



HFW MIDDLE EAST ENFORCEMENT SERIES – THE DRAFT HAGUE JUDGMENTS CONVENTION

A new Convention for the enforcement of foreign judgments is on the horizon.

Questions of judgment enforceability lie at the heart of international litigation. For a judgment creditor it is highly desirable that a favourable judgment obtained in one jurisdiction should freely circulate and attach to a judgment debtor's foreign assets, wherever it does business in the world, and wherever those assets happen to be located, at minimal further delay, process, and expense.

Conversely, when defending an enforcement action, a judgment debtor would want the law to provide reasonable safeguards to prevent inappropriate enforcement of an order of a foreign court. A judgment debtor would likely also expect that its own courts would intervene to prevent direct enforcement of a foreign judgment containing fundamental defects in natural justice, such as where a judgment was obtained by fraud, or where no notice of the proceedings was given to the defendant.

What if there was a global recognition and enforcement convention for court judgments akin to the New York Convention under which recognition and enforcement processes could be harmonised?

In this article, and in view of 60 years of success enjoyed by the New York Convention, we consider the potential future impact of a draft Hague Judgments Convention (the "Hague Convention") – currently being drafted by the Hague Conference on Private International Law – and its possible effects on the current global recognition and enforcement landscape.

2018 marks the sixtieth anniversary of the signature of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention is arguably one of the world's most important and successful international trade law treaties, boasting a membership of 159 State parties, and has created a body of international case law amounting to over 1,750 reported court decisions. A key to the New York Convention's success is the removal of enforcement barriers by its homogenisation of the various member states' national law requirements, standards, and processes to enable domestic recognition and enforcement of foreign arbitral awards. In stark contrast, the international legal landscape for the global recognition and foreign judgments remains unsynchronised and heterogeneous. National law requirements, standards, and processes vary wildly between jurisdictions, and can be fraught with uncertainty and risk for litigants.

The current landscape – International treaties

A judgment's ease of enforceability abroad, as well as the strength of any checks and balances against its enforcement, are fundamental litigation strategy factors for litigants in multinational proceedings, from the very outset of those proceedings – if not before.

Litigants must ordinarily look to either bilateral treaties (such as the *Trans-Tasman Treaty* between Australia and New Zealand) or

multilateral treaties (such as the *Brussels I Recast* in Europe, or the *GCC Convention* in the Middle East) between states when considering judgment enforceability. These provide minimum agreed standards of treatment of certain judgments between courts, and streamline recognition and enforcement procedures. Courts can also establish *ad hoc* inter-court protocols to create, or add to, existing cross-court recognition and enforcement regimes, by targeting institutional relationships with a specific courts (such as the *Memorandum of Guidance between the UK Commercial Courts and the Dubai International Financial Centre Courts in the United Arab Emirates*). However, such court-based protocols are often expressed as non-binding as domestic courts cannot, in the main, create valid international obligations to bind states.

Treaties and protocols are designed to encourage enforcement forums to respect an original judgment's finality (i.e. its *res judicata* status), and often oblige the enforcement forum to refrain from any exhaustive re-examination of the merits of the original dispute. This in turn promotes certainty for parties, reduces legal expense, and improves the rule of law.

At present, the majority of recognition and enforcement instruments remain only regional. They operate between specific trading blocs, or between states with close political or geographical ties. This is because there is a high degree of trust given, and control yielded, between courts in recognition and enforcement proceedings. Necessarily, under such treaties, a court addressed is required to accept the pronouncement of the original court as a just and fair resolution of the underlying dispute.

But how might, for example, an English judgment be enforced by a litigant against a judgment debtor's assets in the US or in Saudi Arabia, in circumstances where there is no reciprocal enforcement treaty between those states? The answer is that, in the absence of any treaty arrangements, the case will need to be re-litigated in the foreign court with the judgment

giving some weight to the original judgment, however all this will be at considerable inconvenience and more expense to all parties, and with the risk of an inconsistent outcome or award of damages. This example highlights the importance of reciprocal enforcement treaties.

