

New Directions in Private International Law

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The term «private international law» lacks a universally agreed definition. This is hardly surprising, since it is often given different meanings in different legal cultures or systems. In the North American common law tradition, for example, it is generally if narrowly equated with conflicts of laws—that is, the specialized principles and rules of national law used by domestic courts to determine which of several competing laws applies to disputes involving people in different countries or of different nationalities or to transactions which cross international boundaries. In such situations, for example, courts can choose to apply the law of the forum, the law of the individual's nationality, or the law of the site of the transaction or occurrence. Most U.S. practitioners and judges think of «private international law» as referring to these choices of law rules.

A broader view, typically held by those individuals trained in civil law systems, expands the definition to include the provisions of domestic (national) law governing the exercise of domestic jurisdiction over people, property and transactions in trans-border situations, as well as the enforcement of foreign judgments. Here, the main questions tend to focus on the permissible scope of domestic court authority to hear disputes involving foreigners and foreign transactions and to recognize and enforce judgments resulting from adjudications in foreign courts. In many countries, these provisions are comprehensively codified.

All three areas—jurisdiction, choice of law, and enforcement of judgments—remain at the heart of most private international law endeavors in one way or another. Private international law conventions, for example, generally aim in one way or another at coordinating these issues between sovereign states. However, many experienced transnational practitioners (and perhaps international lawyers more generally) today find even this broader definition increasingly—and misleadingly—restrictive. If one takes into account recent developments in the various international organizations

where private international principles and instruments are being developed, an even broader definition seems necessary. This has to emphasize not only the international adoption of procedural mechanisms for overcoming divergent national rules but also the articulation of substantive principles of law aimed at promoting the harmonization and even codification of legal rules across different legal systems.

Because differences in legal systems will remain for the foreseeable future, private international initiatives aimed at creating new procedural mechanisms for coordination and cooperation offer significant promise for facilitating the resolution of trans-border disputes. They can ease the burden on courts and private parties in cross-border situations in a wide spectrum of areas. In an increasingly inter-connected world, however, the harmonization and codification functions of private international law assume ever greater practical importance. Globalization is pervasively a result of private activity. It consists in, and is driven by, expanding markets, increasing mobility, instantaneous financial transactions, and virtually unlimited information exchange through the mass media and the Internet. A central goal of private international law efforts, therefore, is to facilitate this activity through codification and harmonization and to provide participants with a greater degree of legal certainty and predictability in their civil and commercial transactions. 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 modern global economy.

Put differently, independent states with little or no experience in private international matters—states that lack the necessary legal infrastructure to participate actively and effectively in the globalized economy—can be disadvantaged in trade, investment, and capital markets. One of the purposes of the private international law project is to assist them in gaining the knowledge and experience needed to overcome this deficiency. In this sense, private international law broadly conceived is an important tool of international economic developmental and progress.

I

To many international practitioners, the most familiar instruments of private international law are the various multilateral treaties designed to enhance cross-border cooperation when disputes result in litigation in domestic courts. In the language of private international law, these involve «international judicial assistance.»

From its founding in 1893 through its establishment as a permanent organization 1950, the Hague Conference on Private International Law has maintained a leading

role in the area of judicial assistance. Largely European in its origins and (until recently) in its orientation, the Conference now counts 69 States as members from around the globe, 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 36 conventions. 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 services') and in providing training and advice to States on implementation of its instruments.

Among the most widely adopted global instruments are 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. As their titles suggest, these treaties 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.

Within the Organization of American States, of course, the 1975 Inter-American Convention on Letters Rogatory and the 1975 Inter-American Convention on the Taking of Evidence Abroad (together with its additional protocol) serve similar functions, but are not as widely ratified or consistently applied as their Hague counterparts.

