Title:

The indirect jurisdiction of the 2019 Hague Convention on recognition and enforcement of foreign judgments in civil or commercial matters – Is the “heart” of the Convention in the right place? (Wining paper)

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ABSTRACT

The new 2019 Hague Convention on recognition and enforcement of foreign judgments in civil or commercial matters (2019 Hague Convention) represents one of the most awaited international agreements in the legal field of private international law. The final result is far from the initial idea of "dual convention" that will cover both recognition and enforcement of foreign judgments and contain direct jurisdictional rules in civil or commercial matters. It has taken almost 30 years to reach the conclusion that full effectuation of this idea is unreachable in single instrument. However, fragmented parts of this idea have been instrumented in the Hague Conference on Private International Law (HCCH) and materialized as 2005 Hague Convention on Choice of Court Agreements and the most recently with the 2019 Hague Convention. This newest addition to the HCCH discarded the idea regarding the direct jurisdictional rules and opted to implement the indirect jurisdictional rules. The system created by the 2019 Hague Convention is rather very simple: if the judgment regarding civil or commercial matters is rendered in a country which satisfies the indirect jurisdictional filters provided in Article 5 and if the grounds for refusal of recognition in Article 7 are not met, then the judgment can be recognized and enforced in a requested country. However, foreign judgments can be recognized and enforced under national law or other international convention, but with consideration to the exclusive bases given in Article 6. In such way, the indirect jurisdictional rules are the linking point between the country of origin and the country of recognition. This article will analyze the indirect jurisdictional rules in the 2019 Hague Convention and will provide for the compatibility of its effectuation in Republic of North Macedonia (N. Macedonia) in context of the new national Private International Law Act.

Keywords: civil or commercial matters; Hague Convention on Recognition and Enforcement of Foreign Judgments; indirect jurisdiction; recognition and enforcement; Private International Law Act of Republic of North Macedonia.

1. The background of the adoption of the 2019 Hague Convention

Without a doubt, the most important universal organization whose purpose is "progressive unification of the rules of private international law"[1] is the Hague Conference on Private International Law(HCCH).[2] The HCCH currently consists of eight-five Members, eight-four are States and one is Regional Economic Integration Organization (the European Union). Moreover, there are seventy parties which are not Members of the HCCH, but have signed, ratified or acceded to one or more HCCH Conventions or are in the process of becoming a Member.[3] In its portfolio the HCCH contains several different international agreements that cover different aspects of private international law such as: conflict of law aspects[4], cross border cooperation[5] and international jurisdiction and exequatur.[6]

One of the earliest conventions of the HCCH was the idea of Having an instrument that addresses cross border recognition of foreign decisions.[7] There are several instruments that address and attempt to resolve issues of easier circulation of decisions among the Member States and other parties of the HCCH.[8] The creation of the idea for a universal instrument that recognizes and enforces foreign judgments in civil or commercial matters comes in 1971,[9] three years after the Brussels Convention.[10] In comparison with the Brussels Convention, the 1971 Hague Convention dealt only with exequatur while the Brussels Convention was also relevant regarding direct international jurisdiction among Members of the European Economic Community.[11] The 1971 Hague Convention failed to produce the desired effects of es-

1 Article 1 of the Statute of the Hague Conference on Private International Law.

2 On the structure of the Hague Conference see Droz L.A.G., A Comment On The Role Of the Hague Conference On Private International Law, Law and Contemporary Problems, (1994), Dyer A,The Hague Convention: Its Successes and Failures - Parts I and II; Australian Family Lawyer, June 1994, Vol. 9, and September (1994), Dyer A. To Celebrate a Score of Years!; New York University Journal of International Law and Politics, Vol. 33, Issue 1, (2000), Lipstein K., One Hundred Years of Hague Conferences on Private International Law, International and Comparative Law Quaterly, (1993), J J.H.A. van Loon, 'The Hague conference on private international law: an introduction', in P.J. van Krieken, and D. McKay, eds, The Hague: Legal Capital of the World (The Hague, TMC Asser Press, 2005), Hans van Loon and Andrea Schulz, 'The European Community and the Hague Conference on Private International Law', in Bernd Martenczuk and Servaas van Thiel (eds), Justice, Liberty, Security: New Challenges for EU External Relations (Brussels University Press, 2008).

3 For the detailed list of Parties to the Hague Conventions see < https://www.hcch.net/en/states/other-connected-parties> (last accessed 15.10.2020).

4 17 Conventions. For the complete list of HCCH Conventions see, <https://www.hcch.net/en/instruments/conventions> (last accessed on 09.12.2020).

5 10 Conventions. For the complete list of HCCH Conventions see, <https://www.hcch.net/en/instruments/conventions> (last accessed on 09.12.2020).

6 10 Conventions. For the complete list of HCCH Conventions see, <https://www.hcch.net/en/instruments/conventions>(last accessed on 09.12.2020).

7 1954 Hague Convention on Civil Procedure dealt only with orders for costs and expenses of the proceedings and judicial decisions whereby the amount of the costs of the proceedings is subsequently fixed.

8 1958 Hague Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children; 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, 1965 Hague Convention on the Choice of Court and 1970 Hague Convention on the Recognition of Divorces and Legal Separations.

9 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

10 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Consolidated version CF 498Y0126(01), Official Journal L 299, 31/12/1972 P. 0032 - 0042

11 Articles 2-18 of the Brussels Convention.

tablishing common provisions on mutual recognition and enforcement of judicial decisions.[12] However, the success of the Brussels Convention kept the idea alive, within the HCCH, to have a universal international instrument that will cover these private international law issues.

An American initiative in the early nineties set the HCCH's mechanism in motion and made efforts 'to negotiate multilaterally through the Hague Conference a convention on recognition or enforcement of judgments'.[13] In 1994, a Special Commission was established by the HCCH which determined that it is 'advantageous' to produce a convention which will cover jurisdiction as well as recognition or enforcement of foreign judgments in civil or commercial matters.[14] Basically, the idea was to have a universal counterpart similar to the Brussels Convention.[15] External and internal factors influenced the negotiations[16] which fragmented the initial idea of "double convention" into adopting two separate conventions: 2005 Hague Convention on Choice of Court Agreements (2005 Hague Convention) and the 2019 Hague Convention on recognition and enforcement of foreign judgments. At first it was much easier to produce a convention for which substantial consensus existed and that was convention regarding jurisdiction based on agreement of the parties.[17] This consensus paved the way for the 2005 Hague Convention which by now is in force between the EU and its Member States (including Denmark) and Montenegro, Singapore, China and Ukraine. Moreover, the 2005 Hague Convention is signed by the USA and N. Macedonia is not yet ratified by these countries.[18]

The initial success of the 2005 Hague Convention,[19] unblocked the work of the HCCH on the further Convention's development on the recognition or enforcement of foreign judgments in civil or commercial matters. Although desires still remained of retaining a "double convention" that would also cover direct jurisdiction, the "maneuver" that capitalized the idea was the delimitation of these two objectives and the formation of two separate entities. The Expert Group would continue the study on the direct jurisdiction and Working Group would propose a draft for the judgment convention.[20] With the mechanism of the HCCH in motion, in 2016, the Working Group produced a Proposed Draft Text of a Judgment Convention while the Expert Group's work stalled until the judgment convention text would be concluded.[21] After several Special Commission meetings[22] a Diplomatic Session began in the Hague on June 18th

12 Only 5 Sates are parties to this Hague Convention. See, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=78>, (last accessed on 15.10.2020).

13 Conclusions of the Working Group Meeting on enforcement of judgments, para. 3, Hague Conference on Private International Law, Prel. Doc. No. 19 of November 1992 for the attention of the Seventeenth Session

14 Conclusions of the Special Commission of June 1994 on the Question of the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law, Prel. Doc. No. 1 (June 1994).

15 Nielsen, P. A., "The Hague 2019 Judgments Convention – from failure to success", Journal of Private International Law 16 (2020), p.208.

16 For detailed explanation of the processes which influenced the negotiations of the 'Judgments Project' see: Brand, R. A., "Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead", Netherlands International Law Review (NILR) 67 (2020), pp 3-17

17 Brand, R.A., (n.16), p.11

18 For the full list of parties to the 2005 Hague Convention see, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last accessed 15.10.2020).

19 Bonomi, A.,Mariottini, Cristina M., "(Breaking) News From The Hague: A Game Changer in International Litigation? – Roadmap to the 2019 Hague Judgments Convention", Yearbook of Private International Law 20 (2018/2019), p.538.

20 Brand, R.A., (n.16), p.14

21 ibid.

22 The meetings were held on 1-9 June 2016; 16-24 February 2017; 13-17 November 2017; and 24-29 May 2018.

and ended on July 2nd with the signing of the Final Act creating the Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters.

2. *Modus Operandi* of the 2019 Hague Convention

The *modus operandi* of the 2019 Hague Convention is simple. If the judgment regarding civil or commercial matters is rendered in a country that satisfies the indirect jurisdictional grounds provided in Article 5 and if the grounds for refusal of recognition in Article 7 are not met, then the judgment can be recognized and enforced in a requested country. However, foreign judgments can be recognized and enforced under national law or other international convention, with consideration to the exclusive base given in Article 6. Therefore, three factors are substantially relevant for the 2019 Hague Convention mechanism to be applied. First, the foreign judgment needs to be rendered in regard to civil or commercial matters (understood autonomously and uniformly according to Article 20 of the 2019 Hague Convention).[23] Second, the foreign judgment needs to pass the test given by the jurisdictional filters in the 2019 Hague Convention. And finally, none of the grounds for refusal as provided in the Article 7 of the 2019 Hague Convention which prevent the recognition and enforcement of the foreign judgment are met. This mechanism must be used together with Article 15 of the 2019 Hague Convention (*favor recognitionis* principle) which broadens the modalities that a foreign judgment can incorporate in the domestic legal system by allowing implementation of national legal rules regarding recognition or enforcement if the decision cannot be recognized and enforced upon the 2019 Hague Convention. The only limitation of the 2019 Hague Convention's Article 15 is that it does not apply to the situation referred in the Convention's Article 6 (exclusive indirect jurisdictional ground). With such position it can be said that the intention of the 2019 Hague Convention is to set out minimum standards for mutual recognition or enforcement of judgments.[24]

This article focuses solely on the first two factors since they represent the initial activators of the 2019 Hague Convention's application.

