The Brussels Convention: 50 Years of Contribution to European Integration

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The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, concluded in Brussels on 27 September 1968, is celebrating today its 50th anniversary. It is a significant date and a long way off from its conclusion, marked by many important and successful events, some of which are also celebrating their anniversary this year. Indeed, the sister of the Brussels Convention, the Lugano Convention, is 30 years old. Her son, the Brussels I Regulation, is 18 years old and has just come of age. It is the anniversary year of a whole family, not to mention the growing of the family through accession agreements, which has brought its membership from the initial 6 to 28 members. Among them, it is worth mentioning here the accession convention concerning the United Kingdom, which is now 40 years old, and might soon be repealed should a hard Brexit occur, as reflected in a recent document issued by the British Government on handling civil cases if there is a no Brexit deal between the EU and the UK. Will it be the first, and hopefully the last, divorce in the family?

The above is an unparalleled series of events in the life of an international legal instrument, which confirm that the Brussels Convention has

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1 Dinner speech held at the Max-Planck-Institute, Luxembourg, on 27 September 2018.
2 The Convention entered into force between the original 6 Member States of the EEC on 1st February 1973, was given the n. 72/455/CEE, and published in OJEC, 1972, L 229.
6 Handling civil legal cases that involve EU countries if there’s no Brexit deal, doc. gov.uk, 13 September 2018.
been the starting point of a prodigious development of European civil procedural law and legal cooperation through half a century, and more in general of European private international law. The Convention, indeed, permeated and continues to permeate many other EU instruments, until the most recent regulation which refers to the Brussels I Regulation as the governing procedural law for the settlement of disputes before the European Patent Court.7

But it is also the starting point of a cooperation on international civil procedure in a wider context, in particular if one considers that the Convention was the inspiring document of the initiative in 1993 – 25 years ago, another anniversary! – to draft a worldwide double convention on jurisdiction and the recognition and enforcement of decisions in civil and commercial matters within the Hague Conference on Private International Law.8 That initiative faced a setback in 1999 and 2002, but later resurged with the adoption in 2005 of a more limited Convention on choice of court agreements, and recently with a more general, though restricted in scope, draft Judgment Convention which will be adopted by the Hague Conference in 2019, thus missing by only one year the fiftieth anniversary we are celebrating today.

The just mentioned series of events marks a fascinating story, which would deserve much more attention that it can receive in a short speech, where it is impossible to go through all the many lights and the few shadows that accompanied the life of the Brussels Convention and its achievements as a central international and European legal instrument. Thus, this speech will try to address briefly only one main question: why is the Brussels Convention and are its developments so important for Europe and its citizens? and it will point only to a few features which appear particularly notable for the progress of the European integration.

In this perspective it may be worth quoting an eminent French scholar, Berthold Goldman, who already in 1971 – before the entry into force of

8 The Special Commission, which was established in 1996, submitted in 1999 a “Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters”, as well as a “Report of the Special Commission” drawn up by Peter Nygh and Fausto Pocar, but the following discussion at the first part of the 19th session of the Diplomatic Conference held in June 1999 did not lead to the adoption of a convention and its outcome is reflected in a Summary that took note of the proposals endorsed by Member States’ delegations. All these documents are published in Hague Conference on Private International Law, Proceedings of the Twentieth Session 14 to 30 June 2005, tome II, Judgments, 197, 207 (2013).
the Brussels Convention\textsuperscript{9} but, importantly, just the year of the adoption of the Protocol establishing the competence of the EC Court of Justice to interpret its provisions\textsuperscript{10} – wrote an essay where the Convention was characterized as a “\textit{traité fédérateur}”, a federating treaty.\textsuperscript{11} While the article is more a description of the Convention than a discussion about why it is a federating treaty, the definition is hitting the mark.

Why does the Convention deserve to be referred to as a federating treaty? This question may beg other questions and multifaceted answers, some of which I will try to address hereafter.

Firstly, it must be recalled that the Convention was concluded in September 1968, at a time when the transitional period of the common market came to an end, due to the so called “acceleration decision”, adopted by the EEC Commission on 1\textsuperscript{st} July 1968, eighteen months ahead of schedule, to introduce the common customs tariff and to eliminate all customs duties on trade between Member States. This temporal coincidence with the achievement of the common market may be fortuitous, especially in light of the several years of negotiations, starting in 1960, that were necessary for agreeing on a text and arriving at the conclusion of the Convention.\textsuperscript{12}

However, the adoption of a treaty providing for the simplification of the formalities governing the reciprocal recognition and enforcement of judgments envisaged in Article 220 of the EEC Treaty was a timely and appropriate measure to complement the free circulation of goods and services. It added a significant instrument of judicial cooperation aimed at supporting that circulation and making the settlement of disputes linked to the common market more uniform, speedy and effective. As the EEC Commission pointed out in a note inviting the Member States to commence the negotiations that led to the adoption of the Convention, a true internal market between them would be achieved only if adequate legal protection and, hence, legal security could be secured by providing for the recognition and enforcement of judgments in civil and commercial matters, \textit{OJEC}, C 59/3, 5 March 1979.

