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Alex Mills

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Assessing the Hague Convention on Choice of Court Agreements 2005

Alex Mills*

Almost twenty years after the adoption of the Hague Choice of Court Convention 2005, it may be an appropriate moment to reflect on and assess its legacy to date. This article, part of an issue paying tribute to the work of Professor Trevor Hartley, notes a number of different ways in which the legacy of the Convention may be evaluated, particularly appreciating the important role of the Explanatory Report co-authored by Professor Hartley. It argues that the Convention should not be judged merely based on the (admittedly limited, but perhaps growing) number of state parties, but also taking into account its wider influence in a number of different respects which may cast a more positive light on its achievement. These include the importance of the Convention to the Hague Conference on Private International Law, the soft power of the Convention, and the role of the Convention in preserving the enforceability of UK judgments based on exclusive jurisdiction agreements in European Union Member States notwithstanding Brexit.

Keywords: jurisdiction; jurisdiction agreements; Choice of Court; Hague Conference on Private International Law; Choice of Court Convention

A. Introduction

This article, part of a special issue paying tribute to Professor Trevor Hartley's contribution to private international law, focuses on one of his major achievements – his significant role in the development of the Hague Convention on Choice of Court Agreements 2005[1] ("the Convention"). Professor Hartley was a member of the drafting committee for the Convention at the Hague Conference on Private International Law ("the Hague Conference"), and most prominently the co-author of a series of explanatory reports on various drafts of the Convention. This work culminated in the official Hartley-Dogauchi Explanatory Report

*Professor of Public and Private International Law, Faculty of Laws, UCL. Email: a. mills@ucl.ac.uk.

[1]Available at https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court.

on the Convention ("the Explanatory Report").[2] Almost twenty years after the adoption of the Convention, it may be an appropriate moment to reflect on and assess its legacy to date. This article notes a number of different ways in which the legacy of the Convention may be evaluated, particularly appreciating the important role of the Explanatory Report. It argues that the Convention should not be judged merely based on the (admittedly limited, but perhaps growing) number of state parties, but also taking into account its wider influence in a number of different respects which may cast a more positive light on its achievement.

B. The limited (but significant) accession of states to the Convention, and the controversy over some of its terms

One simple measure of the success of any treaty is the number of states which have become parties to it. At present for the Convention this numbers 36 states and the European Union, although most of the state parties are EU Member States which have acceded to the Convention automatically by virtue of the accession of the EU.[3] Four further states have signed but not yet ratified the Convention, and while this includes very important economic actors such as the United States (in 2009) and China (in 2017), a significant number of years has elapsed since they became signatories, which does not raise confidence that ratification is imminent.[4] Other states such as Australia which have taken steps towards ratification have seen these falter, apparently for lack of political will, although this may also reflect uncertainty as to the benefits of the Convention, in particular, its impact on the flexibility with which common law courts have traditionally dealt with jurisdictional questions.[5] Although the Convention was envisaged as a parallel Convention to the New York Convention 1958,[6] aiming to give exclusive choice of court agreements (and judgments based thereon) many of the same benefits in terms of internationally harmonised recognition as arbitration agreements (and arbitral awards), it must be acknowledged that the Convention is at this stage a long way short of the New York Convention in terms of the number of state parties (which is, at time of writing, 172).[7] This difficulty is perhaps surprising at first

[2]Available at https://www.hcch.net/en/publications-and-studies/details4/?pid=3959.
[3]For updated details, see https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.
[4]Although in respect of the United States, see further Linda Silberman's article, "Trevor Hartley: Champion for the Hague Choice of Court Convention" in this issue, pointing to more optimistic signs.
[5]See eg discussion in Alex Mills, "The 'Hague Choice of Court Convention' and Cross-Border Commercial Dispute Resolution in Australia and the Asia-Pacific" (2017) 18 *Melbourne Journal of International Law* 1; Brooke Adele Marshall and Mary Keyes, "Australia's Accession to the Hague Convention on Choice of Court Agreements" (2017) 41 *Melbourne University Law Review* 246.
[6]Explanatory Report, at [1].
[7]See https://www.newyorkconvention.org/contracting-states.