To date, the international community has not been able to reach agreement on a general treaty regarding either (i) the permissible bases of jurisdiction over civil and commercial cases involving foreign parties or transactions or (ii) the grounds on which foreign judicial judgments will be recognized or enforced. For a number of years, negotiations on such a treaty were conducted at the Hague Conference, but ultimately failed. Thus, there is no «civil litigation» analogue to the United Nations Convention on the Recognition and Enforcement of Arbitral Awards (the «New York Convention») or its OAS counter-part, the Inter-American Convention on International Commercial Arbitration. Of course, within the OAS system, a few States are party to the 1979 Inter-American Convention on the Extraterritorial Validity of

Foreign Judgments and Arbitral Awards as well as the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments.

Contractual Choice of Court Agreements

From the failed negotiations in The Hague over a possible global «jurisdiction and judgments» treaty arose a new and ultimately successful proposal for a multilateral convention addressed specifically to contractual «choice of court» clauses in international civil and commercial contracts. The Hague Conference on Private International Law adopted this new convention in June 2005 and it is now open for signature and ratification. Thus far, only Mexico has ratified the Convention (on September 26, 2007), although both the United States and the European Community have signed.

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 frequently 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 U.S. parlance they are sometimes called «forum selection clauses») are often employed when the contracting parties do not wish to utilize non-judicial 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.

The potential benefits of the Convention for private parties to qualifying transnational contracts are significant. Resting on the principle of party autonomy, it will ensure that the dispute settlement arrangements agreed to by those private contracting parties are honored in the case of domestic court litigation in much the same

way as agreements to arbitrate, thereby promoting certainty, and predictability in international trade. Moreover, it will enhance the enforceability of the resulting judgments in the courts of other States parties, and thus help to redress the «lack of reciprocity» problem, which arises when foreign judgments are given more favorable consideration in some national courts than the judgments of those courts receive in foreign courts.

Interestingly, this Convention (if ratified) would be the first US treaty covering recognition and enforcement of judicial judgments. Moreover, there exists at present no general federal statute addressing the issue. Foreign judgments are generally given effect in the United States based on comity. Moreover, the law on enforcement of foreign judgments (as well as the law relating to the validity of «forum selection clauses») is primarily a matter of state rather than federal law. For that reason, implementation of the Convention necessarily implicates issues concerning 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 be fashioned between the states and the federal government for enforcement of the Convention? Work on the necessary implementing legislation is underway.

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. Here again, the Hague Conference has long been at the center of efforts to articulate and implement internationally agreed principles and mechanisms regarding the international protection of children and other family members. The cornerstones of the international child protection regime are two widely ratified and implemented treaties—the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

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? Some countries address this issue primarily through bilateral agreements providing for reciprocal recognition and enforcement of support orders in defined circumstances (the United States, for example, is party to more than 20 such agreements with other countries). Within the OAS, the 1989 Inter-American Convention on Support Obligations has twelve States parties. But until recently, a global approach has been lacking.

In November 2007, the Hague Conference adopted a new multilateral instrument, the 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 accepted grounds enumerated in the Convention.

In many situations, the authorities in one country will not process or give effect to requests for enforcement of child support orders from another country in the absence of a treaty obligation. In the United States, courts generally do recognize and enforce foreign child support obligations as a matter of comity, even though U.S. orders may not be given comparable treatment in the originating country. The Convention would regularize this imbalance among all States that adhere to it and will in general work in favor of the children in question.

As with the Choice of Court Convention, however, ratification of this new Convention brings up some issues of federalism, as it exists in the United States. Family law remains largely within the purview of the individual 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 challenges. A combination of federal and state legislation will be required to give effect to the treaty.

II

Still another area of recent efforts to increase international cooperation in private international law involves the remedies available to consumers in transborder transactions. A potentially significant project has been undertaken within the Organization of American States, and in particular as part of its well-known process of specialized conferences on private international law (Conferencia de Derecho Internacional Privado or «CIDIP»).

The first CIDIP was held in 1975. Over the intervening years, six such conferences have taken place, resulting in some 26 separate instruments (including 20 conventions, 3 protocols, 1 model law and 2 «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.

CIDIP VII is currently underway and has focused on two main topics: the electronic registration of security interests and cross-border consumer protection.