The draft Hague Convention

The draft Hague Convention will create a global recognition and enforcement treaty which, similar to the New York Convention, will be open to all jurisdictions, to better enable the enforcement of qualifying judgments between the courts of signatory states in respect of civil and commercial matters. This has to be in the interests of those engaging in cross border transactions and will further enhance and support global trading opportunities.

The modern iteration of this legislative project, lead by the Hague Conference on Private International Law, has been underway since 2012. Previously, the project focussed on creating recognition and enforcement rules for international litigation involving forum selection agreements. This led to the conclusion of the *2005 Hague Choice of Court Convention 2005*. However, in many cases there is no choice of court agreement between parties to an international dispute and, as such, the draft Hague Convention aims to extend the benefits of an international recognition and enforcement treaty to a broader possible range of cases.

Given the number of legal systems to which it is intended to include, the draft Hague Convention must act as low bar to recognition and enforcement, and has been drafted to allow only straightforward judgments with uncontroversial, apolitical subject matters to pass between states. The draft Hague Convention covers only civil and commercial judgments, and so will not include judgments concerning criminal, penal, administrative, revenue or customs matters, or complicated legal or technical subject matter (e.g. family, matrimonial, succession, defamation, privacy, and certain maritime matters), judgments awarding exemplary or punitive damages,

judicial penalties, or complex interim injunctive relief. These exceptions largely reflect accepted international legal norms of private international law.

The draft Hague Convention will establish:

- A general presumption that in-scope civil and commercial judgments between signatory states must be recognised and enforced. To do so, a judgment must meet certain minimum jurisdictional bases for recognition and enforcement in the first state to be eligible for recognition and enforcement in the second. This will include where the defendant was habitually resident or had his place of business in the state of origin, or submitted to the jurisdiction in the state of origin, or was found liable for tortious harm occurring in the state of origin.
- The draft Hague Convention will also establish certain narrow exceptions to recognition and enforcement, including where a 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 draft Hague Convention will be pro-enforcement, and the 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.

HFW sector considerations – Maritime, Aviation, and Insurance matters

Certain maritime matters are likely to be excluded under the draft Hague Convention. The current draft does not cover judgments relating to highly specialised or technical subject matters, including marine

pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage. However, there may be scope for civil and commercial judgments arising out of other maritime matters, such as marine insurance, non-emergency towage and salvage, shipbuilding or ship mortgages to circulate under the draft Hague Convention.

It should be added that, unlike the *Brussels I Recast* which establishes specific, separate provisions in relation to recognition and enforcement of judgments relating to insurance contracts, it is understood that the draft Hague Convention may not make such a distinction, and may treat judgments on insurance matters the same as any other civil and commercial matter.

The draft Hague Convention will also likely declare that it is not intended to override or "oust" the jurisdiction of any other more specialised convention (including those for the commercial carriage of passengers and goods) dealing with particular subject matter in force in contracting states, whether concluded before or after the draft Hague Convention comes into force. Therefore more technical past or future maritime and aviation conventions will not be displaced.

Into the future

Whilst the draft Hague Convention is in the advanced stages there are numerous procedural steps still to complete in negotiating, concluding, and ratifying this large, multiparty international convention such that it is unlikely to enter into force in this decade.

That said, the entry into force of the draft Hague Convention is close enough for litigants to multiparty, multinational disputes (who will be the eventual beneficiaries of the Hague Convention) to anticipate its conclusion. There are likely to be parties already contemplating or even pursuing litigation which will one day create judgments that can be enforced under this Convention.

As one of the world's most active Disputes focussed firms, HFW will be keeping a keen eye on the draft Hague Convention as it enters into

its final phases of development. This is an ambitious private international law project in the pipeline, and it may yet unlock new enforcement pathways into new courts, in new jurisdictions, with no current enforcement regimes.

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Derek recently served as a Recording Secretary at the Fourth Meeting of the Special Commission on the Judgments Project in The Hague, held 23-29 May 2018.

Should you have any questions, please do not hesitate to contact the authors of this briefing:

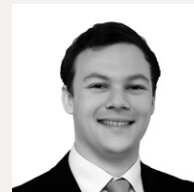


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