

# PRIVATE INTERNATIONAL LAW

## PRIVATE INTERNATIONAL LAW: A DYNAMIC AND DEVELOPING FIELD

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### 1. INTRODUCTION

Private international law is an often overlooked but increasingly important dimension of contemporary legal study and practice. Sometimes viewed as a rather musty set of doctrinal principles rooted in nineteenth century European jurisprudence, it is in fact a dynamic and rapidly evolving field of direct relevance to sophisticated lawyers working in a broad spectrum of international and transnational contexts. Unfortunately, it is taught, and talked about, far less often in the United States than overseas. That should change.

### 2. WHAT IS PRIVATE INTERNATIONAL LAW?

The field of private international law is usually described in one of several ways. In the classic (and narrowest) view, it is equated with *conflicts of laws* – the rules applied by domestic courts to determine which laws apply to cases that involve people in different countries or of different nationalities, or transactions which cross international boundaries. In such situations, courts can choose to apply the law of the forum, the law of the

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individual's nationality, or the law of the site of the transaction or occurrence.

Most texts take a broader approach, in which the definition expands to include issues about the *exercise of domestic jurisdiction* and the *enforcement of foreign judgments*. Here, the main questions are whether there are (or should be) agreed international principles or rules restricting the authority of domestic courts to hear disputes involving foreigners and foreign transactions, and whether (or in what circumstances) there are binding obligations to recognize and enforce judgments resulting from adjudications in foreign courts.

While these areas remain at the heart of many private international law endeavors in one way or another, the majority of practitioners (and perhaps international lawyers more broadly) would today find even that broader focus far too restrictive. In the various international fora in which private international principles and instruments are being developed, an even more expansive view predominates—one which emphasizes the international development of (1) *procedural mechanisms* for overcoming divergent rules, and (2) *substantive principles of law* aimed at promoting harmonization and even codification of legal rules across different legal systems.

Predominant among the former are the mechanisms for enhancing cooperation in cross-border litigation (“judicial assistance” in the language of private international law). As their titles suggest, the 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters and the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters are intended to facilitate service of process and evidentiary discovery in foreign countries through agreed mechanisms of “central authorities.” Even more widely ratified is the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the “Apostille” Convention), which facilitates the circulation of public documents executed in one State party to the Convention to be accepted and given effect in another State party to the Convention.

The scope of recent efforts to harmonize areas of substantive law is truly extensive. In just the past few years, for example, potentially transformative instruments have been adopted in such diverse substantive areas as recognition and enforcement of foreign orders for child support and family maintenances, the carriage of goods wholly or partly by sea, the registration and

enforcement of security interests in mobile equipment (such as aircraft equipment and railroad rolling stock), trans-border insolvency, electronic commerce, the assignment of receivables, choice of law in transnational securities transactions, enforcement of agreements to arbitrate, and contractual forum selection clauses.

A review of this illustrative list indicates three characteristics of private international law instruments that differentiate them from the treaties and conventions which constitute public international law: (1) they aim to regulate relationships between private parties, and to provide rules for the resolution of disputes arising from those relationships, (2) they are intended to operate primarily at the domestic level, and most often in domestic courts, and (3) they function to harmonize and unify diverse national laws and practices in order to facilitate the movement of goods, services, and peoples around the globe.

The importance of these undertakings cannot be overlooked. While it is a truism that we live today in an increasingly globalized world, it is also clear that globalization is overwhelmingly a function of private activity: expanding markets, increasing mobility, instantaneous financial transactions, and virtually unlimited information exchange through the mass media and the internet. As indicated above, one dimension of private international law efforts is to facilitate this activity through codification and harmonization and to provide participants with a greater degree of legal certainty and predictability in their transactions. At the same time, differences in legal systems will remain for the foreseeable future, so that private international initiatives can help bridge those differences in effective ways, particularly by facilitating the resolution of trans-border disputes.

Equally significant is the fact that these efforts contribute directly to economic progress and prosperity in developing countries, especially those lacking the legal and transactional infrastructure necessary to participate fully and efficiently in the global economy. States with little or no experience in private international matters can be disadvantaged in trade, investment, and capital markets. One of the functions of the private international law project is to assist such States in gaining the knowledge and experience needed to overcome this deficiency.

### 3. WHERE IS PRIVATE INTERNATIONAL LAW DEVELOPED?

These efforts at harmonization take place in five main venues, of which four are the principal international organizations dedicated to the negotiation of private international law rules and instruments. In addition, developments within the European Community to adopt increasingly integrative measures are having an impact on the formulation of private international law instruments at the global level.

