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# **Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention**





# Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention

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## Foreword

The cross-border enforcement law has gained growing importance over the years. International trade and commerce have steadily increased and the number of people living outside their native countries continues to grow. A recognition of foreign judgments and their enforcement save time and litigation costs, and there is no need to re-litigate the same dispute between the same parties in a different State's court. Ever since the beginning of the European integration process, mutual recognition of judgments has been a vital component of civil law cooperation.

The South East European (SEE) economies as EU accession countries are engaged in progressive reforms of their judicial systems with the primary aim of strengthening the independence, impartiality and professionalism of judiciary in meeting European standards for judges. Closer judicial cooperation between SEE authorities built on the principle of mutual recognition and based on mutual trust can help overcome the complexity of different systems in the region and build bridges between different jurisdictions.

The 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention) will give impetus to strengthening judicial cooperation in mutual recognition and enforcement of foreign judgments in civil and commercial matter and guaranteeing of a legal certainty in cross-border commercial relations. Streamlining and facilitating cross-border cooperation in civil and commercial matters between judiciaries in SEE countries will definitely lead to make procedures less complex and less lengthy but also to significantly reduce financial costs.

With the aim to implement in-depth research on the cross-border recognition and enforcement of foreign judicial decisions, Country reports are developed analysing the current legal systems, institutional structure, legal practices and existing impediments in SEE countries.

This publication compiles the six Country reports and provides comprehensive overview of the scope of application for the recognition and enforcement of foreign judicial decisions; legal and institutional framework; type of judicial decisions which are eligible for recognition and enforcement; compatibility of the national provisions regarding international jurisdiction with the HCCH 2019 Judgments Convention; procedure for recognition and enforcement of foreign judicial decision; the main legal sources and stakeholders in regards to the recognition and enforcement of foreign judicial decisions and the adoption of the HCCH 2019 Hague Convention; and the main trading partners in each SEE country in terms of import and export.

We hope it will increase the level of importance of cross-border enforcement of foreign judicial decisions and will encourage the responsible authorities, legal community and judiciary in SEE countries to consider the perspectives and benefits the HCCH 2019 Judgments Convention might bring to the whole region.

**Dr. Veronika Efremova**  
**GIZ Senior Project Manager**

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## COUNTRY REPORT: ALBANIA

### Author

Aida Gugu Bushati

### Executive summary

The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention) was adopted on 2 July 2019 to facilitate the effective international circulation of judgments in civil or commercial matters. The ratification process by the signatory parties follows the adoption to ensure the application and the effectiveness of the convention.

The main aim of this study is to analyse the Albanian legal and institutional framework of cross-border recognition and enforcement of foreign judicial decisions in order to support Albania in steering an informed decision on the ratification of the HCCH 2019 Judgments Convention. It provides an overview of the scope of application of the recognition and enforcement rules in Albania in correlation with art. 1 and 2 of the HCCH 2019 Judgments Convention; the compatibility of the national provisions regarding international jurisdiction and the conditions for recognition and enforcement with those provided under the convention; the procedures and the documents that need to be produced; main stakeholders involved in the process and the main trading partners.

The recognition and enforcement of foreign judicial decisions in Albania are regulated by the provisions of the Civil Procedure Code and bilateral agreements ratified by Albania. Reciprocity is excluded as a condition for recognition and enforcement of foreign judgments. The current legal framework is generally in line with the rules and conditions specified under the Convention, and the process of recognition and enforcement is efficient and not too complicated.

Albania is part of many initiatives promoting regional and bilateral free trade. Albania is a candidate country for European Union membership and has had a Stabilisation and Association Agreement in force since 2009. European Member States and neighbouring countries remain the main trading partners of Albania.

## 1. Legal framework of the cross-border recognition and enforcement of foreign judicial decisions

### 1.1 Overview of legal provisions

The recognition and enforcement of foreign judicial decisions in Albania are regulated by the provisions of the Civil Procedure Code (CvPC)<sup>1</sup> and international/bilateral agreements ratified by Albania. Reciprocity is excluded by the CvPC as a condition for recognition and enforcement of foreign judgments.

Art. 393-399 of the CvPC stipulate the rules and procedures for the recognition and the enforcement of foreign judicial decisions in Albania. As a rule, recognition and enforcement of foreign judicial decisions are based on the conditions laid down by the CvPC and separate laws (art. 393 para. 1 of the CvPC). However, in cases where an international agreement has been entered into on a matter, the provisions of that agreement will be applied (art. 393 para. 2 of the CvPC). The Albanian Constitution gives priority to the application of the provisions of international agreements, since the latter have superiority over non-compatible national laws. They are directly applicable, unless they contain provisions that are not self-executing and which require the issuance of a law (art. 122 of the Constitution).<sup>2</sup>

Albania is party to several bilateral and multilateral conventions dealing with recognition and enforcement of foreign judicial decisions. Albania's membership to the Hague Conference on Private International Law dates from 4 June 2002. Albania has ratified the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations; the Hague Convention of 19 October 1996 on Private International Law on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of parental responsibility and measures for the protection of children. Albania has acceded to the Hague Convention of 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.<sup>3</sup> This international instrument, however, was not successful, and therefore not applicable in Albania.

Albania has signed bilateral agreements which contain provisions on recognition and enforcement of foreign civil and commercial judgments. At present the following bilateral agreements are in force: Agreement with Greece "On legal assistance in civil and criminal matters"(1993);<sup>4</sup> Agreement with the Russian Federation "On legal assistance in the civil, criminal and family domain" (1996);<sup>5</sup> Agreement with North Macedonia "On legal assistance in civil and criminal matters" (1998);<sup>6</sup> Agreement with Turkey "On mutual legal assistance in civil, criminal and commercial matters" (1995);<sup>7</sup> Agreement with Romania "On mutual legal assistance in civil, criminal and family matters" (1961);<sup>8</sup> Agreement with Hungary "On mutual legal assistance in civil, criminal and family matters" (1960);<sup>9</sup> Agreement with Bulgaria "On legal assistance in civil matters" (2005).<sup>10</sup> These bilateral agreements regulate cross-border cooperation in civil, commercial, and criminal matters, as well as the recognition and enforcement of court decisions in the respective countries.

Regardless of the law applicable to a particular case, a decision of an Albanian court of appeal (Exequatur) is always needed in order to give effect to and enforce a foreign judicial decision within

the territory of the Republic of Albania. Therefore, a request to give effect to a foreign judgment is submitted to the court of appeal (art. 395 of the CvPC), by the parties or their lawyers. A request for the recognition and enforcement of a foreign decision may also be submitted through diplomatic channels, if this is allowed by the international treaties and based on the principle of reciprocity (art. 395 para. 1 of the CvPC). In this case, if the interested party has not appointed a lawyer, the chairperson of the court of appeal can appoint a lawyer to submit the request on his behalf (art. 395 para. 2 of the CvPC).

The bilateral agreements listed above also provide for the possibility to submit the request for recognition and enforcement of foreign judicial decisions to the court of first instance of the country that has rendered the decision. In this case, the central authorities as envisaged by the agreement (Ministry of Justices) are competent to transmit the request following the procedures stipulated by the bilateral agreements.<sup>11</sup>

In accordance with art. 396 of the CvPC, the request for the recognition of a judicial decision of a foreign state must be accompanied by a copy of the judgment to be enforced, a certificate from the court that issued the judgment certifying that it has become final, the power of attorney in case the request is submitted by the representative of the interested party translated into Albanian and notarized. Both the copy of the judgment and the certificate that the judgment has become final must be certified by the Ministry of Foreign Affairs of Albania.<sup>12</sup> In addition to the above-mentioned documents, the bilateral agreements require the parties to provide a certificate ascertaining that the party was duly notified and represented in the process.<sup>13</sup>

The CvPC contains a specific provision (art. 394) which indicates the conditions that a foreign judicial decision must comply with in order to be recognised and enforced in Albania. They include the authenticity of the decision for which the recognition is required for the purpose of creating the belief that the decision has become final and has the effects of *res judicata* in the state of origin, and that the legitimacy of the litigant claiming the recognition should be taken into consideration. The refusal of recognition and enforcement of a foreign judgment is based on the principles of public order and due process of law (art. 394 of the CvPC). The wording "give effect to the foreign judgment" in art. 394 of the CvPC does not distinguish between recognition and enforcement. The grounds for refusal listed under art. 394 of the CvPC apply to both the recognition and the enforcement processes.

In general, bilateral agreements have similar grounds for refusal of recognition to those provided for in the CvPC, such as lack of court jurisdiction, deficiencies in due process, *res judicata* and *lis pendens*, violation of public policy are the common grounds of refusal found in the different bilateral agreements concluded by Albania.<sup>14</sup>

The enforcement of foreign judgments is subject to the general enforcement rules foreseen in the Civil Procedure Code (art. 510 et seq. of the CvPC). Art. 510 of the CvPC stipulates that enforcement can be done based on the enforcement titles that are listed in the article. The decisions of foreign courts constitute enforcement titles once they are given effect following the rules provided in the CvPC (Article 510(c) of the CvPC). The enforcement title is enforced upon the request of the creditor (art. 511 CvPC). Albanian legislation provides for voluntary enforcement of titles, while obligatory enforcement can be applied only after the deadlines for voluntary enforcement have expired. Obligatory enforcement can start before the voluntary deadlines only when there is a risk that the enforcement will become impossible (art. 517 and 519 of the CvPC).

The request of the creditor must be accompanied by the enforcement title (original and duly

<sup>1</sup> Law no. 8116, of 29.03.1996 on Code of Civil Procedure of the Republic of Albania, OJ no.138 of 07/12/1998, as amended.

<sup>2</sup> Law no. 8417 of 21.10.1998 on Constitution of the Republic of Albania, OJ no. 9, 10 and 11/1996, as amended.

<sup>3</sup> Approved by Law no. 10 194 of 10.12.2009.

<sup>4</sup> Law no. 7760, of 14 October 1993, Official Journal No. 12 of 1993.

<sup>5</sup> Law no 8061, of 8 February 1996 Official Journal No. 2 of 1996.

<sup>6</sup> Law no 8304, of 12 March 1998 Official Journal No. 7 of 1998.

<sup>7</sup> Law no 8036, of 22 November 1995, Official Journal No. 25 of 1995.

<sup>8</sup> Decree no 3250 of 17 April 1961, Official Journal No. 6 of 1962.

<sup>9</sup> Decree no 3119 of 6 June 1960, Official Journal No. 3 of 1961.

<sup>10</sup> Law no 9348 of 24 February 2005, Official Journal No. 19 of 2005.

<sup>11</sup> Art. 26 of the Agreement between Albania and Greece, art. 24 of the Agreement between Albania and North Macedonia.

<sup>12</sup> In practice, the apostille for the documents submitted during the recognition and enforcement process is not issued by the Ministry of Foreign Affairs of Albania but by the Ministry of Foreign Affairs of the country of the court that has rendered the judgment.

<sup>13</sup> Art. 22 of the Agreement between Albania and North Macedonia, art. 22 of the Agreement between Albania and Turkey.

<sup>14</sup> Art. 22 of the Agreement between the Albania and the Bulgaria, art. 21 of the Agreement between Albania and North Macedonia, art. 24 of the Agreement between Albania and Greece.

notarised), the enforcement fee and the power of attorney of the person representing the creditor (art. 510 CvPC). The order is to be enforced within 15 days from the submission of the request by the creditor (art. 515 CvPC).

## 1.2 Assessment of the legal framework

The Albanian rules and procedures for recognition and enforcement of foreign judicial decisions provide a similar system to that contained in international conventions or any other national legislation. The practice of the Albanian courts shows that the process of recognition and enforcement of foreign judgments is not lengthy and complicated. However, it is hard to predict the outcome and the duration of the enforcement process, due to various factors that could have an impact.

Nevertheless, the existing legal framework has certain limits. It only offers the opportunity to recognize and enforce foreign decisions and no other enforcement titles issued outside Albania, such as authentic instruments. Furthermore, it neither enables the enforcement of provisional measures issued outside the territory of the Republic of Albania,<sup>15</sup> nor does it allow for the enforcement of settlement agreements, which constitute an enforcement title under a foreign judgment.<sup>16</sup>

Moreover, while international jurisdiction is regulated in the context of the Private International Law of Albania (PILA),<sup>17</sup> for the recognition and enforcement of foreign decisions, the CvPC provisions apply. This concept stands in contrast not only to the European law of international civil procedure, which always regulates international jurisdiction and recognition in context, but also to the concept used by other national laws in European countries. PILA provides a more liberal regime compared to the ones provided for in CvPC.<sup>18</sup> Indeed, EU regulations in the field of private international law and international procedural law had a considerable impact on the 2011 Albanian reform of private international law,<sup>19</sup> with respect to the law applicable to contractual and non-contractual obligations, which was modelled on the Rome I<sup>20</sup> and Rome II Regulations.<sup>21</sup> The 2011 private international reform did not change the rules on recognition and enforcement of judgments, which continued to be part of the CvPC.<sup>22</sup> The CvPC was only amended in 2017, when the international *lis pendens* rules<sup>23</sup> were first introduced in Albania.<sup>24</sup> Such rules were adopted based on the Brussels I bis solutions, with close reference to art. 33 of Brussels I bis Regulation.<sup>25</sup> The harmonization of domestic legislation with the EU *acquis* is considered a priority under the Stabilisation and Association Agreement and the EU accession process, thus the CvPC is currently under revision.

<sup>15</sup> Exceptionally, the Agreement between Albania and Bulgaria on Mutual Legal Assistance in Civil Matters provides in art. 19 that the term "judgment" capable of recognition and enforcement means final and interim judgments as well.

<sup>16</sup> Kola F. and Çinari. "Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters in Albania," in Brussels I bis Regulation and Special Rules: Opportunities to Enhance Judicial Cooperation. Edited by C.E. Tuo, L. Carpaneto, S. Dominelli, March 2021.

[https://dispo.unige.it/sites/dispo.unige.it/files/pagine/OPEN%20ACCESS\\_Brussels%20I%20bis%20and%20Special%20Rules.pdf](https://dispo.unige.it/sites/dispo.unige.it/files/pagine/OPEN%20ACCESS_Brussels%20I%20bis%20and%20Special%20Rules.pdf)

<sup>17</sup> Law 10 428 of 2 June 2011 on Private International Law, in OJ no. 82, 17.06.2011

<sup>18</sup> Bushati A., and Jessel Holst Ch., "National Report (Albania)," in Basedow J., Rühl G., Ferrari F., De Miguel Asensio P. (eds), *Encyclopaedia of Private International Law*, Cheltenham, 2017.

<sup>19</sup> Law 10 428 of 2 June 2011 on Private International Law, supra note 17.

<sup>20</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 On the law applicable to contractual obligations (Rome I), in OJ L 177, 4.07.2008.

<sup>21</sup> 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 (Rome II), in OJ L 199, 31.07.2007.

<sup>22</sup> Code of Civil Procedure of the Republic of Albania, supra note 1.

<sup>23</sup> Law no.38/2017 of 30 March 2017 On some amendments to the Civil Procedure Code, supra note 1.

<sup>24</sup> Kola F., *Lis pendens-a ndërkombëtare në juridiksionin gjyqësor shqiptar si risi në ligjin procedural shqiptar*, in Jeta Juridike, Shkolla e Magjistraturës no. 3, 2017.

<sup>25</sup> Regulation (EU) No 1215 of the European Parliament and of the Council of 12 December 2012 On jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L351, 20.12.2012.

## 2. Institutional framework for the cross-border recognition and enforcement of foreign judicial decisions

### 2.1 Overview of legal provisions determining stakeholders in the cross-border recognition and enforcement of foreign judicial decisions

The main actors involved in the process of recognition and enforcement of foreign judicial decisions in Albania are courts and bailiffs. Other authorities such as Ministries, lawyers, notaries, translators, experts, banks, and so forth, contribute to the process as required by national legislation or international/bilateral agreements. The Albanian courts of appeal are the competent judicial authorities for the recognition of foreign court decisions. Art. 395 of CvPC stipulates that the request for recognition of a foreign decision shall be submitted to a court of appeal. This provision does not expressly establish the territorial competences of the court of appeal, however, as provided by art. 49 of the CvPC, the competent court of appeal is the court of territorial jurisdiction where one intends to enforce the foreign decision.<sup>26</sup> This reading is also supported by Albanian case law. The Ministry of Justice comes into play, only if the parties rely on bilateral agreements and when the request is submitted to the court that has rendered the decision. Most of the bilateral agreements stipulate that the foreign judicial authorities shall communicate through the Ministries of Justice of their respective states. Some bilateral agreements also recognize the possibility of using diplomatic channels.<sup>27</sup>

Official translators and notaries are also involved in the recognition process. According to art. 396 of CvPC, a foreign judicial decision and other documents required for the process must be translated into Albanian and legalised by notaries. Art. 135 of the Law on Notary,<sup>28</sup> stipulates that the translation of a document from a foreign language into Albanian and vice versa shall be done by the notary himself/herself in the respective language if he/she has been included in the list of official translators administered by the Ministry of Justice. For other languages, which the notary is not competent, the translation shall be done by official translators.

The list of official translators is administered and updated on a yearly basis by the Ministry of Justice.<sup>29</sup> Official translations provided by the list have a wider geographical coverage, including languages used on different continents, minority, and rare languages. Recently, a new draft of the Law on Official Translations and on the Profession of Official Translators has been proposed by the Ministry of Justice.<sup>30</sup> The law is pending approval by the parliament.

The presence of lawyers in various phases of the *exequatur* process does not seem mandatory from the reading of the respective provisions of the civil procedure law. As a rule, parties may represent themselves, except in the cases when representation is mandatory (art. 22 of the CvPC). The presence of lawyers becomes mandatory when parties submit the document via diplomatic channels. In this case, the chairperson of the court of appeal appoints a lawyer, if the party has not appointed one (art. 395 para. 2 of the CvPC).

The enforcement of foreign judicial decisions is subject to the general enforcement rules foreseen in the CvPC (art. 510 et seq.). Enforcement titles are enforced by state or private bailiffs based on the request of the creditor as indicated by the CvPC. The bailiffs are obliged to cooperate with various state and private actors to achieve a successful enforcement, during obligatory enforcement.

<sup>26</sup> Kola F., Vokshi A., *Procedurë civile*, Pjesa II, Botim II, Tirana, 2018.

<sup>27</sup> See Agreement between Albania and Turkey.

<sup>28</sup> Law no.110/2018 On the Notary, available at <http://www.parliament.al/Files/Akte/20181227131907ligj%20nr.%20110%20dt%20%2020%2012%202018.pdf>.

<sup>29</sup> The list is available at <https://www.drejtesia.gov.al/wp-content/uploads/2021/02/LISTA-E-PERKHTYESVE-TE-JASHEM-TE-MINISTRISE-SE-DREJTESISIE-PER-VITIN-2021--e-perditesuar.pdf>.

<sup>30</sup> Draft law approved by the government on 31 January 2021, available at <https://kryeministria.al/newsroom/projektligje-te-miratuarane-mbledhjen-e-keshillit-te-ministrave-date-13-janar-2021/>.

## 2.2 Stakeholders putting the cross-border recognition and enforcement of foreign judicial decisions into practice

### 2.2.1 Courts

The judicial system in Albania is composed of general and specialised courts. The courts of general jurisdiction are established as courts of first instance and courts of appeal.<sup>31</sup> At present there are 6 courts of appeal, each of them covering one or two jurisdictional districts, namely: the Court of Appeal of Tirana, Court of Appeal of Durrës, Court of Appeal of Shkodra, Court of Appeal of Korça, Court of Appeal of Vlora and Court of Appeal of Gjirokastra.

The courts of appeal adjudicate civil, commercial, and criminal matters. They serve as first judicial instance for the purpose of recognition and enforcement of foreign judicial decisions. The decision of the court of appeal which refuses the recognition and enforcement of foreign judicial decisions can be appealed in the High Court (art. 472 of the CvPC). The High Court is based in Tirana and covers the whole territory of the Republic of Albania. The latter has issued several decisions including unifying decisions interpreting the provisions of the Civil Procedural Code related to the recognition and enforcement of judgments.

### 2.2.2 Administrative institutions

The Ministry of Justice and Ministry of Foreign Affairs are responsible for the transfer of documents depending on the specific provisions of CvPC or bilateral agreements. State police, local government units, cadastral agency, or registration centres, and so forth may play a role during the enforcement phase, depending on the specific elements of the judgment or on the type of enforcement.

### 2.2.3 Legal Practitioners

Lawyers may exercise their profession all over the territory of Albania, before every court, prosecutor's office, arbitration court, or public body independent of the local chamber of advocacy to which he/she belongs or in cooperation with other advocates organised in a legal studio. The advocate also practices his/her profession outside the territory of the Republic of Albania, in accordance with the laws of the state where this profession is practiced or based on international acts of which the Republic of Albania is party (art. 6 of the Law of Advocates).<sup>32</sup> The profession of advocate is performed by an Albanian or foreign citizen, according to the rules and procedures of this law. The Chamber of Advocacy of Albania is the only authority responsible for drafting and developing the strategy for the professional education of advocates in the Republic of Albania. The latter has established the School of Advocacy with the aim to organise, prepare and implement the initial and continuous training of lawyers (art. 55 of the Law of Advocates).

These trainings are a direct contribution to the professional development of lawyers. Free legal aid is also ensured based on the rules and procedures provided under the law on legal aid.<sup>33</sup> Legal aid is offered as primary and secondary legal aid, as well as consulting, comprising different legal services such as: delivery of assistance, representation and defence before the courts, compilation of legal acts and so forth.

In general, there is no specialisation of lawyers. However, lawyers working in cooperation with legal studios are specialised in commercial and civil matters.

<sup>31</sup> Art. 3 of Law No. 98/2016 of the Law on the Organisation of Judicial Power in the Republic of Albania, available at <https://qzb.gov.al/preview/4669a00c-9477-41da-acc0-548f1a508cbc>.

<sup>32</sup> Law no.55/2018 on the Profession of Advocate in the Republic of Albania, available at [www.qpz.gov.al](http://www.qpz.gov.al).

<sup>33</sup> Law no.111/2017 on State Guaranteed Legal Aid, available at [www.qpz.gov.al](http://www.qpz.gov.al).

### 2.2.4 Enforcement agents

Enforcement is ensured by private and public bailiffs. Both public and private bailiffs cover the whole territory of Albania. A new law on private bailiffs' services was adopted in 2019.<sup>34</sup> Bailiffs operate in accordance with the rules provided under the Civil Procedure Code and other legal acts covering the enforcement process. Private bailiffs are organised under the national chamber of private bailiffs which has established a national centre for training bailiffs (art. 17 of the Private Bailiffs Law). Bailiff services are offered as a primary and secondary activity. The primary activity of bailiffs is the enforcement of enforcement titles, and the secondary activity includes, among other things, the notification of judicial acts, notification, and collection of financial obligations, organising public auctions on behalf of interested parties (art. 2 of the Private Bailiffs Law). There are no special provisions for the enforcement of foreign judicial decisions, as they will be enforced like any other enforcement title.

### 2.2.5 Other relevant stakeholders

In addition to the above-mentioned institutions, such as courts, notaries, and lawyers, which are primarily involved in the recognition phase, and the bailiffs in the enforcement phase, the involvement of other institutions will depend on the procedures and on the type of enforcement title that needs to be enforced. These institutions might include banks, tax office, local government, cadastral office, judicial police, experts and so forth. Independent licensed experts play an important role during the enforcement phase. They are appointed for the evaluation of items seized and they should have special knowledge in specific fields.<sup>35</sup> The Ministry of Justice administers and updates the electronic register of independent licensed experts.

## 2.3 Mapping the cooperation among stakeholders

Cooperation and coordination between different relevant stakeholders are envisaged in different legal and sublegal acts. The CvPC determines the role of the main actors and their involvement in different stages of the process. On the other hand, the enforcement phase requires a broader cooperation between bailiffs and other state institutions as mentioned above. In order to ensure such cooperation, an integrated electronic case management register has been established, named ALIBIS. This register is interlinked with the business register under the Centre for Business Registration, the national civil registry under the civil status office, national vehicle registry, electronic register of immovable property.<sup>36</sup> Another cooperation system between various state institutions is also ensured through the establishment of SQDNE, a system that allows circulation of documents by using electronic signatures.<sup>37</sup> These integrated systems aim to facilitate and accelerate the enforcement process.

The chamber of private bailiffs has adopted several guidelines, unifying the cooperation between the bailiff office and state police; cooperation with public and private institutions for the collection of information, verification of the legality of the creditor, determination of priority on enforcement titles as required and so forth. Again, these guidelines contribute to fostering an efficient enforcement process and to improve the cooperation among various actors.

<sup>34</sup> Law no.26/2019 on Private Bailiff Services, available at [www.qpz.gov.al](http://www.qpz.gov.al).

<sup>35</sup> Council of Ministers Decisions no. 970, of 4.12.2020 On the approval of the methodology for the determination of the value of the items during the obligatory enforcement, available at <http://www.nchb.al/>.

<sup>36</sup> Council of Minister Decision, no. 416, of 4.07.2018 On the establishment, registration and functioning of administration of interaction and security of case management system of judicial bailiffs' cases, available at <http://www.nchb.al/>.

<sup>37</sup> Council of Ministers Decision no. 43, of 15.1.2020 On the functioning of the process for the transfer of documents between institutions through the electronic signature system, available <http://www.nchb.al/>.

### 3. The role of courts and the enforcement agents in the cross-border recognition and enforcement of foreign judicial decisions

Courts and bailiff services play a crucial role in the process of recognition and enforcement of court decisions. The Albanian justice system went through a profound reform process. As a result, many new laws have been adopted and new institutions have been established. The reform process is supposed to foster efficiency of court proceedings as well as the enforcement process.

#### 3.1 Capacities of courts in regard to the cross-border recognition of foreign judicial decisions

As mentioned above, at present, Albania has 6 courts of appeal of general jurisdiction. The Tirana Court of Appeal has the largest number of judges, 31 in total, while the courts are smaller: the Durrës Court of Appeal has 13 judges, Court of Appeal in Vlora has 12 judges, Shkodra has 10 judges and the Courts of Appeal of Gjirokastra and Korça have 6 judges each.<sup>38</sup> Judges of the court of appeal adjudicate civil and criminal cases. There are no sections and there is no specialisation of judges for recognition of foreign judicial decisions. The requests are adjudicated by judges that are known to be competent on civil cases. Cases are adjudicated by a panel of three judges. Judges of the court of appeal are assisted in their work by the administrative staff of the court and the legal assistants.<sup>39</sup>

#### 3.2 Quantity and quality of judgments regarding cross-border recognition of foreign judicial decisions

The number of requests for the recognition and enforcement of foreign judicial decisions submitted to the courts of appeal on a yearly basis is not very high. The statistics collected from each court show that the Tirana Court of Appeal adjudicates the most cases.<sup>40</sup> It should be underlined that most cases are family cases. The number of civil and commercial requests is extremely low and in most of the cases, the foreign decision comes from national arbitral courts and not from the normal courts.

Table 1: Number of court decisions granting/refusing recognitions

Courts of Appeal	2016	2017	2018	2019	2020
Tirana	250	276	270	280	242
Durrës	93	122	128	123	107
Shkodër	112	99	135	120	103
Korcë	24	57	51	63	46
Vlorë	132	103	158	134	79
Gjirokastrë	33	24	41	41	26

Judges consider the decisions on recognition and enforcement of foreign judicial decisions not to be complicated. Judges do not enter into the merit of the decision but they review its compliance with formal aspects of the request and they review the judgment vis-à-vis the grounds of refusal.

<sup>38</sup> These data reflect the number of judges according to the existing organigram. The number of the court of appeals and the number of judges might change in the future since a new judicial map is being under discussion in Albania.

<sup>39</sup> Art. 42 of Law no.98/2016 on the Organisation of Judicial Power in the Republic of Albania.

<sup>40</sup> Statistics are obtained from face-to-face and online meetings with the chancellors of the courts of appeal. Court decisions on recognition and enforcement of judgments are not reported as a separate category but under other subcategories such as civil, family, or commercial cases. See High Judicial Council Decision no. 41, of 11.02.2021 On the guidelines on the maintained and compilation of the tables with statistical data for the monitoring of court performance, available at <http://klgj.al/>.

The High Court has provided a clear guide for the application of the CvPC provisions related to the recognition and enforcement of foreign judicial decisions.

In a unifying judgment of 2011, the High Court explained that the judicial proceedings before the court of appeal have two main stages: during the first stage, the court reviews the procedural formalities of the request. In cases when the party does not comply with such formalities, the court gives the party extra time to complete the request and the necessary documents as required by the law (art. 395 and 396 of the CvPC). The court cannot reject the request based on procedural deficiencies.

During the second stage, the court reviews the decision vis-à-vis the grounds for refusal, and it can reject the request if any of the legal obstacles specified under art. 394 of the CvPC occur. Some of the legal obstacles such as court competences or ordre public can be reviewed ex officio by the court. Other obstacles are those related to due process, res judicata and lis pendens, and will be reviewed when required by the debtor. The burden of proof lies on him/her. The court has also acknowledged the controversial nature of the recognition process. Both the party who requests recognition and enforcement (the creditor) and the party against whom such an enforcement is sought (debtor) must participate in the process. The issue was finally settled with the Unifying Judgment of the Joint Panels of the Albanian High Court No 6, of 01.06.2011, in which it was held that the court is obliged to summon the person against whom the judgment is rendered in the quality of a third party/interested person in accordance with provisions of CvPC.

The unifying decision of the High Court has an obligatory effect for lower courts. The latter must comply with its reading of the CvPC provisions. In other judgments, both the High Court and the courts of appeal have elaborated further on the legal obstacles listed in art. 394 of the CvPC on a case-by-case basis. The decisions of the court of appeal constitute the recognition of foreign judicial decisions, and constitute at the same time an enforcement order. As a general assumption we might conclude that the quality of judgment given so far is good enough to provide a correct application of the legal provisions.<sup>41</sup>

#### 3.3 Capacities of enforcement agents in regard to the cross-border recognition of foreign judicial decisions

The mission of the state judicial bailiff service is the compulsory enforcement of enforcement titles, in the cases defined in the Code of Civil Procedure. This institution performs its function through state bailiffs, and has a centralized organization, extending throughout the territory of the Republic of Albania. It operates under the General Directorate and it has 22 local offices. The Tirana local office has the highest number of state bailiffs around 18, while the number of state bailiffs in other local offices vary from the size of the local jurisdiction covered by the office, usually it is estimated from 2 to 6 bailiffs per office.<sup>42</sup>

In addition, there are about 140 private bailiffs offering their services in Albania. The majority of them operate in Tirana, around 99 private bailiffs.<sup>43</sup> If we look at the number of cases that are coming per year in each court of appeal, we assume that the number of both state and private bailiffs is sufficient to deal with the enforcement of foreign judicial decisions. Their professional development is an ongoing process also taking into account the latest developments with regard to private bailiffs. The approval of the new law will be followed by the establishment of the necessary infrastructure.

<sup>41</sup> High Court Unifying Decision, no. 6 of 01.06.2011, available at <http://www.gjykataelarte.gov.al/>.

<sup>42</sup> Data obtained from General Directorate of State Bailiffs, available at <http://dpp.gov.al/zyrat-permbaremore/>.

<sup>43</sup> Data obtained from the National Chamber of Private bailiffs; information available in English at <http://www.nchb.al/eng/us/>.

### 3.4 Recognition and enforcement of foreign judicial decisions within educational programs of Judicial Training Academies

The responsibility for judicial training is a task of the School of Magistrates. The Albanian School of Magistrates (SoM) is an independent academic institution established in 1997.

The School of Magistrates is in charge of ensuring:

theoretical and practical initial training of the candidates for magistrates and other legal professionals;

continuous professional training of active judges and prosecutors and other legal professionals;

The initial training curriculum lasts for a period of three years, which comprises the theoretical and practical programme. Legal provisions and case law related to recognition and enforcement of foreign judicial decisions is part of the civil procedure module and private international law module.

During the continuous training, the school conducts 1 to 2 trainings per year on private international law or international procedural law where issues related to recognition and enforcement are also discussed.<sup>44</sup>

## 4. Economic and political aspects in respect to the implementation of the HCCH 2019 Judgments Convention

### 4.1 Main trading partners in terms of import and export

Albania has been a member of the World Trade Organisation since 2000. Albania established a free trade area with the EU through the Stabilisation and Association Agreement<sup>45</sup> and it is part of CEFTA<sup>46</sup>, EFTA<sup>47</sup> and has a bilateral agreement with Turkey.<sup>48</sup>

#### 4.1.1 Import

Italy remains Albania's major import partner, with almost 30% of total imports (though with a small decreasing trend in the past 3 years). The second biggest import partner is Turkey, constituting 10% of total imports in 2019 and 2020. The share of imports from Germany and Greece is almost equal, with Germany holding third position during 2016-2017 (slightly larger percentage of imports from Germany compared to those from Greece), but shifting to fourth position during 2018-2020 because of a slightly larger percentage of imports from Greece. The following positions are held by Serbia, France, and Russia (in the top 7 import partners).

Table 2: Imports to Albania

Imports by country (million ALL)	2016	2017	2018	2019	2020
<b>Italy</b>	169,583	179,236	175,279	164,188	151,978
<b>Turkey</b>	45,654	50,780	54,191	61,797	57,943
<b>Greece</b>	45,657	49,879	52,101	54,336	54,454
<b>Germany</b>	54,959	50,713	49,563	46,482	46,601
<b>Serbia</b>	18,069	24,997	21,710	23,053	22,971
<b>France</b>	11,481	10,973	12,409	13,027	11,838
<b>Russia</b>	10,891	11,779	12,652	11,617	13,513

Source: INSTAT

#### 4.1.2 Export

Italy is Albania's main export destination, constituting half of its total exports over the period 2016-2020. The second export destination is Kosovo<sup>49</sup> (over the same period), followed by Greece, Germany and Spain. Though Greece was in the top three export destinations in 2016, its position has been overtaken by Spain. Spain has left Germany and Greece behind but has returned to the same level of exports as Germany again in 2020.

In the WB6 region, the main export destinations of Albania are North Macedonia and Serbia, though at low levels (about 3% and 2% of total exports, respectively).

Table 3: Export from Albania

Export by country (million ALL)	2016	2017	2018	2019	2020
<b>Italy</b>	132,890	146,040	149,101	143,105	123,510
<b>Kosovo*</b>	16,605	20,924	27,093	29,812	26,247
<b>Germany</b>	8,282	10,861	13,437	14,190	16,008
<b>Spain</b>	7,994	14,992	24,174	23,845	16,601
<b>Greece</b>	11,150	11,602	13,115	12,781	13,211
<b>North Macedonia</b>	6,421	8,431	8,543	8,567	8,855
<b>Serbia</b>	4,700	4,833	8,035	5,386	6,280

Source: INSTAT<sup>50</sup>

According to the data on Foreign Direct Investment (FDI) inward stock for 2019, Albania's top 5 partners are: Switzerland (with a share of 18.4% of total stock), the Netherlands (15.3%), Canada (13.7%), Italy (9.4%) and Turkey (7.4%).

The above analysis shows that the main trading partners of Albania are EU countries and countries of the region.

44 See continuous training programs per calendar year of the SoM at <https://www.magjistratura.edu.al/#3>.

45 SAA between Albania, EU and its Member States entered into on 1/04/2009. European Council and Commission, "Council and Commission Decision of 26 February 2009 concerning the conclusion of the Stabilisation and Association Agreement between the Europe-a Communities and their Member States, of the one part, and the Republic of Albania, of the other part (2009/332/EC, Euratom)," in OJ L 107, 28.04.2009, p. 166.

46 CEFTA entered in force on 01/05/2007 between Albania, Bosnia and Herzegovina, Moldova, Montenegro, North Macedonia, Serbia, UNMIK/Kosovo, information available at <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=560>.

47 EFTA was signed on 1/10/2010 between Albania, Iceland, Liechtenstein, Norway, Switzerland: <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=560>.

48 Bilateral agreement with Turkey entered into force on 1/05/ 2008, available at <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=560>.

49 \*\*All reference to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nation's Security Council Resolution 1244 and without prejudice to the status of Kosovo."

50 <http://www.instat.gov.al/al/temat/tregtia-e-jashtme/tregtia-e-jashtme-e-mallrave/>.

## 4.2 Political aspects in regards to the implementation of the HCCH 2019 Judgments Convention

Albania is a candidate state for EU membership and a member of many international initiatives related to cross-border cooperation. There are no political or legal obstacles to possible implementation of the HCCH 2019 Judgments Convention.

### 4.2.1 Circumstances that can provide for your country to express notifications in accordance with Article 29 of the HCCH 2019 Judgments Convention

Art. 29 of the HCCH 2019 Judgments Convention defines when the convention becomes effective between two contracting states and it allows for a limited opt out option to avoid the establishment of treaty relations with other contracting states. As highlighted in the first part of this report, the recognition of foreign judgments in Albania does not depend on any reciprocity requirement. There are no specific circumstances that would require Albania to express notification in accordance with art. 29 of the HCCH 2019 Judgments Convention.

### 4.2.2 Circumstances that can provide for your country to express declarations in accordance with Article 17, 18, 19 and 25 of the HCCH 2019 Judgments Convention

Art. 17 of the HCCH 2019 Judgments Convention deals with the purely domestic situation from the point of view of the requested state. It allows the state to relieve itself of the obligation to recognise and enforce judgment under the Convention in such cases. The Convention applies only to international cases. The CvPC provisions on recognition and enforcement of foreign judicial decisions do not provide any explicit limitation of this kind, but art. 72 (para. dh) of PILA stipulates that Albanian courts have exclusive jurisdiction over proceedings concerned with the enforcement of judgments in the Republic of Albania. The exclusive jurisdiction of the Albanian court is also envisaged in other situations, particularly in proceedings that have to do with rights in rem of properties located in Albania, proceedings related to the decisions of organs of companies that are habitually resident in Albania, proceedings related to the validity of registration in the public registry, state organs or courts, proceedings related to the registration of intellectual property rights (art. 72 of PILA). In addition, art. 37 of CvPC stipulates that the jurisdiction of Albanian courts cannot be transferred to a foreign jurisdiction by agreement, unless the trial is related to an obligation between foreign persons or between a foreign person and an Albanian citizen or a legal person with no domicile or residence in Albania and if these exemptions are included in international agreements ratified by the Republic of Albania.

Art. 18 of the HCCH 2019 Judgments Convention permits the state to expand the list of the matters excluded from the scope of the Convention. There are no specific indications in the existing legal provisions that Albania may make a declaration to exclude certain matters from the scope of application of the convention.

Art. 19 of the HCCH provides particular treatment of the judgments in which one of the parties was a state or a natural person acting for the state, or government agency of the state or a natural person acting for such a government agency. It provides the state with the possibility to make a declaration that it shall not apply the convention to judgments arising from proceedings to which the state or a natural person acting for the state is a party to the proceedings.

There is nothing in the relevant provisions of the CvPC that could be read as providing and limiting the state as a party to civil proceedings. In the unifying decision of the High Court no.

4 of 2011, related to the recognition and enforcement of foreign arbitral awards, the High Court highlighted that the Ministry involved in the proceedings should be given the possibility to be heard as a third party and submit the necessary evidence.

On the other hand, the position of the foreign state as a party to civil judicial proceedings in Albanian courts is regulated by art. 39 of the CvPC on the jurisdiction of consular and diplomatic missions. Members of consular and diplomatic missions residing in the Republic of Albania are not subject to the jurisdiction of Albanian courts unless:

- a) they voluntarily agree;
- b) the conditions and terms provided by the Vienna Convention on Diplomatic Relations are in place.

The involvement of foreign state agencies in civil proceedings has been an issue adjudicated in several High Court and Constitutional Court decisions. The position of the Albanian courts is the following: state and state agencies enjoy absolute immunity from the jurisdiction of the Albanian court (even in employment relations), unless they voluntarily accept this jurisdiction as provided by Art. 39 para. a of the CvPC,<sup>51</sup> for example, by means of employment contract.

Art. 25 of the HCCH 2019 Judgments Convention deals with a declaration that could be made by the state with a non-unified legal system. Albania has a unified legal system, thus there is no need to make such a declaration.

## 5. International jurisdiction and compatibility with the HCCH 2019 Judgments Convention

### 5.1 General international jurisdiction

International jurisdiction of the Albanian courts is regulated by the Private International Law of Albania (PILA). Except when otherwise provided for, Albanian courts are competent if the defendant is habitually resident in Albania (art. 71 of the PILA). Habitual residence is defined in PILA for both natural and legal persons. These definitions are in line with those provided under EU Rome I and Rome II Regulations.

According to art. 12 of PILA, the habitual residence of a natural person is the place where he/she has decided to stay predominantly, even in the absence of registration and independent of a permit or authorisation to stay. In order to determine this place, the court shall take into account the circumstances of personal or professional nature that show durable connections with the place or indicate the will of the person to create such connections. The habitual residence of legal persons, associations or bodies without legal personality is the place of central administration. The habitual residence of a natural person acting in the course of his business activities is his principal place of business. For a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located is treated as the place of habitual residence (art. 17 of PILA).

### 5.2 Prorogation of jurisdiction

Regarding a party's choice of foreign forum, art. 37 CvPC stipulates that the jurisdiction of the Albanian courts for foreign natural and legal persons is regulated by law. This provision establishes that as a rule, the jurisdiction of Albanian courts cannot be transferred to a foreign jurisdiction by agreement. However, exceptions to the general rule are allowed when the trial is related to

<sup>51</sup> Unifying Decision of the High Court no. 8, of 11.6.2011 available at <http://www.gjykataelarte.gov.al/>.

an obligation between foreign persons or between a foreign person and an Albanian citizen or a legal person with no domicile or residence in Albania and when there is an international agreement ratified by the Republic of Albania that contains such an exception.

Prorogation of jurisdiction in favour of the Albanian courts is permitted by art. 73 of PILA, which lays down certain requirements as to the form of the agreement. The agreement shall be in writing or orally, but the latter evidenced in writing or in a form which accords with international commercial usages of which the parties are or ought to have been aware (art. 73 para. 2 PILA). This provision does not stipulate whether the agreement is valid only when it is done prior to the commencement of the proceedings. Thus, it will depend on the court's interpretation.

Albanian jurisdiction also exists if the defendant enters an appearance at the proceedings without contesting Albanian court jurisdiction, although he is represented in the proceedings by a lawyer, or the court has explained the possibility of contesting the jurisdiction and this explanation has been noted in the minutes of the hearing (art. 73 para. 3 PILA).

### 5.3 In comparison to Article 5 of the HCCH 2019 Judgments Convention, provide for the compatibility of the other jurisdictional criteria in the Convention and in the national legal sources

Art. 5 of the HCCH 2019 Judgments Convention sets out certain minimum jurisdictional filters that judgments must pass through in the original proceedings in order to be eligible for recognition and enforcement under the Hague Judgments Convention. Although these indirect jurisdiction requirements are irrelevant to the national jurisdiction rules, again, the difference between them might provide an unsynchronized outcome.<sup>52</sup> While the Convention does not purport to affect existing national laws on jurisdiction in international cases, judgments from states with direct jurisdictional rules like the filters in art. 5 and 6 will be more likely to circulate under the Convention.<sup>53</sup>

Table 4: Direct and Indirect Jurisdiction filters

HCCH 2019 Judgment Convention		PILA	
<b>art. 5 para. 1a</b>	habitual residence of person	<b>art. 71</b>	habitual residence of the defendant
<b>art. 5 para. 1b</b>	principal place of business of natural person	<b>art. 17</b>	principal place of business of natural persons
<b>art. 5 para. 1d</b>	activities of branch, agency, or establishment	<b>art. 80 para. ç</b>	actions concerning disputes arising out of the operations of a branch or agency of a legal person with seats
<b>art. 5 para. 1e</b>	defendant expressly consented to the jurisdiction	<b>art.73 para. 1 (2)</b>	prorogation of jurisdiction
<b>art. 5 para. 1f</b>	tacit jurisdiction	<b>art.73 para. 3</b>	tacit jurisdiction
<b>art. 5 para. 1g</b>	place obligation took place or should have taken place	<b>art. 80 para. b</b>	place in which the obligation was performed or should have been performed

<sup>52</sup> Rumenov I. Implications of the New 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments on the National Legal Systems of Countries in South Eastern Europe, EU and Comparative Law Issues and Challenges Series – Issue 3, 2020.

<sup>53</sup> Garcimartin F. and G. Saumier. Explanatory Report Convention of the 2 July 2019 of the Recognition, and Enforcement of Foreign Judgments in Civil and Commercial Matters, www.hcch.net.

<b>art. 5 para. 1h</b>	tenancy place of property	<b>art. 72</b>	place where the property is situated
<b>art. 5 para. 1j</b>	place where the deed or omission directly causing harm occurred	<b>art. 80 para. c</b>	place where the act occurred
<b>art. 5 para. 2</b>	consumer and employment contracts		N/A
<b>art. 5 para. 3</b>	immovable property and residential lease	<b>art. 72 para. a</b>	Immovable property, tenancies of immovable property

The Convention uses “habitual residence” as a connecting factor. Albanian legislation is in line with the HCCH 2019 Judgment Convention since it uses habitual residence as one of the main connecting factors for the determination of jurisdiction. The definition of habitual residence for both natural and legal persons is in line with the EU Regulations mentioned above.

The explicit and implied jurisdictions are regulated by PILA in art. 73. The Albanian courts shall also have international jurisdiction if the parties have concluded an agreement as to the international jurisdiction of the Albanian courts. The Albanian court in which a lawsuit is brought has international jurisdiction if the defendant enters an appearance without contesting international jurisdiction, although he is represented in the proceedings by a lawyer, or the court has explained the possibility of contesting the jurisdiction and this explanation has been noted in the minutes of the hearing (art. 73 para. 3 of PILA). This provision is like those of Brussels I bis Regulation art. 25 and 26, however, differences exist in the fact that art. 73 of PILA further elaborates on the implied consent, and there is nothing in this provision that excludes the application of art. 73 para. 3 in cases of explicit consent in favour of the Albanian courts or exclusive jurisdiction of the Albanian courts.

Cases of special jurisdiction are regulated in art. 74–81 of PILA. From a comparative analysis of the provisions of the PILA vis-a-vis art. 5 of the HCCH 2019 Judgments Convention, we can conclude that the indirect jurisdiction filters provided in the Convention are similar to those foreseen in the PILA provisions, with the exception of jurisdiction over consumer and employment contracts. PILA provide for a special legal regime for protected contracts such as employment, consumer or insurance contracts with regard to the law, but not under the jurisdiction section.<sup>54</sup> To conclude, Albanian courts should not have problems in implementing this provision vis-a-vis international jurisdiction filters under PILA.

### 5.4 Exclusive jurisdiction

Art. 6 of the HCCH 2019 Judgment Convention provides a single exclusive basis for the recognition and enforcement of judgments that rule on rights in rem in immovable property. Judgments that meet the filter in art. 6 are eligible for recognition and enforcement. Judgments that do not meet the filter must neither be recognised nor enforced, either under the Convention or under national law. Indeed, the Albanian courts have exclusive jurisdiction on rights in rem in immovable property (art. 72 of PILA). Other situations previously mentioned in this report are: the decisions of the organs of commercial companies when the company's habitual residence is in Albania, the founding or winding-up of legal persons, or decisions of their organs when the legal person has its seat in Albania; the validity of registration in the registers of Albanian state organs or courts; the validity of registration of intellectual property rights which have been made or applied for in Albania; the enforcement of executory titles (art 72 of PILA).

<sup>54</sup> See for example art. 48 (individual employment contract), art. 50 (contract of carriage) or art. 52 (consumer contracts) of PILA.

## 6. Procedure for recognition and enforcement of foreign judicial decisions and compatibility with the HCCH 2019 Judgments Convention

### 6.1 Material scope of application

The HCCH 2019 Judgment Convention applies to judgments in civil or commercial matters. The use of the terms “civil” and “commercial” matters is mostly relevant for legal systems where “civil” and “commercial” are regarded as separate and mutually exclusive categories, although the use of both terms is not incompatible with legal systems in which commercial proceedings are a sub-category of civil proceedings. It does not extend to revenue, customs or administrative matters and other areas as listed in art. 2 para. 1 of the HCCH 2019 Judgment Convention. Whether a judgment relates to civil or commercial matters is determined by the nature of the claim or action that is the subject of the judgment. The nature of the court of the state of origin or the mere fact that a state was a party to the proceedings are not determinative factors. The Convention applies to the recognition and enforcement in one Contracting State of a judgment given by the court of another. Both the State of origin, being the state in which the court granting the judgment is situated, and the requested State, being the State where recognition and enforcement of that judgment is sought, must be parties to the Convention (art. 4 para. 1 of the HCCH 2019 Judgment Convention).

The application of the Convention is not affected by the nature of the parties, i.e., legal or natural persons, private or public. As indicated in art. 2 para. 4, a judgment is not excluded from the scope of the Convention by the mere fact that a state including a government, a governmental agency or any person acting for a state was a party to the proceedings in the State of origin.

However, nothing in this Convention shall affect the privileges and immunities of the state or of international organisations, in respect of themselves or their property. The enumeration is intended to facilitate the application of the Convention in states where there is no established distinction between private and public law. This Convention shall not apply to arbitration and related proceedings. A key element distinguishing public law matters from “civil or commercial” matters is whether one of the parties is exercising governmental or sovereign powers that are not enjoyed by ordinary persons.<sup>55</sup>

#### 6.1.1 In comparison to Article 1 and 2 of the HCCH 2019 Judgments Convention, provide for the compatibility of the material scope of application for the recognition and enforcement of foreign judicial decisions in the Convention and in the national legal sources

Albanian rules on recognition and enforcement of foreign judicial decisions apply to civil, commercial, and family matters. The CvPC does not make a distinction between civil or commercial cases or any other subcategory of judicial cases. The material jurisdiction of the court of appeal is determined by procedural law. The jurisdictional competences of courts are established by procedural laws. The Albanian CvPC stipulates that the Code provides uniform rules for civil cases. All civil disputes and other disputes provided for in this Code and in specific laws fall under the jurisdiction of the courts.<sup>56</sup> The subcategorization of cases within the major civil category is usually made for the purpose of judicial statistics as explained in this report. In this case, the division is made depending on the object of the claim, whether general civil cases, family cases, commercial cases, and employment cases. State and state agencies are, as a rule, immune from the jurisdiction of the Albanian courts unless they voluntarily agree not to be, or

<sup>55</sup> Garcimartin F. and G. Saumier. Explanatory Report Convention of the 2 July 2019 of the Recognition, and Enforcement of Foreign Judgments in Civil and Commercial Matters, www.hcch.net.

<sup>56</sup> Article 1 of the CvPC, supra note 1.

under the conditions and terms provided by the Vienna Convention on Diplomatic Relations (art. 39 of the CvPC).

The provisions of the CvPC on recognition and enforcement of foreign judicial decisions also apply to the recognition of the final award of the arbitration of a foreign state (art. 399 of the CvPC).

### 6.2 Types of foreign judicial decisions that are recognized and enforced

The Albanian CvPC does not make a distinction between different types of foreign judicial decisions. However, art. 396 of the CvPC requires the decision of the foreign court to be final (irrevocable) and the irrevocability to be certified by the court that has rendered the judgment. Moreover, art. 49 of the CvPC distinguishes between lawsuits requesting enforcement on the performance of a certain action or the omission to perform a certain action.

### 6.3 Commencement of the procedure (as a main or as a preliminary question)

Requests for the recognition and enforcement of foreign judicial decisions are treated as a main question. The Albanian CvPC stipulates that the court which tries the main lawsuit has the jurisdiction to also consider secondary requests, the countersuit, or the main intervention. In this case, the court decides for their joinder into a single case (art. 55 of the CvPC).

### 6.4 Documents that need to be produced (formal requirements) for the recognition of the foreign judicial decision

The formal request and the documents to be produced for the recognition and enforcement of foreign judicial decisions must comply with the formal procedural conditions stipulated in art. 395 and 396 of the CvPC. However, if a bilateral agreement is in force between Albania and the country of the court of origin, the formal procedural provisions of the agreements will prevail.

According to the Albanian CvPC, the request can be submitted directly to the court of appeal or through diplomatic channels when stipulated by international agreements (art. 395 of the CvPC). The request must contain:

- a) copy of the judgment which must be enforced and its translation into the Albanian language legalised by a notary;
- b) certificate by the court issuing the judgment that it has become irrevocable along with its translation and legalisation by a notary. Both the copy of the judgment and the certificate that it has become irrevocable must be certified by the Ministry of Foreign Affairs of the Republic of Albania;
- c) a power of attorney in case the request is lodged by the representative of the interested party, translated, and legalised by a notary (art. 396 of the CvPC).

If the request for recognition and enforcement is lodged on the basis of bilateral agreements, the request can be submitted directly to the competent court, the court of first instance that rendered the judgment, and the documents to be submitted are as follows:

- a) a copy of the judgment certified by the court;
- b) where the judgment does not clearly indicate that it is final and enforceable, a document issued by the court certifying that the judgment has entered into force shall be appended to it;

c) a document issued by the court for partial enforcement of the judgment on the territory of the requesting Party when applicable;

d) a document certifying that a party that did not participate in the proceedings, or his representative in cases of incapacity, was duly summoned to court.

The documents referred to above shall be accompanied by a certified translation into the language of the requested contracting party or into English, made by the diplomatic or consular agencies or by any other person authorised in either Party.<sup>57</sup>

In order to assist citizens and help parties to properly comply with the legal requirements, some courts of appeal have established the practice of advising parties to submit the following documents:

the request, containing the generalities of the party and the legal basis;

the judgment of the foreign court legalised by the Ministry of Foreign Affairs of the country of the court that has issued the judgment, translated into Albanian, and notarised;

marriage certificate (for family matters) issued by the civil office;

a certificate from the court of first instance certifying that no dissolution of marriage has been adjudicated between the parties in the court;

Power of attorney if the party is not present.<sup>58</sup>

If the parties do not comply with the formal procedural requirements, the court provides them with additional reasonable time to complete the requirements. Deficiencies in this phase of the proceedings do not constitute grounds for refusal of the request.<sup>59</sup>

## 6.5 Conditions for recognition and enforcement of foreign judicial decisions

The conditions for recognition and enforcement of foreign judicial decisions are stipulated in art. 394 of the CvPC and in bilateral agreements on mutual legal assistance ratified by Albania. Again, the conditions of the bilateral agreements will prevail over the conditions stipulated in the CvPC. In accordance with art. 394 of the CvPC, the foreign judicial decision is not given effect, if:

a) according to the provisions in force in the Republic of Albania, the dispute cannot be in the competence of the court of the state that rendered the judgment;

b) The claim and the summons to court have not been notified to the defendant in absentia, in a regular and timely manner, to give him/her the opportunity to defend himself/herself;

c) A different judgment has been issued by an Albanian court between the same parties, for the same object and for the same cause;

d) A lawsuit that was filed before the foreign judgment became final is being adjudicated by an Albanian court;

e) It has become final in violation of its legislation;

f) It does not comply with the basic principles of Albanian legislation.

Under art. 394 para. a of the CvPC, the recognition of a foreign court decision shall be denied if the court of the state which rendered the foreign judgment, lacks jurisdiction under the PILA (“mirror principle”). Public policy as grounds for refusal is regulated under para. dh (basic principles of Albanian legislation) of art. 394 of the CvPC, though the word “public policy” is not mentioned in

<sup>57</sup> Art. 20 Agreement between Albania and Bulgaria.

<sup>58</sup> See public announcement of the Court of Appeal of Durres of 31.03.2021, available at <http://www.gjykata.gov.al>.

<sup>59</sup> Unifying Decision of the High Court no.6, of 01.06.2011, available at <http://www.gjykataelarte.gov.al/>.

this provision. Albanian case law provides a broad definition of public policy by including issues of substantive and procedural law. According to Albanian jurisprudence, substantive public policy grounds give no importance to the contents of foreign law, but to eventual effects that arise from the recognition of the foreign judgments and their compatibility with the basic principles (provided in substantive norms) of the Albanian law.

Procedural public policy grounds are covered by para. b (default judgments) and para. d (judgments that become final in violation of foreign national legislation). Para. c of art. 394 of the CvPC addresses the issue of res judicata with the aim of avoiding two judgments being issued for the same dispute. Para. ç of art. 394 of the CvPC presents the situation of parallel proceedings and should be applied in line with the lis pendens rules provided under CvPC (art. 37 of the CvPC).<sup>60</sup>

Bilateral agreements that have been ratified by Albania have similar grounds for refusal of recognition to those provided for in the CvPC: lack of court jurisdiction, lack of notification to the absent defendant, res judicata and lis pendens, lack of finality of the judgment and violation of public policy are the common grounds for refusal.<sup>61</sup>

The grounds for refusal stipulated in the CvPC and bilateral agreements ratified by Albania are in general in line with the grounds for refusal contained in the HCCH 2019 Judgment Convention.

Table 5. Grounds for Refusal

Article 394 of the CvPC	Article 7 of the HCCH 2019 Judgment Convention
a) the dispute cannot be within the competence of the court which has issued the decision;	Art. 5 and 6 of the HCCH 2019 Judgment Convention
b) the statement of claim and the writ of summons to court has not been notified duly and in time to the absent defendant in order to give him the possibility to organise a defence;	(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim  (i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested;  or (ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;  (b) the judgment was obtained by fraud;
c) another, different decision has been issued by the Albanian court between the same parties, on the same subject and on the same cause;	(f) the judgment is inconsistent with an earlier judgment given by the court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State

<sup>60</sup> Kola F, Çinari. *Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters in Albania*, in Brussels I bis Regulation and special rules: opportunities to enhance judicial cooperation, Edited by C.E. Tuo, L. Carpaneto, S. Dominelli, March 2021. [https://dispo.unige.it/sites/dispo.unige.it/files/pagine/OPEN%20ACCESS\\_Brussels%20I%20bis%20and%20Special%20Rules.pdf](https://dispo.unige.it/sites/dispo.unige.it/files/pagine/OPEN%20ACCESS_Brussels%20I%20bis%20and%20Special%20Rules.pdf).

<sup>61</sup> Article 22 of the agreement between Albania and Bulgaria.

**Article 394 of the CvPC**

d) a lawsuit, which has been filed before the decision of the court of the foreign state has become irrevocable, is being considered by an Albanian court;

e) it does not comply with the basic principles of Albanian legislation

**Article 7 of the HCCH 2019 Judgment Convention**

(e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

In practice, the most frequent grounds for refusal of recognition are: lack of notification of the defendant, failure to prove that the judgment is final, the type of judgment (civil or administrative), and lack of jurisdiction of the court that has rendered the foreign judgment.<sup>62</sup>

## 6.6 Procedure for recognition and enforcement of foreign judicial decisions

A foreign judgment can be enforced in Albania only after it has been recognised by an appellate court. The request with the necessary documentation is lodged with the competent court of appeal, which should be qualified in accordance with art. 49 of the CvPC: “Lawsuits, requesting enforcement on things, are brought in the court of the place where these things are or the greatest part of their value is. Lawsuits requesting enforcement on performance of or omission to perform a certain action are brought in the court of the place where such enforcement must be fulfilled.”

The procedures to submit the request and the necessary documents are described at length throughout the report. Once the request is lodged with the competent court of appeal, the request will be treated according to the rules of the Civil Procedure Code. As a first step, the lot will be drawn for the selection of judges. The requests for recognition and enforcement are usually treated with priority and in general, the process does not take too much time.<sup>63</sup> The request is adjudicated by a panel of three judges, one of them being the relator of the case. The notification of the requesting party to appear before the court is done in accordance with art. 128 et. Seq. of the CvPC. The notification is done by court employee, postal services, public announcements or by electronic means if the party has given its prior consent (art. 129 of the CvPC).

Regarding the obligation to notify the persons against whom the recognition and enforcement is invoked, a problem has arisen due to the term used for such cases: “request” instead of “lawsuit.” Therefore, the party against whom the judgment has been invoked cannot be summoned as a defendant in the recognition proceedings. However, the party’s participation is necessary in order to assess the existence, or not, of any of the grounds for refusal.<sup>64</sup> The notification is personally addressed to the requesting parties, debtor or other interested parties as required by the requesting party or by the court. Cases are usually closed in one or a maximum of two hearings.

In reviewing the request for the recognition of a foreign judgment, the court of appeal applies

62 Kola F. Çinari., Recognition and enforcement of foreign judgments in civil and commercial matters in Albania, in *Brussels I bis Regulation and special rules: opportunities to enhance judicial cooperation*, Edited by C.E. Tuo, L. Carpaneto, S. Dominelli, March 2021 | [https://dispo.unige.it/sites/dispo.unige.it/files/pagine/OPEN%20ACCESS\\_Brussels%20I%20bis%20and%20Special%20Rules.pdf](https://dispo.unige.it/sites/dispo.unige.it/files/pagine/OPEN%20ACCESS_Brussels%20I%20bis%20and%20Special%20Rules.pdf).

63 Information obtained during the interviews with the chancellors of the courts of appeal.

64 Kola F. Çinari., “Recognition and enforcement of foreign judgments in civil and commercial matters in Albania,” in *Brussels I Bis Regulation and Special Rules: Opportunities to Enhance Judicial Cooperation*, Edited by C.E. Tuo, L. Carpaneto, S. Dominelli, march 2021: [https://dispo.unige.it/sites/dispo.unige.it/files/pagine/OPEN%20ACCESS\\_Brussels%20I%20bis%20and%20Special%20Rules](https://dispo.unige.it/sites/dispo.unige.it/files/pagine/OPEN%20ACCESS_Brussels%20I%20bis%20and%20Special%20Rules).

the rules of adjudication at first instance. Among others, the court of appeal verifies, in advance, the fulfilment of formal conditions for filing a request for the recognition of a foreign judgment. If the request for recognition of a foreign judgment is incomplete, the court shall set a reasonable deadline for its completion and correction. The court of appeal shall then return the request without taking any action, if the requesting party does not complete and correct the formal deficiencies of the request within the deadline set by the court. If the request for recognition of a foreign judgment meets the formal conditions, the court of appeal shall schedule a hearing, the purpose of which is only to assess the existence, or not, of any of the legal obstacles provided by art. 394 of the CvPC, or any other special provision for this purpose.<sup>65</sup> Hence, the court of appeal shall not decide on the merits of the case (art. 397 of the CvPC).

The decision of the court of appeal on granting or refusing recognition and enforcement simultaneously constitutes an executive order. The CvPC provides that the decisions of the courts of foreign countries and foreign courts of arbitration shall be issued by the court that recognises the decision, in the order of the provisions (art. 511 para. b of the CvPC).

Recourse against the decisions of the court of appeal must be filed with the High Court within 30 days (art. 443 of the CvPC).

The cost of the judicial proceedings for the recognition of foreign judicial decisions is a combination of judicial tariffs, tariffs of lawyers, and other fees used for services such as notarisation and translation. Judicial tariffs are set by law<sup>66</sup> and the decision of the High Judicial Council.<sup>67</sup> The court fee for recognition and enforcement of the foreign judicial decision is 5,000 ALL (approximately 45 Euro). Notary fees are set in the joint Guidelines of the Ministry of Justice and the Ministry of the Economy and Finance.<sup>68</sup> Notary fees for the certification of translations and the authenticity of documents are about 5 000 ALL (approximately 45 Euro). Translation fees are set by joint guidelines of the Ministry of Justice and the Ministry of Economy<sup>69</sup> and they are approximately 10 euros per page. The costs of the recognition of the foreign judicial decisions in Albania cannot be considered a heavy burden for the parties.

## 7. Enforcement of foreign judicial decisions

### 7.1 Type of enforcement procedure

The decision of the court of appeal on a request for the recognition of a foreign court decision gives effect to the foreign decision to be enforced in Albania. The enforcement of foreign judicial decisions is subject to the general enforcement rules foreseen in the CvPC (art. 510 et seq.). Art. 510 of the CvPC stipulates that enforcement can be conducted based on the enforcement titles that are listed in the article. The decisions of foreign courts constitute enforcement titles once they are given effect in accordance with the rules provided in the CvPC (art. 510 para. c). The enforcement title is enforced upon the creditor’s request (art. 511 of the CvPC). The enforcement order is issued within five days by the court of appeal (art. 511 para. b of the CvPC).

The court decision refusing an execution order can be appealed according to the provisions regulating special appeals (art. 512 of the CvPC). The enforcement title is enforced by state or private bailiffs according to the request of the creditor. The request of the creditor must be accompanied by the enforcement title (original and duly notarised), the enforcement fee and the power of attorney of the person representing the creditor (art. 510 of the CvPC). The order is to be executed within 15 days from the submission of the request by the creditor (art. 515 of the

65 Unifying Decision of High Court no 6, dated 01.06.2011, available at [www.gjykataelarte.gov.al](http://www.gjykataelarte.gov.al).

66 Law 98/2017 on Judicial Tariffs in Republic of Albania.

67 Decision of the High Judicial Council 641 of 23/12/2020 On the court fees, their collection procedures.

68 Joint Guidelines no.22 of 20.10.2020 On the determination of tariffs for notary services and notary documents.

69 Joint Guidelines no. 3156 of 12/05/2004 On procedures for the selection of official translators and the determination of translation tariffs.

CvPC).

Albanian legislation provides for voluntary enforcement of titles, while obligatory enforcement can be applied only after the deadlines for voluntary enforcement have expired. Obligatory enforcement can start before the voluntary deadlines only when there is a risk that the enforcement will become impossible (art. 517 and 519 of the CvPC). The Civil Procedure Code provides detailed rules about the enforcement of titles in specific fields (Title III of the CvPC).

Forced enforcement of the obligation to the creditor can be conducted in various forms which include actions such as the blocking of bank accounts, seizure of movable and immovable property and so forth. All actions are complementary to each other and serve a single purpose: the settlement of the obligation that the court has imposed on the debtor.

The costs of enforcement cover the bailiff's tariffs, tariffs of experts, notary tariffs and so forth. The bailiffs' fees are set in the Guideline of 2017.<sup>70</sup> They include fixed enforcement fees in (ALL) and in percentages according to the value of the obligation. The margin of percentages is from 3% to 10% of the value of the obligation. Again, the costs of enforcement do not seem very high.

## 7.2 Enforcement procedure in situations when the enforcement officers are directly confronted with foreign judicial decision

There are no special procedures for the enforcement of foreign judicial decisions. They are regulated under the same rules and procedures as domestic titles.

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## COUNTRY REPORT: BOSNIA AND HERZEGOVINA

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### Executive summary

The legal framework of the cross-border recognition and enforcement of foreign judicial decisions mirrors the complexity of the constitutional order and state organisation in Bosnia and Herzegovina (hereinafter: B&H). The main source of private international law in B&H is the Law on the Resolution of Conflicts of Laws with Regulations of Other Countries in Certain Relations (PIL), which is a former Yugoslavian legal act that is still applicable in B&H without any changes. In almost four decades since its adoption, there have been very significant developments in the area of private international law on national and international levels, but B&H has not been part of this process. Private international law reform is not in the focus of interest of legislator(s); moreover, due to the constitutional order in B&H, there is resistance to the adoption of a law on private international law at state/federal level. Along with the fact that B&H has a complex legal system, the adoption of three separate laws on private international law would render the situation even more complex. Scholars in B&H have already stated that one of the alternative ways to reform private international law would be through the accession of B&H to the international conventions to which the EU is a party, for example, the conventions adopted in the framework of the HCCH on private international law.

An overview of the legislation which is relevant for cross-border recognition and enforcement demonstrates several deficiencies besides the outdated regulation on private international law. One of them relates to the very scarce regulation of the procedure for recognition of foreign judicial decisions. Another is the omission of more the very the enforcement procedure where enforcement is sought on the basis of a foreign title. In addition, the provisions on the enforcement of foreign titles differ in the PIL and the enforcement law.

The legal set-up of the institutional framework for the cross-border recognition and enforcement of foreign judicial decisions in B&H is not particularly complex per se; the courts play the main and dominant role here. Apart from the courts, which are the dominant stakeholders in this matter, the B&H Ministry of Justice, lawyers, and institutions that provide education are also relevant.

