PRIVATE INTERNATIONAL LAW: AN INTRODUCTION FROM AN AMERICAN PERSPECTIVE

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Students in U.S. law schools are seldom introduced to the field of "private international law" – unlike many of their foreign counterparts, for whom it is often a required course of study. Yet it is an increasingly relevant and important area of law, one that U.S. practitioners are likely to encounter in a surprisingly wide range of contexts. Without an appreciation of its breadth, substance, and techniques, they may well find themselves at a disadvantage in dealing with foreign lawyers well-versed in the subject. This article provides an overview of the field of private international law (or "PIL") broadly conceived – what it encompasses, where it is developed, the areas where it is likely to be relevant, and the mechanisms and techniques it offers for resolving problems. The aim is to equip practitioners and students alike with a basic appreciation of its scope, sources, and principles so they can function effectively in an increasingly transnational legal environment.

By way of introduction, imagine that you are counsel to a U.S. manufacturer that has discovered a new way to make its products more cheaply and efficiently by using materials or components found only in a foreign country. The client has asked you to make the necessary legal arrangements for buying, transporting, and paying for those materials. You are unfamiliar with the foreign legal system (to say nothing of its business, banking, or trade practices) but understand they are all quite different from those in the United States, so the supplier (and its counsel) will likely not have the same understanding of (or expectations for) the necessary legal arrangements, beginning with the sales contract and

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arrangements for transportation and payment. Are there any relevant international agreements or mechanisms for bridging these differences? Which country's rules, if any, might apply in the drafting process? Also, in the event of disputes regarding interpretation or performance of the contract, where (and how) might they be resolved and what law might apply? May the contracting parties decide those issues for themselves?

Or consider this: your client is a party to a divorce proceeding involving the negotiation of a joint custody agreement for the couple's minor children, with provisions for the payment of child support. The other parent is a citizen of, and has recently returned to, a foreign country. Both parents expect that the children will spend some time with each. If the court grants your client primary custody of either or both of the children, will the courts in the other country recognize and give effect to such an order? If the other party were to obtain a contrary order from those foreign courts, would the U.S. court be bound (or likely) to respect it? What if the other party fails to make agreed payments for child support? Are there any relevant international agreements?

Finally, suppose a U.S. company retains you to file suit against a foreign company over a dispute arising from a business transaction that occurred in the United States. Assuming for the moment that the relevant U.S. court would have jurisdiction over the dispute and the foreign company, how might you serve process on the foreign company in its own country? Would service by normal U.S. methods be effective or acceptable? What obstacles might you encounter in seeking discovery of relevant records and evidence from that defendant? Would it be possible to take the defendant's deposition in the foreign country? What if the defendant files a "counter-suit" in its courts? If you prevail in the U.S. litigation, would the judgment be enforceable in that country (or vice-versa)? Are there better alternatives to seeking a judicial resolution in domestic court?

As the world has become more interconnected, and cross-border activity more common, such questions arise with increasing frequency. Where and how they can be resolved lies at the heart of PIL. For many lawyers, particularly in civil law systems, the term "private international law" is often understood to refer rather narrowly to the application by domestic courts of their national "conflicts of law" principles to determine what law applies in the context of cross-border transactions between private parties.[2] In each of the examples above, therefore, the

2. We use the term "conflicts of law" to denote the problem faced by a court in determining which rules of law apply to a particular question when the issue has relevant connections to more than one legal system. It is typically a matter of the law of the forum. By

answers would be derived – at least in the first instance – from the law of the jurisdiction in which the disputes are presented for resolution.

A somewhat broader view includes (beyond the issues of applicable law) the rules of domestic law that determine, in cases with significant international connections, which court will have jurisdiction to address the dispute and where its eventual judgment might (or might not) be recognized and enforced. Those issues are complementary and commonly designated as "conflicts of jurisdiction." In the contemporary context, PIL also embraces efforts to *harmonize* substantive law norms in such "transnational" areas as commercial transactions and family law in order to minimize conflicts.

We take an even more expansive view of the scope of PIL. In our eyes, the field is better conceived as encompassing (in addition to conflicts of law, jurisdiction and enforcement of judgments, and substantive harmonization) both international "judicial assistance" in procedural matters and alternative methods of dispute settlement (such as arbitration, conciliation, and mediation) when used in the international context.

With this perspective, our intention is to introduce students and practitioners to the primary questions addressed by private international law, the international fora in which they are considered, and the main instruments that have been adopted to address them.[3] Our approach is both topographical (that is, intended to sketch the field in broad strokes) and practice-oriented (rather than doctrinal); the aim is to provide an introductory survey rather than a detailed analysis. It undoubtedly offers a distinctly American perspective – one that reflects common-law approaches and conceives of the field more broadly than many trained in civil law systems would embrace. We certainly do not claim to offer a comprehensive overview. However, we have included a number of references to non-U.S. (as well as scholarly) sources for more in-depth information.

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distinction, the term "choice of law" refers to the parties' exercise of "autonomy" in selecting which law should apply to the transaction in question (paradigmatically, in a commercial contract). The term "choice of court" refers to the parties' (typically contractual) agreement on a particular domestic court for the resolution of disputes arising from the transaction.

3. PIL is rarely taught as a discrete course in U.S. law schools. Courses in "conflicts of law" are common although typically focused on the particular U.S. context (where the main issue is the application of the law of differing U.S. states). A recent and somewhat broader treatment is provided in PETER HAY, PATRICK J. BORCHERS & RICHARD D. FREER, CONFLICT OF LAWS, PRIVATE INTERNATIONAL LAW, CASES AND MATERIALS (16th ed. 2021); *see also* GILLES CUNIBERTI, CONFLICT OF LAWS, A COMPARATIVE APPROACH: TEXT AND CASES (2nd ed. 2022).

After introducing the field in general terms, and the various international fora in which it is developed, we turn to some of the "core issues" that it engages, particularly conflicts of law, choice of forum, and dispute settlement mechanisms. We then discuss, in slightly greater detail, two areas of particular interest: international judicial assistance and international family law, after which we survey a broad (but hardly exhaustive) range of areas where PIL issues and instruments are implicated. Following a short overview of the particular challenges to U.S. participation in many of these projects posed by the structure of the U.S. legal system, we offer some concluding observations.

I. WHAT IS PRIVATE INTERNATIONAL LAW?

Despite its increasing relevance, PIL remains in some respects a loosely defined concept. At the most general level, the term covers legal issues arising between private parties in a transnational or cross-border context – that is, where one or more significant foreign elements[4] are present so that the law of more than one domestic (or national) legal system is implicated.[5] In this view, the main question for a court is "what law applies to this situation?" As suggested in our opening examples, whether the issue is one of substantive or procedural law, the first reference will be to the law of the jurisdiction deciding the issue.

It might be, of course, that the "conflicts" rules of that jurisdiction will direct the court to look to and apply a relevant foreign law.[6] It could also be the case that the parties to a private cross-border transaction have agreed on which law will govern; if so, the question would be whether their "choice of law" is valid and enforceable in the jurisdiction considering the dispute. Are there "mandatory rules" of domestic law that apply no matter what the private parties have agreed (or that prevent application of the rules they have chosen)? A separate but related inquiry concerns how the content and meaning of foreign law is determined and applied in the host jurisdiction.

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4. What a "significant foreign element" is may vary depending on the issue in question. It might be, for instance, that some of the relevant acts or consequences took place in different jurisdictions. Or, as another example, it might be where two parties are of different nationalities.

5. *See generally* CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW (Paul Torremans et al. eds., 15th ed. 2017); BLURRY BOUNDARIES OF PUBLIC AND PRIVATE INTERNATIONAL LAW: TOWARDS CONVERGENCE OR DIVERGENT STILL? (Poomintr Sooksripaisarnkit and Dharmita Prasad eds., 2022).

6. In some situations, the "conflicts" rules of the second jurisdiction may refer the court back to its own law, in a process known as "renvoi."

Obviously, this dimension of PIL is most likely to be encountered in the context of litigation in domestic courts. Other PIL issues that may arise in the course of transnational litigation include party autonomy to choose a particular forum for dispute resolution, the rules for cross-border service of process and discovery of evidence, and the enforcement of judgments rendered by foreign courts. Often those who see PIL from this perspective will pay particular attention to the various "international judicial assistance" agreements designed with these issues in mind (such as those involving service of legal process and obtaining evidence abroad, legalization of documents by use of an "apostille," and enforcement of judgments).[7] Closely related to this dimension are the various agreed mechanisms for international dispute settlement outside of litigation in domestic courts, including international mediation, conciliation and arbitration.

Another way of viewing the field of PIL is to look to the substantive rules that have been developed (regionally and at the international level) in specific areas, to reduce or eliminate the consequences of "conflicts." Examples of efforts to "harmonize" or "unify" the relevant rules can be found in the fields of cross-border commercial transactions, international family law, trans-border bankruptcy and (increasingly) e-commerce, cross-border data transfer and data protection, and privacy.

The field of PIL can also be approached by considering the agendas of the various international institutions dedicated to creating or refining relevant rules and instruments. These include (among others) the Hague Conference on Private International Law ("HCCH"), the UN Commission on International Trade Law ("UNCITRAL"), the International Institute for the Unification of Private Law ("UNIDROIT"), and various components or activities of such regional organizations as the European Union, the Organization of American States, the African Union, and the Asia Pacific Economic Cooperation (APEC).[8] In different areas and in different ways, these organizations work on creating harmonized rules, recommended principles, or model laws in order to facilitate private cross-border activity.

From this brief overview it should be evident that the substance of PIL is expressed in a variety of different legal instruments. It is of course

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7. For an overview of the issues arising under these instruments in litigation in domestic courts, *see* DAVID P. STEWART & DAVID W. BOWKER, RISTAU'S INTERNATIONAL JUDICIAL ASSISTANCE: A PRACTITIONER'S GUIDE TO INTERNATIONAL CIVIL AND COMMERCIAL LITIGATION (2d ed. 2021).

8. Citations to the websites and documents of these organizations are provided *infra* where they are discussed in more detail.

found in domestic legislation. In jurisdictions grounded in the civil law tradition, the rules are most likely to be codified,[9] while in common law systems they are more often a matter of decisional law (that is, expressed as principles applied by courts) although some statutory incorporation is not uncommon. In either case, the first reference for lawyers involved in a cross-border transaction or dispute will be the law of their own jurisdictions to determine whether any mandatory requirements apply.[10]

While bilateral agreements between States on private international law issues are not unusual, the number of multilateral PIL treaties and conventions (both regional and global) continues to grow. Some may find it odd that treaties would be involved in articulating rules and procedures applicable to "private" transactions, since (as agreements between States) treaties are, by definition, a matter of *public* international law.[11] As cross-border issues grow in importance, however, regional, and international harmonization of the rules concerning private transactions and dispute settlement makes it easier for individuals and business entities to interact with each other across borders. At the same time, the progressive elaboration of PIL norms today often takes the form of so-called "soft law" norms and principles.[12]

For many academics, these disparate efforts and instruments occasion lively debate over the nature and fundamental objectives of PIL. What is the essential purpose of PIL? Is it to promote methodological

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9. *See, e.g.*, Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International Law Act] Dec. 18, 1987, BBl 1988 I 5, (amended 2017) (Switz.); Loi du 16 juillet 2004 portant le Code de droit international privé [Law establishing the Code of Private International Law] Jul. 27, 2004, MONITEUR BELGE [M.B.] [OFFICIAL GAZETTE OF BELGIUM], July 27, 2004, 57344, as amended; Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun [MÖHUK] [Code on Private International and International Civil Procedure Law] Nov. 27, 2007, Act No. 5718 (Turk.).

10. For this reason, some commentators differentiate between "private international law" (referring to domestic law relevant to the particular cross-border transaction or dispute) and "international private law" (meaning applicable international treaties, principles, and practices). We find the distinction both uninformative and limiting.

11. As Alex Mills observed in THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW 11 (2009), "private international law is best understood as 'public' in character, and . . . the appropriate perspective for its analysis is systemic." He noted that PIL was historically conceived as a part of an international system of natural law and re-conceptualized over time as autonomous national law, but should today be viewed as "a mutually constitutive international system of secondary norms, serving a public constitutional function." *Id.* at 309.

12. Agreements, declarations and other statements that are not legally binding are sometimes referred to as "soft law." *See generally* Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. OF LEGAL ANALYSIS 171 (2010).

clarity to domestic courts, in order to foster predictability in how similar cases are decided in different legal systems? To promote uniform and consistent results in different legal systems or to provide certainty to transacting parties and efficiency for litigants? To ensure fair and objective treatment or "just outcomes" (recognizing that what may be seen as justice in one system might not be seen that way in every system)? To promote communal values, to "unify" the law through harmonization and the eventual standardization of rules on a global basis, to achieve some form of "regulated transnationalism"?[13] Or to facilitate trade and commerce and thereby advance economic growth and prosperity? It is precisely this diversity of approaches and perspectives that makes the field dynamic.[14]

II. WHERE IS PRIVATE INTERNATIONAL LAW DEVELOPED?

In most instances, as noted *supra*, a practitioner's first resort (in looking for the PIL rules or principles applicable to a given issue or transaction) will necessarily be to the relevant domestic law on one's own jurisdiction. Many domestic systems have codified the relevant rules in discrete parts of their domestic laws.[15]

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13. "The evolution of private international law has always involved the reconciliation of the competing interests of internationalism, consistency and predictability, on the one hand, with those of national sovereignty and comity on the other." Justice Paul Le Gay Brereton, *Conclusion*, *in* COMMERCIAL ISSUES IN PRIVATE INTERNATIONAL LAW: A COMMON LAW PERSPECTIVE 326 (Michael Douglas, Vivienne Bath, Mary Keyes & Andrew Dickinson eds., 2019). Some describe the objective in even broader terms: for example, "to remove outdated and parochial obstacles to productive, positive global transnational activity, and to protect weaker parties and vital public interests, including common goods – and so to play its part in building a sustainable future for humanity and for the planet." Hans Van Loon, *The Global Horizon of Private International Law*, 380 RECUEIL DES COURS 108 (2015).

14. *See generally* PRIVATE INTERNATIONAL LAW: CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019); Symeon C. Symeonides, *Private International Law: Idealism, Pragmatism, Eclecticism. General Course on Private International Law*, 384 RECUEIL DES COURS (2016).

