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UKRAINE ADAPTS ITS LAWS TO EMBRACE THE 2005 HAGUE CONVENTION ON THE CHOICE OF COURT AGREEMENTS

On 15 October 2022, two Ukrainian laws came into effect to implement the Hague Convention on Choice of Court Agreements dated 30 June 2005 (referred to as the "**Convention**"). The first law is the Law of Ukraine "*On the Ratification of the Convention on Choice of Court Agreements*" No. 1544-IX, dated 15 June 2021 which ratifies the Convention. The second is the Law of Ukraine "*On Amendments to Certain Legislative Acts of Ukraine in Connection with the Ratification of the Convention on Choice of Court Agreements*" No. 2627-IX, dated 21 September 2022, which introduces amendments to various legislative acts in order to sync them with the ratified Convention (referred to as the "**Amendment Law**").

One of the notable changes made by the Amendment Law is the inclusion of Article 4-1 in the Law of Ukraine No. 2709-IV, dated 23 June 2005, known as the "**Private International Law**". This newly added Article 4-1 directly implements certain provisions of the Convention. The provisions reflected in Article 4-1 are as follows:

1. **ARTICLE 4-1 OF THE PRIVATE INTERNATIONAL LAW**
 - 1.1 *Scope of choice of court agreements:* Participants in private legal relations involving a foreign element now have the right to enter into agreements on the choice of court of any state. This provision corresponds to Article 3 of the Convention, which recognises the parties' autonomy to select the court for resolving their disputes.
 - 1.2 *Form of the agreement:* The agreement on the choice of court must be made in writing, regardless of the place of its conclusion. This requirement aligns with Article 3(c) of the Convention, which requires that the choice-of-court agreement must be in writing or be documented by any other means of communication which renders information usable for subsequent reference.

- 1.3 *Choice of Ukrainian courts:* The amended Private International Law specifies that if the agreement designates a court in Ukraine, it must be made in writing in accordance with Ukrainian law. This provision is in accordance with Article 5 of the Convention, which permits the designation of a particular court or courts from a contracting state.
- 1.4 *Limitations on changing exclusive jurisdiction:* The amended Private International Law prescribes that the choice-of-court agreement cannot provide for a change in the exclusive jurisdiction of a case with a foreign element to the courts of Ukraine. This limitation corresponds to the Convention, which recognises that a choice-of-court agreement cannot affect the exclusive jurisdiction of a court of the relevant contracting state. Ukrainian courts have currently exclusive jurisdiction in cases concerning real estate located in Ukraine, cases regarding the registration or liquidation of legal entities registered in Ukraine, bankruptcy cases, and other cases where Ukrainian legislation provides for the exclusive jurisdiction of Ukrainian courts.
- 1.5 *Validity of the agreement:* The Amendment Law recognises that the invalidity of a legal instrument, which includes an agreement on the choice of court, does not automatically invalidate the agreement itself. This provision conforms with the general principle set forth in Article 3 of the Convention, which states that the agreement on the choice of court can be severed from other terms of contract and cannot be contested solely on the ground that the contract is not valid.

The introduction of Article 4-1 in Private International Law demonstrates the Ukraine's commitment to the principles and objectives of the Convention. This reflects and implements several important provisions of the Convention, such as the autonomy of parties, the requirement of a written agreement, limitations on changing exclusive jurisdiction, and the severability of the choice-of-court agreement. In this way Ukraine actively promotes and enhances the enforceability and effectiveness of choice-of-court agreements in cross-border disputes.

2. **THE CONVENTION**

The Convention is the convention that aims to provide a framework for the recognition and enforcement of exclusive choice of court agreements in civil and commercial matters. Under the Convention, parties to a contract have the freedom to select a particular court or courts to resolve any disputes that may arise from their contractual relationship. This choice is manifested through an exclusive choice of court agreement, which designates the court(s) that will have jurisdiction over any future disputes. The agreement must be in writing or through any other means that provide a reliable record of its existence.

