

**FORTY YEARS ON:
THE EVOLUTION OF POSTWAR
PRIVATE INTERNATIONAL LAW IN EUROPE**

Symposium in celebration of the 40th anniversary of the
Centre of Foreign Law and Private International Law,
University of Amsterdam, on 27 October 1989

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Centrum voor Buitenlands Recht en
Internationaal Privaatrecht
Universiteit van Amsterdam

The Increasing Significance of International Co-operation for the Unification of Private International Law

J.H.A. van Loon

I. Introduction

1. In his book, 'The Changing Structure of International Law',¹ Wolfgang Friedmann with great perspicacity — and foresight — demonstrated how contemporary (public) international law is characterized by the emergence of a new ('positive') 'international law of co-operation', alongside the traditional ('negative') 'international law of co-existence', the law of diplomatic interstate relations based on abstention and on mutual respect for national sovereignty. This new international law of co-operation appears in the internationalization of many matters which formerly belonged exclusively to municipal law, including private (international) law. It is also reflected in the growing role of intergovernmental organizations and the pursuit through those organizations and through treaties of common interests. While the international law of co-existence is of a universal character — the need for respect for national sovereignty being felt by all nations — the new law of co-operation proceeds both at the universal and regional level, depending on the degree of commonality of interests and purposes.²

International unification of private international law may be seen as an early example of this new law of international co-operation. Typically, it started at the regional level among groups of States with common traditions and common interests — in Latin America with the Congress of Montevideo (1889) and in continental Europe with the first Hague Conference on private international law (1893). The degree of internationalization of municipal law accomplished by the Montevideo Congress and the four early Hague Conferences (1893, 1894, 1900 and 1904) was limited. The resulting treaties unified private international law of States

1. Wolfgang Friedmann, *The Changing Structure of International Law*, London 1964.

2. Friedmann does not pay much specific attention to the international unification of private international law (but see his reference to the 1956 Hague Convention on the Recognition of Foreign companies at p. 182). His book does help, however, to understand that this unification process is really part of a larger movement of growing international co-operation.

whose private international law rules were already very similar.³ In this sense these early treaties remained close to the traditional law of co-existence. Yet, they were milestones which lifted private international law on the international plane and that in turn extended their effects beyond the narrow circles of participating States.

2. The subsequent development of the unification of private international law in this century has been one of increasing international co-operation by States and through international organizations. As we shall attempt to demonstrate in this paper, this has manifested itself in several ways. First, within the field of unification of different systems of private international law — legislative co-operation — there is a growing emphasis on finding appropriate solutions to international problems and an ever greater internationalization of choice of law rules (*infra* III). Increasing international co-operation has come to light, secondly, in the creation of channels permitting courts and administrators to work together in the interest of private parties despite differences in their procedural laws and administrative systems — administrative and judicial co-operation (IV). And thirdly, a new form of unification of private international law has developed which combines techniques derived from both of these approaches, as exemplified by the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the Hague Child Abduction Convention')(V).

This development has not, of course, taken place in a vacuum but in a context of growing internationalization of daily life which presents many challenges to private international law and to the unification of private international law in particular.

II. The Context

3. 'Until recently, the planet was a large world in which human activities and their effects were neatly compartmentalized within nations, within sectors (energy, agriculture, trade), and within broad areas of concern (environmental, economic, social). These compartments have begun to dissolve ...

The planet is passing through a period of dramatic growth and fundamental change. Our human world of 5 billion must make room in a

3. The Hague Conventions were based on the nationality principle, accepted by all participating States; in clear opposition to the European approach, the Montevideo treaties were founded on domicile as a connecting factor, which was on its way to becoming generally accepted in Latin America. See J. Samtleben, *Internationales Privatrecht in Lateinamerika*, Tübingen 1979.

finite environment for another human world. The population could stabilize at between 8 billion and 14 billion sometime next century, according to UN projections. More than 90 per cent of the increase will occur in the poorest countries, and 90 per cent of that growth in already bursting cities.

Economic activity has multiplied to create a \$ 13 trillion world economy, and this could grow five- or tenfold in the coming half-century. Industrial production has grown more than fiftyfold over the past century, four-fifths of this growth since 1950.⁴

Growing international interdependence and interdetermination has led to completely new configurations of private international fact patterns and relations, both in the personal and in the commercial sphere, undreamt of 40 years ago:

— New configurations in the personal and family sphere, as a result of massive movements of people over increasing distances, voluntary and involuntary, permanently and temporarily, legally and illegally: millions of migrant workers, often followed by their families both in and outside the framework of family unification programmes, growing numbers of refugees from developing to developed countries, tourists travelling to ever more remote places for vacation, and retired people spending their 'third age' in sunny, tax-friendly areas. A marriage between Chilean émigrés in France; a divorce between Vietnamese refugees in Australia; the attempted recognition of a Dutch child by its Kenyan biological father;⁵ the surrender for adoption in Europe or the United States of a child born in the Lebanon by its Sri Lankan mother, who herself moved from her home country, to Beirut as a guest worker; the abduction of an Iranian child to Germany by its Iranian mother;⁶ succession to the international estate of a Mexican citizen in the United States or of a retired US citizen in Costa Rica, have become facts of daily life.