The ongoing internationalisation of legal relationships and the growth of international trade require a better understanding and suitability of the domestic legal system in order to tackle legal problems with an international element. The report repeatedly states that the complex state organisation and political circumstances prevent not only the adoption of modern legislation on private international law but also access to important international multilateral agreements which deal with international jurisdiction and cross-border recognition and enforcement. Thus, the cooperation of stakeholders is vital. The cooperation between stakeholders is important due to the lack of mechanisms for the unification of court practices among the entities and Brčko District B&H. There is no supreme court at state level which would have appellate or cassation authority. Furthermore, the absence of an institution whose task would be the unification of judicial practices could lead to divergent judicial judgments recognition and enforcement of foreign judicial decisions in B&H. A de facto unification could be reached through cooperation between the supreme courts of the entities and the Appellate court of Brčko District B&H.

Cooperation can also be realised through education. The Centres that provide education for judges and prosecutors and the universities should develop an agenda with a focus on private international law matters since an analysis of the curricula of these Centres in the Federation B&H and the Republic Srpska has demonstrated that there were only a few trainings devoted to private international law issues. Common trainings for practitioners and judges around the state could be organised within the purview of many projects providing support for the B&H judiciary. The governing institutions, the Ministry of Justice B&H and the Ministry of Foreign Affairs B&H should involve relevant academics in the process of negotiation and accession to international instruments.

The capacity of the courts and enforcement agents were analysed and several shortcomings have been noted. In the Federation B&H and Republic Srpska, the courts of second instance are competent to decide on the recognition of foreign judicial decisions, but there are no specialised departments for this matter: civil law departments decide on the broad scope of issues including recognition of foreign court decisions. It is quite possible that in the internal organisation of a certain court, one or several judges are predominantly or exclusively commissioned to decide on the recognition of foreign judgments, but this decision is rather haphazard as a result of the specialisation or fulfilment of certain special conditions by a judge. In sum, there is no specialisation among the judges either in the field of private international law in general or in the narrower field of recognition of foreign judicial decisions.

The quantity and quality of court decisions could not be assessed. The impossibility of a direct search of case law represents a significant problem. Court decisions are not systematically published or accessible on the respective web-sites. To get an insight into the practice of a certain court, it is necessary to submit a request in accordance with the Law on Access to Information B&H. Due to these circumstances, a very small sample of court judgments formed the subject of the analysis, which does not allow for the drawing of relevant conclusions on the quantity and quality of judicial decisions.

Enforcement agents do not have any competencies in the processes of the cross-border recognition of foreign judicial decisions. Only judges are entitled to deal with the procedure. The situation regarding enforcement procedure is almost the same. The courts decide whether a motion for enforcement on the basis of a foreign title will be granted; the enforcement procedure that follows does not deviate from the enforcement procedure in any other matter. Enforcement agents play a minor role within the enforcement procedure in general. Their position is not precisely regulated, differing from court to court, and is very critically assessed in the relevant literature. Enforcement agents are court employees in B&H; they are underpaid and do not have any career perspectives within the system. The requirements for their job are not defined by the enforcement law and can be regulated differently by each court. There are no specialised admission tests; the candidates for enforcement agents must only pass the civil service exam for employees, which does not include any knowledge or skills in enforcement law. Upon recruitment, the enforcement agents do not receive any specialised training. All these factors have an impact on the capacity of enforcement agents in general.

There are two judicial and prosecutorial training centres in B&H, organised at entity level. The judges nominated in BDB&H can attend seminars in the Republic Srpska or the Federation of B&H. The judges are obliged to attend a certain number of the trainings yearly. The two Centres cooperate well and often organise joint trainings. Providing their capacities allow for it, the Centres may organise trainings for those persons who are not mandatorily involved in the training program, for example, for court clerks who are involved in enforcement proceedings, but this type of education has mostly been omitted until now.

An analysis of the annual reports of the Centre in FB&H and its program for 2020 and 2021 has demonstrated that there are no standard trainings, which are held regularly every year in private international law. The picture is rather haphazard as the titles and rhythm of the trainings held demonstrate. It can be concluded that, as a rule (with minimal deviation), around 20 trainings in civil matters are offered yearly (14-20% of the total number of trainings), and in the field of enforcement and non-contentious proceedings, one or a maximum of two seminars were offered for each (ca. 1% of the total number of the trainings). The data leads to the conclusion that, in general, civil matters and especially enforcement and non-contentious proceedings are not satisfactorily represented in the continuous training of judges. An analysis of the presented topics demonstrates that cross-border recognition and enforcement, which should be taught within the training in civil enforcement and non-contentious matters, is an unrepresented and highly neglected field.

Regarding the economic and political aspects of the implementation of the HCCH 2019 Judgments Convention, the ongoing internationalisation is not accompanied by adequate measures. The most important trade partners of B&H are member states of the EU, but the law which facilitates legal cooperation within the EU does not apply to the relationships with B&H as a non-member state. The implementation of the relevant EU regulations in this field into the legal order of B&H might be problematic as once B&H becomes a member state, EU regulations will immediately become binding for B&H. However, duties arising out of the Stabilisation and Association Agreement stipulate that contracting states have to undertake measures to harmonise their national laws with the *acquis*. B&H has failed to do so in the field of private international law. As mentioned, the doctrine deems accession to international conventions in the field of private international law as a convenient alternative. Unfortunately, after independence and the end of the war, B&H has negotiated and become a member to only a small number of international multilateral conventions and thereby failed to become a party to many HCCH conventions.

The importance of art.5 of the Convention frames it as the central part of the Convention. However, perhaps the most significant differences between PIL and the Convention lie in international jurisdiction. The Convention does not represent the so-called “double convention/ *traité double*” but “*traité simple*,” since it does not regulate international jurisdiction but only enforcement and recognition. Here, it should be mentioned that B&H has not ratified the Convention on Choice of Court Agreements of 2005 which is complementary to the Convention. The Convention defines the jurisdictional criteria that are accepted under the Convention for recognition and enforcement of judgments in the requested state. The provisions of PIL which regulate international jurisdiction do not comply with the jurisdictional criteria of the Convention. Firstly, the general and dominant jurisdiction criterion in PIL, which is connected to the defendant, does not correspond to the same criterion of the Convention, since PIL relies on domicile and alternatively on residence, and the Convention on habitual residence. Habitual residence, which has become one of the most important connecting factors for determination of applicable laws as well as jurisdiction in modern private international law, is not recognised by the PIL.

The habitual residence of the defendant is not a single jurisdictional criterion in the Convention. The Convention recognises three groups of jurisdictional criteria—besides habitual residence—as a connection with the defendant. These criteria are based on consent and connection between the claim and the state of origin. The same criteria can be found in the PIL but there is a lack of convergence in the number, scope, and content of the criteria.

The Convention differentiates between three forms of consent: explicit consent during the proceeding, implied consent and a non-exclusive choice of court agreement of the parties. The PIL is partially in line with the Convention regarding tacit prorogation. Like the Convention, the PIL does not mention the term implied consent or prorogation. On the other hand, the PIL, unlike the Convention, accepts the concept of “submission.” The PIL allows for explicit prorogation under several restrictions, whereby it makes no difference between exclusive and non-exclusive choice of court. This difference is probably the consequence that there are two complementary HCCH Conventions, one from 2019 and one from 2005. For a state such as B&H, which is not a party to the 2005 Hague Choice of Court Convention, this 2019 Convention provision is not really useful as it cannot act as a starting point in the regulation of this issue.

The PIL and Convention depart significantly from each other regarding jurisdictional criteria which rely on a connection between the claim and the court of origin. These differences mirror the differences between the basic concepts used by these two legal instruments. The Convention does not regulate jurisdiction but jurisdictional filters (indirect jurisdiction) whereas the PIL has the opposite approach. The Convention stipulates jurisdictional criteria or, better formulated, “jurisdictional filters” upon which the court of the state where the recognition or enforcement is sought assesses the judgment rendered in the state of origin. The PIL, on the other hand,

provides for direct jurisdiction – the court should decide whether it is competent to adjudicate in cross-border matters under national law or an international agreement if applicable.

Furthermore, the list of jurisdictional criteria related to the connection between the claim and the court of origin is significantly longer in the Convention than in the PIL. The latter regulates only the following issues: non-contractual obligations, proprietary claims when the property of the defendant or selected assets are located in B&H, the claims of a foreigner for obligations to be performed in B&H, ownership and other rights in rem in immovable property or aircraft and ships/vessels. All other jurisdictional filters regulated in the Convention are not mentioned in the PIL.

The analysis of the procedure for recognition and enforcement of foreign judicial decisions in B&H has demonstrated that there are significant differences in comparison to the HCCH 2019 Judgments Convention.

The main determination of the material scope of application is given in art.1 of the Convention, which stipulates that the Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters in the contracting state of a judgment given by the court of another contracting state. National legal sources (e.g., PIL) have a broader scope of application, providing for cross-border recognition and enforcement in matters of the status and legal capacity of natural persons, maintenance obligations as well as other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships, and in wills and succession matters. In addition, the PIL includes privacy rights and intellectual property rights. All these matters are excluded from the scope of the Convention. The Convention provides for many exceptions to its application in art. 6. The list of grounds for non-application of the Convention was compared with those in the PIL. There is no congruence between the Convention and PIL in this part. The provisions of the PIL are applicable to a greater number of issues in civil and commercial law as well as family law and inheritance law. PIL's material scope of application thus differs from that of the Convention.

The PIL does not differentiate foreign judicial decisions and does not provide for different recognition rules depending on the type of foreign judicial decision. Each foreign judicial decision can be recognised if it has become final and if there are no grounds prescribed by the law for the refusal of recognition. The PIL does not only foresee the recognition and enforcement of foreign judicial decisions but of other foreign titles, too.

The PIL does not differentiate between the procedure for recognition as a main or as a preliminary question and provides the barest of procedural rules for both (art. 101). Only one difference exists regarding territorial jurisdiction. The solution regarding ruling on a preliminary question contained in art.8 of the Convention does not exist in the PIL.

The PIL does not contain an explicit provision on who is actively to foresee the procedure for recognition of foreign judicial decisions. The Convention also omits to define a person entitled to initiate the proceedings.

Art. 12 of the Convention prescribes a set of documents that the party seeking recognition and enforcement needs to submit. Here the Convention and PIL do not completely converge. Like the PIL, it requires a complete and certified copy of the judgment and an additional document which instituted the proceedings in case of a default judgment. The requirement - "any documents necessary to establish that the judgment has the effect or, where applicable, is enforceable in the State of origin" is an apt solution. Such a formulation is very favourable and provides the needed flexibility, but the corresponding provision is not contained in the PIL. As far as court settlements are concerned, the Convention provides for rules which are appropriate for these kinds of titles, which is not the case with the PIL. This constitutes a substantial legal gap in the current law in B&H. The Convention has omitted to provide for rules for further enforcement titles and enforceable notarial documents. Furthermore, the Explanatory Report suggests that

administrative documents and notarial documents cannot be considered as judgments, meaning that they are left out of the scope of the Convention. This issue is not resolved in the PIL either and is lively discussed in the doctrine.

Regarding the procedure for recognition and enforcement of foreign judicial decisions, the Convention takes into account specific procedural rules that are applicable in the contracting states. It also provides leeway to the states to exercise discretion in the regulation of the procedure with some minor limitations. As B&H is (still) not a contracting state, these limitations are not applicable. The procedure for recognition and enforcement of foreign judicial decisions is barely regulated in the PIL. Only one article of the PIL is dedicated to this issue (art. 101). The main conditions for recognition are that the judgment has become final, the person seeking recognition and enforcement has presented the evidence and confirmation of the enforceability of the judgment. The PIL lists a set of grounds that will result in the refusal of recognition (or enforcement).

There are no special provisions for the enforcement of foreign enforcement titles. The enforcement procedure is always the same regardless of whether it is based on a foreign title or domestic title. The B&H enforcement law provides for only one type of enforcement procedure: enforcement which aims at the judicial sale or judicial transfer of rights. A forced administration/sequestration is not foreseen. The methods of enforcement are different depending on the assets which the creditor has designated as the subject for enforcement, and not on the kind of the enforcement title (foreign or domestic).

There are no particularities in the procedure if the court decides on recognition as a main or as a preliminary question. The role of enforcement agents is very restricted here: they are predominately involved in the enforcement procedure over movables.

## 1. Legal framework of the cross-border recognition and enforcement of foreign judicial decisions

### 1.1 Overview of legal provisions

B&H is a complexly organised state consisting of two entities – the Federation B&H and Republic Srpska (hereinafter: RS), and the Brčko District B&H (hereinafter: BD B&H). Legislative competencies are divided between the State and its parts. The Constitution of B&H provides for the presumption of competence in favour of the entities; the competencies of the State B&H are only those which are explicitly specified in the Constitution. The Constitution of B&H does not list private international law, cross-border recognition and enforcement as the competencies of the State. This means that B&H does not have the direct authority to regulate the mentioned topics. Indeed, enforcement legislation is regulated at the level of entities and in Brčko District B&H, as is non-contentious procedure (the procedure for recognition of foreign judicial decisions is by nature a non-contentious procedure).<sup>71</sup>

The situation with the regulation of private international law might be quite different. As illogical as it may seem, the strict construction of the B&H Constitution implies the competence of entities in this matter.<sup>72</sup> However, the B&H Constitution allows for the transfer of entity competences to the state (art. III para. 5 of the B&H Constitution). Furthermore, the adoption of private international law legislation could rely on art. I para. 4 of the B&H Constitution (which sets forth a "common" market with the four fundamental freedoms as in the EU).<sup>73</sup> The subject matter of

<sup>71</sup> See Muminović, *Procesno međunarodno privatno pravo*, p. 116; Šaula, *Osnovi međunarodnog privatnog prava Republike Srpske*, p. 302.

<sup>72</sup> See Šaula, *Reform of Private International Law in Countries Successors of the Former Yugoslavia*, p. 1355, and Šaula, *Osnovi međunarodnog privatnog prava Republike Srpske*, pp. 54-56.

<sup>73</sup> Meškić, *Četiri osnovne slobode kao ustavni osnov za harmonizaciju entitetskih propisa*, p. 370; Alihodžić, Meškić and Duraković, *Accepting EU Private International Law Standards into the Legal System of Bosnia and Herzegovina: What Can Be Done While Waiting for Godot?* p. 158.

private international law could be a field where the abovementioned, rarely used, constitutional mechanisms could be employed. An argument in favour of this solution is an analogy with the EU: in order to achieve the four freedoms and functioning of the internal market, the EU unified a number of private international law issues although the treaties of the European Union do not explicitly mention such authority.<sup>74</sup>

#### State level:

The basic source of law for the recognition and enforcement of foreign enforceable titles in civil and commercial matters is the Law on the Resolution of Conflicts of Laws with Regulations of Other Countries in Certain Relations<sup>75</sup> (hereinafter: the PIL). The former Yugoslav Act was adopted into the legal order of both B&H entities and the District. Even though the bases for assuming this law into the entities' legal orders are different,<sup>76</sup> for the purpose of this report, it is only relevant that the same legal regulations are being applied in all of B&H.

The PIL regulates recognition and enforcement of all judicial and arbitration decisions in general terms. Art. 1 of the PIL regulates the scope of the law which encompass conflict rules and international jurisdiction in status, family, and proprietary matters. Although, by defining the scope of the regulation, Art. 1 of the PIL makes no explicit reference to recognition and enforcement of judicial decisions in status, family, and property-related matters, it clearly follows on from the law in its entirety. Status and family-related matters, however, are not of interest for this report, so the question is raised as to what the term "property relations" implies, i.e., whether this notion encompasses both civil and commercial matters.

The answer here should be affirmative. The rationale for this may be found in the Law on Obligations that follows a monistic system. Hence, the same rules apply to commercial contracts and to non-commercial contracts, unless otherwise explicitly stipulated by the Law on Obligation regarding commercial contracts (art. 25 para.1 of the Law on Obligations). According to the Law on Obligations, a contract is deemed to be commercial if both parties are tradesmen, and if they conclude the contract in question within the scope of their business/registered activities. In addition, the bilateral agreements on cross-border legal assistance which B&H concluded with successor states of the former SFRY regulate, *inter alia*, recognition and enforcement of judgments in civil matters rendered in another state-signatory to the agreement, whereas civil matters explicitly imply decisions made in commercial matters as well.<sup>77</sup>

The PIL contains general rules for the enforcement of foreign enforceable titles regardless of whether they concern status, family, or property-related matters, with some derogations when it comes to family relations or status matters (see 6.1 below). This, however, is not the subject of interest of the present project. This report is focused on the recognition of decisions in civil and commercial matters.

Regulations on recognition and enforcement of foreign enforceable titles are primarily focused on the enforcement of foreign judicial decisions.<sup>78</sup> The basic principle is that a foreign judicial decision is made equivalent to a domestic judicial decision if the former has been recognised

by a domestic court.<sup>79</sup> Therefore, the prototype of a foreign enforceable title is a foreign judicial decision, whereas all other enforceable titles can be recognised since they are made equal to a foreign judicial decision: a foreign court settlement,<sup>80</sup> a decision by another national body which is the equivalent to a judicial decision or court settlement in the country of its origin.<sup>81</sup>

Furthermore, the PIL specifically provides for the recognition and enforcement of foreign arbitration awards. The PIL regulates in detail the preconditions for recognition and enforcement of foreign judicial decisions (art. 87-96 PIL) and foreign arbitration awards (art. 91 and 100 PIL), but not the preconditions for the enforcement of other foreign enforcement titles. The mentioned titles are recognised and enforced by the analogous application of provisions pertaining to recognition and enforcement of decisions by foreign courts. However, due to the different natures and specifics that these titles may have, they cannot meet all the preconditions required for a court decision (for example, a settlement is not final, an administrative body's decisions are not final in the same way the courts decisions are, etc.). Hence, an analogous application of the rules on recognition and enforcement of foreign judicial decisions is often problematic. Specific regulations on preconditions for recognition and enforcement of every individual enforceable title would greatly facilitate both recognition and enforcement.<sup>82</sup>

The PIL stipulates the priority of international legal sources over national sources (art. 3); this provision should be included in the Constitution of B&H. Since its independence, B&H has been quite active in entering into bilateral agreements concerning private international law. However, B&H did not begin from ground zero. As a successor to the former Yugoslavia, it became a member to over twenty bilateral treaties on legal assistance in civil matters, recognition and enforcement of judgments and civil procedure. Since then, B&H has ratified bilateral agreements relating to civil law, predominantly with the states in the region but also with other states such as China or Turkey.<sup>83</sup>

If B&H becomes a member to the HCCH 2019 Convention, the question will arise which agreement (bilateral or multilateral – CHCH Convention) has priority. Bilateral agreements concluded with the successor states of the former Yugoslavia regulate, *inter alia*, the recognition and enforcement of foreign judicial decisions. There are two positions regarding the hierarchy of international legal sources. According to the first, a bilateral agreement overrides a multilateral agreement in accordance with the principle *lex specialis derogat legi generali*.<sup>84</sup> According to the second position, a bilateral agreement does not have to be seen as *lex specialis* as it may regulate the same subject matter as a multilateral agreement, so the ruling principle should be *lex posterior derogat legi priori*.<sup>85</sup> Consensus on this issue has not been reached in B&H. However, the most recent literature argues that bilateral and multilateral agreements are in the same hierarchical position and that each case stipulates which of the two guiding principles on the hierarchy of legal sources should be applied. (The mere fact that a bilateral agreement obliges two states does not automatically mean it is *lex specialis* with respect to a multilateral agreement governing the same subject matter – whether it is *lex specialis* or *lex posterior* should be determined in each case.)<sup>86</sup> The fact that a bilateral agreement obliges a smaller number of states does not mean it overrides a multilateral agreement.<sup>87</sup>

74 For the analogy with B&H, see Meyer, Uvođenje Zajedničkog evropskog prava prodaje, p. 18.

75 Official Gazette of Socialist Republic of Yugoslavia, no. 43/82,72/82.

76 In the Federation of B&H, this Law was taken over by a Regulation with legal effect on recognition and application of federal laws (Official Gazette of Republic Bosnia and Herzegovina, 2/92). This Regulation was subsequently enacted as a law (Official Gazette of Republic Bosnia and Herzegovina, 13/94).

In Republic Srpska, pursuant to art. 12. of the Law on Implementation of the Constitution of the Republic Srpska, all federal laws of the former SFRY were incorporated into the legal order of Republic Srpska provided they were not in contradiction with the effective legal order (Official Gazette of Republic Srpska, no. 21/92).

77 Thus, art. 24 of the Agreement between Bosnia and Herzegovina and the Republic of Macedonia on legal assistance in civil and criminal matters; art. 2 para. 2 of the Agreement between Bosnia and Herzegovina and the Republic of Slovenia on legal assistance in civil and criminal matters; art. 1 para. 2 of the Agreement between Bosnia and Herzegovina and Serbia and Montenegro on legal assistance in civil and criminal matters; art. 2 para. 2 of the Agreement between the Government of the Republic of Croatia, the Government of Bosnia and Herzegovina and the Government of the Federation B&H on legal assistance in civil and criminal matters.

78 This is true for regulations of all successor states of the former Yugoslavia. See also, Rijavec, Das internationale Vollstreckungsrecht am Beispiel Sloweniens, p. 83-84.

79 Art. 86 para. 1 PIL.

80 Art. 86 para. 2 PIL.

81 Art. 86 para. 3 PIL.

82 Povelakić, Izvršenje stranih izvršnih naslova sa posebnim osvrtom na strane notarske isprave, p. 260.

83 The list of international and bilateral treaties ratified by B&H can be found on the website of the Ministry of Justice of B&H, available at: [http://www.mpr.gov.ba/organizacija\\_nadleznosti/medj\\_pravna\\_pomoc/bilateralni\\_ugovori/Konvencije.aspx?langTag=bs-BA\(28.04.2021\)](http://www.mpr.gov.ba/organizacija_nadleznosti/medj_pravna_pomoc/bilateralni_ugovori/Konvencije.aspx?langTag=bs-BA(28.04.2021)). See also: Alihodžić, Meškić and Duraković, Accepting EU Private International Law Standards into the Legal System of Bosnia and Herzegovina: What Can Be Done While Waiting for Godot?, p. 167.

84 For more see Muminović, Međunarodno privatno pravo, p. 31. For this position see: Varadi, Bordaš, Knežević and Pavić, Međunarodno privatno pravo, p. 78.

85 For this position see: Stanivuković and Živković, Međunarodno privatno pravo, p. 77; Muminović, Međunarodno privatno pravo, p. 32. However, Muminović explicitly argues that a bilateral agreement is *lex specialis* in relation to a multilateral agreement. See Muminović, Procesno međunarodno privatno pravo, p. 171.

86 Muminović, Međunarodno privatno pravo, p. 31; Šaula, Osnovi međunarodnog privatnog prava Republike Srpske, p. 54; Meškić and Đorđević, Međunarodno privatno pravo, p. 31.

87 Meškić and Đorđević, Međunarodno privatno pravo, p. 31.

## At Entity / Brčko District B&H Level

The PIL is only one national legal source that is unique for all parts of B&H. Other legal sources for the legal issues which are relevant to this report are regulated by both entities and Brčko District B&H.

**Enforcement Procedure:** Law on Enforcement Procedure FB&H,<sup>88</sup> Law on Enforcement Procedure of the Republic Srpska,<sup>89</sup> Law on Enforcement Procedure of Brčko District B&H.<sup>90</sup> Besides the PIL, these laws on enforcement procedure are relevant for this report. The Laws on Enforcement Procedure only regulate enforcement of foreign judicial decisions.<sup>91</sup> Actually, it concerns a provision that does not constitute a novelty with regard to the PIL. On the contrary, this provision is deficient in several aspects compared to the provisions of the PIL. All three laws on enforcement procedure in B&H specify that decisions rendered by foreign courts may be enforced if such decisions meet the requirements for recognition set forth under the law, or under ratified international agreements. Here we have an inconsistency between the laws on enforcement procedure and PIL since the enforcement law provides only and strictly for the possibility to decide on the enforcement of a foreign judicial decision by deciding on recognition as a preliminary question. Other enforcement titles have not been considered.

**Non-Contentious Procedure:** The Law on Non-Contentious Procedure Federation B&H,<sup>92</sup> Law on Non-Contentious Procedure of Republic Srpska,<sup>93</sup> Law on Non-Contentious Procedure of Brčko District B&H.<sup>94</sup> These laws are divided into two parts: first, a general part, which regulates principles and general issues and institutes relevant for each specific non-contentious procedure regulated by laws on non-contentious procedure or any other laws, and the second part which regulates different types of non-contentious procedure (for example, a partition of co-ownership, or a procedure of approval of marriage for underage individuals). The procedure for recognition of foreign judicial decisions is not regulated among these specific non-contentious procedures. Nevertheless, doctrine and judiciaries find that it is indisputable that this is a non-contentious procedure.

**Notary public law:** Law on Notaries of Federation B&H,<sup>95</sup> Law on Notaries of Republic Srpska,<sup>96</sup> Law on notaries of Brčko District B&H.<sup>97</sup> The laws which regulate notary services are relevant for this report since they regulate the effects of foreign notarial deeds. Under these laws, foreign notary deeds have the same legal effects as domestic notarial deeds. The only precondition for the equal effect of a foreign notarial deed is reciprocity. Since the Laws on Notaries do not contain further provisions on foreign notarial deeds and reciprocity, it could be concluded that assumed factual reciprocity is required. The provisions of the Laws on Notaries cannot be taken separately and without connection to the general regulations of the PIL or international agreements. It means that notarial deeds cannot be excluded from general rules regulating recognition.

**Laws which regulate court organisation:** Law on Courts of Federation B&H,<sup>98</sup> Law on Courts of Republic Srpska,<sup>99</sup> Law on Courts of Brčko District B&H.<sup>100</sup> These laws are relevant for this report since they determine which courts are competent for recognition and enforcement of

foreign enforceable titles.

**Laws which regulate civil procedure:** Law on Civil Procedure of Federation B&H,<sup>101</sup> Law on Civil Procedure of Republic Srpska,<sup>102</sup> Law on Civil Procedure of Brčko District B&H<sup>103</sup> are relevant here since the rules of litigious procedure are applied to non-contentious procedure if a certain issue is not regulated under the non-contentious procedure. These laws are also relevant since they contain provisions on the service of documents abroad.

## 1.2 Assessment of the legal framework

At the time of its adoption, the Law on the Resolution of Conflicts of Laws with Regulations of Other Countries in Certain Relations was deemed a modern instrument with a profound reputation in comparative law.<sup>104</sup> In the almost four decades since its adoption, comparative law produced a number of substantial changes in private international law. Many new laws and instruments regarding the material and procedural private international law have been adopted.<sup>105</sup> B&H was not a part of this process,<sup>106</sup> which means that the PIL is outdated and should be reformed. Unfortunately, the reform of the private international law is not in the focus of interest of legislator(s), although there have been significant changes in this field in the region and comparative law in general in the past decades. The ongoing failure of reform can also be seen in light of the failure of B&H to fulfil its obligations arising from the Stabilisation and Association Agreement, since the introduction of standards of EU private international law in B&H legislation is being postponed.<sup>107</sup>

In many states with a complex legal order, private international law is regulated on a state/federal level (for example, Germany, Switzerland, Austria). It is rather an exception for this issue to be in the competence of federal states (for example, USA). However, due to the specific constitutional framework of B&H, private international law reform is not on the agenda of the legislator at state level. Along with the fact that B&H has a complex legal system, an adoption of three separate laws on private international law would render the situation even more complex. Constitutional limitations and the lack of political will maintain status quo. One of the alternative ways could be the accession of B&H to the international conventions to which the EU is a party, for example, the conventions adopted in the framework of the HCCH on Private International Law.<sup>108</sup>

The procedure for recognition of foreign judicial decisions is barely regulated as a non-contentious procedure, which could not be positively assessed.

The lack of harmonisation between the Laws on Enforcement Procedure and PIL should be seen as problematic. The Laws on Enforcement Procedure only refer to enforcement of foreign judicial decisions, while the PIL allows for enforcement of foreign judicial decisions, foreign court settlements, foreign decisions equalised with court decisions in the given country, as well as of foreign arbitration awards and arbitration settlements. At first glance, the provisions of the laws on enforcement procedure encompass a narrower scope of foreign enforceable titles than the PIL.<sup>109</sup> Does narrowing down the foreign enforceable titles in the laws on enforcement

88 Official Gazette of FB&H, 32/03, 52/03, 33/06, 39/06, 39/09, 35/12 i 46/16.

89 Official Gazette of Republic Srpska, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13, 98/14, 66/18.

90 Official Gazette of Brčko District B&H 39/2013 i 47/2017.

91 Art. 19 of the Law on Enforcement Procedure FB&H, Art. 19 of the Law on Enforcement Procedure RS, Art. 18 of the Law on Enforcement Procedure of the BD B&H.

92 Official Gazette of Federation B&H, 2/98, 39/04, 73/05, 80/14 – other law and 11/21.

93 Official Gazette of Republic Srpska, 36/09, 91/16.

94 Official Gazette of Brčko District B&H, 5/01, 36/17.

95 Official Gazette of Federation B&H, 45/02, 30/16 – Decision of the Constitutional court.

96 Official Gazette of Republic Srpska, 86/04, 2/05, 74/05, 76/05 - corrigendum, 91/06, 37/07, 74/07 – Decision of the Constitutional court, 50/10, 78/11, 20/14, 68/17, 113/18 – Decision of the Constitutional court, 82/19.

97 Official Gazette of Brčko District B&H, 9/03, 17/06.

98 Official Gazette of Federation B&H, 38/05, 22/06, 63/10, 72/10.

99 Official Gazette of Republic Srpska, 37/2012, 14/2014 – Decision of the Constitutional court, 44/2015, 39/2016 - Decision of the Constitutional court and 100/2017.

100 Official Gazette of Brčko District B&H, 80/20 – consolidated version.

101 Official Gazette of Federation B&H, 53/03,73/05, 19/06, 98/15.

102 Official Gazette of Republic Srpska, 58/03, 85/03, 74/05, 63/07, 105/08 – Decision of the Constitutional court, 45/09 - Decision of the Constitutional court, 49/09 i 61/13.

103 Official Gazette of Brčko District B&H, 28/18.

104 Šarčević, The New Yugoslav Private International Law Act, p. 283-296.; Lipowscheck, Das neue jugoslawische Internationale Privat- und Prozessrecht im Bereich des Vermögensrecht, pp. 426.; Firshing, Das neue jugoslawische IPR-Gesetz, p. 1-5; Župan, Novi Zakon o međunarodnom privatnom pravu, p. 2.

105 The new law was adopted in Slovenia in 1999, Bulgaria in 2005, North Macedonia in 2007 with amendments in 2010, and then a completely new law in 2020, Albania in 2011, Romania in 2011, Poland in 2011, Czech Republic in 2012, Montenegro in 2014, Hungary and Croatia 2017.

106 Instead of many others: Jessel-Holst, The Reform of Private International Law Acts in South East Europe, with particular Regard to the West Balkan Region, p. 139.

107 Alihodžić, Meškić and Duraković: Accepting EU Private International Law Standards into the Legal System of Bosnia and Herzegovina: What Can Be Done While Waiting for Godot?, p. 178.

108 Alihodžić, Meškić and Duraković: Accepting EU Private International Law Standards into the Legal System of Bosnia and Herzegovina: What Can Be Done While Waiting for Godot?, p. 178.

109 This is the case with all other laws of the former Yugoslav republics, with some differences in Slovenia and Serbia. For more, see Powlakić, Anerkennung

procedure imply that it is only possible to conduct enforcement of foreign judicial decisions? Such an interpretation could not be advocated. This rather awkward legal provision of the Laws on Enforcement Procedure should be interpreted systematically in connection with the PIL provisions as foreign judicial decision is a generic notion for all the foreign enforceable titles enumerated in the PIL. The PIL refers to judicial decisions and other titles considered as judicial decisions (art. 86 PIL).

If B&H becomes an EU member, a number of regulations on private international law would be directly applicable. There are no obstacles, and it is even favourable for B&H to harmonise its private international law with the EU now. This has already been done by Montenegro,<sup>110</sup> North Macedonia,<sup>111</sup> Serbia (which is in the late phase of the adoption of the new law),<sup>112</sup> and other states of the Western Balkans.<sup>113</sup> However, there are no legislative projects on this issue in B&H due to its specific constitutional order.

## 2. Institutional framework for the cross-border recognition and enforcement of foreign judicial decisions

### 2.1. Overview of legal provisions determining stakeholders in the cross-border recognition and enforcement of foreign judicial decisions

In accordance with the B&H Constitution and relevant legislation, both cross-border recognition and enforcement are procedures allocated to the courts. Since the parties are usually represented in proceedings before the courts by lawyers, they can also be assessed as important stakeholders in this area. The Ministry of Justice of B&H plays an important role in negotiating and signing both bilateral and multilateral international agreements.

The legal set-up of the institutional framework for cross-border recognition and enforcement of foreign judicial decisions is not particularly complex *per se* in B&H: “the big players” are the courts. The complexity is caused by the complex state organisation of B&H. With the exception of the Ministry of Justice B&H, all other stakeholders “play” at entity or District level. The court system is organized within the entities and Brčko District B&H without the Supreme Court of B&H which has appellate or cassation jurisdiction.<sup>114</sup> For this reason, jurisprudence regarding recognition of foreign judicial decisions can differ between entities and Brčko District B&H. There is no mechanism for unifying judicial practice in this matter.

## 2.2. Stakeholders putting the cross-border recognition and enforcement of foreign judicial decisions into practice

### 2.2.1. Courts

In all three parts of B&H the courts play the main role in cross-border recognition and enforcement of foreign judicial decisions. The Laws on Courts have provisions on organisation, competence and functioning of the courts. In the Federation B&H and Republic Srpska, the recognition of foreign judicial decisions is within the competence of the courts of second instance (these are

und Vollstreckung ausländischer Mobiliarsicherheiten in Südosteuropa, p. 257-282.

110 Mandić, Montenegro in: IEL, p. 17, subpara. 7 - 11.; Šaula, Reform of Private International Law in Countries Successors of the Former Yugoslavia, New Legal Challenges v. Legal Tradition, p. 1354; Meškić-Dordević, Međunarodno privatno pravo, p. 30.

111 Jessel-Holst, Makedonija na putu ka modernom međunarodnom privatnom pravu, p. 7.

112 See more about the reform of private international law in the region: Šaula, Reform of Private International Law in Countries Successors of the Former Yugoslavia New Legal Challenges v. Legal Tradition, p. 1348. et al; Jessel-Holst, Makedonija na putu ka modernom međunarodnom privatnom pravu, p. 7 et al.

113 Jessel-Holst, The Reform of Private International Law Acts in South East Europe, with particular Regard to the West Balkan Region, p. 134.

114 The Court of B&H has a very specific scope of competence and does not decide on appeal or other legal remedies against the ordinary courts of the entities/Brčko District B&H.

Cantonal courts in the Federation, and District courts in Republic Srpska). They are entitled to decide on the recognition of foreign judicial decisions in civil and commercial matters, and foreign arbitration awards.<sup>115</sup> In both entities, the Supreme Courts are competent to decide in appeal proceedings.

The situation in the Brčko District B&H is somewhat specific: there is only one court of the first instance (municipal court) and only one court of second instance (Appellate court). For these reasons, i.e., in order to guarantee a two-instance procedure, the municipal court is competent to decide on the recognition of foreign titles. However, this issue is not explicitly regulated in the Law on Courts of BDB&H, but this conclusion can be drawn on the basis of legal provisions whereby the municipal court conducts and decides in non-contentious proceedings,<sup>116</sup> and where proceedings recognising foreign titles are considered non-contentious proceedings. In addition, the scope of the Municipal court Brčko District jurisdiction also includes international legal assistance,<sup>117</sup> and these two legal provisions allow the aforementioned conclusion.

The enforcement procedure is allocated to first instance courts. In courts with a high volume of cases, special departments are in charge of enforcement and are specialised for this task, while there is no special department in the second instance court for the recognition of foreign judicial decisions.

The aforementioned demonstrates that the procedures for recognition and enforcement of foreign judicial decisions are fully separate procedures and performed by different courts. These procedures could be merged if the enforcement court decides on recognition as a preliminary question with effect only for the concrete enforcement procedure (see 6.3).

### 2.2.2. Administrative institutions (Ministry of Justice, Central Authorities, etc.)

The Ministry of Justice of Bosnia and Herzegovina was established in 2003, in accordance with the Law on Ministries and Other Administrative Bodies of B&H.<sup>118</sup> The scope of its responsibility encompasses inter alia international and inter-entity judicial cooperation (mutual legal assistance and contacts with international tribunals, drafting of relevant legislation connected to international and inter-entity judicial cooperation, ensuring that the legislation of B&H and its implementation on all organisational levels in B&H complies with the obligations of B&H deriving from international agreements. Additionally, this Ministry is authorised to cooperate both with the Ministry of Foreign Affairs of B&H and with the entities in drafting bilateral and multilateral international agreements.

This Ministry can be seen as a cornerstone for the eventual decision/discussion on accession to the HCCH 2019 Judgment Convention.

### 2.2.3. Legal Practitioners (Lawyers, Legal representative, etc.)

Parties in non-contentious procedures are not obliged to be represented by an attorney. Nevertheless, parties are typically represented by an attorney in procedures for recognition and enforcement of foreign judicial decisions, especially if the applicant is a natural or legal person who is not a speaker of the official languages and who is not familiar with the law in B&H. This is very often the case when foreign natural or juridical persons are seeking recognition and enforcement in B&H. For higher quality court proceedings on recognition and enforcement of foreign judicial decisions, the interplay between the courts/judges and lawyers and legal representatives is very important. While the judges are obliged to take part in obligatory education organised by Centres for the education of judges and prosecutors (s. 3.4.), attorneys are not, which brings certain

115 Art. 28 para. 3(e) of the Law on Courts of FB&H; art. 31 para. 3(d) of the Law on Courts of RS.

116 Art. 21 para. 3 of the Law on Courts of BDB&H.

117 Art. 21 para. 4(f) of the Law on Courts of BDB&H.

118 Official Gazette of B&H, no. 5/2003.

deficiencies. In addition, in B&H, a specialisation among lawyers is quite rare while specialisation in private international law is almost non-existent.

#### 2.2.4. Enforcement agents

Enforcement agents in B&H are judicial employees with very limited competencies in the enforcement procedure and no competencies in the recognition procedure. When they are active in the enforcement procedure, they have the same rights and duties irrespective of enforcement titles (foreign or domestic enforcement titles). More about the status of the enforcement agent see in 3.3. below.

#### 2.2.5 Other relevant stakeholders

The persons/entities which can be organised and provide education on recognition and enforcement should be considered relevant stakeholders. The role of the Centres for the education of judges and prosecutors will be discussed in more detail in section 3.4.

The universities can play a very important role in two directions at least: firstly, by offering adequate curricula for a solid basic education in international private law (and enforcement law). Recognition and enforcement of foreign judicial decisions is a standard part of curricula in private international law and is generally taught in the last semester of studies. Recognition and enforcement of foreign judicial decisions is seldom the subject of legal clinic education, which can be seen as a deficiency. Secondly, since doctrine has stated that significant insufficiencies of knowledge in the field of private international law can be attributed to the judges, this could be a reason why specialist courses could be offered as a part of life-long learning by the universities.

### 2.3. Mapping the cooperation among stakeholders

As we testify to ongoing internationalisation of legal relationships and the growing of international trade, these processes require a better understanding of the domestic legal system and its suitability to tackle legal problems with an international element. It is important to approach this problem systematically. Cooperation among stakeholders is vital in this process. An increase in the quality of legal services provided by legal practitioners and the rulings made by the courts in B&H depends on their education. In this phase, a strong education is necessary. Centres that provide education for judges and prosecutors could develop an agenda with a focus on private international law. As mentioned above, a very important role should be played by academia, as the university teachers in B&H are well equipped with knowledge on private international law. Moreover, since the states in the region have more legislative experience with recent developments in private international law, cooperation with their educational bodies and practitioners could be very useful.

Since there are no mechanisms for the unification of court practices among entities and Brčko District B&H, a *de facto* unification could be reached through the cooperation of the supreme courts of the entities and the Appellate court of the Brčko District B&H. Common trainings for practitioners and judges around the state could be organised within the purview of many projects providing support for the B&H judiciary. The governing governmental institutions, the Ministry of Justice B&H and the Ministry of Foreign Affairs of B&H should involve relevant academics in the process of negotiation and accession to international instruments.

## 3. The role of courts and enforcement agents in cross-border recognition and enforcement of foreign judicial decisions

### 3.1. Capacities of courts in regard to cross-border recognition of foreign judicial decisions

In B&H the organization of the courts differs in different parts of B&H (Federation B&H, Republic Srpska, Brčko District B&H). As stated above under 2.2.1, there is one court of the first instance and one court of the second instance in Brčko District B&H and there are no specialised courts (for example, family courts, labour courts, administrative or commercial courts). The Federation B&H offers the same picture: there are no specialised courts, although doctrine continuously advocates for specialisation.<sup>119</sup> In Republic Srpska, specialized commercial courts have been established.

Within the courts there are departments for criminal, civil, and administrative law; enforcement and non-contentious procedure are often included in the civil law department. The distribution of cases within the courts is carried out automatically based on the System for Automatic Management of Cases (hereafter: CMS). The CMS mirrors the previously mentioned internal organisation of the courts and all cases are assigned to a specific legal field. The processes for recognition are of a non-contentious nature and these cases are classified with a “V” for “vanparnični postupak” – a non-contentious procedure. The CMS System automatically and randomly allocates the case to the judge of a certain court department. In the Federation B&H and Republic Srpska, the courts of second instance are competent to decide on the recognition of a foreign judicial decision, but there is no specialised department for this matter; the civil law departments decide on the broad scope of civil matters including recognition of foreign court decisions. It is quite possible that in the internal organisation of a certain court, one or several judges are predominantly or exclusively commissioned to decide on the recognition of foreign judgments, but this decision is rather haphazard as the result of a specialisation or fulfilling of some special conditions by a certain judge. In sum: there is no specialisation among the judges either in the field of private international law in general or the narrower field of recognition of foreign judicial decisions.

An analysis of the available court decisions on recognition of foreign judicial decision is given in section 3.2. A small sample (a small number of judgments) was analysed, and it is not possible to draw relevant conclusions but rather to get an impression or indices on the quantity and quality of judgments on cross-border recognition of foreign judicial decisions. Here it is necessary to note that the courts are overburdened, that they have (especially in bigger towns) an immense work overload and backlog, which can have a significant impact on the quality of judgments.

### 3.2. Quantity and quality of judgments regarding cross-border recognition of foreign judicial decisions

Unfortunately, it is not possible to research the judicial practice in a systematic manner in B&H. First, the courts do not systematically publish their judgments and they are not accessible on the respective websites. To get an insight into the practices of a certain court, it is necessary to submit a request in accordance with the Law on Access to Information of B&H. If the competent court grants this request, it delivers anonymised decisions due to requests for data protection. In the same way, the request could be directed to the High Judicial and Prosecutorial Council B&H (HJPC).

On 16/03/2021, the request was submitted to the HJPC for data from CMS (System for Automatic

<sup>119</sup> See more: Martinović, Potreba za reformom pravosudnih sustava u BiH.

Management of Cases) related to recognition and enforcement of the foreign judicial decisions in civil and commercial matters.<sup>120</sup> The request was not granted, with the explanation that the system does not recognize such subject matter. More specifically, the “recognition/enforcement of foreign judicial decisions” is not an allowed search criterion in the search engine.<sup>121</sup> The HJPC is generally very supportive and helpful, but if the data systematisation does not comply with the search criterion, no relevant data can be provided by the HJPC. For these reasons, it is not possible to conduct relevant analysis of (non-existent) statistical data.

Requests for insight into decisions on cross-border recognition rendered by the respective courts was submitted to the Cantonal courts Sarajevo, Tuzla, Zenica, Travnik, Mostar, and District court Banja Luka. Having in mind that they are not in possession of systematically collected and structured data, the request was limited to the last five years (01/01/2016-31/12/2020).

The Cantonal courts in Sarajevo and Zenica responded positively to the request and delivered a certain number of cases. The Cantonal Court in Travnik granted the request but due to the pandemic has not yet delivered its decisions. They will be delivered later. In addition, this court does not conduct this procedure free of charge. The request was discussed with the presidents of the Cantonal courts in Zenica and Travnik and with the president of the Civil Law Department of the Cantonal Court in Sarajevo. The same problem, which occurred in the communication with HJPC, was identified: the data is not well systematised and could not be directly searched with the relevant keywords.

In the period from 01/01/2016 to 31/12.2020, the Cantonal Court in Zenica rendered 583 decisions on recognition of foreign judicial decisions.<sup>122</sup> Seventeen court decisions were delivered upon request for purposes of this research.

In the period from 01/01/2016 to 31/12/2020, the Cantonal Court in Sarajevo rendered more than 800 decisions on the recognition of foreign judicial decisions.<sup>123</sup> Twenty-four court decisions were delivered upon request for purposes of this research. The discussion with the President of the Civil Law Department of the Cantonal Court in Sarajevo revealed that almost 80% of the decisions were rendered in family-related cases (divorces, children, i.e., family maintenance). A small group of judgments deals with civil and commercial cases.

The court decisions into which insight was given can be positively assessed:

- The courts were consequently focused on the formal requirements for recognition and explicitly refused in one case to perform *revision au fond*;
- Once, the court refused to recognise a decision on real estate issued by an Austrian court arguing that the court in B&H, where the real estate is situated, has exclusive international jurisdiction;
- The courts correctly list the relevant requirements in all cases, but they merely reproduce relevant provisions without in-depth explanations of their reasoning;
- As a rule, they simply state that the foreign decision is not in violation of the B&H Constitution (which was not disputable in any case);
- In the cases where the court investigated whether the prescribed requirements were met, it also stated that reciprocity existed. In all these cases, the respective decisions were rendered in the countries in the region where bilateral agreements on judicial cooperation, concluded between respective state and B&H, had been in force. The formulation used by the court emphasized the existence of reciprocity as the two states concluded a bilateral agreement. It is indisputable that in these cases diplomatic

reciprocity exists, but it should also be clear that reciprocity can have other sources (law, or *de facto* reciprocity);

- In cases concerning the recognition of decisions from countries in the region where bilateral agreements on judicial cooperation had been in force, the court simultaneously invoked provisions of the PIL and the bilateral agreement. Bilateral agreements concluded with the successor states of the former Yugoslavia do not provide more liberal requirements than the PIL if they regulate the subject matter of recognition and enforcement. The provisions are identical to a great extent. This, however, does not mean that the court should invoke both sources of law. If the same subject matter is regulated by the PIL and the bilateral agreement, preference should be given to the latter since it is an international source of law (art. 3 PIL).

The small number of trainings in this field (section 3.4.) leads to an indirect conclusion that the cases are not discussed in the relevant measure or disseminated through the trainings of judges organised by entity judicial and prosecutorial training Centres. Subsequently, the judges are probably not well informed of the relevant interpretations of legal provisions made by entity Supreme Courts. If the system does not allow “recognition/enforcement in civil and commercial matters” to be successfully used as a search criterion, the judges cannot access the relevant judgments through CMS System.

In conclusion: too few cases have been analysed to allow for the drawing of relevant conclusions on the quantity and quality of judicial decisions. A significant problem is the impossibility of conducting a direct search of case law.

### 3.3 Capacities of enforcement agents in regard to cross-border recognition of foreign judicial decisions

Enforcement agents do not have any competencies in the procedures for cross-border recognition of foreign judicial decisions. Only judges are entitled to deal with the issue. The situation vis-à-vis the enforcement procedure is almost the same. In the enforcement procedure, the judges are the ones who decide and conduct the enforcement procedure, while enforcement agents are authorised to execute some enforcement actions, especially regarding movable assets (for example, eviction of a movable asset or a seizure). If the court decision on recognition is not rendered, but the interested person directly seeks enforcement, it is possible to decide on the recognition of the foreign judgment as a preliminary question, but this is exclusively in the competence of the judges and not of enforcement agents. After the court has decided on recognition as the main question, or after the judge in charge of enforcement has decided on a motion for enforcement based on a foreign judicial decision and recognition as a preliminary question and rendered an enforcement order, the enforcement procedure which follows does not deviate from the enforcement procedure in any other matter.

For these reasons, it is not possible to speak about the capacities of enforcement agents in regard to cross-border recognition or enforcement of foreign judicial decisions but only about their capacity to act within enforcement procedure in general.

The reform of the enforcement law carried out in B&H in 2003 and in Brčko District B&H had as its principal task an increase in the efficiency of the enforcement procedure.<sup>124</sup> A huge number of unsolved enforcement cases demonstrate that this goal has not to be reached.<sup>125</sup> One of

<sup>124</sup> See more by Povlakić, Die praktischen Probleme des Vollstreckungsrechts - dargestellt am Beispiel von Bosnien und Herzegowina, p. 82-84.

<sup>125</sup> According to the information obtained by the High Judicial and Prosecutorial Council of B&H in Decision number 01-07-10-77-114/2019 of 22.05.2019, issued on the basis of the request for access to information, out of the total number of unsolved cases in B&H, enforcement cases constitute 84%. The number of enforcement cases in B&H is ca. 1.8 million, out of which, according to the annual High Judicial and Prosecutorial Council of B&H for 2017, they were allocated among the largest courts in B&H as follows: Basic Court in Banja Luka – 50,549; Municipal Court in Sarajevo – 900,324; Municipal Court in Zenica – 113,386; Basic Court in Bijeljina – 148,841; Municipal Court in Mostar – 34,833; and Municipal Court in Tuzla – 134,156. The situation has not changed significantly in the last two years.

<sup>120</sup> The request should be answered by the President of HJPC in line with the Law on Data Access of B&H

<sup>121</sup> HJPC decision no. 01-07-10-6-74/2021 of 25.03.2021.

<sup>122</sup> The order of the Cantonal Court Zenica 004-0-SUSpi-21-000017 of 09.04.2021.

<sup>123</sup> The order of the Cantonal court Zenica 004-0-SUSpi-21-000017 of 09.04.2021.

the reasons for this situation is the inadequate position of enforcement agents, which is very critically assessed in literature. Enforcement agents are court employees in B&H. A study on civil enforcement in the Western Balkans, partly focused on B&H, has stated that enforcement agents are underpaid and do not have any career perspectives in the system.<sup>126</sup> The situation of enforcement agents has been described as non-structured and unclear and different from court to court. The requirements for their job are not defined by the enforcement law: they are subject to regulations at cantonal level (Federation B&H), and can also be regulated differently by each court. There is no specialised admission test; future enforcement agents have only to pass the exam for civil service employees, which does not encompass any knowledge or skills in enforcement law.<sup>127</sup> Upon recruitment, enforcement agents do not receive any specialised training (section 3.4. below).

These facts are a clear answer about the capacities of enforcement agents in B&H within both the enforcement procedure in general and enforcement based on recognised foreign judicial decisions.

### 3.4 Recognition and enforcement of foreign judicial decisions within educational programs of Judicial Training Academy

There are two judicial and prosecutorial training centres in B&H organised at entity level: The Judicial and Prosecutorial Training Centre of Federation B&H (hereafter: CEST FB&H), established by the Law on the Judicial and Prosecutorial Training Centre of Federation B&H<sup>128</sup> and the Judicial and Prosecutorial Training Centre of Republic Srpska (hereafter: CEST RS), established by the Law on the Judicial and Prosecutorial Training Centre of Republic Srpska<sup>129</sup>. These two acts are almost fully harmonised since they were imposed by the Office of the High Representative for Bosnia and Herzegovina (OHR) in 2002/2003. Afterwards, only some minor changes were enacted. The judges nominated in BDB&H can attend seminars in Republic Srpska or Federation of B&H. These two Centres have established a good cooperation and often organise joint trainings.

The Centres aim to provide continued education and advancement of the judiciary, striving to improve its level of professionalism. In fulfilling this task, the Centres develop training curricula and organise training under the auspices of the HJPC. The training should provide knowledge for the interpretation and implementation of substantial and procedural legal acts, ethical standards, information on recent developments in the sciences and jurisprudence as well as in comparative law.<sup>130</sup>

Both laws provide identical provisions on the obligation of judges to participate in training. The minimal request regarding participation in obligatory training is not determined by the law itself but is determined for each year by the HJPC and Centres. HJPC determined that judges are obliged to participate in three-day trainings (until 2014, four days of training were mandatory).<sup>131</sup> The report for 2013 to 2017, published on the website of the CEST FB&H, demonstrates that of the total number of judges (ca. 900 – 1.000), a significant number of the judge does not fulfil this obligation each year.<sup>132</sup>

The Centres offer a few different types of judicial (and prosecutorial) trainings: a) initial education or basic training, which targets judge recruits, and b) continuous training programs, which

target practicing judges. If the capacities allow, the Centres are allowed to organise trainings for persons who are not mandatorily involved in training programs, for example, for court clerks who are involved in enforcement proceedings. There is, however, no data that such trainings were organised in Federation B&H in the period 2013-2017 (the reports for these years were published on the website of the CEST FB&H).<sup>133</sup>

Although not directly provided by the law, there is a possibility to offer specialised trainings. Such trainings are organised for judges and prosecutors dealing with juvenile matters.<sup>134</sup> Doctrine has frequently complained about the lack of knowledge in the field of private international law among judges<sup>135</sup>, which could be a justified reason to offer specialised education in private international law topic in general, which also encompasses education on cross-border recognition and enforcement.

According to the data received from the Judicial Academy of Federation B&H in the last 10 years (2009-2019), eight trainings were dedicated to cross-border recognition and enforcement in civil matters. At the moment of drafting this report, the report for 2020 was not completed, and that for 2021 is in progress. For these reasons, the training programs for these two years were analysed and not the reports.

The following trainings were held in Federation B&H from 2009 to 2019: “Enforcement of foreign judicial decisions” (2009), “Training in the field of enforcement of foreign maintenance claims” (2012), “Cross-border enforcement” (2013), “International cooperation in family, civil and commercial cases” (2013), “International cooperation in civil law matters” (2015), “Cross-border enforcement” (2016), “International private law in the judicial practice” (2016), and “Inheritance proceeding with a foreign element” (2019).<sup>136</sup> The review of the education planned for 2020 and 2021 offers the same depiction: in 2020 only two seminars on the topic were planned (recognition and enforcement of the foreign arbitral awards and within a two-day seminar devoted to child maintenance and organised by both Centres, one of the topics was recognition and enforcement of foreign child maintenance requests).<sup>137</sup> In 2021, only trainings on the subject of the recognition and enforcement of foreign arbitral awards have been planned.<sup>138</sup>

Two seminars were organised and supported by foreign institutions (IRZ – German Foundation for International Judicial Cooperation, Ministry of work of the Republic Slovenia). The sample is too small to conclude that the foreign partners recognised the deficiency in this field, but this can be a reason for consideration in that direction. The seminar organised by the Slovenian Ministry of Labour was dedicated to the enforcement of foreign alimony and child support claims. The interview with the president of the Civil Department of the Cantonal Court Sarajevo suggests that most of the recognition requests are related to family matters. It is very understandable since even after the dissolution of ex-SFRY, the new states continue to be very connected. In addition, almost overnight, many marriages and family relationships have acquired a foreign element.

These seminars were held by university professors teaching private international law, public servants from the Ministry of Justice of B&H, judges as well as by foreign experts if the training was co-organised and supported by international institutions.

It cannot be said that the curricula of the Centres’ programme regarding cross-border recognition and enforcement or even on private international law in general, have been further developed or improved from 2009 until today. In this field, there is no standard training held regularly every

<sup>126</sup> Uitdehaag/Vincken, *Civil Enforcement in the Western Balkan*, An overview of the present situation and future developments in the various legal systems in the Western Balkan, p. 98.

<sup>127</sup> Ibidem.

<sup>128</sup> Official Gazette of FB&H, no. 24/02, 40/02, 59/02 and 21/03.

<sup>129</sup> Official Gazette of Republic Srpska, no. 34/02, 49/02, 77/02 and 30/07.

<sup>130</sup> Art. 16 of the Law on Judicial and Prosecutorial Training Centre of FB&H, art. 16 of the Law on Judicial and Prosecutorial Training Centre of RS.

<sup>131</sup> Available at <http://www.fbih.cest.gov.ba/index.php/o-centru> (29.04.2021).

<sup>132</sup> In 2013, 88 judges did not participate in the mandatory education; in 2014, 61; in 2015, 88; in 2016, 115.

<sup>133</sup> Available at: <http://www.fbih.cest.gov.ba/index.php/dokumenti-centra/category/18-izvjestaji-o-radu> (28.04.2021).

<sup>134</sup> See Program for 2016 (p. 8), and 2017 (p. 7). The programmes are available at <http://www.fbih.cest.gov.ba/index.php/dokumenti-centra/category/18-izvjestaji-o-radu#> (28.04.2021).

<sup>135</sup> For example, Đorđević, *Kratak kritički osvrt na tumačenje odredaba čl. 13 ZRSZ o utvrđivanju sadržine stranog prava u odlukama bivšeg Višeg trgovinskog suda u Beogradu*(sada: *Privrednog apelacionog suda u Beogradu*), p. 36-40. Šaula, *Razvoj međunarodnog privatnog prava u regionu – Nacionalni izvještaj za Bosnu i Hercegovinu*, p. 137; Povlikić, *Anerkennung und Vollstreckung ausländischer Mobiliarsicherheiten in Südosteuropa*, p. 275.

<sup>136</sup> The date provided by the representative of the CEST FB&H.

<sup>137</sup> Available at: <http://www.fbih.cest.gov.ba/index.php/dokumenti-centra/category/9-programi-obuke>.

<sup>138</sup> Available at: <http://www.fbih.cest.gov.ba/index.php/dokumenti-centra/category/9-programi-obuke>.

year. The picture is rather haphazard as the titles and rhythm of the trainings held show. In addition, from the annual reports for the years 2013 to 2017, which are available on the website of the CEST FB&H,<sup>139</sup> it can be said that as a rule (with minimal deviation) that around 20 trainings in civil matters (14-20% of the total number of trainings) are offered yearly, and in the field of enforcement and non-contentious proceedings one or maximum two seminars were offered for each (ca. 1% of the total number of trainings).<sup>140</sup> These data enable the conclusion that in general, civil matters and especially enforcement and non-contentious proceedings are not satisfactorily represented in the continuous training of the judges. The analysis of the presented topics demonstrates that cross-border recognition and enforcement, which should be taught within the training in civil enforcement and non-contentious matters, is more than unrepresented and is a highly neglected field.

With respect to FB&H, there is no statistical data on how many judges have participated in the training related to cross-border recognition and enforcement but surely some of the numerous judges who do not fulfil the prescribed number of training days, have missed the training in the field of the cross-border recognition and enforcement.

Enforcement agents are not included in the obligatory education of the Centres, but the Centres can provide training for them as well if there are sufficient capacities. In Republic Srpska, one training for court enforcement agents was held,<sup>141</sup> while in the Federation there has been no special training for enforcement agents. On the Centre websites,<sup>142</sup> Practical Guidelines for court enforcement agents were published in 2011. It was published by the HJPC within the Support to the B&H Judiciary project and financed through IPA funds.<sup>143</sup> The Guidelines cannot be assessed as very positive (they are very descriptive, poorly researched, the legal provisions have mainly been reproduced without deeper analysis, etc.). The Guidelines also make no reference to cross-border recognition and enforcement.

## 4. Economic and political aspects in respect to the implementation of the HCCH 2019 Judgments Convention

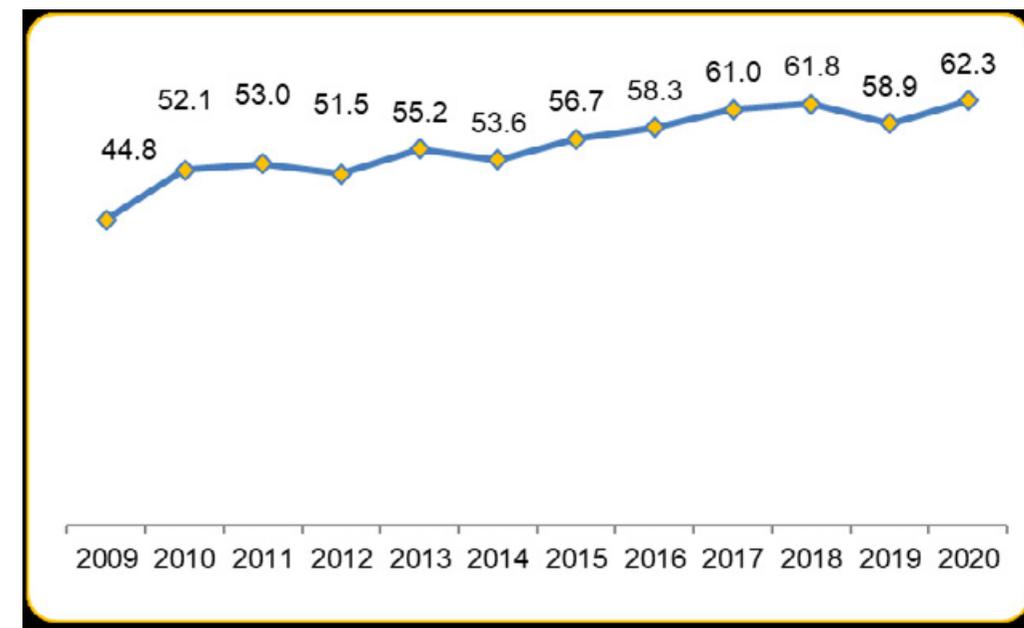
### 4.1 Main trading partners in terms of import and export

B&H is described as a “transitional economy” by the U.S. Foreign Commercial Service and U.S. Department of State.<sup>144</sup> The total nominal GDP in 2019 was approximately \$20.05 billion. In 2019, it grew by 3% and per capita the GDP was \$5,740. Before the COVID-19 pandemic, the economy had forecast a 3.6% growth in 2020 and 4% growth in 2021. The forecast of the World Bank after the outbreak of COVID-19 suggests that the GDP of Bosnia and Herzegovina was about to decrease by 4% in 2020, but to rebound by 4,28% in 2021 and 4.5% in 2021.<sup>145</sup>

The statistics on the main trading partners used in this document are based on the publication of the Foreign Investment Promotion Agency of Bosnia and Herzegovina.<sup>146</sup> The information is based on the research conducted by the Agency for Statistics of Bosnia and Herzegovina.

The main trading partners of Bosnia and Herzegovina are Germany, Serbia, Italy, Croatia, Slovenia, Austria, China, Turkey, Poland, Hungary, France, Netherlands, United States of

America, Russian Federation, the Czech Republic. The value of trade with the aforementioned partners was 11,463,154,000 EUR in 2020 and 13,073,163 EUR in 2019.<sup>147</sup>



The coverage ratio between import and export in Bosnia and Herzegovina

Source: Agency for Statistics of Bosnia and Herzegovina<sup>148</sup>

#### 4.1.1 Import

The total value of imports in 2020 was 8,633,803,000 EUR. Developed countries account for 6,144,244,000 EUR, developing countries for 2,485,652,000 EUR and the undetermined amount is 3,907,000 EUR.<sup>149</sup> In the period January-March 2021, import amounted to around 2,4 billion EUR, which is 2.7% higher than for the same period of last year.<sup>150</sup>

The main import partners of Bosnia and Herzegovina in 2020 were:

- Germany with a share of 12.2%
- Italy with a share of 11.5%
- Serbia with a share of 11.3%
- Croatia with a share of 9.02%
- China with a share of 8.03%
- Turkey with a share of 5.32%
- Slovenia with a share of 4.98%
- Austria with a share of 4.04%
- Poland with a share of 3%
- Hungary with a share of 2.75%.<sup>151</sup>

<sup>147</sup> Ibidem.

<sup>148</sup> Available at: [http://fipa.gov.ba/informacije/statistike/izvoz\\_uvoz/Statistika%20vanjske%20trgovine%202019%20juli%202020\\_Bos.pdf](http://fipa.gov.ba/informacije/statistike/izvoz_uvoz/Statistika%20vanjske%20trgovine%202019%20juli%202020_Bos.pdf) (28.04.2021).

<sup>149</sup> Ibidem.

<sup>150</sup> BiH International Trade in Goods Statistics, January-March 2021, Agency for Statistics of Bosnia and Herzegovina, 20 April 2021, available at: [http://www.bhas.gov.ba/data/Publikacije/Saopštenja/2021/ETR\\_02\\_2021\\_03\\_1\\_HR.pdf](http://www.bhas.gov.ba/data/Publikacije/Saopštenja/2021/ETR_02_2021_03_1_HR.pdf) (29.04.2021).

<sup>151</sup> Available at: <https://trendeconomy.com/data/h2/BosniaAndHerzegovina/TOTAL> (24.04.2021).

### 4.1.2 Export

The total value of export in 2020 was 5,376,385,000 EUR. Developed countries account for 4,309,722,000 EUR, developing countries for 1,059,268,000 EUR and the undetermined amount is 7,395,000 EUR.<sup>152</sup> In the period January-March 2021, export amounted to around 1.8 billion EUR, which is 16.6% higher than for the same period of the previous year.<sup>153</sup>

The main export partners of Bosnia and Herzegovina in 2020 were:

- Germany with a share of 15.4%
- Croatia with a share of 12.9%
- Serbia with a share of 11.6%
- Italy with a share of 9.66%
- Austria with a share of 9.54%
- Slovenia with a share of 9.08%
- Turkey with a share of 3%
- Montenegro with a share of 2.77%
- Switzerland with a share of 2.53%
- France with a share of 2.47%.<sup>154</sup>

The data visualised by The Observatory of Economic Complexity demonstrate the trend of growth in exports in the period from 2014 until 2019. Export had been increased by \$955 million, from \$6.2 billion in 2014 to \$7.15 in 2019.<sup>155</sup>

While B&H is not a member state of the EU, its main trading partners are, for example Germany, Austria, Italy, Croatia, Slovenia, as the tables above demonstrate. However, the EU regulations providing easily obtainable recognition and enforcement are not applicable in B&H. Therefore, there are no instruments that would enable easier recognition and enforcement of foreign judicial decisions between B&H and its main trading partners. This is a strong argument in favour of accession to the HCH 2019 Convention and other Hague conventions or multilateral international agreements, especially when the EU is a part thereof.

### 4.2 Political aspects in regards to the implementation of the HCCH 2019 Judgments Convention

B&H has a complex constitutional order. The authority to accede to international agreements is borne by the state government of Bosnia and Herzegovina. The Federation of B&H and RS as entities may also enter into agreements with states and international organisations but only if prior consent is provided by the Parliamentary Assembly, a legislative body at state level.

Thus, the main authority to accede to international treaties lies with the government at state level. The interplay between the governmental bodies at state level is as follows: the Presidency has the power to negotiate, denounce, and ratify international treaties, pursuant to art. V para. 3(d) of the Constitution of B&H. A precondition for ratification is the consent of the Parliamentary Assembly, as prescribed in Art. IV para. 4(d) of the Constitution of B&H. Once all the aforementioned requirements have been met for an international treaty, it has to be published in the Official

<sup>152</sup> Available at: [http://www.fipa.gov.ba/informacije/statistike/izvoz\\_uvoz/Statistika%20vanjske%20trgovine%202020%20veljaca%202021.pdf](http://www.fipa.gov.ba/informacije/statistike/izvoz_uvoz/Statistika%20vanjske%20trgovine%202020%20veljaca%202021.pdf) (28.04.2021).

<sup>153</sup> B&H International Trade in Goods Statistics, January-March 2021, Agency for Statistics of Bosnia and Herzegovina, 20 April 2021, available at: [http://www.bhas.gov.ba/data/Publikacije/Saopštenja/2021/ETR\\_02\\_2021\\_03\\_1\\_HR.pdf](http://www.bhas.gov.ba/data/Publikacije/Saopštenja/2021/ETR_02_2021_03_1_HR.pdf)

<sup>154</sup> Available at: <https://trendeconomy.com/data/h2/BosniaAndHerzegovina/TOTAL> (28.04.2021).

<sup>155</sup> Available at: <https://oec.world/en/profile/country/bih?tradeScaleSelector2=tradeScale2> (28.04.2021).

Gazette. Thereafter, it becomes an integral part of the legal system of B&H.

