The Hague Conference and the Future of Private International Law

A Jubilee Speech*

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Contents

Anniversaries are days for remembrance of the past, for assessing the challenges of the present and for contemplating options for the future. Addressing these tasks I shall first take a look at the wider context of private international law and its embeddedness in the historic evolution of society, the economy and the international community (infra I.). That evolution has created the need for a reliable transnational legal framework of private cross-border relations, something which is perceived anew under the impact of globalization in the present era. It primarily concerns the coordination of legal systems, i.e. the fields of cooperation between States (infra II.) and

* Key note speech at the conference "HCCH 125 – Ways Forward: Challenges and Opportunities in an Increasingly Connected World", Hongkong 18 April 2018.

RabelsZ 82, 922–943 – DOI: 10.1628/rabelsz-2018-0094
ISSN 0033-7250 – © 2018 Mohr Siebeck

choice of law (infra III.). While the coordination methods implicitly accept the divergence of national legal systems, an increasing tendency aims at replacing them with common laws and values (infra IV.). The observations in these areas are conducive to recommendations for future orientation. At the very end, the institutional basis of the discipline deserves closer attention (infra V.).

I. The context of history

The 125th anniversary of the Hague Conference, with its name so uncommon for an international organization, draws our attention to the second half of the 19th century. What was the situation like that gave rise to the first Hague Conference convened in 1893?[1] It can be encapsulated in some keywords:

(1) the rise of the bourgeois society to its climax and highest perfection;

(2) the positivistic belief in the ability of mankind to perceive and shape all conditions of life;

(3) the assertion of the nation-state as the ultimate point of reference of human societies;

(4) the Eurocentric order of the world;

(5) the first wave of globalization.

The general features of the time have left their traces in the legal landscape at large and in private international law in particular. Thus, positivism and the growing role of the nation-state account for the codification movement that, while having only few followers in the common law world,[2] prevailed on the European continent[3] and in Latin America.[4] Excluding recourse to

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[1] The first Hague Conference was convened, at the invitation of the Dutch government, from 12 to 27 September 1893; see Actes de la Conférence de La Haye chargée de réglementer diverses matières de droit international privé (1893); on its origin and early development see *Hans van Loon*, At the Cross-roads of Public and Private International Law – The Hague Conference on Private International Law and Its Work, Collected Courses of the Xiamen Academy of International Law 11 (2017) 1–65, 4 ff.

[2] This relates in particular to Jeremy Bentham in the UK and David Dudley Field in the US; see *Konrad Zweigert / Hein Kötz*, An Introduction to Comparative Law[3] (1998, reprint 2011) 242.

[3] On the codification movement that started with the Prussian, French and Austrian codes and that incrementally dominated the major part of Europe see *Zweigert / Kötz*, Introduction (n. 2) 86 ff.; *Reinhard Zimmermann*, Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, in: Codification in International Perspective, ed. by Wen-Yeu Wang (2014) 11–43, 17 ff. with many further references.

[4] In Latin America the Civil code of Chile of 1855 drafted by Andrés Bello became highly influential; see *Jürgen Samtleben*, Menschheitsglück und Gesetzgebungsexport – Zu Jeremy Benthams Wirkung in Lateinamerika, RabelsZ 50 (1986) 451–482, 456–458, 467–470.

any prior law, in particular to Roman law,[5] the Codes highlighted the territoriality of, and the divergences between, national private laws. Yet they became an obstacle when cross-border migration and commerce, triggered by the industrial revolution, evolved quickly in the second half of the 19th century. This was perceived – in present terminology – as a first wave of globalization.

The need for conflict rules that had previously existed only with regards to scattered local provisions was increasingly appreciated as urgent. With a view to continuous legal harmony of decisions and at the initiative of the Italian scholar and politician Pasquale Stanislao Mancini,[6] the Institut de droit international launched the proposal for a uniform private international law to be shaped in international treaties.[7] The first implementation of this proposal occurred in Latin America in the Treaties of Lima in 1878 and of Montevideo in 1889.[8] While these conventions were confined to Latin American countries, the Hague Conference convened in 1893 was an exclusively European event. However, over time, the Hague conventions became influential beyond the shores of Europe. That is due to colonialism: apart from China, Japan, Thailand and Ethiopia, the Eastern hemisphere, under European dominance, was inclined to consider European achievements as models of societal progress.

