

THE ELGAR COMPANION TO THE HAGUE
CONFERENCE ON PRIVATE INTERNATIONAL LAW

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The Elgar Companion to the Hague Conference on Private International Law

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Foreword I

Christophe Bernasconi

We live in a world of private international law. Increases in cross-border movement, trans-national commerce and the rise of technology have all highlighted the importance of the discipline and led to an increased awareness of its relevance. As these developments occur, and individuals are faced with challenges that operate across legal systems, the work of the HCCH is more relevant than ever.

The collection of essays found in this compilation reflects the diversity and scale of the HCCH. It provides a comprehensive overview of the Organisation, its journey across the past century, and the Conventions and other instruments that it has produced. The authors are academics, judicial officers, and practitioners from across the world, all of whom have shown great interest in the HCCH and have directly or indirectly contributed to the development of its normative work. I am grateful for their thought-provoking contributions. These experts are merely a sample (albeit an impressive one) of the many great minds who have engaged with the HCCH across its tenure, beginning with Tobias Asser in 1893.

While I defer all substantive matters to the rich content you will find in the following pages, there are a number of key themes I wish to highlight, reflecting the history and personality of the HCCH. It tells a story of resilience and adaptability as it provides a multilateral platform focused on ‘connecting, protecting, cooperating’.

The HCCH is dynamic. It has changed its operating methods to accommodate international developments. Over time, we have strengthened good governance, including restructuring internal bodies and their rules of operation. The key vehicle for setting the Organisation’s work programme and its policy is now the Member-driven Council on General Affairs and Policy, which meets every year. The HCCH also swiftly managed to amend its Statute enabling Regional Economic Integration Organisations to become Members of the Organisation; as a result, in 2007, the European Union became a Member of the HCCH (in addition to its own Member States).

The HCCH is resilient. The history behind the 2005 Choice of Court Convention, 2019 Judgments Convention and the ongoing jurisdiction project show both the challenges of negotiating international agreements, and the rewards. What began as a project with a wide scope was eventually narrowed and broken into separate instruments. To continue to produce meaningful, practical and consensus-based outcomes while facing renewed challenges in developing its normative work has necessitated perseverance at each obstacle.

The HCCH is adaptable. Across this compilation, there are stories of communication and innovation in an effort to embrace advancements in law and technology. Networks have been created, such as the International Hague Network of Judges, in response to jurisdictions having no existing formal mechanism to communicate. This is in addition to regular post-Convention activities such as Special Commissions on the Practical Operation of Conventions, a format which was first established in 1977 to consider the 1965 Service Convention. These fora – unique to the HCCH – hold crucial importance to the ongoing success of its instruments by contributing to uniform interpretation and enabling Conventions to operate in a changing environment. The publication of Guides to Good Practice and Practical Handbooks enable different jurisdictions to adopt common practices while accounting for domestic limitations. Finally, the ongoing role of Central and Competent Authorities, a mechanism central to

a number of Conventions, sees individuals numbering into the thousands become part of the work of the HCCH every day.

The HCCH is effective. It has shown skill in its nuanced drafting processes, both with bilingual drafting and in conceptualising difficult legal concepts into neutral language to ensure Conventions are able to have universal application. HCCH Conventions have real-life practical effect for individuals. The 1961 Apostille Convention assists millions of people around the world every year, and continues to attract signatories. Its Contracting Parties now well exceed 100, a milestone also passed by the 1980 Child Abduction and 1993 Adoption Conventions. More broadly, there are over 930 instances of an HCCH Convention being brought into force by a Contracting Party, yet more than 28,500 agreements would be required to replicate this network at the bilateral level. The benefits of multilateralism thus speak for themselves, saving resources at an international, consular, and individual level. It is not unreasonable to expect this to span further as we progress through the twenty-first century. Finally, new systems have been created in response to new technologies. Conventions that were drafted decades ago, in a wholly paper-based world, have employed new online methods, such as the e-APP (the electronic Apostille Programme), iSupport (an electronic case management and secure communication system for the cross-border recovery of maintenance obligations) and INCADAT (the International Child Abduction Database).

