# At the Cross-roads of Public and Private International Law – The Hague Conference on Private International Law and Its Work

*Hans van Loon**

## 1 Role and Mission of the Hague Conference on Private International Law

### a *An Intergovernmental Organisation Concerned with Private Relationships and Transactions*

1. This Course aims to provide an introduction to the Hague Conference on Private International Law (hereinafter also: the Hague Conference, or: the Conference) and its work, as part of the ongoing programme of the Xiamen Academy of International Law intended, in particular, for an audience from Asia. Unlike the teachings of the Hague Academy of International Law, which every summer provides courses on both public and private international law, the Xiamen Academy's programme focuses on public international law. The inclusion in the programme of a lecture dedicated to the Hague Conference on Private International Law reflects the increasing complementarity of both fields of law.

2. The Hague Conference is an intergovernmental organisation, an organisation of *states*[1] from all continents. Yet, its main concern is *private* relationships and transactions. As an organisation of states dealing with private law matters, it establishes a connection between the "macro-level" of legal ordering of relations among states and the "micro-level" of legal ordering of cross-border interpersonal and business relations.

---

* Independent Consultant. Member of the *Institut de Droit International*. Former Secretary-General of the Hague Conference on Private International Law (1996–2013) and member of its Permanent Bureau since 1978. Parts of this course draw from the author's Inaugural Lecture given on 27 July 2015 during the Second Period (Private International Law) of the 2015 Session of the Hague Academy of International Law, published in the *Recueil des cours* 2015, Vol. 380, pp. 9–108, 2016; Chinese translation: 汉斯.范鲁 (Hans van Loon) 著，张美榕译，吴用校：《全球视角中的国际私法》(The Global Horizon of Private International Law),《国际法研究》(Chinese Review of International Law), 2017 年第六期， vol. 6 (forthcoming).

1 The name "Hague Conference" is explained by the history of the organisation, which started as a series of ad hoc diplomatic conferences. In 1951 these conferences were given a permanent organisational framework, which became operational in 1955, and maintained the name "Conference", cf. *infra* Chapter II.

 | DOI 10.1163/9789004355309_002

3. According to the traditional view, public international law – often briefly referred to as "international law" – is essentially a law for states with respect to other states and individuals. To conduct these relations, states conclude treaties, as citizens conclude contracts with one another. States may be held responsible for violations of international law, as citizens may be held liable for torts. States may have disputes about how to draw the border between them, as citizens may have disputes about the border between their properties. States may resort to arbitration or go to court, as citizens may do.

4. Within each state there are rules that govern the operation of the state and its components – constitutional law is the prime example – and also the relations between the state and the individual – criminal law is a typical illustration. These are *public* laws and those laws, in principle, apply only within the territory of that state. So, when people cross the borders from one state to another, they become subject to the public laws of the other state. If you drive from South-West China to Laos, but do not respect the traffic lights, you risk being prosecuted in China according to the Chinese traffic regulations and in Laos according to the Lao rules of the road.

### b *Diversity of Private Law*

5. But each state also has its rules governing the relations between individuals, *private*, civil and commercial, laws, e.g., the law of contracts or torts or property, or family relations. In contrast to public laws which are very much bound to the state's territory, private laws and their effects may apply to territories, but may also follow people and their activities when they cross international borders. It would be complete chaos, if, when moving to another country, you would have to marry again in order for your marriage to have effect there, or if you have a contract to deliver goods in another country, you would have to conclude the contract again in that country because there it would not be considered a valid contract.

6. As a result, when people move or do business across the borders of their state, situations may arise where choices must be made: if a dispute arises about a contract concluded between a Chinese and an Indonesian company, e.g., about losses claimed by the buyer because of poorly made goods delivered by the seller, which law should apply – Chinese or Indonesian law? Or perhaps a third state's law, for example, the law of Singapore if the parties had chosen that law to govern their contract? And if one, or both, of the parties wishes to submit the dispute to a court, should it go to the courts in China, Indonesia, or a third country, Singapore perhaps? And assuming that a judgment is rendered in one country, e.g., China, will it have effect in Indonesia, and conversely: if a judgment is obtained in Indonesia, will it be recognised in China? Or: will

a judgment given by the courts of Singapore be respected in either China or Indonesia?

### c *Unification of Private Law*

7. There are, in theory, two principal ways of resolving the legal issues that may result from the diversity of laws. One is, to make all the rules of private law uniform; the other, to develop rules for the coordination between different laws and legal orders: rules of private international law (*infra* Nos. 10–12). The former approach looks attractive: why not ensure that the laws of marriage, of sales and other contracts, of torts, of property, indeed the laws of civil procedure are the same everywhere? Then there would be no need to choose between different laws (no need for "choice of law" or "conflict of laws"), and also the choice between different courts would be less important, because they would all apply the same substantive laws and, indeed, the same procedures, and their judgments could be recognised and enforced everywhere without difficulty. The answer is that it has been tried, but has turned out to be feasible in certain, mostly commercial areas only.

8. The 1980 UN *Convention of 11 April 1980 on Contracts for the International Sale of Goods* (CISG) is so far the most successful attempt to unify a broad area of commercial law at the international level. This Convention goes directly to the rights and obligations of the parties to international sales contracts, e.g., the rights and obligations of the seller and the buyer.

9. However, in the Asia Pacific region only a certain number of states are Parties to this Convention: *Australia, China, Iraq, Japan, Kyrgyzstan, Mongolia, New Zealand, the Republic of Korea, Singapore, Uzbekistan and Vietnam*. So that leaves out a number of countries in the region. If you have a sales contract between a Chinese company and an Indonesian company, Indonesian courts will not apply the Convention, since Indonesia is not a Party to it. Nor will Chinese courts, because although China *is* a Party, China applies the treaty only to contracts of sale of goods between parties whose places of business are in states that are both Contracting States, and Indonesia is not.

### d *Diversity of Private International Law*

10. That means that in the case of the Chinese and the Indonesian company, we are back to square one: private international law rules will tell us what law applies, which courts have the power to decide a dispute and whether a judgment rendered by an Indonesian court will be recognised and enforced in China, and vice versa. But here is the problem: despite the term "international" in private international law, *each state has its own system of private international law*. Not only has each state its own substantive laws and its own procedural system

to settle disputes over private law matters, but, in addition, each state has its own system to resolve the issues that arise –

– when a choice must be made between applicable laws – do our rules of civil and commercial law or those of another state apply?
– when a choice must be made between courts – will our courts hear this case or is it a case for a foreign court? Or,
– when a judgment has been obtained in one state and it is to be recognised and enforced in another state.

11. So there is Indian, Korean, Japanese private international law, and it does not stop there: mainland China, Hong Kong and Macao Special Administrative Regions, and Taiwan, each not only have their own systems of private – civil and commercial – law and civil procedure, but also their own systems of private international law.

### e *Unification of Private International Law: The Mission of the Hague Conference*

12. It is the mandate of the Hague Conference on Private International Law *to "progressively" unify this diversity of systems of private international law*. At the centre of this work stands the human being: persons, families, companies and other entities, crossing borders for private or business purposes, in a world that is composed of almost two hundred states, and hundreds of civil and commercial legal regimes and legal cultures.[2] The Conference's mission is to facilitate the unfolding of human aspirations in the private and commercial sphere in our increasingly interdependent world. This mission implies respect for legal diversity of private law, and a special eye for those who are vulnerable in international situations.

## 2 Origin and Development of the Hague Conference

### a *Birth of the Hague Conference*

13. The origins of the Hague Conference on Private International Law go back to the late 19th century. Those were times of expanding trade and commerce and increasing movement of people across borders, in the context of growing legal diversity, as many nations were in the process of codifying their national

2 On which, e.g., H.P. Glenn, *Legal Traditions of the World,* 5th ed.,OUP, Oxford etc., 2010.

laws. As a result, people and companies were increasingly faced with legal uncertainty regarding the three broad issues referred to above (No 10).

14. A group of prominent international lawyers promoted the idea that it would be useful to facilitate cross-border contacts through the negotiation of multilateral treaties: *not* with the aim of making the laws of different countries on persons and families, contracts and torts, and civil procedure uniform – they saw that that was too ambitious a task – but to provide at least a *unified* system of *coordination* of these laws and a minimum of international *mutual assistance*,

15. Interestingly, the efforts started, and the first results were achieved, in Latin America. The Treaty of Lima (1878) and the Treaties of Montevideo (1889) were the first multilateral instruments ever to establish common rules of private international law. The success of these early efforts encouraged the Dutch lawyer and scholar Tobias Asser[3] to persuade the Government of the Netherlands to start similar efforts in Europe. Between 1893 and 1904 four diplomatic conferences – gathering continental European States, and, in 1904, also Japan – were held in The Hague, which produced seven multilateral treaties, two on international civil procedure, and five on international family law.[4] The multilateral treaty or convention – an instrument of *public* international law – thus became the vehicle for the unification of *private* international law.

16. The cornerstone for the Conventions in the family law area was the concept of *nationality*. This was the time of nation-state building in Europe, in Germany, and *Risorgimento* in Italy, and it was the great Italian lawyer and statesman Mancini[5] who proposed that in a transnational setting nationality should be the principal factor connecting people, their relationships and transactions with a specific legal system, in order to determine which court would have jurisdiction or which law to apply. Italian authorities would, as a firm rule, apply French law to the marriage or divorce of a French couple and French courts would apply Italian law to Italians. This approach was very different from the Latin American efforts to harmonize private international law, which were aimed at integrating immigrants as quickly as possible into the

3 Tobias M.C. Asser, Amsterdam 1838 – The Hague 1913. In 1911 he received the Nobel Peace for his work in the field of international law, in particular in the context of the Hague conferences on private international law.

4 See https://www.hcch.net/en/instruments/the-old-conventions (the 1905 Convention on civil procedure revised the earlier Convention of 1896). A fifth session, held in 1925, and a sixth in 1928, did not lead to new binding instruments, except for the 1931 Protocol recognising the jurisdiction of the Permanent Court of International Justice to interpret the Hague Conventions.

5 Castel Baronia 1817 – Naples 1888.

newly independent states of South America, and therefore used domicile, not nationality, as the main connecting factor.

17. Typically for the time, the first generation of Conventions used diplomatic channels for the purpose of international communications: still far away was the idea of direct cross-border contacts between courts and authorities, everything went slowly and stately, through the offices of ambassadors and consuls.

18. While in some respects *la belle époque* with its regional peace, economic prosperity, expanding trade and technological progress was a sort of precursor of modern globalisation, it was also a time of rising nationalism and imperialism. Already during the run-up to the First World War, it appeared that Mancini's theory was too naïve in practice, because the assumption that all laws and courts were entitled to equal respect without any reservation, was based on the notion that all legislators were equally decent, which they turned out not to be, notably not the fascist dictatorships that emerged after the First World War.

19. As a result, nationality, the linchpin of the Hague Conference's treaty system, became its Achilles heel. In the interwar period the treaties became further discredited when the 1902 Hague Marriage Convention was applied by courts to enforce German marriage laws steeped in anti-Semitism. The early Hague Conventions did not yet contain the safety-valve of a public policy (*ordre public*) clause, guiding courts to discard the application of a foreign law, or the recognition of a foreign judgment, when this led to a conflict with the forum state's fundamental values.

20. The result was that the Hague efforts towards internationalisation of private international law practically came to a halt. Private international law developed more and more as part of domestic law but banned to its fringes, and lost much of its prominence. The distance between *private* and *public* international law – which anyway had itself become a weak discipline – increased.[6]

### b *Establishment as a Permanent Intergovernmental Organisation*

21. After the Second World War a new period began. The War had led to the awareness that international cooperation was essential. New intergovernmental organisations were created, foremost the United Nations, based on a reaffirmation of human dignity (cf. *infra* Nos. 137–138). The Hague Conference, resurrecting from its ashes, was founded as an independent intergovernmental organisation by fifteen Western European states – this time including the

6 Cf. A. Mills, *The Confluence of Public and Private International Law*, Cambridge etc., Cambridge University Press, 2009, in particular Chapter 2.

United Kingdom – plus Japan. Its mandate was formulated simply as "*to work for the progressive unification of private international law*".[7] Its Permanent Bureau was set up as a small scientific secretariat, charged with the task of facilitating the gradual establishment of multilateral treaties, subject by subject,[8] based on careful research, in dialogue with representative professional and interest organisations, in a highly structured, yet flexible, negotiation process.[9]

22. A lesson wiser, following the Second World War, the Conference first concentrated on matters other than international family law: revision of the 1905 *Convention relative à la procedure civile*, recognition of companies, international sales. But in the aftermath of the Second World War, with many families dispersed over different countries, there was an urgent need to provide maintenance support to families, and children in particular. The United Nations drew up the *Convention on the Recovery Abroad of Maintenance* in 1956. And the Hague Conference, returning to family law, completed this UN instrument on administrative cooperation with a Convention on the law applicable to child support (1956) and one on the recognition and enforcement of court decisions on child support (1958).[10]

### c *Early Innovations*

23. These early Hague Conventions on child support introduced several important innovations. The first was the introduction of the concept of *habitual*

7 *Statute* Art. 1, https://www.hcch.net/en/instruments/conventions/full-text/?cid=29.

8 The Hague Conventions and all relevant date pertinent thereto are accessible at www.hcch.net.

9 As will appear from the next Chapters, the growth of the number of Hague Conventions, in particular those based on legal and administrative cooperation, and of the number of states Parties thereto, the mission of the Hague Conference has enlarged considerably and now includes monitoring of the practical operation of its instruments, as well as supporting states with their implementation ("post-Convention services"), cf. also *infra*, No. 42.

10 *Convention sur la loi applicable aux obligations alimentaires envers les enfants* of 24 October 1956 and *Convention concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants* of 15 April 1958. Both were subsequently revised and their scope was extended to adults: *Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* and *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*. Again, both 1973 Conventions were revised in 2007, by the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* and the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, cf. *infra* Nos. 175–178.

*residence* instead of nationality as the principal connecting factor to determine the applicable law and (indirectly) the jurisdiction of courts. It was felt that if two children in similar circumstances had their centre of life, their habitual residence, in the same country and were both depending on support of a parent abroad, it was simply not fair to apply different laws to them, or refer them to courts in different countries, with the risk that they would not receive the same child support only because they happened to have different nationalities.

24. This innovative concept of habitual residence has gradually become the new cornerstone of many Hague Conventions. It is essentially intended as a *factual* concept: as such it also presents an alternative both to the nationality principle and the principle of domicile as used in common law systems, which are both primarily *legal* concepts. The concept has become very popular, and has been taken over in many other international instruments and also in domestic legislations (cf. *infra* No. 37).

25. The choice of habitual residence rather than nationality as the main connecting implied a second innovation: deliberately, the 1956 and 1958 Conventions also aimed to serve a *substantive* purpose, that of protecting the child. The 1956 Convention on applicable law even went a step further by giving children a second chance if they could not obtain support under the law of their habitual residence.[11]

26. A third major innovation was the following. We saw (*supra* Nos. 18–19) that the Hague Conventions of the first generation naively gave too much scope to foreign laws and decisions. Aware of this problem, the Hague Conventions negotiated after the Second World War initially allowed the setting aside of the designated law simply "*pour un motif d'ordre public*" – for reasons of public policy. This of course moved the pendulum too far to the other side, because if *any* public policy consideration is sufficient to set aside the foreign law or decision, then this opens the door to parochialism, and respect for diversity will be at risk.

27. The Hague Child Support Conventions introduced the now famous formula, according to which the application of the foreign law, or the recognition of the foreign decision, may be refused if this is *manifestly incompatible with the public policy* of the forum. The formula is intentionally open-ended but it

11 Art. 3. This idea was further elaborated in the "cascades" provided by Arts. 4–6 of the 1973 Hague *Convention on the Law Applicable to Maintenance Obligations*, and Arts. 3–4 (2)–(4) of the 2007 Hague *Protocol on the Law Applicable to Maintenance Obligations*.

has done wonders in practice: it has helped to keep the refusal to apply foreign laws or to recognise foreign decisions to a bare minimum. In this sense it stands as a marker of *respect for legal diversity* of private law, while reserving the application of fundamental values embraced by the forum, including, increasingly, values embodied in international and regional human rights instruments.

### d *Bridging the Civil and Common Law Divide*

28. From the 1960's onwards, when, in addition to the United Kingdom and Ireland, the United States (1964), Canada (1968), Australia (1973) and other common law countries joined the Hague Conference, and English was added to French as an official language, bridging the divide between the *civil* (*continental*) *law* and the *common law* systems grew into a central concern of the Conference. Accommodating their diverse approaches – basic assumptions, concepts, methodologies – regarding both private law and private international law, including the role of judges, lawyers, and the taking of evidence in civil procedure, family law, contracts, torts, property law and succession, among others, became an ongoing challenge. And it still is, although in some areas, in particular in matters of judicial jurisdiction and civil procedure, it has become apparent that the divide between the approaches of the United States of America and of other – including common law – countries may be no less challenging than that between civil and common law systems (cf. *infra* Nos. 76–80, 125).

