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A view from the Hague

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This article highlights the crucial role of Trevor Hartley as the principal author of the Explanatory Report of the 2005 Hague Choice of Court Convention. His exhaustive and crystal-clear explanations, for example on the Convention's sophisticated rules on intellectual property and its relation to the Brussels I Regulation, are a lasting, indispensable help to its correct interpretation and application. They even shed light on some aspects of the 2019 Hague Judgments Convention. The article also recalls Trevor Hartley's essential role in the European Group for Private International Law, of which he has been an original member since 1991, most of the time as the only representative of a common-law legal system. Lastly, this contribution praises Trevor Hartley's exceptional scholarly and pedagogical qualities, as evidenced notably by his widely used *International Commercial Litigation*.

Keywords: 2005 Choice of Court Convention; explanatory report; Hague Judgments Convention 2019; GEDIP; scholar and pedagogue

A. Prologue

The early years of this century were a challenging time for the Hague Conference on Private International Law (Hague Conference, HCCH). After a decade of study, discussions and negotiations, the dream of a "mixed convention" on civil and commercial matters, with rules on original, or direct, adjudicatory jurisdiction and recognition and enforcement of foreign judgments, with a grey area left to national law – that dream was over. The 2001 Diplomatic Conference ended with a text crammed with brackets.[1] That text had no future.[2]

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[1]See "Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001: Interim Text", *Hague Conference on Private International Law, Proceedings of the Twentieth Session* (hereinafter: *Proceedings XX*), Tome II, *Judgments*, (Intersentia 2013), 621–57.

[2]See "Some reflections on the present state of negotiations on the judgments project in the context of the future work programme of the Conference" (Prel. Doc. No 16 of February 2002), *Hague Conference on Private International Law, Proceedings of the Nineteenth Session* (hereinafter *Proceedings XIX*), Tome I, *Miscellaneous Matters*, Brill (2008), 429–35. See also D McClean's reflections, "The Hague Conference's Judgments

Arthur von Mehren's idea of a mixed convention was ingenious.[3] But it was also open-ended and therefore prone to conflicting expectations, especially from the two sides of the North Atlantic. The United States of America (US) was looking for a regime that would facilitate recognition and enforcement of US judgments notably by European countries. Europe wanted a treaty that would cap the international jurisdiction of US courts. Between these opposing desires – better access to enforcement and less expansive grounds of jurisdiction – a deal was not on the cards.

That was not all: during the negotiations, the Treaty of Amsterdam had entered into force,[4] which had major implications for the negotiations in the Hague Conference, where the European Union (EU) countries traditionally played a major role but had now agreed to enable the transfer of legislative powers in the field of private international law to the Union. Of course, these developments could not leave the Conference indifferent – the future of the Conference was at risk.[5]

Its response was to develop a dual strategy:[6] first, a rapid expansion of the organisation's membership, to strengthen its global character – bringing important new States on board, like Brazil, Russia, South Africa, and India –, and secondly, a change of the Statute to enable the admission of the EU as a full member,

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Project", in James Fawcett (ed) *Reform and Development of Private International Law, Essays in Honour of Sir Peter North* (Oxford University Press, 2002), 255–71.

[3]See AT von Mehren, "Recognition of United States Judgments Abroad and Foreign judgments in the United States" (1993) 57 *Rabels Zeitschrift* 449, "Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?" (1994) 57 *Law & Contemporary Problems* 271. See also Von Mehren's further reflections in "Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions" (1998) 24 *Brooklyn Journal of International Law* 17–29, and "Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?" (2001) 49 *The American Journal of Comparative Law* 191–202.

[4]The *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, signed in Amsterdam on 2 October 1997, entered into force on 1 May 1999.