A great number of international treaties are in force in B&H by virtue of succession from former Yugoslavia. Some of them had been accessed afterwards. However, there is a problem in the functioning of the government and other institutions at state level that creates a gridlock. The problem is a *par excellence* political one in nature. These circumstances are mirrored in the fact that since the independence of the state in 1995, B&H has failed to become a contracting party to a significant number of international treaties drafted under the framework of the Hague Conference on Private International Law. For instance, it is not a contracting party of the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, while most of the other former Yugoslavian successor states are along with the European Union and many European states. The same applies to the Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, the Convention of 30 June 2005 on Choice of Court Agreements, and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. On the other hand, B&H is a contracting party to the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

An attitude of restraint towards the ratification of HCCC conventions, due to the political obstructions which cause dysfunctionality in the state B&H, has manifold negative effects. B&H remains an exception in the region as other states which are a part of the EU have ratified certain HCCC conventions or the EU has done so.<sup>156</sup> The states which are not members (such as Serbia, Montenegro, North Macedonia) have a more proactive role and have ratified a number of HCCH conventions. It is, nevertheless, indisputable that the state has the authority to access international conventions (provided that consultations with the entities have been conducted), yet the legislative competence of the state parliament to adopt legal acts which are not explicitly listed in the Constitution as a competence of the state is contestable. This bars the adoption of the new, modern law on private international law (see 1.2). "Ratification of Hague Conventions already ratified by the EU or all of its Member States is currently the most appropriate way for B&H to harmonise with the EU legislation in the field of private international law."<sup>157</sup>

The signing and ratification of the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters has just recently been put on the agenda of the competent bodies.

#### 4.2.1 Circumstances that can provide for your country to express notifications in accordance to Article 29 of the HCCH 2019 Judgments Convention

As the HCCH 2019 Judgments Convention is not part of the legal system of Bosnia and Herzegovina and its accession to the Convention is not envisaged or even discussed, it is hard to make any claim in this respect until it is. There is also a lack of discussion on this issue by the officials that could be mentioned.

#### 4.2.2 Circumstances that can provide for your country to express declarations in accordance to Article 17, 18, 19 and 25 of the HCCH 2019 Judgments Convention

As the HCCH 2019 Judgments Convention is not part of the legal system of Bosnia and

<sup>156</sup> See more: Alihodžić, Meškić and Duraković, Accepting EU Private International Law Standards into the Legal System of Bosnia and Herzegovina: What Can Be Done While Waiting for Godot?, p. 161.

<sup>157</sup> See more: Alihodžić, Meškić and Duraković, Accepting EU Private International Law Standards into the Legal System of Bosnia and Herzegovina: What Can Be Done While Waiting for Godot?, p. 165.

Herzegovina and its accession to the Convention is not envisaged or even discussed, it is hard to make any claim in this respect until it is. There is also a lack of discussion on this issue by the officials that could be mentioned.

## 5. International jurisdiction and compatibility with the HCCH 2019 Judgments Convention

The Convention does not represent the so-called “double convention/traité double” but a “traité simple,” since it does not regulate international jurisdiction but only enforcement and recognition.<sup>158</sup> Here it should be mentioned that B&H has not ratified the Convention on Choice of Court Agreements of 2005 which is complementary to the HCCH 2019 Convention. The importance of art. 5 of the Convention frames it as the central part of the Convention.<sup>159</sup> The Explanatory Report suggests that the architecture of this article separates three issues.<sup>160</sup> The first part lists the jurisdictional criteria that are accepted under the Convention for recognition and enforcement of a judgment in a requested State, and the second part is focused on the jurisdictional criteria in relationships involving weaker parties (consumers, employees). The third part determines the filter on judgments on residential leases of immovable property (tenancy) or registration of immovable property, which could be assessed as exclusive jurisdiction (see 5.4). The jurisdictional filters in art. 5 operate by providing jurisdiction to the court if there is either a connection between the state of the origin and the defendant (see 5.1), if there is an agreement of parties (explicit or implicit) (see 5.2), or if there is a connection between the claim and the state of origin (see 5.3).<sup>161</sup>

### 5.1 General international jurisdiction (domicile, habitual residence)

The domicile of the defendant is a criterion for determining general international jurisdiction. The dominant approach of the PIL regarding general international jurisdiction is the domicile of the defendant (art. 46).<sup>162</sup> The international jurisdiction of a Bosnian and Herzegovinian court exists if the defendant has domicile in B&H, or in the absence of domicile, residence in B&H.

Habitual residence, which has become one of the most important connecting factors for the determination of the applicable law as well as jurisdiction,<sup>163</sup> is not even mentioned in the PIL. Therefore, the PIL does not use the criteria of habitual residence. This can be explained, as mentioned repeatedly in this report, as a consequence of the lack of modernisation of the private international law of B&H. On the other hand, the Convention relies on the notion of “defendant” and his/her/its “habitual residence” as defined in art. 3. para. 2 as one of three jurisdictional criteria in the Convention.

This legal provision sets out the rules for determining the habitual residence of an entity or person other than a natural person, alternatively stipulating the four criteria for determining habitual residence. A legal person, an entity or person other than a natural person is deemed a habitual resident in the state in which their statutory seat, central administration, principal place of business is located or if they are incorporated or established in this state. In contrast, the

<sup>158</sup> The reasons for the adoption of such convention are available at: van Loon, Towards a global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters, p. 16.

<sup>159</sup> Garcimartín and Saumier, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters - Explanatory Report, p. 88.

<sup>160</sup> *Ibidem*.

<sup>161</sup> Stewart, The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, p. 778.

<sup>162</sup> For more about this criterion on jurisdiction in different conventions and in comparative law see van Loon, Towards a global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters, p. 23.

<sup>163</sup> Kostić-Mandić, *Međunarodno privatno pravo*, p. 254; Alihodžić, Meškić and Duraković, Accepting EU Private International Law Standards into the Legal System of Bosnia and Herzegovina: What Can Be Done While Waiting for Godot?, p. 154; Rumenov, The indirect jurisdiction of the 2019 Hague Convention on recognition and enforcement of foreign judgments in civil or commercial matters – Is the “heart” of the Convention in the right place?, p. 18-19.

definition of habitual residence of natural persons is left out of the Convention.<sup>164</sup>

It can be said that the general and dominant jurisdiction criterion connected to the defendant in the PIL does not correspond with the same criterion of the Convention, since PIL relies on domicile and alternatively on residence, and the Convention on habitual residence.

The habitual residence of the defendant is not a single jurisdiction criterion in the Convention. Besides habitual residence, the Convention recognises three groups of jurisdiction criteria as connecting factors with the defendant: these are criteria based on consent and connections between the claim and the state of origin.<sup>165</sup> The same criteria could be found in the PIL but there is a lack of convergence in the number, scope, and content of the criteria. See more in 5.2 and 5.3.

### 5.2 Prorogation of jurisdiction (expressively/tacitly, before or after the commencement of the procedure)

The PIL knows the prorogation of jurisdiction only to a limited extent. In general, due to the lack of PIL reform, B&H is resistant to the modern development of private international law which means, *inter alia*, a strengthening of party autonomy in wider spheres of private international law.

First, prorogation is generally prohibited in family matters (art. 49 para. 3 in connection with art. 61-70 PIL). Second, this agreement is not allowed when the courts in B&H have exclusive jurisdiction. Furthermore, even in non-family law matters and where the case does not concern exclusive jurisdiction, the autonomy of will in this field is subject to limitations related to the nationality of the parties. The parties can agree on jurisdiction of a court in B&H only if one of them is a Bosnian and Herzegovinian citizen or has a seat in B&H. *Vice versa*, the parties can agree on the jurisdiction of a foreign court only if one of them is a citizen or has a seat in the respective foreign state.

The PIL has only one legal provision on this topic and it deals with the permissibility of the prorogation agreement but not with formal requirements or the time of the agreement conclusion. Only art. 50 stipulates that prorogation can be agreed upon tacitly and after the commencement of the procedure. Namely, when the competence of the domestic court depends on the consent of the defendant, it will be assumed that consent exists if the defendant provides the statement of defence without contesting the competence of the domestic court or enters into the proceedings on the merits.

The Convention acknowledges three forms of the consent: explicit consent during the proceeding (art. 5 para. 1(e)), implied consent (art. 5 para. 1(f)), and a non-exclusive choice of court agreement of the parties (art. 5 para. 1(m)).

A foreign judicial decision can be recognised if the defendant has explicitly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given. PIL assumes consent given before the proceeding has started. This difference is a consequence of the fact that there is another HCCH Convention, complementary to the HCCH 2019 Convention, namely Choice of Court Convention from 2005, which regulates *ex ante* prorogation.

Regarding tacit prorogation, art. 5 para. 1(f) of the Convention does not mention the terms “prorogation,” “implied consent” or “submission.”<sup>166</sup> It stipulates that a judgment is eligible for recognition and enforcement if a) the defendant argued on the merits before the court of origin; b) without contesting jurisdiction within the timeframe provided in the law of the state of origin,

<sup>164</sup> Rumenov, The indirect jurisdiction of the 2019 Hague Convention on recognition and enforcement of foreign judgments in civil or commercial matters – Is the “heart” of the Convention in the right place?, p. 19.

<sup>165</sup> *Ibidem*, p. 17.

<sup>166</sup> Rumenov, The indirect jurisdiction of the 2019 Hague Convention on recognition and enforcement of foreign judgments in civil or commercial matters – Is the “heart” of the Convention in the right place?, p. 25.

unless it is evident that an objection to jurisdiction or the exercise of jurisdiction would not have succeeded under that law. Here, the Convention takes into account that procedural law in the state of origin may be limiting, i.e., it sets a high threshold for contesting jurisdiction.<sup>167</sup> The term “the law of the State of origin” seems too broad, if it refers to the state with a complex legal system, as the different territorial units within a state might have different timeframes.<sup>168</sup>

The PIL is partially in line with the Convention regarding tacit prorogation. Like the Convention, the PIL does not mention the term implied consent or prorogation. The PIL, unlike the Convention, accepts the concept of “submission.” Under the PIL, there is tacit prorogation if the defendant submits a response to the claim (submission) and thereby contests jurisdiction. The Convention requires the defendant to argue on the merits before the court of origin and contest jurisdiction, whereas arguing on the merits without contesting jurisdiction is sufficient under the PIL. The PIL considers arguing on the merits *per se* as tacit prorogation. A further difference is that the PIL does not refer to the condition for contesting jurisdiction in the state of origin. This solution is less favourable for the defendant in the *exequatur* proceedings.

Art. 5 para. 1(m) regulates non-exclusive choice of court agreements as a criterion for jurisdiction, stipulating that the judgment which was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible to be usable for subsequent reference, other than an exclusive choice of court agreement. The definition of an “exclusive choice of court agreement” is given as well. The PIL allows for prorogation, but under the restrictions mentioned above, whereby no difference is made between exclusive and non-exclusive choice of court agreements. This difference is probably the consequence of there being two complementary HCCH Conventions, the 2019 and the 2005 on the choice of court. For a state such as B&H, which is not party to the 2005 Hague Choice of Court Convention, this provision of the 2019 Convention is not really useful as it cannot act as a starting point in the regulation of this issue.

### 5.3 In comparison to Article 5 of the HCCH 2019 Judgments Convention, provide for the compatibility of the other jurisdictional criteria in the Convention and in the national legal sources

It is not easy to make a comparison between the PIL and the Convention regarding the jurisdictional criteria relying on the connection between the claim and the court of origin. The problem lies in the different levels of comparison. The Convention does not regulate jurisdiction which PIL does; the Convention provides for jurisdictional criteria or, better formulated, “jurisdictional filters” upon which the court of the state where recognition or enforcement is sought assesses the judgment rendered in the state of origin.<sup>169</sup> The PIL regulates direct jurisdiction – the court should decide whether it is entitled to adjudicate in cross-border relationships under the national law or an international agreement if applicable.

At first glance, the list of jurisdictional criteria related to the connection between the claim and the court of origin is significantly longer in the Convention than in PIL. The latter regulates only the following issues: non-contractual obligations, proprietary claims when the property of the defendant or selected assets are located in B&H, the claims of a foreigner for the obligations to be performed in B&H, ownership and other rights *in rem* in the immovable property or aircraft and ships/vessels. All other jurisdictional filters regulated in the Convention are not mentioned in the PIL. For this reason, only a comparison of the overlapping issues is rendered, although it is still possible that the same criteria concern different relevant conditions, requirements, and

<sup>167</sup> *Ibidem*.

<sup>168</sup> Garcimartín and Saumier, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters - Explanatory Report, p. 160.

<sup>169</sup> Rumenov, The indirect jurisdiction of the 2019 Hague Convention on recognition and enforcement of foreign judgments in civil or commercial matters – Is the “heart” of the Convention in the right place?, p. 17.

limitations.

Non-contractual obligations (art. 5 para. 1(j) of the Convention and art. 53 PIL). There is no convergence regarding jurisdictional criteria. The Convention puts the act or omission causing harm (death, physical injury, damage to or loss of tangible property) in the focus, not the consequences of a harmful event (“irrespective of where that harm occurred”). The PIL, in contrast, relies on the place where the harm occurred. If the harm occurred in B&H, the Bosnian and Herzegovinian courts are entitled to adjudicate. The scope of application of art. 5 para. 1(j) of the Convention is very limited since harm has to be manifested in death, physical injury, or damage to an object. Art. 53 of the PIL does not provide for any limitations regarding the type of damages. This limitation is mitigated by the possibility for other jurisdictional filters to be applied such as habitual residence. PIL also recognises other jurisdictional filters in case of an extra-contractual liability: permanent residence and subsidiary temporary residence. One should be aware that many sources of harm are left out of the scope of the Convention (e.g., nuclear harm, maritime pollution, etc – see 6.1.1).

Immovable property. The Convention has special rules for contractual obligations secured by a right *in rem* in immovable property. A judgment made against a defendant on a contractual obligation secured by a right *in rem* in immovable property located in the state of origin can be recognised, if the contractual claim was brought against the same defendant together with a claim regarding the right *in rem* (art. 5 para. 1(i)). PIL relies on immovable objects. While the Convention can be interpreted in such a way that jurisdiction over contractual obligations could be considered separately if the contractual claim was not brought together with the claim deriving from the right *in rem*, the solution in the PIL is different: for the right *in rem* and certain contractual obligations relating to immovable objects, the *situs* rule is applicable and the exclusive jurisdiction is claimed by the B&H courts (art. 56). Doctrine expands this rule to all contractual obligations relating to immovable property.<sup>170</sup> The Convention stipulates that a judgment concerning a lease of immovable property (tenancy) which was made by the court of the state in which the property is situated can be recognised and enforced. This situation is treated differently under PIL, which provides for the exclusive jurisdiction of the B&H courts when immovable property is situated in B&H.

Trust, art. 5 para. 1(k). The legal order in B&H is not familiar with the institution of trust, and there is no special conflict of law rules and international jurisdiction rules relating to this subject matter.

Counterclaim. Art. 5 para. 1(l) provides for a jurisdictional filter regarding counterclaims. Unlike the Convention, PIL does not contain jurisdiction rules for such cases.

Regarding contractual obligations as jurisdictional criteria as provided in art. 5 para. 1(g) of the Convention, there is no convergence between the Convention and PIL. Namely, PIL does not contain similar rules regarding jurisdiction relating to contractual obligation. Only when the contractual obligation should be performed in B&H and the foreign natural or juridical person operating a branch or agency in B&H is sought in B&H, is there a rule that the B&H court has jurisdiction (art. 55 PIL). This could be understood as a combination of the jurisdictional criteria provided in art. 5 para. 1(g) and art. 5 para. 1(d), but the provisions are not identical.

Unlike the Convention (in art. 5 para. 2), the PIL does not contain specific rules for consumers. Direct jurisdiction in cases where the consumer sues the tradesman is provided not in PIL but in the laws on civil procedure. They provide for the possibility of bringing a lawsuit before the court of the consumer’s domicile/residence.

It could be concluded that the PIL and Convention depart significantly from each other regarding jurisdictional criteria which rely on a connection between the claim and the court of origin.

<sup>170</sup> Muminović, Procesno međunarodno privatno pravo, str. 46.

## 5.4 Exclusive jurisdiction

The PIL determines different situations where the courts in B&H have exclusive jurisdiction. The court in B&H has exclusive jurisdiction in cases concerning real estate located in B&H (art. 56 PIL). The PIL prescribes exclusive jurisdiction under certain circumstances for marriage disputes, maternal and paternal disputes, probate proceedings concerning succession when immovables are part of the estate, but this not relevant for this report as these issues do not fall within the scope of the Convention. Exclusive jurisdiction is the ground for refusing recognition of a judgment which has been rendered by a foreign court instead of by the exclusively competent court in B&H (art. 89 para. 1 PIL).

Contrary to the PIL, in the provisions on the grounds for refusal of recognition and enforcement (art. 7), the Convention does not explicitly mention exclusive jurisdiction of the requested state. Only art. 5 of the Convention stipulates that a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the state of origin, which leads to the conclusion that there is an exclusive jurisdiction of courts in the subject matter of rights *in rem* in immovable property. There is a convergence of the Convention and PIL on this issue, although the general concept of the Convention, which does not regulate jurisdiction but jurisdictional filters (indirect jurisdiction) and the concept of the PIL do not comply.

Art. 5 of the Convention sets out the minimum standards for recognition and enforcement. In general, it prescribes filters applicable to all legal matters under the scope of this Convention. In order to curtail the discretion of national governments and courts, it sets out specific rules concerning certain types of legal relationships (consumer contracts, tenancy, contracts of employment).<sup>171</sup> A specific solution is envisaged in the Convention regarding real estate. Art. 5 para. 1 of the Convention provides for a possibility of concurrent jurisdiction of more than one court in cases of legal matters concerning real estate. However, art. 5 para. 3 explicitly establishes exclusive jurisdiction in matters of a residential lease of immovable property (tenancy) and the registration of immovable property by the court of the State where the property is situated. Therefore, art. 5 para. 3 operates as a middle ground between concurring jurisdiction guaranteed in art. 5 para. 1 and exclusive jurisdiction guaranteed in art. 6.<sup>172</sup>

## 6. Procedure for recognition and enforcement of foreign judicial decisions and compatibility with the HCCH 2019 Judgments Convention

### 6.1 Material scope of application

#### 6.1.1 In comparison to Article 1 and 2 of the HCCH 2019 Judgments Convention, provide for the compatibility of the material scope of application for the recognition and enforcement of foreign judicial decisions in the Convention and in the national legal sources

The main determination of the material scope of application is given in art. 1 of the Convention, which stipulates that the Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters in one contracting state of a judgment given by a court of another contracting state. The material scope of application for recognition and enforcement of foreign judicial decisions in the Convention and the national legal sources are not fully comparable.

<sup>171</sup> Stewart, *The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, p. 778.

<sup>172</sup> Rumenov, *The indirect jurisdiction of the 2019 Hague Convention on recognition and enforcement of foreign judgments in civil or commercial matters – Is the “heart” of the Convention in the right place?*, p. 18.

The national legal sources have to provide for recognition and enforcement of foreign judicial decisions and other enforcement titles in all matters and not only in civil and commercial matters and independently from the fact which country has issued an enforcement title (contracting state or a third state). It is clear that for these reasons the national legal sources have a broader scope of application.

The PIL as main legal source in the broad area of private law provides rules for the recognition and enforcement of foreign judicial decision in statutory, family and proprietary relationships, which means that the PIL has a broader scope of application than the Convention. Art. 2 of the Convention foresees the exclusions of the material scope of the Convention. Here the Convention and PIL do not converge. Unlike the Convention, PIL regulates recognition and enforcement not only in the core field of civil law and in commercial law, but also recognition and enforcement of the status and legal capacity of natural person issues, maintenance obligations as well as other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships and in wills and succession matters. In addition, the PIL includes privacy rights and intellectual property rights. All these topics are excluded from the application of the Convention (art. 2 para. 1 (a-d), (l), (m)).

The PIL does not make any difference by prescribing preconditions for recognition and enforcement of judicial decisions rendered in any of the above-mentioned fields of private law. The same requirements should be fulfilled in any case of enforcement and recognition, with some exceptions regarding legal status and capacity of the natural person (art. 93-95 PIL).<sup>173</sup>

The PIL, just like the Convention, does not provide for enforcement of revenue claims, customs, or administrative matters (art. 1 para. 2 of the Convention).

The recognition and enforcement in the field of insolvency are excluded from the scope of the regulations of both the Convention and PIL. International insolvency is subject to the regulation of the insolvency codes of the entities and Brčko District B&H, which is criticised in the doctrine.<sup>174</sup>

The regulation on composition, resolution of financial institutions, and analogous matters, mainly contained in the laws on banks and other financial institutions of the entities and Brčko District B&H, does not include private international law issues. The same is valid for the different kinds of carriers of passengers and goods in air, railway and road traffic. The relevant laws or agreements in the field of transportation do not generally provide for specific private international law regulation, but there are some exceptions. Some private international law regulations for air traffic are available in the Civil Aviation Contract Law<sup>175</sup> and they contain some jurisdiction rules for the damages caused in air transportation (art. 49, 77). The PIL will apply to all issues which are not regulated by this Law.

The Convention on the Contract for the International Carriage of Goods by Road is in force in B&H by virtue of succession.<sup>176</sup> It contains some private international law rules on contracts for the carriage of goods by road in vehicles for reward, but there are no provisions on international jurisdiction, so one can conclude that the general jurisdiction rules of the PIL apply here.

Transboundary marine pollution, marine pollution in areas beyond national jurisdiction, shipsource marine pollution, limitation of liability for maritime claims (art. 2 para 1(g)), are covered either with specific conflict of laws rules or with specific rules on international jurisdiction; the general jurisdiction rules of PIL will be applied.

The civil liability for nuclear damages is subject to the regulation of the Law on liability for nuclear

<sup>173</sup> If a foreign decision concerns the status of a domestic citizen, the foreign decision will be recognised if the foreign law does not deviate from the domestic law substantially. If a foreign decision concerns the status of the citizen of that state, it will not be assessed in light of exclusive jurisdiction, compliance with the Constitution of Bosnia and Herzegovina, and the requirement of reciprocity. If a foreign decision concerns the status of the citizen of a third state, it will be recognized, according to the PIL, if it fulfils the requirements for recognition in the state of the citizen concerned.

<sup>174</sup> Muminović, *Procesno međunarodno privatno pravo*, p. 100.

<sup>175</sup> Official Gazette of B&H, 51/15.

<sup>176</sup> Official Gazette of FNRJ, 11/58.

harm.<sup>177</sup> This law is aligned with the Vienna Convention on Civil Liability for Nuclear Harm from 1963<sup>178</sup> and contains some rules on private international law issues, precisely on the applicable law, on jurisdiction and recognition of foreign judicial decisions. The Court of B&H has exclusive jurisdiction if the nuclear incident or harm occurred on its territory. If it is not certain whether the nuclear incident occurred on the territory of B&H, jurisdiction to determine damages is born by the court of the state where the nuclear plant is located (art. XI of the Vienna Convention, art. 10 of the Law on Liability for Nuclear Harm). These issues are also excluded from the application of PIL; here the Convention and PIL comply.

Regarding the jurisdiction rules which concern the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs (art. 2 para. 1(i)), as well as the validity of entries in public registers (art. 2 para. 1(j)), it can be said that the PIL provides no specific rules, and PIL does not exclude these issues from its material scope of application.

The Laws on Defamation on the level of entities have been enacted. The FB&H Law on Protection from Defamation<sup>179</sup> and the RS Law on Protection from Defamation<sup>180</sup> contain provisions specifically designed for liability for defamation, but there are no rules on the applicable laws, international jurisdiction or on cross-border recognition or enforcement. Unlike the Convention, the issue of cross-border defamation is subject to the general jurisdiction rules of PIL.

The activities of the armed forces, including the activities of their personnel in the exercise of their official duties, law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties are not regulated by specific private international law rules and more specifically, there are no specific international jurisdiction rules for these issues; general jurisdiction rules apply.

The Law on Competition of B&H<sup>181</sup> does not provide for private international law rules in cross-border relationships, so that anti-trust (competition) matters are not subject to any specific rules. The same applies to sovereign debt restructuring through unilateral State measures.

Unlike the Convention, which does not apply to arbitration and related proceedings, the PIL regulates this issue. Special requirements for the recognition and enforcement of arbitration awards have been foreseen. B&H is a contracting party (by way of succession) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The provisions of PIL are highly harmonised with the provisions of the New York Convention. Both instruments require submission of either the original award or a duly certified copy as well as the original arbitration agreements or a duly certified copy thereof in the official language of the state in which the award is relied upon. Furthermore, recognition and enforcement of the award may be refused due to the same list of reasons, such as the lack of arbitrability of a particular subject matter, public policy, etc. If the competent authority decides to adjourn the decision on enforcement, it may require suitable security from the party seeking it.

Furthermore, the judgments in cases where a state, a government, governmental agency, or person acting for a State were a party to the proceedings are not excluded from the scope of this Convention by the mere fact that the state or some other public law person/entity was the party in a certain proceeding. There is no direct provision that regulates this issue, but in B&H there is no doubt that if the state, the government, the governmental agency, or similar person are parties in private relationships, they have the same status as any other legal or natural person.<sup>182</sup> Here the Convention and PIL go in the same direction.

<sup>177</sup> Official Gazette of B&H, 87/13.

<sup>178</sup> This Convention was ratified in 1977, Official Gazette of SFRY, 5/77.

<sup>179</sup> Official Gazette of FB&H, 19/03, 73/05.

<sup>180</sup> Official Gazette RS, 37/2001.

<sup>181</sup> Official Gazette of B&H, 48/05, 76/07 and 80/09.

<sup>182</sup> With respect to proprietary relationships, this has been expressed through the principle of singularity of ownership (there is only one type of ownership, independent of who is the owner (art. 3 para. 2 of Law on Property Rights FB&H, art. 3 para. 2 of Law on Property Rights RS)).

If a matter to which the Convention does not apply arises as a preliminary question by way of defence, such an occurrence does not exclude a judgment from the Convention if that matter was not an object of the proceedings. Such an exception is not present in the legal system of B&H.

In short, art. 6 of the Convention provides for many exceptions to its application. The list of the grounds for non-application of the Convention is very long and is not congruent with the list in the PIL which is very limited. The Provisions of the PIL are applicable to a greater number of issues in civil and commercial law as well as family law and inheritance law. The PIL's material scope of application thus differs from that of the Convention.

## 6.2 Types of foreign judicial decisions that are recognized and enforced (e.g. positive-negative decisions, interim measures)

The PIL does not make any difference between foreign judicial decisions and does not provide for different recognition rules depending on the type of foreign judicial decision. Each foreign judicial decision can be recognised if it is final and if there are no grounds, prescribed by the law, for the refusal of recognition.

The PIL does not envisage only recognition and enforcement of foreign judicial decisions but of other foreign titles, too. The PIL equalises foreign court settlements with foreign court decisions; foreign court settlements can be recognised as well. The decisions of other state bodies in family, statutory and property matters (this is the scope of the PIL's application) can be also recognised if they are equated with court decisions and court settlements in the state of origin. The doctrine has discussed whether enforceable foreign notarial acts can be enforced in B&H.<sup>183</sup>

The recognition and enforcement of interim measures is a problematic issue both in the doctrine and in court practice. The PIL does not contain any provisions on this particular point. In order to avoid problems in practice, it would be necessary to regulate this issue. Unfortunately, the bilateral agreements concluded between the states of the former SFRY do not contain any provisions to this effect either. Unlike the PIL, the Convention explicitly states that interim measures are not judgments, meaning that they will not be recognised and enforced under this instrument.<sup>184</sup> Although there is no a clear provision in the PIL, the results are the same: since the interim measure cannot be final in the sense of a judgment, they are not suitable for recognition and enforcement.

A judgment is defined under the Convention in art. 3 as "any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention." In order to be in line with the previous work of the HCCH, especially with the HCCH 2005 Choice of Court Convention, the Convention provides a two-part test to determine which decision is deemed a judgment: "the judgment must be (i) "a decision on the merits" and (ii) given by a 'court.'"<sup>185</sup> The approach of the Convention means that a procedural decision which does not concern the merits and where the court does not dispose of the claim are not within the purview of this Convention. Court decisions within the purview of Convention are those concerning money and non-money judgments, judgments given by default and judgments in collective actions. The second part of the test requires the decision to be made by a court. The Convention, however, fails to define the term court thus creating a certain ambiguity with respect to the scope of this term.<sup>186</sup> The PIL is different in this respect as it envisages in art. 86

<sup>183</sup> Povlakić, *Anerkennung und Vollstreckung ausländischer Mobiliarsicherheiten in Südosteuropa*, p. 172; Rijavec, *Problematika ovršnog notarskog akta na primjeru Slovenije*, p. 157.

<sup>184</sup> See: Garcimartín and Saumier, *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters - Explanatory Report*, p. 73.

<sup>185</sup> *Ibidem*.

<sup>186</sup> Garcimartín and Saumier, *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters - Explanatory*

that a decision of another body which is recognised in the state of adoption as a judgment can be recognised as judgment by the B&H courts. Thus, the PIL does not require a judgment to necessarily be a decision rendered by a court.

The court settlements are also equalised with judgments and can be recognised under PIL (for more see 1.1). Similar to the PIL, certain Court settlements are treated as judgments, as provided for in art. 11 of the Convention.

### 6.3 Commencement of the procedure (as a main or as a preliminary question)

The PIL does not differentiate between the procedure for recognition as a main or as a preliminary question and provides bare procedural rules for both (Art. 101). Only one difference is established regarding territorial jurisdiction. For the procedure for the recognition of foreign judicial decisions as a main question, the PIL determines the territorial jurisdiction: the court where the enforcement should be sought has the competence to decide on it. The *ratione materiae* jurisdiction is regulated by the laws which regulate court organisation in the entities and Brčko District B&H (see 1.1 and 2.2.1). But, if the recognition of a foreign judicial decision was not subject to the recognition procedure, and enforcement has been sought, the court, where the enforcement is sought, can decide on recognition as a preliminary question with the effects for the respective proceeding only (art. 101 para. 5).

A solution regarding the ruling on a preliminary question contained in art. 8 of the Convention does not exist in the PIL in B&H.

The PIL does not contain an explicit provision on who is actively authorised to initiate the procedure for recognition of foreign judicial decisions. The PIL only refers to cases related to personal status, determining that any party with legal interest may initiate a procedure (art. 101 para. 6 PIL). The doctrine does not dispute that this rule should be applied in all other cases, therefore in civil and commercial matters, and that a procedure may be initiated by the persons for whom the judgment in question has a legal meaning.<sup>187</sup> It is a prevailing interpretation in jurisprudence that in civil and commercial matters, the authorised persons are the parties in the procedure (universal and singular successors of the parties), whereas only for status-related matters can persons who did not take part in the procedure, but have a legal interest in the matter, initiate the recognition procedure.<sup>188,189</sup>

The Convention omits to define a person entitled to initiate the proceedings. Interestingly, art. 3 contains a definition of the defendant, whereas the definition of a party seeking recognition and enforcement is not available. This party is only referred to in art. 12 of the Convention, which lists the documents it has to produce.

### 6.4 Documents that need to be produced (formal requirements) for the recognition of the foreign judicial decision

The person authorised to seek recognition should submit a request to the competent court by producing the original text or an authorised copy of the foreign court decision. If the judgment is not in an official language of B&H, it shall be accompanied by a certified translation into one of the official languages. These two requirements are not explicitly requested by the law, but

Report, p. 75.

<sup>187</sup> Petrović, *Anerkennung und Vollstreckung ausländischer (deutscher) Gerichtsentscheidungen*, p. 418.

<sup>188</sup> Informacija "Priznanje i izvršenje stranih sudskih i arbitražnih odluka" Projekt Kantonalnog suda u Tuzli u saradnji sa USAID/Justice sector Development Project, March, 2008.

<sup>189</sup> The wider interpretation of the doctrine in terms of subjects authorised to initiate a procedure for recognition and enforcement should be accepted when drafting a new version of the PIL. In every case of initiation of a procedure for recognition and enforcement, the authorised person should be a person with legal interest.

all analysed judgments (see 3.2) demonstrate that the courts request the production of such documents.

The judicial decision should be provided with a clause which confirms that the decision has become final, issued by the court or any other body competent under the law of the state of origin (art. 87 PIL). When the authorised party applies for enforcement, it should submit the judgment with the enforceability clause issued in accordance with the law of the state of origin (art. 96 PIL).

Art. 12 of the Convention prescribes a set of documents that the party seeking recognition and enforcement needs to produce. It lists the following:

- a complete and certified copy of the judgment;
- if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings, or an equivalent document was notified to the defaulting party;
- any documents necessary to establish that the judgment has an effect or, where applicable, is enforceable in the State of origin.

Like the PIL, it requires a complete and certified copy of the judgment and an additional document which instituted the proceedings in the case of a default judgment. The third requirement - "any documents necessary to establish that the judgment has the effect or, where applicable, is enforceable in the State of origin" is an apt solution. Such a formulation is very favourable and provides the needed flexibility. It puts in focus the practice of the State of origin, thereby pre-empting the domestic courts from requiring the submission of documents that might be unavailable. PIL does not provide such a flexibility by requiring the confirmation of enforceability from the State of origin.

In case of court settlements, the additional requirement is "a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin." The certificate does not necessarily have to be issued by the court which was involved in the settlement, so it is possible for another court to issue it.<sup>190</sup> The PIL treats the required documents in the of court settlements differently. In fact, it does not set the requirements for court settlements at all (see 6.5).

The Convention differs from the PIL insofar as it prescribes that if the judgment does not allow the court to verify whether the conditions for recognition and enforcement are met, it may require any necessary documents. The PIL does not grant the courts this possibility, which should be corrected in the future.

Furthermore, unlike the PIL, the Convention prescribes that an application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a foreign court (including an officer of the court) in the form recommended and published by the Hague Conference on Private International Law. The PIL should be improved following the solution provided in the Convention.

The Convention provides that documents relating to the application should be submitted in a certified translation in the official language of the requested State unless the law of the requested State provides otherwise. The PIL only mentions the certified translation in the provisions relating to the recognition and enforcement of arbitration awards. However, it is a well-established practice in B&H that all documents submitted to the court have to be in the official languages and certified by a court translator, and that they have to be submitted along with the original documents.

<sup>190</sup> Garcimartín and Saumier, *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters - Explanatory Report*, p. 137.

## 6.5 Conditions for recognition and enforcement of foreign judicial decisions

The main condition for recognition is that the judgment has become final and the person seeking recognition and enforcement has presented the evidence as well as confirmation of the enforceability of the judgment. PIL lists a set of grounds that will render the recognition (or enforcement) to be denied.

A foreign final judicial decision will not be recognised:

- if the court which issued the given decision did not have jurisdiction, i.e., if it concerns a subject matter in the exclusive jurisdiction of a court or other institution in B&H;
- if the right of a party to be heard has been violated. This right is deemed to have been violated if one person could not take part in the procedure (for example, a suit or other act was not served in person, i.e., personal service was not even attempted. This ground for rejection of recognition is discarded if the given person is engaged in a dispute on the main issue in the first instance procedure);
- if there is an earlier final and binding judgment concerning the same cause of action by a domestic court or some other body in B&H, or already recognised foreign judgment on the same cause of action;
- recognition would not be in line with the constitutional order in B&H;
- there is no reciprocity between the State of origin and state of destination (factual and presumed reciprocity).

Art. 86 of the PIL (as elaborated under 1.1) generally provides for the recognition and enforcement of foreign judicial decisions. The condition and procedure for recognition and enforcement are tailor-made according to the judicial decisions, even though other titles could be recognised and enforced (court settlements, other titles). The provisions of PIL are not completely compatible with the recognition of court settlements and other titles. First, this title cannot be final like the judgments can, and the finality is the main precondition for recognition. This deficiency demonstrates that special rules for enforcement and recognition of settlements and other titles should be enacted. This constitutes a substantial legal gap in the current law. Critics of the HCCH work argue that there is too much formalism as creditors might be prejudiced by the absence of documents.<sup>191</sup> The provisions of PIL are even more rigid and create an even less favourable situation for creditors.

Unlike the PIL, art. 11 of the Convention regulates the recognition of judicial settlements (*transactions judiciaires*). Judicial settlements which a court of a contracting state has approved, or which have been concluded in the course of proceedings before a court of a contracting state, and which are enforceable in the same manner as a judgment in the state of origin, shall be enforced under this Convention in the same manner as a judgment.

Unfortunately, although the Convention “did not forget” judicial settlements, it has omitted to provide rules for other enforcement titles and enforceable notarial documents. Furthermore, the Explanatory Report suggests that administrative documents and notarial documents cannot be considered as judgments, meaning that they are left out of the scope of the Convention.<sup>192</sup>

## 6.6 Procedure for recognition and enforcement of foreign judicial decisions

The procedure for recognition, declaration of enforceability, or registration for enforcement, and the enforcement of a judgment is governed by the law of the requested state unless the

<sup>191</sup> Hartley and Dogauchi, Explanatory Report on the 2005 HCCH Choice of Court Agreements Convention, p. 211.

<sup>192</sup> Garcimartin and Saumier, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters - Explanatory Report, p. 75.

Convention provides otherwise (art. 13). Only two direct instructions under the Convention are directed to the domestic court. The court of the requested state shall act expeditiously and shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another state. This approach demonstrates that the drafter of the Convention had taken into account specific rules of procedure that are applicable in the states. It also provides leeway to the states to exercise discretion in the regulation of the procedure,<sup>193</sup> which is limited only to a certain extent, such as the requirement of exclusion of *forum non conveniens* objections in art. 13 para. 2.<sup>194</sup> As B&H is (still) not a contracting state, these two rules are not applicable in B&H, but both are necessary, especially the provision whereby this procedure should be conducted expeditiously.

The procedure for recognition and enforcement of foreign judicial decisions is barely regulated in the PIL. Only one article of the PIL is dedicated to this issue (art. 101).

Besides the provision on territorial jurisdiction (see 6.1.1), and the person authorised to initiate the recognition procedure (see 6.3), only two questions are regulated. It is prescribed that there shall be no review of the merits of the judgment. Here the PIL and Convention converge. But an exception, established by the Convention (art. 11), is not foreseen in the PIL. The Convention prescribes, that there may only be a review of the merits of the judgment if it is necessary for the application of the Convention. As a second question, the issue of legal remedy against a decision on recognition is regulated. An appeal can be filed within 15 days from the service of a judgment.

Proceedings for the recognition of foreign judgments are non-contentious. This is not disputable either in theory or practice, even though there is no explicit legal provision to this effect. This conclusion cannot be directly derived from the laws regulating non-contentious procedure. In addition, entity laws on non-contentious procedure, as well as the Law on Non-Contentious Procedure of Brčko District B&H, do not envisage this procedure as a separate non-contentious procedure. However, all three legal texts specify that the rules of non-contentious procedure should be applied in other legal matters within the jurisdiction of courts for which the law does not explicitly specify should be resolved in a non-contentious procedure, but which do not relate to the protection of infringed or threatened rights or due to the character of a legal matter or parties to the procedure, and the provisions of the law regulating litigious procedure cannot be applied.

Both the PIL and Convention fail to address the situations where the debtor seeks a declaration of refusal of recognition or enforcement of a judgment by the court.

## 7. Enforcement of foreign judicial decisions

### 7.1 Type of enforcement procedure

Although the competencies for the regulation of the enforcement procedure in B&H are not given to the state B&H, the three enforcement acts (the entities and Brčko District B&H) are of the same provenience, and under the impact of the enforcement law of former Yugoslavia, and further of Austrian enforcement law.<sup>195</sup> However, unlike the Austrian *Executionsordnung*,<sup>196</sup> the Bosnian and Herzegovinian enforcement law provides for only one type of enforcement procedure – enforcement which aims at the judicial sale or judicial transfer of rights. Forced administration/sequestration is not envisaged.

<sup>193</sup> Garcimartin and Saumier, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters - Explanatory Report, p. 139.

<sup>194</sup> David P. Stewart, The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, p. 778.

<sup>195</sup> For more see Povolakić, Die Entwicklung des Zivilprozessrechtes in B&H (1918 – 2008), p. 208.

<sup>196</sup> Para. 94, Stand der Gesetzgebung: 02.01.2021, Gesetz vom 27. Mai 1896, über das Exekutions- und Sicherungsverfahren (Executionsordnung), StF: RGBI. Nr. 79/1896. Available: <https://www.jusline.at/gesetz/eo/gesamt> (30.04.2021).

The methods of enforcement are different depending on the asset which the creditor has proposed as the subject for enforcement, but not depending on the kind of enforcement title (foreign or national). The foreign judicial decision/enforcement title is mentioned only in one article of the respective enforcement code;<sup>197</sup> there are no special provisions for the enforcement of foreign enforcement titles.

## 7.2 Enforcement procedure in situations when the enforcement officers are directly confronted with the foreign judicial decision

The enforcement procedure is always the same regardless of whether it is based on a foreign title or not. The procedure is initiated by the creditor who should submit the motion for enforcement accompanied by the enforcement title. When the enforcement is sought on the basis of a foreign judicial decision, two situations are possible, as already elaborated above: the creditor submits the foreign decision which has already been recognised by the competent court, which is, in this case, equal with the decision of the national/domestic courts. There are no particularities in the procedure in this case. If the court, in charge of the enforcement, should decide on the recognition of the foreign judicial decision as a preliminary question, the court will decide on the preliminary question, before deciding on whether to grant the motion for enforcement or not. This decision is exclusively in the court's competence. Furthermore, the enforcement procedure will be conducted like any other enforcement procedure, and enforcement officers/agents will be involved if the law provides for such involvement. As has been stated under 3.3, enforcement agents are primarily involved in the enforcement procedure of movables.

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## COUNTRY REPORT: KOSOVO

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### Executive Summary

The following report provides an insight into recognition and enforcement of foreign judgments in the Republic of Kosovo. Given that this is a matter of private international law, the Kosovo Private International Law Act – inherited from the Yugoslav era – is at the heart of this analysis. The report highlights the various shortcomings of this outdated law and also introduces the changes that are likely to happen in an upcoming PIL reform.

Decisions on recognition and enforcement of foreign judgments in Kosovo is a competence of the Basic Courts, but their enforcement involves private enforcement agents as well. Conditions for recognition and enforcement are rather straightforward and comparative to PIL Acts elsewhere: the finality of the judgment, absence of violations of public policy, absence of violations of procedural rights, absence of conflicting judgments and, most notably, reciprocity. The report shows that the experience of Kosovo courts in recognition and enforcement of foreign judgments, especially in civil and commercial matters, is limited and inconsistent.

One of the core provisions of the HCCH 2019 Judgments Convention, art. 5, lays down the jurisdiction grounds on the basis of which a rendered judgment can be recognised. To enable a comparison between these grounds and those applicable in Kosovo, a thorough analysis of general, specific and exclusive jurisdiction criteria in Kosovo is provided. While the Judgments Convention uses habitual residence as a connecting factor for general jurisdiction, Kosovo PILA uses domicile. The special jurisdiction basis stemming from contractual matters is also rather complex in Kosovo, given the lack of clarity of two key provisions. There are currently no special jurisdiction provisions for matters related to consumer contracts. A common ground between the Judgments Convention's indirect jurisdiction rules and the Kosovo PILA is the grounds for exclusive jurisdiction based on the location of immovable property.

Much more convergence of jurisdictional criteria between the Judgments Convention and Kosovo is expected once the new PILA is adopted—hopefully soon. The provisions of the (draft) new PILA are all based on Regulation Brussels *Ibis*. This convergence is important for free circulation of judgments originating from Kosovo or those for which recognition is sought there, in hopes of making easier a mission that is currently greatly hindered by complexities surrounding its recognition as an independent state abroad.

Lastly, the report also provides an analysis on the procedure for recognition and enforcement, as well as the legal and institutional framework through which such processes are carried out.

## 1. Legal framework of the cross-border recognition and enforcement of foreign judicial decisions

Cross-border recognition and enforcement of foreign judgments in Kosovo is a matter of Private International Law. This area of law in Kosovo is regulated by the Law on the Resolution of Conflict of Law with the provisions of other states in certain relations,<sup>198</sup> known as the Private International Law Act. For purposes of simplicity, this Report will be referring to it as “Kosovo PIL Act.” It is one of the few laws of the former SFRY period that continues to apply in post-war Kosovo.<sup>199</sup> The law is not easily accessible in Albanian and there is no consolidated<sup>200</sup> version published online for the needs of legal professionals; This law, although rather outdated, contains rules that regulate all aspects of civil legal relations with a foreign element: the rules on determining the competent law, the rules for determining the competence (jurisdiction) of our courts in civil proceedings with a foreign element as well as the rules on the recognition and enforcement of foreign judgments. Furthermore, this law does not have a very rich tradition of application in Kosovo and has not been meticulously analysed by its scholars either. Therefore, to interpret the provisions of this law, it is necessary to take into account the interpretations of scholars in the region of the Western Balkans, as well as the case law of these countries.<sup>201</sup>

Meanwhile, Kosovo is in the process of adopting a new law on Private International Law.<sup>202</sup> Its provisions and the changes they will bring about have been included in this Report, as much as possible.

As the analysis below will illustrate, the Kosovo PIL Act does leave many questions unanswered. As such, it is highly necessary to employ other domestic laws to supplement these provisions. One such important source is the Law on Contentious Procedure<sup>203</sup> – the equivalent of a Civil Procedure Act – which is a useful supplement in matters of jurisdictional procedure and recognition of foreign judgments. In general, this law provides a functional basis. However, it should be noted that the version in English is a rather poor translation and its reading should always be accompanied with a reading in one of the local languages.

Given that the procedure for recognition and enforcement of foreign judgments is a non-litigious one,<sup>204</sup> one of the key sources is the Law on Non-Contentious Procedure.<sup>205</sup> Furthermore, given that the Kosovo PIL Act only has two basic provisions on the enforcement of foreign judgments, the role of the Law on Enforcement Procedure<sup>206</sup> to explain this procedure further is paramount.

Other special laws and regulations are also referenced in this Report when necessary to elucidate important matters, especially in Section 5 on International Jurisdiction.

A closer look is necessary to assess the role of international agreements and Kosovo.<sup>207</sup> Due to its disputed statehood, Kosovo is not a member of the Hague Conference on Private International Law and is only a connected state. Kosovo was only allowed to accede to the first Convention

<sup>198</sup> Official Gazette of SFRY, no. 43/82 and 72/82, 23 July 1982.

<sup>199</sup> Implementation of this law is enabled by UNMIK Regulation no. 2006/12. 1999/24 of 12 December 1999, which leaves in force all laws before March 1989 which had no discriminatory provisions. The same law has been internalised and continues to be implemented in the Republic of Serbia and Bosnia and Herzegovina.

<sup>200</sup> All published versions still contain the terms “Yugoslavia”, “Yugoslav Court” and the like.

<sup>201</sup> Bosnia and Herzegovina and Serbia continue to apply this law to this day. Before that, the PIL Act(s) of North Macedonia were almost verbatim adoptions of the same act. Therefore, their court practices and doctrine are continuously referred to in this report.

<sup>202</sup> An earlier version of this Draft is available at: <https://kryeministri-ks.net/wp-content/uploads/2018/08/PROJEKTLIGJI-P%C3%8BR-T%C3%8B-DREJT%C3%8BN-ND%C3%8BRKOMB%C3%8BTARE-PRIVATE.pdf>. A newer and improved version of this Draft has recently been discussed in the Assembly of the Republic of Kosovo on 19<sup>th</sup> November, 2020. The author is one of the members of the working group that worked on the law, and references in this Report are to the latest version of the Draft.

<sup>203</sup> Law No. 03/L-006 on Contested Procedure, available in English at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2583>

<sup>204</sup> See Section 6.3 below.

<sup>205</sup> Official English title is Law No. 03/L-007 on Out Contentious Procedure, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2608>. However, this is not the appropriate term and thus the term “non-contentious procedure” will be used herein.

<sup>206</sup> Law No. 04/L-139 on Enforcement Procedure, available in English at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2870>.

<sup>207</sup> For a summarised approach to this matter, see Donikë Qerimi, “Western Balkans,” in *Choice of Law in International Commercial Contracts*, Private International Law, Oxford University Press, 2021.

in 2015,<sup>208</sup> which was followed by numerous objections and declarations from Serbia and, later, other contracting parties.<sup>209</sup>

As Kosovo was a part of the former Yugoslavia, which was a signatory to many Conventions,<sup>210</sup> many of the conventions that were signed at the time have been applied in Kosovo. Although local scholars maintain that these conventions have been succeeded by Kosovo,<sup>211</sup> this is not reflected on the Conference website where the statuses of each Convention are listed and updated.<sup>212</sup> Nor is this reflected or alleged by the Ministry of Foreign Affairs and Diaspora.<sup>213</sup> This matter will be treated in further detail below in Section 4.2.

Unlike the countries of the region that have signed a number of bilateral international agreements, Kosovo has a limited number of bilateral agreements that regulate various areas of private international law. According to the Ministry of Foreign Affairs, Kosovo has gone through the process of ratifying agreements with Austria, the United Kingdom, Belgium, Germany, Finland and the Czech Republic.<sup>214</sup> However, only verbal notes of the success of the agreements with Austria<sup>215</sup> and the United Kingdom<sup>216</sup> have been published in the *Official Gazette*. The exact content of these agreements is not known as the agreements have not been published.<sup>217</sup> Agreements relevant to recognition and enforcement of judgments may be those on international legal cooperation on civil matters in general.<sup>218</sup>

## 2. Institutional framework for the cross-border recognition and enforcement of foreign judicial decisions

### 2.1. Overview of legal provisions determining stakeholders in the cross-border recognition and enforcement of foreign judicial decisions

In general, cross-border recognition and enforcement of foreign judgments in Kosovo entails the involvement of courts, private enforcement agents and possibly the Ministry of Justice of the Republic of Kosovo.

<sup>208</sup> Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (the “Apostille Convention”); See <<https://www.hcch.net/de/news-archive/details/?varevent=438>>.

<sup>209</sup> See <<https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1319&disp=resdn>>.

<sup>210</sup> Stanivuković, Maja and Mirko Živković. “Serbia,” in *Kluwer Encyclopedia of Private International Law*. Wolters Kluwer, 2018, p. 22.

<sup>211</sup> See, most recently, Kuçi, Hajredin. “E Drejta Ndërkombëtare Private Në Kosovë.” *Hyrje Në Sistemin Ligjor Në Kosovë*. Prishtine, Kosovo, Akademia e Drejtësisë, 2019, pp. 103–40.

<sup>212</sup> See the status of all texts here: <https://www.hcch.net/en/instruments/status-charts>.

<sup>213</sup> Following a request to the Ministry of Foreign Affairs and Diaspora in October 2020 for access to these public documents, the author was sent a list of successful agreements with many countries, but none of them are Hague Conference Conventions. There is a mention of three agreements to facilitate the implementation of the three Hague Conventions between France and Yugoslavia.

<sup>214</sup> See <http://www.mfa-ks.net/al/ministria/541/marveshjet-ndrkombtare/541>.

<sup>215</sup> <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8520>

<sup>216</sup> <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=8543>

<sup>217</sup> Following a request to the Ministry of Foreign Affairs and Diaspora for access to these public documents, the author was sent a list of successful agreements (see list in the footnote below), as well as some of the original texts of the successful agreements.

<sup>218</sup> According to the practice of the Department for International Legal Cooperation, together with the Ministry of Justice, these are the relevant successful agreements: With the Federal Republic of Austria: Agreement on the Recognition and Enforcement of Mutual Judicial Decisions and Comparisons in Commercial Matters of 18 March 1960; Agreement on Mutual Recognition and Enforcement of Alimony of 10 October 1961;

With the United Kingdom: Convention between His Majesty on behalf of Great Britain and the King of Yugoslavia on Legal Proceedings in Civil and Commercial Matters (London, 27 February 1936).

With the Kingdom of Belgium : Agreement between the Kingdom of Belgium and the Socialist Federal Republic of Yugoslavia on Mutual Judicial Assistance in Civil and Commercial Matters (24 September 1971); Convention between the Kingdom of Belgium and the Socialist Federal Republic of Yugoslavia Concerning the Recognition and Enforcement of Judgments in Alimony Obligations (12 December 1972);

With the Czech Republic : Agreement between the SFRY and the RS of Czechoslovakia on the Regulation of Legal Relations in Civil, Family and Criminal Matters;

With the French Republic: Agreement between the French Republic and the Socialist Federal Republic of Yugoslavia with a view to facilitating the implementation of the Hague Agreement of 1 March 1954 on Civil Procedure, signed on 29 October 1969; Agreement between the Government of the French Republic and the Socialist Federal Republic of Yugoslavia on the Law on Jurisdiction over the Rights of Individuals and Families, signed in Paris on 18 May 1971; Agreement between the Government of the French Republic and the Socialist Federal Republic of Yugoslavia on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Paris on 18 May 1971.

The legal framework that determines the stakeholders in these matters requires a very holistic approach, since provisions are spread out over a number of laws, among which: the PIL Act, Law on Courts, Law on Contested Procedure, Law on Enforcement Procedure, Law on Non-Contentious Procedure and Law on Arbitration. Specific reference to these is given in the next section.

## 2.2. Stakeholders putting cross-border recognition and enforcement of foreign judicial decisions into practice

### 2.2.1 Courts

The Kosovo Law on Courts,<sup>219</sup> art. 12 para. 2, mandates the Basic Courts with the power to “to provide international legal assistance and decide on the acceptance of decisions of foreign courts.” Matters of recognition of enforcement of foreign judgements fall within the jurisdiction of the General Department, with the exception of recognition and enforcement of foreign arbitral awards which fall under the competencies of the Department for Commercial Matters.<sup>220</sup> The latter is authorized to adjudicate disputes between local and foreign business organisations in all commercial matters as well as obstruction of possession (with the exception of immovable property).<sup>221</sup>

There is a developing legal initiative to establish a new and separate Commercial Court.<sup>222</sup> Art. 3 para. 3 of the Draft Law foresees that the first instance chambers of this Court will be empowered with recognition and enforcement of foreign judgments. Given that this Court is expected to be populated with judges specialized in commercial matters, this news is certainly welcome. That is especially valid when taking into account the challenges faced until now in recognition and enforcement of judgments, which will be analysed below in Section 3.

### 2.2.2 Administrative institutions

Art. 92 of the Kosovo PIL Act requires the court to refer to the “authority responsible for administration of justice” when it has doubts on whether reciprocity exists with a certain state. An Administrative Instruction on the Procedure for offering international legal aid on criminal and civil matters<sup>223</sup> empowers the Department for International Legal Cooperation of the Ministry of Justice with such an authority. Given the many flaws of the Administrative Instruction, a Law on International Legal Cooperation in Civil Matters has been prepared and may hopefully be adopted soon.<sup>224</sup> This Law<sup>225</sup> clarifies, among other things, the role of the Ministry of Justice as a Central Authority in transmitting requests for mutual legal assistance between courts in Kosovo and abroad, but also provides the legal basis for courts to communicate directly when necessary.

### 2.2.3 Legal Practitioners – lawyers and notaries

In a procedure for the recognition and enforcement of a foreign judicial decision, parties are often aided by lawyers, given the specificity of such cases. However, legal representation by a lawyer is not mandatory in such a procedure. Lawyers in Kosovo are considered a free legal profession

and are regulated by the Law on the Bar.<sup>226</sup> Foreign lawyers are allowed to practice in Kosovo only under the condition of reciprocity.<sup>227</sup>

Another important free legal profession in Kosovo is that of the notary public, and they play a significant role in the procedure for the recognition and enforcement of foreign judgements. Their functions are regulated by the Law on Notaries.<sup>228</sup> Both of these professions are managed by their respective Chambers and overseen by the Department of Free Legal Professions of the Ministry of Justice.

### 2.2.4 Enforcement agents

The Law on Enforcement Procedure designates both the courts and private enforcement agents as enforcement agents.

Issues relating to family law and reinstating employees and civil servants (and their compensation) fall within the exclusive enforcement powers of the courts. Other matters are left to private enforcement agents, and therefore their role in the procedure for enforcing foreign judgements is crucial. Notwithstanding, private enforcement agents are employed once the decision for recognition and enforcement of a foreign judgement has been decided by the competent court in Kosovo. As will be shown below, the foreign judgement undergoes recognition and enforcement proceedings before the Basic Court of a particular territory in Kosovo, and its enforcement, including the deadline for voluntary enforcement, is specified in the Court’s decision.<sup>229</sup> A foreign judgement becomes an enforcement document only after having been recognised by the courts in Kosovo.<sup>230</sup> The private enforcement agent then renders the writ based on proposals for carrying out enforcement (made by the party), and carries out the enforcement to fulfil the debtor’s claim based on an enforcement document.<sup>231</sup>

The Enforcement Agent profession is mainly regulated by the Law on Enforcement Procedure and other secondary legislation.<sup>232</sup> They are managed daily by the Chamber of Private Enforcement Agents and overseen by the Ministry of Justice.

## 3. The role of courts and enforcement agents in cross-border recognition and enforcement of foreign judicial decisions

This Report will show the numerous shortcomings of the legal framework in Kosovo in the area of private international law in general. However, the matter of greater concern is the professionalism of judges<sup>233</sup> in dealing with recognition and enforcement of foreign judgements. As a caveat, it should first be noted that none of the countries in the region recognise case law as a source of law.<sup>234</sup> Slightly more significance is attached to doctrinal writings, although authors agree that these too do not represent a source of law.<sup>235</sup>

As a second caveat, it should be noted that only recently have the judgements of courts in Kosovo started to be published in Kosovo.<sup>236</sup> Despite the existence of search mechanisms, they are often ineffective. For example, a keyword search rarely yields all possible results since

<sup>219</sup> Law No. 06/L-054 on Courts, available in English at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18302>.

<sup>220</sup> Art. 39 para. 2 of Kosovo Law on Arbitration, available in English at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2579>

<sup>221</sup> Art. 12 para. 2, art. 1 para. 1. and art. 1 para. 2. of Law on Courts.

<sup>222</sup> See the Draft Law available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=40935>.

<sup>223</sup> Administrative Instruction on the Procedure for offering international legal aid on criminal and civil matters, no. 01-1265 (2009).

<sup>224</sup> See the Concept Document, detailing the flaws of the current situation and what the proposed solutions are, at: <https://kryeministri-ks.net/wp-content/uploads/2018/12/Koncept-Dokumenti-p%C3%ABr-Fush%C3%ABn-e-Bashk%C3%ABpunimit-Juridik-Nd%C3%ABrkomb%C3%ABtar-n%C3%AB-%C3%87%C3%ABshjet-Civile-MD-Shqip.pdf>

<sup>225</sup> The author was part of the drafting working group. The Law has been drafted and is expected to be processed soon for adoption.

<sup>226</sup> Law no. 04/L-193 on the Bar, available in English at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8673>.

<sup>227</sup> Art. 40 of the Law on the Bar.

<sup>228</sup> Law no. 06/L –010 on Notary, available in English at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18334>.

<sup>229</sup> Art. 24 of the Law on Enforcement Procedure.

<sup>230</sup> Art. 22 para. 1 item 5 of the Law on Enforcement Procedure.

<sup>231</sup> Art. 5 para. 3 of the Law on Enforcement Procedure.

<sup>232</sup> Available in “Browse sub-normative acts” feature: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2870>

<sup>233</sup> Kosovo has recently published a national Draft Strategy on Rule of Law, which identifies major flaws in the professionalism of judges in general in Kosovo. The draft is available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41053>.

<sup>234</sup> See National Reports for these countries in *Elgar Encyclopaedia of Private International Law* (2017) cited in this report. There is no national report for Kosovo.

<sup>235</sup> Ibid.

<sup>236</sup> See e.g. website of Prishtina Basic Court: <https://pristine.gjyqesori-rks.org/publikimet/aktgjykimet/?r=M>

many judgments are published as scanned pictures. Furthermore, any online research would still be inconclusive since only decisions from 2018 and onwards have been published. Most importantly, cases of recognition and enforcement of foreign judicial decisions, registered under “civile të ndryshme” or “miscellaneous civil matters,” are not published.<sup>237</sup>

Therefore, the case law references in this Report are a result of the author’s own on-site research in Prishtina Basic Court on numerous occasions throughout 2017 and 2020.<sup>238</sup> The on-site research shows that there are major discrepancies in approaches towards recognition and enforcement of foreign judgements. This conclusion is valid for Prishtina Basic Court at least. However, as the Basic Court of the capital city, one could reasonably expect that its decisions would be exemplary to other courts in the country.

The vast majority of judgments seeking enforcement are decisions on family matters, particularly divorce.<sup>239</sup> Even in these family matters, however, there are divergent approaches where some decisions originating in states that do not recognise Kosovo have been rightfully recognised<sup>240</sup> while others were refused on the grounds of lack of reciprocity.<sup>241</sup> Furthermore, there is a substantial lack of clarity within the decisions themselves. The decisions are typically very short and the court provides very little reasoning as to why the decision was refused. That is partly due to a standard language form that may have been copied and pasted between decisions – e.g., paragraphs reiterating the necessary formal requirements of the documents to be submitted. This is quite often the case when the same decision concludes with “therefore, since the proposal does not fulfil the legal criteria for recognition...” and then it concludes again with “therefore, since the plaintiff has not acted in accordance with the notice of the court...”<sup>242</sup> Before such conclusions, when dealing with judgments from non-recognising countries, the Court also reiterates the same paragraph that there is no reciprocity and there are no international agreements between Kosovo and that particular state.<sup>243</sup> This makes it difficult for the reader to understand whether the judgment has been refused recognition based on formal requirements or because lack of reciprocity.

In lieu of a conclusion, unfortunately, one has to agree with the statements of fellow Albanian scholars who noted that “it is premature to discuss solid jurisprudence of the Albanian courts in this field.”<sup>244</sup> This conclusion is undoubtedly valid for Kosovo as well.

There is little to no data that specifically addresses the performance of enforcement procedures, or the role of private enforcement agents in particular. Numerous practical challenges have been identified in the enforcement procedure, which then led to its amendment in 2017.<sup>245</sup> The National Strategy on Rule of Law notes that there is a necessity to empower the Chamber of Enforcement Agents, increase the number of private enforcement agents and ensure a better geographical allocation, as well as a uniform system on data collection to enable a better view of the overall performance of the system.<sup>246</sup>

The institution in charge of training and capacity development of judges in Kosovo is the Kosovo Academy of Justice. There are no specialized trainings on matters of private international law.

237 Up to May 3, 2020, only one case on “miscellaneous civil matters” appears on the website.

238 Besides this research, the author had the personal experience of having to carry out on-site research at the courts in Kosovo when conducting case law research for her PhD thesis and journal contributions. Attempting to conduct such research is generally met with steep bureaucratic hurdles and hardly ever yields the desired results. Recently, some companies in the region have begun subscription services of case law summaries from other countries, without the possibility of viewing the entire judgment.

239 Even as far as Brasil; See Prishtina Basic Court decision C.N. no. 8/2015 of 16.02.2015.

240 Prishtina Basic Court Decision C.N. no. 42/17 of 17.07.2017, recognizing a judgment originating in Serbia

241 Prishtina Basic Court Decision C.N. no. 383/19 of 01.11.2019 refusing a judgment on divorce issued in Bosnia and Herzegovina and Prishtina Basic Court judgement C.N. no. 349/19 of 10.12.2019, refusing a judgment on divorce issued in Slovakia.

242 Ibid, both decisions.

243 Ibid, both decisions.

244 Aida Gugu Bushati and Nada Dollani. “Albanian PIL Act and Its Implementation in Judicial Practice.” 18 Annals of the Faculty of Law of University of Zenica, 2016, p. 147.

245 EU Project “Support to Free Legal Professions and the Bar Association” (EuropeAid/136612/DH/SER/XK) - “Preliminary Report on Challenges for the Free Legal Professions,” March 2017

246 Draft pages 17 and 31-32; available at <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41053>.

Matters with a foreign element are often treated within trainings on other broader topics. For example, training on the jurisdiction of courts in commercial matters will now be a constitutive part of a training on foreign applicable instruments in the field of commercial law.<sup>247</sup> Training on recognition and enforcement of foreign judgments is only provided as one of the topics within the training on international legal cooperation in criminal and civil matters.<sup>248</sup> Other specialised trainings on this particular topic are not conducted.

## 4. Economic and political aspects in respect to the implementation of the HCCH 2019 Judgments Convention

### 4.1 Main trading partners in terms of import and export

Kosovo is a signatory state of the CEFTA Agreement.<sup>249</sup> It has a major trade deficit of circa 3,113 billion euro.<sup>250</sup> The Kosovo Agency of Statistics has recently reported a major increase of 92.2% in the export of goods, and an increase of 51.8% in import, compared to 2020.<sup>251</sup>

The main trading partners are some EU countries and the CEFTA countries in the region. Exports are higher to CEFTA countries than to the EU countries.<sup>252</sup> The main CEFTA member export partners are Albania (16.2%), North Macedonia (12.2%), Serbia (5.8%), and Montenegro (3.3%). The main export partners among EU countries are Italy (10.6%), Germany (7.1%), and The Netherlands (2.5%).<sup>253</sup>

The main import trading partners among the CEFTA members are Serbia (5.9%), North Macedonia (5.6%) and Albania (5.5%). The EU import trading partners are Germany (14.8%), Italy (6.1%), Greece (5.9%), and Slovenia (3.6%).<sup>254</sup>

Other key export trading partners are the USA (14.3%) and Switzerland (7.8%), whereas Turkey (12.8%) and China (8.7%) are key import partners.<sup>255</sup>

The Ministry of Trade has identified the following as some of the main challenges that hamper export and the dependence on import: a weak production sector, limited progress in quality and innovation, travel visa requirements, non-tariff barriers and other institutional barriers such as lack of staff at the Kosovo Food and Veterinary Agency.<sup>256</sup>

There is, however, more hope in service trade. Services constitute the largest sector of Kosovo’s economy, whose contribution to the total domestic value added generation is constantly growing.<sup>257</sup> Reports show that service exports amount to 78.2% of the total trade in this sector in 2017, and 80.96% in 2018.<sup>258</sup> The same reports show that in 2018, 75.7% of Kosovo’s total worldwide service exports were registered with the EU and CEFTA member countries. In 2018, 61.44% of Kosovo’s total service imports originated in the EU and in CEFTA countries.

247 The first pilot training, by the author, will be given in June 2021 on the topic of “Implementation and specifics of international instruments, directives and regulations of EU on commercial, fiscal and custom matters.”

248 Response of the Academy of Justice upon the enquiry of the author on this matter, on April 26, 2021.

249 <https://cefta.int/cefta-parties/>

250 Ministry of Trade and Industry of the Republic of Kosovo, “Analysis of Trade Policy: factors that hamper growth of export of goods,” August 2020, available at: <https://mint.rks-gov.net/desk/inc/media/9AA24A4B-6ECF-4D67-91ED-A9D29F23D004.pdf>

251 Kosovo Agency of Statistics, External Trade of Goods, March 2021.

252 Ibid., p. 8, 24. 3 million EUR to CEFTA countries and 19.8 million to EU countries.

253 Ibid., p. 8.

254 Ibid.

255 Ibid.

256 Ministry of Trade and Industry of the Republic of Kosovo, “Analysis of Trade Policy: factors that hamper growth of export of goods,” August 2020, available at: <https://mint.rks-gov.net/desk/inc/media/9AA24A4B-6ECF-4D67-91ED-A9D29F23D004.pdf>

257 Luis Abugattas, Shqipe Jashari Sekiraqa and Xhorxhina Bami “Kosovo’s Trade in Services with the EU and CEFTA Member Countries”, available at: <https://mint.rks-gov.net/desk/inc/media/7010F0DF-B3D8-42C3-9C59-CBCC2565A04F.pdf>.

258 Ibid., p. 1.

## 4.2 Political aspects in regards to the implementation of the HCCH 2019 Judgments Convention

As briefly introduced above, Kosovo's membership in international organisations, such as the HCCH, is hampered by its disputed political status. These Conventions operate in a system akin to a "sisterhood," where member states agree to unify the rules of international law among them, so that this leads to easier cooperation between them in various proceedings before the respective competent bodies of each state and, at the very end, to recognition of each other's decisions. This privilege is not automatically extended to those States which are not members of the Conference, in one form or another.

