Response 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)

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We suggest the UK accede to Hague 2019. Accession to Hague 2019 will help consolidate the UK's leading position as a forum for international dispute resolution and settlement in commercial matters. Further, Hague 2019 could facilitate access to justice and foster international trade. Hague 2019 will unlock reciprocal recognition and enforcement of judgments with States with which the UK has not entered into bilateral agreements whilst accession to the Convention is also a viable route for the UK to re-establish judicial cooperation in civil and commercial matters with its closest trading partners in the European Union, alongside earlier accession to the 2005 Hague Choice of Court Convention.

This is the right time for the UK to consider the Hague 2019 and there is no reason to delay UK's accession to the Convention.

Whilst there is a mechanism at common law for enforcement of foreign judgments, as well as the ability to use the provisions of the 1920 Act and the 1933 Act in respect of judgments from certain countries, any international instrument which eases recognition and enforcement of judgments will generally be welcome to practitioners and their clients. Knowledge that such procedures exist can increase the confidence of clients to enter into cross-border transactions (in that it increases confidence in the effectiveness of dispute resolution should things go wrong).

There would be no serious downsides to joining Hague 2019. The Convention should be implemented using a registration model since it aligns with the predominant approach in the UK law on recognition and enforcement of foreign judgments. Section 4B(3) of the Civil Judgments and Jurisdiction Act 1982 could serve as a model for integrating a test of the indirect jurisdictional grounds in the registration of Hague

2019 judgments. Registration of Hague 2019 judgments could be made conditional upon evidence that the bases for recognition and enforcement in Article 5-6 Hague 2019 are satisfied. It would not involve a review of the grounds for refusal contained in Article 7 Hague 2019.

The UK should not make any declarations. Before taking a decision on whether to apply the reservation suggested in relation to the Russian Federation, the following two points should be considered. First, if the reservation was applied, judgments handed down by Russian courts would not be enforceable in the UK under Hague 2019, however, parties could still seek enforcement under common law. Second, the law on recognition and enforcement of foreign judgments already allows the UK courts to refuse recognition and enforcement for reasons pertaining to public policy, and the incompatibility of foreign judgments with sanctions imposed on the Russian Federation by the UK could justify such a refusal.

Applying Hague 2019 may produce certain benefits compared to the 2007 Lugano Convention. These benefits are enabled by the lack of direct jurisdiction rules in Hague 2019.

No negative equalities impact regarding the Equality Act 2010 are envisaged as a result of acceding to Hague 2019. Similarly, no material impact on intra-UK recognition and enforcement of civil judgments is envisaged.

Finally, as a general point, it is suggested here that the successful operation of Hague 2019 in the UK will require careful consideration of the Convention's relationship with instruments governing the recognition and enforcement of arbitral awards (New York Convention) and mediation settlements (Singapore Mediation Convention).

II. ABBREVIATIONS

Article	Art.
Articles	Arts.
European Union	EU
exempli gratia	e.g.
paragraph	para.
versus	v

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Civil Judgments and Jurisdiction Act 1982	Civil Judgments and Jurisdiction Act
Convention on Choice of Court Agreements	Hague 2005
Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters	2007 Lugano Convention
Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters	Hague 2019 ***or*** Convention
New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958	New York Convention
Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)	Brussels Ia Regulation
United Nations Convention on International Settlement Agreements Resulting from Mediation	Singapore Mediation Convention

III. RESPONSES

Question 1

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?

Our view is that the UK should accede to Hague 2019. Accession to Hague 2019 will help consolidate the UK's leading position as a forum for international dispute resolution and settlement in commercial matters. First, it will complement Hague 2005, which strengthens the effectiveness of choice of court clauses in favour of the UK courts.[1] Moreover, accession to Hague 2019 would be in keeping with steps taken by the UK to facilitate alternative dispute resolution and settlement, such as potential accession to the Singapore Mediation Convention alongside the New York Convention.[2]

Furthermore, accession to Hague 2019 could facilitate access to justice and foster international trade by laying down a set of minimum conditions for the reciprocal recognition and enforcement of judgments. It is generally expected that, in respect of matters falling within its scope, Hague 2019 will eliminate barriers to cross-border trade among the Contracting States, as it ensures that UK business and private persons will be able to enforce their rights against counterparties who reside or whose property is situated in the other Contracting States.[3] This is particularly relevant for

