LMA briefing - Q1 2024

The 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments: what might this mean for the future of asymmetric jurisdiction clauses?

The 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments (Hague 2019) is a relatively new Convention which provides a new route to recognise and enforce cross-border judgments. It is of particular interest to finance lawyers because it facilitates the recognition and enforcement of judgments which derive from asymmetric jurisdiction clauses.

Following a consultation at the end of 2022, the Government concluded that it was the right time for the UK to join Hague 2019. As a result, Hague 2019 was signed by the UK on 12 January 2024 and will be ratified in the UK once all of the necessary implementing legislation and rules have been put in place for all UK jurisdictions. Once ratified in the UK, Hague 2019 will come into force after 12 months.

In this briefing, the Lexis+® Banking and Finance team looks at the current limitations related to cross-border enforcement of judgments deriving from asymmetric jurisdiction clauses and what Hague 2019 could mean for their future.

The use of asymmetric jurisdiction clauses in finance transactions

Asymmetric jurisdiction clauses (also known as unilateral, hybrid or one-way choice of court agreements) are a specific type of jurisdiction clause which set out different requirements for each party to the agreement as to where they may bring proceedings in the event of a dispute. Asymmetric clauses typically provide that one party may only bring proceedings in the courts of a specified jurisdiction, while the other party has the flexibility to bring proceedings in any court that has jurisdiction.

Asymmetric jurisdiction clauses are common in finance documents. The clause is typically expressed as exclusive, but with a further provision which states that, notwithstanding this, the lender (but not the borrower) is permitted to bring proceedings in any other courts which may have jurisdiction if it chooses. The borrower is therefore obliged to start any proceedings in the specified jurisdiction while the lender has flexibility. Lenders have historically been extremely reluctant to negotiate any changes to this position.

The pre-Brexit position

In order to fully appreciate the current position on enforcement of judgments deriving from asymmetric jurisdiction clauses, it is necessary to rewind the clock back to pre-Brexit and examine the various regimes that applied in the UK to jurisdiction agreements.

Regulation (EU) 1215/2012, Brussels I (recast)

Within the EU, Regulation (EU) 1215/2012, Brussels I (recast) deals with choice of court agreements and sets out the requirements for a valid jurisdiction agreement. It obliges EU Member States to give effect to jurisdiction clauses in favour of other Member States (article 25), and to recognise and enforce their judgments (articles 36 and 39). More specifically, it provides that where there is an agreement that a court or the courts of an EU Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction.

Pre-Brexit, as an EU Member State, the UK benefitted from the certainty that these provisions provided. However, this was not without a certain element of controversy. A key issue for finance lawyers was whether asymmetric jurisdiction clauses fell within the remit of Article 25 of Brussels I (recast). While the English courts considered asymmetric jurisdiction clauses to be valid for the purposes of the Brussels regime, the courts of certain other EU Member States (France in particular) have not and the matter is currently the subject of a referral to the Court of Justice by the French Cour de cassation. This inconsistent approach among EU Member States had the potential to cause difficulties when seeking to enforce a judgment in an EU Member State which did not recognise asymmetric clauses.

The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 30 October 2007 (the Lugano Convention)

The Lugano Convention also deals with jurisdiction clauses and applied to the UK prior to Brexit by virtue of its membership of the EU. It provides that if one or more of the parties is domiciled in a contracting state and the parties agree that the courts of a contracting state are to have jurisdiction over any disputes that have arisen or may arise in connection with their legal relationship, then those courts shall have jurisdiction.

The contracting parties to the Lugano Convention are the EU, Denmark and relevant EFTA Member States being Iceland, Norway and Switzerland.

Similarly to the Brussels regime, there is an ongoing area of uncertainty around enforcement under the Lugano Convention where a jurisdiction clause is asymmetric, with the courts in certain civil law jurisdictions having considered them incompatible with the convention's objectives.

The Hague Convention on Choice of Court Agreements 2005 (Hague 2005)

Looking further afield, the UK was also bound by the Hague Convention on Choice of Court Agreements 2005 as part of its membership of the EU.

