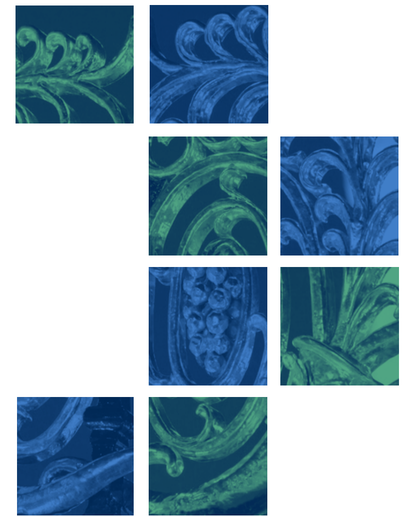

The Hague-19 Convention and international disputes

Is it 'back to the future' for the export of English judgments to overseas jurisdictions?

JOSHUA FOLKARD & CHARLES CONNOR
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On 27 June 2024, the United Kingdom ratified the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, or the Hague-19 Convention. This will enter into force in England and Wales on 1 July 2025.[1]

In their Explanatory Report on the Hague-19 Convention (the Explanatory Report)[2] – a key tool in the interpretation of the convention – Professors Francisco Garcimartin and Geneviève Saumier describe the convention as "a much-needed and long-awaited piece of the 'puzzle' that is cross-border dispute resolution".[3] Even if the convention does have that salutary effect in England and Wales, its entry into force will, doubtlessly, add some complications to the well-established common law on the recognition and enforcement of foreign judgments.

What are the key features of the Hague-19 Convention as it stands, and how will it apply in England and Wales upon its entry into force in just under 12 months' time?

Background

In 1992, the Hague Conference on Private International Law (HCCH) commenced work on the development of uniform rules as to both jurisdiction and the recognition and enforcement of foreign judgments in cross-border civil/commercial cases.[4]

Over the following decade, the scope of this work was scaled down to focus only on cases involving choice of court agreements. This led to the conclusion of the Convention of 30 June 2005 on Choice of Court Agreements (the Hague Choice of Court Convention), which entered into force on 1 October 2015. The UK participated in this convention, from the moment it entered into force, by virtue of its membership of the European Union. (Post-Brexit, it has acceded to the Hague Choice of Court Convention in its own right.)[5]

Between 2011 and 2019, the HCCH drafted the text of what would eventually become the Hague-19 Convention. It is currently in force in all EU states bar Denmark, and in Ukraine (it will enter into force in Uruguay on 1 October 2024). Other states, including the Russian Federation, Israel, and the United States of America have signed, but have not ratified, the Hague-19 Convention.

Key provisions

The below discussion outlines several of the most important provisions of the convention, in the order a court is likely to approach them.

Scope

Article 1 of the Hague-19 Convention sets out its substantive and geographical scope. Article 1(1) defines the substantive scope – the recognition and enforcement of judgments in civil or commercial matters – and should be read in conjunction with article 2, which excludes certain matters (see below). Article 1(2) addresses the geographical application of the convention – "this Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State" – and should be read in conjunction with article 30, which sets out the articles of the convention which a contracting party can make declarations in relation to.

Article 16 sets out the temporal scope of the convention: it will only apply where proceedings were issued, in the foreign court, *after* the entry into force of the convention in the UK (that is, after 1 July 2025).

1 See: HCCH | The United Kingdom ratifies the 2019 Judgments Convention; HCCH | Declaration/reservation/notification
2 See: https://www.hcch.net/en/publications-and-studies/details4/?pid=6797
3 Explanatory Report, Foreword, p3.
4 Explanatory Report, [3].
5 Private International Law (Implementation of Agreements) Act 2020, s 3D.

Article 2, as explained above, excludes certain matters from the scope of the convention. Article 2(1) sets out 17 categories of case which fall outside; Article 2(2) states that those exclusions do not apply if the excluded matter "arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings".

Therefore, a party seeking to rely, before the English and Welsh courts, on a foreign judgment that falls *outside* the scope of the Hague-19 Convention – because (i) it has been given by a court in a non-contracting state, (ii) it does not relate to civil or commercial matters, (iii) it falls within the exclusions set out in article 2, and/or (iv) it was given in foreign proceedings which were commenced before 1 July 2025 – will have to fall back on the common law rules for the recognition and enforcement of foreign judgments (see article 15).

It bears emphasis that the English courts, in determining the meaning of provisions in the convention, will apply an *autonomous* approach (that is, "by reference to the objectives of the Convention and its international character, and not by reference to national law").[6] This approach to meaning is perfectly familiar to the English courts – they have, for example, been deploying it in relation to the Hague Choice of Court Convention since its entry into force in 2015.[7] For some concepts, determining autonomous will be relatively straightforward. 'Judgment', for example, is defined in article 3(1)(b) as follows: "[A]ny decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognized or enforced under this Convention. An interim measure of protection is not a judgment." Other concepts – such as 'civil or commercial' (article 1(1)) – may pose greater problems.