15. Many country-specific analyses are available: *see, e.g.*, XIAOHONG LIU, ZHENGYI ZHANG, ET AL., CHINESE PRIVATE INTERNATIONAL LAW (2021); ADRIANA DREYZIN DE KLOR, PRIVATE INTERNATIONAL LAW IN ARGENTINA (2021); KAZUAKI NISJOKA, YUKO NISHITANI, ET AL., JAPANESE PRIVATE INTERNATIONAL LAW (2021); STELLINA JOLLY, SALONI KHANDERIA, ET AL., INDIAN PRIVATE INTERNATIONAL LAW (2021); STEPHANE-LAUREN TEXTIER, DROIT INTERNATIONAL PRIVÉ LEXIFICHE: RÈGLES GÉNÉRALES (2021); CHUKWUMA OKOLI, RICHARD OPPONG, ET AL., PRIVATE INTERNATIONAL LAW IN NIGERIA (2021). *See generally* A GUIDE TO GLOBAL PRIVATE INTERNATIONAL LAW (Paul Beaumont & Jayne Holliday eds., 2022).

At the same time, it is important to understand that private international law also develops at the regional and global levels, in different fora and locations. One way of introducing the field is briefly to survey the main international bodies that contribute significantly to the development of PIL instruments.

A. The Hague Conference on Private International Law

One central venue for the development of private international law is the Hague Conference on Private International Law ("HCCH"). While its activities date back to 1893, in 1955 it became a permanent intergovernmental organization. Its mandate, as expressed in Article 1 of its Statute, is "to work for the progressive unification of the rules of private international law."[16] Its reach is increasingly global. The current HCCH membership includes 90 States and one "regional economic integration organization" (the European Union as an entity separate from its members); in addition, 65 non-member States are either signatories or contracting parties to at least one Hague convention.[17]

The Permanent Bureau is the main driver of the Conference's day-to-day activities. Its primary function is to organize and run plenary sessions, which occur every four years. Permanent Bureau staff perform research relevant to Conference activities, provide advice and training, and maintain contacts with experts, various organs within member States, and other international organizations.

While formal instruments such as conventions are drafted and adopted by States, the Permanent Bureau convokes and supports the negotiation of such instruments. All HCCH conventions are designed with the aim of achieving what the organization sees as its ultimate goal: "a world in which, despite the differences between legal systems, persons – individuals as well as companies – can enjoy a high degree of legal security."[18]

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16. Statute of the HCCH art. 1, Oct. 31, 1951, 220 U.N.T.S. 121; *see generally* A COMMITMENT TO PRIV. INT'L LAW (Permanent Bureau of the HCCH eds., 2013).

17. At the time of writing, El Salvador was the latest country to become a member of the HCCH, doing so on March 2, 2022. For the current list of parties, see *Status Table – Statute of the Hague Conference on Private International Law*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=29 (last visited Apr. 11, 2022). For the list of non-States Parties that have signed or ratified one of the HCCH's conventions, see *Other Connected Parties*, HCCH, *available at* https://www.hcch.net/en/states/other-connected-parties (last visited Apr. 11, 2022).

18. *See About HCCH*, HCCH, *available at* https://www.hcch.net/en/about (last visited Apr. 10, 2022).

Between 1951 and 2008, the Conference adopted 38 treaties; since then, two more have been added. The most-widely ratified Hague conventions involve legalization of foreign public documents through the use of "apostilles,"[19] the rules and methods for cross-border service of legal process,[20] and the mechanisms for obtaining evidence from abroad.[21] Most recently, the Conference adopted a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[22] Other important Hague instruments concern access to justice, international child abduction, intercountry adoption, conflicts of laws relating to the form of testamentary dispositions, enforcement of maintenance obligations, and reciprocal recognition of divorces.[23]

The HCCH is also working, inter alia, on instruments concerning the protection of international tourists and visitors, the cross-border recognition and enforcement of agreements in family matters involving children, the legal parentage of children and surrogacy, and the recognition and enforcement of foreign civil protection orders. Of particular relevance to the international litigating community is the recently undertaken project on the jurisdiction of domestic courts in transnational civil or commercial disputes.[24]

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19. *See* Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189 [hereinafter "Apostille Convention"].

20. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter "Hague Service Convention"].

21. *See* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter "Hague Evidence Convention"].

22. *See* Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 (last visited Apr. 10, 2022) (not yet entered into force) [hereinafter "Hague Judgments Convention"].

23. Typically, the entry in force of a convention is subject to a minimum number of parties; as a result, it is not unusual for conventions to enter into force some years after negotiations have been completed and the text agreed. *See generally HCCH Conventions: Signatures, Ratifications, Approvals and Accessions*, HCCH, *available at* https://assets.hcch.net/docs/ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf (last visited Apr. 10, 2022).

24. *See Jurisdiction Project*, HCCH, *available at* https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project (last visited Apr. 10, 2022). *Cf.* MILANA KARAYANIDI & PAUL BEAUMONT, RETHINKING JUDICIAL JURISDICTION IN PRIVATE INTERNATIONAL LAW: PARTY AUTONOMY, CATEGORICAL EQUALITY AND SOVEREIGNTY (2021).

B. The United Nations Commission on International Trade Law

The UN General Assembly ("UNGA") established the UN Commission on International Trade Law ("UNCITRAL") in 1966 for "the promotion of the progressive harmonization and unification of the law of international trade."[25] Since then, UNCITRAL has served as the core legal body within the United Nations in the field (broadly conceived). Half of its members are elected by the General Assembly every three years. At its seventy-sixth session, in December 2021, UNGA voted to increase UNCITRAL's membership from sixty to seventy countries; five of the new members were elected at that session, and the remaining five will be elected during UNGA's seventy-ninth session in 2025.[26]

UNCITRAL's main activity is to prepare (and promote the adoption and use of) legislative and non-legislative instruments related to key parts of commercial law. Its substantive focus has largely been on dispute resolution, international contract practices, transport, insolvency, e-commerce, international payments, secured transactions, procurement, and the sale of goods. While over time it has developed other instruments (such as model laws and legislative guides), some of its most important PIL instruments have been multilateral conventions in areas where a high degree of harmonization is required. Two widely adopted examples are the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[27] and the 1980 UN Convention on the International Sale of Goods ("CISG").[28]

The main areas of UNCITRAL's current focus are Micro, Small, and Medium Enterprises (Working Group I); Arbitration and Conciliation/Dispute Settlement (Working Group II); Investor-State Dispute Settlement Reform (Working Group III); Electronic Commerce (Working Group IV); and Insolvency Law (Working Group V).[29] Working Group VI's work on the Judicial Sale of Ships concluded in

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25. G.A. Res. 2205 (XXI), at art. I (Dec. 17, 1966). *See generally* UNICITRAL, *available at* www.uncitral.org (last visited May 25, 2021).

26. G.A. Res. 76/109 (Dec. 9, 2021). The ten new memberships are equally distributed among world regions: two each from African States, Asia-Pacific States, Eastern European States, Latin American and Caribbean States, and Western European and Other States.

27. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter "New York Convention"].

28. UN Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter "CISG"].

29. *Working Groups*, UNCITRAL, *available at* https://uncitral.un.org/en/working_groups (last visited Aug. 4, 2022).

February 2022, when it submitted a revised Draft Convention on the Judicial Sale of Ships to the UNCITRAL membership for consideration;[30] in November 2022, it will turn its attention to negotiable multimodal transport documents.[31]

At UNCITRAL's fifty-fifth session, which ended in July 2022, the body approved the Draft Convention on the Judicial Sale of Ships, sending the document to UNGA for consideration and recommending its adoption.[32] At the same session, UNCITRAL also adopted Working Group IV's Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services. [33]

In addition to its working groups and their activities, UNCITRAL also maintains the "Case Law on UNCITRAL Texts" ("CLOUT") system, which offers a database of relevant court decisions and arbitral awards from around the world.[34] The goal is to help a court in any given jurisdiction arrive at a uniform interpretation of an UNCITRAL instrument; if courts in different jurisdictions were to decide similar cases differently, the outcome would be less certainty for private parties. Most of the cases reported in CLOUT are related to the Convention on the International Sale of Goods and the Model Law on International Commercial Arbitration.

C. The International Institute for the Unification of Private Law

The International Institute for the Unification of Private Law ("UNIDROIT"), headquartered in Rome, is an independent intergovernmental institution devoted to studying the needs and methods for modernizing, harmonizing, and coordinating private law – particularly commercial law. Founded in 1926 as an auxiliary organ of

30. *See* U.N. Comm'n. On Int'l Trade L., Report of Working Group VI (Judicial Sale of Ships) on the work of its fortieth session (New York, 7–11 February 2022), ¶ 10, U.N. Doc A/CN.9/1095 (Feb. 12, 2022); U.N. Comm'n. On Int'l Trade L., Draft convention on the international effects of judicial sales of ships, U.N. Doc A/CN.9/1108 (Mar. 4, 2022).

31. *See Working Groups, supra* note 29.

32. Press Release, U.N. Comm'n. On Int'l Trade L., UN Commission on International Trade Law concludes 55th Session in New York, U.N. Press Release UNIS/L/333 (July 20, 2022).

33. *See id. See also* U.N. Comm'n. On Int'l Trade L., Report of Working Group IV (Electronic Commerce) on the work of its sixty-second session (Vienna, 22–26 November 2021), U.N. Doc A/CN.9/1087 (Dec. 23, 2021); U.N. Comm'n. On Int'l Trade L., Draft Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services, U.N. Doc A/CN.9/1112 (Feb. 21, 2022).

34. *Case Law on UNCITRAL Texts (CLOUT)*, UNCITRAL, *available at* https://uncitral.un.org/en/case_law (last visited Apr. 10, 2022).

the League of Nations, it was re-established in 1940 through a multilateral agreement (i.e. the UNIDROIT Statute), to which sixty-three States are currently party.[35]

Over the years, UNIDROIT has produced more than seventy studies and drafts, many of which have resulted in the adoption of conventions, model laws, principles, and legal and contractual guides on a range of subjects, including agency, capital markets, civil procedure, commercial contracts, contract farming, cultural property, factoring, franchising, international sales, international wills, leasing, reinsurance, secured transactions, and transport. Among its best known instruments are the Principles on International Commercial Contacts (2016), the Cape Town Convention on International Interests in Mobile Equipment (2001) (with separate protocols pertaining to aircraft equipment, rail equipment, space equipment, and mining, agricultural and construction equipment), the Convention on International Financial Leasing (1988), and the Convention Providing a Uniform Law on the Form of an International Will (1973).[36] In addition, UNIDROIT maintains one of the leading documentation centers on private law, holding more than 260,000 volumes from a wide array of countries.[37]

D. Regional Organizations

Regional entities have long played important roles in the development of PIL. In recent decades, the European Union ("EU") has adopted community-wide codifications of law on a variety of private law topics, including contracts, torts, family law, and insolvency as well as jurisdiction, choice of law, and judgments.[38] Because it is committed to

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35. UNIDROIT Statute Incorporating the Amendment to Article 6(1) Which Entered into Force on 26 March 1993, *available at* https://www.unidroit.org/english/presentation/statute.pdf (last visited Apr. 08, 2022) [hereinafter "UNIDROIT Statute"].

36. *See Instruments,* UNIDROIT, *available at* https://www.unidroit.org/instruments (last visited May 25, 2022).

37. *See Library,* UNIDROIT, *available at* https://www.unidroit.org/library (last visited May 25, 2022).

38. *See generally* MICHAEL BOGDAN & MARTA PERTEGÁS SENDER, CONCISE INTRODUCTION OF EU PRIVATE INTERNATIONAL LAW (4th ed. 2019); FELIX WILKE, A CONCEPTUAL ANALYSIS OF EUROPEAN PRIVATE INTERNATIONAL LAW (2019); HOW EUROPEAN IS EUROPEAN PRIVATE INTERNATIONAL LAW? (Jan von Hein, Eva-Maria Keininger & Giesela Rühl eds., 2019). *See also International Law,* EUROPEAN E-JUSTICE PORTAL, *available at* https://e-justice.europa.eu/content_international_law-10-en.do (last visited Apr. 8, 2022). *See also EUPILLAR (European Union Private International Law: Legal Application in Reality),* UNIV. OF ABERDEEN, *available at* https://www.abdn.ac.uk/law/research/eupillar/.ph (last visited Apr. 8, 2022).

achieving "freedom, security and justice without internal borders," the EU can enact binding rules that apply directly to member States (and their citizens) in their relations with each other. In practice, those rules also have considerable influence over activities and transactions affecting private parties outside the EU. The corpus (and influence) of EU private law instruments and initiatives is extensive and is often addressed as a separate course in European law schools.

Another important (but sometimes less widely appreciated) regional contributor to the development of private international law is the Organization of American States ("OAS").[39] While not aimed at the economic or political integration of its member States in the same way as the EU is, the OAS has nonetheless adopted many important PIL instruments over time, with the aim of standardizing rules in order to facilitate trade and promote dispute resolution within the hemisphere, beginning with the Bustamante Code in 1928.[40] More recently, it promulgated the 1979 Inter-American Convention on General Rules of Private International Law, the 1975 Inter-American Convention on International Commercial Arbitration, and the 1994 Convention on the Law Applicable to International Contracts.[41]

The OAS has also adopted several important non-binding instruments related to private international law. Two recent examples are (i) the Principles for Electronic Warehouse Receipts for Agricultural Products, intended to highlight the importance of pursuing legislative reform as a means of promoting economic development in the agricultural sector, with an eye to the possible elaboration of model legislation,[42] and (ii) the Model Law on the Simplified Corporation, aimed at encouraging States to enact legislation permitting an alternative to complicated formal requirements for incorporation, thereby fostering

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39. *See generally Department of International Law: Private International Law*, ORGANIZATION OF AMERICAN STATES [O.A.S.], *available at* http://www.oas.org/en/sla/dil/private_international_law.asp (last visited Apr. 9, 2022).

40. Convention on Private International Law, Feb. 20, 1928, O.A.S.T.S. No. 23 *available at* http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-31_Bustamente_Code.pdf (last visited May 25, 2022).

41. *See* Inter-American Convention on General Rules of Private International Law, May 8, 1979, O.A.S.T.S. No. 54; Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, O.A.S.T.S. No. 78; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42. All three are available at www.oas.org/en/topics/treaties_agreements.asp (last visited Apr. 9, 2022).

