KEY POINTS

- The Hague Convention will only apply where a debtor company(ies) and the creditors whose liabilities are sought to be restructured are parties to an exclusive choice of court agreement.
- An English court may be unable to find jurisdiction under the Hague Convention where creditors have only agreed to a one-sided English court exclusive jurisdiction clause.
- Case law from the German BGH suggests that, for the purposes of enforcement, English court orders with respect to a scheme of arrangement could be considered a "judgment" under the Judgments Regulation regime and, by analogy, also under the Hague Convention.

Feature

Authors Rian Matthews and Dr Max Oehm

The Hague Convention on Choice of Court Agreements: an unexpected game changer for English schemes of arrangement?

This article considers to what extent the jurisdictional approach taken by the English courts with respect to schemes of arrangement, including the recent decision in *Re Van Gansewinkel Groep BV*, can be applied to the Hague Convention on Choice of Court Agreements, which has recently been entered into by the EU, the US, Ukraine, Singapore and Mexico.

Over the past few years, English court schemes of arrangement (SOA) have been increasingly used to restructure obligations (particularly finance obligations) of foreign companies in financial distress.

The growth has been driven, in part, by the relative ease of enforcement of English SOAs under EU law. But given the UK's decision to leave the EU, this article looks at another enforcement option: the Hague Convention on Choice of Court Agreements (the Convention).

WHAT IS THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS?

The Convention aims to promote the enforcement of exclusive choice of court agreements (CCA) between parties to international transactions; ie agreements between two or more parties to submit to a designated national court's jurisdiction, so that their disputes can be resolved by that designated court exclusively.

The Convention came into force on 1 October 2015. The current signatories are Mexico (2007), the United States of America (2009), the European Union (2015), Ukraine (2016), and Singapore (2016).[1] The UK is currently a party to the Convention through its EU membership. We have assumed in this article that the UK would separately accede to the Convention following Brexit.

The Convention generally applies between "Convention States", ie states which have signed and ratified the Convention. However, under EU law, the Convention does not apply as between EU members states, as questions of jurisdiction and enforcement between EU member states are governed instead by the EU Recast Judgments Regulation[2] and other relevant EU regulations (eg EU Insolvency Regulation).[3] The Convention therefore does not apply between the UK and other EU member states at present (ie it only applies between the UK and non-EU member states).

If the UK leaves the EU Judgments Regulation regime as part of Brexit, and assuming the UK does accede to the Convention, then the Convention would at that point apply between the UK and EU member states.

The provisions of the Convention apply

> 'in international cases to exclusive choice of court agreements concluded in civil or commercial matters' (Art 1).

The relevant CCA must be in writing or in a form

> 'which renders information accessible so as to be usable for subsequent reference' (eg email, fax) (Art 3).

The CCA can either be a free-standing agreement, or a clause in a wider commercial agreement (ie a jurisdiction clause) (Art 3).

The Convention imposes three obligations on Convention States with respect to any CCA which provides that a "designated" court of a Convention State has exclusive jurisdiction to determine any disputes between the parties to that agreement.

- First, a Convention State's courts, if they are the "designated" court, must hear any case brought before them which is covered by the CCA (Art 5).
- Second, conversely, a Convention State's courts must refuse to hear any such case if they are not the "designated" court (Art 6).
- Third, a Convention State's courts must recognise and enforce a judgment of another Convention State's courts if

that second court is the "designated" court in the CCA (Art 8).

There is currently no case law considering how the Convention should be interpreted.[4] But cases considering the Recast Judgments Regulation (and similar provisions in its predecessor, the EU Judgments Regulation)[5] may provide some guidance. This is because the Convention was deliberately referenced during the process of drafting the Recast Judgments Regulations in order to increase "coherence" between the Recast Judgments Regulation and Convention regimes. In this article, we have therefore drawn on case law (particularly English case law) which has considered the application of the Judgments Regulation and Recast Judgments Regulation to English SOAs.

THE ENGLISH COURTS' STATUTORY POWER TO SANCTION A SCHEME OF ARRANGEMENT

A SOA is a statutory procedure under the Companies Act 2006, Pt 26. Broadly, it enables a company to effect a compromise or arrangement with its members or creditors (or any class of them), subject to certain statutory requirements and sanction (ie approval) by the English courts.