(Refusing) recognition and enforcement

If a foreign judgment passes through the scope filter (articles 1, 2 and 16), it will only be eligible for recognition and enforcement if one of the requirements set out in **article 5(1)** is met. All of these requirements are based on some sort of link between the judgment debtor and the state in which the foreign judgment was given (such as habitual residence).

Even if (i) the foreign judgment is within the scope of the convention and (ii) at least one of the requirements set out in article 5(1) has been met, recognition or enforcement may be refused, pursuant to **article 7**, if:

- The document which initiated the foreign proceedings was either not notified to the defendant in sufficient time and in such a way as to enable them to arrange the defence (subject to some exceptions), or was notified to the defendant but in a manner incompatible with fundamental principles of the English court concerning service of documents;
- The judgment was obtained by fraud (see Analysis: Fraud below);
- Recognition or enforcement would be "manifestly incompatible" with the public policy of England and Wales;
- The foreign proceedings were contrary to a choice of court agreement;
- The judgment is inconsistent with an English judgment in a dispute between the same parties; or
- The judgment is inconsistent with an earlier judgment given by a court of a third state between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested state.

Practical points

Article 12(1) requires the party seeking recognition/enforcement to, among other things, produce "a complete and certified copy of the judgment" and "any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the state of origin".

Beyond that, the procedure for recognition/ enforcement in England and Wales is to be governed by English law (**article 13(1)**).

Analysis

As with any new convention affecting the proceedings of international disputes, there are a number of aspects of the Hague-19 convention where details of interpretation and application remain unclear, or it is possible to discern tensions with established law and procedure.

Following are three of the most significant for practitioners seeking to anticipate the convention's effect from 1 July 2025.

Territorial extent

The UK Government had the option to extend the Hague-19 Convention to: (i) all constituent countries of the UK; (ii) the British Overseas Territories (BOTs) including Bermuda, the British Virgin Islands (BVI) and the Cayman Islands; and (iii) the Crown Dependencies (Guernsey, Jersey and the Isle of Man).

6 Explanatory Report [32]; also art 20.
7 *Etihad Airways PJSC v Flöther* [2020] EWCA Civ 1707; [2022] QB 303. See also the Explanatory Report on the 2005 Hague Convention, [49].

The UK Government had extended previous HCCH conventions to certain territories, including the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention).[8] As an aside, while the Hague Evidence Convention is often utilised in BVI litigation and has been domesticated into BVI law,[9] the HCCH Status Table does not list its extension to the BVI[10] (although the United States of America has extended the Hague Evidence Convention to the United States Virgin Islands[11]). The Hague Evidence Convention is, however, listed as having been extended to the Crown Dependencies and (among other BOTs) the Cayman Islands.

With regard to the Hague-19 Convention, the UK Government has not (yet[12]) opted to extend it to any of the BOTs or Crown Dependencies. Rather, the Government declared pursuant to article 25 that the Convention shall extend only to England and Wales.[13] As matters stand, judgments from Scotland and Northern Ireland will also therefore not be capable of 'export' under the Hague-19 Convention.

Fraud

The current, common law mechanism for recognising and enforcing foreign judgments has a broad exception where it is alleged that the incoming judgment was obtained by fraud.[14] This exception applies even where the foreign court considered and rejected the alleged fraud.[15] The only relevant limitations on the 'fraud exception' appear to be that:

- there must be prima facie evidence of fraud, failing which relitigation of the matter would amount to an abuse of process;[16] and
- where the issue of fraud has already been relitigated for a second time in the foreign court (for example, on an application to set aside the original judgment), the losing party cannot have a third 'bite of the cherry' due to issue estoppel.[17]

Article 7(1)(b) of the Hague-19 Convention provides simply that: "Recognition or enforcement [of a foreign judgment] may be refused if … the judgment *was obtained* by fraud" [emphasis added]. This is broader than the fraud exception under the Hague Choice of Courts Convention, which is limited to cases where the judgment was obtained by fraud "in connection with a matter of procedure".[18] By contrast, the Hague-19 fraud exception will extend to "substantive fraud", which the Explanatory Report defines as: "behaviour that deliberately seeks to deceive in order to secure an unfair or unlawful gain or to deprive another of a right", at [255].

It remains to be seen whether English and Welsh judges would allow as broad an approach to the fraud exception under Hague-19 as is permissible at common law. It is noteworthy, however, that aside from the possibility of 'vetoing' application of the Hague-19 Convention as between the UK and any subsequently joining state,[19] the convention is open for signature and accession by all states.[20]

This potentially distinguishes the position under the Hague-19 Convention from the position prior to the end of the Brexit transition/implementation period in respect of EU member state judgments.[21] The Brussels I Recast only allowed refusal of recognition and/or enforcement where it would be "manifestly contrary to [UK] public policy".[22] This likely excluded a case where the EU member state court had considered and rejected an allegation of fraud.[23] That approach was more restrictive than under the common law, but formed part of a system where (at least in theory) there was mutual trust and confidence between all EU member states.[24]