[1] In R Garnett, 'The Judgments Project; fulfilling Asser's dream of free-flowing judgments' in T John, R Gulati and B Köhler, *The Elgar companion to the HCCH* (Edgar Elgar 2020) 320.
[2] The UK is a Contracting State to the New York Convention. It is presently considering accession to the Singapore Mediation Convention.
[3] RA Brand, 'Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead' (2020) 67 Netherlands International Law Review 3, 4-5.

the UK's relationship with its closest European trading partners, since the EU recently decided to accede to Hague 2019.[4]

[4] Council decision concerning the accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, <https://data.consilium.europa.eu/doc/document/ST-13494-2021-INIT/en/pdf>.

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, we believe this is the right time for the UK to consider the Hague 2019.

First, Hague 2019 will unlock reciprocal recognition and enforcement of judgments with States with which the UK has not entered into bilateral agreements. This benefit is timely against the backdrop of the UK's policy of stimulating cross-border trade.

Second, acceding to Hague 2019 presently seems to be the most feasible route for the UK to establish a framework for reciprocal recognition and enforcement of judgments with its closest trading partners in the EU, since the EU denied the UK's request to accede to the 2007 Lugano Convention.[5] Accession to the Hague 2019 would put in place an adequate pathway to recognition and enforcement as between the UK and the EU Member States.[6]

[5] Communication from the Commission to the European Parliament and the Council Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, COM(2021) 222 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0222>.

[6] M Poesen, 'Civil and commercial private international law in times of Brexit: Managing the impact, and fostering prospects for a future EU-UK cooperation' in M Sacco (Ed), *Brexit: A Way Forward* (Vernon Press 2019) 283 ff.

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?

While the impact of potential accession to the Hague 2019 will become more ascertainable over time, we believe that it will strengthen the perception of the UK as a business-oriented international dispute resolution forum. We appreciate that the impact may vary depending on the industries and on the legal issues concerned. As we will outline in what follows, we expect some impact on cross-border consumer and employment contracts and financial services agreements, but we do not expect significant impact on international commercial disputes.

Parties to cross-border employment contracts, consumer contracts or financial services agreements will likely benefit from the added legal certainty that Hauge 2019 offers. First, the Convention provides for protection of UK consumers and employees, who benefit from protective rules on recognition and enforcement (Article 5(2) Hague 2019). Second, the Convention has the potential of benefitting the financial services industry in the UK. Financial services agreements often include non-exclusive choice of court agreements.[7] Such choice of court agreements being excluded from Hague 2005, their effectiveness until now depended on domestic law.[8] Hague 2019 would ensure the reciprocal effectiveness of non-exclusive choice of court agreements,[9] which could potentially benefit the UK financial services industry.

The Convention is less likely to impact on industries such as commercial shipping or aviation since their core business of carriage of goods and persons is outside of its

[7] *Commerzbank v Liquimar* [2017] EWHC 161 (Comm), para. 80.

[8] G Van Calster, *European Private International Law* (Hart 2020) para. 2.333 ff; A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) 528-532; D Draguiev, 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability' [2014] Journal of International Arbitration, 19-45.

[9] Art. 5(1)(m) 2019 Hague.

scope of application (Article 2(1)(f) Hague 2019).[10] Further, the Convention excludes matters such as intellectual property rights and competition law (Article 2(1)(m) and (p) Hague 2019). Industries, such as research and development intensive sectors like the pharmaceutical industry, to which these matters are of relevance are less likely to be impacted by Hague 2019. We expect that arbitration or mediation, or a combination thereof, will remain a preferable choice of dispute resolution methods in these sectors.[11]

[10] C Kessedjian, 'Comment on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters - Is the Hague Convention of 2 July 2019 a useful tool for companies who are conducting international activities?' [2020] Nederlands Internationaal Privaatrecht, 19-33.