23 Ribeiro-Bidaoui, J., "The International Obligation of the Uniform and Autonomous Interpretation of Private Law Conventions: Consequences for Domestic Courts and International Organisations", Netherlands International Law Review 67 (2020), p.141; Garcimartín Alférez, F., Saumier, G., "Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Explanatory Report", as approved by the HCCH on 22 September 2020,p.8, <https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf> (last accessed 27.10.2020)

24 Garcimartin Alférez F, Saumier G., (n.23), par. 326.

2.1. *Scope of application of the new 2019 Hague Convention*

The 2019 Hague Convention regarding *ratione materiae* and *ratione loci* takes the well-established approach which is found in the 2005 Hague Convention as well as in the Brussels Ibis Regulation[25] with certain specifics particular to the 2019 Hague Convention. Article 1 together with Article 2 of the 2019 Hague Convention provide for the scope of application and define its application in substantive and geographic terms.[26] In substantive terms, the Convention's scope of application goes from general to specific, first determining the larger legal field of civil or commercial matters and then specifying areas which are excluded from the scope of application. Article 1 of the 2019 Hague Convention states that it applies to civil or commercial matters[27] and then excludes the more specific areas such as revenue, custom and administrative decisions from the scope of application.[28] Similar to the Brussels Ibis Regulation,[29] the scope of application is not only limited to these public law aspects, but also covers other *acta iure imperii* when States are exercising their governmental and sovereign powers that are not enjoyed by ordinary persons.[30] In contrast, the 2005 Hague Convention does not refer to these issues because it is uncommon to have a jurisdiction agreement relating to disputes in those matters.[31] Despite the differences in the wording of the 2005 Hague Convention and the 2019 Hague Convention, both instruments must be interpreted in the same way.[32]

Moreover, Article 2(4) of the 2019 Hague Convention provides that a judgment is not excluded from the scope of the Convention on the fact that a State, including a government, a governmental agency, or any person acting for a State was a party to the proceedings. As a balance to this principle, Article 19 provides for possibility of a State to provide for declaration that opts out these decisions with effect that once a Contracting Party makes such declaration it will not be able to avail itself of the Convention for the recognition or enforcement of a favorable judgment.[33]

25 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32.

26 Garcimartín Alférez, F., Saumier, G., (n.23), par. 27.

27 The characterization of a judgment whether it relates to civil or commercial matters depends on the nature of the claim or action that is the subject matter of the judgment and not on the nature of the court, nature of the parties or the mere fact that the claim is transferred to another person. See, Garcimartín Alférez, F., Saumier, G., (n.23), par. 28-31, p.8.

28 Garcimartín Alférez, F., Saumier, G., (n.23), par. 34-35.

29 On the interpretation of the CJEU see, Nikiforidis (Case C-135/15, OJ C 198, 15.6.2015) and Kuhn (Case C-308/17, ECLI:EU:C:2018:911)

30 Hartley T., Dogauchi M. "Convention of 30 June 2005 Choice of Court Agreements Convention: Explanatory Report",<https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf> (last accessed 13.11.2020), par.85

31 Bonomi, A.,Mariottini, Cristina M., (n.19), p.542

32 Garcimartín Alférez, F., Saumier, G., (n.23), par. 34.

33 Bonomi, A.,Mariottini, Cristina M., (n.19), p.542

Article 2 goes into further specifics, enumerating the other areas which are excluded from the scope of application.[34] In comparison with the 2005 Hague Convention, the 2019 Hague Convention lists 17 exclusions, while the 2005 Hague Convention provides for 16 exclusions but adds Article 2(1) consumer cases and employment contracts to the excluded matters. Although the scope of application of these two Conventions is similar, the scope of the 2019 Hague Convention is broader and also applies to employment and consumer contracts, physical injuries, damage to tangible property, rights in rem and leases of immovable property, and some anti-trust(competition) matters.[35] On the other hand, the Brussels Ibis Regulation contains only 6 exclusions from its scope,[36] as many of these exclusions are sensitive for many States.[37]

Another important aspect of Article 2 of the 2019 Hague Convention is that it excludes arbitral and other alternative dispute resolution decisions from the scope of application. Moreover, the 2019 Hague Convention is applicable towards civil or commercial judicial decisions in which one of the parties is a state, government, governmental institution, or a person acting in the name of the state, but excludes aspects regarding the immunity and the privileges of the states and international organizations.

When the court of recognition is confronted with foreign judgment in determining whether a judgment was rendered in "civil or commercial matters," it must keep Article 20 of the 2019 Hague Convention in mind, which is the requirement for uniform interpretation and application of the Convention.[38] Consequently, this departs from the understanding of the term "civil or commercial matters" in national notion[39] and from the understanding provided in the Brussels Ibis Regulation which is much broader than the one in the 2019 Hague Convention.[40] Moreover, the recognizing court must provide for consistency in the interpretation of the term "civil or commercial matters" with other HCCH instruments in particular the 2005 Hague Convention on Choice of Court Agreements.[41]

Regarding the *ratione loci,* the geographical or territorial application of the Convention is modeled that it applies to recognition or enforcement of judgment in one Contracting State rendered by a court of another Contracting State.[42] However, Article 29 of the Convention is

34 The matters excluded from the new 2019 Hague Convention are: (a) the status and legal capacity of natural persons; (b) maintenance obligations; (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; (d) wills and succession; (e) insolvency, composition, resolution of financial institutions, and analogous matters; (f) the carriage of passengers and goods; (g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; (h) liability for nuclear damage; (i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs; (j) the validity of entries in public registers; (k) defamation; (l) privacy; (m) intellectual property; (n) activities of armed forces, including the activities of their personnel in the exercise of their official duties; (o) law enforcement activities, including the activities of law enforcement personnel in the exercise of official duties; (p) anti-trust (competition) matters; (q) sovereign debt restructuring trough unilateral State measures.

35 Garcimartín Alférez, F., Saumier, G., (n.23), par. 44.

36 Article 1(2) of the Brussels Ibis Regulation.

37 Garcimartín Alférez, F., Saumier, G., (n.23), par. 44; Nielsen, P. A., (n.15), p.212.

38 Garcimartín Alférez, F., Saumier, G., (n.23), par. 32.

39 Hartley/Dogauchi Report (n.30), para.49.

40 Wilderspin, M., Vysoka, L., "The 2019 Hague Judgments Convention through European lenses", Nederlands Internationaal Privaatrecht (NIPR) 2020, p. 37.

41 Nielsen, P. A., (n.15), p.211

42 Article 1(2) of the 2019 Hague Convention.

particularly important for the territorial scope of application as it provides for a possibility of Contracting States to limit the territorial application towards a particular State that objects to the establishment of relations with another State and as such the Convention will not have effect between these two States.[43]

Jurisdictional filters in the 2019 Hague Convention

The HCCH's change of direction regarding the separation of the "double convention" into two simple conventions, (recognition or enforcement *vis* a *vis* direct jurisdiction) constructed the grounds to introduce special rules that determine sufficient jurisdictional connection between the court of origin and the case, yet still appreciate the national jurisdictional rules of the country of origin. Such position was manageable, only by introducing rules that deal with indirect jurisdiction, or "jurisdictional filters" as they are often referred to.[44] The "central" provisions[45] or the "heart"[46] of the 2019 Hague Convention are Articles 5 and 6 which respectively deal with indirect jurisdiction and exclusive indirect jurisdiction. As such, their place in the 2019 Hague Convention system is of outmost importance as they represent the linking point between the country of origin and the country of recognition.

Indirect jurisdiction is usually defined together with direct jurisdiction. This is because the specific characteristics of "indirect jurisdiction" are derived from "direct jurisdiction" and refer to the procedural moment when these characteristics are determined and by whom. Direct jurisdiction refers to initial stage of the proceedings where a Court, based on rules and principles, determines the circumstances that are entitled to adjudicate and render a substantive judgment with regard to the international and/or interstate connections involved.[47] These rules and principles that determine the jurisdictional criteria are provided in the national law of the court of origin, so the court of origin determines the jurisdiction by its own law.[48] Indirect jurisdiction refers to a different moment in the proceedings, in the stage of *exequatur* of the judgment in front of court of recognition, when this court identifies the connections with the Country of origin that are considered sufficient for the judgment to be recognized and enforced.[49] Therefore, two different legal bases and two different courts assert the connections between the forum and the present case. Direct jurisdiction, from the court of origin on the bases of its domestic legal order and indirect jurisdiction by the court of recognition which asserts the connection on the bases of its own law.[50]

Terms of the 2019 Hague Convention are simple. Article 5 does not harmonize the national rules on direct jurisdiction and the direct jurisdiction is governed by national law in all

43 Garcimartín Alférez, F., Saumier, G., (n.23), par. 407-420.

44 Weller M., The Jurisdictional Filters of the HCCH 2019 Judgments Convention, Yearbook of Private International Law XXI (2019/2020), pg.281; Garcimartín Alférez, F., Saumier, G., (n.23), par. 134.

45 Garcimartín Alférez, F., Saumier, G., (n.23), par. 134.

46 Bonomi, A.,Mariottini, Cristina M., (n.19), p.549

47 Michaels R., Jurisdiction, Foundations, Elgar Encyclopedia of Private International Law (Jürgen Basedow et al. eds., forthcoming), p.2

48 Garcimartín Alférez, F., Saumier, G., (n.23), par. 135.

49 Garcimartín Alférez, F., Saumier, G., (n.23), par. 134.

50 Some countries borrow the rules applicable to indirect jurisdiction from their own ordinary (direct) lurisdictional rules of the enforcing country ('mirror principle'). Michaels, R., Recognition and Enforcement of Foreign Judgments, in Max Planck Encyclopedia of Public International Law (Rüdiger Wolfrum ed., 2009), p.6

Contracting States.[51] Article 5 provides for 'jurisdictional filters' which represent minimum standards by which the Court of origin's international jurisdiction to adjudicate is controlled by the Court of recognition before recognition or enforcement is granted as the result of the exequatur proceedings.[52] The term 'jurisdictional filters' is constructed since they filter foreign judgments by identifying the connections with the State of origin that are considered sufficient[53] and sort out judgments based on unacceptable grounds of jurisdiction from passing through towards the common recognition or enforcement scheme of the Convention.[54] Moreover, the actual rule of direct jurisdiction applied by the court of origin becomes irrelevant and the key issue is whether the connection with the court of origin is met as a question of fact.[55] In such way, the 'jurisdictional filters' go further than the direct jurisdictional rules of the State of origin, providing that the connections are established without taking into account the assertion of the direct jurisdiction by Court of origin.[56] This rigid parallelism of the assertion of the connections between the Court of origin and the Court of recognition is mitigated by the content of the 'jurisdictional filters'. Rather than putting forth broad jurisdictional filters, Article 5 identifies areas of communality with a view to increasing acceptance.[57]

