GUIDELINES ON

ENFORCEMENT OF FOREIGN JUDGMENTS IN LOCAL COURTS AND USE OF THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS FOR THE COMMONWEALTH OF INDEPENDENT STATES

by

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Litigation that does not result in an enforceable judgment has no or little value. The world community had been pursuing a goal to bring uniformity and certainty for enforcing judgments in foreign jurisdictions. This goal has been accomplished through the compromise of the members of the Hague Conference on International Private Law by creating the 2005 Hague Convention on Choice of Court Agreements. The Hague Convention on Choice of Court Agreement makes it realistically possible to recognize and enforce the judgments of foreign courts whose jurisdiction is conferred on the choice of court agreement concluded for resolving disputes that arise from the concerned transactions.

Commonwealth of Independent States presented by the twelve Post-Soviet countries has their own legal framework for recognition and enforcement within the Commonwealth area. However, the question remains if the Hague Choice of Court Convention will have a room for a use in the Commonwealth region considering that there are four regional agreements already that deal with matters of recognition and enforcement of judgments.

CHAPTER 1. INTRODUCTION

The world of business tends to move towards uniformity of permissible rules of conduct. Uniformity means predictability, clarity, and confidence. The participation and undertakings of governments are crucial in establishing that desired uniformity in certain areas, especially in the areas of law enforcement. Judgment without enforcement is similar to a car without its wheels. No matter how good the car or judgment is, one will run into the sand. With the rise of global trade and the increase of commercial cross-border relations, one common question is asked by a reasonable business person. That question is this: "Will I collect my money from my debtor who has assets in country A if I get a judgment in a country B?"

The absence of uniform legal rules leads to uncertainties which are in turn "are reflected in party forum shopping and parallel proceedings" along with the "difficulties" of recognition and enforcement of foreign judgments.[1] There is no need to engage in a litigation that will not end with an enforceable judgment therefore the question of recognition and enforcement of foreign judgments is the primary concern for the prevailing party.

In 1993 some 35 countries, including the member states of the European Community and the United States, committed to negotiating a multilateral Convention on Jurisdiction and the Recognition of Judgments under the auspices of the Hague Conference on Private International Law.[2] It turned out that that the negotiations were much more difficult and as of year-end 2001 there was no guarantee that agreement on a convention would be accomplished and deadlines for completing the text were put off a few times.[3] "As in many other international negotiations, the main protagonists were the European Union and the United States with other countries including Canada, Australia and a few countries from Latin America."[4] Many countries have resolved the problem of recognition and enforcement through bilateral treaties.[5]

[1] Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents 3 (2008)
[2] Andreas F. Lowenfeld, International Litigation and Arbitration 492 (2d ed. 2002)
[3] *Id.* at 493.
[4] *Id.*
[5] *See* Andreas F. Lowenfeld, International Litigation and Arbitration 388 (2d ed. 2002)

There have been counter-arguments to recognition and enforcement of foreign country judgments described well by Andreas F. Lowenfeld.[6]

First of all, many countries have "a generalized distrust of courts of other states", particularly when the prevailing party is a citizen of a country where the judgment is rendered.[7]

Second, different countries have different views of certain aspects of the judicial systems of other countries.[8] Americans tend to view suspiciously systems where juries are not allowed and where cross-examination is limited or not available while non-Americans, both from world of common law and civil law consider the American system of jury trials in civil actions with caution, particularly in tandem with contingent lawyer's fees, extensive discovery, and enormous damage awards.[9]

Third, every state is careful not to commit itself to recognize a judgment contrary to its public policy.[10] Public policy may refer to variety of aspects including certain categories of causes of action, procedural defects, unavailability of certain types of damages or even choice of law other than its own for certain instances.[11]

Fourth, some states view that recognition and enforcement of foreign judgments should be a matter of reciprocity.[12]

Fifth, acceptance of the criteria used in exercising jurisdiction, effects given to default judgments and effects of determinations of a jurisdictional challenge.[13]

All these reasons described above including the primary reason of inevitability of conflicting legal systems that contributed to the lack of harmonization of recognition and enforcement rules on worldwide basis. Nevertheless, major consensus had been achieved through adoption of the Hague Convention on Choice of Court. The focus of the present work will be analysis of the Hague Convention on Choice of Court Agreements along with analysis of the regional agreements of the Post-Soviet countries that at present time comprise the Commonwealth of Independent States.

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[6] *Id.* at 390.
[7] *Id*.
[8] *Id*.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id*.
[13] *Id.*

CHAPTER 2. THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

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I. Background of the Convention

The attempts to harmonize the matters of recognition and enforcements of foreign commercial and civil judgments by the Hague Conference on Private International Law resulted in few agreements.[14] In 1969, the Hague Conference on Private International Law adopted two conventions: a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters[15] and a Convention on the Recognition of Divorces and Legal Separations[16]. Only five countries, Cyprus, The Netherlands, Portugal, Kuwait, and Albania acceded to the first convention and the convention entered into force on August 20, 1979. [17] The second convention was ratified or acceded to by eighteen countries and entered into force on August 24, 1975. [18]

[14] Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents 5 (2008)

[15] Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, February 1, 1971, http://www.hcch.net/index_en.php?act=conventions.text&cid=78; Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents 5 (2008)

[16] Convention on the Recognition of Divorces and Legal Separations, June 1, 1970, http://www.hcch.net/index_en.php?act=conventions.text&cid=80; Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents 5 (2008)

[17] Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters: Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=78 (follow "Status Table" hyperlink) (last visited April 6, 2011).

[18] Convention on the Recognition of Divorces and Legal Separations: Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=80 (follow "Status Table" hyperlink (last visited April 6, 2011).

Other significant agreements in the area of recognition and enforcement of judgments have been The Brussels Convention and The Lugano Convention.[19] In May 2002, The Brussels Convention was replaced by the Brussels I Regulation, thereby becoming the domestic law of the European Union. [20] The Lugano Convention aimed to include the Member States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland). [21] The Lugano Convention had a limited possibility to include other third states because it required unanimous consent of the existing contracting states of the convention to allow accession to the convention. [22] The demarcation between the Brussels and Lugano Conventions is expressed in Article 54B of the Lugano Convention. [23] It is stated that the Lugano Convention will not apply to relations among the fifteen 'old' European Union Member States, but will apply to cases where one of the other countries mentioned above is involved. [24]

Post-Soviet countries had also realized a need for creating their own legal framework for recognition and enforcement of judgments within the former Soviet countries. This desire led to adoption of two conventions by different members of the Commonwealth of Independent States. The first convention is The Minsk Convention on Legal Assistance and Legal Relations in Matters of Civil, Family and Criminal Law[25] concluded on January 22, 1993. The second convention is The Kishinev Convention on Legal Assistance and Legal Relations in Matters of Civil, Family and Criminal Law[26] concluded on October 7, 2002. These two conventions have been designed to deal with the issues of mutual recognition and enforcement of judgments in the areas of civil, family, and criminal law within the boundaries of the contracting states. In

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[19] BRAND & HERRUP, supra note 1, at 5; Trevor Hartley & Masato Dogauchi, Explanatory Report 50 (2007), reprinted in Brand & Herrup, supra note 1, at 223, 241 & n.9-10
[20] BRAND & HERRUP, supra note 1, at 6.
[21] *Id.*
[22] *Id*.
[23] Trevor Hartley & Masato Dogauchi, Explanatory Report 50 (2007), reprinted in Brand & Herrup, supra note 1, at 223, 241 & n.10
[24] *Id*.
[25] Konventsiya o pravovoi pomoshi y pravovih otnosheniyah po grazhdanskim, semeinym y ugolovnym delam, Minsk, ot 22 yanvarya 1993 [The Minsk Convention on Legal Assistance and Legal Relations in Matters of Civil, Family and Criminal Law, Jan. 22, 1993], http://www.minjust21.ru/konventsiya_1993 [hereinafter The Minsk Convention]. Translations from Russian are provided by the author unless otherwise noted.
[26] Konventsiya o pravovoi posmoshi y pravovih otnosheniyah po grazhdanskim, semeinym y ugolovnym delam, Kishinev, 7 oktyabrya, 2002 [The Kishinev Convention on Legal Assistance and Legal Relations in Matters of Civil, Family and Criminal Law, Oct.7, 2002], http://www.minjust.kz:81/doc/show/id/1733/ [hereinafter The Kishinev Convention]. Translations from Russian are provided by the author unless otherwise noted.

other words, these conventions had regional application in the same manner as their European "counterparts" (as The Brussels and Lugano conventions).

Despite the existence of the few regional treaties created to resolve the issues of enforcement, the problem of global recognition and enforcement of judgments had not been resolved. In the absence of a global mechanism, re-litigation in a foreign forum may be the only realistic possibility. In response to the problem a movement to create such a global mechanism was initiated by the United States: "The United States proposed in 1992 that the Member States of the Hague Conference on Private International Law negotiate a multilateral convention with rules applicable to both the exercise of jurisdiction and the recognition and enforcement of the resulting judgments in the courts of the Contracting States."[27] The June 1994 Special Commission instituted by the Hague Conference decided that it would be "advantageous to draw up a convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters" and recommended including this question in the Agenda of the Conference at its Eighteenth Session.[28]

The negotiation process took a long time and was quite problematic. [29] There were few drafts produced during the negotiation process. The First Preliminary Draft Convention text was adopted in 1999. [30] Further deliberations demonstrated that disagreements were serious among the delegates on the text and only parts of it had been adopted by small majorities. [31] In 2001 a Diplomatic Conference resulted in a new text.[32] The 2001 Interim text contained more "bracketed provisions, footnotes, and explanations of various positions".[33]

[27] BRAND & HERRUP, supra note 1, at 4.
[28] *Id.* at 7. & n.22
[29] Ved P. Nanda, The Landmark 2005 Hague Convention on Choice of Court Agreements, 42 Tex. Int'l L.J. 773, 775-776 (2007) (discussing the process of adoption of the Hague Convention on Choice of Court Agreements).
[30] *Id.* at 775.
[31] *Id.* at 775.
[32] BRAND & HERRUP, supra note 1, at 8.
[33] *Id.*

However, the concept of a "double convention"[34] that had been already implemented in both European conventions, Brussels and Lugano, had been present in these two drafts of the Hague Convention.[35] Developing a convention that would function well on a global basis proved to be a difficult process. In 2002, an informal working group established by Commission I of the Nineteenth Session of the Hague Conference worked further on jurisdictional provisions based on agreement of the parties. [36] That informal working group in 2003 produced a draft text of a choice of court convention.[37] The draft was circulated among the Member States of the Hague Conference. [38] At the Twentieth Session of the Hague Conference on Private International Law, The Convention on Choice of Court Agreement was finalized. [39] A multiple-effort product had finally been created and on June 2005, the Convention became open for signature and ratification.[40]