Of course, we continue to face challenges which are inherent to an international body. Traditional understandings of private international law are being challenged by new technologies, such as distributed ledger technology, which is decentralised and delocalised. Unique challenges triggered by catastrophe – such as natural disasters or global pandemics – have implications on both everyday life and the ability to access legal and administrative processes. In these circumstances, both the normative and non-normative work of the HCCH has proven helpful in assisting persons at risk and in need. The HCCH is on the front foot, and will continue to respond to challenges, providing a forum for the future.

As an organisation, we continue to go from strength to strength. Over the last decade – at the time of writing – the HCCH witnessed 16 new Member States and over 250 instances in which a Contracting Party joined an HCCH Convention. We have celebrated milestones including the 125th Anniversary of the HCCH in 2018, and the conclusion of the 2019 Judgments Convention, a potential gamechanger for private international law. In line with broader strategic goals, we now have two Regional Offices: the Regional Office for Latin America and the Caribbean, opened in 2005, and the Regional Office for Asia and the Pacific, opened in 2012. These are in addition to many more meetings, publications, workshops and anniversaries, which are far too many to mention in writing.

Our work encompasses local and national implementation, civil and common law systems, and individuals that come from socially, ethnically, and economically diverse backgrounds. We continue to balance priorities and remain proactive, creating ambitious goals, acknowledging shortfalls and building to be better.

I would like to extend my thanks to the authors for their time and expertise, and the editors at Elgar for their assistance. I would also like to thank Thomas John, my former Attaché at the HCCH, for his organisation and commitment to this project which have been invaluable to its completion.

The HCCH seeks to better the lives of individuals in a globalised world, a goal that remains more vital today than ever. And while there is still a long way to go to establish the HCCH as a truly global and fully inclusive organisation, in this piece of work, you will find the story

of what it has achieved this in the past, and how it will continue to do so in the future. This companion will no doubt help increase the visibility of the work of the HCCH, and provide a useful resource about the Organisation and its role in the future development of private international law.

Christophe Bernasconi
Secretary General



Foreword II

Lord Collins

This fine *Companion* celebrates more than 125 years of the existence of the Hague Conference and its great achievements in the field of private international law.

Scholars and practitioners know of the widespread acceptance, and enormous influence, of the Hague Conventions on, in particular, child abduction, adoption, legalisation and service of documents, and cross-border taking of evidence. The more recent choice of court and judgments conventions will eventually have a great influence on international commerce.

In this volume there are 35 contributions from foremost experts around the world. They deal with the history of the HCCH, its role in an increasingly globalised world, and its role in the future. Especially valuable is the critical analysis of the existing HCCH instruments.

Although it is invidious to single out particular contributions, to take a few examples of the fine scholarship on display, Professor Horatia Muir Watt of Sciences-Po Law School shows how the HCCH has kept pace with modern theories of private international law; Professor Ronald Brand of the University of Pittsburgh Law School discusses the history of the 2005 Choice of Court Convention and the major issues considered during the course of negotiations and resolved in the text; Professor Richard Garnett of Melbourne University Law School contributes a detailed discussion of the recent Judgments Convention, which is likely to achieve greater success than previous efforts in this field; Guy Morton, a very prominent City of London solicitor, discusses the Hague Securities Convention; and Professor Philippa Webb, of King's College London School of Law, contributes a comparative study of *forum non conveniens*.

All scholars in this field will need to take notice of this comprehensive work, and practitioners in ever-increasing international litigation will find much that is of great practical importance.

