

Perspectives on Reciprocal Judicial Cooperation in Civil and Commercial Matters between EU Member States and Georgia: Which Way Forward?

1. Introduction

In light of the fact that the European Union (EU) cooperates with Georgia in the framework of the European Neighborhood Policy and its eastern regional dimension, the Eastern Partnership, it is obvious since the signing of the Association Agreement¹ and the Deep and Comprehensive Free Trade Area² (Association Agreement/DCFTA) with the European Union in June 2014 that Georgia has taken a further step on its path toward EU integration.³ The obligations undertaken by Georgia under the Association Agreement/DCFTA again are testimony to Georgia's expressed intention to continue its reform-

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¹ ASSOCIATION AGREEMENT between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part signed on June 27, 2014: <http://www.parliament.ge/uploads/other/34/34754.pdf>.

² For available texts in Georgian and English, see: <http://www.economy.ge/?page=economy&s=7>.

³ For details of the European Neighborhood Policy and Enlargement Negotiations, see: https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/georgia_en.

ist approach to approximating its domestic regulatory standards with the EU *acquis communautaire*. In particular, the Association Agreement sets forth important issues with respect to judicial cooperation in civil and commercial matters, approximation of which brings Georgia to an enhanced level in the international framework of judicial cooperation. The present article is an attempt to analyze Georgia's perspectives on becoming an attractive and flexible jurisdiction within the framework of judicial cooperation in civil and commercial matters on the international level.

According to Article 21 of the Association Agreement, which refers to legal cooperation, “[t]he Parties agree to develop judicial cooperation in civil and commercial matters as regards the negotiation, ratification and implementation of multilateral conventions on civil judicial cooperation and, in particular, the conventions of The Hague Conference on Private International Law in the field of international legal cooperation and litigation as well as the protection of children.” Article 21 makes clear that Georgia should take further steps to become more active in The Hague Conference on Private International Law (HCCH), which provides a forum for its members to develop and implement common rules in the sphere of private international law.

Reducing barriers to cross-border commercial litigation through the clear allocation of mechanisms for cross-border recognition and enforcement of foreign judgments will bring benefits not only to businesses that engage in international transactions, but also to the Georgian state as an interested party seeking to establish a regulatory environment conducive to international trade and investment.

It is worth mentioning that Georgia has been a party to the Statute of The Hague Conference on Private International Law (entry into force: 15 July 1955) since 2001⁴ and is thus bound by the following conventions:⁵

- Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents;
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;

⁴ <https://www.hcch.net/en/states/hcch-members/details1/?sid=40>.

⁵ <https://www.hcch.net/en/states/hcch-members/details1/?sid=40>.

- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption; and
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

Since signing the Association Agreement in 2014, Georgia has taken steps toward implementation by introducing three national action plans, as follow:

- Decree no. 1516 of the Government of Georgia as of 03.09.2014 on approving the 2014 National Action Plan for the Implementation of the Association Agreement (Action Plan 2014)⁶;
- Decree no. 59 of the Government of Georgia as of 26.01.2015 on approving the 2015 National Action Plan for the Implementation of the Association Agreement (Action Plan 2015)⁷; and
- Decree no. 382 of the Government of Georgia as of 07.03.2016 on approving the 2016 National Action Plan for the Implementation of the Association Agreement (Action Plan 2016).⁸

Each of the above action plans expressly stipulates⁹ that Georgia's planned further actions are to enhance judicial cooperation in civil and commercial matters by acceding to and implementing the below-listed conventions:

- The 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention);
- The 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention);
- The 1980 Convention on the Civil Aspects of International Child Abduction (Child Abduction Convention); and
- The 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Convention on Parental Responsibility and Protection of Children).

⁶ <https://matsne.gov.ge/ka/document/view/2496190>.

⁷ <https://matsne.gov.ge/ka/document/view/2702520>.

⁸ <https://matsne.gov.ge/ka/document/view/3222307>.

⁹ Compare action item 195 of the Action Plan 2014, item 226 of the Action Plan 2015 and item 78 of the Action Plan 2016.

The Service Convention and the Evidence Convention are subject to future accession, while the Child Abduction Convention¹⁰ and the Convention on Parental Responsibility and Protection of Children¹¹ are currently applicable in Georgia.