The question asked in the beginning of this section remains unanswered. "While the considerable effort of drafting the Convention is over, what remains is the work of persuading states to join the Convention and, for the states that join, the work of implementing the Convention's rules." [41] The Status table[42] of The 2005 Hague Convention on Court of Choice Agreements (the "Hague Convention," "Convention," or "Choice of Court Convention") demonstrates that Mexico is the only country that has acceded to the Convention. The European Union and the U.S. have signed the Convention, but according to Article 31:1 The Convention "shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession."[43]

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[34] "Double conventions "provide both rules of direct jurisdiction applicable in the court in which the case is first brought ("the court of origin"), as well as rules applicable in the court of another state asked to recognize and enforce the resulting judgment ("the court addressed")". Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents 7,8 (2008)
[35] *Id.* at 7-9.
[36] BRAND & HERRUP, supra note 1, at 9.
[37] HARTLEY & DOGAUCHI, supra note 23, at 242; BRAND & HERRUP, supra note 1, at 9.
[38] BRAND & HERRUP, supra note 1, at 9.
[39] *Id.*
[40] *Id.* at 10.
[41] William J. Woodward, Jr., Symposium Article: Saving the Hague Choice of Court Convention, 29 U.Pa. J.Int'l L. 657, 662-663 (2008) (discussing the issues of implementing legislation for the Hague Convention on Choice of Court Agreements).
[42] The Hague Convention on Choice of Court Agreements, June 30, 2005 Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited April 6, 2011)
[43] The Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (hereinafter Choice of Court Convention)

The Convention is not in force for the U.S. and the E.U. Moreover, since the second instrument of ratification, acceptance, approval or accession has not been deposited, the Convention is not in force itself.[44]

At the present time the U.S. is taking actions to implement the Convention through enactment of the necessary implementing legislation. The Uniform Law Commissioners (ULC) of the National Conference of Commissioners of Uniform State Laws and the co-rapporteur of the Drafting Committee have advocated a "cooperative federalism" approach to implementation. [45] The ULC have indicated that the Hague Convention addresses state law issues since recognition and enforcement of judgments have traditionally been determined by state law.[46] They also have expressed concern with the potential "disharmony" in state law if the private international law conventions are implemented solely through federal legislation.[47] Therefore the proposed option would be implementing the Convention through a ULC Model law combined with federal legislation.[48] The "cooperative federalism" approach would require the states by federal law to adopt the ULC model as state law; if they do not adopt the ULC model, then the federal legislation would preempt existing state law to the extent inconsistent and become state law.[49]

The National Conference of Commissioners of Uniform State Laws has drafted the Uniform International Choice of Courts Agreements Act (Act).[50] In the Prefatory Note of the Act it is stated that the Act attempts to integrate the Convention into state law.[51] "The form of implementation of an international convention through a uniform state law and federal statute provides the best mechanism for maintaining state law while meeting the needs for multilateral agreements that increasingly address areas that have been traditionally in the realm of state law."[52] "This Act, therefore, strives to maintain the integrity of both

[44] Choice of Court Convention, supra note 43, art. 31.
[45] Peter D. Troboff, Symposium:14th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: A Special Tribute to Andreas Lowenfeld: Proposed Principles for United States Implementation Of The New Hague Convention On Choice Of Court Agreements, 42 N.Y.U. J.Int'l L.& Pol.237, 246 (2009).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Uniform International Choice of Courts Agreements Act, http://www.law.upenn.edu/bll/archives/ulc/hccca/2010am_draft.htm
[51] *Id.*
[52] *Id.*

existing state law and the international treaty while providing accessible law for bar and bench domestically."[53]

"The main drafting principle has been to remain as faithful as possible to the Convention text except where variation is necessary, and then while maintaining the integrity of the original text."[54] This approach helps in the application of the Act which will be used by lawyers and judges from other countries who are called upon to interpret our law."[55] The implementation work is still in process and has not yet been completed, and the Final 2011 Annual Meeting Agenda of the Uniform Law Commission that will be held in July 2011 includes consideration of the Uniform International Choice of Court Agreement Act.[56]

As Peter D. Troboff pointed out when describing his third principle to guide implementation:"We cannot ask middle-class litigants in this country or from elsewhere in the world to regard this Convention as a step forward if our implementing legislation creates new complexities and spawns litigation over interpretative issues, however interesting they may be to law professors."[57] He further states that "it is reasonable for non-U.S. litigants to hope that the Convention will make matters simpler."[58] The author of the present work strongly agrees with the ideas expressed by Peter D.Troboff and further would like to point out that whatever is being done to implement the Hague Convention in the United States, it will become attractive to other potential contracting members if the utilization of the Convention in the United States does not become an unreasonably complicated and hardly achievable task.

II. Central rules of the Convention
A. Scope
B. Jurisdiction
C. Recognition and enforcement

A. Scope

[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] http://www.uniformlaws.org/Shared/Annual%20Meeting/2011BusinessAgenda.pdf
[57] Peter D. Troboff, Symposium:14th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: A Special Tribute to Andreas Lowenfeld: Proposed Principles for United States Implementation Of The New Hague Convention On Choice Of Court Agreements, 42 N.Y.U. J.Int'l L.& Pol.237, 247 (2009).
[58] *Id.*

The Hague Convention deals only with "international cases"[59] which are identified in the Convention in two ways depending on what kind of purpose is sought: whether asserting jurisdiction or seeking recognition and enforcement. [60] Article 1 of the Convention as the starting points clearly determines two filtering tests.[61]

The first test is internationality of the case. For jurisdictional purposes, a case is defined as "international"[62] if "the parties are"[63] not "resident in the same Contracting State"[64] *and "*all other relevant elements to the dispute are connected only with that state"[65] leaving aside "the location of the chosen court."[66] It is self-evident that passing internationality test should not create any barriers when the parties are resident in two different states.

The Convention provides the test for defining a 'resident' for the purposes of the Convention in particular for the purposes of jurisdiction under Article 1(2).[67] Article 4(2) states that "an entity or person other than a natural person shall be considered to be resident in the State -

b) where it has its statutory seat;

c) under whose law it was incorporated or formed;

d) where it has its central administration; or

e) where it has its principal place of business."[68]

These 'residence' tests are quite broad and flexible. The same enterprise can easily be found to be a resident of a number of countries under the aforesaid provision. For example, the same company can be incorporated in one country and have central administration in another and thus be considered as a "resident" of two states. However, this flexibility allows stretching of the utilization of the Convention by establishing minimum standards for passing one of the prongs of the internationality test if the parties share residence in any state.

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[59] Choice of Court Convention, supra note 43, art. 1.
[60] *Id.*
[61] *Id*.
[62] *Id.* at art. 1(2).
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Choice of Court Convention, supra note 43, art. 4(2).

However, the importance of the 'internationality' test should not be underestimated when such internationality (of the case) is claimed under the provision of "all other relevant elements to the dispute are connected"[69] not only with that state. The following hypothetical will demonstrate ambiguities of connection of "other relevant elements to the dispute" to a foreign forum.

Assume that two Russian companies entered into a financial lease transaction. The residency of the two parties is unquestionable. They both were incorporated in Russia. The leasing object is multi million-dollar construction equipment manufactured in Germany. A lessor has agents in Germany that provide support in purchase of goods from German manufactures including acceptance of goods on behalf of the Russian lessor and negotiating the manufacture's warranty terms. The lessor had also financed this transaction through a German bank under its credit line with that bank. Within a few months after the equipment arrived, the equipment software stops working properly and the lessee claims warranty repairs and adjustments to the schedule of lease payments due to an idle period. The Lessor refuses to make adjustments to the schedule of payments and argues that the manufacturer's warranty does not cover the situation because, as the lessor claims, the equipment stopped working due to improper use and the warranty terms do not cover free repairs under those circumstances. The manufacturer's engineers issue a report after inspection that repair work will be an additional cost. The lessee brings an action requesting specific performance under the specific provision of the financial lease agreement which designates a German court as the forum for adjudicating any disputes arising from the lease agreement. Should a German court still exercise jurisdiction over the dispute assuming that Germany and Russia have ratified the Convention? Does the Hague convention apply to this case? Can the internationality test be applied on the premise that this dispute involves certain relevant elements that are connected with a country other than the residence country of the parties?

The general approach to what defines "the relationship of the parties" and "all other elements relevant to the dispute" is that it "will be determined by national law rather than a Convention standard."[70] Moreover, a

[69] *Id.* at 1(2).
[70] Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents 51 (2008)

suggestion has been made that the language of Article 1(2) allows national courts to understand that "the burden of persuasion on this scope issue will be on the party resisting application of the Convention".[71]

However, "a defaulting party" not interested in litigating abroad in the court chosen by the choice of court agreement may attempt to explore the Convention internationality test provision established for jurisdictional purposes in order escape from application of the Convention at all. Discretionary provisions that allow national courts to test internationality of "the relationships of the parties" and internationality of "all other elements relevant to the dispute" are understandable from its core. Still, analysis by legal scholars and experts from the perspectives of their own national law standards and making those analyses available to the international legal community seems to be a good idea, regardless of the fact the these concepts will be developed based on a case-by-case basis in each domestic jurisdiction.

After passing internationality tests established for jurisdictional purposes, the next step will obviously be defining "internationality" for recognition and enforcement purposes. For recognition and enforcement purposes, "a case is international where recognition or enforcement of a foreign judgment is sought."[72] This test seems to be straight-forward. Bringing a judgment made by the court chosen in one Contracting State to a foreign court for recognition and enforcement in another Contracting State must be self-evident to pass through the requirements of Article 1(3). Although the author did not participate in the Convention negotiation and drafting process, it seems that to her that Article 1(3) had always been the ultimate and highly desired goal of the initial negotiators, but in order to reach that goal the jurisdictional limitations in Article 1(2) had to be adopted as a balancing compromise. Bringing recognition and enforcement of a purely domestic case to a court addressed in a foreign country where a defaulting party holds its assets is a very progressive norm. Making assets unreachable in foreign countries might not be very 'helpful' even if, in that event, the Hague Convention would have wide-spread world popularity. However, a question of what off-shore jurisdictions will decide to accede to the Hague Convention, considering the context of Article 1(3), remains very intriguing for the author.

[71] *Id.* at 53.
[72] Choice of Court Convention, supra note 43, art. 1(3).