Lord Collins of Mapesbury LLD, FBA (Lawrence Collins)
Former Justice, UK Supreme Court

Editors' introduction to the Elgar companion to the HCCH

Founded in 1893, the HCCH is the oldest international organisation in The Hague. For more than 125 years, the Organisation has been, and continues to be, a shining example of the tangible benefits effective and successful multilateralism can yield for people and business around the globe. With this Companion, we set out to provide a unique, unprecedented and comprehensive insight into the HCCH, compiling in one source accessible and thought-provoking contributions on the Organisation's work. Written by some of the world's leading private international lawyers, all of whom have directly or indirectly worked closely with the HCCH, the result is a collection of innovative and reflective contributions, which we believe will inform shaping the future of this important global institution.

In the first Foreword to this Companion, the current Secretary General of the HCCH, Dr Christophe Bernasconi, elegantly captured the value of the contributions for the future development of private international law. For the Secretary General to make this observation is significant: the HCCH is the premier international organisation mandated to help achieve global consensus on the private international law rules regulating cross-border personal and commercial relationships. We are grateful for his support of this project.

STRUCTURE OF THE COMPANION

Given the broad coverage of this Companion, it is helpful to provide the reader with some orientation.

First, we approached private international law classically, that is by understanding the subject matter with reference to its three dimensions: jurisdiction, applicable law, and the recognition and enforcement of foreign judgments. But, as the contributions in this work show, since its inception, and in particular since the 1980s, the HCCH has helped to reach international consensus concerning a further, a 'fourth' dimension of private international law: cross-border legal cooperation. In line with this development, and with our firm belief that such cooperation is crucial to the private international law of the twenty-first century, this Companion has adopted a strong focus on cross-border legal cooperation, including by an increased use of technology. We now consider this decision fortuitous as a global pandemic is testing the domestic and international justice sector like never before, bringing into sharp focus the often non-existing or still arcane methods prevalent especially in the area of cross-border legal cooperation.

The Companion organises its 35 chapters in three Parts. Part I consists of contributions that trace the development of the HCCH from its inception in 1893 until the present day, with the organisation now becoming increasingly global. The initial Chapters specifically concern the history of the HCCH; its institutional setting, especially in terms of the HCCH's privileges and immunities; as well as a contribution on the relationship between the HCCH, and the other two international organisations dealing with international private law issues, i.e., UNCITRAL and UNIDROIT, often also referred to as the HCCH's 'Sister Organisations'.

Another set of Chapters demonstrate how the HCCH is evolving from an organisation whose membership was historically European-based but is nowadays becoming increasingly global. The HCCH currently has 85 Members, with its membership comprising of 84 States and the EU. Perhaps other Regional Economic Integration Organisations may also become members one day, and this should be encouraged. Remarkably, since the turn of the century, the HCCH has added 38 New Members (or 45 per cent of its current membership). The increased membership consists of five South American States, two from North America, one in Oceania, fourteen in Asia, eleven in Europe and five in Africa.¹ This Section of the Companion considers this expanded reach of the HCCH, and consists of thoughtful contributions on the organisation's work in Latin America and the Caribbean; Africa; and in the Asia Pacific. The Chapters also reflect on the work of the HCCH's Regional Offices, namely, the Regional Office for Asia and the Pacific (ROAP) which is based in Hong Kong and commenced its work in 2012; as well as the Regional Office for Latin America and the Caribbean operating out of Buenos Aires since 2005.

The final Section in Part I contains stimulating contributions concerning some of the contemporary philosophical dimensions of private international law as shaped by globalisation, and the ways in which the HCCH can be understood in this context; the role the organisation can play in shaping private international law into the future; considering whether the 2015 Choice of Law Principles establish a good framework for regulatory competition in contract law; what role can the HCCH play in further strengthening legal cooperation across borders; and the concept of *public order* including its relationship with mandatory law.