[5]See J Basedow, "Was wird aus der Haager Konferenz für Internationales Privatrecht?", *Festschrift für Werner Lorenz zum 80. Geburtstag*, (Munich 2001) 463. See also the *Declaration on the use of the European Community's powers in the field of private international law* adopted by the *Groupe européen de droit international privé*/European Group for Private International Law at its Oslo session (1999), https://gedip-egpil.eu/wp-content/uploads/1999/10/gedip-documents-9de.pdf, preceded by its *Declaration on cooperation between the European Union and other international Organisations in matters of civil law Geneva session* (1995), https://gedip-egpil.eu/wp-content/uploads/1995/10/gedip-documents-5de.pdf.

[6]See "Strategy of the Organisation", *Proceedings XIX,* Tome I, *Miscellaneous Matters* 65-213, https://assets.hcch.net/docs/923bc358-cbf8-4cd5-9435-d41d4bc3d29c.pdf; *Proceedings XX,* Tome I, *Miscellaneous Matters*, 75-154, https://assets.hcch.net/docs/9a30f4d8-0f45-46c6-a0bf-0f30bc8aa79f.pdf

in addition to the EU member countries.[7] Also, consensus was now formally introduced as the principal negotiation method.

After the failure of the larger judgments exercise,[8] the US proposed to reduce the project to a treaty on exclusive choice of court agreements. The EU and some other member States of the HCCH initially were not enthusiastic. Excellent papers by intern Avril Haines,[9] now director of national intelligence in the Biden administration, and then HCCH first secretary Andrea Schulz,[10] now in a leading position in the Justice Ministry in Germany, as well as a lot of diplomatic work, and three meetings of an informal Working Group very ably led by Allan Philip from Denmark – all helped to make minds ripe for the idea of the Choice of Court Convention.

From then on two series of negotiations took place simultaneously, one on the change of the Statute, and one on the Choice of Court Convention. There was a dynamic (political) relationship between the negotiations: the EU had a particular interest in a rapid modification of the Statute, which would move up its status in the HCCH from that of an observing organisation to a full member; the US, having proposed the judgments project in 1992, was particularly interested in the adoption of the Choice of Court Convention. These nuances could have jeopardised the successful conclusion of the diplomatic session but in the end, they helped each other. Both negotiations could be successfully concluded on time on 30 June 2005.

B. Enter Trevor Hartley

1. *Hague Choice of Court Convention*

Trevor Hartley was elected as rapporteur for the negotiations on the Choice of Court Convention, together with Masato Dogauchi from Japan. It is no secret,

[7]The amendments to the Statute of the Hague Conference on Private International Law, adopted in 1951 and entered into force in 1955, were adopted on 30 June 2005 and entered into force on 1 January 2007.

[8]For conjecture on why the larger project failed, see also E Jueptner, *A Hague convention on jurisdiction and judgments: why did the Judgments Project (1992-2001) fail?*, (Intersentia 2024).

[9]A Haines, "The Impact of the Internet on the Judgments Project: Thoughts for the Future", *Proceedings XX, Tome I, Miscellaneous Matters,* 157–73 and "Choice of Court Agreements in International Litigation: Their Use and Legal Problems to which They Give Rise in the Context of the Interim Text", *ibid*, 175–87.

[10]A Schulz, "Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, *Proceedings XX, Tome III*, (Intersentia 2010), HCCH | Proceedings of the Twentieth Session (2005) – Choice of Court (https://www.hcch.net/en/publications-and-studies/details4/?pid=4968), 11–35, Meeting Reports, 37–117, 273–97, "Mechanisms for the Transfer of Cases within Federal Systems", 119–47, "The Relationship between the Judgments Project and other International Instruments", 149–65, and studies on the relation to instruments adopted in the context of the Commonwealth of Independent States, American instruments and possible treaty conflicts with ICSID and the New York Arbitration Convention, 231–71 and 319–73.

however, that the explanatory reports, first on the draft Convention (2004),[11] then on the final text of the Convention adopted in 2005,[12] were mainly Trevor's work.

At the Hague Conference, explanatory reports are not just a chronicle of the negotiations. Ideally, they also provide a clear analysis of the instrument, as well as guidance to all those who will be working with the Convention, government lawyers preparing implementing legislation, judges interpreting and applying the instrument, and practising lawyers, looking for solutions and support for their arguments.