[11] According to the 2021 Queen Mary International Arbitration Survey, 90% of respondents consider international arbitration together with ADR or a standalone as the preferred method of resolving cross-border disputes post-COVID-19. See 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, p. 5, available at <https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/>. See also, J Landbrecht, Commercial Arbitration in the Era of the Singapore Convention and the Hague Court Conventions, ASA Bulleting 4/2019, 880-881 The added benefit of arbitration is a higher uniformity of international and national rules, the latter especially through the adoption of national arbitration laws in over 100 jurisdictions based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments in 2006).

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)?

It is important to clients that they are actually able to enforce a judgment which is in their favour - and they do not wish for this to be frustrated or made overly-complicated by the cross-border nature of the original dispute. Whilst there is a mechanism at Scots common law for enforcement of foreign judgments, as well as the ability to use the provisions of the 1920 Act and the 1933 Act in respect of judgments from certain countries, any international instrument which eases recognition and enforcement of judgments will generally be welcome to practitioners and their clients – not only in respect of the enforcement of foreign judgments in Scotland, but also of the enforcement of Scottish judgments abroad. Knowledge that such procedures exist can increase the confidence of clients to enter into cross-border transactions (in that it increases confidence in the effectiveness of dispute resolution should things go wrong). Given the EU's accession to the Hague 2019 Convention, this general point has particular resonance since the UK's withdrawal from the EU ended the UK's participation in the Brussels I Regulation (recast) scheme for intra-EU recognition and enforcement of judgments (and the Lugano Convention's recognition and enforcement scheme in respect of Iceland, Norway and Switzerland). Of course, as a convention with a potentially global reach, the Hague 2019 Convention can be applied more widely than the UK-EU arena. It is necessary to bear in mind that the Hague 2019 Convention does not have such a broad subject-matter scope as the Lugano Convention, does not contain direct jurisdiction rules, and differs in the detail of its rules – however, were the UK in the future to be permitted to re-join the Lugano Convention, there seems no reason why accession to Hague 2019 would impede the reinstatement of Lugano among the tools available to a person seeking to enforce a judgment.

Question 5

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.

As with every new instrument, courts and practitioners will have to gain experience with applying the Convention in practise. However, in our view there would be no serious downsides to joining the Convention. We note in particular that the Convention excludes from its scope defamation and privacy judgments (Art. 2(1)(k)), as well as pure economic loss (Art. 5(1)(j)), which are among the most commonly deployed claims in respect of Strategic Lawsuits Against Public Participation (SLAPP).[12] While claimants may identify other routes to frame a SLAPP claim, including with reference to data protection, in order to bring it within the scope of the Convention, we consider the limitation of the Convention's scope as well as the grounds for refusal of recognition and enforcement to limit the potential for proliferation of SLAPPs.

[12] On SLAPPs see J Borg-Barthet, 'The Brussels Ia Regulation as an Instrument for the Undermining of Press Freedoms and the Rule of Law: An Urgent Call for Reform' Centre for Private International Law Working Paper Series, University of Aberdeen, 007/20) <https://www.abdn.ac.uk/law/documents/007.20%20-%20Borg-Barthet.pdf>.

Question 6

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

We believe that there are no aspects or specific provisions in the Convention that cause concern or may have adverse effects from the UK perspective. As noted above (response to Questions 1 and 2), our view is that the UK overall would benefit from acceding to the 2019 Convention.

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?

We suggest that using a registration model would be preferable since it aligns with the predominant approach in the UK law on recognition and enforcement of foreign judgments. In the current state of UK law, a registration model is applied to Hague 2005 (see s.4 Civil Jurisdiction and Judgments Act 1982), as well as judgments whose enforcement is sought under the Administration of Justice Act 1920 and Foreign Judgments (Reciprocal Enforcement) Act 1933. Registration of foreign judgments under these regimes is a relatively simple process whereby the judgment creditor seeks a declaration that a foreign judgment has the same effect as a UK judgment.[13] It is then for the judgment debtor to challenge the registration of the foreign judgment. This is a well-established system that used to be applied in a similar form to EU judgments under the Brussels Ia Regulation. It would therefore be logical and prudent to apply a similarly familiar registration model to Hague 2019.

[13] A Briggs. *Conflict of Laws* (Oxford University Press 2013) 164-165.

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?