The rationale of this rule from point of view of the parties is that it goes directly to the interest parties and assists them to design a litigation strategy based on eligibility of the ensuing judgment to circulate in other Contracting States.[58] In planning their litigation strategy, claimants will have to decide whether they wish to bring proceedings on "exorbitant" jurisdictional grounds, knowing that, if they do so, they may be unable to take advantage of the Convention.[59]

2.2.1. Structure and types of jurisdictional filters in the 2019 Hague Convention

Article 5 and 6 of the 2019 Hague Convention provide for the jurisdictional filters against which the judgment from the state of origin is assessed by the State where recognition or enforcement is sought.[60] These filters can be divided in three traditional jurisdictional categories: jurisdiction based on connection with the defendant, jurisdiction based on consent, and jurisdiction based on connections between the claim and the state of origin.[61] More

51 Nielsen, P. A., (n.15), p.214

52 Weller M., (n.44), p. 281

53 Garcimartín Alférez, F., Saumier, G., (n.23), par. 134.

54 Weller M., (n.44), p. 281.

55 The requested state is limited only to the 'jurisdictional filters' given in Article 5 and is not allowed to apply the 'mirror principle' when assessing the connections with the State of origin. Nielsen, P. A., (n.15), p.214

56 Even if the Court of origin based its direct jurisdiction on some exorbitant bases(nationality of the claimant or service of the defendant in the State of origin), nevertheless, the recognizing Court independently determines whether the circumstances present in Article 5 of the 2019 Hague Convention apply (habitual residence of the defendant).

57 The goal was to identify the circumstances in which the person against whom recognition and enforcement was sought could not reasonably claim that the proceedings should have been heard in some other court. Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues", Prel. Doc. No.2 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments. See also, Bonomi, A.,Mariottini, Cristina M., (n.19), p.549; Garcimartín Alférez, F., Saumier, G., (n.23), par. 138.

58 Bonomi, A.,Mariottini, Cristina M., (n.19), p.549

59 ibid.

60 Garcimartin F, Saumier G., (n.23), par 134.

61 Garcimartin F, Saumier G., (n.23), par 138; Weller M., (n.44), p.282; Nielsen P.A., (n.15), p.214.

specifically, this list contains jurisdictional filters such as: habitual residence,[62] principal place of business,[63] claimant,[64] branch, agency or other establishment,[65] defendant expressively[66] or implicitly[67] consented to the jurisdiction of the court of origin, contractual obligations,[68] lease of immovable property (tenancy),[69] contractual obligation secured by a right *in rem* in immoveable property,[70] non-contractual obligation,[71] trusts,[72] counterclaims[73] and non-exclusive choice of court agreements,[74] consumer and employment contracts,[75] and residential lease of immovable property(tenancy).[76] Most of these grounds can be found in the national legal systems, but they are precisely formulated in the new 2019 Hague Convention.[77] Moreover, there is no hierarchy between these jurisdictional filters since they are all attributed with the same status and legitimacy,[78] and the satisfaction of a single ground can fulfill this condition[79]with only consideration given to the exclusive indirect jurisdictional base in Article 6 (which refers to forum *rei sitae* as an exclusive base of jurisdiction for rights *in rem* over immoveable property).

2.2.1.1. Connections with the defendant as a jurisdictional filter

a) Habitual Residence

One of the most recognizable "products" of the HCCH is the popularization of habitual residence as a connecting factor and a jurisdictional criterion, even though the connecting factor serves different functions and appears in different contexts.[80] Its popularity comes from the liberation of the notion of "natural or home State forum"[81] from the doctrinal burdens present in domicile and the flexible, factual understanding of the creation and loss of the habitual residence which corresponds with the present more dynamical social and economic relations.[82] Moreover, its application is also present in international family law because of the possibility

62 Article 5(1)(a) of the 2019 Hague Convention.
63 Article 5(1)(b) of the 2019 Hague Convention.
64 Article 5(1)(c) of the 2019 Hague Convention.
65 Article 5(1)(d) of the 2019 Hague Convention.
66 Article 5(1)(e) of the 2019 Hague Convention.
67 Article 5(1)(f) of the 2019 Hague Convention.
68 Article 5(1)(g) of the 2019 Hague Convention.
69 Article 5(1)(h) of the 2019 Hague Convention.
70 Article 5(1)(i) of the 2019 Hague Convention.
71 Article 5(1)(j) of the 2019 Hague Convention.
72 Article 5(1)(k) 2019 Hague Convention.
73 Article 5(1)(l) of the 2019 Hague Convention.
74 Article 5(1)(m) of the 2019 Hague Convention.
75 Article 5(2) of the 2019 Hague Convention.
76 Article 5(3) of the 2019 Hague Convention
77 Garcimartín F, Saumier G., (n.23), par. 138.
78 Weller M., (n.44), p.282
79 ibid.
80 Weller M., (n.44), p.285
81 Garcimartín F, Saumier G., (n.23), par. 139.
82 North P.M. and Fawcett J.J., Cheshire and North's Private International Law, 12 edn. London, 1992, pp.166-167; Rumenov I., The legal paradox of child's habitual residence: How to uniformly understand a factual concept?, Iustinianus Primus Law Review, No. 08, volume V, Winter 2014 p.5.

for children to obtain habitual residence different from their caregivers and have separate needs affiliated to the "real" place where they live[83] which aligns with the modern understanding of children's rights.[84]

Article 5(1)(a) provides that a judgment is eligible for recognition or enforcement if the person against whom such recognition or enforcement is sought was habitually resident in the State of origin at the time that person became party to the proceedings. This is the only jurisdictional filter that concerns links solely to the person against whom recognition is sought while the other filters refer to consent or to connections with the dispute giving rise to the judgment.[85] For proper understanding of Article 5(1)(a) of the 2019 Hague Convention, several aspects should be addressed. Firstly, the difference between the habitual residence of natural person and legal person, secondly, the difference between the defendant in the main proceedings and the defendant in the exequatur proceedings, and last, the relevant time when habitual residence is assessed.

The first general difference between the determination of the habitual residence for natural persons and legal persons is within the fact that habitual residence for legal persons contains definition while the definition for natural persons is left out of the Convention and the Explanatory Report. Such position is not a novelty and definitions regarding legal persons are present in the most recent EU[86] and HCCH PIL instruments: 2005 Hague Convention[87]; the Brussels Ibis Regulation[88]; Rome I Regulation[89] and Rome II Regulation.[90] When applying Article 5(1)(a) of the 2019 Hague Convention towards legal persons, notion must be given to Article 3(2) of the 2019 Hague Convention which provides that persons other than natural persons shall be deemed as habitually resident in a State, if their statutory seat; central administration; principal place of business is located or they were incorporated or formed under the law of that State.[91] On the other hand, the 2019 Hague Convention lacks a definition for habitual residence regarding natural persons. The rationale of such position is because in general habitual residence is factual concept[92] determined for each case individually. For its determination three factors became relevant, two of which are objective, such as the factual residence of the natural person on a territory and the passing of certain time. The longer the time period, the more certain is the creation of a habitual residence on a territory and the

83 Rumenov I., Determination of the Child's Habitual Residence According to the Brussels II bis Regulation, Pravni Letopis, Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, Ljubljana Slovenia, 2013, pp.70-75.

84 Rumenov I., The impact of the UN Convention on the rights of the Child on the Hague Convention on the Civil Aspects of International Child Abduction, Sofia, 2020 (to be published)

85 Garcimartín F, Saumier G., (n.23), par. 140.

86 The wording of the definitions present in the EU Regulations follows the patterns and the construct of Article 54 TFEU. See also, Weller M., (n.44), p.284.

87 Article 4(2) of the 2005 Hague Convention.

88 Article 63 (1) of the Brussels Ibis contains similar connecting factor but are referring to domicile of a legal person.

89 Article 19 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16

90 Article 23 of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40–49.

91 This four criteria tend to provide different understanding from the notion "doing-business" in the forum State, U. S. doctrine that was criticized and rejected in the *Goodyear* and *Daimler* judgments of the Supreme Court. "Doing business" is a much lower threshold than "principal place of business" and must be implemented differently. More on this aspect see, Bonomi, A.,Mariottini, Cristina M., (n.19), p.551.

92 Garcimartín F, Saumier G., (n.23), par. 142.

opposite. The shorter the time is on a territory; the more indefinite is the answer of if habitual residence was established. The third factor is that the "intention" of the person to reside on that territory is subjective. It functions as a "catalyst" or "inhibitor" for the creation of habitual residence, because if the person's intention is more evident (this intention must have some objective elements such as buying of a house, getting a permanent work for him/her or its spouse, enrolling the children into a certain school etc.) then the time needed for creation of a habitual residence is shorter. The opposite, the less distinguishing the "intention" is, the more time will have to pass for the establishment of the habitual residence.[93] However, in certain (longer) periods of time, habitual residence will eventually be established. Such certainty of establishment or loss of habitual residence is one of the advantages over domicile, since its doctrinal understanding can lead to some paradox situations.[94] Moreover, that is one of the reasons for more frequent use of habitual residence instead of domicile - to escape the doctrinal "mess" of domicile created by the different understanding in national legal sources.[95] However, the lack of definition on such important jurisdictional filter can produce discrepancies in the implementation of this filter, as the Explanatory Report does not contain certain guiding prospects of its determination and practitioners will have to rely heavily on Article 20 of the 2019 Hague Convention and the developing practice.[96]

Secondly, there is no equation between the defendant in the main proceedings and the defendant in the exequatur proceedings. Article 5(1)(a) of the 2019 Hague Convention does not restrain itself only to the defendant from the main proceedings, but gives possibility that in the exequatur proceedings any person against whom recognition is sough can be defendant in the exequatur proceedings, such as in certain situation the "original" claimant in the main proceedings,[97] or any other party that was not a party to the proceedings in the State of origin such as joinder, intervention, impleader, interpleader, subrogation and succession.[98] Of essence is that there has been valid succession of the obligations by the latter.[99] The law of the requested State determines the validity of the transfer of obligation.[100]

Thirdly, the relevant time for establishing habitual residence is the time the person against whom recognition is sought became a party to the proceedings in the Court of origin.[101] Subsequent change of habitual residence does not affect the proceedings (*perpetuation fori)*.[102]

The new Private International Law Act of N. Macedonia (PILA)[103] provides for domicile or habitual residence of the defendant as jurisdictional criteria for the determination of the basic

93 Rumenov I., Legal paradox, (n.82), pp.2-4.

94 Varadi T., et al., Međunarodno privatno pravo, Belgrade, 2007, pg.271-273

95 Rumenov I., Legal paradox, (n.82), pp.3-5.

96 More on the ideas how to uniformly understand this factual concept see Weller M., (n.44), p. 285.

97 For example the defendant seeks recognition and enforcement of the cost order against that person in the requested State, Garcimartín F, Saumier G., (n.23), par. 141.