The explanatory report for the Choice of Court Convention is a masterpiece. It demonstrates Trevor's unrivalled pedagogical talent and experience, and also shows his concern to help practitioners. It starts with an overview of four-five pages, which in fact, with precise references, helps you navigate through the report. It draws attention to the most challenging issues, including intellectual property and the relationship with the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (as it then stood, prior to its recast in 2012).

Trevor clearly explains how the Convention deals with intellectual property matters, some of which are included, some excluded, but then again with exceptions.[13] As we know, despite efforts to include IP matters in the 2019 Hague Judgments Convention, its final text excludes them altogether.[14] I cannot help wondering whether – if Trevor had taken part in the negotiations of the 2019 Convention – those efforts might have been more successful.

Concerning the relationship with the Brussels I Regulation in its 44/2001 version, Trevor points out, step by step, in which circumstances the Choice of Court Convention, in which the Regulation, and in which both instruments apply.[15]

What complicated matters for the rapporteurs at the time was the *Gasser* ruling of the Court of Justice of the European Union on the Brussels I Regulation 44/2001.[16] According to *Gasser*, if the parties had concluded an exclusive choice of court agreement in favour of the court of an EU member state – in this case, Austria – but one party seised any *other* EU member state court – here Italy – *before* the other party seised the chosen court, then that other court – the Italian court – nevertheless had priority: the rule of *prior tempore, potior iure* applied. The Court of Justice thus inadvertently allowed an unscrupulous party,

[11] *Proceedings XX, Tome III, ibid* 166–229.
[12] *Ibid*, 784–863.
[13] *Ibid*, 797–9, 805–7 and 831–3.
[14] See X Kramer, "Scope of Application: Challenges, Compromises and Chances", in M Weller et al. (eds), *The HCCH 2019 Judgments Convention, Cornerstones, Prospects, Outlook* (Hart, 2023), 3–19 at 13–5.
[15] *Proceedings XX, Tome III,* 855–9.
[16] C-116/02 *Erich Gasser GmbH v MISAT Srl*, Judgment of 9 December 2003, EU: C:2003:657.

at the first signs of a dispute, to launch proceedings, and notoriously slow proceedings at that, before the Italian court to undermine the agreed Austrian court.

The CJEU handed down its judgment in the middle of the Hague negotiations, in December 2003. In The Hague, no one, including the EU experts and delegates, liked the judgment. Therefore, in opposition to *Gasser*, the Choice of Court Convention unambiguously gives priority to the chosen court even if a party seeks to preclude it by seising a different court.

In fact, *Gasser* came as a blessing in disguise, because it increased the attractiveness of the Choice of Court Convention. The Convention gives priority, not to the court first seised, but to the *chosen* court. Indeed, the rejection of the *Gasser* rule by the Choice of Court Convention subsequently inspired the Brussels I recast to abolish *Gasser*.

But when Trevor wrote his report, *Gasser* was still alive and kicking,[17] and the rapporteurs had to explain how the Choice of Court Convention related to the then applicable version of the Regulation including in the case of *lis pendens*, as interpreted in *Gasser*. With five subtly construed hypothetical cases, Trevor patiently explains in detail how the two instruments operate when both apply.

Well aware of his neutral role as rapporteur, Trevor refrained from criticising *Gasser*, biting his tongue. But in his scholarly work he did not mince his words about what he really thought of the judgment: he recalled how the UK government – no doubt assisted by Trevor – had argued before the Court of Justice that giving priority to the court where the case was first brought, would encourage deceitful parties to bring proceedings before courts other than those of their choice, simply as a delaying tactic. But the UK's arguments were rejected without explanation and the CJEU maintained that the *lis pendens* rule should be applied according to its wording. So Trevor concluded in a seminal article:

> Thanks to the European Court, ... *pacta servanda sunt* no longer appears to apply to choice-of-court agreements. A party can violate his agreement and then block proceedings against him by launching a torpedo.[18]

[17]Arguably, it still is for the 2007 Lugano Convention on jurisdiction, recognition and enforcement of judgments, which applies to the European Union, including Denmark, and to Iceland, Norway and Switzerland. One would hope, however, that in light of the amendments to the *lis pendens* provisions of the Brussels I Regulation by Brussels Ia (2012), which amounted to a rejection of *Gasser*, and the entry into force of the Choice of Court Convention for the EU (2015), including Denmark (2018), and Switzerland (1 January 2025), the CJEU would now take heed of Trevor's arguments and review *Gasser*, should it ever be asked to interpret the *lis pendens* provisions of the Lugano Convention.