As to the first, the task has been to prepare implementing regulations for the 2002 Model Inter-American Law on Secured Transactions, and more specifically, for the operations of the Registry of Movable Property Security Interests called for by Title IV of the Model Law. Registration is a central feature of the priority structure of the law applicable to security interests in most types of collateral, and the primary role of a registry is to provide for public disclosure of security interests. The Model Regulations (adopted in September 2009) are designed to provide guidance to States that have implemented or contemplate the adoption of the Model Law.

Consumer Protection

With respect to the second topic, three different proposals are currently 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. One has been advanced by Brazil in the form of a draft multilateral 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.

These three proposals represent markedly different approaches to resolving the problem faced by individual consumers who purchase goods or services transnationally. The Brazilian draft treaty would validate contractual choice-of-law determinations only where the chosen law is the «most favorable to the consumer.» Clearly, such a rule would favor the consumer over the seller. It raises two questions: first, whether the choice of law is the main obstacle faced by consumers seeking compensation or other remedies in cross-border transactions of relatively minor amounts, and second, whether the rules favoring the consumer can be determined with some measure of consistency, economy and objectivity. In any given contractual situation, it might be necessary to make several such determinations. For example, would such a rule mean the law with longer filing periods, or the law allowing less costly consumer proceedings, or the higher potential damage awards? Attempts to clarify these issues, and explore possible alternatives, are on-going.

The Canadian proposal for a Model Law is intended to establish uniform jurisdictional and choice of applicable law rules with respect to cross-border business-to-consumer contracts. Standardizing these rules among the countries of the hemisphere would, it is contended, establish a predictable, fair, and efficient legal framework for

resolving disputes relating to cross-border consumer contracts. In addition, it would facilitate the free movement of goods and services among States, promote consumer confidence in the marketplace, and provide greater consistency and enhancing judicial cooperation in disputes.

The US proposal, by contrast, suggests three «model laws» with more specific goals. One would establish an expeditious, low-cost and «user friendly» procedure for resolving «small claims» in cross-border consumer contracts as an alternative to litigation in domestic courts. A second would create government redress mechanisms including authority for a government's consumer protection authorities to cooperate with their foreign counterparts in cross-border disputes and enforcement of judgments. The third would provide for the 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 time-consuming to be practical, especially in light of the small value of most consumer complaints, so that the important task is not to harmonize concepts of jurisdiction or choice of law, but rather to fashion alternative mechanisms providing rapid, binding, low-cost means of redress for the individuals concerned.

To be successful, however, whichever of these proposals (or combination of proposals) is ultimately approved will depend on broad, effective, and consistent adoption and implementation in the domestic laws and legal structures of a substantial number of countries in the hemisphere. Without broad participation, none of these alternatives would have more than a limited effect at most.

III

The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 to serve as the core legal body of the UN 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. The Working Groups 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 1958 UN Convention on the Recognition and Enforcement of Arbitral Awards, the 1976 UNCITRAL Arbitration Rules, and its 1985 Model Law on International Commercial Arbitration—all of which are foundational instruments governing the process of settling transnational commercial disputes through arbitration rather than domestic court litigation.

Another seminal instrument is the 1980 UN Convention on the International Sale of Goods and Services («CISG»), ratified to date by more than half of the member States of the United Nations. UNCITRAL has been active in other areas as well, including through adoption of the 1997 Model Law on Cross-Border Insolvency and more recently the 2005 UN Convention on the Use of Electronic Communications in International Contracts.

Still another on-going area of UNCITRAL's work of particular significance to developing countries concerns public procurement and infrastructure development. Efforts continue, for example, to revise UNCITRAL's 1994 Model Law on Procurement of Goods, Construction, and Services. In 2000, the Commission adopted a Legislative Guide on Privately Financed Infrastructure Projects, intended to assist in the establishment of a legal framework favorable to private investment in public infrastructure. The Guide was supplemented in 2002 by Model Legislative Provisions drafted to assist domestic legislative bodies in the establishment of the necessary legal framework.

Transportation Law

In 2008, UNCITRAL completed work on a new UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. The Convention was adopted by the UN General Assembly on December 11, 2008 and opened for signature following a formal signing ceremony in Rotterdam in the fall of 2009. To date, twenty one States have signed the treaty.