Through establishing uniform rules for the recognition and enforcement of exclusive choice of court agreements the Convention contributes to the development of a harmonised international legal framework in cross-border civil and commercial litigation. It provides legal certainty, facilitates international trade and investment,

and promotes the efficient resolution of disputes through the enforcement of choice of court agreements.

2.1 **Cornerstones of the Convention**

Articles 3, 5, 6 and 8 stand out as key pillars of the Convention and establish the framework for the validity, jurisdiction, recognition, and enforcement of exclusive choice of court agreements. They ensure the effectiveness of judgments, promoting legal certainty and facilitating cross-border civil and commercial transactions. These articles generally enhance party autonomy, protect contractual expectations, and contribute to the harmonisation of international dispute resolution.

2.1.1 Article 3 addresses the concept of exclusive choice of court agreements and provides definitions and requirements for such agreements.

- (a) Firstly, it defines that an exclusive choice of court agreement is an agreement entered into by two or more parties and which designates, for the purpose of resolving disputes arising from a specific legal relationship, the courts of one contracting state or specific courts of one contracting state, while excluding the jurisdiction of any other courts. This definition clarifies that exclusive choice of court agreements focus on specifying the courts that will have jurisdiction over the disputes, thereby excluding other courts from consideration.
- (b) Further, it establishes a presumption that a choice of court agreement designating the courts of one contracting state or specific courts of one contracting state is considered exclusive unless the parties expressly provide otherwise. This emphasises the default nature of exclusivity in such agreements, unless explicitly stated otherwise by the parties involved.
- (c) Thirdly, Article 3 outlines the requirements for the conclusion or documentation of an exclusive choice of court agreement. It specifies that such an agreement must be in writing or by any other means of communication that allows the information to be accessible and usable for subsequent reference. This ensures that the agreement is clearly and reliably documented, facilitating its enforceability and interpretation.
- (d) Finally, it provides that an exclusive choice of court agreement forming part of a contract is considered independent of the other terms of the contract. This provision establishes the autonomy and severability of the choice of court agreement from the overall validity of the contract. It expressly requires that the validity of the exclusive choice of court agreement cannot be challenged solely on the grounds that the contract itself is invalid.

- 2.1.2 Article 5 establishes the jurisdiction of the chosen court in an exclusive choice of court agreement. It ensures that the designated court(s) have the authority to hear and decide disputes covered by the agreement, and it prohibits the court from declining jurisdiction in favor of another court in another state. This notwithstanding, it acknowledges that certain jurisdictional rules, such as those related to subject matter or internal allocation, may still apply. The parties' choice must nonetheless be duly considered when the chosen court has discretion over transferring the case.
- (a) Article 5 provides that the court or courts of a contracting state that have been designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies. This means that if the parties involved in a civil or commercial matter have agreed to a specific court or courts to resolve their dispute, those designated courts will have the authority to hear and decide the case. However, it is important to note that this provision does not override the domestic laws of the state in which the court is located, and if the agreement is null and void under the law of that state, the designated court's jurisdiction will not apply.
 - (b) It further provides that a court with jurisdiction cannot refuse to exercise its jurisdiction on the basis that the dispute should be decided in a court of another state. This provision reinforces the principle of the chosen court's authority and prevents it from declining jurisdiction solely on the grounds that another court in a different jurisdiction might be more appropriate to hear the case.
 - (c) It finally specifies that the foregoing provisions do not affect certain rules related to jurisdiction. This includes rules concerning jurisdiction based on the subject matter or the value of the claim, as well as rules concerning the internal allocation of jurisdiction among the courts of a contracting state. However, it emphasises that where the chosen court has discretion regarding the transfer of a case, due consideration should be given to the parties' choice. In other words, if the chosen court has the power to transfer the case to another court within the same jurisdiction, it should take into account the parties' agreement when making a decision.
- 2.1.3 Article 6 of the Convention outlines the obligations of a court that has been approached with a dispute to which an exclusive choice of court agreement applies. The main requirement is that the court, which is not the chosen court designated in the agreement, must suspend or dismiss the proceedings. There are certain exceptions where the court may continue with the proceedings despite the existence of an exclusive choice of court agreement:

