Ministry of Justice

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

A response by the Association of Personal Injury Lawyers

January 2023

Introduction

APIL welcomes the opportunity to respond to the Ministry of Justice's consultation on the Hague Convention of 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

APIL is supportive of the UK becoming a Contracting State to the Hague Convention 2019. There is currently no private international law framework in place between the UK and the EU which covers the recognition and enforcement of civil judgments. Therefore, we believe that Hague 2019 should be welcomed as a positive addition to the UK's private international law landscape following Brexit. The advantage of Hague 2019, of course, is that its reach goes further than the UK's post-Brexit relationship with the EU, extending to enforcement of UK judgments falling within its scope across the globe as and when more countries become contracting states.

However, as an organization that represents injured people, APIL is concerned that the limitations and exclusions from the scope of Hague 2019, mean there are a number of notable shortcomings that limit how the Convention can assist serious injury victims seeking to enforce a UK judgment overseas.

Whilst some cross-border injury cases will fall within the scope of Hague 2019 following its ratification by the UK, APIL believes that an unacceptably high proportion of cross-border injury victims will still need to continue to rely on the domestic rules of enforcement. This means individuals having to ascertain what those rules are on a case-by-case basis depending on the country in which they are seeking enforcement, with accompanying uncertainty, delay, and additional cost.

The signing of Hague 2019 would provide a much-needed set of rules for the recognition and enforcement of judgements between the UK, the EU and beyond. However, it would not provide for some of the necessary protections afforded to weaker parties in the Lugano Convention 2007. APIL strongly believes that the UK should continue its efforts to re-join the Lugano Convention.

While Hague 2019 is therefore a step in the right direction, more needs to be done to ensure serious injury victims seeking to enforce a judgment overseas have an effective mechanism for doing so. APIL is keen to ensure that Hague 2019 is not seen as the complete solution on the question of judicial cooperation in civil and commercial matters post-Brexit, particularly given some of the key shortcomings in Hague 2019 for serious injury victims seeking to enforce a judgment overseas.

APIL has only responded to questions within our remit.

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?

APIL believes that the UK should accede to Hague 2019. In the absence of the European regime or a relevant bilateral treaty, becoming a contracting state to Hague 2019 can be seen as a positive step towards filling some of the gaps left by Brexit. Further, as more states outside the EU ratify Hague 2019, its reach will enable the recognition and enforcement of qualifying judgments across the globe.

However, APIL is concerned that the Convention has a number of notable shortcomings which mean its impact for serious injury victims seeking to enforce a judgment overseas will be limited. For judgments falling outside the scope of Hague 2019, serious injury victims will need to continue to rely on the domestic rules in the state where they are seeking enforcement, with the associated costs, uncertainty and delay this creates. We set out our concerns about Hague 2019's shortcomings in detail in answer to question 6.

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?

As mentioned above, we believe that the UK should become a contracting state to Hague 2019 and that this should happen as soon as is practicable.

At the same time, APIL considers it is important that the UK Government does not lose sight of the importance to individuals, consumers and victims of re-joining the Lugano Convention 2007. Serious injury victims have lost a number of important protections afforded to weaker parties by the European regime on jurisdiction and enforcement. Individuals, consumers and victims are now forced to use national law to fill in the gaps left by Brexit.

As such, APIL encourages the UK government to renew efforts in this regard and to ensure that from a political and diplomatic standpoint acceding to Hague 2019 at this time would not be detrimental to ongoing efforts in relation to the UK re-joining the Lugano Convention. The Lugano Convention is the best model for continued cooperation in the enforcement of judgments in relation to the EU and EFTA states post-Brexit, with an associated set of jurisdictional rules that offer parties certainty.

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.

As mentioned above, Hague 2019 has a narrower scope and does not cover the protections that individuals used to have before Brexit. One of the possible drawbacks of acceding to Hague 2019 might be that the UK Government steps back in its attempts to re-join the 2007 Lugano Convention, incorrectly perceiving Hague 2019 as the full answer to cross-border issues of jurisdiction and enforcement.

We strongly recommend that the UK Government continues to seek the UK's re-accession to the Lugano Convention due to the notable limitations and exclusions from scope in the Hague Conventions in respect of the protections afforded to injured claimants (see answer to

question 6). While accession to the Hague Convention is a step in the right direction, it is not enough.

Q6: Are there any aspects or specific provisions in the Convention that cause concern or may have adverse effects from a UK perspective? [1]

There are several limitations to and exclusions from the scope in Hague 2019. APIL is concerned that the Convention may be of limited assistance to serious injury victims.