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. 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

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 80 years. Moreover, it could have significant benefits for the developing countries, many of which are currently party to the 1978 United Nations Convention on the Carriage of Goods by Sea (often referred to as the «Hamburg Rules»).

IV

The International Institute for the Unification of Private Law (known as UNIDROIT), with headquarters in Rome, has 63 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 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 have been the adoptions of the 1973 Convention on a Uniform Law on the Form of an International Will and a 1995 Convention on Stolen or Illegally Exported Cultural Objects. In addition, the Institute has adopted model laws on Franchise Disclosure (2002) and Leasing (2008). In 2004 it adopted two sets of Principles, one on International Commercial Contracts and the other on Transnational Civil Procedure (in co-operation with the American Law Institute).

A particularly important and promising instrument produced by UNIDROIT is the 2001 Cape Town Convention on International Interests in Mobile Equipment (now in force for 32 States). 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, which 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. A second Protocol was concluded in 2007 covering the financing of railroad rolling stock (such as engines, freight cars, and passenger cars).

Work is proceeding on a possible third protocol addressed to space-based assets. 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.

Intermediated Securities

On October 9, 2009, a diplomatic conference in Rome approved and adopted a new UNIDROIT Convention on Substantive Rules for Intermediated Securities. This Convention is intended to harmonize the rules governing the holding, transfer, and collateralization of securities in contemporary financial markets.

In today's securities markets, the traditional concept of custody or deposit of physical certificates evidencing the holder's interests has become outmoded. Today, the typical investor does not actually have custody of a physical certificate, but instead «holds» securities through a chain of intermediaries that are ultimately connected to the central securities depository. When transactions occur, the securities themselves are no longer physically moved; instead, the creation and transfer of securities take place electronically, through entries to the accounts concerned. For purposes of efficiency, operational certainty, and speed, a system of holding through intermediaries has been developed. In many countries, however, the law has lagged behind these developments, creating uncertainty and unnecessary risk with respect to the holding and disposition of securities.

In 2006, the Hague Conference took an important step towards addressing these problems by adopting a Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary. As the title suggests, that treaty was aimed at harmonizing the rules of private international law regarding securities held with an intermediary within the territories of States Parties but it did not address issues of substantive law. By comparison, the new UNIDROIT Convention is intended to promote cross-border system compatibility by providing the basic legal framework for the modern intermediated securities holding system, enhance the stability of national financial markets and to promote capital formation.

The treaty describes the rights resulting from the credit of securities to a securities account and details different methods for transferring securities and establishing security and other limited interests in those securities. It clarifies the rules regarding the irrevocability of instructions to make book entries and the finality of the resulting book entries, precludes «upper-tier attachment,» and establishes a priority ranking among competing interests with respect to securities. The innocent («good faith») acquirer of securities is given some protection from adverse claims; the rights of the account holder and the responsibilities of the intermediary in the event of insolvency area addressed. The Convention also establishes a regime for loss allocation and defines the legal relationship between collateral providers and collateral takers where securities are provided as collateral.

V

An increasingly important venue for the articulation of private international law norms and mechanisms is the European Union. These activities are of course part of the ongoing integrative efforts to harmonize the internal law of the Community through the development of conventions, directives, and regulations, for promoting the proper functioning of the «internal market.» Within the European judicial area, judgments must be able to circulate freely in order to bring certainty and efficiency in the commercial sphere, and to ensure individual mobility where matters of personal status are concerned.

At the same time, the Community must as a matter of law have due regard for principles of subsidiary, proportionality and legal certainty. Understandably, tensions have arisen (between member States and the authorities in Brussels) in many areas where harmonization efforts are viewed as intruding into the proper sphere of EU member state authority, particularly where the proposed changes involve differences between the «common law» and «civil law» traditions.

Nonetheless, the scope of European harmonization efforts in the field of «judicial cooperation in civil matters» is considerable, covering topics as diverse as sales contracts, company law, employment contracts, marriage and divorce, tort law, traffic accidents, wills, provision of legal assistance, and small as well as uncontested claims procedures, to name just a few.