#### *3.1. The Hague Conference*

From its founding in 1893, through its establishment as a permanent organization in 1950, the Hague Conference on Private International Law has maintained a pivotal role in the field. Largely European in its origins, the Conference now counts sixty-nine States from around the globe as members, including China, India, the Republic of Korea, Malaysia, Sri Lanka, and a growing number of Central and Latin American countries. In April 2007, the European Community itself became a member (denominated a Regional Economic Integration Organization). More than 120 States from all continents are parties to at least one of the Conference's thirty-six conventions.

In addition to the Service, Evidence, and Apostille Conventions mentioned above, the Conference has produced a number of essential family law instruments, including the Adoption and Abduction Conventions and most recently the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. In 2005, it adopted a Convention on Choice of Court Agreements and in 2006 a Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary.

The Conference's Permanent Bureau devotes a substantial portion of its efforts in encouraging consistent practices under, and uniform interpretation of, these and other instruments (a function it calls "providing post-Convention service") and in providing training and advice to States on implementation of its instruments.

#### *3.2. UNCITRAL*

The United Nations Commission on International Trade Law ("UNCITRAL") was established in 1966 to serve as the core legal body of the U.N. system in the field of international trade law. Comprising sixty member States elected by the General Assembly

for six-year terms, the Commission functions primarily through six working groups. They do the substantive preparatory work on specific topics: procurement, international arbitration and conciliation, transport law, electronic commerce, insolvency, and security interests.

Among UNCITRAL's signal achievements are the 1970 U.N. Convention on the Recognition and Enforcement of Arbitral Awards, the 1980 Convention on the International Sale of Goods and Services, a 1985 Model Law on International Commercial Arbitration, a 1997 Model Law on Cross-Border Insolvency, and the 2005 U.N. Convention on the Use of Electronic Communications in International Contracts. In 2008, it completed work on a new U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (replacing the 1978 "Hamburg Rules"). Efforts continue to revise UNCITRAL's Model Law on Procurement of Goods, Construction and Services and its 1976 Rules for International Commercial Arbitration.

### 3.3. UNIDROIT

The International Institute for the Unification of Private Law ("UNIDROIT") is headquartered in Rome and has sixty-three member States representing a wide range of different legal, economic, and political systems as well as different cultural backgrounds. The most recent additions were the Kingdom of Saudi Arabia and the Republic of Indonesia. Its purpose is to study the needs and methods for modernizing, harmonizing, and coordinating private and in particular commercial law as between States and groups of States.

Among its many accomplishments are the adoption of a Convention on a Uniform Law on the Form of an International Will (1973), the 2001 Cape Town Convention on International Interests in Mobile Equipment (together with subsequent protocols on financing aircraft equipment and railway rolling stock), a Model Law on Franchise Disclosure (2002), and in 2004 the Principles of Transnational Civil Procedure (in co-operation with the American Law Institute). It is currently working on a model leasing law and a substantive convention on securities law.

### 3.4. *The OAS*

Within the Organization of American States (or "OAS," of which all thirty-five independent countries of the Americas are

members), issues of private international law are addressed through a process of specialized conferences on private international law (known by the Spanish acronym "CIDIP"). The first CIDIP was held in 1975, and over the years the process has produced some twenty-six separate instruments (including twenty conventions, three protocols, one model law, and two "uniform documents"). These instruments cover various topics and are designed to create an effective legal framework for judicial cooperation between member states and to add legal certainty to cross border transactions in civil, family, commercial, and procedural dealings of individuals in the Inter-American context. Active preparations for CIDIP VII are ongoing, including in the areas of cross-border consumer protection and electronic registration of security interests.

### *3.5. The European Community*

An increasingly important venue for the articulation of private international law is the European Community ("EC"), which continues to create new rules dealing with substance as well as conflicts of law, jurisdiction, and judgments. These activities are, of course, part of the ongoing integrative efforts to harmonize the internal law of the Community. However, as the EC increasingly exerts its influence in creating various private international fora, accommodating this emergent Community law becomes more of a challenge for other states. The task is to find common ground for agreement on autonomous principles and interpretations in new instruments at the global level.

## 4. FIVE ILLUSTRATIVE DEVELOPMENTS

To illustrate both the diversity and the complexity which characterizes the contemporary world of private international law, consider the following brief descriptions of just five significant developments over the past several years.