The English courts can sanction a SOA with respect to any company which is 'liable to be wound up under the Insolvency Act 1986'.[6] The courts have interpreted this to cover not only UK registered companies, but also foreign registered companies provided there is a "sufficient connection" with England.[7]

As discussed above, the Convention only applies to CCAs which designate the courts of a Convention State as having exclusive jurisdiction to resolve any dispute. The English courts have consistently recognised that, if there is a jurisdictional clause in an agreement which grants the English courts exclusive jurisdiction, then this can provide a "sufficient connection" to England with respect to that company (at least in so far as any SOA concerns that agreement).[8] So, if parties to a CCA designate the English courts as having exclusive jurisdiction so as to benefit from the Convention, then this could in turn be used to engage the SOA provisions in the Companies Act 2006.

ARE SCHEMES OF ARRANGEMENT EXPRESSLY EXCLUDED FROM THE CONVENTION?

The starting point to considering the application of the Convention to English SOAs is to ask whether the Convention itself expressly excludes SOAs from its scope. The Convention might, given that Art 2(2)(e) excludes from the Convention all 'insolvency, composition and analogous matters'. But some English cases, which have found that a similar exclusion in Art 1(2)(b) of the Recast Judgments Regulation does not exclude some SOAs, suggest that the exclusion in the Convention may not apply to at least "solvent" SOAs (ie an SOA sought outside of formal winding-up or insolvency proceedings).

In *Van Gansewinkel*,[9] the English High Court considered a proposed restructuring of the Van Gansewinkel group, a waste disposal company registered abroad, with its centre of main interest in Belgium and the Netherlands. The group companies had all agreed to the exclusive jurisdiction of the English courts under the group financing agreements. When the group experienced financial difficulties, it proposed a re-organisation by way of an English SOA, which was subsequently approved and sanctioned by Justice Snowden.

Justice Snowden considered whether a "solvent" SOA fell under the Recast Judgments Regulations. His Honour determined it did, and in particular that it was not excluded by Art 1(2)(b), which excludes

> 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

Snowden J held that Art 1(2)(b) was only intended to exclude proceedings or compromises falling within the EU Insolvency Regulation, and a solvent SOA did not fall within that latter regulation.[10] Snowden J considered that the Recast Judgment and EU Insolvency Regulations were intended to dovetail, with no overlap or gap between them. So, because a solvent SOA did not fall within the EU Insolvency Regulations, it must necessarily fall within the Recast Judgments Regulations.

Justice Snowden's analysis cannot be applied directly to Art 2(2)(e) of the Convention, because there is no equivalent to the EU Insolvency Regulation against which the Convention should be read. But, Snowden J's analysis may still have persuasive force given the drafting history of the Convention. There, one can find that the

> 'term "insolvency" [in the context of Art 2(2)(e)] does not cover the winding-up or liquidation of corporate entities for reasons other than insolvency'.[11]

There is therefore a good argument that Art 2(2)(e) was only meant to exclude original insolvency proceedings from the Convention's scope. Solvent SOAs are arguably a different kind of proceeding and should therefore, as with the similar provisions in the Recast Judgments Regulations, fall outside the exclusion in Art 2(2)(e).

WHEN WOULD THE ENGLISH COURTS HAVE JURISDICTION WITH RESPECT TO A SCHEME OF ARRANGEMENT UNDER THE CONVENTION?

Assuming a SOA is not expressly excluded from the scope of the Convention, when could the Convention come into play with respect to an English SOA? It is beyond the scope of this article to look at every aspect of the Convention, but we have considered below two key threshold requirements.

The Convention is only binding on Convention States

The Convention is generally only binding between Convention States. The Convention, therefore, will only be useful where the English courts have jurisdiction,

and a party seeks to restrain or stay parallel proceedings, or seek enforcement, in the courts of another Convention State.

At the moment, from the UK's point of view, this covers only a limited number of states. But more states will hopefully accede to the Convention in time, with some commentators hoping the Convention will become as widely adopted as the New York Convention.[12] Furthermore, if the UK leaves the EU judgment and enforcement regimes, and assuming the UK separately accedes to the Convention, then the Convention would apply between the UK and EU member states.

