STEWARTS

Response to the Ministry of Justice's Consultation on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague 2019)

Preamble

Stewarts is the UK's largest litigation-only solicitors' firm and specialises in high value and complex disputes. The firm acts for both corporate and individual clients and has leading and specialist departments in aviation and international injuries, clinical negligence, commercial litigation, competition litigation, divorce and family, employment, financial crime, insolvency, international arbitration, investor protection litigation, media disputes, personal injury, policyholder disputes, tax litigation and disputes, and trust and probate litigation.

Stewarts has strategic partnerships in place with other specialist solicitors' firms across the world, enabling its clients to take a global approach to litigation. The firm is top-ranked in both the Legal 500 and Chambers and Partners.

Stewarts appreciates the opportunity to respond to the Ministry of Justice's consultation on the Hague Convention of 2 July 2019. Our submissions below are all focussed on the types of complex and high value commercial and injury litigation in which we exclusively specialise.

Executive summary

We support the UK's accession to Hague 2019 as soon as possible. As a result of Brexit, there is not currently a private international law framework covering the recognition and enforcement of civil judgments in place between the UK and the EU. Hague 2019 will help fill some of the gaps left by Brexit in relation to the enforcement of judgments between the UK and EU and helpfully goes further, as an international convention, with the potential to facilitate enforcement of judgments with the rest of the world.

We agree with the Law Society and APIL's stance that while accession to Hague 2019 is a positive first step in providing more certainty on cross-border recognition and enforcement of judgments, there remain a number of notable shortcomings in the Hague 2019 enforcement regime, particularly for individuals, consumers and victims seeking access to justice. Therefore, the UK and EU should resume negotiations for the UK's accession to the Lugano Convention at the earliest opportunity.

Response to consultation questions

Q1: Should the UK accede to Hague 2019? Please provide your reasoning. What do you expect the added value to be for the UK upon accession?

Yes, we support the UK becoming a Contracting State to Hague 2019.

As more states ratify Hague 2019 as an international convention, a unified global framework for the recognition and enforcement of court judgments will be created. Ratifying the Convention will provide greater legal clarity on the recognition and enforcement of a judgment in other jurisdictions, reduce costs, and promote the better management of transactional and litigation risks. In this sense, Hague 2019 furthers the stated aims of the Hague Conference.

Following the UK's exit from the EU, and the subsequent absence of a bilateral treaty between the UK and the EU, accession to Hague 2019 should be welcomed as a positive addition to the

UK's private international law landscape. The UK economy will likely benefit from certainty on enforcement of judgments falling within the scope of Hague 2019, with a side effect of the Convention being the support of international trade. Hague 2019 offers reassurance to UK businesses that effective mechanisms are in place to secure enforcement in other jurisdictions and, as such, we consider that UK businesses will be more inclined to operate across borders and enter into cross-border contracts and investment relationships.

When compared to the Hague Convention on the Choice of Court Agreements 2005 (Hague 2005), Hague 2019 provides a wider scope in relation to agreements with asymmetric jurisdiction clauses. This means that under Hague 2019 it is not a requirement for parties to have agreed an exclusive jurisdiction clause to enforce a judgment falling within the scope of the Convention. Furthermore, a party can bring an action before a court under a state's given procedural and jurisdiction rules without having agreed a jurisdiction clause at all and can then rely on Hague 2019 when seeking enforcement, providing the judgment falls within its scope. In addition, Hague 2019 applies to a wider range of disputes than Hague 2005.

International parties may be encouraged to use English courts and English law in their disputes should the UK accede to Hague 2019. In turn, this will enhance the reputation of England as a preferred jurisdiction for the resolution of international disputes and consequently increase revenue within the UK legal sector. Additionally, other countries may be encouraged to join Hague 2019. The UK takes quite a broad approach in making foreign judgments enforceable in its jurisdictions, but this is not always reciprocated in the absence of international agreements[1].

We are keen to emphasise that, alongside Hague 2019, it must remain a high priority for the UK to re-join the Lugano Convention as that is a much more comprehensive framework of rules on jurisdiction and enforcement of judgments between the UK and the EU/EFTA states. In particular, the Lugano Convention provides greater protection to weaker parties to a dispute.

Q2: Is this the right time for the UK to consider Hague 2019? Are there any reasons why you consider now would not be the right time for the UK to become a Contracting State to the Convention?