Recent OECD studies and research carried out by French demographers suggest that the large differences in wealth in the world and

4. World Commission on Environment and Development, *Our Common Future*, Oxford/New York 1987, p. 4.

5. District Court of The Hague, 30 December 1988 (unpublished). According to the traditional Dutch conflict rule, the national law of the father would govern the question of recognition of his child; however, common law jurisdictions do not know this institution. This has recently inspired Dutch courts to depart, in various ways, from the traditional rule in order to make such recognition possible in the interest of the child.

6. OLG Celle, 24 October 1988, *IPRax* 1989, pp. 390–391, no. 68, and K. Siehr, *Entführung iranischer Kinder nach Deutschland und ihre Rückführung in den Iran*, *ibid.* pp. 373–374.

the population growth to be expected in the Third World will lead to continuing migration pressure from the 'developing' countries on the 'developed' countries.⁷

— New configurations in the sphere of international business, both trade and investment: growing dependence of domestic economies on international sales of goods, transfers of technology and transport, which in turn depend increasingly on international banking, financial and insurance transactions; the increasing role of multinational companies; government involvement in international business; government regulation of competition with extraterritorial effects; growing use of transnational forms of co-operation such as international joint ventures; transnational mergers of companies followed by mergers of auditors' and law firms, are just some of many examples available.

4. As the traditional distinctions between national and international issues and in the personal, social, economic and administrative areas of concern have become blurred, the lines between domestic and international, private and public law can no longer be drawn sharply. As a result, these different bodies of law interrelate with increasing complexity. Here are a few examples just as a reminder:

— New 'floating' systems of private (international) law such as *lex mercatoria* and 'delocalized' forms of international arbitration may be seen as attempts to transcend the limitations of domestic legal orders. Yet, in the absence of an autonomous transnational order they continue to depend ultimately on those domestic systems for their efficacy.⁸

— (International) human rights law is increasingly having an impact on both domestic and multilateral private international law. One of the main reasons for the recent reform of private international law in the Federal Republic of Germany was the discriminatory character of the previously existing conflict rules which gave preference to the law of the husband and father over that of the wife and mother. The European Convention on Human Rights as interpreted by the Euro-

pean Court of Human Rights in Strasbourg⁹, concerning, for example, discrimination against children born out of wedlock with respect to the right to inherit from their parents, may set aside the result to which traditional conflict rules would lead.¹⁰

— Domestic policies, embodied in public laws and regulations, may interfere with private international relations. They may do so in an effort either to protect existing diversity (for example, laws protecting a country's cultural heritage, currency or specific market structure) or to give extraterritorial effect to a specific country's economic or political imperatives as if they were universally valid. In a world in which national boundaries are becoming daily more porous, such policies if they derive from a foreign State can no longer be simply ignored on the theory that their effect is limited to that foreign territory.¹¹ However, as in the case of *lex mercatoria*, an autonomous transnational order co-ordinating such policies of different States does not yet exist. Hence has arisen a continuing discussion on the desirability of empowering domestic courts to fill this gap, in particular where the foreign law claiming application does not derive from the State whose law is applicable to the legal relationship in question, but from a 'third' State.¹²

5. All this suggests that the context of private international law is becoming increasingly international, calling for an adequate response. The response may, of course, be given by a domestic authority (legislator, court).¹³ In fact, a clear trend has become visible in recent domestic codifications of private international law towards multilateral (bilateral) conflict rules, preferential treatment of the *lex fori* being admitted only in limited cases. For example, in the new Swiss Code the *lex fori* is given preference only where the court is called upon to *create* actively

7. See Organisation for Economic Co-operation and Development, *The Future of Migration*, Paris 1987. Institut français des relations internationales, *Rapport annuel mondial sur le système économique et les stratégies*, Paris 1988.

8. See, e.g., J.D.M. Lew (ed.), *Contemporary Problems in International Arbitration*, Dordrecht etc. 1987. See also F.J.M. de Ly, *De lex mercatoria, Inleiding op de bronnen van het transnationaal handelsrecht*, Antwerpen 1989. But see also *Compañia Valenciana de Cementos Portland SA v. Primary Coal Inc.*, Court of Appeal Paris, 13 July 1989, noted in *International Business Lawyer* 18 (1990), p. 4.

9. In *Marckx v. Belgium*, ECHR, 13 June 1979; *Inze v. Austria*, ECHR, 28 October 1987.

10. See, e.g., D. Cohen, *La Convention européenne des droits de l'homme et le droit international privé français*, *Revue critique de droit international privé* 1989, pp. 451–483. Cf. Article 20 of the Hague Child Abduction Convention, Article 25 of the Inter-American Convention on the International Return of Children.

11. See F.A. Mann, *Conflict of Laws and Public Law*, *Recueil des cours* 1971–I, pp. 187–196; P. Lalive, *Le droit public étranger et le droit international privé*, *Travaux du Comité français de droit international privé* 1973–1975, pp. 215–245.

12. Cf. the current debate among EEC countries on whether or not to accept Article 7(1) of the *EEC Convention of 19 June 1980 on the Law Applicable to Contractual Obligations*. See for a recent survey E. Jayme/C. Kohler, *Das internationale Privat- und Verfahrensrecht der EG – Stand 1989*, *IPRax* 1989, pp. 337–346, at pp. 341–343.