It was not before 1904 that Japan attended a Hague Conference as the first non-European country.[9] Nevertheless, the conferences essentially remained European events until the end of World War II. In 1951, 15 European countries including Great Britain, and Japan, founded the Hague Conference as an intergovernmental organization.[10] By and by some countries of the Western hemisphere, such as the USA in 1964 or Argentina in 1972, joined, but the European countries kept their programmatic influence as evidenced by

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[5] Art. 7 Law of 21 March 1804 giving effect to the French Civil code (Loi 30 ventôse an VII) explicitly abrogated Roman law: "À compter du jour où ces lois sont exécutoires, les lois romaines, les ordonnances, les coutumes générales ou locales, les statuts, les règlements, cessent d'avoir force de loi générale ou particulière dans les matières qui sont l'objet desdites lois composant le présent code."

[6] *Pasquale Stanislao Mancini*, De l'utilité de rendre obligatoire pour tous les États, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de règles générales du droit international privé pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles, Clunet 1 (1874) 221–239 (I) and 285–304 (II).

[7] See the resolution adopted by the Institut in *Institut de droit international*, Annuaire 1 (1877) 123–126.

[8] Cf. *Jürgen Samtleben*, Internationales Privatrecht in Lateinamerika (1979) 9 ff. and 13 ff.

[9] This occurred at the fourth Conference; see *Conférence de droit international privé*, Actes de la quatrième Conférence de La Haye pour le droit international privé (16 mai – 7 juin 1904) (1904) XIII and 4 (speech of President Asser).

[10] See *van Loon*, Collected Courses of the Xiamen Academy on International Law 11 (2017) 1, 6 f.; for the text of the Statute see the website of the Hague Conference: <www.hcch.net>.

the ratifications of conventions.[11] The Eurocentric character of the Hague Conference was finally challenged when the European Union took over, from its Member States, the legislative competence for private international law in the Treaty of Amsterdam of 1997.[12] Thereby, the Hague Conference lost its main field of action. But it has made great efforts to keep track of globalization and to attract new members from other continents. This has been successful. Since the year 2000, more than 30 States from outside the European Union have acceded to the Hague Conference, most of them from non-European countries, the most recent accessions being those of Saudi Arabia and Kazakhstan.[13]

The transition of the Hague Conference from a Eurocentric to a universal organization has been mirrored, facilitated and promoted by changes that become visible in a comparison of the "old" conventions adopted before World War I with the conventions concluded after World War II. The old conventions – just like their Latin American counterparts – were exclusively intended for reciprocal application between States represented at the respective conference. They created a special regime for interstate relations within a closed club; no other States were admitted until special protocols adopted in the 1920s allowed for their adhesion. The post-World War II conventions generally enable States not represented during the negotiations to accept the binding character of the resulting convention by accession, adhesion or approval. Now, the Hague conventions are basically "open", and many of the new members have in fact made use of this possibility to join, thereby gaining positive experience with Hague instruments.

A second change is the abandonment of reciprocity with regards to choice of law; the modern conventions are *lois uniformes* that apply regardless of whether the designated law is the law of a Contracting State. Thus, Contracting States need not care for national choice-of-law provisions in the respective field. By giving effect to the convention they introduce a national regime which at the same time ensures conformity with international standards.

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[11] See the detailed analysis in *Jürgen Basedow*, Was wird aus der Haager Konferenz für Internationales Privatrecht?, in: FS Werner Lorenz (2001) 463–482, 473–477.

[12] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, done at Amsterdam on 2 October 1997, OJ 1997 C 340/1; see arts. 73m ff. EC Treaty, p. 30. The relevant provisions have been amended and renumbered as arts. 81 ff. Treaty on the Functioning of European Union, consolidated version in OJ 2016 C 202/47. On the effect of this transfer of competences on the Hague Conference see *A.V.M. Struycken*, Het Verdrag van Amsterdam en de Haagse Conferentie voor internationaal privaatrecht – Brusselse schaduwen over Den Haag, WPNR 2000, 735.

