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UK Signs Hague 2019: New Clarity For Enforcement Of Choice Of Court Clauses In Finance Documents

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Effective choice of court clauses (also known as jurisdiction clauses) are central to finance agreements. Reliable, certain process to enforce contractual obligations is essential for cross-border trade and finance transactions. Parties want to be sure that any disputes will be heard not just according to their chosen law but in their chosen forum, and that any judgment obtained can be easily and reliably enforced, including abroad if needed.

The UK's recent accession to the Hague Judgments Convention 2019 (Hague 2019) is the first welcome step to fill a gap in EU-wide enforcement of judgments caused by Brexit and may go even further if Hague 2019 is adopted by more countries globally, as appears likely.

The EU scheme

Among the 27 EU member states, the Brussels Regulation 2012 (Brussels Recast) provides a wide-ranging scheme for (a) the automatic mutual recognition and enforcement of choice of court agreements, meaning that courts other than a court contractually designated will decline to hear a dispute and (b) for the enforcement of resulting judgments within the EU. These rules encompass both exclusive jurisdiction clauses, that is clauses designating one named court, as well as non-exclusive clauses.

Post Brexit – Hague 2005 and the asymmetric question

On the UK's departure from the EU, Brussels Recast ceased to have effect as between the UK and EU states and so parties and their lawyers had to seek alternatives.

The Hague Convention on Choice of Courts 2005 (Hague 2005), an international treaty to which the EU, the UK and Singapore (among others) are party, provides for the recognition of exclusive jurisdiction agreements as well as for the enforcement in other signatory states of judgments given by courts designated under such clauses.

However, questions remain about the application of Hague 2005 to asymmetric clauses, which are a feature of many Loan Market Association (LMA) standard loan agreements and are commonly sought by lenders. Under such clauses, the borrower is obliged to bring any dispute in a specified court, but the lender has the option to commence proceedings elsewhere, and that freedom may be unlimited or within a list of identified jurisdictions.

The English Court has consistently upheld the validity of asymmetric clauses. It even considers them to be “exclusive” jurisdiction clauses within the meaning of Brussels Recast but not – crucially – for the purposes of Hague 2005: as per the Court of Appeal in *Etihad Airways PJSC v Lucas Flother* [2020] EWCA Civ 1707.

Other EU countries have taken a different view even as to validity of asymmetric clauses, with the French Supreme Court having refused to enforce an open-ended asymmetric clause against an individual on the basis that it lacked foreseeability and legal certainty. The issue has recently been referred to the CJEU.

Outside of Hague 2005, parties have to rely on the domestic law of the country in which they seek to enforce a judgment or in which proceedings had been brought in breach of contract. Even where domestic law ultimately allows enforcement, the process can be timely, expensive and can differ significantly between countries.

The UK has therefore sought to accede to the Lugano Convention, a predecessor to Brussels Recast, which remains in force as between the EU and EFTA states (Switzerland, Norway and Iceland) and is practically very similar to the Brussels regime. The UK government has indicated it will continue this process, which requires consent from the existing signatories although its accession has been blocked to date by the EU Commission, which sees the Lugano regime as closely tied to economic integration.

Loan market approach

The LMA precedent loan agreements changed following Brexit to include an option for either an exclusive jurisdiction clause or the original asymmetric drafting.

Many lenders continued to include an asymmetric clause to provide maximum flexibility of commencing proceedings in the jurisdiction of their choice, whilst retaining security that the borrower may only bring any dispute in the specified court. Given some of the potential risks to recognition and enforcement noted above, the inclusion of certain jurisdictions in a transaction can, however, influence the risk / benefit analysis undertaken by lender in regard to whether they prefer certainty over flexibility.

There has been a move to adopt exclusive jurisdiction clauses in the larger deals with syndicated lenders, whereas private credit funds have generally been more comfortable to retain the asymmetric position.

Hague 2019

Hague 2019 is a welcome addition to the legal framework for enforcement of judgments as it will fill one of the lacunas left by Brexit. It requires signatory states to recognize and enforce civil and commercial judgments falling within a wide list of categories, including that they were given by a court under a non-exclusive jurisdiction clause. Hague 2019 is thereby designed to complement Hague 2005, which covers only exclusive jurisdiction clauses.

The UK signed Hague 2019 on January 12, 2024. It has still to ratify the treaty, which does not have retroactive effect, and which will only come into effect a 12-month period after ratification (to allow current signatories to elect to opt out as regards the UK).

Several other countries are in the same position as the UK, having signed but not yet ratified Hague 2019, including Israel, Russia and the US. The position of the US is of particular interest to international finance parties given the complete absence to date of any agreement between the UK and the US on the mutual recognition and enforcement of judgments, but it is not recommended to hold one’s breath. The US signed Hague 2005 in 2009, and Hague 2019 in 2022 and its ratification is still pending for both.

Once ratified, Hague 2019 will provide some comfort to lenders in respect of the enforceability of English judgments under an asymmetric clause in the EU. We may see the UK loan market revert to asymmetric clauses, rather than exclusive jurisdiction clauses, to provide lenders with the flexibility to commence proceedings in the most appropriate jurisdiction.

Parties can always of course choose arbitration, and arbitration agreements are very widely recognized and enforced across EU member states and indeed globally. Our experience, however, is that many finance parties still show a strong preference for national courts. The combination of Hague 2005 and Hague 2019 will add welcome certainty to the enforcement of their choices.

Special thanks to Alice Dawson-Loynes for her contributions to the article.

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