Although the HCCH 2019 Judgments Convention is also open for signature to non-members, Kosovo's adherence to this Convention could be accompanied by numerous challenges. Not only is there a long and complicated process of adherence to the Conference, but each Convention also offers the possibility to the signatory states of that convention to make reservations about and declarations on the implementation of an instrument (or part of it) to a certain state. This is exactly what happened with the only Convention to which Kosovo is officially a signatory - the Apostille Convention - in which Serbia has made a statement opposing Kosovo's signing of it.<sup>259</sup>

Naturally, Serbia is one of the most active countries in opposing Kosovo's statehood. According to its Constitution, Kosovo is a constituent part of it as an Autonomous province.<sup>260</sup> While this stance may be in complete contrast with political reality<sup>261</sup> or aspects of public international law,<sup>262</sup> it does, nevertheless, hinder the circulation of judgments between these two countries. Judgments rendered by the courts of the Republic of Kosovo are not recognised by Serbian courts and may even be considered against their constitutional order. If Kosovo and Serbia both choose to adhere to the Judgments Convention, there is a great likelihood that Serbia would make a notification pursuant to art. 19 (Declarations with respect to judgments pertaining to a state), as allowed by art. 29 and 30.

Other countries that might be prompted to make such notifications would be Bosnia and Herzegovina in the region, five EU Member states that do not recognise Kosovo's independence – Spain, Greece, Cyprus, Slovakia and Romania – and China and Russia as two other major political opponents of Kosovo's independence.

Although Kosovo does not have a particular reason (other than political sensitivity) to make such a notification even towards Serbia, a notification by any of these countries would suffice to disable the operability of the Judgments Convention between the two of them. That is because art. 29 para. 1 stipulates that the Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with para. 2 or 3.

On the other hand, Kosovo could make a notification based on Article 18 (Declarations with respect to specific matters) with regards to recognition and enforcement of decisions of parallel courts that have operated in Kosovo for a lengthy period of time, but *de facto* under the authority of the Serbian government and assumed jurisdiction over Kosovo from Serbia proper, or operated in the territory of Kosovo.<sup>263</sup> However, the matters of these courts have also been addressed in a political negotiations process between Kosovo and Serbia, through an agreement on justice and

<sup>259</sup> See <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1319&disp=resdn>, and see, for example, the response of Switzerland: <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=349&disp=resdn>.

<sup>260</sup> Art. 182, Constitution of the Republic of Serbia of 2006. "Kosovo and Metohia's" status of an autonomous province is equated alongside the territory of Vojvodina within Serbia.

<sup>261</sup> Kosovo is recognised by 117 states as an independent country; See <https://www.mfa-ks.net/politika/484/lista-e-njohjeve/484>.

<sup>262</sup> See International Court of Justice Advisory Opinion on the "Accordance with international law of the unilateral declaration of independence in respect of Kosovo" of 22 July 2010.

<sup>263</sup> Organization for Security and Co-operation in Europe Mission in Kosovo, Department of Human Rights and Rule of Law, "Parallel Structures in Kosovo", p. 5, available at: <https://www.osce.org/files/f/documents/9/1/42584.pdf>

integration of parallel judicial structures in Kosovo.<sup>264</sup> Therefore, this matter might need closer analysis in the light of that process when the time comes.

## 5. International jurisdiction and compatibility with the HCCH 2019 Judgments Convention<sup>265</sup>

### 5.1 General international jurisdiction (domicile, habitual residence)

While the HCCH 2019 Judgments Convention uses habitual residence of the person against whom recognition or enforcement is sought (possibly the defendant) as the connecting factor for general jurisdiction, the Yugoslav PIL Act used domicile. Art. 46 gives authority to national courts to assert jurisdiction in cases when the defendant is domiciled in the country or, in cases of legal persons, has its seat there. Alternatively, failing to establish domicile in any other state, the Kosovo courts will have jurisdiction if the person *resides* in any of these countries.

However, residence (not habitual residence) is also a ground for jurisdiction here, but only if the person is a national of the country as well. Therefore, regardless of the person's domicile, if the defendant is a national of Kosovo and resides there, the Kosovo courts will have jurisdiction.

It is important to point out that the terminology the Western Balkans use as a basis to establish general jurisdiction may be rather confusing in the eyes of a foreign lawyer or scholar. The Yugoslav PIL Act, which until a decade ago was also applicable in other former Yugoslavian states, is one of the sources for this confusion. In Serbian, (one of) the original language(s) of the law, art. 46 of the law uses the term "prebivalište" as the general jurisdictional basis for the Yugoslavian courts. The term is translated as "permanent residence" in the English versions available online to this date.<sup>266</sup> However, scholars seem to have pin-pointed this "misunderstanding" and, when writing in English, refer to this jurisdictional criterion as "domicile."<sup>267</sup> Perhaps the degree of confusion is further exacerbated by the lack of definition of domicile or the term in the official languages. This matter, back then as well as today, was left to the other – domestic – laws which, as will be shown below, hampers uniformity.<sup>268</sup>

Serbian scholars have interpreted the term "domicile" in art. 46 of the PILA in conjunction with their domestic law.<sup>269</sup> Scholars explain that it comprises two standard elements of the notion of domicile – the objective and the subjective element (*corpus* and *animus*). The objective component of domicile is making one's home in a certain place, and the subjective component is one's intention to permanently settle in that place. It may be concluded by interpretation of [Article 3, paragraph 2], that nobody can have more than one domicile at a time. Furthermore, it follows from Articles 2 and 6 of this Law, that each person would have to have a domicile somewhere, and that it is impossible to have a person without a domicile, because the old domicile cannot be lost until the new one is acquired.<sup>270</sup>

<sup>264</sup> See <https://balkaninsight.com/2015/02/10/belgrade-pristina-reach-deal-on-judiciary/>

<sup>265</sup> Earlier versions of analysis contained in this section have been published as part of the Doctoral thesis of the author in Donikë Qerimi, "Jurisdiction in International Disputes in Commercial Matters: A Comparison between the Brussels Ibis and the Western Balkans" (Gent University, 2019).

<sup>266</sup> There is no official translation of the law available today. The version cited here is available through the website of the Serbian Ministry of Justice, available at:

[http://arhiva.mpravde.gov.rs/images/Law%20on%20resolving%20conflict%20of%20law\\_180411.pdf](http://arhiva.mpravde.gov.rs/images/Law%20on%20resolving%20conflict%20of%20law_180411.pdf). In the several versions available online, including when the law is attached as Annex to an official report of the Montenegrin government, this translation form exists. The Ministry of Justice of Kosovo has a rather improved translation, possibly re-translated by the United Nations Mission in Kosovo which served as the communicating channel with other countries and whose competences, cases and materials were later inherited by Kosovo's Ministry of Justice. This improved version, uniquely, uses the term 'domicile'. It also provides a better translation of many other terms analysed in this Chapter, which will be elaborated herein.

<sup>267</sup> See e.g. Maja Kostić, Maja Stanivuković, and Mirko Živković, "Montenegro," in *Kluwe Encyclopedia of Private International Law*, 2013. Maja Stanivuković and Mirko Živković, "Serbia," in *Kluwe Encyclopedia of Private International Law*, 2009; Kostić, Stanivuković, and Živković, "Montenegro."

<sup>268</sup> It is not uncommon for translation to cause practical problems. The Schlosser report mentions the problems experienced by Malta in interpreting domicile. The Maltese Code of Organization, written in Italian, used the term "domicilio" which means "residence." However, some cases were translated into English as "domicile" and led to some confusion. See para. 176 of the Report.

<sup>269</sup> The Law of the Republic of Serbia on Citizens' Domicile and Residence.

<sup>270</sup> Stanivuković and Živković, "Serbia," 2018, p. 123.

It is also possible, according to the practice of the Serbian courts, that a person is domiciled in two places at the same time. In a case that involved multiple defendants, jurisdiction was challenged due to the objection of the defendants that the anchor defendant was indeed domiciled in Bosnia and Herzegovina and not in Serbia. Having looked at proof of domicile provided by the Ministries of the Interior of both countries, the Court of Appeals in Belgrade concluded that the defendant was domiciled in Serbia, notwithstanding the proof that he was also domiciled in Bosnia and Herzegovina.<sup>271</sup> The proof of domicile which the court based its decision on, were confirmations of addresses by the respective Ministries of the Interior. As such, the Court concluded that it had jurisdiction not only over the defendant, but also over the co-defendants, based on the same provision.

Mistakes in the application of this provision have also occurred in the past. In 1998, the High Commercial Court in Belgrade rectified a mistake of a lower court which had concluded that it did not have the jurisdiction to *enforce* a foreign decision because the defendant was not domiciled in Serbia. The Court explained that the two matters were not related, and that the provision that should have been applied was art. 101 on the procedure for enforcement, instead of art. 46 which deals with the jurisdiction of a court to adjudicate the case on the merits.<sup>272</sup>

When it comes to legal persons, the Western Balkans generally lean towards the seat of the legal person as the basis for general jurisdiction over them. Despite mentioning the seat as the basis for general jurisdiction, the Yugoslav PIL Act uses the term “nationality” throughout the law. When it comes to the nationality of legal persons, in Yugoslav scholarship and practice there has always been a lack of uniformity regarding the terminology and its use.<sup>273</sup> Scholars note that regional doctrine uses the terms “nationality” “citizenship” or “affiliation” interchangeably.<sup>274</sup> Indeed, the Serbian term “pripadnost,” which is also seen in the Albanian scholarship as “përkatsia,”<sup>275</sup> could be literally translated as “belonging.” Stanivuković provides the only explanation as to the use of the term nationality throughout Yugoslav law: “nationality of the legal persons does not exist as an administratively concluded fact, but it is determined by the courts through other connecting factors (the place of establishment, the seat of the legal person, the place that uses the criteria of control over the legal person) [...]”<sup>276</sup>

Besides lacking a definition for domicile, the Yugoslav PIL Act also provides no definition of “seat” as mentioned in Art. 46. However, with regard to the status of legal persons, the Act uses the term “affiliation” which, according to art. 17, shall be “determined by the law of the state in which it is established.” It proceeds by stipulating that “if a legal person has its real seat of business in a different country, and not in the one where it was established, and by the law of that state it is affiliated there, it shall be regarded as a legal person of that country.” The Yugoslav law, hence, recognises the two theories on the affiliation of legal persons – the incorporation and the real seat theory. This, however, has been criticized by some of the most renowned scholars of the region:

[The] varied doctrinal interpretations of the PIL Code Article 17 amply demonstrate the failure of the legislator to provide a workable definition of the concept of a legal person’s nationality. Domestic courts will often have to determine the content of foreign law in order to determine the State to which the legal person belongs. Furthermore, certain questions remain without a direct answer. For example, a company incorporated in Serbia may change its seat by a resolution of a governing body specified in its by-laws (statute). If a company transferred its central administration abroad, would it still be considered as a domestic company? The answer is probably yes, but the court would have to consult the law of the real seat to see whether the company is considered

to be a national there. What would happen, on the other hand, if a legal person incorporated abroad transferred its real seat to Serbia? Would such a legal person be considered as belonging to Serbia according to domestic law? Neither the PIL Code in Article 17, nor other laws give an explicit answer to this question.<sup>277</sup>

Although the authors recognize the confusion that the law creates as to what law should be applied when resolving the question of the legal person, neither the law nor scholarship have provided any leads for the judiciary to evaluate what “the real seat” is. What elements should the judiciary take into account when assessing whether a company has used the Serbian or Kosovo systems for just mere official registration or incorporation, maybe for tax purposes, but *de facto* its seat is elsewhere? How is the judge supposed to assess whether a seat in Serbia or Kosovo is “real” or “fictive” and then know what law to apply to it? This remains unknown, at least in the eyes of scholarly writings to date.

A Serbian court decision seems to suggest that the fact that a domestic subsidiary was founded solely by a foreign legal person, combined with their jointly causing damage to a Serbian plaintiff, satisfies the grounds for jurisdiction over that foreign parent company. A German foreign company had objected to jurisdiction over it as a second-tiered co-defendant. However, the High Commercial Court concluded that the lower courts were right to assert jurisdiction over the case since the domestic subsidiary was founded solely by that German company and since they jointly acted in violation of the contractual obligations on the sale of goods to the plaintiff.<sup>278</sup>

The same difficulties that derive from the absence of a definition for domicile in the PILA are seen here in Kosovo, too. However, Kosovo has taken this difficulty to a whole new level. That is because, the English version of the Law on domicile and residence is titled the Law on “Dwelling and Emplacement”.<sup>279</sup>

The terms “dwelling” and “emplacement” are highly perplexing when seen at first in such a context. A simple search of “dwelling” gives results “oil dwelling” or related fields, but not domicile. The closest use of this term is seen in the First Restatement of Conflict of Laws of United States of America of 1934 which explains that “when a person has one home and only one home, his domicile is the place where his home is” and that “a home is a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place.”<sup>280</sup>

It becomes a little clearer when the definition of “dwelling” in art. 2 of the law is “a place in which a resident is situated in order to live there permanently”. Similarly, “emplacement” is also defined clearly as “a place in which the resident is situated temporarily because of work, education, or other reasons, but does not have an intention to live there permanently.” The law applies to the citizens of Kosovo as well as foreigners pursuant to art. 2.

There is, however, an explanation for this misguided use of highly perplexing terms, which goes back to Kosovo’s recent history. This Law was passed by the then “Provisional Institutions of Self Government of Kosovo” overseen by the United Nations Mission in Kosovo (UNMIK) in 2007. Back then, Kosovo had not yet declared its independence and hence any element of statehood, even as simple as mentioning “domicile” had to be avoided. As an author explained,

there are cases where UNMIK has promulgated the Assembly’s laws with some amendments required so that all claims or indications that Kosovo may be an independent state are avoided. The UNMIK Regulation promulgating the law on dwelling and emplacement amends, throughout the law, the word “Kosova” by “Kosovo”, the word “citizen” by the words “habitual resident”,

271 Decision of the Court of Appeals in Belgrade, Gž. 7857/2012 of 6.2.2014.

272 Decision of the High Commercial Court in Belgrade, Pž. 8908/98 of 30.12.1998.

273 Maja Stanivuković. “Tačke Vezivanja Za Komercijalna Prava Lica u Međunarodnom Privatnom Pravu (Points of Connection for Commercial Legal Persons in International Private Law).” *Zbornik Radova Pravnog Fakulteta u Novom Sadu* 36, 2002, p. 181.

274 Ibid.

275 Asllan Bilalli and Hajredin Kuçi, *E Drejta Ndërkombëtare Private*. Prishtina, Kosovo, University of Prishtina, 2012.

276 Maja Stanivuković. “Tačke Vezivanja Za Komercijalna Prava Lica u Međunarodnom Privatnom Pravu (Points of Connection for Commercial Legal Persons in International Private Law).” p. 181. The original text is in Serbian and the citations of this article are the author’s own translation.

277 Ibid., p. 240.

278 Decision of High Commercial Court, Pž. br. 4897/2004-1 of 15.7.2004.

279 Law no. 02 /L-121 on Dwelling and Emplacement, *Official Gazette of the Republic of Kosovo*, Year III, No. 40, October 2008, available at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2589>.

280 Restatement (First) of Conflict of Laws § 12 and §13 (1934) cited in Susan Frelich Appleton, “Leaving Home? Domicile, Family, and Gender,” *U.C. Davis Law Review*, 2014, 1954.

the words “Ministry of Defence and Kosovo Security Force” by the words “other governmental institutions”, and the words “defence forces” by the words “Kosovo Protection Corps.”<sup>281</sup>

A sigh of relief can be seen in the Albanian and Serbian versions of the law, where the classic terms “domicile” and “residence” were kept. That, at least, clears the fog for the local judges but not for the foreign lawyers or scholars who need it.

Therefore, in the absence of a definition in the PILA, the term domicile should be understood in accordance with Kosovo’s domestic law, which would be the aforementioned Law on Dwelling and Emplacement.<sup>282</sup> Although Kosovo has a Law on Foreigners,<sup>283</sup> it does not regulate the domicile of foreigners otherwise. The Law, among others, regulates matters such as residence permits, visa types and conditions for such, as well as the status of stateless persons. Hence, the domicile of nationals of Kosovo as well as those of other countries is regulated therein, since art. 2 of the law defines “citizens” as “nationals of Kosovo or foreigners”. The same article defines domicile as “the place in which the citizen is situated with the intention to live there permanently.” Again, it should be noted that this interpretation stems from the Albanian and Serbian versions of the law – not the version in English.

These same elements should be used when assessing whether a person is domiciled abroad, e.g. while assessing whether jurisdiction can be exercised based on the domicile of that person. Foreign domicile is usually proven by the party itself by providing the necessary paperwork. This is, however, a presumption that the person is indeed domiciled in that state and may be proven otherwise.<sup>284</sup>

As noted above, it is possible, and it was also recognised by courts in the region, that a person may be domiciled in two countries. Those are the cases when the laws of both countries consider the person to be domiciled in their respective state.<sup>285</sup> The law does not specifically address the resolution of a positive conflict of domiciles – i.e., what connecting factor would be applied in such cases. This is also not a matter addressed thoroughly in regional doctrine. However, it is a consideration that is more pertinent for determining the applicable law, rather than jurisdiction.<sup>286</sup> If the defendant is considered to have domicile in a particular state, that state will consider itself competent to exercise jurisdiction.

Better news comes from Kosovo’s New Draft PIL Act<sup>287</sup>, which regulates these criteria in a more sophisticated manner. Kosovo’s new choice of connecting factor – similar to Macedonia and Serbia – is now a combination of both domicile and habitual residence. Having noted the problems above with their definition in domestic laws, it is satisfactory to see that the new draft law now provides definitions for domicile and habitual residence, for natural and legal persons separately. While habitual residence is defined as the “permanent centre of his/her vital activities,”<sup>288</sup> domicile is the place “where that person has settled with the intention to live there permanently.”<sup>289</sup>

### 5.1.1. Plurality of parties

In cases involving multiple defendants, there is a likelihood that the resulting judgement may result in multiple parties being held liable and enforcement being sought against all. The HCCH

<sup>281</sup> Alexander Orakhelashvili, “The International Court’s Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the ‘Foam on the Tide of Time,’” *Max Planck Yearbook of United Nations Law* 15 (2011).

<sup>282</sup> Law no. 02 /L-121 on Dwelling and Emplacement, *Official Gazette of the Republic of Kosovo*, Year III, no. 40, October 2008, available at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2589>.

<sup>283</sup> Law no. 04/L-219 on Foreigners, *Official Gazette of The Republic of Kosovo*, No. 35, September 2013, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8876>.

<sup>284</sup> Aleksandar Jakšić, *Međunarodno privatno pravo, opšta teorija*. Beograd, 2017, p. 326.

<sup>285</sup> Ulrich Magnus, Peter Mankowski, and Richard Fentiman, *Brussels I Regulation*. Sellier, 2007, pp. 669–70.

<sup>286</sup> In cases of applicable law, there might be a need to refer to the ‘layers’ provided in art. 11 or 12, designed for matters of double nationality. In such cases, as a last resort, the courts might apply the “closest connection.”

<sup>287</sup> The Draft Law has last been discussed in the Parliament in November 2020. Due to the fall of the Parliament and the Government, the Draft will be reprocessed for adoption in 2021.

<sup>288</sup> Art. 6.

<sup>289</sup> Art. 6 para. a. Since this is still the first draft of the proposal, these Articles will be renumbered, likely making this art. 7.

2019 Judgements Convention requires that the filters laid down in art. 5 be assessed individually for each party – i.e., requesting the assessment of the connection of each liable defendant with the state of origin.<sup>290</sup> As the Report explains, “the mere fact that only one of them has, for example, their habitual residence in the State of origin (Art. 5(1)(a)) is not sufficient for the other co-defendants to be considered to be habitually resident in that State. In such a case, the judgment will not be eligible for recognition and enforcement against the other two co-defendants unless another Article 5 filter is satisfied.”<sup>291</sup>

This might present many challenges in enforcing decisions from the region in the future since one of the elements where the Western Balkan countries (and the Brussels *Ibis*) are in sync is the issue of jurisdiction over multiple defendants. In these cases, the courts of the Western Balkans will – similar to the Brussels *Ibis* – use the anchor defendant domiciled in their state, to assert jurisdiction over the other defendants not domiciled there.

Art. 46 of the PIL Act stipulates that the Kosovo court has jurisdiction over a case of several defendants as jurisdiction can be asserted over them on basis of the general jurisdiction provided therein. In applying this same article, the Serbian High Commercial Court had decided that the German parent company was rightfully considered a co-defendant in a case where its Serbian subsidiary had violated its contractual obligations to the plaintiff. The Court concluded that it “has jurisdiction in this dispute both for the first and the second defendant, since they jointly worked and acted to bring the damage to the plaintiff, which resulted in the solidarity of the defendants.”<sup>292</sup>

The same principle is contained in the Albanian PIL Act art. 80, the Serbian Draft PIL Act art. 16, Kosovo Draft PIL Act art. 111, the Montenegrin PIL Act art. 100 and North Macedonia New PIL Act art. 107.

Naturally, with these being national PIL acts, they apply to all defendants equally; their applicability is not limited to only some co-defendants which is the case with art. 8 of Brussels *Ibis*.

## 5.2 Prorogation of jurisdiction (expressively/tacitly, before or after the commencement of the procedure)

### 5.2.1. Prorogation of jurisdiction through a choice of court agreement

The former Yugoslav PIL Act – now the current Kosovo PIL Act – provides for very clear language on the issue of prorogation of jurisdiction. In art. 49, the Act regulates both the issue of choice of court agreements towards the courts of one of the countries that apply this law, and allocation of jurisdiction towards a foreign court. The first paragraph provides that the parties may agree on the jurisdiction of a foreign court under two conditions: first, that one of the parties is “a foreign citizen or a legal entity having its seat abroad” and secondly, that “the dispute in question is not a dispute for which the courts of [Kosovo have] exclusive jurisdiction pursuant to the provisions of this or any other federal law.” The second paragraph also foresees one restriction for allocating jurisdiction in favour of the courts of any of these countries: one of the parties must be a national or a legal person with the seat in Kosovo.

The provision is quite clear in that Kosovo courts are not open to cases of non-citizens and neither do they allow jurisdiction to be “taken away” if both parties to the agreement are their nationals. The latter part of the condition differs substantially with the modern art. 25 of the Brussels *Ibis* which applies to agreements on jurisdiction in favour of an EU Member State court, without restrictions as to domicile of the parties. With art. 49 of Kosovo PIL Act still in force,

<sup>290</sup> Francisco Garcimartín and Geneviève Saumier, “Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention)” (The Hague, 2020), para. 137.

<sup>291</sup> *Ibid.*

<sup>292</sup> Judgement of High Commercial Court, Pž. no. 4897/2004-1 of 15.7.2004.

parties from Kosovo may still be successfully sued in Kosovo, irrespective of having a choice of court agreement concluded in favour of an EU court.

While the Kosovo courts are less familiar with cases involving forum selection clauses,<sup>293</sup> Serbian courts have had more opportunities to apply this provision. These courts have been very strict in applying their own procedural rules, even at the expense of an agreement for jurisdiction of a foreign court. The Commercial Appeals Court has turned down a defendant's appeal on grounds of jurisdiction because his objection on the grounds that the parties had an agreement on jurisdiction was given at a later stage in the proceedings before the Basic Commercial Court.<sup>294</sup> In another Legal opinion that was given by the sitting Division on Commercial Disputes of the Serbian Supreme Commercial Court, the court opined that two foreign parties may only litigate a case before Serbian Courts if they are entitled to on another legal basis, e.g. art. 54 para. 2 in this case, because they would not be allowed by virtue of art. 49 para. 2 to agree on the jurisdiction of these courts since none of them have a seat in the Republic of Serbia.<sup>295</sup> The same interpretation is likely to be adopted by Kosovo courts, if faced with such a case.

The PIL Act, however, did *not* address the issue of validity of the agreement in particular, nor did it leave space for the possibility of an invalid choice of court agreement to be possible. A general provision that evaluates the validity of "a legal transaction or a legal act" as to form is provided in art. 7. According to the provision, a legal transaction or act is considered to be valid either according to the law of the place where the legal transaction was entered into or where the legal act was undertaken, or according to the law that is applicable to the content of the legal transaction or legal act. It would seem rather practical to apply this provision to the validity of choice of court agreements as well. However, scholars in the region do not seem to agree that this provision addresses the matter of validity of prorogation agreements in particular. They argue that despite the absence of formal requirements in the PIL Act, "it should be taken that (...) the agreement must be in writing – *ad solemnitatem*."<sup>296</sup> This argument is based on an analogy with provisions on Arbitration from the same PIL Act, and the provisions of the (Serbian) Law on Contentious Procedure, which provide for such formal requirements. They also prescribe that the proof of existence of an agreement be done in writing *ad probationem* or other writings. However, this last criterion, should be interpreted "elastically" so as to include the exchange of letters, telegram and other forms of communication.<sup>297</sup> Other authors, on the other hand, affirm that a written form of agreement on prorogation is *not* a requirement for its formal validity.<sup>298</sup> Nevertheless, a Yugoslav Federal Court Decision in 1997 had not only required a written form of the agreement, but it also held that "the agreement was only valid if the signature is placed and if it concerns the dispute at hand or other disputes that derive from the respective legal relationship. An agreement on jurisdiction that is not signed by both parties to the agreement is not to be considered valid."<sup>299</sup> It is not clear what legal basis the judges used to evaluate the formal validity of the agreement back then<sup>300</sup> and neither is such a legal basis clear now.

The first group of authors have also put forward the issue of severability of the choice of court agreement.<sup>301</sup> They also instruct that the applicable law to the issue of substantive validity is *lex fori prorogati* but they do not show the legal basis where it derives from.<sup>302</sup>

293 During a case law discovery phase in Kosovo, conducted by the author in 2015, one case was noted before the Prishtina Basic Court, Department for Commercial Matters, in which the parties had allocated this court's jurisdiction through an agreement. Case No. 535/14, where a local company as claimant has sued a foreign consulting company for return of debt, was still open throughout the research phase, and apart from there being an agreement, no other arguments on the jurisdiction had taken place up to that point.

294 Decision of the Serbian Commercial Court of Appeals (Privredni Apelacioni Sud), Pž. 10343/2011 of 18 January 2012.

295 Legal Opinion (Pravno švatanje) adopted by the Commercial Disputes Division of the Higher Commercial Court, held on 26 March 2007, Case Law of Commercial Courts Bulletin No. 1/2007.

296 Tibor Varadi, Bernadet Bordaš, and Gašo Knežević, *Međunarodno Privatno Pravo*, V (Novi Sad: Forum, 2001), p. 494.

297 Varadi, Bordaš, and Knežević, p. 494.

298 Maja Stanivuković and Mirko Živković, *Međunarodno Privatno Pravo*, Belgrade, 2004, p. 193.

299 Stanivuković and Živković, p. 193, citing Federal Court decision no Gsn 5/97, 3 April 1997.

300 The authors have not provided further elaboration on the case or provided more information on it.

301 Tibor Varadi et al. *Međunarodno Privatno Pravo* XIII. Belgrade, 2010, pp. 508–9.

302 Ibid.

Although not specifically on the issue of choice of court agreements with a foreign element, art. 66 para. 3 of the Kosovo Law on Civil Procedure (Law on Contentious Procedure) expressly requires that the choice of court agreement be "in writing and signed by both parties." Neither the Law nor the commentary<sup>303</sup> recognises the problematic potential of the condition that the agreement be "signed by both parties" in the modern world. In today's world, when most agreements are reached without the presence of the parties in the same place, such a requirement may result in the invalidity of most agreements. It can only be hoped that the Kosovo courts interpret such a requirement broadly, so that it also entails other forms of signature, including those online or agreements that are not typically signed but where consent is considered to have been given.<sup>304</sup>

The conclusion (recommendation) that an agreement on jurisdiction as per the current PIL Act should be in writing is indeed a logical, but also tenacious conclusion. In absence of such a requirement, there would not be much to differentiate it from the tacit agreement to jurisdiction, or voluntary appearance or consent to jurisdiction. The absence of such specifications in the law could perhaps be blamed on the time of the drafting of the law. Notwithstanding the logic, providing with certainty that there is a clear requirement on a certain form of the agreement, albeit as basic as a written form signed by both parties, does have a dose of tenacity in it, given that the same law *does* provide formal requirements as well as some further provisions when regulating arbitration agreements.

### 5.2.1.1. Prorogation of jurisdiction foreseen in Draft New Kosovo PIL Act

The fundamental changes that the Draft New Kosovo PIL Act brings can be grouped into three main points; first, the draft does not limit the choice of either domestic or foreign courts to any requirement of nationality, domicile or residence;<sup>305</sup> secondly, although it considers an agreement to be exclusive unless otherwise agreed,<sup>306</sup> it also recognizes that more than one court may be chosen with such an effect;<sup>307</sup> and thirdly, in addition to regulating the formal requirements of agreements,<sup>308</sup> it regulates the substantive validity of agreements in favour of a Kosovo court<sup>309</sup> and those in favour of a foreign court separately and, most important, differently.<sup>310</sup> The latter – the "tailor made" techniques for addressing these two types of choice of court agreements differently – is indeed an impressive effort which will surely have a positive practical impact.

Clearly, the substantive validity of a choice of court agreement towards a Kosovo court will be evaluated in accordance with the Kosovo law. Conversely, the formal as well as substantive validity of an agreement that chooses a foreign court will be evaluated pursuant to the law of the chosen forum. However, this provision also adds that the permissibility or admissibility of such an agreement to be concluded will be evaluated "also in accordance with Serbian law."<sup>311</sup> This last part is directly linked with the way in which agreements on jurisdiction are conditioned under the new draft; similar to the Draft Serbian PIL Act, the Montenegrin PIL Act, these agreements should be agreements "in matters with an international element in which the law of the Republic of

303 Iset Morina and Selim Nikci. *Komentar: Ligji Për Procedurën Kontestimore*. 1st Edition. Deutche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 2012, p. 149.

304 See e.g. interpretations of the CJEU of the form requirements within the Brussels Convention (now Brussels Ibis) in *MSG v Gravières Rhénanes*, Case C-106/95 (1997).

305 Art. 123 "1. In matters with an international element in which, according to the law of the Republic of Kosovo, the parties may freely dispose of their rights, they may agree upon the jurisdiction of the courts of the Republic of Kosovo to settle a dispute that has arisen or may arise out of a particular legal relationship"; and art. 124, regulating jurisdiction of foreign courts "1. In matters with an international element where the parties, according to the law of the Republic of Kosovo, are allowed to freely dispose of their rights, the parties may agree upon the jurisdiction of the court or courts of a foreign state to settle a dispute that has arisen or may arise out of a particular legal relationship".

306 Art. 123 "2. The jurisdiction of the court of the Republic of Kosovo under paragraph 1 of this Article shall be exclusive, unless the parties have agreed otherwise."

307 See above, para. 2 "unless the parties have agreed otherwise" or, in art. 124 para. 1 "court or courts."

308 Art. 125.

309 Art. 123 para. 3 "The material validity of the agreement on jurisdiction of the court of the Republic of Kosovo shall be governed by the law of the Republic of Kosovo." "The material validity of an agreement on jurisdiction of the court of the Republic of Serbia is evaluated in accordance with the law of the Republic of Serbia."

310 Art. 124 para. 4 "The material and formal validity of the agreement on the prorogation of a foreign court shall be governed by the law of the state of the chosen court, whereas the admissibility of the agreement is concurrently governed by the law of the Republic of Kosovo."

311 Ibid.

Kosovo allows parties to freely dispose of their rights.” This may make choice of court agreements subject to laws other than the PIL Act and may reduce predictability for the parties. That aside, the Kosovo lawmaker has clearly intended to limit the recognition of jurisdiction pursuant to choice of court agreements for matters other than what its own law allows by inserting a clause in art. 124 which provides that the permissibility of such an agreement will be evaluated against the Kosovo law as well.

With regard to form, the Kosovo Draft PIL Act provides for the usual requirements: an agreement in writing or an oral agreement evidenced in writing afterwards as well as electronic ones; or in accordance with the parties’ practices or those of the trade.<sup>312</sup> Finally, it also explicitly provides for the severability of the agreement on jurisdiction and the agreement as a whole.<sup>313</sup>

### 5.2.2. Express and implied consent

One of the bases to allow for enforcement of a decision in a contracting state, according to the HCCH 2019 Judgments Convention, art. 5 para. 1(e), is if “the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given.” Furthermore, another form of consent, as given by art. 5 para. 1(f), is if “the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law.”

With regard to the express consent, regulated by (e), there is no specified form: it can be given orally or in writing, but it does “require a positive act (orally or in writing), as opposed to a failure to raise an objection, for example, or the mere withdrawal of a challenge to jurisdiction of the court of origin.”<sup>314</sup> As to the implied consent, pursuant to (f), it is deemed to be the type of consent “typically from the defendant arguing on the merits and failing to contest the jurisdiction of the court of origin.”<sup>315</sup>

The Kosovo PIL Act treats this matter rather differently – in a single provision – but with a highly similar effect. It does not address the matter of express consent to the jurisdiction, except through a choice of court agreement. Art. 50 of the PIL Act considers “that the defendant has given his/her consent by lodging a reply to the action or objection to a payment order without contesting jurisdiction or if he/she has engaged in litigation.” “Lodging a reply” should be understood not only as filing a counterclaim but also any other reply where it does not express his challenge of the jurisdiction.

In applying the same provision in the (now) Serbian PIL Act, Serbian court practice shows a rather strict application of this provision. The Commercial Appeals Court refused a defendant’s appeal based on an existing choice of court agreement in favour of Austrian courts since the defendant had tacitly accepted the Serbian court’s jurisdiction. Referring to art. 50, the court noted that “the law regulated in a timely manner the period within which jurisdiction may be challenged,” suggesting that this objection should have been raised at the beginning of the procedure.<sup>316</sup> The same principle has been confirmed by the High Commercial Court, upholding the decision of a lower court, noting that “the first action [the defendant] had taken in this proceeding objected to the jurisdiction of the court, seeking the application of Slovenian law and court proceedings in K. and expressly pleaded not to accept the jurisdiction of this court.”<sup>317</sup>

The same interpretation is expected by the Kosovo courts: in a similar decision of the Prishtina

<sup>312</sup> Art. 123.

<sup>313</sup> Art. 123 “3. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; 4. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.”

<sup>314</sup> Francisco Garcimartín and Geneviève Saumier, “Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention),” para. 162.

<sup>315</sup> Francisco Garcimartín and Geneviève Saumier, para. 165.

<sup>316</sup> Decision of the Serbian Commercial Court of Appeals (Privredni Apelacioni Sud), Pž. 10343/2011 of 18 January 2012.

<sup>317</sup> Decision of the Serbian High Commercial Court (Viši trgovinski Sud) Pž. 8989/2009 of 18 November 2009.

Basic Court, the court rejected a defendant’s plea for lack of jurisdiction over it, noting that the plea should have been made earlier in the proceedings, though without noting when exactly.<sup>318</sup> A major flaw that is found in Kosovo’s Civil Procedure Act (Law on Contentious Procedure) is that it does not specify the exact moment up to which a defendant can object to the jurisdiction of the court. Art. 18 para. 3 provides that the court need not drop the case if “the jurisdiction of the court is dependent on the approval of the defendant and the defendant has already given his or her consent,” but the moment of “giving consent” is not specified. The commentary on the Law, on the other hand, sees the consent within this provision in light of an agreement between the parties as a prorogation agreement.<sup>319</sup> Some guidance can be sought in art. 20 para. 2 of that Law, which requires that the defendant object to the court’s lack of jurisdiction *because of the existence of an arbitration agreement*, up to the moment of “responding to the claim.”<sup>320</sup> Nevertheless, the lack of clarity persists as to other non-arbitration-related cases.

The provisions of the Draft New Kosovo PIL Act regulate these matters in a much clearer way, and is highly comparable to the HCCH 2019 Judgments Convention provisions cited in this section. Kosovo’s Draft art. 126 provides that the defendant is considered to have tacitly consented to jurisdiction if: it filed a written answer to the claim or he/she has filed an objection to the payment order, without contesting jurisdiction; or pleaded to the merits at the preparatory hearing or, if the preparatory hearing has not been held, at the first hearing on the merits, without contesting jurisdiction; or it has filed a counterclaim. The second paragraphs of these provisions also provide for the obligation of the court to inform defendants that are considered to be weaker parties – consumers, employees or an insured person, in an identical manner as art. 26 para. 2 of Brussels *Ibis*.

## 5.3 Compatibility of the other jurisdictional criteria in the Convention with the Kosovo PIL Act

### 5.3.1. Jurisdiction based on the activities of a branch, agency or other establishment

The Judgments Convention, art. 5 para. 1(d) provides for grounds of recognition if “the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment.” These terms are not defined and the Explanatory Report notes that “an establishment implies a stable physical presence of the defendant in the State of origin where the defendant carries out an activity.”<sup>321</sup>

There is no provision equivalent to this basis of jurisdiction in the current Kosovo PIL Act. There are provisions that provide special jurisdiction within this act, but they are conditioned with the contractual and non-contractual obligations in question and their place of contract and performance. Therefore, they are not oriented towards the defendant but rather towards the obligation – be it contractual or non-contractual. These bases will be analysed in the section below.

However, there is an emergence of provisions similar to Brussels *Ibis* among the Western

<sup>318</sup> Department of Commercial Matters, Case 55/13. The Court dismisses the argument of the defendant on jurisdiction because of the party’s lack of legal standing. The court noted that this issue should have been brought up sooner in the proceedings. It does not note, however, the legal basis of that conclusion.

<sup>319</sup> Morina and Nikci, *Komentar: Ligji Për Procedurën Kontestimore*, p. 60.

<sup>320</sup> Emphasis added, Art. 20 (original English version) “1. If litigant parties have contracted an arbitrage to settle the dispute, the court, to which has been submitted the claim which includes the same contentious parties, based on the objection of the defendant shall be declared incompetent, all the proceedings shall be nullified and the claim dropped. The court shall not act in this manner if it determines that the arbitrage contract is not valid, the validity is terminated or it cannot be implemented. 2. Objection from section 1 of this article, the defendant may submit by responding to the claim.”

<sup>321</sup> Francisco Garcimartín and Geneviève Saumier, “Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention),” para. 157.

Balkans countries. This is first witnessed in the Albanian PIL Act, art. 80, the Montenegrin Act, in art. 102 and in the more recent PIL reforms in North Macedonia, Serbia and Kosovo. The new Draft Kosovo PIL Act art. 150 contains provisions that are almost verbatim from the Brussels *Ibis* art. 7 para. 5.

One important difference between this provision of Kosovo's future PIL Act and the Judgments Convention art. 5 para. 1(d) is that "establishment" is not limited to "establishment without legal personality." This excludes subsidiaries and any other part of a commercial organisation that is constituted as a separate legal entity.<sup>322</sup> This is quite a difference from art. 7 para. 5 of the Brussels *Ibis*, which was interpreted by the CJEU to also include subsidiaries.<sup>323</sup>

The term "establishment" was at the focus of the CJEU very recently,<sup>324</sup> albeit in the context of a different regulation. The Court has had to decide whether a separate subsidiary of a non-EU parent company was an "establishment" in the EU, for the purposes of the Regulation on European Union Trade Mark.<sup>325</sup> The Advocate General in that case relied heavily on Brussels *Ibis* Regulation's understanding of "establishment" under art. 7 para. 5 and essentially noted the guidance of four key cases that shape the understanding of establishment under art. 7 para. 5. Firstly, in *De Bloos*, the Court had decided that "one of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body."<sup>326</sup> Secondly, the AG recalled the language of the Court's decision in *Somafer*, to accentuate the importance of the "special connection" that the actions of such an establishment have to have with the forum, and the importance of the "appearance of permanence."<sup>327</sup> Thirdly, in *Blanckaert*, the Court had underlined that an establishment "must appear to third parties as an easily discernible extension of the parent body."<sup>328</sup>

Therefore, when assessing the enforceability of future Kosovo judgments on such a basis of jurisdiction, the receiving courts should take note of the breadth of this future provision.

While art. 150 of the Draft Kosovo PIL Act, just like art. 7 para. 5 of the Brussels *Ibis*, covers "disputes arising out of the operation" of an establishment, caution should be called for on account of the resemblance between it and another provision. That is art. 130, similar to art. 24 para. 2 of Brussels *Ibis*, which covers disputes on "the validity of the constitution, the nullity or the dissolution of companies (...), or the validity of the decisions of their organs." Particular attention should be paid to the resemblance of the types of the disputes covered by the two provisions when it comes to the "operations" of a legal person and the "validity of the decision" of their organs. In cases falling within art. 24 para. 2, exclusive jurisdiction pertains to the courts where such an establishment is seated, which is determined by the PIL rules of the court concerned with the question. This rule should be interpreted narrowly.<sup>329</sup>

### 5.3.2. Jurisdiction based on the place of performance of a contractual obligation

Art. 5 para. 1(g) of the Judgments Convention makes way for the recognition of judgments that were rendered by the courts of the place where a contractual obligation was performed. This provision, mirroring the typical special jurisdiction rules,<sup>330</sup> requires that the judgment "ruled on a

contractual obligation" be given by the court of a State "in which performance of that obligation took place." This particular place is to be determined either by the agreement of the parties or the law applicable to the contract in absence of such an agreement. This is all conditioned – "unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State."

This particular basis of jurisdiction is quite a peculiar one in the Kosovo PIL Act. The pursuit of identifying provisions on special jurisdiction on any commercial or contractual matters within this law is not very forthright. Such a pursuit requires a combined analysis of art. 54 and 55 of the Act. As a starting point in assessing the special jurisdictional criteria, one ought to look at art. 54, which contains two key provisions: the first provision uses property as a connecting factor, whereas the second provision speaks of obligations and uses connecting factors pertaining to the obligations of the parties. Similar to some other provisions,<sup>331</sup> this provision has been translated differently in different versions of the law, which makes the "scouting" for special jurisdiction on commercial matters even harder. In some versions<sup>332</sup> the provision is translated as claims under "*property law*" which is a narrow translation of the original Serbian term "imovinskopravnim zahtevima." Other versions, scholars<sup>333</sup> and practice have interpreted it as "pecuniary claims"—an opinion shared by this author as well.

As a starting point, the first part of the article provides that "in disputes on pecuniary claims, the court of the Federal Republic of Yugoslavia shall have jurisdiction if the defendant's property or the object claimed is situated in the territory of the Federal Republic of Yugoslavia." Undoubtedly, this provision raises the question of what is included in "property" under this provision. It, unquestionably, raises the concern of whether this provision can be seen as a twin provision of that which is<sup>334</sup> found in the German Civil Procedure Code (ZPO) art. 23<sup>335</sup> which provides for jurisdiction over foreign defendants for as long as their assets were located within the territory of Germany.<sup>336</sup> This article, enshrining forum patrimonii, was added to allow suits against foreigners and was seen as entirely exorbitant.<sup>337</sup>

It is assumed that the Yugoslav provision was inspired by the said German provision since their content is identical.<sup>338</sup> One of the most important aspects to be examined is what kind of property is meant to serve as a connecting factor, being a normative ambiguity which most certainly calls for clarification. Prof. Stanivuković and Živković suggest that art. 54 prescribes jurisdiction to Serbian courts "in disputes on pecuniary claims, if the defendant's tangible or intangible property is found in the territory of Serbia."<sup>339</sup> The same is shared by Varadi, Bordaš and Knežević, who explain that the value of the property, compared to that of the dispute, is irrelevant and even a property that is disproportionate to the value of the dispute may be used for these purposes.<sup>340</sup> Indubitably, the same is presumed to be valid for Bosnia and Herzegovina and Kosovo, whose authors have not given any different interpretation. In applying this provision, the Serbian Supreme Commercial Court has reiterated that the Courts shall not exercise jurisdiction over a foreign company when such a defendant does not have property in the country and the parties have not contractually designated jurisdiction to them.<sup>341</sup>

defendant's domicile", Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas', Mammee Bay Resorts Ltd, Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd, Case C-281/02 (2005).

331 See Section 5.1. above, explaining divergences in translation of "domicile" throughout each countries' versions of the law.

332 See e.g., the version available on the website of the Serbian Ministry of Justice: [http://arhiva.mpravde.gov.rs/images/Law%20on%20resolving%20conflict%20of%20law\\_180411.pdf](http://arhiva.mpravde.gov.rs/images/Law%20on%20resolving%20conflict%20of%20law_180411.pdf)

333 All authors cited in this section.

334 The current version shows that the provision was repealed: [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p0058](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0058) but it is still referred to as existing, e.g., in Varadi, Bordaš, and Knežević, *Međunarodno Privatno Pravo*.

335 This jurisdictional basis is analysed in detail in the next chapter, Property-oriented jurisdiction.

336 Ralf Michaels, "Jurisdiction, Foundations." *Elgar Encyclopedia of Private International Law*, n.d.

337 Peter Hay, "Notes on the European Union's Brussels-I 'Recast' Regulation." *The European Legal Forum Forum Iuris Communis Europae* 13, no. 1, 2013, pp. 1–36.

338 Michaels, "Jurisdiction, Foundations."

339 Toni Deskoski, "The New Macedonian Private International Law Act of 2007," *Yearbook of Private International Law* 10 (2008), pp. 441–58, 231.

340 Stanivuković and Živković, "Serbia," 2009.

341 Decision of Supreme Commercial Court (Viši Privredni Sud) No. PZ. 415/97 of 5 March 1997, Buletin No. 2/1998: 18.

322 Ibid.

323 SAR Schotte GmbH v Parfums Rothschild SARL, Case 218/86 (1987).

324 A. De Bloos, SPRL v. Société en commandite par actions Bouyer, Case 14/76 (1976).

325 Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78).

326 AG Tanchev Opinion for Hummel Holding A/S v Nike Inc., Nike Retail BV, Case C-617/15 (2017), citing Hummel Holding A/S v Nike Inc., Nike Retail BV, Case C-617/15.

327 AG Tanchev Opinion for A. De Bloos, SPRL v. Société en commandite par actions Bouyer, Case 14/76.40-41, citing Somafer SA v Saar-Ferngas AG, Case 33/78 (1978).

328 Hummel Holding A/S v Nike Inc., Nike Retail BV, Case C-617/15.

329 Adrian Briggs, *Civil Jurisdiction and Judgments*, Sixth (Informa Law, 2015). Berliner Verkehrsbetriebe (BVG), v JPMorgan Chase Bank NA, Frankfurt Branch, Case C-144/10 (2011), Nicole Hassett v South Eastern Health Board and Cheryl Doherty v North Western Health Board, Case C-372/07 (2008).

330 A type of jurisdiction "based on the existence of a particular close connecting factor between the dispute and the courts other than those of the State of

The answer to this question may be inferred from a Legal Opinion of the Commercial Disputes Division of the Supreme Commercial Court of Serbia, in which it has given quite a broad interpretation of what property within the meaning of this article includes. In assessing whether the local courts may have jurisdiction in a case between two foreign legal entities in a trademark infringement matter, the Court opined that jurisdiction can be asserted in accordance with art. 54 because the merchandise whose destruction was in question was located in Serbia and, most importantly, that “claims on destruction of merchandise through which a right was harmed and for proving such a harm, respectively for the prohibition of such harm, can be considered to be a property claim in a broad sense.”<sup>342</sup> In other words, the term “property” within the meaning of art. 54 is not only used to designate immovable property, but movable property as well, such as goods or merchandise sold between parties.<sup>343</sup>

An equally thought-provoking provision for the purposes of special jurisdiction in commercial matters is the second sentence of art. 54, which also vests Kosovar courts with jurisdiction “in disputes concerning obligations *created* at the time when the defendant was present in Kosovo” respectively. Much like many others in this Law, this provision has not been thoroughly discussed in practice or scholarly writings of the region.<sup>344</sup> Its practice in the courts seems to have been quite unequivocal as well. In the case of a citizen of Bosnia and Herzegovina who had entered into a contract in Serbia, the High Court in Subotica had decided that that lower courts were correct in exercising jurisdiction based on art. 54, sentence 2, despite the defendant having moved to Bosnia.<sup>345</sup>

There is a lack of clarity whether the “defendant” in the realm of this provision is a natural person only, or a legal one as well. In addressing this, one author considers that this part of the provision is only applicable to natural persons.<sup>346</sup> Assuming this is accurate, the next question that begs an answer is what would happen in situations where foreign legal persons have, for instance, only operated in one of these countries for a short period of time (e.g., days) and created obligations of any kind there? Most importantly, what would be the rationale behind allowing natural persons to be subject to Kosovar courts but reject such a jurisdictional basis for legal persons?<sup>347</sup> The provision only uses “presence” in the country as a connecting factor - one that can be assumed by natural and legal persons equally. Hence, the opinion shared here is that the provision should be applicable to legal and natural persons equally.

The other Article that dictates special jurisdiction on contractual matters, art. 55, is not spotless either. Instead of foreseeing a different situation, e.g., providing only for place of performance of the obligations as the connecting factor, this provision foresees *both* of these factors, complicating the matters further. In short, the article gives jurisdiction to the Kosovar courts to rule over disputes concerning obligations created or that are to be performed in these countries against a foreign defendant, if such a person has an agency or representative in the country.<sup>348</sup> Confusion over this

provision stems from the ambiguity over what type of jurisdiction this article regulates. The first part of the article signals a purpose to regulate special jurisdiction – the type of jurisdiction whose epicentre is the nature of the dispute or relation or the facts of the case<sup>349</sup> – whereas the second one uses a connecting factor which is usually attributable to general jurisdiction, i.e., the location of a person’s agency or representative.

This distinction is not merely a theoretical one since the answer to it provides the result to the entire “equation” of special jurisdiction in commercial matters in these countries. If art. 55 designates general jurisdiction, then it does not limit art. 54’s authorisations to courts to adjudicate disputes when property or obligations are connected, regardless of the defendant’s seat. Conversely, if art. 55 regulates special jurisdiction in contractual matters, then it is the provision that limits art. 54’s authorisations to courts in cases when a foreign person is the defendant.

The situation would have been clearer if art. 55 had included the word “only” or “also.” In concrete, had the provision provided that “the court of the Federal Republic of Yugoslavia shall have jurisdiction *only* if that person has its representative office or agency” then it would directly indicate that its intention is to limit the powers set in art. 54, second sentence. On the contrary, had the provision provided that “the court of the Federal Republic of Yugoslavia shall *also* have jurisdiction if that person has its representative office or agency,” then it would be read as broadening the authorisations under art. 54, second sentence. The latter option would, indeed, be more similar to the Brussels *Ibis* approach and the HCCH 2019 Judgments Convention approach.

The view supported here is that art. 55 should be read as an *extension* of art. 54, meaning that they regulate the same type of jurisdiction. In art. 54, the lawmaker intended to prescribe jurisdiction generally over the place of creation or performance of the obligations, whereas in art. 55 it limited this power for cases where a foreign person is the defendant. This can also be deduced from another decision of the Commercial Appellate Court in Serbia, in which the Court reiterated that unless there was proof that a certain Serbian legal person was a registered representative or agent of the Slovenian defendant, the Serbian courts did not have jurisdiction to rule over their contractual matter, without exploring the grounds under art. 54.<sup>350</sup>

This reading leaves the courts *without* special jurisdiction based on obligations created or performed on the territory, over foreign defendants (unless they have the said connections). However, the courts may still be empowered with jurisdiction on *forum contractus* and/or *forum solutionis* thanks to the Civil Procedure Law (Law on Contested Procedure).

Art. 61 provides that “disputes with a physical or legal person with a residence or headquarters outside of our country regarding *obligations created in Kosovo* or that *need to be fulfilled in Kosovo*, the claim may be filed with the court in whose territory his or her permanent representative office for Kosovo or the headquarters of the body trusted to execute such duties is situated.” Furthermore, this law also allows domestic territorial jurisdiction provisions to apply to situations of international jurisdiction for disputes not regulated by other laws or international agreements.<sup>351</sup> These provisions can help supplement the gaps or ambiguities left open in art. 54, 55 or elsewhere in the PIL Act.

Another issue is whether the “obligation” referred to in the articles above is the one that has given rise to the dispute or whether the rule adopts a characteristic performance approach.<sup>352</sup> According to one author, the correct interpretation should be that the obligation is the one that drove the parties to the court since, if the lawmaker wanted to opt for characteristic performance,

342 Legal Opinion (Pravno švatanje) adopted by the Commercial Disputes Division of the Higher Commercial Court, held on 26 March 2007, Case Law of Commercial Courts Bulletin No. 1/2007.

343 This interpretation of the term “property” in the realm of art. 54 is in compliance with the term property within Article 1 of Protocol 1 of the European Convention of Human Rights. This term was subject to hundreds of decisions of the European Court of Human Rights whose case law has consistently maintained that the term “property” is to include movable and immovable property, tangible and intangible assets, and even claims that have a legitimate expectation of becoming property; See e.g., the most recent case against Serbia regarding infringement of Article 1 of Protocol 1 of the Convention, Case of Koka Hybro Komerc Doo Brojler v Serbia (Application no. 59341/09), decision of 14 March 2017.

344 In brief, Hrvoje Sikirić writes that “the place of performance” of the obligation in question, for the purposes of this rule, should be governed by the *lex causae* determined by this PIL Act. However, it should be noted that this provision does not speak of jurisdiction based on the place of performance, but rather of that where the obligation was created; See Varadi, Bordaš, and Knežević, *Međunarodno Privatno Pravo*. Questions presented here were not answered either by the most in-depth Article on this matter written by Professor Milena Petrović, “Posebna Međunarodna Nadležnost Za Sporove Iz Ugovornih Odnosa Prema Pravu EU i Pravu Republike Srbije,” *Annals of the Faculty of Law of University of Belgrade*, no. 1, 2014, pp. 41–61.

345 Decision of High Court in Subotica No. Gž. 605/2011 of 13 September 2011.

346 Varadi, Bordaš, and Knežević, *Međunarodno Privatno Pravo*.

347 By contrast, the Albanian High Court came to a similar conclusion but for an unclear provision that used nationality or headquarters as a connecting factor and justified that since a legal person’s headquarters cannot be moved, (a certain part of) the provision was only applicable to natural persons. See below a detailed analysis of the case *Sil Ceramiche SPA v Mezuraj* (2013) in the section on 4.2.1 Choice of Court Agreements in Albania.

348 Original and full provision as included in art. 55 of Yugoslav PIL Act reads: “In disputes against a natural person or a legal entity having its seat abroad, for obligations that were created in the Federal Republic of Yugoslavia or that must be performed in the territory of the Federal Republic of Yugoslavia, the court of the Federal Republic of Yugoslavia shall have jurisdiction if that person has its representative office or agency in the territory of the Federal Republic of Yugoslavia or if the seat of the legal entity to which it entrusted the conduct of its business is in the Federal Republic of Yugoslavia.”

349 Using the words of Trevor C Hartley, *International Commercial Litigation*, Second Edition, Cambridge University Press, 2015, in describing this type of jurisdiction.

350 Decision of the Commercial Appellate Court, Pž. 9461/2011 of 25 July 2012.

351 Art. 28 para. 3 of the Law on Contentious Procedure.

352 Hartley, *International Commercial Litigation*, p. 58.

“it should have expressly provided so.”<sup>353</sup> This same view is supported here since it is also the view that the CJEU adopted early on.<sup>354</sup>

Finally, it should be noted that there is one more open door for these three countries to assert jurisdiction in the aforementioned matters: retorsion. The Kosovo PIL Act has foreseen, in art. 48, the possibility for its courts to extend jurisdiction as a matter or retorsion towards nationals of a state that has the power to exercise another basis of jurisdiction over its nationals:

*If the court in a foreign State shall have jurisdiction in disputes against Kosovo citizens on the basis of grounds of jurisdiction that do not exist in the provisions on jurisdiction of the court of the Republic of Kosovo, those grounds shall be applicable to the existence of jurisdiction of the court of the Republic of Kosovo in disputes in which the defendant is a citizen of that foreign State.*

Since there is no record of this provision being applied before, it is unknown whether its application is likely to result in exercising jurisdiction today. Nonetheless, it seems to be a theoretical possibility, and one which should be flagged as possibly exorbitant. This basis of jurisdiction is also reiterated in the Law on Contentious Procedure, art. 62.

The Kosovo PIL Act also fails to provide specific protective jurisdiction rules on consumer contracts, individual employment contracts or insurance.

With this entire rather dissatisfying framework of jurisdictional bases in the background, it is very comforting to see that Kosovo has now already taken serious steps towards addressing these matters in its new Draft PIL Act. Art. 146 of Kosovo’s Draft PIL Act is a verbatim transposition of art. 7 para. 1 of Brussels *Ibis* and, as such, much closer to the jurisdiction basis provided for in art. 5 para. 1(g) of the Judgments Convention.

In art. 146 para. 1, the Draft states that the courts in Kosovo have jurisdiction “in matters relating to a contract, where the ground for the claim is an obligation that was performed or should have been performed in the Republic of Kosovo.” Identical to art. 7 para. 1(b) of Brussels *Ibis*, para. 2 of Draft art. 146 defines the place of performance of the contract as the place of delivery of goods, or provision of services, when concerned with such contracts. The Draft PIL Act also provides for special protective jurisdiction rules in consumer, individual employment contracts and insurance matters. They are all based on the equivalent Brussels *Ibis* rules. Hence, their interpretation is expected to be done in accordance with the interpretation of Brussels *Ibis*, as indicated in Draft art. 1, where the Regulation is listed among the acts with which the Draft PIL Act has been harmonised.

### 5.3.3. Jurisdiction based on non-contractual obligation

It is famously clear that art. 5 para. 1(j) of the Judgments Convention is quite limited in scope (damages to persons and property) and is limited to physical injury (including death) for physical persons or loss or damage to property.<sup>355</sup> As such, it does not apply where the judgment is given on a claim based on losses that are not connected to a physical injury or damage to tangible property.<sup>356</sup> Conversely, national PIL provisions, such as the ones of Kosovo PIL Act, do not have such limitations.

Art. 54, which was analysed above in detail, provides for the jurisdiction of Kosovo courts when an *obligation* was created there. Given the inclusion of non-contractual matters within the concept of obligations from all of these countries, it is apparent that this provision is intended to apply to

<sup>353</sup> Ibid.

<sup>354</sup> Petrović, “Posebna Međunarodna Nadležnost Za Sporove Iz Ugovornih Odnosa Prema Pravu EU i Pravu Republike Srbije.”

<sup>355</sup> Francisco Garcimartín and Geneviève Saumier, “Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention),” para. 196.

<sup>356</sup> Ibid.

non-contractual matters of jurisdiction. Insofar the factor of “obligations” is fulfilled, art. 54 may apply to non-contractual obligations as well.<sup>357</sup>

As was submitted above, in contractual matters, art. 55 should be read as an *extension* of art. 54. One of the arguments that supports this interpretation submitted here is that the same logic is intended to apply in non-contractual matters as well when viewing the report between art. 54 and art. 53.

Art. 53 provides for a specific rule on jurisdiction for non-contractual liability for damages. The provision provides a mixture between general and special jurisdiction, with an addition to a factually based anchor as well, by stipulating that “in disputes on non-contractual liability for damages the court of Kosovo shall have jurisdiction if such jurisdiction exists on the basis of provisions of Article 46<sup>358</sup> and Articles 50<sup>359</sup> to 52<sup>360</sup> of this Law or if the damage has occurred in the territory of the Republic of Kosovo.”<sup>361</sup> The second part of this provision also speaks to the applicability of the provision in actions of harmed victims towards insurance companies for compensation of damages.

While the provisions on the applicable law on non-contractual matters are much more detailed,<sup>362</sup> the provision on the jurisdiction on such matters cannot be considered as such. An important note should be made with regard to the absence of specifics as to what is included in the place “where the damage has occurred.” It could be concluded that the same inspiration as in the *Bier*<sup>363</sup> case could be given to this provision as well, but the intention of the lawmaker becomes unclear when art. 28 of the law applicable to non-contractual liability for damages is taken into account. In art. 28, the lawmaker explicitly provided for the application of both laws alternatively, namely “the law of the place where the act was performed or the law of the place where the consequence occurred, depending on which of the two laws is more favourable to the injured person.” This solution, however, is not reflected in the jurisdiction rules of these matters. This could be seen as an indication towards the intention, or lack thereof, of the lawmaker to empower the courts of both locations with jurisdiction as it did with the applicable law. Some scholars only mention the forum in the place “where harm was caused” without elaborating.<sup>364</sup> In applying the same provision, the Commercial Court of Appeals in Serbia has likewise decided on the jurisdiction of the local courts in cases where the harm was caused on the territory of Serbia, despite the action that gave rise to it being outside its territory.<sup>365</sup> The court decided that the Serbian courts had jurisdiction over the foreign defendant, based on art. 53, for the harm that was caused to a local entity through reduction of funds in his bank account as a result of wrongful invoicing issued through abuse of authority from the respondent.<sup>366</sup>

In addition to this, art. 54 which allocates jurisdiction generally for all obligations, speaks only of “obligations *created* at the time when the defendant was *present* in Kosovo.” Does that mean that these courts do not have jurisdiction over, e.g., an unjust enrichment claim towards a foreign defendant because it resulted later, outside its territory, or after the defendant was no longer present in the territory? A simple reading of this provision would suggest just that, which is indeed very limiting to the courts and the plaintiffs who would wish to seek redress for such non-contractual claims.

A better solution is now found in art. 149 of the Kosovo Draft PIL Act, which is a verbatim

<sup>357</sup> Hrvoje Sikirić, “Određivanje međunarodne nadležnosti Uredbe Vijeća (EZ) br. 44/2001, p. 60. See the same position advocated in Petrović, “Posebna Međunarodna Nadležnost Za Sporove Iz Ugovornih Odnosa Prema Pravu EU i Pravu Republike Srbije.”

<sup>358</sup> General jurisdiction based on the domicile or the seat of the defendant.

<sup>359</sup> Provision on defendant’s consent.

<sup>360</sup> Provision on jurisdiction over nationals that live abroad on official duty.

<sup>361</sup> Emphasis added.

<sup>362</sup> See specific provisions between art. 25-29 of the Act.

<sup>363</sup> Handelskwekerij G. J. Bier BV v Mines de potasse d’Alsace SA., Case 21/76 (1976).

<sup>364</sup> Varadi, Bordaš, and Knežević, *Međunarodno Privatno Pravo*.

<sup>365</sup> Decision of the Commercial Court of Appeal, Pž 715/2013 of 30 January 2013 - Court Practice of Commercial Courts - Bulletin No. 4/2013.

<sup>366</sup> Ibid.

transposition of Brussels *Ibis* art. 7 para. 3. In short, it provides for the jurisdiction of its courts if: a) the event giving rise to damage or the damage has occurred there; or b) if a harmful event or damage is likely to occur there.

## 5.4 Exclusive jurisdiction

The Kosovo PIL Act provides for nine cases in which its courts have exclusive jurisdiction. While seven of them relate to status and family matters, one exclusive jurisdiction relates to the administration of immovable property located in Kosovo irrespective of the nationality of the deceased, as stipulated in art. 71, 72 and 73, and one relates to rights *in rem* to immovable property located in Kosovo, including lease and rent.<sup>367</sup> As the analysis below will show, when such an exclusive jurisdiction basis exists here, foreign judgments cannot be recognised or enforced, prorogation of jurisdiction is not possible and domestic courts may not stay their proceedings in case of *lis pendens*.<sup>368</sup>

In the latter points, the Kosovo PIL Act and art. 5 para. 1(h) and (i) of the Judgments Convention are quite similar. The former, in art. 56, provides for “exclusive jurisdiction in disputes on ownership and other real rights on immovables, in disputes concerning disturbance of peaceful possession of immovables, as well as in disputes arising from leasing of immovables, or from contracts on use of the apartment or business premises, if the immovable is situated in the territory of the Republic of Kosovo”. Exclusive jurisdiction, therefore, is envisioned for rights *in rem* for all matters related to immovable property without exception of tenancies.

With heavy influences of the Brussels *Ibis*, the Kosovo Draft PIL Act provides for a different approach when it comes to tenancies. While the first part of art. 142 provides for exclusive jurisdiction based on the location of property on its territory, para. 2 has adopted the solution of Brussels *Ibis*. It provides that “the court of the Republic of Kosovo shall not have exclusive jurisdiction in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, provided that the tenant is a natural person and the landlord and the tenant are domiciled in the same state”. This last part, again, is where the Judgments Convention’s jurisdiction basis and that of the Kosovo Draft PIL Act will differ, as they do with Brussels *Ibis*.

## 6. Procedure for recognition and enforcement of foreign judicial decisions and compatibility with the HCCH 2019 Judgments Convention

### 6.1 Material scope of application

The HCCH 2019 Judgments Convention is limited to judgments in civil or commercial matters (art. 1) and even that has more limitations specified in art. 2. The Convention has a rather lengthy list of exclusions from its scope, ranging from status, maintenance, matrimonial property regime, succession and even defamation.

Being a national law that regulates these matters as a primary source, the Kosovo PIL Act does not have such limitations. It applies to all matters that are indeed excluded from art. 2. That is, of course, for as long as the judgment is provided in “private” matters – matters that fall within the scope of the law. As such, judgments of foreign courts rendered in criminal proceedings may not be recognised and enforced except in the part in which they contain a decision on the pecuniary

claim of the victim.<sup>369</sup> Foreign judgments rendered for the purpose of the collection of State taxes are not enforceable.<sup>370</sup>

One common exclusion between these two comparative ends, however, is the exclusion of arbitral awards. Although the original version of the PIL Act does have provisions on enforcement of arbitral awards (art. 97-100), these provisions no longer apply due to the adoption of a new Law on Arbitration.<sup>371</sup>

### 6.2 Types of foreign judicial decisions that are recognised and enforced (e.g. positive-negative decisions, interim measures)

Another important matter to consider is what types of documents have to undergo the recognition and enforcement procedure. The Judgments Convention provides a definition for “judgment” in art. 3 para. 1(b), to mean any decision on the merits given by a court (...). The Explanatory Report notes that “the term ‘court’ must be interpreted autonomously and refers to authorities or bodies that are part of the judicial branch or system of a State and which exercise judicial functions. It does not include administrative authorities, notaries public or non-State authorities.”<sup>372</sup> Likewise, within the meaning of art. 86 of the Kosovo PIL Act enforcement provisions, a foreign judgement is considered to also be a decision of another authority that is *equated* with a decision of the court in the country where it was rendered, or with a judicial settlement. This brings up the question of notarial deeds which is not very upfront if one only observes the provisions. The Kosovo Law on Notaries provides that foreign notarised deeds are enforceable in Kosovo under the condition of reciprocity,<sup>373</sup> but the procedure is not set therein. This is conditional upon the rights contained therein not being in violation of the legal order of Kosovo. However, if the notarial deed has the same force as a court judgment in the country of origin, its recognition should be requested from the court prior to enforcement procedure.<sup>374</sup> As such, any notarial deed that recognizes a right, gives effect to the determination of a right or obligation would have the same force as a court judgment and would therefore need to undergo the proceedings of recognition and enforcement under the PIL Act. This is also evident from case law in Kosovo, albeit rather limited, but which shows cases of notarial deeds being recognised through a court procedure.<sup>375</sup>

According to the Explanatory Report of the Convention, judgments that give effect to the determination of a legal right and obligation, such as deciding whether a plaintiff has or does not have a right, including declaratory judgements, fall within the scope of the Convention.<sup>376</sup> The same is true for judgments that order the debtor to perform or refrain from performing a specific act, such as an injunction or an order for specific performance of a contract.<sup>377</sup> The Convention explicitly excludes interim measures of protection in art. 3.

The Kosovo PIL Act does not specifically address the matter of whether positive or negative decisions are recognisable or enforceable under it, nor has this topic been treated much among scholars. The assumption would be that both positive and negative decisions should be recognised under these provisions, since they both determine a legal right and/or obligation. Similarly, the possibility of recognition of provisional or interim measures is not discussed either. Art. 77 of the PIL Act does empower Kosovo courts to undertake the necessary provisional measures

<sup>369</sup> Stanivuković and Živković, “Serbia,” 2018, p. 289.

<sup>370</sup> *Ibid*, citing Judgment of the Supreme Court of Croatia, Gž. 561/80 of 6 May 1980, Zbirka sudskih odluka No. 2, 1980, p. 155.

<sup>371</sup> Law on Arbitration, No. 02/L-75, available in English at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2579>.

<sup>372</sup> Francisco Garcimartín and Geneviève Saumier, “Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention),” para. 102.

<sup>373</sup> Article 3.5 of Law No. 06/L-010 on Notary, available in English at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18334>.

<sup>374</sup> Slavko Đorđević, “Kratak Kritički Osvrt Na Priznanje i Izvršenje Stranih Javnobeležničkih Isprava Prema Zakonu o Javnim Beležnicama Srbije,” *Nova Pravna Revija*, no. 1 (2014), pp. 81–84.