42. Inter-American Juridical Report: Electronic Warehouse Receipts for Agricultural Products, CJI/doc. 505/16 rev. 2 (Sep. 27, 2016); *cf.* O.A.S. Gen. Ass. Res. on International Law, AG/RES. 2926 (XLVIII-O/18) (Jun. 5, 2018).

competitiveness and stimulating economic development.[43] In 2019, the OAS adopted a Guide on the Law Applicable to International Commercial Contracts in the Americas.[44]

In Africa, several regional bodies deal with private international law, either exclusively or as part of their broader mandates. The Organization for the Harmonization of African Business Law in Africa ("OHADA") works to "harmonize business law in Africa in order to guarantee legal and judicial security for investors and companies in its member States."[45] In 2015, OHADA created a Common Court of Justice and Arbitration ("CCJA"), based in Abidjan, Côte d'Ivoire, with three functions: judicial, advisory, and arbitration.[46] Other African entities address private international law in more limited ways. For example, the Southern African Development Community ("SADC") created a model Bilateral Investment Treaty in 2012. Although it is non-binding and aimed primarily at adoption by States, this treaty can serve to help resolve disputes over the rights and obligations of private international investors.[47] The Common Market for Eastern and Southern Africa ("COMESA") Treaty also includes provisions on private investment.[48]

The Asia-Pacific Economic Cooperation ("APEC") – a group of 21 member states formed in 1989 with the primary goal of promoting free trade and sustainable development in the Pacific Rim economies – has been active in a number of PIL areas, including cross-border privacy

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43. *See* O.A.S. Department of International Law, Model Law on the Simplified Corporation: Status of Reforms in the Region, OEA/Sec. Gnl DDI/doc. 3/21 rev. 1 (June 14, 2021), *available at* http://www.oas.org/en/sla/dil/docs/publication_Model_Law_on_the_Simplified_Corporation_Status_of_Reforms_in_the_Region_2021.pdf (last visited Apr. 9, 2022).

44. *Guide on the Law Applicable to International Commercial Contracts in the Americas*, O.A.S. (2019), *available at* http://www.oas.org/en/sla/dil/publications_Guide_Law_Applicable_International_Commercial_Contracts_Americas_2019.asp (last visited Apr. 9, 2022).

45. L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires [hereinafter "OHADA"]. *See General Overview*, OHADA, *available at* https://www.ohada.org/index.php/en/ohada-in-a-nutshell/general-overview_(last visited Apr. 9, 2022).

46. *See CCJA at a Glance*, OHADA, *available at* https://www.ohada.org/en/ccja-at-a-glance/ (last visited Apr. 9, 2022). Reports of CCJA cases are available at http://biblio.ohada.org/pmb/opac_css/index.php (last visited Apr. 9, 2022) (in French only).

47. *See SADC Model Bilateral Investment Treaty Template with Commentary*, INT'L INST. FOR SUSTAINABLE DEVELOPMENT (Jul. 2012), *available at* https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (last visited Apr. 9, 2022).

48. *See* Treaty Establishing the Common Market for Eastern and Southern Africa, art. 158, Nov. 5, 1993, *available at* https://www.comesa.int/wp-content/uploads/2020/07/Comesa-Treaty.pdf.

issues, investment law, and on-line dispute resolution.[49] In East and Southeast Asia, scholars from 10 different countries recently created the Asian Principles of Private International Law ("APPIL"), a project aimed at harmonizing the region's PIL rules and principles.[50] Although APPIL activities remain "soft law" – nothing APPIL creates is binding on any State – its activities and instruments are persuasive and may function as models for various domestic jurisdictions.[51]

E. Other Contributors

Non-governmental organizations also contribute significantly to the articulation and development of PIL. For example, the International Chamber of Commerce ("ICC") characterizes itself as "the World Business Organization" and "the institutional representative of more than 45 million companies in over 100 countries."[52] Its mission is to promote trade and investment as vehicles for inclusive growth and prosperity. The ICC has had broad influence in a variety of areas, thanks in part to its rules for the Uniform Customs and Practice for Documentary Credits ("UCP 600"), standard terms for international commercial transactions ("Incoterms"), and rules for curtailing corruption.[53] It is perhaps best known for establishing the International Court of Arbitration in 1923; ICC arbitration remains one of the methods most frequently chosen by parties to international commercial transactions for resolving their disputes outside of national courts.[54]

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49. *See generally About APEC*, ASIA-PACIFIC ECONOMIC COOPERATION, *available at* https://www.apec.org/About-Us/About-APEC (last visited Apr. 11, 2022).

50. *See generally* Weizuo Chen and Gerald Goldstein, *The Asian Principles of Private International Law: objectives, contents, structure, and selected topics on choice of law*, 13 J. OF PRIV. INT'L L. 411 (2017); Uematsu Mao, *APPIL (Asian Principles of Private International Law) and its Perspective Regarding International Jurisdiction*, 37 RITSUMEIKAN L. REV. 35 (2019); CONVERGENCE AND DIVERGENCE OF PRIVATE LAW IN ASIA (Gary Low ed., 2022).

51. Chen & Goldstein, *supra* note 50, at 433.

52. *See generally* THE INTERNATIONAL CHAMBER OF COMMERCE, *available at* www.iccwbo.org (last visited Apr. 11, 2022). The International Chamber of Commerce is not to be confused with the other major international legal organization with the same acronym, the International Criminal Court.

53. *See generally id.* The most recent version of the UCP (UCP 600) was published in 2007, of INCOTERMS in 2020, and of the anti-corruption rules in 2011.

54. The ICC Rules of Arbitration were revised in 2021. *See generally Dispute Resolution Services,* INT'L CHAMBER OF COM., *available at* https://iccwbo.org/dispute-resolution-services (last visited Apr. 11, 2022); The American Arbitration Association's International Centre for Dispute Resolution similarly supports international commercial arbitrations. *See generally* INT'L CENTER FOR DISP. RESOL., *available at* www.icdr.org (last visited Apr. 11, 2022).

In many countries, private associations also play an active role in the PIL field broadly conceived. In the United States, for instance, they include the American Law Institute, the American Bar Association's Section of International Law, and the American Society of International Law. The Uniform Law Commission ("ULC") provides a forum in which practitioners, academics, and judges (acting as "commissioners") collaborate to develop uniform acts (model laws) for adoption at the state (rather than federal) level, such as the Uniform Commercial Code.[55] One point of coordination and dialogue from the U.S. perspective is provided by the Secretary of State's Advisory Committee on Private International Law ("ACPIL").[56]

III. CONFLICTS OF LAW, CHOICE OF FORUM, AND DISPUTE SETTLEMENT MECHANISMS

The foregoing survey illustrates the central role of conflicts of law issues in the field of private international law. The paradigmatic context is a commercial transaction between private parties where at least one of the parties is a "foreigner" and/or the transaction in question has some cross-border dimension, and litigation arising from the transaction has been filed in a domestic (national) court.[57] As long as the world community continues to consist primarily of independent (territorial) States with separate and differing systems of domestic law, methods will be needed for resolving the question of which rules and principles apply to disputes arising from events and transactions that occur in, or have a significant relationship to, more than one State.[58]

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55. *See generally* UNIFORM LAW COMM., *available at* www.uniformlaws.org (last visited Apr. 11, 2022). Among the ULC's PIL-related accomplishments are the Uniform Electronic Transactions Act, the Uniform Interstate Family Support Act, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Uniform Foreign-Country Money Judgments Recognition Act.

56. *See generally General Resources – Private International Law*, U.S. DEP'T OF STATE, *available at* www.state.gov/general-resources-private-international-law (last visited Apr. 11, 2022).

57. *See generally* TREVOR C. HARTLEY, INTERNATIONAL COMMERCIAL LITIGATION: TEXT, CASES AND MATERIALS ON PRIVATE INTERNATIONAL LAW (3d ed. 2020); GEERT VAN CALSTER, EUROPEAN PRIVATE INTERNATIONAL LAW: COMMERCIAL LITIGATION IN THE EU (3d ed. 2021).

58. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAW § 1 (AM. LAW INST. 1971). The ALI is currently considering a revision (to become the RESTATEMENT (THIRD) OF CONFLICT OF LAW). *See Restatement of the Law Third, Conflict of Laws*, AM. L. INST., *available at* https://ali.org/projects/show/conflict-laws/ (last visited June 6, 2022).

Of course, that "conflicts" question has both substantive and procedural dimensions. It arises when different legal systems (i) provide different substantive rules for deciding those questions and (ii) have different jurisdictional and/or procedural rules about where and how the disputes can be resolved. Accordingly, the issues might be resolved in different ways.

(a) One possible solution lies in the direction of harmonizing the *conflicts* rules. If different national courts look to the same "applicable law" rules in determining which law applies to similar transactions, then it should matter less where a given dispute is actually heard and decided. The parties in question will have a clear (or, at least, clearer) idea of the substantive rules under which their dispute is likely to be resolved.

Adopting standardized conflicts of law rules in specific areas of interaction lies at the heart of many PIL projects. Within the EU, for instance, harmonized conflict-of-law rules for both contractual and non-contractual obligations are provided in the Rome I and II Regulations.[59] In the OAS, the effort is reflected in the Mexico City Convention.[60] However, the undertaking has proven quite difficult in light of significant differences in national law, tradition, and culture.[61] It has accordingly motivated adoption of various "soft law" instruments, such as the 2015 Hague Principles on Choice of Law in International Commercial Contracts,[62] and the OAS Guide on the Law Applicable to International Commercial Contracts in the Americas.[63]

(b) Another possible solution is to harmonize the *substantive* law relating to a particular area or issue. Where the relevant rules in the concerned jurisdictions are the same – that is, where similar statutes have been adopted by their legislatures or if all the jurisdictions in question have agreed by treaty to apply the same substantive rules – the "conflicts" problems can be minimized if not eliminated. In theory, resolution of the

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59. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L177) 6 (EC) [hereinafter "Rome I"]; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. (L 199) 40 (EC) [hereinafter "Rome II"].

60. Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, O.A.S.T.S. No. 78.

61. *See generally* SYMEON SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS (2014).

62. *Principles on Choice of Law in International Commercial Contracts*, HCCH (Mar. 19, 2015), *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=135 (last visited Apr. 11, 2022).

63. *See Guide on the Law Applicable to International Commercial Contracts in the Americas*, *supra* note 44.

parties' disagreement should be the same no matter which jurisdiction addresses it. This approach underlies the private international law efforts in such integrative contexts as the European Union. It is also reflected at the global level in several specific areas discussed in Parts V and VI of this paper, including cross-border commercial transactions, transnational issues in family law, and transportation of goods internationally.

(c) A different approach permits the parties to a given transaction to agree, between themselves, on the specific law or laws they want to apply to their transaction – in effect, to "privatize" the issue. This contractual *choice of law* approach is frequently characterized as founded on concepts of "freedom of contract" or "party autonomy." Where permitted, the courts in different countries will give effect to the parties' clearly expressed agreement on the governing law – unless it violates some fundamental norm of applicable domestic law, generally characterized as a matter of "public policy" (*ordre public*) or "mandatory norms" (*lois de police*), meaning that no derogation is permitted. (However, the meanings given to those terms, and the methods used to apply them, often differ from one country to another.) The point is that by clear agreement the parties have a reliable understanding about the law under which their dispute will be resolved, regardless of the forum.[64] Not all systems recognize the validity of such agreements to the same extent, however.

(d) Still another approach permits contracting parties to agree on a particular domestic court where their dispute will be resolved, to the exclusion of other available fora. Such contractual *choice of court* or *forum selection* clauses typically provide that disagreements arising under the contract must be submitted to a *specified domestic court* (such clauses may also specify the law to be applied by that court). The choice could be the domestic courts of one (or the other) of the parties to the contract (or dispute), or those of a third country. Whether the chosen court will be able to accept the dispute, however, is a question of the national law defining that court's jurisdiction, and that law typically cannot be overridden simply by the agreement of private parties. The 2005 Hague Convention on Choice of Court Agreements represents an effort to oblige the chosen domestic courts to respect the parties' choice (to the exclusion of other courts) and to give effect to the resulting judgments.[65]

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64. *See generally* CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS (Daniel Girsberger, Thomas Kadner Graziano & Jan L. Neels eds., 2021).

65. Hague Convention on Choice of Court Agreements, June 30, 2005, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=98 (last visited Mar. 20,

(e) With the emergence of a variety of *international commercial courts*, the possibility now exists for contracting parties to agree to "internationalize" their dispute settlement mechanisms in even more ways.[66] Many of these courts are specialized bodies (or chambers) within domestic legal systems, while others are independent, but all seek to attract commercial disputes that would otherwise be submitted to domestic litigation or international commercial arbitration.[67]

(f) Alternatively, parties to international transactions may decide to preclude litigation altogether by agreeing that disputes under their contract must be submitted to *international commercial arbitration*. It is possible for them to agree to create their own free-standing or *ad hoc* tribunal, and for that purpose UNCITRAL has adopted a "comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship."[68] However, it is far more common today for contracting parties to choose "institutional" or "administered" arbitration, where an existing entity such as the International Chamber of Commerce,[69] the Permanent Court

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2022); *see generally* RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS (2008).

66. *See, e.g.*, the Singapore International Commercial Court ("SICC") and the China International Commercial Courts ("CICC"). For an overview, see Pamela Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227 (2020). *See also* Diego P. Fernández Arroyo & Makane Moïse Mbengue, *Public and Private International Law in International Courts and Tribunals: Evidence of An Inescapable Interaction*, 56 COLUM. J. TRANSNAT'L L. 797 (2018).

67. One organization working to advance the work of commercial courts is the Standing International Forum of Commercial Courts ("SIFoCC"). Formed in 2017, SIFoCC member courts share best practices, "work together to keep pace with rapid commercial change," "make a stronger contribution to the rule of law than they can separately," and help countries to "enhance their attractiveness to investors by offering effective means for resolving commercial disputes." *See generally* STANDING INTERNATIONAL FORUM OF COMMERCIAL COURTS, *available at* https://sifocc.org (last visited Aug. 5, 2022); *see also* GLOBAL PRIVATE INTERNATIONAL LAW: ADJUDICATION WITHOUT FRONTIERS, (Horatia Muir Watt, Lucia Bíziková, Agatha Brandão de Oliveira & Diego P. Fernández Arroyo eds., 2019).

68. *See UNCITRAL Arbitration Rules*, UNCITRAL, *available at* https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration (last visited Mar. 20, 2022).