Carriage of passengers and goods

Article 2.1(f) excludes the carriage of passengers and goods from the scope of Hague 2019 – APIL is concerned that this exclusion will be disadvantageous to injured people. This exclusion means that a passenger in a car collision cannot rely on Hague 2019 to enforce a judgment for damages, although a non-passenger injured in the same accident could rely on 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, there are no other conventions covering the enforcement of a judgment arising from the injury of passengers in a car. We believe that this exclusion gives rise to considerable unfairness by putting two innocent victims of the same accident on an unequal footing on the issue of enforcement.

Interim damages and costs awards and preliminary requests for disclosure

Under Article 3.1(b), the definition of "judgment" excludes interim measures. This will mean that the enforcement of an interim award of damages, which can be vital to serious injury victims to help with funding care costs and rehabilitation, for example, will be excluded from the scope of Hague 2019.

We believe that 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.

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 in Article 5.1 (j) that for a claim in tort, the damage must have occurred in the state of origin, irrespective of where the harm occurred.

We are concerned that cross-border injury victims will not be able to enforce English judgments using Hague 2019. 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

[1] 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/

the UK Supreme Court's decision in *Brownlie*[2], 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).

Under those circumstances, 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. Thus, a judgment relying on *Brownlie* will presumably be unenforceable using Hague 2019 because the Convention requires the "act or omission" to have occurred in the state of origin of the judgment. The fact that the victim is suffering the "indirect, ongoing consequences of the act or omission" in the state of origin of the judgment will not suffice.

Fatal accidents and claims for financial dependency

Another shortcoming of Hague 2019 is that it could also exclude enforcement of a judgment obtained by a claimant for loss of financial dependency on the deceased following a fatal accident on the basis this is an "indirect" loss.

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 Explanatory Notes to Hague 2019 recognise there are issues over how the Convention might be interpreted, leaving the question of interpretation of this part to national courts, which further highlights the uncertainty of the regime for weaker parties.

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. APIL is concerned that serious injury victims who have obtained a judgment from the UK courts are likely to be refused enforcement due to the use of a conditional fee agreement (ie. "no win, no fee" arrangement) to fund the legal costs of bringing their claim. This is a common method of funding that enables access to justice for injury victims in the English courts. At the successful conclusion of the claim, an injury victim will 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.

Our members have seen problems with the recognition and enforcement of English judgments by European countries on the basis that an award of costs under the English loser-pays principles offended public policy. 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. We are concerned that injury victims will face uncertainty, delays, and additional costs in trying to defeat public policy arguments on enforcement regarding the Contracting States' interpretation of Article 7 of Hague 2019.

[2] [2021] UKSC 45

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?

APIL agrees with the use of a registration model. It would make logical sense for the same registration requirement used for Hague 2005 to be applied to Hague 2019.

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.

We refer to our concerns about the drawbacks of Hague 2019 for injured people, in answer to question 6.

We believe that Hague 2019 should be implemented for all Contracting States. We cannot see a rationale for limiting the Convention to EU/EFTA states. Firstly, Hague 2005 was applied to all Contracting States so it would be sensible to implement Hague 2019 in the same way. Secondly, there is no guarantee that the UK will re-join the 2007 Lugano Convention soon, as suggested in the question. For that reason, Hague 2019 should be implemented to all the Contracting States, particularly given that while the UK is still trying to re-join the 2007 Lugano Convention, Hague 2019 will be the only international instrument to provide for a much-needed set of rules on the recognition and enforcement of civil and commercial judgments. Thirdly, as more states ratify Hague 2019 as an international convention, its reach will go further than the EU and enable recognition and enforcement of qualifying judgments across the globe.

APIL believes that it is crucial that the UK Government re-attempts to join the Lugano Convention 2007. The signing of Hague 2019 is a step in the right direction for the UK and could help fill in some of the gaps left by Brexit. However, we believe that the shortcomings of the Convention in relation to injured people are significant. The 2007 Lugano Convention is the best model for continued cooperation in the enforcement of judgments as it offers a similar framework to the Brussels (Recast) Regulation. APIL strongly recommends that more action is taken by the UK Government, using all legal, political and diplomatic means at its disposal to cooperate positively and constructively with the EU and EFTA states and to secure the UK's re-accession to the 2007 Lugano Convention.

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?

As mentioned throughout this response, Hague 2019 provides inadequate protection for seriously injured people. Those who are disabled as a result of 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, 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*[3], 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 (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".

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 believe that the Convention should be implemented in all jurisdictions in the UK.

-Ends-

Any queries about this response should be, in the first instance, directed to:

Ana Ramos

Legal Affairs Assistant

ana.ramos@apil.org.uk

APIL

3, Alder Court

Rennie Hogg Road

Nottingham

NG2 1RX

Tel: 0115 943 5403

[3] [2021] UKSC 45