<sup>375</sup> See Prishtina Basic Court Decision No. C.N. nr. 472/15, dated 10.11.2015, recognising a notarial deed issued in New Jersey, USA.

<sup>376</sup> Francisco Garcimartín and Geneviève Saumier, “Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention),” para. 113.

<sup>377</sup> *Ibid*, para 96.

<sup>367</sup> Items as listed in Zlatan Meškić, “Bosnia and Herzegovina,” *Elgar Encyclopaedia of Private International Law*, Elgar European Law, 2017, p. 184, for Bosnia and Herzegovina, which applies the same law inherited from the Former Yugoslavia.

<sup>368</sup> *Ibid*.

for the protection of personality, rights and interests of a foreign national who is present or has property in Kosovo, but that is in matters of guardianship. The opinion shared here is similar to the stance of the Judgments Convention – that interim measures serve two main purposes: to provide a preliminary means of securing assets out of which a final judgment may be satisfied, or to maintain the status quo pending determination of an issue at trial.<sup>378</sup> As such, they are not equal to a judgment, as provided for in art. 86 of the PIL Act.

### 6.3 Commencement of the procedure (as a main or as a preliminary question)

Recognition and enforcement procedures are initiated as the main subject of proceedings before a court. The Law on Courts, art. 12, mandates the Basic Courts with the power to enforce foreign judgments. Judgments on civil and commercial matters will be recognised and enforced through a non-litigious procedure, in which a combination of provisions are required mainly from the Law on non-contentious procedure<sup>379</sup> and the Law on Enforcement Procedure.<sup>380</sup> Furthermore, art. 101 para. 5 of the Kosovo PIL Act stipulates “if no separate ruling has been rendered on recognition of a foreign judgment, any court may decide on the recognition of that judgment as a preliminary issue in the proceedings, but only with effect to those proceedings.”

All foreign judgments, be they related to family or status matters or commercial matters, are filed for recognition and enforcement in the respective general department of the Basic Court pursuant to territorial jurisdiction rules within Kosovo. This includes judgments on commercial matters.<sup>381</sup> Until recently, matters of recognition and enforcement of foreign decision were considered to be a competence solely of the President of the Court.<sup>382</sup> It was unclear back then and it is unclear now where that specific authority derives (derived) from, since none of the primary laws provide for it. A Regulation on the Internal Organisation of Courts only specifies that requests for enforcement of foreign judgments are registered in a register on “miscellaneous civil cases” along with numerous other civil matters.<sup>383</sup>

### 6.4 Documents that need to be produced (formal requirements) for the recognition of the foreign judicial decision

The basic formal requirements as to the necessary documents are laid down in art. 87, which requires that the party requesting enforcement submits the judgment itself, along with a certificate issued by the competent foreign court or other authority certifying that the judgment has become final (subject to no ordinary appeal) pursuant to the law of the State where it was rendered.

The practice of the Prishtina Basic Court shows that the court accepts the original judgment, or a certified copy,<sup>384</sup> along with the aforementioned proof of finality, or “certificate of enforceability.”<sup>385</sup> Although the decisions refer to art. 87 of the PIL Act when pointing this out, the language used there seems to have been borrowed from art. 36 of the Law on Enforcement Procedure, which stipulates “the proposal for enforcement shall be submitted to the enforcement body accompanied

378 Francisco Garcimartín and Geneviève Saumier. “Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention),” para. 99.

379 Official English title is Law No. 03/L-007 on Out Contentious Procedure, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2608>. However, this is not the appropriate term and thus the term “non-contentious procedure” will be used herein.

380 Available in English at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2608>.

381 See e.g., Prishtina Basic Court Decision No C.N. no. 508/2015 of 22.03.2016, on recognition of a judgment originating in Slovenia, against a local company; Prishtina Basic Court Decision no. C.N. No. 184/17 of 06.10.2017 on the matter of recognition and enforcement of a judgment from Commercial Court in Pančevo, Serbia.

382 Author’s experience at the Prishtina Basic Court while conducting research on enforcement of foreign decisions. The author has recently been informally informed that this is no longer the case and that cases of recognition and enforcement of foreign judgments are now allocated amongst the judges in the General Department, civil division.

383 Art. 2 para. 4 Kosovo Judicial Council Regulation No. 02/2020 on internal organisation and operation of Courts in the Republic of Kosovo.

384 The language used in decisions is “përshkrim i vërtetuar”.

385 See e.g., Prishtina Basic Court Decision no. C.N. 287/14, of 27.07.2017.

with the enforcement document, in original or certified copy, with enforceability certificate for enforceability.” An authenticated translation is another formal requirement, although it is not specifically listed in the PIL Act or in the Law on Enforcement Procedure. This can be found in art. 331 para. 2 of the Law on Contested Procedure, whose provisions apply, based on art. 18 of the Law on Enforcement Procedure.

There are numerous cases in which recognition has been refused due to the plaintiff not meeting these criteria.<sup>386</sup>

### 6.5 Conditions for recognition and enforcement of foreign judicial decisions

The key requirements for recognition, other than those analysed above in this section, are: finality, absence of exclusive jurisdiction of Kosovo courts, existence of reciprocity, absence of procedural violation that prevented the party from participating in the proceedings, absence of violation of public policy, and absence of a final domestic judgment or of a foreign judgment that had already been recognised in the same matter.<sup>387</sup> Highly similar conditions are foreseen in the Draft PIL Act, with some highly important differences: removal of the reciprocity requirement, introduction of “the mirror principle” in excessive jurisdiction of a foreign court (art. 161), and elaborate provisions on violation of the right to a defence (art. 164). Unfortunately, these particular provisions have been subject to highly debated amendments at the Assembly<sup>388</sup> and are likely to be changed. Therefore, they will not be analysed in detail.

After assessing the finality of judgment (discussed in section 6.4 above), the court pursuant to art. 89 para. 1 should assess whether the courts or other authorities in Kosovo have exclusive jurisdiction over the matter.<sup>389</sup> If the answer is in the affirmative, then the judgment will be refused recognition. Prishtina Basic Court refused recognition and enforcement of a decision from a Commercial Court in Serbia because, according to Kosovo law, the matter fell within exclusive competencies of the Kosovo Privatisation Agency.<sup>390</sup>

Reciprocity is one of the key requirements for recognition and enforcement of foreign judgments, provided in art. 92. Reciprocity within the meaning of this article is a factual one – meaning that it does not require a treaty on mutual recognition for it to be considered existing.<sup>391</sup> Although reciprocity is not required in matrimonial matters or establishing paternity and maternity (art. 92 para. 2) there are cases when such judgments have been refused recognition based on lack of reciprocity.<sup>392</sup> Numerous other cases have been refused recognition because of reciprocity as well.<sup>393</sup> The Prishtina Basic Court shows particular activism in pointing out the lack of reciprocity when dealing with cases from Serbia.<sup>394</sup> The existence of reciprocity, however, is presumed. This was also seen applied well in practice.<sup>395</sup> Scholars support the view that reciprocity should be examined only at the request of the party, although in practice it is often examined *ex officio*.<sup>396</sup> When in doubt, the courts may ask the Ministry of Justice for clarifications on whether reciprocity exists.<sup>397</sup>

386 Ibid.; See also Prishtina Basic Court Decision no. 541/14.

387 Similarly listed in Stanivuković and Živković, “Serbia,” 2018, p. 290.

388 Last debated in the Assembly of the Republic of Kosovo on 19<sup>th</sup> November, 2020.

389 See Section 5.4. above for a full list of provisions for which exclusive jurisdiction is provided under the Kosovo PIL Act.

390 Prishtina Basic Court Decision no. C.N. no. 184/17, of 06.10.2017. The court does not specifically refer to art. 89 para. 1 for assessing its jurisdiction but it only refers to domestic law that regulates the jurisdiction of the Kosovo Privatisation Agency

391 Stanivuković and Živković, “Serbia,” 2018, p. 292.

392 See e.g., Prishtina Basic Court judgement C.N. no. 349/19 of 10.12.2019, refusing a judgment on divorce issued in Slovakia and Prishtina Basic Court judgement C.N. no. 383/19 of 01.11.2019 refusing a judgment on divorce issued in Bosnia and Herzegovina.

393 See Prishtina Basic Court judgement C.N. no. 377/18 of 10.04.2019; Prishtina Basic Court judgement C.N. no. 184/18 of 25.04.2019; Prishtina Basic Court judgement C.N. no. 277/18 of 23.11.2018.

394 Decision of Prishtina Basic Court CN. no. 184/17 of 06.10.2017, refusing recognition of a Serbian decision, *inter alia*, for absence of reciprocity and absence of an agreement to the contrary. Contrast with a decision of the same court CN. no. 692/13 where it does not examine the issue of reciprocity with Serbia and only points out that the document seeking recognition is not a “foreign decision” within the meaning of the Law, since it was only a legalised copy of a contract.

395 See e.g., Prishtina Basic Court Decision No C.N. no. 508/2015 of 22.03.2016, on recognition of a judgment originating in Slovenia against a local company.

396 Meškić, “Bosnia and Herzegovina,” p. 194.

397 Art. 92, combined with an Administrative Instruction on the Procedure of offering international legal aid on criminal and civil matters, No. 01-1265 (2009).

Reciprocity in recognition and enforcement is particularly challenging for Kosovo, whose political status is still unrecognised by many EU States – Greece, Spain, Slovakia, Cyprus and Romania – and its closest neighbours – Serbia and Bosnia and Herzegovina. The latter also happen to be some of its closest partners in trade, as noted above. It has been strongly advocated that reciprocity should be removed as a requirement for recognition for foreign judgments in Kosovo, which would significantly ease the process of recognition of Kosovo's judgments worldwide.<sup>398</sup> This same stance is advocated in this report as well.

An attempt to remove this condition was made by the working group of the Draft PIL Act of Kosovo in its first Draft. The working group had replaced a request for reciprocity with the “mirror principle” in art. 161. However, when reprocessing the Draft in June 2021, the Ministry of Justice has reintroduced reciprocity in recognition and enforcement of judgements.<sup>399</sup> Not only has it been reintroduced, but it has also been amplified compared to the version of reciprocity that is currently in force. As noted above, reciprocity is currently only required for matters other than matrimonial matters. However, the newly inserted provision in the Draft PIL Act does not provide for this exception. If the provision remains as is now, reciprocity will be required for all matters within the scope of the law. Given that this matter is a highly sensitive and disputable one, it is very likely that amendments will be proposed to have it removed. Therefore, it is unknown whether the provision reintroducing reciprocity will be adopted or discarded and, as such, further analysis on this matter should be provided at a later point in time.

The judgment seeking recognition should not violate public policy according to art. 91. According to scholars in the region, domestic courts rarely rely on this exception and even when they do, it is for status-related matters.<sup>400</sup> For a judgment to amount to a violation of public policy, it would have to entail “an extraordinary and clear incompatibility with fundamental principles that are valid in the Republic of Kosovo.”<sup>401</sup> Indeed, there are indications that Kosovo courts may be quite liberal when it comes to interpreting the notion of public policy. A particular example is the recognition of a decision of a German court for dissolution of a civil partnership between a same-sex couple, which has been recognised by the Basic Court of Prishtina.<sup>402</sup> It should be expected that the courts will be rather liberal in interpreting public policy in commercial matters.

Next on the list of items, the court needs to ensure that the judgment is free from procedural violations that prevented the party (against whom recognition is sought) to participate in the proceedings as required by art. 88. The second part of this article explains that the irregularities in question are those relating to service of process and invitations of the court have not reached the party. Although this is a rather sensitive matter, it has not been treated in more detail in scholarship and it does not seem to have been raised in the courts either.

Finally, the court should inspect whether the matter is considered to be *res judicata* in Kosovo already. Art. 90 provides that a judgment shall be refused recognition if a final judgment was rendered on the same matter by the courts in Kosovo or if another foreign judgment rendered in the same matter has been recognised in Kosovo. This same provision also authorises the court to *stay* recognition procedures if there is a case on the same matters pending before courts in Kosovo, until such case is decided. This provision is the equivalent of art. 7 para. 2 of the Judgements Convention. However, the PIL Act provision does *not* provide the grounds to *refuse* recognition and enforcement, like art. 7 para. 2 of the Convention does. The PIL Act only provides the court with the grounds to stay such proceedings until the final decision is rendered in the dispute.<sup>403</sup>

398 Donikë Qerimi and Samuel Fulli-Lemaire, 7<sup>th</sup> Journal of Private International Law Conference, August 2017, Rio de Janeiro, Brasil.

399 This change has been made without prior consultations with the members of the working group.

400 Stanivuković and Živković, “Serbia,” 2018, p. 293.

401 Morina and Nikci, *Komentar: Ligji Për Procedurën Kontestimore*, p. 524.

402 Prishtina Basic Court Decision No. C.N. No. 248/2015 of 25.05.2015. The decision does not explicitly mention the same-sex nature of the partnership, but it can be inferred from the names of the parties and the documents of the case attached.

403 For a thorough analysis on *lis pendens* within the Yugoslav PIL Act, see Qerimi, “Jurisdiction in International Disputes in Commercial Matters: A Comparison between the Brussels Ibis and the Western Balkans,” pp. 228–34.

As stipulated in art. 101 para. 2, the court shall confine itself to an examination whether the conditions provided in art. 86 to 100 have been fulfilled and, if it considers it necessary, it may request an explanation either from the rendering court or from the parties.

In accordance with art. 101 para. 3 and 4, the decisions on recognition and enforcement may be appealed within 15 days before the Court of Appeals in Kosovo.

## 7. Enforcement of foreign judicial decisions

The second sentence of art. 96 of the PIL Act dictates that if the plaintiff seeks enforcement of a foreign judgment in Kosovo – besides the documents required for recognition – he should also provide certification of enforceability of that judgment based on the law of the state where it originated. After the judgment is recognised, the enforcement procedure is then carried out based on the Law on Enforcement Procedure, as stipulated in art. 11 and art. 22 para.1(5). Art. 12 provides limitations to enforcing against property of a foreign state or organisation, which require the prior approval of the Ministry of Justice and Ministry of Foreign Affairs.

With the exception of family matters and decisions on reinstatement of an employee by the employer, all other matters can be enforced by private enforcement agents. Typically, the decision allowing for enforcement of a foreign decision indicate a time within which the judgments should be executed voluntarily. This deadline may also be extended by the enforcement agent.<sup>404</sup> The private enforcement agent then renders the writ based on proposals for carrying out enforcement (made by the party), and carries out the enforcement to fulfil the debtor's claim based on an enforcement document.<sup>405</sup>

Given that a foreign judicial decision is only an “enforceable document” after it has been recognised by a court in Kosovo, there are no situations when the enforcement officers are directly confronted with foreign judicial decisions.

More specific details on enforcement procedure have been shared in other sections above and their repetition will be omitted here.

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## COUNTRY REPORT: MONTENEGRO

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### Executive Summary

The legal framework for cross-border recognition and enforcement of foreign judicial decisions in Montenegro in civil and commercial matters basically relies on the Private International Law Act of Montenegro and a few international treaties. Montenegro only has jurisdiction over conditions stipulated by law (or international agreement) in the recognition of foreign judicial decisions. Only decisions on merits may be recognised, regardless of name in the state of origin and the type of authority, both in and out of court, making the decision.

In Montenegro, the courts (basic and commercial) have exclusive jurisdiction in the recognition and enforcement of foreign judicial decisions, while the enforcement procedure lies in the competence of enforcement agents and only by the way of exception with the judiciary. As the competence for recognition of foreign judgments remains exclusively with the competent court, an enforcement agent may not decide on the recognition of foreign judgments as a preliminary question in enforcement procedure.

There are no records regarding the quantity and quality of judgments regarding cross-border recognition of foreign judicial decisions for all courts on the territory of Montenegro. However, individual cases may be tracked via the official court website. The courts are generally equipped to decide on such cases as the Judicial and Public Prosecutor's Training Centre of Montenegro often organises training on recognition and enforcement of foreign judicial decisions.

The economy of Montenegro mostly relies on tourism and foreign investments. Even though the country has good economic relations with all countries worldwide, Montenegro's trading activities are focused on neighbouring countries and the European Market. Presently, it is hard to assess whether Montenegro will express either the notification in accordance with art. 29 or the declaration in accordance with art. 19 of the HCCH 2019 Judgment Convention as further analysis regarding prevailing national interests is needed.

In Montenegro, provisions on international jurisdiction are mainly contained in the 2014 Private International Law Act (PILA), and in most cases, the provisions of the PILA will apply. Its provisions are only vaguely compatible with the HCCH 2019 Judgments Convention and mainly regarding prorogation of jurisdiction. Other relevant provisions either stick to a traditional basis for jurisdiction, adherent to national legal systems, or mirror provisions of the Lugano Convention (to which Montenegro is not a contracting state). However, Montenegro is party to the HCCH 2005 Choice of Court Convention.

The impediments to recognition and enforcement stipulated by the PILA are generally in line with those from the HCCH 2019 Judgments Convention, the differences being stricter impediments regarding international jurisdiction in the national law of Montenegro. The PILA explicitly stipulates a wider scope of exclusive jurisdiction as well as the notion of exorbitant jurisdiction (so-called "mirror jurisdiction") as a basis for rejecting recognition.

## 1. Legal framework of the cross-border recognition and enforcement of foreign judicial decisions

The most important legal source for the recognition of foreign judicial decisions in Montenegro is the Private International Law Act<sup>406</sup>, which regulates this matter in detail. The provisions of the Law on Extra-Judicial Procedure also apply to certain issues.

PILA stipulates that in the absence of specific provisions in the present chapter on the procedure for recognition of foreign judicial and arbitration decisions, the provisions of the law governing non-litigious procedure shall apply accordingly (art. 158 - Due application of other legislation), and the provisions of the Law on Enforcement and Securing of Claims shall apply to the enforcement procedure itself.

As for multilateral agreements, Montenegro is a Contracting State to the Convention on Choice of Court Agreements (HCCH 2005 Choice of Court Convention), which is applicable in Montenegro as of August 1, 2018. Although the Convention provides for the recognition and enforcement of a judgment rendered by a chosen court, in many cases there is no exclusive choice of court agreement between the parties to a dispute.<sup>407</sup>

There are also certain provisions that are important for this area in a number of multilateral international agreements ratified earlier. The Hague Convention on Civil Procedure and the Hague Convention on International Access to Justice contain provisions on the recognition and enforcement of decisions relating to costs and expenses.

Montenegro has concluded bilateral treaties on legal assistance in civil procedures with the following states: Austria, Belgium, Bosnia and Herzegovina, Cyprus, Czech Republic, France, Greece, Hungary, Italy, Macedonia, Poland, Romania, Serbia and Slovakia. The Ministry of Justice of Montenegro factually applies the treaties of the former Yugoslavia with Croatia<sup>408</sup> and with the Russian Federation.<sup>409</sup>

Furthermore, there are four bilateral treaties dealing exclusively with recognition and enforcement of foreign decisions and arbitral awards, concluded with: Austria, Belgium, France and Greece: the Agreement with Austria on the Mutual Recognition and Enforcement of Arbitral Awards and Settlements Reached Before Arbitral Tribunals in Commercial Matters (1960, in force since 1961); the Convention with Austria on the Recognition and Enforcement of Maintenance Judgments (1961, in force since 1962); the Convention with Belgium on the Recognition and Enforcement of Maintenance Judgments (1971, in force since 1976), the Convention with France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters (1971, in force since 1972); the Agreement with Greece on the Mutual Recognition and Enforcement of Judgments (1959, in force since 1960).

### 1.1. Overview of legal provisions

The PILA is the basic source of law that, in practice, will most often be applied to the recognition and enforcement of a foreign judicial decision. Part Three of the law regulates this matter in detail. Chapter XII specifies the effect of recognition of a foreign judicial decision in Montenegro and what constitutes a foreign judicial decision (art. 141), and exhaustively states the conditions/obstacles for recognition of a foreign judicial decision (art. 142-147, art. 149).

<sup>406</sup> For references to these laws, see the Bibliography at the end of this report

<sup>407</sup> The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention) is intended to complement it.

<sup>408</sup> The Agreement between the Federal Republic of Yugoslavia and Croatia on Legal Assistance in Civil and Criminal Matters (in force since 1998).

<sup>409</sup> See Maja Kostić-Mandić. *Private International Law of Montenegro*, *International Encyclopaedia of Laws*. Kluwer Law International, 2020, pp. 30-31. The Agreement with the USSR on Legal Assistance in Family, Civil and Criminal Matters (in force since 26 May 1963). The issue of the succession of international treaties with the Russian Federation has not been concluded, so we have no official confirmation from the Russian side that the agreement is in force.

In order for a foreign judicial decision to have effect in our country, it is necessary to go through the recognition procedure. Art. 141 of the PILA, stipulates that a recognised foreign judicial decision in Montenegro is equated with the decisions of domestic courts. This means that a foreign decision in our country can produce only those effects that our law provides for such decisions.

According to the PILA, the conditions for recognition of a foreign court decision are: 1) the finality of a foreign judicial decision under the law of the state of origin (and enforceability if enforcement is sought), as well as the absence of violations of Montenegrin law with regard; 2) international jurisdiction; 3) the right to defence; 4) the existence of a final decision on the same matter and between the same parties and the effect of *lis pendens*, and 5) public order. The conditions are exhaustive and are reduced to formal, procedural conditions, and the only condition that touches on the merits is that there is no violation of the public order of the country in which recognition is sought. Depending on the fulfilment of the conditions provided for by national law, a foreign decision may be recognised or its recognition may be refused. In any case, the decision cannot be changed, supplemented or modified.

Chapter XIV regulates in detail the procedure for recognizing foreign judicial decisions (art. 152-158).

The jurisdiction of courts for the recognition and enforcement of foreign judicial decisions is prescribed by the Law on Courts, and the provisions of the Law on Enforcement and Securing of Claims apply to enforcement proceedings.

### 1.2. Assessment of the legal framework

Like in all the countries of the former Yugoslavia, the system of limited control of judicial decisions, most common in comparative law, applies in Montenegro. In the recognition of foreign judicial decisions, Montenegro only has jurisdiction over conditions stipulated by law (or international agreement). Only decisions on merits may be recognised, regardless of name in the state of origin and the type of authority, both in and out of court, making the decision, as long as the decision is made in the form, procedure and by the authority responsible for making such a decision under the law of the state of origin (e.g., a decision of a foreign administrative body may be recognised if it meets the conditions for recognition). The foreign character of the decision is related to the moment when the decision became final, which means that, e.g., decisions of courts in Slovenia or Croatia that became final during the existence of SFR Yugoslavia could not now be considered foreign decisions.<sup>410</sup>

For the first time, the procedure for the recognition of foreign court decisions is regulated in detail by the PILA, and successful solutions from the legislation of the countries of the region served as a starting point.<sup>411</sup>

## 2. Institutional framework for the cross-border recognition and enforcement of foreign judicial decisions

### 2.1. Overview of legal provisions determining stakeholders in the cross-border recognition and enforcement of foreign judicial decisions

In Montenegro, the courts play the most important role in the recognition and enforcement of foreign judicial decisions, while the role of other stakeholders, besides enforcement agents, is not

<sup>410</sup> Kostić-Mandić, Maja. *Međunarodno privatno pravo* (Private International Law). Podgorica, Pravni fakultet UCG, Podgorica, 2017, p. 184.

<sup>411</sup> Compare art. 152-158 of the Montenegrin PILA with art. 108-111 of the Slovenian PILA and arts. 111-116 of the Macedonian PILA.

directly regulated in relation to enforcement measures. The role of the court in this procedure is prescribed by the Law on Courts and the PILA. The former law prescribes only jurisdiction, while the PILA, in addition to jurisdiction, contains detailed provisions on the exequatur procedure and does not contain provisions on enforcement agents, whose jurisdiction is prescribed by The Law on Enforcement and Securing of Claims.

## 2.2. Stakeholders putting the cross-border recognition and enforcement of foreign judicial decisions

### 2.2.1. Courts

The basic courts of Montenegro decide on the recognition and enforcement of foreign judicial decisions, except for commercial matters where the Commercial Court of Montenegro is competent.<sup>412</sup> The basic courts and the Commercial Court have exclusive jurisdiction to decide on enforcement and recognition of foreign judicial decisions (PILA, art. 152 para. 3).

The basic courts and the Commercial Court have exclusive jurisdiction over enforcing foreign judgments in enforcement procedures in the following matters only: to hand over or take away a child; to reinstate an employee at work; when the judgment obliges the debtor to perform an act that no other person can perform instead of him/her in accordance with law or legal transaction; on a petition to create security; on a petition for counter-enforcement, and upon the request of a judgment creditor for payment of unliquidated damages (LESC, art. 4).

### 2.2.2. Administrative institutions (Ministry of Justice, Central Authorities etc.)

The role of administrative institutions regarding recognition and enforcement of foreign judicial decisions is not explicitly prescribed by the positive legislation. However, the Ministry of Justice, which is also the Central Authority for all HCCH conventions ratified by Montenegro, can be addressed by the court deciding on recognition and enforcement of foreign judicial decisions in order to obtain information on a foreign law (in accordance with the European Convention on Information on Foreign Law of 1968); if service is needed (in accordance with the HCCH 1965 Service Convention<sup>413</sup>), or if assistance in some other way is needed.

Furthermore, the Ministry of Justice prepares an annual general report on the application of the PILA as an obligation in the course of European integration, and collects data on case law of the Montenegrin courts. However, the data are only of a general nature, containing the number of cases according to courts and areas and without official designations of cases, cases in the field of recognition and enforcement included.

### 2.2.3. Legal Practitioners (Lawyers, Legal representatives, etc.)

In proceedings in which decisions are made on the recognition and enforcement of foreign judicial decisions in Montenegro, the parties always engage lawyers. They are usually lawyers from a foreign country, who have the right to represent in Montenegro as well. As far as we know, these lawyers are not particularly specialised in dealing with such cases.

### 2.2.4. Enforcement agents

The Law on Enforcement and Securing of Claims, which was initially implemented in 2014,

<sup>412</sup> The Commercial Court decides on the recognition and enforcement of foreign judicial decisions rendered by commercial courts, as well as of foreign arbitration awards (art. 14 para. 4 and art. 18 para. 2(4) of the Law on Courts).

<sup>413</sup> The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (HCCH 1965 Service Convention).

introduced a new legal profession into the legal system of Montenegro – the enforcement agent as an independent holder of a function with public authority. The provisions of the LESC clearly distinguish between the jurisdiction of the court and the public enforcement officer, and specify their respective powers (art. 4). This basically abandoned the so-called system of “court executions” as enforcement agents are competent to decide in enforcement procedures, to levy enforcement, as well as to enforce securing of claims, except in cases where the competency of the court is prescribed by law (art. 3). The competence for recognition of foreign judgments remains exclusively with the competent court (PILA, art. 152 para. 1, para. 2, para. 3) and consequently, enforcement agents may not decide on the recognition of foreign judgments as a preliminary question in enforcement procedure.

The local jurisdiction of enforcement agents is clearly stipulated by the provisions of the LESC. Thus, they determine and execute enforcement on the basis of an enforcement document of the court or authority whose seat is in the official area of the enforcement agent, whereas the competence of the enforcement agent is related to the residence(s) or seat of the executive debtor in cases where the determination and enforcement results from authentic documents. Here, one must also have in mind the provision of the PILA stipulating that “the enforcement of court and arbitration decisions shall fall within the territorial jurisdiction of the court in territory of which the enforcement is to be carried out” (art. 152 para. 4). This inconsistency between the two laws is clearly a mistake which should not have occurred in the first place. Both the PILA and the LESC took several years to draft and then had a long *vacatio legis*, but both entered into force in 2014.

According to enforcement agents, it is not a problem in practice as they simply disregard this provision but it can be misleading to the general public, so this provision of the PILA should be amended for the sake of legal security.<sup>414</sup>

### 2.2.5. Other relevant stakeholders

Notarial service in Montenegro functions as a public service pursuant to the Law on Notaries.<sup>415</sup> In addition to drafting and issuing notarial acts and keeping deposits of certificates, securities, money and other movables, they are in charge of performing services conferred to them by court decisions.<sup>416</sup> In the scope of private international law, the most important role played by notaries is in the field of contracts and succession.<sup>417</sup> The Law on Notaries provides for notarial form as a prerequisite of validity of a number of the most significant contracts in the area of succession, family and obligations law.<sup>418</sup> A notarial deed on any legal transaction shall acquire the status of a public document and under certain conditions, it may also obtain the status of an executory title. However, if a foreign notary deed is to be performed in Montenegro, it is not necessary to conduct an exequatur procedure.

A foreign notarial deed has, subject to reciprocity, the same legal effect as a notarial deed drawn up in Montenegro.<sup>419</sup>

## 2.3. Mapping the cooperation among stakeholders

So far there has been no specific cooperation among stakeholders. The situation could be improved if the main stakeholders exchanged information and data, took part in topical trainings, and when the Ministry of Justice and the courts provided easily traceable case records.

<sup>414</sup> Kostić-Mandić, Maja. Private International Law of Montenegro, International Encyclopaedia of Laws. Kluwer Law International, 2020, p. 207.

<sup>415</sup> Art. 52 para. 1 of the Law on Notaries, <https://www.paragraf.me/propisi-crngore/zakon-o-notarima.html>

<sup>416</sup> Art. 4 of the Law on Notaries.

<sup>417</sup> Notaries acting as court commissioners have been entrusted by court decisions with ruling on succession procedures.

<sup>418</sup> See Korać, Velibor. “Notarial Form *Ad Solemnitatem* in Montenegrin Law.” *Annals FLB – Belgrade Law Review*, no. 3, year LXIV, 2016. [https://www.researchgate.net/publication/312353465\\_Notarial\\_form\\_ad\\_solemnitatem\\_in\\_Montenegrin\\_law](https://www.researchgate.net/publication/312353465_Notarial_form_ad_solemnitatem_in_Montenegrin_law) (accessed 16 Apr. 2021).

<sup>419</sup> Art. 8 para. 1 of the Law on Notaries.

### 3. The role of courts and enforcement agents in cross-border recognition and enforcement of foreign judicial decisions

#### 3.1. Capacities of courts in regard to cross-border recognition of foreign judicial decisions

The Rules of the Court of Montenegro<sup>420</sup> provide general information regarding the capacities of courts in Montenegro. Courts can have special departments established to deal with specific fields of law.

A Department can have one or more Councils.<sup>421</sup> The Court decides upon an application for the recognition of a foreign judgement in an extra-judicial procedure. Procedures for the recognition of foreign decisions are classified under “Pso”<sup>422</sup> or “Rs” as complex extra-judicial cases. One judge decides on the application for recognition of a foreign judgement in the first instance. For example, in the Basic Court in Podgorica, there are four judges that dealt with cases regarding recognition of foreign judgements in 2020. A council of three judges decides on complaints regarding decisions in the second instance.<sup>423</sup> This procedure is classified under “Psp” or “Rp.”

#### 3.2. Quantity and quality of judgments regarding cross-border recognition of foreign judicial decisions

The Ministry of Justice of Montenegro supervises the implementation of the PILA in Montenegro. An Annual Report on the Implementation of PILA provides data regarding the quantity of decisions. Officially, the Ministry of Justice collects the data regarding the implementation of the PILA in court practice: there was an overall number of 443 PIL cases in the period 2019/2020.

There are no records regarding quantity and quality of judgments regarding cross-border recognition of foreign judicial decisions for all the courts on the territory of Montenegro. However, the High Court in Podgorica has a department monitoring case law and tracking PIL cases. In spite of the above, in Montenegro, it is still difficult to obtain information on case law regarding the application of laws or conventions in the field of PIL, and international treaties in general, since specialised software used by the courts only recognises the application of the European Convention on Human Rights. Court decisions are generally published on the official court website after being anonymised,<sup>424</sup> but in practice this does not apply to all decisions. Furthermore, sometimes it takes years before a decision is made available on the website. The research that the author of this analysis privately conducted on the practice of the basic courts in Podgorica and Cetinje for the period from January 2015 to November 2018 shows that cases where recognition and enforcement of foreign judgments were sought constitute most of the cases involving an international element in private law issues. The judges are, generally, proficient in these matters, with the most challenging cases being those originating from common law countries (the USA or the UK), where they face difficulties ascertaining the finality of a foreign judgment.

In the period from January 2015 to November 2018, the Commercial Court in Podgorica decided mostly on the recognition of judgments from Serbia in accordance with the bilateral agreement with this country,<sup>425</sup> and in one case, on the recognition of a decision from Croatia in accordance with the PILA.<sup>426</sup>

420 Rules of the Court of Montenegro “Official Gazette of Montenegro” no. 65/16, 19/19, 58/19,6/20 and 93/20.

421 Art. 25 of the Rules of the Court.

422 Art. 252 of the Rules of the Court.

423 Annual Report of Basic Court Podgorica for 2020, <https://sudovi.me/ospj/sadrzaj/d5wx>

424 <http://en.sudovi.me/vrhs/library/laws> (accessed 16 Apr. 2021).

425 Commercial Court Rs. br. 16/15, Rs. br. 19/16, Rs. br. 2/17, Rs. br. 19/17, br. 20/17, Rs. br. 23/17, Rs. br. 13/18.

426 Commercial Court Rs. br. 20/16.

However, courts have their own individual reports. For example, the Individual Annual Report of the Basic Court in Podgorica provides the information that in 2020, the Basic Court in Podgorica received 24 applications for recognition of foreign judgements and has decided on 29 such applications.<sup>427</sup>

Furthermore, in 2020, the Basic Court in Podgorica received 5 complaints on recognition decisions, which were classified “Rp,” and has resolved 6 cases. However, no data is collected regarding the quality of decisions on enforcement of foreign judgements.

#### 3.3. Capacities of enforcement agents in regard to the cross-border recognition of foreign judicial decisions

In Montenegro, enforcement agents are not competent to make decisions in recognition (exequatur) procedures. They are only competent to make decisions in enforcement procedures.

#### 3.4. Recognition and enforcement of foreign judicial decisions within educational programs of Judicial Training Academies

Montenegro, as a candidate country for EU membership, and on the basis of the Stabilisation and Association Agreement, has undertaken the obligation to harmonise its laws with the *acquis Communautaire*. As part of numerous trainings, the Judicial and Public Prosecutor’s Training Centre<sup>428</sup> also dealt with issues of recognition and enforcement of foreign judicial decisions. Thus, in March 2015, in cooperation with the German Foundation for International Cooperation / IRZ Foundation, a two-day seminar entitled “Jurisdiction, recognition and enforcement of judicial decisions in civil and commercial matters in European Union law and Montenegrin law” was organised for civil and commercial court judges of the northern and central regions. On that occasion, the topics of recognition and enforcement of foreign judicial decisions on the basis of the Brussels I Regulation, the Lugano Convention and the Private International Law Act were discussed. In the same year, the Centre, within a technical support project from Luxembourg to Montenegro, in cooperation with EIPA (European Institute of Public Administration) from Luxembourg, organised a seminar on “Free circulation of judgments - Mutual recognition and enforcement of judicial decisions in judicial cooperation in the EU in civil and commercial matters - New EU Regulation Brussels I-bis and proceedings before European courts.”

In 2016, as part of a two-day seminar held in Bar, training was conducted on the following topics: Recognition and enforcement of foreign judicial decisions in civil and commercial matters on the basis of the Private International Law Act and the Brussels I Regulation.

In Podgorica in December 2016, the Judicial and Public Prosecutor’s Training Center, in cooperation with the International Organisation for the Development of Law / IDLO from Rome, with the financial support of the European Bank for Reconstruction and Development (EBRD), within the project “Support for judicial training in the field of commercial law in Montenegro,” organised a seminar on the topic: “Enforcement and security in Montenegro and in the EU.” The topics were: Enforcement and security of claims in Montenegro - the relationship between the enforcement agent and the court; Objections and objects of execution (with emphasis on execution on real estate, shares and stakes, ship); Interim measures; Recognition of foreign judicial decisions; Enforcement of judicial decisions in the EU: Lugano Convention, Brussels I Regulation, the European Enforcement Order Regulation (No. 805/2004), the European Payment Order Regulation (No. 1896/2006), the European Small Claims Procedure Regulation (No. 861/2007) and the European Regulation amending European Payment Order Regulation

427 Annual Report of Basic Court Podgorica for 2020, <https://sudovi.me/ospj/sadrzaj/d5wx>

428 <http://cosdt.me/>

and European Small Claims Procedure Regulation (No. 2015/2421).

In May 2017 in Podgorica, the Judicial and Public Prosecutor's Training Centre organised the fifth (V) module of the EU Law Training Program entitled "Mutual Recognition and Enforcement, Instruments for Recognition and Enforcement in Civil and Commercial Matters within EU Judicial Cooperation - Revised EU Brussels I-bis Regulation and European Procedures." The seminar was organised in cooperation with the European Institute of Public Administration based in Luxembourg (EIPA Luxembourg) within the Luxembourg Technical Support Program for Montenegro "Strengthening the capacity of judicial bodies and the quality of justice" with the financial support of the Government of Luxembourg.

Both foreign and national experts were involved in all these trainings.

#### 4. Economic and political aspects in respect to the implementation of the HCCH 2019 Judgments Convention

The Convention is strongly pro-enforcement with the potential of harmonising the laws in this field. It aims to reduce the costs of transnational litigation and to promote access to justice, trade, investment and global economy,<sup>429</sup> so that the contracting States are bound to recognise and enforce foreign judgments, subject to certain defences relating to public policy, fraud, insufficient notice, etc.<sup>430</sup> The Convention provides several solutions with the aim of encouraging the accession of States. Firstly, the Convention provides for "indirect" jurisdictional bases. Secondly, the Convention excludes areas where differences between legal systems are irreconcilable. Thirdly, it has a narrow scope of application. The success of this Convention depends on the political will of the States to sign the Convention. So far, the Convention has been signed by three countries.<sup>431</sup> It remains to be seen in what timeframe and how many states will sign Convention. On the other hand, if the Convention is not successful, parties will be bound to conduct fragmented analyses of different national laws across multiple jurisdictions.

Montenegro has commercial relationships with countries that have become actively involved in The Hague Conference. The question shall then be imposed as to how beneficial it is for Montenegro to become a contracting party. Is this Convention of benefit for commerce, investments, consumers and the Government?<sup>432</sup> If Montenegro becomes a State Party to the HCCH 2019 Judgments Convention, it will increase its ability to export judgements from Montenegrin courts abroad and to a potentially wider range of Countries (compared to State Parties to the HCCH 2005 Choice of Court Convention).<sup>433</sup> In addition, foreign investors would benefit from the legal security in terms of guarantee that judgments rendered in their country can be recognized and enforced in Montenegro, under the same conditions that are in place in their country. In such a scenario, one can expect political stability and a functioning legal system to add to the Montenegrin economy.

##### 4.1. Main trading partners in terms of import and export

The economy of Montenegro mostly relies on tourism and foreign investments. Montenegro is a candidate for EU membership and has signed the EU Stabilisation and Association Agreement and an Interim Agreement on trade and trade-related issues. However, because it is not a member of EU, Montenegro has its own Customs regulations. The Law on Customs and The Regulation

<sup>429</sup> Stewart, David P. "The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters." *American Journal of International Law*, Volume 113, Issue 4, October 2019, pp. 772-783.

<sup>430</sup> Garcimartin, Francisco and Genevieve Saumier. "Explanatory Report, on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters." *The Hague Conference on Private International Law – HCCH, 2020* (Explanatory Report).

<sup>431</sup> Israel, Ukraine and Uruguay. <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>

<sup>432</sup> Teitz, Louise Ellen. "Another Hague Judgments Convention? Bucking the past to provide for the future." *Duke Journal of Comparative & International Law*, Vol. 29, pp. 491-511.

<sup>433</sup> The HCCH 2005 Choice of Court Convention is often criticised that it failed to achieve the desired goal as it is only in effect in EU, Mexico, Montenegro and Singapore.

on Customs Tariffs represent the main sources for import/export regulation in Montenegro. Even though the country has good economic relations with all countries worldwide, Montenegrin trading activities are focused on neighbouring countries and the European Market.

Montenegro is a member of WTO which promotes the movement of goods to a wider market.<sup>434</sup> Regional integration has been achieved by membership in the CEFTA, the EFTA, and an EU Free Trade Agreement. Furthermore, Montenegro has adhered to various international standards and has entered into various agreements with numerous countries.

The Statistical Office of Montenegro – MONSTAT collects, processes and disseminates the official data regarding the main trading partners of Montenegro. According to them, the highest external trade was with CEFTA parties and the EU member states.

##### 4.1.1. Import

The leading trade partners with respect to imports are Serbia - €500.4 million, Germany - €244.2 million and China - €221.9 million.<sup>435</sup>

The most frequently imported products in Montenegro are machinery and transport equipment worth approximately €578.1 million.

##### 4.1.2. Export

Montenegro exports its products to Serbia - €107.9 million, Hungary - €45.0 million and Bosnia and Herzegovina - €29.8 million.<sup>436</sup>

The structure of exports relies on natural resources including aluminium, mineral fuels and oils, and iron and steel.

#### 4.2. Political aspects in regards to the implementation of the HCCH 2019 Judgments Convention

At the moment, it is difficult to give an objective view of the situation regarding the possible ratification of the Convention by Montenegro, and its prospective implementation. On the basis of the general elections held on August 30, 2020, there was a change of government in Montenegro, and the successor party to the former League of Communists - the Democratic Party of Socialists, with its coalition partners, lost power for the first time since the introduction of the multiparty system (in December 1990). In the run-up to the elections, the previous government did not consider Montenegro's accession to the HCCH 2019 Judgments Convention.

The new government was formed in December 2020, and has not yet taken concrete measures in this regard. However, it is expected that the possible ratification of this convention will not be a priority for the new government, especially since current issues are related to changes in electoral legislation and related regulations, as well as the adoption of a number of regulations to achieve transitional justice.

##### 4.2.1. Circumstances that can provide for your country to express notifications according to Article 29 of the HCCH 2019 Judgments Convention

So far Montenegro has not used the opt-out mechanisms included in the other HCCH instruments.

<sup>434</sup> Montenegro has been a member of WTO from 29 April 2012, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

<sup>435</sup> <https://www.monstat.org/eng/page.php?id=171&pageid=171>

<sup>436</sup> Ibid.

At first sight, one might draw the conclusion that it is not likely that Montenegro might consider expressing notifications according to art. 29 of the HCCH 2019 Judgments Convention. Bearing in mind the main functions of this notification in the Convention (defining when it becomes effective between two Contracting States and allowing for a limited opt-out option to avoid the establishment of treaty relations with other Contracting States),<sup>437</sup> one specific provision attracts our attention. The PILA specifies that a foreign judgment shall not be recognised if the foreign court based its jurisdiction on facts not recognised by the law of Montenegro as facts that may serve as grounds for the establishment of international jurisdiction of a Montenegrin court in handling the same dispute.<sup>438</sup> One might argue that in order to preserve the so-called “mirror jurisdiction” from the national legislation, Montenegro might consider expressing notification in this regard.

#### 4.2.2. Circumstances that can provide for your country to express declarations in accordance with Article 17, 18, 19 and 25 of the HCCH 2019 Judgments Conventions

In our view, it is not likely that Montenegro will express the declaration in accordance with art. 17 of the Convention, as PILA does not provide a definition of a foreign judgment and the only criteria it uses is the location of the court of origin of the judgment outside of Montenegro. Therefore, the residence of parties, or other matters beyond the list of conditions/impediments for recognition from art. 142–147 of the PILA are irrelevant. Furthermore, Montenegro adheres to the same provision from the HCCH 2005 Choice of Court Convention (art. 20).

As regards the possibility of Montenegro expressing the declaration in accordance with art. 18, the answer is not that straightforward. In general, expressed reservations in other instruments were always aimed at neutralizing some *common-law* concepts.<sup>439</sup> As the HCCH 2019 Judgments Convention already addresses some safeguards (e.g., punitive damages), it is hard to assess the possible outcome. One of the issues that might be considered in this context are contracts producing *in rem* effects over immovable property situated in Montenegro as they fall under the exclusive jurisdiction of Montenegrin judiciary.<sup>440</sup>

Art. 19 of the HCCH 2019 Judgments Convention raises many questions, and at least two issues should be briefly addressed: the capacity of a party to exercise sovereign power and immunity. As the declaration according to art. 19 of the Convention can be made only in relation to a party who has the capacity to exercise sovereign power, even though it may also engage in commercial activities, the State should identify which government agencies are covered by the declaration and the circumstances under which they would be included before making a decision on expressing this declaration.<sup>441</sup> Another question is whether art. 2 para. 5 is a sufficient guarantee that state property will be protected, even though the state retains its immunity.<sup>442</sup> Montenegro, being a small country, might consider that the state’s interest in allowing enforcement under the facilitated conditions prescribed by the Convention is not in its best interests and may consider providing for the application of stricter conditions in order to protect state property.

<sup>437</sup> Explanatory Report, p. 176.

<sup>438</sup> Art. 145 of the PILA.

<sup>439</sup> E.g. pre-trial discovery (HCCH 1970 Convention, art. 23).

<sup>440</sup> See *infra* under 5.4.

<sup>441</sup> “...whether directly or in a delegated manner, generally or in a specific field, and natural persons acting for them, regardless of their employment status.” Explanatory Report, p. 154.

<sup>442</sup> Immunity issues in relation to recognition and enforcement of foreign judicial decisions are not dealt with in Montenegro national legislation. Immunity from enforcement measures in enforcement procedures of domestic or foreign court judgments is provided by art. 13 of the Law on Enforcement and Securing of Claims (LESC). Art. 29 of the Law on Civil Procedure provides that the court of Montenegro will have international jurisdiction if its jurisdiction for a dispute with an international element is expressly provided by a statute or an international treaty or if its jurisdiction arises from the provisions on local jurisdiction of the domestic court. The second option is available if there is no express provision on jurisdiction of the domestic court either in a statute or in an international treaty for the specific type of dispute with an international element. The PILA solely provides that its provisions also apply to private law relations with an international element in which one party is a state unless otherwise provided for by law (PILA, art. 22). In addition, there are specific references to Public International Law as a source of law in some domestic laws. For example, the Law on Civil Procedure (art. 28) provides that the rules of Public International Law shall govern the question of the jurisdiction of Montenegrin courts to adjudicate cases against foreign citizens protected by immunity and against foreign States and international organizations.

The declaration with respect to non-unified legal systems from art. 25 is not relevant for Montenegro.

## 5. International jurisdiction and compatibility with the HCCH 2019 Judgments Convention

In Montenegro, international jurisdiction provisions are mainly contained in the 2014 Private International Law Act, and in most cases, the provisions of the PILA will apply. Its provisions are only vaguely compatible with the HCCH 2019 Judgments Convention and mainly regarding prorogation of jurisdiction. Other relevant provisions either stick to the traditional basis for jurisdiction, adherent to national legal systems, or mirror provisions of the Lugano Convention (to which Montenegro is not a Contracting State.) However, Montenegro is a party to the HCCH 2005 Choice of Court Convention, and in the case of a legal gap, the Law on Civil Procedure allows for the application of domestic rules on local jurisdiction in the function of the rules of international jurisdiction.<sup>443</sup>

Jurisdiction shall be established on the basis of the facts and circumstances present at the time the procedure is initiated and any subsequent changes of facts upon which the jurisdiction was established that may occur at a later stage of a procedure shall not impact jurisdiction (PILA, art. 112). If international jurisdiction is provided by a ratified international treaty, it will have supremacy over the PILA or any other special law regulating international jurisdiction and shall apply directly when it regulates relations differently than national legislation.<sup>444</sup> In case that a foreign court has jurisdiction under the provisions of an international treaty, the domestic court should only declare itself incompetent and it should not deliver the case files to the foreign court.

### 5.1. General international jurisdiction (domicile, habitual residence)

The general jurisdiction of the judiciary of Montenegro for all types of litigious and non-litigious matters with a foreign element is based on the domicile of the defendant and by way of exception on the residence of the defendant who is a natural person. Thus, habitual residence is not a condition for general international jurisdiction in the PILA.

If the defendant is a legal person, according to the rule of general jurisdiction, he may be sued in the country in which he has his seat. The qualification of the notion of the seat (as well as the place of domicile) of the defendant is defined under domestic law. In trials relating to legal persons, in case of doubt, the place where their management is located shall be considered their seat. In disputes against Montenegro or local government units, the seat of its parliament is relevant.<sup>445</sup>

In certain cases, the residence of the defendant can also be the basis for this type of jurisdiction, but only when the defendant is a natural person. If a defendant neither has a domicile in Montenegro nor in the other State, a court in Montenegro shall have jurisdiction if the defendant has his residence in Montenegro.<sup>446</sup>

The PILA extends the general jurisdiction of domestic courts in the case of the existence of material co-defendants, as well as for non-litigious matters, if certain requirements are met. In the event of a lawsuit with multiple defendants and with the status of material co-defendants, a Montenegrin court shall also have jurisdiction when one of the defendants has his domicile or seat in Montenegro.<sup>447</sup> Where a legal relationship is decided upon in non-litigious procedure

<sup>443</sup> Art. 29 of the Law on Civil Procedure.

<sup>444</sup> Pursuant to art. 9 of the Constitution of Montenegro.

<sup>445</sup> Art. 40 of the PILA.

<sup>446</sup> Art. 99 paragraph 2 of the PILA.

<sup>447</sup> Art. 100 of the PILA. According to the HCCH 2019 Judgments Convention Explanatory Report, p. 137, in case of plurality of parties the filters laid down by

involving several parties, a Montenegrin court shall have jurisdiction if the party against whom the claim is filed has his domicile or seat in Montenegro, and where the procedure involves only one person, if that person has his domicile or seat in Montenegro.<sup>448</sup> In non-litigious procedures, there is no defendant so the court starts from the domicile of the person whose role in the procedure is similar to the defendant's role. Furthermore, there is no alternative application of the defendant's residence to natural persons who do not have a domicile.

## 5.2. Prorogation of jurisdiction (expressively/tacitly, before or after the commencement of the procedure)

Provisions on prorogation of jurisdiction in the PILA were inspired by the rules of the Lugano Convention, the Brussels I Regulation (before the 2012 recast) and the HCCH Convention on Choice of Court Agreements (in force in Montenegro since 8 January 2018). The basic ideas of these international documents were tailored into a national piece of legislation.

The PILA provides for the possibility of choosing forum agreements of both the Montenegrin and foreign judiciary. Pursuant to the PILA, parties may agree on the jurisdiction of a foreign judicial authority (one or more foreign courts) or domestic courts (one or more national courts) in matters in which they may freely decide, irrespective of their citizenship, domicile or residence,<sup>449</sup> as long as there is an international character in their relationship. This wording goes well beyond the former rule of the ex-Yugoslav Law on the Resolution of Conflict of Laws with the Regulations of Other States (LRCL)<sup>450</sup> and is aimed at liberalising this domain.<sup>451</sup> The PILA is thus in line with the art. 1 para. 2 of the HCCH 2005 Choice of Court Convention on scope, which provides the definition of an international case (the jurisdictional rules of the Convention will apply either if the parties are not resident in the same State, or if some other element relevant to the dispute [the location of the chosen court excluded] has a connection with some other State).

Under the PILA, the prorogation agreement will have no effect if the judiciary of Montenegro has exclusive jurisdiction over a certain type of dispute, and if the dispute is a type of relation for which parties cannot agree on the jurisdiction because they cannot freely dispose of their rights.<sup>452</sup> Thus, for example, for a dispute over the transfer of property rights to immovable property located in Montenegro, the Montenegrin judiciary has exclusive jurisdiction over and any agreement of jurisdiction of a foreign court for this dispute will not produce legal effects in our country. But, if it is a matter of choice of forum agreement for a dispute on the payment of damages due to non-execution of a contract for the sale of this immovable property, since this type of dispute does not fall under the exclusive jurisdiction of our judiciary, a judgment based on such an agreement could be recognised in our country if it meets other, legally prescribed conditions.<sup>453</sup>

An agreement on the jurisdiction of a court may be stipulated before a dispute arises, for example, as a clause in a sales contract, which provides that all disputes arising out of the contract may be settled by the courts of a particular country, or after a dispute has arisen, in the form of a prorogation contract. In both cases, the emphasis is on contracting jurisdictions for disputes from particular relations. A general prorogation clause, on the basis of which a particular jurisdiction would have been assumed for all future disputes arising out of all legal relations of the parties,

irrespective of the subject matter of the dispute, is not allowed.<sup>454</sup> The jurisdiction of either a domestic or foreign court shall be exclusive, except when otherwise agreed by the parties.

An agreement on jurisdiction is concluded or confirmed: (1) in writing; (2) in a form compliant with the practice that the parties have already established; or (3) in international trade and exchange, in a form compliant with the custom that the parties knew or ought to have known and which is generally known in that area of trade and is regularly adhered to by the parties in agreements of the same type. An agreement on jurisdiction is deemed to be concluded in writing if it is concluded by electronic means of communication that may create a permanent record of the agreement.<sup>455</sup>

In addition to the explicit agreement of the parties, in matters where an agreement on the jurisdiction of a Montenegrin court is allowed, the jurisdiction of a Montenegrin court may be established by the consent of a defendant. A defendant is deemed to have given his consent for a Montenegrin court to have jurisdiction if he has filed a written response to a claim or a complaint against a payment order, or by pleading the merits without having contested jurisdiction.<sup>456</sup>

## 5.3. In comparison to Article 5 of the HCCH 2019 Judgments Convention, provide for the compatibility of the other jurisdictional criteria in the Convention and in the national legal sources

Before comparing national jurisdictional criteria and criteria from art. 5 of the HCCH 2019 Judgments Convention, we shall give a brief overview of the main basis for specific jurisdiction from the PILA. This legislation adheres to a generally accepted basis for specific international jurisdiction,<sup>457</sup> (citizenship,<sup>458</sup> habitual residence, domicile of plaintiff, place where the property is situated, place of performance of a contract, place of harmful event and so forth).

The establishment of specific jurisdiction in order to protect a certain category of persons, usually the weaker party, which is in the role of the plaintiff, is based on the place of domicile of the consumer, the place of habitual work of the employee and so forth. Special protection for consumers and employees is primarily based on the premises that:

1. the weaker party as the plaintiff institutes the procedure in Montenegro: in the case of consumer contracts, if the consumer has domicile in Montenegro, and in the employment contract, if the employee habitually performs his job in Montenegro;<sup>459</sup>
2. the other party to the contract (company, employer) may initiate the procedure only in Montenegro as the place of domicile of the weaker party;
3. in order to avoid disturbing this system, the possibility of parties designating jurisdiction is limited.

The PILA introduces the concept of exceptional jurisdiction (*Forum necessitates*) and provides for the possibility of establishing jurisdiction of the courts and bodies of Montenegro when such jurisdiction is not prescribed by law.<sup>460</sup> Nevertheless, this possibility is of exceptional character and requires fulfilment of certain conditions: the proceedings cannot be initiated abroad, or it would be unreasonable to demand that the action be brought abroad, and that the case has a sufficient connection with Montenegro.<sup>461</sup>

454 Triva, Siniša and Mihajlo Dika. *Građansko parnično procesno pravo, 6. izdanje* (Civil Litigation Law, 6th edn.). Zagreb, Narodne novine, 2004, p. 286; Jakšić, Aleksandar. *Građansko procesno pravo* (Civil Procedural Law). Belgrade, Univerzitet u Beogradu, Pravni fakultet 2010; Vuković, Đuro. *Međunarodno građansko procesno pravo* (International Civil Procedural Law). Zagreb, Informator, 1987, p. 29.

455 Art. 105 of the PILA.

456 Art. 106 of the PILA.

457 Kostić-Mandić, Maja. "The New Private International Law Act of Montenegro." *Yearbook of Private International Law*, Vol. XVI, 2014/2015, p. 437–438.

458 As citizenship is not relevant for this subject matter it will not be addressed in the following survey.

459 Even if the employee does not or did not regularly work only in one country, if the business unit that engaged the employee is or was located in Montenegro.

460 The ability to establish the jurisdiction of judiciary in Montenegro, although the PILA does not provide for the competence of our bodies for this type of relationship, is motivated by securing access to justice as one of the fundamental human rights.

461 Art. 113 of the PILA.

art. 5 must be assessed individually for each party.

448 Art. 109 of the PILA.

449 Under the HCCH 2005 Choice of Court Convention (Art. 1 para. 2), it is provided that in the domain of jurisdiction a case is considered to be international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, irrespective of where the chosen court is located, are connected only with that State.

450 Law on Resolution of Conflict of Laws with Regulations of Other States, Belgrade, "Službeni list SFRJ" no. 43/82, 72/82 and "Službeni list SRJ" no. 49/96.

451 Previously, pursuant to art. 49 of the LRCL, in order to be able to agree on the jurisdiction of the domestic judiciary, at least one of the parties had to be a citizen of Montenegro or in the case of a legal person, have its seat in Montenegro. For the contracting of the jurisdiction of a foreign judiciary, foreign citizenship, or seat in a foreign country and the lack of exclusive jurisdiction of Montenegrin judiciary were required.

452 Art. 104 of the PILA.

453 Pak, Milan. *Međunarodno privatno pravo, 4. izdanje* (Private International Law, 4th edn.). Belgrade, Službeni list SRJ, 2000, p. 56.

The following section compares jurisdictional criteria from art. 5 of the HCCH 2019 Judgments Convention and those in the national legal sources (the PILA) and offers a brief statement on their compatibility.

The general jurisdiction rule in the PILA provides that the court of the defendant's domicile has jurisdiction. Therefore, habitual residence is not a base for this type of jurisdiction to the subject matters covered by the HCCH 2019 Judgments Convention, so these criteria are not compatible with the art. 5 para. 1(a).

Generally, habitual residence is not a standard for jurisdiction in the PILA for the subject matters covered in this Study. The Act provides no special rules on jurisdiction pertaining to natural persons conducting business activities and other rules cannot be applied by way of analogy and therefore the national criteria on jurisdiction are not compatible with art. 5 para. 1(b).

In addition, there is no special provision in the PILA stipulating that a judgement is eligible for recognition if the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based, and therefore the national criteria on jurisdiction are not compatible with art. 5 para. 1(c).

Art. 102 of the PILA, entitled "Jurisdiction according to the place of business" is compatible with the art. 5 para. 1(d). It stipulates that a Montenegrin court shall have jurisdiction over a dispute arising out of the business operation of a branch, representative unit or secondary establishment located in Montenegro even when the defendant does not have his statutory seat in Montenegro.

The PILA stipulates that in matters in which an agreement on the jurisdiction of a Montenegrin court is allowed pursuant to art. 103, the jurisdiction of the Montenegrin court may be established by the consent of the defendant (art. 106 para. 1). In addition, the Law on Civil Procedure addresses the situation when the jurisdiction of the domestic court depends on the consent of the defendant.<sup>462</sup> Thus, Montenegrin provisions are compatible with situations where the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which judgment was given from art. 5 para. 1(e) in the manner explained in the Explanatory Report.<sup>463</sup>

Art. 106 para. 2 of the PILA addresses a similar situation as does art. 5 para. 1(f) of the Convention. A defendant is deemed to have given consent for the jurisdiction of a Montenegrin court if he has filed a counterclaim or a complaint against a payment order, if at the preliminary hearing, or if there was no such hearing, at the first hearing on the merits he entered into discussion without having contested jurisdiction, or if he has filed a counterclaim.

Regarding jurisdiction to hear contractual disputes, the PILA (art. 123) mirrors the wording of art. 5 para. 1(g) and art. 5 para. 1(g)(l) of the Convention in a general rule, even addressing what is considered to be the place of fulfilment of the obligation unless the parties have otherwise agreed (in the supply of goods, the place in which, under the contract, the goods have been delivered or should be delivered; in the supply of services, the place in which, under the contract, the services have been delivered or should be delivered). As parties are free to agree on jurisdiction for contractual obligations they may agree otherwise. However, the filter under ii) addressing the law applicable to the contract is not applicable in Montenegro.

Exclusive jurisdiction of the Montenegrin judiciary exists only in proceedings regarding the long-term tenancy of immovable property located in Montenegro. If a tenancy of immovable property is concluded for temporary private use for a period of not more than six consecutive months, if the tenant is a natural person and both the landlord and tenant have their domicile in another country, there will be no exclusive jurisdiction of our judiciary and in that case, there is a compatibility of

<sup>462</sup> Art. 9 para. 3 of the Law on Civil Procedure reads as follows: "When in the course of a procedure, the court finds that a domestic court does not have jurisdiction over the dispute, it shall declare that it is not competent, annul the actions conducted in the procedure and reject the complaint, except in cases when jurisdiction of the domestic court is dependent on consent of the defendant whereby the defendant granted consent."

<sup>463</sup> Explanatory Report, pp. 95-96. <https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf>

art. 119 para. 2 of the PILA with art. 5 para. 1(h) of the Convention.

Pursuant to art. 101 of the PILA, a Montenegrin court with jurisdiction to hear one of several actions shall also have jurisdiction to hear other actions if they are related to the action that the Montenegrin court has jurisdiction over (the actions shall be deemed related if the connections among them are so close that it is justified to hear and determine them together to avoid the risk of irreconcilable judgments if the actions were heard separately). Generally speaking, the doctrine is unanimous that exclusive jurisdiction of Montenegrin courts exists only regarding the proprietary legal effects of contracts on immovable property. By way of analogy, a judgment will be eligible for recognition if it is ruled against the defendant on a contractual obligation secured by a right *in rem* on immovable property located in Montenegro, if the contractual claim was brought together with a claim against the same defendant relating to the right *in rem* and this criterion is fully in compliance with art. 5 para. 1(i) of the Convention.

The criterion from the PILA art. 126 para. 1 stipulating that "A Montenegrin court shall have jurisdiction to hear disputes in respect of non-contractual relations even when the tort/delict occurred or is likely to occur on the territory of Montenegro" is fully in compliance with art. 5 para. 1(j) of the Convention.

Montenegrin law does not recognise the concept of trust as it is a legal category unknown to the domestic legal system. Therefore, there is no provision in compliance with art. 5 para. 1(k) of the Convention.

Regarding jurisdiction for a judgment ruled on a counterclaim, the PILA stipulates, in a general manner, that the Montenegrin court shall have jurisdiction to hear the counterclaim arising from the same agreement or facts on which the original action is based, but it does not provide for the additional filters from art. 5 para. 1(l (I, II)).

As Montenegro is a State Party to the HCCH 2005 Choice of Court Convention, it introduced provisions on the same subject matter in line with the Convention in the PILA (art. 103, 104) and fully harmonized its legislation with the definition of a choice of court agreement as per art. 5 para. 1(m) of the HCCH 2019 Judgments Convention.

The PILA provisions on jurisdiction in consumer and employment matters (art. 124-125) are in line with the Lugano Convention and compatible with the criteria from art. 5 para. 2 of the HCCH 2019 Judgments Convention.

The PILA provisions on exclusive jurisdiction (art. 119, 111) are fully compatible with art. 5 para. 3 of the Convention.

## 5.4. Exclusive jurisdiction

The PILA regulates exclusive jurisdiction mirroring art. 22 para. 1 of the Lugano Convention. The PILA specifies that a Montenegrin court shall have exclusive jurisdiction when so explicitly provided for by that or another piece of legislation. Based on the PILA, the judiciary of Montenegro is exclusively competent for two groups of relations: those related to immovable property located in Montenegro and procedures where the exercising of certain private rights depends on the authorities of Montenegro, matters beyond the scope of the HCCH 2019 Judgments Convention.<sup>464</sup>

The first area includes the exclusive jurisdiction of the Montenegrin judiciary for proceedings relating to the acquisition, transfer, alteration and termination of real rights in immovable property in Montenegro, as well as for the tenancy of immovable property located in our country. Here, the

<sup>464</sup> Subject matters include: registration with public registers kept in Montenegro, validity, nullity or dissolution of a company or other legal person and the validity of decisions of their organs, if they have their seat in Montenegro and procedures related to the registration or validity of industrial property rights in Montenegro (Arts. 111, 118 and 122 of the PILA, respectively).

difference between the proprietary and obligatory legal effects of the contract should be made. If the rights in rem in immovable property are transferred by contract, exclusive jurisdiction applies only to the proprietary effects of the contract.<sup>465</sup> Regarding the tenancy of immovable property located in Montenegro, the exclusive jurisdiction of our judiciary exists only in the proceedings regarding long-term tenancy. If a tenancy of immovable property is concluded for temporary private use for period of not more than six consecutive months, if the tenant is a natural person and if both the landlord and tenant have their domicile in another country, there will be no exclusive jurisdiction of our judiciary.<sup>466</sup>

The PILA does not provide exclusive jurisdiction for the disputes in respect of the rights in rem in aircraft, vessels, nor for disputes in respect of a lease of aircraft and vessels even if the register where the aircraft or vessel is registered is kept in Montenegro.<sup>467</sup>

The PILA also provides for cases of relative exclusive jurisdiction on the basis of a prorogation agreement entered into by parties. The law explicitly states that exclusive jurisdiction is based on an agreement on the jurisdiction of a domestic or foreign judiciary, unless the parties have otherwise agreed.<sup>468</sup> A situation may arise where, despite the existence of a prorogation agreement, one party initiates proceedings in another country and not in the country whose jurisdiction was determined by agreement, and the other party files a written response to a claim or a complaint against a payment order, or pleads the merits without having contested jurisdiction. In such cases, the parties took the opportunity to change their choice of competent jurisdiction based on their party autonomy (which can be expressed through conclusive actions) for their case that no longer has the character of the rules on exclusive jurisdiction.

Relative exclusive jurisdiction also includes rules for certain types of contracts where the legislator protects the weaker party. Thus, in the case of a consumer contract, the legislator protects the consumer, or, in the case of an individual employment contract, the employee, by stipulating that an economically stronger party (trader or employer) can sue a weaker party that has domicile in Montenegro only in Montenegro, unless the parties designate the jurisdiction of another judiciary by prorogation agreement.<sup>469</sup>

## 6. Procedure for recognition and enforcement of foreign judicial decisions and compatibility with the HCCH 2019 Judgements Convention

### 6.1. Material scope of application

#### 6.1.1. In comparison to Article 1 and 2 of the HCCH 2019 Judgments Convention, provide for the compatibility of the material scope of application for the recognition and enforcement of foreign judicial decisions in the Convention and in the national legal sources

Montenegrin legislation is compatible with the substantive scope regarding civil and commercial matters as stipulated by art. 1 of the HCCH 2019 Judgments Convention which addresses the scope of the Convention, defining it in substantive and geographic terms.<sup>470</sup>

465 Galić, Aleš. "Uredba Brisel I: temelj evropskog građanskog procesnog prava (The Brussels I Regulation – the base of European civil procedural law)." *Recent trends in European PIL – challenges for the national legislations of the South East European countries*. Edited by T. Deskoski. Skopje, Faculty of Law Skopje, 2011, p. 50.

466 Art. 119 para. 2 of the PILA.

467 Art. 121 of the PILA.

468 Art. 103–104 of the PILA.

469 Art. 124–125 of the PILA.

470 Explanatory Report, p. 52.

Furthermore, recognition and enforcement shall not extend specifically to revenue or customs in Montenegro. However, meritorious decisions in administrative matters may be the subject of recognition and enforcement under strict conditions explained in detail under title 6.2. of this Study.

Montenegrin legislation is also compatible with art. 2 para. 1 and its filters (sub-paragraphs "a" to "q") of the HCCH 2019 Judgments Convention which exclude certain matters from the scope of the Convention. In Montenegro, the status of natural persons, maintenance, family matters, succession matters (sub-paragraphs a, b, c, d) as traditional civil matters may be the subject of recognition and enforcement pursuant to the PILA. Some matters listed in art. 2 para. 1 of the Convention fall under exclusive jurisdiction of the Montenegrin judiciary (sub-paragraphs e, i, j, m – the exception being intellectual property judgments based on general contract law), and some are subject to other ratified international treaties (sub-paragraphs f, g, h). For other matters listed, they should be examined to determine whether the judgments in concrete cases fall under the notion of civil cases and judgments eligible for recognition and enforcement (sub-paragraphs k, l). Other matters listed are generally not considered civil and commercial matters in Montenegrin legislation if they stem from *acta iure imperii*.