13. Cf. W.L.M. Reese, *The Influence of Substantive Policies on Choice of Law*, in: *Festschrift für Frank Vischer*, Zürich 1983, pp. 287–292.

a new legal relationship (adoption, protection of minors, divorce).¹⁴ Besides, many of these domestic codes reflect the influence of international conventions on private international law. In fact in a growing number of situations only international co-operation can provide a satisfactory legal framework. The emergence of intergovernmental organizations has in this field as in others been greatly instrumental in providing a forum for such co-operation. The reach of many of these organizations is limited to a regional grouping of States (Organization of American States, Council of Europe, EEC, International Commission on Civil Status, Asian-African Legal Consultative Committee). The Hague Conference on private international law became an intergovernmental organization in 1955, dominated by European States, and started in the 1960's to expand and include more non-European States, so that now the dilemma as between regionalism or universalism¹⁵ has been largely overcome.

III. Legislative Co-operation

6. The history of the recent Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons¹⁶ provides a good example of the increasing extent of international co-operation which has become necessary in order to establish conflict rules which meet the needs of innumerable individuals moving, and acquiring assets, across frontiers.

The first draft for a Hague treaty on international inheritance dates back to 1893; work continued through successive sessions but did not reach the stage of adoption of a treaty. The draft prepared at the Fifth Session in 1925 was based exclusively on the nationality principle as a connecting factor, even though a number of delegates argued convincingly that their countries had great hesitation concerning the nationality

principle as a doctrinal imperative.¹⁷ One senses in the preparatory discussion a lack of practical orientation, and the drafts reflect this. After the Second World War work was resumed more purposefully and pragmatically. In 1956, the UK delegation proposed the drawing up of a treaty on the validity of forms of wills; the objective of the exercise was stated in a straightforward way: the convention should secure the formal validity of wills everywhere.¹⁸ The resulting 1961 Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, indeed based on the *favor testamenti*, has practically eliminated all litigation on the formal validity of wills and is among the most successful Hague Conventions, having been ratified or acceded to by 32 States in all continents. In the late '60s a new effort was made to unify the rules applicable to the substantive aspects of international succession. The Hague Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons was definitely more oriented towards practice than the 1925 draft and based on what would still seem to be a workable compromise between nationality and habitual residence as connecting factors; it even allows for a limited autonomy of choice of the applicable law. Yet it left the problem of devolution of the estate — the transfer of property from the deceased to his heirs — hanging in the air.

The '70s and '80s saw a growing awareness of the urgency of unifying choice of law rules for the handling of international estates. The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition,¹⁹ which touches upon international succession matters in a number of ways, is an example of a remarkable form of co-operation. Once in force,²⁰ it will create an avenue for the wider recognition of trusts in countries where that institution does not exist, without providing them with a *quid pro quo* because it does not lead to a wider recognition of similar institutions in the common law countries. It will simply make life easier for individuals who, most often inadvertently, cross the borders between trust and non-trust jurisdictions.

14. See, generally, E. Vassilakakis, *Orientations méthodologiques dans les codifications récentes du droit international privé en Europe*, Paris 1989. On the international character of the Swiss Code, see: A.E. von Overbeck, *Le projet suisse de loi sur le droit international privé — une codification nationale d'inspiration internationaliste*, in: *Liber Memorialis François Laurent*, Brussels 1989, pp. 1181–1197.

15. See H.U. Jessurun d'Oliveira, *Universalisme ou régionalisme de la Conférence de La Haye*, *Revue critique de droit international privé* 1966, pp. 347–386.

16. Text in *International Legal Materials* 1989, pp. 148–154 (introductory note by E.F. Scoles at pp. 146–147); Explanatory Report by D.W.M. Waters to be published in: Hague Conference on private international law, *Proceedings of the Sixteenth Session* (1988).

17. See: Conférence de La Haye de droit international privé, *Actes de la Cinquième session* (1925).

18. See: Conférence de La Haye de droit international privé, *Actes de la Huitième session* (1956), p. 269.

19. Text in: *International Legal Materials* 1984, pp. 1388–1392; Report by A.E. von Overbeck in: *International Legal Materials* 1986, pp. 595–618. See also: E. Gaillard and D.T. Trautman, *Trusts in Non-trust Countries: Conflict of Laws and the Hague Convention on Trusts*, *American Journal of Comparative Law* 1987, pp. 307–304.

20. It has been ratified by the United Kingdom and Italy, signed but not yet ratified by Canada, Luxembourg, the Netherlands and the United States. The third ratification will bring it into force.

The 'strange animal' of the trust being dealt with specifically, the way came free for tackling the transfer of property on succession in general. A special meeting organized by the International Union of Latin Notaries brought out very clearly the causes and aspects of multiplication of international problems of succession.²¹ It appeared that in the great majority of cases international succession problems involved comparatively small estates, the size of which did not warrant the costs of initiating court proceedings, in particular since such proceedings had to be initiated in several countries and different courts often reached different results which were not recognized abroad. Therefore, since unification at the substantive law level could not realistically be expected, co-operation at the choice of law level became an urgent need.

7. So, in contrast to the work on the early drafts, the work on the 1989 Succession Convention took place not just with a view to finding compromises between different domestic systems of choice of law, but with a substantive objective in mind: to provide people who act internationally with choice of law rules appropriate to their needs. From the perspective of an individual acting in an international context, it would be very desirable to be able to handle the whole estate as a unit and not as a fragmented collection of movables and immovables all caught up within the intricacies of different laws. Moreover, it would be particularly useful if a testator could designate — within limits so as to afford some protection to spouses and relatives — one single law to govern the entire estate. The negotiations were largely inspired by this perspective and the principle of unity of the succession and that of freedom of choice for the testator, *professio juris*, were accepted with remarkable consensus. This was all the more striking since a number of participating countries, such as the United States, Canada, Australia, United Kingdom, France and Belgium so far have systems based on different conflict rules for movables and immovables (scission). With respect to *professio juris*, the Convention now provides in its Article 5(1):

'A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there.'