Part II of the Companion concerns contributions on existing HCCH instruments. It traces the evolution, implementation, and effectiveness of each of those instruments, and looks forward in terms of how improvements may be achieved. Here, the task was not only to provide a record of the organisation's successes and achievements, but also a critical analysis of its current work. The authors canvas the traditional tripartite of private international law, including forum selection, choice of law and the recognition and enforcement of judgments. In addition, they also provide their thoughts on the fourth dimension of private international law, i.e. cross-border legal cooperation, tracing the pioneering, as well as championing, role of the HCCH in this regard, resulting in cooperation being a quintessential feature, in particular of more modern conventions, developed and adopted by the HCCH.

The first Section of this Part addresses HCCH instruments in the family law sphere. Contributions include an analysis of the HCCH and its instruments relating to marriage; the 1980 Child Abduction Convention; the 1993 Intercountry Adoption Convention; a Chapter on the challenges posed by the 1996 Child Protection Convention in South America; the 2000 Adult Protection Convention; a contribution on HCCH instruments in the area of maintenance Obligations; the work of the HCCH in the field of mediation in international children's cases; and a contribution overviewing the interaction between various HCCH instruments concerning child protection.

The next Section concerns HCCH instruments in the sphere of civil procedure, cross-border litigation and legal cooperation. No doubt, the HCCH has had some of its major successes in this sphere. But as the Chapters show, more work needs to be done given the ever-increasing cross-border movement of goods, services and people, and the need to better incorporate the

¹ HCCH, 'Members & Parties' <www.hcch.net/en/states> accessed 30 April 2020.

use of technology in cross border legal cooperation. Contributions concern the 1961 Apostille Convention; the 1965 Service and 1970 Evidence Conventions; the 2005 Choice of Court Convention; and finally, the 2019 Judgments Convention which was decades in the making. The final Section in Part II consists of contributions on HCCH commercial and finance instruments. Contributions specifically focus on the 1985 Trusts Convention; the 2006 Securities Convention; and the 2015 Choice of Law Principles, which constitute a soft law instrument demonstrating versatility in the kind of instruments HCCH has helped negotiate.

Part III of the Companion consists of Chapters that discuss the substantive development of private international law focusing on current and possible future priorities for the HCCH. In that regard, this Companion seeks to bridge the HCCH's past and its future.

The first Section focuses on current priorities. It consists of contributions on: a highly difficult area of international family law, i.e. parentage and international surrogacy and how common solutions may be found; how the HCCH may play a global governance role in the sphere of the protection of international tourists; and how the exercise of civil jurisdiction can be regulated. Specifically, this Chapter shows how the doctrine of *forum non conveniens* is increasingly being influenced by access to justice concerns, a matter borne out by a comparative analysis.

The final Section of the Companion contemplates possible future priorities for the HCCH. Contributions concern how private international law rules ought to be developed in the context of FinTech; what role the HCCH may play in setting out the private international law rules in the sphere of international commercial arbitration; how the digitisation of legal cooperation ought to reshape the fourth dimension of private international law; the potential development of special private international law rules in the context of complex contractual relationships; how the HCCH can engage with and embrace modern information technology in terms of the development of private international law; and finally, what role there is for the HCCH in developing a regulatory regime for highly mobile international employees. It is hoped that in addition to providing ideas on how progress may be made on its current priorities, the contributions in Part III can also provide a basis for the HCCH's future work.

SOME GENERAL REFLECTIONS

The contributions in this Companion chronicle the evolution of the HCCH in the last 125 years and provide a deep insight into the operation and workings of the organisation. In addition, they critically assess the past and current work of the HCCH, as well as providing impetus for possible future directions. We encouraged the authors to use the Companion as a platform for critical reflections and assessments – their familiarity with the HCCH, the Organisation's work, but also its mandate and capacity, ensures the great value of each individual contribution.

We believe that this Companion could be of much interest in three particular ways. First, it is an academic contribution that provides considered expositions on current and future legal issues in private international law in general. The selection of authors, which are drawn from different regions and legal backgrounds, allowed considering topics from a number of different perspectives. The quality of the contributions, we hope, will result in the Companion serving a most useful source in the substantive development of private international law. We also hope that this Companion will constitute a useful resource for States, judges, legal practitioners, academics, and other public and private international organisations engaged in

advancing private international law, not only in terms of gaining an understanding of existing HCCH instruments, but also in their efforts towards legislative and policy reform.