69. *See 2021 Arbitration Rules*, INT'L CHAMBER OF COM., *available at* https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (last visited Mar. 20, 2022).

of Arbitration,[70] or the London Court of International Arbitration[71] provides not only the rules but also administrative support and assistance for the arbitration. Some entities (such as the Stockholm Chamber of Commerce or the Singapore International Arbitration Centre) specialize on a regional basis.[72]

The attraction of international commercial arbitration has been strengthened by the widespread adherence of States to international agreements requiring their courts to give effect to such choices, inter alia by precluding domestic suits on the same issues and enforcing the resulting arbitral awards. Among these are the New York Convention[73] and the Inter-American Convention on International Commercial Arbitration ("Panama Convention").[74]

(g) Where the issues arise out of contracts not between private parties but between States and foreign investors, they may be eligible for arbitration according to the provisions of specialized bilateral investment treaties ("BITs")[75] or under the rules of the International Center for the Settlement of Investment Disputes ("ICSID").[76]

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70. *See About Us*, PERMANENT COURT OF ARBITRATION, *available at* https://pca-cpa.org/en/about/ (last visited Mar. 20, 2022); *see also Arbitration*, PERMANENT COURT OF ARBITRATION, *available at* https://pca-cpa.org/en/services/arbitration-services/ (last visited Mar. 20, 2022).

71. General information about the LCIA is available at www.lcia.org (last visited Mar. 20, 2022).

72. General information about the Stockholm Chamber of Commerce Arbitration Institute is available at https://sccinstitute.com (last visited Mar. 20, 2022); information about the Singapore International Arbitration Centre ("SIAC") is available at www.siac.org.sg (last visited Mar. 20, 2022); information about the China International Economic and Trade Arbitration Commission ("CIETAC") is available at www.cietac.org (last visited Mar. 20, 2022).

73. New York Convention, *supra* note 27. It is implemented in U.S. law by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208.

74. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245 [hereinafter "Panama Convention"]. It is implemented in U.S. law by 9 U.S.C. §§ 301-307). *See generally* GEORGE A. BERMANN, INTERNATIONAL ARBITRATION AND PRIVATE INTERNATIONAL LAW (2017).

75. Many countries have negotiated BITs providing for the settlement of disputes between their investors and host States. *See, e.g.*, *Database of Bilateral Investment Treaties*, ICSID, https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties (last visited Mar. 20, 2022).

76. ICSID arbitration is governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Washington Convention") and specialized rules and regulations. *See* INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES (Apr. 2006) *available at* https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf; *see also generally* ICSID, *available at* https://icsid.worldbank.org (last visited Mar. 20, 2022).

(h) As an alternative to arbitration, *international mediation* of commercial disputes appears to be gaining in popularity, particularly with the adoption of the 2018 UN Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention"),[77] which provides a legal framework for recognizing and enforcing international mediation agreements. Other relevant instruments include the EU Directive on Mediation[78] and UNCITRAL's 2018 Model Law on International Commercial Mediation.[79]

(i) Still another alternative is offered by recent developments in online dispute resolution ("ODR"), which may be especially useful for disputes arising out of cross-border, low-value e-commerce transactions. UNCITRAL's Technical Notes on Online Dispute Resolution describe the stages of an ODR proceeding, discussing such aspects as the appointment, powers, and functions of the neutral ODR administrator. The aim is to "foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings."[80] The EU has also established an ODR platform intended to "make online shopping safer and fairer through access to quality dispute resolution tools."[81]

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77. U.N. Convention on International Settlement Agreements Resulting from Mediation, Dec. 20, 2018, *available at* https://treaties.un.org/Pages/showDetails.aspx?objid=080000028054826c&clang=_en (last visited June 6, 2022) [hereinafter "Singapore Convention on Mediation"]. *See* Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private International Law Treaties*, 30 AM. REV. INT'L ARB. 265 (2019).

78. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 2008 O.J. (L 136) 3.

79. The Model Law is available at https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation (last visited May 25, 2022).

80. UNCITRAL, TECHNICAL NOTES ON ONLINE DISPUTE RESOLUTION 1 (2017) *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf (last visited May 25, 2022); *see generally Online Dispute Resolution*, UNCITRAL, *available at* https://uncitral.un.org/en/texts/onlinedispute (last visited Mar. 20, 2022).

81. Regulation No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), 2013 O.J. (L 165) 1 (EU). *See Online Dispute Resolution – about the ODR platform*, EUR. COMM'N, *available at* https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks (last visited Mar. 20, 2022).

IV. INTERNATIONAL JUDICIAL ASSISTANCE

Returning to the option of litigation in domestic courts, a main objective of the PIL effort has long been to reduce (if not eliminate) some of the procedural obstacles that parties may encounter when their dispute has transnational dimensions.[82] Here, we focus in particular on a set of conventions adopted by the Hague Conference in an effort to resolve such practical problems.

A. Service

Different legal systems have different standards, and rely on different methods, in their requirements for notifying a litigant's opposing party of the various stages and developments in the course of a domestic litigation – starting with notice that the proceeding has begun. The differences can be consequential. For example, U.S. students and practitioners are often surprised to learn that, in many foreign legal systems, "service of process" can only be made by a government official, not by a private party, even though it does not typically have the same fundamental role in "energizing" the court's jurisdiction over the parties and proceeding as in U.S. law. Nonetheless, failure to observe the applicable law and procedures of the foreign jurisdiction may well have significant adverse consequences for the proceeding and potential enforcement of any resulting judgment.

To help bridge these differences, the 1965 Hague Service Convention[83] creates an international framework for serving process outside of a home State. It applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad"[84] subject to some exceptions. As a matter of U.S. law, when the Service Convention does apply, it is both mandatory and exclusive; that is, service must be made through the channels it authorizes.[85]

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82. *See generally* Ronald A. Brand, *Private Law and Public Regulation in U.S. Courts*, *in* CILE STUDIES IN PRIVATE LAW, PRIVATE INTERNATIONAL LAW, AND JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP 115 (2005).

83. Hague Service Convention, *supra* note 20.

84. *Id.* at art. 1.

85. Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa, 482 U.S. 522 (1987). The Convention does not apply, however, where the address of the person being served is not known or where service does not cross borders, or in criminal, penal or administrative matters.

The "main channel" involves transmission through a "Central Authority" established by States Party (typically a government ministry), although States are permitted to authorize alternative authorities, including diplomatic or consular missions, judicial officers, the postal service, or any other method to which the two Contracting States have agreed.[86] The Convention requires the use of three model forms: a request, a certification, and a summary of the document to be served.[87] Under the Convention, a destination State may – but is not obliged to – recognize service through the "postal channel."[88] Recently, service by electronic means ("e-mail service") has proven controversial – more specifically, with regard to whether e-service can be considered one of the methods of service allowed under Article 10.[89]

The question of service was also addressed in the Principles of Transnational Civil Procedure adopted by the American Law Institute (ALI) and UNIDROIT in 2004,[90] and subsequently modified by the European Law Institute (ELI) and UNIDROIT in regard to "the particularities of specific legal systems."[91] The final text was adopted in 2020 and was published officially in 2021.[92]

Within the OAS, the Inter-American Convention on Letters Rogatory addresses "the performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas

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86. Hague Service Convention, *supra* note 20, at arts. 8-11, 18.

87. These forms, and guidelines for completing them, are available at https://www.hcch.net/en/publications-and-studies/details4/?pid=6560&dtid=65 (last visited Mar. 20, 2022).

88. *See Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice Conventions (20-23 May 2014)*, at ¶ 37, HCCH (2014), *available at* https://assets.hcch.net/upload/wop/2014/2014sc_concl_en.pdf (last visited Mar. 20, 2022).

89. Decisions by U.S. courts have reached differing conclusions. *See, e.g.*, Zanghi v. Ritella, No. 19 CIV. 5830 (NRB), 2020 WL 6946512 (S.D.N.Y. Nov. 25, 2020); Prem Sales, LLC v. Guangdong Chigo Heating & Ventilation Equip. Co., No. 5:20-CV-141-M-BQ, 2020 WL 6063452 (N.D. Tex. Oct. 14, 2020).

90. *See ALI / UNIDROIT Principles of Transnational Civil Procedure*, UNIDROIT, *available at* https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/ (last visited June 6, 2022).

91. *See ELI/UNIDROIT Rules – Overview*, UNIDROIT, *available at* https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules/overview/ (last visited June 6, 2022).

92. ELI/UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE (Jan. 2021), *available at* https://www.unidroit.org/wp-content/uploads/2021/06/English-integral.pdf (last visited Feb. 14, 2022). The official print edition, released on Oct. 19, 2021, is available through Oxford University Press at https://global.oup.com/academic/product/eli—unidroit-model-european-rules-of-civil-procedure-9780198866589?cc=us&lang=en#.

abroad," provided that the acts are not "acts of compulsion."[93] Like the Hague Service Convention, it requires each Contracting Party to designate a central authority to ensure cooperation between jurisdictions but permits service by consular, diplomatic, and judicial channels. Within the EU, a specific regulation covers intra-community cross-border service.[94] It is similar to the aforementioned regimes: transmitting agencies are to be used for sending judicial or extrajudicial documents to be served from one Member State to another. Other avenues include consular or diplomatic channels, postal services, or direct service.

B. Evidence

Different legal systems have different rules for obtaining evidence in preparation for trial – both in terms of what can be sought, what must be disclosed, and how it is collected. American lawyers are often surprised to find that the kind of extensive party-directed pre-trial discovery typical in U.S. courts is impermissible in many foreign jurisdictions, especially civil law jurisdictions.

The purpose of the 1970 Hague Evidence Convention[95] is to help bridge these differences. It provides for "letters of request" sent to a designated authority in the requested State for execution in accordance with local law. Consular and diplomatic agents can also take evidence when local law permits. In recently celebrating the Convention's 50th anniversary, the Hague Conference highlighted the need for greater use of technology in justice systems around the world, in particular the need for "technology-neutral instruments" to "facilitate cooperation in cross-border dispute settlement," including in the "taking of evidence remotely by video-link, where appropriate and subject to domestic law requirements."[96]

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93. Inter-American Convention on Letters Rogatory, arts. 2a, 3, Jan. 30, 1975, O.A.S.T.S. No. 43; *see also* Additional Protocol to the Inter American Convention on Letters Rogatory, May 8, 1979, O.A.S.T.S. No. 56.

94. Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, 2007 O.J. (L 324) 79 (EC).

95. Hague Evidence Convention, *supra* note 21. The United States is a party.

96. *See HCCH a|Bridged: Innovation in Cross-Border Litigation and Civil Procedure Edition 2020* (Dec. 2, 2020), *available at* https://assets.hcch.net/docs/9bfe5d4a-355d-46ee-818a-b06410b83c60.pdf (last visited Feb. 14, 2022); *see also Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice Conventions*, *supra* note 88.

EU Regulation No. 1206/2001 allows courts in one Member-State jurisdiction to request information directly from other courts; member States designate central authorities but they are only meant to supply information to courts, to seek solutions to difficulties that may arise, and forwarding requests in "exceptional cases."[97] In the Americas, the Inter-American Convention on Taking Evidence Abroad (and its additional protocol) focus on the use of letters rogatory as the vehicle for gathering evidence in foreign jurisdictions.[98]

C. Apostilles

The purpose of the 1961 Hague Apostille Convention[99] is to simplify the process of "legalizing" public documents issued in one State so they can be given formal effect in another State. Such documents include birth, death, marriage and citizenship records, graduation diplomas, certificates of incorporation, patents, and judicial documents.[100] The Hague Apostille Section keeps a current list of authorities designated to issue apostilles in each State Party's jurisdiction.[101]

An electronic apostille program (the "e-APP") was launched in 2006. The e-APP (issued by one of the designated authorities in the document's State of origin) can be attached to an electronic document. An "e-register" is maintained for purposes of verifying the apostille.[102]

V. JUDGMENTS AND JURISDICTION

Different legal systems have different rules about when their courts can entertain different kinds of cases involving foreign or cross-border matters, as well as different criteria for giving effect to judgments issued

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97. *See, e.g.*, Council Regulation No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, arts. 1, 2, 17, 2001 O.J. (L 174) 1 (EC).

98. Inter-American Convention on Taking Evidence Abroad, Jan. 30, 1975, O.A.S.T.S. No. 44; Additional Protocol to the Inter-American Convention on Taking Evidence Abroad, May 24, 1984, O.A.S.T.S. No. 65.

99. *See* Apostille Convention, *supra* note 19.

100. In other words, documents from a court or tribunal, administrative documents, notarial acts, or official certificates. *See Outline – Hague Apostille Convention*, HCCH, *available at* https://assets.hcch.net/upload/outline12e.pdf (last visited Feb. 14, 2022) [hereinafter "Apostille Convention Outline"].

101. *See Authorities,* HCCH, *available at* https://www.hcch.net/en/instruments/conventions/authorities1/?cid=41 (last visited Feb. 14, 2022).

102. *See Implementation Chart of the e-App,* HCCH, *available at* https://assets.hcch.net/docs/b697a1f1-13be-47a0-ab7e-96fcb750ed29.pdf (last visited Feb. 14, 2022).

by foreign courts. These issues have long been at the core of private international law. In this area, much of the effort has been focused at the Hague Conference, which in 2005 adopted the Convention on Choice of Court Agreements, which requires the domestic courts of States party to give effect to the contracting parties' choice of domestic courts to resolve disputes arising from the relevant agreement and to give effect to the resulting judgments (subject to various conditions and requirements).[103]

A recent development of some significance was the adoption in 2019 of the Hague *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. This new treaty* aims at promoting the international "circulation" of such judgments by setting out specific criteria for recognition and enforcement (as well as agreed grounds for refusal) of final judgments issued by the courts of other States parties.[104] The aim is to provide some measure of predictability to the transacting parties (and to their counsel) as to whether and to what extent a judgment will be given effect in another jurisdiction. The central obligation of States parties is to recognize and enforce qualifying judgements without a substantive review of the merits of the underlying dispute. To be eligible, however, judgments must have been rendered by a jurisdiction that has a sufficient jurisdictional connection to the issue in question, and they must not involve specified exclusions such as rights *in rem*, defamation and privacy, intellectual property, antitrust or competition law, or transboundary pollution law.[105]

For several decades, the HCCH has been considering the question of trying to harmonize the "international" or cross-border jurisdiction of domestic courts in civil and commercial cases. Following the adoption of the 2005 Choice of Courts and 2019 Judgments Conventions, it established a Working Group to consider formulating rules for concurrent proceedings (parallel proceedings and related actions or claims) in

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103. *See* note 65, *supra*.