There must be an "exclusive" choice of court agreement

The Convention only applies where there is an "exclusive choice of court agreement" (Art 1(1)). Article 3(a) provides that this requires the relevant agreement to designate

> 'for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts in one Contracting State to the exclusion of the jurisdiction of any other courts'.

Clearly, the Convention will only apply where the debtor company or companies, and the creditors whose liabilities are sought to be restructured, are parties to a CCA (either a free standing agreement or a jurisdictional clause in another commercial or finance agreement).

This is an important limitation. Article 25 of the Recast Judgments Regulations provides that an EU member state will have jurisdiction over a dispute (*inter alia*) where

> 'parties have agreed that the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship'.

The English courts have relied on this article to find jurisdiction in a SOA context where creditors are subject to a valid jurisdictional agreement in favour of the English courts. But where particular creditors are not subject to such agreements, the English courts have had to rely on other grounds to assert jurisdiction under the Judgments Regulations/Recast Judgments Regulations (eg the related party provisions under Art 6(1) of the Judgments Regulation, now Art 8(1) of the Recast Judgments Regulations; see, eg *Van Gansewinkel*). The Convention, however, does not provide any alternate grounds for jurisdiction: ie if all the creditors in a SOA are not bound by a valid CCA in favour of the English courts, then the Convention cannot provide any other basis for jurisdiction.

That said, if there is no CCA at the outset under which an English court can assert jurisdiction, it might be that the Convention would permit one to be "agreed" subsequently. In the *Apcoa*[13] decisions, an English SOA was sought to restructure US$860m bonds. The bond agreement vested the Frankfurt courts with jurisdiction rather than the English courts. But the agreement also contained a contractual amendment mechanism. This was used to insert an English court exclusive jurisdiction clause into the bond agreement. Justice Hildyard in the English High Court held that, while the English court exclusive jurisdiction clause may have only been inserted to enable a SOA, the bond agreement had nevertheless been amended in accordance with its terms. The jurisdiction clause was therefore valid. Hildyard J accepted this was sufficient to both satisfy the "sufficient connection" test (see above) and, potentially, to engage Art 23 of the Judgments Regulation (now Art 25 of the Recast Judgments Regulation) granting the English courts jurisdiction over the bond holders (who were parties to the bond agreement). Given the similarity in wording between the Convention, Art 3(a), and equivalent provisions in the Judgments (and Recast Judgments) Regulations, it is conceivable a similar strategy might be validly used to engage the Convention.

There is a further point to note. In *Global Garden Products*,[14] Justice Snowden held that, in a SOA context, the court did not have jurisdiction over certain finance creditors under Art 25 of the Recast Judgments Regulation where those creditors had only agreed to a one-sided English court exclusive jurisdiction clause in their favour (ie the clause provided that the borrower had submitted to the exclusive jurisdiction of the English courts, but that finance creditors were free to pursue proceedings elsewhere). This analysis might also be applied to Art 3(a) of the Convention. Parties will have to bear this in mind if they are hoping to invoke the Convention at some point, particularly given that lenders will often seek one-sided clauses when negotiating finance agreements with borrowers.

WOULD AN ENGLISH COURT'S SANCTION ORDER BE A "JUDGMENT" WITHIN THE MEANING OF ART 8(1) OF THE CONVENTION?

So, if the English courts sanction a SOA, and all other requirements of the Convention have been met, would any orders by the English courts with respect to that SOA be enforceable in another Convention State?

Article 8(1) of the Convention states that a

> '*judgment* given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter' [emphasis added].

The question, therefore, is whether orders of the English courts would constitute a "judgment" for these purposes.

This issue has not been addressed by the courts yet with respect to the Convention; but both the English High Court and the German Federal Court of Justice (BGH) have addressed this question under EU law, ie whether orders with respect to an SOA constitute a "judgment" and are therefore enforceable under the Judgments Regulation regime.