\textsuperscript{9} See \textit{supra}, fn 2.
\textsuperscript{10} The Protocol was adopted in Luxembourg on 3 June 1971 and entered into force on 1\textsuperscript{st} September 1975, \textit{OJEC}, L 204, 1975; see also an amended version of the Protocol in \textit{OJEC}, C 97, 11 April 1983.
enforcement of judicial decisions beyond the boundaries of each national territory.13

Secondly, and even more importantly, the adoption of the Convention contributed substantially to enhance, within its scope of application, the respect for human rights in the international civil procedural domain at a time in which their respect in this area of law was not felt so urgent and important as it is nowadays. On one hand, the suppression of exorbitant fora based on nationality that characterized the rules governing jurisdiction in civil matters in some contracting States and conflicted with human rights, as legal literature recognised much later, represented a significant step in that direction.14 On the other hand, a simplified procedure for the enforcement of foreign judgments, based on an injunction according to the model provided in the Hague Conventions on civil procedure concluded in 1905 and 1954 with respect to the decisions on costs, went in the same direction.15

There is no doubt that making justice more equal and efficient meant enhancing the protection of a basic human right as is the right to access to justice. And there is also no doubt that an equal protection of that right, as well as of all human rights, represented an essential federative pillar in a group of States as was the European Community, as is now the European Union. It is not by mere accident that when the Communities moved towards forming a closer union, the need was felt for the adoption of a common bill of rights, the Charter of fundamental rights of the European Union,16 which was subsequently made formally binding for the European institutions in relation to their legislative and administrative activity, as

13 Paul Jenard, supra ftn 12, ibidem.
16 The Charter was solemnly proclaimed at Nice on 7 December 2000 (OJEC, C364/1, 18 December 2000), and was made formally binding only much later, with the Lisbon Treaty (see the adapted wording of the text, replacing the original one, in OJEU, C326/391, 26 October 2012). However, most of its content was sub-
well as for the Member States with respect to the implementation of Union law.17

A third additional factor should not be neglected. The exclusive competence for the interpretation of the Convention, granted to the Court of Justice with the Protocol of 3 June 1971,18 aligned the provisions of the Convention to those of the founding Treaties and the secondary community legislation for the purposes of their exclusive judicial interpretation, and recognised their equal role in contributing to the European integration and in providing for an additional guarantee in this respect. The importance of the Protocol as a powerful tool in the hands of the Court should by no means be underestimated in the perspective of the European integration. After a few years from the entry into force of the Protocol the jurisprudence became so rich in this new field of European law that its impact on the harmonization of the legal systems of the Member States was substantial.

In this context, it cannot be denied that the determination of autonomous legal notions independent of national law for the interpretation of the Convention contributed to the unification of the law and performed a federative task. However, even when the Court chose the option not to interpret a notion autonomously, and rather preferred to refer to the national systems for its interpretation, such referral frequently meant that the national legislators were indicated to proceed themselves to unify the law. An example lies in the well-known question of the definition of the place of performance of contractual obligations. The Court’s reference to national private international law19 was regarded as a confirmation of the importance of the initiative whereby the States parties of the Convention were going to adopt common legislation with a view to unifying their private international law on the matter of contractual and non-contractual obligations.20 The Court’s decision not only confirmed the link between the Brussels Convention and the future Rome Convention of 19 June 1980

17 See Art. 51 of the Charter.
18 Supra, ftn 10.
20 See the Draft Convention on the law applicable to contractual and non-contractual obligations, Commission doc. XIV/398/72-E, Rev. 1 (1972), and the “Report” substantially applicable as of its proclamation, because it dealt with rights that were either present in the European Convention on Human Rights or in EU legislative acts, as well as affirmed in the case law of the European Court of Justice: see Fausto Pocar, in F. Pocar and M. Baruffi, Commentario breve ai trattati sull’Unione europea, 2nd ed., 1793–1795 (2014).
on the law applicable to contractual obligations. It also served the purpose of contributing to identify a legal basis for that Convention, which could be indirectly be brought back to Article 220 of the EC Treaty as being ancillary to the Brussels Convention. In the same perspective, the Brussels Convention had also opened the door for the development of a more general “communitarisation” of private international law in Europe.

But perhaps the main contribution to the recognition of a federative role of the Brussels Convention was provided by the Court of Justice with the Opinion rendered on 7 February 2006 on the competence of the European Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. On that occasion the Court expressed the view that the conclusion of the revised Lugano Convention falls entirely within the sphere of the exclusive competence of the European Community, rather than within a shared competence with the member States.

