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Legal Update

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Post-Brexit regimes for recognition and enforcement of English judgments in the Netherlands and vice-versa

Replacement of the Brussels Recast Regulation

In brief

The mutual recognition and enforcement of judgments in civil and commercial matters between the UK and the Netherlands used to be governed by the Brussels Recast Regulation. Today, post-Brexit, it is not an easy task to determine which rules apply. The key issue is whether the Convention between the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters dated 17 November 1967[1] (the '1967 Convention') revived. Nonetheless, a notable exception to the current uncertainty exists with respect to judgments that fall within scope of the Hague Convention on Choice of Court Agreements dated 30 June 2005[2] (the 'HCCA').

Key takeaways

Exclusive choice of court agreements enable parties to rely on the HCCA for recognition and enforcement of their judgments in Contracting States (such as the UK and the Netherlands).

In cases where the HCCA does not apply, the situation remains unclear because of the uncertainty regarding the status of the 1967 Convention. If the 1967 Convention did not revive, parties will have to rely on national laws. Recognition and enforcement under national laws may seem cumbersome at first, but will generally be straightforward, and will generally not require a review of the merits of the case.

Introduction and background

More than a year has passed since the EU acquis ceased to provide the terms for the mutual recognition and enforcement of English judgments in the (European part of the Kingdom of the) Netherlands and Dutch judgments in England & Wales (excluding Jersey and Guernsey and Isle of Man), in civil and commercial matters. To fill the gap left in relation to recognition and enforcement of civil law judgments, the UK applied to join the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters dated 30 October 2007 (the 'Lugano Convention 2007') in April 2020.

The Lugano Convention largely resembles the EU acquis and it already applies between the EU, Switzerland, Norway and Iceland. The application of the UK was deemed to be an efficient solution to resolve the lack of common framework for recognition and enforcement of judgments in civil and commercial matters between the EU and the UK. However, for the UK's application to be successful, unanimous consent of all signatories to the Lugano Convention was required. The European Commission issued communications on 4 May 2021 (to the European Parliament and the Council of the EU[3]) that it was set to oppose the accession of the UK, and on 28 June 2021 (to the depositary of the 2007 Lugano Convention[4]) that the EU was not in a position to consent to the

[1] In Dutch: https://wetten.overheid.nl/BWBV0004295/1969-09-21; in English: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

[2] https://www.hcch.net/en/instruments/conventions/full-text/?cid=98

[3] 1_en_act_en.pdf (europa.eu).

[4] 20210701-LUG-ann-EU.pdf (admin.ch)

UK's accession. Despite no public views or statement from the European Parliament or the Council of the EU on this matter, this latter notification appears to represent a formal refusal, and was treated as such by the depositary's acknowledgment of 1 July 2021.[5]

It was then assumed that the 1967 Convention would apply to the mutual recognition and enforcement of judgments in civil matters (except where the HCCA applies).

The Dutch approach

One Dutch court applied the 1967 Convention[6] when recognition and enforcement of an English judgment was sought in the Netherlands. However, on 13 December 2021 the Dutch Minister for Legal Protection (the Minister voor Rechtsbescherming in Dutch) made a public statement[7] to the effect that (i) the 1967 Convention had been replaced by the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters[8] (the '1968 Brussels Convention'), (ii) the 1967 Convention no longer applies as of 1 January in 1987, thereby implying (iii) that the 1967 Convention did not revive. The Dutch minister added that the rules of sections 1-12 of the Dutch Code of Civil Procedure ('DCCP') (which determine which court is competent to hear a case) and section 431 DCCP (on the recognition of foreign judgments in the Netherlands) apply.

This public statement raises all sorts of questions, namely what the meaning and impact of this statement is and how the status of the 1967 Convention can be correctly assessed and by whom. For now, however, the assumption that the 1967 Convention does not apply in the Netherlands seems justified given the position of the Dutch government.