Section 4B(3) of the Civil Judgments and Jurisdiction Act 1982 could serve as a model for integrating a test of the indirect jurisdictional grounds in the registration of Hague 2019 judgments:

> "A judgment which is required to be recognised and enforced under the 2005 Hague Convention must be registered without delay on completion of the formalities in Article 13 of the 2005 Hague Convention if the registering court considers that it meets the condition for recognition in Article 8(3) of the 2005 Hague Convention, without any review of whether a ground for refusal under Article 9 applies."

Rule 4(1)(c) of Part 74 specifies that "[an] application for registration of a judgment must be supported by written evidence exhibiting […] the grounds on which the judgment creditor is entitled to enforce the judgment."[14]

In keeping with this set of provisions, registration of Hague 2019 judgments could be made conditional upon evidence that the bases for recognition and enforcement in Article 5-6 Hague 2019 are satisfied. It would not involve a review of the grounds for refusal contained in Article 7 Hague 2019. A provision in the Civil Judgments and Jurisdiction Act 1982 could be considered to the following effect:

> "A judgment which is required to be recognised and enforced under the 2019 Hague Convention must be registered without delay on completion of the formalities in Article 12 of the 2019 Hague Convention if the registering court considers that it meets the conditions for recognition in Articles 5 and 6 of the 2019 Hague Convention, without any review of whether a ground for refusal under Article 7 applies."

[14] See Rule 62.28(2) of the Court of Session Rules for Scotland.

Question 9

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

Article 14

Article 14 embodies considerations about access to justice and enshrines the non-discrimination principle based on the sole ground of nationality, domicile or residence. Within the context of the work of the Hague Conference on Private International Law, this principle can be traced back to the 1905 Civil Procedure Convention.[15] Nowadays, the importance of the non-discrimination principle for foreign litigants is underscored by the increasing importance of human rights considerations within the sphere of private international law generally.[16] During the negotiations of the 2019 Convention, most delegations supported a 'non-security rule'[17] as opposed to adopting an alternative approach of leaving the matter to national law.[18] The final wording of Article 14 as it stands represents a compromise between these two approaches. The Explanatory Report to the 2019 Convention highlights that the 'no-security' view,[19] enshrined in paragraph 1 of Article 14, represents the default (i.e., the 'traditional') approach.[20] It follows that the declaration mechanism in paragraph 3 of Article 14 represents an exception to the default approach. Although Article 14 refers only to 'enforcement', the overall context of the Convention along

[15] See also the 1954 Hague Convention on Civil Procedure, Arts. 17 and 18; the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Arts. 17 and 18; and the 1980 Hague Convention on International Access to Justice, Arts. 14 and 15. Permanent Bureau, 'Information Document on Provisions on Cost', Info Doc No 5, July 2016.

[16] On this point, see generally J Fawcett, *Human Rights and Private International Law* (Oxford University Press 2016).

[17] M Dotta Salgueiro, 'Article 14 of the Judgments Convention: The Essential Reaffirmation of the Non-discrimination Principle in a Globalized Twenty-First Century' (2020) 67 Netherlands International Law Review 113, 117.

[18] Explanatory Report on the Hague 2019 Judgments Convention, para. 320.

[19] I.e., that 'no security, bond or deposit may be required from the applicant for the sole reason that they are a national of another State or their residence or domicile is in another State'.

[20] Explanatory Report on the Hague 2019 Judgments Convention, para. 321.

with the discussions during the negotiations suggest that the provision also covers the recognition/registration stage.[21]

Under the Civil Procedure Rules, the court may make an order for security of costs where the claimant is resident outwith the jurisdiction; however, this is not permitted when the claimant's country of residence is a State bound by the 2005 Hague Choice of Court Convention (see Pt 25, r. 13, and Pt. 74, r. 5). This exception is all the more significant given the fact that there is no 'no-security' provision included in the 2005 Convention.

Considering the above, we believe that the UK should not make a declaration under Article 14 of the 2019 Convention.