98 Bonomi, A.,Mariottini, Cristina M., (n.19), p.551

99 Garcimartín F, Saumier G., (n.23), par. 144.

100 ibid.

101 Garcimartín F, Saumier G., (n.23), par. 143.

102 Garcimartín F, Saumier G., (n.23), par. 143; Weller M., (n.44), p.286

103 Private International Law Act (Закон за меѓународно приватно право), Official Gazette of Republic of North Macedonia, no. 32/2020

jurisdiction.[104] On first glimpse, such position corresponds with the jurisdictional filter provided in Article 5(1)(a) of the 2019 Hague Convention and usually the domicile will correspond with the habitual residence of the defendant. However, regarding natural persons, recent migration in N. Macedonia and the region contains a possible problem in the application of this jurisdictional filter. Namely, Courts will traditionally determine the basic jurisdiction upon the domicile of the defendant in N. Macedonia despite the newly introduced jurisdictional criterion habitual residence. Domicile is determined according to Law on reporting domicile and temporary residence[105] and is mostly of administrative nature however with subjective element incorporated in the notion.[106] In practice, the Courts determine the domicile upon personal or travel documents issued by the Ministry of Interior Affairs,[107] which sometimes don't correspond with the factual situation,[108] as many people intentionally or by omission disrespect the obligation to register if they leave the country for more than three months.[109] This could result in a hypothetical situation where the Courts in N. Macedonia rightfully assumed jurisdiction on the basis of Article 110 of the PILA (domicile of the defendant) and that decision could not pass the jurisdictional filter provided in the Article 5(1)(a) of the 2019 Hague Convention because the defendants habitual residence is in another country. One possible solution is the application of the habitual residence of the defendant as a jurisdictional criterion based on Article 110 of the PILA instead of the domicile. Article 110 of the PILA provides for both jurisdictional criteria and the fulfillment of one criterion will suffice. In these cases, if the Courts of N. Macedonia determine the jurisdiction based on the habitual residence of the defendant, this would mitigate the disproportion between the domicile and the habitual residence and still provide for sufficient protection of the defendant.

b) Principal place of business (natural person)

Article 5(1)(b) provides jurisdictional filter for limited and narrow situations where a natural person against whom recognition or enforcement is sought, had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of that activities. This scenario upholds several conditions for its application. Firstly that the person is a natural

104 Article 110(1) of the PILA of N. Macedonia

105 Official Gazette of Republic of Macedonia No. 36/92, 12/93, 43/00, 66/07, 51/11, 152/15 and 55/16

106 Article 2 of the Law on reporting domicile and temporary residence defines the term domicile as "Domicile is the place where the citizen settled **with intent** to permanently live there and has acquired an apartment for living." Article 4 provides that the person has acquired an apartment that is the domicile is registered based on ownership or legally registered lease contract.

107 Article 98 of the Law on civil procedure, Official Gazette of Republic of Macedonia No. 79/2005, 110/2008, 83/2009, 116/2010 and 124/2015

108 The Ministry of Internal Affairs of Republic of N. Macedonia does not maintain consistent records of the two categories of addresses – temporary residence and permanent domicile. Based on a simple declaration, citizens may be registered at a temporary address in the country, and allowed to vote there, although they are not living at the declared address, or might not have a domicile in the country. In spite of legal provisions obliging the MoIA to register citizens who left the country for more than three months and did not declare it, and to conduct verifications of temporary address declarations, there was limited proactive action by MoIA to update the address registry. This report has found in correlation to the voter's registry that "The review process, which was observed by the four main political parties, led to a limited number of deletions, mostly of deceased people. In addition, 39,502 voters were identified as having "questionable registration" data and were required to re-register, and 171,500 voters were considered as temporarily residing abroad and were moved to a separate register of out-of-country voters." OSCE/ODIHR Election Observation Mission Final Report, EARLY PARLIAMENTARY ELECTIONS 11 December 2016, available on line <https://www.osce.org/files/f/documents/8/b/302136.pdf> (last accessed 13.11.2020).

109 Article 8 of the Law on reporting domicile and residence.

person, secondly, that the claim on which the judgment is based arose out of activities of the natural persons business, thirdly the principle place of business of the natural person is in the State of origin and lastly, the timing when the principle place of business was established in the State of origin is limited to the time when the person become a party to the proceedings.[110] The rationale of this jurisdictional filter was to establish a differential supplement to Article 5(1)(a) which will cover *tête-à-tête* dealings of natural person in course of business, but only one which could qualify as 'principle'.[111] Generally, the mechanism established by the 2019 Hague Convention, in relation to the jurisdictional filters, where the existence of one filter would suffice, gives an impression that Article 5(1)(b) is superfluous and ads to the complexity of Article 5 of the 2019 Hague Convention. Such narrow application could be covered by simply adding an extension to the definition provided in Article 3(2) of the 2019 Hague Convention[112] that the habitual residence of a natural person acting in the course of his business activity shall be his principal place of business[113] for claims arising out of that business. The Macedonian PILA, influenced by the Rome I and II Regulation, contains similar definition for principle place of business for natural person.[114]

c) Bringing a claim in the main proceedings - claimant

One of the most obvious jurisdictional filters is Article 5(1)(c) which refers to judgments against the claimant of the main proceedings. The rationale of this jurisdictional filter is straightforward, if the claimant from the main proceedings (which under most of the circumstances chooses the forum), loses the case,[115] then that judgment should be recognizable in other countries without the possibility of challenging such jurisdiction.[116] There are some aspects which must be accounted for regarding the application of this jurisdictional filter. Firstly, this rule refers to claims, thus excluding counterclaim which is dealt with specifically in Article 5(1)(l) of the 2019 Hague Convention.[117] Secondly, Article 5(1)(c) is particularly important when the claimant does not have habitual residence in the State of origin because in such scenario the jurisdictional filter which is based on the implicit consent of the claimant becomes relevant, opposite of the connection of the parties to the state of origin through Article 5(1)(a) of the 2019 Hague Convention.

d) Branch, agency or other establishment

The influence of Article 7(5) of the Brussels Ibis Regulation regarding "branch jurisdiction" can be seen in Article 5(1)(d) of the 2019 Hague Convention, although the later, provides for

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110 Garcimartín F, Saumier G., (n.23), par. 152.

111 As oppose of e-commerce for which would be more difficult to establish this predominance. Garcimartín F, Saumier G., (n.23), par. 149; Weller M., (n.44), p.287

112 Weller M., (n.44), p.287.

113 For comparison see Article 19 of the Rome I Regulation and Article 23 of the Rome II Regulation.

114 Article 6(2) of the PILA of N. Macedonia.

115 Cost award is rendered against him/her which are recognizable according to Article 3(1)(b) of the 2019 Hague convention.

116 Garcimartín F, Saumier G., (n.23), par. 147-151.

117 Moreover, counterclaimant does not 'chooses' the forum. Bonomi, A.,Mariottini, Cristina M., (n.19), p.553

more restrictive approach regarding subsidiaries.[118] The scenario provided in Article 5(1)(d) refers to a specific situation conditioned on several aspects. First, the defendant in the main proceedings maintained branch, agency or other establishment. Second, the branch, agency or other establishment were without legal personality. Third, the branch, agency or other establishment is located in the State of origin at the time that defendant become party of the proceedings in the Court of origin. And last, the judgement on which the claim is based arose out the activities of the branch, agency or other establishment.

The implementation of this rule from the Courts of N. Macedonia should be without any problems, since the Macedonian PILA contains a provision regarding the determination of the jurisdiction of Courts for cases which arise out of the operations of the branch, agency or other establishment, conditioned that they are situated in N. Macedonia and the defendant does not have statutory seat in N. Macedonia.[119] If the defendant does have statutory seat in N. Macedonia, then the basic jurisdiction of the Courts of N. Macedonia will be determined upon the statutory seat of the defendant provided in Article 110 of the PILA (which is in line with the jurisdictional filter provided in Article 5(1)(a) of the 2019 Hague Convention).

2.2.1.2. Consent to the jurisdiction of the court of origin as a jurisdictional filter

Article 5(1) of the 2019 Hague Convention provides for jurisdictional filters that concern three forms of consent: express consent during proceedings (Article 5(1)(e) of the 2019 Hague Convention), implied consent (Article 5(1)(f) of the 2019 Hague Convention) and non-exclusive choice of court agreement of the parties (Article 5(1)(m) of the 2019 Hague Convention).[120]

a) Express consent to the Jurisdiction of the Court of origin within the main proceedings as a jurisdictional filter

The first jurisdictional filter provided in Article 5(1)(e) of the 2019 Hague Convention, refers to the explicit consent of the defendant (in the exequatur proceedings), which was given during the course of the (main) proceedings. This jurisdictional filter relates to generally uncontroversial jurisdictional criterion, which is the express consent to the jurisdiction of the Court of origin premised on the assumption that a defendant who has expressed its consent cannot legitimately object on jurisdictional grounds to the circulation of the ensuing judgment.[121] However, this provision is limited in two aspects: first, it refers to *express consent*, as a positive act[122] as oppose to implied consent, which is dealt with in Article 5(1)(f) of the 2019 Hague

118 See Garcimartín F, Saumier G., (n.23), par. 157. However, there are some other interpretations whether this rule covers subsidiaries through the 'doctrine of appearance' as it is provided in the decision by the CJEU case ***SAR Schotte GmbH v Parfums Rothschild SARL*** (ECLI:EU:C:1987:536), Weller M., (n.44), p.289.