Article 59 of the Vienna Convention on the Law of Treaties dated 23 May 1969[9] (the 'Vienna Convention') may shed some further light on the issue, as it sets out rules on termination and suspension of a treaty implied by the conclusion of a later treaty. Article 59 stipulates:

> Article 59
> *Termination or suspension of the operation of a treaty implied by conclusion of a later treaty*
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> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
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> (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
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> 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

The relevant 'later treaty' to consider is the Council Convention 78/884/EEC to the 1968 Brussels Convention[10] (the 'Accession Convention'), whereby (effective 1 January 1987) the UK acceded to the 1968 Brussels Convention. The Accession Convention reads in article 24:

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[5] 271 (admin.ch)

[6] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBOVE:2018:4365

[7] https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2021/12/13/antwoorden-kamervragen-over-rechtszekerheid-na-brexit/antwoorden-kamervragen-over-rechtszekerheid-na-brexit.pdf

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41968A0927%2801%29

[9] https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

[10] https://curia.europa.eu/common/recdoc/convention/en/c-textes/brux06a.htm

Article 24

> The following shall be inserted at the appropriate places in chronological order in the list of Conventions set out in Article 55 of the 1968 Convention: - the Convention between the United Kingdom and the French Republic providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Paris on 18 January 1934,
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> (…)
>
> - the Convention between the United Kingdom and the Kingdom of the Netherlands providing for the reciprocal recognition and enforcement of judgments in civil matters, signed at The Hague on 17 November 1967.

Article 55 of the 1968 Brussels Convention clarifies that the 1968 Brussels Convention *supersedes* the list of conventions stated therein, which also includes the 1967 Convention as per the terms of the Accession Convention. And this is where the ambiguity arises: does 'supersede' imply that the 1967 Convention is terminated or merely that it is (temporarily) superseded? The articles 31-33 of the Vienna Treaty deal with the interpretation of treaties. It is beyond the scope of this article to include a further analysis on this point; it will likely be subject to academic debate. It is currently still unclear.

We note that it is undisputed that the 1967 Convention was never terminated for the non-European parts of the Kingdom of the Netherlands and for Jersey, Guernsey and the Isle of Man. This is in line with article 30 paragraph 3 of the Vienna Convention[11].

The approach in England & Wales

In the UK, the status of the 1967 Convention remains unclear as well, until the English courts hand down judgments on recognition and enforcement of a Dutch judgment. This means that we cannot be sure whether we should apply the regime as set out in the Foreign Judgments (Reciprocal Enforcement) Act (the '1933 Act'[12], which applies in case of revival of the 1967 Convention) or rather the rules of common law. We have done some research to identify cases where a similar issue was to be decided. We identified one case[13]. Unfortunately, the judge however did not give clear directions at all (maybe for lack of being offered detailed submissions on this issue).

In light of the foregoing, we will explore the legal framework that is applicable to the recognition and enforcement of English judgments in the Netherlands and vice-versa.

The regime for mutual recognition and enforcement of judgments based on exclusive choice of court agreements as set out in the HCCA in the Netherlands and the UK

First of all, a distinction must be made for cases where a judgment has been rendered by a court that was given jurisdiction through an *exclusive* choice of court agreement (more commonly known as an exclusive forum selection clause), and cases where jurisdiction was conferred onto the court pursuant to a *non-exclusive* choice of court agreement, or national or international conflicts of laws rules.

An *exclusive* forum selection clause differs from a *non-exclusive* forum selection clause in the sense that it confers exclusive jurisdiction to a particular court as opposed to creating the option for one of the parties to refer a dispute to a particular court (without losing the possibility to refer the dispute to another court in another jurisdiction). Moreover, especially in financing documents, it is common to include *asymmetrical jurisdiction clauses*, typically allowing the lender to bring a case against the borrower anywhere whilst leaving the borrower with only one forum in one jurisdiction. There is some debate on whether these asymmetrical jurisdiction clauses fall within scope of the HCCA, though on balance it is more likely that they are excluded from its scope.

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[11] Article 30 (3) reads: 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

[12] https://www.legislation.gov.uk/ukpga/Geo5/23-24/13

[13] https://vlex.co.uk/vid/enkhtsetseg-pescatore-v-maria-872481600. This case is about recognition and enforcement of an Italian judgment; between the UK and Italy there was also a bilateral treaty that preceded the 1968 Brussels Convention, and that bilateral treaty was also included in article 24 of the Accession Convention.

In cases where the first situation applies, the HCCA sets out the terms for recognition and enforcement for those judgments that fall within its scope. This convention (as per article 2(1)) does not apply to: choice of court agreements a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party; or b) relating to contracts of employment, including collective agreements. Moreover, it does not apply (as per article 2(2) of the Convention) to matters such as insolvency, competition law matters, family law matters, tort claims, lease agreements, infringements of intellectual property rights and more. And - importantly - it does not apply to judgments for interim measures either (as per articles 4(1) and 7).