Article 17

Considering the relationship between Hague 2019 and instruments on alternative dispute resolution (notably the New York Convention and the Singapore Mediation Convention), a potential declaration under Article 17 deserves careful consideration. The underlying rationale behind Article 17 is that if a situation is 'internal' to the requested State (i.e., all parties are domiciled in the requested State and all pertinent circumstances of the dispute are located in that State), there should be no reason for the parties to seek a judgment in another State. Such provision renders the concept of the 'neutral court' (i.e., a court that has no link with the dispute) ineffective, which is unwelcome as often commercial partners who have not opted for arbitration (most likely due to financial constraints as arbitration may be too costly for many small business claims) may want to choose a court without any links to either party in order to prevent possible bias.[22] Therefore, we are of the view that the UK should not make

[21] M Dotta Salgueiro, see above footnote 17, 119.

[22] C Kessedjian, 'Comment on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Is the Hague Convention of 2 July 2019 a useful tool for companies who are conducting international activities?' (2020) Nederlands Internationaal Privaatrecht (NIPR), 19, 24.

a declaration under Article 17 In general terms, this approach is consistent with the view expressed by the UK delegate during the negotiations on the 2005 Hague Convention. The delegate emphasised the need to maximise the potential of the instrument in order "to improve economies by freeing up world trade' by discouraging the use of declarations, and, where used, by keeping them narrow."[23]

[23] Proceedings of the Twentieth Session (2005), Tome III, Choice of Court, 597.

Article 18

Similarly, we believe that the UK should avoid restricting the utility of the Convention by making a declaration under Article 18. Although under the corresponding provision of the 2005 Hague Convention (Article 21), the UK has made a declaration covering insurance contracts, we believe that this approach should not be replicated principally for the following two reasons. First, the declaration made under the 2005 Convention excludes particular types of insurance contracts from the scope of the Convention with a view to protecting certain policyholders, insured parties and beneficiaries. This, however, seems disproportionate to us as it goes beyond the generally recognised necessity to protect economically and socially weaker parties. Second, it places unnecessary restrictions on cross-border circulation of insurance contracts; and makes the UK cross-border insurance law overly complex.

Article 19

The intention of the drafters of the Convention was for Article 19 to be interpreted in a narrow fashion.[24] In practical terms this means that the provision could be utilised in relation to State agencies and natural persons acting for the government or a government agency, however, not in relation to State-owned enterprises.[25] An example of a State agency in relation to which an Article 19 declaration could be made is a Law Commission.[26] As it is not obvious why a State would see it beneficial to make such a declaration , we believe that there is no reason for the UK to make a declaration under Article 19.

[24] Prel. Doc. No 5 of April 2019 - Report of informal working group IV – declarations with respect to judgments pertaining to governments, per P Beaumont, 'Judgments Convention: Application to Governments' (2020) 67 Netherlands International Law Review 121, footnote 9.
[25] Beaumont, see above footnote 24, 135.
[26] *ibid.*

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)?

As this question relates to a matter of policy, we limit our answer to the legal aspects of a reservation in relation to the Russian Federation.

First, the effect of a reservation should be considered. If the UK applied a reservation, judgments handed down by Russian courts would not be enforceable in the UK under Hague 2019. However, parties could still seek enforcement under common law. If the UK wishes to bar the recognition and enforcement of Russian judgments in general, legislation should be put in place that bars recognition and enforcement under common law too.

Second, the law on recognition and enforcement of foreign judgments already allows the UK courts to refuse recognition and enforcement for reasons pertaining to public policy.[27] The incompatibility of foreign judgments with sanctions imposed on the Russian Federation by the UK could justify such a refusal. For example, if a Russian creditor sought enforcement of a debt against a UK creditor who was no longer allowed to perform their obligations due to sanctions imposed on the Russian Federation by the UK, UK courts would be able to refuse enforcement based on public policy.

[27] T Hartley, *International Commercial Litigation* (Cambridge University Press, 2020) 456 ff.

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? Please provide practical examples of any problems.

In our answer we will address both the drawbacks and the benefits of applying Hague 2019 instead of the 2007 Lugano Convention with the EU/EFTA States.

Potential Drawbacks

1) Parallel proceedings. In our view, the main drawback of not applying a set of common jurisdiction rules with EU/EFTA States such as the 2007 Lugano Convention is the lack of a unified way of addressing parallel proceedings. Whereas the Lugano Convention establishes rules to manage and prevent parallel proceedings and the related risk of conflicting judgments, Hague 2019 does not contain any such rules. Hague 2019 merely provides that conflicting judgments are not capable of being recognised or enforced per Article 7(1)(e)-(f).