Art. 2 para. 2 of the HCCH 2019 Judgments Convention refers to cases "where a listed matter excluded from the scope of the Convention was the 'object' of the proceedings, and not where it arose as a preliminary question, in particular by way of defence."<sup>471</sup> The preliminary question, though not in this context, is addressed in art. 155 of the PILA stipulating "Where a Montenegrin court handles the matter of recognition or declaration of enforceability of a foreign judgment as a preliminary question, the Montenegrin court shall have jurisdiction in respect of its recognition or declaration as enforceable in the procedure in which it decides the matter in relation to which the application is made."

Arbitration and related proceedings addressed in art. 2 para. 3 of the HCCH 2019 Judgments Convention as matters excluded from the scope of the Convention are fully in line with Montenegrin legislation as these matters fall under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the Law on Arbitration.

The national legislation of Montenegro is in line with art. 2 para. 4 and 5 of the HCCH 2019 Judgments Convention. The PILA even stipulates that its provisions also apply to private law relations with an international element in which one party is a state unless otherwise provided for by law. As privileges and immunities addressed in art. 2 para. 5 of the HCCH 2019 Judgments Convention are usually linked to the exercise of State authority (*acta iure imperii*), situations involving privileges and immunities will not give rise to judgments in civil or commercial matters.<sup>472</sup>

### 6.2. Types of foreign judicial decisions that are recognized and enforced (e.g. positive-negative decisions, interim measures)

In Montenegro, the subject of recognition may be a foreign judicial decision, court settlement or decision of another authority which is equivalent to a court judgment in the country of origin and regulates private legal relations with an international element.<sup>473</sup> Only meritorious decisions may be recognised, irrespective of name in the country where they were rendered, and irrespective of which type of authority, possibly even non-judicial, may have made the decision, as long as the decision was made in the form, procedure and by an authority competent for the adoption of such a decision pursuant to the law of the country of the decision-making (e.g. the decision of a foreign administrative or religious body on divorce can be recognised if it meets the conditions

471 Explanatory Report p. 56.

472 Explanatory Report p. 71.

473 Art. 141 of the PILA.

for recognition).<sup>474</sup> The Law on Enforcement and Securing of Claims stipulates that foreign enforceable decisions must meet the requirements for recognition and enforcement, prescribed by law or international treaty in order to be viable for the enforcement procedure (art. 12). This law lists judicial decisions and decisions in administrative procedures which may be subject to the enforcement procedure (which also applies to foreign decisions). According to this law, judicial decisions are: a judgment, ruling, ruling on securing of claims, payment and other court order, arbitration decisions and a court settlement (art. 10 para. 1). Decisions in administrative procedure under this Law are: a ruling and conclusion of a state administration body and other state body, as well as a business organisation or other legal entity adopted in performance of public authorisations and settlements reached under the law governing general administrative procedure (art. 19 para. 2).

Applying the rule contained in art. 19 para. 1 of the LESC on foreign judicial decisions, the list might appear as follows: foreign condemnatory judgment from civil proceedings and foreign condemnatory decision from civil, non-litigious and executive proceedings, foreign judicial decision on security, foreign payment and other foreign court orders, foreign arbitration awards, a foreign court settlement concluded before a court.<sup>475</sup>

The foreign character of the decision relates to the moment when the decision has become final, which means that, for example, the decisions of courts in Slovenia or Croatia that became valid during the existence of SFR Yugoslavia could not now be considered foreign decisions.<sup>476</sup>

### 6.3. Commencement of the procedure (as a main or preliminary question)

The procedure for the recognition of a foreign judicial decision shall be initiated by an application. The recognition of foreign court decisions shall fall within the territorial jurisdiction of the court having actual jurisdiction.

Where a Montenegrin court handles the recognition or declaration of enforceability of a foreign judgment as a preliminary question, the Montenegrin court shall have jurisdiction over its recognition or declaration as enforceable in the procedure in which it decides the matter for which the application was made.<sup>477</sup>

### 6.4. Documents that need to be produced (formal requirements) for the recognition of the foreign judicial decision

The following must be submitted together with the application for recognition or declaration of enforceability of a foreign judgment: the original judgment or its certified transcript, together with a translation by a certified court interpreter; a certificate that the judgment is final under the law of the State in which it was given and a certificate that the judgment is enforceable under the law of the State in which it was given if the declaration of enforceability of the judgment is sought (PILA, art. 156).

### 6.5. Conditions for recognition and enforcement of foreign judicial decisions

In Montenegro, the preconditions for the recognition of a foreign judgment are formulated as impediments to recognition, that is, in a negative way. The only positively formulated precondition

is that the applicant for the recognition must submit a certificate of the competent foreign court or other authority that the judgment has become final.

Therefore, except in the above case, the burden of proof is on the opponent of the applicant and if they prove the existence of an obstacle, the recognition of the foreign judgment shall be denied. A different rule applies for impediments proven *ex officio* by the court. If the court fails to determine the existence or absence of the conditions that are accounted for *ex officio*, it will be considered that there are no obstacles and therefore a decision on the recognition of a foreign decision will be issued.

Pursuant to the PILA, the conditions for the recognition of a foreign judgment are:

Finality under the law of the State of origin

A foreign judgment shall be recognised if the person seeking recognition submits, together with the judgment (or its certified transcript, a certified translation of the foreign judgment) a certificate by a foreign court or other competent authority that the judgment has become final pursuant to the law of the country of origin.<sup>478</sup> If the applicant for the recognition fails to submit the certificate even after a postponed deadline, the application for the recognition of a foreign court decision will be rejected.

Impediments to recognition concerned with possible violations of Montenegro's legal system as the country in which recognition is sought include:

International jurisdiction

International jurisdiction involves two cases: the lack of exclusive jurisdiction of the Montenegrin judiciary and the lack of excessive jurisdiction of the foreign judiciary. The law specifies that a foreign judgment shall not be recognised if the subject matter is within the exclusive jurisdiction of a judicial or other authority of Montenegro,<sup>479</sup> as well as if the foreign court based its jurisdiction on facts not recognised by the law of Montenegro as the facts that may serve as grounds for the establishment of international jurisdiction of a Montenegrin court in handling the same dispute.<sup>480</sup>

The right of the defence

Respecting the rights of the defence in the law of Montenegro implies that a Montenegrin court shall refuse to recognize a foreign judgment if upon a party's application the court finds that the defendant could not have taken part in the foreign proceedings due to irregularities in the procedure. The inability to participate in the proceedings should be interpreted narrowly, that the party was not able to participate in a certain stage of the procedure and that later a different result could not have been attained in the appellate procedure or using extraordinary legal remedies. If a party had at its disposal an effective remedy at the later stages of the proceedings, but did not use it, it is not entitled to invoke a violation of the right of the defence in the procedure for the recognition of a foreign judgment.<sup>481</sup> The PILA specifies that irregularities relate "especially" to adequate service and sufficient time to prepare for defence,<sup>482</sup> which opens the possibility for a wider interpretation of the content of this institute. In the first case, the person against whom the decision was made must prove that he could not have taken part in the procedure because he was not served in person with the summons, lawsuit, or decision which instituted the proceedings, or if no attempt of service was made. If personal delivery was tried, but it was not successful,

474 Pač, Milan. *Međunarodno privatno pravo* (Private International Law). Belgrade, Nomos, 1991, p. 104.

475 Račić, Ranka. *Sprovođenje stranih izvršnih naslova u Crnoj Gori* (Enforcement of Foreign Executory Titles in Montenegro). Podgorica, Pravni zbornik, no. 3/2019, p. 73.

476 For the case law in Serbia, see: Varadi, Bordaš, Knežević, Pavić. *Međunarodno privatno pravo, 14. izdanje* (Private International Law, 14th edn.). Belgrade, Univerzitet u Beogradu, Pravni fakultet, 2012, p. 583.

477 Art. 152 and 155 of the PILA.

478 Art. 142 and art. 149 para. 2 of the PILA.

479 Art. 144 of the PILA.

480 Art. 145 of the PILA.

481 Dika, Mihajlo, Gaša Knežević and Srđan Stojanović. *Komentar Zakona o međunarodnom privatnom i procesnom pravu* (Commentary of the PILA). Belgrade, Nomos, 1991, p. 290.

482 Art. 143 of the PILA.

the opponent of the applicant cannot rely on this reason. This objection is characteristic of the decisions made in the absence of the defendant.<sup>483</sup> In the second case, the opponent of the applicant for the recognition in the foreign procedure was not given sufficient time to prepare the defence as, for example, the deadlines for addressing the allegations of the other party were too short.<sup>484</sup> The opponent of the applicant for the recognition cannot invoke this basis if he has in any way taken part in the hearing on the merits in the first instance proceeding.

The existence of a final judgment in the same matter and between the same parties and the effects of *lis pendens*

Art. 146, para. 1 of the PILA stipulates, “A foreign judgment shall not be recognised if a judicial or other authority of Montenegro gave a final judgment involving the same cause of action, or if another foreign judgment on the same cause of action was recognized in Montenegro.” Therefore, Montenegrin law gives priority to domestic final judgments irrespective of the time of rendering, and if there is a valid domestic decision, or a previously recognised foreign judgment in the same legal matter, between the same parties, this will constitute an unavoidable impediment to the recognition of a foreign judgment.

The PILA prescribes that the court shall stay the proceedings for recognition of a foreign judgment if proceedings instituted earlier and involving the same cause of action and between the same parties are still pending before a Montenegrin court. The proceedings will be stayed until the earlier proceedings have been completed.<sup>485</sup> What will happen next with the recognition procedure depends on the outcome of the domestic lawsuit. If the domestic litigation results in the issuance of a meritorious decision, we would have a situation of the existence of an adjudicated matter (*res iudicata*) and a foreign judgment could not be recognised. If the procedure in Montenegro does not end with the issuance of a meritorious decision, the recognition procedure would continue.

#### Violation of public policy

A foreign court judgment will not be recognized if the effect of its recognition, and not the judgment itself, would be manifestly contrary to the public policy of Montenegro.<sup>486</sup> The court shall act *ex officio*. In this segment, both the merits of the decision and the existence of important procedural legal irregularities in the making of a foreign judgment can be examined. In both cases, one should always bear in mind the effect of the foreign decision and its relationship with the basic principles of the domestic legal system. The public policy subsumes a defence based on procedural and substantive fraud.<sup>487</sup>

The above listed impediments for recognition and enforcement from the PILA are in line with those from art. 7 of the HCCH 2019 Judgments Convention. The only tricky issues relate to international jurisdiction. Jurisdiction-related issues are dealt with in several articles, paragraphs and sub-paragraphs of the Convention and they are not addressed in the same manner in the PILA. Thus, the provision on exclusive jurisdiction (art. 6 of the Convention) is narrower in scope than the concept of exclusive jurisdiction as explained in detail under heading 5.4. of this Study. Another defence which is not the same in the two legal sources is the notion of exorbitant jurisdiction (so called “mirror jurisdiction”) which is explicitly listed as an impediment to recognition in art. 145 of the PILA.

## 6.6. Procedure for recognition and enforcement of foreign judicial decisions

In order for foreign judgments to produce an effect in Montenegro, they have to pass through a

<sup>483</sup> Stanivuković, Maja and Mirko Živković. *Međunarodno privatno pravo: opšti deo* (Private International Law: General Part). Belgrade, Službeni list SGG, 2004, p. 453.

<sup>484</sup> Ibid.

<sup>485</sup> Art. 146 para. 2 of the PILA.

<sup>486</sup> Art. 147 of the PILA.

<sup>487</sup> See Kostić-Mandić, Maja. *Međunarodno privatno pravo* (Private International Law). Podgorica, Pravni fakultet UCG, Podgorica, 2017, pp. 196-198.

formal recognition process called “*exequatur*.” Art. 141 of the PILA stipulates that a recognised foreign judicial decision in Montenegro is the equivalent of decisions of domestic courts. This means that a foreign judgment in Montenegro can produce only those effects stipulated by our legal system and cannot produce any effect that it would have under the law of the State of origin. In its procedure for recognition of a foreign judgment, the court shall limit itself to examining whether the conditions from art. 142–147 of the PILA have been met.

The procedure for the recognition of foreign judgments is regulated by art. 152- 157 of the PILA. The recognition procedure is initiated by an application of a party.<sup>488</sup> The court decides in special extra-judicial procedure on such an application. In the recognition procedure the court only examines whether conditions for enforcement have been met.<sup>489</sup> The procedure must be expeditive and it is normally based on adjudicating written documents and does not involve hearings. The court may, by its ruling, recognize a judgment, recognize a judgment and establish that it is enforceable or refuse recognition. A party can submit a complaint against a ruling on recognition to the Council of three judges of a Basic Court or Commercial Court in 30 days from the date of receipt. The unsatisfied party has a right to file an appeal to the High Court (or the Court of Appeal if the Commercial Court decided as a first instance court) against the ruling refusing recognition. Furthermore, if the judgment of a foreign court has been set aside by the court of the country of origin, the party can submit an application to reopen the procedure as an extraordinary legal remedy.<sup>490</sup>

Foreign condemnatory judgments recognised by a court in Montenegro are executory titles.

## 7. Enforcement of foreign judicial decisions

### 7.1. Type of enforcement procedure

Enforcement procedure is regulated by The Law on Enforcement and Securing of Claims. Enforcement procedure can be initiated by the application of a party to an Enforcement Agent,<sup>491</sup> except in cases where the court is competent for enforcement.<sup>492</sup> Enforcement agents are appointed by the Minister of Justice, who supervises their work. A party shall submit the ruling on recognition together with confirmation that the judgment is final and enforceable, attached to the application for enforcement.<sup>493</sup>

Upon receipt of the enforcement application, the Enforcement Agent renders a decision to initiate the collection procedure or to refuse enforcement. An unsatisfied party can file a complaint against such a decision to a competent court within 5 days of the receipt of the decision. However, such a complaint does not prevent the collection procedure because collection is based on executory title.<sup>494</sup>

It is also important to emphasize that Enforcement Agents are only competent to decide on enforcement procedure, to levy enforcement and to enforce the securing of claims, except in cases where the competency of the court is prescribed by law. However, the competence for recognition of foreign judgments remains exclusively with the competent court (PILA, art. 152 para. 1, 2, 3) and therefore public enforcement officers may not decide on the recognition of a foreign judgment as a preliminary question in an enforcement procedure.<sup>495</sup>

<sup>488</sup> Art. 152 of the PILA.

<sup>489</sup> Art. 153 of the PILA.

<sup>490</sup> Art. 154 of the PILA.

<sup>491</sup> Collier, J. G. *Conflict of Laws*. Cambridge University Press, 2004, p. 123.

<sup>492</sup> Art. 4 of the LESC.

<sup>493</sup> Rogerson, Pippa. *Collier's Conflict of Laws*. Cambridge University Press, 2013, p. 237.

<sup>494</sup> Art. 47 and 49 of the Law on Enforcement and Security of Claims “Official Gazette of Montenegro” no. 36/2011, 28/2014, 20/2015, 22/2017, 76/2017 and 25/2019.

<sup>495</sup> Račić, Ranka. *Sprovođenje stranih izvršnih naslova u Crnoj Gori* (Enforcement of Foreign Executory Titles in Montenegro). Podgorica, Pravni zbornik, no.

On the basis of a decision that has partially become enforceable, enforcement may be ordered only to that extent. Enforcement shall also be ordered on the basis of a judicial decision that has not become final and non-appealable, and on the basis of a decision adopted in administrative procedure that has not become final, if the law prescribes that an appeal does not hinder the enforcement of a decision.

## 7.2. Enforcement procedure in situations when the enforcement officers are directly confronted with a foreign judicial decision

When a foreign judicial decision is attached to the application for enforcement, the enforcement agent is obliged to reject such an application as inadmissible because there is no court decision recognizing the foreign judicial decision. In the explanation of the ruling rejecting the application for enforcement, he/she is obliged to explain why it was rejected and to instruct the executive creditor to submit an application for recognition of a foreign judicial decision.

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## COUNTRY REPORT: NORTH MACEDONIA

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## Executive Summary

The purpose of this Report is to provide an overview of the national legislation regarding recognition and enforcement of foreign judicial decisions and to critically assess the current legal system, institutional structure, legal practices and existing obstacles for cross-border enforcement of foreign judicial decisions in the Republic of North Macedonia. Moreover, this Report is constructed around the solutions provided in the HCCH 2019 Judgments Convention in order to intensify international cooperation with the Hague Conference on Private International Law (HCCH) and steer towards an informed decision on the ratification of the HCCH 2019 Judgments Convention by the Republic of North Macedonia. This Report, in its extensive preparation, intended to incorporate the views of the most relevant stakeholders for the recognition and enforcement procedures in the Republic of North Macedonia such as the Ministry of Justice of the Republic of North Macedonia (MoJ), the Chamber of Enforcement Agents of the Republic of North Macedonia, and the largest civil court in the Republic of North Macedonia – the Basic Civil Court of Skopje.

The main strategy of national Private International Law is to transpose the relevant EU Regulations into the Private International Law Act (PILA 2020) and to be in line with the developments of the Hague Conference on Private International Law (HCCH). Such a strategy intends to gradually adapt the judiciary to the solutions and principles provided in the EU Regulations even before the Republic of North Macedonia becomes a Member State to the EU, and at the same time, to provide for a universality that is based on the experiences from the HCCH Conventions. As a result, the PILA 2020 intends to operationalise this strategy, and the findings are presented in this Report. The PILA 2020 has been in force since February 2021, and at the time this Report was being written, potential problems had not arisen in practice, although the timeframe of its application is rather short (only 2 months).

Generally, in the context of the HCCH 2019 Hague Judgments Convention, this Report shows that the national procedure for recognition and enforcement of foreign decisions will support the circulation of judgments on the basis of the HCCH 2019 Judgments Convention. Nevertheless, there are certain aspects that the PILA 2020 needs to adopt to provide for better coordination between these two legal instruments. Many of the indirect jurisdictional filters provided in art. 5 of the HCCH 2019 Judgments Convention are present in the PILA 2020. However, there are certain aspects that could potentially disrupt coordination between the PILA 2020 and the HCCH 2019 Judgments Convention such as the problems with the domicile of persons that are not registered, or that have abandoned their domicile in the Republic of North Macedonia and have habitual residence in a different place.

Regarding the stakeholders, this Report shows that they are well aware of the legal sources and the complexity and interconnection of the national and international legal sources, however, all of them have indicated that too little is done in the practical training of the stakeholders, especially with the implementation of the new PILA 2020 and the four signed HCCH Conventions in 2019, which have still not been ratified by the Assembly of the Republic of North Macedonia.

## 1. Legal Framework of the cross-border recognition and enforcement of civil judicial decisions

### 1.1 Overview of Constitutional and Legal Provisions

The legal provisions on Private International Law and especially those for the recognition and enforcement of foreign judicial decisions in the Republic of North Macedonia (North Macedonia) are covered by two different categories of legal sources: national legal sources and international agreements.

Coordination between the national legal sources and international agreements is provided for by art. 118 of the Constitution of Republic of North Macedonia<sup>496</sup> which stipulates the supremacy of international agreements over national legal sources.<sup>497</sup> Moreover, the Law on Courts<sup>498</sup> explicitly states that in situations when the Court considers that the internal law is in collision with the provisions of the international agreement ratified in accordance with the Constitution, then conditionally, if the provisions in the international agreement are directly applicable, the Court will apply the provisions of the international agreement.<sup>499</sup> Such a position is also envisaged in the Private International Law Act (hereinafter the PILA 2020)<sup>500</sup> where the supremacy of international agreements stipulates that the provisions of the PILA 2020 are not applicable if they are regulated by ratified international treaties.<sup>501</sup>

Therefore, to properly understand the system of incorporation of foreign judicial decisions in North Macedonia, mention has to be made to the national legal sources, as well as the international agreements (bilateral and multilateral) that are applicable in North Macedonia. Part 1.1.1 will address the legal provisions for the recognition and enforcement of foreign judicial decisions that are part of the national legal sources, while Part 1.1.2. will provide an overview of the international legal agreements that contain provisions on recognition and enforcement of foreign judicial decisions.

#### 1.1.1 National Legal Sources

##### 1.1.1.1. Private International Law Act of the Republic of North Macedonia

The PILA 2020 was adopted in January 2020 (in force since February 2021) and represents the second systematisation of private international law rules since the Republic of North Macedonia's independence from the Socialist Federative Republic of Yugoslavia (hereinafter the SFRY) in 1991. However, to properly understand the rules of the new PILA 2020, mention must be made to its predecessors: the Private International Law Act of 2007 (hereinafter the PILA 2007)<sup>502</sup> and Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters (hereinafter the PILA 1982).<sup>503</sup> Furthermore, the duty imposed by art. 68 of the Stabilisation and Association Agreement with the European Communities and their Member States (SAA)<sup>504</sup> for the adaptation of internal laws and compatibility of the legal sources of North Macedonia with EU legal sources has significant bearing on the structure and the substance of the new PILA 2020.

496 Official Gazette of RM, no. 52/91, 1/92, 31/98, 91/01, 84/03, 107/05, 03/09, 49/11 and Official Gazette of RNM, no. 06/19 with the Constitutional Act on implementation of the Amendments XXXIII - XXXVI of the Constitution of Republic of Macedonia, Official Gazette of RNM, no. 06/19.

497 "The international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law."

498 Law on Courts, Official Gazette of RM, no. 58/06, 62/06, 35/08, 150/10, 83/18, 198/18 and Official Gazette of RNM, no. 96/19.

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500 Private International Law Act (Закон за меѓународно приватно право), Official Gazette of Republic of North Macedonia, no. 32/2020.

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503 Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters (Закон за решавање на судирот на законите со прописите на другите држави во одредени односи), Official Gazette of the SFRY, no.43/1982.

504 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, Official Gazette of the Republic of Macedonia, no. 28/2001.

The scope of the PILA 2020 has been slightly changed and, in comparison with the PILA 2007, it now only contains one paragraph covering all of the PIL issues (applicable law, international jurisdiction and procedure and recognition and enforcement). This rule also does not specify the subject matter of the relations covered by the PILA 2020,<sup>505</sup> but contains the general definition that the PILA 2020 applies to "... private legal relations having an international element..."<sup>506</sup>

#### 1.1.1.2 The provisions in the PILA 2020 regarding recognition and enforcement of foreign decisions

Part IV of the PILA 2020 refers to the recognition and enforcement of foreign decisions. The provisions on recognition and enforcement are divided into three chapters, Chapter I definitions; Chapter II conditions for recognition and enforcement and Chapter III procedure for recognition and enforcement. These aspects will be covered in Part 6 of this Study.

505 This was case with the PILA 2007, which in art. 1 stipulated "...personal (status), family, labour, property and other civil relationship having an international element." An identical solution was contained in art. 1 of PILA 1982.

506 Art. 1 of the PILA 2020

## 1.1.2 International Legal Sources

### 1.1.2.1 Bilateral Agreements

The Republic of North Macedonia has developed friendly relations with other countries with the general aim to enhance its trade and cooperation. For this purpose, a significant number of bilateral agreements have been concluded in different PIL areas. These bilateral agreements refer to the following aspects: Consular Conventions,<sup>507</sup> Bilateral Agreements for trade and/or economic cooperation,<sup>508</sup> Bilateral Agreements for international legal assistance,<sup>509</sup> and Bilateral Agreements that are applicable in the Republic of North Macedonia based on succession from the former Socialist Federal Republic of Yugoslavia (SFRY).<sup>510</sup>

<sup>507</sup> Consular Convention between the Republic of Macedonia and the Republic of Bulgaria (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.32/1999); Consular Convention between the Republic of Macedonia and the Federal Republic of Yugoslavia (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.50/1997); Consular Convention between the Republic of Macedonia and the Republic of Romania (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.6/); Consular Agreement between the Republic of Macedonia and the Republic of Turkey (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.6/2003); Consular Convention between the Republic of Macedonia and the Russian Federation (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.31/2003); Consular Convention between the Republic of Macedonia and Ukraine (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.55/2000, with correction in 79/2000); Consular Convention between the Republic of Macedonia and the Republic of Croatia (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.34/1997);

<sup>508</sup> Agreement for trade and economic cooperation, concluded between the Government of the Republic of Macedonia and the Government of the Russian Federation (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.49/1993); Agreement for economic cooperation between the Republic of Macedonia and the Republic of Slovenia (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.37/1992); Amendments of the Agreement for economic cooperation between the Republic of Macedonia and the Republic of Slovenia according to the legal order of the EU (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.131/2006); Agreement for trade and economic cooperation, concluded between the Republic of Macedonia and the Republic of Turkey (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.19/1995); Agreement between the Government of the Republic of Macedonia and the Government of the People's Republic of China on Trade and Economic Cooperation (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.60/1995); Agreement between the Macedonian Government and the Ukrainian Government for trade and economic cooperation (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.50/1997); Agreement between the Macedonian Government and the Austrian Federal Government on Economic, Agricultural, Industrial, Technical and Technological cooperation (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.55/1997); Agreement for Economic and Trade Cooperation between the Macedonian Government and the Albanian Government (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.15/1998); Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Croatia on Trade and Economic Cooperation (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.17/1995); Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Croatia for amendments and changes of the Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Croatia on Trade and Economic Cooperation (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.63/2015); Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Belorussia on Trade and Economic Cooperation (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.31/2003); Agreement for Economic and Trade Cooperation between the Republic of Macedonia and the State of Qatar (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.110/2005); Agreement for Economic and Trade Cooperation between the Republic of Macedonia and the Swiss Federal Council (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.117/1996); Agreement for Trade Cooperation between the Government of the Republic of Macedonia and the Government of Malaysia (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.7/1999); Trade Agreement between the Government of the Republic of Macedonia and the Government of the Arab Republic of Egypt (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.7/2000); Agreement for economic cooperation between the Government of the Republic of Macedonia and the Government of the Republic of Serbia (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.88/2015); Agreement for economic cooperation between the Government of the Republic of Macedonia and the Government of the Republic of Bulgaria (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.143/2010); Agreement between the Government of the Republic of Macedonia and the Government of the Czech Republic for economic and industrial cooperation (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.77/2010); Agreement for economic cooperation between the Government of the Republic of Macedonia and the Government of the Republic of Kosovo (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.77/2010); Agreement for economic cooperation between the Government of the Republic of Macedonia and the Government of the Republic of Montenegro (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.117/2011); Agreement for economic cooperation between the Government of the Republic of Macedonia and the Government of the Republic of Hungary (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.132/2011); Agreement for technical, industrial and scientific cooperation between the Government of the Republic of Macedonia and the Government of the Republic of Romania (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.40/2012); Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Kazakhstan for trade and economic cooperation (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.139/2012); Memorandum for economic cooperation between the Ministry of Economy of the Republic of Macedonia and the Ministry of Economy of the Republic of Slovakia (The Memorandum was signed on 19.11.2012); Agreement for economic cooperation between the Government of the Republic of Macedonia and the Socialist Republic of Vietnam (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.6/2016).

<sup>509</sup> Agreement between the Macedonian Government and the Albanian Government for legal assistance in civil and criminal matters (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.16/1998); Agreement between the Republic of Macedonia and Bosnia and Herzegovina for legal assistance in civil and criminal matters (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.10/2006); Agreement between the Republic of Macedonia and Bosnia and Herzegovina for amendments and changes of the Agreement between the Republic of Macedonia and Bosnia and Herzegovina for legal assistance in civil and criminal matters (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.13/2014); Agreement for legal assistance in civil matters between the Republic of Macedonia and the Republic of Bulgaria (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.13/2002); Agreement between the Republic of Macedonia and the Republic of Romania for mutual legal assistance in civil matters (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.41/2004); Agreement for legal assistance in civil and criminal matters between the Republic of Macedonia and the Republic of Slovenia (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.24/1996); Agreement for legal assistance in civil and criminal matters between the Republic of Macedonia and the Republic of Turkey (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.23/1997); Agreement for legal assistance between the Republic of Macedonia and the Republic of Croatia in civil and criminal matters (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.15/1995); Agreement between the Republic of Macedonia and Ukraine for legal assistance in civil matters (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.48/2000); Agreement between the Republic of Macedonia and the Republic of Serbia for legal assistance in civil and criminal matters (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.15/2013); Agreement between the Republic of Macedonia and the Republic of Montenegro for legal assistance in civil and criminal matters (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.55/2016).

<sup>510</sup> Agreement between the Federal People's Republic of Yugoslavia and the People's Republic of Bulgaria for mutual legal assistance of 23 March 1956 (Official Gazette of the Federal People's Republic of Yugoslavia, no.1/1957); Agreement between the Federal People's Republic of Yugoslavia and the Republic

### 1.1.2.2 Multilateral Agreements

The Republic of North Macedonia is a member to a large number of multilateral conventions covering different aspects of private international law. Some of these multilateral agreements have been signed and ratified by North Macedonia, while others were succeeded from SFRY. The following list of multilateral agreements is based on the international organisation that adopted these multilateral conventions: Hague Conference on Private International Law (HCCH);<sup>511</sup> Council of Europe;<sup>512</sup> United Nations and other relevant international organisations.<sup>513</sup>

## 1.2 Assessment of the Legal Framework

The Republic of North Macedonia tends to follow the new trends of PIL and to be in line with the new tendencies of the EU PIL and the provisions of the Hague Conventions. The Constitution does not contain direct rules on exequatur procedures for foreign decisions. Art. 118 of the Constitution is a very important provision which resolves the issue of hierarchy and coordination between national and international legal sources.

The PILA 2020, the second codification of the PIL rules in North Macedonia, is the most significant legal source regarding PIL and thus for the recognition and enforcement of foreign decisions. This act is relatively new (enacted in 2020 and in force from 2021) with solutions that are different from the solutions in the PILA 2007. The new solutions in the PILA 2020 are constructed around the ideas of enhancing the transparency of provisions, of adopting an open and international

of Austria for mutual legal cooperation of 16 December 1956 (Official Gazette of the Federal People's Republic of Yugoslavia, no.8/1955); Agreement between the Federal People's Republic of Yugoslavia and the People's Republic of Poland for mutual legal cooperation of 6 February 1960 (Official Gazette of the Federal People's Republic of Yugoslavia, no.5/1963); Agreement between the Socialist Federal Republic of Yugoslavia and the Czechoslovak Socialist Republic for the regulation of the legal relations in civil, family and criminal matters of 20 January 1964 (Official Gazette of the Socialist Federal Republic of Yugoslavia, no.13/1964); Agreement between the Federal People's Republic of Yugoslavia and the Union of Soviet Socialist Republics for legal assistance in civil, family and criminal matters of 24 February 1962 (Official Gazette of the Federal People's Republic of Yugoslavia, no.5/1963); Agreement between the Federal People's Republic of Yugoslavia and the Kingdom of Greece for recognition and enforcement of court decisions of 18 June 1959 (Official Gazette of the Federal People's Republic of Yugoslavia, no.6/1960); Agreement between the Socialist Federal Republic of Yugoslavia and the Republic of Cyprus for legal assistance in civil and criminal matters of 19 September 1984 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.2/1986); Convention of the Federal People's Republic of Yugoslavia and the Kingdom of Greece for mutual legal relations of 18 June 1959 (Official Gazette of the Federal People's Republic of Yugoslavia, no.7/1960); Agreement for mutual legal cooperation between the Socialist Federal Republic of Yugoslavia and the People's Republic of Hungary of 7 March 1968 (Official Gazette of the Federal People's Republic of Yugoslavia, no.3/1968 with amendments in Official Gazette of the Federal People's Republic of Yugoslavia, no.1/1987); Agreement between the Federal People's Republic of Yugoslavia and the People's Republic of Romania for legal assistance of 18 October 1961 (Official Gazette of the Federal People's Republic of Yugoslavia, no.8/1961); Agreement for facilitation of the implementation of the Hague Convention on Civil Procedure of 1 March 1954 between Socialist Federal Republic of Yugoslavia and the French Republic of 29 October 1969 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.21/1971); Convention for recognition and enforcement of judicial decisions in civil and commercial matters between the Government of the Socialist Federal Republic of Yugoslavia and the Government of Republic of France of 18 May 1971 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.7/1972).

<sup>511</sup> HCCH Convention on civil procedure of 1 March 1954 (Official Gazette of the Federal People's Republic of Yugoslavia, no.6/1962); HCCH Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961 (Official Gazette of the Federal People's Republic of Yugoslavia, no.10/1962); HCCH Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions of 5 October 1961 (Official Gazette of the Federal People's Republic of Yugoslavia, no.10/1962); HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965 (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.29/2008); HCCH Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.140/2008); HCCH Convention on the Law Applicable to Traffic Accidents of 4 May 1971 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.26/1976); HCCH Convention on the Law Applicable to Products Liability of 2 October 1973 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.8/1977); HCCH Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.7/1991); HCCH Convention on International Access to Justice of 25 October 1980 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.4/1988); HCCH Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993 (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.103/2008); HCCH Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; HCCH Convention on Choice of Court Agreements of 30 June 2005; HCCH Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 23 November 2007; HCCH Protocol on the Law Applicable to Maintenance Obligations of 23 November 2007 (The last 4 HCCH Conventions were signed in 2019 but have still not been ratified by the Assembly of the Republic of North Macedonia).

<sup>512</sup> European Convention on Information on Foreign Law from 1968 with additional Protocol from 1978 (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.13/2002); European Agreement on the Transmission of Applications for Legal Aid from 1977 (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.47/2002); European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children from 1980 (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.12/2002); European Convention on Nationality from 1997 (Official Gazette of the Republic of Macedonia, Supplement International agreements, no.12/2002).

<sup>513</sup> Convention on the Recovery Abroad of Maintenance of 20 June 1956 (Official Gazette of the Federal People's Republic of Yugoslavia, no.2/1960); Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 10 June 1958 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.11/1981); European Convention on International Commercial Arbitration of 21 April 1961 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.12/1963); Convention on the settlement of investment disputes between States and nationals of other States of 18 March 1965 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.7/1967); Protocol on Arbitration Clauses of 24 September 1923 (Official Gazette of the Federal People's Republic of Yugoslavia, no.4/1959); Convention on the Execution of Foreign Arbitral Awards of 26 September 1927 (Official Gazette of the Federal People's Republic of Yugoslavia, no.4/1959); United Nations Convention on Contracts for the International Sale of Goods (CISG) of 11 April 1980 (Official Gazette of the Socialist Federal Republic of Yugoslavia, Supplement International agreements, no.10/1984).

approach in dealing with PIL issues and making the rules more easily accessible to legal practitioners.<sup>514</sup> To achieve these aims, the PILA 2020 has set three main goals.

The first goal of the new PILA 2020 is to make the Act more “user friendly,” by dividing the Act into sections and subsections according to subject matter, and with headings before every component and additional headings to identify the subject matter for every article. Structured thus makes the PILA 2020 more easily accessible to legal practitioners and subsequently enhances the transparency of the provisions.

The second goal is to implement through the PILA 2020 most of the new tendencies of EU private international law (hereinafter the EU PIL) provisions, and those of the Hague Conference of Private International Law (hereinafter the HCCH) regarding the determination of applicable law, jurisdictional criteria and provisions regarding recognition and enforcement of foreign decisions. To achieve this goal—“the Europeanisation of the PIL”—the PILA 2020 is transposing the private international law provisions of the EU, especially those which have “universal application.”<sup>515</sup> These rules are created according to firmly rooted principles in the private international law instruments of the EU and the HCCH, whereby the law designated by the Regulation shall apply whether or not it is the law of a participating Member State, and all intra-Union and extra-Union situations shall be dealt with on an equal basis.<sup>516</sup> Moreover, the legislator bears in mind that EU PIL is still under construction,<sup>517</sup> consisting not only of the legal instruments of the European Council and the European Parliament, but also of international conventions (especially significant are those of the HCCH).<sup>518</sup> On the other hand, there are certain discrepancies in the implementation of the EU PIL rules that can be traced in many of the Member States of the EU.<sup>519</sup> Therefore, to properly implement the EU PIL rules and, at the same time, to provide for a more coherent approach to the EU PIL, the national legislator opted to incorporate many of these PIL tendencies (increased use of party autonomy as a connecting factor, reduction of nationality as a connecting factor, introduction of habitual residence as an alternative to the domicile as a connecting factor/ jurisdictional criteria, limitation of the exclusive jurisdictional grounds, etc.) in the PILA 2020 so that judges and the practitioners could become acquainted with the EU PIL rules even before North Macedonia becomes a Member State to the EU. So, for this purpose, the PILA 2020 has been harmonised with the following EU Regulations:

- 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;<sup>520</sup>
- Council Regulation (EU) no. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation;<sup>521</sup>
- Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to

maintenance obligations;<sup>522</sup>

- Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I);<sup>523</sup>
- 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 (Rome II);<sup>524</sup>
- Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;<sup>525</sup>
- Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 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;<sup>526</sup>

The third goal of the legislator is to Europeanise the national PIL with the specific notion that the national private international law act does not only apply among Member States of the EU, but also among third countries. So this notion of universality of the provisions played an important role in the drafting of the PILA 2020, based on experiences from the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children from 1996; the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance from 2007; the Hague Protocol on the Law Applicable to Maintenance Obligations from 2007 and the Hague Convention on Choice of Court Agreements from 2005.

The PILA 2020 represents a significant step forward for the national PIL, bridging the new tendencies in private international law and Europeanising the core understanding of its institutions. The systematisation that has been introduced in this new PIL code provides for much easier implementation by legal practitioners in North Macedonia. It will nevertheless be a challenge for the judiciary to accommodate such a large structural change with respect to the private international law, however, to achieve the main goal of the legislation, that is to bring it closer to the EU private international law rules, this must not represent an obstacle. When the judiciary adapts to these provisions in the PILA 2020, then the imminent move to the EU private international law regulations should not represent a tremendous problem. Thereby, the PILA 2020 solves two problems with one act: it modernizes the national private international law in an evolutionary manner and provides for easier adaptation to EU regulations.

Very important provisions in the PILA 2020 are the rules for interpretation of the provisions which are fully transposed EU regulations. These rules allow the judiciary to comply its national law with the standards and interpretations of the EU institutes and thereby to go in line with the interpretation provided in the EU, although North Macedonia is still just a candidate country to the EU. Without these provisions, it would still be possible to distort the understanding of EU legal institutions and the goal of harmonising the internal law with EU legislation would not be achieved.

Regarding international legal sources, North Macedonia tends to be a member to the most significant PIL multilateral conventions. However, there is certain room for improvement. Although North Macedonia signed four Hague Conventions (HCCH 1996 Convention; HCCH 2005 Convention; HCCH 2007 Convention and HCCH 2007 Protocol) in 2019, three years later, these conventions have not been ratified by the Assembly of the Republic of North Macedonia.

514 Kramer X. et al. Study by the European Parliament's Committee on Legal Affairs "A European framework for private international law: current gaps and future perspectives." PE 462.487, 8.

515 There are several provisions in the EU Regulations that tend to harmonise the conflict of legislation within the EU providing for "universal application" of these provisions such as art. 2 of Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 4.7.2008, 6–16; art. 3 of 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 (Rome II), OJ L 199, 31.7.2007, 40–49.; art. 4 of the Council Regulation (EU) no. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation OJ L 343, 29.12.2010, 10–16; art. 20 of the Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 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 OJ L 201, 27.7.2012, 107–134; and art. 20 of 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 OJ L 183, 8.7.2016, 1–29.

516 Boele Woelki K. "For better or for worse: The Europeanisation of International Divorce Law." *Yearbook of Private International Law*, vol. 12. 2010, p. 29.

517 *Ibid.*, p. 20.

518 *Ibid.*

519 Hess, B., S. Law and P. Ortolani (eds.). "An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law." JUST/2014/RCON/PR/CIVI/0082, 2017, p. 45.

520 OJEU L183/1.

521 OJEU L 343/10.

522 OJ L 7, 10.1.2009.

523 OJEU L177/6.

524 OJEU L 199/40.

525 OJEU L351/1.

526 OJEU, L 201/107.

A certain number of bilateral agreements were signed from 1991 onwards, and there are also a number of bilateral agreements that are applicable in the Republic of North Macedonia based on succession from the former Socialist Federal Republic of Yugoslavia (SFRY). North Macedonia could further enhance its policy for judicial cooperation in civil matters with other countries by signing bilateral agreements and multilateral conventions for judicial assistance in civil matters. In addition, as an active participant in the HCCH, North Macedonia follows the developments in this organisation, and based on its own interests, it can become a member to other HCCH Conventions (the HCCH Convention on the International Protection of Adults 2000 and the HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019).

## 2. Institutional Framework for the cross-border recognition and enforcement of civil judicial decisions

### 2.1 Overview of Legal Provisions Determining Stakeholders in the cross-border recognition and enforcement of civil judicial decisions

The procedure for recognition and enforcement of foreign judicial decisions is envisaged as a non-contentious procedure that is conducted before the Courts of the Republic of North Macedonia. The main stakeholders in this procedure are the judiciary. The PIL also specifies other relevant stakeholders that play an important role in the procedure for the incorporation of foreign judgments into the legal system of North Macedonia. The main stakeholder in the exequatur procedure are the Courts of the Republic of North Macedonia. Their organisation and competences are established by the Law on Courts.<sup>527</sup> The recognition and enforcement procedure is envisaged in the Private International Law Act from 2020<sup>528</sup> and since it represents a special non-contentious procedure, the Non-contentious Procedure Act is also applicable.<sup>529</sup>

Other relevant stakeholders that are particularly important in the process of the enforcement of foreign judicial decisions in North Macedonia are enforcement agents. The procedure and duties of Enforcement Agents are provided in the Enforcement Act.<sup>530</sup>

The Ministry of Justice of the Republic of North Macedonia (the Ministry of Justice), especially the Sector for International Judicial Assistance, is of significant importance in the procedure for recognition and enforcement. They are often the Central Authority in Conventions that referee international judicial assistance, and they play a role in the procedure for judicial assistance provided in the Law on Civil Procedure.<sup>531</sup>

### 2.2 Stakeholders putting the cross-border recognition and enforcement of civil decisions into Practice

#### 2.2.1 Courts

In North Macedonia, the competence to decide in independent proceedings on the recognition of foreign judgments is given to the basic courts with extended jurisdiction (**Основни судови со проширена надлежност**).<sup>532</sup> The basic courts are established for one or more municipalities.

<sup>527</sup> Law on Courts, Official Gazette of RM, no. 58/06, 62/06, 35/08, 150/10, 83/18, 198/18 and Official Gazette of RNM, no. 96/19.

<sup>528</sup> Private International Law Act (Закон за меѓународно приватно право), Official Gazette of Republic of North Macedonia, no. 32/2020.

<sup>529</sup> Official Gazette of the Republic of Macedonia, no. 9/2008.

<sup>530</sup> Official Gazette of the Republic of Macedonia, no. 72/2016, 142/2016, 233/2018 and 14/2020.

<sup>531</sup> Official Gazette of the Republic of Macedonia, no.79/2005, 110/2008, 83/2009, 116/10 and 124/2015.

<sup>532</sup> Art. 31, Law on Courts.

There are a total of 27 basic courts in North Macedonia. *Competentia ratione materiae* of the basic courts is determined by the rules of general legal delegation. The basic courts are established as courts with basic jurisdiction and courts with extended jurisdiction. The basic courts with extended jurisdiction have specialised court divisions that adjudicate certain types of cases. It should be noted that although all the basic courts are established as courts of general jurisdiction, the Law on Courts establishes different *ratione materiae* jurisdiction of the basic courts for the area of Skopje as the capital city. Namely, the two basic courts that are situated in Skopje are organised as “specialised” courts with complete separation of jurisdiction in criminal and civil matters. Previously known as the Basic Court Skopje 1 and Basic Court Skopje 2, the basic courts in Skopje have been renamed as Basic Criminal Court Skopje and Basic Civil Court Skopje.

Territorial jurisdiction over the recognition of a foreign judicial decision lies with any court that has substantive jurisdiction.<sup>533</sup> However, such a position does not preclude the possibility that the recognition of a foreign judgment arises as a preliminary question by the executing court. If no special ruling has been rendered as to the recognition of a foreign judicial decision, any court may decide thereon as on a preliminary question, however, with an effect referring only to this procedure.<sup>534</sup>

#### 2.2.2 Administrative institutions (Ministry of Justice, Central Authorities etc.)

The most important administrative institution that has competences in regard to judicial assistance in civil matters is the Ministry of Justice of the Republic of North Macedonia. There is a special sector devoted to international judicial assistance in civil matters that, among other responsibilities, covers: responsibilities in regard to the requests of national and foreign courts in providing international judicial assistance in civil matters for the recognition and enforcement of foreign judicial decisions in criminal and civil matters; statistical data for civil cases; responsibilities for negotiating and signing bilateral agreements in judicial assistance and the implementation of these agreements; observation of the application of the ratified conventions for their proper implementation in cases involving judicial assistance in civil matters; observation of the application of International Agreements;<sup>535</sup> cooperation with the diplomatic and consular representatives of the Republic of North Macedonia in foreign countries in providing international judicial assistance.

The Central Authorities which are organised on the basis of these Conventions covering international judicial assistance are usually<sup>536</sup> based in the same Sector for international judicial assistance at the Ministry of Justice of Republic of North Macedonia.

#### 2.2.3 Legal Practitioners (Lawyers, Legal representatives, etc.)

The legal practice is particularly important for the recognition and enforcement of foreign judicial decisions and for international judicial cooperation. Since the recognition and enforcement procedure is envisaged as a non-contentious judicial procedure, the foreign creditor of the claim usually hires a legal practitioner (lawyer) to file the application for the recognition and enforcement of the foreign judicial decision. This procedure, provided for in PILA 2020 (art. 163-175), applies

<sup>533</sup> Art. 166 para. 2 of the PILA 2020.

<sup>534</sup> Art. 167 of the PILA 2020.

<sup>535</sup> HCCH Convention on civil procedure of 1 March 1954; HCCH Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961; HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965; HCCH Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970; HCCH Convention on International Access to Justice of 25 October 1980; Convention on the Recovery Abroad of Maintenance of 20 June 1956; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 10 June 1958; European Convention on International Commercial Arbitration of 21 April 1961; Convention on the settlement of investment disputes between States and nationals of other States of 18 March 1965; Protocol on Arbitration Clauses of 24 September 1923; Convention on the Execution of Foreign Arbitral Awards of 26 September 1927.

<sup>536</sup> The Central authorities determined on the basis of the Conventions that refer to family matters are structured in the Ministry of Labor and Social Policy.

both to judicial decisions and arbitration awards.

## 2.2.4 Enforcement agents

The enforcement procedure in North Macedonia is prescribed in the Enforcement Act.<sup>537</sup> This law came into force on January 1, 2017. Historically, before the new model for enforcement had been envisaged in North Macedonia, civil enforcement was in the exclusive jurisdiction of the courts in accordance with the former federal Enforcement Procedure Act of 1978. Under this Law, the courts had jurisdiction to allow and to conduct the enforcement of monetary and non-monetary claims. The responsibility for enforcement was entrusted to judges (executive judges), because it considered that the interpretation of the content of the court judgment in terms of its compulsory execution requires professional judicial knowledge. Judicial officers (court clerks) were also included in the enforcement procedure performing major technical (and sometimes even essential) tasks within the proceedings.<sup>538</sup>

The first Enforcement Procedure Act of 1997 (with amendments in 2000 and 2003) basically retained the same solutions as the former federal Act of 1978. The Enforcement Act of 2005 (with amendments in 2006, 2007, 2008, 2009, 2010, 2011 and 2013)<sup>539</sup> introduced a new system of enforcement in North Macedonia. Namely, the previous court-oriented system of enforcement was replaced with a bailiff-oriented system. The enforcement procedure has ceased being under the jurisdiction of the courts and the enforcement was entrusted to enforcement agents - persons with public authorisations established by law, who conduct enforcement.<sup>540</sup>

In North Macedonia, the legal system entails private enforcement by independent and highly professional enforcement agents. They conduct enforcement in accordance with the enforcement title and in accordance with legal authorisations. The modern concept of enforcement is deemed efficient and effective because it provides prompt and complete collection of the creditor's claim.

## 2.3 Stakeholders responsible for adoption of the 2019 Hague Convention

The procedure for adoption of international agreements in North Macedonia is provided for in the Law on conclusion, ratification and enforcement of international agreements.<sup>541</sup> It is a very important legal act that sets forth the procedure for conducting negotiations for the conclusion of international agreements, accession to multilateral international agreements, initiation of the procedure for the ratification and enforcement of international agreements in North Macedonia.<sup>542</sup> The Law on conclusion, ratification and enforcement of international agreements applies both to bilateral and multilateral agreements. This law also maps the main stakeholders that are responsible for the adoption of international agreements. For international judicial cooperation in civil matters and recognition and enforcement of foreign judicial decisions, the direct stakeholders that are relevant in the context of adoption of international agreements are: the Ministry of Justice of the Republic of North Macedonia; the Government of the Republic of North Macedonia; the Ministry of Foreign Affairs of the Republic of North Macedonia; the Ministry of Finance of Republic of North Macedonia and the Secretariat for Legislation of Republic of North Macedonia. The following indirect stakeholders play a significant role on policy level in terms of providing expertise and analysis, certified legal translations and as a forum for discussion and education and for operationalisation of international agreements regarding international judicial cooperation

<sup>537</sup> Official Gazette of the Republic of Macedonia, no. 72/2016, 142/2016, 233/2018 and 14/2020.

<sup>538</sup> Zoroska-Kamilovska T., Rakocevic M., "A General Overview of Enforcement in Civil and Commercial Matters in Macedonia." *LeXonomica*, Vol. 8, No. 1, June 2016, p. 31.

<sup>539</sup> Official Gazette of the Republic of Macedonia, no. 35/2005, with amendments 2006 (Official Gazette of the Republic of Macedonia, no. 50/2006, 129/2006), 2008 (Official Gazette of the Republic of Macedonia, no. 8/2008), 2009 (Official Gazette of the Republic of Macedonia, no. 83/2009), 2010 (Official Gazette of the Republic of Macedonia, no. 50/2010, 83/2010, 88/2010, 171/2010) and 2011 (Official Gazette of the Republic of Macedonia, no. 148/2011).

<sup>540</sup> Zoroska-Kamilovska and Rakocevic, p. 31-33.

<sup>541</sup> Official Gazette of the Republic of Macedonia, no.5/1998.

<sup>542</sup> Art. 1 the Law on conclusion, ratification and enforcement of international agreements.

in civil matters as well as recognition and enforcement of foreign judicial decisions: universities and Non-Governmental Organisations(NGO's).

## 2.3.1 Ministries and other Institutions

The main stakeholders that are relevant for the adoption of international agreements in the scope of international judicial cooperation in civil matters covering also the recognition and enforcement of foreign judicial decisions are the Ministry of Justice of the Republic of North Macedonia, the Government of the Republic of North Macedonia, the Ministry of Foreign Affairs of the Republic of North Macedonia, the Ministry of Finance of Republic of North Macedonia and the Secretariat for Legislation of Republic of North Macedonia. The key stakeholder for international agreements on recognition and enforcement of foreign judicial decisions is the Government which is responsible for the conclusion and negotiations of international agreements in the name of the Republic of North Macedonia.<sup>543</sup> Upon written initiative of the Ministry of Justice,<sup>544</sup> the Government decides that it needs to start negotiations or conclude an international agreement. The Ministry of Justice will produce a proposal for the start of negotiations or fulfilment of the relevant conditions for the conclusion of a bilateral agreement or accession to a multilateral international agreement.<sup>545</sup> This proposal needs to contain several elements such as: the constitutional basis, opinion on the relations with the relevant international organisation, the reasons for the conclusion of the international agreement, the financial needs and the means of their procurement in regard to the enforcement of the international agreement, and the delegation that will conduct the negotiations.<sup>546</sup> The proposal needs to contain the draft of the international agreement that is to be concluded or acceded.<sup>547</sup> This proposal is then sent to the Ministry of Foreign Affairs as well as the Ministry of Finance and the Secretariat for Legislation that need to provide their Opinion on this Proposal.<sup>548</sup> If the Government accepts the Proposal, then it will determine the basis for the negotiations and the delegation that will conduct the negotiations.<sup>549</sup> Moreover, the Government can authorise the Chief of the delegation<sup>550</sup> (usually the Minister of Justice) to sign the international agreement.<sup>551</sup> After the signing of the international agreement, the Delegation will prepare a written report and submit it to the Government.<sup>552</sup> The decision on the accession of North Macedonia to a multilateral international agreement that is in force is implemented by the Ministry of Foreign Affairs.<sup>553</sup>

The next stage of the procedure is the ratification of the international agreement. The Ministry of Justice sends the original text of the international agreement with its proposal for initiating the ratification process and an explanation to the Ministry of Foreign Affairs.<sup>554</sup> Then, the Ministry of Foreign Affairs initiates the procedure for the ratification of the international agreement on the basis of a proposal for the adoption of a Law on the ratification of the international agreement that has been submitted to the Government. The Government submits the Law on ratification of the international agreement to the Assembly of the Republic of North Macedonia which ratifies the international agreement.<sup>555</sup>

The final stage regarding the enforcement of international agreements is provided by the Government or the Ministry of Justice.<sup>556</sup>

<sup>543</sup> Art. 3 para. 2 of the Law on conclusion, ratification and enforcement of international agreements.

<sup>544</sup> For The Hague Conventions, the Sector for international judicial assistance at the Ministry of Justice is responsible.

<sup>545</sup> Art. 6 para. 1 and 2 of the Law on conclusion, ratification and enforcement of international agreements.

<sup>546</sup> Art. 8 para. 1 of the Law on conclusion, ratification and enforcement of international agreements.

<sup>547</sup> Art. 8 para. 3 of the Law on conclusion, ratification and enforcement of international agreements

<sup>548</sup> Art. 9 of the Law on conclusion, ratification and enforcement of international agreements.

<sup>549</sup> Art. 12 para. 1 of the Law on conclusion, ratification and enforcement of international agreements

<sup>550</sup> If the Government does not authorise a person to sign the international agreement, after the acceptance of the written report of the delegation, it can authorise a relevant person to sign the international agreement. Art. 15 para. 2 of the Law on conclusion, ratification and enforcement of international agreements

<sup>551</sup> Art. 12 para. 2 of the Law on conclusion, ratification and enforcement of international agreements

<sup>552</sup> Art. 14 of the Law on conclusion, ratification and enforcement of international agreements

<sup>553</sup> Art. 17 of the Law on conclusion, ratification and enforcement of international agreements

<sup>554</sup> Art. 19 of the Law on conclusion, ratification and enforcement of international agreements

<sup>555</sup> Art. 20 of the Law on conclusion, ratification and enforcement of international agreements

<sup>556</sup> Art. 23-24 of the Law on conclusion, ratification and enforcement of international agreements

### 2.3.2 NGO's

In North Macedonia, there are no significant NGOs whose main focus is the recognition and enforcement of foreign judicial decisions and international judicial assistance. However, from experience in other legal fields, the cooperation between the Ministry of Justice and NGOs is positive.

### 2.3.3 Academia

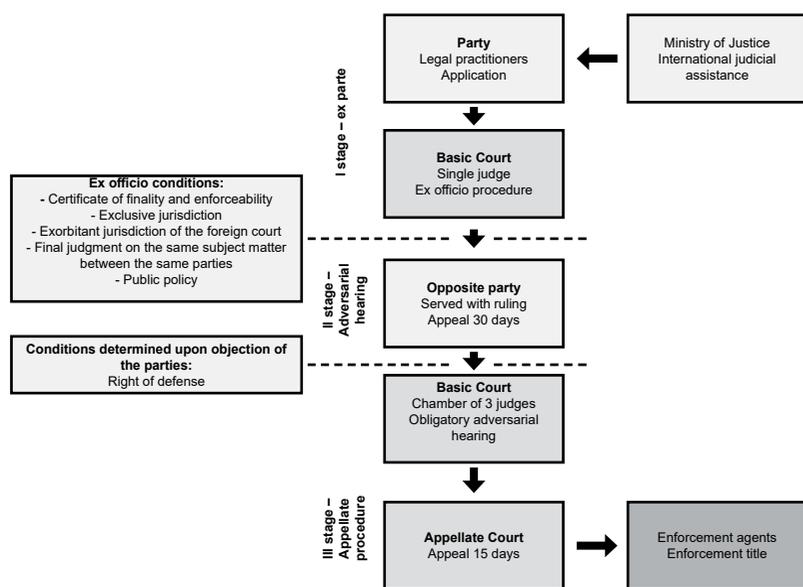
The cooperation between the Ministry of Justice and the Universities in North Macedonia is positive. A large number of the teaching staff of the Universities participates in the working groups of the Ministry of Justice for the drafting of new legislation. Moreover, the teaching staff is included in the education of the Judges and the Public prosecutors, which is provided by the Academy for Judges and Public Prosecutors.

### 2.3.4 Other Relevant Stakeholders

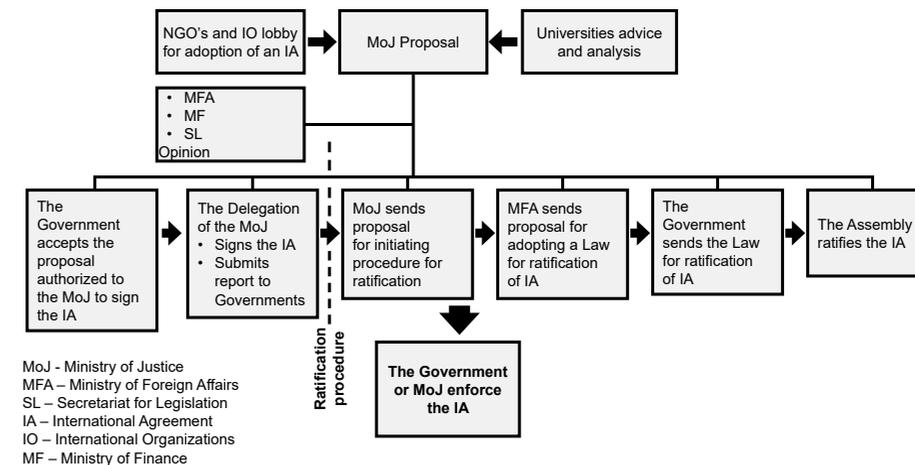
The Governmental organisations of several countries such as Germany (GIZ), USA (USAID), the Scandinavian countries, Holland, United Kingdom and the United Nations have played a very important role in the shaping of the judicial system in North Macedonia. These countries and international organisations have organised a large range of activities that help the national authorities provide for better legal solutions and better implementation of new legislation. These activities consist of providing analysis of a particular legal field, procuring experts on certain legal aspects, organising debates, workshops and other educational activities.

## 2.4 Mapping Cooperation among Stakeholders

### 2.4.1 Stakeholders relevant for the procedure for recognition and enforcement of foreign judicial decisions



### 2.4.2 Stakeholders relevant for the procedure for adoption of the 2019 Hague Convention



## 3. The Role of Courts and the enforcement agents in the cross-border recognition and enforcement of civil judicial decisions

### 3.1 Capacities of Courts in regard to the cross-border recognition of foreign judicial decisions

The largest basic civil court is located in Skopje and it is the Basic Civil Court Skopje (previously Basic Court Skopje 2). The recognition and enforcement procedure is envisaged as a non-contentious procedure, thus the competence to decide on the exequatur is assigned to the non-contentious and succession section of the Basic Civil Court Skopje. This section of the Basic Civil Court Skopje consists of only three judges, covering various legal aspects that are decided in non-contentious procedure. The number of cases these judges decide on annually is considerable: for example, they receive and decide on around 200 applications for recognition and enforcement. However, most of these cases relate to divorce, so they are decided by a single judge.<sup>557</sup> The statistical data shows that a small number of cases are decided in Stage II of the recognition and enforcement procedure (by a chamber of three judges).<sup>558</sup> The statistical data is given in Table 1.

### 3.2 Quantity and Quality of the decisions regarding cross-border recognition of judgments

After evaluation of the data provided by the Ministry of Justice of the Republic of North Macedonia and the Chamber of Enforcement Agents of the Republic of North Macedonia, the total number is 21 cases, processed through the system of the Ministry of Justice, and 32 cases with a foreign

557 Table 1.1

558 Table 1.2

element that needed to be enforced by Enforcement Agents in North Macedonia in the period 2017-2020. The data system of the Ministry of Justice does not provide for classification of the cases based on the criteria whether the foreign decisions needs to be enforced or only recognized by the Court. Moreover, the Ministry of Justice maintains information about the number of cases that are processed through mechanisms provided in bilateral and multilateral agreements as international judicial assistance. In these cases, the Ministry of Justice provides the parties with judicial assistance, by helping the parties with translations of the documentation, assisting the parties with submitting the application to the relevant Court that has jurisdiction for a particular case and other assistance. An important note with respect to these cases is that most of them were processed in accordance with the PILA 2007. Since the PILA 2020 has only become applicable as of January 2021, the Ministry of Justice and the Chamber of Enforcement Agents do not have enough data about the cases in the current year.

Generally, the position of enforcement agents is that they apply the provisions of the Enforcement Act (EA)<sup>559</sup> and the PILA 2020, and in order for a foreign judicial decision to be enforced in North Macedonia, it first needed to be recognised by the domestic court. If the enforcement agent is directly confronted with a foreign judicial decision, it will refuse the request for enforcement with the explanation that the foreign judicial decision has not been recognised by the domestic court, and therefore the foreign decision lacks a ruling on recognition. According to the Chamber of Enforcement Agents of the Republic of North Macedonia, they have encountered certain problematic aspects connected to technical problems during the enforcement procedure of foreign judgments in the cases of payment of debt on non-residential bank accounts. In such situations, the bank procedure required the basis for the transaction and the complete case file for the case, and the procurement of all of the documentation was required. This was not a problem for cases where the payment was provided in one instalment. However, in situations with recurring payments (maintenance obligations), this caused certain problems and increased the costs of administration of the enforcement procedure because the bank required the complete case file and all of the documentation for every successive payment. In view of the Chamber of Enforcement Agents of the Republic of North Macedonia, such a procedure only increases the cost of enforcement and it is unnecessary because the basis for such a transfer was procured when the first instalment was transferred.

#### Number of cross-border recognition cases and decisions decided by the Basic Civil Court Skopje (2017-2020)

Year	2017	2018	2019	2020
1. Total number of cases	190	200	195	210
2. Cases decided by a Chamber of three judges (Stage II of the recognition and enforcement procedure)	5	3	3	5

Table 1: Number of cases annually

#### Number of cross-border cases processed by the Ministry of Justice of Republic of North Macedonia (2017-2020)<sup>560</sup>

Year	2017	2018	2019	2020
Number of cases	1	11	7	2

Table 2: Number of cases annually

559 Official Gazette of the Republic of Macedonia, no. 72/2016, 142/2016, 233/2018 and 14/2020.

560 In some of the cases, the parties directly address their application through some of the mechanisms provided in the bilateral and multilateral agreements through the Ministry of Justice of the Republic of North Macedonia as judicial assistance in civil matters.

### 3.3 Capacities of Enforcement Agents in regard to the cross-border recognition of foreign judicial decisions

The enforcement of judgments in the territory of North Macedonia is conducted according to the EA. The enforcement procedure applies to domestic enforceable judgments as well as to foreign judgments if they satisfy the conditions for recognition provided in the national legislation or international agreement ratified according to the Constitution.<sup>561</sup> Such a position provides that all of the enforcement agents that are authorised in North Macedonia can enforce foreign judgments.

#### Number of cross-border cases enforced by the Enforcement Agents (2017-2020)

Year	2017	2018	2019	2020
Number of cases	16	13	1	2

Table 3: Number of cases annually

### 3.4 Recognition and enforcement of foreign judicial decisions within Educational Programs of Judicial Training Academies

The Academy for Judges and Public Prosecutors “Pavel Shatev” (The Academy) is envisaged as a main bearer of activities for the improvement of the efficiency and effectiveness of the judicial system through professional training of judges, public prosecutors, the judicial and prosecutorial service. Its structure and organisation are governed by the Law on the Academy for Judges and Public Prosecutors,<sup>562</sup> Statute,<sup>563</sup> and other relevant acts. There are two types of educational activities: basic education and continuous education. The basic education concerns the candidates for judges and public prosecutors, while continuous education is designed as permanent enhancement of the compatibilities of the judiciary. The educational program for the basic education of candidates on the subject of recognition and enforcement of foreign judicial decisions is covered with 2 hours of theoretical education (these 2 hours concern the entirety of the national PIL) and 2 hours of theoretical education on EU cooperation in civil and commercial matters. Practical education is envisaged in the educational program as 5 hours of education (2 hours of PIL and 3 hours of EU PIL).

Continuous education consists of permanent courses on the novelties and new legal acts at national and international level, thus covering the field of private international law and exequatur procedure for foreign judicial decisions. In 2019, the Academy conducted two trainings on the “Brussels Ibis Regulation” and the “Brussels IIbis Regulation”; in 2020, the Academy did not provide any training on recognition and enforcement; while for 2021, one training is envisaged on the subject of “Recognition and enforcement of foreign judicial decisions”.

561 Art. 8 of the Enforcement Act.

562 Official Gazette of the Republic of Macedonia, no. 20/2015, 192/2015, 231/2015 and 163/2018.

563 Official Gazette of the Republic of Macedonia, no. 56/2015.

## 4. Economic and political aspects in respect to the implementation of the 2019 Hague Convention

### 4.1 Main trading partners in terms of import and export

In the period 2016-2019, North Macedonia's major trading partner countries for exports were Germany, Serbia, Bulgaria, Belgium and Greece, and for imports they were Germany, United Kingdom, Greece, Serbia, and China. From Table 4 and Table 5, it is evident that the most significant trading partners of North Macedonia are from Europe, however, other global trade partners such as Turkey, USA, Russian Federation, South Africa, Brazil and others are also important.

#### 4.1.1 Import

Country	2019 <sup>564</sup>	2018	2017	2016
Germany	\$1,075,000,000	\$1,050,359,000	\$910,251,000	\$829,895,000
United Kingdom	\$1,084,000,000 (1 <sup>st</sup> )	\$863,262,000	\$780,175,000	\$726,830,000
Greece	\$765,000,000	\$766,755,000	\$617,952,000	\$497,191,000 (4 <sup>th</sup> )
Serbia	\$678,000,000	\$646,640,000	\$590,390,000	\$541,002,000 (3 <sup>th</sup> )
China	\$544,000,000	\$523,244,000	\$444,003,000	\$421,227,000
Italy	\$527,000,000	\$508,038,000	\$427,153,000	\$384,877,000
Turkey	\$452,000,000	\$425,512,000	\$367,197,000	\$349,265,000
South Africa	/	\$295,604,000 (10 <sup>th</sup> )	\$250,095,000 (9 <sup>th</sup> )	\$172,985,000 (10 <sup>th</sup> )
USA	\$309,000,000 (9 <sup>th</sup> )	\$244,757,000 (11 <sup>th</sup> )	\$176,565,000 (13 <sup>th</sup> )	\$150,211,000 (11 <sup>th</sup> )
Russian Federation	\$142,000,000 (20 <sup>th</sup> )	\$131,372,000 (20 <sup>th</sup> )	\$148,494,000 (15 <sup>th</sup> )	\$142,962,000 (12 <sup>th</sup> )
Brazil	\$42,000,000 (27 <sup>th</sup> )	\$46,722,000 (31 <sup>th</sup> )	\$44,432,000 (29 <sup>th</sup> )	\$43,045,000 (28 <sup>th</sup> )

Table 4: Import trading partners

Source: WITS – World Bank [<https://wits.worldbank.org/CountryProfile/en/Country/MKD/Year/2018/TradeFlow/EXPIMP/Partner/by-country>]

564 Source: NBRSM [[https://www.nbrm.mk/nadvoresno\\_trgovska\\_razmena.nspj](https://www.nbrm.mk/nadvoresno_trgovska_razmena.nspj)]

#### 4.1.2 Export

Country	2019 <sup>565</sup>	2018	2017	2016
1. Germany	\$3,501,000,000	\$3,248,099,000	\$2,662,466,000	\$2,246,626,000
2. Serbia	\$277,000,000 (4 <sup>th</sup> )	\$542,956,000	\$474,634,000	\$423,706,000
3. Bulgaria	\$351,000,000 (2 <sup>nd</sup> )	\$360,718,000	\$332,914,000	\$246,501,000
4. Belgium	\$238,000,000 (5 <sup>th</sup> )	\$259,265,000	\$133,448,000 (5 <sup>th</sup> )	\$189,266,000
5. Greece	\$193,000,000 (7 <sup>th</sup> )	\$225,133,000	\$203,511,000 (4 <sup>th</sup> )	\$163,326,000 (6 <sup>th</sup> )
China	\$166,000,000 (10 <sup>th</sup> )	\$65,259,000 (22 <sup>th</sup> )	\$62,256,000 (18 <sup>th</sup> )	\$47,810,000 (19 <sup>th</sup> )
Turkey	\$87,000,000 (15 <sup>th</sup> )	\$96,166,000 (14 <sup>th</sup> )	\$88,595,000 (9 <sup>th</sup> )	\$70,721,000 (11 <sup>th</sup> )
South Africa	/	\$39,511,000 (25 <sup>th</sup> )	\$563,000 (63 <sup>th</sup> )	\$6,718,000 (30 <sup>th</sup> )
USA	\$50,000,000 (24 <sup>th</sup> )	\$67,377,000 (19 <sup>th</sup> )	\$55,547,000 (22 <sup>th</sup> )	\$50,768,000 (16 <sup>th</sup> )
Russian Federation	\$52,000,000 (23 <sup>th</sup> )	\$131,372,000 (26 <sup>th</sup> )	\$54,127,000 (23 <sup>th</sup> )	\$48,953,000 (18 <sup>th</sup> )
Brazil	\$6,200,000 (31 <sup>th</sup> )	\$3,444,000 (41 <sup>th</sup> )	\$2,956,000 (47 <sup>th</sup> )	\$2,717,000 (40 <sup>th</sup> )

Table 5: Export trading partners

Source: WITS – World Bank

[<https://wits.worldbank.org/CountryProfile/en/Country/MKD/Year/2018/TradeFlow/EXPIMP/Partner/by-country>]

## 4.2 Political aspects in regards to the implementation of the 2019 Hague Convention

### 4.2.1 Circumstances that can provide for your Country to express notifications in accordance to Article 29 of the 2019 Hague Convention

Art. 29 of the 2019 Hague Convention fulfils two functions: it defines when the Convention becomes effective between two Contracting States and it allows for a limited opt-out option to avoid the establishment of treaty relations with other Contracting States. The principal result of art. 29 is that the Convention has effect between two Contracting States only if neither has deposited a notification in respect of the other in accordance with para. 2 or 3. Para. 1 specifies that in the absence of any such notification, the Convention has effect between the two States from the first day of the month following expiry of the period during which notifications may be made.<sup>566</sup> Regarding North Macedonia, there are no political or legal issues with other countries

565 Source: NBRSM [[https://www.nbrm.mk/nadvoresno\\_trgovska\\_razmena.nspj](https://www.nbrm.mk/nadvoresno_trgovska_razmena.nspj)]

566 Garcimartín Alférez, F., Saumier, G. "Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Explanatory Report," as approved by the HCCH on 22 September 2020, <<https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf>> (Accessed

that could result in the use of the limited opt-out option, and it is expected that the 2019 Hague Convention will be applicable towards all of the Member States to the Convention.