For transactional lawyers, familiarity with many of the European regulations, directives, and case law is now essential. These include, among others, the uniform choice of law rules for contractual («Rome I») and non-contractual («Rome II») obligations, and the regulation on the recognition and enforcement of judgments in civil and commercial matters («Brussels I»). In 2000, the European Council adopted a regulation standardizing service of judicial and extrajudicial documents in civil or commercial matters within the Member States. For those involved in family law, an important text on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility («Brussels II bis»).

These regulations apply only to EU member states and within the Community, and they do not purport to regulate non-EU transactions, events, or people. However, anyone doing business within the Community must realize that private international law within Europe is changing, driven by these developments, and that Europeans (companies and individuals) will tend to be guided by the law applicable to them under Community rules. In addition, in multilateral venues (such as the Hague Conference) the EC increasingly exerts its influence in the negotiation and formula-

tion of new international rules and procedures. Accordingly, accommodating this emergent Community law becomes more of a challenge for non-European states. The task is to find common ground for agreement on autonomous principles and interpretations in new instruments at the global level.

VI

This brief overview suggests that the field of private international law—viewed expansively—has several important characteristics. First, the topics are diverse, as different as family law, dispute settlement, assets financing, international trade, and consumer protection. Second, 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. Third, in working towards the goals of coordination, unification, and harmonization, the international community employs a range of different modalities: conventions and protocols, model laws and rules, hortatory principles and legislative guidance depending on which might be considered most likely to achieve the objective most effectively in light of the circumstances.

Fourth, this work takes place in a range of institutional multilateral forums, rather than simply in national courts or legislatures, permitting the particularization of a wide range of interested parties and other stakeholders, from governments and government agencies to international organizations, non-governmental organizations and relevant elements of the private sector.

Finally, and perhaps most importantly for present purposes, the foregoing demonstrates 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. Wrongly viewed as a rather musty set of doctrinal principles rooted in 19th 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.

Some observers contend that the conceptual boundary between public and private international law is eroding. It is no longer the case, they note, and that public international law (for example, in the form of multilateral treaties and conventions as well as non-binding instruments such as model laws and statements of principle) deals only with relations between sovereign states and international organizations. That conclusion is accurate, as the foregoing review demonstrates. From choice of court

agreements to child support and family maintenance, from consumer protection to the transportation of goods by sea and the regulation of intermediated securities, the international community is increasingly involved in formulating rules and procedures applicable to private individuals, transactions and relationships, for use by domestic courts and tribunals rather than in international bodies.

In his recent book, *The Confluence of Public and Private International Law*, Alex Mills takes the argument further, contending that one should view private international law «not as a series of separate national rules, but as a single international system, functioning through national courts.» Viewed from this systemic perspective, he contends, private international law is properly considered as reflecting concepts of «justice pluralism» based on principles of tolerance and mutual recognition. «[T]he operation of private international law constitutes an international system of global regulatory ordering ... a system of secondary legal norms for the allocation, the 'mapping,' of regulatory authority.»

[R]ules of private international law are not primarily concerned with questions of private justice or fairness (although such concerns may arise in the question of whether jurisdiction will be exercised), but with the implications of justice pluralism, or 'meta-justice' – the acceptance that different legal orders may equally be justly applied depending on the context, and the attempt to coordinate the consequential diversity of rules of private law. This is not to advocate a particular degree of tolerance between legal cultures, but merely to observe that private international law provides a set of tools, which order and preserve the existence of diverse norms by minimizing the potential for regulatory conflict. ... [P]rivate international law effects this legal ordering by reflecting and embodying underlying international norms, defining the architecture of the international order across two dimensions.

In making this argument, Mills harkens back to the origins of private international law in Roman law and pre-positivist concepts of «natural law.» One need not subscribe to natural law principles; much less Mills' concepts of 'justice pluralism,' to acknowledge the growing functional importance of private international law in an increasingly globalized, interconnected society.