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Articles

The Brussels Convention 1968: A Code and a Concept

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It is undoubtedly fitting to commemorate the fiftieth anniversary of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. As discussed further below, the Convention is deserving of celebration not only as a *code*, but perhaps even more so as a *concept*. Such a celebration is also, however, somewhat strangely timed from the perspective of an academic at a United Kingdom university. The strangeness does not come from the fact that the UK was not an original signatory to the Convention, but only to an Accession Convention of October 1978 – we may have to remove some candles from the cake, but that still leaves us with a significant anniversary to mark. The more challenging issue is, of course, Brexit, a process which presently colours and questions every aspect of our perspective on the European Union and its relationship with the United Kingdom. Celebrating the Brussels Convention may seem a little like hosting a wedding anniversary party in the midst of fractious divorce settlement negotiations. Or more bleakly, it may be suggested that an account of the life of the Convention risks seeming less like a birthday toast, and more like a valediction. But such a perspective would be too self-absorbed and superficial, even if these are attributes which might be considered appropriate to the Brexit age. It is too self-absorbed because the Convention began without the United Kingdom, and it (and its successor Regulations) will continue, with or without the United Kingdom. And it is too superficial because the experience of the Convention has challenged and ultimately enriched private international law as a subject in the United Kingdom, in a way which is likely to prove enduring regardless of the outcome of the Brexit negotiations.

The Brussels Convention was itself rather understated in its preambular claims. It sought to 'implement' Article 220 of the Treaty Establishing the European Economic Community, to 'secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals'. However, far from being concerned merely with the 'simplification of formalities', the Convention provided a harmonised and codified account not only of rules governing the recognition and enforcement of Convention State judgments in civil and commercial matters, but also of the rules of jurisdiction (excluding most claims against non-EU domiciled defendants). The rules of jurisdiction were harmonised on the basis that their collective acceptance between Convention States was a necessary precondition for agreement that judgments could be freely recognised across the European Community, without any investigation of the jurisdictional basis on which the judgment had been awarded.

This achievement of the Convention, which we might call the Convention as *code*, is already worthy of celebration. As a code, the Convention gave us both structure and rules which have shaped and continue to shape modern private international law, both within and beyond the European Community and now European Union. A clear and foundational distinction was drawn, for example, between exclusive and non-exclusive rules of jurisdiction, and in relation to the latter, between general and special jurisdiction. The Convention also provided separate rules governing prorogation of jurisdiction, including both choice of court agreements and submission after commencement of proceedings, giving them a distinctive status. Further specialised rules dealt with insurance contracts and instalment sales and loans, with the latter subsequently replaced by similar specialised rules for consumer and employment contracts. Finally, the issue of parallel proceedings was dealt with through mandatory rules on *lis pendens* and discretionary rules on related proceedings. This is not to claim that the structure of the Convention was entirely original or perfectly clear – for example, the fact that both exclusive and non-exclusive jurisdiction agreements are governed by the same provision, which has a dual functionality within the Convention, is potentially problematic – but merely that it embedded certain analytical distinctions which have become highly influential. These structural elements continue to shape the most recent Brussels I Regulations, even in contexts in which the rules have evolved significantly since 1968. Even more significantly, the categorisation of jurisdictional rules which the Convention contains is firmly entrenched in any discussion of the law of civil jurisdiction around the world.

A second significance of the Convention as *code* is in the content of the rules which it adopted. Among its many innovations, two may be particularly highlighted here. A first is the use in the Convention of the concept of 'domicile' as the primary connecting factor for general jurisdiction and for determining the scope of application of the Convention rules. As private international law rules diversified in the late nineteenth century and early twentieth century, and (both as cause and effect) were increasingly viewed as part of national law, one of the key points of divergence related to the conceptual basis for general jurisdiction. In some legal systems nationality played this role, in others it was based on factual connections between an individual and a place of residence, and in others still the subjective intentions of the individual themselves had a role to play (including in the common law conception of 'domicile'). The Hague Conference on Private International Law contributed the concept of habitual residence as a means of transcending this divergence in its twentieth century efforts to reunify private international law. The Brussels Convention relied instead on a concept of domicile which is radically different from the common law conception of that term. This apparent unification was of course only partially effective – for natural persons, recourse was still necessary to diverse rules of national law to determine the meaning of domicile, under Article 52 of the Convention, and even the more unified definition of domicile for companies and other legal persons in Article 53 depended in part on national law. Nevertheless, the adoption of domicile as a new connecting factor provided a pathway to forge common rules of private international law between diverse national legal traditions.

