



THE NEW HAGUE JUDGMENTS CONVENTION

Dispute Resolution analysis: Sara Sheffield, Partner and Derek Bayley, Associate, both at HFW Dubai, discuss the background to and the details of the new 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the Hague Judgments Convention) – a new international convention aimed at making it easier to enforce court judgments across jurisdictions.

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What is the 2019 Hague Judgments Convention?

On 2 July 2019, during its 22nd Diplomatic Session, the Hague Conference on Private International Law (HCCH) and its delegates concluded the text of a new treaty governing the cross-border recognition and enforcement of civil and commercial judgments—the Hague Judgments Convention.

The conclusion of the Hague Judgments Convention and its opening for signature is a significant milestone in improving the international enforceability of commercial court judgments. In his remarks at the signing ceremony, Dr Christophe Bernasconi, the Secretary General of the HCCH, explained that the Hague Judgments Convention will become ‘an apex stone for global efforts to improve real and effective access to justice’ and that it will fill an ‘an important gap in the landscape of private international law’.

What is the background to the Hague Judgments Convention?

Previously, the HCCH focussed on creating a set of recognition and enforcement rules for international litigation involving exclusive choice of court (ie forum selection) agreements. This led to the conclusion of the 2005 Hague

Choice of Court Convention, which is now in force in Mexico, Montenegro, Singapore and the EU28 (including the UK).

The Hague Judgments Convention is the sister instrument to the 2005 Hague Choice of Court Convention, but is considerably wider in its scope, as it creates rules for the circulation of qualifying court judgments beyond cases where there was a judgment produced on the basis of a choice of court agreement between parties to an international dispute. It is more akin, in terms of its breadth, to the 1958 New York Convention (dealing with international recognition and enforcement of arbitral awards).

What are the key points of relevance to dispute resolution practitioners?

As stated in its preamble, the Hague Judgments Convention aims to facilitate the cross-border recognition and enforcement of judgments emanating from the courts of contracting states to the Hague Judgments Convention.

The Hague Judgments Convention applies only to civil and commercial judgments and expressly excludes judgments concerning criminal, penal, administrative, revenue or customs matters (Article 2). Nor does the Hague Judgments

Convention encroach on technical subject matters covered by more specialised treaties (eg family, matrimonial, succession, defamation, intellectual property matters, and certain maritime matters), or where matters are treated inconsistently as between legal systems (insolvency, privacy matters and certain anti-trust/competition matters). These exceptions largely reflect accepted international legal norms of private international law, and genuine policy differences where it might not be appropriate that a judgment in one state should be given equivalent effects in another.

Article 5 of the Hague Judgments Convention sets out certain minimum jurisdictional filters that qualifying judgments must pass through in the original proceedings in order to be eligible for recognition and enforcement under the Hague Judgments Convention. This includes, inter alia, where the defendant was habitually resident or had his place of business, or submitted to the jurisdiction, or was found liable for tortious harm occurring, in the state of origin.

Article 7 of the Hague Judgments Convention sets out certain key exceptions to recognition and enforcement. These include circumstances where:

- there was some fundamental defect in notification or service of the claim
- the judgment was obtained by:
 - fraud
 - violated due process
 - did not adhere to certain jurisdictional requirements of the originating court (such as where it was rendered in breach of a choice of court agreement or ruled on matters of exclusive jurisdiction of a requested state)
 - was contrary to public policy of the requested state, or
 - was inconsistent with another judgment handed down by the requested state between the same parties

Ultimately, the Hague Judgments Convention is pro enforcement, and its exceptions are intended to operate narrowly. State signatories should expect to provide reciprocal and equal treatment to qualifying foreign judgments within their own legal system.

Of the general and final clauses, the Hague Judgments Convention contains several noteworthy provisions that give further insights into its intended practical operation, and entry into force:

- Article 16 of the Hague Judgments Convention does not apply to a judgment given prior to the Hague Judgments Convention being in force for both the State of origin and the requested state
- Article 23 of the Hague Judgments Convention contains a 'give way' clause in favour of treaties concluded on the same subject matter, either earlier or later than the Hague Judgments Convention. By design, the Hague Judgments Convention provides maximum deference to regional or bilateral instruments, so that more finely-tuned regional treaties are not overridden by the more general provisions of the Hague Judgments Convention

- Article 29 of the Hague Judgments Convention contains a bilateralisation clause, effectively enabling states to make declarations to prevent the application of the Hague Judgments Convention to judgments emanating from a particular state. This is an interesting political mechanism that would allow states to consider whether they would wish to have treaty relations with any particular other contracting state, at the time of each state's accession
- Article 28 of the Hague Judgments Convention stipulates that it shall enter into force 12 months after the ratification, acceptance, approval or accession of two states (the 12-month period allowing for bilateral objections under Article 29 of the Hague Judgments Convention). In that regard, it has quite a long entry into force

What are the procedural steps to bring the Hague Judgments Convention into force? When is it likely it will come into force?

