

Asymmetric jurisdiction clauses within the scope of the Hague 2019 Convention

JANUARY 31, 2024

ASYMMETRIC JURISDICTION CLAUSES WITHIN THE SCOPE OF THE HAGUE 2019 CONVENTION

On 12 January 2024, the UK signed the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the “**Hague 2019**”), following its announcement in November 2023. Once it enters into force, the Hague 2019 will bring back certainty to the use of non-exclusive and asymmetric jurisdiction clauses in English law finance agreements and reinforce the English courts’ position as a preferred jurisdiction in cross-border transactions.

WHERE WERE WE BEFORE ACCEDING TO THE CONVENTION?

Before Brexit, English judgments were enforceable in all EU Member States pursuant to the EU’s Brussels I Regulation (EU) 1215/2012 (the “**Brussels I Regulation**”), which ensured reciprocity with regards to the enforceability of judgments of the courts of an EU Member State amongst other EU Member States. Exclusive jurisdiction clauses (where all parties are restricted to commencing proceedings only in a specified jurisdiction), non-exclusive jurisdiction clauses (where parties are allowed to bring proceedings anywhere) and asymmetric jurisdiction clauses (where a party is allowed to bring proceedings anywhere whilst the other is limited to one exclusive jurisdiction) were supported by the Brussels I Regulation, so judgments by the courts of a EU member state in respect of civil or commercial contracts (regardless of the jurisdiction agreement applicable to it) were to be recognised and enforced in any other EU member state.

The Brussels I Regulation ceased to apply to the UK from 1 January 2021 following its exit from the EU. Since then, the Hague Convention on Choice of Court Agreements 2005 (the “**Hague 2005**”) was the only multilateral instrument of recognition and enforcement of foreign judgments applicable to the UK, since its efforts to accede the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters have been blocked so far by the EU.

The Hague 2005 compelled all parties to it (including the EU) to enforce court judgments from another party, but only in respect to contracts with an exclusive jurisdiction clause. Since non-exclusive jurisdiction clauses and asymmetric jurisdiction clauses were outside of the scope of the Hague 2005, parties to agreement with these clauses had to look at national law to see whether there were any reciprocal conventions that would facilitate such

enforcement or they would have to use an exclusive jurisdiction clause if they wanted to ensure judgments would be enforceable under Hague 2005.

THE RELEVANCE OF ASYMMETRIC JURISDICTION CLAUSES IN FINANCING ARRANGEMENTS

Asymmetric jurisdiction clauses are commonly used in financial documentation governed by English law, and are now the market practice and the expectation of the parties as reflected in the LMA English law facility documentation.

Asymmetric jurisdiction clauses require one party to an agreement (generally the borrower) to bring proceedings in front of a specific court whilst allowing the other party (generally a financial institution) to sue in that court or in any other court with jurisdiction under its local rules. Unlike contracts with reciprocal commercial obligations, it is reasonable that borrower be only able to dispute a contract in the jurisdiction of the governing law of the loan agreement, but lenders need to be able to enforce their obligations wherever the borrower or a guarantor operates.

Non-exclusive and asymmetric jurisdiction clauses are within the scope of the Hague 2019. Therefore, once Hague 2019 is operative parties to a cross-border transaction will return to their position before Brexit in the sense that they will now have certainty that any judgments from courts chosen by these clauses will be enforceable in the states which are party to the Convention.

WHO IS SIGNING UP TO THE HAGUE 2019 AND WHEN WILL IT ENTER INTO FORCE IN THE UK?

The UK government has formally announced its accession to Hague 2019, which will be laid before Parliament for scrutiny in the following months in order to be ratified. However, Hague 2019 will only come into force in the UK 12 months after being ratified, so it is expected to enter into force in early 2025, depending on the date of ratification by Parliament. This 12-month period is also applicable to every new contracting state joining Hague 2019.

Hague 2019 will only apply to the recognition and enforcement of judgments deriving from proceedings instituted on or after the date on which Hague 2019 had effect in both relevant states, being the state in which proceedings were instituted and the state in which such judgments are requested to be enforced. Therefore, parties that have agreed to non-exclusive or asymmetric jurisdiction clauses would have to wait until Hague 2019 enters into force in the UK before instituting proceedings before an English Court in order to rely on it for purposes of its enforceability in a party state to Hague 2019. Subject to that, Hague 2019 will apply to disputes of historic matters.

Hague 2019 will only apply to English court judgments being enforced in another contracting state (and vice versa), so long as such contracting state has not opted-out in relation to the UK's accession to Hague 2019 during the ratification period. So far, the European Union (besides Denmark), Ukraine and Uruguay have ratified Hague 2019 and are now within the 12-month ratification period. In addition, other countries such as the United States have also signed Hague 2019 and are due to ratify it soon, widening the scope of Hague 2019 when compared to the Brussels I Regulation upon which the UK relied before Brexit.

CONCLUSION

Hague 2019 promises to bring back certain certainty to lenders and financiers in relation to the use of non-exclusive or asymmetric jurisdiction clauses in their financing documentation for the enforcement of English court judgments abroad. Provided it is ratified by Parliament and other contracting countries do not opt out to the UK's accession, the Hague 2019 will facilitate the entry into cross-border transactions among the existing contracting parties and will have the potential to extent its benefits beyond Europe.

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