### e *Bridging the Divide between Systems Based on Faith and Secular Systems*

29. Likewise, the participation of Egypt and Israel in the Conference, later followed by other states south and east of the Mediterranean and beyond, prompted the Conference to build bridges between legal systems based on religion (faith) and secular systems. Provision had to be me made for the fact that in such systems different laws may apply to different categories of persons (cf. *infra* Nos. 152, 156), as well as for specific legal institutions, such as repudiation,[12] and more recently, kafala (cf. *infra* No. 168). The "Malta process", initiated in 2004, is a long-term effort to work towards the more effective resolution as between these different systems of parental disputes concerning children.[13]

12 Hague *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, Art. 1 (1), cf. *infra*, Nrs 154–157.

13 https://www.hcch.net/en/publications-and-studies/details4/?pid=5214.

## 3 The Impact of Contemporary Globalisation

### a *Globalisation and Its Impact on the Nation-state*

30. Modern globalisation[14] is often associated with the fall of the Berlin Wall and the invention of the World Wide Web,[15] both of which occurred in 1989. The lifting of the Iron Curtain opened new opportunities for communication, travel, investment, production and marketing, not just across the former ideological and political barrier between Eastern and Western Europe, but across all regions and continents. The World Wide Web revolutionized networking and information sharing on a global scale. These changes accelerated the development of global production chains and markets, radically increased the global mobility of people, goods, services and capital, and permitted instant sharing around the world of information through mass media and cyberspace, altering our views (as individuals, but also as groupings, including states) of the world, the state, and ourselves.

31. The expansion of the range, intensity, velocity and impact of global interactions blurs the boundaries between local and global affairs as never before. Inevitably, this affects the traditional functions and powers of the nation-state as an entity exercising sovereignty over a certain territory. Indeed, globalisation has a *twofold* impact on the nation state's role and authority, with "*upwards*" and "*downwards*" effects:

32. On the one hand, states around the world are forced to intensify their cooperation to deal with issues they are no longer able to resolve alone. This leads them to transfer traditional nation-state functions and prerogatives "*upwards*" to global and regional intergovernmental organisations, sometimes with far-reaching attributes, such as those of the World Trade Organisation (WTO) panel dispute settlement system,[16] or even supranational organisations, such as the European Union.[17] These organisations are increasingly directed to the regulation of transnational issues generated by private actions rather than to interstate conduct.[18] China's accession to the WTO in December 2001 illustrates how WTO membership may go beyond relations among its member

14 The concept is used here in a descriptive manner (cf. R. Michaels, *Globalization and Law: Law beyond the State*, http://scholarship.law.duke.edu/faculty_scholarship/2862, p. 2, distinguishing between globalisation "as reality", "as ideology" and "as theory").

15 T. Berners-Lee, Information Management: A Proposal, CERN, March 1989.

16 Cf. *infra*, No. 50.

17 On the Europeanisation of private international law, cf. *infra* No. 40.

18 R. Wai, "The cosmopolitanism of transnational economic law", C.M. Baillet & K.F. Aas (eds.), *Cosmopolitan justice and its discontents*, Oxford etc. Routledge, 2011, p. 159.

states, and may have effects inside a country, reinforcing, in the case of China, legal and judicial protection of individual trading rights, property rights and individual rights of access to independent and impartial courts for the benefit of producers, investors, traders and consumers.[19]

33. On the other hand, and in a "*downwards*" move, state powers are transferred to, or assumed by, the private sector. New private actors such as credit rating agencies – Moody's, S &P's, and Fitch Ratings – are in control of the global rating business or, like ICANN, operate domain names. Transnational companies create their own private ordering, such as transnational codes of conduct, or, in cooperation with trade unions, global framework agreements. Various rules of the International Chamber of Commerce,[20] widely used model contracts, *lex mercatoria* coupled with international commercial arbitration, all provide a "*seemingly stable base on which transnational* [*commercial*] *practice develops, often without or to the side of state law*".[21] More generally, global economic activity has become critically depending on private arrangements.[22]

34. This does not mean that globalisation makes the role of the nation-state obsolete. *Public* transnational ordering, international law and policy remain crucially dependent on state organs and officials. In fact, state executives and courts increasingly fulfill a *dual* role. Operating within the "purely" national context – their traditional role – they act as state organs only. But where they take part in the formation of international law, or interpret and apply international instruments, as they increasingly do, they actually also function, as G. Scelle pointed out, as agents of the decentralized international legal order ("role splitting", "*dédoublement fonctionnel*").[23]

35. The interface between the nation-state and *private* transnational ordering has its own challenges. Traditional state laws, not least rules of private international law, often stand in the way of trade and commerce as well as non-business related activity. Their reform, their adaptation to the globalizing

19 Cf. E.-U. Petersmann, "Constitutional Functions and Constitutional Problems of International Economic Law in the 21st Century", *Collected Courses of the Xiamen Academy of International Law*, Vol. 3, 2010, Leiden etc., Nijhoff, 2011, pp. 155 *et seq*. (pp. 180–182).

20 E.g. Incoterms, the Uniform Customs and Practice for Documentary Credits, Contractual Joint Venture Model Agreements, etc., cf. R. Goode., H. Kronke, E. McKendrick & J. Wool, *Transnational commercial law: text, cases and materials*, Oxford etc., OUP, 2007, pp. 197–200.

21 R. Wai, *op cit.,* p. 157.

22 Cf., generally, G. Teubner (ed.), *Global Law without a State*, Aldershot, Dartmouth, 1997.

23 Cf. A. Cassese "Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in international law", *European Journal of International Law*, Vol. 1, 1990, pp. 210 *et seq.*

economy and society, which is now being undertaken in a growing number of countries, is a matter of eminent practical importance.

### b *Proliferation of Legislation at All Levels – Expansion of the Hague Conference*

36. Globalisation has given a huge boost to activity in the field private international law of legislators, as well as courts and executives, around the world. The last decades have seen a "*tremendous increase in codification activity*"[24] at the national, regional and global levels. The lifting of the Iron Curtain and the dissolution of the Soviet Union provoked a codification wave in Eastern Europe and Asia – e.g., Republic of Korea, 2001, Japan, 2007, China 2012 – followed by many other states.[25] Several of these national private international law statutes reflect the increasing interaction between national, regional and global sources.

37. Hague Conventions – thirty-eight of which saw the light since 1951 – have inspired codifications around the world, ranging from the 2010 Chinese Private International Law Act,[26] which, among other innovations, has made the bold step of replacing nationality by habitual residence as the main connecting factor,[27] to the recent Act on private international law of the Dominican Republic, which in its preamble expressly refers to the Hague Conventions as a source of inspiration even though the country is not (yet) a member of the Hague Conference.

38. New codifications generally eschew rigid broad provisions, and provide for flexible and nuanced solutions, using a plurality of techniques. They remain faithful to the principle of equality of forum law and foreign law, often with concern for the substantive propriety of the result of the rules' application when weak parties are involved, and thus largely to the multilateral approach characteristic for the Hague Conventions, while catering for important forum

24 S. Symeonides, *Codifying Choice of Law Around the World*, Oxford etc., OUP, 2014, p. 345.

25 For a chronological and alphabetical list, and bibliography, see Symeonides, *op.cit*, p. 5 *et seq*. and Appendix.

26 Law of the People's Republic of China on the Applications of Laws to Foreign-related Civil Relations, text and English translation in J. Basedow & K.B. Pissler, *Private International law in Mainland China, Taiwan and Europe,* Mohr Siebeck, Tübingen, 2014, pp. 439 *et seq.*; Q. He, "Recent Developments of New Chinese Private International Law With Regard to Contracts", *ibid.,* pp. 157 *et seq*.

27 J. Huang, "New perspectives on Private International Law in the People's Republic of China", *ibid.,* pp. 3 *et seq*. W. Chen, "Selected Problems of General Provisions in Private International Law: The PRC Perspective", *ibid.* pp . 51 *et seq*.

interests through unilateral provisions and overriding mandatory rules.[28] Nevertheless, in the field of family law, often more prone to strong traditions, important differences persist.[29] And this also applies, generally, to national rules on judicial jurisdiction and recognition and enforcement of foreign decisions, often bound up with national interests.

39. At the regional level, in the Americas, the Organisation of American States through its CIDIP process, which began in 1975, has so far produced twenty Inter-American Conventions and several additional instruments on private international law. In Latin-America, the legislative work of MERCOSUR in the field of commerce and trade since 1991 has also extended into the field of private international law. Hague Conventions have served as models for both CIDIP and MERCOSUR. In 2005 the Hague Conference established a *Regional Office* in *Buenos Aires*, Argentina, to support the promotion, implementation and practical operation of Hague Conventions.

40. Above all, the European Union, since the entry into force of the Treaty of Amsterdam in 1999, has adopted a wide range of instruments, which apply directly in its member states.[30] The "*Europeanisation*" of private international could build on the work of the Hague Conference, which not only had paved the way for the unification of private international law in Europe during the previous century, but whose Conventions also offered models for the European Union (EU) legislative activity. At the same time, the appearance of the EU as a new actor in private international law gave an additional impetus to the globalisation of the Conference's membership and the reach of its work, and led the Conference to change its statute to enable the EU to join the organisation as a member.[31]

41. Membership of the Conference has increased from around 35 Member states in 1990, to 47 in 2000, and to 83 (including the EU) in 2017. While in the Asia Pacific Region *Japan* was the first country to join the Hague Conference in 1957 – and, as we have seen, participated already in its work as early as 1904 – followed by *Australia* in 1973 and *China* in 1987, the *Republic of Korea* joined in 1997, *Sri Lanka* in 2001, *New Zealand* and *Malaysia* in 2002, *India* in 2008, the *Philippine*s in 2010, *Vietnam* in 2013, *Singapore* in 2014 and *Kazakhstan* in 2017.

---

28 Symeonides, *op.cit.* pp. 347–351.

29 Hence the importance of bridge-building initiatives such as the Malta Process, cf. *supra* No. 29.

30 X. Kramer et al., *A European Framework for private international law: current gaps and future perspectives*, EP Parliament Study, 2012, http://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf.

31 Cf. H. van Loon & A. Schulz, "The European Community and the Hague Conference on Private International Law", B. Martenczuk & S. van Thiel (eds.), *Justice, Liberty and Security*, Brussels, VUBPRESS, 2008, pp. 257 *et seq.*

The presence of the Hague Conference in Asia-Pacific was in December 2012 reinforced by the creation of a *Regional Office*, established in *Hong Kong* Special Administrative Region of China.

42. If one includes the non-member states having joined one or more Hague Conventions, the total number of states connected with the Conference reaches 150. Since the Hague Conventions most in demand are those establishing or including forms of direct judicial and administrative cooperation, the implementation and operation of which present particular challenges, in particular to developing, including many non-member, countries, the Conference has developed a broad range of supporting "post-Convention services".[32]

### c *Impact of Globalisation on Private International Law Approaches and Methods*

43. Globalisation not only has encouraged the proliferation of private international law at the national, regional and global levels, it also has an impact on its general outlook and methods. Where the nation-state is no longer its sole anchor space, private international law must transcend its traditional boundaries, and, adapting its methodologies while preserving its integrity, orient itself towards the idea of an emerging global community.

44. In the emerging global society, private international law should not stand in the way of productive and efficient transnational economic and financial activity but facilitate and support it, reduce transaction costs and enhance parties' confidence in the law.[33] At the same time it must enable market deficiencies to be corrected, and enable weaker parties, important societal values and common goods to be protected.

45. Likewise, in the field of the law of persons and families, private international law should not block but facilitate and support cross-border relationships, including their financial and property aspects, and help avoid limping legal relationships, while recognising that the impact of culture and traditions is generally more significant in this area than in the economic sphere.

---

32 Cf. F. Pocar & H. van Loon, "The 120th anniversary of the Hague Conference on Private International Law", *RDIPP*, Vol. 50, 2014, pp. 517 *et seq.*

33 More generally, "rules of law, however theoretically appealing, however rooted in legal concepts and tradition and however elegantly expressed, are of little value if, instead of promoting the achievement of legitimate business objectives, they stand in their way", R. Goode, "The UNIDROIT Draft Mobile Equipment Convention, Confluence of Legal Concepts and Philosophies", in *Mélanges en l'honneur de Denis Tallon*, Paris, Société de léglislation compare, 1999, pp. 69 *et seq*., p. 82.

46. During the past decades, the Hague Conference has been an evolving platform for the elaboration of new methods to cope with the challenges of globalisation, both in the sphere of commerce and trade and of persons and families. The next Chapters will illustrate this development.

## 4 Hague Conventions Promoting Global Trade, Investment and Finance

### a *The Global Framework Regulating the Cross-border Movement of Goods, Services, Capital and Workers*

47. The Hague Conference has drawn up a number of instruments contributing to the legal infrastructure of global trade, investment and finance. They operate within the context of global public international law regimes regulating these matters, and it is therefore useful to take a bird's eye view on this wider legal framework.

48. In a fully integrated world economy, there would be free movement of goods, services, capital and workers. Such free movement is ensured at the regional level within the European Union, and to a lesser degree in other regional economic organisations. The establishment of the ASEAN Economic Community in 2015 ultimately has similar objectives. At the global level, most progress has been made so far with regard to the freedom of trade in goods.

#### i Goods

49. The global legal framework for the free trade in *goods* is provided by GATT, the General Agreement on Tariffs and Trade, which is now incorporated in the WTO. It is based on a number of principles, including that of the most favoured nation treatment: a benefit granted to anyone state accrues to all other states' profit. This of course has a liberalizing and harmonizing effect. Under another principle, the Parties engage from time to time in negotiations to reduce customs duties. The current round of negotiations started in Doha, Qatar in 2001, and in December 2013 substantial progress was made in Bali, with a deal, the Bali package. By cutting trade bureaucracy this deal could reduce advanced economies' cost for doing business internationally by 10%. The deal is estimated worth a trillion dollar deal for the global economy.

50. A very important feature of the WTO is its dispute settlement system, with independent panels. The decisions of these panels must be submitted to the Dispute Settlement Body. However, when the DSB establishes panels, when it adopts panel and Appellate Body reports and when it authorizes retaliation,

the DSB must approve the decision unless there is a consensus against it.[34] This special decision-making procedure is commonly referred to as "negative" or "reverse" consensus.

ii Services

51. More recently, efforts have been made to provide a global framework for the free trade in *services*, the so called General Agreement on Trade in Services (GATS). GATS covers twelve service sectors (Business; Communication; Construction and Engineering; Distribution; Education; Environment; Financial; Health; Tourism and Travel; Recreation, Cultural, and Sporting; Transport; "Other".). While national governments have the option to exclude any specific service from liberalisation under GATS, since virtually any public service may qualify as being "*provided on a commercial basis*", this may, in the absence of a global constitutional framework, pose difficult policy dilemmas especially to countries where state authority is weak.

iii Capital

52. The free movement of capital is primarily ensured by bilateral investment treaties. They guarantee access to the host country, and provide safeguards that protect the investor's rights, including a dispute settlement procedure. The Organisation for Economic Cooperation and Development has among its members (including, in the Asia–Pacific region, Australia, Japan, Republic of Korea and New Zealand) further reduced restrictions on capital movement, apart from investment purposes: it has almost completely liberalised international capital flows.

iv Workers

53. The movement of workers, and migration generally, is a "black hole" in the global legal system. Basically, this is a matter for national regulations on emigration and immigration. Article 12 (2) of the International Covenant on Civil and Political rights stipulates that "*Everyone shall be free to leave any country, including his own*", but there is no corresponding right of a foreigner to *enter* the territory of a state party or to reside in that state.[35] A multilateral global framework exists only for refugees, the United Nations *Convention of 18 July 1951 relating to the Status of Refugees,* cf. *infra* Nos. 144–145. The United Nations *Convention of 18 December 1990 on the Protection of the Rights of All Migrant*

34 Articles 6.1, 16.4, 17.14 and 22.6 of the DSU.

35 In a different context, the 1993 Hague Intercountry Adoption Convention establishes in respect of children adopted under the Convention a system guaranteeing authorization to enter and reside permanently in the receiving state, see *infra*, Nos. 168–170.

*Workers and Members of Their Families*[36] has not been successful, since it has only been ratified by countries of origin of these persons, not by any major country of destination,[37] cf. *infra* Nos. 144, 146.

54. In part thanks to these liberalising global or regional frameworks (regarding trade in goods, and capital movements), in part despite the lack of such frameworks (regarding the movement of workers), private actors, people and businesses, are increasingly moving and acting beyond national borders. This leads to an exponential increase in situations where there is a need to provide certainty and predictability regarding which court has jurisdiction to deal with legal disputes, which law applies, and whether judgments rendered will be recognised and enforced abroad.