2) Interim measures. Under Hague 2019, interim measures are not regarded as judgments capable of being recognised or enforced under its regime (Art 3(1)(b)). By contrast, the 2007 Lugano Convention does allow the recognition and enforcement of interim measures under certain conditions.[28] This is a clear disadvantage of applying Hague 2019 instead of the 2007 Lugano Convention. Interim measure may include freezing injunctions (for example bank account preservations orders), orders aimed at conserving evidence, or indeed a mere interim injunction for partial payment. The Explanatory Report on Hague 2019 emphasises that the Convention does not prevent

[28] Art. 31 2007 Lugano Convention. Moreover, any court that has jurisdiction on the merits has the jurisdiction to issue provisional measures: I Pretelli, 'Provisional and Protective Measures in the European Civil Procedure of the Brussels I System' in V Lazic´and S Stuij (Eds), *Brussels Ibis Regulation* (T.M.C. Asser Press 2017) 100.

the recognition and enforcement of interim measures under national law.[29] While this is true, the application of national law cannot ensure the same extent of reciprocal recognition and enforcement of interim measures as bilateral or multilateral international instruments.

3) Consumer/employee protection. Hague 2019 offers less jurisdictional protection than the 2007 Lugano Convention. The 2007 Lugano Convention grants a jurisdictional privilege to these parties, since they are usually in a position of social or economic weakness. Article 16(2) of the 2007 Lugano Convention allows a business to pursue a consumer in the courts of the consumer's domicile, excluding all other jurisdictional grounds contained in the Convention. A similar rule applies to employers, who are forced to pursue an employer in the employee's domicile per Art 20(1). The 2007 Lugano Convention bars recognition and enforcement of judgments rendered in breach of the jurisdictional rules for consumers and employees.[30]

Hague 2019 also aims at protecting consumers and employees through its jurisdictional filters. Art 5(2) excludes recognition and enforcement against consumers and employees under certain jurisdictional filter provided in Art 5(1). Recognition and enforcement remain available under the remaining filters. The Explanatory Report on Hague 2019 asserts that "[i]n practice, these exceptions are likely to restrict the circulation of judgments against a consumer or employee to those given in the State of that person's habitual residence, absent express consent to the jurisdiction of another court by the consumer or employee directed at that court."[31] In this respect Hague 2019 offers similar protection to the 2007 Lugano Convention. While we agree with this, we would like to highlight that neither Hague 2019 nor Hague 2005 limit exclusive choice of court clauses in consumer and employment contracts. Consumer and employment matters are excluded from Hague 2005 (Art 2(1) Hague 2005), and

[29] Explanatory Report on the Hague 2019 Judgments Convention, para. 99.
[30] Art. 35(1) 2007 Lugano Convention.
[31] Explanatory Report on the Hague 2019 Judgments Convention, para. 221.

Hague 2019 does not deal with exclusive choice of court agreements (Art 5(1)(m) Hague 2019). Neither Hague 2019 nor Hague 2005 therefore offer the same level of consumer and employee protection as the 2007 Lugano Convention against exclusive choice of courts agreements in consumer and employment matters.

4) Economic torts. Further Hague 2019 puts more restrictive conditions to the recognition and enforcement of judgments concerning cross-border torts[32] than the 2007 Lugano Convention. Under Lugano, all tort judgments are allowed to circulate, regardless of the nature of the tort. Hague 2019 however only facilitates the circulation of judgments on "non-contractual [obligations] arising from death, physical injury, damage to or loss of tangible property". Judgments concerning pure economic loss, such as cases of investment damage or prospectus liability, are hence not covered by the regime on recognition and enforcement in Hague 2019. This exclusion could affect the rights of parties in the UK who, for instance, seek redress for the devaluation of financial assets against EU/EFTA defendants. Hague 2019 does not facilitate the recognition and enforcement of judgments granting compensation in such cases, leaving the matter entirely up to the domestic laws of EU/EFTA States.[33]

Potential Benefits

We would like to highlight that applying Hague 2019 may produce certain benefits compared to the 2007 Lugano Convention. These benefits are enabled by the lack of direct jurisdiction rules in Hague 2019.