Second, the Companion aims to provide considerable and thorough insight into the workings of the organisation itself, and thus serve well as a comprehensive practical guide to the HCCH. We consider that this will appeal to those who wish to gain a better understanding of the HCCH as an Organisation regardless of their familiarity with it. It may also benefit those who have been working with the organisation for some time and wish to broaden or deepen their understanding further.

Finally, in addition to highlighting the successes of the HCCH, the aim has also been to critically analyse the organisation and its work. Much work has been done by the HCCH, but more is required and we discerned four key themes.

The first underlying theme that can be observed throughout all contributions is how access to justice values increasingly underpin private international law. Just some examples include the call for enhanced access to documents in multiple languages; better use of technology to improve legal cooperation across borders; the need to enhance access to justice for consumers and international tourists; the impact of the right to a fair trial on access to justice for the employees of international organisations such as the HCCH; the bearing of fair trial rights on civil jurisdiction, such as through the doctrine of *forum non conveniens*; and ensuring access to justice for vulnerable sections of society. In all those instances this important value in its various manifestations is beginning to underpin the development of private international law. This is a positive development. We consider that private international law ought to be more than mere technical rules, but should be driven by underlying tangible values that have great practical importance. Access to justice is no doubt a laudable value, recognised in Sustainable Development Goal 16 of the UN. We strongly believe that private international law in general, and the HCCH in particular, could play a significant role in providing and strengthening access to justice at an international level. That the Organisation appears to understand that it can play this role is hinted at in its most recent HCCH Strategic Plan 2019–2020. This understanding is however somewhat limited as it is mentioned only in the context of the HCCH's non-normative work.² Based on the discussions in the present contributions, we consider that the HCCH could – and should – pursue a comprehensive access to justice agenda across its entire normative and non-normative work programme with much more vigour than is currently the case.

Another theme we grasped was the increased interaction between public and private international law. The area of civil jurisdiction is one where public and private international law especially ought to inform each other. While this interaction is being subjected to increased academic scrutiny, the same does not seem to be the case in practice. It will be important for the HCCH to pay more attention to public international law developments when pursuing its projects, especially in the sphere of the further work on the Judgments Project. Equally, it can only be hoped that if private international law pays increased attention to the public realm, the public realm is likely to return the favour, which is equally needed.

² A possible connection of the non-normative work of the HCCH is not a strategic priority of the HCCH per se but is mentioned in the Context to Strategic Priority 2. See HCCH, Strategic Plan of the HCCH 2019 – 2022 (2019) 5, <<https://assets.hcch.net/docs/bb7129a9-abee-46c9-ab65-7da398e51856.pdf>> accessed 30 April 2020.

On the same lines, we also observed that the interaction between HCCH instruments and human rights treaties, such as the UNCRC and UNCRPD, was much too evident. As so many HCCH international family law instruments are concerned with child protection and the protection of other vulnerable persons, this interaction is hardly surprising. Further, clear interrelationships exist in other spheres as well. For example, between international labour standards developed by the ILO and the rules on civil jurisdiction in employment cases. In the modern work environment where the employment relationship is radically shifting, the HCCH could also work towards greater cooperation with other international organisations such as the ILO to better protect the rights of weaker parties.

A third theme that emerged was the HCCH's willingness to adopt soft law instruments as opposed to only help negotiate conventions. There is no better example of this than the adoption of the 2015 Choice of Law Principles, which rightly promote party autonomy. With party autonomy perhaps now constituting a recognised connecting factor in private international law, as is also evident with the adoption of the 2005 Choice of Court Convention underpinned by this same connecting factor, the HCCH has no doubt made an important stride to embrace the potential of soft law instruments to achieve international consensus. Following the adoption of the 2019 Judgments Convention, which was decades in the making, and only successfully negotiated after the failures of the past were recognised, rectified, and compromises made, perhaps soft law instruments could be pursued with greater energy by the HCCH. Ultimately, it will be the experience of the 2015 Choice of Law Principles that will dictate whether more soft law instruments are negotiated under the umbrella of the HCCH.