[13] See <www.hcch.net>; cf. also *Jürgen Basedow*, EU-Kollisionsrecht und Haager Konferenz – ein schwieriges Verhältnis, IPRax 2017, 194–200, 195 f.

II. Cooperation mechanisms

1. Mutual judicial assistance

As the cross-border movements of persons, goods and capital are intensifying, the need for effective judicial cooperation between States increases. It includes all issues of procedural practice, these ranging from the service and legalization of documents, legal aid, security for legal costs, the procurement of evidence, translation issues, the assessment of foreign law and on to jurisdiction and the recognition and enforcement of foreign decisions. Many of these subjects have been dealt with by Hague conventions. They have received a large number of ratifications and accessions, indicating the demand of the international community: about 100 in the case of adoption cooperation[14] and child abduction,[15] even more in the case of legalization of public documents.[16] Other instruments on civil procedure,[17] on the service abroad of documents[18] and on the taking of evidence in foreign countries[19] have attracted between 50 and 75 States and still demonstrate these States' strong interest in judicial cooperation.

The explanation for this success is simple. The judiciary cannot avoid the problems that arise where a statement of claim has to be served in a foreign country or where evidence is located abroad etc. These problems are intricate, requiring communication in foreign languages and unknown formalities, and they are often perceived as troublesome by the judges and government officials involved. They know that the solution depends on the foreign court's cooperation. There is an inherent element of reciprocity: if you help me, I promise to help you; and if you decline to help me you cannot expect me to provide assistance to you in a similar case. A convention somehow

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[14] Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded on 29 May 1993. Text, translations and status chart are available at <www.hcch.net>.

[15] Convention on Civil Aspects of International Child Abduction, concluded on 25 October 1980. Text, translations and status chart are available at <www.hcch.net>.

[16] Convention Abolishing the Requirement of Legalisation of Foreign Public Documents, concluded on 5 October 1961. Text, translations and status chart are available at <www.hcch.net>.

[17] Convention on Civil Procedure, concluded on 1 March 1954; on 23 January 2018 this Convention had 48 Contracting States. Text, translations and status chart are available at <www.hcch.net>.

[18] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, concluded on 15 November 1965; on 23 January 2018 this Convention had 73 Contracting States. Text, translations and status chart are available at <www.hcch.net>.

[19] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, concluded on 18 March 1970; on 23 January 2018 this Convention had 61 Contracting States. Text, translations and status chart are available at <www.hcch.net>.

channels the activities needed and formalizes the promise of reciprocity. It can be predicted that instruments on judicial cooperation will attract the approval of States also in the future to the extent that they target complex problems which the courts are neither able to avoid nor resolve on their own.

2. Recognition and enforcement of foreign judgments

The recognition and enforcement of foreign judgments appears to be the ultimate and most far-reaching form of judicial cooperation between States, although enforcement applications at present are no longer lodged by the foreign court or State, but by the winning party. But while the matter is no longer dealt with by letters rogatory of courts, the element of reciprocity still surfaces in some States, such as China,[20] Germany[21] or Japan,[22] in explicit provisions requiring the ascertainment of reciprocity as a condition of enforcement. Would this finding not provide fertile ground for a multilateral recognition convention establishing once and for all reciprocity between the Contracting Parties in this field? It is surprising that among the Hague conventions in this field, the only ones that can be considered as successful are those dealing with specific areas of family law, such as intercountry adoption,[23] parental responsibility[24] or, to a lesser extent, maintenance awards[25] and divorce decrees.[26]

But to date, no instrument having general application to civil and commercial matters has had much effect. The 1971 Hague Convention did not succeed in overcoming the traditional bilateral treaty-making in this area.[27]

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[20] See *Weizuo Chen*, China, in: Encyclopedia of Private International Law, ed. by Jürgen Basedow / Giesela Rühl / Franco Ferrari / Pedro de Miguel Asensio, vol. III (2017) 1970–1980, 1979, who refers to arts. 281 f. Chinese Civil Procedure Law as amended in 2013.