21. See J.H.A. van Loon, Succession in private international law — prospective study, Annex, Preliminary Document No. 2, 1986, to be published in: Hague Conference on private international law, *Proceedings of the Sixteenth Session* (1988).

This provision really represents a 'quantum leap' because it goes further than anything known in any present domestic system of law²² and also further than any single domestic system of private international law reasonably *could* go, since introducing such freedom of choice unilaterally in an international context hostile towards such freedom of choice would not serve any useful purpose. Article 5(1) clearly illustrates the benefits of international legislative co-operation.

8. As far as the 'objective' connecting factor was concerned, the atmosphere was quite different from that in 1925. Despite strong attachments of some delegates to the traditional connecting factor prevailing in their domestic systems, there was a willingness to look for a factor which best represented the centre of the deceased person's life, the place most likely to be the centre from which a person would plan his estate, the place where those dependent on him, particularly his wife or unmarried companion, would stay with him. Neither domicile nor nationality alone — both static concepts — reflected sufficiently the life-centre reality. The time factor was brought in to introduce a dynamic element and exception clauses to add the necessary element of flexibility.²³

9. It is worth noting that both the unity principle and *professio juris* will lead to a considerably wider application of foreign law, particularly in scission States. Moreover, the Convention stimulates the mutual application by civil and common law systems of each other's different systems for family protection: shares determined by statute vs. provision by the court, Article 7(2)(a).

10. A proposal to include a provision such as that of Article 7(1) of the EEC Convention on Contractual Obligations (cf. *supra* II, note 12) failed, but the Convention does respect the application of particular inheritance regimes of the *situs* (for example for immovable property)

22. Cf. for example Article 90(2) of the recent Swiss and Article 25(2) of the recent German Codes on private international law.

23. Article 3 of the Convention now reads as follows:

'(1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.

(2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.

(3) In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.'

whether that situs is localized in the forum, in a Contracting State or elsewhere (Article 15).²⁴

11. The Succession Convention was drawn up within the circle of Member States of the Hague Conference on private international law. It was felt that although the international dimension of inheritance problems had increased spectacularly in recent years, the drawing up of a convention on international succession required a commonality of interests which had not yet sufficiently developed on a worldwide scale. This was not so in the case of international sales, where the Hague Conference three years before had opened its doors to all the States of the world. The Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods²⁵ provides the private international law supplement to the UN Convention of 11 April 1980 on Contracts for the International Sale of Goods; it also revises the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, which had been negotiated by a small, mostly European, circle of States. In contrast to the situation for international inheritance, the principle of freedom of choice of the applicable law for international sales was already admitted in most systems of law, although sometimes subject to undefined restrictions, in particular as regards the position of some Third World countries. Article 7, paragraph 1, of the Convention now clearly and unequivocally determines:

'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.'

The question of whether the Convention should expressly permit the parties to choose *lex mercatoria* for their sales contract was discussed but, in view of the uncertainties referred to *supra* II, it was felt that the Convention should remain silent on this point.²⁶

24. See D.W.M. Waters, *supra* note 16, nos. 110–113.

25. Text in: *International Legal Materials* 1985, pp. 1575–1578, introductory note by E. Gaillard at pp. 1573–1574; Explanatory Report by A.T. von Mehren, Hague Conference on private international law, *Proceedings of the Extraordinary Session of October 1985*, p. 709. The Convention, signed by Czechoslovakia and the Netherlands, will enter into force upon the fifth ratification.

26. See Von Mehren, *supra* note 25, no. 156. See also: M.P. Pelichet, La vente internationale de marchandises et le conflit de lois, *Recueil des cours* 1987–I, pp. 9–210, at pp. 178–181.

12. With regard to the 'objective' connecting factor, there was no difficulty in accepting the same main rule that appeared already in the 1955 Convention, *i.e.* the law of the State where the seller had his place of business at the time of conclusion of the contract. The problems arose around the exceptions to this main rule: the cases in which the law of the place of the buyer should control when the parties had not chosen the applicable law. Here the North/South dimension and the specific needs of the developing countries became visible. China, Algeria and India, respectively, sought and obtained three exceptions in favour of the law of the buyer. Article 8(2) of the Convention provides:

'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 (a call for tenders).'

In the case of sub-paragraph (a) the seller has clearly come into the economic sphere of the buyer and it would seem perfectly reasonable that, in the absence of a choice by the parties, the buyer's law governs the contract.

A situation that would clearly fall under sub-paragraph (b) is 'where the seller has contracted to deliver and install a complex machine in the buyer's factory. In view of the complexity and importance of the activities that the seller undertakes to perform at the buyer's place of business, it is reasonable to assume that, in the absence of a contractual stipulation for another law, the buyer's law applies.'²⁷

In the hypothesis under (c), the contract is also clearly embedded in the buyer's economic sphere and therefore the buyer's law provides the natural legal context in the absence of a choice by the parties.