- (a) *Nullity of the Agreement*: If the exclusive choice of court agreement is found to be null and void under the law of the chosen court, the court may proceed with the case.
- (b) *Lack of Capacity*: If a party to the agreement lacked the legal capacity to enter into the agreement under the law of the court where the proceedings have been initiated, the court may continue with the case.
- (c) *Manifest Injustice or Public Policy*: If giving effect to the exclusive choice of court agreement would result in a manifest injustice or would be manifestly contrary to the public policy of the court's jurisdiction, the court may proceed with the case.
- (d) *Exceptional Reasons*: If there are exceptional reasons beyond the control of the parties that make it unreasonable to perform the exclusive choice of court agreement, the court may continue with the case.
- (e) *Chosen Court's Decision*: If the chosen court has already decided not to hear the case, the court approached with the dispute may proceed with the proceedings.

It is clear that while Article 6 aims to uphold the principle of party autonomy and enforce exclusive choice of court agreements, it recognises certain exceptional circumstances where the court may deviate from the agreement. It may be seen to be providing a framework for courts to determine when and whether they should suspend or dismiss proceedings taking into account the specific circumstances of the case and the interests of justice.

2.1.4 In its turn, Article 8 of the Convention deals with the recognition and enforcement of judgments given by a court designated in an exclusive choice of court agreement. Here is a brief analysis of the key provisions:

- (a) *Recognition and Enforcement*: A judgment given by a court of a contracting state designated in an exclusive choice of court agreement must be recognised and enforced in other contracting states in accordance with the provisions of Chapter III (*Recognition and Enforcement*) of the Convention. Recognition or enforcement can only be refused based on the grounds specified in the Convention.
- (b) *No Review of Merits*: The court addressed, where recognition or enforcement is sought, is generally not allowed to review the merits of the judgment given by the court of origin. The findings of fact on which the court of origin based its jurisdiction are binding on the court addressed, unless the judgment was given by default.
- (c) *Effect and Enforceability*: A judgment can only be recognised if it has effect in the state of origin, and it can only be enforced if it is

enforceable in the state of origin. This provision provides that the judgment is valid and effective in its originating jurisdiction.

- (d) *Postponement or Refusal*: Recognition or enforcement of a judgment may be postponed or refused if the judgment is under review in the state of origin or if the time limit for seeking ordinary review has not expired. However, such refusal does not prevent a subsequent application for recognition or enforcement of the judgment.
- (e) *Application to Transferred Cases*: Article 8(5) extends application of Article 8 to judgments given by a court of a contracting state following a transfer of the case from the chosen court in that state. However, if the chosen court had discretion on whether to transfer the case, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the state of origin.

These provisions create a sound framework for the recognition and enforcement of judgments under the Convention, ensuring that judgments given by the designated court in an exclusive choice of court agreement are generally recognised and are enforceable across contracting states, while also allowing for limited grounds for refusal or postponement based on specific circumstances.

2.2 **Benefits and Drawbacks of the Convention**

The Convention may be seen to hold significant advantages for countries in the realm of international civil and commercial matters. Looking at the benefits of ratifying the Convention can provide a deeper understanding of the advantages it offers in promoting a fair and efficient international legal framework.

2.2.1 The Convention has clear potential to provide (just a few benefits as an example):

- (a) increased legal certainty and predictability in cross-border commercial disputes because the Convention provides clear rules on jurisdiction and recognition and enforcement of judgments.
- (b) improved access to justice for parties involved in cross-border disputes as it is aiming to reduce the risks and costs associated with parallel litigation in multiple jurisdictions.
- (c) enhanced attractiveness as a destination for foreign investment providing greater predictability and stability for international businesses.
- (d) facilitation of international trade by reducing legal uncertainty and the potential for costly and time-consuming cross-border disputes.
- (e) promotion of international cooperation and comity among contracting states and the encouragement of mutual recognition and respect for each other's legal systems.

