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2019 Hague Convention: On UK Accession and the Convention's Interplay with International Arbitration

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On 27 June 2024, the United Kingdom ("UK") ratified the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("2019 Hague Convention" or "Convention"), with 1 July 2025 being the expected date of its entry into force in England and Wales.

This blog post shall first provide a brief historical overview of the 2019 Hague Convention as well as the rationale for its adoption. Second, it shall outline the rationale for the UK's accession to the Convention. Then, it shall summarise some of the key substantive provisions of the Convention. Last, the blog post shall explore the interplay between the Convention and international arbitration.

2019 Hague Convention: A Short History and Rationale for Its Adoption

With an ever-increasing globalisation and the growth of cross-border interactions of all kinds between civil and commercial parties, disputes are an inevitable occurrence. It was already in the 1990s that the Hague Conference on Private International Law ("HCCH") recognised that an effective and smooth regime for international transactions would require a tool that enables swift and uncomplicated recognition and enforcement of foreign judgements.

In the domain of arbitration, the quintessential instrument that facilitates the recognition and enforcement of foreign arbitral awards is the 1958 New York Convention ("NY Convention"). The HCCH's initial aim in the 1990s was to create a counterpart to the NY Convention that would enable a straightforward recognition and enforcement of foreign judgements. However, the endeavour proved rather unsuccessful initially due to a lack of consensus on an array of divisive issues. Consequently, the HCCH's ambition had to be curtailed, so the HCCH temporarily settled for adopting the Convention of 30 June 2005 on Choice of Court Agreements ("Choice of Court Convention"). The aim of the Choice of Court Convention is to ensure the effectiveness of choice of court agreements by commercial parties as well as to facilitate recognition and enforcement of judgements rendered under such agreements. The HCCH hence viewed the Choice of Court Convention as an important achievement, albeit one that required additional budling blocks.

In 2011, the HCCH opted again to look into the possibility of drafting "a global instrument on matters relating to jurisdiction and the recognition and enforcement of judgments in civil and

commercial matters." Eventually, the lack of consensus on divisive matters was overcome, and the much-needed additional building blocks were finally added in the form of the 2019 Hague Convention.

One ought to note that the number of ratifications of both the Choice of Court Convention and the 2019 Hague Convention remains low. As of this writing, the former boasts 9 ratifications while the latter has been ratified by 4 parties. That being said, both have been ratified by the European Union ("EU"), which inflates the number of countries in which these two instruments apply.

UK's Accession to the 2019 Hague Convention

The UK's swift accession to the 2019 Hague Convention was the country's response to the consequences of Brexit. While part of the EU, the judgements of the UK courts benefited from the Brussels I Regulation regime. More precisely, Article 36(1) of the Regulation provides that "[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required." However, the application of the Brussels I Regulation in relation to the UK ceased on 1 January 2021. What this meant in practice was that from that date onwards, the recognition and enforcement of the judgements of the UK courts in the EU Members would be a more challenging endeavour, and depend on the laws of individual EU Member States. Given that English courts have historically enjoyed the status of preferred dispute resolution fora for commercial parties across all four corners of the globe, a sudden shift towards making the recognition and enforcement of judgements of the English courts in the EU posed a threat to this status. The UK Government's response was to join the Choice of Court Convention and then the 2019 Hague Convention.

Brief Overview of the Key Provisions of the 2019 Hague Convention

Article 1 of the 2019 Hague Convention lays out its scope. It provides that "[t]his Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters." The terms civil and commercial are not defined in the Convention. That being said, the terms will have to be approached from an autonomous perspective given that Article 20 requires that the Convention be interpreted by observing its international character and the need to promote its uniform application. Unlike the NY Convention whose default approach, absent a declaration of reciprocity, is to require the Contracting States to recognize foreign arbitral awards made in the territories of Non-Contracting States as well, the 2019 Hague Convention takes the opposite approach. Its Article 1(2) makes it clear that it "shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State."

The rather broad scope of application established in Article 1 is then narrowed down by the specific exclusions as listed in Article 2 of the Convention. Among other things, the Convention will not apply to "(a) the status and legal capacity of natural persons; (b) maintenance obligations; (c) other family law matters, […]; (d) wills and succession; (e) insolvency, composition, […]; (f) the carriage of passengers and goods;" etc.

