

International Comparative Legal Guides



Enforcement of Foreign Judgments 2020

A practical cross-border insight into the enforcement of foreign judgments

Fifth Edition

Featuring contributions from:

Advokatfirman Hammarskiöld & Co

Allen & Gledhill (Myanmar) Co., Ltd.

Allen & Gledhill LLP

Archipel

Bae, Kim & Lee LLC

Bär & Karrer Ltd.

Blake, Cassels & Graydon LLP

Boss & Young, Attorneys-at-Law

Covington & Burling LLP

CRA – Coelho Ribeiro e Associados

CRB Africa Legal

Debarliev, Dameski and Kelesoska,
Attorneys at Law

ESENYEL & PARTNERS LAWYERS AND
CONSULTANTS

Gall

GASSER PARTNER Attorneys at Law

GVZH Advocates

Herbert Smith Freehills LLP

King & Wood Mallesons

Konrad Partners

Kubas Kos Gałkowski

Macesic and Partners LLC

Machado Meyer Sendacz e Opice Advogados

MinterEllison

Montanios & Montanios LLC

Mori Hamada & Matsumoto

Osborne Clarke LLP

Papadimitriou – Pimblis & Partners

PIERRE THIELEN AVOCATS S.à r.l

Portolano Cavallo

Quevedo & Ponce

Rahmat Lim & Partners

Roberts & Shoda

Sébastien Champagne & Vanessa Foncke

Simont Braun

Sorainen

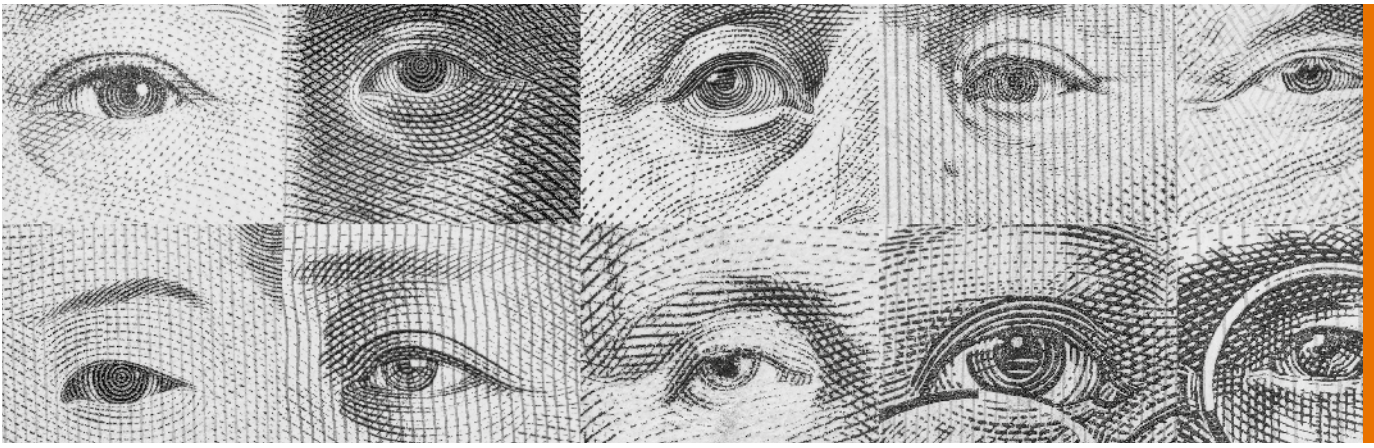
Van Oosten Schulz De Korte

Williams & Connolly LLP

Wilmer Cutler Pickering Hale and Dorr LLP



ICLG.com



ISBN 978-1-83918-034-7
ISSN 2397-1924

Published by

glg global legal group

59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 367 0720
info@glgroup.co.uk
www.iclg.com

Group Publisher
Rory Smith

Publisher
Jon Martin

Senior Editors
Suzie Levy
Rachel Williams

Editor
Oliver Chang

Creative Director
Fraser Allan

Printed by
Ashford Colour Press Ltd.

Cover image
www.istockphoto.com

Strategic Partners



International Comparative Legal Guides

Enforcement of Foreign Judgments 2020

Fifth Edition

Contributing Editors:

Louise Freeman & Shivani Sanghi
Covington & Burling LLP

©2020 Global Legal Group Limited.