1) Exorbitant jurisdiction. While the 2007 Lugano Convention does contain rules of jurisdiction for cross-border disputes involving defendants who are domiciled in EFTA States and EU Member States, its regime of recognition and enforcement is

[32] We use tort as a generic term that encompasses delict and non-contractual obligations broadly understood.

[33] It should be noted that including pure economic loss would have been undesirable for other reasons. For instance, inclusion of these matters would have provided a significant route for SLAPP claimants (on the impact of Hague 2019 on SLAPPs in the UK, see our response to Question 5).

broader than EFTA. Lugano governs the recognition and enforcement of civil and commercial judgments handed down in EFTA States and EU Member States, regardless of the domicile of the parties involved.[34] This approach has been criticised.[35] It allows judgments rendered against defendants who are domiciled outwith EFTA or the EU to circulate freely within EFTA or the EU, even though the court of origin may have had a merely immaterial or tangential link to a case. The traditional example is French law, which grants jurisdiction to the French courts whenever the *claimant* has French nationality. Under Lugano, a judgment rendered based on the claimant's nationality would have to be recognised and enforced, even if the claimant's nationality was the only link to the court's territory. A similar outcome is unlikely under Hague 2019, since the jurisdictional filters of Articles 5 and 6 generally do not provide for enforceability if the jurisdiction of the court of origin was exorbitant.

2) Anti-suit injunctions. The Court of Justice of the European Union held in *West Tankers* that the English courts were not allowed to issue anti-suit injunctions against proceedings in another EU Member State.[36] This judgment precedes Brexit and concerns the Brussels Ia Regulation 1215/2012. Post-Brexit, this limitation no longer applies. This means that UK courts regained the freedom to issue anti-suit injunctions aimed at EU/EFTA proceedings.[37] However, if the UK were to join the 2007 Lugano Convention, the power of its courts to issue anti-suit injunctions in regard to proceedings in EU/EFTA States would again be doubtful in light of the CJEU's *West Tankers* judgment. It is widely accepted that the case law of the CJEU on Brussels Ia should inform the interpretation of the 2007 Lugano Convention, given the similarities

[34] Art. 38(1) 2007 Lugano Convention.

[35] See M Poesen, 'Civil Litigation against Third-country Defendants in the EU: Effective Access to Justice as a Rationale for European Harmonization of the Law of International Jurisdiction' (2022) 59 Common Market Law Review 6 1597, 1609 and references in footnote 66 there (https://doi.org/10.54648/cola2022113).

[36] Case C-185/07, *Allianz SpA v West Tankers Inc, (The Front Comor)*, ECLI:EU:C:2009:69.

[37] E.g. *Ebury Partners Belgium SA/NZ v Technical Touch BV and another* [2022] EWHC 2927 (Comm). See similarly in respect of Hague 2005: T Hartley, 'Post-Brexit: The New Shape of English Private International Law' J Harris and C McLachlan (Eds), *Essays in International Litigation for Lord Collins* (Oxford University Press 2022) 241.

between the Lugano and Brussels Regimes and the practical benefits of alignment between said regimes.[38]

3) *Forum non conveniens*. Under the 2007 Lugano Convention (or indeed the Brussels Ia Regulation, which is similar to the 2007 Lugano Convention), courts would no longer have the freedom to apply the doctrine of *forum non conveniens*.[39] This doctrine is mainly applied in common law jurisdictions, including the England and Wales, Scotland and Northern Ireland. *Forum non conveniens* allows the UK courts to decline jurisdiction if the courts of another state are more appropriately positioned to judge.[40] By joining the 2007 Lugano Convention, UK courts would no longer have the freedom to apply *forum non conveniens* in international disputes that are within the scope of Lugano, as Lugano typically limits judicial discretion to decline jurisdiction.[41]

[38] See A Borrás, I Neophytou and F Pocar, '13th report on national case law relating to the Lugano Conventions' (2012) 28 <https://www.regjeringen.no/globalassets/upload/jd/vedlegg/rapporter/lugano_13th_report.pdf>.