Article 8(2), then, provides an interesting example of a traditional set of multilateral conflicts rules which takes into account specific needs, in this case of (buyers in) developing countries. One could say that, with-

27. Von Mehren, *supra* note 25, no. 75.

out being a full-fledged example of 'functional allocation'²⁸, this provision has a nevertheless 'functional' colouring to it.

13. A passionate discussion took place concerning the possible inclusion of a provision parallel to Article 7 of the EEC Convention on Contractual Obligations. While an article similar to Article 7(2) of that Convention was included (Article 17), all attempts to make *express* provision for the possible application of mandatory provisions of the law of a third State to the contract failed.²⁹

* * *

14. As Friedmann observed, the international law of co-operation may proceed both at the universal level — exemplified by the 1986 Sales Convention — and at the regional level. Regional legislative co-operation may take place for different reasons. A common legal culture may inspire a group of States to adapt solutions found at a more universal level to regional circumstances, needs and traditions. This has occurred for example in the case of the recent Inter-American Conventions on Support Obligations and on the International Return of Children, both adopted on 15 July 1989, and both inspired by Hague Conventions.³⁰ The commonality of interests may also permit a regional group to go a step further than what would be feasible in a wider circle. The EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, recently extended so as to include all twelve present EEC Members, and the parallel Convention of 16 September 1988 linking EEC and EFTA countries provide impressive examples.³¹ So also does the EEC Convention on Contractual Obligations.

With the interdependency of economies and cultures all over the world proceeding so rapidly, however, work at a more universal level will also become more intense. Would it be conceivable to extend the EEC/

EFTA Judgments Convention to other, Eastern European States, or even to Canada, the US or Australia; or should one rather reconsider the Hague Convention and Protocol of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters?³² Could the EEC Contractual Obligations convention be extended to EFTA countries, and beyond?³³ What about the EEC and more universal conventions on specific contracts such as the 1986 Hague Sales Convention?³⁴ These are challenging questions without ready answers.

IV. Judicial and Administrative Co-operation

15. Whereas legislative co-operation in the sense used in this paper attempts to establish international norms — uniform rules of conflict of laws, of jurisdiction and of recognition and enforcement of judgments — international judicial and administrative co-operation has a more limited objective in that it respects existing differences in procedural and administrative systems. Yet, the history of multilateral treaties establishing this form of co-operation, like that of treaties establishing common norms, increasingly tends towards embodying substantive international policies in order to make these instruments better serve the interests of private individuals caught up in the intricacies of otherwise uncoordinated procedures and administrative processes. The Hague Convention of 1 March 1954 on Civil Procedure, like its predecessors of 1896 and 1905, was still very much tailored according to the traditional international law of diplomatic interstate relations, the law of co-existence. Co-operation in the service abroad of documents and the taking of evidence abroad respected the outer boundaries of sovereignty and only used diplomatic and consular channels. It is only in matters concerning the enforcement of orders for costs that this Convention introduced a remarkable system of co-operation in that it provides for an extraordinary, rapid procedure for enforcement of those decisions abroad.³⁵

28. See Th.M. de Boer, *Beyond Lex Loci Delicti*, Deventer etc. 1987, in particular pp. 42–52.

29. Von Mehren, *supra* note 25, nos. 158–165. As to the consequences, see: Pelichet, *supra* note 26, pp. 181–191 and references in footnote 267.

30. See G. Parra-Aranguren, The Fourth Inter-American Specialized Conference on Private International Law (CIDIP-IV, Montevideo, 9–15 July 1989), in: *Netherlands International Law Review* 36 (1989), pp. 269–284.

31. See G.A.L. Droz, La Convention de San Sebastian alignant les Conventions de Bruxelles sur la Convention de Lugano, to be published in: *Revue critique de droit international privé* 1990, and: *id.*, La Convention de Lugano parallèle à la Convention de Bruxelles concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale. *Revue critique de droit international privé* 1989. pp. 1–51.

32. Ratified by Cyprus, Portugal and the Netherlands, but not operating in the absence of the required implementing bilateral treaties.

33. The Sixteenth Session of the Hague Conference (1988) decided to maintain 'the law applicable to contractual obligations' on its agenda but without priority: Final Act, B(5)d.

34. The Fourth Inter-American Specialized Conference on Private International Law (CIDIP-IV), which met at Montevideo 9–15 July 1989, adopted a recommendation encouraging Member States of the Organization of American States to ratify this Convention.

35. Article 19, a provision too often ignored in international litigation.

The heavy, time-consuming methods for transmission of documents abroad of the 1954 Convention became more and more unbearable with the growing internationalization of life in the second half of this century. It more and more frequently happened that a defendant abroad was informed that proceedings had been instituted or a judgment given against him at a time when the court had already rendered its default judgment, or the period for appeal had already elapsed. This was felt to be more and more unacceptable in a time where means of communication were becoming ever more rapid. The Hague Convention of 15 November 1965 on the Service of Documents Abroad in Civil or Commercial Matters ('the Service Convention') replaces the system of diplomatic interstate communication by a more direct method of transmission of documents through Central Authorities and supplements this by a new system of protection of the defendant in Articles 15 and 16. Without modifying the divergent rules of civil procedure, and without requiring a change of procedures by those countries which, like France, Belgium and the Netherlands, provide for methods of service of process that is initially effectuated on their own territory, '*notification au parquet*',³⁶ Article 15 instructs the court not to give judgment until the defendant has had an opportunity to learn of the document and has had sufficient time to defend himself.³⁷ Article 15 comes close to a 'human rights', or international 'due process' of law provision. A reference to Article 15 has been incorporated both in the EEC and the EEC/EFTA Judgments Conventions.³⁸

16. The Service Convention constitutes a bridge between different procedural systems both as among differing civil law systems — those which like the German system require delivery to the defendant and those which like the French allow for a *notification au parquet* — and between civil law and common law systems. With respect to the taking of evidence abroad, civil law systems resemble each other more closely and the function and great practical significance of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ('the Evidence Convention') is in the establishment of channels of co-operation among the courts of the civil law and those of the common law jurisdictions.

