**(DRAFT) CONVENTION ON JURISDICTION AND THE MUTUAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS**

(Sarajevo Convention)

**EXPLANATORY REPORT**

**Preliminary observations**

The purpose of the present Convention is to improve the judicial cooperation in the field of civil and commercial law in the contracting States, by establishing uniform rules on the international jurisdiction of the courts, facilitating recognition and by introducing an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements.

The Convention takes into account the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Accession Conventions under the successive enlargements of the European Union[[1]](#footnote-1) (“Brussels Convention”) and the Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[[2]](#footnote-2) (“Brussels I Regulation”). The provisions of the mentioned instruments apply in all EU Member States (in Denmark by virtue of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 19 October 2005).

The Convention also takes into account the Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[[3]](#footnote-3) (“Lugano Convention”), concluded between the EU, Denmark, Iceland, Norway and Switzerland, which extends the principles laid down in the Brussels I Regulation to States members of the European Free Trade Association (EFTA)[[4]](#footnote-4).

**History of the proposal**

There is a common understanding that due to a common past and many mutual characteristics of the Western Balkan countries, in particular their legal traditions and actual legal basis, the judicial cooperation in civil and commercial matters among them could be implemented by the same legal regime and standards.

In 2008 the Republic of Slovenia, after consultations with Western Balkan countries, made an initiative within the EU to create a new regional convention. Such new convention would regulate certain issues of judicial cooperation in civil and commercial matters, in particular jurisdiction, recognition and enforcement of judgments, with a possible extension to service of documents and taking of evidence. The convention should be open also to other countries in the neighbourhood and the EU. This initiative was supported and the European Commission assured close examination of the said initiative.

On the Brdo process Conference of the Western Balkans, held on 15 April 2011 at Brdo pri Kranju, which focused on improving judicial cooperation in criminal and civil matters, the Republic of Slovenia re-presented its regional initiative from 2008. The initiative strives to enhance judicial cooperation in civil and commercial matters between the Western Balkan countries and EU Member States by encouraging Western Balkan countries to follow certain principles and contents of the acquis communautaire. In the conference conclusions the participants welcomed the regional initiative.

On the Ministerial Forum EU - Western Balkans, held at 3 and 4 October 2011 in Ohrid, the participants supported the work on the initiative, recognising it as a useful and perspective tool in judicial cooperation.

At the 3rd Annual Ministerial Conference, held on 29 and 30 November 2011 in Belgrade, the participants adopted the decision to established an expert team which should continue the activities regarding the realization of the objectives formulated by the Republic of Slovenia, based on the principles of the acquis communautaire of the European Union, for the purpose of establishing a regional multilateral instrument for jurisdiction, recognition and enforcement of judgments.

**Scope**

The Convention shall apply in civil and commercial matters, with the exception of the matters enumerated in Art. 1 (revenue, customs or administrative matters; status or legal capacity of natural persons, matrimonial property, wills and succession, bankruptcy proceedings, social security, arbitration). This means that, apart from maintenance issues, family law matters are excluded. The scope is the same as for the Lugano Convention. It is not, however, the same as for the Brussels I Regulation. On the level of the EU, the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations has as of 18 June 2011 superseded the Brussels I Regulation as far as maintenance issues are concerned.

**Jurisdiction**

General jurisdiction *–* The general rule on jurisdiction is determined on the basis of the domicile of the defendant (Art. 2). For the domicile of natural persons see below (“general provisions”, Art. 59). The domicile of companies and other legal persons is defined in Art. 60.

If the defendant is not domiciled in a contracting State, Art. 4 applies. Jurisdiction is then determined by the national law of the State of the court seised.

Special jurisdiction - In the case-groups described in Articles 5 to 7, the Convention allows the plaintiff, on his own choice, to bring his action in another contracting State than at the domicile of the defendant. Such special jurisdiction is provided for contracts; maintenance matters; tort, *delict* and *quasi-delict*; actions arising out of a crime; company branch offices (Art. 5) and in the cases described in Art. 6 and 7.

Protective jurisdiction *–* A separate and comprehensive set of rules applies for matters relating to insurance; consumer contracts; as well as for individual contracts of employment. The provisions on jurisdictions in matters relating to insurance in Articles 8 to 14 are modeled after the Brussels I Regulation. The “large risks” are defined in Directive 2009/138/EC[[5]](#footnote-5).

Jurisdiction over consumer contracts is regulated in Articles 15 to 17. The consumer is protected as the weaker party to a contract. The interpretation of “consumer” should follow the uniform concept used in the acquis communautaire. Therefore the consumer may be defined as a natural person who concludes a contract for a purpose which can be regarded as being outside his trade or profession (Art. 6 Rome I Regulation)[[6]](#footnote-6).