55. As we saw, a number of countries in East Asia recently adopted new rules on private international law (*supra* No. 36). Since these are national initiatives, however, their solutions differ in many respects. Therefore, there remains a need to unify or harmonise the rules of private international law at a wider, regional or global, level. Already, suggestions for harmonisation of the private international law rules of China, Japan and Korea have been made, while it has also been pointed out that all three of these countries are members of the Hague Conference, which offers a forum for the *global* unification and cooperation in the field of private international law.[38] In any event, there is clearly growing interest in the Asia Pacific region for the work of the Hague Conference.

### b *Hague Instruments Concerning Global Trade, Investment and Finance*

56. A number of Hague instruments purport to facilitate economic and financial activity of private actors across borders. This also includes the transnational dealings of governments as commercial actors (acting *jure gestionis*,

36 http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx.

37 For a proposal to develop a multilateral global treaty framework for temporary of circular migration discussed at the Hague Conference from 2006–2013, see. *Some reflections on the utility of applying certain techniques for international cooperation developed by the Hague Conference on Private International Law to issues of international migration*, General Affairs and Policy, Preliminary Document No. 8 (2006); Updates: Prel. Doc. No. 23 (2007); Prel. Doc. No. 6 (2008); Prel. Doc. No. 8 (2009); Prel. Doc. No. 7 (2010), https://www.hcch.net/en/governance/council-on-general-affairs/archive-2000-2015-> Meetings of 2006–2010.

38 See K.H. Suk, "Harmonization of Private International Law Rules in Northeast Asia", Paper presented at the International Law Association of Japan Conference, Shizuoka, October 12, 2013, p. 2.; W. Zhu "Unifying or Harmonizing Private International Law in East Asia: Necessity, Possibility and Approach", *Asian Women Law*, Vol. 13 , 2010.

as opposed to *jure imperii*). Facilitating these activities means, above all, respecting and ensuring the effectiveness of the arrangements that the parties *themselves* have made, upholding their mutual contractual obligations, including their common choice of law and of court.

57. Why should parties to an *international* contract, unlike parties to a purely *national* contract, be entitled to designate themselves the applicable law or the way to resolve possible disputes? Because this is the most natural and most efficient way to avoid a choice between laws or courts: parties to an international commercial transaction will want to manage risks involved in the transaction, and one way of doing this is by agreeing in advance on the law that they want to see applied to their transaction and on a dispute settlement method.

58. In two early judgments of 1929, the Permanent Court of International Justice, the predecessor of the International Court of Justice, recognized the expressed or presumed intention of the parties with regard to the applicable law as a general principle of law.[39] More recently, a Resolution was adopted by the *Institut de droit international* declaring that "*the autonomy of the parties has also been enshrined as a freedom of the individual in several conventions and various United Nations resolutions*".[40]

59. At the national level, party autonomy has found increasing recognition. As an example Article 3 of the Chinese private international law provides: *in accordance with the provisions of law, the parties may expressly choose the law applicable to a civil relationship involving a foreign element*. A dozen other provisions of the law, in special parts, elaborate this further.

### i Hague Principles on Choice of Law in International Commercial Contracts

60. The *Principles on Choice of Law in Commercial Contracts*[41] were adopted by the Hague Conference on 19 March 2015. They are principles, not binding rules, and so they do not stand in the way of existing *binding* instruments which admit the principle of party autonomy. Why, then, did the Hague Conference undertake this work? In fact, the suggestion came from its sister organisations

39 *Case concerning the payment of various Serbian loans issued in France*, PCIJ, 12 July 1929, series A, No. 20 p. 41 and *Case concerning the payment in gold of Brazilian federal loans contracted in France*, PCIJ 12 July 1929, series A, No. 21, p. 93.

40 IDI, Resolution adopted at its Basle Session in 1991, http://www.justitiaetpace.org/idiE/resolutionsE/1991_bal_02_en.PDF.

41 Accessible, with an official commentary, at https://www.hcch.net/en/instruments/conventions/full-text/?cid=135. Cf. M. Pertegás & B.A. Marshall, "Party autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts", *Brooklyn Journal of International Law*, Vol. 39, 2014, pp. 975 *et seq.*

mainly active in the field of global harmonisation of *substantive* commercial law, UNIDROIT and UNCITRAL. They had found that party autonomy in matters of applicable law still meets with resistance, e.g., in South America and the Middle East, with all the risks this carries for commercial transactions including in the context of court litigation and arbitral proceedings.

61. So, the primary aim of the Principles is to spread the concept of party autonomy to states that have not yet adopted it, or have done so with significant restrictions, thereby ensuring the universality of contractual party autonomy as a fundamental principle of the global legal architecture for private international transactions.[42] States ready to let go outdated sovereignty concerns may decide to introduce the Principles into their laws.[43] In addition, the non-binding nature of the instrument made it possible to draft rules that are aspirational and may inspire continued law development and refinement even in legal systems that have already embraced the principle of party autonomy.[44]

*Definition of Internationality*

62. Traditionally, private international instruments require a foreign element for their application, e.g., they only apply "*between parties having their place of business in different states*".[45] This reflects a perspective *from within the nation-state* that views the international as the exceptional, and the domestic as the common situation. The Principles take the *opposite view*: According to its Article 1 "*For the purposes of these Principles, a contract is international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State*".[46] So, the paradigm shifts: the *transnational* dimension, rather than being viewed as the exception, becomes the normal scenario for the application of the instrument, with the purely internal case as an exception.

42 UNCITRAL provided its endorsement of the Hague Principles during its Forty-eighth session held in Vienna in July 2015.

43 A recent Australian government study proposes to implement the Principles together with the 2005 Choice of Court Convention, through a new International Civil Law Act, *Australia's Accession to the Convention on Choice of Court Agreements, National Interest Analysis* [2016] ATNIA 7. Paraguay already codified the Principles through its "*Ley sobre el derecho aplicable a los contratos internacionales*", of 15 January 2015.

44 Australia (cf. previous fn.) offers an example.

45 Cf. Art. 1 (a) of the Hague *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, cf. also its Art. 1 (b).

46 Art. 1 (2).

63. In fact, the Principles transcend geographical conditions: not only do they permit the parties to delocalise their contract, they also open the door for a choice of rules of law that are *non-state* law:

*No Connection Required*

64. The Principles establish the parties' freedom to choose the law governing their contract. In addition, they provide – like Japanese[47] and Korean,[48] but unlike Chinese private international law – that this choice may apply to part of the contract only and, subject to the formal validity of the contract or the rights of third parties, may be made or modified at any time.[49] In addition, in accordance with Chinese, Japanese and Korean practice, the Principles do not require any connection between the chosen law and the parties or their transaction.[50] In this way they make room for the growing practice that parties, delocalising the contract, choose a particular law because it is neutral as between them or particularly well-developed for the type of transaction in question. In maritime transport and in banking transactions, for example, the choice of English law is very popular. Usually, there will be additional factors making the situation "*international*", but that is not always so, and the Principles do not posit any condition *ex ante* for their application.[51]

*Non-state Law*

65. Moreover, the Principles admit the possibility of the parties choosing "*rules of law*" that are *not* rules of *state* law, but rules that are "*generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the forum provides otherwise*".[52] So, if the forum does not prohibit such a choice,[53] the parties may choose, for example, the substantive rules of the United Nations Convention on Contracts for the International Sale of

47 Art. 2 (2).

48 Art. 25 (2).

49 Art. 2 (1)–(3).

50 Art. 2 (4): "*No connection is required between the law chosen and the parties or their transaction*".

51 If the choice of a foreign law is made in an otherwise purely domestic situation, the courts of the state of the parties' home state might consider that the case is not "*international*" according to Art. 1(2), and ignore the choice of law in the first place. But foreign courts and arbitral tribunals are unlikely to do so; they might however, find reason to apply one of the corrections of Art. 11 (cf. *infra* Nos. 69–70).

52 Art. 3.

53 Interestingly, the 2015 Paraguayan statute introducing the Principles into Paraguayan law accepts parties' choice of non-state law without reserve.

Goods (CISG) as rules of law governing their contract in situations in which the CISG would not otherwise apply according to its own terms, or the UNIDROIT Principles of International Commercial Contracts.[54]

66. Currently, such a choice is generally not afforded to parties litigating before national courts.[55] In contrast, in international commercial *arbitration* it is not disputed that parties may choose non-state law. The UNIDROIT Principles of International Commercial Contracts have been applied by arbitral tribunals around the world, including where they were expressly chosen by the parties to govern the substance of their dispute, or when the contract generically referred to the "*general principles of law*" or "*lex mercatoria*".[56]

67. *Court* decisions of this type are rarer but not lacking. Moreover, courts have cited the UNIDROIT Principles in support of their interpretation of the applicable domestic law.[57] If choice of law is admitted as a basic principle, it is difficult to see why in a globalising world economy where transnational private legal ordering is so common, a choice of non-state law should be allowed in arbitration but prohibited in the context of court litigation.[58]

*Weaker Parties, Third Parties, and Public Interests*

68. Contractual party autonomy obviously cannot be unlimited. Weaker parties, third parties and general public interests must be protected. The Principles exclude *consumer* transactions and *employment* contracts, whether

54 http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf.

55 Not in Chinese, Japanese or Korean PIL. The Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation) only permits the parties to incorporate a non-state body of law or an international convention into their contract by reference, i.e. subject to, not in lieu of, the law designated by the Regulation; cf. Recital (13), *a contrario,* contrary to an initial Commission proposal to that effect.

56 Cf. E. Finazzi Agrò, "The Impact of Unidroit Principles in International Dispute Resolution in Figures", *Uniform Law Review*, 2011, pp. 719 *et seq.*

57 *Ibid.*

58 Cf. G. Saumier and L. Gama Jr, "Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts", D.P. Fernández Arroyo & J.J. Obando Peralta (eds.), *El derecho internacional privado en los procesos de integración regional*, San José, Editorial Juridica Continental, 2011, pp. 41 *et seq*; J.L. Neels and E.A. Fredericks, "Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts" *De Jure Vol.* 44, pp. 101 *et seq.*, and, critical, R. Michaels, "Non-State Law in the Hague Principles on Choice of Law in International Contracts", *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, Kai Purnhagen & Peter Rott (eds.), Heidelberg etc., Springer, 2014, pp. 43 *et seq*.

concluded before or after a dispute arises, thus leaving the regulation of party autonomy in these matters to national or regional law.[59] States implementing the Principles remain free to exclude party autonomy in other areas.[60]

69. Regarding their application by civil courts, the Principles follow the traditional pattern of earlier Conventions such as the 1978 Hague Agency Convention:[61] courts are not prevented from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties, and they may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy of the forum[62] (cf. *supra* Nos. 26–27). They also point to the law of the forum as the reference legal system for the court's decision of whether effect may or must be given to the overriding mandatory provisions of the law of a third state (other than the *lex fori* or the otherwise applicable law (*lex causae*)) or the public policy of a state whose law would be applicable in the absence of the parties' choice of law.

70. In international arbitration, arbitral tribunals, unlike courts, do not operate as part of the judiciary of a single state's legal system[63] but in a transnational framework. Various states may be involved when it comes to giving effect, or not, to their award.[64] The Principles expressly recognise that the arbitral tribunal may be required, or allowed to take into account, the public policy or mandatory provisions of a law other than the law chosen. An obvious example is that of the laws of the state or states where the award is to be recognised and enforced.

### ii 2005 Hague Choice of Court Convention

71. In contrast to the widely ratified United Nations *Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards,* which ensures the effect of arbitral awards across borders, until recently no global equivalent for ordinary civil court judgments based on choice of court agreements was available. This clearly gave an edge to international commercial arbitration

59 Art. 1 (1).

60 Paraguay's statute of 2015 introducing the Hague Principles into its law also excludes franchising, agency and distribution contracts from its scope.

61 *Infra*, Nos. 90–91.

62 Arts. 11 (1) and (3).

63 Although from a functional perspective, courts increasingly also operate as agents of a decentralized international legal order, cf. *supra* No. 34.

64 Cf. e.g., G.B. Born, *International Arbitration: Law and Practice*, Alphen A.D. Rijn, Kluwer, 2012, Part III.

over civil court proceedings. The Hague *Convention of 30 June 2005 on Choice of Court Agreements,*[65] which on 1 October 2015 came into force on the international plane between the *EU*[66] and *Mexico*, and as of 1 October 2016 also binds *Singapore*, aims to level the playing field between these two modes of dispute resolution. The treaty thus enlarges private operators' options for the resolution of their disputes,[67] facilitates the effective planning of their commercial relationships, as well as serves the common good.

72. There are, of course, important differences between arbitration and civil court proceedings. In arbitration, the principle that parties may by contract choose a private mode of dispute resolution is well established,[68] and the main concern of the New York Convention is to give transnational effect, through the court system, to the arbitral award. In contrast, in civil court proceedings sovereignty apprehensions tend to come more to the fore. It took the pressure of early 21st century globalisation to finally overcome these sovereignty concerns, and to reach global consensus on an instrument which secures both the parties' choice of court and the recognition and enforcement of the judgment rendered by the chosen court.

73. The particulars of civil court proceedings explain the structure of the Convention. In addition to its rules on recognition and enforcement, it contains provisions on the jurisdiction both of the chosen court and of other potentially competing courts. Hence the Convention's three basic rules:

(1) if the choice of court agreement is valid, the chosen court must, in principle, accept its jurisdiction;
(2) if a party nevertheless approaches the court of another jurisdiction, then that court must, in principle, suspend or dismiss proceedings; and
(3) the judgment rendered by the chosen court must, in principle, be recognised and enforced by all Contracting States.

74. In light of the development of commercial litigation in a globalizing world economy, several novel features of the Convention are noteworthy:

65 https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court.

66 Thereby binding all EU Member States except Denmark.

67 Cf. L.E. Teitz, "The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration", *American Journal of Comparative Law*, Vol. 53, 2005, pp.543 *et seq.*

68 Under Art. II of the New York Convention, the court seized of an action in a matter in which the parties have agreed on arbitration, must in principle refer the parties to arbitration.

*Definition of Internationality*

75. Like the Hague Principles, the Choice of Court Convention applies "*in international cases*", and, "*a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*".[69]

*Exclusivity, Exclusion of Forum Non Conveniens and Lis pendens*

76. When inserting a choice of court clause in their commercial contract, parties will usually intend that choice to be exclusive, and they will want the chosen court to accept its jurisdiction.[70] But in actual practice such expectations may be frustrated. Courts may find that the clause is in fact not exclusive, or may discard it applying the doctrine of *forum non conveniens* or the *lis* (*alibi*) *pendens* rule.[71] Such interference with parties' expectations is, save in exceptional circumstances, not proper in an efficient borderless economy. The Convention provides a solution for both issues.

77. First, it stipulates that the choice of court agreement "*shall be deemed to be exclusive unless the parties have expressly provided otherwise*"[72] This rule reverses the presumption found in some jurisdictions, notably in the majority of courts in the United States, that the clause is "*permissive*" rather than exclusive unless the contrary is expressly indicated.[73] Thus an agreement designating "*the courts of China*" is regarded as exclusive for the purposes of the Convention, even though it does not specify which court in China will hear the proceedings and even though it does not explicitly exclude the jurisdiction of

69 Art. 1 (a), (b). In respect of *recognition and enforcement*, "*a case is international where recognition or enforcement of a foreign judgment is sought*", Art. 1 (c). Arts. 19 (on limiting jurisdiction) and 20 (on limiting recognition and enforcement) permit reservations restricting the effect of these broad definitions. So far, none of the Parties to the Convention have made either of these reservations.

70 Art. 22 offers Contracting States the possibility to declare that they will also recognise and enforce non-exclusive choice of court agreements, see Explanatory Report by T. Hartley & M. Dogauchi, Hague Conference on Private International Law, *A&D XXth Session, Tome III, Choice of Court*, pp. 784 *et seq*., Nos. 240 *et seq.* On non-exclusive choice of court agreements, see also M Keyes & B.A. Marshall, "Jurisdiction agreements: exclusive, optional and asymmetrical", *JPIL*, Vol. 11, 2015, pp. 345 *et seq.*

71 Cf. C. McLachlan, "*Lis pendens* in International Litigation", *Recueil des cours*, Vol. 336, 2008.

72 Art. 3 (b).

73 T. Hartley & M. Dogauchi, *op.cit,* No. 102. R.A. Brand and P.M. Herrup, *The 2005 Hague Convention on Choice of Court Agreements*, Cambridge etc., CUP, 2008, p. 17.

courts of other States. In such a case, Chinese law will be entitled to decide in which court or courts the action may be brought.