[18]Trevor C Hartley, "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws" (2005) 54 *International and Comparative Law Quarterly* 813 at 821.

Fortunately, the Choice of Court Convention and Brussels I recast have restored *pacta sunt servanda* for choice of court agreements.

After the publication of the explanatory report, Trevor has continued to explain the Choice of Court Convention, and has stood up for the treaty, refuting the rather extraordinary criticism that the treaty would threaten the New York Arbitration Convention.[19]

2. *Hague Judgments Convention 2019*

The Hartley/Dogauchi explanatory report is not only indispensable in relation to the Choice of Court Convention. It is also helpful in relation to the 2019 Hague Judgments Convention.

To avoid any conflicts with the 2005 Convention, the 2019 Convention excludes *all* exclusive choice of court agreements, leaving them to the Choice of Court Convention, or when that treaty is not applicable, to national law.

But the 2019 Convention *in*cludes, within the limits of *its* substantive scope, *all* judgments based on a choice of court agreement that is not "exclusive", ie which fall outside the scope of the 2005 Convention. This includes asymmetrical choice of court agreements, which are quite broadly used in some commercial contexts, where one party, eg, the borrower in a loan agreement, is committed to have to resolve any dispute under the contract to the courts of one State alone, while the other party, eg, the bank, is free to go to courts in other States.

Asymmetrical choice of court agreements and other non-exclusive choice of court agreements are thus covered by the 2019 Convention. But, as Paul Beaumont has pointed out,[20] several issues which such agreements have in common with exclusive choice of court agreements and are covered by the 2005 Convention and Trevor's report, are not dealt with, or not in the same detail, in the 2019 Convention and its Explanatory Report.

Take the important issue of the substantive validity of such agreements: is that issue severable from the question of the overall validity of the contract? Should the court addressed apply the law of the chosen court, rather than its own law, to determine the validity of the agreement? – Not to do so would mean reversing an important achievement of the 2005 Convention in relation to the system of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Should the court addressed be bound by a ruling of the

[19]See his comment in the EAPIL blog (30 June 2021), Is the 2005 Hague Choice-of-Court Convention Really a Threat to Justice and Fair Play? A Reply to Gary Born – EAPIL (https://eapil.org/2021/06/30/is-the-2005-hague-choice-of-court-convention-really-a-threat-to-justice-and-fair-play-a-reply-to-gary-born/). See further on this matter the article by Linda Silberman in this issue of the Journal.

[20]P Beaumont, "The Hague System for Choice of Court Agreements: Relationship of the HCCH 2019 Judgments Convention to the HCCH 2005 Convention on Choice of Court Agreements" in Weller et al (n 14), 125–41, especially 127 and 131.

chosen court on the validity? If those questions are left to national law, the uniformity which the 2019 Convention seeks to achieve is at risk. Obviously, the better option is to apply the solutions of the 2005 Convention, with the explanations Trevor provides.

Another example: the Explanatory Report on the 2019 Convention[21] says that oral agreements are excluded from the scope of the Convention. However, Trevor's report on the 2005 Convention will make you understand that that does not apply to oral agreements *documented in writing*, eg by a transcript of a telephone call.[22]

3. *European group for Private International Law*

I was invited to present "A view from The Hague", but fortunately Trevor and I did not only meet in The Hague for the negotiations of the 2005 Choice of Court Convention. In fact, since 1991, we have met annually in various cities in Europe as members of the *Groupe européen de droit international privé*/European Group for Private International Law, GEDIP/EGPIL. There Trevor, in a group consisting essentially of civil law lawyers, represented the UK legal systems and basically the common law of England and Wales, and most of the time he has been alone in that role. He must sometimes have felt uncomfortable in this position, which may explain why he refused to join a GEDIP/EGPIL sub-group on the treatment of foreign law, fearing that he would be forced to accept a rule that required the mandatory application by the courts of EU conflict rules.