In rendering such an opinion, the Court settled the scholarly dispute about the value of the reference made in Article 4(1) of the Brussels Convention to national rules of competence in order to establish jurisdiction over defendants non domiciled in a Member State. In particular, it had to decide whether that reference was a mere recognition of an original member States’ competence, as suggested by a part of legal literature, or marked the attribution to Member States of a competence of the Community, as suggested by another part of legal doctrine. By stating that Regulation Brussels I “contains a set of rules forming a unified system which apply not only to relations between different Member States, …but also to relations between a Member State and a non-member country”, the Court concluded in favour of the second alternative option.

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21 OJEC, L 266, 9 October 1980. As it is well known, the initial project which comprised contractual and non-contractual obligations was later restricted to the domain of contractual obligations: see Mario Giuliano and Paul Lagarde, “Report on the Convention on the law applicable to contractual obligations”, OJEC, No C 282, 31.10.80, at 4f.
23 Opinion of the Court (Full Court), 1/03, European Court Reports, 2006, I-01145.
24 Opinion, supra fn 23, at 144.
It also drew from such a conclusion that there was a need to unify the national rules of jurisdiction over defendants domiciled in third countries, as it was subsequently proposed by the Commission in its Green Paper on the review of Brussels I Regulation.\textsuperscript{26} By offering a basis to the Commission’s proposal the Court substantially contributed to the establishment of an external competence of the European Union, which represents of itself a federative factor.

An additional contribution in this perspective lies in the statement of the Court that a lack of uniformity of the rules of competence over defendants domiciled in third countries may constitute an obstacle to the good functioning of the internal market. It could determine a forum shopping in favour of the most convenient jurisdiction, whose decision will have effect in all the Member States as a consequence of the liberalisation of the circulation of judgments. Furthermore, conflicts between different rules of jurisdiction drawn up by various legal systems “could give rise to the concurrent jurisdiction of several courts to resolve the same dispute, but also to a complete lack of judicial protection, since no court may have jurisdiction to decide such a dispute”.\textsuperscript{27}

By advocating the Union’s competence, the Court’s opinion thus not only underlined the importance of the unification of the external jurisdiction for the proper functioning of the internal market. It also stressed its importance for the establishment of a market where stakeholders receive equal and full protection of their right to access to justice, thus completing the scope of the agreement reached at the conclusion of the Convention with the deletion of the national exorbitant fora. In this respect the position taken by the Court contains a significant federative element.

It is highly unfortunate that the competent EU institutions – the Parliament and the Council – as well as the Member States disregarded the opinion of the Court of Justice and did not implement it but to a limited extent in the revision of the Brussels I Regulation carried out some years later, in contrast with the proposal submitted by the Commission.\textsuperscript{28} This attitude of the legislative institutions is the more regrettable if one considers that


\textsuperscript{27} Opinion supra ftn 23, at 141.

the Court’s arguments – which rely on the proper functioning of the internal market and on the respect for a fundamental right like the access to justice – show that its opinion was not expressing a mere option but a binding obligation on the European legislator and the Member States. By failing to enhance the equal access to justice of its citizens, the EU institutions did not comply with Article 47 of the Charter of fundamental rights that they are obliged to respect within the powers conferred to them by the Treaties.\textsuperscript{29} It is highly desirable that this attitude changes in the near future with a view to putting the European legislation in line with the jurisprudence of the Court.

These last developments show that, notwithstanding the many significant results achieved by the Brussels Convention and its related instruments during half a century, significant gaps still exist and need to be filled in order to enable the Convention to fully perform its federative role and reach the finish line pre-determined by its founding fathers. Harmonized rules on jurisdiction over defendants domiciled in third countries, as well as common rules concerning the recognition and enforcement of judgments rendered outside of the EU, are still missing and need to be adopted.

Will the Convention succeed in achieving this goal in the next future? Or will the EU abandon this target with the hope that the lacunae will be filled in a worldwide convention concerned with the relations with third countries within the framework of the Hague Conference on private international law?

While this perspective may be desirable, it does not seem to be realistic, at least in a short term, at the present stage of the harmonization of international law of civil procedure. As mentioned earlier, after 25 years of negotiations there are still serious difficulties of States to reach consensus on a double convention dealing both with direct jurisdiction and the recognition and enforcement of judgments. The current draft Judgment Convention is limited to the recognition and enforcement of foreign judgments and an addition of rules on direct jurisdiction is not at hand; furthermore, the scope of application of the draft is far more restricted than the scope of the Brussels I Regulation. As a consequence, a Hague conven-

\textsuperscript{29} Art. 51 of the Charter.
tion will govern the relations of the EU Member States with third countries only to some extent, leaving out many areas of those relations, which will continue to be governed either by national laws or by a European uniform legislation.

Therefore, while a full success of the future Hague Judgement Convention may help to resolve a number of problems in the relations of the EU Member States with third countries, its worldwide dimension will not be suitable to ensure the coherence of a regional system as far as the equality of access to justice for all the persons residing in the Union is concerned. A legislative initiative of the Union will still be necessary to achieve this goal, and its importance needs to be pointed out on the occasion of this anniversary. A celebration is not only a time for expressing satisfaction with past accomplishments, but rather an opportunity to look at the way ahead.