Bar Council response to the Ministry of Justice's consultation on possible UK accession to the Hague Convention 2019 on The Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice's consultation[1] on possible UK accession to the Hague Convention 2019 on The Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("Hague 2019")("the consultation").

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Preliminary remarks

4. The Bar Council has long advocated for the UK to accede to Hague 2019 without delay.

5. Hague 2019 is a worldwide convention. UK accession will simplify the recognition and enforcement of judgments within its scope for litigants in the UK and in other jurisdictions across the globe that accede to the Convention. As at the time of writing, only the EU (and thus its Member States, bar Denmark[2]) and Ukraine are parties to the Convention, though others will surely follow. Indeed, the fact of both the UK and the EU being parties is

[1] https://www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019

[2] References to the EU in the context of Hague 2019 in this paper means the EU26 without Denmark, unless expressly stated otherwise.

likely to encourage other states to follow suit, simplifying the recognition and enforcement of judgments across an expanding list of jurisdictions.

6. Despite its potentially global reach, the most pressing need for UK accession to Hague 2019 arises in the context of EU-UK private litigation, partially to fill the gap created when the UK departed the EU without an agreement covering cooperation in civil and commercial matters. UK accession to Hague 2019 provides a means to re-establish a substantial level of free movement of judgments between the UK and EU. Among the many relevant factors here, we note that difficulties in enforcing foreign judgments in England & Wales and vice versa are being cited as a reason to favour the several English language commercial courts established in EU jurisdictions these past years.

7. Taking a longer view, the Bar Council hopes that UK accession to Hague 2019 will prove to be a first step in agreeing solutions that remove the several obstacles to justice facing litigants, particularly citizens and small businesses, on both the EU and UK side, involved in cross-border civil and commercial cases, which were occasioned by the UK's departure from the EU.

8. In that context, we note the UK's live application, dating from April 2021, to join the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 2007 ("Lugano")[3] , concluded between the EU, Denmark in its own right and three out of the four members of the EFTA (Switzerland, Norway, and Iceland). Whilst the EU's reluctance to agree to UK accession to Lugano is regrettable, we note that in its formal statement to that effect dated August 2021, the European Commission made it plain, inter alia, that it considers the Hague Conventions to be the appropriate measures to govern Private International Law and jurisdiction issues as between the EU and third countries, of which the UK is now one. In that spirit, we expect the UK's application to accede to Hague 2019 to be met with little or no resistance, and ideally, no reservations or declarations viz the UK on the part of the EU or its Member States.

9. There are three Hague Conventions of particular interest in this context, **Hague 2019** being the broadest in scope and most recent. **Hague 2005**[4] provides uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in cases where the parties entered into an exclusive Choice of Court agreement. **Hague 2007**[5] is focussed on the recovery of child support and related family maintenance payments. Both the UK and EU are parties to these earlier Conventions.

10. More specifically, we note that UK accession to Hague 2019 will help plug a significant gap in Hague 2005, in that it would ensure that if parties conclude a non-exclusive or asymmetric jurisdiction clause in favour of the English[6] courts, the resulting judgment may nonetheless benefit from recognition/ enforcement, not under Hague 2005, but under Hague

[3] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:22007A1221(03)
[4] Convention of 30 June 2005 on Choice of Court Agreements, https://www.hcch.net/en/instruments/conventions/full-text/?cid=98
[5] https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support
[6] References in this paper to English courts, judgments and law should be read as "English and Welsh" unless expressly stated otherwise.

2019. The impact of accession to Hague 2019 may, accordingly, be much wider in the longer-term than just the recognition/ enforcement of judgments itself: it may affect longer-term choices of English courts in contracts, and indeed choices as to where to commence proceedings.

11. There are other areas too where the UK is likely to benefit considerably from accession to Hague 2019. For instance, there will be a duty on Contracting States to enforce English trusts judgments where one of the Convention bases is satisfied. By contrast, the number of judgments from other Contracting States affecting English trusts (or concerning any trusts) is likely to be much lower.

12. The Bar Council encourages the Government to proceed with accession to, and ratification of, Hague 2019 with all speed and will be happy to continue to provide expert advice on any matters arising during that process.

Consultation Questions

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?

13. Yes, the UK should accede to Hague 2019, first and foremost as a means to re-establish a substantial level of free movement of judgments between the UK and EU.