Unfortunately for the parties and maybe fortunately for the lawyers, commercial litigations are complex and testing possible waivers from utilization of this kind of significant international source of law is very important. Before reaching for jurisdiction of the chosen court under the Convention, the test established for the internationality scope of the Convention must be passed first.

It might be too early to conclude that an exclusive choice of court agreement will tacitly "guarantee" an application of the Convention. Article 2 (1) of the Convention has a list of grounds on which the Convention shall not apply: (1) when a natural person is acting primarily for personal, family, or household purposes and (2) when a choice of court agreement is related to employment contracts, including collective agreements. [73] Moreover, there are also sixteen matters that are excluded from the scope of the Convention.[74] Those matters are quite straightforward and should be analyzed in depth on a case-by-case basis by the national courts. [75] Issues might arise if there are certain types of cases with matters that belong to the excluded list and are outside of the excluded list at the same time.

Notwithstanding the listed exclusions, the Hague Convention provides that proceedings are not excluded from the Convention's scope "where a matter excluded under that paragraph arises merely as a

[73] Choice of Court Convention, supra note 43, art. 2(1).
[74] *Id.* art. 2(2).
[75] Article 2(2):
This Convention shall not apply to the following matters-

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 successions;
e) insolvency, composition 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) anti-trust (competetition) matters;
i) liability for nuclear damage;
j) claims for personal injury brought by or on behalf of natural persons;
k) tort or delict claims for damage to tangible property that do not arise from contractual relationship;
l) rights in rem in movable property, and tenancies of immovable property;
m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
n) the validity of intellectual property rights other than copyright and related rights;
o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
p) the validity of entries in public registers.

preliminary question and not as an object of the proceedings"[76]. It is further explained that "the mere fact that a matter excluded […] arises by way of defense does not exclude proceedings from the Convention, if that matter is not an object of the proceedings"[77]. It is very clear that drafters carefully attempted to allow proceedings go forward despite the barriers that may arise under excluded matters. [78] To put it simply, unless the excluded matter under the Convention is (a) a preliminary question and not an object of the proceedings or (b) 'appears' in defense, but not an object of the proceedings, then proceedings should be continued.

The application of these rules in Article 2 will be different 'in the hands of every judge'. From this author's point of view, the object of proceedings will likely be determined by an adjudicator first based on the essence of the claims. Then, the next step should be identifying whether the excluded matter is a preliminary or principal question of the proceedings. The final step will be determining if that preliminary or principal question will fall within the object of the proceedings. The importance of the provisions of Article 2 (3) extends to an attempt to close the doors to tactical litigation when certain matters are raised to fall within the excluded matter and prevent litigation for different kinds of reasons. These provisions shift to a plaintiff a certain level of burden of prevailing on excluded matters and a chance for continuing proceedings at the same time. However, an adjudicator's discretion can be quite broad in establishing whether the excluded matter is a preliminary question and whether that matter constitutes an object of proceedings.

B. Jurisdiction

The Article 5 (1) of the Hague Convention determines that "The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State".[79]

[76] Choice of Court Convention, supra note 43, art. 2 (3).
[77] *Id.*
[78] BRAND & HERRUP, supra note 1, at 71-73.
[79] Choice of Court Convention, supra note 43, art. 5 (1).

In regard to the exclusive choice of court agreement Article 3(a) defines "exclusive choice of court agreement" to mean "an agreement made by two or more parties […] and designates, for the purpose of the deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts."[80]

The agreement must be "in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference"[81].

To put it plainly, to utilize the Convention, there must be an agreement "concluded" in writing or by any other means accessible for subsequent reference[82] and such agreement must designate the court or courts of a Contracting state that will decide a certain range of disputes[83] by excluding the jurisdiction of any other courts[84].

A choice of court agreement that meets the aforesaid requirements is deemed to be exclusive. Exclusivity of a choice of court agreement is based on Article 3(b) of the Convention, which states that "A choice of court agreement […] shall be deemed to be exclusive unless the parties have expressly provided otherwise"[85]. The framers deliberately used the term "deemed" rather than "presumed" to avoid complexity in evidence law, "including the nature of evidentiary presumptions"[86]. Therefore, the Convention characterizes a choice of court agreement as exclusive "unless the parties have expressly provided otherwise". [87]

One of the characteristics of a choice of court agreement is the severability between the choice of court agreement and the principal contract in which the choice of court agreement exists.[88] Article 3 (d) states that "an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement

[80] Choice of Court Convention, supra note 43, art. 3(a).
[81] Choice of Court Convention, supra note 43, art. 3(c).
[82] *Id.*
[83] Choice of Court Convention, supra note 43, art. 3(a).
[84] *Id.*
[85] Choice of Court Convention, supra note 43, art. 3(b).
[86] BRAND & HERRUP, supra note 1, at 42, 43.
[87] *Id.* at 43.
[88] Choice of Court Convention, supra note 43, art. 3(d).

independent of the other terms of the contract. [89] The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid."[90] The choice of court agreement is severable and its validity cannot be challenged solely on the grounds of invalidity of the underlying contract.[91] However, this might lead to the situation when the same considerations that invalidated the contract may be potentially appropriate to void the choice of court agreement as well. [92]

The language of Article 5(1) that the designated court shall exercise jurisdiction over the dispute unless the exclusive choice of court agreement is "null and void under the law of that State" suggests that law applicable to deciding whether a choice of court agreement is null and void will be the law of the country of that designated court. [93]

A court chosen in an exclusive choice of court agreement "shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another state"[94] under Article 5(2). Professor Ronald A. Brand and Paul M.Herrup in their book "The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents" explain that this provision was adopted to overcome with the considerations of "the civil law doctrine of *lis alibi pendens*[95] as well as of the common law doctrine of *forum non conveniens"*. [96] In other words, a designated court shall enforce an exclusive choice of court agreement regardless of the fact that another court first took the same action or regardless of considerations of *forum non conveniens* doctrine. [97] Following such an explanation, it seems that despite the parallel proceedings or considerations of *forum non conveniens* the chosen court must still exercise jurisdiction. [98]

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[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Ved P. Nanda, David K., Pansius Litigation of International Disputes in U.S. Courts §7:33. Court convention forum selection rules, LOID § 7:33
[93] Choice of Court Convention, supra note 43, art. 5(1).
[94] Choice of Court Convention, supra note 43, art. 5(2).
[95] Lis alibi pendens is primarily a civil law doctrine that reflects the policy of "race to the court house" to allow jurisdiction in one and only one court, as opposed to the common law doctrine "race to judgment" by allowing parallel proceedings, but giving effect to the first judgment rendered. Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents 82 (2008)
[96] BRAND&HERRUP, supra note 1, at 82
[97] BRAND&HERRUP, supra note 1, at 82-83.
[98] See BRAND& HERRUP, supra note 1, at 82-83.

The intent of the drafters is understandably aimed at saving exclusive jurisdiction of a chosen court, but the question remains whether the provision of Article 5(2) expands to the doctrine of *res judicata*. The role of *res judicata* still seems to be 'unclear' in this respect because nothing in Article 5 (2) suggests that the chosen court shall still exercise jurisdiction even if the dispute *had been resolved* in another court and the disputing parties may be precluded from re-litigating the same controversies even in a chosen court. It seems from this author's point of view that the language such as "*shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State*"[99] expands to *res judicata* considerations even if that dispute had been resolved by the court not-chosen. In other words if the case can be decided in a different court, then the designated court should not decline jurisdiction, but the plain language does not say that "on the ground the dispute had been decided in another court, which means that if a dispute had been decided in another court, then, in the author's opinion, the provisions of not-declining jurisdiction should not apply. Therefore it seems that the *res judicata* defense available in many jurisdictions may still be an option behind the scenes.[100]

The provisions of Article 5(3) make it clearer that enforcement of an exclusive court agreement by a chosen court shall not affect rules on subject matter jurisdiction (including controversy amount criterion) and internal allocation of jurisdiction within the court of a Contracting state. [101] This norm raises the importance of the 'quality' of a choice of court agreement. A drafter of a choice of court agreement must carefully examine the choice of court in terms of choosing a proper court for adjudicating possible disputes. The following important matters must be scrutinized by a drafting lawyer: what courts will have subject matter jurisdiction? What will be the minimum amount in controversy to hear such a case for this court? Will there be any restraints in terms of 'territorial jurisdiction'? Otherwise, an exclusive choice of court agreement might be doomed from the outset. Despite the tenuous simplicity of the utilization of the Hague

[99] Choice of Court Convention, supra note 43, art. 5(2).
[100] For instance, in the Civil Procedural Code of the Republic of Kazakhstan there is a norm in Article 247 that provides that a claim must be dismissed in the event if the same claim on the same cause of action had been already adjudicated, then there is a decision rendered on that dispute and that judgment has an effect (i.e. has entered into force). These judgments are called as "judgments with prejudicial effect" and they carry the same meaning of the concept of *res judicata*.
[101] Choice of Court Convention, supra note 43, art. 5(3).

Convention, transactional lawyers must be aware of the domestic procedural laws before making a choice of the proper court. Proper court actions and documentation when it comes to transferring a case can save the exclusive choice of court agreement for future recognition and enforcement purposes if due consideration to the choice of the parties will be well documented and reasoned. In other words, assuming that the disputing parties are interested in resolving their disputes under the umbrella of the Hague Convention, if the transfer of a case to another court has been done with proper indication of the parties' further considerations, then why not presume that the court where a case has been transferred is a chosen court as well?

C. Recognition and Enforcement

The entire impetus behind adopting the 2005 Hague Convention is international recognition and enforcement of judgments. [102] Article 8 (1) provides that a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement has to be recognized and enforced in other Contracting States.[103] The key requirements provided to the courts for recognition and enforcement are (1) there must be a judgment *originated in the court designated by an exclusive choice of court agreement* and (2) recognition and enforcement of that judgment must be effected *by the courts* in other Contracting states. It is not essential that the court of origin based its jurisdiction on the agreement on choice of court. [104] "Article 8 also includes cases when courts of origin predicated their jurisdiction on some other ground such as the domicile of the defendant despite the fact that the court of origin had been designated in an exclusive choice of court agreement.[105] However, under very close examination of the aforesaid provision, the author still finds that a court of origin still must be a court designated in a written choice of court agreement. That court can exercise its power by asserting different ground for jurisdiction, but the critical point is that finding another ground for jurisdiction may well be just an exercise of the normal functions of a designated court.