The analysis provided in this article is mainly limited to perspectives on Georgia's creation of a respective legal framework for judicial cooperation on commercial matters in which the Evidence Convention and/or the Service Convention play a decisive role. Additionally, this article examines whether there are other international instruments which should be also taken into consideration for the purposes of developing and enhancing judicial cooperation in commercial matters. The main goal of this article is to identify and analyze the opportunities available for Georgia to: (i) become an attractive jurisdiction for cross-border transactions and commercial litigation cases; and (ii) bring Georgia closer to the EU. The article ends by providing some brief concluding remarks.

2. The Importance of Georgia's Acceding to the Service and Evidence Conventions

In order to support the need of businesses and citizens for access to justice in cases of cross-border litigation, two key aspects must be taken into consideration: (i) service of documents; and (ii) taking of evidence. The Service and Evidence Conventions introduced in the previous section are the main instruments applicable to facilitating international cross-border litigation. Georgia is currently contracting several multilateral and bilateral conventions and agreements¹² on judicial cooperation. However, the number of the contracting states to the referred conventions and agreements does not exceed 16 and is thus insufficient.

¹⁰ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>.

¹¹ <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>.

¹² Please see the list of the conventions and agreements which apply to both Georgia and the following countries: Azerbaijan, Uzbekistan, Ukraine, Kazakhstan, Turkmenistan, Armenia, Belorussia, Kyrgyzstan, Moldova, Russia, Tajikistan, Greece, Bulgaria, Cyprus, Turkey, and Czech Republic: <http://www.justice.gov.ge/Ministry/Index/336>.

2.1. Service Convention

The Service Convention applies in all cases involving civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad.¹³ The Service Convention serves as an essential tool facilitating the transmission of documents for service abroad. Thus, it significantly reduces the time required to complete process services abroad.¹⁴ Failure to ensure proper service can seriously harm the legal interests of respective parties and causes manifold difficulties in cross-border litigation. The low number of multilateral and bilateral agreements concluded by Georgia results in a lack of international regulations applicable to the service of documents in cases of cross-border commercial litigation involving Georgia. Hence, once Georgia becomes a contracting state to the Service Convention, it will have rules in common with 72 contracting states on the cross-border service of documents. These common rules will contribute to the flexible management of cross-border commercial litigation cases in which Georgia is involved.

Apart from the above advantages, accession to the Service Convention will bring Georgia closer to EU member states for the following reasons. First, the majority of EU member states are contracting states to the Service Convention.¹⁵ Second, the main principles of the Service Convention are mirrored in Regulation (EC) No. 1393/2007 of the European Parliament and of the European Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000¹⁶ (2007 EU Service Regulation).¹⁷

¹³ Article 1 of the Service Convention: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=17>.

¹⁴ HCCH, Practical Handbook on the Operation of the Service Convention, 2016, p. IX.

¹⁵ <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>.

¹⁶ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32007R1393>.

¹⁷ Judicial cooperation in civil matters in the European Union, A guide for legal practitioners, 2015, p. 85: http://ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf

2.2. Evidence Convention

The Evidence Convention is, after Service Convention, a major international treaty covering cross-border civil procedures. The Evidence Convention is an essential instrument that greatly streamlines the procedures for taking evidence abroad, thus significantly reducing the time required for obtaining evidence.¹⁸ According to Article 1 of the Evidence Convention, in civil and commercial matters a judicial authority of a contracting State may in accordance with the provisions of the law of that state: request the competent authority of another contracting State, by means of a letter of request, to obtain evidence or perform some other judicial act.¹⁹ Similar to the Service Convention, Georgia's accession to the Evidence Convention brings with it a number of advantages.

First, by becoming a contracting state to the Evidence Convention, Georgia will have a common legal framework with 61 other states with respect to cross-border taking of evidence.²⁰ Second, most EU member states are contracting states to the Evidence Convention. Hence, accession will facilitate cross-border judicial cooperation between EU member states and Georgia on the multilateral convention level. Furthermore, as a matter of fact, the basic principles of the Evidence Convention are in line with those of Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters²¹; thus, accession to the Evidence Convention will further advance the approximation of Georgian laws to EU regulations.

3. Choice of Court Convention

Another international instrument relevant to cross-border civil and commercial litigation is the Hague Convention of 30 June 2005 on Choice of Court

¹⁸ HCCH, Practical Handbook on the Operation of the Evidence Convention, 2016, p. IX.

¹⁹ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=82>.

²⁰ <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82>.

²¹ Judicial cooperation in civil matters in the European Union, A guide for legal practitioners, 2015, p. 91: http://ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf; <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32001R1206>.