A fourth theme that emerged is perhaps more subtle: multilateralism. Those contributions that consider the HCCH, its existing conventions as well as the Organisation's current priorities reflect that the founder of the HCCH, T M C Asser, conceived the first Conference in 1893 not only as a platform which develops unified rules of private international law, but also as a forum in which experts come together and develop these rules in a peaceful and professional setting. This goal has not changed, and multilateral expertise is combined to forge innovative legal solutions to the vexed challenges of a globalised world. And these solutions are adopted by consensus, the decision-making technique which lies at the very heart of the HCCH.

When dealing with the Organisation, it is important to appreciate that it decides on every aspect of its work programme and budget by reaching to the furthest extent possible consensus among its Members.³ This consensus-based approach has been chosen not without reason. While much effort may be exerted to achieve consensus, and achieving it may take longer, consensus-based decision making ensures the maximum buy-in of the Members in the outcomes produced by the HCCH. This buy-in becomes very clear in the Organisation's premier decision-making bodies, the Diplomatic Sessions, which adopt the HCCH's multilateral Conventions; the Council on General Affairs and Policy (CGAP), the 'engine room' which determines the Organisation's annual work programme; and the Council of Diplomatic Representative (CDR), which takes important financial and budgetary decisions. A common saying in all bodies, but also in Working and Experts' Groups, is: nothing is agreed, until everything is agreed; and everything is agreed by consensus.⁴

³ See Statute of the HCCH, Article 8(2) and Rules of Procedure of the HCCH, Rule II.H.3, available <<https://www.hcch.net/en/governance/rules-of-procedure>> accessed 30 April 2020.

⁴ The Rules of Procedure of the HCCH have rules to support voting both at meetings, i.e. at Diplomatic Sessions, CGAP and CDR, as well as by distance. See Rules of Procedure of the HCCH, Rule

This consensus-based approach to the multilateral work of the HCCH has been highly successful for the Organisation. It ensured that the development of private international law rules remained based on expertise and enjoys significant buy-in. But the HCCH is unlikely to be immune from the challenges to building consensus as experienced by other international organisations. Therefore, it will remain important for the HCCH to constantly review and, if necessary, to adapt its consensus-based approach to decision-making. This will be paramount so that the HCCH continues Asser's vision that a peaceful and professional forum develops multilaterally unified private international law.

FINAL REMARKS

Overall, and despite some regions not yet connected to the HCCH as they perhaps should be, the HCCH is now a global organisation for the unification of private international law. It is the world organisation for legal cooperation. It is 125 years old and going strong. The HCCH is highly relevant and important in an increasingly internationalised world. It is no doubt an organisation with a bright future. At a time when we are witnessing a pushback against multilateralism, the HCCH is an admirable example of the value of international cooperation and how international organisations can improve the day-to-day lives of people and enhance certainty and predictability for cross-border trade and commerce.

However, as the contributions to this Compendium make apparent, while much has been done, more is required. We sincerely hope that this Companion will be a contribution to the understanding of the HCCH and the development of the Organisation as well as of private international law. This project could not have been possible without the immense dedication shown by each and every contributor, to whom we are ever grateful. We also take this opportunity to thank the editors at Edward Elgar Publishing who expertly guided the publication process. We end this brief introduction here and hope that readers will find the contributions in this Companion as thought-provoking and useful as we did.

II.H.4 and Rule II.I.6, available <<https://www.hcch.net/en/governance/rules-of-procedure>> accessed 30 April 2020. To the Editors' knowledge, the HCCH has never taken a decision by vote at a meeting.