All rights reserved. Unauthorised reproduction by any means, digital or analogue, in whole or in part, is strictly forbidden.

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.

This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Expert Chapters

- 1** **Enforcement Under the Hague Choice of Court Convention**
Louise Freeman & Shivani Sanghi, Covington & Burling LLP
- 5** **European Union**
Sébastien Champagne & Vanessa Foncke
- 12** **International Enforcement Strategy – An Overview**
Andrew Bartlett, Osborne Clarke LLP
- 17** **The Personal Jurisdiction Filter in the Recognition and Enforcement of Foreign Judgments in the United States**
David W. Ogden, David W. Bowker, Karin Dryhurst & Apoorva J. Patel, Wilmer Cutler Pickering Hale and Dorr LLP

Q&A Chapters

- 24** **Australia**
MinterEllison: Beverley Newbold & Evan Goldman
- 31** **Austria**
Konrad Partners: Dr. Christian W. Konrad & Philipp A. Peters
- 39** **Belarus**
Sorainen: Alexey Anischenko, Valeria Dubeshka & Katsiaryna Hashko
- 44** **Belgium**
Simont Braun: Rafaël Jafferli & Fanny Laune
- 49** **Brazil**
Machado Meyer Sendacz e Opice Advogados: Eduardo Perazza de Medeiros & Ariana Júlia de Almeida Anfe
- 55** **Canada**
Blake, Cassels & Graydon LLP: Erin Houtl & Josianne Rocca
- 62** **China**
Boss & Young, Attorneys-at-Law: Dr. Xu Guojian
- 69** **Croatia**
Macesic and Partners LLC: Anita Krizmanic
- 76** **Cyprus**
Montanios & Montanios LLC: Yiannis Papapetrou
- 82** **Ecuador**
Quevedo & Ponce: Alejandro Ponce Martínez & María Belén Merchán
- 87** **England & Wales**
Covington & Burling LLP: Louise Freeman & Shivani Sanghi
- 94** **France**
Archipel: Jacques-Alexandre Genet & Michaël Schlesinger
- 100** **Germany**
Herbert Smith Freehills LLP: Catrice Gayer & Sören Flecks
- 107** **Greece**
Papadimitriou – Pimblis & Partners: Nikos L. Kanellias
- 113** **Hong Kong**
Gall: Nick Gall, Ashima Sood & Kritika Sethia
- 119** **Italy**
Portolano Cavallo: Filippo Frigerio, Martina Lucenti, Micael Montinari & Claudia Rivieccio
- 125** **Japan**
Mori Hamada & Matsumoto: Yuko Kanamaru & Yoshinori Tatsuno
- 130** **Korea**
Bae, Kim & Lee LLC: Seong Soo Kim & Yoo Joung Kang
- 136** **Liechtenstein**
GASSER PARTNER Attorneys at Law: Thomas Nigg & Domenik Vogt
- 142** **Luxembourg**
PIERRE THIELEN AVOCATS S.à r.l: Peggy Goossens
- 147** **Malaysia**
Rahmat Lim & Partners: Jack Yow & Daphne Koo
- 153** **Malta**
GVZH Advocates: Dr. Karl Briffa, Dr. Ariana Falzon & Dr. Nicole Sciberras Debono
- 158** **Myanmar**
Allen & Gledhill (Myanmar) Co., Ltd.: Minn Naing Oo
- 162** **Netherlands**
Van Oosten Schulz De Korte: Jurjen de Korte
- 167** **Nigeria**
Roberts & Shoda: Adeniyi Shoda & Abolanle Davies
- 174** **North Macedonia**
Debarliev, Dameski and Kelesoska, Attorneys at Law: Ivan Debarliev & Martina Angelkovic
- 179** **Poland**
Kubas Kos Gałkowski: Dr. Barbara Jelonek-Jarco & Agnieszka Trzaska
- 188** **Portugal**
CRA – Coelho Ribeiro e Associados: Rui Botica Santos & Mark Robertson
- 194** **Singapore**
Allen & Gledhill LLP: Tan Xeauiwei & Melissa Mak
- 201** **Spain**
King & Wood Mallesons: Alfredo Guerrero & Fernando Badenes
- 207** **Sweden**
Advokatfirman Hammarskiöld & Co: Sandra Kaznova & Caroline Bogemyr
- 213** **Switzerland**
Bär & Karrer Ltd.: Saverio Lembo & Aurélie Conrad Hari