glance, given that the Convention was negotiated and agreed as a minimum common standard that could be extracted from the broader judgments project, reflecting the fact that party autonomy, at least as a matter of general principle, is widely accepted in the modern law of civil jurisdiction.[8]

There are perhaps a variety of reasons for this, including a lack of political will or interest by some governments, and the possible marginalisation of private international law given that it may lack an influential constituency or lobby group. At least some of the benefits of accession to the Convention would be gained by foreign parties, who are generally less likely to have political influence. Nevertheless, the devil may also partly be found in some of the detail. Although the basic approach of the Convention is relatively uncontroversial, at least in many states, in negotiating and drafting specific provisions of the Convention, it was necessary at times to strike a difficult and delicate balance, and a lack of ratification by some states may reflect a degree of unease with that balance.

Perhaps the most obvious examples of this are the various safeguards established under Article 9 of the Convention, which seek to balance the legal certainty and finality of judgments based on exclusive jurisdiction agreements against the need to protect defendants from the consequences of improper or untrustworthy judgments. There are two competing policy interests here which are each important, and the balance between them could legitimately be struck in different ways, although few would reject the need for some accommodation of each interest. Most controversially, Article 9(a) provides that recognition and enforcement of a judgment based on an exclusive jurisdiction agreement may be refused if:

> a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;

The challenge raised by this provision arises principally from its qualification ("unless the chosen court has determined that the agreement is valid"). This has raised a degree of controversy in assessing the value of the Convention, as it seems to suggest the possibility of what is commonly known as "bootstrapping".[9] If an exclusive jurisdiction agreement is valid and effective, then it is natural that the determination by the chosen court of that fact would be perceived

[8]See generally eg Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018).

[9]For detailed discussion, see Gary Born, "The Hague Convention on Choice of Court Agreements: A Critical Assessment" (2021) 169 *University of Pennsylvania Law Review* 2079. See also very similarly (also authored by Gary Born, presenting essentially the same argument) https://arbitrationblog.kluwerarbitration.com/2021/06/18/why-states-should-not-ratify-and-should-instead-denounce-the-hague-choice-of-court-agreements-convention-part-iii/.

as binding – it is a determination made by the court chosen by the parties. But this at least appears circular, because if another court were to reject the validity of the exclusive jurisdiction agreement, they would also be rejecting the authority under which the judgment gained its bindingness. Similar difficulties arise in relation to Article 8(2) of the Convention, which provides 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". There are, of course, competing policy considerations here. On the one hand, an exclusive jurisdiction agreement is intended to create legal certainty and avoid the possibility of litigation (even over the validity of the jurisdiction agreement itself) taking place in courts other than that agreed by the parties.[10] On the other hand, an invalid jurisdiction agreement can confer no authority, let alone exclusive authority, on the court which it appears to designate.

The correct response to this difficulty is not entirely straightforward. One option is to identify ways around the apparent conundrum. For example, it could be argued that if the court considering whether to enforce a judgment from another Convention state does not accept that there is a valid jurisdiction agreement, it could on that basis reject the application of the Convention entirely, as the entire scope of the Convention is premised on its application "in international cases to exclusive choice of court agreements concluded in civil and commercial matters".[11] A downside of this approach is that there would be some efficiency cost in allowing an enforcing court to conduct a full and independent reconsideration of the question of the validity of the jurisdiction agreement, which will have already been determined by the judgment court. Another option is to identify other mechanisms within the Convention which would allow for a degree of flexibility, including the various other defences against recognition and enforcement. Indeed, Trevor Hartley's service to the Convention has included drawing attention to these provisions by way of defending the balance it strikes.[12] For example, the court in which the judgment is sought to be enforced might nevertheless reject enforcement on the basis that:

> recognition and enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings

[10]In the words of the Explanatory Report, at [183]: "The purpose of this is to avoid conflicting rulings on the validity of the agreement among different Contracting States: they are all required to apply the law of the State of the chosen court, and they must respect any ruling on the point by that court."
[11]Art 1.
[12]See 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/. For a response from João Ribeiro-Bidaoui, then a member of the Permanent Bureau of the Hague Conference, see https://arbitrationblog.kluwerarbitration.com/2021/07/21/hailing-the-hcch-hague-2005-choice-of-court-convention-a-response-to-gary-born/.

> leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.[13]

Although this provision may appear to have a procedural focus, it could be argued that this procedural focus is non-exhaustive (thus some substantive review at least in respect of the validity of the jurisdiction agreement is permissible where this relates to public policy concerns). Alternatively, it could be contended that where procedurally fair proceedings led to the conclusion that the jurisdiction agreement was valid then that decision ought indeed to be considered binding.

Another approach would be to try to identify some middle ground which seeks to balance the competing policy considerations, admittedly with limited textual foundation. For example, the enforcing court could be permitted to conduct a review of the decision of the judgment court as to the validity of the exclusive jurisdiction agreement, but one which gave a degree of deference to the views of that court. Alternatively, Article 9(a) could be limited to situations in which there is an apparent or *prima facie* exclusive jurisdiction agreement in the evidence submitted to the court – such an agreement could be viewed as conferring an ostensible authority onto the designated court, to the exclusion of any other, even if ultimately a reason were found for denying validity to the agreement. Were such an apparent agreement exceptionally determined to be fraudulent, any ensuing judgment could in any event likely be denied recognition or enforcement on the basis of Article 9(d) of the Convention, which permits refusal of recognition and enforcement where "the judgment was obtained by fraud in connection with a matter of procedure". This approach would be reminiscent of the likely best approach to interpreting Article 31(2) of the Brussels Ia Regulation, which presents some of the same interpretive difficulties, as it gives exclusive jurisdiction to the court *apparently* designated in an exclusive jurisdiction agreement, at a point in time where the validity of that jurisdiction agreement is yet to be determined.[14]

The debate on these issues is likely to continue.[15] The presence of such a debate perhaps demonstrates most of all how much of an achievement it was to reach agreement on the Convention, and how challenging international harmonisation is in the field of private international law. Even in areas in which there is general and widespread agreement on the core principles, there always remain difficult questions at the boundaries which engage competing policy interests, which are invariably going to be very challenging to reconcile. Adopting an

[13]Art 9(e).
[14]See, for example, Mills, *supra* n 8, at 130ff.
[15]For detailed discussion on various issues relating to implementation of the Convention, including the question of how to respond to concerns regarding this particular issue, see the Report of the New York City Bar's Working Group on Three Private International Law Treaties, published on 18 March 2024, available at https://www.nycbar.org/reports/private-international-law-treaties-hague-coca-judgments-singapore/.

international convention and accepting the benefits it brings perhaps inevitably involves some degree of compromise, and in international harmonisation it is important, as the saying goes, not to let the perfect be the enemy of the good – in debating what rules to adopt, not to lose sight of the benefits of reaching international agreement, even if that might entail accepting some imperfections. In essence, if we are to assess the Convention, it is important to judge it not only against what might be considered ideal rules (on which views may reasonably differ), but also against the complexity and disorder which would likely prevail in its absence.

C. The importance of the Convention to the Hague Conference

A second point which relates to and follows from the above is that, at least for the Hague Conference, the Convention has a measure of success merely because it not only has been adopted, but has also come into force – a stage which some of the conventions adopted by the Hague Conference have disappointingly never reached. As is well known, the Convention is a by-product of a wider project on jurisdiction and judgments, which sought to develop an international equivalent to the European Union's Brussels Convention (and later Regulation). By the early 2000s, this project had more-or-less stalled,[16] and the Convention was salvaged as at least a partial success of that project. Although it has a much narrower and more specialised focus, it encompasses both rules on jurisdiction and on the recognition and enforcement of judgments (based, in both cases, on exclusive jurisdiction agreements), and thus exemplifies the "double convention" approach reflected in the earlier work of the project and in the Brussels Convention (and successor instruments). That "salvage operation", in which Trevor Hartley played no small part, was a very significant achievement for private international law, in two respects.