In *Primacom Holding*[15] a SOA was

Biog box

Rian Matthews is a local principal in the Dispute Resolution team at Baker & McKenzie. Wong & Leow. in Singapore. Email: rian.matthews@bakermckenzie.com

Dr Max Oehm is an associate in the Dispute Resolution team at Baker & McKenzie in Frankfurt. Email: max.oehm@bakermckenzie.com

sought for Primacom Holding GmbH, a German-incorporated company with no establishment in the UK. The Scheme creditors were all creditors under financing arrangements entered into by Primacom. Justice Hildyard's view in that case was that Art 2 of the Judgments Regulation[16]

> 'simply has no application in the context of a scheme at all, put shortly, because in such a scheme no one is being sued'.[17]

Justice Snowden in *Van Gansewinkel* acknowledged that there was force in this view.[18] But neither judge finally determined the issue one way or the other.

In *Equitable Life*, the BGH was faced with the question of recognition and enforcement of a SOA under the Judgments Regulation. The claimant in this case was a German citizen domiciled in Germany. The claimant had entered into a life insurance contract with Equitable Life, an English life insurer. Equitable Life undertook a SOA and shortly after, the claimant brought an action in negligence against Equitable Life, seeking damages for negligent advice in connection with the profit participation element which was a part of the life insurance contract. Equitable Life argued that the SOA barred the claimant from raising such claims. On appeal, the BGH held that, amongst other things, the adversarial nature of the scheme procedure speak to a classification of a SOA as a "judgment" which is enforceable under the Judgements Regulation[19] (although, in the end, the BGH refused to recognise the SOA because the Judgments Regulation provisions on jurisdiction in insurance matters had not been observed).[20]

Ultimately, this issue under EU law has not been authoritatively resolved one way or the other (let alone under the Convention). There is much force to the BGH's view that orders with respect to a SOA could be considered a "judgment" under the Judgments Regulation regimes and, therefore, potentially also under the Convention, but this is clearly an area where further consideration is warranted.

CONCLUSION

The Convention is an exciting development and, as the treaty becomes more widely adopted, has the potential to provide commercial parties with greater certainty in their contractual dealings.

Will the Convention however provide a way to achieve greater harmony in cross-border restructurings, in particular with regards to the enforceability of English court schemes of arrangements?

This article cannot consider this question exhaustively; but it is clear that, while the Convention cannot be a panacea, and certainly cannot entirely fill the gap which will be created if the UK is no longer part of the EU insolvency and judgments regimes, the Convention may nevertheless have an important role to play in cross-border restructurings where it can be invoked. ■

1 Although the US and Ukraine have not yet ratified the Convention.
2 Council Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Official Journal L 351/1.
3 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Official Journal L 160.
4 And, in any event, the Convention will ultimately need to be interpreted in accordance with principles of international law, including the Vienna Convention on the Law of Treaties (1969).
5 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012.
6 Companies Act 2006, s 895(2)(b).
7 See c. 220, 221 of the Insolvency Act 1986; *Re Drax Holding Ltd.*, [2003] EWHC 2743 (Ch).
8 *Re Rodenstock* [2011] EWHC 1104 (Ch).
9 [2015] EWHC 2151 (Ch).
10 The EC Insolvency Regulations apply to "insolvency proceedings". While SOAs are often used to restructure the liabilities of companies in financial trouble, solvent SOAs do not strictly fall within the definition of "insolvency proceedings" under Art 2(a) and Annex A of the EC Insolvency Regulations.
11 Report by Peter Nygh and Fausto Poca, August 2000, p 35.
12 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). To date, 159 states are parties to the New York Convention.
13 [2014] EWHC 997 (Ch); [2014] EWHC 1867 (Ch); [2014] EWHC 3849 (Ch).
14 [2016] EWHC 1884 (Ch).
15 [2012] EWHC 164 (Ch).
16 Referring to the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
17 [2012] EWHC 164 (Ch) paras 10, 13.
18 [2015] EWHC 2151 (CH) para 42.
19 BGH NZI 2012, 425, para 26 (available only in German).
20 Articles 8, 12 and 35 of the EU Judgments Regulations.

Further Reading:

- Hybrid jurisdiction clauses: time for a rethink? [2016] 1 JIBFL 6.
- *Global Garden Products*: new hurdles for companies seeking creditors' schemes [2016] 9 JIBFL 520.
- LexisNexis Loan Ranger blog: Jurisdiction clauses in the English courts: is there a presumption of exclusivity?