[102] William J. Woodward, Jr., Symposium Article: Saving the Hague Choice of Court Convention, 29 U.Pa. J.Int'l L. 657, 668 (2008) (discussing the issues of implementing legislation for the Hague Convention on Choice of Court Agreements).
[103] Choice of Court Convention, supra note 43, art. 8(1).
[104] HARTLEY & DOGAUCHI, supra note 23, at 273.
[105] *Id.*

It is very clear from the article 8 (1) of the Hague Convention that the language "shall be recognized and enforced in other Contracting States" presumes that the judgment has to be submitted from a court of a Contracting state *other than the state of court addressed*. [106] Then the case must be identified as international under Article 1(3) for recognition and enforcement purposes. [107]

Nothing in Article 8 (1) suggests that recognition and enforcement is limited to a certain number of countries. In other words, if judgments have been submitted for recognition and enforcement in a few Contracting countries, then the judgments shall be recognized and enforced regardless of the number of countries where such recognition and enforcement is sought. [108] In this author's view, that opportunity is a core on which significance and attractiveness of the Convention resides because the first question that a litigator asks is whether the litigator is precluded from seeking recognition and enforcement in multiple forums when dealing with sophisticated opponents, for example with multinational companies.

There is an opinion that the Hague Convention could have been drafted in a broader way by stipulating that the judgment from a chosen, but even if in a non-contracting state, could be enforceable in a contracting state. [109] The same author, however, concludes that drafters carefully avoided such a provision to discourage free-riders and encourage states to join the Choice of Court Convention by limiting the enforcement undertaking only to contracting states. [110]

There shall be no review of the merits of the judgment unless such review is necessary for the application of the recognition and enforcement provisions. [111] To avoid review of the foreign judgments by the court addressed as if it were an appellate court, this standard provision was included in the Convention.[112]

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[106] See BRAND & HERRUP, supra note 1, at 100.
[107] *Id.*
[108] *Id.*
[109] Louise Ellen Teitz, The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration, 53 Am.J.Comp.L.543, 554-555 (2005) (discussing the Hague Convention on Choice of Court Agreements in operation).
[110] *Id.*
[111] Choice of Court Convention, supra note 43, art. 8(2).
[112] HARTLEY & DOGAUCHI, supra note 23, at 273

However, Article 11 seems to frustrate the principle of "no review of the merits of the judgment allowed". [113] Article 11 (1) provides that recognition or enforcement may be refused, if and to the extent that, the judgment awards damages that do not compensate a party for actual loss or harm suffered. [114]

During the 2005 Diplomatic Session, the statement regarding Article 11 was made by the members of the Working Group and that statement was adopted by the Session[115]:

"(a) Let us starts *with a basic and never disputed principle*: judgments awarding damages are within the scope of the Convention […].

(b) During the negotiations, it has become obvious that some delegations have problems with judgments awarding *damages that go far beyond the actual loss of the plaintiff*. Punitive and exemplary damages are an important example. [Some delegations made it clear that the public policy exception could not solve these problems because of their limited concept of public policy]. Therefore it was agreed that there should be *an additional ground for refusal of judgments on damages.* […]

(d)This does not mean that the court addressed is allowed to examine whether it could have awarded the same amount of damages or not. *The threshold is much higher*. Article 11 only operates when it is *obvious* from the judgment that the award appears to go beyond the actual loss or harm suffered."

To determine whether the awarded damages compensate a party for actual loss or harm suffered, the court addressed is more likely "to study" the case and make its own conclusions as to whether awarded damages compensate actual loss or harm suffered. Could that be a review of the merits? If it could be, then it can be easily concluded that application of the recognition and enforcement provisions of the Convention may require a review of the merits of the judgment, especially when recognition and enforcement of the judgment can be refused partially to the extent established by the Convention.

The court addressed shall be bound by the findings of fact on which the court of origin asserted its jurisdiction unless the judgment was given by default. [116] Findings of fact on the basis of which the court of

[113] Choice of Court Convention, supra note 43, art. 11.
[114] *Id.*
[115] HARTLEY & DOGAUCHI, supra note 23, at 281 & n.242
[116] Choice of Court Convention, supra note 43, art. 8(2).

origin asserted its jurisdiction may contain certain determinations such as "the existence of consent to a choice of court agreement" and the "capacity of the parties" to conclude that agreement, if the agreement is exclusive, if the court of origin is designated to adjudicate the particular dispute, if the agreement was made for resolving civil or commercial matters, and whether the case is international for the purposes of recognition and enforcement. [117]

Article 8(3) stipulates that a judgment will be recognized only if it has effect in the country of origin and will be enforced only if it is enforceable in the country of origin. [118] This provision brings up the difference between recognition and enforcement. [119] Recognition aims to ensure that the court addressed gives effect to the determination of legal rights and obligations made by the court of origin. [120] Enforcement is the application of the legal procedures of the court addressed to provide that the defendant complies with the judgment given by the court of origin. [121] The decision to enforce judgment must be preceded by recognition of such judgment while the recognition does not have to be accompanied or followed by the enforcement. [122] For example, there might be declaratory judgments that do not require enforcement in the court addressed.[123]

For the purposes of the present analysis, the particular interest is grounds for refusal to recognize and enforce judgments by the court addressed. Refusal to recognize or enforce may be allowed only on the grounds specified in the Convention.[124] The Choice of Court Convention notes seven circumstances when the recognition or enforcement may be declined. [125] Recognition or enforcement may be refused under the following conditions:

(1) The choice of court agreement was null and void under the law of the chosen court's state unless the chosen court has determined that the agreement is valid. [126]

[117] BRAND & HERRUP, supra note 1, at 103
[118] Choice of Court Convention, supra note 43, art. 8(3).
[119] HARTLEY & DOGAUCHI, supra note 23, at 274
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] See HARTLEY & DOGAUCHI, supra note 23, at 274-275
[124] Choice of Court Convention, supra note 43, art. 8(1).
[125] Choice of Court Convention, supra note 43, art. 9.
[126] *Id*. art.9 (a).

(2) One of the parties lacked the capacity to conclude the choice of court agreement under the law of the requested state. [127]

(3) The defendant was not notified about the proceedings in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin *or* the defendant was not notified about the proceedings in a manner compatible with fundamental principles of the requested state concerning service of documents. *[128]*

(4) The judgment was obtained by fraud in connection with a matter of procedure. [129]

(5) Recognition or enforcement would be manifestly incompatible with the public policy of the requested state. [130]

(6) The judgment is inconsistent with a judgment rendered on a dispute between the same parties in the requested state.[131]

(7) The judgment is inconsistent with an earlier judgment in another state between the same parties on the same cause of action, provided that the earlier judgment meets the requirements necessary for its recognition in the requested state. [132]

Although Article 8 sets forth the principle of recognition and enforcement, Article 9 sets out exceptions to it.[133] However, the use of the "may" provides that recognition and enforcement is not mandatory when but one of the enumerated conditions exist. [134] The courts of the requested states have enough room to exercise their discretion when they contemplate whether they should refuse to recognize or enforce the judgment submitted by the interested party. The whole recognition and enforcement chapter of the Convention uses "shall" when there are provisions on recognition and enforcement, while the language of the 'refusal provisions' is the "may". In particular, the first sentence of Article 8(1)

[127] *Id*. art.9(b).
[128] *Id.* art. 9(c).
[129] *Id*. art. 9(d).
[130] *Id*. art. 9(e).
[131] *Id*. art. 9(f).
[132] *Id*. art. 9(g).
[133] HARTLEY & DOGAUCHI, supra note 23, at 276
[134] BRAND & HERRUP, supra note 1, at 110

dictates to recognize and enforce if the certain requirements are met, while the second sentence permits refusal only on the certain grounds. [135] Moreover, there is a list of enumerated grounds in Article 9 which *may be* a basis for refusal.[136] The party raising defense to contesting recognition and refusal cannot be certain that invoking one of the grounds for refusal will be sufficient enough to prevail. Therefore the ultimate goal as to creating certainty for all the parties involved has been shifted mostly to the creditors or the parties seeking recognition and enforcement.

The only mandatory language in the Convention that deals with non-recognition and non-enforcement is Article 10 (1).[137] It provides that a ruling on a preliminary question in which an excluded matter under Article 2 (2) or Article 21 has arisen, shall not be recognized or enforced under the Convention.[138] Article 2(2) lists matters excluded from the scope of the Convention and Article 21 covers specific matters excluded from the scope by the declarations made with respect to certain matters.[139] Thus, Article 10 (1) reinforces the principle of leaving outside of the Convention the matters that are initially subject to exclusion from the Convention by providing that the rulings on the preliminary questions in respect to excluded matter shall not be recognized or enforced.[140]

Thus, drafters of the Convention deliberately and straightforwardly reflected the "pro-recognition" and "pro-enforcement" nature of the Convention. That is understandable from the initial goal of the document. Recognition and enforcement are the mechanisms whereby coercive functions of a state are exercised; therefore for mandating courts of a requesting state to utilize their powers in 'pro-enforcement' manner it is well balanced to give them discretion to invoke "refusal provisions" of the Convention.

The courts of the requested state also have a safe tool embodied in Article 14, which provides that the procedures for recognition and the enforcement of the judgment are governed by the law of the

[135] Choice of Court Convention, supra note 43, art. 8(1).
[136] *Id.* art.9
[137] *Id*. art. 10(1).
[138] *Id*.
[139] *Id.*art 2(2), 21.
[140] *Id*. art.10 (1).

requested state unless the Convention does not provide otherwise. Domestic procedural law will supplement the very limited coverage of the Convention and should make recognition and enforcement 'viable' for the interested party.

CHAPTER 2. LEGAL MECHANISMS OF RECOGNITION AND ENFORECEMENT WITHIN THE COMMONWEALTH OF INDEPENDENT STATES

Table of sections

I. Background and overview of the acting regional enforcement of judgment agreements in the 'hemisphere' of the Commonwealth of Independent States.

Four regional agreements have been concluded by the various members of the Commonwealth of Independent States. They are:

(1) The Agreement on Order of the Disputes' Resolution Related to Economic Activity, Kiev, March 20, 1992 (The 1992 Kiev Agreement [141]), entered into force[142] in ten countries: Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine;

[141] Soglashenie o poryadke razresheniya sporov, svyazannih s osushestvleniem hozyaistvennoi deyatel'nosti, Kiev, 20 Marta 1992 [The Agreement on order of the Disputes' Resolution Related to Economic Activity, Mar. 20, 1992] available only in original language (Russian) at http://gesetze.cisg-library.org/gus_arbitrage.shtml [hereinafter The 1992 Kiev Agreement]. Translations from Russian are provided by the author unless otherwise noted.