The first relates to the specific contribution which it has made to private international law, and the way that it has reflected and reinforced the emergence of a consensus on party autonomy in the context of jurisdiction. This is discussed further below. The second relates to its importance for the standing of the Hague Conference as an institution, and the role that it plays in private international law in the fields of civil and commercial disputes. The Hague Conference is, of course, a unique institution in private international law, and one with a potentially foundational role in the discipline, particularly as it provides a focal point for the adoption and practical realisation of an internationalist perspective on private international law. The adoption of the Convention arguably changed the narrative from what might otherwise have been a sense of disappointment after the long period of negotiation on the jurisdiction and judgments project.

[16]See eg Eva Jueptner, *A Hague Convention on Jurisdiction and Judgments: Why did the Judgments Project (1992–2001) Fail*? (Lacier Intersentia, 2024).

The project could thus be recast not as a failure, a reflection of unrealised international idealism, but as making modest and targeted progress where possible, a reflection of pragmatic and incremental achievement. This provided a reaffirmation of the importance and the possibility of work at the Hague Conference, and the global approach to private international law and internationalist tradition which it exemplifies. While counter-factual history may perhaps belong more to the arts than the sciences, without the success of the Convention it is not clear whether the later development of the Hague Judgments Convention 2019[17] and the continued work on parallel proceedings at the Hague Conference[18] would have occurred.

D. The "soft power" of the Convention

Any assessment of the Convention should also, it is submitted, involve an acknowledgement and consideration of what might be called "the soft power of hard law". This is a concept which perhaps requires some explanation.

International lawyers (public and private) may in various contexts debate whether it is better to try to create hard law, particularly treaties like the Convention, or softer, non-binding instruments like the 2015 Hague Principles on Choice of Law in International Commercial Contracts.[19] Each has its advantages and disadvantages – treaties have a stronger binding effect, for example, but for that reason are also less likely to be adopted, while a non-binding instrument may be more influential on a wider range of states if it is considered to represent best practice. Choosing the appropriate form of instrument for a particular legal project involves a complex array of considerations.

Among these considerations, it is important to acknowledge that the success of a hard law instrument like a treaty should not be measured exclusively by its ratifications. Just like a soft law instrument, a treaty can influence thinking and practice in an area of law, even among states which do not formally ratify it, or even in cases in which it does not technically apply. While we might say that the Convention was the product of an emerging consensus on party autonomy in the context of jurisdiction agreements, it can also be said to have crystallised that consensus in an important way, and potentially changed the way that private international law is approached.

Some examples may illustrate this. In the European Union, although the Convention (broadly speaking) does not apply as between EU Member States because it is excluded pursuant to Article 26(6), the rules on jurisdiction in the Brussels Ia Regulation were nevertheless closely modelled on the Convention. This reflected

[17]Available at https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments.
[18]See further https://www.hcch.net/en/projects/legislative-projects/jurisdiction.
[19]Available at https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-law-principles.

both the sense of the Convention as "best practice" in the field, and also the desire to avoid overcomplicating the law through the adoption of different regimes in different contexts. Although the Convention is not binding *internally* within the EU, it may nevertheless be identified as exercising an influence on legal developments. The Convention has, on this basis, been relied on in argument as affecting the potential interpretation of the Brussels Ia Regulation, although the alignment between the two instruments is not precise and such arguments will therefore not always be persuasive.[20]

In the courts of England and Wales, even in cases where the Convention does not apply it has also been relied on, at least by parties, as representing a potential international standard for the treatment of exclusive jurisdiction agreements.[21] Although under the common law rules courts retain a discretion not to give effect to an exclusive jurisdiction agreement (whether in favour of the English courts or a foreign court), the cases in which this actually occurs are rare – even in cases which are not covered by the Convention,[22] arguably it (alongside the Brussels Ia Regulation and its predecessor instruments) has normalised or at least reinforced the idea that exclusive jurisdiction agreements ought to be given effect absent very exceptional circumstances.

The fact that jurisdiction based on an exclusive jurisdiction agreement is considered to be a legal entitlement, not only in cases under the Hague Convention but also more widely, is now also reflected in the Civil Procedure Rules. Under Rule 6.33 as presently drafted:

> 2B) The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form –
>
> (a) the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention;
>
> (b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim; or
>
> (c) the claim is in respect of a contract falling within sub-paragraph (b).