Provisions on jurisdiction over individual employment contracts (Articles 18 to 21) protect the employee as the weaker party to a contract.

Exclusive jurisdiction - For certain subject-matters which are determined in Art. 22, the jurisdiction provided for is exclusive, regardless of domicile. Examples for this are disputes on rights *in rem* in immovable property, on companies and on intellectual property rights.

Prorogation of jurisdiction– Prorogation may be performed through an express choice-of-court agreement or be implied. Art. 23 grants the parties the right to agree freely which court shall have jurisdiction over their dispute. Unless otherwise agreed, such jurisdiction shall be exclusive. The formal requirements for the prorogation clause are also determined in Art. 23.

Implicit prorogation is regulated in Art. 24. If a plaintiff brings action before a court that would otherwise not have jurisdiction under the Convention, that court will receive jurisdiction by the defendant´s entering an appearance before this court. Whether the defendant has entered an appearance in the proceedings will be determined by the domestic rules of the court seised.

Prorogation of jurisdiction is denied in cases of protective jurisdiction under Art. 13, 17 and 21 or where another court has exclusive jurisdiction by virtue of Art. 22 (Art. 23(5), Art. 24).

Lis pendens - Articles 27 et seq. on lis pendens and related actions aim to prevent parallel proceedings in matters involving the same cause of action and between the same parties by giving preference to the court first seised. The time at which a court shall be deemed to be seised is defined in a uniform manner in Art. 30.

**Recognition and enforcement**

Articles 32 to 56 determine a simplified regime for the mutual recognition and enforcement of judgments. For the declaration of enforceability of authentic instruments and court settlements see below (“authentic instruments and court settlements”).

**Judgment** - A legal definition of “judgment” is rendered in Art. 32 (“any judgment given by a court or tribunal of a contracting State, however called, including a decree, order, decision or writ of execution as well as the determination of costs or expenses by an officer of the court”). The application of Art. 32 is limited to the scope of the Convention as defined in Art. 1. Capable of recognition and enforcement are also judgments given in a contracting State by criminal courts or by administrative tribunals insofar they relate to civil or commercial matters.[[7]](#footnote-7)

**Recognition** – Art. 33(1) provides that a judgment given in a contracting State shall be recognized in the other contracting States without any special procedure being required (*principle of automatic recognition*).

If there is a dispute about the recognition of a judgment, any interested part may apply for a declaratory decision that the judgment be recognized (Art. 33(2)). In this case, recognition is the principal issue in the declaratory proceedings. As in the EU, such declaratoryproceedings may turn out a rare exception.

Recognition as an incidental issue is regulated in Art. 33(3).

The grounds for refusal of recognition are specified in Art. 34. These are: manifest contradiction to public policy in the contracting State in which recognition is sought (Art. 34(1)); infringement of the rights of a defendant in default of appearance (Art. 34(2)); irreconcilability with a judgment given in a dispute between the same parties in the contracting State in which recognition is sought (Art. 34(3)); irreconcilability with an earlier judgment given in another contracting State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfills the conditions necessary for its recognition in the contracting State addressed (Art. 34(4)).

A review as to jurisdiction of the court that had rendered the judgment is restricted so as to strengthen the principle of automatic recognition. Jurisdiction may only be reviewed under the narrow conditions laid down in Art. 35.

Review under Articles 34 and 35 is excluded by virtue of Art. 41 in the first stage of the recognition or enforcement proceedings. The review is only possible at the second stage of the proceedings, after the declaration of enforceability has been granted, on appeal of the party against whom enforcement is sought (Art. 45).

A foreign judgment may under no circumstances be reviewed as to its substance (Ar. 36).

A foreign judgment may on principle be recognized in another contracting State even before becoming res judicata. However, Art. 37 confers to the court of a State in which recognition is sought the right to stay the proceedings if an ordinary appeal against the judgment has been lodged in the country of origin.

Law applicable to the effects of a foreign judgment – The issue is not determined in the Convention. As under the EU law, recognition should have the effect of conferring on judgments the authority and effectiveness accorded to them in the contracting State in which they were given[[8]](#footnote-8).

**Enforcement** - Theenforcementof a judgment which has been given in a contracting State, in another contracting State requires that the judgment is already enforceable in the State of origin. The enforcement is subject to a declaration of enforceability given on the application of an interested party (Art. 38). The competent court or authority for receiving the application is designated in ANNEX II. For the procedure for making the application, the lex fori applies (Art. 40).