119 Article 149 of the PILA..

120 Garcimartín F, Saumier G., (n.23), par. 160.

121 Bonomi, A.,Mariottini, Cristina M., (n.19), p.552

122 Garcimartín F, Saumier G., (n.23), par. 162.

Convention, and second, the consent is not limited for it to be addressed to the Court[123] but also it can arise out of communication with the other party *during the course of the proceedings.*[124]

Ambiguities exist with these uncontroversial jurisdictional criteria, such as the express consent, that need to be addressed. First, what is the standard of review, as to whether or not the consent of the defendant can be categorized as "express" and second, what is the burden of proof during the exequatur proceedings. As it was said,[125] the 2019 Hague Convention does not intend to interfere into the application of the direct jurisdiction by the Court of origin, limiting itself to the assessment of facts of whether they existed during the main proceedings that give a certain notion as to if there was sufficient connection between the case and the parties of the main proceedings and the forum that decided these issues. So for the notion of "express consent" the 2019 Hague Convention does not implement the standard of review of the *lex fori proccessualis* because, that manner of consenting may not be known or recognized in all procedural systems.[126] Therefore "express" consent should be characterized independently, by the Court of recognition, regardless of the basis for jurisdiction in the Court of origin in correlation with Article 20 of the 2019 Hague Convention.[127] As for burden of proof, the Explanatory Report does not explicitly address this issue. However, it does provide that the conditions in Article 5 and 6 represent "positive conditions" while for Article 7 states that it represents a "negative condition".[128] On that ground it can be stated that the burden of proof regarding Article 5 and 6 of the 2019 Hague Convention is on the claimant[129] in the exequatur proceedings while the duty arising out of Article 7 for submission and proof of the grounds for refusal are on the party opposing the recognition.[130]

b) Submission as a jurisdictional filter

The second modality of consent as a jurisdictional filter is provided in Article 5(1)(f) and refers to the question of implied consent as a jurisdictional filter. The development of this provision and its implementation into the 2019 Hague Convention illustrates the phases that the Judgment Project needed to undergo to be implemented as a jurisdictional filter.[131] Generally, submission as a jurisdictional ground is widely known and present in national legislations[132]

123 As it is provided in Article 5(2) of the 2019 Hague Convention "...only if the consent was addressed to the court, orally or in writing". Article 5(1)(e) is not limited with such expression of the consent thus the consent can be expressed orally, electronically, or in writing for example in court documents (e.g., memoranda, briefs, statements) however, timely fixated for the moment after the proceedings have been initiated. Bonomi, A.,Mariottini, Cristina M., (n.19), p.552; Weller M., (n.44), p.290

124 Garcimartín F, Saumier G., (n.23), par. 162; Bonomi, A.,Mariottini, Cristina M., (n.19), p.552; Weller M.,(n.44), p.290.

125 See text to note 51.

126 Garcimartín F, Saumier G., (n.23), par. 163

127 Weller M., (n.44), p.290. For the possible scenarios how this consent could be given see, Garcimartín F, Saumier G., (n.23), par. 164.

128 Garcimartín F, Saumier G., (n.23), par. 111

129 With exception to Article 5(1)(f) regarding implied consent, where the burden of proof is on the defendant in the exequatur proceedings. Weller M., (n.44), p.292

130 Weller M., (n.44), p.283.

131 For more on the development of this provision into the 2019 Hague Convention see, Saumier, G., Submission as a Jurisdictional Basis and the HCCH 2019 Judgments Convention, Netherlands International Law Review (NILR) 67 (2020), pp 49-65.

132 For comparative aspects and different implementations see Saumier, G, pp 52-58

and in the EU Legislation.[133] However, its presence and interpretation in different legal surroundings raises certain concerns for its predictability particularly important for litigants and parties in cross border commerce.[134] The "baseline" and the common denominator in most of the legal systems that seem to form a consent of what constitutes a "submission" is that the defendant responded to the claim without making any objection to the Courts jurisdiction. The opposite, submission is not established on the sole basis that the defendant has appeared for the purpose of objecting to the jurisdiction of the Court.[135] From that certain aspect, legal systems develop complex and controversial modalities of implementing "implied consent" as a jurisdictional base.[136]

In line with that notion, the importance of Article 5(1)(f) of the Hague Convention as an indirect jurisdictional provision provides for certain balance without tackling the direct jurisdiction of the Courts. The rationale of such position from the point of view of the 2019 Hague Convention is straightforward. Whatever the reasons are as to why the defendant didn't contest the jurisdiction in the court of origin (intentionally, to avoid additional costs or delays, out of ignorance etc.) if an objection could have been raised pursuant to the applicable rules of jurisdiction and procedure of the *lex fori*, the failure to raise one can be interpreted as a waiver of any such jurisdictional challenge by the defendant and can be described as defendants implied onsent to the claimant unilateral choice of forum.[137] The scenario developed by the HCCH in the 2019 Hague Convention for a foreign judgment to pass the jurisdictional filter is based on two conditions: firstly, the defendant had argued on the merits before the Court of origin; and secondly the defendant must have failed to contest the jurisdiction within the timeframe provided in the State of origin with one exception, if it is evident that an objection to jurisdiction would have been unsuccessful.[138] The provision does not refer to 'submission', 'implied consent' or 'tacit prorogation' however, such conduct is what Article 5(1)(f) of the 2019 Hague Convention is about, that the defendant argued on the merits without contesting the jurisdiction.[139] This position represents the common consent for application of submission applied in most of States.[140] The Explanatory Report is cautious in the explanation of the meaning of "arguing on the merits" and "contesting jurisdiction", because of the divergent approach in different countries regarding submission, however it states that the understanding of these notions is not dependent on the characterization of the state of origin and the recognizing court can make its own evaluation.[141] According to Article 5(1)(f), the procedural rules of the Court of origin are relevant regarding the specific timeframe for a defendant to object to jurisdiction with the exception that the defendant can show in the requested state that any attempt to contest the jurisdiction of the Court of origin would not have succeeded.[142] This

133 Article 26 Brussels Ibis Regulation

134 Weller M., (n.44), p.291.

135 Saumier, G, (n.131), p.50.

136 Weller M., (n.44), p.291.

137 Saumier, G, (n.131), p. 51.

138 Garcimartín F, Saumier G., (n.23), par. 167.

139 Saumier, G, (n.131), p. 62.

140 Saumier, G, (n.131), p. 63.

141 Garcimartín F, Saumier G., (n.23), par. 168.

142 Garcimartín F, Saumier G., (n.23), par. 172.

exception is directed towards leaving a possibility that the assumption of Article 5(1)(f) of the Hague Convention is rebuttable, that procedural laws in the Court of origin allow the defendant to challenge jurisdiction with a very high threshold, it must be *evident* that the objection to jurisdiction would not have succeeded under the law of the State of origin.[143]

One aspect that need to be addressed (not only) in regard to Article 5(1)(f) of the 2019 Hague Convention is Article 15 of the 2019 Hague Convention which refers to the situation when a decision does not pass the jurisdictional filter it can be recognized and enforced under national rules. According to Article 15 of the 2019 Hague Convention, states will not be prevented from enforcing judgments where they consider that the defendant submitted to the court of origin even if that would not be case under Article 5(1)(f) of the 2019 Hague Convention.[144] Regarding the burden of proof it is directed towards the defendant in the exequatur proceedings since it indicates "...unless...".[145]

c) Non-exclusive choice of court agreements as a jurisdictional filter

The third modality of consent as a jurisdictional filter refers to non-exclusive choice agreements and this modality must be reviewed along with the 2005 Hague Convention. Article 5(1)(m) of the 2019 Hague Convention can be seen as a "sequel" for the choice of court agreements and the completion of the express consent of the parties. It is intended to cover non-exclusive choice of court agreements that were left out of the general system of the 2005 Hague Convention and intended to be accepted by countries by additional declarations and certain conditions.[146] According to this provision, if the formal validity of the non-exclusive choice of court agreement is satisfied[147] and this agreement is not an exclusive choice of court agreement, then it satisfies the requirement of Article 5 of the 2019 Hague Convention.

Despite the intention to have simple solutions and increase the predictability of cross border commerce, the system created by the HCCH that refers to choice of court agreements can be qualified as "complex". Namely, choice of court agreements can be distributed for recognition or enforcement between different legal sources on the bases of (i) characterization of the agreements as exclusive or non-exclusive; and (ii) the relevant time when the consensus was expressed by the parties. Also, other variables can complicate this position even further, depending on whether the States are parties to the 2005 and 2019 Hague Convention and whether they have made reciprocal declarations according to Article 22 of the 2005 Hague Convention. The baseline for the solution of these complex situations is the premise that the HCCH system tends to avoid overlap between these two Conventions[148] and it restrains itself from discouraging States from ratifying both instruments.[149] On that ground, the 2005 Hague Convention deals with exclusive choice of court agreements and in correlation with

143 Garcimartín F, Saumier G., (n.23), par. 173.

144 Saumier, G, (n.131), p. 65

145 Weller M., (n.44), p.292

146 Article 22 of the 2005 Hague Convention.

147 The formal validity of the non-exclusive choice of court agreement follows the liberal approach provided in Article 3(c) of the 2005 Hague Convention (the agreement needs to be concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference),

148 Garcimartín F, Saumier G., (n.23), par. 215.

149 Bonomi, A.,Mariottini, Cristina M., (n.19), p.554.

Article 5(1)(f) of the 2019 Hague Convention, that were reached prior to the commencement of the proceedings.[150] Judgment rendered by a Court, that seized the jurisdiction on the basis of expressive consent in the course of the proceedings will be recognized and enforced on the ground of the 2019 Hague Convention. The exequatur of judgment rendered by Courts seized on the base of non-exclusive choice of Court agreement can be either recognized and enforced according to the 2019 Hague Convention if there are no reciprocal declaration (activating Article 23 of the 2005 Hague Convention), or according to that convention if there are such declarations.[151] The solutions of these complex situations is strictly constructed according to the "either, or" approach[152] with certain consistency between these two instruments manifested in the corresponding rules regarding formal validity of the choice of court agreements and the notion of "exclusive choice of court agreements".[153]

The above scenarios prerequisite that both States have ratified both instruments. In other scenarios, if judgment that is rendered by Court seized on the base of an exclusive choice of Court agreement made prior to the proceedings and that State is not a party to the 2005 Hague Convention but has ratified the 2019 Hague Convention, then according to Article 15 of the 2019 Hague Convention recognition or enforcement can be conducted according to national rules.[154]

The Macedonian PILA is highly influenced by the Brussels Ibis Regulation and provides direct jurisdictional rules regarding express and implied consent.[155] Parties can agree on the jurisdiction before and after the dispute has arisen in connection to a particular legal relationship.[156] Moreover, N. Macedonia has signed the 2005 Hague Convention and it is expected to ratify. If N. Macedonia becomes Member state to the 2019 Hague Convention, then the distribution of the judgments that are recognized and or enforced according to these instruments will be conducted on the "either, or" principle.