Under the common law, the existence of a jurisdiction agreement in favour of the English courts provided a basis of jurisdiction (under Rule 6.36 and Practice

[20]See eg *Etihad Airways PJSC v Flother* [2020] EWCA Civ 1707; *Weco Projects APS v Piana* [2020] EWHC 2150 (Comm).

[21]See eg *Merchant International Company Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz* [2012] EWCA Civ 196, at [46].

[22]This could include cases in which there is a choice of the courts of a non-Convention state, as well as cases in which there is a choice of the courts of a Convention state (including the English courts) but the choice of court agreement was entered into prior to the entry into force of the Convention for that state.

Direction 6B), but permission was required to commence proceedings on this basis where the defendant was not subject to service within the territory. However, prior to the departure of the UK from the European Union, Rule 6.33 provided for proceedings to be commenced without permission where jurisdiction was established on the basis of either the Brussels Ia Regulation or the Convention (in respect of the latter, effectively what is now subparagraph (a) above), and in practice these two instruments together covered the vast majority of claims based on jurisdiction agreements.[23] In relation to the Convention, this reflected the "obligatory" nature of the jurisdiction it confers, as the exercise of jurisdiction may not be subject to the ordinary *forum conveniens* discretion – as the Convention states, "A court that has jurisdiction … shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State" (Article 5(2) of the Convention). Rule 6.33 thus allowed for proceedings to be commenced on the basis of a jurisdiction agreement without permission where jurisdiction could be established on the basis of the Convention.[24] In April 2021, this was however broadened[25] so it is no longer limited to Convention cases, but covers *all* jurisdiction agreements (exclusive and non-exclusive, and regardless of when they are entered into) in favour of the English courts, as set out above (including later modifications – with subparagraph (c) being added in September 2022).[26] Thus even in cases in which the Convention does not apply, it appears to have affected the approach of English law towards jurisdiction agreements, recognising them as establishing a legal right rather than merely a jurisdictional connection (accepting that outside the Convention it remains possible that proceedings based on a jurisdiction agreement might be stayed pursuant to the doctrine of *forum non conveniens*).

These various effects may, at least in some cases, be difficult to measure, and strong weight was also attached to exclusive jurisdiction agreements (in England, in the European Union, and beyond) before the Convention. Nevertheless, there is arguably evidence of the Convention having a "soft law" effect on legal perceptions of such agreements, beyond its direct legal effects. More than just a legal instrument, the Convention may thus be viewed as representative of an

[23]They would not, however, have applied to some claims based on jurisdiction agreements agreed prior to these instruments entering into force.

[24]Prior to April 2021, CPR 6.22(2B) read "The claimant may serve the claim form on the defendant out of the United Kingdom where each claim against the defendant to be served and included in the claim form is a claim which the court has power to determine under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention."

[25]Pursuant to The Civil Procedure (Amendment) Rules 2021, SI 2021/117, s.6.

[26]It is not necessary to prove that a jurisdiction agreement exists on the balance of probabilities, but only that there is a good arguable case for jurisdiction to be established on the basis of such an agreement – see *Pantheon International Advisors Ltd v Co-Diagnostics, Inc* [2023] EWHC 1984 (KB).

international consensus on the importance of giving effect to exclusive jurisdiction agreements, and the narrowness of the circumstances in which permitting parties to depart from such agreements is justified.

E. The role of the Convention in the context of Brexit

For the United Kingdom and for the legal industry in London in particular, a further point to note in assessing the significance of the Convention is the contribution it has made in the context of the exit of the UK from the European Union. One feature of the UK's membership of the EU was that English judgments benefited (on a reciprocal basis) from strong rules regarding recognition and enforcement throughout the Member States of the EU. It was thought, although empirically this is difficult to measure, that this contributed to the value of English judgments and thus to the attractiveness of the London courts as a forum to resolve international commercial disputes. One of the concerns of the legal industry in London arising from Brexit was whether this might affect London as a forum of choice for litigants, because of the potential increase in the difficulty of enforcing English judgments in EU Member States, or at least the potential cost increase in determining the likelihood of enforceability (as this would be subject to the diverse national rules of each Member State). The UK's application to join the Lugano Convention was in part driven by these concerns, but as is well known this application was rejected by the Commission on behalf of the EU.

