

## When Contracting with European Counterparties, Could Hague Convention 2019 Aid Your Clients on Enforcement?

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How do I enforce? That is the first question lawyers should look at when drafting agreements or advising clients on commencing litigation that involve parties of different countries. How do I enforce any judgment against my counterparty's assets if things go wrong.

Whilst the EU and the UK have generally favourable processes for enforcing judgments of foreign courts against assets in their jurisdictions, hoops often have to be jumped through when enforcing under local laws.

Because of this, parties engaging in cross-border contracts with European counterparties looked to adopt jurisdiction clauses where streamlined enforcement processes existed.

One such jurisdiction was the UK where parties would have the benefit of litigating in the English language whilst having the benefit of 'Brussels Recast.' Prior to Brexit, the process of enforcing English judgments in the EU and vice versa was streamlined under EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (commonly referred to as Brussels Recast). Brussels Recast regulated jurisdiction and the recognition and enforcement of judgments between EU member states. In effect, it provided a simplified mechanism to allow judgments in one member state to be automatically recognised and enforced in another. Because of this, many counterparties from across the world elected to have English court jurisdiction clauses in their contracts even if their counterparties were based in the EU as they would have the benefit of litigating in an English language system and knowing they would have the benefit of Brussels Recast when enforcing.

That position changed post Brexit however when the UK exited the Brussels Recast regime. Since Brexit, parties who have adopted English court dispute resolution clauses who wish to enforce in the EU and vice versa have had to either take advantage of 'Hague 2005' (discussed below) or settle on the fact that any judgment will have to be enforced under the local law of the jurisdiction in question.

## What is Hague 2005?

The 2005 Hague Convention on the Choice of Court Agreements (commonly referred to as 'Hague 2005') establishes a framework for recognizing and enforcing judgments arising from international commercial agreements with exclusive jurisdiction clauses.

Post Brexit, the UK ceased to be a party to the Brussels Recast regime and therefore businesses had to look at other avenues when looking to enforce English judgments in the EU or EU judgments in the UK.

After trying to join the 2007 Lugano Convention, a possibility that was blocked by the EU, the UK proceeded to ratify Hague 2005. That provided some respite for businesses seeking to adopt English court dispute resolution clauses when dealing with EU counterparties and vice versa. However, as businesses who are familiar with Hague 2005 will be aware, Hague 2005 does not provide a full alignment with the position under the Brussels Recast regime.

For example, Hague 2005:

- only applies to contracts:
  - containing exclusive jurisdiction clauses; and
  - which are “international” in nature (eg between commercial businesses from different countries); and
- importantly, does not apply to contracts containing non-exclusive jurisdiction or asymmetric jurisdiction clauses.

In many contractual relationships, particularly where there is an exchange of data, information or confidential material, a non-exclusive jurisdiction clause may be needed to enable effective recourse in the defendant's home state.

In the context of asymmetric clauses, no authoritative decision has been reached about whether they are enforceable under Hague 2005; a Dutch court has ruled that asymmetric clauses are not “exclusive” for the purposes of Hague 2005 but there have been conflicting positions from the English courts.

In situations where parties do not have the benefit of Hague 2005, parties needing to enforce any English judgment in an EU state and vice versa have to rely on local law procedures for registering and enforcing foreign judgments. Whilst some EU member states have a relatively simple procedure for registering and enforcing foreign judgments, it adds an extra layer of complexity which parties need to consider when entering into contractual agreements.

### **What is Hague 2019 and how can it assist parties contracting with European counterparties?**

Following ratification, Hague 2019 has been in force between the EU (except Denmark) and Ukraine since September 2023. Hague 2019 will come into force in the UK on 1 July 2025.

Unlike Hague 2005, Hague 2019 does not require parties to have agreed an “exclusive jurisdiction” clause in their agreement in order to take advantage of the streamlined enforcement process. That means parties can agree non-exclusive, asymmetric or unilateral dispute resolution clauses in their agreements (or bring an action before a court under procedural jurisdictional rules) and still take advantage of the streamlined enforcement process under Hague 2019. It will also apply to a number of non-contract claims such as certain tort claims.

Parties should note however that Hague 2019 only applies to civil and commercial judgments. Judgments arising from matters concerning issues such as defamation, intellectual property or family law disputes are excluded. Further, interim measures of protection are also excluded.

Recognition and enforcement can only be refused under Hague 2019 for specific examples such as:

- judgment is not final (i.e., it is subject of an appeal)
- the defendant was not notified of the proceedings
- judgment was obtained by fraud
- judgment is contrary to public policy in the enforcing state
- proceedings were brought in breach of an agreement that any dispute would be heard before the courts of another country
- judgment conflicts with another judgment on the same subject matter which has been made earlier
- judgment awards exemplary or punitive damages that do not compensate the judgment creditor for the harm or loss they have suffered

One point parties should also note is that Hague 2019 does not address the situation where a claim has been commenced in the wrong court in breach of a jurisdiction agreement (other than including such situation as a cause for refusal of enforcement, as we have just mentioned). This is unlikely to matter in the context of UK/EU contracts once Hague 2019 comes into force because if there is an exclusive jurisdiction clause, the protections under Hague 2005 will be engaged and the court in which the claim has been wrongly brought should refuse to hear the claim. Where there is a non-exclusive jurisdiction clause, a court will need to consider if there is a basis on which it has jurisdiction. Whilst these types of scenarios do occur, they are relatively few and far between.

The ratification of Hague 2019 by the UK will be a welcomed relief to businesses contracting with EU counterparties who commonly adopt English court dispute resolution clauses and vice versa. Hague 2019 provides a clear framework for the recognition and enforcement of judgments from one contracting state in the courts of another contracting state without review of its merits. This will help facilitate international trade on the basis that it reduces time and costs associated with enforcement of foreign judgments in respect of proceedings issued on or after 1 July 2025.

Hague 2019 is currently in force in: (1) EU jurisdictions (except Denmark) and Ukraine as of 1 September 2023; and (2) Uruguay as of 1 October 2024. Other jurisdictions such as Albania, Costa Rica, Israel, Kosovo, Montenegro, North Macedonia, Russian Federation and USA have signed Hague 2019 but have not ratified the convention. It is not clear when those states will ratify Hague 2019 so that it comes into force in those jurisdictions.

### **What should parties be doing now?**

Given that the benefits of Hague 2019 vis-à-vis the UK and EU will only apply to proceedings commenced on or after 1 July 2025, any parties who wish to litigate in England seeking to enforce in the EU and vice versa who wish to bring proceedings before 1 July 2025 should consider if they have the benefit of Hague 2005 if they want a streamlined process of enforcing an English judgment against an EU counterparty and vice versa. Absent having the benefit of Hague 2005, parties will need to rely upon local law procedures for registering and enforcing foreign judgments in respect of any proceedings issued prior to 1 July 2025.

In the meantime, parties entering into commercial arrangements with UK and EU counterparties should look at their dispute resolution clauses to see how they can structure the clauses to take full benefit of Hague 2019 in the event that disputes arise. Your usual Mills & Reeve and AGM Abogados contact would be delighted to assist in helping parties on how to structure their dispute resolution clauses to ensure they maximise their ability to enforce any judgment.

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