36. No one had anticipated that a similar problem might arise in the United States. But see: US Supreme Court 15 June 1988, No. 86-1052, *International Legal Materials* 1988, pp. 1093-1104 (*Volkswagenwerk Aktiengesellschaft v. Schlunk*).

37. Similarly, Article 16 in certain cases permits the judge to relieve the defendant from the effects of the expiration of the time for appeal from a judgment.

38. See, generally, G.A.L. Droz, La Conférence de La Haye et l'entraide judiciaire internationale, *Revue des cours* 1980, III, pp. 159-184.

Like the Service Convention, the Evidence Convention replaces the cumbersome diplomatic channels with a system of direct communication between requesting courts and a receiving Central Authority. One of the key differences between evidence taking in civil law and common law jurisdictions is that in the former group the process of obtaining evidence is normally conducted by the courts, rather than by private attorneys as is the case in common law jurisdictions. A special chapter was included in the Evidence Convention in order to permit evidence taking by diplomatic officers, consular agents and commissioners without compulsion. It is reported that this system works well and that, for example, 'the overwhelming majority of discovery requests by American litigants are "satisfied willingly [...] before consular officials and, occasionally, commissioners, and without a need for involvement by a French court or the use of its coercive powers"'.³⁹ Another difference is that the civil law system is inquisitorial rather than adversarial and the judge normally questions the witness and prepares a written summary of the evidence. In common law countries, however, this task is carried out by counsel and results in verbatim transcripts. Under Article 9 of the Evidence Convention a foreign court must grant a request to use a 'special method or procedure'. This provision has led to highly interesting new forms of international co-operation between courts, resulting among other things in the honouring by courts in France and Germany of requests to administer oaths, to produce verbatim transcripts, or to permit cross-examination of witnesses by counsel. The extent of such forms of judicial co-operation made possible by the Evidence Convention seems to have been underrated by the US Supreme Court in its judgment of 15 June 1987 in *Société nationale industrielle aéronautique et al. v. United States District Court for the Southern District of Iowa*.⁴⁰ In this important decision the Court stated that 'in many situations the letter of request procedure authorized by the Convention would be unduly time-consuming and expensive, as well as less certain to produce needed evidence than direct use of the [discovery proceedings of the Federal Rules of Civil Procedure]'. This statement, for which it gave no support, brought the Court in a 5-4 vote to its rejection of the thesis, supported by a minority of the Court, that American litigants should first resort to the Convention procedures before initiating discovery under the US federal rules.

17. At the initiative of the Permanent Bureau of the Hague Conference a meeting was held in 1977 for the first time concerning the practical

39. See: Brief for Republic of France as *Amicus Curiae*, in the *Aérospatiale* case, *International Legal Materials* 1986, pp. 1519-1534.

40. *International Legal Materials* 1987, pp. 1021-1045.

operation of the Service Convention. This meeting was followed a year later by a similar meeting on the Evidence Convention and in 1980 these 'monitoring Special Commissions' were institutionalized by a decision of the Fourteenth Session of the Hague Conference. These meetings have contributed considerably to strengthen the co-operation among Central Authorities under the Conventions and the reports of these meetings have also been referred to by courts.⁴¹ The Special Commissions have not limited themselves to technical matters. For example, during the last one, which took place in April 1989, on the Service and Evidence Conventions jointly, the Special Commission expressed itself on the scope of the term 'civil and commercial matters', which appears in both Conventions but without definition as follows:

'The Commission considered it desirable that the words "civil or commercial matters" should be interpreted in an autonomous manner, without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both laws cumulatively.'⁴²

Moreover, the Commission implicitly criticized the majority opinion in *Aérospatiale* and endorsed the minority's view when it said:

'[...] having regard to the object of the Convention, the Commission thought that in all Contracting States, whatever their views as to its exclusive application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought.'⁴³

V. New Forms of International Co-operation

18. The need for international co-operation in matters of child protection had become particularly clear since the *Boll* case⁴⁴ in which two

States, the Netherlands and Sweden, litigated over the right to take protective measures concerning a Dutch girl residing in Sweden. Consequently, the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors redefined the respective powers of the courts and authorities of the place of the child's habitual residence and nationality, but also introduced embryonic forms of co-operation between the responsible authorities. So, for example, Article 4 provides that the authorities of the minor's nationality can take overriding measures for the protection of the child's personal property, but only 'after having informed the authorities of the State of the child's habitual residence'. Similarly, according to Article 5, in case of the transfer of a child's habitual residence from one Contracting State to another:

'Measures taken by the authorities of the State of the former habitual residence shall be terminated or replaced [by the authorities of the new habitual residence] only after previous notice to the said authorities.'⁴⁵

In its Articles 6 and 10 the Convention goes beyond imposing a simple duty to inform and establishes a form of co-operation. Under Article 6 the authorities of the State of the child's nationality may 'in agreement with those of the State of the child's habitual residence or where the child possesses property' entrust to them the implementation of the measures of child protection taken. Article 10 provides that:

'in order to ensure the continuity of the measures applied to the child, the authorities of a Contracting State shall, as far as possible, not take measures with respect to the child save after an exchange of views with the authorities of the other Contracting States whose decisions are still in force.'