## 4.2.2 Circumstances that can provide for your Country to express declarations in accordance with Article 17, 18, 19 and 25 of the 2019 Hague Convention

In light of the general politics of North Macedonia in regards to the enhancement of trade and predictability of cross-border enforcement of foreign judicial decisions, it is expected that North Macedonia will not use the possibility to express declarations in accordance with art. 17, 18, 19 and 25 of the 2019 Hague Convention.

## 5. International jurisdiction and compatibility with the 2019 Hague Convention

### 5.1 General international jurisdiction (domicile, habitual residence)

The simplicity and consistency of the PILA 2020 is evident in the first section of Chapter I, setting out the general provisions for international jurisdiction. The main novelty regarding the general jurisdiction provisions both in contentious and in non-contentious procedure is the introduction of the habitual residence of the defendant as a jurisdictional criterion.<sup>567</sup> The domicile of the defendant is still present as a jurisdictional criterion but now it is given alternatively with the habitual residence of the defendant. So, the general jurisdiction of the Courts of North Macedonia is established if the defendant (who is a natural person) has domicile *or* habitual residence in North Macedonia. There is a separate provision regarding the general jurisdictional criterion for legal persons in both procedures which establishes the jurisdiction of the Courts of North Macedonia according to the seat of the legal person.<sup>568</sup> Another novelty is the provision in the PILA 2020 that excludes succession from general jurisdiction.<sup>569</sup>

Art. 5 para. 1(a) of the 2019 Hague Convention provides that a judgment is eligible for recognition or enforcement if the person against whom such recognition or enforcement is sought was habitually resident in the State of origin at the time that person became party to the proceedings. The new PILA 2020 also provides for domicile or habitual residence of the defendant as jurisdictional criteria for the determination of basic jurisdiction.<sup>570</sup> At first glance, such a provision corresponds with the jurisdictional filter provided in art. 5 para. 1(a) of the 2019 Hague Convention, and usually the domicile will correspond with the habitual residence of the defendant. However, recent migrations in North Macedonia and the region may give rise to a possible problem in the application of this jurisdictional filter in the case of natural persons. Namely, Courts will traditionally determine the basic jurisdiction upon the domicile of the defendant in North Macedonia despite the newly introduced jurisdictional criterion habitual residence. Domicile is determined according to the Law on reporting domicile and temporary residence<sup>571</sup> and is mostly of an administrative nature, however, with a subjective element incorporated in the notion.<sup>572</sup> In practice, the Courts determine the domicile upon personal or travel documents issued by the Ministry of Internal

Affairs,<sup>573</sup> which sometimes do not correspond with the factual situation,<sup>574</sup> because many people intentionally or by omission disrespect the obligation to register if they leave the country for longer than three months.<sup>575</sup> As a result, there could be a hypothetical situation where the Courts in North Macedonia rightfully assumed jurisdiction on the basis of art. 110 of the PILA (domicile of the defendant) but the decision could not pass the jurisdictional filter provided in art. 5 para. 1(a) of the 2019 Hague Convention, because the defendant's habitual residence is in another country. One possible solution is the application of the habitual residence of the defendant as a jurisdictional criterion based on art. 110 of the PILA instead of the domicile. Art. 110 of the PILA provides for both jurisdictional criteria and the fulfilment of one suffices. In these cases, if the Court of North Macedonia determines jurisdiction based on the habitual residence of the defendant, this would mitigate the disproportion between the domicile and the habitual residence and still provide for sufficient protection of the defendant.

### 5.2 Prorogation of jurisdiction (expressively/tacitly, before or after the commencement of the procedure)

Section 2 of the PILA 2020 is now dedicated to the prorogation of jurisdiction. This section has been modified and constructed according to the Brussels Ibis Regulation.<sup>576</sup> Art. 122 to 125 mirror the provisions in Section 7 of the Brussels Ibis Regulation and the wording of these provisions tries to follow the wording of the provisions in the Brussels Ibis Regulation. In comparison with the PILA 2007, one of the most significant novelties is provided in art. 122 of the PILA 2020 which refers to the prorogation of jurisdiction of the Courts of the Republic of North Macedonia. According to this provision, exclusive jurisdiction status is attributed to the prorogation of jurisdiction of the Courts of North Macedonia.<sup>577</sup> With such a position, the prorogation of jurisdiction of the Courts of North Macedonia are afforded all the modalities for protection of exclusive jurisdiction in the PILA 2020 such as the *lis pendens* rule<sup>578</sup> and non-recognition of foreign decisions that are in breach of prorogation of the Courts of Republic of North Macedonia.<sup>579</sup> The effect of the exclusive jurisdictional aspect of Choice of Court agreements is not absolute, since it is left to the parties to opt for such an effect.<sup>580</sup> Another important difference in the PILA 2020 from the PILA 2007 is that in order to choose the Courts of the Republic of North Macedonia, it is not required for one of the parties to be a Macedonian citizen, or if a legal person to have its *situs* in North Macedonia.<sup>581</sup> Furthermore, in the PILA 2020 stipulates that in order to choose a foreign Court, it is not required for one of the parties to be a foreign citizen or if a legal person to have its *situs* in foreign state.<sup>582</sup>

Art. 5 para. 1 of the 2019 Hague Convention provides for jurisdictional filters that concern three forms of consent: express consent during proceedings (art. 5 para. 1(e) of the 2019 Hague Convention), implied consent (art. 5 para. 1(f) of the 2019 Hague Convention) and non-exclusive

<sup>573</sup> Art. 98 of the Law on civil procedure, Official Gazette of the Republic of Macedonia, no. 79/2005, 110/2008, 83/2009, 116/2010 and 124/2015

<sup>574</sup> The Ministry of Internal Affairs of Republic of N. Macedonia does not maintain consistent records of the two categories of addresses – temporary residence and permanent domicile. Based on a simple declaration, citizens may be registered at a temporary address in the country, and allowed to vote there, although they are not living at the declared address, or might not have a domicile in the country. In spite of legal provisions obliging the MoIA to register citizens who left the country for longer than three months and did not declare it, and to conduct verifications of temporary address declarations, there was limited proactive action by MoIA to update the address registry. This report found in correlation to the electoral roll that “The review process, which was observed by the four main political parties, led to a limited number of deletions, mostly of deceased people. In addition, 39,502 voters were identified as having ‘questionable registration’ data and were required to re-register, and 171,500 voters were considered as temporarily residing abroad and were moved to a separate register of out-of-country voters.” OSCE/ODIHR Election Observation Mission Final Report, EARLY PARLIAMENTARY ELECTIONS 11 December 2016, available on line <https://www.osce.org/files//documents/8/b/302136.pdf>. Accessed 28 Apr. 2021.

<sup>575</sup> Art. 8 of the Law on reporting domicile and residence.

<sup>576</sup> Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJEU L351/1. For more on the jurisdictional agreements in the Brussels Ibis Regulation

<sup>577</sup> Art. 122 para. 2 of the PILA 2020

<sup>578</sup> Art. 119 of the PILA 2020

<sup>579</sup> Art. 160 of the PILA 2020

<sup>580</sup> Art. 122 para. 2 of the PILA 2020

<sup>581</sup> Art. 56 para. 3 of the PILA 2020

<sup>582</sup> Art. 123 para. 1 of the PILA 2020. For the formal validity of Choice of Court agreements, the conditions mimic the provisions of art. 25 para. a to c of the Brussels Ibis Regulation. There is also the possibility of tacit choice of Court in situations where the defendant entered an appearance either by submitting a response to the lawsuit, entered an appearance for the main issue without contesting the jurisdiction or filed a counterclaim (art. 125 para. 1 of the PILA 2020).

28 Apr. 2021), p. 176-177, para. 407-408.

<sup>567</sup> Art. 110 para. 1 of the PILA 2020 and art. 114 para. 1 of the PILA 2020

<sup>568</sup> Art. 110 para. 1 of the PILA 2020 and art. 114 para. 1 of the PILA 2020

<sup>569</sup> Art. 110 para. 2 of the PILA 2020 and art. 114 para. 3 of the PILA 2020

<sup>570</sup> Art. 110 para. 1 of the PILA 2020

<sup>571</sup> Official Gazette of the Republic of Macedonia, no. 36/92, 12/93, 43/00, 66/07, 51/11, 152/15 and 55/16

<sup>572</sup> Art. 2 of the Law on reporting domicile and temporary residence defines the term domicile as “Domicile is the place where the citizen settled with the intent to permanently live there and has acquired an apartment for living.”

choice of court agreement of the parties (art. 5 para. 1(m) of the 2019 Hague Convention).<sup>583</sup> Highly influenced by the Brussels Ibis Regulation, the PILA 2020 provides direct jurisdictional rules regarding express and implied consent.<sup>584</sup> Parties can agree on the jurisdiction before and after the dispute has arisen in connection to a particular legal relationship.<sup>585</sup> Moreover, North Macedonia has signed the 2005 Hague Convention and it is expected to ratify it. If North Macedonia becomes a Member State to the 2019 Hague Convention, then the distribution of the judgments recognised and/or enforced according to these instruments will be conducted on the “either or” principle.

The PILA 2020 gives several alternatives for submission such as: the defendant has submitted a response to the claim without contesting jurisdiction; has argued on the merits and did not contest jurisdiction or file a counterclaim.<sup>586</sup> The latest point for contesting jurisdiction is the preliminary court hearing, or in the case of no preliminary court hearing, at the first court hearing for the trial.<sup>587</sup> As is the case in art. 26 para. 2 of the Brussels Ibis Regulation, in matters where a policyholder, an insured, a beneficiary of an insurance contract, an injured party, a consumer or an employee is the defendant, the court shall, before assuming jurisdiction, ensure that the defendant is informed of his right to contest the jurisdiction of the court, and of the consequences of entering or not entering an appearance.<sup>588</sup> So for cases of submission, judgments rendered from the Courts of North Macedonia could circulate under the 2019 Hague Convention.

### 5.3 In comparison to Article 5 of the 2019 Hague Convention, provide for the compatibility of the other jurisdictional criteria in the Convention and in the national legal sources

#### 5.3.1 Principal place of business (natural person)

Art. 5 para. 1(b) provides a jurisdictional filter for the very limited, very narrow situations where a natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that the person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of those activities. The PILA 2020 is influenced by the Rome I and II Regulation and contains a similar definition for principal place of business for a natural person.<sup>589</sup>

#### 5.3.2 Bringing a claim in the main proceedings - claimant

One of the most obvious jurisdictional filters is art. 5 para. 1(c) which refers to judgments against the claimant of the main proceedings. The rationale of this jurisdictional filter is straightforward: if the claimant from the main proceedings (who under most circumstances chooses the forum) loses the case,<sup>590</sup> then the judgment should be recognisable in other countries without the possibility of contesting jurisdiction.<sup>591</sup> There are some aspects that need to be taken into account regarding the application of this jurisdictional filter. Firstly, this rule refers to claims, thus excluding counterclaims which are dealt with specifically in art. 5 para. 1(l) of the 2019 Hague Convention.<sup>592</sup> Secondly, art. 5 para. 1(c) is particularly important when the claimant does not have a habitual

residence in the State of origin because in such a scenario, the jurisdictional filter which is based on the implicit consent of the claimant becomes relevant, as opposed to the connection of the parties to the state of origin in art. 5 para. 1(a) of the 2019 Hague Convention.

#### 5.3.3 Branch, agency or other establishment

The influence of art. 7 para. 5 of the Brussels Ibis Regulation regarding “branch jurisdiction” can be seen in art. 5 para. 1(d) of the 2019 Hague Convention, although the latter provides for a more restrictive approach regarding subsidiaries.<sup>593</sup> The implementation of this rule from the Courts of North Macedonia should be conducted without any problems, since the PILA 2020 contains a provision regarding the determination of the jurisdiction of Courts for cases which arise out of the operations of a branch, agency or other establishment, so long as they are situated in North Macedonia and the defendant does not have a statutory seat in North Macedonia.<sup>594</sup> If the defendant does have a statutory seat in North Macedonia, then the basic jurisdiction of the Courts of North Macedonia will be determined upon the statutory seat of the defendant provided in art. 110 of the PILA (which is in line with the jurisdictional filter provided in art. 5 para. 1(a) of the 2019 Hague Convention).

#### 5.3.4 Contractual obligations

Art. 5 para. 1(g) of the 2019 Hague Convention stipulates the jurisdictional filter on legal relations that are contractual relations. For a foreign judgment to pass this filter it must fulfil several conditions: firstly, it must be in regard to contractual obligations; secondly, the Court of origin has to be the court where the place of performance of that obligation had happened or was supposed to happen; thirdly, the place of performance of the contractual obligation was determined in the contract or alternatively if the contract was silent on the issue according to the law applicable to the contract; and finally, that the place of performance of the contract is not arbitrary, randomly or insufficiently related to the transaction between the parties, and that there is a purposeful and substantial connection to the State of origin. If this provision is compared with the rules on direct jurisdiction regarding contracts in the EU, namely provided in the Brussels Ibis Regulation<sup>595</sup> and in other non-EU jurisdictions,<sup>596</sup> it is evident that this provision represents a compromise between two approaches<sup>597</sup> and tries to build “conceptual bridges”<sup>598</sup> between the more “legalistic” legal culture and the more “factual” legal culture.<sup>599</sup>

Art. 145 of the PILA 2020 follows the jurisdictional criteria from art. 7 para. 1 of the Brussels Ibis Regulation and provides for this dual direct jurisdictional system, over which the Courts of North Macedonia would assume jurisdiction (the place of performance for contracts and if the parties have not agreed differently, the “characteristic” obligation regarding sale of goods and services). In such a way, the possible outcome with respect to the correlation between the Hague and the Brussels Ibis Regime applies to North Macedonia and the assumed jurisdiction in accordance with art. 145 of the PILA would not correspond with the requirements set forth in art. 5 para. 1(g) of the 2019 Hague Convention. Thus, judgments rendered by North Macedonian courts on that jurisdictional ground may not pass the jurisdictional filter. However, such decisions can be

<sup>583</sup> Garcimartín and Saumier, para. 160.

<sup>584</sup> Section 2, art. 122-125 of the PILA.

<sup>585</sup> Art. 122 and 123 of the PILA.

<sup>586</sup> Art. 125 of the PILA

<sup>587</sup> Ibid.

<sup>588</sup> Art. 125 para. 2 of the PILA.

<sup>589</sup> Art. 6 para. 2 of the PILA 2020.

<sup>590</sup> Damages are rendered against him/her which are recognisable according to art. 3 para. 1(b) of the 2019 Hague Convention.

<sup>591</sup> Garcimartín and Saumier, para. 147-151.

<sup>592</sup> Moreover, a counterclaimant does not “choose” the forum. Bonomi, A., Mariottini, Cristina M., “(Breaking) News From The Hague: A Game Changer in International Litigation? – Roadmap to the 2019 Hague Judgments Convention”, *Yearbook of Private International Law* 20 (2018/2019), p. 553

<sup>593</sup> See Garcimartín and Saumier, para. 157. However, there are some other interpretations whether this rule covers subsidiaries through the “doctrine of appearance” as it is provided in the decision by the CJEU case *SAR Schotte GmbH v Parfums Rothschild SARL* (ECLI:EU:C:1987:536), 9. Weller M. “The Jurisdictional Filters of the HCCH 2019 Judgments Convention.” *Yearbook of Private International Law* XXI, 2019/2020, p.289. The scenario provided in art. 5 para. 1(d) refers to a specific situation under several conditions: first, that the defendant in the main proceedings maintained a branch, agency or other establishment; secondly, that the branch, agency or other establishment were without legal personality; thirdly, that the branch, agency or other establishment is located in the State of origin at the time the defendant become party to the proceedings in the Court of origin and lastly, that the claim on which the judgment is based arose out of the activities of the branch, agency or other establishment.

<sup>594</sup> Art. 149 of the PILA.

<sup>595</sup> Art. 7 para. 1 of the Brussels Ibis Regulation.

<sup>596</sup> US and Canada. For the legal doctrines in these countries see Bonomi and Mariottini, p. 556.

<sup>597</sup> Garcimartín and Saumier, para. 180.

<sup>598</sup> Weller, p.294.

<sup>599</sup> Garcimartín and Saumier, para. 180.

recognised and enforced in other States according to other jurisdictional filters set forth in art. 5 or according to national rules according to art. 15 of the 2019 Hague Convention.

### 5.3.5 Non-contractual obligations

The jurisdictional filter for judgments relating to non-contractual obligations is set forth in art. 5 para. 1(j) of the 2019 Hague Convention. The jurisdictional criterion provided in the article is the place where the act or omission directly causing such harm occurred, irrespective of where that harm occurred, meaning that the State of origin is the place where this act or omission causing the harm occurred. This position, seen together with the limitation of the types of harm, is in line with U.S. case law and represents a departure from the broad jurisdictional approach of the Brussels Ibis regulation.<sup>600</sup> This can produce some ambiguity regarding the application of art. 5 para.1(j) of the 2019 Hague Convention towards judgments coming from Courts in North Macedonia since art. 148 para. 1 of the PILA 2020 is a transposition of art. 7 para. 2 of the Brussels Ibis Regulation covering a broader material scope of relations that would not be recognised or enforced according to the 2019 Hague Convention. However, if the judgments cannot be recognised or enforced according to this jurisdictional filter then the other jurisdictional filters in art. 5 para. 1 of the 2019 Hague Convention can apply or eventually art. 15 of the 2019 Hague Convention will provide for recognition and enforcement of foreign judgments according to national rules.

### 5.3.6 Trusts

The provisions in art. 5 para. 1(k) of the 2019 Hague Convention applies towards judgments that refer to trusts. There are no specific rules regarding trusts in PILA 2020.

### 5.3.7 Counterclaims

Art. 5 para. 1(l) of the 2019 Hague Convention provides for a jurisdictional filter regarding counterclaims. This provision differentiates two scenarios based on the fact whether the counterclaim was: (i) in favour of the counterclaimant; or (ii) against the counterclaimant.

The PILA 2020 contains a specific provision regarding counterclaims, establishing the direct jurisdiction of the Courts of North Macedonia for counterclaims if the request for the counterclaim is in correlation with the claim.<sup>601</sup> Such a position is in line with the 2019 Hague Convention.

### 5.3.8 Consumer and employment contracts

Consumers and employees are generally protected in national and international legislation.<sup>602</sup> Such provisions can be found in the Brussels Ibis Regulation,<sup>603</sup> other international instruments,<sup>604</sup> and also in the PILA 2020.<sup>605</sup> Consumer and employee contracts are excluded from scope of application of the 2005 Hague Convention<sup>606</sup> and the recognition or enforcement of judgments in these relations is covered by the 2019 Hague Convention. However, not all judgments relating to consumer and employment contracts are covered by the 2019 Hague Convention.

The PILA 2020 contains specific provisions regarding the determination of direct jurisdiction over consumer and individual employment contracts.<sup>607</sup> In regard to consumer contracts, art. 146 of

the PILA is applicable. The provisions in art. 146 of the PILA are modelled on the rules regarding the determination of direct jurisdiction in the Brussels Ibis Regulation<sup>608</sup> and refer to two separate scenarios: whether the claimant is the consumer or the seller. If the claimant is the consumer, then the Courts of North Macedonia would have jurisdiction if the seller has domicile in North Macedonia.<sup>609</sup> If the reverse is the case, if the seller is the claimant and the defendant is the consumer, then exclusive jurisdiction of the Courts of North Macedonia applies if the consumer has domicile in North Macedonia.<sup>610</sup> This situation is especially important in regard to the 2019 Hague Convention, because in most cases, jurisdiction over consumer judgments where the consumer is the person against whom recognition is sought would be established according to the domicile of the consumer. Bearing in mind the limited possibilities that are left after the implementation of the restrictions and limitations provided in art. 5 para. 2 of the 2019 Hague Convention, the only foreseeable outcome would be the jurisdictional filter in art. 5 para. 1(a) of the 2019 Hague Convention which is the habitual residence of the consumer. Such a position is not without problems, such as the issues which were referred to above regarding the problem of determining domicile by the Courts of North Macedonia and habitual residence. In some situations this would eventually lead to judgments on consumer contracts not being recognised according to the 2019 Hague Convention, where the Court of North Macedonia rightfully seized its jurisdiction on the basis of the domicile of the defendant, but the defendant is habitually resident elsewhere, thus making the 2019 Hague Convention inapplicable to consumer contracts. Such a position could be mitigated by two rules: first by the possibility in art. 146 para. 3 of the PILA that allows exception to exclusive jurisdiction by allowing the parties to consent to the jurisdiction of the Courts of North Macedonia under the condition that it must be given after the dispute has arisen. However, the consent must be provided expressly during the course of the proceedings before the Court, in order to pass the jurisdictional filter limitation in art. 5 para. 2 that refers to art. 5 para. 1(e) of the 2019 Hague Convention. This scenario would be of use to a very small number of judgments since it prerequisites very specific acts by the parties. The second possibility provided in art. 15 of the Hague Convention, seems to be more realistic, and in a situation when a judgment is rendered against a consumer with habitual residence outside of North Macedonia, these judgments will be recognised according to the national rules of the Court of recognition. The same rationale goes for individual consumer contracts since art. 147 of the PILA provides for the same exclusive jurisdiction based on the domicile of the employee as a jurisdictional criterion.

## 5.4 Exclusive jurisdiction

The specific provisions on jurisdiction follow the systematisation of the provisions determining the applicable law. Section 3 of Chapter I in Part III is divided into subsections containing specific jurisdiction provisions for status of persons,<sup>611</sup> family relations,<sup>612</sup> succession,<sup>613</sup> rights in rem,<sup>614</sup> intellectual property rights,<sup>615</sup> contractual and non-contractual relations.<sup>616</sup>

The PILA 2020 has introduced important changes regarding exclusive jurisdiction. Firstly, the number of situations where exclusive jurisdiction was attributed to the Courts of North Macedonia has been reduced. In the PILA 2007 there were 13 situations of exclusive jurisdiction of Courts of North Macedonia.<sup>617</sup> In the PILA 2020, only 7 situations are characterised with exclusive jurisdiction of the Courts of North Macedonia:

<sup>608</sup> Rumenov I. Europeanisation of the Macedonian Private International Law – Legal Evolution of a National Private International Law Act, EU and comparative law issues and challenges (ECILC), Vol.4, 2020, Osijek, Croatia, p. 319.

<sup>609</sup> Art. 146 para. 1 of the PILA.

<sup>610</sup> Art. 146 para. 2 of the PILA.

<sup>611</sup> Art. 126 to 130 of the PILA 2020.

<sup>612</sup> Art. 131 to 136 of the PILA 2020.

<sup>613</sup> Art. 137 to 140 of the PILA 2020.

<sup>614</sup> Art. 141 to 143 of the PILA 2020;

<sup>615</sup> Art. 144 of the PILA 2020.

<sup>616</sup> Art. 145 to 150 of the PILA 2020.

<sup>617</sup> Art. 65, 66, 67, 68, 63, 84, 85, 86, 73 para. 2, 76 para. 2, 78 para. 2, 83 para.2, 87, 88 and 91 of the PILA 2007.

1. Choice of Court agreements determining the jurisdiction of the Court of North Macedonia (unless the parties have determined otherwise);<sup>618</sup>
2. Disputes relating to establishment, dissolution and changes in the legal status of a legal person, if the company, another legal person or association has the principal place of business in the Republic of North Macedonia;<sup>619</sup>
3. Disputes relating to entries into public registries, if the public registries are kept in the Republic of North Macedonia;<sup>620</sup>
4. Disputes relating to adoption, if the adoptee is a national of Republic of North Macedonia and has habitual residence in Republic of North Macedonia in the time of the institution of the procedure for adoption;<sup>621</sup>
5. Disputes relating to property rights on immovable property and disputes relating to lease or rent of immovable property (except for short term leases for a period less than six consecutive months) if the immovable property is situated in the territory of Republic of North Macedonia;<sup>622</sup>
6. Disputes relating to industrial property rights, if the application for submission or registration was filed in the Republic of North Macedonia, the submission or registration of that right was conducted in the Republic of North Macedonia, or based on ratified international agreement, in which case it shall be considered that the submission or registration of that right was conducted in the Republic of North Macedonia;<sup>623</sup>
7. Disputes relating to individual employment agreements, if the employer is plaintiff and the employee is defendant and he/she has domicile in the Republic of North Macedonia.<sup>624</sup>

#### 5.4.1 Jurisdictional criterion for determining the international jurisdiction in regard to rights in rem in immovable property

The 2019 Hague Convention contains several provisions regarding immovable property. Art. 6 of the 2019 Hague Convention is very specific and is a very important provision in the mechanism of the Convention, elevating the protection of the forum in which immovable property is located to the utmost importance and providing for exclusive indirect jurisdiction for these cases.<sup>625</sup> The consequence of the provisions of art. 6 of the 2019 Hague Convention is that judgments relating to rights *in rem* will only be recognised if they are rendered by the Court where the property is situated. This means that the only path forward towards exequatur for these judgments is if they were rendered in the forum *rei sitae*, and the opposite, if they are rendered by another Court than the one where the immovable property is situated these judgments must not be recognised and enforced either under the Convention or under national law, making art. 15 of the 2019 Hague Convention inapplicable in these situations.<sup>626</sup> Such a position is not a novelty in private international law because, in general, similar counterparts can be found in other legal sources such as for example in art. 24 of the Brussels Ibis Regulation.

The PILA 2020 provides for a set of jurisdictional rules regarding rights in rem and tenancies. Art. 141 of the PILA, heavily influenced by art. 24 of the Brussels Ibis Regulation, firstly provides for exclusive jurisdiction of the Court of North Macedonia over rights *in rem* on immovable property

or tenancies of immovable property. However, art. 141 para. 2 of the PILA provides an exclusion from the exclusive jurisdiction of Courts of North Macedonia regarding short-term tenancies, (modelled according to art. 24 para. 1 of the Brussels Ibis Regulation) provided that the tenancies of immovable property are concluded for temporary private use for a maximum period of six consecutive months, and if the tenant is a natural person and if the landlord and the tenant are domiciled in the same Member State. With such a position, it is expected that judgments from the Courts of North Macedonia in most cases will base their jurisdiction over cases regarding immovable property and tenancies on the fact that the immovable property is situated in North Macedonia, providing for exclusive jurisdiction, except for short term tenancies which could only in limited situations be given a concurrent jurisdiction.

## 6. Procedure for recognition and enforcement of foreign judicial decisions and compatibility with the 2019 Hague Convention

### 6.1 Material scope of application

The *ratione materiae* of the PILA 2020 is given in art. 1. It provides that the PILA 2020 contains provisions to determine the applicable law for private legal relations that contain a foreign element, provisions for jurisdiction and provisions regarding the procedure of courts and other authorities as well as provisions for the recognition and enforcement of judicial decisions and the decisions of other authorities.

In comparison with art. 1 of the PILA 2007, it generally differs in two respects. Firstly, in regard to the legal relations that are covered, the PILA 2020 contains only a general description of the legal relations “private legal relations that contain a foreign element” while the PILA 2007 enumerated the legal relations relating to “...personal (status), family, labour, property and other civil relationship having an international element.” The identical solution was contained in art. 1 of PILA 1982. Secondly, there is a formal difference between art. 1 of the PILA 2020 and art. 1 of the PILA 2007, where art. 1 of the PILA 2020 contains only one paragraph and art. 1 of the PILA 2007 contained two paragraphs. The subject matter of the law, however, remained the same, containing provisions for the determination of the applicable law, international jurisdiction of the Courts and other authorities of the Republic of North Macedonia and recognition and enforcement of foreign decisions in North Macedonia.

#### 6.1.1 In comparison to Article 1 and 2 of the 2019 Hague Convention, provide for the compatibility of the material scope of application for the recognition and enforcement of foreign judicial decisions in the Convention and in the national legal sources

The 2019 Hague Convention regarding *ratione materiae* takes the well-established approach which is found in the 2005 Hague Convention as well as in the Brussels Ibis Regulation<sup>627</sup> with certain specifics that are particular for the 2019 Hague Convention.

Art. 1 together with art. 2 of the 2019 Hague Convention provide for the scope of application of this Convention and define its application in substantive terms.<sup>628</sup> In substantive terms, the scope of application as provided in art. 1 of the 2019 Hague Convention states that it applies to civil or commercial matters<sup>629</sup> and then excludes the more specific areas such as revenue, custom and

<sup>618</sup> Art. 122 para. 2 of the PILA 2020.

<sup>619</sup> Art. 129 of the PILA 2020.

<sup>620</sup> Art. 130 of the PILA 2020.

<sup>621</sup> Art. 136 para. 2 of the PILA 2020.

<sup>622</sup> Art. 141 of the PILA 2020.

<sup>623</sup> Art. 144 of the PILA 2020.

<sup>624</sup> Art. 147 para. 2 of the PILA 2020.

<sup>625</sup> Nielsen, p.223.

<sup>626</sup> Garcimartín and Saumier, para. 231.

<sup>627</sup> Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32.

<sup>628</sup> Garcimartín and Saumier, para. 27.

<sup>629</sup> The characterisation of a judgment whether it relates to civil or commercial matters depends on the nature of the claim or action that is the subject matter of the judgment and not on the nature of the court, nature of the parties or the mere fact that the claim is transferred to another person. See Garcimartín and

administrative decisions from the scope of application.<sup>630</sup> Similar to the Brussels Ibis Regulation, the scope of application is not limited only to these public law aspects, but also covers other *acta iure imperii* when States exercise their governmental and sovereign powers that are not enjoyed by ordinary persons.<sup>631</sup> Moreover, art. 2 para. 4 of the 2019 Hague Convention provides that a judgment is not excluded from the scope of the Convention if a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings. As a balance to this principle, art. 19 provides for the possibility for a State to provide a declaration that opts out of these decisions with the effect that once a Contracting Party makes such a declaration it will not be able to avail itself of the Convention for the recognition or enforcement of a favourable judgment.<sup>632</sup> Art. 2 goes into further specifics, enumerating the other areas which are excluded from the scope of application.<sup>633</sup> Another important aspect of art. 2 of the 2019 Hague Convention is that it excludes arbitral and other alternative dispute resolution decisions from the scope of application. Moreover, the 2019 Hague Convention is applicable towards civil or commercial judicial decisions in which one of the parties is a state, government, governmental institution or a person acting in the name of the state, but excluding aspects regarding immunity and the privileges of the states and international organizations.

When confronted with a foreign judgment, the court of recognition must bear in mind art. 20 of the 2019 Hague Convention in determining whether a judgment was rendered in “civil or commercial matters,” which is a requirement for uniform interpretation and application of the Convention.<sup>634</sup> Consequently, this departs from the understanding of the term “civil or commercial matters” in the national notion<sup>635</sup> and from the understanding provided in the Brussels Ibis Regulation which is much broader than that in the 2019 Hague Convention.<sup>636</sup> Moreover, the recognising court must provide for consistency in the interpretation of the term “civil or commercial matters” with other HCCH instruments, in particular with the 2005 Hague Convention on Choice of Court Agreements.<sup>637</sup>

The *ratione materiae* of the PILA 2020 is compatible with the 2019 Hague Convention although it has been slightly changed and simplified from the subject matter of the PILA 2007. In comparison with the PILA 2007, the PILA 2020 now only contains one paragraph stipulating that the PILA 2020 applies towards all of the PIL issues (applicable law, international jurisdiction and procedure and recognition and enforcement). This rule does not go into the specific subject matter of the relations covered by the PILA 2020,<sup>638</sup> but contains a general definition that the PILA 2020 applies to “... private legal relations having an international element...”<sup>639</sup> Moreover, art. 174 of the PILA 2020 provides that the procedure envisaged in art. 165-171 for the recognition and enforcement of foreign judicial decisions is also applicable regarding the procedure for the recognition of foreign arbitral awards.<sup>640</sup>

Saumier, para. 28-31, p.8.

630 Garcimartín and Saumier, para.34-35.

631 Hartley T., Dogauchi M. “Convention of 30 June 2005 Choice of Court Agreements Convention: Explanatory Report”, <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>. Accessed 28 Apr. 2021, para.85.

632 Bonomi and Mariottini, p.542.

633 The matters excluded from the 2019 Hague Convention are: (a) the status and legal capacity of natural persons; (b) maintenance obligations; (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; (d) wills and succession; (e) insolvency, composition, resolution of financial institutions, and analogous matters; (f) the carriage of passengers and goods; (g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; (h) liability for nuclear damage; (i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs; (j) the validity of entries in public registers; (k) defamation; (l) privacy; (m) intellectual property; (n) activities of armed forces, including the activities of their personnel in the exercise of their official duties; (o) law enforcement activities, including the activities of law enforcement personnel in the exercise of official duties; (p) anti-trust (competition) matters; (q) sovereign debt restructuring through unilateral State measures.

634 Garcimartín and Saumier, para. 32.

635 Hartley and Dogauchi, para.49.

636 Wilderspin, M., Vysoka, L., “The 2019 Hague Judgments Convention through European lenses”, *Nederlands Internationaal Privaatrecht (NIPR) 2020*, p. 37.

637 Nielsen, p.211.

638 This was the case with the PILA 2007 which in art. 1 provided “...personal (status), family, labour, property and other civil relationship having an international element.” The identical solution was contained in art. 1 of PILA 1982

639 Art. 1 of the PILA 2020

640 While the recognition and enforcement of foreign arbitral awards is carried out according to the provisions of the Convention signed in New York on 10 June 1958 on the recognition and enforcement of foreign arbitral awards. Art. 37 of the Law on International Commercial Arbitration of the Republic of Macedonia, Official Gazette of the Republic of Macedonia, no.39/2006.

## 6.2 Types of judicial decisions that are recognized and enforced (e.g. positive-negative decisions, interim measures)

The PILA 2020 directly refers to the explanation of the types of decisions which are recognized and enforced in North Macedonia. Art. 157 of the PILA 2020 regarding the types of decisions that can be recognised and enforced in North Macedonia gives a broader meaning to the term “foreign decisions.” It does not limit itself only to Court decisions<sup>641</sup> but also broadens this aspect with court settlements<sup>642</sup> and other decisions made by a relevant authority in the country of origin which have the same effect as judicial decisions, provided that they refer to the *rationae materiae* of the PILA 2020 given in art. 1 of the same Act.<sup>643</sup> The intention of art. 157 of the PILA 2020 is to cover a larger area of foreign decisions which would be eligible for recognition in North Macedonia. Art. 157 of the PILA 2020, by giving a broader meaning to the term “foreign decisions” restrains North Macedonia from disqualifying foreign decisions because they bear a different name or because the country of origin has a different procedure for rendering those decisions. Therefore, art. 157 of the PILA 2020 is focused on the subject matter of the decision and not on the authorities that brought it or the name of the decision. In this way, the PILA 2020 upholds the sovereignty of the foreign states and the national character of their legal systems. Consequently, all types of decisions (declaratory, constitutive and condemnatory), whatever their title, can be recognised and have legal effects in North Macedonia, but only condemnatory decisions can be enforced, because of their nature.

## 6.3 Commencement of the procedure (as a main or as a preliminary question) – jurisdiction of the Courts in North Macedonia regarding the recognition and enforcement of foreign judgments

The jurisdiction of the Courts in North Macedonia regarding the recognition of foreign decisions depends on whether recognition is sought as a main question or as a preliminary one.

In North Macedonia, the competence to decide on the recognition of foreign judgments in independent proceedings is given to the basic courts with extended jurisdiction (**Основни судови со проширена надлежност**).<sup>644</sup> Territorial jurisdiction over the recognition of a foreign judicial decision lies with any court that has substantive jurisdiction.<sup>645</sup> However, such a position does not preclude the possibility that the recognition of a foreign judgment arises as a preliminary question by the executing court. If no special ruling has been rendered as to the recognition of a foreign judicial decision, any court may decide thereon as on a preliminary question, however, with an effect referring only to this procedure.<sup>646</sup>

## 6.4 Documents that need to be produced (formal requirements) for the recognition of the foreign judicial decision

The positive conditions outlining the formal requirements for recognition and enforcement of foreign judicial decisions are given in art. 159 of the PILA 2020. Recognition and enforcement is admitted only if the certain conditions are met. The proof of these requirements needs to accompany the application for recognition, and already at that stage of the recognition procedure they need to be fulfilled so the foreign decision can be recognised and/or enforced. If the court fails to recognise (positively) the existence of these requirements, it will refuse recognition.

641 Art. 157 para. 1 of the PILA 2020.

642 Art. 157 para. 2 of the PILA 2020.

643 Art. 157 para. 3 of the PILA 2020.

644 Art. 31, Law on Courts

645 Art. 166 para. 2 of the PILA 2020.

646 Art. 167 of the PILA 2020.

Art. 159 of the PILA 2020 stipulates that the applicant for the recognition of a foreign judicial decision shall attach the following to his application:

- the foreign judicial decision or authenticated copy thereof, and
- the certificate of a competent foreign court or another authority on the finality of the decision under the law of the State in which the decision was rendered.

This is a very important aspect: because of the diversity of languages existing in the world, the party that seeks recognition must produce a certified translation of a foreign judicial decision in the language officially used by the Court.<sup>647</sup>

Regarding the enforcement of foreign decisions, art. 159 para. 2 starts with the same formal requirements for the enforcement of the foreign decisions as those which are stipulated in art. 159 para. 1. However, because of the nature of enforceable judgments, the PILA 2020 seeks additional formal requirements, where the applicant for enforcement of a foreign judicial decision must also produce a certificate on enforceability according to the law of the country of origin. This act will serve as proof that the foreign judgment is enforceable according to the law of the country of origin.

## 6.5 Conditions for recognition and enforcement of foreign judicial decisions

The provisions of the PILA 2020 regarding the conditions for recognition and enforcement of foreign judicial decision underwent structural and substantial modification in comparison to the provisions in PILA 2007. Firstly, Chapter II of Part IV is divided into two sections: Section 1 which provides for the conditions for recognition and enforcement of foreign decisions that are considered ex officio by the Court; and Section 2 that provides for the conditions that are considered upon objection by the parties. Secondly, in line with the tendency of the PILA 2020, the conditions have been amended and reduced.

### 6.5.1 Conditions determined ex officio

One of the greatest novelties regarding recognition and enforcement of foreign judicial decisions in North Macedonia is that the Court of recognition inspects most of the conditions ex officio and thus provides for swift recognition based on objective circumstances. Most of the conditions for recognition in the PILA 2020 were present in its predecessor the PILA 2007.

#### 6.5.1.1 Certificate of finality and enforceability

The certificate of finality and enforceability provided in art. 159 of the PILA 2020 is a combination of art. 101 and 102 of the PILA 2007. The wording of these provisions has remained unchanged. For more on this condition see Part 6.4.

#### 6.5.1.2 Exclusive jurisdiction

Regarding the exclusive jurisdiction of the courts of North Macedonia, the provision from its counterpart in the PILA 2007<sup>648</sup> has been simplified, providing that foreign judicial decision would not be recognised in North Macedonia if exclusive jurisdiction over the matter lies with the court or some other authority in Republic of North Macedonia, unless the provisions of the PILA 2020 allow the parties to agree otherwise.<sup>649</sup> The situations for exclusive jurisdiction is provided in the PILA 2020 and outlined in Part 5.4 of this Report.

<sup>647</sup> Art. 159 para. 3 of the PILA 2020.

<sup>648</sup> Art. 104 of the PILA 2007

<sup>649</sup> Art. 160 of the PILA 2020

### 6.5.1.3 Exorbitant jurisdiction of the foreign court

One of the novelties regarding conditions for recognition and enforcement is that, as prevention from exorbitant jurisdiction, the legislator opted to incorporate the “mirror principle” meaning that a foreign judicial decision would not be recognised in the Republic of North Macedonia if the jurisdiction was determined according to circumstances which are not provided for determination of jurisdictions for complementary cross-border issues in the Republic of North Macedonia.<sup>650</sup>

#### 6.5.1.4 Final judgment on the same subject matter between the same parties

The provisions in the PILA 2020 on parallel proceedings solve this problem with the rules of *lis pendens*<sup>651</sup> and the provisions provided in art. 162 which stipulate that foreign judicial decisions shall not be recognised if the court or another authority in North Macedonia rendered a final decision on the same subject matter or if another foreign judicial decision on the same subject matter and between the same parties was recognised in the Republic of North Macedonia.<sup>652</sup> This provision sustained a slight, but very important, change regarding the identity of the parties, because art. 106 of the PILA 2007 provided that only the subject matter of both decisions should correspond for the foreign judicial decision which was previously recognized, while the provision in art. 164 of the PILA 2020 requires both of the judicial decisions to be “...on the same subject matter and between the same parties...”. Para. 2 of art. 164 of the PILA 2020 remains the same as art. 106 para. 2 of the PILA 2007.

#### 6.5.1.5 Public policy

Another significant novelty in the PILA 2020 that is in line with the new tendencies in private international law<sup>653</sup> is the higher threshold that is required in order to apply the “public policy” exemption. Art. 107 of the PILA 2007 provided that a foreign judicial decision would not be recognised in the Republic of North Macedonia on the grounds of public policy. For this clause to take effect, the provision of “public policy” only stipulated that if the effects of recognition thereof were contrary to public policy of North Macedonia then this exemption could be applied. Art. 163 of the PILA 2020 elevates the threshold higher to the standard “evidently contrary to public policy.” Such wording is not only semantically significant, but provides for a much more restrictive approach to the use of the “public policy” exemption.<sup>654</sup>

### 6.5.2 Conditions determined upon objection of the parties

The possibility to refuse to recognise a foreign decision upon objection by the parties has been limited to the minimum in the PILA 2020 only in cases against severe violations by the judicial authorities of the Country of origin.<sup>655</sup> In the PILA 2020, art. 164 provides for three scenarios when the Courts shall refuse recognition and enforcement of foreign judgments upon objection by the party with respect to the violation of the right of defence:

- due to irregularities in the proceedings, the party (in the main proceedings) was not given opportunity to participate therein; or<sup>656</sup>

<sup>650</sup> Art. 161 of the PILA 2020

<sup>651</sup> Art. 119 of the PILA 2020

<sup>652</sup> Art. 162 of the PILA 2020

<sup>653</sup> Kramberger Škerl J., *European Public Policy (With an Emphasis on Exequatur Proceedings)*, Journal of Private International Law vol. 7, 2011, pp. 466-477; Kramberger Škerl J., *Evropeizacija javnega reda v mednarodnem zasebnem pravu*, Pravni letopis, Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, Ljubljani (2009), pp. 349-370; Hess B.; Pfeifer T., *Study on the Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law*, prepared for the European Parliament's Committee on Legal Affairs [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI\_ET%282011%29453189], Accessed 28 Apr. 2021, pp. 1-181; Siehr K., *General problems of private international law in modern codifications—de lege lata and—de lege europea ferenda*, Yearbook of Private International Law, 2005, p. 54

<sup>654</sup> Hess and Pfeifer, *Study on the Interpretation of the Public Policy Exception*, p. 13.

<sup>655</sup> Art. 164 of the PILA 2020.

<sup>656</sup> Art. 164 para. 1 of the PILA 2020.

- the summons, the document or the ruling instituting the proceedings were not personally served upon him, or if such personal service was not even tried, except when that party pleaded on the merits of the plaintiff's claim in the procedure of first instance: or<sup>657</sup>
- the party was not given sufficient time to arrange its defence from the moment of service of the document instituting the proceeding until the moment when the hearing was scheduled.<sup>658</sup>

### 6.5.3 In comparison to Article 7 (1) and (2) of the 2019 Hague Convention, provide for the compatibility of the conditions for recognition and enforcement of foreign judicial decisions in the Convention and in the national legal sources (the national conditions for recognition and enforcement are more favorable or more restrictive compared to the conditions provided in Article 7 of the 2019 Hague Convention)

The second threshold of the 2019 Hague Convention is that recognition and enforcement can be refused if the foreign judgment does not fulfil the conditions laid down in art. 7 para. 1 and para. 2 of the 2019 Hague Convention. These six conditions can lead to refusal of recognition or enforcement of a judgment in a requested state. The intention of the drafters was to create a minimum standard for refusal, however, states may go further than these conditions.<sup>659</sup> Most of these conditions are not a novelty and they can be found in the national legal systems.

The first condition refers to infringement of the right of defence in the state of origin.<sup>660</sup> This condition specifically refers to the lack of proper notification of the defendant, which constitutes a ground for refusal of recognition and enforcement.<sup>661</sup> The wording of both of these rules in the 2019 Hague Convention and in the PILA 2020 is different, however several overlapping issues can be detected. First, both of these rules refer to the question of service of documents. The North Macedonian rule starts from a more general position to more specific, from existing irregularities in the proceedings which as a consequence prevented the party from participating, to the more specific aspect of service of documents. The 2019 Hague Convention rule refers only to the question of service of documents. However, this rule must be read in conjunction with art. 7 para. 1(c) which refers to the public policy defence, but with specific reference to the "... fundamental principles of procedural fairness..." which, on a general level, covers issues such as the right of the party to be heard, equity of arms, etc.<sup>662</sup> Secondly, the standard upon which the service of documents is weighted in the North Macedonian and in the 2020 PILA is not specified. In the 2019 Hague Convention, there is no specific reference to the standard in the first scenario. The question whether the document instituting the proceedings was duly served on a defendant must be determined in the light of the provisions of the 2019 Hague Convention and several modalities for proper service can be provided such as service to the employee or the defendant or public notice.<sup>663</sup> However, the right to be heard is not violated if the requested court is satisfied that all investigations required by the principle of diligence and good faith have been undertaken to trace the defendant without success.<sup>664</sup> In the second scenario, which is intended to protect the requested state, the issue is whether the defendant was notified in a manner that is incompatible with the fundamental principles of the requested state concerning service of documents.<sup>665</sup> Thirdly, in both rules, the behaviour of the defendant in the State of origin dictates

its outcome; namely, if the defendant entered an appearance and presented his case in the court of origin without contesting notification, a defence based on improper notification will not be available in the requested State.<sup>666</sup>

The second condition in the 2019 Hague Convention refers to fraud as grounds for refusal of recognition and enforcement.<sup>667</sup> This condition can be seen together with the third condition of the 2019 Hague Convention which refers to the public policy defence.<sup>668</sup> The public policy provision in the PILA 2020 corresponds with the complementary provisions in art. 7 para. 1(b) and (c) of the 2019 Hague Convention. Public policy has a very broad meaning and its interpretation varies according to the national legal systems. Its scope and contents depend on the manner in which an individual state values its interests. This means that public policy or *ordre public* in Private International Law can be understood as the sum of the values on which the legal, social and cultural order of a particular country depend and which must also be complied with in the so-called relationships with an international element.<sup>669</sup> However, in the context of the 2019 Hague Convention, its scope should be understood in relation to other provisions in the text.<sup>670</sup>

The fourth condition refers to a judgment rendered by a Court that assumed jurisdiction although there was a choice of court agreement which designated a Court other than the court of origin.<sup>671</sup> This condition tends to uphold the *prorogation iurisdictionis* and to respect party autonomy. Art. 7 para. 1(d) of the 2019 Hague Convention needs to be seen together with the indirect jurisdictional bases given in art. 5 and it presents a last defence against a judgment that was rendered by a court that established jurisdiction on other bases, while a choice of court agreement was present in the case.<sup>672</sup> The PILA 2020 has not provided for a specific rule regarding breach of the choice of court agreement as a condition for recognition and enforcement. Instead, the PILA 2020 has taken an indirect approach by providing that choice of court agreements have an exclusive jurisdictional character (if not otherwise determined by the parties)<sup>673</sup> and that foreign judgments will not be recognised if the Court of recognition has exclusive jurisdiction.<sup>674</sup> The effect of this approach is that foreign judgments are not recognised if they violate the allowed and rightful parties' choice of court agreement.

The fifth and the sixth conditions refer to two similar situations which resolve the problem of parallel proceedings.<sup>675</sup> First, where the competing judgment was given by a court in the requested state, second where the competing judgment was given in another state (other than the court of origin).<sup>676</sup> In the first case, the judgment from the country of origin is inconsistent with a judgment given in the requested state in a dispute between the same parties.<sup>677</sup> The rule provided in this article is the same as the one in the 2005 Hague Choice of Court Agreement Convention<sup>678</sup> and has two conditions: inconsistency between the judgments and dispute between the same parties. It does not require a temporal hierarchy and same cause of action.<sup>679</sup> The second case applies where the judgment is inconsistent with an earlier judgment given in another state between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested state.<sup>680</sup> This rule is more specific than the last and contains more requirements to be applied. First, the judgment from the third state must have

<sup>666</sup> Garcimartín and Saumier, para. 250.

<sup>667</sup> Art. 7 para. 1(b) of the 2019 Hague Convention.

<sup>668</sup> Art. 7 para. 1(c) of the 2019 Hague Convention.

<sup>669</sup> Kramberger Škerl, p.349.

<sup>670</sup> Garcimartín and Saumier, para. 262.

<sup>671</sup> Art. 7 para. 1(d) of the 2019 Hague Convention.

<sup>672</sup> Garcimartín and Saumier, para. 267-268.

<sup>673</sup> See art. 122 para. 2 of the PILA 2020.

<sup>674</sup> See art. 160 of the PILA 2020.

<sup>675</sup> Art. 7 para. 1(e) and (f) of the 2019 Hague Convention.

<sup>676</sup> Garcimartín and Saumier, para. 270.

<sup>677</sup> Art. 7 para. 1(e) of the 2019 Hague Convention.

<sup>678</sup> Art. 9 para. f of the 2005 Hague Choice of Court Agreement Convention.

<sup>679</sup> Garcimartín and Saumier, para. 271.

<sup>680</sup> Art. 7 para. 1(f) of the 2019 Hague Convention.

<sup>657</sup> Art. 164 para. 2 of the PILA 2020.

<sup>658</sup> Art. 164 para. 3 of the PILA 2020.

<sup>659</sup> Garcimartín and Saumier, para. 326.

<sup>660</sup> Art. 7 para. 1(a) of the 2019 Hague Convention.

<sup>661</sup> Garcimartín and Saumier, para. 24.

<sup>662</sup> Garcimartín and Saumier, para. 250.

<sup>663</sup> Garcimartín and Saumier, para. 251.

<sup>664</sup> Ibid.

<sup>665</sup> Art. 7 para. 1(a)(ii) of the 2019 Hague Convention.

been given prior to the judgment from the state of origin, irrespective of which court was first seized.<sup>681</sup> Secondly, both judgments need to be on the same subject matter. Thirdly, the earlier judgment must be eligible for recognition and enforcement in the requested state, whether or not that recognition or enforcement has been sought yet.<sup>682</sup>

Art. 162 of the PILA 2020 refers to the question of irreconcilable judgments. These rules are modelled to protect the national legal system against irreconcilable judgments rendered in other legal systems on the same subject matter (between the same parties). As was the case with the other legal obstacles for recognition and enforcement in the PILA 2020, art. 162 is also given as a negative one, meaning that a foreign judicial decision shall not be recognised if the court or another authority in North Macedonia rendered a final decision on the same matter or if another foreign judicial decision rendered on the same matter was recognised in North Macedonia.<sup>683</sup> The Court shall stay the proceedings for recognition of a foreign judgment in cases where an earlier instituted proceedings are pending before the Court of the Republic of North Macedonia in the same subject matter and between the same parties, until the judgment in these proceedings becomes final.<sup>684</sup> The determination of the existence of this legal obstacle is *ex officio*. Thus, this Article refers to two different procedural situations. The first paragraph refers to cases where the courts in North Macedonia have already rendered a final judicial decision regarding the same matter or a foreign judicial decision has already been recognised in North Macedonia when a request for recognition is made. The second paragraph of the same Article refers to cases where North Macedonia courts have seized jurisdiction and proceedings are ongoing when request for recognition is made. The second situation is also covered in the 2019 Hague Convention in art. 7 para. 2. This rule allows the court of the requested state to postpone or refuse recognition and enforcement if proceedings between the same parties on the same subject matter are pending before the court of the requested state and two additional criteria are met: first that the requested court was first seized, and second, there is close connection between the dispute and the requested state.<sup>685</sup>

## 6.6 Procedure for recognition and enforcement of foreign judicial decisions

The core of the procedure for recognition and enforcement of foreign judgments has generally remained the same as the procedure in the PILA 2007. The novelties in the procedure for recognition and enforcement relate to two aspects: firstly, the time limits have been prolonged;<sup>686</sup> and secondly, the adversarial hearing in the second stage of the procedure for recognition is obligatory.<sup>687</sup>

The procedure for recognition and enforcement of foreign judicial decisions in North Macedonia can be divided into three stages which are similar to the systematisation provided in the Brussels I Regulation. The first stage is the *ex parte* procedure, which is completed without the participation of the person against whom the recognition/enforcement is sought.<sup>688</sup> Firstly, the procedure for the recognition of a foreign judicial decision is instituted upon application.<sup>689</sup> In matters referring to personal status, recognition may be sought by anyone that has legal interest.<sup>690</sup> This first stage of the recognition is adjudicated by a single judge of a district court.<sup>691</sup> This court, after considering the formal requirements and those which it determines *ex officio*,<sup>692</sup> adopts a ruling

on recognition of the foreign decision if it finds that there are no obstacles to the recognition.<sup>693</sup>

As previously stated, one of the main characteristics of the first stage of the procedure is that it is conducted *ex parte*. This serves the purpose of having the element of surprise, which is necessary in a later enforcement procedure if the respondent is not to have the opportunity of withdrawing his assets from any measure of enforcement.<sup>694</sup> This element of “surprise” is less important in family matters, with some exceptions in child abduction cases.<sup>695</sup>

After this stage, the ruling on recognition is served by the Court upon the opposite party and/or upon other parties in the proceedings in which the foreign judicial decision was rendered with the instruction that an appeal can be filed within 30 days<sup>696</sup> from the service of the ruling on the recognition of the foreign judicial decision.<sup>697</sup> There is one exception to this second stage of the procedure that is particularly important for the recognition and enforcement of foreign decisions in family matters. In situations regarding divorce, the Court shall not serve the ruling on recognition of a foreign judicial decision relating to divorce upon the opposite party if the person applying for recognition is a national of North Macedonia and the opposite party has neither domicile nor habitual residence in North Macedonia.<sup>698</sup>

Appeal against this first stage ruling is dealt by the same district Court (the Court that adopted the ruling on recognition) but now by a chamber of three judges.<sup>699</sup> In this stage, the Court can rule on the decision of the appeal after a court hearing.<sup>700</sup> It must be stated that this adversarial hearing is obligatory.<sup>701</sup> At the adversarial hearing, the court decides only according to the submissions by both parties. With this, the principle of “equality of arms” in the PILA 2020 is provided and the opposing party can appeal the ruling on recognition in a way that is limited only to the conditions provided in the PILA 2020.

The third stage of this procedure is conducted in front of the Appellate Courts of the Republic of North Macedonia. Against the court that refused the application for recognition and against the court ruling as to appeal, an appeal to the Appellate Court is permissible within 15 days<sup>702</sup> of service of the decision.<sup>703</sup> When it comes to the enforcement of foreign judicial decisions, a foreign judicial decision that has been recognised by a Court of North Macedonia in the procedure stipulated in art. 165-171 of the PILA 2020, is conducted according to the relevant national provisions regarding enforcement.<sup>704</sup>

## 6.7 Costs of the proceedings

The costs of the recognition proceedings are determined according to art. 171 of the PILA 2020, which provides that the costs are determined in accordance with the rules which would be applicable if the matters were governed by the Court or another authority of the Republic of North Macedonia.

681 Garcimartín and Saumier, para. 272.

682 Ibid.

683 Art. 162 para. 1 of the PILA 2020.

684 Art. 162 para. 2 of the PILA 2020.

685 Art. 7 para. 2 of the 2019 Hague Convention.

686 Art. 168 and 170 of the PILA 2020.

687 Art. 169 of the PILA 2020.

688 Art. 168 of the PILA 2020.

689 Art. 165 para. 1 of the PILA 2020.

690 Art. 165 para. 3 of the PILA 2020.

691 Art. 166 para. 1 of the PILA 2020.

692 Art. 165 para. 2 of the PILA 2020.

693 Art. 168 para. 1 of the PILA 2020.

694 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968) by Mr P. Jenard Official Journal of the European Communities No. C 59/1, p. 50.

695 Magnus U., Mankowski P.(eds) *European Commentaries on Private International Law: Brussels IIbis Regulation*, Sellier, European Law Publishers, 2012, p. 302.

696 In the PILA 2007, the timeframe was 15 days.

697 Art. 168 para. 2 of the PILA 2020.

698 Art. 168 para. 3 of the PILA 2020.

699 Art. 169 of the PILA 2020.

700 Art. 169 of the PILA 2020.

701 In the PILA 2007, the adversarial hearing was not obligatory.

702 In the PILA 2007, this timeframe was 8 days.

703 Art. 170 of the PILA 2020.

704 Art. 173 of the PILA 2020.

## 7. Enforcement of foreign judicial decisions

### 7.1 Type of enforcement procedure

The enforcement of judicial decisions in North Macedonia is conducted in a separate enforcement procedure. The enforcement procedure is conducted on the basis of an enforcement title. In North Macedonia, the following decisions are considered enforcement titles: domestic decisions (an enforceable court decision and court settlement, an enforceable decision and settlement in an administrative procedure if designated for fulfilment of a monetary claim, an enforceable notary public title, a decision for issuing a notarial payment order and other titles considered under the law as enforcement titles)<sup>705</sup> as well as foreign judicial decisions that are recognised by the domestic courts. The PILA 2020 stipulates that enforcement is conducted according to relevant national provisions if a foreign judicial decision has been recognised by the Court of North Macedonia in the procedure provided by art. 165-171 of the PILA 2020.<sup>706</sup> Moreover, EA also provides that the enforcement procedure applies to domestic enforceable judgments as well as foreign judgments if it satisfies the conditions for recognition provided in the national legislation or international agreements ratified according to the Constitution.<sup>707</sup> Therefore, all enforcement agents that are authorised in North Macedonia can enforce foreign judgments. Therefore, when enforcement agents are confronted with a recognised foreign judgment that needs to be enforced in North Macedonia, they will enforce this decision based on the rules of the EA.

The length of the enforcement procedure does not differ from the enforcement of domestic judgments and depends on the means of enforcement that are provided in the specific case and the economic welfare of the debtor against whom enforcement is conducted.

### 7.2 Enforcement procedure in situations when the enforcement officers are directly confronted with foreign judicial decision

The PILA 2020 and the EA provide that a party that wants to satisfy its claim and this claim is based on a foreign judicial decision cannot directly engage enforcement agents on territory of North Macedonia if the foreign judicial decision has not been recognised by the domestic courts. In such situations the enforcement agent will refuse the request for enforcement with the explanation that the foreign judicial decision was not recognised by the domestic court and therefore lacks a ruling on recognition of the foreign decision.

In such situations, the enforcement agent does not have the jurisdiction to determine whether the conditions for recognition have been fulfilled according to the national legislation or ratified international agreements in order for the foreign judicial decisions to be recognised as domestic. The jurisdiction over recognition of foreign judicial decisions is exclusively attributed to the Courts of the Republic of North Macedonia.

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<sup>705</sup> Art. 12 of the EA.

<sup>706</sup> Art. 173 of the PILA 2020.

<sup>707</sup> Art. 8 of the EA.

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## Annex 1 – Glossary

**EA** – Enforcement Act

**EU PIL** - EU private international law

**GIZ** - Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

**HCCH** - Hague Conference on Private International Law

**IA** – International Agreements

**IO** – International Organisation

**MFA** – the Ministry of Foreign Affairs of the Republic of North Macedonia

**MoJ** - the Ministry of Justice of the Republic of North Macedonia

**NBRSM** – the National Bank of the Republic of North Macedonia

**NGO** - Non-Governmental Organisation

**ODIHR** - The OSCE Office for Democratic Institutions and Human Rights

**OSCE** – Organisation for Security and Cooperation in Europe

**PIL** – Private International Law

**PILA 1982** - Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters

**PILA 2007** - Private International Law Act of 2007

**PILA 2020** - Private International Law Act of 2020

**SAA** - Stabilisation and Association Agreement with the European Communities and their Member States

**SFRY** - the Socialist Federative Republic of Yugoslavia

**SL** – Secretariat of Legislation of the Republic of North Macedonia

**USAID** – United State Agency for International Development

## Annex 2 – Template for Good Practice Examples

### Example 1

<ul style="list-style-type: none"> <li>• <b>Area:</b></li> </ul>	Private International Law, EU Judicial Cooperation in Civil Matters
<ul style="list-style-type: none"> <li>• <b>Title (original language)</b></li> </ul>	Утврдување на степенот на усогласеност на националното законодавство на Република Македонија со законодавството на Европската Унија за правосудната соработка во граѓанско правната материја
<ul style="list-style-type: none"> <li>• <b>Title (EN)</b></li> </ul>	Assessment of the harmonisation of national legislature of the Republic of Macedonia with the EU acquis in the area of judicial cooperation in civil matters
<ul style="list-style-type: none"> <li>• <b>Organisation (original language)</b></li> <li>• Resp. for implementation</li> <li>• Resp. for financing</li> </ul>	Министерство за Правда на Република Северна Македонија
<ul style="list-style-type: none"> <li>• <b>Organisation (EN)</b></li> <li>• Resp. for implementation</li> <li>• Resp. for financing</li> </ul>	Ministry of Justice of the Republic of North Macedonia
<ul style="list-style-type: none"> <li>• <b>Government / Civil society</b></li> <li>• Resp. for implementation</li> <li>• Resp. for financing</li> </ul>	Government
<ul style="list-style-type: none"> <li>• <b>Internet link</b></li> </ul>	
<ul style="list-style-type: none"> <li>• <b>Type of initiative</b></li> </ul>	study
<ul style="list-style-type: none"> <li>• <b>Main target group</b></li> </ul>	policy makers
<ul style="list-style-type: none"> <li>• <b>Brief description (max. 1000 chars)</b></li> </ul>	The bilingual Report prepared by the Department of Private International Law of the Faculty of Law “Iustinianus Primus” – Skopje represented a comprehensive assessment of the national legislation and its compliance with the EU Acquis in the field of Judicial Cooperation in Civil Matters. This assessment resulted in a Report that covered all of the EU Regulations and Directives, as well its counterparts in the Private International Law and Civil Procedure Law in Republic of North Macedonia. This Report was a part of the screening of the national legislation in the process of the accession of North Macedonia in the EU.

<ul style="list-style-type: none"> <li>• <b>Evaluation or quality control</b></li> </ul>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes                      how?</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Involvement of stakeholders</b></li> </ul>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes                      who? and how?</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Why good practice?</b></li> </ul>	<ul style="list-style-type: none"> <li>• x above international/EU standards effectiveness and impact transferability                      <input type="checkbox"/>                      x</li> <li>• <input type="checkbox"/> innovation sustainability                      <input type="checkbox"/></li> </ul>

**Example 2**

<ul style="list-style-type: none"> <li>• <b>Area:</b></li> </ul>	Enforcement of judgments
<ul style="list-style-type: none"> <li>• <b>Title (original language)</b></li> </ul>	Балканска иницијатива за извршување
<ul style="list-style-type: none"> <li>• <b>Title (EN)</b></li> </ul>	Balkan Enforcement Initiative
<ul style="list-style-type: none"> <li>• <b>Organisation (original language)</b></li> <li>• Resp. for implementation</li> <li>• Resp. for financing</li> </ul>	Комора на извршители на Република Северна Македонија Албанската комора на извршители Комората на јавни извршители на Црна Гора Комора на јавни извршители на Република Србија
<ul style="list-style-type: none"> <li>• <b>Organisation (EN)</b></li> <li>• Resp. for implementation</li> <li>• Resp. for financing</li> </ul>	Chamber of Enforcement Agents of the Republic of North Macedonia Albanian Chamber of Private Bailiffs Chamber of Judicial Officers of Montenegro Serbian Chamber of Judicial Officers
<ul style="list-style-type: none"> <li>• <b>Government / Civil society</b></li> <li>• Resp. for implementation</li> <li>• Resp. for financing</li> </ul>	
<ul style="list-style-type: none"> <li>• <b>Internet link</b></li> </ul>	<a href="https://www.balkaninitiative.net/">https://www.balkaninitiative.net/</a>
<ul style="list-style-type: none"> <li>• <b>Type of initiative</b></li> </ul>	Training, improvement of the legislation, enhancement of the cooperation between the regional Chambers
<ul style="list-style-type: none"> <li>• <b>Main target group</b></li> </ul>	general public, policy makers

<ul style="list-style-type: none"> <li>• <b>Brief description (max. 1000 chars)</b></li> </ul>	Balkan Enforcement Initiative is a joint structure encompassing official national chambers of licensed judicial officers in the Western Balkan region. The Initiative is designed in order to enhance cross-border collection of outstanding balances in the Western Balkans, to build channels of communication between public and private spheres dedicated to further economic development, and to voice the profession's clear recommendations on matters affecting efficient and fair enforcement.
<ul style="list-style-type: none"> <li>• <b>Evaluation or quality control</b></li> </ul>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes                      how?</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Involvement of stakeholders</b></li> </ul>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• x yes                      who? and how?</li> </ul> Chamber of Enforcement Agents of the Republic of North Macedonia is a founding member of this initiative and actively participates in the development of means of enhancement of the cross border enforcement of judicial decisions
<ul style="list-style-type: none"> <li>• <b>Why good practice?</b></li> </ul>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards effectiveness and impact transferability                      x                      x</li> <li>• <input type="checkbox"/> innovation sustainability                      x</li> </ul>

## COUNTRY REPORT: SERBIA

### Author

Slavko Đorđević

## 1. Legal framework of the cross-border recognition and enforcement of foreign judicial decisions

### 1.1 Overview of legal provisions

The recognition and enforcement of foreign judicial decisions in the Serbian legal system is regulated by the Private International Law Act<sup>708</sup> (henceforth abbr. Serbian PILA), the Non-Litigious Procedure Act<sup>709</sup> (henceforth abbr. NLPA) and the Enforcement and Security Interest Act<sup>710</sup> (henceforth abbr. ESIA). The Serbian PILA is the primary legal source whose provisions regulate which foreign judicial decisions are eligible for recognition and enforcement (art. 86), the grounds for non-recognition and non-enforcement (art. 87-96) and recognition proceedings (art. 101). Since recognition proceedings are, by nature, non-litigious proceedings, the provisions of NLPA also apply, i.e., they supplement the Serbian PILA provisions on recognition proceedings. The enforcement of foreign condemnatory decisions is regulated by ESIA provisions.