220

Tanzania

CRB Africa Legal: Rugambwa Cyril Pasha & Charles
R.B. Rwechungura

231

USA

Williams & Connolly LLP: John J. Buckley, Jr. &
Ana C. Reyes

226

Turkey

ESENYEL & PARTNERS LAWYERS AND
CONSULTANTS: Selcuk Esenyel

Enforcement Under the Hague Choice of Court Convention

Covington & Burling LLP



Louise Freeman



Shivani Sanghi

The Hague Choice of Court Convention is regularly referred to in the context of its role post-Brexit. In this chapter, we go back to basics, with a reminder of what the Convention is and what it does, as well as looking at its likely role post-Brexit.

What is the Hague Choice of Court Convention?

The Hague Choice of Court Convention¹ is an international treaty concluded within the Hague Conference on Private International Law. It was signed on 30 June 2005 and it came into effect on 1 October 2015.

It is designed to promote international trade and investment by offering greater certainty for parties involved in business-to-business contracts and international litigation. This is achieved through the creation of a worldwide framework of rules relating to jurisdiction agreements (also known as forum-selection or choice of court clauses) in civil and commercial matters, and the subsequent recognition and enforcement of a judgment given by a court of a Contracting State designated in such an agreement.

The Convention covers: jurisdiction rules for determining which court hears a case; the obligations of a court when an action is commenced which breaches an exclusive jurisdiction agreement in favour of another court; and the recognition and enforcement of judgments given by other Contracting States.

Who are Parties and Signatories to the Hague Choice of Court Convention?

The current parties to the Convention (each a “Contracting State”) are all of the EU Member States including, until 31 January 2020, the UK by virtue of its EU membership, Mexico, Montenegro and Singapore.

The United States, China, Ukraine and North Macedonia have signed but not yet ratified the Convention, and are therefore not yet parties to the Convention.

When Does the Hague Choice of Court Convention Apply?

The Convention applies to “exclusive” choice of court agreements “concluded in civil or commercial matters” (Article 1). An agreement designating one or more specific courts in a Contracting State is deemed to be exclusive unless the parties have expressly provided otherwise (Article 3).

The chosen court has jurisdiction unless the choice of court agreement is: substantially invalid under the law of the Contracting State (e.g., entered into by fraud, mistake, misrepresentation, duress, lack of capacity, etc.); manifestly unjust or contrary to the chosen court’s public policy; or cannot be performed for exceptional reasons beyond the control of the parties.

The Convention only applies in international matters. This is defined as all situations “*unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*” (Article 1(2)).

What Does the Hague Choice of Court Convention Not Cover?

As it applies only to exclusive jurisdiction agreements, the Convention is widely understood not to apply to asymmetric jurisdiction agreements.² Asymmetric (or hybrid) jurisdiction agreements typically require one party to an agreement to sue in the courts of a specified jurisdiction only, whilst allowing the other party to sue in any court with jurisdiction and are commonly found in financial markets transactions.

The Convention also has exclusions intended to confine it to international trade (e.g., it does not apply to consumers, employment law, family law and probate). It also does not apply to certain specialist matters (such as arbitration and competition / antitrust law) (Article 2).

How Does the Hague Choice of Court Convention Work?

The Convention contains three basic rules that give effect to exclusive choice of court agreements:

1. For an exclusive jurisdiction agreement establishing a choice of court that is a Contracting State to the Convention, the chosen court is obliged to hear the case (Article 5). The chosen court cannot decline to do so on the basis that the case should be decided in another Contracting State, or that another Contracting State is more appropriate, or that another Contracting State is already hearing it. So, if the parties choose exclusive English jurisdiction, the English court must accept jurisdiction.
2. All other courts must refuse to hear the case (Article 6). So, if the parties choose exclusive English jurisdiction, Mexican courts (for example) must refuse to hear the case.
3. Any judgment on a case’s merits given by the chosen court under an exclusive choice of court agreement must be recognised and enforced across all other Contracting States, provided that the judgment would be enforceable in the Contracting State of Origin (Article 8) and a ground of refusal does not apply (Article 9). This includes summary judgments³ and determination of costs or expenses by the court, but does not include enforcement of any interim measures. So, if the parties choose exclusive English jurisdiction and the English court gives a judgment on the case, the Mexican court (for example) must enforce that judgment unless one of the limited exceptions applies.