Regarding submission, the PILA of N. Macedonia gives several alternatives for submission such as: the defendant has submitted a response to the claim without contesting the jurisdiction; has argued on the merits and didn't contest to the jurisdiction, or filed a counterclaim.[157] The latest moment for contesting jurisdiction is the preliminary court hearing, or in case of absence of preliminary court hearing, on the first court hearing for the trial.[158] As is the case in Article 26(2) of the Brussels Ibis Regulation, in matters referred to the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the em-

150 ibid.

151 Article 22 offers the possibility for a Countries to extend the scope of the 2005 Hague Convention to cover non-exclusive choice of court agreements regarding the recognition and enforcement of judgments. This provision is based on the reciprocity principle and the obligation to recognize and enforce judgments based on non-exclusive choice of court agreements arises only in regard to judgments given by courts of other Contracting Parties that have also provided declarations based on Article 22. For further details see, Hartley/Dogauchi Report (n.30), para. 240-255.

152 Weller M., (n.44), p.293.

153 In comparison see Article 3 of the 2005 Hague Convnetion and Article 5(1)(m) of the 2019 Hague Convention. See also, Garcimartín F, Saumier G., (n.23), par. 216,218; Bonomi, A.,Mariottini, Cristina M., (n.19), p.554. For the subtle differences between the 2005 Hague Convention and the 2019 Hague Convention see Weller M., (n.44), pp.293-294.

154 Bonomi, A.,Mariottini, Cristina M., (n.19), p.554.

155 Section 2, Articles 122-125 of the PILA.

156 Articles 122 and 123 of the PILA.

157 Article 125 of the PILA

158 ibid.

ployee is the defendant, the court shall, before assuming jurisdiction, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.[159] For cases of submission, judgments rendered from the Courts of N. Macedonia, could circulate under the 2019 Hague Convention.

2.2.1.3. Connections between the claim and the court of origin as a jurisdictional filter

a) Contractual obligations

Article 5(1)(g) of the 2019 Hague Convention provides for jurisdictional filter on the base of the legal relations that are in question which are the contractual relations. For a foreign judgment to pass this filter it must fulfill several conditions. Firstly, the judgement must be in regard to contractual obligations. Secondly, the Court of origin has to be the court where the place of performance of that obligation had happened or it was supposed to happen. Thirdly, the place of performance of the contractual obligation has been determined in the contract or alternatively, if the contract has been silent on that issue, according to the law applicable to the contract. Lastly, the place of performance of the contract needs not be arbitrary, randomly or insufficiently related to the transaction between the parties, that there is purposeful and substantial connection to the State of origin. If this provision is compared with the rules on direct jurisdiction regarding contracts in EU namely provided in the Brussels Ibis Regulation[160] and in other non-EU jurisdictions[161] it is evident that this provision represents compromise between two approaches[162] and tries to build "conceptual bridges"[163] between the more "legalistic" legal culture and the more "factual" legal culture.[164]

The first condition for application of Article 5(1)(g) of the 2019 Hague Convention, is correlated with the delimitation between the "contractual" and "non-contractual"[165] relations, task that according to the EU experience is not a simple one.[166] This task regarding characterization of the terms "contractual" and "non-contractual" relations will add initial complexity to this Convention which should be resolved according to Article 20 by the requirement of autonomous and uniform interpretation, with the notion of its international character.[167]

The second and the third condition are centered on the place of performance of the contract determined in the agreement or in absence of such agreement arising out of the *lex contractus*.[168] In order for judgments to pass this filter, the Court of origin should be in the "place of

159 Article 125(2) of the PILA.

160 Article 7(1) of the Brussels Ibis Regulation.

161 US and Canada. For the legal doctrines in these countries see, Bonomi, A.,Mariottini, Cristina M., (n.19), p.556.

162 Garcimartín F, Saumier G., (n.23), par.180

163 Weller M., (n.44), p.294

164 Garcimartín F, Saumier G., (n.23), par.180

165 For these relations Article 5(1)(j) of the 2019 Hague Convention applies. See, point d) from this part.

166 Stone P., EU Private International Law, Cheltenham, 2010, p.290; van Calster G., European Private International Law, Oxford, 2016, p.137; Dickinson A., The Rome II Regulation: The Law Applicable to Non-contractual Obligations; Oxford, 2008, p.173.

167 Garcimartín F, Saumier G., (n.23), par.195

168 Nielsen, P. A., (n.15), p.218

performance" of the contract. Such position is different from the Brussels Ibis Regulation, which is more favorable in providing more fixated jurisdictional criteria[169] regarding sale of goods and services,[170] while for the other contracts has similar rule to Article 5(1)(g) of the 2019 Hague Convention. The formulation provided in the Article 5(1)(g) of the 2019 Hague Convention creates more "variable" connection depending on the source of the dispute between the parties, for example, the place of performance will be determined based on which party has brought the claim.[171] Such divergent position (for sale of goods and services) between these two regimes will eventually create problem for judgments rendered by national Courts of the EU Member States on the base of the Brussels Ibis Regulation, since they will not pass the jurisdictional filter provided in the Article 5(1)(g) of the Hague Convention.[172]

The last condition serves as a corrector of the more rigid "legal" based determination of the "place of performance" and tries to provide for more "factual" determination based on purposeful and substantial connection to the State of Origin.[173] This condition bases its corrective aspect on the activity-based connecting factors[174] for allocation of the place of performance that according to "legal based" determination may be determined as arbitrary, random or insufficiently related to the transaction.[175] As an example, contracts performed online could be in practice.[176]

Article 145 of the PILA of N. Macedonia follows the jurisdictional criteria from Article 7(1) of the Brussels Ibis Regulation and provides for this dual direct jurisdictional system upon which Courts of N. Macedonia would assume the jurisdiction as long as the place of performance for contracts and if the parties haven't agreed differently, the "characteristic" obligation regarding sale of goods and services. In such a way, the possible outcome referred to regarding the correlation between the Hague and the Brussels Ibis Regime, applies to N. Macedonia and the assumed jurisdiction in accordance with Article 145 of the PILA could not correspond with the requirements in Article 5(1)(g) of the 2019 Hague Convention and thus, judgments rendered by N. Macedonian court on that jurisdictional ground may not pass the jurisdictional filter. However, such decisions can be recognized and enforced in other States according to other jurisdictional filters of Article 5 or according to national rules according to Article 15 of the 2019 Hague Convention.

b) Immovable property

The 2019 Hague Convention contains several provisions regarding immovable property. These provisions differentiate according to two criteria: (i) the legal relationship regarding the

169 Garcimartín F, Saumier G., (n.23), par.181

170 See Article 7(1)(b) of the Brussels Ibis Regulation, providing for the "characteristic" obligation regarding sale of goods and services as a jurisdictional criteria.

171 For example, the place of delivery if the claim was brought by the buyer and the place of payment if the claim was brought by the seller.

172 Bonomi, A.,Mariottini, Cristina M., (n.19), p.556; Weller M., (n.44), p.295.

173 Garcimartín F, Saumier G., (n.23), par.181

174 Weller M., (n.44), p.297.

175 Garcimartín F, Saumier G., (n.23), par.188.

176 Garcimartín F, Saumier G., (n.23), par.187.

rights *in rem*; and (ii) the afforded "importance" of these provisions and the accommodating "protection".

Article 6 of the 2019 Hague Convention is a specific and important provision in the mechanism of the Convention which elevates the protection of the forum in which immovable property is located to outmost importance and provides for exclusive indirect jurisdiction in these cases.[177] The consequence of such position of Article 6 of the 2019 Hague Convention is that judgments relating to rights *in rem* will only be recognized if they are rendered by the Court where the property is situated. This means that the only path forward towards *exequatur* for these judgments is if they were rendered in the forum *rei sitae.* The opposite would be if they are rendered by another Court than the one where the immovable property is situated. These judgments must not be recognized and enforced either under the convention or under national law, making Article 15 of the 2019 Hague Convention inapplicable in these situations.[178] Such position is not a novelty in private international law because in general similar counterparts can be found in other legal sources such as Article 24 of the Brussels Ibis Regulation.

The terms "immovable property" and "rights *in rem*" are very broad in their meaning and notion. The 2019 Hague Convention does not provide for a definition in regard to these terms. Instead, guidance can be found in the Explanatory Report providing that the legal relation that refers to the "rights *in rem*" are enforceable *erga omnes* and include

"ownership, mortgages, usufructs or servitudes; other States may grant *erga omnes* effect to certain rights of possession or use, or to some types of long-term leases".[179]

For the term "immovable property" the Explanatory Report provides that it includes among other things

"land, benefits or improvements to land, and fixtures (as opposed to chattels), including things embedded, attached, or affixed to the earth, or permanently fastened to anything embedded, attached, or affixed to the earth."[180]

Moreover, the 2019 Hague Convention provides for specific provisions regarding some of the rights *in rem* that relate to lease of immovable property (tenancy),[181] residential lease or on the registration of immovable property.[182] While Article 5(1)(h) of the 2019 Hague Convention has been positioned as a jurisdictional filter, thus providing for possibility of concurrent jurisdiction, Article 5(3) of the 2019 Hague Convention is positioned to be in the middle between Article 6 of the 2019 Hague Convention and Article 5(1) of the 2019 Hague Convention. On one hand, Article 5(3) has not been envisaged as an exclusive indirect jurisdiction, on the other hand, this provision has been deprived of the possibility of fulfillment of other jurisdictional filters according to the Article 5(1) of the 2019 Hague Convention. As a consequence, if judgments in regard to residential lease or the registration of immovable property do not pass the

177 Nielsen, P. A., (n.15), p.223.

178 Garcimartín F, Saumier G., (n.23), par.231.

179 Garcimartín F, Saumier G., (n.23), par.234.

180 Garcimartín F, Saumier G., (n.23), par.236.

181 Article 5(1)(h) of the 2019 Hague Convention

182 Article 5(3) of the 2019 Hague Convention.

forum *rei sitae* filter, then they cannot be recognized and enforced on any other jurisdictional filter provided in Article 5(1) of the 2019 Hague Convention, but still they can be recognized and enforced according to Article 15 of the 2019 Hague Convention (other national rules).