A second innovation in the Convention relates to the rules governing prorogation of jurisdiction. Article 17 of the Convention provided for the effectiveness of choice of court agreements entered into in favour of the courts of Contracting States, where at least one party to the agreement is domiciled in a Contracting State. Giving effect to choice of court agreements was certainly not a novelty of the Convention, and (as expressly acknowledged in the Jenard Report on the drafting of the Convention) it fol-

lowed the lead of the Hague Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods, and the Hague Convention of 25 November 1965 on the choice of court. However, neither of these Hague Conventions ever entered into force, and the Brussels Convention 1968 thus provided newfound solidity to the status of party autonomy in choice of court. The effectiveness of choice of court agreements may now be unquestionable and indeed is generally taken for granted, but this is a relatively modern development in private international law which the Brussels Convention certainly played a role in solidifying. In the United States, for example, it was not until the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*, 407 US 1 (1972), that the validity of a choice of court agreement was firmly established under US federal law. The Brussels Convention also significantly permitted a choice of court in the absence of any connections between the parties or their dispute and the chosen court. The possibility of such a free choice of forum has facilitated the establishment of the modern globalised litigation market, in which parties may select freely between courts in different jurisdictions as their preferred dispute resolution service providers – detaching the institutions and procedures of dispute resolution from their traditional territorial or personal jurisdictional moorings. This possibility is likely to be advanced as the Hague Convention on Choice of Court Agreements 2005 attracts further ratifications, and it is complemented by the further possibility to choose for disputes to be resolved through arbitration, supported by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (which is, of course, also celebrating an anniversary this year).

A final aspect of the Convention as *code* which is deserving of note is the relative sparseness of its provisions. The Convention did not contain clear guidance on the meaning of some of its key rules or concepts. For example, there was no definition of some key connecting factors, such as 'the place of performance of the obligation in question' in the ground of special jurisdiction for claims relating to a contract (Article 5(1)), or 'the place where the harmful event occurred' in the ground of special jurisdiction for claims relating to tort (Article 5(2)). The Convention also did not contain clear guidance on the relationship between some of its key rules or concepts. We might single out here the rule governing choice of court agreements, which provides for the exclusive jurisdiction of the chosen court, and the rule governing *lis pendens*, which prioritises the court first seised. The relationship between these rules has a well-known history, in the UK perhaps even an infamous one. This history includes the controversial decision of the Court of Justice in *Gasser v MISAT* (C-116/02), ECLI:EU:C:2003:657, and most recently the significant but still uncertain modifications of Article 31(2) of the 2012 Recast Regulation. The point here is not to reopen old debates about the interpretation of the Convention (or to open new debates about the interpretation of the Regulation), but rather to note how much the drafters of the Brussels Convention left to the Court of Justice. The harmonisation of private international law in the European Union has undoubtedly been as much a judicial as a legislative process, as numerous foundational decisions of the Court of Justice have clarified and developed the Convention rules, on many occasions establishing 'autonomous' European definitions which are distinct from the traditional law of the Member States. There are undoubtedly different views on whether or not this is a feature of the Convention that should be celebrated, which are likely to track different views on the legal correctness or policy consequences of the decisions themselves. It is also perhaps not clear whether this was a matter of deliberate regulatory technique, political compromise, or omission, or indeed some combination of all three. But regardless of such ques-

tions, the key point is that the codification established by the Convention was as much a question of process as outcomes – the agreed text was also an agreement to delegate important decision-making to the Court of Justice, which has put that Court at the heart of the achievements and the controversies of the Convention.

All the observations above relate to the idea of the Brussels Convention as a *code*. But as noted above, there is a second important contribution of the Convention, which is the role of the Convention as a *concept*. Before the Convention, certain bilateral and regional treaties provided for mutual harmonisation of aspects of private international law between some States of the European Community, but in general private international law varied widely in their laws – a consequence of the establishment of diverse national legal traditions of private international law in the nineteenth century. The Brussels Convention was only the first of a number of European instruments which have since been adopted to harmonise rules of private international law. This harmonisation was not simply a matter of regulatory alignment, but reflected a distinct theory of the potentiality of private international law, and the role it might play in a pluralist European legal order. While there are a variety of ideas concerning the exact nature of that role, sometimes even within a single European private international law instrument, these ideas all reject the view that private international law is essentially part of national law, serving national policy interests. These ideas acknowledge instead the public and systemic function and effects of private international law rules. Under this perspective, private international law is part of the process of defining the European legal order and facilitating the efficient functioning of the internal market. The principle of mutual trust has provided a new foundation for private international law, streamlining the recognition and enforcement of judgments between Member State courts. This has also, somewhat more contentiously but consistently with its own legal logic, led to the exclusion of the unilateralism of traditional devices such as the common law anti-suit injunction (*Turner v Grovit* (C-159/02), ECLI:EU:C:2004:228) and *forum non conveniens* discretion (*Owusu v Jackson* (C-281/02), ECLI:EU:C:2005:120).