Eventually, GEDIP/EGPIL settled for a more modest procedural recommendation. At its 2013 meeting in Lausanne, the Group adopted the following recommendation:

> When, in the light of the facts of the case, the court finds that the dispute may raise a question of applicable law under European Union law, it shall, as soon as possible, invite the parties to take a position on this question.[23]

Although this is not (yet) the position taken by British courts, it is arguably, as Alex Critchley suggests, the direction in which they should go in light of their increasing case management role.[24] Trevor was also invaluable as the one who ensured that our GEDIP/EGPIL texts were published in perfect and elegant English.[25]

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[21] *Proceedings XXII, Tome I, Judgments*, Book 5, 32–157.
[22] See Beaumont, *supra* n 20 at 129 (fn.14).
[23] See https://gedip-egpil.eu/wp-content/uploads/2013/10/Position-du-Groupe.pdf
[24] See ADJ Critchley, *The Application of Foreign Law in the British and German Courts* (Hart 2022) at 200.
[25] See T Hartley, "Presentation of GEDIP work" in M Fallon, P Kinsch & C Kohler, *Le droit international privé européen en construction – vingt ans de travaux du GEDIP/ Building European Private International Law – Twenty Years' Work by GEDIP*, (Intersentia 2011) 9-12.

It is not hard to imagine that it is not an enviable position to be the only common law lawyer in a group of civil law lawyers, especially when you are confronted, year after year, with texts biased towards the civil law from the EU institutions, and especially the CJEU case law with an even stronger civil law bias. In a biting commentary on the Court's jurisprudence and dogmatic methodology, Trevor, referring to the *Gasser*, *Turner* and *Owusu* cases, famously wrote: "It seems that the continental judges in the European Court want to dismantle common law as an end in itself … ".[26]

One may wonder whether those continental court judges really intended to kill the common law. Perhaps, it was more a matter of their lack of familiarity with the common law, lack of sensitivity, and limited vision. But one feels and understands, Trevor's deep frustration very well.

In the GEDIP/EGPIL I felt a lot of sympathy for Trevor, and in fact often shared his concerns because in the HCCH civil and common law systems hold each other more in balance than in the EU, and our concern at the Conference has always been to facilitate this equilibrium and to draw the best from both systems. It is to be hoped that the current HCCH Working Group on jurisdiction in transnational civil or commercial litigation will find that balance, for example, when proposing solutions for the conundrum of parallel proceedings.[27]

4. *Textbook writer*

Finally, Trevor's scholarship continues to inspire me as I am privileged from time to time to co-teach with Verónica Ruiz Abou-Nigm at Edinburgh Law School, and Trevor's *International Commercial Litigation* is one of our teaching companions.[28] It is a real pleasure to use, to have his crystal-clear presentations and explanations studied by students, and to enjoy his lively commentary, which always focuses on the meaning of the law in practice.

So:

C. No exit Trevor Hartley

He remains on the stage. May it be given to Trevor, with his outstanding talents as a lecturer and author, to continue for a long time to make his scholarship in Private International Law, or the conflict of laws, widely accessible to both common law and civil law lawyers!

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[26]Hartley, *supra* n 18 at 828.

[27]For the latest developments of this project, see https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project/ under bibliography. *Adde*: D McClean, "The Right to a Fair Trial, *Forum Non Conveniens* and the Limits of the Possible", in Permanent Bureau (eds), *A Commitment to Private International Law/Un engagement au service du droit international privé, Essays in Honour of Hans van Loon* (Intersentia 2013), 357–69.

[28]The latest edition is the 3rd edn (Cambridge University Press, 2020).

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