In this context, the Convention took on a special prominence, with the UK acceding in its own right in 2020 with a view to ensuring continuity of membership.[27] Of course, the Convention is not a complete response to the absence of an instrument such as the Brussels Ia Regulation, which provides a general regime for jurisdiction and the recognition and enforcement of judgments. When parties choose to litigate in London they do not always do so in a jurisdiction agreement – sometimes that choice is made unilaterally by a claimant after a dispute has arisen, especially if it arises between two parties who do not have a contractual relationship. But often the forum is chosen in a jurisdiction agreement, and for those disputes, the Convention offers at least a partial response to the loss of the recognition and enforcement rules under the Brussels Ia Regulation. The statistics do not seem to suggest any slow-down in the volume of work of the London Commercial Court since Brexit.[28] Once again this is difficult to quantify, but the Convention has potentially played an important role in at least

[27]There was some debate about when the UK's membership should be considered to have commenced, but the web page of the Hague Conference takes the (correct, it is submitted) view that this dates from when the UK originally became a party as an EU Member State, which is also the position maintained by the UK. See https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

[28]See eg the various annual Portland Commercial Courts Reports, available at https://portland-communications.com/our-thinking/publications/#commercial-courts-report.

giving a sense of continuity and reassurance that business as usual has continued in legal London – that judgments based on English jurisdiction agreements remain readily enforceable throughout the Member States of the EU, without recourse to national rules. For judgments which are not based on an exclusive jurisdiction agreement, the benefits of the Convention in terms of simplified international recognition and enforcement rules will soon be paralleled and complemented by the Hague Judgments Convention 2019, which has come into effect already for the EU, and has recently been ratified by the UK with entry into force in England and Wales on 1 July 2025.

F. The importance of the Explanatory Report

A final point which is notable in assessing the Convention relates more directly to Trevor Hartley's role as co-author of its Explanatory Report. One of the challenges which arises in relation to any statutory law reform is the possibility of legal uncertainty introduced by changes in the law, as it may take some time for the courts to clarify any ambiguities in the agreed text. This challenge is particularly acute where a statute introduces new terms or concepts which have not previously been the subject of jurisprudence within the legal system. For this reason, the challenge of uncertainty is also potentially acute when it comes to the adoption of legal reforms through a treaty. For a treaty to provide effective harmonisation or uniformity, it is generally necessary that it be interpreted independently of national systems, adopting a uniform international interpretation.[29] But identifying such a meaning is a potentially complex and novel interpretive process. The rules on treaty interpretation in the Vienna Convention on the Law of Treaties 1969,[30] which are also widely accepted as reflecting customary international law, are well known (perhaps even notorious) for being an aggregation of different interpretive methods, requiring application of "good faith", and consideration of the "ordinary meaning" of terms used in a treaty, "in their context", and "in light of its object and purpose", among other factors. It is of course preferable if treaty language can be drafted as clearly as possible in order to minimise ambiguity and reduce the role of the interpretive process, but it is also perhaps inevitable that in the process of negotiating a treaty, particularly on a multilateral basis as is the case in the work of the Hague Conference, some degree of ambiguity may occasionally be necessary in order to reach agreement. Philip Allott famously described a treaty as "a disagreement reduced to writing",[31] which

[29]As is the case with the Convention, Art 23 of which provides that: "In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application."
[30]United Nations Treaty Series, vol. 1155, p. 331, Arts 31–32.
[31]Philip Allott, "The Concept of International Law" (1999) 10 *European Journal of International Law* 31.

perhaps slightly cynically captures the idea that treaty negotiations can sometimes be about achieving constructive ambiguity. But he was also making a deeper point, that any "treaty is not the end of a process, but the beginning of another process"[32] – the treaty becomes a living instrument in a legal order subject to continuing processes of interpretation.

These complexities potentially increase the costs of adopting a treaty. The uncertainty of interpreting the language of a treaty may create a barrier to accession, because of uncertainty as to precisely what the implications of accession would be. If, as in the context of private international law, a treaty is being adopted at least in part to increase legal certainty for parties, this uncertainty may at least in the short term be counter-productive, as a treaty reform may make the law more internationalised, but at the same time less clear and more contested, leading to more rather than fewer disputes.