How Did the Convention Apply in the UK pre-Brexit?

The UK, by virtue of its EU membership, has been a party to the Convention since the Convention came into force on 1 October 2015.

The Convention has been most relevant to the UK where there is an exclusive choice of court agreement with a nexus to Mexico, Montenegro or Singapore. The Convention has had limited effect where there is a nexus to an EU Member State, as the Brussels Recast Regulation⁴ has taken priority.

What Will be the Relevance of the Convention After Brexit?

Under the Withdrawal Agreement

Now that the Withdrawal Agreement has been ratified and approved by the UK and the EU,⁵ the UK will continue to be bound by the obligations stemming from international agreements including the Hague Convention during the Transition Period ending on 31 December 2020 (Articles 126 and 129(1), Withdrawal Agreement).

However, whether or not other non-EU signatories to the Hague Convention will treat the Hague Convention as continuing to have effect in relation to UK jurisdiction clauses during the Transition Period is unclear – as it is not something that the UK and the EU can simply agree between themselves. Pursuant to the terms of the Withdrawal Agreement,⁶ the EU has now notified other parties to international agreements that the UK is to be treated as an EU Member State during the Transition Period; however, the notification is not binding on the non-EU signatories to the Hague Convention.

The UK will also continue to be treated as a Member State for the purposes of the Brussels Recast Regulation,⁷ which will therefore continue to be the primary means by which jurisdiction and enforcement will be assessed in matters with an EU nexus.

It seems likely that, at some stage before the end of the Transition Period, the UK government will accede to the Hague Convention in its own right.

In the event of no civil jurisdiction and judgments agreement being concluded

If no civil jurisdiction and judgments agreement is entered into by the end of the Transition Period (or indeed, if there is a full no-deal Brexit), the UK intends to become a party to the Hague Convention in its own right. The Convention then would govern jurisdiction and enforcement of relevant judgments as between the UK and the EU (as well as the other Contracting States of Mexico, Singapore and Montenegro) where there is an exclusive jurisdiction clause in favour of one of those states.

It is open to the UK to become a party to the Convention in its own right once the Convention ceases to apply to the UK, at the end of the Transition Period. The UK intends to deposit an instrument of accession to the Convention prior to the end of the transition period.

The UK's accession at the end of the Transition Period would enable the Hague Convention to apply to disputes with an EU-nexus, unless and until some other arrangement is put in place between the EU and the UK, such as an agreement for the UK to join the Lugano Convention⁸ (which applies more broadly than the Hague Convention because it is not limited to exclusive jurisdiction agreements) or a bespoke agreement between the UK and the EU on jurisdiction and enforcement of judgments.

Remaining uncertainty

The steps taken by the UK government to ensure the continued application of the Hague Convention are welcome. There remain some limitations and uncertainties arising from the regime when compared to the current EU-wide regime, however, such that it does not answer all issues that may arise in this context.

In particular, the Hague Convention does not contain any rules relating to jurisdiction in situations other than exclusive choice of court agreements, and does not contain any rules relating to jurisdiction in the absence of party choice.

There is also some uncertainty as to whether courts in EU Member States will be bound to apply the Convention to exclusive jurisdiction clauses entered into after 1 October 2015 (when the Hague Convention came into force for the EU) but prior to the date of the UK's independent accession to the Convention, as it applies only from the date of "entry into force" for the state of the chosen court. This gives rise to uncertainty as to whether the date of "entry into force" for the UK is the date it entered into force by means of the UK's membership of the EU, or only when it entered into force independently, by the UK's own accession to the Convention.

The UK has legislated in this regard⁹ to protect choice of court agreements entered into after 1 October 2015 and prior to the date of the UK's independent accession to the Convention. However, this only dictates how UK courts will address this issue. By contrast, the European Commission has published guidance suggesting that the Convention will only apply to exclusive choice of court agreements concluded *after* the UK has become an independent party to the Convention.¹⁰ It therefore remains to be seen how EU Member State courts will address this issue.