### *4.1. Family Law*

International family law has begun to emerge as a field of specialization in its own right, due largely to the promulgation of a series of international instruments on various aspects of child protection. The cornerstones are two widely ratified and implemented treaties—the 1980 Hague Convention on the Civil Aspects of International Child Abduction (eighty-one Contracting



States as of the end of 2008) and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (seventy-seven Contracting States).

In an increasingly globalized world, families frequently span continents. So do family disputes and dissolutions. How are trans-border maintenance and support arrangements to be handled in such cases? The United States has already entered into more than twenty bilateral agreements with other countries, essentially providing for reciprocal recognition and enforcement of support orders in defined circumstances. In November 2007, the Hague Conference adopted a new multilateral instrument, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, adopted in November 2007. The basic principle here is also reciprocity: a decision on child maintenance and support made in one Contracting State must be recognized and enforced in other Contracting States if the first state's jurisdiction was based on one of the enumerated grounds. Since foreign countries generally will not process U.S. child support requests in the absence of a treaty obligation (even though U.S. courts generally do recognize and enforce foreign child support obligations), adherence to this treaty would in most cases work in favor of U.S. families.

In the United States, of course, family law remains largely within the purview of the states, and the role of federal authorities (e.g., the Department of Health and Human Services) is limited. On the other hand, ensuring compliance with treaty obligations is an important federal interest, indeed an obligation. Ensuring uniform and consistent implementation of the commitments contained in this new treaty thus raises some interesting federalism questions. A combination of federal and state legislation will be required to give effect to the treaty.

#### *4.2. Contractual Choice of Court Agreements*

Some of the same issues are presented by the prospect of U.S. adherence to the new Choice of Court Agreements Convention, adopted by the Hague Conference in June 2005. The United States recently signed this treaty, and the question of how it ought to be implemented is under active consideration.

This treaty addresses a gap in the current fabric of international commercial dispute settlement by providing that States parties to the Convention must recognize and enforce an important type of

dispute settlement clause used in international commercial transactions by which the private contracting parties agree to resolve their disputes in specified domestic courts. These "exclusive choice of court agreements" (in the United States they are sometimes called "forum selection clauses") are often employed when the contracting parties do not wish to utilize alternative mechanisms such as arbitration. When they are able to agree to submit any disputes which may arise under the contract to a specified national court or judicial system, they want some certainty that the chosen court will in fact hear the case and that the resulting judgment will be recognized and enforced in other countries.

Thus, the new Convention sets forth three basic rules to be applied in all Contracting States with respect to exclusive choice of court agreements: (1) the court chosen by the contracting parties has (and must exercise) jurisdiction to decide a covered dispute, (2) courts *not* chosen by the parties do *not* have jurisdiction and must suspend or dismiss proceedings if brought, and (3) a judgment from a chosen court rendered in accordance with such an agreement must be recognized and enforced in the courts of other Contracting States. Optionally, States parties to the Convention may permit their courts to recognize and enforce judgments of courts of other States party designated in *non-exclusive* choice of court agreements.

If ratified, this would be the first U.S. treaty covering recognition and enforcement of judicial judgments. Its potential benefits to private parties are clear: resting on the principle of party autonomy, it would ensure that the dispute settlement arrangements agreed to by the private contracting parties will be honored, thereby promoting certainty and predictability in international trade. Moreover, by enhancing the enforceability of the resulting judgments, it would help level the playing field, since at present foreign judgments are generally given more favorable consideration in U.S. courts (under principles of comity) than U.S. judgments receive in foreign courts.

However, questions of "forum selection clauses" and enforcement of judgments remain, in the U.S. system, primarily issues of state rather than federal law. As with the question of child support agreements, therefore, implementation of this treaty implicates some issues of the allocation of authority between the federal and state governments. Should ratification of the treaty necessarily result in the "federalization" of these areas of the law?



Or can a workable division of responsibility for enforcement of the Convention be fashioned? Work on the necessary implementing legislation is underway.

#### *4.3. Mobile Assets Financing*

To facilitate international development, the private international law community has been working for a number of years to harmonize and standardize the mechanisms for registering ownership and security interests in easily identifiable, high-priced mobile equipment that readily can move across national boundaries. The goal is to promote competition, provide greater certainty and transparency to transacting parties, and reduce transaction costs including making credit cheaper—all necessary elements in the development process. The Cape Town Convention on International Interests in Mobile Equipment, together with a Protocol addressing matters specific to aircraft and aircraft engines, came into force in 2006 and has already attracted over twenty States parties, including the United States. A second Protocol was concluded in 2007 covering the financing of railroad rolling stock (such as engines, freight cars, and passenger cars).