104. *See generally Judgments Section*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/specialized-sections/judgments (last visited June 6, 2022). As of June 6, 2022, six States (including the United States) had signed the Convention. *See Status Table*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 (last visited June 6, 2022).

105. *See generally* David P. Stewart, *The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, 113 AM. J. INT'L L. 772 (2019); Louise Ellen Teitz, *Another Hague Judgments Convention? Bucking the Past to Provide for the Future*, 29 DUKE J. COMP. & INT'L L. 491 (2019); RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS (Linda Silberman and Franco Ferrari eds., 2017).

different national systems.[106] Given the significant variations in the jurisdictional rules of national courts around the world, and the fact that within the EU the question is formally regulated,[107] this effort faces significant challenges. Some progress has nonetheless been made: the Working Group's meetings in late 2021 and early 2022 included discussion of parallel proceedings, and the chair's 2022 report provided both a draft of provisions on parallel proceedings for future discussion and a flowchart outlining the basic structure of a possible future convention.[108]

VI. INTERNATIONAL FAMILY LAW

Marriages between individuals of different nationalities are increasingly common, and in consequence (regrettably) so are issues related to separation, divorce, and child custody and family support arrangements involving former partners living in different countries. The Hague Conference has been particularly active in the area of international family law, but it is not the only forum in which international family law is developed: the EU has standardized some of these relevant areas by regulation.

A. Divorce, Child Support, Family Maintenance and Parental

106. *See Legislative Work*, HCCH, *available at* https://www.hcch.net/en/projects/legislative-projects (last visited Feb. 13, 2022).

107. Council Regulation (EU) 44/2001 of Dec. 22, 2000, on jurisdiction and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1 (EC) [hereinafter "Brussels I Regulation"], was superseded by Council Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012 O.J. (L 351) 1 (EU) ["Brussels I Recast" or "Brussels I Bis"]. Regulation 1215/2012 applies "only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015," and provides that Regulation 44/2001 "shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation." *See id.* at arts. 66 & 80. A chart comparing the provisions of these two regulations can be found in Annex III of Regulation 1215/2012. *See also* Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INT'L L. 97 (2019); MARTA REQUEJO ISIDRO, BRUSSELS 1 BIS: A COMMENTARY (Elgar, 2022).

108. *See Report of the Working Group on Jurisdiction* (Mar. 2022), HCCH, at Annex I et seq., *available at* https://assets.hcch.net/docs/d05583b3-ec71-4a5b-829c-103a834173bf.pdf (last visited Aug. 5, 2022);

Responsibility

While the rules regarding marriage itself remain primarily a matter of domestic law (and are rarely regulated by international instruments), that is less true with respect to termination of the relationship and its consequences.

Within the EU, the Brussels IIa Recast Regulation[109] deals in part with jurisdiction, recognition, and enforcement of judgments in matrimonial matters and matters of parental responsibility and establishes uniform jurisdictional rules for legal separation, divorce, and annulment. It requires Member States to designate a central authority to oversee the Regulation's application, including requests from other Member States for information on national laws and procedures or for judicial assistance.[110] The Rome III Regulation[111] provides for conflicts of law rules applicable to divorce and legal separation that recognize a role for the "autonomy" of parties, for instance by enabling couples from different countries to agree in advance which law would apply in the event of their divorce or legal separation (and, in the event the couple cannot agree, it provides a formula by which judges can decide which country's law applies). Similarly, child custody and family support arrangements involving former partners living in different countries within the EU are also standardized by regulation; the EU Maintenance Regulation,[112] for example, enumerates the rules for jurisdiction over such disputes.

The Hague Conference's 2007 *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance,* and its *Protocol on the Law Applicable to Maintenance Obligations,* are, like the EU Maintenance Regulation, intended to establish a workable system for the cross-border recovery of child support and other forms of family

109. Council Regulation (EC) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, 2019 O.J. (L 178) 1 (EU) [hereinafter "Brussels IIa Recast"].

110. *See id.* at preamble ¶¶ 72, 75-76, 78, 84-85; *id.* at arts. 76-80, 82, 86-87.

111. Council Regulation (EU) No. 1259/2010 of 20 December implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, 2010 O.J. (L 343) 10 (EU) [hereinafter "Rome III"].

112. Council Regulation (EU) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2009 O.J. (L 7) 1 (EC) [hereinafter "EU Maintenance Regulation"].

maintenance.[113] This Convention requires States Parties to establish an efficient system for recognizing and enforcing maintenance decisions made in other Contracting States. The United States became a party to this Convention in 2016; it is given domestic effect by the 2008 Uniform Interstate Family Support Act ("UIFSA"), enacted in every state of the Union as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.[114] The EU is also now party to the 2007 Convention and its Protocol, and its application was taken into account in the EU Maintenance Regulation.[115]

The United States has signed but not ratified the 1996 Hague Convention on Jurisdiction, Applicable Law, Enforcement and Cooperation in Respect of Parental Responsibility and measures for the Protection of Children (the Child Protection Convention).[116] A large number of European States (but not the EU as a legal entity), as well as a number of South American countries, have adopted this convention.

The EU's regulations related to family law sometimes overlap with Hague Conventions on the same subject. For example, as noted above, the Brussels IIa Recast Regulation deals with jurisdiction, the recognition and enforcement of judgments in matrimonial matters as well as matters of parental responsibility, and it therefore sometimes covers the same

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113. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, and its Protocol on the Law Applicable to Maintenance Obligations, Nov. 23, 2007, both available in the "Child Support Section" at https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support (last visited May 25, 2022). The EU is a Party to the Convention. *See Status Table*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=131 (last visited Feb. 13, 2022).

114. *Uniform Interstate Family Support Act*, https://www.uniformlaws.org/committees/community-home?CommunityKey=71d40358-8ec0-49ed-a516-93fc025801fb (last visited Mar. 20, 2022). The last U.S. states to enact it did so in 2016. *See also International Child Support Enforcement*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/intl-child-support.html (last visited Mar. 20, 2022); *Office of Child Support Enforcement – International*, U.S. DEP'T OF HEALTH AND HUM. SERVS., www.acf.hhs.gov/css/partners/international (last visited Mar. 20, 2022). The United States has not ratified the 2007 Protocol.

115. *See* EU Maintenance Regulation, *supra* note 112. The conflicts of laws rules refer to those of the Protocol. *See id.* at art. 15. The Maintenance Regulation has separate sections on recognition and enforcement of decisions given in those countries that have adopted the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations and those countries that have not. *See id.* at ch. IV.

116. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, *available at* https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf (last visited May 25, 2022) [hereinafter "Child Protection Convention"].

ground as the Child Protection Convention. These intersections can, on occasion, make it somewhat more difficult to navigate the wide range of conflicts of jurisdiction, conflicts of law and recognition rules, as well as the identification of the national authorities in charge of the cooperation between administrative or judicial authorities related to those matters. The EU has (sometimes) addressed such overlaps: Brussels IIa Recast includes provisions that direct parties on how to tackle relationships with a number of other, related international instruments (should the need to do so arise).[117]

B. Parental Abduction

On occasion, a child may be wrongly removed from the "habitual environment" of the parent or other person to whom custody has been lawfully granted. When such an abduction crosses international boundaries, the legal issues can become complicated.

The 1980 Hague Convention on the Civil Aspects of International Child Abduction is intended to deter the illegal removal of children (under 16 years of age) across borders, to ensure their prompt return, and to establish reciprocal mechanisms for enforcing custodial rights in Contracting States.[118] In this respect, the Abduction Convention not only contributes to the resolution of thousands of cases of abduction, but also acts as a deterrent to many other cases, with its clear message pointing out that abduction is harmful to the child, who has the right to contact both parents, and the effectiveness of its measure for the immediate return

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117. *See, e.g.*, Brussels IIa Recast, *supra* note 109, at ch. VIII. For example, Article 95 provides that Brussels IIa Recast takes precedence over the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors, and the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations. Article 96 deals specifically with the relationship between Brussels IIa Recast and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Article 97 deals specifically with the relationship between Brussels IIa Recast and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

118. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 (last visited Feb. 10, 2022). Note that the Brussels IIa Recast Regulation also deals with international child abduction. Its provisions complement the 1980 Hague Convention: Article 22, which provides that "Where a person, institution or other body alleging a breach of rights of custody applies, either directly or with the assistance of a Central Authority, to the court in a Member State for a decision on the basis of the 1980 Hague Convention ordering the return of a child under 16 years that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, Articles 23 to 29, and Chapter VI, of this Regulation shall apply and complement the 1980 Hague Convention." *See* Brussels IIa Recast, *supra* note 109, at ch. III.

of the child.[119] The Hague Conference maintains a regularly-updated database of relevant decisions from the various Contracting States and hosts an electronic case management tool that "identifies, stores, and disseminates information used to manage and monitor international child abduction and access cases."[120]

In the United States, the Abduction Convention is implemented by the International Child Abduction Remedies Act (ICARA).[121] The Office of Children's Issues in the U.S. Department of State's Bureau of Consular Affairs serves as the U.S. Central Authority.[122] According to recent analysis by the Hague Conference, the U.S. is making the most applications for return and receiving the most return applications.[123] Those figures clearly demonstrate the importance of these issues for American practitioners and students.

C. Intercountry Adoption

The Hague Conference has also addressed the growing practice of cross-border adoptions and the attendant difficulties. Its 1993 Convention on the Protection of Children and Co-operation in Respect of

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119. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381 (2008).

120. *See Child Abduction Section*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction (last visited Feb. 14, 2022); HCCH, ICHILD USER GUIDE 5 (2007), *available at* https://assets.hcch.net/docs/141934fc-83b7-4106-9ba6-5c3ea3ba6b85.pdf (last visited June 6, 2022). The International Child Abduction Database ("Incadat") is available at https://www.incadat.com/en (last visited May 25, 2022). *See generally* PETER MCELEAVY & AUDE FIORINI, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION (2nd ed. 2021).

121. *See* 22 U.S.C. § 9001 *et seq.* (2021). A substantial body of U.S. case law has emerged under this statute. *See, e.g.*, Monasky v. Taglieri, 140 U.S. 719 (2020).

122. *See* 22 U.S.C. § 9006; *see also* 22 C.F.R. 94.6. *See also International Parental Child Abduction*, U.S. DEP'T. OF STATE, *available at* https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction.html (last visited Feb. 12, 2021).

123. NIGEL LOWE & VICTORIA STEPHENS, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2015 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2017) at ¶ 29 ("Combining both incoming and outgoing applications the [Central Authority of the] United States of America (USA) handled the greatest number with 597 applications . . ."), *available at* https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf_(last visited Feb. 12, 2022).

Intercountry Adoption[124] is aimed at protecting children (and their families) against the risks of illegal, irregular, premature, or ill-prepared adoptions abroad. Each Contracting Party must establish a central authority to deal with cross-border child adoption issues and ensure that Convention procedures are followed. If an adoption is made in accordance with the procedures outlined in the Convention, all other Contracting Parties must recognize the adoption "by operation of law."[125]

In U.S. law, the Convention applies to all adoptions by U.S. citizens habitually resident in the United States of children habitually resident in any other country that is a party. It is implemented by the federal Intercountry Adoption Act of 2000 ("IAA").[126] Only federally accredited adoption service providers may offer certain key adoption services for Convention adoptions. The Office of Children's Services in the U.S. Department of State serves as the U.S. Central Authority.[127]

D. Other Initiatives

Within the HCCH, work continues in other family law areas. For instance, an Experts Group on cross-border recognition and enforcement of agreements in family matters involving children published its latest findings in 2020, focused inter alia on the use of mediation to resolve conflicts related to parental agreements.[128] The group found that "in order for such amicable solutions to be effective, they must be in a form that allows their recognition and enforcement in States other than the State where the agreement was reached,"[129] which suggests that a binding instrument dealing with these issues would be a useful innovation. The Conference has also undertaken projects on parentage and surrogacy and on cohabitation outside of marriage, addressing the challenges when

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124. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=69 (last visited Feb. 11, 2022), [hereinafter "Hague Adoption Convention"].

125. *Id.* at art. 23.

126. *See* Pub. L No. 106-279 (Oct. 6, 2000), codified at 42 U.S.C.A. §§ 14901 *et seq.* (2021).

127. *See Intercountry Adoption*, U.S. DEP'T OF STATE, *available at* https://travel.state.gov/content/travel/en/Intercountry-Adoption.html/ (last visited Feb. 11, 2022).

128. *See, e.g., Overview of the findings of the Experts' Group on cross-border recognition and enforcement of agreements in family matters involving children in relation to the development of a normative instrument*, HCCH (March 2020), *available at* https://assets.hcch.net/docs/3cd99dea-d087-4999-8016-57f738854e90.pdf (last visited Feb. 11, 2022).

129. *Id.* at ¶ 12.

unmarried couples "become subject to a foreign legal system that does not necessarily recognize their status in relation to one another, or in relation to third parties, such as adopted children."[130]

E. Other Regional Efforts

Within the OAS, several family law-related instruments have been adopted, including the Inter-American Convention on Support Obligations,[131] the Inter-American Convention on the International Return of Children,[132] the Inter-American Convention on the Conflict of Laws Concerning the Adoption of Minors,[133] and the Inter-American Convention on International Traffic in Minors.[134] These instruments operate in much the same way as the Hague Conventions and the Brussels II regulations, by providing obligations and mechanisms for cooperation among designated central authorities in each Contracting Party.

F. Wills, Trusts, and Estates

Another focus of harmonization efforts is testamentary succession and administration of estates. In 1973, for instance, UNIDROIT proposed a Convention Providing for a Uniform Law on the Form of an International Will.[135] To date, it has entered into force for 13 States;[136]

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130. *See, e.g.*, *Report of the Experts' Group on the Parentage / Surrogacy Project (meeting from 12 to 16 October 2020)* (Mar. 2021), HCCH, at Annex I, *available at* https://assets.hcch.net/docs/a6aa2fd2-5aef-44fa-8088-514e93ae251d.pdf (last visited Feb. 11, 2022); *Update on the Developments in Internal Law and Private International Law Concerning Cohabitation Outside Marriage, Including Registered Partnerships* (Mar. 2015), HCCH, at ¶ 1, *available at* https://assets.hcch.net/upload/wop/gap2015pd05en.pdf (last visited Feb. 11, 2022).