Conclusion

Unless a bespoke agreement is put in place before the end of the Transition Period, the Convention will have increased relevance between the UK and the EU post the Transition Period. The Convention would then provide a useful stop-gap for EU/UK judicial relations, but the remaining uncertainties seem sure to become the subject of litigation.

Endnotes

1. Formally the "Hague Convention of 30 June 2005 on Choice of Court Agreements".
2. As referenced at paragraph 32 of the Explanatory Report to the Hague Convention, although there is one English case in which the judge suggested, *obiter*, that this was not necessarily the case (*Commerzbank Aktiengesellschaft v Liqueur Tankers Management Inc* [2017] EWHC 161 (*Comm*)).
3. *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 (The High Court of Singapore).
4. Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (*Brussels Recast Regulation*). The Brussels Recast Regulation takes priority in accordance with Article 26(6) (a), Hague Convention.
5. The Withdrawal Agreement was ratified by the UK on 23 January 2020 and by the EU on 30 January 2020.
6. Footnote to Article 129(1), Withdrawal Agreement.
7. By virtue of Article 127 and Article 67, Withdrawal Agreement.
8. The UK government has indicated that the UK intends to accede to the Lugano Convention in its own right at the end of the Transition Period. Switzerland, Iceland and Norway have issued statements that they will support a

request for accession from the UK. The UK will need to obtain the support of those countries and also of the EU and Denmark to accede to the Lugano Convention.

9. The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018.
10. Commission Notice to stakeholders on the effect on civil justice and private international law of the UK's withdrawal from the EU (18 January 2019); questions and answers related to the United Kingdom's withdrawal from the European Union in the field of civil justice and private international law (11 April 2019) (particularly section 3.3).



Louise Freeman focuses on complex commercial disputes, and co-chairs the firm's Commercial Litigation and European Dispute Resolution Practice Groups.

Described by *The Legal 500* as "one of London's most effective partners" and by *Chambers* as "a super person to work with", Ms. Freeman helps clients to navigate challenging situations in a range of industries, including financial markets, technology and life sciences. Most of her cases involve multiple parties and jurisdictions, where her strategic, dynamic advice is invaluable. Ms. Freeman also represents parties in significant competition litigation proceedings.

Covington & Burling LLP
265 Strand
London WC2R 1BH
United Kingdom

Tel: +44 20 7067 2000
Email: lfreeman@cov.com
URL: www.cov.com



Shivani Sanghi is a dual-qualified lawyer: a Solicitor-Advocate in England and Wales; and an Advocate in India. Drawing on her extensive experience in complex, high-value cross-border litigation and international arbitration, Ms. Sanghi has advised clients across multiple jurisdictions including the UK, Russia, India, British Virgin Islands, Cayman Islands, Luxembourg, Cyprus, and Bulgaria.

Ms. Sanghi has represented clients in a wide variety of sectors, including banking, telecoms, private equity, and software technology, and has represented clients in many high-profile cases before the English courts, including the Court of Appeal and the UK Supreme Court.

Ms. Sanghi has been recognised by *The Legal 500 UK 2019*, as "senior associate to note" and "excellent future star" in the commercial litigation category. She has also been named in *The Lawyer* for involvement in the *Russian Facebook/VK.com* dispute and the *VTB v Nutritek* case.

Ms. Sanghi previously practised as an Advocate in Delhi.

Covington & Burling LLP
265 Strand
London WC2R 1BH
United Kingdom

Tel: +44 20 7067 2000
Email: ssanghi@cov.com
URL: www.cov.com

Covington & Burling LLP (Covington) is a pre-eminent international law firm with more than 1,000 attorneys and advisors and with offices in Beijing, Brussels, Dubai, Frankfurt, Johannesburg, London, Los Angeles, New York, Palo Alto, San Francisco, Washington, Shanghai, and Seoul. In an increasingly regulated world, we have an exceptional ability to navigate clients through their most complex business problems, deals, and disputes.

www.cov.com

COVINGTON

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Recovery & Insolvency
Corporate Tax
Cybersecurity
Data Protection
Derivatives

Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control

Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms