

A NEW CHAPTER FOR THE RECOGNITION OF POST-BREXIT ENGLISH JUDGMENTS

Switzerland embraces the Hague Convention on the choice of court agreements to be in force on 1 January 2025. A wider recognition of choice of court agreements improves the predictability of cross-border dispute resolutions and reduces the costs they generate and is therefore crucial to international trade. Switzerland's adherence to this international convention once again demonstrates its commitment to enhancing cooperation in civil and commercial matters, as well as the attractiveness of Switzerland as an international place of jurisdiction and enforcement. With this development, a new era starts for the recognition of post-Brexit English judgments that will then be facilitated again.

THE HAGUE CONVENTION AND ITS BENEFITS FOR THE SWISS REGULATORY FRAMEWORK

OVERVIEW OF THE HAGUE CONVENTION

The Hague Convention on the Choice of Court Agreements (**Hague Convention**) governs the international jurisdiction of courts when the parties to a civil or commercial dispute have designated the competent court in their contract, as well as the recognition and enforcement of judgments rendered by the court elected by the parties.

Similarly to the arbitration agreement, a choice of court agreement is perceived as the parties' first consensual step towards the settlement of a dispute. Moreover, choice of court agreements ensure the predictability of settlement conditions and further help avoid the possibilities of *forum shopping*.

As of today, some states were reluctant to accept the choice of court agreements that derogated from their own national courts' jurisdiction. The Hague Convention will change that, since it imposes for all its member States to recognise the exclusive choice of court agreements.

In fact, the Hague Convention provides for three main rules:

- The courts of a State designated in an exclusive choice of court agreement have exclusive jurisdiction to hear the dispute (Art. 5 Hague Convention);
- All other courts must decline jurisdiction (Art. 6 Hague Convention); and
- The contracting States must recognise and declare enforceable a decision rendered by the courts designated in

an exclusive choice of court agreement (Art. 8 Hague Convention).

The Hague Convention is already in force in the European Union (EU), the United Kingdom (UK), and others, including Mexico, Singapore and Ukraine. Other countries, including the United States of America and China, have signed but not yet ratified it.

ADVANTAGES FOR THE SWISS SYSTEM

Adherence to the Hague Convention aims at, in particular, to strengthen the attractiveness of Switzerland for trade dispute resolutions on an international level. Indeed, several cantons (e.g. Geneva and Zurich) are planning to set up courts specialised in international trade disputes with the possibility to entertain proceedings in English. For these courts to gain importance in Switzerland and abroad, their judgments must be recognised and enforceable worldwide.

Moreover, Switzerland's adherence will enhance and secure trade relations with countries not bound by the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Lugano Convention**), including the UK. In fact, since Brexit and EU's refusal to endorse the UK's adherence to the Lugano Convention, Switzerland together with the EU are not bound to the UK by any treaty on international jurisdiction or recognition and enforcement of judgments. As the UK is an important trading partner for Switzerland, adherence to the Hague Convention will partially fill this gap.

IMPLICATIONS OF THE HAGUE CONVENTION ON SWISS LAW

Although on a diplomatic level, Switzerland's adherence to the Hague Convention shows once again its commitment to multilateralism and international cooperation, particularly in the civil and commercial spheres, in substance, the ratification of the Hague Convention will only entail limited obligations for Switzerland, which do not go much further than the current state of positive law. In fact, the PILA already provides for a recognition of international choice of court agreements. However, before the entry into force of the Hague Convention, the PILA allowed for a chosen judge to decline its jurisdiction in certain cases, which will now be expressly forbidden. The related provision in the PILA will be amended accordingly.

It should be noted that the Hague Convention provides for the precedence of international conventions of its contracting States, irrespective of whether they were concluded before and after the entry into the Hague Convention (Art. 26 Hague Convention). Therefore, the Lugano Convention will still apply if the chosen court belongs to a contracting State of the Lugano Convention and a party is domiciled in one of its contracting States. This is particularly important with regard to the recognition and enforcement of judgments as the Hague Convention, unlike the Lugano Convention, does not provide for a simplified recognition and enforcement system *ex parte*.

As for the transitory regime, the Hague Convention shall apply only to the choice of court agreements made after its entry into force, i. e. 1 January 2025. Moreover, its provisions do not apply

to disputes that commenced before its entry into force in the State of the seized court. It follows that it must not only have been seized after the entry into force of the Hague Convention for said State, but also that the choice of court must have been concluded after the entry into force of the Hague Convention in the State of the chosen court.

REFUSAL OF RECOGNITION OR ENFORCEMENT

As mentioned above, the Hague Convention does not provide a simplified recognition and enforcement procedure. Per Lugano Convention, the recognition procedure is normally conducted *ex parte*, without informing the opposing party (which allows for a certain surprise effect,). The Hague Convention provides that it is the law of the State in which enforcement is sought that is decisive for the procedure for recognition, and that the tribunal seized must act rapidly. Therefore, the Hague Convention does not forbid for the notification of and submission by the adverse party and the procedure will depend on the law of the seized State.

Moreover, the Hague Convention includes various provisions addressing the grounds for refusal of recognition and enforcement. Art. 9 of the Hague Convention provides for seven exhaustive grounds of refusal which are discretionary, meaning that it is up to the court addressed to refuse recognition if they are met. Mainly, recognition or enforcement may be refused if:

- The choice of court agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid.
- A party lacked the capacity to conclude the agreement under the law of the requested State.
- There is a violation of the notification procedure of the document instituting proceedings or equivalent documents.

In Switzerland, this third ground of refusal could be of importance. Indeed, in common law countries, a document can be notified privately, without any authority. Under the Hague Convention, Switzerland will be able to refuse recognition and enforcement of decisions notified in this way.

- The judgment was obtained by fraud in connection with a matter of procedure.
- The recognition or enforcement would be manifestly incompatible with the public policy of the requested State.
- The judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties.
- The judgment is inconsistent with an earlier judgment given in another State between the same parties on the

same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Furthermore, under Art. 11 para. 1 of the Hague Convention, recognition or 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. It should be noted that these grounds of refusal are either examined by the court of its own motion or must be raised by the parties, depending on what each national law specifies. In Switzerland, the court reviews substantive public policy of its own motion but it is the defendant who must raise issues relating to procedural public policy (Art. 27 para. 2 PILA). And finally, Art. 10 para. 1 and 2 of the Hague Convention specifies that recognition of judgments relating to excluded matters (as the main question or raised as a preliminary question) is not possible.

NON-EXCLUSIVE CHOICE OF COURT AGREEMENTS

Upon adherence to the Hague Convention, Switzerland will declare, pursuant to the opt-in under Art. 22 of the Hague Convention, that its courts will also recognise and enforce judgments rendered by foreign courts based on non-exclusive choice of court agreements which are notably relevant in the financial sector. However, such extension of the Hague Convention's scope concerns only the provisions relating to the recognition and enforcement of judgments, thus excluding the provisions relating to jurisdiction (Art. 5 and 6 Hague Convention). This means that the non-exclusively chosen court will determine its own jurisdiction on the basis of the law of the forum and not of the Hague Convention. As non-exclusive choice of court agreements are

relatively usual, in particular in the international banking sector, such a declaration is an advantage. It will ultimately secure the recognition in Switzerland of judgments rendered by a court in a contracting State seized on the basis of a non-exclusive choice of court clause. Furthermore, Switzerland is not committing itself to anything that does not already result from the Lugano Convention or its domestic law.

It should be noted, however, that Switzerland is yet the only State which has made such a declaration whereas the Hague Convention requires reciprocity, which means that both the State of origin and the requested State have made such a declaration, for it to be applicable. Consequently, and for the time being, this declaration will remain moot.

Conclusion and key takeaways

In conclusion, adherence to the Hague Convention on the Choice of Court Agreements will indeed secure the enforcement of judgments rendered by an exclusively elected court in a contracting State. Such a development will improve the predictability of dispute settlement in international civil and commercial matters and will in particular fill a gap with the UK judgments. It enhances Switzerland's legal certainty and economic attractiveness, aiming to establish the country as an important international jurisdiction for conflict resolutions, which can only be welcomed. On a more practical level, it should be noted that, due to the Hague Convention's strict transitory regime, parties (who have drawn up a choice of court agreement) wishing for their dispute to fall under the scope of the Hague Convention will have to sign a new agreement on the choice of court after 1 January 2025.



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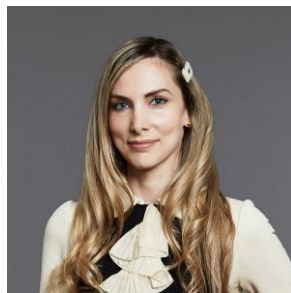


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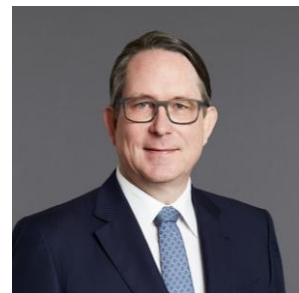


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