131. Inter-American Convention on Support Obligations, July 15, 1989, O.A.S.T.S. No. 71.

132. Inter-American Convention on the International Return of Children, July 15, 1989, O.A.S.T.S. No. 70.

133. Inter-American Convention on the Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, O.A.S.T.S. No. 62.

134. Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, O.A.S.T.S. No. 79.

135. Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, *available at* https://www.unidroit.org/instruments/international-will (last visited Apr. 4, 2022).

136. *See id.* at art. XIV (the Convention permits States with "two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills [. . .] to declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time."). Canada made such a declaration; accordingly, although UNIDROIT counts Canada in the thirteen States for whom the Convention has entered into force, it has only entered into force

the United States signed in 1973 but a proposed uniform implementing statute has not gained significant support.[137]

Similarly, in 1985, the HCCH proposed a *Convention on the Law Applicable to Trusts and on their Recognition,*[138] intended to address the complications arising from the fact that such instruments, while well-known in common law countries, are generally not recognized or embraced in civil law systems.[139] A proposed Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons,[140] adopted in 1989, has failed to gain support, even though it is increasingly common for the estates of decedents to include personal, investment, or business assets in more than one national jurisdiction (and thus subject to differing national laws) and despite the fact that the Convention is addressed primarily to the choice of law rules applicable to succession rather than the disposition of substantive assets.[141]

VII. OTHER SUBSTANTIVE ISSUES AND INSTRUMENTS

We mention here only a few of the many efforts to standardize or harmonize the rules of law in other substantive areas relevant to private cross-border transactions.

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for nine of Canada's thirteen provinces and territories. *See Status - Convention Providing a Uniform Law on the Form of an International Will*, UNIDROIT, *available at* https://www.unidroit.org/instruments/international-will/status/ (last visited Apr. 4, 2022).

137. *See Status - Convention Providing a Uniform Law on the Form of an International Will*, *supra* note 136; *Uniform Wills Recognition Act 1977*, UNIFORM L. COMM., *available at* https://www.uniformlaws.org/committees/community-home?communitykey=e0a2332d-5263-4fab-880f-1607fc5affba&tab=groupdetails (last visited Apr. 4, 2022).

138. Convention on the Law Applicable to Trusts and on their Recognition, July 1, 1985, *available at* https://assets.hcch.net/docs/8618ed48-e52f-4d5c-93c1-56d58a610cf5.pdf (last visited Apr. 4, 2022).

139. *See* ALFRED E. VON OVERBECK, EXPLANATORY REPORT ¶ 12 (Permanent Bureau of the HCCH trans., 1985), *available at* https://assets.hcch.net/docs/ec6fb7e0-deda-417f-9743-9d8af6e9e79b.pdf (last visited Mar. 20, 2022).

140. Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Aug. 1, 1989, *available at* https://assets.hcch.net/docs/5af01fa4-c81f-4e99-b214-64421135069f.pdf (last visited Jun. 6, 2022) (not yet in force).

141. *See* DONOVAN W.M. WATERS, EXPLANATORY REPORT ON THE CONVENTION ON THE LAW APPLICABLE TO SUCCESSION TO THE ESTATES OF DECEASED PERSONS 21 (Permanent Bureau of the HCCH ed., 1989), *available at* https://assets.hcch.net/docs/7bfd5915-bf1b-4f9f-9b93-61f979bf8e61.pdf (last visited Apr. 4, 2022).

A. Commercial Law

Differences in national laws and procedures governing commercial transactions have long posed impediments to cross-border trade, giving rise to efforts at harmonization. Indeed, many trace PIL's conceptual origins to the emergence of a standardized *lex mercatoria* or "merchant law" in Europe during the Middle Ages.[142] Harmonization of the relevant rules, or at least the removal of obstacles to smooth transactions and dispute settlement, remains an important objective.

The task is more easily described than accomplished. Differences in approach to economic (as well as political) issues in legal systems around the world pose obstacles to harmonization. In many countries, the national legislature has adopted a single, comprehensive national code (consider, for example, the commercial codes of Germany,[143] France[144] and Turkey[145]) while in others, the approach is less centralized. In the United States, for example, much of the substantive commercial law remains a matter of state law, with a relatively limited role for the federal government, and it is accordingly found in both judicial decisions (common law) and statutes.[146]

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142. *See, e.g.*, Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133, 1134-35 (2000) ("A *lex mercatoria* with universal purport, which Maitland called the "'private international law' of the Middle Ages,' developed after the Dark Ages, when trade and commerce once again brought together merchants from many parts. The rules that governed their transactions were not purely local in nature. Nor, however, were they derived from the other supranational systems of the times, the revived *ius civile* elaborated by law teachers in Upper Italy and the Catholic Church's canon law. Rather, the emerging law merchant, which amounted to a 'rebirth of the old *jus gentium* of the Mediterranean,' had to develop institutions, such as negotiable instruments, for which these legal systems offered no counterpart to deal with the exigencies of commercial transactions that did not respect territorial boundaries.").

143. *See* HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE] (GER.), BGBI., Federal Law Gazette, *available at* https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html#p0018

144. *See* CODE DE COMMERCE [COMMERCIAL CODE] (Fr.), *available at* https://www.legifrance.gouv.fr/codes/id/LEGITEXT000005634379/ (last visited Apr. 4, 2022)

145. *See* TÜRK TICARET KANUNU [TURKISH COMMERCIAL CODE], Kanun Numarası 6102, *available at* https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6102.pdf (last visited Apr. 7, 2022).

146. Efforts to harmonize certain aspects of the law in the United States have been undertaken through the Uniform Commercial Code, a privately promulgated model law instrument intended to conform aspects of state law. While adopted in all fifty U.S. states, it has been modified by state legislatures in various ways and consequently is not precisely "uniform." Neither is it a complete "code."

One obvious risk for parties involved in international trade and commercial transactions is confusion over the meaning of terms commonly used in the relevant contracts. In a purely domestic context, geographical proximity, local knowledge, and common approaches make it relatively easy for the parties to assess the risks of doing business with each other and, therefore, to agree on the terms of the transaction. In the cross-border context (much like the hypothetical at the beginning of this article), the task is more complicated: with little (perhaps no) understanding of the foreign country's laws or practices, contracting parties may not be sure they understand the terms of the transaction in the same way or that each will be able to comply accordingly.

To illustrate the variety of international approaches in this broad substantive area, we begin by noting three very different approaches.[147]

(i) Incoterms

The first involves "soft law" efforts to define the "international commercial terms" typically used in transnational contracts for the sale of goods. The first set of "Incoterms," adopted in 1936 by the International Chamber of Commerce, aimed to minimize misunderstandings about basic elements of the transactions in question. While non-binding, they were quickly embraced and have been frequently updated and are still widely used. The latest revision (effective January 1, 2020) contains eleven definitions, defining how and when parties bear the costs and risks of shipping and delivery.[148]

In the same vein, other trade associations have created standard forms for international shipping. In the freight forwarding industry, for example, standardized documents created by the International Federation of Freight Forwarders Associations are widely used.[149]

(ii) The U.N. Convention on Contracts for the International Sale of Goods

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147. *See generally* CHRISTIAN TWIGG-FLESNER, FOUNDATIONS OF INTERNATIONAL COMMERCIAL LAW (2021); *see also* UNCITRAL, HCCH & UNIDROIT: LEGAL GUIDE TO UNIFORM INSTRUMENTS IN THE AREA OF INTERNATIONAL COMMERCIAL CONTRACTS, WITH A FOCUS ON SALES 27, 44, 77, U.N. SALES NO. E.21.V.3 (2021), *available at* https://assets.hcch.net/docs/0571d8ca-8b56-41a2-8443-4fe93e306c17.pdf (last visited Apr. 11, 2022).

148. *See Introduction to Incoterms 2020*, INT'L CHAMBER OF COM., *available at* https://file-eu.clickdimensions.com/iccwboorg-avxnt/files/723e_inco2020_eng_intro.pdf?m=6/3/2020%202:01:57%20PM&_cldee=eFPP5X_7GzH1unpbpP3vANlg5-peFwGEoSL8Y0U2FBqTtv—-pCNQkItK9FRGPqJ&recipientid=contact-0ddf912cc1b9ec11983f000d3ab54bee (last visited Apr. 11, 2022).

149. *See Who We Are*, INTERNATIONAL FEDERATION OF FREIGHT FORWARDERS ASSOCIATIONS, *available at* https://fiata.org/who-we-are.html (last visited Apr. 20, 2022).

A different approach entails codification of substantive rules by multilateral treaty, of which the 1980 UN Convention on Contracts for the International Sale of Goods ("CISG") is a good example.[150] The CISG applies to contracts for the sale of goods when the contracting parties have places of business in different States and when (i) both places of business are in Contracting States or (ii) the choice of law in the relevant jurisdiction leads to the law of a Contracting State.[151] Party autonomy and contractual freedom are key components of the Convention: if parties wish to derogate from its rules or exclude them entirely from their sales contract, they may do so. However, the Convention has limited substantive scope: it applies only to the sale of goods (subject to certain exclusions[152]) and deals only with the *formation* of the contract (and *not* with the validity of the contract, the contract's effect, or liability related to the contract).

The Convention was negotiated under the auspices of UNCITRAL, which, as noted *supra*, maintains the CLOUT database of relevant decisional interpretations.[153] This repository can be a valuable reference for practitioners and judges alike.

(iii) The Rome I Regulation

At the regional level, where the goal is the creation of an integrated economic system, substantive harmonization of commercial law can be the priority. Within the European Union, for example, the Rome I Regulation accepts the parties' freedom to choose the law applicable to their contractual relationship in civil and commercial matters subject to mandatory choice of law rules for contractual obligations.[154]

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150. CISG, *supra* note 28; for a list of contracting States, *see also generally Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*, UNCITRAL, *available at* https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (last visited Apr. 11, 2022).

151. CISG Art. 95 allows States Party to declare they will apply the CISG only when both parties are resident in Contracting States.

152. Exclusions include sales of goods bought for personal, family, or household use; auction sales; sales that occur by authority of law; sales of stocks, shares, investment securities, negotiable instruments or money; sales of ships, vessels, hovercraft or aircraft; and sales of electricity.

153. *See* CLOUT, *supra* note 34.

154. Rome I, *supra* note 59 (art. 5 deals specifically with contracts of carriage, addresses choice of law, and provides rules for the carriage of passengers); *see infra* p. 45 for more in-depth discussion of art. 5's limitations on party autonomy.

B. Cross-Border Payments

In the cross-border context, a seller may be unable easily to vet a foreign buyer's ability or willingness to pay, particularly if the two have had no prior dealings. In the event of non-payment, the seller may find it difficult to get access to the buyer's assets. For that reason, payment obligations in international transactions are frequently set out in documentary letters of credit or guarantees. Different legal frameworks provide globally applicable rules for different types of documentary transactions when they occur across borders.

For example, the Uniform Customs and Practice for Documentary Credits ("UCP") provides a set of rules to supplement the governing law of a letter of credit transaction.[155] More recently the ICC has adopted supplementary rules to address the electronic presentation of documents, reflecting its expectation that "traditional trade instruments will, over time, inexorably move towards a mixed ecosystem of paper and digital, and, ultimately, to electronic records alone."[156] The ICC has also developed the Uniform Rules for Demand Guarantees ("URDG") to foster standard international banking practices for demand guarantee-issuing banks.[157]

Under standby letters of credit, the issuer agrees to make payment to the beneficiary if the principal defaults on the relevant undertaking, but the agreement is independent of the underlying contract. The Institute of International Banking Law & Practice developed the International Standby Practices specifically for this type of arrangement.[158] *The UN Convention on Independent Guarantees and Stand-by Letters of Credit* applies to both independent guarantees and stand-by letters of credit but has not yet been widely adopted.[159]

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155. For a summary of the most recent version (UCP 600), adopted in 2007, see *UCP 600 (Uniform Customs & Practice for Documentary Credits) - What does UCP 600 mean?*, TRADE FIN. GLOB., *available at* https://www.tradefinanceglobal.com/letters-of-credit/ucp-600/ (last visited Apr. 11, 2022).

156. *See* David Meynell, *Introduction to UCP Version 2.0, in* INT'L CHAMBER OF COM., eUCP VERSION 2.0, (May 2019), *available at* https://iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf (last visited Apr. 11, 2022).

157. *See, e.g.*, Raymond Cox & Niamh Cleary, *URDG 758*, THOMPSON REUTERS PRAC. L. (last detailed review and updating in Dec. 2018), *available at* _https://tmsnrt.rs/2Oc84Al (last visited Apr. 20, 2022).

158. *See ISP 98*, INST. OF INT'L BANKING L. & PRAC., *available at* https://iiblp.org/isp98/ (last visited Apr. 11, 2022).

159. UN Convention on Independent Guarantees and Stand-by Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 163; *see also* Filip de Ly, *The UN Convention on Independent*

C. Transportation of Goods

The cross-border carriage of goods can occur by road, rail, air, sea, or some combination thereof ("multimodal transport"). A variety of instruments, both regional and global, have been developed to standardize the relevant arrangements. Within the EU, for instance, Article 5 of the Rome I Regulation deals specifically with choice of law in contracts of carriage; it places limits on party autonomy, for example, by restricting the parties who *do* wish to choose by limiting their available options to the country where (a) the passenger has his habitual residence, (b) the carrier has his habitual residence, (c) the carrier has his place of central administration, (d) the place of departure is situated, or (e) the place of destination is situated.[160]

Road. A number of instruments address the carriage of goods by road, including the 1956 UN Convention on the Contract for the International Carriage of Goods by Road ("CMR"), which applies to "every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties."[161] A similar convention exists (but has not yet entered into force) within the OAS: the Inter-American Convention on Contracts or the International Carriage of Goods by Road.[162]

Rail. A separate treaty establishes rules applicable to contracts for the carriage of goods by rail between member States. Like the CRM, the 1980 Convention Concerning International Carriage by Rail ("COTIF") allows for party autonomy.[163] It has been ratified mostly by European,

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Guarantees and Stand-by Letters of Credit, 33 THE INT'L LAW. 832 (1999); *see also* U.N. Convention on Independent Guarantees and Stand-By Letters of Credit, S. Treaty Doc. No. 114-9 (2d Sess. 2016) (in the United States, this treaty was submitted to the U.S. Senate February 10, 2016, for advice and consent to ratification).

160. Rome I, *supra* note 59, at art. 5(2).

161. Convention on the Contract for the International Carriage of Goods by Road art. 1, May 19, 1956, 399 U.N.T.S. 189. Most (although not all) of the CMR's 58 contracting parties are European or Central Asian nations.