Article 5(1)(h) of the 2019 Hague Convention is designed to be a jurisdictional filter for the cases of lease of immovable property.[183] Certain dilemmas arises out of their ambivalent nature and also there are certain problems in their characterization which result in different legal traditions that correspond with their divergent understanding as to whether these cases should be treated more as right *in rem* or as contract.[184] Accordingly, if these legal relations in the characterization are leaning more towards the rights *in rem* then for these cases, the place where the property is situated or *forum rei sitae* is more appropriate for disputes regarding landlord and tenant on the existence or interpretation of the agreement, eviction, compensation for damages caused by the tenant or the recovery of rent.[185] In such situations these legal relations are usually provided with exclusive jurisdiction.[186] On the other hand, if these legal relations are leaning towards contracts (rights *in personam*) then the jurisdiction is decided in concurrent nature.[187]

The compromises negotiated in the 2019 Hague Convention can be seen in this provision in several aspects. Firstly, the starting point of this provision is that it treats these relations as rights *in rem* and provides for forum *rei sitae* as a jurisdictional filter. As a compromise, this provision does not provide for exclusive jurisdiction, (exclusive jurisdiction on the bases of Article 6 of the 2019 Hague Convention is only provided for judgments ruled on rights in rem in immovable property) and provides for an concurrent jurisdiction in regard to judgments on tenancy. Lastly this provision is limits the scope of Article 5(1) of the 2019 Hague Convention regarding residential lease of immovable property and registration of immovable property by depriving the concurrent option for these last two cases. Judgments in regard to lease of immovable property and registration of immovable property are eligible for recognition and enforcement only if they were given by a court of the State where the property is situated.[188] However, these relations according to Article 5(3) of the 2019 Hague Convention have not been given the exclusive indirect jurisdiction treatment in Article 6 since they can circulate according to Article 15 of the 2019 Hague Convention.[189]

The PILA of N. Macedonia provides for a set of jurisdictional rules regarding the rights in rem and tenancies. Article 141 of the PILA, heavily influenced by Article 24 of the Brussels Ibis Regulation, firstly provides for exclusive jurisdiction of the Court of N. Macedonia, regarding rights *in rem* in immovable property or tenancies of immovable property. However, Article 141 (2) of the PILA provides an exclusion from the exclusive jurisdiction of Courts of N. Macedonia regarding short-term tenancies, (modeled according to Article 24(1) of the Brussels Ibis

183 Lease of immovable property – tenancy as sometimes they are called, refer to legal relationships which arise out of agreement where one party undertakes to provide the other party with a temporary right of use of an immovable property, or part of it, in exchange for rent. Garcimartín F, Saumier G., (n.23), par.189.

184 Garcimartín F, Saumier G., (n.23), par.189.

185 Garcimartín F, Saumier G., (n.23), par.190.

186 Weller M., (n.44), p.300, Nielsen, P. A., (n.15), p.220.

187 Weller M., (n.44), p.300.

188 Garcimartín F, Saumier G., (n.23), par.230.

189 ibid.

Regulation) provided that the tenancies of immovable property are concluded for temporary private use for a maximum period of six consecutive months and also if the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State. With such position, it is expected that judgments coming from the Courts of N. Macedonia in most of the cases will base their jurisdiction for cases regarding immovable property and tenancies on the fact that the immovable property is situated in N. Macedonia, providing for exclusive jurisdiction, except for short term tenancies which could only, in limited situations, be given a concurrent jurisdiction.

c) Contractual obligations secured by right in rem in immovable property

Article 5(1)(i) of the 2019 Hague Convention is positioned as jurisdictional filter regarding judgments that concern contractual obligations which are secured by right *in rem* in immovable property and is conditioned on two conditions. First, that the judgment is rendered in the State where the immovable property is located. And second, the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*.[190] This provision has a particularly narrow scope of application in contrast to the other jurisdictional filters and is intended for judgments which would not be recognized or enforced according to the other jurisdictional filters because, for example, the debtor was not habitually resident in that state or payments were not due in that State.[191]

d) Non-contractual obligations

The provision regarding the jurisdictional filter for judgments relating to non-contractual obligations is provided in Article 5(1)(j) of the 2019 Hague Convention. As it was stated for the contractual relations, delimitation between the "contractual" [192] and "non-contractual" relations according to the EU experience is not a simple one. Therefore the 2019 Hague Convention, the same situation that occurred regarding the definition for "contractual relations" applies for the definition for "non-contractual relations" and leaves to the national courts to determine the content of this term in accordance with the other provisions of the Convention, particularly Article 20 which provides for autonomous and uniform application of the provisions in the Convention.[193]

The determination of the material scope of application regarding "non-contractual relations" has to start with the other provisions in the 2019 Hague Convention that are of direct significance for the determination of the scope of Article 5(1)(j) of the 2019 Hague Convention. Firstly, Article 2 of the 2019 Hague Convention provides for the relations that are excluded from the scope of application which are of importance to non-contractual obligations and such as: (g) marine pollution, limitation of liability for maritime claims, general average, and

190 Weller M., (n.44), p. 300

191 Garcimartín F, Saumier G., (n.23), par.192.

192 For these relations Article 5(1)(g) of the 2019 Hague Convention applies. See, point a) from this part.

193 Garcimartín F, Saumier G., (n.23), par.195

emergency towage and salvage; (h) liability for nuclear damage; (k) defamation; (l) privacy;[194] (m) intellectual property; (n) activities of armed forces, including the activities of their personnel in the exercise of their official duties; (o) law enforcement activities, including the activities of law enforcement personnel in the exercise of official duties; and (p) anti-trust (competition) matters.[195] In comparison, Brussels Ibis Regulation contains very broad jurisdictional criterion in Article 7(2), which provides that:

> "A person domiciled in a Member State may be sued in another Member State:
>
> > (2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;"

Moreover, the Brussels Ibis Regulation does not contain as large portion of excluded maters from the scope of application[196] Regulation Rome II, in its scope of application regarding the determination of the applicable law regarding non-contractual obligations, covers some of these excluded issues in the 2019 Hague Convention.[197]

Secondly, Article 5(1)(j) of the 2019 Hague Convention enumerates the types of injuries that would pass the jurisdictional filter to: to persons and to property.[198] Moreover it goes further into specific details that the jurisdictional filter points towards *per se* physical injury (including death) for individuals and damage or loss of tangible property.[199] In that context, such position of the scope of application, provides for very limited number of judgments that it relates to and tries to mitigate this position with other jurisdictional filters in Article 5(1) such as habitual residence and principal place of business in the State of origin.[200] Such position is part of the compromise in the drafting of the Convention, in order to obtain greater acceptance between the States.[201]

The jurisdictional criterion provided in Article 5(1)(j) of the 2019 Hague Convention is the place where the act or omission directly causing such harm occurred, irrespective of where that harm occurred, meaning that the State of origin is the place where this act or omission causing the harm occurred. This position, together with the limitation of the types of harm, is in line with the U.S. case law and represents a departing of the broad jurisdictional approach of the Brussels Ibis regulation.[202] Such aspect can produce some ambiguity regarding the application of Article 5(1)(j) of the 2019 Hague Convention towards judgments coming from Courts in N. Macedonia since Article 148(1) of the PILA is transposition of Article 7(2) of the Brussels Ibis Regulation covering broader material scope of relations that would not be recognized or enforced according to the 2019 Hague Convention. However, if judgments could not be recognized or enforced according to this jurisdictional filter then the other jurisdic-

194 For more on the reasons of exclusion of privacy matters from the scope of application of the 2019 Hague Convention see, North C., "The Exclusion of Privacy Matters from the Judgments Convention", Netherlands International Law Review 67 (2020).

195 See also Weller M., (n.44), p.301.

196 See Article 2 of the Brussels Ibis Regulation.

197 See Article 1 of the Rome II Regulation.

198 Garcimartín F, Saumier G., (n.23), par.196.

199 ibid.

200 Garcimartín F, Saumier G., (n.23), par.194; Weller M., (n.44), p.301

201 Bonomi, A.,Mariottini, Cristina M., (n.19), p.558

202 Garcimartín F, Saumier G., (n.23), par.197; Bonomi, A.,Mariottini, Cristina M., (n.19), p.558

tional filters in Article 5(1) of the 2019 Hague Convention can apply or eventually Article 15 of the 2019 Hague Convention will provide for recognition and enforcement of foreign judgments according to national rules.

e) Trusts

The provisions in Article 5(1)(k) of the 2019 Hague Contention apply towards judgments that refer to trusts. Trusts are a common law institute.[203] In order for a foreign judgment relating to trusts to pass this jurisdictional filter of the 2019 Hague Convention it should fulfill several conditions. Firstly, it needs to refer to the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing. Secondly, at the time that the proceedings were instituted, the State of origin needs to be either designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or alternatively, the State of origin needs to be expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated. And finally, the judgment relates to internal aspects of a trust between persons who are or were within the trust relationship.[204] However, if the judgments could not be recognized or enforced according to this jurisdictional filter then the other jurisdictional filters in Article 5(1) of the 2019 Hague Convention can apply or eventually Article 15 of the 2019 Hague Convention will provide for recognition and enforcement of foreign judgments according to national rules.[205]

f) Counterclaims

Article 5(1)(l) of the 2019 Hague Convention provides for jurisdictional filter regarding counterclaims. This provision differentiates two scenarios based on if the counterclaim was: (i) in favor of the counterclaimant; or (ii) against the counterclaimant. The first scenario tries to establish some balance between the claimant and the counterclaimant and their acceptance of the jurisdiction of the State of origin, narrowing its application towards cases which refer to a counterclaim which is out of the same transaction or occurrence as the claim.[206] The convention gives a broader scope regarding the interpretation of the 'transaction,' not limiting itself only to counterclaims arising out of the actual contract on which the original claim was based, and covering collateral contract which according to the term 'same occurrence' must be in regard to the related set of circumstances.[207] In the application of this scenario, notion must be given to Article 5(1)(c) of the 2019 Hague Convention that excluded its application regarding counterclaims.[208] The second scenario refers to the recognition or enforcement of judgments regarding counterclaims that are against counterclaimant. Also, this provision establishes some balance between the claimant and the counterclaimant, but also provides

203 Weller M., (n.44), p.303.
204 Garcimartín F, Saumier G., (n.23), par.199-207.
205 Garcimartín F, Saumier G., (n.23), par.199.
206 Garcimartín F, Saumier G., (n.23), par.210.
207 Garcimartín F, Saumier G., (n.23), par.211.
208 See text to note 116.

a certain safeguard for the counterclaimant and its involuntary acceptance of the established jurisdiction where the action was compulsory under the law of the State of origin in order to avoid preclusion.[209]

The PILA contains a specific provision regarding counterclaims, establishing direct jurisdiction of Courts of N. Macedonia for counterclaims if the request for counterclaim is in correlation with the claim.[210] Such position is in line with the 2019 Hague Convention.

g) Consumer and employment contracts

Consumers and employees are generally protected in national and international systems.[211] Such provisions can be found in the Brussels Ibis Regulation,[212] other international instruments,[213] and also in the PILA of N. Macedonia.[214] The consumer and employee contracts are excluded from scope of application in the 2005 Hague Convention[215] and the recognition or enforcement of judgments in these relations is covered with the 2019 Hague Convention. However, not all judgments relating to consumer and employment contracts are covered with the 2019 Hague Convention as Article 5(2) provides very specific limitations. The first delimitation in the Convention is made on the fact of whether the judgments have been rendered in favor or against the consumers and the employees. Consumers and employees as 'weaker party' can benefit from the 2019 Hague Convention system since all of the jurisdictional filters apply without restrictions for judgments that are rendered in their favor.[216] On the other hand, if the judgments are rendered against a consumer or an employee then these judgments can still be recognized or enforced according to the 2019 Hague Convention but with certain restrictions and limitations.