Agreements (Choice of Court Convention), which is aimed at ensuring the effectiveness of choice of court agreements (also known as “forum selection clauses” or “jurisdiction clauses”) between parties to international commercial transactions.²² The Choice of Court Convention provides considerable certainty to businesses engaging in cross-border activities by creating a legal environment better adapted and tailored to the needs of international trade and investment, thus allowing parties to better manage risks and barriers related to cross-border litigation.²³ In particular, parties to international transactions may, based on the Choice of Court Convention, agree in advance how to resolve disputes arising out of or in connection with the concluded transaction. The main issue arising from choice of forum clauses in international practice is the difficulty of ensuring proper enforcement, as applicable laws on the validity and enforcement of respective jurisdiction clauses differ and vary from jurisdiction to jurisdiction.²⁴ In order to ensure the validity and enforceability of forum selection clauses, the Choice of Court Convention contains three basic rules pertaining to choice of court agreements:²⁵

1. The chosen court must in principle hear the case (Article 5);
2. Any court not chosen must in principle decline to hear the case (Article 6);
and
3. Any judgment rendered by the chosen court must be recognized and enforced in other contracting states except where a ground for refusal applies (Articles 8 and 9).

In contrast to international arbitration agreements which are extensively recognized according to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, forum selection clauses allowing choice of respective state courts are not always duly respected and declared enforceable due to the particularities of the national jurisdiction of the

²² <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>.

²³ Outline of the Convention, May 2013: <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf>.

²⁴ Schack, Internationales Zivilverfahrensrecht, 6. Auflage, 2014, Paragraphs: 500-553.

²⁵ Outline of the Convention, May 2013: <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf>.

referred court. Consequently, one of the main purposes of the Choice of Court Convention is to rectify this situation by creating a legal environment more favorable to international trade and investment.²⁶

The Choice of Court Convention applies to exclusive choice of court agreements “concluded in civil or commercial matters” (Article 1) and excludes consumer and employment contracts and certain specified subject matter (Article 2).²⁷

As Georgian case law does not provide a unified and well-established interpretation of the legal nature and outcome of choice of court agreements under the Private International Law of Georgia and existing multi- and bilateral treaties on judicial cooperation,²⁸ it is reasonable for Georgia to accede to the Choice of Court Convention in order to create a better-defined legal framework for resolving international commercial disputes in Georgia and for the recognition and enforcement of Georgian court judgments outside of Georgia. Such an outcome should occur, especially in light of a promising project launched by the Ministry of Justice of Georgia in October 2016 related to the creation of a special commercial court judiciary system.²⁹

Georgia will benefit in various ways by acceding to the Choice of Court Convention. First, it is worth mentioning that 30 states and Regional Economic Integration Organizations (REIOs)³⁰ are currently bound by this Convention. It is clear that the Choice of Court Convention has continued to gain momentum since its entry into force on 1 October 2015; Singapore ratified the Convention on 2 June 2016, becoming the first Asian state to ratify, and the United States of America and Ukraine are now signatory states to the Convention.³¹ Second, it is important to note that the EU is a signatory to the

²⁶ Outline of the Convention, May 2013: <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf>.

²⁷ For further details, see Explanatory Report by Trevor Hartley and Masato Dogauchi, 2013: <https://www.hcch.net/en/publications-and-studies/details4/?pid=3959>.

²⁸ Gamkrelidze, International Competence in International Private Law in: Justice and Law, Legal Journal, #3(30)11, p. 15; Svanadze, in: Beiträge und Informationen zum Recht im postsowjetischen Raum (www.mpipriv.de/gus), http://mpipriv.de/files/pdf4/2016_05_23.pdf.

²⁹ For more information, see: <http://www.justice.gov.ge/News/Detail?newsId=5307>

³⁰ Regional Economic Integration Organizations.

³¹ Suggested Further Work in Support of Forum and Law Selection in International Commercial Contracts, Council on General Affairs and Policy of the Conference – March 2017, please follow the link: <file:///C:/Users/ThinkPadT410/Downloads/March%202017.pdf>.

Choice of Court Convention.³² Hence, accession to the Choice of Court Convention will bring Georgia closer to those EU member states (which include every EU member state except Denmark) which are bound by the Convention. Accession will thus greatly contribute to the establishment of legal certainty in cross-border investment and business transactions and related disputes involving businesses from EU member states and Georgia.