There will be a 12 month delay between the UK formally acceding to Hague 2019 and the Convention entering into force (it will enter into force on the first day of the month following the expiry of 12 months). Further, the Convention is not retrospective and will only apply to UK judgments arising from cases commenced after the Convention comes into force for both the UK and the State in which recognition or enforcement is sought. Therefore, the UK should seek accession to Hague 2019 as soon as is practicable.

In parallel, we encourage the UK government to renew efforts to re-join the Lugano Convention. Post-Brexit, serious injury victims have lost important protections afforded to weaker parties, and as explained in our response to Q6, Hague 2019 does not go far enough in this regard. The Lugano Convention affords higher protections to injury victims and consumers, both in relation to jurisdiction and enforcement. As such we believe the Lugano Convention is the best model for continued cooperation in the enforcement of judgments in relation to the EU/EFTA states post-Brexit.

[1] We note, however, increasingly positive developments in what might traditionally have been viewed as more challenging jurisdictions on the question of enforcement: China: in March 2022, the People's Supreme Court granted enforcement of a High Court judgment in a commercial case based on the principle of reciprocity. UAE: a Ministry of Justice circular to Dubai courts in September 2022 concluded that the reciprocity principle is met in relation to judgments from E&W, highlighting the decision of the High Court *in Lenkor Energy Trading DMCC v Puri* [2020] EWHC 75 (QB), which permitted enforcement of a Dubai judgment.

The UK government should also ensure that accession to Hague 2019 will not, from a political and diplomatic standpoint, be detrimental to the UK's aim of re-joining the Lugano Convention as soon as possible.

Q3: What impact do you think becoming a Contracting State to the Convention will have for UK parties dealing in international civil and commercial disputes?

By becoming a Contracting State to the Convention, UK parties involved in international civil and commercial disputes will have the assurance that judgments they may obtain from the UK courts will be enforceable in an expansive range of jurisdictions.

For example, UK parties can be confident that judgments falling within the terms of the Convention will be enforceable throughout the EU (a Contracting State of the Convention) without the need to consider the domestic enforcement rules on a case-by-case basis for each EU Member State.

UK consumers and employees would be offered important protections by Article 5.2 of Hague 2019, which restricts enforcement of judgments against consumers/employees from courts in which they are not habitually resident, unless they have expressly consented to that jurisdiction.

The Convention will apply whenever there is not an exclusive jurisdiction clause and whichever point in time that non-exclusive jurisdiction clause was agreed to. Parties with historic one-way jurisdiction or non-exclusive jurisdiction clauses will be in a better place than those with exclusive jurisdiction clauses which fall under Hague 2005.

As mentioned in our response to Q1, as further countries accede to Hague 2019, the benefits of the Convention will become even more valuable, offering UK parties a reassurance that their UK judgments will be recognised and enforced in a broader range of jurisdictions.

Q4: What legal impact will becoming a Contracting State to the Convention have in your jurisdiction (i.e. in England and Wales, in Scotland or in Northern Ireland)?

We consider that the legal impact of the UK acceding to Hague 2019 will be positive for UK consumers, employees, businesses, legal services and for HMRC, as explored and highlighted in our response to the other questions in this consultation. Hague 2019 enhances the prospect of enforcement of UK judgments in the EU and beyond for cases falling within the Convention's scope.

Q5: What downsides do you consider would result from the UK becoming a Contracting State to the Convention? Please expand on the perceived severity of these downsides.

We do not see any downsides to the UK becoming a Contracting State to Hague 2019. However, as detailed in our response to Q6 below, although we are supportive of the UK's proposed accession to Hague 2019, in relation to the EU/EFTA states the Convention does not offer sufficient benefits in comparison to the Lugano Convention, particularly in relation to seriously injured people. We stress that the UK should put increased effort into re-joining the Lugano Convention.

Q6: Are there any aspects or specific provisions in the Convention that cause concern or may have adverse effects from a UK perspective?[2]

Declarations

An aspect of the Convention that causes concern is the ability of the Contracting States to make 'declarations', which can be made, modified or withdrawn at any time. Declarations may involve a Contracting State stating that the Convention may not apply between them and another Contracting State; or it may limit the Convention's application to specific matters. The use of such declarations has the potential to limit, significantly and detrimentally, the scope of the Convention. This ability, even if not exercised, causes uncertainty that could have an adverse impact on businesses.