In addition, the 2019 Hague Convention provides the definition regarding the term 'consumer'. For the purpose of the convention, 'consumer' is defined as "a natural person acting primarily for personal, family or household purposes in matters relating to a consumer contract".[217] This definition is identical to the definition of 'consumer' provided in the 2005 Hague Convention.[218] In comparison, the Brussels Ibis Regulation provides for negative definition of consumers,[219] and contains a restriction that the other party must be acting in its trade and professional capacity.[220] Such unresolved aspects provide for one ambiguity as to whether the restrictions of Article 5(1) of the 2019 Hague Convention apply towards 'consumer to

209 Garcimartín F, Saumier G., (n.23), par.212.

210 Article 113 of the PILA.

211 Nielsen P.A., (n.15), p.222.

212 Articles 17 to 23 of the Brussels Ibis Regulation. The Brussels Ibis Regulation also affords certain protection toward insured person, see also Articles 10 to 16 Brussels Ibis Regulation.

213 Garcimartín F, Saumier G., (n.23), par.222.

214 Articles 146 and 147 of the PILA.

215 Article 2(1)(b) of the 2005 Hague Convention.

216 Bonomi, A.,Mariottini, Cristina M., (n.19), p.557

217 Article 5(2) of the 2019 Hague Convention.

218 Article 2(1)(a) of the 2005 Hague Convention.

219 "...for a purpose which can be regarded as being outside his trade or profession..." Article 17(1) of the Brussels Ibis Regulation.

220 Article 17(1)(c) of the Brussels Ibis Regulation

consumer' contracts.[221] On the other hand, the 2019 Hague Convention does not contain definition regarding 'employment contracts'. The intention of this provision is to be applicable in regard to salaried workers at any level excluding persons carrying on independent activity[222] and applying to individual employment relations thus excluding collective labor law relations.[223]

Furthermore, the restrictions and the limitations provided in Article 5(2) of the 2019 Hague Convention correlates to Article 5(1) of the 2019 Hague Convention and refers to the exclusion and limitation of the jurisdictional filters that relate to consent of the parties[224] and the place of performance of the contractual obligation.[225] The jurisdictional filter that referred to the expressive consent of the parties during the course of the main proceedings is further narrowed with Article 5(2) of the Hague Convention. For its application, the expressively addressed consent must be directed towards to the Court (and not to the other party), orally or in writing during the main proceedings. Moreover, the consent according to Article 5(2) of the 2019 Hague Convention is narrowed further by excluding submission and non-exclusive choice of court agreements. The only possible option for the judgment against consumer or employee to be recognized or enforced according to the 2019 Hague Convention on the basis of consent is that the 'weaker party' expressively accepted the jurisdiction during the main proceedings in manner that it addressed this written or oral consent directly to the Court of origin. Together with the exclusion of the place of performance of the contractual obligations for the cases of consumer and employment contracts, the only other possible alternative of recognizing or enforcing judgments against consumers or employees according to the 2019 Hague Convention is based on the habitual residence of the consumer and the employee.[226]

The PILA of N. Macedonia contains specific provisions regarding the determination of the direct jurisdiction regarding consumer and individual employment contracts.[227] Article 146 of the PILA is applicable regarding consumer contracts. The provisions in Article 146 of the PILA are modeled on the rules regarding the determination of the direct jurisdiction in the Brussels Ibis Regulation[228] and denote two separate scenarios: whether the claimant is the consumer or the seller. If the claimant is the consumer, then the Courts of N. Macedonia would have jurisdiction if the seller has domicile in N. Macedonia.[229] The other way around, if the seller is the claimant and the defendant is the consumer, then there is exclusive jurisdiction of Courts of N. Macedonia if the consumer has domicile in N. Macedonia.[230] This situation is especially important in regard to 2019 Hague Convention, because in most cases, the jurisdiction of consumer judgments where the consumer is the person against whom recognition is sought, would be determined according to the consumer's domicile. Keeping in mind the

221 Garcimartín F, Saumier G., (n.23), par.222

222 Garcimartín F, Saumier G., (n.23), par.223

223 Garcimartín F, Saumier G., (n.23), par.224; Weller M., (n.44), p.305; Nielsen P.A., (n.15), p.223.

224 Article 5(1)(e), (f) and (m) of the 2019 Hague Convention.

225 Article 5(1)(g) of the 2019 Hague Convention.

226 Garcimartín F, Saumier G., (n.23), par.225; Weller M., (n.44), p.305

227 Articles 146 and 147 of the PILA.

228 Rumenov I., Europeanisation of the Macedonian Private International Law – Legal Evolution of a National Private International Law Act, EU and comparative law issues and challenges(ECILC), Vol.4, 2020, Osijek, Croatia, p.319.

229 Article 146(1) of the PILA

230 Article 146(2) of the PILA

limited possibilities that remain after the implementation of the restrictions and limitations provided in Article 5(2) of the 2019 Hague Convention, the only foreseeable outcome would be the jurisdictional filter in Article 5(1)(a) of the 2019 Hague Convention which is the consumer's habitual residence. Such position is not without problems, as the issues which were referred above,[231] regarding the problem of the determination of domicile by the Courts of N. Macedonia and the habitual residence. Eventually in some situations this would lead to judgments concerning consumer contracts not being recognized according to the 2019 Hague Convention, where the Court of N. Macedonia rightfully seized its jurisdiction based on the domicile of the defendant, but the defendant is habitually resident elsewhere, thus making the 2019 Hague Convention inapplicable to consumer contracts. Such position could be mitigated by two rules, first by the possibility in the Article 146(3) of the PILA that allows exception to the exclusive jurisdiction by allowing the parties to consent to the jurisdiction of the Courts of N. Macedonia conditioned that it must be given after the dispute has arisen. However, consent must be expressly provided during the proceedings addressed to the Court, in order to pass the jurisdictional filter limitation in Article 5(2) that refers to Article 5(1)(e) of the 2019 Hague Convention. This scenario would useful to a very small number of judgments since it prerequires very specific acts by the parties. The second possibility provided in Article 15 of the Hague Convention, seems more realistic and in the situation when judgment is rendered against a consumer with habitual residence outside of N. Macedonia, these judgments will be recognized according to the national rules of the Court of recognition. The same rationale goes for individual consumer contracts since Article 147 of the PILA provides for the same exclusive jurisdiction based on the domicile of the employee as a jurisdictional criterion.

231 See text to note 80.

3. Conclusion

The indirect jurisdiction or the jurisdictional filters of the 2019 Hague Convention, represent the first and most important filter that distributes judgments that would be recognized or enforced according to the 2019 Hague Convention. These judgements would be recognized or enforced based on other instruments or they would not be recognized as they are in the situations provided according to Article 6 of the 2019 Hague Convention. These 16 different jurisdictional filters, with their relevant conditions, scenarios, requirements and limitations "move the engine" of the 2019 Hague Convention by distinguishing between the judgments that are eligible for recognition or enforcement from the ones that are not. Such functions are not attributed to the "heart" of the body, but rather to the "brain".

The approach taken by this Convention is very important for the acceptance of 2019 Hague Convention because it does not tackle the issue of direct jurisdiction, instead it provides the minimum standards according to which judgments could circulate and does not prevent States from applying their national laws. The solutions provided in the 2019 Hague Convention are a product of a transatlantic compromise that could potentially lead to an adoption of a genuine universal instrument for recognition or enforcement of judgments in civil or commercial matters. This success comes with a price. States need to digest this compromise of institutes, terms, definitions and jurisdictional criteria that are unknown to their legal tradition. This task would certainly not be easy, but the concept established by this instrument to become a minimum standard in exequatur of judgments in civil or commercial matters makes it worthwhile. With such possibility there is certain danger, that States in the short term will rely more on Article 15 of the 2019 Hague Convention than on the other provision in the Convention. This distorts the initial intention of the HCCH. In the long term, the "passive" approach can influence countries to synchronize their direct jurisdictional criteria with the criteria provided in the Article 5 and 6 of the new 2019 Hague Convention, which will create an outcome of easier judgement circulation. Moreover, the work on the new Direct Jurisdiction Convention is now predictable, influenced by these compromises taken in Article 5 and 6 of the 2019 Hague Convention.

The implementation of the 2019 Hague Convention in N. Macedonia is not without certain problems. Although many of these jurisdictional filters are present in the PILA of N. Macedonia, the main jurisdictional filters, the habitual residence of the defendant, comes under potential threat. As it has been elaborated, the distortion in the national legislation regarding the notion of domicile and habitual residence provides that Courts of N. Macedonia can assume the jurisdiction on the bases of domicile of the defendant even if its habitual residence is elsewhere. In such situations these judgments would not pass the jurisdictional filter in the 2019 Hague Convention. One possible solution is the use of habitual residence of the defendant as a jurisdictional criterion which is provided in Article 110 of the PILA together with domicile of the defendant. The fulfillment of one of these jurisdictional criteria would suffice for the jurisdictional connection to be established. In such situations the problem with the "do-

micile" would be solved. This problem is directly in correlation with Article 5(1)(a) of the Hague Convention, but also indirectly extends to consumer contracts and individual employment contracts. Similar problems would be encountered in other South European countries as the notion of domicile and habitual residence is similar and many people have left their domicile country and established habitual residence elsewhere. but according to the national notion of domicile, continue to be domiciled in their original country. Despite these resolvable problems, the 2019 Hague Convention should represent a welcomed solution for N. Macedonia and the region, since it offers these regional economies a range of possibilities for resolving transnational disputes through legal certainty and increased procedural predictability. Such position would increase global trade and with positively influence the region's economy.

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