Article 28 of the Hague Judgments Convention (described immediately above) provides the relevant period for entry into force (ie 12 months after the accession of the first two states). However, the length of the process of accession can be quite nebulous-it can take several years for interested states to study the text and consider the legal and political effects of the Hague Judgments Convention.

In effect, the conclusion of the Hague Judgments Convention text has now 'handed over the keys' from recognition and enforcement experts to national legislatures for implementation, and it remains to be seen which states will sign, ratify/ accede to the Hague Judgments Convention, and in what timeframe.

In what may prove to be a positive early indication of the popularity of the Hague Judgments Convention, on 2 July 2019, Uruguay became the first signatory state. Further, on 3 July 2019, the day after the Hague Judgments Convention was concluded, the European Commission announced on behalf

of the EU28 (including the UK), that it would start the process of preparing for accession to the Hague Judgments Convention. Uruguay's signature indicates its eventual intention to accede to the Hague Judgments Convention, but this is not the same as formal accession under the Vienna Convention on the Law of Treaties—accession is still required. As such, there are currently no states having acceded to or ratified the Hague Judgments Convention.

It is generally hoped that the Hague Judgments Convention will attract significantly more contracting states than the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, which attracted only five state parties.

The true potential of the Hague Judgments Convention now lies in the hands of state legislatures. The wider the accession rate of states to the Hague Judgments Convention, the more powerful an instrument it will become. It is hoped that in time, and with a wide basis of participation, the Hague Judgments Convention may unlock new enforcement pathways between courts, in jurisdictions which have limited or no current enforcement regimes.

Will the Hague Judgments Convention provide assistance for the enforcement of English judgments in an EU Member State in the event of a no-deal Brexit? Could the Hague Judgments Convention become a viable Brexit backstop?

The Hague Judgments Convention could feasibly one day feature as part of the UK's fundamental legal architecture in its relationship with the EU, in the event of a no-deal Brexit.

Upon Brexit, the UK will leave the EU, and depart from the Brussels I (Recast) Regulation (EU) 1215/2012 (the Recast Brussels Regulation), which governs mutual enforcement of judgments between EU Member States. This is likely to cause disruption to the general ease of enforceability of English judgments in the courts of EU Member States

(as well as EU judgments in the UK). If no other provisions are concluded to the contrary, in the event of a no-deal Brexit, common law rules on jurisdiction and the enforcement of judgments will largely apply in cases that are currently covered by the Recast Brussels Regulation regime.

The Hague Judgments Convention would, however, allow qualifying judgments to circulate under a convention framework between the UK and the continuing EU27, should both become party to the Hague Judgments Convention. As noted, it already looks likely that the EU will join the Hague Judgments Convention in due course. As for the UK, if Brexit has not occurred by the time that the EU28 signs, technically, the UK would be bound to the Hague Judgments Convention as a Member State of the EU28. However, upon a no-deal Brexit, the UK would be entitled (and indeed required) to accede to the Hague Judgments Convention in its own right, to continue to enjoy the Hague Judgments Convention's benefits with respect to the continuing EU27 Member States. This situation was previously considered and confirmed in the context of the UK's accession to the 2005 Hague Choice of Court Convention on 28 December 2018. At that time, the UK deposited its instrument of accession with the depositary in the Netherlands in its own right, such that the 2005 Hague Choice of Court Convention will enter into force for the UK once the UK is no longer part of the EU28 upon Brexit.

The UK will no doubt be looking similarly closely at accession to the Hague Judgments Convention in its own right in a post no-deal Brexit scenario. However, it is important to consider that:

- the proposed timeframe for signature by the EU28 (including the UK) is unclear and will require coordination internally among EU Member States. For the 2005 Hague Choice of Court Convention, the time taken between conclusion of the text and EU signature was approximately four years. In that regard, there may still be considerable delay before the EU28 (or EU27) is in a position to sign and accede
- Article 16 of the Hague Judgments Convention makes clear that judgments created in the UK or the EU before the Hague Judgments Convention comes into effect are excluded
- inherent to the assumption of a no-deal Brexit is that the UK will leave the EU with no coverage by way of a multilateral or bilateral instrument or transitional arrangement on matters of recognition and enforcement of civil and commercial judgments with the EU27. If that is incorrect, and some multilateral instrument (such as the 1988 Lugano Convention) or some other bespoke arrangement between the EU27 and the UK is concluded that is more comprehensive than the Hague Judgments Convention, then that arrangement, concluded either earlier or later, would take precedence over the Hague Judgments Convention under the give-way clause

In light of the above, there are clearly various factors that may limit the immediate potential usefulness of the Hague Judgments Convention as a Brexit backstop. Thus, even if signed by the UK and the EU27, once in force, the Hague Judgments Convention

would only provide a minimum standard of circulation between the UK and the EU27 for certain future qualifying judgments, rather than providing any comprehensive alternative to the detailed Brussels Recast regime that will be discarded in a no-deal Brexit.

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