A possible third Protocol (addressed to space-based assets) has recently been under negotiation. Of particular interest to satellite manufacturers, operators, service providers and users, this instrument has encountered a number of difficult technical issues, such as deciding on priorities in financing, treatment of included (or “onboard”) components, differing coverage of interests at the manufacturing and launch stages, protection of the interests of insurers, etc. In time, UNIDROIT expects to turn to a fourth Protocol covering mobile agricultural, construction, and mining equipment.

#### *4.4. Consumer Protection*

Within the OAS CIDIP process, three proposals are under consideration to advance consumer protection within the hemisphere as a way of facilitating cross-border trade in goods and services while at the same time lowering transaction costs for consumers. Brazil has advocated a draft convention on consumer protection to address choice of law, Canada has proposed draft model laws on jurisdiction and choice-of-law rules for consumer contracts, and the United States has submitted a draft Legislative Guide on Consumer Dispute Settlement and Redress.

The proposals represent different approaches to resolving the issues. The Brazilian draft treaty would validate party choice-of-law determinations only where the chosen law is the “most favorable to the consumer.” One difficulty with this approach, however, is in establishing the criteria by which that determination can be made with some measure of consistency and objectivity. Would it mean the law with longer filing periods, or the law allowing less costly consumer proceedings or higher potential damage awards? Attempts to clarify these issues, and explore possible alternatives, are ongoing.

The U.S. proposal, by contrast, suggests three “model laws” for possible adoption by OAS member states: one establishing a procedure for resolving “small claims” in cross-border consumer contracts, a second on government redress mechanisms including authority for domestic consumer protection authorities to cooperate with their foreign counterparts in cross-border disputes and enforcement of judgments, and a third for adoption of model rules for electronic arbitration of cross-border consumer claims. The United States has expressed the view that resolving cross-border consumer claims through traditional court mechanisms is too expensive and not practical, given the small value of most consumer complaints, and the U.S. proposals therefore focus on alternate effective redress. To be successful, however, such an approach would depend on rapid, effective and consistent adoption of the model law, rules and mechanisms in the domestic laws of a substantial number of countries in the hemisphere—obviously, a more arduous path than ratification of a single convention.

#### *4.5. Transportation Law*

A major reform of the antique international rules governing sea borne transportation of goods is underway. The new United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted by the U.N. General Assembly on December 11, 2008, and will be opened for signature following a formal signing ceremony in Rotterdam in the fall of 2009. It will effectively replace the venerable Hague-Visby Rules by establishing an updated regime of uniform liability rules to govern contracts between cargo shippers and carriers for the international carriage of goods where the journey includes carriage by sea and may include carriage by other modes of transport.

The new Convention includes comprehensive rules regarding the entire contract of carriage, including: liability and obligations of the carrier, obligations of the shipper to the carrier, transport documents and electronic transport records, delivery of the goods, rights of the controlling party and transfer of rights, limits of liability, and provisions regarding the time for suit to be filed, jurisdiction, and arbitration.

This Convention promises to bring about much-needed modernization and harmonization of the law in this important transactional field, which has remained fractured between different legal regimes for over eighty years. It could have significant benefits for the developing countries, many of which are currently party to the 1978 treaty known as the "Hamburg Rules" but may be more likely to choose the new "Rotterdam Rules" because of their involvement in the U.N. drafting process.

##### 5. WORKING FOR THE FUTURE

This brief survey of the emergent field of private international law (broadly construed) indicates several salient characteristics. The topics are diverse, as different as family law, dispute settlement, assets financing, international trade, and consumer protection. They generally involve both substance and procedure, melding questions of conflicts of law, jurisdiction, and enforcement of judgments with dispositive principles and rules that speak to the merits of the subjects they treat. In working towards the goals of unification and harmonization, the international community employs different modalities: conventions and protocols, model laws and rules, hortatory principles and legislative guidance. This work takes place in a range of institutional fora, and necessarily implicates the interests of a wide range of stakeholders and interested parties from the private sector and non-governmental organizations, as well as governments.

Perhaps most importantly for present purposes, the foregoing should demonstrate that private international law is a central, indeed critical field for any international law practitioner, one of growing relevance and importance. In many respects, it represents the future development of transnational legal mechanisms and principles. Yet in the contemporary U.S. law school curriculum, it tends to fall uncomfortably in between (and thus is not covered by) the most common courses – public international law, international business transactions, comparative law, conflicts of law, the law of international organizations, etc. This gap deserves to be filled.