[142] The list of the countries in which the Agreement entered into force was given in the Decision of the Economic Court of the Commonwealth of Independent States, February 21, 2007 #01-1/2-06, see annotation of the Decision available at: http://sudsng.org/database/annot/annot2007/?retType=submitForm#1

(2) The Agreement on mutual enforcement of the decisions by arbitration and economic courts of the members of the Commonwealth, Moscow, March 6, 1998 (The 1998 Moscow Agreement[143]), entered into force[144] in four countries: Azerbaijan, Kazakhstan, Kyrgyzstan and Tajikistan;

(3) The Convention on Legal Assistance and Legal Relations in Matters of Civil, Family and Criminal Law (The Minsk Convention[145]), 22 January, 1993 entered into force[146] in all twelve member countries of the Commonwealth of Independent States; Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine;

(4) The Convention on Legal Assistance and Legal Relations in Matters of Civil, Family and Criminal Law (The Kishinev Convention[147]) Kishinev, October 7, 2002 entered into force in six countries: Belarus, Azerbaijan, Kazakhstan, Kyrgyzstan, Armenia and Tajikistan.[148]

The above-listed four conventions represent attempts and measures to harmonize recognition and enforcement of judgments of the competent courts in the region of the Commonwealth of Independent States. However, the 1998 Moscow Agreement was not a popular legal document since it had entered into force in only four countries. The main reason why, for instance, Belarus had not ratified the 1998 Moscow Agreement has been described by a Senior Expert of Legislation and International Relations Division of the Highest Economic Court of Belarus, Olga Moskalyuk. [149] She states that the 1998 Moscow Agreement had a

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[143] Soglashenie o poryadke vzaimnogo ispolneniya reshenii arbitrazhnyh, hozyaistvennih y economicheskih sudov na territoriyah gosudarstv-uchastnkiov Sodruzhestva, Moskva, 6 Marta, 1998 [The Agreement on Mutual Enforcement of the Decisions by Arbitration and Economic Courts of the Members of the Commonwealth, Mar. 6, 1998], the text of the Agreement available in its original language only (Russian) at http://www.minjust.kz:81/doc/show/id/1566/ [hereinafter The 1998 Moscow Agreement]. Translations from Russian are provided by the author unless otherwise noted.

[144] List of countries in which the Agreement entered in force is given at http://www.minjust.kz:81/doc/show/id/1566/

[145] The Minsk Convention, supra note 25.

[146] The list of countries and the dates when The Minsk Convention entered into force is given at: http://www.minjust21.ru/konventsiya_1993/page/2

[147] The Kishinev Convention, supra note 26.

[148] The status of the Kishinev convention is available in Russian at http://www.minjust.kz:81/doc/show/id/1733/

[149] Olga Moskalyuk, Sudebnaya praktika: Nekotorye voprosy primeneniya deistvuyushih na prostranstve Sodruzhestva Nezavisimih Gosudarstv mezhdunarodnih dogovorov Respubliki Belarus, svyazannih s deyatel'nost'yu hozyaistvennih sudov [Some issues of application of international agreements related to the actions of the economic courts in the region of the Commonwealth of Independent States], http://www.busel.org/texts/cat5kh/id5xwdyef.htm

critical provision on "unobjectionable" debiting of a debtor's account in an 'enforcing state' based on the rendered judgment in a Contracting state. Such provision would contradict the interests of the state due to certain legislative limitations of such actions.[150] The author of the present work can only speculate that the same reasoning could possibly answer questions as to the unpopularity of the 1998 Moscow Agreement among other members of the Commonwealth. The 1998 Moscow Agreement does not contain any jurisdictional grounds for bringing a suit in the courts of a Contracting State by a national (resident) of another Contracting state. This Convention mainly deals with mechanisms and procedures of enforcement of judgments rendered by a court of one Contracting state by a court of another Contracting state. The core of the 1998 Moscow Agreement is 'undisputable enforcement' of judgments rendered by any courts of the Contracting state. Moreover, this Agreement also provides detailed procedural steps for automatic and unobjectionable debiting of the debtors' accounts held in a bank of any Contracting state. However, Article 1 of the 1998 Moscow Agreement provides that in the event the present Agreement and the 1992 Kiev Agreement do not regulate certain cases (events) the Minsk Convention must apply.

In February 2007 The Economic Court of the Commonwealth of Independent States[151] rendered a Decision, № 01-1/2-06 (the Decision of the CIS Economic Court), on interpretation of application of the 1992 Kiev Agreement, the Minsk Convention, and the Kishinev Convention in respect to what treaty provisions must apply in the event of existence of overlapping provisions.[152] The request had been made by the Highest Economic Court of Tajikistan. [153] The summary of the Decision of the CIS Economic Court is that the 1992 Kiev Agreement has special norms as compared to the Minsk and Kishinev Conventions and under the principle of "lex speciales derogate lex generales," "the specific law must prevail over the general."[154] It is important to note that the request had been made only in regard to certain provisions such

[150] *Id.*
[151] The Economic Court of the Commonwealth of Independent States is a competent body to interpret the provisions of agreements and other legal acts of the Commonwealth and its institutions, http://sudsng.org/competence/sng/
[152] Reshenie Ekonomicheskogo Suda Sodruzhestva Nezavisimih Gosudarstv ot 21 Fevralya 2007 № 01-1/2-06 [The Decision of the Economic Court of the Commonwealth of Independent States, Feb.21, 2007, #01-2/2-06], http://lawrussia.ru/texts/legal_498/doc498a996x659.htm [hereinafter the Decision of the Economic Court], see annotation to the Decision of the Economic Court available at the website of the Economic Court: http://sudsng.org/database/annot/annot2007/?retType=submitForm#1
[153] *Id.*
[154] *Id.*

as "communication procedures" between competent courts, justice bodies in the course of legal assistance for civil matters, "language of the documents" and "recognition and enforcement of judgments on economic disputes."[155] Also, the Court, in the analytical part of the Decision in respect to recognition and enforcement, determined that all these treaties deal with significantly different mechanisms of recognition and enforcement of judgments.[156]

Taking into consideration the fact that the Minsk Convention has entered into force in all twelve members of the Commonwealth of Independent States, the 1992 Kiev Agreement has entered in force in ten countries of the Commonwealth and has specific 'coverage' and considering that the 2002 Kishinev Convention is the most recent and comprehensive agreement, the focus of this work will be based on these three legal sources: The 1992 Kiev Agreement, the Minsk and the Kishinev Conventions.

II. *The 1992 Kiev Agreement, the Minsk Convention and the 2002 Kishinev Convention*

A. Scope

The 1992 Kiev Agreement is the shortest agreement in the group and has only thirteen articles. [157] The Scope of the Agreement is limited. The Agreement governs resolution of disputes arising from the contractual and other civil relations between economic entities and their relationships with governmental and other bodies.[158] It also governs enforcement of judgments. [159]

Economic entities are defined as enterprises, their associations, entities of any legal form and sole entrepreneurs formed under the laws of a contracting state.[160]

[155] *Id.*
[156] *Id.*
[157] The 1992 Kiev agreement, supra note 141.
[158] *Id*. art.1.
[159] *Id.* art.1.
[160] *Id.* art.2

The principle of 'national treatment' of economic entities is embodied in Article 3 of the 1992 Kiev Agreement.[161] Article 3 clearly states that the economic entities of one Contracting state enjoy the legal and judicial protection of their rights and legitimate interests equal to the same protection of the national economic entities of any other Contracting state.[162] The economic entities are entitled in the territory of any Contracting State without any encumbrance to bring any legal actions in the arbitration (economic) courts, arbitration tribunals and other dispute resolution bodies that are authorized to resolution of disputes.[163] The economic entities are entitled to participate in the courts, bring any legal actions, and enjoy other procedural rights. [164]

As to the 1993 Minsk Convention and the 2002 Kishinev Convention, the scope of these two Conventions is certainly broader than the 1992 Kiev Agreement.[165] The Minsk and Kishinev Conventions are the conventions on legal assistance and legal relations in the matters of civil, family, and criminal law while the 1992 Kiev Agreement is an agreement on dispute resolution related to economic activity. Therefore, the scope of the Minsk and Kishinev conventions is very general and targets a very broad range of matters. [166]

The two conventions (The 1993 Minsk Convention and 2002 Kishinev Convention) start with a principle of 'national treatment' embodied in the preamble and Article 1 of both Conventions. [167] The difference between the "national treatment" clause of the 1992 Kiev Agreement and those two conventions is that the latter extend the national treatment clause to individuals while the 1992 Kiev Agreement deals only with economic entities and sole entrepreneurs. [168] It is worth noting that the 1993 Minsk Convention explicitly provides that it *applies to the legal entities formed under the laws of the Contracting state* while the 2002 Kishinev Convention only states that *it applies to legal entities*. [169] This change in a more recent convention

[161] *Id.* art.3
[162] *Id*. art.3
[163] *Id.* art.3
[164] *Id.* art.3
[165] The 1993 Minsk Convention, supra note 25, art.1, art.6; The 2002 Kishinev Convention, supra note 26, art.1, 6
[166] The 1993 Minsk Convention, supra note 25, art.1, art.6; The 2002 Kishinev Convention, supra note 26, art.1, 6.
[167] The 1993 Minsk Convention, supra note 25, art.1; The 2002 Kishinev Convention, supra note 26, art.1.
[168] *Id.* art.1; The 1992 Kiev agreement, supra note 141, art. 1,2.
[169] The 1993 Minsk Convention, supra note 25, art.1 (3); The 2002 Kishinev Convention, supra note 26, art.1(4)

might well be an effort to expand the application to the "resident entities" that were not formed under the laws of a certain Contracting state.

The goal of the Conventions is similarly reflected in Article 4 of the Conventions. [170] It states that the justice agencies of the Contracting states provide legal assistance on civil, family, and criminal matters. [171]

However, the broad scope of the 1993 Minsk and 2002 Kishinev Conventions in regard to legal assistance in civil, family, and criminal matters cannot be examined without the scope of legal assistance provided in article 6 of both Conventions. Considering that the scope of legal assistance in the 2002 Kishinev convention is much broader than the 1993 Minsk convention, the language of Article 6 of both conventions is as follows:

Article 6 of the 1993 Minsk Convention[172]:

"The Contracting Parties provide legal assistance by performing procedural and other actions, envisaged by the laws of the requesting Contracting Party, in particular: drafting and sending documents, conducting searches, seizures, … recognition and enforcement of judgments on civil matters, verdicts in parts of a civil claim, writs of executions, serving documents."