14. Despite its limitations in scope[7], for the cases it does cover Hague 2019 will "increase certainty and predictability, promote the better management of transaction and litigation risks, and shorten timeframes for the recognition and enforcement of a judgement in other jurisdictions"[8]; as between the parties to the Convention.

15. We endorse the Government's own commentary that "While most countries have domestic rules which allow judgments from other countries to be recognised and enforced in another, these rules are different in each country. Hague 2019 aims to provide a uniform approach and therefore increase certainty for parties,". The benefits for the UK that flow from its accession will only be enhanced as more countries accede.

16. Hague 2019 has the potential to benefit a wider range of litigants than do the existing Hague Conventions referred to above to which the UK is already a contracting party. As noted, Hague 2005 only assists parties that have concluded an exclusive choice of court agreement falling within its ambit. Thus, whilst seasoned commercial litigants and large companies may benefit therefrom, it will almost never serve smaller SMEs and individuals, victims of torts; those attempting to enforce employment or consumer rights, and others, for whom access to justice is made that much more complex and expensive in the cross-border context.

[7] Hague 2019 contains no rules on jurisdiction and its rules on recognition and enforcement do not apply to, IP, defamation, carriage of passengers and goods, antitrust etc.).
[8] HCCH | It's done: the HCCH 2019 Judgments Convention has been adopted!

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?

17. UK accession and ratification should be pursued as rapidly as possible. By Article 16 of the Convention, Hague 2019 only applies "if at the time the proceedings were instituted in the State of origin, the Convention had effect between that State and the requested State". For it to have effect in both states, an interval of 12 months must have elapsed since each completed its accession / ratification.

18. Even in a best-case scenario therefore, for UK litigants it seems likely that only cross-border civil or commercial proceedings launched after the end of 2024 (at the earliest), could benefit from recognition and enforcement under Hague 2019, even if the case is otherwise within scope and the other jurisdiction is a current signatory.

Q3: What impact do you think becoming a Contracting State to the Convention will have for UK parties dealing in international civil and commercial disputes?

19. In the immediate sense, UK accession will provide greater legal certainty and reduce complexity and cost for civil and commercial litigants seeking to enforce foreign judgments in the UK, or UK judgments in other Contracting States' jurisdictions, provided of course they are in scope, and proceedings were launched after both (all) relevant jurisdictions became Contracting Parties.

20. Further, it will enhance the reputation of the UK as a jurisdiction in which litigants can be confident that judgments emanating from the courts of other Contracting States will be recognised and enforced in a predictable and uniform way, and vice versa. This should help counter any tendency to opt for non-UK courts due to specific concerns in that regard.

21. For small UK companies and consumers who would be unlikely to benefit from Hague 2005 cited above, UK accession to Hague 2019 should remove at least one of the uncertainties creating a barrier to their securing judicial relief against foreign, and in particular EU-based, parties.

Q4: 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)?

22. As the Bar Council of England and Wales, our answers to the questions posed in this consultation are necessarily focused on that jurisdiction, unless reference is made to UK law-making more generally.

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.

23. The Bar Council supports UK accession to Hague 2019. In so far as we have any concerns of the type raised here, they do not relate to the instrument itself.

24. Rather, the Bar Council considers that UK accession to Hague 2019 will provide only a partial solution to the problems facing, in particular small company and individual, litigants involved in cross-border civil and commercial litigation, who generally lack the legal or financial resources to pursue parallel claims in different jurisdictions; secure exequatur before foreign courts, or otherwise fill the gaps between Hague 2019 and e.g. the Brussels regime to which the UK as an EU Member State was a party[9]. Whilst the nature of cross-border litigation may make some of those problems inevitable, the Bar Council urges the UK government to continue to explore bi or multi-lateral solutions with other countries and blocs with which the UK enjoys close trading and other relationships, which relations inevitably give rise to litigation. The EU is first among these, though by no means alone.

25. Thus in the longer-term EU-UK context, we hope that the UK's being a party to Hague 2019 will be seen as a stepping-stone towards a more ambitious EU-UK agreement on civil justice cooperation, and not an end in itself. That said, we urge the UK to consider changes to domestic law along the lines suggested in our response to question 11, which may themselves assist with some of these issues.