162. Inter-American Convention on Contracts for the International Carriage of Goods by Road, Jul. 15, 1989, O.A.S.T.S. No. 72.

163. *See* Convention Concerning International Carriage by Rail app. B art. 1, May 9, 1980, *amended* June 3, 1999, *available at* http://otif.org/fileadmin/new/3-Reference-Text/3A-COTIF99/05_Appendix_B.pdf (last visited Apr. 10, 2022)).

African, and Near Eastern States.[164] The Convention's governing body also oversees the Regulation concerning the International Carriage of Dangerous Goods by Rail ("RID"), which the EU has incorporated through Directive 2008/68/EC.[165]

Water. Some 90% of world trade goes by sea,[166] so it is unsurprising that maritime transportation of goods has long been governed by international agreements,[167] most recently the 2008 UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea ("the Rotterdam Rules").[168] That convention establishes uniform liability rules for contracts between shippers and carriers for the international carriage of goods by sea and the obligations of the carrier and the shipper, transport documents and electronic transport records, limits of liability, and provisions regarding the time for suit to be filed, jurisdiction, and arbitration.[169] A separate agreement applies to contracts of carriage by inland waterways.[170]

Air. Anyone who has traveled internationally by air should be familiar with the Montreal Convention, a widely ratified treaty that establishes a liability regime for passengers accidentally injured or killed in the course of a flight, as well as for delay, loss, or damage to baggage and air cargo.[171]

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164. For a current list of States Party, see *Status of the Protocol of 3 June 1999 for the Modification of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980*, INTERGOVERNMENTAL ORG. FOR INT'L CARRIAGE BY RAIL, *available at* http://otif.org/fileadmin/new/3-Reference-Text/3A-COTIF99/Status_Protocol%201999_e_as%20at_01-05-2019.pdf (last visited June 6, 2022).

165. *See* Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods, 2008 O.J. (L 260) 13 (EC).

166. *See Explaining Shipping.* INT'L CHAMBER OF SHIPPING, *available at* https://www.ics-shipping.org/explaining/ (last visited Apr. 10, 2022); *see generally* United Nations Conference on Trade and Development, *Review of Maritime Transport 2019*, U.N. Doc UNCTAD/RMT/2019/Corr.1 (Jan. 31, 2020).

167. Such as the Hague Rules (1924), the Hague-Visby Rules (1968), and the Hamburg Rules (1978).

168. *See* Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008, *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rotterdam-rules-e.pdf (last visited Apr. 10, 2022).

169. *Id.*

170. The Budapest Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway, Oct. 3, 2000, *available at* http://www.unece.org/fileadmin/DAM/trans/main/sc3/cmniconf/cmnidoc/finalconf02e.pdf (last visited May 25, 2022).

171. *See* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, *available at*

D. E-Commerce, the Internet, and the Digital Economy

The rapid emergence of electronic methods for transacting business ("e-commerce") has posed significant challenges for private international law. UNCITRAL's Working Group IV has been a focal point for the development of agreed international rules regarding the digital economy. Among the instruments it has adopted are Model Laws on Electronic Commerce (1996), Electronic Signatures (2001), and Electronic Transferable Records (2017),[172] as well as the UN Convention on Electronic Communications in International Contracts (2005).[173] In 2019, UNCITRAL approved the publication of "Notes on the Main Issues of Cloud Computing Contracts," while continuing work on a new instrument on the use and cross border recognition of electronic identity management services ("IdM services") and authentication services ("trust services").

Other recent regulations on a regional level have addressed e-commerce issues, for example the European Union's General Data Protection Regulation ("GDPR").[174]

E. Mobile Equipment

Large-scale mobile equipment – such as aircraft, railroad rolling stock, satellites, construction vehicles, and other large machines – is costly to build, use and maintain; it is therefore often leased rather than purchased outright. It is also designed to move and, not infrequently, crosses national borders. Differences in how domestic legal systems approach rights dealing with secured transactions, title, and leasing agreements create significant uncertainties and make access to financing more difficult and more expensive, particularly in developing

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https://www.iata.org/contentassets/fb1137ff561a4819a2d38f3db7308758/mc99-full-text.pdf (last visited Apr. 10, 2022) [hereinafter "Montreal Convention"].

172. *See generally* Working Group IV: Electronic Commerce, UNCITRAL, *available at* https://uncitral.un.org/en/working_groups/4/electronic_commerce (last visited Apr. 10, 2022); *see also* Electronic Commerce, UNCITRAL, *available at* https://uncitral.un.org/en/texts/ecommerce (last visited Apr. 10, 2022).

173. *See* Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, 2898 U.N.T.S. 3. The Convention was submitted to the U.S. Senate on February 10, 2016. *See* S. Treaty Doc. No. 114-5.

174. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter "GDPR"]. For one approach to the issues, *see* DAN JERKER SVANTESSON, PRIVATE INTERNATIONAL LAW AND THE INTERNET (2021).

countries.[175] The owner or lessor may not be confident that its security interest in the equipment will be respected in the new jurisdiction, or whether the rights and remedies that came with a security interest obtained in the original jurisdiction were transferred "as is" to the new jurisdiction when the property in question moved across borders.[176]

UNIDROIT's 2001 Cape Town Convention on International Interests in Mobile Equipment[177] was designed to address the challenges inherent in obtaining secure, enforceable rights for this type of high-value, moveable property. The Convention, which entered into force in 2006, creates an international interest that all contracting States must recognize, consisting of "(1) the ability to repossess or sell or lease the equipment in case of default; and (2) the holding of a transparent finance priority in the equipment."[178] To provide notice of security interests, it also provides for an electronic register.[179] The Convention itself has been described as a "broad umbrella provision that provides the general principles"[180] since it is given specific (sectoral) application by four additional protocols, addressing in turn aircraft equipment, railway rolling stock, space assets, and mining, agricultural, and construction equipment.[181]

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175. *See* Roy Goode, *The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing*, 7 UNIFORM L. REV. 3 (2002), *available at* https://www.unidroit.org/english/publications/review/articles/2002-1-goode-e.pdf (last visited Apr. 10, 2022).

176. *See* Sandeep Gopalan, *Securing Mobile Assets: The Cape Town Convention and Its Aircraft Protocol*, 29 N.C. J. INT'L L. & COM. REG. 59, 61-63 (2003).

177. *See* UNIDROIT, Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285, *available at* https://www.unidroit.org/instruments/security-interests/cape-town-convention (last visited Apr. 10, 2022).

178. Sean D. Murphy (ed.), *Cape Town Convention on Financing of High-Value, Mobile Equipment*, 98 AM. J. INT'L L. 852, 853 (2004).

179. The register is online at https://www.internationalregistry.aero/ir-web/ (last visited Mar. 20, 2022).

180. *See* Gopalan, *supra* note 176, at 69-70.

181. Protocol on the Matters Specific to Aircraft Equipment, Nov. 16, 2001; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, Feb. 23, 2007; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, Mar. 9, 2012; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural, and Construction Equipment, Nov. 22, 2019 [hereinafter "MAC Protocol"]. The texts of these protocols are available at https://www.unidroit.org/instruments/security-interests/. The United States signed the MAC Protocol in 2019.

F. Financial Securities

In today's computerized securities markets, transactions typically occur in large volumes and at great speed, frequently across national borders. Because different legal systems have different ways of classifying the rights that come with such transfers, uniform rules regarding the perfection, priority, and other effects of transfers became important. The 2006 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary[182] was "designed to apply in relation to all securities held with an intermediary, independent of how the rights resulting from a credit of securities to a securities account are classified by any legal system."[183] It has been described as a "pure conflict of laws convention [that] does not impose any changes on existing or future substantive law."[184] It applies to any situation involving intermediary-held instruments or assets that are financial in nature, apart from cash, and it creates a uniform conflict of laws regime establishing a primary rule for determining the law applicable to those securities, fallback rules in the event that the applicable law is not determined by the primary rule, and factors to be disregarded in determining the applicable law.[185]

UNIDROIT has also adopted an instrument focused on financial securities: the Convention on Substantive Rules for Intermediated Securities.[186] The stated goal of that instrument is "to promote internal soundness and cross-border system compatibility by providing the basic legal framework for the modern intermediated securities holding

182. Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, Jul. 5, 2006, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=72 (last visited Mar. 20, 2022) [hereinafter "Hague Securities Convention"]. The United States ratified the Convention in 2016. *See* S. Treaty Doc. No. 112-6.

183. ROY GOODE, HIDEKI KANDA & KARL KREUZER, HAGUE SECURITIES CONVENTION – EXPLANATORY REPORT 11 (2nd ed. 2017), *available at* https://assets.hcch.net/docs/d1513ec4-0c72-483b-8706-85d2719c11c5.pdf (last visited Apr. 10, 2022).

184. *Id.* at 21.

185. Hague Securities Convention, *supra* note 182 at arts. 4-6.

186. Convention on Substantive Rules for Intermediated Securities, Oct. 9, 2009, *available at* https://www.unidroit.org/instruments/capital-markets/geneva-convention (last visited Mar. 20, 2022). The Convention is not yet in force. *See Status of the UNIDROIT Convention on Substantive Rules for Intermediated Securities,* UNIDROIT, *available at* https://www.unidroit.org/instruments/capital-markets/geneva-convention/status/ (last visited Apr. 10, 2022).

system."[187] It describes, among other things, the rights of a securities account holder, the legal framework for acquisition and disposition of securities, priority among competing interests, loss sharing in case of insolvency of the intermediary, and obligations and liability of intermediaries.[188]

G. Cross-Border Insolvency

Cross-border insolvencies present similarly difficult challenges given substantive and procedural differences in national law. UNCITRAL's Working Group V has adopted a number of insolvency-focused instruments, including the 1997 Model Law on Cross-Border Insolvency, designed to "assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency."[189] It focuses on several PIL elements in foreign proceedings, cooperation among the courts of States where a debtor's assets are located, and coordination of concurrent proceedings. To date, legislation based on this model law has been adopted in 53 jurisdictions, including the United States.[190]

In 2018, Working Group V adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, aimed at creating a "harmonized procedure for recognition and enforcement of insolvency-related judgments."[191] In early 2021, UNCITRAL published a Digest of

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187. *Background to the 2009 Geneva Convention*, UNIDROIT, *available at* https://www.unidroit.org/instruments/capital-markets/geneva-convention/overview/ (last visited Apr. 10, 2022).

188. *See* Convention on Substantive Rules for Intermediated Securities, *supra* note 186, at ch. 2 and arts. 11-13, 19, 26, and 28.

189. *See* UNCITRAL's Model Law on Cross-Border Insolvency (1997) and its Guide to Enactment and Interpretation (2013), *available at* https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (last visited Apr. 10, 2022).

190. *See Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, UNCITRAL, *available at* https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited Mar. 20, 2022). In 2015, for example, OHADA (which includes 17 Member States) adopted the Acte uniforme portant organisation des procédures collectives d'apurement du passif, the text of which is available (in French) at https://www.droit-afrique.com/uploads/OHADA-Acte-uniforme-2015-Procedures-collectives.pdf. The United States adopted legislation based on the model in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (2005 Act), codified in Chapter 15 of the U.S. Bankruptcy Code.

191. *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)*, UNCITRAL, *available at*

Case Law on the Model Law for Cross Border Insolvency, which examines how the model law has been applied in jurisdictions that have adopted it.[192] The Working Group has also drafted a Model Law on Enterprise Group Insolvency, whose purpose is "to provide effective mechanisms to address cases of insolvency affecting the members of an enterprise group."[193]

Additional examples of harmonized insolvency law include EU Regulation 2015/848,[194] which is directly applicable in all EU member States (except Denmark) and requires mandatory recognition of other EU States' insolvency proceedings.[195] It also requires the establishment of insolvency registers, in which the information concerning insolvency proceedings is "published as soon as possible after the opening of such proceedings,"[196] and addresses applicable law and jurisdiction, primary and secondary insolvency proceedings, insolvency proceedings for two or more members of a group of companies, and data protection for parties involved.

Outside of the intergovernmental organizations that have worked on cross-border insolvency, there are other, judicially driven efforts to encourage coordination and cooperation in cross-border insolvencies and restructurings. For example, judges from a number of jurisdictions around the world formed the Judicial Insolvency Network ("JIN") in 2016. JIN "serves as a platform for sustained and continuous engagement for the furtherance of [...] judicial thought leadership, best practices, and communication and cooperation."[197] The network issued the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, whose "overarching aim [...] is the preservation of

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https://uncitral.un.org/en/texts/insolvency/modellaw/mlij (last visited Apr. 11, 2022); *see also UNCITRAL Legislative Guide on Insolvency Law* (rev. ed. 2019), UNCITRAL, *available at* https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law (last visited Apr. 11, 2022).

192. *See* UN COMMISSION ON INTERNATIONAL TRADE LAW, DIGEST OF CASE LAW ON THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (2021), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf (last visited Apr. 11, 2022).

193. UN COMMISSION ON INTERNATIONAL TRADE LAW, MODEL LAW ON ENTERPRISE GROUP INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.20.V.3 (2020).

194. Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, 2015 O.J. (L 141) 19 (EU).

195. *See id.* at preamble ¶ 65 and arts. 19-20.

196. *Id.* at arts. 24-27.

197. *See About Us*, JUDICIAL INSOLVENCY NETWORK, *available at* https://jin-global.org/about-us.html (last visited Aug. 4, 2022).

enterprise value and the reduction of legal costs."[198] The Guidelines have been adopted by sixteen courts and / or jurisdictions around the world.[199]

H. Consumer Protection

Harmonization of domestic consumer protection laws has begun to receive serious attention in recent years, partly because of the efforts of the International Consumer Protection and Enforcement Network ("ICPEN").[200] In 2015, the UN General Assembly adopted a revision of its UN Guidelines for Consumer Protection,[201] which provide a comprehensive overview of what consumer protection legislation should cover, including institutional enforcement and systems of redress. The 2015 revision includes sections on privacy, e-commerce, and financial services, added "as an explicit response to the irruption of the digital economy and to the recent financial crisis."[202] Additional sections address, among others, disputes, and redress; the energy, public utilities, and tourism sectors; and international cooperation.

