



RESPONSE

by

THE FACULTY OF ADVOCATES

to

the Ministry of Justice consultation on The Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague 2019)

The Faculty of Advocates is the independent referral Bar in Scotland. The Faculty is pleased to have the opportunity to respond to this consultation, although should make it clear at the outset that the Faculty does not seek to comment upon issues of policy. We respond to the Questions posed in the Consultation Paper as follows:

Question 1: Should the UK accede to Hague 2019? What do you expect the added value to be for the UK upon accession?

Yes. Whilst a mechanism exists at Scots common law for the enforcement of foreign judgments in Scotland, international conventions (and other legal instruments) providing for the recognition and enforcement of judgments increase the portability of judgments for clients by making it easier for them to rely upon Scottish judgments abroad, or to enforce foreign judgments in Scotland. On that basis, a convention of this nature is welcome in principle. In addition to that general benefit, the added value for the UK on accession to the Hague 2019 Convention has two aspects:

- Prior to the UK's withdrawal from the EU, the UK benefitted from the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Brussels I Regulation (recast)) which allowed for easier recognition and enforcement of judgments as between the UK and other EU Member States, and also from the application of the 2007 Lugano Convention which allowed for easier recognition and enforcement of judgments as between the UK and Norway, Iceland and Switzerland. The new UK-

EU relationship, which has been put in place following the UK's withdrawal from the EU, meant that the UK's participation in those instruments came to an end. Efforts by the UK to be permitted to re-join the 2007 Lugano Convention have been unsuccessful, and the European Commission has made it clear that it sees the Hague 2019 Convention as the appropriate vehicle for UK-EU judgment recognition and enforcement in the future. Given that the EU have now acceded to the Hague 2019 Convention, UK accession would once more put in place arrangements for recognition and enforcement of judgments from EU Member States in the UK, and vice versa (although it must be recognised that the Hague 2019 Convention does not cover such a wide subject-matter scope as the Brussels I Regulation (recast)).

- Furthermore, the global nature of the Hague 2019 Convention holds the potential for the portability of UK judgments on a much wider geographical basis than an agreement with the EU – including major trading nations such as the USA.

Question 2: 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?

Yes. There would not seem to be any convincing reasons for the UK holding back from becoming a Contracting State to the Hague 2019 Convention at this stage. In particular, given that the European Commission consider that accession to the Hague 2019 Convention, rather than the UK re-joining the 2007 Lugano Convention, would be the appropriate basis for future recognition and enforcement of judgments as between the UK and EU Member States, it would not seem necessary to remain outside the Hague 2019 Convention in order to continue pursuing attempts to re-join the 2007 Lugano Convention.

Question 3: What impact do you think becoming a Contracting State to the Convention will have for UK parties dealing in international civil and commercial disputes?

As indicated above, participation in the Hague 2019 Convention will make it easier for parties to enforce Scottish judgments in Contracting States, and to enforce judgments from Contracting States in Scotland. This may give parties greater confidence when conducting cross-border commerce.

Question 4: 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)?

See the answer to Question 3.

Question 5: What downsides do you consider would result from the UK becoming a Contracting State to the Convention?

It must be acknowledged that an individual litigant in a particular case may not welcome a judgment being enforced against them (whether a foreign judgment being enforced in Scotland, or a Scottish judgment being enforced abroad). However, the Hague 2019 Convention contains appropriate safeguards, for example, to protect against enforcement of a judgment where that would be manifestly contrary to public policy, or where the judgment was obtained by fraud.

Question 6: Are there any aspects or specific provisions in the Convention that cause concern or may have adverse effects from a UK perspective?

No. It should, however, be noted that in terms of Article 10 of the Hague 2019 Convention, it is provided that recognition and enforcement of a judgment may be refused “*if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered*”. However, section 5 of the Protection of Trading Interests Act 1980 currently prohibits the enforcement in the UK of a judgment for multiple damages: and this has been interpreted by the courts as prohibiting enforcement of such a judgment to any extent (*Service Temps Inc v MacLeod* 2014 SLT 375).

Question 7: 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?

A registration model would seem an appropriate mode of implementing the Convention. This model is already used in the UK for recognition and enforcement schemes, such as those contained in the Administration of Justice Act 1920, and the Foreign Judgments (Reciprocal Enforcement) Act 1933. The first stage of the registration process also provides a ready opportunity for establishing indirect jurisdictional grounds (see Question 8).

Question 8: 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?

It would seem appropriate that these grounds be established at the registration stage by the person seeking to enforce the judgment. Specific provision can be made within the appropriate section (Ch. 62) of the Rules of the Court of Session.

Question 9: In your view, are there any declarations which the UK should make? If so, why?

From a purely legal standpoint, there are no particular matters which seem to the Faculty to require the making of a declaration.

Question 10: 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)?

The legal implication of applying the reservation is that litigants would not be able to rely upon the Hague 2019 Convention in order to obtain recognition and enforcement of Russian judgments in Scotland (and vice versa). It would remain possible for litigants to attempt to enforce a Russian judgment in Scotland at common law (by way of an action for decree conform), so it is not that recognition and enforcement would be rendered impossible. The Faculty's impression is that the volume of litigation in Scotland with a Russian aspect is not such as to cause significant practical implications if this reservation were to be applied.

Question 11: 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?

The Hague 2019 Convention does indeed have a narrower scope than the 2007 Lugano Convention, and lacks the agreed jurisdiction rules of the latter instrument. The difficulty is that the UK cannot unilaterally choose between these instruments, but would require to be permitted to re-join the 2007 Lugano Convention (and the necessary consent has not been forthcoming thus far). This would not therefore seem to be a reason for holding back from participation in the Hague 2019 Convention. If the position were to change in future, and the UK was to be permitted to re-join the 2007 Lugano Convention, then provision could be

made to make it clear that the 2007 Lugano Convention would supplant the Hague 2019 Convention as between the UK and Lugano Contracting States.

Question 12: 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 [Equality] Act 2010?

Given the safeguards contained within the Hague 2019 Convention, the Faculty does not see any obvious equalities impacts.

Question 13: Would you foresee any intra-UK considerations if the Hague 2019 was to be implemented in only certain parts of the UK?

No. The Hague 2019 Convention does not have automatic intra-UK application. Nor is there any need to give it intra-UK application, since it would not represent an improvement on the arrangements which are already in place for intra-UK recognition and enforcement. The only matter which would require to be considered were the Hague 2019 Convention only to be implemented in certain parts of the UK, would be to make clear that a judgment recognised in one part of the UK in terms of the Hague 2019 Convention could not then circulate throughout the UK by way of the intra-UK arrangements already in place. This could be done by amendment of section 18(7) of the Civil Jurisdiction and Judgments Act 1982 (which makes it clear that the intra-UK enforcement provisions do not apply to judgments registered under the 1920 Act, the 1933 Act, and the 2007 Hague Convention on International Recovery of Maintenance).

Question 14: What other comments, if any, do you have.

The Faculty has no other comments.