With respect to international legal sources, Serbia is not a contracting party to any multilateral convention specifically dedicated to cross-border recognition and enforcement of foreign judicial decisions. However, Serbia has ratified several multilateral conventions which are dedicated to other legal issues, but contain some provisions on recognition and enforcement of judicial decisions, such as the HCCH 1954 Convention Relating to Civil Procedure,<sup>711</sup> the HCCH 1980 Convention on Civil Aspects of International Child Abduction,<sup>712</sup> the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR),<sup>713</sup> the 1963 Vienna Convention on Civil Liability for Nuclear Damage,<sup>714</sup> the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and Restoration of Custody of Children,<sup>715</sup> the 1956 New York Convention on Recovery Abroad of Maintenance.<sup>716</sup> Serbia is also a party to many bilateral conventions that contain provisions on recognition and enforcement of judicial decisions in civil and commercial matters (e.g. bilateral treaties with Bulgaria,<sup>717</sup> Bosnia and Herzegovina,<sup>718</sup> Montenegro,<sup>719</sup> North Macedonia,<sup>720</sup> Czech Republic,<sup>721</sup> Slovakia,<sup>722</sup> Hungary,<sup>723</sup>

<sup>708</sup> The Law on Resolution of Conflict of Laws with Regulations of Other Countries (Serbian Private International Law Act, henceforth: abbr. Serbian PILA), Official Gazette of SFRY, No 43/82 and 72/82 – Amendment Official Gazette of FRY, No 46/96 and Official Gazette of RS, No 46/2006 – oth. law.

<sup>709</sup> Non-litigious Procedure Act – abbr. NLPA, Official Gazette of SRS, No. 25/82 and 48/88 and Official Gazette of RS, No. 46/95 - oth. law, 18/2005 - oth. law, 85/2012, 45/2013 - oth. law, 55/2014, 6/2015 and 106/2015 - oth. Law.

<sup>710</sup> Official Gazette of RS, No. 106/2015, 106/2016, 113/2017 and 54/2019.

<sup>711</sup> Official Gazette of FPRY – Supplement, No. 6/62.

<sup>712</sup> Official Gazette of SFRY – International treaties, No. 7/91.

<sup>713</sup> Official Gazette of FPRY – Supplement, No. 11/1958.

<sup>714</sup> Official Gazette of SFRY – Supplement, No. 5/1977.

<sup>715</sup> Official Gazette of FRY – International treaties, No. 1/2001.

<sup>716</sup> Official Gazette of FPRY – Supplement, No. 2/60.

<sup>717</sup> Treaty between the People's Republic of Bulgaria and the Federal People's Republic of Yugoslavia on Mutual Legal Assistance of 23 March 1956, Official Gazette of FPRY – Supplement: International treaties and other agreements, No. 1/57.

<sup>718</sup> Treaty between the Serbia and Montenegro and the Republic of Bosnia and Herzegovina on Legal Assistance in Civil and Criminal Matters, Official Gazette of S&M – International treaties, No. 6/2005-6, and Treaty between the Republic of Serbia and the Republic of Bosnia and Herzegovina on Amendments of the Treaty between the Serbia and Montenegro and the Republic of Bosnia and Herzegovina on Legal Assistance in Civil and Criminal Matters, Official Gazette of RS – International treaties, No. 13/2010-35.

<sup>719</sup> Treaty between the Republic of Serbia and the Republic of Montenegro on Legal Assistance in Civil and Criminal Matters, Official Gazette of RS – International treaties, No. 1/2010-57.

<sup>720</sup> Treaty between the Republic of Serbia and the Republic of Macedonia on Legal Assistance in Civil and Criminal Matters, Official Gazette of RS – International treaties, No. 5/2012-1.

<sup>721</sup> Treaty between the Czechoslovak Socialist Republic and the Socialist Federal Republic of Yugoslavia on Legal Relations in Civil, Family and Criminal Matters of 20 January 1964, Official Gazette of SFRY – Supplement: International treaties and other agreements, No. 13/1964.

<sup>722</sup> Treaty between the Czechoslovak Socialist Republic and the Socialist Federal Republic of Yugoslavia on Legal Relations in Civil, Family and Criminal Matters of 20 January 1964, Official Gazette of SFRY – Supplement: International treaties and other agreements, No. 13/1964.

<sup>723</sup> Treaty between the People's Republic of Hungary and the Socialist Federal Republic of Yugoslavia on Mutual Legal Relations of 7 March 1968, Official Gazette of SFRY – Supplement: International treaties and other agreements, No. 3/1968.

Poland,<sup>724</sup> Romania,<sup>725</sup> Russia,<sup>726</sup> Cyprus<sup>727</sup>). With France<sup>728</sup> and Greece,<sup>729</sup> Serbia concluded bilateral treaties specifically dedicated to recognition and enforcement of judicial decisions in civil and commercial matters.

## 1.2 Assessment of the legal framework

It should be emphasized that pursuant to the provisions of the Serbian PILA, Serbian courts are exclusively competent to recognise foreign judicial decisions<sup>730</sup> which must be final<sup>731</sup> and enforceable<sup>732</sup> under the law of the country of origin. In the recognition proceedings, the court is limited to examination of the requirements and grounds for non-recognition and non-enforcement provided by art. 87-96 of the Serbian PILA which are of a formal character. They include violation of public policy, *res iudicata*, violation of the exclusive international jurisdiction of Serbian courts, absence of reciprocity and violation of a defendant's right to arrange his/her defence in proceedings before the court of origin.<sup>733</sup> As concerns reciprocity, it suffices to be factual and its existence is presumed until proven otherwise. Furthermore, it is very important to mention that there are no provisions on indirect jurisdiction, and that the court has no authority to review the foreign judicial decision as to the facts that were established and the law that was applied in the proceedings before the court of origin.<sup>734</sup>

Therefore, the Serbian regime of cross-border recognition and enforcement of foreign judicial decision belongs to the so-called regimes of limited control of foreign judicial decisions and may be evaluated as liberal.<sup>735</sup> However, it must be born in mind that the absence of reciprocity represents one of the grounds for non-recognition, the overcoming of which is best to be achieved by conclusion of bilateral or multilateral treaties. Furthermore, the conclusion of such treaties is the only way for establishing reciprocity with the foreign countries that require the existence of diplomatic reciprocity, such as for example Austria, the Netherlands and Sweden. Although Serbia is a party to many bilateral treaties that contain provisions on mutual recognition and enforcement of judicial decision in civil and commercial matters, such treaties have not been concluded with above mentioned countries as well as with some other countries which are, in terms of economic and political relations, very important for Serbia (such as for example China and the United States of America). Since the conclusion of bilateral treaties depends on multiple factors and in some cases can hardly be achieved (e.g., with countries that are Member States of EU), the HCCH 2019 Judgments Convention becomes very convenient instrument for establishing cross-border regime for recognition and enforcement of judicial decisions in civil and commercial matters (which is one of the reasons why Serbia should sign and ratified this convention).

<sup>724</sup> Treaty between the People's Republic of Poland and the Federal People's Republic of Yugoslavia on Mutual Legal Relations in Civil and Criminal Matters of 6 February 1960, Official Gazette of SFRY – Supplement: International treaties and other agreements, No. 5/1963.

<sup>725</sup> Treaty between Romanian People's Republic and the Federal People's Republic of Yugoslavia on Legal Assistance of 18 October 1960, Official Gazette of FPRY – Supplement: International treaties and other agreements, No. 8/1961, with the Additional Protocol, Official Gazette of SFRY – Supplement, No. 4/1973.

<sup>726</sup> Treaty between the Federal People's Republic of Yugoslavia and the Union of Soviet Socialist Republics on Legal Assistance in Civil, Family and Criminal Matters of 24 February 1962, Official Gazette of FPRY – Supplement: International treaties and other agreements, No. 5/63.

<sup>727</sup> Treaty between the Socialist Federal Republic of Yugoslavia and the Republic of Cyprus on Legal Assistance in Civil and Criminal Matters, Official Gazette of SFRY – International treaties, No. 2/86.

<sup>728</sup> Convention between the Socialist Federal Republic of Yugoslavia and the Government of the Republic of France on Recognition and Enforcement of Judicial Decisions of 18 May 1971, Official Gazette of SFRY – Supplement: International treaties and other agreements, No. 7/1972.

<sup>729</sup> Agreement between the Federal People's Republic of Yugoslavia and Kingdom of Greece on Mutual Recognition and Enforcement of Judicial Decisions of 18 June 1959, Official Gazette of FPRY – Supplement: International treaties and other agreements, No. 6/60.

<sup>730</sup> Art. 86 para. 1 of Serbian PILA.

<sup>731</sup> Art. 87 of Serbian PILA.

<sup>732</sup> Art. 96 of Serbian PILA.

<sup>733</sup> Art. 93–95 of Serbian PILA contain special provisions on recognition of foreign judicial decisions concerning the civil status of Serbian nationals and foreigners, which will be not discussed here at all since they are irrelevant for this study.

<sup>734</sup> See M. Stanivuković, M. Živković, Serbia, in: Verschraegen, B. (ed.), *International Encyclopedia of Laws*, vol. 2, *Private International Law*, supp. 21, Kluwer Law International 2009, 238.

<sup>735</sup> About recognition and enforcement of foreign judicial decisions under the rules of SPILA see in detail: M. Dika, G. Knežević, S. Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Beograd 1991, 275 etc.; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, *Međunarodno privatno pravo*, Beograd 2012, 531 etc.; M. Stanivuković, M. Živković, *Međunarodno privatno pravo*, Beograd 2008, 433 etc.; T. Varadi, 'Anerkennung und Vollstreckung ausländischer Entscheidungen in Jugoslawien', *RabelsZ* 51 (1987), 632 etc; M. Stanivuković, M. Živković, op. cit. (Kluwer), 237 etc.

## 2. Institutional framework for cross-border recognition and enforcement of foreign judicial decisions

### 2.1 Overview of legal provisions determining stakeholders in the cross-border recognition and enforcement of foreign judicial decisions

In Serbia, the main stakeholders in the cross-border recognition and enforcement of foreign judicial decisions are the courts, the Ministry of Justice, legal practitioners (professional lawyers) and enforcement agents.

The organisation of the judicial system in Serbia, including *ratione materiae* jurisdiction of Serbian courts, is regulated by the Act on Organisation of Courts<sup>736</sup> (henceforth abbr. AOC). The international jurisdiction of Serbian courts is regulated by Serbian PILA (art. 46-78), while the local jurisdiction of courts is regulated by the Litigious Procedure Act<sup>737</sup> (henceforth abbr. LPA). It is important to mention that the provisions on local jurisdiction of LPA can be used as provisions on international jurisdiction, too, but only if there are no provisions on international jurisdiction for specific types of disputes in the Serbian PILA, another extant act or international treaty (art. 26 para. 2 LPA).

The organisation, activity and competencies of the Ministry of Justice is mainly regulated by the Act on Ministries<sup>738</sup> and by the Regulation<sup>739</sup> on the Internal Organisation of the Ministry of Justice. However, the role of the Ministry of Justice concerning the issues of recognition and enforcement of foreign judicial decisions is regulated by the Serbian PILA.<sup>740</sup> The Ministry of Justice is also nominated or acts as the central authority for the operationalisation of many multilateral and bilateral international conventions which also cover the issues of recognition and enforcement of foreign judicial decisions.<sup>741</sup>

The activity and competencies of enforcement agents in enforcement proceedings are regulated by ESIA.

Finally, the organisation and activity of professional lawyers, i.e., advocates, is regulated primarily by the Act on Advocacy,<sup>742</sup> but also by LPA and NLPA. The extent of the authority of statutory representatives is to be determined by the law applicable to the legal relation between them and the represented party.<sup>743</sup> If the party is a legal person, the statutory representative is the director of the legal person and the extent of his/her authority is determined by the law applicable to the status of the legal person.<sup>744</sup>

<sup>736</sup> Official Gazette of RS, No. 116/2008, 104/2009, 101/2010, 31/2011 - oth. law, 78/2011 - oth. law, 101/2011, 101/2013, 106/2015, 40/2015 - oth. law, 13/2016, 108/2016, 113/2017, 65/2018 – Constitutional Court Decision, 87/2018 and 88/2018 – decision of Constitutional Court.

<sup>737</sup> Official Gazette of RS, No. 72/2011, 49/2013 – decision of Constitutional Court, 74/2013 – decision of Constitutional Court, 55/2014, 87/2018 and 18/2020.

<sup>738</sup> Official Gazette of RS, No. 128/2020.

<sup>739</sup> See <https://mpravde.gov.rs/files/Pravilnik%20MP%20mart%202019.pdf>

<sup>740</sup> Art. 92 of Serbian PILA.

<sup>741</sup> See information on <https://www.mpravde.gov.rs/sekcija/5/medjunarodna-saradnja.php>

<sup>742</sup> Official Gazette of RS, br. 31/2011 i 24/2012 – decision of Constitutional Court.

<sup>743</sup> M. Dika, G. Knežević, S. Stojanović, op. cit., 253.

<sup>744</sup> See Art. 17 of Serbian PILA.

## 2.2 Stakeholders putting the cross-border recognition and enforcement of foreign judicial decisions into practice

### 2.2.1 Courts

Since a foreign judicial decision can only be put into circulation on the territory of the Republic of Serbia if a Serbian court has previously recognised it, there is no doubt that the courts are the main stakeholders in the process of cross-border recognition and enforcement of judicial decisions. Pursuant to art. 11 of AOC, judicial authority belongs to the courts of general jurisdiction and to the courts of special jurisdiction. The former consists of basic courts, higher courts, appellate courts and the Supreme Cassation Court, whereas the latter are commercial courts, Commercial Appellate Court, misdemeanour courts, Misdemeanour Appellate Court and Administrative Court. The higher courts as courts of general jurisdiction are competent to recognise foreign judicial decisions in civil matters,<sup>745</sup> while the commercial courts have the jurisdiction to decide on recognition and enforcement of foreign judicial decisions in commercial matters.<sup>746</sup> Appeals against decisions on recognition are to be lodged with the appellate courts or Commercial Appellate Court.<sup>747</sup>

When a foreign judicial decision has been lawfully recognised by the Serbian court, and a debtor still avoids fulfilling his/her obligation determined by this decision, the recognised decision shall be enforced in accordance with the rules of ESIA upon the request of the creditor. The basic or commercial court is competent to conduct enforcement proceedings<sup>748</sup> except in cases concerning recovery of debts arising out of communal activities where the enforcement proceedings are conducted by enforcement agents.<sup>749</sup> As soon as the decision on enforcement is rendered, the enforcement on the debtor's assets is to be performed by enforcement agents, unless it is specifically prescribed that the court has to perform the enforcement.<sup>750</sup>

### 2.2.2 Administrative institutions (Ministry of Justice, Central Authorities etc.)

The role of the Ministry of Justice in cross-border recognition and enforcement of foreign judicial decisions is reflected in its providing clarification on the existence of reciprocity. Namely, reciprocity with regard to recognition and enforcement of a foreign judicial decisions is presumed until proven otherwise. However, if the existence of reciprocity is in doubt, the court conducting the recognition proceedings shall ask the Ministry of Justice to clarify whether reciprocity exists.<sup>751</sup>

The Ministry of Justice also serves as an authority for the operationalisation of many bilateral and multilateral conventions, by providing assistance to the parties and court with regard to initiating recognition proceedings in Serbia (e.g., assistance concerning the submission of documents necessary for the initiation of recognition proceedings).<sup>752</sup>

### 2.2.3 Legal Practitioners (Lawyers, Legal representatives, etc.)

In most of the cases concerning recognition and enforcement of foreign judicial decisions the parties are represented by professional lawyers (i.e., advocates). However, the participation of professional

lawyers is not mandatory, which means that the parties can act in the proceedings without a lawyer.<sup>753</sup>

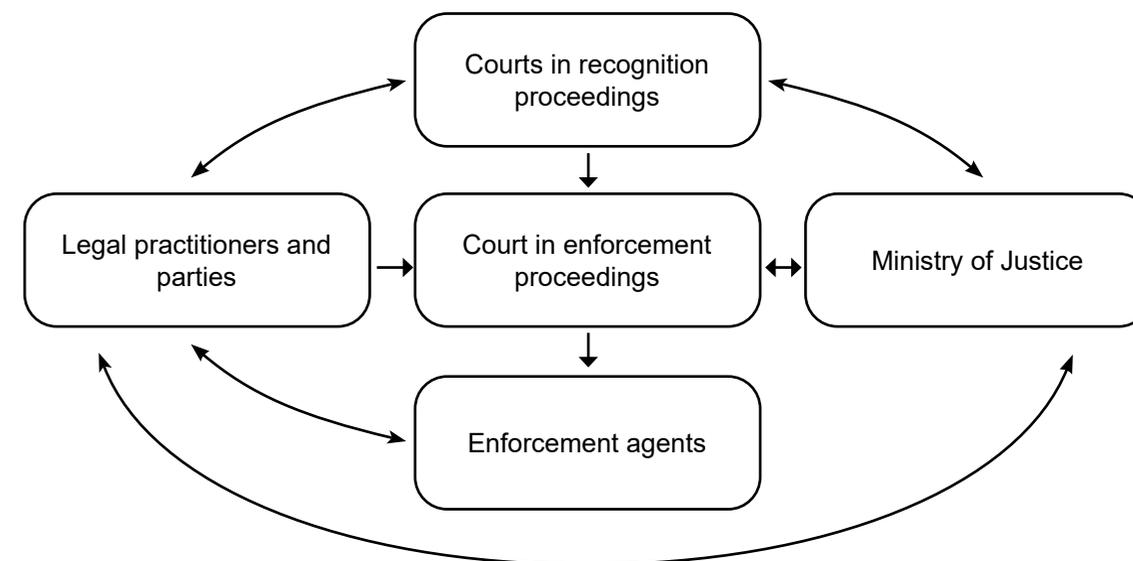
If the party is incapable of acting independently in the proceedings (e.g., the party is a minor), he/she must be represented by a legal representative or, in some cases, by a temporary representative determined by the court,<sup>754</sup> who can hire a professional lawyer.

Legal persons are represented by their legal/statutory representatives (e.g. directors) who can also hire professional lawyer.

### 2.2.4 Enforcement agents

The court conducts enforcement proceedings with regard to recognised foreign condemnatory judicial decision, and as soon as it renders the decision on enforcement, enforcement on the debtor's assets is performed by enforcement agents. Therefore, enforcement agents do not conduct enforcement proceedings (the first phase of the proceedings), but rather perform the enforcement by using different means (the second phase of the proceedings) in accordance with the decision on enforcement rendered by the court in the enforcement proceedings.<sup>755</sup> The only exception where they are competent to do both are the cases of recovery of debts arising out of communal activities<sup>756</sup> However, these cases are usually internal and rarely the subject matter of foreign judicial decisions.

## 2.3 Mapping the cooperation among stakeholders



<sup>745</sup> Art. 23 of AOC.

<sup>746</sup> Art. 25 of AOC.

<sup>747</sup> Art. 24 and 26 of AOC.

<sup>748</sup> Art. 6 para. 1 of ESIA.

<sup>749</sup> Art. 3 para. 3 of ESIA.

<sup>750</sup> Art. 4 of ESIA.

<sup>751</sup> Art. 92 of Serbian PILA.

<sup>752</sup> See <https://www.mpravde.gov.rs/sekcija/5/medjunarodna-saradnja.php>

<sup>753</sup> Art. 85 of LPA.

<sup>754</sup> Art. 76-84 of LPA, Art. 4-6 of NLP.

<sup>755</sup> See Art. 3 and 4 of ESIA.

<sup>756</sup> Art. 3 para. 3 of ESIA.

### 3. The role of courts and enforcement agents in cross-border recognition and enforcement of foreign judicial decisions

#### 3.1 Capacities of courts in regard to cross-border recognition of foreign judicial decisions

The court deciding on the recognition and enforceability of foreign judicial decisions can only examine the conditions for recognition set out in art. 86-96 of Serbian PILA. As seen above, these conditions are of a formal (procedural) nature; only the examination of whether the foreign judicial decision is contrary to Serbian public policy allows for the merits of the decision to be examined. The court has no authority to review the foreign judicial decision as to the facts that were established and the law that was applied or to modify the decision in any respect.<sup>757</sup>

#### 3.2 Quantity and quality of judgments regarding cross-border recognition of foreign judicial decisions

There are no exact statistics on Serbian court decisions recognising foreign judicial decisions. According to the information obtained during our personal research,<sup>758</sup> at least thirty foreign judicial decisions were recognised by Serbian courts in the period from 2010 to 2019. The quality of Serbian court decisions recognising foreign judicial decisions can be marked as “high,” since the application of legal provisions on the concrete circumstances of the respective cases has been adequately explained in each case. It can be noted that Serbian courts frequently consult the relevant private international law literature which deals with cross-border recognition and enforcement of foreign judicial decisions.

#### 3.3 Capacities of enforcement agents in regard to the cross-border recognition of foreign judicial decisions

Enforcement agents have no capacity with regard to recognition of foreign decisions, since foreign judicial decisions can be recognised and declared enforceable only by the court. As already said above, the courts conduct recognition proceedings and enforcement proceedings with regard to recognised foreign judicial decisions, while enforcement agents perform the enforcement on debtors’ assets in accordance with the decision on enforcement rendered by the court.

#### 3.4 Recognition and enforcement of foreign judicial decisions within educational programs of Judicial Training Academies

Recognition and enforcement of foreign judicial decisions cannot be found as a special subject in Serbian Judicial Academy educational programs. However, attention is paid to them within the subjects relating to civil and commercial matters with an international element.

### 4. Economic and political aspects in respect to the implementation of the HCCH 2019 Judgments Convention

#### 4.1 Main trading partners in terms of import and export

##### 4.1.1 Import

According to the report of the Serbian Institute for Statistics,<sup>759</sup> during 2020, the main trading partners in terms of import of goods to Serbia come from Germany, China, Italy, the Russian Federation and Hungary.

Currently, regimes of mutual recognition and enforcement of judicial decisions in civil and commercial matters have been established with Germany (under national rules), Hungary (under bilateral treaty), Italy (under national rules) and the Russian Federation (under bilateral treaty), while no such regime exists with China at present.

##### 4.1.2 Export

According to the same report, during 2020 the main trading partners in terms of export of goods come from Germany, Italy, Bosnia and Herzegovina, Romania and Hungary.

Currently, regimes of mutual recognition and enforcement of judicial decisions in civil and commercial matters have been established with all these countries (with Germany – under national rules, with B&H – under bilateral treaty, Romania – under bilateral treaty, Hungary – under bilateral treaty).

#### 4.2 Political aspects in regards to the implementation of the HCCH 2019 Judgments Convention

##### 4.2.1 Circumstances that can provide for your country to express notifications in accordance to Article 29 of the HCCH 2019 Judgments Convention

Art. 29 of the HCCH 2019 Judgments Convention provides the possibility for a Contracting State to notify the depositary, within the period of 12 months, that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between these two States pursuant to this Convention (para. 2) as well as the possibility for a State, which is willing to become a Contracting State, to notify the depositary that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to this Convention (para 3). In this respect, Serbia may make such a notification with regard to Kosovo, because Serbia considers Kosovo, i.e., the province of Kosovo and Metohija (in terms of the Constitution of the Republic of Serbia), as a part of its territory. The same has already occurred with regard to Kosovo’s accession to the HCCH 1961 Apostille Convention, where Serbia objected to the accession and notified that Kosovo, i.e., the province of Kosovo and Metohija, is, pursuant to the Constitution of the Republic of Serbia, an integral part of Serbian territory, invoking also Security Council Resolution 1244.<sup>760</sup>

<sup>757</sup> M. Stanivuković, M. Živković, op. cit. (Kluwer), 238.

<sup>758</sup> By using the data base <https://www.paragraf.rs>

<sup>759</sup> See <https://www.stat.gov.rs/oblasti/spoljna-trgovina/>

<sup>760</sup> See <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=342&disp=resdn>

## 4.2.2 Circumstances that can provide for your country to express declarations in accordance to Article 17, 18, 19 and 25 of the HCCH 2019 Judgments Convention

From the Serbian point of view, we find that there is no need for the declaration on limiting recognition and enforcement which can be expressed in accordance with art. 17 of the HCCH 2019 Judgments Convention. Namely, although it may happen that a case decided by the judgment of a court of another Contracting State has strong connections with Serbia as a requested Contracting State, there should be no obstacle to recognizing and enforcing such a judgment in Serbia in accordance with the HCCH 2019 Judgments Convention if it has passed through one of the “jurisdiction filters” of art. 5 and there are no grounds for refusal as stipulated by art. 7 of the Convention.

Similarly, we also find that Serbia has no reason to make the declaration on specific matters (art. 18), which would exclude any specific matter covered by the HCCH 2019 Judgments Convention. Serbian national legal provisions on recognition and enforcement of foreign judicial decisions have a broader scope of application and are more liberal than those of the HCCH 2019 Judgments Convention, which is the reason why such a declaration should be not made.

The same conclusion should be drawn with respect to the declarations on judgments pertaining to a State (art. 19) – there is no need for Serbia to make such a declaration. Namely, in cases involving civil and commercial matters where Serbia (as a State) or natural or legal person acting for Serbia (as a State) is a party, Serbia or the person acting for Serbia usually wants to avoid the national courts and, consequently, decides to conclude an arbitration agreement with the other party bringing the case before international commercial arbitration (either ad hoc or institutional arbitration), which means that the application of the HCCH 2019 Judgments Convention would be very rare in such cases.

## 5. International jurisdiction and compatibility with the HCCH 2019 Judgments Convention

### 5.1 General international jurisdiction (domicile, habitual residence)

The general international jurisdiction of Serbian courts is regulated by art. 46 of the Serbian PILA. It is determined on the domicile of the defendant in Serbia, if the defendant is a natural person, or on the seat of the defendant in Serbia, if the defendant is a legal person (art. 46 para. 1 and 5).<sup>761</sup> Exceptionally, the general jurisdiction of Serbian courts can be established if the defendant who is a natural person has residence in Serbia, if he/she is not domiciled in Serbia nor in any other State (art. 46 para. 2) or if both parties are citizens of Serbia (art. 46 para. 3). In case there are several defendants in a lawsuit who are considered to be in a legal community as to the subject matter of the dispute, or if their rights and obligations arise from the same factual and legal basis, the Serbian courts shall also have international jurisdiction if one of the defendants is domiciled or has its seat in Serbia (art. 46 para. 4).<sup>762</sup>

Therefore, the general jurisdiction of Serbian courts is determined by the domicile and residence of a natural person and by the seat of a legal person as jurisdiction criteria which have to be interpreted in accordance with Serbian law. Domicile should be understood as the place where a natural person has settled with the intention of living there permanently, i.e., the place where a natural person has the centre of his/her life activities, and his/her professional, economic, social

<sup>761</sup> About Art. 46 of Serbian PILA see M. Dika, G. Knežević, S. Stojanović, op. cit., 165-172; M. Stanivuković, M. Živković, op. cit., 184; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 498-499.

<sup>762</sup> Ibid.

and other relations confirm his/her permanent connection to that place.<sup>763</sup> The residence of a natural person is the place where a natural person resides temporarily outside his/her domicile. The seat of a legal person is to be understood as a place where its central administration is located.<sup>764</sup>

The Serbian PILA does not recognise habitual residence as a jurisdiction criterion.

### 5.2 Prorogation of jurisdiction (expressively/tacitly, before or after the commencement of the procedure)

The prorogation of jurisdiction in civil and commercial matters is regulated by art. 49 of the Serbian PILA which contains different rules for the prorogation of jurisdiction of a Serbian court and prorogation of jurisdiction of a foreign court.<sup>765</sup> If the parties intend to agree that the Serbian court is to have jurisdiction in at case, at least one party must be a national of Serbia or have a seat in Serbia (art. 49 para. 2). On the other hand, if the parties intend to prorogate the jurisdiction of a foreign court, at least one party must be of foreign nationality or have a seat in a foreign State and the dispute in question must not fall under the exclusive jurisdiction of Serbian courts (art. 49 para. 1). It should be stressed that the prorogation of jurisdiction of a foreign court will be valid only if, in addition to the fulfilment of the requirements provided by art. 49 para. 1 of the Serbian PILA, the requirements of the foreign *lex fori prorogati* are fulfilled too.<sup>766</sup>

The choice of court agreement may be concluded expressly (*expressis verbis*) or tacitly (*prorogation tacita*). The conclusion *expressis verbis* means that it is concluded in advance in written form, either as a separate agreement or as a prorogation clause contained in the contract, or after the initiation of proceedings when the defendant gives an oral statement acknowledging jurisdiction before the court.<sup>767</sup> Serbian literature and judicial practice equate *prorogatio tacita* with jurisdiction established upon submission which is, to certain extent, regulated by art. 50 of the Serbian PILA.<sup>768</sup> It means that a prorogation agreement is concluded tacitly if the defendant submits a written response to a claim without contesting jurisdiction or if he/she appears at the first hearing and discusses the merits of the case without contesting the jurisdiction of the court.<sup>769</sup>

### 5.3 In comparison to Article 5 of the HCCH 2019 Judgments Convention, provide for the compatibility of the other jurisdictional criteria in the Convention and in the national legal sources

Art. 5 of the HCCH 2019 Judgments Convention provides grounds for indirect jurisdiction, usually marked as “jurisdiction filters,” which the foreign judgment must satisfy in order to be eligible for recognition and enforcement in the requested State.<sup>770</sup> These “filters” show the quality of contacts that the case has with the State whose court rendered the judgment (the State of origin) and represent the minimum standards by which the court of the requested State controls the international jurisdiction of the State of origin court.<sup>771</sup> It means that the court of the requested State examines whether any of the prescribed “filters” is met and, if the answer is positive, it shall

<sup>763</sup> Art. 3 point 2 of Act on Domicile and Residence of Citizens, Official Gazette of RS, No. 87/2011.

<sup>764</sup> See Art. 19 of Company Law Act, Official Gazette of RS, No. 36/2011, 99/2011, 83/2014 - oth. law, 5/2015, 44/2018, 95/2018 and 91/2019

<sup>765</sup> See M. Dika, G. Knežević, S. Stojanović, op. cit., 178-191; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 501-503; M. Stanivuković, M. Živković, op. cit., 188-193.

<sup>766</sup> T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 503.

<sup>767</sup> M. Stanivuković, M. Živković, op. cit. (Kluwer), 232.

<sup>768</sup> T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 502; M. Stanivuković, M. Živković, op. cit., 192.

<sup>769</sup> Ibid.

<sup>770</sup> About jurisdiction filters in HCCH 2019 Judgments Convention see I. Rumenov, The indirect jurisdiction of the 2019 Hague Convention on recognition and enforcement of foreign judgments in civil or commercial matters – is the “heart” of the Convention in the right place?, SEE Law Journal, issue 1, No. 8, 2021, 10 etc. Also see R. Brandt, The Hague Judgments Convention in the United States: A “Game Changer” or a New Path to the Old Game?, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3747078](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3747078), 8 etc., 17 etc.

<sup>771</sup> Ibid., 16-17.

consider the foreign judgment as eligible for recognition and enforcement.

The list of jurisdiction filters provided by art. 5 of the HCCH 2019 Judgment Convention are as follows: habitual residence, principal place of business, branch, agency or other establishment, expressly or implicitly consent of the defendant to the jurisdiction of the court of origin, place of performance of contractual obligation, location of immovable property which is the subject matter of the lease contract, location of immovable property in cases concerning contractual obligation secured by right in rem in that property, place of act or omission in cases concerning non-contractual obligations, trusts, counterclaim, non-exclusive choice of court agreements, consumer and employment contracts and residential lease of immovable property. There is no hierarchy between these filters and eligibility for recognition of the foreign judgment exists if only one of them is satisfied.<sup>772</sup>

Since many of the above-listed grounds are similar to the criteria for direct jurisdiction of Serbian courts regulated by the Serbian PILA, we are going to compare them in order to determine their compatibility, which can influence the decision on whether the HCCH 2019 Judgment Convention should be signed and ratified by Serbia. However, it must be kept in mind that art. 15 of the HCCH 2019 Judgments Convention does not prevent the recognition and enforcement of judgments under national law which can be more liberal toward cross-border recognition and enforcement than the Convention itself.

### 5.3.1 Habitual residence

Pursuant to art. 5 para. 1a, a judgment is eligible for recognition or enforcement if “the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin.”

For proper application of this provision, attention must be paid to the fact that the HCCH 2019 Judgments Convention differentiates the habitual residence of a natural person from the habitual residence of a legal person. The habitual residence of a natural person is not defined by the Convention, but there is a broad stance in comparative literature, that it is the State on whose territory a natural person resides a certain period of time with the intention of habitually (continuously) residing on that territory, where such intention is shown through his/her personal, social, economic, professional and other connections to that place.<sup>773</sup> On the other hand, the habitual residence of a legal person is defined by art. 3 para. 2 of the HCCH 2019 Judgments Convention which provides that it is deemed to be the State where that person has its statutory seat, its central administration or principal place of business, or the State under the law of which it was incorporated or formed. In addition, art. 5 para. 1a mentions “the person against whom recognition or enforcement is sought,” which means that the person can be the defendant or the claimant or any other person who took part in the proceedings before the court of the State of origin, if he/she assumes the defendant role in the recognition proceedings before the court of the requested State.<sup>774</sup>

The Serbian PILA does not use habitual residence as criteria for general jurisdiction at all. As already mentioned above, the main criterion is domicile, if the defendant is a natural person, or seat, if the defendant is a legal person. Considering the previously cited definition of domicile in Serbian law, one could say that domicile will correspond to the habitual residence of a defendant in almost all situations, which means that Serbian judgments could pass the jurisdiction filter of art. 5 para. 1a. However, it must be taken into account that the court primarily gets information on the domicile of the defendant from his/her official personal documents and usually relies on it when establishing jurisdiction, although such information sometimes does not correspond with

the factual situation (e.g., it might be that a person who still has registered domicile in Serbia has been living in a foreign country for years).<sup>775</sup> In order to avoid such discrepancies, the court itself should determine and consider all facts necessary for the proper determination of a defendant’s domicile, and if it fails to do so, any party may bring evidence that the actual domicile of the defendant is in a foreign State, irrespective of the fact that it is formally registered in Serbia. In addition, it should also be mentioned that many Serbian authors consider that the information on the registered domicile contained in the official documents represents a rebuttable presumption that the person to whom the official document relates is actually domiciled in that State.<sup>776</sup>

The seat of a legal person as jurisdictional criteria in Serbian law corresponds with the habitual residence of a legal person under the HCCH 2019 Judgment Convention. Namely, the legal person has a seat in Serbia if it has its central administration in Serbia.<sup>777</sup> It should also be mentioned that a legal person which was incorporated or formed in accordance with Serbian law must have its statutory seat in Serbia and almost always has its central administration in Serbia. It is hard to imagine that a legal person incorporated or formed under foreign law will have its statutory seat or its central administration in Serbia.

### 5.3.2 Principal place of business

Pursuant to art. 5 para. 1b, a judgment is eligible for recognition or enforcement if “the natural person against whom recognition or enforcement is sought had his/her principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which judgment is based arose out of activities of that business.”

It is obvious that this provision relates to a natural person who conducts business activities, where the jurisdiction filter is the location of his/her principal place of business in the State of origin. The Serbian PILA does not recognise the principal place of business of a natural person as jurisdiction criteria. However, the Serbian Company Law Act regulates the legal status of entrepreneur,<sup>778</sup> a legally capable natural person who conducts business activities. This person has a registered seat which is defined as the place where he/she conducts business activities<sup>779</sup> and is a jurisdiction criterion under the Serbian PILA. Therefore, with regard to entrepreneurs, Serbian courts can establish jurisdiction to rule on claims arising out of entrepreneur business activities, if he/she has a seat on the territory of Serbia.

### 5.3.3 Bringing a claim in the proceedings before the court of origin

Pursuant to art. 5 para. 1c, a judgment is eligible, “if the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based.”

This jurisdiction filter is focused on the person who was a claimant in the proceedings before the court of origin, and if that person lost the case, it seems quite rational that the judgment is eligible for recognition or enforcement in other States irrespective of the criterion on which the jurisdiction of the court of origin was based.<sup>780</sup>

### 5.3.4 Branch, agency or other establishment

Pursuant to art. 5 para. 1d, a judgment is eligible for recognition or enforcement, if “the defendant

<sup>775</sup> See S. Đorđević, *Primena međunarodnog privatnog prava u javnobežničkoj praksi*, [http://www.beleznik.org/images/pdf/obavestjenje/uputstvo\\_zaprimeru\\_mpp\\_u\\_jb\\_praksi.pdf](http://www.beleznik.org/images/pdf/obavestjenje/uputstvo_zaprimeru_mpp_u_jb_praksi.pdf), 9; I. Rumenov, op. cit., 21.

<sup>776</sup> A. Jakšić, *Međunarodno privatno pravo, opšta teorija*, Beograd 2017, 326; see also M. Stanivuković, M. Živković, op. cit., 97.

<sup>777</sup> See Art. 19 of Serbian Company Law Act.

<sup>778</sup> See Art. 83-92 of Serbian Company Law Act.

<sup>779</sup> Art. 87 of Serbian Company Law Act.

<sup>780</sup> See and compare I. Rumenov, op. cit., 22.

<sup>772</sup> *Ibid.*, 18.

<sup>773</sup> See *ibid.*, 19-20; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 275; M. Stanivuković, M. Živković, op. cit., 113-114.

<sup>774</sup> I. Rumenov, op. cit., 20.

maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment.”

This jurisdiction filter refers to a situation where the defendant in the proceedings before the court of origin maintained a branch, agency or other establishment without legal personality and the subject matter of the rendered judgment was a claim related to the activity of the branch, agency or establishment. Art. 55 of the Serbian PILA contains a provision on direct jurisdiction of Serbian courts which will in a certain number of cases correspond with the jurisdiction filter of art. 5 para. 1d of the HCCH 2019 Judgments Convention. According to this provision, in disputes against a natural person or legal person having its seat abroad, which concern the obligations that were created in Serbia or that must be performed in Serbia, the Serbian court shall have jurisdiction if the person has its representative office or agency in Serbia or if the seat of the legal person to which it entrusted the conduct of its business is in Serbia.<sup>781</sup> Although it is not explicitly expressed, this jurisdiction rule obviously takes into account obligations arising out of the business operations of the defendant’s official representative or agency located in Serbia.

### 5.3.5 Consent to the jurisdiction of the court of origin and non-exclusive choice of court agreement

Pursuant to art. 5 para. 1 points (e) and (f), a judgment rendered by the court of origin will be eligible for recognition or enforcement in the requested State, if the defendant expressly consented to the jurisdiction of the court of origin during the proceedings in which the judgment was rendered, or if the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law. The first filter relates to express consent and the second to implied consent to jurisdiction. In addition to this, art. 5 para. 1m provides a jurisdiction filter that refers to non-exclusive choice of court agreements – if a judgment was given by a court designated in accordance with a non-exclusive choice of court agreement which meets certain formal requirements, it will be considered eligible for recognition or enforcement in the requested State.

As discussed above, the Serbian PILA regulates prorogation of jurisdiction which covers both express and implied consent to the jurisdiction as well as non-exclusive choice of court agreements, so the judgments rendered by Serbian courts whose jurisdiction was established in one of these ways could be eligible for recognition and enforcement under the HCCH 2019 Judgments Convention.

### 5.3.6 Place of performance of contractual obligation

Pursuant to art. 5 para. 1g, a judgment is eligible, if it concerns a contractual obligation and was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with (i) the agreement of the parties, or (ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State. Therefore, the State of origin must be the State where the obligation was performed or was supposed to be performed according to the provisions of the contract or by *lex contractus*. However, even if these criteria are fulfilled, the judgment cannot pass this filter if the activities of the defendant regarding contractual obligations did not constitute sufficient connection to the State of origin.

<sup>781</sup> About interpretation and application of Art. 55 of Serbian PILA see M. Dika, G. Knežević, S. Stojanović, *op. cit.*, 201-202.

According to art. 53 para. 3 of LPA, the Serbian court has jurisdiction to rule on cases concerning obligations which should be performed in Serbia. There is also a special jurisdiction provision in art. 481 para. 1 of LPA for cases concerning commercial contracts, according to which the Serbian court has jurisdiction to rule on the validity, breach or performance of contract if the defendant, according to the agreement of the parties, had to perform the contractual obligations in Serbia.<sup>782</sup> Since the jurisdiction filter of art. 5 para. 1g requires more criteria for establishing a sufficiently strong connection with the State of origin, it may be said that the judgments of Serbian courts in such cases will rarely pass this jurisdiction filter.

### 5.3.7 Location of the leased immovable property

Pursuant to art. 5 para. 1h, a judgment is eligible for recognition or enforcement if it ruled on a lease of immovable property (tenancy) and was given by a court of the State in which the property is situated.

The Serbian PILA provides for the exclusive jurisdiction of Serbian courts regarding rights in rem in or tenancy of immovable property situated in Serbia (art. 56), while special jurisdiction rules for short-term tenancies do not exist at all.

### 5.3.8 Contractual obligation secured by right in rem

Art. 5 para. 1i provides a jurisdiction filter for judgments concerning contractual obligations secured by right in rem in immovable property, which requires that such a judgment was given in the State where the immovable property is located and that a contractual claim was brought together with a claim against the same defendant relating to that right in rem. This filter seems to be very specific, since it covers specific types of situations involving rights in rem that serve to secure performance of contractual obligations.

The Serbian PILA does not recognise this filter as a ground for direct jurisdiction, but provides exclusive jurisdiction of Serbian courts for disputes involving any right in rem in immovable property situated in Serbia. Therefore, only if a claim relating to right in rem in immovable property in Serbia which served as security was brought together with a contractual claim against the same defendant before a Serbian court, the judgment rendered in such a case would pass this jurisdiction filter.

### 5.3.9 Place of act or omission in cases concerning non-contractual obligations

Pursuant to art. 5 para. 1j, a judgment is eligible for recognition or enforcement, if it ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred. Therefore, this jurisdiction filter requires the State of origin to be the place where the act or omission directly causing the harm occurred, meaning that the place of damage is irrelevant.

On the other hand, art. 53 of the Serbian PILA provides that the Serbian court has jurisdiction in cases concerning non-contractual liability, if the damage occurred in Serbia. This rule covers a very broad material scope of non-contractual obligations, but its criteria for establishing jurisdiction (place of damage) differs from the criteria (place of act or omission) required by the jurisdiction filter of art. 5 para. 1j of the HCCH 2019 Judgments Convention. However, some Serbian authors find that the criteria of art. 53 of the Serbian PILA should be interpreted more broadly in order to cover the place of act or omission, too.<sup>783</sup>

<sup>782</sup> See and compare *ibid.*, 200-201.

<sup>783</sup> See *ibid.*, 196-197

### 5.3.10 Trusts

Art. 5 para. 1k provides for a jurisdiction filter regarding trusts.<sup>784</sup> Since the Serbian legal system does not recognise trust as a legal institute at all, this jurisdiction filter is of very little practical relevance from the Serbian point of view.

### 5.3.11 Counterclaims

Art. 5 para. 1l regulates the jurisdiction filter for judgments ruled on counterclaim. Such judgments are eligible for recognition or enforcement (i) to the extent that they were in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim, or (ii) to the extent that they were against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion.

The Serbian PILA does not contain special rules on international jurisdiction concerning counterclaims. However, it seems that the Serbian court which has international jurisdiction to rule on the claim can, in accordance with the provisions on local jurisdiction of art. 198 of LPA which can be analogously applied to international jurisdiction, rule on the counterclaim which is in correlation with the claim.<sup>785</sup> Such an approach is in line with the jurisdiction filter of art. 5 para. 1l of the HCCH 2019 Judgments Convention.

### 5.3.12 Consumer and employment contracts

Art. 5 para. 2 regulates the jurisdiction filter for judgments rendered in matters relating to consumer and employment contracts, providing that the judgments rendered in favour of consumers or employees are eligible for recognition and enforcement if they pass any of jurisdiction filters contained in art. 5 para. 1, while the judgments rendered against consumers or employees are eligible if the jurisdiction of the court of origin was based on consent given orally or in writing to that court or on the habitual residence of the consumer or employee.<sup>786</sup>

The Serbian PILA does not have any special rules on direct jurisdiction of Serbian courts in matters relating to consumer or employment contracts.

### 5.3.13 Other criteria for direct jurisdiction of Serbian courts in the context of HCCH 2019 Judgments Convention

Pursuant to the Serbian PILA, Serbian courts can establish jurisdiction upon criteria which does not correspond to the jurisdiction filters of art. 5 of the HCCH 2019 Judgments Convention at all. For example, for pecuniary claims, the Serbian court shall have jurisdiction if the defendant's property or the object claimed is situated in Serbia (art. 54 para. 1 of the Serbian PILA), or if the obligations were created at the time when the defendant was present in Serbia (art. 54 para. 1 of the Serbian PILA).<sup>787</sup> The judgments rendered in such cases are not eligible for recognition or enforcement under the HCCH 2019 Judgments Convention.

## 5.4 Exclusive jurisdiction

In the context of the scope of application of the HCCH 2019 Judgments Convention, the only relevant rule on exclusive direct jurisdiction is that of art. 56 of the Serbian PILA which provides for exclusive jurisdiction of Serbian courts in matters relating to the ownership and other rights

in rem in immovable property as well as to the lease of immovable property, if that immovable property is situated in Serbia. The term "other rights in rem" covers all real rights, in addition to ownership, which can be acquired on immovable property under Serbian law.<sup>788</sup> It should be also mentioned that the Serbian PILA does not differentiate long-term leases from short-term leases of immovable property with regard to jurisdiction.

Art. 6 of the HCCH 2019 Judgments Convention regulates exclusive indirect jurisdiction in cases concerning rights in rem in immovable property, stating that judgments ruled on such cases shall be recognised and enforced if and only if the immovable property is situated in the State of origin. Therefore, the HCCH 2019 Judgments Convention ensures that the court of the State in which the immovable property is situated exclusively decides on disputes relating to rights in rem in such property.<sup>789</sup>

## 6. Procedure for recognition and enforcement of foreign judicial decisions and compatibility with the HCCH 2019 Judgments Convention

### 6.1 Material scope of application

#### 6.1.1 In comparison to Article 1 and 2 of the HCCH 2019 Judgments Convention, provide for the compatibility of the material scope of application for the recognition and enforcement of foreign judicial decisions in the Convention and in the national legal sources

The material scope of the HCCH 2019 Judgments Convention is determined by its art. 1 and 2. The provision of art. 1 para. 1 sentence 1 broadly defines the material scope, stating that this Convention applies to the recognition and enforcement of judgments in "civil or commercial matters," whereby the term "civil or commercial matters" has to be interpreted uniformly bearing in mind the international character of the convention.<sup>790</sup> After such a broad determination, the provisions of art. 1 para. 1 sentence 2 and art. 2 specify the legal issues which are explicitly excluded from the material scope of the Convention. Namely, the convention does not apply to revenue, customs and administrative matters, which are of a public law nature, as well as to the following matters which are of a civil law or commercial law nature: (a) the status and legal capacity of natural persons; (b) maintenance obligations; (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; (d) wills and succession; (e) insolvency, composition, resolution of financial institutions, and analogous matters; (f) the carriage of passengers and goods; (g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average; (h) liability for nuclear damage; (i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs; (j) the validity of entries in public registers; (k) defamation; (l) privacy; (m) intellectual property; (n) activities of armed forces, including the activities of their personnel in the exercise of their official duties; (o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties; (p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect

<sup>784</sup> See more I. Rumenov, op. cit., 34.

<sup>785</sup> M. Stanivuković, M. Živković, op. cit., 198.

<sup>786</sup> See more I. Rumenov, op. cit., 35-37.

<sup>787</sup> See more M. Dika, G. Knežević, S. Stojanović, op. cit., 198-200; M. Stanivuković, P. Đundić, *Međunarodno privatno pravo, posebni deo*, Novi Sad 2008, 69-70.

<sup>788</sup> See more M. Dika, G. Knežević, S. Stojanović, op. cit., 202-203; M. Stanivuković, P. Đundić, op. cit., 49-51.

<sup>789</sup> See and compare I. Rumenov, op. cit., 30.

<sup>790</sup> Art. 20 of the HCCH 2019 Judgments Convention.

both occurred in the State of origin; (q) sovereign debt restructuring through unilateral State measures. In addition to this, arbitral awards and other decisions rendered in alternative dispute resolution proceedings are also explicitly excluded from the scope of the Convention (art. 2 para. 3). On the contrary, the judgments in civil or commercial matters rendered in the proceedings in which one of the parties was a State, including government, governmental agency or any person acting for a State are not excluded from the scope of the convention. However, the exclusion of such judgments is possible under art. 19, which enables a Contracting State to declare that it shall not apply the Convention to such judgments.<sup>791</sup>

According to the Serbian PILA, a foreign judgment can be recognized and enforced if it was brought in civil and commercial matters (art. 86 and art. 1). The term “civil and commercial matters” is to be interpreted and characterized in accordance with Serbian law.<sup>792</sup> It covers the status issues of natural and legal persons, family, succession, property, contractual and non-contractual matters as well as other issues of civil law and commercial law nature<sup>793</sup> (which means it covers most of issues that are excluded by art. 2 para. 1 of the HCCH 2019 Judgments Convention). Foreign judgments relating to revenue, customs or administrative matters cannot be recognised and enforced in Serbia.<sup>794</sup>

## 6.2 Types of foreign judicial decisions that are recognised and enforced (e.g. positive-negative decisions, interim measures)

Pursuant to art. 86 para. 1 and 2 of the Serbian PILA, a decision of the court of a foreign country rendered in a civil or commercial matter can be recognised and enforced in Serbia, whereby a settlement reached in a foreign court (judicial settlement) is also considered as a foreign judicial decision. In addition to this, art. 86 para. 3 of the Serbian PILA provides that a decision of another foreign authority (e.g., notary) which is equivalent to a judicial decision in the country of origin shall also be considered as a foreign judicial decision.<sup>795</sup>

Any foreign judicial decision, which is final under the law of the country of origin, is *per se* eligible for recognition. If the recognition of foreign final condemnatory judicial decision is sought, such decision must also be enforceable under the law of the country of origin. The person who initiates recognition proceedings must have a legal interest to require that the foreign judicial decision in question be recognised and declared enforceable in Serbia.<sup>796</sup>

Judicial decisions on interim or provisional measures cannot be recognised and enforced because they are not final.<sup>797</sup>

## 6.3 Commencement of the procedure (as a main or as a preliminary question)

In Serbia, the recognition of a foreign judicial decision can be the main issue of the proceedings or it can be resolved as a preliminary question in proceedings involving another matter (incidental/preliminary recognition).<sup>798</sup>

Ruling on the recognition of a foreign judicial decision as the main issue is conducted in non-

<sup>791</sup> More about the scope of application see I. Rumenov, op. cit., 14-16; M. Wilderspin, L. Vysoka, The 2019 Hague Judgments Convention through European lenses, <https://www.nipr-online.eu/pdf/2020-138.pdf>, 2020, 36-37.

<sup>792</sup> M. Stanivuković, M. Živković, op. cit., 439.

<sup>793</sup> See Art. 1 of Serbian PILA.

<sup>794</sup> M. Stanivuković, M. Živković, op. cit., 439.

<sup>795</sup> See T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 537-539; M. Dika, G. Knežević, S. Stojanović, op. cit., 279-285; M. Stanivuković, M. Živković, op. cit., 437-438.

<sup>796</sup> M. Dika, G. Knežević, S. Stojanović, op. cit., 340; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 558.

<sup>797</sup> T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 539.

<sup>798</sup> See Art. 101 of SPILA; M. Stanivuković, M. Živković, op. cit., 440; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 557.

litigious proceedings before either the higher court or commercial court, depending on whether the foreign decision was brought in a civil or commercial matter.<sup>799</sup> The parties as well as any person who can assert an interest in the recognition of a foreign judicial decision can apply for recognition.<sup>800</sup> The decision on the recognition of a foreign judicial decision rendered in these proceedings produces erga omnes effects.

However, before an erga omnes effective decision on the recognition of a foreign judicial decision has been rendered, any court in Serbia can bring a preliminary decision on the recognition of the foreign judicial decision in proceedings involving another matter (irrespective of whether it is litigious, non-litigious or enforcement proceedings), in which case such recognition has effect only for those proceedings (art. 101 para. 5 of the Serbian PILA). In practice, the recognition of a foreign decision occurs most often as a preliminary question in enforcement proceedings<sup>801</sup> (see below in section 7.1.1.).

## 6.4 Documents that need to be produced (formal requirements) for the recognition of the foreign judicial decision

In addition to the written application for initiation of recognition proceedings before a Serbian court, the applicant must submit:<sup>802</sup>

- a) the original foreign judicial decision or its officially certified copy (both must be properly legalised);
- b) the certified translation of the foreign judicial decision in Serbian;
- c) the certificate issued by the competent foreign authority which certifies that the foreign judicial decision has become final (unless such a certificate is contained in the decision itself) as well as a certified translation of that certificate in Serbian;
- d) for condemnatory foreign judicial decisions, the certificate issued by the competent foreign authority which certifies that the foreign judicial decision has become enforceable (unless such a certificate is contained in the decision itself) as well as a certified translation of the certificate in Serbian.

## 6.5 Conditions for recognition and enforcement of foreign judicial decisions

Conditions for the recognition of foreign judicial decision are the same as conditions for its enforcement (i.e., declaring it enforceable) and they are regulated by art. 87-96 of the Serbian PILA. First of all, the foreign court decision can be recognised and enforced in Serbia only if it is final (legally binding) and enforceable under the law of the country of origin (art. 87 and 96 the Serbian PILA). Recognition and enforcement will be refused:

- a) if the party was prevented from participating in the proceedings before the foreign court (art. 88 of the Serbian PILA). Namely, the Serbian court shall not recognise and enforce a foreign judicial decision if it determines, upon the objection of the person against whom that decision was rendered, that that person could not take part in the proceedings before a foreign court because of procedural irregularities (art. 88 para. 1 of the Serbian PILA). It shall be considered that such irregularities particularly exist if any summons, writ or decision by which the proceedings were initiated had not been served upon the person against whom the decision was rendered or no personal service had been attempted, unless that person had in any way entered into the proceedings (art. 88 para. 2 of the

<sup>799</sup> Art. 23 and 25 of AOC.

<sup>800</sup> M. Dika, G. Knežević, S. Stojanović, op. cit., 340; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 558.

<sup>801</sup> See T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 559-560.

<sup>802</sup> M. Stanivuković, M. Živković, op. cit., 442-443.

Serbian PILA);<sup>803</sup>

- b) if Serbian courts have exclusive jurisdiction in the matter (art. 89 of the Serbian PILA). It should be particularly emphasized that only the existence of exclusive jurisdiction of Serbian courts in the matter in which the foreign judicial decision was rendered represents a ground for non-recognition and non-enforcement of that decision. There are no special rules on indirect jurisdiction;
- c) if a Serbian court or other competent authority has already rendered a final decision in the same matter and between the same parties or another foreign judicial decision in the same matter and between the same parties has already been recognised in Serbia (art. 90 para. 1 of the Serbian PILA - *res iudicata*). It should be noted: if the final decision in the same matter and between the same parties was rendered by a Serbian court, the foreign judicial decision cannot be recognised and enforced irrespective of whether the proceedings before the foreign court were initiated earlier than the proceedings before the Serbian court or the foreign decision was rendered earlier than the Serbian decision.<sup>804</sup> However, the court shall stay recognition of a foreign judicial decision if the earlier initiated proceedings before the Serbian court in the same matter and between the same parties are pending, until the final and binding decision is rendered (art. 90 para. 2 of the Serbian PILA);
- d) if the foreign judicial decision violates public policy/*ordre public* (art. 91 of the Serbian PILA) - this ground for non-recognition and non-enforcement is to be interpreted narrowly. Only violations which target fundamental procedural and substantive principles of the Serbian legal system are to be taken into account;<sup>805</sup>
- e) if there is no reciprocity between Serbia and the country of origin with regard to mutual recognition and enforcement of judicial decisions (art. 92 para. 1 of the Serbian PILA). It is important to emphasize that the reciprocity with respect to the recognition of foreign judicial decisions is presumed until proven otherwise. If there is a doubt whether reciprocity exists, the Serbian Ministry of Justice shall provide an explanation (Art 92 para. 3 of the Serbian PILA). However, the absence of reciprocity does not constitute a ground for non-recognition of foreign judicial decisions in marital disputes or in paternity and maternity disputes, and if a Serbian national requires the recognition and enforcement of a foreign judicial decision (art. 92 para. 2 of the Serbian PILA).

The court shall *ex officio* examine the grounds specified under points b), c) and d), while the grounds specified under points a) and e) will be examined only upon request of one of the parties.

Comparing the grounds for non-recognition and non-enforcement regulated by the Serbian PILA with those provided by art. 7 of the HCCH 2019 Judgments Convention, one may say that there are similarities as well as differences. As far as the similarities are concerned, both acts provide for violations of the defendant's right to arrange his/her defence in the proceedings, violations of public policy and *res iudicata* as grounds for refusal of recognition and enforcement of foreign judicial decisions. However, these grounds are not identically regulated. Firstly, the ground concerning the violation of the right to defence is more rigidly regulated by art. 7 para. 1(a) of the HCCH 2019 Judgments Convention which requires that the document instituting the proceedings in the State of origin (including the statement of the essential elements of the claim) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, or it was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State with regard to service

<sup>803</sup> See more M. Dika, G. Knežević, S. Stojanović, op. cit., 287-291; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 546-548; M. Stanivuković, M. Živković, op. cit., 454-456.

<sup>804</sup> M. Stanivuković, M. Živković, op. cit., 458.

<sup>805</sup> See M. Dika, G. Knežević, S. Stojanović, op. cit., 300-304; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 553-555; M. Stanivuković, M. Živković, op. cit., 456-458.

of documents. Secondly, the violation of public policy as a ground for non-recognition is more precisely regulated in art. 7 para. 1(c) of the HCCH 2019 Convention, which stipulates in detail that recognition and enforcement would be manifestly incompatible with the public policy of the requested State taking into account its fundamental principles of procedural fairness and situations involving infringements of its security and sovereignty, than in art. 91 of the Serbian PILA which simply stipulates that the foreign judicial decision should be incompatible with the public policy. Thirdly, as concerns regulating *res iudicata* as a ground for refusal of recognition and enforcement, there are differences with regard to the foreign judicial decision which was earlier rendered by the court of another State. While art. 90 para. 1 of the Serbian PILA provides that another foreign judicial decision in the dispute between the parties must be recognised in Serbia in order to represent *res iudicata* ground for non-recognition and non-enforcement, art. 7 para. 1(f) of the HCCH 2019 Judgments Convention requires that an earlier judicial decision given by the court of another State between the same parties on the same matter fulfils the conditions for recognition in the requested State. It means that this decision does not need to be previously recognised in separate recognition proceedings in order to become *res iudicata* ground. Finally, it should be mentioned that art. 7 para. 2 of the HCCH 2019 Judgments Convention enables the postponing or refusal of recognition and enforcement if the earlier instituted proceedings between the same parties on the same subject matter are pending before a court of requested State and the case is closely connected to the requested State. This provision corresponds, to a certain extent, to the provision of art. 90 para. 2 of the Serbian PILA with the difference that the latter obliges the Serbian court to postpone recognition of a foreign judicial decision if the earlier initiated proceedings before a Serbian court in the same matter and between the same parties are pending and does not require that the dispute has a close connection with Serbia as the requested State.

In addition to the aforementioned grounds for non-recognition and non-enforcement, the HCCH 2019 Judgments Convention provides for two more grounds which cannot be found in the Serbian PILA. First, pursuant to art. 7 para. 1(b), recognition and enforcement may be refused if the judgment was obtained by fraud. Although this ground does not exist in the Serbian PILA, it may be subsumed under the grounds concerning the violation of the public policy which is regulated by art. 91 of the Serbian PILA. Second, art. 7 para. 1(d) stipulates that recognition and enforcement may be refused if the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin. Such ground does not exist in the Serbian PILA and cannot be subsumed under any other ground regulated by this act.

## 6.6 Procedure for recognition and enforcement of foreign judicial decisions

As already mentioned above, the higher courts are competent for recognition of foreign judicial decisions brought in civil matters, while the commercial courts are competent for recognition of foreign judicial decisions brought in commercial matters. The locally competent higher or commercial court will be that in whose territory the recognition proceedings need to be conducted (art. 101 para. 1 of the Serbian PILA). This rule is to be interpreted as follows: it is sufficient for the establishment of local jurisdiction if the applicant states that he/she can use the foreign judicial decision in the territory of that court.<sup>806</sup>

In the course of recognition proceedings, the court examines whether the requirements for recognition are met and can, if necessary, request clarification (information) from the court of the country of origin or/and from the parties (art. 101 para. 2 of the Serbian PILA). An oral hearing will only take place if the court considers this to be necessary for further clarification of the facts (art. 11 NLP). The recognition proceedings end with a decision on the recognition of the

<sup>806</sup> T. Varadi, B. Bordaš, G. Knežević, V. Pavić, op. cit., 558.

foreign judicial decision, which produces erga omnes effects. The parties can appeal against this decision to the appellate court or Commercial Appellate Court within a period of 15 days from the day of service of the decision (art. 101 para. 3 of the Serbian PILA).

When the decision on recognition of a foreign condemnatory judicial decision becomes final, the recognised decision is to be enforced like any other domestic condemnatory decision in accordance with the rules of ESIA.<sup>807</sup>

## 7. Enforcement of foreign judicial decisions

### 7.1 Type of enforcement procedure

In Serbia, one type of enforcement proceedings exists and can be marked as general enforcement proceedings. It consists of two phases.<sup>808</sup>

#### 7.1.1. The first phase

The first phase of enforcement proceedings is conducted by the court. It begins when the creditor has submitted the application for enforcement with all the other necessary documents, especially an enforceable judicial decision or other enforceable instrument (e.g. enforceable arbitral award)<sup>809</sup> or verified enforceable document (e.g., an invoice issued by a creditor to a debtor),<sup>810</sup> to the basic or commercial court<sup>811</sup> on whose territory the debtor has domicile, residence or seat.<sup>812</sup> Within the period of eight days from the date of receiving the creditor's application, the court examines the requirements for enforcement and renders the decision on enforcement, if the requirements have been met, or the decision on refusal of enforcement, if they have not been met.<sup>813</sup> The parties can lodge an appeal against this decision with the same court (i.e., the basic or commercial court) within eight days,<sup>814</sup> whereby the appeal normally does not delay the enforcement.<sup>815</sup> The court shall reject a belated and/or incomplete appeal.<sup>816</sup> Where a complete appeal has been submitted on time, the court forwards the appeal with all the necessary documents to the court of second instance, i.e., the higher court or Commercial Appellate Court,<sup>817</sup> which decides on the appeal.<sup>818</sup>

As concerns this phase of the proceedings, art. 46 of AESI contains special provisions on the enforcement of foreign condemnatory judicial decisions, where the recognition of such a decision arises as a preliminary question in enforcement proceedings.<sup>819</sup> In such cases, the court examines, in addition to other requirements provided by ESIA, whether the conditions for recognition provided by art. 86-96 of the Serbian PILA are met<sup>820</sup> and renders the decision on the enforcement of the foreign judicial decision or the decision on refusing its enforcement. In the appeal against this decision the parties can cite the fulfilment or non-fulfilment of the conditions for recognition as the reason for the appeal.<sup>821</sup>

In the end, it must be noted that this phase of enforcement proceedings can be exceptionally

<sup>807</sup> Art. 46 para. 1 of ESIA.

<sup>808</sup> B. Poznić, V. Rakić-Vodinelić, *Gradansko procesno pravo*, Beograd 2015, 574.

<sup>809</sup> All types of enforcement documents/titles are listed in Art. 41 of ESIA.

<sup>810</sup> Which documents are considered to be verified is regulated by Art. 52 of ESIA.

<sup>811</sup> Art. 6 para. 1 of ESIA.

<sup>812</sup> Art. 7 of ESIA.

<sup>813</sup> Art. 64 of ESIA.

<sup>814</sup> Art. 25 para. 1 of ESIA.

<sup>815</sup> Art. 25 para. 2 of ESIA.

<sup>816</sup> Art. 76 para. 2 of ESIA.

<sup>817</sup> Art. 6 para. 2 of ESIA.

<sup>818</sup> Art. 6 para. 2 and 77etc. of ESIA.

<sup>819</sup> Art. 46 para. 2 of ESIA.

<sup>820</sup> Art. 46 para. 3 of ESIA.

<sup>821</sup> Art. 46 para. 4 of ESIA.

conducted by the enforcement agent, if the subject matter of enforceable instrument or verified enforceable document is recovery of debts arising out of communal activities.<sup>822</sup>

#### 7.1.2. The second phase

As soon as the court renders the decision on enforcement, it delivers this decision with the copies of all documents necessary for performing the enforcement to the enforcement agent<sup>823</sup> (indicated in the creditor's application for enforcement), which marks the beginning of the second phase of enforcement proceedings. In this phase, the enforcement agent performs the concrete acts of enforcement by using the different means and methods which were proposed by the creditor in his/her application for enforcement. These enforcement means/methods are divided into two categories: the means for enforced settlement of monetary claims (such as e.g., selling movable and immovable assets, transfer of money from debtor's account etc.) and the means for enforced fulfilment of other (non-monetary) claims (e.g., handover of debtor's movable and immovable assets).<sup>824</sup> However, it should be mentioned that the court is exclusively competent to conduct the second phase of the enforcement proceedings in some specific cases concerning actions which must be performed by a debtor or a debtor refraining from action as well as in cases that relate to returning employees to work and to the enforcement of decisions on family relations (except maintenance obligations).<sup>825</sup>

### 7.2 Enforcement procedure in situations when the enforcement officers are directly confronted with foreign judicial decisions

As already stated in this study, the court is exclusively competent to recognise a foreign condemnatory judicial decision and it usually conducts the first phase of enforcement proceedings with respect to previously recognised foreign condemnatory judicial decisions. It means that the enforcement agent can come into contact with such a decision in the second phase of the enforcement proceedings, when it has been already recognised and the court decision on its enforcement has already been rendered. In such situations, the duty of enforcement agent is to perform the concrete actions of enforcement by using the proposed means and methods.

However, considering that the enforcement agent is competent to conduct the first phase of enforcement proceedings in respect of an enforceable judicial decision that relates to the recovery of debts arising out of communal activities, a problem can arise if such a decision is a foreign condemnatory judicial decision (which will be rare), the enforcement of which is sought by the creditor before it has been recognised by the court. Following the provisions of ESIA, one of the possible conclusions could be that the enforcement agent can decide on recognition of a foreign condemnatory judicial decision as a preliminary question. However, such a conclusion is wrong, since art. 86 of the Serbian PILA explicitly provides that only the court can decide on the recognition of foreign judicial decisions. In addition to this, art. 46 para. 3 of ESIA states that the court competent in enforcement proceedings decides preliminarily on recognition of foreign judicial decisions and this provision must be interpreted strictly. Bearing this in mind, if the enforcement agent is confronted with unrecognised foreign judicial decisions in the first phase of the enforcement proceedings, he/she cannot decide preliminarily on its recognition, meaning that he/she should dismiss the enforcement proceedings and refer the creditor to initiate recognition proceedings before the court.

<sup>822</sup> Art. 3 para. 3 of ESIA.

<sup>823</sup> Art. 70 of ESIA.

<sup>824</sup> Art. 54 of ESIA.

<sup>825</sup> Art. 4 para. 1, 363, 364 and 366 of ESIA.

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