78. An agreement referring to a *particular* court in China – for example, the People's court of Xiamen – would also be exclusive. The same is true of an agreement that designates two or more specific courts in the same Contracting State – for example, "either the People's court of Xiamen or of Beijing". An agreement stating that A may sue B only in the court of Xiamen, and that B may sue A only in the courts of Beijing, would also be an exclusive choice of court agreement under the Convention because it excludes the courts of all other States. The agreement would not, however, be considered exclusive under the Convention if the two courts were in different States, e.g. either the court in Beijing or the court in Seoul.

79. Secondly, the chosen court "*shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State*".[74] And, as a counterpart, any other court, in principle, "*shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies…*".[75]

80. Under the *forum non conveniens* doctrine, mainly applied in common law countries, a court having jurisdiction has discretion to suspend or dismiss the proceedings if it finds that another court would be a more appropriate to hear the case. But this becomes problematic when a party, in defiance of its given word, seises a court different from the agreed forum.

81. This applies likewise where a party seises another court than the agreed court. The *lis pendens* rule, which is mainly applied in civil law countries, requires a court to suspend or dismiss proceedings if another court has been seised first in the proceedings. That this rule is unhelpful in the situation where the parties have made a choice of court agreement became obvious as a result of the judgment of the Court of Justice of the EU in the case of *Gasser v. MISAT*.[76] In that case, the Court of Justice gave precedence to the Italian court, first seised by the Italian party, instead of the Austrian court chosen by the parties.

82. In contrast to *Gasser*, the Convention firmly gives priority to the parties' choice. Only if the chosen decides not to hear the case may the other court assume jurisdiction.[77] This also eliminates any exorbitant ground upon which the other court might have based its jurisdiction, e.g. service of the document instituting the proceedings on a non-resident defendant during a temporary

74 Art. 5 (2).

75 T. Hartley & M. Dogauchi, *op cit.,* Nos. 127 *et seq.*

76 CJEU 9 December 2003, *Erich Gasser GmbH v MISAT Srl.,* Case C-116/02.

77 Art. 6 (e).

presence in the forum state ("*tag jurisdiction*"), or presence of property belonging to the defendant within that state.

83. The reinforcement of party autonomy by the Convention has already inspired reforms at the regional and national levels. The Brussels I Regulation (recast), which applies as from 10 January 2015, provides that priority must be given to the court of the EU member state chosen by the parties even if that court is the second seised.[78] It thus reverses *Gasser,* and establishes a regime similar to that of the Choice of Court Convention.[79]

*Determination of the Validity of the Choice of Court Agreement*

84. The Convention introduces a further innovation by providing that the court seized instead of the chosen court by a party claiming that the choice of court agreement is null or void, shall determine the validity of the agreement not according to its own law, but *in accordance with the law of the State of the chosen court.*[80] This contrasts with the New York Convention which does not specify what law must be applied to the arbitration agreement, thus leaving the court seised free to apply its own law.[81] The rule preferred by the negotiators of the Choice of Court Convention serves the global *transnational* law perspective: it requires the court seised, for its determination of the validity of the parties' agreement, to transcend the limits of its own domestic system, put itself in the shoes of the chosen court, and reason according to that chosen court's law including its choice of law rules.[82]

*Protection of Weaker Parties*

85. A choice of court imposed by a stronger party in a transnational situation may have far-reaching consequences, in terms of access to justice and costs, e.g.

78 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L351/1, 20.12.2012., Art. 32 (2)–(4). The exclusivity of the forum selection clause (see Art. 25 (1)) was already specified in previous versions of the Regulation.

79 Similarly, the new Argentinian Civil and Commercial Code, which entered into force in August 2015, confirms the exclusive character of the forum selection clause as well as the parties' freedom to conclude a choice of court agreement. Likewise, the new Brazilian Code of Civil Procedure, entered into force in March 2016, consolidates party autonomy in the matter of forum selection. Código Civil y Comercial, Arts. 2606 and 2605 Código de Processo Civil, Art. 25.

80 Art. 6 (a); T. Hartley & M. Dogauchi, *op cit.,* No. 149.

81 Cf Art. II (3) of the 1958 New York Convention.

82 The same rule applies to the recognition and enforcement of the judgment rendered by the chosen court, Art. 8 (a). This innovation has been followed in the Brussels I Regulation (recast), Art. 25 (1).

when it forces the weaker party to litigate in a remote jurisdiction with a very different legal system. At the national and regional levels, legislators and courts have intervened in varying ways to define and protect certain categories of *weaker parties*, including maintenance creditors, consumers, passengers and shippers of goods, workers and policy holders, in their relations with maintenance debtors, professionals, employers, carriers, and insurers.

86. In view of this variety of approaches, the Convention might have dealt with the issue by inserting a rule like: "*The agreement on the choice of court shall be void or voidable if it has been obtained by an abuse of economic power of other unfair means*".[83] But this clearly would have detracted from the predictability which is the central objective of the instrument. Instead, a consensus emerged to expressly exclude choice of court agreements relating to *consumer* transactions and *employment* contracts (including collective bargains) – even where such agreements are concluded after the dispute has arisen – as well as a number of other matters such as maintenance obligations and the carriage of passengers and goods.[84]

87. As a result, the regulation of choice of court agreements concerning these excluded types of agreements and matters is left to national or regional law. For example, the Brussels I Regulation (recast) provides specific rules restricting choice of court agreements concerning consumer contracts and individual contracts of employment. In addition, it restricts choice of court agreements relating to insurance contracts.[85] Since the latter are in principle covered by the Choice of Court Convention, the EU upon approving the Convention made use of the possibility[86] to exclude matters relating to insurance contracts where the policyholder is domiciled in the EU and the risk or insured event, item or property is related exclusively to the EU.[87]

*Impact of the Convention in the Asia-Pacific Region*

88. As mentioned, *Singapore* has already ratified the Convention. The *Trans-Tasman Proceedings Arrangement* between Australia and New Zealand, which entered into force in 2013, is inspired by the Convention, and should pave the

83 Hague *Convention of 25 November 1965 on the Choice of Court* (not entered into force), Art. 4 (3).

84 Arts. 2 (1) and (2) (b) and (f).

85 Art. 15.

86 Offered by Art. 21 of the Convention.

87 The declaration has reciprocal effect, so that other Contracting States will not be required to apply the Convention to such contracts where the chosen court is located within the European Union.

way for ratification at a later stage by these two countries, as proposed by a recent Australian government study, which, interestingly, also suggests implementing the 2015 Hague Principles in the same statute.[88] And the Convention's potential is further illustrated by a bilateral agreement between Hong Kong and mainland China, which has also been inspired by the Convention, the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned*.

*The Ongoing "Hague Judgments Project"*

89. The Choice of Court Convention is a first step in what has become known as the "Hague Judgments Project". Following the Convention's completion in 2005, work has continued on judgments that are not based on exclusive choice of court agreements, and a Special Commission is in the process of preparing a draft for a Convention on the recognition and enforcement of judgments in civil or commercial matters.[89] The draft limits itself to the cross-border effect of judgments, and it remains to be seen whether in a later stage consensus could be achieved around direct grounds of jurisdiction.[90]

### iii Hague Conventions on Specific Contracts: International Sales and Agency

90. With regard to freedom to select the applicable law, a number of Hague Conventions implement this principle for specific international commercial contracts: for sales, the 1955 Convention on the Law Applicable to the International Sale of Goods,[91] which was revised by the *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods,*[92] and in respect of agency the *Convention of 14 March 1978 on the Law Applicable to Agency.*[93] Although the 1986 Sales Convention has not entered into force on the international plane, it has had an impact on domestic private international law legislation, including in *Canada* (*Quebec*) and *China.*

88 *Supra* No. 61, fn.

89 Accessible at https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafdbb.pdf.

90 Cf. R.A. Brand, "Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments", *Recueil des cours*, Vol. 358, 2014.

91 *Convention du 15 juin 1955 sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels*, https://www.hcch.net/en/instruments/conventions/full-text/?cid=31.

92 https://www.hcch.net/en/instruments/conventions/full-text/?cid=61.

93 https://www.hcch.net/en/instruments/conventions/full-text/?cid=89.

91. In contrast with the Principles, these Conventions also deal situations where the parties have *not* designated the applicable law.[94] For example, the 1986 Hague Sales Convention stipulates:

*Article 7* (*1*) A *contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.*

(*2*) *The parties may at any time agree to subject the contract in whole or in part to a law other than that which previously governed it, whether or not the law previously governing the contract was chosen by the parties. Any change by the parties of the applicable law made after the conclusion of the contract does not prejudice its formal validity or the rights of third parties.*

*Article 8* (*1*) *To the extent that the law applicable to a contract of sale has not been chosen by the parties in accordance with Article 7, the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract.*

(*2*) *However, the contract is governed by the law of the State where the buyer has his place of business at the time of conclusion of the contract, if –*

a) *negotiations were conducted, and the contract concluded by and in the presence of the parties, in that State; or*
b) *the contract provides expressly that the seller must perform his obligation to deliver the goods in that State; or*
c) *the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid* (*a call for tenders*)

(*3*) *By way of exception, where, in the light of the circumstances as a whole, for instance any business relations between the parties, the contract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law.*

....

94 1955 Hague Sales Convention, Article 3; 1978 Hague Agency Convention, Article 6 (regarding the relations between the principal and the agent) and Article 11 (regarding the relations between the principal and the third party).

Interestingly, 8 (2) (b) was proposed by China, and 8 (2) (c) by India (Article 8 (2) a) was the result of an Algerian proposal).

### iv 1985 Hague Trusts Convention

92. The Hague *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*[95] provides choice of law rules for trusts and ensures their recognition in countries which do not have the trust as a legal device. Trusts are widely used in common law countries, and increasingly also in legal relationships involving civil law countries, for a variety of purposes. Under a trust, assets are placed under the control of a trustee for the benefit of a beneficiary (or for a specified purpose). The trust assets are not part of the trustee's own assets but constitute a separate fund, and the trustee has the powers and duty, for which he or she is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the applicable law.

93. The trust is governed by the law chosen by the trustee, and if no applicable law has been chosen by the law with which it is most closely connected, for which the Convention provides some indicators. The Convention also provides a list of effects which a state Party to the Convention – in particular a state whose law does not have the trust – must recognise as a minimum; on the other hand, it protects such states against undue infringements on their legal system.

94. The Convention is relevant to the Asia Pacific region, as family and investment trusts in particular are often used for business purposes, both in countries with a common law and a civil law background.[96] Currently, the Convention applies in *Hong Kong SAR*. Other states Parties include *Australia, Canada, the United Kingdom,* and several other European countries, including *Italy, Switzerland, Luxembourg,* and *the Netherlands*. It has been signed but not yet ratified by the United States.

### v 2006 Hague Securities Convention

95. The Hague *Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities*[97] provides choice of law rules for securities held with an intermediary. Most securities today are held for investors by

95 https://www.hcch.net/en/instruments/conventions/full-text/?cid=59. Cf. D. Hayton, "Reflections on The Hague Trusts Convention after 30 years", *Journal of Private International Law*, Vol. 12, 2016, pp. 1 *et seq*.

96 Cf. A. Reyes, "ASEAN and The Hague Conventions", *Asia Pacific Law Review*, Vol. 22 No. 1, pp. 25 *et seq*. (pp. 40–41).

97 https://www.hcch.net/en/instruments/conventions/full-text/?cid=72.

financial intermediaries. The great majority of actively traded securities do not exist in physical (paper) form, but as electronic book-entry debits and credits, much like money in the bank. Shares, bonds and other securities are now transferred 24 hours a day electronically from one security account to another. The financial market has become the prime example of a true global marketplace.

96. In each country there will be a Central Security Depositary which maintains security accounts for financial institutions, which in turn maintain securities accounts for their customers, e.g., institutional investors, and so forth until an intermediary maintains a securities account for an ultimate investor.

97. Against this background the traditional law of the place of the location of the securities, the *lex rei sitae*, is no longer suitable to determine the applicable law. And yet, at critical moments, e.g., in the case of imminent insolvency, certainty regarding the applicable legal regime is essential. The Convention provides this certainty by determining the law applicable to issues such as the legal nature and effects against the intermediary as well as third parties of rights resulting from a credit of securities to a securities account, or of a disposition of securities held with an intermediary. The basic rule is that this law is, in simplified terms, the law of the state expressly agreed in the account agreement, provided that the relevant financial intermediary has an office in that state.

98. An example may illustrate how the Convention operates. Let us assume that a Japanese financial institution wants to invest in an Australian company, but demands a security interest as collateral. The Australian company has an interest in an Illinois company that it could pledge to the Japanese investor. But the transfer of that security will pass through the whole chain of intermediaries, in different countries. Theoretically, in order to know if the ultimate Japanese investor, has received an interest that will prevail over the interests of third parties, including the interests of the liquidator should the Australian company enter insolvency, one would have to check all the transfers in between, which may involve many different countries and legal systems. In fact that is impossible. The Securities Convention therefore provides that the law determining whether the ultimate investor, the Japanese investor, has acquired an effective title is the law that governs the account agreement as expressly agreed by the Japanese investor with its bank. That makes it possible to ignore the intermediate steps.

99. The Convention is in force for Mauritius, Switzerland, and the United States. Joining the Convention "*would be in keeping with the goal of promoting*

*freer capital within the Asian Economic Community and establishing exchange and debt market linkages, including cross-border capital raising activities*".[98]

### vi Hague Conventions on Torts: Traffic Accidents and Products Liability

100. Two Hague Conventions deal with two specific forms of torts: traffic accidents and products liability. The Hague *Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*[99] determines the applicable law to questions of liability and damages in the case of an international traffic accident. This is important in Europe, with many small countries and intensive international traffic of cars, but may be less relevant to the Asia-Pacific region.

101. More pertinent to the region is the Hague *Convention of 2 October 1973 on the Law Applicable to Products Liability.*[100] Imagine a manufacturer in China who produces goods, e.g., fruits or vegetables, brings them on the market in Singapore, where they are sold to a buyer, living in Jakarta, who then takes the products to Indonesia, where they cause injury, for example because the fruits or vegetables contain traces of poisonous insecticide. Which law should govern the liability of the producer – the law of China, Singapore or Indonesia? Each of these laws may define the basis and extent of liability, the kinds of damage, the form extent of compensation etc., in different terms.

102. The wrongful act took place in China, so arguably Chinese law should apply to the consequences, the liability and the damage. But one could also reason that the products were acquired in Singapore, so the law of Singapore should apply – which, it seems, would be the result according to Japanese private international law (Art.18). Finally one may find that since the damage was suffered in Indonesia, Indonesian law should apply – this would seem to be the solution of Chinese private international law (Art.45). There is something to be said for each of these three solutions. Yet, it is clearly unsatisfactory that, depending on which of the eligible private international law systems applies, the outcome will be different. Therefore, a regional, and preferably, global unified regime is to be preferred.

103. The Products Liability Convention recognises that multiple connecting factors may be relevant in determining the applicable law. It therefore requires that *at least two* important contacts be located in a state before that state's law can be selected as the applicable law:

98 A. Reyes, *op. cit.*, p. 41.

99 https://www.hcch.net/en/instruments/conventions/full-text/?cid=81.

100 https://www.hcch.net/en/instruments/conventions/full-text/?cid=84.

*Article 4: The applicable law shall be the internal law of the State of the place of injury, if that State is also –*

a) *the place of the habitual residence of the person directly suffering damage, or*
b) *the principal place of business of the person claimed to be liable, or*
c) *the place where the product was acquired by the person directly suffering damage.*

*Article 5:* [*However,*] *the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage if that State is also –*

a) *the principal place of business of the person claimed to be liable, or*
b) *the place where product was acquired by the person directly suffering damage.*[101]

*Article 7: Neither* [*of these two laws applies*] *if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in* [*either*] *State through commercial channels.*

104. In our example, Article 4 would apply, designating Indonesian law since both the place of injury and the habitual residence of the damaged person are located in Indonesia. And since the producer could reasonably foresee that the products would be made available in Indonesia, Article 7 will not change the outcome.

## 5 Hague Conventions Promoting Administrative and Judicial Cooperation

### a *1961 Hague Apostille Convention*

105. The Hague *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents,*[102] or "Apostille Convention", is a basic instrument that supports cross-border contacts, private and business

101 Art. 6 provides that "[*w*]*here neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury".*

102 https://www.hcch.net/en/instruments/conventions/full-text/?cid=41 See also the Apostille section on the Hague Conference website, https://www.hcch.net/en/instruments/conventions/specialised-sections/apostille.

relationships of all kinds. The Convention facilitates the circulation across borders of public documents, such as birth, marriage, and death certificates, judgments and other court documents, patent certificates, and notarial acts.