Article 6 of the 2002 Kishinev Convention understandably has a longer list in reference to the scope of such legal assistance and with a greater specificity: "The Contracting Parties provide mutual legal assistance by performing procedural and other actions, envisaged by the laws of the requesting Contracting Party, in particular: drafting, sending and serving documents to a addressee, conducting inspections, searches, seizures, … searches of property and monetary funds of the civil defendants for the purposes of enforcement of judgments on civil, commercial, and other economic disputes, recognition and enforcement of enforcement inscriptions, judgments on civil and criminal matters."[173]

[170] The 1993 Minsk Convention, supra note 25, art.4.; The 2002 Kishinev Convention, supra note 26, art.4.

[171] The 1993 Minsk Convention, supra note 25, art.4(1); The 2002 Kishinev Convention, supra note 26, art.4 (1).

[172] The 1993 Minsk Convention, supra note 25, art.6.

[173] The 2002 Kishinev Convention, supra note 26, art.6.

The parties to the 1993 Minsk Convention had nine years for testing the Convention and that is why the most recent Convention (The 2002 Kishinev Convention) is more comprehensive and detailed compared to its predecessor. The 2002 Kishinev Convention provides that for the Contracting states to the 2002 Kishinev Convention the 1993 Minsk Convention will be terminated and therefore does not apply. [174] However, for the Contracting states in which the 2002 Kishinev Convention has not entered into force, the 1993 Minsk Convention will continue to apply. [175]

Regardless of the form of expression of scope, all three regional agreements are designed to resolve issues of recognition and enforcement of judgments.

The 1992 Kiev Agreement, as it was correctly described by the Economic Court of the Commonwealth of Independent States, has very narrow and specific subject matter, which is resolution of the disputes between economic entities, including individuals with the legal status of a sole entrepreneur.

The critical and distinguishing feature of the 1992 Kiev Agreement is that its scope governs disputes that derive from contractual and other civil legal relationships of the parties. The concept of "contractual relationships" is universal especially in the civil zone of the Post-Soviet countries. Contractual relationships are premised on the existence of a contract regardless of its form and can mean any relationships between the parties that are premised on the equality of the parties, in other words, any civil relationships unless there is an exercise of public function when one of the parties exercises the presupposed or delegated state function.

However, the detailed comparison of provisions on jurisdiction, recognition, and enforcement shows that these provisions duplicate each other in the 1992 Kiev Agreement, the Minsk Convention and the Kishinev Convention to the certain extent.

B. Jurisdiction

[174] The 2002 Kishinev Convention, supra note 26, art.120 (2,3).
[175] *Id.*

The 1992 Kiev Convention has eight jurisdictional grounds[176], including jurisdiction based on a written agreement on choice of court which will be discussed in a greater detail after an overview of other jurisdictional grounds. A competent court of a Contracting party can (is entitled to) exercise jurisdiction over the dispute under the following conditions[177]:

(1) A defendant permanently is domiciled or resides in that Contracting state on the day when a suit is brought; [178]

A suit can also be brought by a plaintiff's choice based on any defendant's resident or domiciled state in the event of existence of few defendants to the case. [179]

(2) Trade, industrial and other economic activity of an enterprise (its branches) is conducted in that Contracting state.[180]

(3) The obligations are performed or have to be performed fully or partially under a contract which is a subject-matter of the dispute and performance of such contractual obligations is on the territory of that Contracting state.[181]

(4) An act or other event that gave rise to a cause of action for compensation of damages took place in the territory of that Contracting state.[182]

(5) A plaintiff with a claim on protection of business reputation is resident in that Contracting state.[183]

(6) A counterparty-supplier, a contractor or service provider (service performer) are located in that Contracting state and the dispute involves conclusion, amendment, or termination of the contract. [184]

(7) Disputes over the ownership rights and other rights *in rem* on real property must exclusively belong to the state where a real property is located. [185]

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[176] The 1992 Kiev agreement, supra note 141, art 4(1,2).
[177] *Id.*
[178] *Id*. art 4(1)
[179] *Id*. art 4(1)
[180] *Id*. art 4(1)
[181] *Id*. art 4(1)
[182] *Id*. art 4(1)
[183] *Id*. art 4(1)
[184] *Id*. art 4(1)
[185] *Id.* art 4(3).

This list of jurisdictional grounds is quite straightforward. The 1993 Minsk Convention and 2002 Kishinev Convention have almost the same jurisdictional grounds. [186] However, under close examination, there is a little difference between the 1992 Kiev Agreement on the one hand, and the 1993 Minsk Convention and the 2002 Kishinev Convention on the other hand. In particular, the 1993 Minsk Convention and 2002 Kishinev Convention have an additional jurisdictional ground for bringing a lawsuit against legal entities and the basis for asserting jurisdiction will be a place where a legal entity is governed or a legal entity's branch or representative office is located. [187] While the 1992 Kiev agreement in respect to the legal entities generally asserts that basis will be a place of residence of a defendant or where trade, industrial activity of an enterprise (or of its branch) is conducted. [188]

Also, the 1993 Minsk and the 2002 Kishinev Conventions have another additional basis for jurisdiction of a court of a Contracting State which is based on the claims to carriers arising from the agreements on carriage of goods, passengers, and luggage. [189] In this type of case, the claims must be brought at the place where the transportation organization is governed. [190]

Taking into consideration the "legal assistance" nature of the Conventions, there are numerous grounds for jurisdiction over different types of disputes (not necessarily of a contractual and commercial nature) in the 1993 Minsk and the 2002 Kishinev Conventions.[191] These disputes include recognition of restricted (limited) legal capability or full incapability, declaring a person to be missing or deceased, personal and property matters of the spouses, divorce matters, invalidating marriages, child support and guardianship matters, extra contractual indemnification for delicts (torts), inheritance matters and overlapping jurisdiction in respect of the same defendants in the criminal jurisdiction.[192] It is also stipulated

[186] The 1993 Minsk Convention, supra note 25, art.20, The 2002 Kishinev Convention, supra note 26, art.22.
[187] *Id.*
[188] The 1992 Kiev agreement, supra note 141, art. 4(1).
[189] The 1993 Minsk Convention, supra note 25, art. 20 (3), The 2002 Kishinev Convention, supra note 26, art.22 (3).
[190] *Id.*
[191] The 1993 Minsk Convention, supra note 25, art.20, art.21, art.24 (1,3,4), art.25 (1), art.27 (6), art. 29, art.30, art.32, art.34, art. 42, art.48, art.77., The 2002 Kishinev Convention, supra note 26, art.22, art.23, art.27, art.28 (1,2), art.31 (6), art.32, art.33, art.35, art.36, art.45, art.51.
[192] *Id*.

that the jurisdictional grounds established by the Conventions for the matters described in the previous sentence must not be affected by a written agreement on choice of court. [193]

However, of particular interest to the analysis here is a written agreement on choice of court which exists in all three documents: the1992 Kiev Agreement, the 1993 Minsk and 2002 Kishinev Conventions. All these three international legal sources have the almost identical separate provisions on jurisdiction based on court of choice agreement. The difference will be shown below.

In the 1992 Kiev Agreement, article 4(2) states the following:

"The competent courts of the Contracting states shall adjudicate also other cases when written agreement on choice of court exists. Existence of such an agreement must terminate proceedings upon a statement made by a defendant if such request has been made before a judgment over that dispute is rendered.[194]

To compare, Article 21 of the 1993 Minsk convention provides this language:

"The courts of the Contracting states may adjudicate also other cases when there is a written agreement on choice of court… Existence of such an agreement must terminate proceedings upon a statement made by a defendant."[195]

Finally, Article 23 of the 2002 Kishinev Convention states this:

"The courts of the Contracting states may adjudicate also other cases when there is a written agreement on choice of court concluded before main adjudicating proceedings are finalized […] Existence of such an agreement must terminate proceedings upon a statement made by a defendant."[196]

All three documents allow courts of a Contracting state to exercise jurisdiction in the event of the existence of a written agreement between the disputing parties on choice of court. However, the difference between the language as "shall adjudicate" and "may adjudicate" is still in place. The two latter documents do not further provide for what are the grounds for a court's discretion to hear a case or to refuse to hear a

[193] The 1993 Minsk Convention, supra note 25, art. 21 (1), The 2002 Kishinev Convention, supra note 26, art.23 (1).
[194] The 1992 Kiev agreement, supra note 141, art. 4(2).
[195] The 1993 Minsk Convention, supra note 25, art. 21.
[196] The 2002 Kishinev Convention, supra note 26 art.23.

case under the choice of court agreement. Although having an exclusive choice of court agreement will not tacitly guarantee that the designated court will hear the case because nothing in the latter Conventions suggests that the designated courts must take jurisdiction over the case. Unfortunately the author has not been able to identify the considerations of the drafters for adopting this language since no source was found for that purpose. However, the author can only suggest that there might be an economic rationale for this absence of "binding language" which imposes no involuntary burden on the courts of the Contracting states.

It is worth emphasizing again that the 'binding language' is present in the 1992 Kiev Agreement which has entered into force[197] in ten countries[198] out of the twelve members of the Commonwealth of Independent States. Utilization of the 1992 Kiev Agreement must serve a better purpose for asserting 'mandatory' jurisdiction based on the written choice of court agreement since 1992 Kiev Agreement has mandatory language, entered into force in the same region (except for two countries) and its scope specifically covers the adjudication of disputes arising from the contractual and other civil relationships between the economic entities of the Contracting states. [199]

The provision that allows termination of proceedings based on a defendant's statement made before judgment is rendered demonstrates that honoring the autonomy of the parties extends beyond the written agreement on choice of court. That provision implicitly states the following scenario: a plaintiff can exercise its autonomy by bringing an action in the court not designated by the agreement. A defendant is the party that makes the critical determination as to whether to stay in the 'non-mandatory' forum or to 'terminate' the plaintiff's 'unrestricted' will to file a lawsuit in a court not-chosen by making a statement that the dispute shall be removed to a court chosen by a written agreement. Therefore, it can be concluded that the written

[197] The list of the countries in which the Agreement entered into force was given in the Decision of the Economic Court of the Commonwealth of Independent States, February 21, 2007 #01-1/2-06, see annotation of the Decision available at: http://sudsng.org/database/annot/annot2007/?retType=submitForm#1

[198] Only two countries have not 'validated' the 1992 Kiev Agreement: Moldova and Georgia. *Id.*

[199] The 1992 Kiev agreement, supra note 141, the list of the countries in which the Agreement entered into force was given in the Decision of the Economic Court of the Commonwealth of Independent States, February 21, 2007 #01-1/2-06, see annotation of the Decision available at: http://sudsng.org/database/annot/annot2007/?retType=submitForm#1 .

choice of court agreement under this Convention can be either exclusive or permissive depending on the choice of the disputing parties. The exclusive and permissive nature of the written choice of court agreement contained implicitly in the article 4(2) of the 1992 Kiev Agreement can be demonstrated in the next hypothetical.