Arbitration

The question of whether judgments obtained in breach of arbitration clauses must be recognised and/or enforced under multilateral conventions is a vexed one: see, for example, criticism of the decision in *The Wadi Sudr*[25] under the (unrecast) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the

8 See the Extensions list at: https://www.hcch.net/en/instruments/conventions/status-table/extensions/?cid=82&mid=564
9 See CAP 24 Evidence (Proceedings in Foreign Jurisdictions) Ordinance dated 1 October 1988.
10 See: https://www.hcch.net/en/instruments/conventions/status-table/extensions/?cid=82&mid=564
11 See the Extensions list at: https://www.hcch.net/en/instruments/conventions/status-table/extensions/?cid=82&mid=565
12 The UK Government's declaration under article 25 also stated that "it may at any time submit other declarations or modify this declaration in accordance with Article 30 of the Convention".
13 See: https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1525&disp=resdn
14 Also known as the 'Abouloff rule', after *Abouloff v Oppenheimer & Co* [1882] 10 QBD 295.
15 *Vadala v Lawes* [1890] 25 QBD 310, at 317 (Lindley LJ).
16 *Owens Bank Ltd v Étoile Commerciale SA* [1995] 1 WLR 44, at 51 (Lord Templeman).
17 *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241. Further, see Folkard & Bergson in Day & Merrett (eds), *Landmark Cases in Private International Law* (Hart, 2023), at 104–5.
18 Although the Explanatory Report makes the point that under the Hague Choice of Courts Convention substantive fraud could engage the public policy exception in article 9(e): see [257].
19 Art 29(2).
20 Arts 24(1) and (3).
21 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 (recast): https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215
22 Arts 45(1)(a) and 46.
23 See Rogerson, *Collier's Conflict of Laws* (4th ed, 2013), at 228.
24 See Brussels I Recast, Recital 26.
25 *National Navigation v Endesa Generacion SA* [2009] EWCA Civ 1397; [2010] 2 All ER (Comm) 1243.

recognition and enforcement of judgments in civil and commercial matters ("Brussels I").[26]

The UK Government had the opportunity to declare that it would not apply the Hague-19 Convention to arbitral matters, but (yet[27]) has not done so.

This leaves two main potential protections for arbitration in the text of the Hague-19 Convention:

- **Article 2(3)**, which provides that: "The Convention shall not apply to arbitration and related proceedings"; and
- **Article 7(1)(d)**, which states that: "[r]ecognition or enforcement may be refused if ... the proceedings in the court of origin were contrary to an agreement ... under which the dispute in question was to be determined in a court of a State other than the State of origin".

The Explanatory Report provides that article 2(3) "should be interpreted widely", such that "the requested State may refuse, under its national law or other international instruments, to recognise or enforce a judgment given in another State if the proceedings in the State of origin were contrary to an arbitration agreement, even if the court of origin ruled on the validity of the arbitration agreement": at [279]. Such an approach would be welcomed by arbitration practitioners, and it will be interesting to see if it is confirmed by the courts.

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While there remain issues and implications to be identified and resolved over time, the significance of the Hague-19 Convention remains clear. This is the first multilateral scheme for the recognition and enforcement of judgments following the end of the Brexit transition/implementation period and, as a result of its coming into force, judgments from England and Wales will more easily be recognised and enforced in the EU, as was the case prior to Brexit and the changes it brought to the international disputes landscape.

26 Among the chorus is Professor Briggs, who opines in Briggs, *Civil Jurisdiction and Judgments* (7th ed, 2021) that the decision: "deserves to be reconsidered, as the court gave insufficient weight to the public policy of holding the parties to their agreement to arbitrate" and was a "strange and unconvincing" judgment which, after the end of the Brexit transition/implementation period, should be "disregarded", at [33.15].

27 As above, the UK Government's declaration under article 25 stated that "it may at any time submit other declarations or modify this declaration in accordance with Article 30 of the Convention".

Meet the authors

Joshua Folkard

Josh is a specialist in private international law and the conflict of laws. He is regularly instructed in cases concerning service out, the pleading and proving of foreign law and the recognition and enforcement of judgments/arbitral awards (including against states).

Alongside full-time practice, Josh teaches international commercial litigation and conflict of laws at University College London and has published extensively in those areas. He also sits on the expert panel for the Law Commission's law reform project 'Digital assets: which law, which court?'.

Read Josh's online bio

Charles Connor

Charles is a first-year tenant at Twenty Essex. He is currently instructed in several cases involving complex issues of private international law, including *Alcatel v Amazon* (a FRAND dispute). He has also, in his first few months of practice, provided advice on the enforcement of a substantial foreign tax judgment made against a high-net-worth individual.

Charles has a keen academic interest in the conflict of laws, having studied it on the BCL.

Read Charles' online bio

■ TWENTY ESSEX

LONDON
20 Essex Street
London
WC2R 3AL

enquiries@twentyessex.com
+44 (0)20 7842 1200

SINGAPORE
28 Maxwell Road
#02-03 Maxwell Chambers Suites
Singapore 069120

singapore@twentyessex.com
t: +65 6225 7230

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