106. When public documents started crossing borders in sizable numbers in the early 19th century, foreign consuls became involved in certifying the origin of these documents. The reasons for this ranged from lack of familiarity with the foreign legal system to fears of forgery. Consuls as intermediaries could give assurances that the public document was authentic. That was the beginning of what is now called legalisation: the formality by which the consul in the country of origin of the document who represents the country in which a public document has to be produced certifies that the signature of the person signing the document is authentic, that he or she had the capacity to sign, and that any seal or stamp is indeed the seal or stamp of this or that ministry etc. In the course of time legalisation became quite a lengthy process in some countries, and turned into a chain of authentications.[103]

107. The Hague Apostille Convention cuts through this red tape, by replacing the legalisation formality, the chain of authentications, by one simple formality: a simple certificate, the *apostille*. The apostille is posed or attached to the public document by a competent authority designated by each state Party, and it is this apostille that certifies the authenticity of the signature, the capacity of the person who has issued the documents, and of any seal or stamp in all states Parties. This simple device thus considerably reduces transaction costs.

108. *Authenticity* of a document must be distinguished from its *content*. Authenticity means that the document is what it purports to be, that it has not been tampered with or corrupted, that the birth or patent certificate in question has really been issued by such and such state authority. If a certificate contains a mistake, e.g. a wrong birth date or a wrong description of the invention, the certificate is still authentic – it is an official public document – although the *content* is not true. Administrations, courts, and arbitral tribunals may still have to assess whether what is stated in the document is true and whether the document is admissible as proof.

103 E.g., a local civil registry would authenticate the public document. Next, this authentication would be confirmed by the Ministry of Justice, and then by the Ministry of Foreign Affairs of the state of origin. Subsequently, it would be authenticated by the consul of the foreign state in which the document was to be produced, whose authentication would then have to be confirmed by its Ministry of Foreign Affairs. In the US, a notary's signature and seal would have to be certified by a county clerk; the county clerk's signature by the secretary of state's office of the state of the county; the secretary of state's certificate by the US Department of State; and the US Department of State's authentication would have to be legalized by the foreign consul, etc.

109. Jointly with the American National Notary Association, the Hague Conference has improved the practical operation of the Convention – without modifying its text – through the "e-APP program", which consists of two innovations: the electronic register and the electronic apostille.

110. The electronic register replaces the traditional card system maintained by the competent authorities, and which, in fact, was rarely used. The e-register enables recipients of documents bearing apostilles wherever they are, to search the register online to check whether or not the apostille has been issued by the competent authority, and – depending on the degree of sophistication of the e-register – to verify further details of the apostille and/or underlying public document.

111. The electronic apostille goes a step further. Increasingly, public documents, including civil registry documents, are in electronic form. So, applying a paper apostille certificate is no longer possible. The electronic apostille is issued in electronic format with the electronic signature of an officer of the issuing competent authority, to a scanned version of the relevant document.

112. The Hague Conference has published several tools to facilitate the implementation and application of the Convention, including "The ABC's of Apostilles" and an "Apostille Handbook". The Convention has attracted more than 110 states Parties. In the Asia Pacific region *Australia, Bahrain, Brunei Darussalam, China* (*Hong Kong and Macao SAR only*), *India, Japan, the Republic of Korea, Kyrgyzstan, Mauritius, Mongolia, New Zealand, Oman, Seychelles, Tajikistan, Uzbekistan,* as well as *Cook Islands, Marshall Islands, Niue, Samoa, Tonga and Vanuatu* are Parties. In its 2010 report "*Investing Across Borders*", the World Bank recognised the value of the Apostille Convention for foreign investors when they start up their business in a foreign country.

### b *1965 Hague Service Convention*

113. Just as consuls and diplomatic officials were called upon to authenticate public documents for their production in a foreign country, they would act as intermediaries in cross-border civil litigation. Their role as such was prominent in the 1896 the Hague Convention on civil procedure, which underwent small revisions in 1905 and again in 1954. These Conventions essentially covered four topics of cross-border assistance in procedural matters: (1) service of documents abroad, (2) taking of evidence abroad, (3) dispensation of nationals of states Parties from the obligation to pay security for costs, and (4) free legal aid for such nationals.

114. Starting in the 1960's, Hague Conference undertook a revision of this system. The 1954 Convention on Civil Procedure[104] – which is still popular, and

104 *Convention du premier mars 1954 relative à la procédure civile*, English translation at https://www.hcch.net/en/instruments/conventions/full-text/?cid=33.

was recently acceded to by Mongolia – was replaced in three stages by three new Conventions: on Service of Documents abroad (1965), on the Taking of Evidence abroad (1970), and on Access to Justice (1980) – the latter covers both security for costs and legal aid.

115. A common feature of all three Conventions is that the consular (and diplomatic) channel has been replaced by a more direct method of transmission. Under each of these Conventions, states must designate a *Central Authority*, as the focal point for receiving communications from other states Parties, and, as the case may be, for the forwarding of communications abroad. Generally, the Ministries of Foreign Affairs or Justice are designated as Central Authorities.

116. The Hague *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*[105] deals with the service of process across international borders in civil and commercial – but not in criminal – matters. The Convention makes it possible, in particular, for a plaintiff in one Contracting State to give notice of judicial proceedings, through the Central Authority channel, to a defendant in another Contracting State.

117. The laws on civil procedure of many legal systems provide specific rules for the service of documents abroad. But these rules differ, and this leads to practical issues. Notorious are the problems resulting from fictitious service of a defendant (e.g. through publication on the notice board of the court seized) in international cases. A judgment rendered on that basis is unlikely to be recognised and enforced in the defendant's state. Furthermore, service providers have competence to act only in their own jurisdiction. So, there is a need both for coordination and for cross-border assistance to ensure that service abroad is actually effective.

118. The purpose of the Convention is to make this coordination of procedures possible and to provide the necessary cross-border assistance. The three main features of the Convention are:

– Simplification and efficiency: instead of consular and diplomatic channels, the Convention uses Central Authorities as its main channel of transmission of documents and they also ensure the service of the documents (Articles 2–7). In addition, several alternative methods for transmission and service are provided for, e.g., direct cross-border communication between process servers and postal channels (Articles 8–10).

105 https://www.hcch.net/en/instruments/conventions/full-text/?cid=17. See also the Service section on the Hague Conference website, https://www.hcch.net/en/instruments/conventions/specialised-sections/service.

– Actual notice: the Convention provides that where a writ of summons had to be transmitted abroad and the defendant has not appeared, no judgment shall be given until it is established that the document has been served by a method prescribed by the internal law of the requested foreign state, or was actually delivered to the defendant or his or her residence, and in sufficient time to enable the defendant to defend. The plaintiff's interest in seeing the procedures progressing is also protected. But even if judgment has been given in a case where the defendant has not appeared, and the time for appeal has expired, the judge may relieve the defendant from the effects of the expiration of the time for appeal under certain conditions (Articles 15–16).
– Proof of service: execution of the request for service is certified by means of a standard certificate, which is completed by the Central Authority of the requested foreign state (Article 6).

119. The Convention deals with service of judicial or extrajudicial documents (such as demands for payments, protests with respect to bills of exchange, consents to adoptions or recognitions of paternity). It deals with service only: service of a document under the Convention does not imply any obligation to recognise or enforce the resulting judgment. Therefore, the Convention does not contain a public policy exception (cf. *supra* Nos. 26–27), and allows the requested State to refuse to comply with the request only if it deems that compliance would infringe its sovereignty or security.

120. The Service Convention gave rise to the first Hague Conference meeting to review the practical operation of a Hague Convention in 1977, where the Central Authorities and other actors would discuss how the instrument was applied and how its application could be improved. The success of this meeting prompted the Conference to extend the idea of review meetings to other Hague Conventions, and since the 1993 Hague Adoption Convention[106] a provision to the effect that the Conference "*shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention*" has been a standard clause in Hague Conventions. This, in turn, has led to the development of a wide range of supporting tools. In the case of the Service Convention, these include a "*Practical Handbook on the Operation of the Service Convention*"[107] Over 70 states in the world are Parties to the Convention,

106 Cf. *Infra*, Nos. 170–174.

107 3d edition, available in paper and e-book format, https://www.hcch.net/en/publications-and-studies/details4/?pid=2728.

including in the Asia-Pacific region: *Australia, China, India, Japan, Kazakhstan, Republic of Korea, Kuwait, Pakistan, Seychelles, Sri Lanka,* and *Vietnam*.

### c *1971 Hague Evidence Convention*

121. Like the Service Convention, the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*[108] provides for coordination of different systems of taking of evidence, and for assistance across borders. It establishes two main methods of taking of evidence abroad: through requests for assistance addressed to foreign courts, and through diplomatic officers, consuls and commissioners.

122. Under Chapter 1, each Contracting State designates a Central Authority which receives Letters of Request directly from the courts of another Contracting State, thus bypassing diplomatic and consular channels. In principle, the court of the request*ed* State which executes the request applies its own law. But the court of the request*ing* State may ask that court to execute the request in a special manner.

123. An example, regarding the hearing of witnesses, will illustrate how this may work. In common law systems, the witness' statement will be recorded in full, read to him or her, and then signed by the witness. In civil law systems, the judge will question the witness and dictate a summary of the questions and answers. In the common law, cross-examination of witnesses is possible, not in civil law systems. Yet, thanks to the Convention, in Germany and France the common law methods have been applied at the request of American courts, and France has even amended its legislation to make this possible. Conversely, German judges have appeared in New York court rooms and have interrogated witnesses according to the German system.

124. Very importantly, the Convention provides that the same *measures of coercion* available to force a witness to testify in internal law shall be available for requests made under the Convention. Interesting also is the coordination of the application of rules on *privileges*. Different legal systems have different rules regarding privileges of witnesses, who may excuse themselves from giving evidence, or duties to refuse to give the evidence. Under the Convention, a witness may refuse to give evidence when he or she has that privilege either under the law of the state of execution or under the law of the state of origin. The 1980 Access to Justice Convention deals with the *immunity* of witnesses and experts (cf. *infra* Nos. 128, 132).

108 https://www.hcch.net/en/instruments/conventions/full-text/?cid=82. See also the Evidence section on the Hague Conference website, https://www.hcch.net/en/instruments/conventions/specialised-sections/evidence.

125. The Convention has a special provision dealing with *pre-trial discovery of documents*. Pretrial discovery of documents is a method developed in common law systems of civil procedure. It may be used after the complaint has been filed to obtain access to documents, as a means to secure that all the facts are known before trial. In the United States this technique is widely used to avoid that attorneys withhold key evidence until the day of the trial and then surprise the other party, and to promote settlements by giving parties a basis to assess the case of their adversaries. The courts have a significant role in controlling the process. But in other common law countries, e.g., the United Kingdom, the scope of the method's reach is more limited, and it was at the United Kingdom's proposal that Article 23 was included in the Convention. The formulation of Article 23, however, is not quite adequate, and states sharing the concerns of the United Kingdom should follow the more precise declaration made by this country upon ratification of the Convention.[109]

126. Chapter 2 makes provision for the taking of evidence by diplomats or consuls and by commissioners. Some countries, e.g. Mexico, quite often use consuls for the taking of evidence from Mexican nationals in the United States. In the common law, the court may appoint a person, often a lawyer, as a commissioner, who may then take evidence in another country. The Convention makes special provision for this, but, unlike the procedure when the normal Central Authority channel is used, this method as a rule does not provide for measures of compulsion: the commissioner has to make his own arrangements for the witness to appear.

127. The practical application of the Convention is facilitated by a *Practical Handbook on the Operation of the Evidence Convention.*[110] Over 60 states in the world have joined the Evidence Convention, including in the Asia-Pacific Region: *Australia, China, India, Kazakhstan, Republic of Korea, Kuwait, Seychelles,*

109 According to this Declaration, the United Kingdom understands "*Letters of Request issued for the purpose of obtaining pre-trial discovery of documents … as including any Letter of Request which requires a person: a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power*". (emphasis supplied)

In this way the United Kingdom excluded not all requests for the discovery of documents, but only those that amount to so called "fishing expeditions". Many other Contracting States have followed the example of the United Kingdom.

110 3d edition, available in paper and e-book format, https://www.hcch.net/en/publications-and-studies/details4/?pid=2728.

*Singapore* and *Sri Lanka* (most, but not all, also are Parties to the Service Convention).

### d *1980 Access to Justice Convention*

128. The Hague *Convention of 25 October 1980 on International Access to Justice*[111] facilitates cross-border *access to legal aid* and to court proceedings *without advance deposit of security* for costs. In addition, it deals with *copies of entries and decisions*, and with *physical detention and safe-conduct for witnesses and experts*. It basically provides for non-discrimination and for assistance to all persons who are nationals of, or habitually resident in states Parties.

129. In respect of *legal aid*, the Convention guarantees in its Chapter 1 that all nationals of states Parties, as well as all those who have their habitual residence in a state Party, are entitled to the same benefits as nationals habitually resident in a state Party. Similarly, they are entitled to legal advice, but only if they are present in the State where advice is sought. Foreigners living abroad may address a request for legal aid through a Central Authority channel. Once legal aid is given, it also extends to the recognition and enforcement of any decision obtained.

130. Regarding *security for costs*, many legal systems require foreign plaintiffs to deposit a certain sum of money before they may appear in proceedings to guarantee that the defendant will be paid his costs and expenses if the plaintiff loses the case, and that the court fees will be paid. The Convention in its Chapter 2 exempts foreigners, whether physical or legal persons, from this obligation if they are nationals of or habitually resident in another state Party.

131. How then can the defendant be sure that he will recover his costs if the plaintiff loses the proceedings? Here the Convention provides an ingenious mechanism: the order for payment of costs may be rendered enforceable without charge in the state where the plaintiff resides. Moreover the defendant may send an application for the enforcement of the order through a Central Authority channel.

132. Chapter 3 enables persons who are nationals of or habitually resident in a state Party to obtain *copies of public documents* on the same conditions as nationals and, under Chapter 4 these persons are, under the same conditions, exempt from arrest or detention, and they are entitled to *immunity* from restrictions on their personal liberty if they are called to appear as a *witness or expert* in court proceedings.

111 https://www.hcch.net/en/instruments/conventions/full-text/?cid=91.

133. The Convention was initially mostly ratified by European states. Recently it has been ratified by *Brazil* (2012), *Costa Rica* (2016) and *Kazakhstan* (2015). Together, the Apostille, Service, Evidence and Access to Justice Conventions constitute a package of instruments facilitating administrative and judicial cooperation for both commercial and personal and family matters essential in a globalising world economy and society. This certainly also applies in regional settings, and economic integration in Asia, including ASEAN, would significantly benefit joining these four Hague Conventions.

## 6 Hague Conventions Promoting Personal Security and Protecting Families in Cross Border Situations

### a *The Global Framework for the Protection of Private and Human Rights in Cross-border Situations*

134. The Hague Conference has a long tradition, going back to its very beginnings in the late 19th century, of ensuring stability and protection of persons and families in cross-border situations through multilateral treaties. As we saw, the first generation of Hague Conventions included instruments on the law applicable to marriage and to the effects of marriage on the personal and marital property relations of the spouses, on jurisdiction and applicable law in respect of divorce, on guardianship of minors, and of adults (*supra* No. 15). Following the Second World War, all of these treaties were reviewed and replaced by new Conventions. In addition, instruments were developed on maintenance obligations, on adoption of children, on child abduction, and in the field of succession, trusts, and wills.

135. While the first generation of treaties was negotiated in relative isolation, negotiations on the post-Second World War Conventions took place against the backdrop of a growing body of global and regional instruments also dealing with private rights or rights of mixed private and public character of persons and families, in particular human rights treaties. This has led to increasing interaction between such instruments, in so far as they apply to cross-border situations, and modern Hague Conventions. This is especially true for the successful four modern Hague Children's Conventions: the 1980 Child Abduction, 1993 Adoption, 1996 Protection of Children and 2007 Child and Family Support Conventions. A few brief remarks on this larger framework for the protection of private rights are therefore in order.

136. International law has long protected private rights in cross-border situations, in particular foreigner's property and due process. Traditionally, however, this protection was given not directly to the foreigner but to his state.

More recently, investment treaties have created the possibility for foreigners to invoke themselves the rights they have under investment treaties. Economic frameworks such as that of the WTO may also have a general effect, even within countries, to enhance the protection of private rights (cf. *supra* No. 32).