Limitations and exclusions notably impacting serious injury victims

There are a number of notable limitations and exclusions from the scope of Hague 2019, which means it may be of limited assistance to serious injury victims. Victims who obtain a judgment that falls outside the scope of Hague 2019 will need to continue to rely on the domestic rules in the state where they are seeking enforcement. By contrast, in relation to the EU/EFTA states, the Lugano Convention provides a uniform set of rules for the recognition and enforcement of judgments, resulting in greater certainty for cross-border injury victims, enabling their access to justice, minimising delay and reducing costs

1. Carriage of passengers and goods

Article 2.1(f) in our view arbitrarily excludes the carriage of passengers and goods from the scope of Hague 2019. Part of the rationale for this is that there are other international conventions governing the carriage of passengers, for example, the Montreal Convention for carriage by air and the Athens Convention for carriage by sea. However, the exclusion extends to a common scenario not necessarily covered by another international convention: a claim for damages by a passenger in a car. Paradoxically, a non-passenger injured in the same accident could rely on Hague 2019 to enforce a judgment for damages, giving rise to considerable unfairness and putting two innocent victims of the same accident on an unequal footing on the issue of enforcement.

2. Interim damages and costs awards and preliminary requests for disclosure

Under Article 3.1(b), the definition of "judgment" excludes interim measures. This will likely exclude from the scope of Hague 2019 the enforcement of an interim award of damages, which can be vital to serious injury victims. This limitation may also cause difficulty for the weaker party to a dispute when, for example, seeking to enforce an order for disclosure or preliminary action taken in proceedings. Examples of such preliminary proceedings include an order for pre-action disclosure in England and Wales, a party taking advantage of the Article 145 pre-action disclosure procedure under the French Code of Civil Procedure or the *diligencias* procedure available in Spain which assists a party in obtaining/clarifying key information before starting full court proceedings.

[2] We have referred to the article *The Hague 2019 Judgments Convention is on the horizon – what does it mean for international injury victims?* by Christopher Deacon, Stewarts Law, to enable us to answer this question. The full article can be found at: https://www.stewartslaw.com/news/hague-2019-judgments-injury-victims/

3. The tort gateway to jurisdiction in England and Wales and indirect damage

One of the most notable of Hague 2019's limitations is the requirement that for a claim in tort, the damage must have occurred in the state of origin. Article 5.1(j) says that a judgment is eligible for recognition and enforcement if one of the following requirements is met:

"… the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the state of origin, irrespective of where that harm occurred."

Many injury victims rely on an alleged tort/breach of a non-contractual obligation as the basis for their claim for damages. Under English law, following the UK Supreme Court's decision in *Brownlie*[3], the victim of a serious injury overseas has the option of returning to the courts of England and Wales and bringing a claim for damages under the tort gateway at Civil Procedure Rule 6BPD 3.1(9)(a). In doing so, the victim must rely on the fact that they are suffering ongoing losses and the indirect financial consequences of an accident abroad on returning home. A judgment obtained in reliance on the Brownlie jurisdiction rules is likely to be unenforceable using Hague 2019 because the Convention appears to require the "act or omission" to have occurred in the state of origin of the judgment; suffering the "indirect, ongoing consequences of the act or omission" in the state of origin of the judgment will not suffice.

4. Fatal accidents and claims for financial dependency

Hague 2019 could also arbitrarily exclude enforcement of a judgment obtained by a claimant bringing a claim for loss of financial dependency on the deceased following a fatal accident on the basis this is an "indirect" loss. This is because Article 5.1(j) refers to harm being "directly caused", which may exclude indirect loss consequential to the original injury or death. On the other hand, as the claim for financial dependency "arises from the death", it may be within scope. The approach in the Explanatory Notes is that the question of interpretation of this part of Hague 2019 should be left to national courts, further highlighting the uncertainty of the regime for weaker parties. When adopting Hague 2019 we would encourage the Government to issue an explanatory note to the effect that it intends judgments for fatal accident losses to within the interpretation of this clause and hence be enforceable by the UK courts.

5. Public policy and refusal of recognition and enforcement

Article 7 sets out the basis on which a judgment may be refused recognition or enforcement by the Requested State. This is a standard provision in international enforcement regimes, permitting a state to refuse recognition and enforcement on public policy grounds.