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

26. The main concerns we have with Hague 2019 relate to the limitations of its scope rather than any potential for adverse effects from a UK perspective arising from its contents. Insofar as certain provisions demand particular attention, we have given examples of these below in answering some of the other questions raised by this consultation. It is, however, worth stressing that none of the issues identified below undermine the general view that the advantages of accession overwhelmingly outweigh any issues that may arise in applying particular Articles of the Convention.

27. It is worth noting here that the solutions offered by Hague 2019 may be curbed to the extent that individual Contracting States may choose, from time to time, to make declarations limiting the material scope of, or negating, its application with specified Contracting State(s).

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?

28. In principle we would support a registration model. They are already familiar in England & Wales (see e.g. the Civil Jurisdiction and Judgments Act 1982, or Part 74 of the Civil Procedure Rules) and could be applied and understood in the context of Hague 2019.

29. That said, the application of Hague 2019 will give rise to complexities and uncertainties, explored further in response to question 8 below, that could make the practical

[9] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215

operation of such a registration system harder and more open to challenge, the more so as more Contracting States beyond the EU accede to the Convention. Principally, of course, this is because whilst the Brussels and Lugano regimes contain harmonised rules of jurisdiction and permit minimal defences at the recognition stage on the basis that the court of origin lacked jurisdiction, Hague 2019 contains no such harmonised rules of jurisdiction and instead relies on quite detailed grounds for recognition or enforcement (as set out principally in Articles 5-7). A considered registration model might however, if sufficiently adapted, assist with these problems too – see further at question 8 below.

30. The Bar Council is frequently asked for practical data to illustrate the points it makes in the context of exercises such as this. Gathering data about litigation trends can be challenging. A centralised registration model, were a workable one put in place, could be a useful tool in this context, allowing the Ministry of Justice over time to keep track of e.g. the jurisdictions with which cross-border litigation occurs; the grounds of jurisdiction relied upon, the types of cases and causes of action, etc. Providing for that registration data to be specifically searchable would also be helpful.

Q8: 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?

31. A foreign judgment's eligibility for recognition and enforcement by a court under Hague 2019 is dependent on a finding by that court that one or more of the several requirements set out in Article 5 has been met. Once met, the Convention requires the recognition & enforcement, subject to the defences set out, in particular, in Articles 6 and 7.

32. Whilst not providing a specific view on the implementation of these provisions, we suggest that in examining this, consideration be given to the potential complexity of the exercise the courts may be faced with in making the assessments needed here. Thus, by way of example:

32.1. Hague 2019 requires the recognition/ enforcement of judgments from Contracting States whose courts may have taken jurisdiction on a completely different basis under their national law to anything set out in Art.5. The English court may then have to work out what happened in that foreign court to decide if one of the bases in Art.5 was met. That may not always be straightforward (and may require some fact finding). It may be particularly difficulty in the case of default judgments.

32.2. Moreover, although there are various protections in Hague 2019 and declarations permitted between Contracting States to which the Convention is applicable, there are only limited derogations from the free recognition principles in Article 7. Some of those would require English courts to make a sensitive judgment on e.g., whether under Art.7(1)(c) "fundamental principles of procedural fairness" were complied with in another Contracting State. Such defences may either rarely be invoked given this ostensibly high threshold, or, if

the defence is to be invoked more frequently, potentially have significant comity implications.

32.3. Consider too a case where another ground for recognition in Article 5 is satisfied, and the English court finds itself having to enforce a foreign judgment relating to a commercial tenancy of immovable property in England (Arts 5(3) and 6 carve out only more limited derogations).

32.4. Moreover, the complexity of some of the Convention terms may render the question whether a judgment is entitled to recognition uncertain/ unpredictable. To take one example of a term that is open to interpretation: Art.5(1)(g) "…unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State".

32.5. Also, in some cases, classification problems may arise (e.g. what do "contractual obligation" or "non-contractual obligation" in Article 5 mean in an international convention which aspires to uniform meanings, particularly where an English court is faced with a judgment from the courts of another Contracting State with no English language equivalent; or a claim is made e.g. to recover payments pursuant to an allegedly void contract; and, conversely, how is a court in another Contracting State likely to classify for Article 5 purposes e.g. an English judgment concerning e.g. breach of fiduciary duty, equitable claims, constructive trusts etc, concepts unknown in their law?

33. The Bar Council therefore anticipates that Hague 2019 will generate significant amounts of case law over time. There may also be issues as to how the need to promote uniform interpretation (Art 20) is to operate in practice and the weight to be given e.g., to European Court decisions, including on concepts taken from the Brussels Convention/ Brussels regime.