The judgment shall be declared enforceable immediately on completion of certain basic formalities (Art. 41). In particular, the applicant shall produce a copy of the judgment that is proven to be authentic (Art. 53) as well as a certificate in accordance with ANNEX V (Art. 54). At this first stage of proceedings, the court may not review the foreign judgment under the grounds for non-recognition laid down in Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application (Art. 41). In this first stage, the proceedings is thus not contradictory. The court or competent authority shall decide without delay on the application for declaration of enforceability. The decision on the application shall be brought to notice of the applicant (Art. 42(1)). The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party (Art. 42). By this, the first stage of proceedings is completed.

A review is possible in the second stage of proceedings (Articles 43 to 46). Namely, the decision of the court or competent authority on the application for a declaration of enforceability may be appealed against by either party (Art. 43(1)). In the practice, however, a decision rejecting the application will only be challenged by the applicant. On the other hand, only the party against whom enforcement is sought will have an interest in challenging the declaration of enforceability. The appeal is dealt with in adversary proceedings (Art. 43(3)). An appeal against the declaration of enforceability is to be lodged within one month of service thereof (Art. 43(5)).

The contracting States shall determine the court competent for the appeal which is to be indicated in ANNEX III. They are free to use the terminology of their national law (appeal, objection etc.).A contracting State may provide in the national law that the same court decides both on the application for recognition (or enforcement) and on the appeal on such decision. For example, the Macedonian Private International Law Act of 2007 provides for “prigovor” (objection) against the application for recognition, which is decided by the very court of first instance. The essential requirement remains for the contracting States that they provide a contradictory procedure for dealing with the appeal against the decision on the application for recognition (or enforcement).

During the time specified for an appeal and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought (Art. 47(3)).

The judgment given on the appeal may be contested only by the final appeal referred to in ANNEX IV (Art. 44) which applies only in exceptional cases.

The court with which an appeal is lodged under Article 43 or 44 shall make the decision without delay. It shall refuse or revoke a declaration of enforceability only on one of the grounds for non-recognition specified in Articles 34 and 35 (see above “recognition”).

Again, under no circumstances may the foreign judgment be reviewed as to its substance (Art. 45).

It has been mentioned before that a foreign judgment may on principle be recognized in another contracting State even before becoming res judicata. In the context of enforcement, Art. 46 largely, but not in full corresponds to Art. 37 (see above “recognition”). Namely, the court dealing with an appeal under Article 43 or 44 may, on the application of the party against whom enforcement is sought, stay the proceedings: a) if an ordinary appeal has been lodged against the judgment in the State of origin, or b) if the time for such an appeal has not yet expired; in that case, the court may specify the time-limit for lodging such an appeal. The court may also make enforcement conditional on the provision of a security (Art. 46).

For provisional or protective measures see Art. 47.

**Authentic instruments and court settlements**

Articles 57 and 58 extend the regime laid down for the enforcement of judgments to authentic instruments and court settlements. It must be emphasized that the latter are only susceptible to enforcement, and not to recognition. For Articles 57 and 58 to apply the instrument (or settlement) must be enforceable in the State of origin.

For the notion of “authentic instrument” , a legal definition can be found in the Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 on creating a European Enforcement Order for uncontested claims as follows:

*Art. 4 For the purposes of this Regulation, the following definition shall apply:*

*3. “authentic instrument”:*

*(a) a document which has been formally drawn up or registered as an authentic instrument, and the authenticity of which:*

*(i) relates to the signature and the content of the instrument; and*

*(ii) it has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates;*

*or*

*b) an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them;*

A similar interpretation is used in the context of Art. 57 of the Brussels I Regulation[[9]](#footnote-9). Practical examples for authentic instruments are enforceable notarial deeds, but also settlements concluded before conciliation bodies in competition law cases. Private settlements following mediation proceedings are not per se considered authentic instruments but must first be put into an official document.[[10]](#footnote-10)

A party applying for a declaration of enforceability shall produce a certificate issued by the competent authority of the contracting State in which the authentic instrument has been drawn up or registered. The certificate must be in the standard form described in ANNEX VI. As the case may be, the authority which issues such a certificate may even be a notary. The court seised shall proceed in accordance with Article 38 et seq. It shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the State of enforcement (Art. 57(1)).

With regard to court settlements similar rules apply, provided the settlement has been approved by a court in the course of proceedings and is enforceable in the State of origin (Art. 58).[[11]](#footnote-11) The certificate shall be in the standard form described in ANNEX V.

**General provisions**

The Convention gives an autonomous definition of domicile of a company or other legal person or association in Art. 60.

With regard to the domicile of natural persons, there is no such autonomous definition. Art. 59 refers the matter to the national law (domicile in the forum state is subject to the lex fori, whereas for the determination of domicile in another state the law of that other state shall apply).