One of the concerns for serious injury victims who have obtained a judgment from the UK courts is that their claim is likely to have been pursued under a conditional fee agreement, colloquially referred to as a "no win, no fee" arrangement. This is a method of funding that enables access to justice for injury victims in the English courts, but are not allowed in many European jurisdictions. At the successful conclusion of the claim, an injury victim can expect to not only have a judgment ordering the defendant to pay damages but also a judgment requiring the defendant to pay the majority of the legal costs incurred by the victim in pursuing their claim.

[3] *FS Cairo (Nile Plaza) LLC (Appellant) v Lady Brownlie (as Dependant and Executrix of Professor Sir Ian Brownlie CBE QC) (Respondent)* [2021] UKSC 45.

Even under the European regime pre-Brexit, some courts resisted the enforcement of English judgments on the basis that an award of costs pursuant to the English cost principles offended public policy. At a time prior to LASPO 2013, when CFA success fees were still recoverable, the Greek Court of Appeal has previously ruled against enforcement of an English costs award on the basis the costs were "excessive", a decision overruled by the Greek Supreme Court under the European regime on the basis it was a breach of the EU law concept of mutual trust. It remains to be seen how Contracting States will interpret and apply the public policy exemption in Article 7 of Hague 2019. However, previous experience demonstrates the uncertainty for victims, delay and additional costs they might face in trying to defeat public policy arguments on enforcement.

6. Punitive damages awards

Article 10 says that enforcement of a judgment may be refused if it includes damages that do not compensate a party for actual loss or harm suffered. This provision aims to exclude punitive damages awards from the scope of Hague 2019. While those awards are not available under English law, they are often awarded to claimants who suffer injury at the hands of large corporations in proceedings brought in a number of US states. If the victim then wanted to seek enforcement against a corporation in a Hague 2019 Contracting State, it would be unable to rely on the Convention to enforce the punitive damages element of the award.

Q7: Do you have a view on whether the Convention should be implemented using a registration model for the purpose of recognition and enforcement of judgments from other Contracting States?

The Convention should be implemented using a registration model for the purpose of recognition and enforcement of judgments from other Contracting states.

The procedure for registration is set out in Part 74 of the Civil Procedure Rules and we believe it would make sense if the same approach is taken in implementing Hague 2019. The English courts currently enforce foreign judgments using a registration model, including under the Civil Jurisdiction and Judgments Act 1982 (which implements Hague 2005), the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. If the implementation approach is familiar and consistent with previous models, it will be easier for people to navigate.

The use of a registration model can also allow the collection of statistical data in relation to the enforcement of judgments under the Convention, as all attempts to register must be recorded.

Q8: Do you have a view on how the Convention should be implemented for the purposes of establishing how indirect jurisdictional grounds should be established by the relevant domestic court?

Article 5 of the Convention lists a number of requirements that must be met in order for a judgment to be eligible for recognition and enforcement in another Contracting State. Determination of whether or not a judgment meets these requirements is made by the courts of the Requested State, rather than by the courts in the State of Origin. For clarification purposes, we advise that a procedure for establishing that these requirements are met should be set out in Part 74 of the Civil Procedure Rules (the registration process).

Q9: In your view, are there any declarations which the UK should make? If so, why?

We do not believe that the UK should make any declarations. As mentioned in our response to Q6, making declarations can limit the usefulness of the Convention. In order to fulfil its full potential, declarations should be avoided.

Q10: What do you consider would be the legal or practical implications of the UK applying the reservation suggested in relation to the Russian Federation (paragraph 4.22)? It should be noted that it would always be possible to repeal such a reservation in the future.

Stewarts strongly condemns Russia's unlawful invasion of Ukraine. We agree that, following Russia's illegal and continued attack on Ukraine, careful consideration should be given to whether the provisions of Hague 2019 should apply to Russia. The invasion of Ukraine is a clear breach of international law and we understand the rationale behind the UK government considering making a reservation against applying the Convention to Russia.

We note, however, that the EU and Ukraine have not made the proposed reservation, and the Russian Federation is yet to ratify Hague 2019. Should Russia decide to accede to the Convention, it would not be in force until 12 months later, giving the UK sufficient time to revisit the notion of applying for a reservation in relation to Russia based on the prevailing circumstances at that later date.