Hague 2005 has just over 90 members, including the EU and states in Asia, Europe, Africa, North and South America and Oceania. It provides a mechanism for the recognition and enforcement of certain judgments in other contracting states (Article 8). However, Hague 2005 only applies in cases in which the court that handed down the judgment had exclusive jurisdiction under a choice of court agreement.

An exclusive choice of court agreement, for the purposes of Hague 2005, is defined in Article 3. The definition sets out five requirements that the choice of court agreement must meet, including that the agreement must be exclusive ie the agreement must designate the courts of one state or one or more specific courts of one state to the exclusion of the jurisdiction of any other courts. Therefore, it does not assist where an asymmetric jurisdiction clause has been used.

The current position

The history of cross-border enforcement of judgments deriving from asymmetric jurisdiction clauses is clearly complex. For lawyers drafting jurisdiction agreements for new transactions, it will be important to understand the current position whilst keeping an eye on the future.

The Brussels regime

Now that the UK is not part of the EU, it is no longer subject to Regulation (EU) 1215/2012, Brussels I (recast). The recognition and enforcement of UK judgments by the courts of an EU Member State will currently depend on that Member State's particular domestic enforcement rules.

The Lugano Convention

Now that the UK has left the EU, it is also no longer bound by the Lugano convention and is regarded as a third state for the purposes of the application of the convention.

Although the UK made an application for accession to the Lugano Convention in its own right, the EU refused to give consent.

Hague 2005

The UK's decision to leave the EU also meant that the UK would no longer be bound by Hague 2005. The UK would need to accede to Hague 2005 in its own right to continue to benefit from its provisions. Note that the position of the UK in relation to Hague 2005 was complicated by the fact that it was not able to become a contracting state of Hague 2005 in its own right while either still a member of the EU or bound by the provisions in the Withdrawal Agreement.

On 1 January 2021, the UK reacceded to Hague 2005 as a party in its own right. However, in the absence of the Brussels regime and the Lugano Convention (notwithstanding their uncertainty surrounding asymmetric jurisdiction clauses), reacceding to Hague 2005 still leaves the position in respect of asymmetric jurisdiction clauses wide open.

This has led to lenders rethinking the terms of jurisdiction clauses in finance documentation where there are assets or obligors located in the EU in order to weigh up (a) the benefits of the certainty of an exclusive jurisdiction clause that is within the remit of Hague 2005 but which provides little flexibility as to jurisdiction, against (b) the flexibility of being able to choose a jurisdiction for enforcement under an asymmetric jurisdiction clause and the uncertainty that that may entail.

The future - Hague 2019

Hague 2019 complements Hague 2005. It also provides a framework for the recognition and enforcement of certain foreign judgments in civil and commercial matters between contracting parties (see article 4) but, in doing so, it seeks to simultaneously avoid overlap with Hague 2005 and any gaps between the two instruments.

Article 5(1)(m) of Hague 2019 provides that it covers judgments given by a court designated in an agreement, other than an exclusive choice of court agreement.

Hague 2019 defines an 'exclusive choice of court agreement' as an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts. This definition almost exactly replicates the definition of exclusive choice of court agreements in Article 3(a) of Hague 2005.

If this was not clear enough, the explanatory report on Hague 2019[1] specifically confirms that asymmetric jurisdiction clauses are not considered exclusive under Hague 2005 and therefore fall within the scope of Hague 2019.

Once ratified and in force in the UK, Hague 2019 will provide for the recognition and enforcement of judgments from other contracting states that stem from asymmetric jurisdiction agreements. This will provide much needed certainty for the many types of financing transactions which include such arrangements.

The Government is planning to achieve implementation and ratification of Hague 2019 as soon as possible and, if feasible, by the end of June 2024. The convention will then come into force 12 months after the date of ratification.

In terms of when the effects of this change may be seen, note that Hague 2019 has no retroactive effect, and in relation to the enforcement of UK judgments, the convention will only be applied in cases in which the UK proceedings were commenced after the convention came into force for the UK and the convention was also in force in the enforcing state at the same time (see Articles 16 and 28 of Hague 2019).

[1] Explanatory Report by Professor Francisco Garcimartín and Professor Geneviève Saumier on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, para 217