**Relationship to other instruments**

Contracting States have concluded among them a number of bilateral agreements on legal assistance which contain rules on recognition and enforcement of judgments. The scope of these agreements is typically broader than that of the Convention and extends to matters of family law and succession. On the other hand, such agreements do not cover international jurisdiction.

This Convention shall as between the contracting States supersede bilateral agreements covering the same matter (Art. 64). Conventions superseded shall be enumerated in ANNEX VII.

In relation to matters to which this Convention does not apply the agreements referred to in Art. 64 shall continue to have effect. This will in particular apply for the recognition and enforcement of judgments in matters of divorce and succession as the most frequent cases in the practice.

As regards the relationship to other conventions which in relation to particular matters govern the recognition or enforcement of judgments, those are superseded by the provisions of Title III of the Convention. An exception is made in case the other convention is “more favourable” for the free circulation of judgments (Art. 66(3). Thus, the Convention shall not prevent the application of another convention which provides for a broader bases for recognition, or for simplified, more expeditious procedures on an application for recognition or recognition and enforcement. An example for such a more favourable regime is the Hague Convention on the international recovery of child support and other forms of family maintenance of 23 November 2007 which shall enter into force for Albania on 1 January 2013 and for Bosnia and Herzegovina on 1 February 2013.

**Final provisions**

The Convention shall be open for signature by States which are Members of CEFTA. It shall enter into force following ratification by the required number of States as determined in Art. 68.

After entering into force, the Convention shall be open for accession by any other Members of CEFTA, any Contracting Party to the Lugano Convention of 2007 or any other State wishing to accede (Art. 69). Members of CEFTA or Contracting Parties to the Lugano Convention may accede under the simplified regime provided in Art. 70.

All other States must fulfill the requirements of Art. 71. On principle, their accession requires the unanimous agreement of the Contracting Parties (Art. 71(3)). In the case that a Contracting Party has made an objection to the accession of a particular State, the Convention shall enter into force only in relations between the acceding State and the Contracting Parties which have not made any objections (Art. 71(4)).

**Protocols annexed to the Convention**

**1. Protocol 1 on certain questions of jurisdiction, procedure and enforcement**

**2. Protocol 2 on the uniform interpretation of the Convention and on the Standing Committee**

The Convention shall be applied and interpreted by the courts of the contracting States in due consideration of any relevant decisions rendered by the Court of Justice of the European Union on the Brussels I Regulation, the Lugano Convention as well as the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (“Brussels Convention”).

The Standing Committee which shall be set up in accordance with Art. 2 of Protocol 2 shall inter alia coordinate the efforts for uniform interpretation. It shall in regular intervals request information from the contracting States on the practice of the courts in those States with regard to the provisions of the Convention and promulgate such information among the contracting States.

**3. Protocol 3 on observing changes in the Brussels I Regulation**

The contracting Parties are aware that a Recast of the Brussels I Regulation has been adopted by the Council of the EU on 6 December 2012 which will start applying two years after its entry into force.

They undertake to harmonize the provisions of the Convention to the extent reasonable and possible with the revised version of the Regulation.

1. OJ L 299, 31.12.1972, p. 32. [↑](#footnote-ref-1)
2. OJ L 12, 16.1.2001, p.1. [↑](#footnote-ref-2)
3. OJ L 339, 21.12.2007, p.3. [↑](#footnote-ref-3)
4. For details of the Lugano Convention it can be referred to the Explanatory Report by Prof. Fausto Pocar (OJ C 319, 23.12. 2009, p. 1). [↑](#footnote-ref-4)
5. Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335, 17.12.2009, p.1. [↑](#footnote-ref-5)
6. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4.7.2008, p. 6. [↑](#footnote-ref-6)
7. See Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters by P. Jenard (OJ C 59, 5.3.1979, p. 3). [↑](#footnote-ref-7)
8. Court of Justice Case C-145/86 Horst Ludwig Martin Hoffmann v Adelheid Krieg para. 11; Case C-420/07 Meletis Apostolides v David Charles Orams et al. para. 66. [↑](#footnote-ref-8)
9. See Pocar Report para. 170, as well as Court of Justice Case C-260/97 Unibank v Christensen, para. 15. [↑](#footnote-ref-9)
10. See Magnus, Ulrich, Mankowski, Peter (-Vékás, Lajos), European Commentaries on Private International Law, Brussels I Regulation, 2nd ed., Sellier European Law Publishers (Munich 2012) Art. 57 Recitals 8 et seq. [↑](#footnote-ref-10)
11. For definition of court settlement see also Court of Justice Case C-414/92 Solo Kleinmotoren GmbH v Emilio Boch. [↑](#footnote-ref-11)