Despite these hints given to the courts and administrative authorities to establish a system of communication and co-operation, such a system has not really come off the ground. The reason is no doubt that international collaboration between courts and authorities which only rarely have occasion to deal with each other, can hardly be expected to work. Only a co-ordinated system of co-operation, such as those provided for under the Service and Evidence Conventions, can provide the infrastructure, and the incentive, which permit a lasting form of co-operation. As a result, the 1961 Convention remains essentially a traditional treaty on

41. By the Supreme Court of the Netherlands, for instance: HR 21 February 1986, *NJ* 1987, 149 (*Arcalon et al. v. US Bankruptcy Court for the Southern District of California*); English translation in: *International Legal Materials* 1989, pp. 1577-1583.

42. See: Hague Conference on private international law, Report on the Work of the Special Commission on the Operation of the Service and Evidence Conventions, *International Legal Materials* 1989, pp. 1556-1569. The Special Commission's opinion may be contrasted with the judgment of the House of Lords of 16 February 1989, *International Legal Materials* 1989, pp. 693-718 (*Re The State of Norway*).

43. See: Report, *supra* note 42, p. 1569.

44. Case concerning the application of the Convention of 1902 governing the guardianship of infants: Judgment of 28 November 1958, *ICJ Reports* 1958, p. 55. This decision was 'a watershed for children's rights in private international law': C.A. Dyer, *Childhood's Rights in Private International Law*, presentation for the First International Congress

on Childhood and Society (Madrid 1989), p. 8.

45. Cf. also Article 11.

choice of law rules which generally serves a useful function but, because of its lack of a system of co-operation, sometimes leads to rather abstract fights over questions of jurisdiction and applicable law which tend to obscure the practical issue at stake.

The weaknesses of the 1961 Convention had become particularly apparent in cases of international abduction of children by one parent. A rapid increase in international child abductions started in the '70s, again, as a result of the growing internationalization of daily life: rapid mass international transportation, international migration, increasing numbers of broken international families, etc. One possible course of action would have been to complete the Protection of Minors Convention by provisions on the enforcement of custody judgments, thus adding 'teeth' to the 1961 Convention which lacks provisions on such enforcement. This is, essentially, the method followed in the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children. This treaty is modelled on the classical example of a convention on the recognition and enforcement of judgments, with the additional facility of a system of central authorities which, within this framework, assist parents in recovering their children.

19. The Hague Child Abduction Convention constitutes a departure from this classical pattern. It is an example of a new system of international co-operation, both at the legislative and at the judicial and administrative level, where private international law techniques have been adapted to serve the overall double policy objective of securing the prompt return of abducted children and ensuring the respect of rights of custody and of access. The Convention is neither concerned with the law applicable to the custody of children, nor is it a treaty on the recognition and enforcement of decisions on custody:

— it does not establish choice of law rules concerning custody of children. Instead it refers to the law of the State where the child was habitually resident immediately before the removal or the retention (including the rules of private international law of that State) only in order to establish whether abduction was 'in breach of rights of custody': Article 3(a). Indeed, if the authorities of the State to which a child has been removed have received notice of a wrongful removal, the Convention prohibits them expressly from deciding on the merits of rights of custody, except in the exceptional case where the child is not to be returned under the Convention or where no application is lodged within a reasonable time (Article 16). Neither should the decision to return the child 'be taken to be a determination on the merits of any custody issue' (Article 19);

— nor is it a traditional treaty on the recognition and enforcement of decisions on custody. This option, which was discussed at length, 'was deliberately rejected. Due to the substantive consequences which flow from the recognition of a foreign judgment, such a treaty is ordinarily hedged around by guarantees and exceptions which can prolong the proceedings. Now, where the removal of a child is concerned, the time factor is of decisive importance. In fact, the psychological problems which a child may suffer as a result of its removal could reappear if a decision on its return were to be taken only after some delay'.⁴⁶

Instead, the Convention defines the powers of authorities and courts in terms of the objectives of the Convention. The Central Authorities 'shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children ...': Article 7(1). They shall take 'all appropriate measures in order to obtain the voluntary return of the child' (Article 10), but also 'initiate or facilitate the institution of judicial or administrative proceedings: Article 7(2)(f). The courts provide a specific remedy under the Convention, *i.e.* they 'shall order the return of the child forthwith' (Article 12) except in some narrowly defined circumstances (Article 13).⁴⁷

20. As in the case of the Service and Evidence Conventions, the Hague Conference organized a 'monitoring' Special Commission, which in fact closed on the eve of the symposium 'Forty Years On'. Thirty States, two intergovernmental and seven non-governmental international organizations attended the meeting. A crew from the New Zealand television recorded the meeting for a programme broadcasted a few days later in New Zealand, in which the Attorney General of New Zealand announced legislation enabling New Zealand to accede to the Convention which would bring the total number of Contracting States to fifteen. All this indicates that the Convention is more than an affair for specialists and attracts wide public interest. The meeting served a number of functions.