Assume that there is a service contract between a company incorporated in Kazakhstan and a company incorporated in Russia. The agreement contains a choice of court agreement that designates the Specialized Interdistrict Economic Court of Almaty City[200] to resolve disputes arising from the contract. Despite the court of choice agreement, the Russian company files a lawsuit in the Arbitration Court of Moscow City, which is a state court for adjudicating disputes between legal entities. The Arbitration Court of Moscow City can be a competent court for adjudicating this dispute under general jurisdiction rules based on plaintiff's right to bring a lawsuit in that Court on the premise that a defendant has a branch office or the property in Moscow. So, before a judgment is rendered, the defendant, which is a Kazakhstani company can decide 'to stay' in the non-designated court (Arbitration Court of Moscow City) or to remove the case to the designated court by making a statement in the Arbitration Court of Moscow City that there is a choice of court agreement between the parties, the dispute must be adjudicated in a designated forum, and defendant intends to explore that choice of court agreement. In the event such a statement is made by the defendant, the proceeding in the non-designated court must be terminated by that Court unless the exclusive statutory jurisdiction of the Arbitration Court of Moscow City has not been affected. Since Russia and Kazakhstan are both the contracting parties to the 1992 Kiev Agreement, the proceedings have to be terminated in the Arbitration Court of Moscow City and a plaintiff's logical next step will be bringing a case in the Specialized Interdistrict Economic Court of Almaty City.

However, it is worth mentioning that the Arbitration Procedural Code of the Russian Federation (Article 148: 1(5)) allows also the termination of such proceedings in the event a statement has been made by a

[200] Specialized Interdistrict Economic Courts are the courts in Kazakhstan which have jurisdiction over the civil disputes between legal entities, sole entrepreneurs and corporate claims. Article 30 (1) of the Civil Procedural Code of Kazakhstan, http://www.minjust.kz:81/doc/show/id/276/

defendant in regard to a choice of court agreement.[201] Therefore, the defendant will have two authoritative sources to remove the case from the Arbitration Court of Moscow City.

Article 4 of the 1992 Kiev Agreement also has provisions stating that written agreement of the parties on choice of court cannot also affect the exclusive jurisdiction of a court of a Contracting State in two events: (1) a dispute over ownership title on real estate 'belongs' exclusively to the Court of a Contracting state in which territory the real estate is located and (2) disputes over claiming invalidity of the governments' and other agencies' acts in full or in part that have no legislative nature can exclusively be brought in a court of a Contracting state where that issuing agency is located. It shall also include claims on compensation of damages incurred as a result of such acts or as a result of improper fulfillment of obligations by such bodies owed to the economic entities. [202]

Counter-claims and claims on offset deriving from the same legal relations as in the initiating suit must be adjudicated in the same court where the first suit is being resolved. [203]

C. Recognition and Enforcement

Recognition and enforcement provisions of the Kiev Agreement, 1993 Minsk Convention and 2002 Kishinev Convention have few identical provisions; however, it is worth closely considering what are the differences and similarities between these legal documents.

General principles and categories of judgments subject to recognition and enforcement

The 1992 Kiev Agreement, as can be concluded from the preceding discussion, differs from the conventions. Article 7 of the 1992 Kiev Agreement provides that the CIS member states mutually recognize and enforce judgments of the competent courts.[204] The judgments rendered by the competent

[201] Article 148 (1)(5) of the Arbitration Procedural Code of the Russian Federation, available in original language (Russian) at http://base.spinform.ru/show_doc.fwx?regnom=1405&page=4
[202] The 1992 Kiev agreement, supra note 141, art. 4(3)
[203] *Id.* art.4(5)
[204] The 1992 Kiev agreement, supra note 141, art.7.

courts of one Contracting state shall be enforced on the territory of the other member states of the Commonwealth of Independent States.[205]

The 1993 Minsk Convention and the 2002 Kishinev Convention have almost identical general principles for recognition and enforcement. There are two similar provisions in both conventions:

(1) Judgments of the Contracting states on civil and family matters, including judicial settlements and notary acts in respect to monetary obligations, shall be recognized and enforced in the other Contracting states; [206]

(2) Judgments in criminal matters in respect to compensation of damages shall be recognized and enforced in the other Contracting states. [207]

However, the Kishinev Convention went further and added to the second part that judgment in criminal matters in respect to levying of fines and confiscation shall also be recognized and enforced.[208] It is worth emphasizing that the Kishinev Convention has a third category of judgments that also must be recognized and enforced and that is *judgments (decisions) on arrest of the property, including monetary funds in bank accounts*. [209] This third category is in regard to preliminary injunctions granted for the purposes of securing relief.[210]

Listing the categories of the judgments subject to recognition and refusal limits recognition and enforcement to a certain class of judgments. However, the enumerated categories are quite broad and general and should not bar <u>any</u> 'civil' judgment including commercial from recognition and enforcement.

From the author's point of view, one of the valuable norms is the third category of the decisions in the Kishinev convention, which is an injunction taken by the court to ensure that the assets of the defaulting party will not be wasted until the dispute between the parties is finally resolved. However, this norm puts an additional burden on the requested state to take additional actions to enforce such measures while the

[205] *Id.*
[206] 1993 Minsk Convention, supra note 25, art. 51, The 2002 Kishinev Convention, supra note 26, art.54 (1).
[207] *Id*.
[208] The 2002 Kishinev Convention, supra note 26 art.54 (1).
[209] *Id.*
[210] *Id.*

final judgment has not yet been rendered, and nothing suggests in advance what will be the resulting judgment. Nevertheless, one can agree that enforcing such measures will make a significant contribution to the efficient enforcement of the final judgments and make enforcement worthier for the party seeking such enforcement.

Documents to be produced for the request to recognize and enforce

Enforcement shall be made on the basis of a petition filed by an interested party and such petition shall be accompanied by the judgment or its copy[211] (properly notarized copy of the judgment[212]), an official document confirming that the judgment entered into force, unless otherwise is not apparent in the text of the judgment[213], proof of proper notice to the adversary party about the proceedings[214], writ of execution[215], a document confirming partial enforcement at time of the request[216], and *a document confirming agreement of the parties in respect to cases with a forum selection clause*[217].

Refusal of recognition and enforcement

Under the Kiev Agreement, Article 9 sets forth grounds for refusal to enforce. Enforcement may be denied only in the events that the party against whom the enforcement is sought files a petition against enforcement and presents evidence that[218]:

a) A requesting state member of the CIS had rendered a judgment earlier on the same dispute and the same cause of action between the same parties;[219]

b) a recognized judgment of a third state member or non-member state of the CIS rendered on the same subject matter between the same parties and on the same cause of action exists; [220]

[211] 1993 Minsk Convention, supra note 25, art. 53(2), The 2002 Kishinev Convention, supra note 26, art.56 (2).
[212] The 1992 Kiev agreement, supra note 141, art.8.
[213] *Id.* art.8.,The 1993 Minsk Convention, supra note 25, art. 53(2), The 2002 Kishinev Convention, supra note 26, art.56 (2).
[214] *Id*.
[215] The 1992 Kiev agreement, supra note 141, art.8.
[216] 1993 Minsk Convention, supra note 25, art. 53(2), The 2002 Kishinev Convention, supra note 26, art.56 (2).
[217] *Id.*
[218] The 1992 Kiev agreement, supra note 141, art.9.
[219] *Id.*
[220] *Id*.

c) a dispute had been resolved by the incompetent court under the 1992 Kiev Agreement provisions; [221]

d) an adversary party has not been notified about the proceedings;[222]

e) a three-year limitation period to submit judgment for enforcement has expired.[223]

These enumerated grounds for refusal to enforce can only be invoked if the petition to deny enforcement has been filed by the party against whom the relief is sought. That means that the initiating step for considerations of the court as to whether to refuse or grant enforcement shall come from the interested party, which is obviously the party who lost the dispute. The wording "may be denied", imposes no obligation on the requested court to deny even if one of the requirements are satisfied.

However, for the application of the Minsk and Kishinev conventions, there does not have to be a petition by the party against whom the recognition and enforcement is sought.[224] There are six grounds for refusal of recognition and enforcement under the Minsk Convention and eight grounds under the Kishinev Convention. [225]

Recognition and enforcement may be denied under the Minsk Convention in the following events:

(1) Under the laws of the Contracting state where judgment had been rendered, the judgment does not have effect and is not enforceable except for cases when judgment shall be enforced before it has such effect;[226]

(2) The defendant had not participated in the proceedings due to the fact that he or his representative was not timely and properly served with notice;[227]

[221] *Id*.
[222] *Id*.
[223] *Id*.
[224] The 1993 Minsk Convention, supra note 25, art. 54, 55, The 2002 Kishinev Convention, supra note 26, art.56.
[225] The 1993 Minsk Convention, supra note 25, art. 55, The 2002 Kishinev Convention, supra note 26, art.59.
[226] The 1993 Minsk Convention, supra note 25, art. 55.
[227] *Id.*

(3) A court of the requested state had earlier rendered a judgment on the dispute between the same parties on the same subject matter and on the same causes of action or a recognized judgment of a third state exists, or the proceedings on this case have been earlier initiated in the requested state;[228]

(4) The courts of the requested state have exclusive jurisdiction over the dispute under the provisions of this Convention or under the domestic laws of the requested state;[229]

(5) The document confirming a choice of court agreement is lacking;[230]

(6) The limitation period for enforcement actions determined by the laws of the requested state has expired. [231]

In addition to this list of the grounds for refusal of recognition and enforcement, The Kishinev Convention has two more bases for refusal:

(7) The judgment has been rendered with violation of the provisions of the Kishinev convention; [232]

(8) Recognition and enforcement of the judgment contradicts the public policy of the requested state.[233]

The Kishinev Convention further states in Article 54(2) that recognition and enforcement of the listed categories of the judgments shall be governed by the law of the requested state.[234]

All these three treaties do not require having only a judgment rendered on the basis of a choice of court agreement. Any enforceable civil judgment (with exception listed above) from the Contracting states can be submitted for recognition and enforcement. Moreover, if the judgment has been rendered by a court designated in a choice of court agreement, then a court of the requested state must check for a 'presence' of the document confirming a forum selection clause. However, the grounds for refusal of recognition and enforcement under the aforesaid Conventions do not suggest that the court addressed

[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] The 2002 Kishinev Convention, supra note 26, art.59.
[233] *Id.*
[234] The 2002 Kishinev Convention, supra note 26, art.54(2).

must examine the exclusiveness or any other characteristics of the choice of court agreement including capacity of the parties to conclude such an agreement, matters of validity of the choice of court agreement. The only instance when jurisdiction of the court of origin can be challenged by the court addressed is when the courts of the requested states have exclusive jurisdiction over the dispute under the Conventions' provisions or the domestic laws of the requested state.

