify those marital property agreements for specific reasons beyond contract law rules. Indeed, spouses emotionally depend on one another, and their relationship is interwoven with interests of other family members (children and parents). Marital property agreements often comprise longer periods of time, during which unpredictable events might occur in the life of spouses. Such events may encompass the birth and raising of children, as well as illness of elderly family members, due to which one spouse spends more time within their family to the detriment of their professional development and career.[30]

6. Conclusion

The historical overview of marital property agreements in the Republic of Croatia is characterised by gradual broadening of the freedom of contractual regulation of matrimonial property relations. Initially, spouses were permitted to conclude marital property agreements based on very restricted autonomy, according to which they could not freely amend the default matrimonial property regime of community of property. Later, spouses were permitted to do so, but only in the part referring to their earnings or income. That possibility was hardly used in practice. Finally, the broad freedom and vast autonomy in the contractual regulation of matrimonial property relations was introduced in to Croatian family legislation in 2003. Until today, marital property agreement has been regulated by just a few provisions, leaving the door open to extensive autonomy of spouses with minimum restraints. Notwithstanding that, marital property agreements in Croatia are not made often, and Croatian courts

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marital property agreement and that they freely consent thereto. No distinctions should be between pre-marital property agreements and post-marital property agreements.

[29] *Ibid.*, p. 130

[30] *Ibid.*, p. 138. According to the principle 4:15, it is allowed to set aside or adjust of a marital property agreement in case of exceptional hardship.

are not often in position to decide on contents and validity of marital property agreements. Nevertheless, the rare case law has opened up particular questions relating to marital property agreements. The problems appearing in case law relate to the issue of differentiating between marital property agreements and agreements on the division of matrimonial property, as well as to the issue of marital property agreement formulation.

The identified problems are not unknown to other contemporary legal systems. Trying to find the solution for the problems relating to the marital property agreements, it could be helpful to take into account the European Principles of European Family Law Regarding Property Relations between Spouses. Is there a better way to find a legislative solution than to look into the common core for the solution of similar legal problems, on the basis of comparing the different solutions provided by the family laws of the various European jurisdictions?[31]

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[31] Boele-Woelki *et al*., 2013.