For its part, the EU has adopted a robust legal and regulatory framework for protecting consumers.[203] Expressed primarily through directives establishing "minimum harmonization levels," this enforcement framework is designed to protect consumers and provide for mutual assistance between member State enforcement authorities when

198. *See JIN Guidelines*, JUDICIAL INSOLVENCY NETWORK, *available at* https://jin-global.org/jin-guidelines.html#list-1 (last visited Aug. 4, 2022).

199. *See id.* The courts and / or jurisdictions that have adopted these Guidelines are the United States Bankruptcy Court for the District of Delaware, the Supreme Court of Singapore, the United States Bankruptcy Court for the Southern District of New York, the Supreme Court of Bermuda, the Chancery Division of England & Wales, the Eastern Caribbean Supreme Court, the Supreme Court of New South Wales, the United States Bankruptcy Court for the Southern District of Florida, the Seoul Bankruptcy Court, the Grand Court of the Cayman Islands, the United States Bankruptcy Court for the Southern District of Texas, the Commercial List of Users' Committee of the Superior Court of Justice – Ontario (Commercial List), the District Court Midden-Nederland (the Netherlands), the Federal Court of Australia, the Supreme Court of British Columbia, and Brazil.

200. *See generally What We Do*, INT'L CONSUMER PROTECTION AND ENFORCEMENT NETWORK, *available at* https://icpen.org/what-we-do (last visited Apr. 11, 2022).

201. *See United Nations Guidelines for Consumer Protection*, UNCTAD, *available at* https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-on-consumer-protection (last visited Apr. 11, 2022).

202. *Id.*

203. *See generally* JANA VALANT, CONSUMER PROTECTION IN THE EU: POLICY OVERVIEW 5 (2015), *available at* https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf (last visited Apr. 11, 2022).

one requests information from others regarding actual or potential intra-EU consumer protection violations.[204]

Of particular importance is the aforementioned EU General Data Protection Regulation ("GDPR"), which has been described as the "toughest privacy and security law in the world."[205] It applies broadly to any organization, whether or not EU-based, that targets or collects data on people in the EU, and it covers data collection and protection rules, accountability and compliance rules, data security, data processing rules, and privacy. Different types of penalties can be applied to violators, depending on the type of violation committed, and they can be substantial.[206]

For its part, the OAS has dedicated efforts toward harmonizing consumer protection law through the seventh Inter-American Specialized Conference on Private International Law ("CIDIP VII").[207] Within this process, three proposals were made to advance consumer protection as a way of facilitating cross-border trade in goods and services while lowering transaction costs for consumers: Brazil has advocated a draft convention to address choice of law, Canada has proposed draft model laws on jurisdiction and choice-of-law rules, and the United States has submitted a draft Legislative Guide on Consumer Dispute Settlement and Redress. The proposals represent different approaches to resolving the issues. The Brazilian draft treaty would validate party choice-of-law determinations only where the chosen law is the "most favorable to the consumer." One difficulty with this approach, however, is in establishing the criteria by which that determination can be made with some measure of consistency and objectivity. Would it mean the law with longer filing periods, or the law allowing less costly consumer proceedings or higher

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204. Commission Regulation 2006/2004 of Oct. 27, 2004, on cooperation between national authorities responsible for the enforcement of consumer protection laws, art. 6, 2004 O.J (L364) 1 (EC).

205. GDPR, *supra* note 174. *See also What is GDPR, The EU's new data protection law?*, GDPR.EU, *available at* https://gdpr.eu/what-is-gdpr/ (last visited Apr. 20, 2022).

206. GDPR, *supra* note 174, at arts. 83-84. Administrative fines, for example, vary from up to €10 million or 2% of the violator's global annual revenue (whichever is higher), to up to €20 million or 4% of global annual revenue (whichever is higher).

207. For an overview of CIDIP VII, see *Department of International Law, instruments by conference – CIDIP VII*, O.A.S., *available at* http://www.oas.org/en/sla/dil/private_international_law_conferences_Cidip_VII.asp (last visited Apr. 11, 2022). For a history of the CIDIP process more generally, *see Department of International Law – the History of the CIDIP Process*, O.A.S., *available at* http://www.oas.org/en/sla/dil/private_international_law_history_cidip_process.asp (last visited Apr. 11, 2022).

potential damage awards? Attempts to clarify these issues and explore possible alternatives are ongoing.

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

The OAS has also developed a proposed (and important) Inter-American Model Law on Access to Public Information for consideration by member States.[208]

I. Non-Contractual Obligations

Although not strictly within our working definition of PIL, we cannot conclude without noting efforts to deal with many of the same issues in the field of non-contractual obligations (generally, what a U.S. lawyer would think of as tort law). Within the EU, the Rome II Regulation aims at harmonizing the rules for determining the law applicable when the issues arise in civil and commercial matters.[209]

The basic principle is *lex loci delicti comissi*. Thus, article 4 of the Regulation provides that, as a general rule,

the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage

208. *Model Law on Access to Public Information*, O.A.S., *available at* http://www.oas.org/en/sla/dil/access_to_information_model_law.asp (last visited Apr. 11, 2022).

209. *See* Rome II, *supra* note 59, at arts. 1-2.

occurred and irrespective of the country or countries in which the indirect consequences of that event occur.[210]

The doctrine of "close connections" also applies where it is "clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country" other than the country that should normally apply under the general rule or its immediate exception; the law of the country with those close connections thus applies.[211]

The same overall approach is reflected in the 1971 Hague Convention on the Law Applicable to Traffic Accidents[212] and the 1973 Hague Convention on the Law Applicable to Products Liability (the latter addresses choice of law in cross-border cases where liability arises due to defective products).[213] Finding an approach to cross-border civil liability for environmental damage has been on the agenda of the Hague Conference since 1993, and in 2010 the Permanent Bureau invited the Council on General Affairs and Policy of the Conference to revisit the question.[214]

VII. PARTICULAR CHALLENGES FOR THE U.S. LEGAL SYSTEM

Most PIL issues arise from the fact that different national legal systems around the world address (and resolve) similar problems in different ways. For the United States, two particular facts complicate its engagement with PIL in the international context: (1) the federal structure

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210. *Id.* at art. 4(1). Under art. 4(2), "where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply."

211. *Id.* at art. 4(3). The "national override" is found in Article 16, which provides that the Regulation shall not restrict the application of a forum's mandatory rules, irrespective of the law applicable to the non-contractual obligation.

212. Convention on the Law Applicable to Traffic Accidents, May 4, 1971, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=81 (last visited Mar. 20, 2022).

213. Convention on the Law Applicable to Products Liability, Oct. 2, 1973, *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=84 (last visited Mar. 20, 2022). For a list of contracting parties, see *Status Table – Convention of 2 October 1973 on the Law Applicable to Products Liability*, HCCH, *available at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=84 (last visited Mar. 20, 2022).

214. *See* Christophe Bernasconi, *Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?*, 12 HAGUE Y.B. OF INT'L L. 1 (2000); *Should the Hague Conference Revisit the Scope and Nature of Possible Work in the Field of Civil Liability for Environmental Damage?*, HCCH, *available at* https://assets.hcch.net/upload/wop/genaff2010pd12e.pdf (last visited June 6, 2022).

of its government, in which the authority of the central government is limited and many PIL issues fall within the competence of the constituent states, and (2) the hybrid nature of its legal system, in which some PIL issues are matters of common law rather than statute.

The United States is not, of course, the only country with a federal system, but it does have more subnational components with substantial independent legislative authority than any other.[215] Under the U.S. Constitution, the federal government has limited (delegated) authority to enact substantive law; each of the constituent States retains authority that has not been granted to the federal government. The judicial system is similarly bifurcated: the jurisdiction of the federal courts is circumscribed, and each state (and territory) maintains its own system of courts. The relationship between the two is complicated: in some areas relevant to PIL, a case may be properly pursued in the federal courts, but state law will apply, while in others the reverse is true: the state courts may be empowered to hear the case but must decide it under federal law.

In both federal and state courts, the "law" is a mixture of legislation (duly enacted statutes) and common law (judicial decisions governed by the principle of *stare decisis*). Some areas are substantially codified, others much less so. For instance, the United States lacks a comprehensive national commercial code.[216] The law of contracts is generally a matter of common law, although some areas have been standardized through adoption of a "uniform law" by the states. Similarly, there are no uniform "conflicts of law" rules of general applicability at the national level: while some states have enacted some relevant provisions, this area remains largely a matter of common (decisional) law.[217] Recognition and enforcement of foreign judgments remains (mostly) a matter of state law, although with a fairly high degree of uniformity due to adoption of uniform laws; foreign judgments are not

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215. On the challenges of federalism generally, see Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws*, 32 U. PA. J. INT'L L. 369 (2010). For background on the U.S. approach to PIL, see Peter Pfund, *Contributing to Progressive Development of Private International Law: The International Process and the United States Approach*, 249 RECUEIL DES COURS 9 (1994), *available at* http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789041102607_01 (last visited Mar. 20, 2022).

216. *See generally Commercial Law Research Guide – Uniform Commercial Code*, GEO. L., *available at* https://guides.ll.georgetown.edu/commerciallaw/ucc (last visited Apr. 8, 2022). The Uniform Commercial Code, a product of two private entities (the Uniform Law Commission and the American Law Institute), has not been adopted uniformly in every U.S. jurisdiction; neither is it truly comprehensive.

217. The American Law Institute is currently pursuing a third "RESTATEMENT OF THE LAW" in this area.

entitled to the constitutionally-mandated "full faith and credit" as accorded to those of sister "states" of the Union.

Some areas fall primarily within federal competence, for example bankruptcy and intellectual property. Not a few are governed by both federal and state law, such as privacy, data protection, and e-commerce, to mention only three. Others, such as family law, remain primarily matters of state law.

In a few discrete areas, harmonization occurs at the federal level by virtue of the jurisdictional reach of the federal courts. For instance, most transnational cases involving civil and commercial matters are brought in federal (as opposed to state) courts; in consequence, articulation of the rules regarding the interpretation and application of foreign law in the U.S. legal system largely occurs at the federal level. The same is largely true with respect to issues of international judicial assistance (through application, for example, of the Hague Service and Evidence Conventions).

One important point is often unnoticed or misunderstood by non-U.S. lawyers: to the extent that the international community addresses PIL issues by treaty or convention, U.S. ratification may raise "federalism" issues. Under Art. VI cl. 2 of the U.S. Constitution, duly ratified treaties become part of the "supreme Law of the Land," displacing contrary state law. Thus, ratification of PIL treaties inescapably "federalizes" the issues – even in areas that have traditionally been the subject of state law. For example, while family law remains primarily within state competence, U.S. adherence to various Hague Conventions has required the federal government to assume an important role that it might otherwise not have had.

The significance of this fact is often overlooked. Wholly apart from the substance, U.S. ratification of PIL treaties can be challenging since states may not welcome federal "intrusion" into areas traditionally falling within state competence. At the same time, the federal government must be confident that the United States is capable of complying fully with its international obligations. In some cases, creative solutions must be found to these mutually valid but sometimes competing concerns.[218]

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218. *See generally* Paul R. Dubinsky, *Private Law Treaties and Federalism: Can the United States Lead?* 54 TEX. INT'L L. J. 39 (2018); Charlotte Ku, William H. Henning, David P. Stewart & Paul F. Diehl, *Even Some International Law Is Local: Implementation of Treaties through Subnational Mechanisms*, 60 VA. J. INT'L L. 101 (2019).

VIII. CONCLUSION

Some may conclude from this survey that private international law cannot properly be considered a cohesive "field" of law (either substantive or procedural) and is best understood more as a collection of disparate (if related) problems arising in the broad context of cross-border transactions, together with an array of tools, methods or principles for resolving those problems.[219] To some extent, such a criticism is valid – even if it could be made of other areas of contemporary concern (for example, is "privacy" a cohesive field?). In any event, it may well be one reason that PIL is rarely taught as a discrete course in U.S. law schools. Even if accurate, that view does not diminish the growing relevance and importance of the field.

As we hope this survey has demonstrated, international practitioners and students alike must be alert not only to the particular problems that can arise in the "transnational" or "cross-border" context but also to the variety of relevant mechanisms and approaches – including both the increasing efforts at substantive harmonization and the expanding architecture of engagement and procedural cooperation – that PIL offers for their resolution.[220] Acquainting students and practitioners to the breadth and complexity of (and developments in) the field is the main reason for this article.[221]

In the end, of course, the objective of the PIL project broadly considered – the ultimate purpose or justification for the wide-ranging efforts described above – must be to promote justice, efficiency, and

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219. *See* John Linarelli, *Toward A Political Theory for Private International Law*, 26 DUKE J. COMP. & INT'L L. 299 (2016); Alex Mills, *The Identities of Private International Law: Lessons from the U.S. and EU Revolutions*, 23 DUKE J. COMP. & INT'L L. 445, 474 (2013) (Alex Mills has described PIL as "a form of 'secondary law' (in H.L.A. Hart's sense) which serves the international, federal or regional function of ordering the distribution of regulatory authority between legal orders, accepting and reinforcing their pluralism.").

220. Verónica Ruiz Abou-Nigm emphasizes the term "cosmopolitan integration." She writes: "The raison d'être of private international law is the plurality of international orders; dealing with this plurality is the quintessential function of private international law." *See* Verónica Ruiz Abou-Nigm, *Bridging and Balancing: Diversity and Integration in Private International Law*, *in* DIVERSITY AND INTEGRATION IN PRIVATE INTERNATIONAL LAW 362, 386 (Verónica Ruiz Abou-Nigm & María Blanca Noodt Taquela eds., 2019).

221. Several sources can be helpful for those interested in monitoring PIL developments online, including: "Conflict of Laws .net: Views and News in Private International Law" at https://conflictoflaws.net; "Letters Blogatory: the blog of international judicial assistance," at https://lettersblogatory.com/; the European Association of Private International Law at https://eapil.org; and the European Group of Private International Law at https://gedip-egpil.eu/en/.

economic growth and development around the world.[222] Those are the standards by which the efforts described above, in all the different venues, must ultimately be judged.

222. *See* David P. Stewart, *Private International Law, the Rule of Law, and Economic Development*, 56 VILL. L. REV. 607 (2011). For a recent examination of how private international law can contribute to international development, see THE PRIVATE SIDE OF TRANSFORMING OUR WORLD - UN SUSTAINABLE DEVELOPMENT GOALS 2030 AND THE ROLE OF PRIVATE INTERNATIONAL LAW (Ralf Michaels, Verónica Ruiz Abou-Nigm & *Hans van Loon* eds., 2021).