From this perspective, the practice of the Hague Conference under which an official explanatory report accompanies a treaty, exemplified by the Hartley-Dogauchi Explanatory Report for the Convention, may be singled out for praise. If a treaty comes with an explanatory report, this may significantly reduce these costs and uncertainties, lowering the barriers to accession. It may give greater depth of background to the bare text of a treaty, explaining the decisions and debates that went into its negotiation and drafting. The treaty and its explanatory report may in effect be viewed as a package, offering not only harmonised rules but agreed interpretive guidance which reduces the need for recourse to the general international law rules and principles of treaty interpretation. It is notable and perhaps regrettable that no explicit reference to the Explanatory Report was included in the legislation adopting and implementing the Convention in the UK,[33] as was the case in the Republic of Ireland.[34] This departs from prior practice of the UK in connection with EU private international law conventions, under which express statutory reference to an explanatory report was at least sometimes included to aid in interpretation.[35] Despite this omission, in practice the courts of England and Wales have referred to the Explanatory Report on a number of occasions, relying on it to ascertain the meaning of various provisions of the Convention and its scope of application.[36] In assessing the

[32] *Ibid*.

[33] Private International Law (Implementation of Agreements) Act 2020.

[34] Choice of Court (Hague Convention) Act, 2015, s.4(2): "Judicial notice shall be taken of the explanatory report by Trevor Hartley and Masato Dogauchi on the Convention and that report may be considered by any court when interpreting any of the provisions of the Convention and shall be given such weight as is appropriate in the circumstances." See eg discussion in *Compagnie De Bauxite ET D'alumine De Dian Dian SA v GTLK Europe Designated Activity Company* [2023] IEHC 324.

[35] In relation to the Rome Convention, see for example the Contracts (Applicable Law) Act 1990, s.3(3), making express mention of the Giuliano-Lagarde Report.

[36] See eg *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm), at [37]–[39]; *Etihad Airways PJSC v Flother* [2020] EWCA Civ

Convention, it is therefore also necessary to include the Explanatory Report which underpins it, providing greater depth and guidance to national courts, and offering some reassurance in response to potential concerns regarding legal uncertainty.

G. Conclusion

Assessing the Hague Choice of Court Convention 2005 is a complex exercise which may be carried out from multiple perspectives. The primary argument of this article is the need to avoid an overly simplistic assessment based on the number of ratifying parties. For states assessing the Convention, considering or reflecting on ratification, it is important to assess it not only against what might be identified as "ideal" rules (on which views may differ), but also against the complexity and disorder of diverse national rules in the absence of any international codification. The Convention may also be assessed from the point of view of the Hague Conference, noting it as a successful achievement of the jurisdiction and judgments project which had otherwise stalled, reinforcing the standing of the Hague Conference as an institutional *situs* for the development of internationalised rules of private international law. In assessing the impact of the Convention, it is further important to appreciate that it may have a wider "soft law" influence beyond its ratifying parties or in cases which fall outside its binding scope. In England and Wales, the Convention may further be ascribed a particular value as a result of its contribution to maintaining the status of London as a desirable place to choose to resolve international disputes, as by facilitating the enforcement of judgments based on exclusive jurisdiction agreements it has also assisted in preserving the value of English judgments notwithstanding the UK's departure from the EU. Finally, in assessing the Convention it is important to note that it comes together with the Explanatory Report – one of the enduring legacies of Trevor Hartley, together with his co-author Masato Dogauchi – which aids in its interpretation and thereby assists in reducing the uncertainties which are inevitable in any process of law reform. While a simplistic assessment of the Convention should be avoided, it has undoubtedly had an important influence on private international law thinking and practice in a range of ways since its adoption, and regardless of its ratification count, it may confidently be predicted that it will continue to be highly influential for many decades to come.

Disclosure statement

No potential conflict of interest was reported by the author(s).

1707, at [85]; *Weco Projects APS v Piana* [2020] EWHC 2150 (Comm), at [99]; *Motacus Constructions Ltd v Paolo Castelli SpA* [2021] EWHC 356 (TCC), at [19]; *Borrelli v Otaibi* [2024] EWHC 1148 (Comm), at [15] and [23].