Whenever the HCCA does apply, judgments given by a court of a Contracting State designated in an exclusive choice of court agreement will be recognized and enforceable in other Contracting States pursuant to article 8 of the HCCA. Recognition and enforcement may only be refused on the grounds specified within the HCCA. These grounds are limited.

Some important aspects of article 8 of the HCCA are worth noting here, before turning to the grounds for refusal. In article 8(2) it is stated that there shall be no review of the merits of the judgment given by the court of origin, and that the court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default. Article 8(3) clarifies that judgments shall be recognized only if they have effect in the State of origin and enforced only if enforceable in the State of origin.

There are a limited number of grounds for refusal under the HCCA, set out in article 9. In principle, these grounds form the only possibility to block enforcement of a foreign judgment once enforcement is sought in another Contracting State under the HCCA. Broadly speaking, some refusal grounds relate to formal aspects of the proceedings and some relate to the validity of the agreement (in which the exclusive choice of court was made). Finally, and more interestingly, recognition and enforcement may also be refused if the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties or if 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.

Lastly, it is important to note that there is still an unresolved ambiguity with respect to the HCCA and Brexit, because the HCCA only applies to exclusive choice of court agreements entered into *after the entry into force of the HCCA in the designated Contracting State*. Since the UK technically left and rejoined the HCCA on 1 January 2021, some (notably, the European Commission[14]) have taken the position that the HCCA only applies to choice of court agreements in favor of English courts, if they are entered into after 1 January 2021.

Those who seek enforcement of an English judgment that was rendered by an English court, whose jurisdiction was based on an exclusive choice of court agreement entered into between 1 October 2015 (when the HCCA became binding for EU Member States) and 1 January 2021 (when the UK was no longer bound by the EU acquis and re-joined the HCCA as a Contracting State), should be aware of this unresolved ambiguity. For new contracts (or even for existing contracts), it is advisable to enter into a new exclusive choice of court agreement if the parties wish to rely on the HCCA.

Recognition and enforcement of English judgments in the Netherlands that are not based on an exclusive choice of court agreement

In cases where jurisdiction was not conferred onto a court through an exclusive choice of court agreement, national conflict of laws rules apply. This means that a party seeking recognition and enforcement of an English judgment (that falls outside the scope of the HCCA) in the Netherlands will have to resort to the proceedings governed by article 431(2) DCCP.

In principle, this means that the case will have to be judged on the merits again. In reality, this may seem more cumbersome than it is. This is because Dutch courts will assess the judgment according to the so-called *Gazprom*-criteria, as developed by the Dutch Supreme Court (in the case with registration number ECLI:NL:HR:2014:2838). One will see that these criteria bear a striking resemblance to some of the refusal grounds under the HCCA:

(i) Whether the jurisdiction of the court that rendered the judgment is based on a ground for jurisdiction which is generally accepted by international standards;

(ii) Whether the foreign judgment was rendered in a judicial procedure that meets the requirements of due process and is adequately safeguarded.

[14] https://ec.europa.eu/info/sites/default/files/civil-justice-qa_en.pdf

(iii) Whether recognition of the foreign judgment is not contrary to Dutch public policy; and

(iv) Whether the foreign judgment is reconcilable with a judgment given by a Dutch court between the same parties, or with an earlier judgment given by a foreign court between the same parties in a dispute involving the same subject matter and cause of action, provided that such earlier judgment is capable of being recognized in the Netherlands.

If the court decides that the English judgment satisfies these criteria, recognition and enforcement will be swift as the case will not have to be reviewed on the merits. The Dutch court will essentially render a judgment in line with the English judgment. However, if the court finds that the English judgment for some reason does not meet the *Gazprom*-criteria, the case will have to be reviewed on the merits in its entirety.

Recognition and enforcement of Dutch judgments in England & Wales that are not based on an exclusive choice of court agreement

A Dutch judgment on the merits of the action, that is final and conclusive and for a sum of money, can be recognized and enforced either under the 1933 Act or under the common law rules. We note that if the 1933 Act applies, it cannot be bypassed by opening proceedings under the common law rules. Therefore, it is important to know what regime applies. However, without case law that gives a decisive answer on the issue, the situation remains unclear. We will briefly set out both regimes and we shall offer some thoughts on what we feel would be the most likely regime to apply.

Common law rules

Dutch judgments on the merits of the action, that are final and conclusive and for a sum of money, create a common law obligation that can be enforced as if it were a debt in fresh legal proceedings. Often, summary proceedings are available when enforcement is sought.