34. Were a workable registration system as mooted under question 7 above put in place, it may be useful to consider incorporating a requirement whereby the party seeking recognition and enforcement would cite the Article 5 ground relied upon and provide evidence supporting their assertion that it has been met. The judgment would then prima facie be registered; the other party then notified and given a period of time to apply to set aside on the basis that Art.5 is not satisfied and/or one of the defences to recognition is established. Consideration would need to be given to varying that time limit depending on whether the judgment debtor is in the jurisdiction.

35. Finally, adapting this procedure to make it user-friendly for less sophisticated litigants would also be desirable.

Q9: In your view, are there any declarations which the UK should make? If so, why?

36. In principle, the Bar Council does not consider that the UK should make declarations. As anticipated in the consultation itself, any UK declarations should be considered against the

backdrop that they may risk being met with reciprocal declarations or other negative measures by other contracting parties.

37. That said, there are certain articles which are potentially more divisive than others, and where arguably the case for a declaration is stronger. For instance, Article 14(1) provides that no security etc shall be required from a person seeking to enforce a judgment from another Contracting State on the sole ground that the party is not resident in the UK/ a British national. A declaration in respect of this provision is permissible under the Convention, and consideration could be given to whether one was appropriate to provide security for costs in e.g. cases involving litigants from future Contracting States which may have very different procedural and substantive legal rules and cost regimes (and with whom there may be little prior history of cooperation in this area). This is especially so given that (as indicated above), recognition and enforcement in England under Hague 2019 may, on occasion give rise to complex and potentially costly litigation as to the interpretation of the Convention and/or its application to the facts.

Q10: 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)? It should be noted that it would always be possible to repeal such a reservation in the future.

38. The Bar Council joined with other domestic Bars in unequivocally condemning the invasion of Ukraine by Russia last year as a "gross violation of international law as set out in the UN Charter." That position remains unchanged and has guided relevant policy stances ever since.

39. Several months are likely to pass between now and UK signature and from then to ratification of Hague 2019, during which period the suggested reservation would have no practical effect. Meanwhile, the situation in the conflict zone remains highly volatile and unpredictable.

40. Given that the Convention itself allows for the possibility, we consider that the more appropriate time to assess the merits of a possible reservation in relation to the Russian Federation, if at all, would be at the moment of UK ratification.

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

41. There is no doubt that the Lugano Convention is of broader scope than Hague 2019 (and, of course, it contains direct jurisdiction rules). But whilst we hope this may change in time, given the current impasse as regards UK accession to the Lugano Convention, we do not consider that the respective ambits of the Lugano Convention and Hague 2019 should affect in any way the present decision whether to accede to Hague 2019. To the contrary, that impasse with accession to the Lugano Convention only makes it more important that the UK

should accede to Hague 2019 as soon as possible to ensure that there is an effective regime in place for mutual recognition and enforcement of judgments between UK and EU courts.

42. We suggest a more useful exercise would be to examine the potential to facilitate the free movement of judgments as between the EU and the UK through adapting UK domestic law in the field, without reliance on further international conventions.

43. For instance, a relevant question to consider is whether UK accession to Hague 2019, without more, should have wider ramifications for the rules of jurisdiction in England & Wales. Of course, Hague 2019 itself does not affect these directly. But although the gateways for permission to serve out of the jurisdiction have only recently been amended/ expanded in England & Wales[10], the question arises whether English law should have a more direct correlation between the grounds on which English & Welsh courts take jurisdiction in the first place and the grounds on which any resulting judgment would be recognised and enforced in the EU and other Contracting States under Hague 2019?

44. Bringing about a closer correlation between the two is entirely within the UK's own competence. It might increase confidence that any English judgment would ultimately be entitled to recognition/ enforcement in the EU and any other Contracting State because one of the grounds in Article 5 of Hague 2019 would be satisfied (which, in turn, may further encourage parties to litigate in England in the first place). Moreover, although they are not bound by the English court's findings, it would make it potentially much easier for courts in another Contracting State where recognition is sought to identify the basis on which the English court assumed jurisdiction, and so may facilitate such recognition under Hague 2019 further.

Bar Council
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For further information please contact

Evanna Fruithof, Consultant Director,

The General Council of the Bar of England and Wales, Brussels Office

evanna.fruithof@barcouncil.be

[10] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06/pd_part06b