137. A new era in the protection of private rights started with the adoption by the United Nations of the *Universal Declaration of Human Rights*[112] in 1948, the basis for all the post-second World War work on human rights. Although not a binding instrument, it carries great authority, as "*a common standard of achievement for all peoples and all nations*". The Universal Declaration lays great emphasis on human dignity, the inherent dignity of human beings, both in its Preamble:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world

and in its Article 1:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood

138. Dignity is an important notion, because it transcends the distinction between civil and political, and social, economic and cultural rights, and because, unlike freedom, or equality, it is not subject to limitations. It is absolute, and the foundation of the prohibition of inhumane treatment. The word "dignity" was introduced in the Preamble and Article 1 with the express support of the Chinese experts, and so was the notion of brotherhood. Also, the word "conscience" was added to "reason" at the request of the Chinese experts.[113]

139. The Universal Declaration then goes on to define a number of rights, such as the right to equal and fair trial, the right not to be subjected to interference with one's private or family life, the right to marry, to property, and to special protection of mothers and children. No specific attention is given to cross-border situations: the human rights are framed *in terms of rights vis-à-vis a single state*. However, Article 28 provides:

112 http://www.un.org/en/universal-declaration-human-rights/.

113 Cf. P.-E. Will, "The Chinese Contribution to the Universal Declaration of Human Rights", M. Delbas-Marty & P.E. Will (eds.), *China, Democracy and Law*, Leiden etc. 2012, pp. 299 *et seq.*

> Everyone is entitled to a social an international order in which the rights and freedoms set forth in this Declaration can be fully realized

Arguably, this implies that the international order should be configured such that everyone is afforded legal certainty across borders in respect of their rights, thus permitting the full realization of the rights and freedoms set forth in the Declaration.

140. All of these human rights, with the exception of the right to property on which no consensus could be reached during the Cold War period, have been further elaborated, and turned into binding obligations in the two Covenants on Human Rights of 1966, on Civil and Political Rights,[114] and on Economic, Social and Cultural Rights[115] and in the 1989 Convention on the Rights of the Child.[116]

141. Like the Universal Declaration, the Covenants, which also predate contemporary globalisation (cf. *supra* Nos. 30–35) do not give specific attention to the protection of human rights in cross-border situations. Yet, it is not difficult to see how, e.g., in relation to the right to marry as guaranteed by the Covenant on Civil and Political Rights, a number of Hague Conventions may provide additional protection and certainty in cross border situations:

142. According to Article 23 the Covenant on Civil and Political Rights (which builds on Article 16 of the Universal Declaration):

1. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
2. *The right of men and women of marriageable age to marry and to found a family shall be recognized.*
3. *No marriage shall be entered into without the free and full consent of the intending spouses.*
4. *States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

143. So the the right to marriage is recognised, but the Article does *not* deal with the *international* aspects of marriage and its effects, and leaves unanswered questions such as:

114 http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

115 http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

116 For the current status of signatures, ratifications etc. of these and other UN human rights instruments, see http://indicators.ohchr.org.

(1) What law or what laws should be applied to determine whether a foreigner has the capacity to marry? Is the validity of a marriage, validly concluded in country A, recognised in country B? Are there any generally accepted grounds of refusal of such recognition? The 1978 Hague Marriage Convention deals with these questions, *infra* Nos. 147–153.

(2) What law applies to the marital property relations of the spouses in international situations; do they have the option of choosing the applicable law? And it they move to another country, are they free to change the applicable law, and how? The 1978 Hague Matrimonial Property Convention[117] provides detailed rules on the law applicable to matrimonial property regimes, including the right of spouses to choose the applicable law before marriage, and their right to change that law during marriage.

(3) What law applies to any maintenance obligations of the spouses towards each other or the children during and after marriage, and how can maintenance creditors' rights be enforced across borders? The 2007 Hague Convention on Child and Family Support provides effective machinery for applications for child and spousal support in cross border situations – during and after marriage – and for the recognition and enforcement of any maintenance orders abroad, and the 2007 Protocol provides rules on applicable law. Cf. *infra* Nos. 175–178.

(4) When measures of protection of the children must be taken after – or in exceptional cases during – marriage, which country's authorities have jurisdiction in an international situation to order such measures? What law applies to these measures? Will they be recognised and enforced abroad? What if one of the parents wrongfully removes or retains a child? The 1996 Hague Convention on the Protection of Children provides a very complete framework for these questions, and the 1980 Hague Child Abduction offers specific machinery for the return of children after wrongful parental removal or retention of children, and for rights of access. Cf. *infra* Nos. 166–169; 158–165.

(5) What protection is given to spouses in relation to their divorce in international situations? And will a divorce granted in country A be recognised in country B? Clearly, Article 23 of the Covenant does not establish a right to divorce. But it is important for people's legal security to know that their divorce will – or in some cases will not – be recognised abroad, e.g. if they wish to re-marry with another person. The 1970 Hague Divorce

117 *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes,* https://www.hcch.net/en/instruments/conventions/full-text/?cid=87.

Convention deals with the recognition abroad of divorces and separations. Cf. *infra* Nos. 154–157.

144. In contrast to the Covenants, the *1989 United Nations Convention on the Rights of the Child*[118] in several of its articles *does* give attention to *cross-border* aspects. The interaction between this instrument and several Hague Conventions will be discussed in more detail below, Nos. 158–178. Only a few global human rights instruments *specifically* address *cross-border* legal issues. So do the UN *Convention of 28 July 1951 relating to the Status of Refugees,*[119] and its 1967 Protocol,[120] and the 1990 UN *Convention of 18 December 1990 on the Protection of the Rights of All Migrant Workers and Members of their Families* (cf. *supra* No. 53).[121]

145. The Refugee Convention, in its Chapter 2, Juridical Status, includes specific provisions on private international law. Article 12 provides that the personal status of refugees is governed, not by the law of the state of their nationality – the country from which they have fled, and whose laws may adversely affect them – but of the state of their domicile or residence. During the negotiations of the 1989 Hague Successions Convention,[122] the 1993 Hague Adoption Convention, the 1996 Hague Protection of Children and 2000 Hague Protection of Adults Convention,[123] specific attention was given to refugee situations. With the support of UNHCR, a recommendation was adopted on the application of the Adoption Convention in refugee situations, and following a joint mission of UNHCR, UNICEF and the Hague Conference, special provision was made for "refugee children and children who, due to disturbances occurring in their country, are internationally displaced" in the 1996 and 2000 Conventions, cf. *infra* No. 168, under (1).

146. The Migrants Convention gives broad protection to migrant workers – both permanent and temporary, including seasonal and project-tied workers, and to regular as well as irregular migrants – and their families, including access to justice, respect for family life, and safeguards against expulsion. Unlike

118 http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

119 http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx.

120 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en.

121 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en.

122 *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons,* https://www.hcch.net/en/instruments/conventions/full-text/?cid=62.

123 *Convention of 13 January 2000 on the International Protection of Adults*, https://www.hcch.net/en/instruments/conventions/full-text/?cid=71.

many Hague Conventions, it does not, however, provide cooperative machinery to organize the migration of workers, in particular temporary and circular migration, nor does it subject intermediaries to a system of licensing and supervision, or facilitate the easy and inexpensive transfer of remittances.

### b *Hague Conventions on Marriage and Divorce*

#### i 1978 Hague Marriage Convention

147. The Hague *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*[124] facilitates the celebration of marriages, and ensures the recognition of their validity across borders.

148. Chapter 1 of the Convention, on *Celebration*, makes the law of the place of celebration, the *lex loci celebrationis*, the primary reference. This applies first of all to the *formal* requirements for the marriage: formalities, witnesses, etc.[125] This is hardly surprising, because this is one of the few questions of choice of law on which most systems of private international law agree. But the law of the place of celebration also applies to the *substantive* requirements of the marriage.[126]

149. This has three major advantages:

(1) local authorities can apply the requirements of their own law in respect of consent of the parties or age and degree of prohibited relationship (*e.g.,* uncle and niece), and not the requirements of the law of the domicile, nationality or community of foreign marriage candidates; (2) it avoids characterisation problems, for example, the problem of determining whether a parent's consent is a matter of form or of substance, because the applicable laws will coincide; and (3) it allows unusual or oppressive requirements of a foreign law (*e.g.*, any requirements based on race or colour) to be ignored.

150. While Chapter 1 of the Convention (Celebration), is optional and may be excluded, Chapter 2, in contrast, is mandatory. The question of the recognition of the validity of marriages is critical in an age of exponential growth of mobility. The basic rule of the Convention is a simple one: the state of celebration – *any* state, not just another *Contracting* state – determines the validity of the marriage, and the states Parties are bound, subject to a limited number of exceptions and to the mandates of their *ordre public*, to recognise the validity

124 https://www.hcch.net/en/instruments/conventions/full-text/?cid=88.

125 Art. 2.

126 Art. 3 (1) This is in accordance with the approach some countries, in particular immigration countries, have taken, but is new to many countries of the civil law, and some of the common law tradition, which tend to apply the personal law of each future spouse to determine the substantive requirements of the marriage.

of the marriage if valid according to the law of the state of celebration.[127] This has the great advantage of *avoiding the need to review the applicable law* under the conflict of laws rules of the recognising state.[128]

151. A limited number of exceptions are allowed: a state Party may refuse to recognise the validity of a marriage where at the time of the marriage under the law of the requested state, (1) one of the spouses was already married; or (2) the spouses were related to one another, in the direct line or as brother and sister; or (3) one of the spouses had not attained the minimum age required for marriage; or (4) if one of the spouses lacked the capacity to give their consent or (5) did not freely consent to the marriage. In addition, *ordre public* may be invoked by the requested state, for example, when in a concrete case the marriage certificate, or the underlying marriage itself, is a fake or is otherwise fraudulent.[129] So, while the Convention favours the recognition of marriages, it avoids the possibility of resorting to "marriage heavens".

152. Despite its forward looking approach, the only state in the Asia Pacific region where the Hague Marriage Convention currently applies is *Australia*. Many other countries in the region could benefit from the clarity and personal security the Convention provides in the many complex situations resulting from international marriages, including the possibility that a state has two or more territorial units where different laws apply in relation to marriage – the case of China – or in relation to marriage has two or more systems of law applying to different categories of persons, as is the case in India.

153. The Hague Marriage Convention is limited to the celebration and the recognition of the validity of a marriage, and does not deal with effects beyond its validity. Specific Hague Conventions deal with other effects of international marriages. The 1978 Hague Matrimonial Property Convention, the 1961 Forms of Wills Convention,[130] the 1989 Hague Successions Convention[131] and the 1985 Hague Trusts Convention (*supra* Nos. 92–94) deal with the property relations of spouses; the 2007 Child and Family Support Convention deals with spousal support (*infra* Nos. 175–178), and the 2000 Protection of Adults

127 Art. 9.

128 Cf. Art. 10: Where a competent authority of the State where the marriage was celebrated has issued a marriage certificate, the marriage shall be presumed to be valid until the contrary is established.

129 Art. 11.

130 *Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, https://www.hcch.net/en/instruments/conventions/full-text/?cid=40.

131 *Supra*, No. 145.

Convention is concerned with the protection of vulnerable adults, including spouses.[132]

ii 1970 Hague Divorce Convention

154. The Hague *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*[133] facilitates the recognition of divorces and legal separations obtained in another state Party and assures divorced and separated spouses that that their new status shall receive the same recognition abroad as in the country where the divorce or separation is obtained. The Convention thus simplifies the possibility of remarriage and clarifies the legal relationship of the couple concerned, which also can prove very important for the dependent children of a new relationship. The Convention furthermore envisages combating "forum shopping" in the field of divorce.

155. The Convention applies to the recognition of divorces and legal separations which follow judicial or other proceedings officially recognised in a state Party and which are legally effective there. It covers not only decrees granted by a court but also divorces resulting from legislative, administrative or religious acts. The Convention only applies to the decree of divorce or legal separation, not to findings of fault or to ancillary orders pronounced on the making of the decree of divorce or legal separation.

156. The recognition of a divorce or legal separation may be refused in certain circumstances (e.g. where adequate steps were not taken to give notice of the proceedings to the respondent; or the divorce is incompatible with a previous decision determining the matrimonial status of the spouses), and a state Party may refuse recognition where such recognition is manifestly incompatible with its public policy. Like the Marriage Convention the Convention makes provision for states where more than one legal system applies in matters of divorce (cf. *supra* No. 152).

157. In the Asia-Pacific region the Divorce Convention is currently in force only for *Australia* and China (*Hong Kong* SAR only). For a country like India, where courts have long struggled with the recognition of foreign divorces, the ratification of the Convention would bring great benefits. Already in 1975, the

132 Common features of these Conventions are: freedom of choice of the applicable law (party autonomy) generally within certain limits to protect the family and third parties; habitual residence as the principal factor connecting persons and the applicable law or competent court; and the use of the Central Authority for cross-border administrative assistance.

133 https://www.hcch.net/en/instruments/conventions/full-text/?cid=80.

Supreme Court of India, in *Satya v. Teja Singh*, 1975 AIR 105, recommended the 1970 Hague Divorce Convention as a possible model the legislator to follow.[134]

### c *Hague Conventions on the Protection of Children*

#### i The 1980 Hague Child Abduction Convention

158. The Hague *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*[135] preceded the 1989 UN Convention on the Rights of the Child (CRC). The Child Abduction Convention thus inspired Article 11 of the CRC requiring states to "*take measures to combat the illicit transfer and non-return of children*". The Child Abduction Convention provides the rules and machinery to fight parental abduction of children not just generally, but in each individual case of an abducted child falling under its scope. Moreover, it serves the child's right to live with both parents, and, in case of a child's separation from one of the parents, "*to maintain personal relations and direct contact with both parents on a regular basis, including in the case of a child whose parents reside in different States*".[136] Joining the Hague Abduction Convention is thus a critical step for the implementation of these objectives of the CRC.

159. But the interaction between the two instruments works both ways. Article 12 CRC affirms the right of the child to be heard in any proceedings affecting him or her. This is more compelling language than that of the Child Abduction Convention,[137] and courts around the world have interpreted the latter Convention in the light of this CRC provision.[138] In contrast, claims questioning the

134 "*Unhappily, the marriage between the appellant and respondent has to limp. They will be treated as divorced in Nevada but their bond of matrimony will remain unsnapped in India, the country of their domicil..... Our legislature ought to find a solution to such schizoid situations as the British Parliament has, to a large extent, done by passing the 'Recognition of Divorces and Legal Separations Act, 1971'. Perhaps, the International Hague Convention of 1970 which contains a comprehensive scheme for relieving the confusion caused by differing systems of conflict of laws may serve as a model*"(note: the British Recognition of Divorces and Legal Separations Act, 1971 incorporates the essence of the 1970 Hague Divorce Convention).

135 https://www.hcch.net/en/instruments/conventions/full-text/?cid=24. See also the Child Abduction Section of the Hague Conference website, https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction.

136 Arts. 9 and 10 CRC.

137 Art. 13 (2): "*The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and maturity at which it is appropriate to take account of its views*".

138 Moreover, *EU regulation No. 2201/2003 of 27 November 2001 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000*, (Brussels II a or Brussels II

Child Abduction Convention's compatibility with Article 3 of the CRC (the best interests of the child principle) have not been successful: courts generally tend to interpret the human rights instruments and the Child Abduction Convention in a harmonious way.[139]

160. Anticipating the development of modern globalisation (*supra* Nos. 30–35), the Child Abduction Convention breaks with the traditional private international law approach of looking at nation-states as essentially self-contained legal orders. The Convention's primary aim is to "*protect children internationally from the harmful effects of their wrongful removal or return and … to ensure their prompt return*".[140] So far the way of achieving this would have been setting up a system of recognition and enforcement by the authorities of the state to which a child was taken – the state of refuge – of a judgment given in the state of the child's habitual residence before the removal – the child's home state. A major drawback of such an approach is that, where no court decision exists in the home state but the removal is in breach of the applicable law – a common scenario –, it requires the left behind parent first to obtain such a judgment in the home state.

161. Instead of imposing this detour via the courts of the home state, the Convention involves the authorities of the state of refuge, requiring them to *look through international borders directly into the legal situation in the child's home state*. When deciding whether the taking of the child was wrongful they must do so, not in terms of their own rules, but of those of the state of the child's home state.[141]

162. Moreover, the Child Abduction Convention, building on the successful cooperative machinery developed by the Hague Conventions promoting administrative and judicial cooperation (*supra* Chapter 5), establishes a system of direct cross-border administrative cooperation, with broad responsibilities for Central Authorities both to prevent and combat abductions.[142] Central Authorities are required "*to take all appropriate measures … to secure the voluntary return of the child or to bring about an amicable resolution of the*

bis), building on the Abduction Convention, has reinforced the obligation of the authorities of EU Member States to give the child the opportunity to be heard when they apply the Abduction Convention: Articles 11 (2) 23 (b), 41 (2) (c), 42 (2) (a).

139 Cf. International Child Abduction Database, INCADAT, http://www.incadat.com.

140 Preamble, par.2; the Convention also aims "to secure protection of rights of access", Art. 21. For a comprehensive critical analysis cf. R. Schuz, *The Hague Child Abduction Convention*, Oxford etc., Hart, 2013.