Q11: While both Hague 2019 and the 2007 Lugano Convention provide a framework for recognition and enforcement of civil and commercial judgments, what drawbacks, if any, do you foresee if the UK were to apply only Hague 2019 with EU/EFTA States, given its narrower scope and lack of jurisdiction rules? Please provide practical examples of any problems.

It is our view that Hague 2019 should be implemented for all Contracting States, rather than limiting its application to EU/EFTA States. Hague 2005 was applied to all Contracting States and it would be logical to implement Hague 2019 in the same way, particularly as the UK is not currently a party to the 2007 Lugano Convention and there is no guarantee that the UK will become a member in the near future. Should the UK accede to Hague 2019, it will be the only international instrument to provide a much-needed set of rules on the recognition and enforcement of civil and commercial judgments, and as such, it should not solely be implemented to EU/EFTA States, but rather to all Contracting States. As more states ratify the Convention, its reach will widen and enable recognition and enforcement of qualifying judgments across the world.

However, as stated throughout our response to this consultation, we believe that the Lugano Convention is a much better framework for the cross-border recognition and enforcement of judgments in relation to the EU/EFTA states, and the UK should renew and continue its efforts to re-join the Lugano Convention, alongside and following accession to Hague 2019.

The main reason that we prefer the Lugano Convention to Hague 2019 for the UK's relationship with EU/EFTA states is its wider scope, extending to a framework on jurisdiction as well as the recognition and enforcement of judgments, which is important given the volume and frequency of cross-border trade and movement between the EU/EFTA and the UK.

Q12: Do you consider that the UK becoming party, or not becoming party, to the Hague 2019 Convention would have equalities impacts in regards to the Equalities Act 2010?

We agree with and endorse the response provided by APIL as to the equalities impact on serious injury victims of the limitations to the scope of Hague 2019.

As we have highlighted throughout our response to this consultation, we consider that Hague 2019 provides inadequate protection for seriously injured people in a number of common and important scenarios following cross-border injury. Those who are disabled because of a third party's negligence will fall within the Equalities Act 2010 as having protected characteristics, and therefore there will be equalities impacts as a result of the UK becoming party to the Hague 2019 Convention. This is because the shortcomings we have identified will mostly impact individuals who meet the definition of disabled pursuant to the Equalities Act 2010.

One of the main issues, as described above, is that cases with ongoing damage where proceedings are brought in England & Wales relying on the tort gateway following an accident overseas, and which will encompass those cases where a person is disabled as a result of the injury suffered, will not fall within the scope of Hague 2019. The issue of interpretation of the "tort gateways" was considered at length by the Supreme Court in the case of Brownlie, with Lord Lloyd-Jones (with whom the majority agreed) holding that:

"in my view, therefore, there is no reason to read "damage" in paragraph 3.1(9)(a) as limited to the damage which violates the claimant's right and which completes the cause of action. On the contrary, the word in its ordinary and natural meaning and when considered in the light of the purpose of the provision extends to the physical and financial damage caused by the wrongdoing, considerations which are apt to link a tort to the jurisdiction where such damage is suffered".

Lord Lloyd-Jones also referred to Lady Hale's comments in Brownlie I[4] (at para 54*), "if I am seriously injured in a road accident, the pain, suffering and loss of amenity which I suffer are all part of the same injury and in cases of permanent disability will be with me wherever I am. The damage is in a very real sense sustained in the jurisdiction".*

We consider that the restrictive scope of Hague 2019 discriminates against seriously injured people who suffer ongoing disability because of injuries suffered abroad.

Q13: Would you foresee any intra-UK considerations if the Hague 2019 was to be implemented in only certain parts of the UK?

We agree that the Convention should be implemented in all jurisdictions in the UK and we see no reason for doing otherwise.

Q14: What other comments, if any, do you have?

It is clear that more needs to be done to ensure victims of serious injury seeking to enforce a judgment overseas have an effective mechanism for doing so. As explained in Q6 even with the UK's ratification of Hague 2019, in a number of common scenarios cross-border injury victims will likely need to continue to rely on the domestic rules of enforcement on a case-by-

[4] *Four Seasons Holdings Inc. v Brownlie* [2017] UKSC 80

case basis depending on the country in which they are seeking enforcement, with accompanying uncertainty, delay and additional cost.