First of all, it was informative. It appeared, for example, that in Australia it is customary for 'custody' to be granted to one parent but that

46. See E. Pérez-Vera, Explanatory Report, *Conférence de La Haye de droit international privé, Actes et documents de la Quatorzième session*, Tome III: Child Abduction, pp. 426-473, no. 36.

47. For another exception, see Article 20 referring to fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (cf. *supra* II).

nevertheless the parent who has not been awarded such 'custody', as a co-guardian, has the right to be consulted and to give or refuse consent before the child is permanently removed from Australia. Therefore, the concept of 'custody' rights under Australian law, is narrower than that of the Convention. The Australian Central Authority was encouraged by the meeting to include, when forwarding an application for return of a child from abroad, specific information on the rights of such a co-guardian which fall within the contemplation of the treaty.

Secondly, the meeting served the function of reconfirming the spirit of the Convention and of reinforcing the discipline it requires. There is now a large body of case law in a number of countries⁴⁸, in which the abductor opposed the return of the child, trying to establish that 'there is a grave risk that his or her return would expose a child to physical or psychological harm or otherwise place the child in an intolerable situation' (Article 13b). It appeared that the courts in general had given a strict interpretation to the words 'grave risk' and the meeting expressed its satisfaction over this.

Thirdly, the meeting took in part the character of an international dispute settlement procedure when it went into an investigation of the problems which States Parties to the Convention had encountered through Spain's handling of incoming requests for the return of children during the two years since the Convention had entered into force for that country. The meeting unanimously concluded that:

'Spain is strongly encouraged without further delay to take all appropriate measures to ensure that its Central Authority and its judicial and administrative authorities are provided the necessary powers and adequate resources to enable it fully to comply with its obligations under the Convention'.⁴⁹

* * *

21. The basic scheme of the Hague Child Abduction Convention, with its carefully tailored procedures for international co-operation and novel private international law techniques adapted to that purpose, may well lend itself to being applied to other fields of private international law. Two such areas come to mind, one being the protection of the cultural heritage and the other the international adoption of children.

22. In a paper for a workshop on 'International Sales of Works of Art',⁵⁰ Georges A.L. Droz has proposed to apply the mechanisms of the Hague Child Abduction Convention to the situation, well known from the case law in many countries, where a work of art has been exported in violation of rules prohibiting such exports. The parallel with the situation of international child abduction is that the objective is to restore the *status quo ante*. The objective of an international convention could simply be to return the work of art to the country from which it has been illegally exported. The law of the country of origin would be taken into consideration not to determine ownership, but rather to determine the 'wrongful removal' of the object. It would be up to the country of origin to define — within agreed internationally acceptable limits — what should constitute a protected work of art. The procedure could be strengthened by a system of co-operation between Central Authorities who could channel requests originating in Contracting States.⁵¹

23. Intercountry adoption of children is another area where there would seem to be an emerging worldwide consensus on substantive international policies⁵² which require new response going beyond traditional private international law techniques, as were used, for example, in the Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions. Contrary to the case of child abduction and the return of works of art, the problem here is not one of restoring the *status quo ante*, but on the contrary, of providing a child with a (new) family and hence with a new legal status. This, however, involves on the one hand the child's natural parents, relatives, legal guardians and the State of origin itself, and on the other the adopting parents and the receiving State. Many countries have tried unilaterally to prevent irregular practices and child trafficking, using different techniques: judicial control, supervision by emigration/immigration authorities, by the justice ministries, etc. What is needed in addition, however, is some form of confidence building and the creation of channels of communication and co-operation. Some bilateral agreements

48. See: *Case Law Decided under the Convention of 15 October 1980 on the Civil Aspects of International Child Abduction*, with Addendum 1, Preliminary Document No. 2 for the attention of the Special Commission of October 1989.

49. See: Hague Conference on private international law, *Overall Conclusions of the Special Commission of October 1980*

50. G.A.L. Droz, *La protection internationale des biens culturels et des objets d'art, vue sous l'angle d'une convention de droit international privé*, P. Lalive (ed.), *International Sales of Works of Art*, Geneva Workshop, 11–13 April 1985, pp. 535–544.

51. For further details, in particular concerning the need for taking into account the interests of innocent purchasers, see: Droz, *supra* note 50.

52. See: Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, UNGA A/Res/41/85 of 3 December 1986, and see: Article 21 of the UN Convention on the Rights of the Child adopted on 20 November 1989; *International Legal Materials* 1989, pp. 1456–1476, introductory note by C. Price Cohen, pp. 1448–1454.

have already been concluded between countries of origin and receiving countries. The time seems now to have come to broaden the negotiation framework, and the Sixteenth Session of the Hague Conference in October 1988 decided that work should start on a multilateral convention on intercountry adoption, for the preparation and negotiation of which all interested countries would be invited.

VI. Concluding Remarks

24. The unification of private international law — in the past sometimes considered to be an end in itself — has increasingly become part of the new 'international law of co-operation'. Private international law treaties have more and more become instruments through which States cooperate, in the framework of an international organization and with the support of other international and non-governmental organizations, in order to respond to common international needs which arise as a result of the growing internationalization of life, private and business. Traditional choice of law techniques are being used and adapted to further substantive policies which may stretch from facilitating international estate planning to preventing child abduction. Far from being an end in itself, unification of private international law is now an adventurous co-operation process which seeks to provide private citizens with the legal tools which allow them to feel better adapted to an increasingly international environment.