141 Art. 3 (1) (a): "*The removal or the retention of a child is to be considered wrongful where-a*) *it is in breach of the rights of custody attributed … under the law of the State in which the child was habitually resident immediately before the removal or retention*".

142 Arts. 6 and 7.

*issues*".[143] The Convention is not a criminal cooperation treaty, but seeks to achieve its aims through *civil* means. The ultimate goal being that, if at all possible, the child maintains bonds with both parents, criminal sanctions are not helpful.

163. Among these measures facilitating *mediation* is of growing importance.[144] For the system to work, it is essential that Central Authorities are properly equipped, and that states Parties ensure that they are well-equipped and well-resourced. Although this remains a concern, a living network of well over a hundred Central Authorities has developed around the world. This global professional community plays a crucial role in preventing and combatting parental child abduction.

164. In addition to the administrative cooperation system, the Convention provides for coordinated court intervention in situations of persistent parental conflict. The need for direct liaison across borders has also manifested itself in respect of courts, even without an express basis in the Convention. Parallel to the global administrative Central Authority web, a network of over a hundred liaison judges from over eighty jurisdictions – the "International Hague Network of Judges" – has developed to promote direct judicial communications in child abduction cases. Such communications may assist in resolving practical issues surrounding return, and may facilitate settlements between parents before the court in the state of refuge.[145]

165. The Convention has been ratified by almost 100 states around the world. States Parties in the Asia-Pacific region include *Australia, China* (*Macao and Hong Kong* SAR), *Fiji, Iraq, Japan, Kazakhstan, Republic of Korea, Mauritius, New Zealand, Philippines, Seychelles, Singapore, Sri Lanka, Thailand, Turkmenistan,* and *Uzbekistan*. The Hague Conference regularly organises Special Commission meetings to review the practical operation of the Convention (cf. *supra* No. 120) and has developed a wide range of "post-Convention" services to promote widespread ratification, assist Contracting States to implement the Conventions effectively, and promote consistency and good practices in the daily operation of the Conventions. These services include a database for decisions concerning the Convention (INCADAT), and a series of Guides to Good Practice.[146]

143 Art. 7 (2) (c).

144 Generally on the use of mediation in the framework of the Child Abduction Convention, Hague Conference, *Mediation-Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction,* https://assets.hcch.net/upload/guide28mediation_en.pdf.

145 Hague Conference, *Direct Communications*, https://assets.hcch.net/docs/62d073ca-edao-494e-af66-2ddd368b7379.pdf.

146 For further details: https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction.

Contracting States are both beneficiaries and partners in this continuing enterprise.

ii 1996 Hague Child Protection Convention

166. While the Child Abduction Convention provides a specific remedy for the return of children and also secures the exercise of rights of access, it is not embedded in a broader framework for the legal protection of children. The 1996 Hague *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*[147] fills this gap.

167. The 1996 Convention supports a range of articles of the CRC.[148] For the cross-border issues which arise under those provisions the 1996 Convention determines (1) which authorities or courts may act in international situations, (2) which law applies, (3) when decisions taken in one state should be respected and enforced in other states, and (4) how states may cooperate to protect children. By providing the jurisdictional basis for measures of protection accompanying a return order – e.g., an order prohibiting the left behind father from approaching or molesting mother and child – and ensuring the recognition and enforcement of such measures by the authorities of the home state, the Convention also assists in the operation of the 1980 Convention.

168. A few examples may illustrate the operation of the Convention:

(1) *Jurisdiction.* During the war in former Yugoslavia it became manifest that the authorities in some countries of ex-Yugoslavia were reluctant to take certain measures of protection – e.g., providing foster care for a refugee child from another ex-Yugoslavian country – because they considered that the mere presence of that child on their territory was not enough to give them authority to act and that it was up to the national authorities of the child to do so. This, of course, is often not possible in refugee situations.[149] The 1996 Convention puts beyond doubt that mere presence of

147 https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.

148 E.g. Arts. 11 on child abduction; 12 on the child's opinion; 18 on parental responsibilities; 19 on protection from abuse; 20 on alternative care (including *kafala*); 22 on refugees; and 35 on child trafficking.

149 Cf. *Report of the joint mission of UNICEF, UNHCR and DCI in collaboration with the Hague Conference on Private International Law for the protection of the rights of unaccompanied children in former Yugoslavia* (1993) at https://www.hcch.net/en/publications-and-studies/details4/?pid=3916&dtid=28.

the child in such situations is sufficient as a ground of jurisdiction.[150] Another novelty, borrowed from the system operating between states under the federal system of the United States of America, but here transplanted in a *transnational* situation, is the possibility to transfer, or request the transfer, of a case from the court of one state to the court of another state party.[151]

(2) *Applicable law*. The rules on parental responsibility, e.g. of unmarried fathers, vary from country to country, which may give rise to issues when children move across borders. The Convention ensures that, if parental authority is given under the law of the state where the child lives, it continues when the child moves to another state, even when the laws of the latter would not confer parental responsibility, or would require a court order to obtain it.[152]

(3) *Recognition and enforcement*. If, in a case of child abduction, the court of the state of refuge is willing to order the return of the child but only when combined with a measure of protection – for example, an order prohibiting a father from approaching or molesting mother and child – the 1996 Convention not only provides the jurisdictional basis for such a measure, it also ensures respect for that order by the authorities of the state of origin until they decide on the custody issue[153]

(4) *Administrative cooperation*. In the case of an unaccompanied (migrant, including refugee) child, or teenage runaway, one Central Authority may request the cooperation of another to take measures to protect such a child. Consultation is required in the case of placement of a child in a foster family, including by way of *kafala* or institutional care in another State party.[154]

169. In the Asia-Pacific region, the Convention has so far only been ratified by *Australia*. Because of its complementary role vis-à-vis both the CRC and the Child Abduction Convention, it deserves to be more widely embraced by countries in the region. Like the latter Convention, the 1996 is being supported

150 Art. 6. This set the example for Art. 6 of the 2000 Protection of Adults Convention, and Art. 13 of the Brussels II a Regulation.

151 Arts. 8 and 9. This set the example for Art. 8 of the 2000 Protection of Adults Convention, and Art. 15 of the Brussels II a Regulation.

152 Art. 16.

153 Arts. 7 (3), 11, and 23–28.

154 Art. 33.

by a range of post-Convention services, including a *Practical Handbook on the operation of the 1996 Hague Child Protection Convention.*[155]

### iii 1993 Hague Adoption Convention

170. Article 21 CRC deals specifically with intercountry adoption. Its provisions have had a clear impact on the drafting of the Hague *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Convention.*[156] The Convention aims to protect children and families in cross-border adoption, in particular in the relations between developing countries and developed countries. In such asymmetrical relations, often compounded by cultural differences, abuses, and adoption failures, are prone to occur.

171. The Convention recognises the primary responsibility of the state of origin of adopted children to decide on matters relating to the child and the birth family, culminating in the decision to entrust the child to prospective parents,[157] and of the receiving state concerning the prospective adoptive family and the child's admission to and permanent residence in that state.[158] But in contrast to traditional methodology, it does not rely on rules of jurisdiction and applicable law, but on *substantive* safeguards and procedures, which, if respected may lead to a *joint* decision by, or on behalf of, the administrative Central Authorities to entrust the child to the prospective adoptive parents: the Central Authorities of *both* states must give the green light for the adoption of *each* child to proceed.[159] It is on the strength of this cooperative framework that *all* Contracting States must recognise the adoption.[160]

172. The Convention contains detailed provisions on informed consent to the adoption by the birth parents and the child. No consent during pregnancy is allowed.[161] A further novelty of the Convention is its recognition of the role of private intermediaries. Historically, private initiative has been leading in the development of intercountry adoption. The Convention accepts the role of private bodies but subjects them to accreditation by their state, and, if they act in another state, to authorisation by that state. They must pursue non-profit objectives, be directed and staffed by qualified persons and be subject

155 https://www.hcch.net/en/publications-and-studies/details4/?pid=6096&dtid=3.

156 https://www.hcch.net/en/instruments/conventions/full-text/?cid=69 . Cf. also the Adoption Section on the Hague Conference website, https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption.

157 Arts. 4, 16.

158 Arts. 5, 15.

159 Art 17 (c).

160 Art. 23.

161 Arts. 4 and 15, cf. CRC Art. 21 (a).

to supervision by their state.[162] More generally, the Convention prohibits any "*improper financial or other gain*"[163]. Also, the Convention creates an obligation for states to *preserve information* about the child's origin, which gives effect to the child's right to identity.[164]

173. The 1993 Convention also implements the important CRC's policy objective that a child should preferably find a permanent family in the country of origin. The Convention reinforces this "*subsidiarity principle*" by transforming it into a requirement for any adoption made under the Convention. The authorities of the state of origin of the child must, in *each individual case,* first give due consideration to a local family care solution before authorising the adoption abroad.[165]

174. Almost 100 states around the world have joined the Convention. In the Asia-Pacific region, they include: *Australia, Cambodia, China, Fiji, India, Kazakhstan, Rep. of Korea, Kyrgyzstan, Mauritius, Mongolia, New Zealand, Philippines, Seychelles, Sri Lanka, Thailand* and *Vietnam*. The Hague Conference has developed various strategies, in cooperation with other international organisations such as UNICEF, to ensure the proper operation of the Convention, including a *Guide to Good Practice No 1* and *No 2,*[166] and strategies for the implementation of the subsidiarity principle, which requires a functioning socio-legal infrastructure, in various countries, through its ICATAP technical assistance programme.[167] And this has worked: the Convention has spurred countries of origin in the Asia Pacific region such as Cambodia, China, Nepal and Thailand, to take measures to support families to stay together, and to develop *domestic* adoption programmes.

### iv 2007 Child Support Convention

175. Article 27 (4) CRC reminds parents of their primary responsibility for the child's living conditions, and provides that in order to secure the recovery of child support in cross-border situations, states must cooperate through existing, or new international agreements.[168] Such situations frequently arise when a parent, usually the father, moves to another country, leaving behind a child

162 Articles 9–13. The Convention also reserves a limited role to for profit intermediaries in Art. 22(2)–(5).

163 Art. 32, cf. Art. 21 (d) CRC.

164 Art. 30, cf. Art. 8 CRC.

165 Preamble and Art. 4 (b) Adoption Convention, cf. Art. 21 (b) CRC.

166 https://assets.hcch.net/upload/adoguide_e.pdf; https://assets.hcch.net/upload/adoguide2en.pdf.

167 https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption.

168 Art. 27 (4).

and his or her mother. The mother may have obtained support for the child and perhaps for herself while the father stops paying, or she may wish to make a fresh application for such support.

176. The Hague *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*[169] fulfils this objective. It builds on the experience both of the Hague Conventions on the recognition and enforcement of decisions on maintenance obligations, first for children only (1958), subsequently revised and extended to adults (1973), and of the United Nations with its *Convention of 20 June 1956 on the Recovery Abroad of Maintenance*.

177. The 2007 Convention makes generous provision for free legal assistance in child support and (connected) spousal support cases processed through the Central Authority system, and penetrates into traditional preserves of domestic law by prescribing detailed procedures for the recognition and enforcement of support decisions, again including effective access to these procedures. It takes into account the different capabilities of various countries, allowing states with limited resources to restrict the provision of free legal assistance,[170] and offering alternative procedures for recognition and enforcement of foreign child support decisions.[171] Extensive requirements for the provision of information on national laws and procedures as a prerequisite for the ratification of the Convention, including of a "country profile", and a sophisticated automated case management system (iSupport) complete the system.

178. The Convention binds 27 EU Members and the EU itself, and 9 more states. As a complement to the Convention, the 2007 *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations,*[172] which binds 30 states and the EU, provides a regime of choice of law rules which permits party autonomy in respect of maintenance obligations between adults, and protects children.

## 7 Outlook – (Potential) Significance of the Hague Conference and Its Work for the Asia-Pacific Region

179. Enhanced transnational business and personal (family) relations as a result or manifestation of globalisation and regional cooperation, increase the need

169 https://www.hcch.net/en/instruments/conventions/full-text/?cid=131. Cf. also the Child Support Section of the Hague Conference website, https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support.

170 Based, however, on an assessment of the means of the *child* (Art. 16).

171 Cf. Arts. 23 and 24.

172 https://www.hcch.net/en/instruments/conventions/full-text/?cid=133.

for legal certainty, predictability, personal security and protection of vulnerable persons across borders. In the Asia-Pacific region, this need is heightened by the fact that its legal systems differ widely, and are rooted in diverging traditions. Recent years have seen an increased interest in private international law in a number of countries in the region. Several of them have adopted private international law statutes, and/or joined the Hague Conference or become parties to at least some the Hague Conventions (*supra* Nos. 36–42). Sustained efforts to join the Conference and its Conventions would bring tangible benefits to the region, in particular if states and stakeholders in different countries would, as has been suggested,[173] coordinate these efforts.

180. As a preliminary step, to promote the circulation of public documents, all countries in the region should follow the example of Australia, Hong Kong SAR, India, Japan, the Republic of Korea and several others, and join the 1961 *Apostille* Convention (*supra* Nos. 105–112). This Convention, the ratification of which has been recommended by the World Bank (No.112), has amply demonstrated its usefulness, which has been further enhanced by the e-APP program (Nos. 109–111). Likewise, the 1965 *Service* Convention (Nos. 113–120), 1970 *Evidence* Convention (Nos. 121–127) and 1980 *Access to Justice* Convention (Nos. 128–133) have provided invaluable bridges across civil law and common, faith-based and secular, federal and unitary systems. Joining these four instruments will benefit both business and personal (family) relations, both within the region and extending to other regions.

181. In the commercial law field, at the cross-roads of civil procedure and contract law, countries in the region would be well advised to follow the example of Singapore, and join the 2005 *Choice of Court* Convention, which has already served as a model in the Trans-Tasman Arrangement between Australia and New-Zealand and in the relations between Mainland China and Hong Kong SAR (*supra* Nos. 71–89). Likewise, the 2015 *Principles on Choice of Law in International Commercial Contracts* could be the starting point for efforts to further harmonise choice of law in contracts. The suggestion recently made in Australia to combine the provisions of the Choice of Court Convention and the Hague Principles in one International Civil Law Act[174] is worth considering across the region. The 1985 *Trusts* Convention would serve both family and investment purposes, in particular across civil law and common law systems (Nos. 92–94). The 2006 *Securities* Convention would bring certainty to security transactions (Nos. 95–99), and the 1973 *Products Liability* Convention would resolve the current disharmony between different conflict rules in the field of civil liability for deficient products (100–104).

173 *Supra*, No. 55.

174 *Supra* No. 61 fn.

182. That a marriage, divorce, adoption, or paternity, is recognised in one country but not in another, may violate fundamental rights, and is anyway intolerable, especially since instruments are available to avoid such limping relationships. Across the Asia Pacific region the 1978 Hague *Marriage* Convention (*supra* Nos. 147–153) and 1970 *Divorce* Convention (Nos. 154–157) deserve serious consideration, as – in respect of the latter – the Indian Supreme Court already suggested more than 40 years ago. High priority should be given to the four modern Hague Children's Conventions, the 1980 *Child Abduction* Convention (Nos. 158–165), the 1996 *Child Protection* Convention (Nos. 166–169), the 1993 *Adoption Convention* (Nos. 170–174) and the 2007 *Child Support* Convention (Nos. 175–178). Each of these instruments provides essential safeguards, procedures and cooperative machinery to protect, in cross-border situations, many of the fundamental rights guaranteed by the UN Convention on the Rights of the Child which has been universally ratified in the Asia Pacific region.

183. In addition, participation in the current work of the Hague Conference by those countries in the region that are not yet members of the organisation,[175] including on judgments (*supra* No. 89), as well as on various other topics such as international parentage and surrogacy arrangements, family agreements involving children, and ongoing review of existing Conventions would benefit these states and their citizens and enrich the Hague Conference on Private International Law and its work.

## Selected Publications

### *Reports and Published Lectures*

The Global Horizon of Private International Law, Inaugural Lecture, Hague Academy of International Law, Private International Law Session 2015, *Recueil des cours de l'Académie de La Haye*, Vol. 380, pp. 9–108, 2016; Chinese translation: 汉斯. 范鲁(Hans van Loon) 著，张美榕译，吴用校：《全球视角中的国际私法》(The Global Horizon of Private International Law),《国际法研究》(Chinese Review of International Law), 2017 年第六期，vol. 6 (forthcoming).

"The Brussels IIa Regulation: towards a review?", European Parliament, DG for Internal Policies, *Cross-Border Activities in the EU- Making Life easier for Citizens*, 2015, pp. 178–207.

(With S. De Dycker) "The Role of the International Court of Justice in the Development of Private International Law", *Mededelingen KNVIR*, 2013, pp. 73–119.