4. Judgments Project

The above-referred Choice of Court Convention is linked to the “Judgments Project”, an important project current led by the HCCH.³³ The project goes back to work undertaken by the HCCH since 1992 on two main aspects of private international law in cross-border litigation regarding civil and commercial matters: (i) the international jurisdiction of courts; and (ii) the recognition and enforcement of such court judgments abroad.³⁴ Introduction of the Choice of Court Convention was one of the outcomes of the Judgments Project.

Currently, the Judgments Project is focused on the creation of a worldwide convention on the recognition and enforcement of foreign judgments. Conclusion of such a convention will bring international litigation and cross-border recognition and enforcement of foreign judgments to an enhanced level in terms of facilitating international trade and investment, especially in a time when cross-border commerce and international business transactions are becoming increasingly important.³⁵ Achievement of uniformity of recognition and enforcement of foreign judgments on a global level will reduce the legal obstacles encountered by individuals and corporations involved in cross-border transactions and create a more reliable judicial infrastructure in support of international trade and investment.³⁶

³² <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>.

³³ <https://www.hcch.net/en/projects/legislative-projects/judgments>.

³⁴ <https://www.hcch.net/en/projects/legislative-projects/judgments>.

³⁵ For an overview of the Judgments Project, see: <https://www.hcch.net/en/projects/legislative-projects/judgments>.

³⁶ For an overview of the Judgments Project, see: <https://www.hcch.net/en/projects/legislative-projects/judgments>.

According to estimates, on average there are more than 70 cases heard by the Supreme Court of Georgia each year with respect to the recognition and enforcement of foreign judgments in Georgia.³⁷ This number is not low in the Georgian context. Georgia will benefit by actively establishing for itself “[...] the goal of finding the means to improve [...] all in its current legislation that still hampers trade, [...] and does so with the intent [...] of seeing accepted the principle of mutual recognition of judgments”³⁸. Hence, it would be a major step forward for Georgia in terms of judicial cooperation in cross-border recognition and enforcement of foreign judgments if the country succeeds in becoming an active participant of the Judgments Project with the final aim of acceding to the respective convention after its successful introduction. Moreover, it is worth nothing that the current applicable laws of Georgia set forth such principles as *Res Judicata*, *Indirect Jurisdiction*, *Conflicting Judgments*, *Lis Pendens*, *Reciprocity* and *Public Policy* all in a manner comparable to German, Swiss, and European principles.³⁹ Such principles establish a reasonable base for simplified implementation of the respective convention in Georgia.

5. Conclusion

The present article analyzes the perspectives of reciprocal judicial cooperation between EU member states and Georgia in civil and commercial matters. The analysis shows that for Georgia the way toward closer approximation with EU standards in international judicial cooperation goes through and via The Hague regime; more specifically, the HCCH. The establishment of an efficient and dependable legal framework for regulating cross-border litigation constitutes a fundamental role of the HCCH.⁴⁰ Consequently, the

³⁷ Letter N: p-84-16 of supreme court of Georgia as of 02.06.16.

³⁸ E. Hirsch Ballin (ed.), *A mission for his time: Tobias Asser's inaugural address on commercial law and commerce, Amsterdam 1862* (The Hague: T.M.C. Asser Press, 2012) pp. 33-34.

³⁹ For further analysis of the comparison of Georgian rules on recognition and enforcement of foreign judgments with German and European principles, see: Svanadze, *Grundlagen des deutsch-georgischen Anerkennungsrechts*, 2014.

⁴⁰ For an overview of the Judgments Project, see: <https://www.hcch.net/en/projects/legislative-projects/judgments>.

HCCH is a main forum for Georgia's participation with the ultimate goal of successfully implementing the Association Agreement in the context of enhanced international judicial cooperation.

In particular, it would be reasonable for Georgia to proceed with identification of the respective Hague conventions subject to further accession by Georgia and applicable to the sphere of international judicial cooperation.

Within that context, it is a significant step taken by Georgia to include the Service and Evidence Conventions in the respective agendas of the Action Plans referred above.

Additionally, it is reasonable for Georgia to consider potential accession to the Choice of Court Convention in terms of its contribution to the removal of inherent risks and obstacles involved in matters of cross-border litigation arising out of or in connection with international trade and investment transactions involving Georgian parties.

Taking respective steps toward accession to the Choice of Court Convention will create a reasonable and adequate base for Georgia to actively participate in the Judgments Project. Participation in the Judgments Project would bolster Georgia's image as a nation with primary goal of creating an attractive jurisdiction for international trade and investment and respective disputes. ■