- (f) protection of the interests of individuals and businesses involved in cross-border disputes offering fair and efficient resolution of such disputes.
- (g) improved cross-border coordination and cooperation among courts and legal systems providing certain framework for such cooperation.
- (h) and, finally, potential for increased legal harmonisation across jurisdictions encouraging adoption of common rules and principles for cross-border disputes.

2.2.2 While the Convention offers numerous benefits, it is essential to critically evaluate its potential drawbacks. Through an examination of the following issues, a more comprehensive understanding of the implications of the Convention and its effectiveness in achieving its objectives can be obtained. Some possible drawbacks of acceding to the Convention based on the criticisms expressed by various scholars, could include:

- (a) *Limitations on Judicial Discretion:* One of the criticisms is that the Convention imposes limitations on judicial discretion, particularly in interpreting choice-of-court agreements. Critics believe that this restriction could hinder flexibility of courts in accommodating specific circumstances or resolving complex disputes. It is thought that a rigid application of the Convention may undermine a country's legal system and impede the development of jurisprudence. It can be argued however that the limitations on judicial discretion are necessary to promote predictability, uphold party autonomy, and enhance the enforceability of choice-of-court agreements across jurisdictions.
- (b) *Risk of Inconsistent Decisions:* Another concern is the potential risk of inconsistent decisions if a country's courts and arbitral tribunals lack coordination. Inconsistency in judgments can lead to uncertainty and confusion, affecting parties' confidence in the chosen dispute resolution mechanism. Therefore it is necessary to foster effective communication and cooperation between courts and tribunals to mitigate the risk of contradictory outcomes.
- (c) *Potential for Forum Shopping:* Critics further suggest that the Convention may increase the potential for forum shopping, whereby parties select a jurisdiction based on its perceived advantages or favorable outcomes. This concern arises from the recognition and enforcement mechanisms established by the Convention, which aim to honour exclusive choice-of-court agreements. Parties may arguably exploit these provisions by strategically selecting a jurisdiction known for its favourable legal climate, potentially undermining the integrity of the dispute resolution process.

- (d) *Limited Scope of Application:* Another aspect of criticism relates to the limited scope of the Convention, which solely applies to exclusive choice-of-court agreements. We heard arguments that this narrow focus may restrict the Convention's effectiveness in resolving disputes arising from other types of agreements or utilising alternative dispute resolution mechanisms. It was contended that expanding the scope to include non-exclusive agreements or other dispute resolution methods would enhance the Convention's relevance and utility.
- (e) *Complexity of Enforcement:* There were further concerns expressed regarding the complexity and time-consuming nature of the enforcement process under the Convention. The arguments are such that intricate procedural requirements, potential conflicts of laws, and differing national interpretations of the Convention's provisions could deter parties from utilising the Convention as a preferred dispute resolution mechanism.
- (f) *Limited Ratification:* The limited number of countries that have ratified the Hague Convention has been identified as a potential drawback. With fewer countries ratifying the Convention, its effectiveness as a global dispute resolution mechanism may be compromised.
- (g) *Potential for Abuse:* Some critics argue that the Convention could be abused by parties seeking to delay or frustrate the dispute resolution process. They highlight the possibility of challenging the validity of choice-of-court agreements or refusing to comply with court judgments or arbitral awards. These tactics could undermine the efficiency and effectiveness of the Convention in achieving timely and enforceable outcomes.

It is important to note that these drawbacks should be considered in the context of the Convention's overall objectives and the broader landscape of international dispute resolution. While these concerns may pose challenges, they do not overshadow the potential benefits and the underlying intention of the Convention to promote party autonomy, enhance cross-border enforceability, and provide a predictable framework for resolving international disputes.



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