175 Cf. https://www.hcch.net/en/states/hcch-members.

"The Hague Conference on Private International Law: Current problems and perspectives", in *La Codificación del Derecho Internacional – Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz*, 2002, pp. 21–41.

"International Co-operation and Protection of Children with regard to Intercountry Adoption", in *Recueil des Cours, Volume 244* (1993-VII), pp. 195–456, 1995.

"Report on Intercountry Adoption of Children/Rapport sur l'adoption d'enfants originaires de l'étranger ", Hague Conference on Private International Law / Conférence de La Haye de droit international privé, *Proceedings of the Seventeenth Session/Actes et documents de la Dix-septième session (1993), Tome II*, 1994, pp. 11–119 (also translated into Spanish).

"International Adoption of Children", International Law Association (ILA), *Report of Sixty-Fourth Conference* (Queensland, 1990), pp. 362–386; *Idem*, *Report of the Sixty-Third Conference* (Warsaw, 1988), pp. 570–665.

"Succession in private international law-Prospective Study/Droit international privé des successions-Étude prospective", in Hague Conference on Private International Law/Conférence de La Haye de droit international privé, *Proceedings of the Sixteenth Session/Actes et Documents de la Seizième (1988), Tome II*, (1990), pp. 140–161 (Supplementary Notes / Notes complémentaires, *ibidem*, pp. 106–139, pp. 196–201; 202–205;206–217; 222–231).

(With C.A. Dyer) "Report on trusts and analogous institutions/Rapport sur les trusts et institutions analogues", Hague Conference on Private International Law/Conférence de La Haye de droit international privé, *Proceedings of the Fifteenth Session/ Actes et documents de la Quinzième session (1984), Tome II* (1985), pp. 10–108 (also translated into Japanese).

"Feasibility study on the law applicable to contractual obligations / Étude prospective sur la loi applicable aux obligations contractuelles", Hague Conference on Private International Law / Conférence de la Haye de droit international privé, *Proceedings of the Fifteenth Session / Actes et documents de la Quinzième session (1984), Tome I* (1986), pp. 98–113 (cf. *Proceedings of the Seventeenth Session / Actes et Documents de la Dix-septième session (1993), Tome I*, pp. 154–157).

### *Articles*

"El desafío doble de la migración internacional", Editorial, *Revista Española de Derecho Internacional*, Vol. 68/2/2016, pp. 15 *et seq*.

"Protecting Children across Borders: The Interaction between the CRC and the Hague Children's Conventions", T. Liefaard & J. Sloth-Nielsen, *25 Years of the UN Convention on the Rights of the Child*, The Hague, 2016.

"The transnational context: impact of the global Hague and regional European instruments", *Rivista di diritto internazionale privato e processuale*, "Per un nuovo diritto internazionale privato", Vol. 51, 2015, pp. 743–754.

(With F. Pocar) "The 120th Anniversary of The Hague Conference on Private International Law", *Rivista di diritto internazionale privato e processuale,* Vol. 50, 2014, pp. 517–528.

"The Earth is one but the world is not: what role for global and regional unification of Private International law?", *Revista Perspectiva Jurídica Universidad Panamericana*, 2014, pp. 359–373.

"El derecho internacional privado ante la Corte internacional de Justicia: mirando hacia atrás y mirando hacia adelante", *Anuario espanõl de derecho internacional privado,* Vol. 13, 2013, pp. 35–51.

"La méthode de la reconnaissance et les conventions de droit international privé de La Haye", P. Lagarde (ed.), *La Reconnaissance des situations en droit international privé*, 2013, pp. 121–129.

"The Hague Conference on Private International Law: Asser's vision and an evolving mission", *NIPR* (*Nederlands Internationaal Privaatrecht*) Vol. 30, 2012, pp. 358–361; also published in *Hague Yearbook of International Law/Annuaire de La Haye de droit international,* Vol. 24, 2012, pp. 3–10.

"Law as an instrument of innovative and secure development of the global world", *Saint-Petersburg International Legal Forum,* 2011, pp. 24–28 (in English and Russian).

"The accommodation of religious laws in cross-border situations: the contribution of the Hague Conference on Private International Law", *Cuadernos de Derecho Internacional* Vol. 2, 2010, pp. 261–267.

"Legal Diversity in a Flat, Crowded World: the Role of the Hague Conference", *Revue hellénique de droit international*, Vol. 62, 2009, pp. 494–509; also published in *International Journal of Legal Information,* Vol. 39, 2011, pp. 172–185.

"The need for global cooperation in the field of private international law: India and the work of the Hague Conference", R.K. Dixit, R.K.P. Shankardass, C. Jayaraj, Manoj Kumar Sinha, (eds.), *International Law – Issues and Challenges*, Vol. 2., Indian Society of International Law, New Delhi, 2009, pp. 105–117.

"Vers un nouveau modèle de gouvernance multilatérale de la migration internationale – réflexions à partir de certaines techniques de coopération développées au sein de la Conférence de La Haye", *Vers de nouveaux équilibres entre ordres juridiques. Liber Amicorum Hélène Gaudemet-Tallon*, Paris, Dalloz, 2008, pp. 420–434.

(With A. Schulz) "The European Community and the Hague Conference on Private International Law", Martenczuk, B., and van Thiel, S., (eds.), *Justice, Liberty, Security: New Challenges for EU External Relations*, Brussels, BUP, 2008, pp. 257–299.

"Bridging cultural differences between Western and religious legal systems – the contribution of the Hague Conference on Private International Law", in Vriesendorp, D., Nelissen F.A., Wladimiroff M., (eds.), *The Hague Legal Capital? Liber in Honorem W.J. Deetman*, The Hague, Hague Academic Press, 2008, pp. 15–22.

"Remarks on the needs and methods for governance in the field of private international law – at the global and the regional levels", Cafaggi, F., Muir-Watt, H., (eds.),

*Making European Private Law – Governance Design*, Cheltenham, Edward Elger Publishing, 2008, pp. 197–208.

"Quelques aspects de la mondialisation dans le domaine des conflits de juridictions", *Travaux du Comité français de droit international privé*, années 2004–2006, pp. 227 *et seq*.

" L'actualité de la Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance", *Mélanges en l'honneur de Mariel Revillard – Liber Amicorum*, Paris, Éditions Defrénois, 2007, pp. 323–341.

"Unification of private international law in a multi-forum context", Kieninger E.M., (ed.), *Denationalisierung des Privatrechts? Symposium anlässlich des 70. Geburtstages von Karl Kreuzer,* Tübingen: Mohr Siebeck, 2005, pp. 33–52.

"The Hague Conference on Private International Law: An Introduction", van Krieken, P.J., & McKay, D., (eds.), *The Hague: Legal Capital of the World*, The Hague: T.M.C. Asser Press, 2005, pp. 518–526.

"Global and Regional Cooperation in the Field of Private International Law: A Challenge for the Hague Conference", *Japanese Yearbook of Private International Law*, Vol. 7, 2005, pp. 2–19.

"The Hague Conference on Private International Law and its Relevance to the UN Convention on the Rights of the Child", E. Verhellen (ed.), *Understanding Children's Rights*, Ghent: Ghent University, 2004, pp. 243–352.

"The implementation and Enforcement of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction in comparative perspective: It's Japan's move!" *Gender Law and Policy Annual Review* Vol. 2, (2004) (The Tohoku University 21st Century COE Program), English, pp. 189–209; Japanese, pp. 123–137.

"International Governance and Institutions: What Significance for International Law? Balancing Global and Regional Perspectives", *Proceedings of the 11th Annual Meeting of the Australian New Zealand Society of International Law*, 2003, pp. 8–14.

"The Hague Convention of 1st July 1985 on the Law Applicable to Trusts and on their Recognition", Prum, A. & Witz, C. (eds.) *Trust et fiducie, la Convention de La Haye et la nouvelle législation luxembourgeoise*, Paris: Édition Montchrestien, 2005, pp.19–33.

"The Hague Conference on Private International Law in a time of Globalisation: New Challenges and New Conventions in the fields of Civil Procedure and Applicable Law", Baur, J.F., Manzel, H.-P., (eds.), *Systemwechsel im europäischen Kollisionsrecht*, Fachtagung der Bayer-Stiftung für deutsches und internationales Arbeits-und Wirtschaftsrecht am 17. und 18. Mai 2001, München, C.H. Beck, 2002, pp. 193–203.

"Law, International Commerce and the Formulating Agencies – the Future of Harmonisation and Formulating Agencies – A Perspective from the Hague Conference", I. Fletcher, L. Mistelis, M. Cremona, (eds.), *Foundations and Perspectives of International Trade Law*, London: Sweet and Maxwell, 2001, pp. 67–72.

"Globalisation and The Hague Conference on Private International Law", *International Law Forum du droit international*, 2000, pp. 230–234.

"Recent Developments in International Treaty Law on the Protection of Children", *International Family Law*, 1999, pp. 91–95.

"One Hundred Years of Activity of the Hague Conference on Private International Law in the Field of Family Law", *Japanese Yearbook of Private International Law*, 1999, pp. 95–116.

"Unification and Co-operation in the Field of International Family Law: A Perspective from The Hague" in Borrás, A, Bucher, A., Struycken, T, Verwilghen, M. (eds), *E Pluribus Unum. Liber Amicorum Georges A.L. Droz*, The Hague etc., Martinus Nijhoff, 1996, pp. 173–190.

"What New Conventions There May Be: A Perspective From The Hague", Lowe, N., Douglas, G., (eds.), *Families Across Frontiers*, International Society of Family Law 8th World Conference, Cardiff 1994, The Hague: Kluwer, 1996, pp. 855–868.

"Os Aspectos Legais da Adoção Internacional e a Proteção da Criança – Relatório da Associação de Direito Internacional", in "*Uma vida dedicada ao Directo. Homenagem a Carlos Henrique de Carvalho*", São Paulo, Editora Revista dos Tribunais, 1995, pp. 241–254.

"Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption", *The International Journal of Children's Rights,* 1995, pp. 463–468.

"The Hague Conference – its origins, organization and achievements", *Svensk Juristtidning*, 1993, pp. 293–307.

"Introductory Note on the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption", in *Uniform Law Review*, 1993, pp. 76–81.

"Family Relations in a Mobile Society – Private International Law Issues", in *Contemporary International Law Issues: Sharing Pan-European and American Perspectives*, ASIL/NVIR Proceedings, Dordrecht, Kluwer, 1992, pp. 218–225.

"Some Comments on the Declaration of Human Responsibilities for Peace and Sustainable Development", Brenes-Castro, A., ed., *Seeking the True Meaning of Peace*, Conference Proceedings and Post-Conference Contributions, San José, University of Peace Press, 1991, pp. 422–432.

"The Increasing Significance of International Co-operation for the Unification of Private International Law", Centrum voor Buitenlands Recht en Internationaal Privaatrecht, *Forty Years On: the Evolution of Postwar Private International Law in Europe*, Deventer, Kluwer, 1990, pp. 101–122.

"The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons", *Hague Yearbook of International Law*, Vol. 2, 1989, pp. 48–66.

"Quelques réflexions sur l'unification progressive du droit international privé dans le cadre de la Conférence de La Haye", Erauw J., Bouckaert B., Bocken H., Gaus H., Storme M., (eds.), *Liber memorialis François Laurent 1810–1887*, Bruxelles : E. Story-Scientia, 1989, pp. 1133–1149.

"Der Entwurf einer Konvention über die Rechte des Kindes im Kontext anderer internationaler Übereinkommen", AGJ Mitteilungen *Forum-Jugendhilfe*, Bonn, 1988, pp. 28–32.

"Towards a Convention on the Law Applicable to Succession to the Estates of Deceased Persons", *Hague Yearbook of International Law* Vol. 1, (1988), pp. 270–279.

"The Hague Conventions on Private International Law", in F.G. Jacobs & S. Roberts, (eds.), *The Effect of Treaties in Domestic Law*, London, Sweet and Maxwell, 1987, pp. 221–251.

### *Annual Reviews*

"The Hague Conference on Private International Law – Work in Progress", Annual contributions, in Sarcevic P., Volken P., Bonomi A., eds., *Yearbook of Private International Law*, 1999–2010: 12 (2010), pp. 419–434; 7 (2005), pp. 240–247; 6 (2004), pp. 237–245; 5 (2003), pp. 169–175; 4 (2002), pp. 219–226; 3 (2001), pp. 237–244; 2 (2000), pp. 169–178; 1 (1999), pp. 205–214.

"Hague Conference on Private International Law – Work in…", Annual overviews of the work of the Hague Conference, in *Hague Yearbook of International Law /Annuaire de La Haye de droit international*, 1988–2005: 2005 (pp. 197–205); 2004 (pp. 359–367); 2003 (pp. 299–314); 2002 (pp. 273–279); 2001 (pp. 281–289); 2000 (pp. 307–315); 1999 (pp. 337–340); 1998 (pp. 271–274); 1997 (pp. 269–271); 1996 (pp. 241–242); 1995 (pp. 209–228); 1994 (pp. 325–341); 1993 (p. 293); 1992 (pp. 279–283); 1991 (pp. 339–341); 1990 (pp. 286–288); 1989 (pp. 354–355); 1988 (pp. 470–471).

### *Forewords*

"Préface", Isnard J., Andrieux F., Chardon M.,(eds.), *Si l'Union m'était contée … 1952–2012* – Soixante ans d'expertise et d'actions internationales au service de la profession d'huissier de justice, Union Internationale des Huissiers de Justice et Officiers judiciaires, 2012, p. 7.

"Prólogo", Tagle de Ferreya G. Forcada Miranda F.J. y Seoane de Chiodi M., *La Restitución Internacional de Niños*, Visión doctinaria y jurisprudencial en Argentina y España (Córdoba, Nuevo Enfoque Jurídico, 2011), pp. 17–21 (English, pp. 13–16).

"Prefácio", Grandino Rodas J., de Campos Monaco G.F., eds., *Conferência da Haia de Direito Internacional Privado: A Participação do Brasil* (Brasilia: Fundação Alexandre de Gusmão, Ministério das Relaçoes Exteriores, 2007) pp. XV–XXI (English pp. XXIII–XXVIII).

"Foreword", Svantesson D.J.B., *Private International Law and the Internet*, (Alphen a.d. Rijn: Kluwer Law International,) 2007, pp. XIII–XV.

"Foreword", Lowe N., Everall M., Nicholls M., *International Movement of Children.* Law Practice and Procedure, Bristol: Jordan Publishing, 2004, pp. v–vi.

"Foreword", Selman P., (ed.), *Intercountry Adoption, Developments, trends and perspectives* (London: British Agencies for Adoption and Fostering, 2000), pp. 1–2.

"Preface", Detrick S., and Vlaardingerbroek P., ( eds.), *Globalization of Child Law, the Role of the Hague Conventions* (The Hague *etc.*: Kluwer Law International, 1999), pp. VII–IX.

### *Edited Books*

With Doek J.E. & Vlaardingerbroek P., *Children on the Move*. How to implement their right to family life, The Hague: Martinus Nijhoff, 1996.

With van Eeuwijk, P.C.Th.M., *Identiteitsproblemen bij Adoptiekinderen*, Amsterdam / Lisse: Swets & Zeitlinger, 1989.

### *Book Reviews*

Schuz, R., *The Hague Child Abduction Convention: A Critical Analysis*, *Netherlands International Law Review* (*NILR*), Vol. 62, 2015, pp. 201–206.

Trimmings, K., *Child Abduction within the European Union*, *NILR*, Vol. 61, 2014, pp. 128–132.

### *Selection of Publications under the Name of the Permanent Bureau of the Hague Conference*

"Some reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference / Quelques réflexions sur l'état actuel des négociations du projet sur les jugements dans le contexte du programme de travail future de la Conférence", Hague Conference on Private International Law / Conférence de La Haye de droit international privé, *Proceedings of the Nineteenth Session / Actes et Documents de la Dix-neuvième session (2001/2002), Tome I* (2008), pp. 428–435.

"Some reflections of the Permanent Bureau on a general convention on enforcement of judgments / Quelques réflexions du Bureau Permanent sur une convention générale sur l'exécution des jugements", Conférence de La Haye de droit international privé/Hague Conference on Private International Law, *Actes et Documents de la Dix-septième session / Proceedings of the Seventeenth Session (1993), Tome I*, (1995), pp. 231–239.

"Note sur la compétence judiciaire et la reconnaissance et l'exécution des décisions en matière de successions / Note on judicial jurisdiction and recognition and enforcement of decisions in matters of succession upon death", *ibidem*, pp. 220–227.

Practical Handbook on the operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters / Manuel pratique sur le fonctionnement de la Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale, 1st ed., Antwerp, Maklu, 1984.

Practical Handbook on the operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters / Manuel pratique sur le fonctionnement de la Convention de La Haye du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale, 1st ed., Antwerp, Maklu, 1983.