We note that the above principle for foreign monetary judgments does not apply to judgments including fines, other penalties or taxes.

Moreover, Dutch judgments are only enforceable if the original court had jurisdiction in accordance with the (UK) conflict of laws rules, which jurisdiction generally is either derived from a territorial or a consensual basis.

There are a few grounds for the court to refuse enforcement:

- the foreign court breached the rules of natural justice (notably rules on due notice and the opportunity to be heard in the original proceedings);j
- the judgment was obtained by fraud;
- enforcement would be contrary to public policy;
- judgment is for multiple damages (multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favor the judgment is given);
- proceedings were brought contrary to a jurisdiction or arbitration agreement.

Section 24(1) of the Limitation Act 1980[15] provides that the action to enforce a foreign judgment under the common law rules must be commenced within six years of the date on which the foreign judgment became enforceable.

The judgment obtained in the fresh proceedings can then be enforced like any other domestic judgment.

The 1933 Act

As a result of the 1967 Convention, the 1933 Act may also apply to judgments that originate from a Dutch court. The 1933 Act applies to final and conclusive judgments awarding money that may still be subject to appeal. The 1933 Act provides a mechanism for registration and enforcement of the Dutch judgment. Within 12 months of the date of the judgment, an application for registration

[15] https://www.legislation.gov.uk/ukpga/1980/58

must be made by the judgment creditor. A court may extend the 12 month period. The application must be made within 6 years of the date of the judgment or - if the judgment was appealed - within 6 years of the date of the last judgment in these proceedings as per section 2(1) of the 1933 Act.

Section 4 of the 1933 Act stipulates grounds for refusal of the application:

> 4 Cases in which registered judgments must, or may, be set aside.
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> (1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment—
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> (a) shall be set aside if the registering court is satisfied—
>
> (i) that the judgment is not a judgment to which this Part of this Act applies or was registered in contravention of the foregoing provisions of this Act; or
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> (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
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> (iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or
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> (iv) that the judgment was obtained by fraud; or
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> (v) that the enforcement of the judgment would be contrary to public policy in the country of the registering court; or
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> (vi) that the rights under the judgment are not vested in the person by whom the application for registration was made;
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> (b) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

Section 4(2) specifies when the original court is deemed to have jurisdiction, and section 4(3) specifies when it is not deemed to have jurisdiction. Jurisdiction is assumed when the judgment debtor voluntarily appeared in the original proceedings, when it acted as plaintiff or counter-claimed, when the jurisdiction of the original court was agreed before the original proceedings commenced with the judgment debtor and - if the judgment debtor was defendant in the original proceedings - if the judgment debtor had its residence in (or as a body corporate: its principal place of business in) the country of that court (i.e., the Netherlands), and if the original judgment relates to a transaction through or at the place of business of the judgment debtor in the country of the court (i.e., the Netherlands).

Once the judgment is registered, it can be enforced in England & Wales as if it were a domestic judgment.

Section 6 of the 1933 Act provides that if the Act applies, the registration procedure as set out in the Act is the only means to seek recovery of a sum payable under a judgment in the UK. As a consequence, an English court will have to decide if the 1967 Convention revived (and therefore the 1933 Act applies). In case it did not revive post Brexit, the judgment creditor should seek to enforce under the common law rules as summarized above.

Conclusion

Since Brexit, identifying the applicable legal regime for recognition and enforcement of English judgments in the Netherlands and vice versa proved to be rather difficult. In this article, we have sought to provide some clarity on the applicable rules. The conclusion can be drawn that - both for the Netherlands and the UK - the HCCA provides a route for enforcement in cases where jurisdiction was conferred onto the court by an exclusive choice of court agreement. The uncertainty regarding its applicability with respect to exclusive choice of court agreements predating 1 January 2021 can be remedied by renewing those agreements. In cases where the HCCA does not apply, national laws are most likely to provide the rules for enforcement. In the Netherlands it seems most likely that article 431(2) DCCP provides the relevant rules. In most cases, it is unlikely that a review on the merits will be required. In the UK, common law provides largely the same rules to enforce a Dutch judgment. It remains to be seen whether the 1967 Convention will play any role at all. From a practical point of view, a joint English and Dutch statement would solve this uncertainty, but perhaps a new treaty would be preferable.

If you have any questions regarding the enforcement of English judgments in the Netherlands, or Dutch judgments in England & Wales, please feel free to reach out to us.

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