[39] Case C-281/02, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" aors*, ECLI:EU:C:2005:120.

[40] F Farrington, 'A return to the doctrine of forum non conveniens after Brexit and the implications for corporate accountability' (2022) 18 Journal of Private International Law 3, 404-405 (https://doi.org/10.1080/17441048.2022.2151092).

[41] A Briggs, *Civil Jurisdiction and Judgments* (Informa 2021) 379; P Beaumont, '*Forum non conveniens* and the EU rules on Conflicts of Jurisdiction: A Possible Global Solution' [2018] Revue critique de droit international privé 447, 450.

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 Act 2010?

In our view, the Hague 2019 Convention will have no negative equalities impacts regarding the Equality Act 2010. Hague 2019 may help upholding the Equality Act 2010 in cross-border cases, seeing as the Convention provides for protective rules for foreign judgments concerning consumer and employment relationships. Thanks to these rules, the enforcement of UK judgments ruling on cross-border cases regarding discrimination of consumers (e.g. in digital services) or employees (e.g. gender-based discrimination) may be facilitated. Hague 2019 may therefore help to ensure the extraterritorial respect for the protection laid down in the Equality Act 2010. However, for Hague 2019 to have such a positive impact, further investment into civil justice remains necessary, in particular when it comes to litigation costs and legal aid. Free movement of judgments tends to favour parties who have better access to courts. Given the effect of protected characteristics on financial resources, any liberalisation is more likely to favour the better-resourced party unless it goes paired with broader reform.

Question 13

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

The Hague 2019 Convention would not itself require to be implemented in respect of intra-UK recognition and enforcement, and there would seem no reason for the UK to choose to do so, since the intra-UK recognition and enforcement scheme which is already in place (and which is contained in Schedules 6 and 7 of the Civil Jurisdiction and Judgments Act 1982) is even easier and more straight-forward than that envisaged by the Hague 2019 Convention. It is not immediately obvious why any particular part of the UK might not wish for the Hague 2019 Convention to be implemented – however, if so, and thus if there were to be partial implementation in the UK, then perhaps it might usefully be clarified by way of amendment of section 18(7) of the Civil Jurisdiction and Judgments Act 1982, that a judgment recognised and enforceable in one part of the UK in terms of the Hague 2019 Convention could not then utilise the intra-UK recognition and enforcement arrangements in order to also permit enforcement in other parts of the UK.

Question 14

What other comments, if any, do you have?

As a general point we suggest that the successful operation of Hague 2019 in the UK will require careful consideration of the Convention's relationship with instruments governing the recognition and enforcement of arbitral awards (New York Convention) and mediation settlements (Singapore Mediation Convention).

In relation to arbitration, Article 2(3) Hague 2019 provides that "[this] Convention shall not apply to arbitration and related proceedings." It is essential that the UK courts interpret this exclusion to encompass *all* foreign judgments in support of arbitration, including court decisions on annulment/setting aside of arbitral awards and decisions on their recognition and enforcement, all of which parties may aim to circulate in other jurisdictions.[42] In any of these matters, a court judgment cannot circulate under Hague 2019. It should be noted that the exclusion of arbitration from Hague 2019 does not extend to situations where a defendant appeared in court and submitted arguments on the merits without requesting the matter be referred to arbitration, or expressly agreed to submit to litigation instead of arbitration during proceedings. In such cases, the defendant is deemed to have submitted to litigation and waived their right to have the matter submitted to arbitration. A foreign judgment resulting from those proceedings can therefore circulate under the Convention (Art 5(1)(e)-(f) Hague 2019).

Judicial settlements should be considered as judgments that are eligible for enforcement under Hague 2019 (Article 11 Hague 2019). The Drafters of Hague 2019 confirmed that the Convention covers both in-court settlement (court annexed mediation) or out-of-court settlements (approved or confirmed by court). In this respect, Hague 2019 dovetails with the Singapore Mediation Convention, which excludes settlement that have been approved by a court or concluded during

[42] Explanatory Report on the Hague 2019 Judgments Convention, para. 78.

proceedings before a court, as well as settlements that are enforceable as a judgment in the State of that court (Art 1(3)(a) Singapore Mediation Convention).