Under the 1992 Kiev Agreement, Article 9 (c) provides that the enforcement may be denied if the dispute is resolved by the incompetent court. To determine the proper competence of the court of origin brings an analysis of the jurisdictional grounds established in Article 4 of the 1992 Kiev Agreement. The list of jurisdictional grounds is quite straightforward and should not cause unreasonable challenges to the enforceability of the judgment.

It is also worth emphasizing that under the 1992 Kiev Agreement, the 1993 Minsk and 2002 Kishinev Conventions, the Courts of the requested state may refuse recognition and enforcement if a limitation period for enforcement actions has expired under the domestic laws of the requested state. This ground is not given in the Hague Convention. From the author's point of view, limiting the enforcement to a period in which all domestic litigators are obligated to operate is a very fair standard, because it does not give an unfair advantage to the non-domestic judgments and perfectly corresponds with the principle of national treatment embodied in the 1993 Minsk Convention and 2002 Kishinev Convention.

I. The Hague Convention and the Commonwealth of Independent States

A. Do the CIS countries need the Choice of Court Convention?

One of the most obvious and significant benefits of the Hague Convention is its potential worldwide application in erasing boundaries for reaching assets of the defaulting parties through enabling to international recognition and enforcement of judgments.

As to regional agreements concluded by the members of the Commonwealth of Independent States, as was shown in the preceding discussion, the jurisdictional grounds for bringing an action in the domestic courts of the Contracting states are enumerated in a greater range and they deal mostly with scenarios when a forum selection clause does not exist.

It is self-evident that the Hague Convention will add significant value to the adjudicating disputes arising from the contracts with a forum selection clause. The scope of the Hague Convention is limited to certain categories of cases and the essential criterion for its application is existence of the choice of court agreement.

The 1992 Kiev Agreement, the 1993 Minsk Convention and the 2002 Kishinev Convention [collectively The CIS treaties] in fact do not have elaborated rules on jurisdiction, recognition and enforcement matters specifically targeted to a detailed application of choice of court agreement. In this author's point of view, it does not seem to be necessary here taking into consideration a numerous set of factors. First of all, the regional agreements have a broader range of subject-matter jurisdictions for civil matters including commercial matters. Second, the provisions of these legal sources establish the clear grounds for an adjudicator to resolve an issue of its competence over the dispute, in other words, grounds for exercising jurisdiction including jurisdiction based on a choice of court agreement are clearly defined. Third, the CIS treaties are not restricted to exclusive court jurisdiction in a forum selection clause, but allow disputing parties to exercise their autonomy even after a lawsuit is brought by deciding whether the parties should explore a forum selection clause or subject the dispute to the other available jurisdictional grounds.

The Hague Convention resolves many substantive questions while the CIS treaties leave these matters to national laws of a court where issue arises. In this respect, the CIS agreements have a broader discretion for the courts and broader availability of defenses. For example, as was discussed in preceding chapters, under the Hague Convention, recognition and enforcement may be refused on the 'substantive grounds' as invalidity of a choice of court agreement, a capacity of the parties to conclude such agreement, or amount of damages that do

not cover actual loss or harm suffered. The CIS countries do not specify and thus do not limit grounds for refusal of recognition and enforcement based on 'substantive' tests. That lack of substantive grounds can be both advantage and disadvantage at the same time depending on each side's perspective. Nevertheless, this broadness and flexibility of the CIS agreements is understandable from the regional character of the agreements and the 'close legal backgrounds' of the Contracting states and nothing should suggest that aforesaid should negate the importance of the Hague Convention.

The answer to the question as to whether the CIS countries need the Hague Convention is absolutely affirmative. But, from the author's point of view, the Hague Convention is not as meaningful for the "internal CIS" application as for the application outside of the Commonwealth to disputes with non-CIS countries.

No country signs an international treaty for altruistic considerations. The practical considerations for the members of the Commonwealth of the Independent States might well be as to who are the contracting members to the Hague Conventions? Are these Contracting members major trading partners? Will becoming parties to the Hague Convention contribute to the increase of investments from those Contracting members in the CIS states? What are the average litigation costs in a foreign forum for domestic businesses compared to the international arbitration? After answering this type of question, it might well be concluded that opening up its courts to the foreign litigants and validating an opportunity for seeking justice can only assist the economic development of a state. However, in any event, it is important to remember that legitimate notions of 'expectations of mutual benefits of the Contracting members' should not be frustrated when becoming a member of 'the Choice of Court Convention Club'.

B. Legal correlation between the Hague Convention and the CIS treaties

Assume that some members of the Commonwealth have ratified or acceded to the Hague Convention on Choice of Court Agreements. What will be the correlation between the regional agreements and the Hague Convention?

Under Article 30 (3) of the Vienna Convention on the Law of Treaties[235], when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended […] the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. Further, article 30 (4) (b) of the Vienna Convention on the Law of Treaties states that "When the parties to the later treaty do not include all the parties to the earlier one: as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations".[236]

The 2002 Kishinev Convention provides that for the Contracting states to the 2002 Kishinev Convention the 1993 Minsk Convention will be terminated and therefore does not apply. [237] However, for the Contracting states in which the 2002 Kishinev Convention has not entered into force, the 1993 Minsk Convention will continue to apply. [238]

Analysis of the certain fundamental rules of The Hague Convention and the CIS treaties demonstrate that contracting to the Choice of Court Convention does not create inconsistencies with the obligations of the CIS countries under the CIS treaties. In any event, Article 26 (1) of the Hague Convention 'generously' defines that the Choice of Court Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting states, whether concluded before or after the Hague Convention.[239]

Moreover, the important language of Article 26 of the Choice of Court Convention in respect to relationship with other international instruments for the CIS countries can be found in paragraph 3 of Article 26 of the Hague Convention[240]:

"This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying [the Hague Convention] would be inconsistent with the obligations of that Contracting State to any non-Contracting State".

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[235] http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
[236] *Id.*
[237] The 2002 Kishinev Convention, supra note 26, art.120 (2,3).
[238] *Id.*
[239] Choice of Court Convention, supra note 43, art. 26(1).
[240] *Id*. art 26(3)

Therefore if any of the CIS countries would become a Contracting state to the Hague Convention, the provisions of Article 26 of the Choice of Court Convention should guarantee to the other members of the CIS treaties non-application of the Hague Convention in order to pursue consistency with the previous undertakings.

As it was very precisely pointed The Hague Convention "may, over time, increasingly give international arbitration a run for its money, break the monopoly, and offer corporate counsel a wider variety of choices to resolve transnational disputes". [241]

CHAPTER 5. CONCLUSION

The drafters of the Hague Convention had done a tremendous work in bringing in coexistence the concepts from the different legal systems and giving reasonable incentives to join the Hague Convention. The opportunity to bring recognition and enforcement of a purely domestic judgment to a foreign country where a debtor holds its property is a very effective tool against the defaulting parties "escaping" in those countries. What makes the Hague Convention even more attractive is a possibility of seeking recognition and enforcement in multiple forums when dealing with sophisticated opponents which may well be multinational companies.

Commercial litigators should unarguably scrutinize their cases on possible rejections of the application of the Choice of Court Convention because a variety of tests must be passed to utilize the Hague Convention. A well-drafted choice of court agreement can make adjudication in a chosen court a reasonably achievable task, but however unawareness of the grounds for refusal to recognize and enforce under the Choice of Court Convention *in the context of the domestic laws of "recognizing and enforcing jurisdiction"* may easily lead to the "fatality" of the enforceability of a judgment.

It is important to emphasize again that the "pro-recognition" and "pro-enforcement" nature of the Hague Convention is balanced by discretion of the national courts to invoke the "refusal provisions", therefore the tenuous approach to the superficial simplicity of the Convention's application can easily throw the litigators over the bridge. However, the Hague Convention is a new era for international litigation and its future is in the

[241] Guy S. Lipe, Timothy J. Tyler, The Hague Convention on Choice of Court Agreements: creating room for choice in international cases, 33 Houston Journal of International Law 657, 662-663 (2010) (discussing the Hague Convention on Choice of Court Agreements).

hands of any judge of the national courts of a Contracting member state and therefore seminars and conferences at the global level with the first-hand consultations from the team of drafters can only contribute to the prospect of the Hague Convention.

The question of whether the Hague Convention "produces" value to the countries of the CIS has been resolved in favor of the Hague Convention *for the obvious want and need of recognition and enforcement "beyond the CIS' borders"*. The CIS treaties permit the national courts to exercise jurisdiction if a written agreement on choice of court exists. Unlike the Hague Convention the provisions of the 1993 Minsk Convention and 2002 Kishinev Convention do not provide explicitly that the chosen courts must take jurisdiction and resolve the case. However, the 1992 Kiev Agreement provides that the courts *shall* adjudicate cases when written agreement on choice of court exists and the 1992 Kiev Agreement's scope specifically covers the adjudication of disputes arising from the contractual and other civil relationships. The 1992 Kiev Agreement seems to be akin to the Hague Convention in terms of mandatory exercise of jurisdiction where a forum selection clause exists and considering the civil and commercial "scope" of the 1992 Kiev Agreement.

As to recognition and enforcement matters, all three CIS treaties do not limit recognition and enforcement to the judgments rendered on the basis of a choice of court agreement. Any enforceable civil judgment (with few exceptions described in Chapter 2) from the Contracting states can be submitted for recognition and enforcement. If the judgment has been rendered by a court designated in a choice of court agreement, then a court of the requested state must check for a "presence" of the document confirming a forum selection clause.

Considering that the approaches to the drafting of the Hague Convention and of the CIS treaties had been distinguishable since the Hague Convention has been premised on the existence of the choice of court agreement, the CIS treaties in fact do not have elaborated and detailed rules in terms of jurisdiction, recognition and enforcement for the purposes of the utilization of a forum selection clause. *Thus if predictability and greater certainty is desired to explore a forum selection clause in resolving a dispute even within the CIS* then the Hague Convention on Choice of Court Agreement seems to be potentially a more efficient tool for that specific purpose.

The author of this work strongly believes that despite the pragmatic aspects of the international legal norms, the law must serve for educative purpose as well. If the defaulting parties will be aware that there is a strong and solid mechanism for enforcement of judgments on a worldwide basis, would that party still run to a third country ‘to cloak’ its assets? The answer again will be: “It depends”. However, the world legal community at least is making best available efforts to discourage such runners and provide better certainty and clarity in recognition and enforcement of foreign judgments in local courts.