Once the judgement is found to be within the scope of the Convention, Article 4 then comes into play by providing that the judgement rendered by a court of one Contracting State "shall be

recognised and enforced in another Contracting State […],” with the court in the latter Contracting State not being allowed to review the judgement on merits beyond what is necessary to apply the Convention.

It ought to be noted that not all judgements that fall within the general scope of the Convention will be eligible for recognition and enforcement in other Contracting States. Namely, Article 5 of the Convention puts forth an exhaustive list of the so-called jurisdictional filters. These can be defined as connecting points that tie the case and the judgement to the State from which the judgement originated in a way so as to trigger the obligation on the part of another Contracting State to recognise it. The presence of only one jurisdictional filter is enough to trigger such obligation. To illustrate, one such jurisdictional filter is the habitual residence of a person against whom the recognition and enforcement of a judgement is sought. If the person in question was habitually resident in the State at the time when they became a party to the proceedings before a court of that State, then this factual scenario will serve as a jurisdictional filter that will trigger the obligation on the part of other Contracting States to recognise the ensuing judgement.

Article 7 of the Convention provides for grounds to refuse or postpone the recognition and enforcement of judgements even though they fall within the scope of the Convention and have a relevant jurisdictional filter. Article 7(1) allows, but does not mandate, a court to refuse recognition and enforcement of a judgement when, for example, the judgement had been obtained by fraud or because it is in contravention to the public policy of that court’s State. International *lis pendens* is the subject of Article 7(2), which outlines when the court may refuse or postpone recognition and enforcement of a judgement in a case that is also pending before the courts of the recognising State.

2019 Hague Convention and International Arbitration

With the adoption of the 2019 Hague Convention, and now that the UK and France will both be covered by the Convention (two States whose capital cities, London and Paris, are the two powerhouses of international arbitration), the only natural question to ask is what the 2019 Hague Convention and its potential future growth may mean for international arbitration?

The question posed here can be approached from two perspectives, resulting in two sub-questions. First, can the application of the 2019 Hague Convention have a direct or indirect impact on international arbitration cases? Second, can the 2019 Hague Convention be a game-changer in the sense of increasing the attractiveness of litigation at the expense of arbitration in the domain of international commercial disputes?

As to the first sub-question, Article 2(3) of the 2019 Hague Convention makes it unequivocally clear that “[t]his Convention shall not apply to arbitration and related proceedings.” Thus, any direct application of the Convention to arbitration or any related proceedings, e.g., to recognition and enforcement of arbitral awards or to recognition of court judgements rendered in support of arbitral proceedings, would be overstepping the scope of the Convention. As per the Explanatory Report by Francisco Garcimartín & Geneviève Saumier, Article 2(3) is sufficiently broad to encompass judgements that have been rendered on civil or commercial matters that the parties had previously agreed to submit to arbitration. Even if the court would find in its judgement that the arbitration agreement was invalid, as a result of Article 2(3), this judgement would still fall outside

of the scope of application of the Convention. However, if one party initiates court proceedings in contravention to the valid arbitration agreement, and the opposing side participates in the court proceedings without ever raising the issue of an existing arbitration agreement, Article 2(3) would not remove the ensuing judgement from the Convention's scope of application.

As to the second sub-question, while the easier enforcement of arbitral awards as compared to court judgements—thanks to the NY Convention—remains an important advantage of arbitration over litigation, it is certainly not the only one. Commercial parties also value other characteristics of arbitration that are not offered by litigation. In comparison to litigation, arbitration provides the possibility for the parties to choose their own decision-makers, enables high levels of privacy and confidentiality, allows for a high degree of flexibility, promotes neutrality, and can often times be less expensive and time-consuming than going to court. Even if the 2019 Hague Convention were to be on par with the NY Convention in terms of the number of contracting parties, arbitration would still hold sway over litigation due to these comparative advantages. Moreover, while the 2019 Hague Convention does make the movement of judgements across borders significantly less cumbersome, it is still a far cry from the liberal regime created by the NY Convention. Given the Convention's reliance on jurisdictional filters to amplify the conditions required for a judgement to be recognised and enforced, there will always be a higher likelihood on average that a court judgement will narrowly fail to satisfy the requirements of the 2019 Hague Convention than it will be for an arbitral award not to successfully pass the test that is the NY Convention.

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