Placed in historical perspective, this is a rediscovery or reinvention of the multilateralist function and vision of private international law which dominated the discipline until the nineteenth century. Through transplanting these ideas to a regional context, the Europeanisation of private international law has provided an important renewal of private international law's traditional public dimension, and (although sometimes met with suspicion and even disdain by national scholars, not least in the UK) a revitalisation of private international law as an academic discipline. And it has become understood that private international law has a unique and critical role to play in the European legal order. Private international law allows the diverse private law systems of the Member States to coexist, because it imposes order on that diversity. The unification of private international law is therefore, perhaps ironically, a foundation of European legal pluralism. At the same time, in European private international law there is also increasing consciousness of the effect of private international law on rights such as the individual right of access to justice, or on the protection of weaker parties such as consumers and employees. There is thus a growing awareness that it is not only the systemic ordering function of private international law that matters, but also its impact on individuals, and the way in which it distributes authority between states.

The significance of this transformation of private international law, from a UK perspective, may be highlighted by two observations, one from the dawn of the UK participation in the Brussels Convention, and

one from what is perhaps its dusk. The first observation is that the UK signatory of the 1978 Accession Convention was Lord Elwyn-Jones, then Lord Chancellor, who had a prosecutor in the Nuremberg trials. His German counterpart in the signing of the Convention, the Minister of Justice Hans-Jochen Vogel, had been an officer in the Wehrmacht during the Second World War. The Brussels Convention and the subsequent UK Accession were in their own small way part of the restoration of a shared conception of European order and values. Private international lawyers across Europe have come to understand their own role as being part of a European professional community sharing in that European project – we may be practising, studying, teaching and researching in different countries, but we do so as part of a single discipline. The Brussels Convention established not only the *content* of European private international law, but also the *concept* of European private international law, and re-established an intellectual and professional community of European private international lawyers.

The second observation is that the UK government has proposed, in a policy paper of 22 August 2017, that the 'optimum outcome' of the Brexit negotiations will be 'an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework'. In addition, the UK government declared that 'It is our intention to continue to be a leading member in the Hague Conference and to participate in those Hague Conventions to which we are already a party and those which we currently participate in by virtue of our membership of the EU'. Brexit may in many respects appear to signal an end to the UK's participation in cooperative European legal arrangements. But there is no sign that the UK government or indeed the private sector wishes for this to be the case in the context of private international law. The legacy of the Brussels Convention and its successor private international law instruments has been firmly established, and is reflected in the recognition that private international law functions best not through unilateralism, but as a collective regulatory technique, serving systemic objectives.

Celebrating the fiftieth anniversary of the Brussels Convention does not mean that we must embrace its every rule, or agree with every decision of the Court of Justice. But it should mean recognising the significance of the twin contributions of the Convention to modern private international law. The first, the idea of the Convention as *code*, established many of the modern categories which are used to analyse rules on jurisdiction, and entrenched some of the key features of modern jurisdiction such as the priority given to party autonomy. In its legislative sparseness, it also delegated key authority for developing the Convention to the Court of Justice, which has placed that Court at the heart of debates over private international law in the European Union. The second contribution of the Convention is as a *concept*. It reflected the idea that private international law was a subject which should not be pursued through unilateralist techniques adopted by individual states, but should rather be approached collectively, founded on an idea of mutual trust, serving systemic objectives. The Convention was only the first of a large and growing family of European private international law instruments, and in encouraging systemic thinking has arguably also advanced the internationalist perspective on private international law embodied by the Hague Conference. These processes have also established a Europeanised (and indeed also a globalised) intellectual community of private international lawyers, working together across national boundaries. The richness of that European community, re-established by the Brussels Convention and exemplified by the symposium in this volume, is certainly worthy of celebration.