[21] Sec. 328(1) no. 5 of the Code of Civil Procedure; cf. *Anatol Dutta*, Reciprocity, in: Encyclopedia (n. 20) vol. II, pp. 1466–1471; *Jürgen Basedow*, Gegenseitigkeit im Kollisionsrecht, in: FS Dagmar Coester-Waltjen (2015) 335–348, 344 ff.

[22] Art. 118 no. 4 Code of Civil Procedure; cf. *Yasuhiro Okuda*, Recognition and Enforcement of Foreign Judgments in Japan, YB PIL 15 (2013/14) 411–420, 417 f.

[23] See above n. 14; on 23 January 2018 this Convention had 96 Contracting States.

[24] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and the Protection of Children, concluded on 19 October 1996; on 23 January 2018 this Convention had 47 Contracting States. Text, translations and status chart are available at <www.hcch.net>.

[25] Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Enforcement, concluded on 2 October 1973; on 23 January 2018 this Convention had 24 Contracting States. Text, translations and status chart are available at <www.hcch.net>.

[26] Convention on the Recognition of Divorces and Legal Separations, concluded on 1 June 1970; on 23 January 2018 this Convention had 19 Contracting States. Text, translations and status chart are available at <www.hcch.net>.

[27] Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, concluded on 1 February 1971 with a Supplementary Protocol of the

Thus, in the field of commercial law, there is a surprising contrast between the great success of the Brussels[28] and Lugano[29] Conventions in Europe and the absence of a workable multilateral regime for the rest of the world. What are the reasons for this? Is the enforcement of foreign arbitral awards under the New York Convention[30] sufficient? If not, will the Hague Judgments Project[31] fill the gap?

First, the significance of claims enforcement for international trade is usually underestimated. Trade treaties such as GATT or Preferential Trade Agreements (PTAs)[32] are State-centred: they regulate importation and exportation quotas, tariff rates, non-tariff regulatory barriers to trade etc. That is to say, they regulate the behavior of the *governments* involved. They do not take account of the fact that, within the margin established by trade law, the major part of cross-border commerce is in the hands of private undertakings and not public entities. Private actors, especially smaller ones, will engage in such commerce only where they trust in the availability of claims enforcement, which includes the recognition of judgments beyond the border. From a commercial perspective this context is obvious.[33] However, the people negotiating the Hague Judgments Convention have no contacts with the officers of their own governments who are responsible for international trade. The representatives of both areas of the law act like strangers in the night.

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same day; while the Convention, on 23 January 2018, had 5 Contracting States, the Protocol had only 4. Text, translations and status chart are available at <www.hcch.net>. For the need of bilateral agreements see art. 21 of the Convention.

[28] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, concluded at Brussels on 27 September 1968, OJ 1972 L 299/32, English translation in OJ 1978 L 304/36; the Convention was later replaced by an EU regulation; see now Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1.

[29] Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007, OJ 2007 L 339/3.

[30] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded at New York on 10 June 1958, 330 UNTS 3.

[31] See the 2017 Draft Convention on the website of the Hague Conference, at <www.hcch.net>.

[32] For the original version of the General Agreement of Tariffs and Trade of 1947 see 55 UNTS 194; it is now in force as Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization, concluded on 15 April 1994, 1867 UNTS 3, 190. For a survey of preferential trade agreements see *Matthias Oesch*, Commercial Treaties, in: Max Planck Encyclopedia of Public International Law, ed. by Rüdiger Wolfrum (2014) (electronic resource) paras. 21 ff.; *Peter Behrens*, Europäisches Marktöffnungs- und Wettbewerbsrecht (2017) 113 f.

[33] For an illuminating legal analysis of this context see *Ronald Brand*, Recognition of Foreign Judgments as a Trade Law Issue, in: Economic Dimensions in International Law, ed. by Jagdeep Bhandari / Alan Sykes (1997) 592–641, 613 ff.

This has always been the case, with the single exception of the Rome EEC Treaty of 1957.[34] The objective of the Common Market included the customs union as well as the removal of quotas and regulatory barriers. In this respect the EEC Treaty was a trade agreement. In the last phase of the negotiations the delegations became aware that, for the implementation of the Common Market, private market participants' confidence in claims enforcement plays an important role. They added art. 220 which, *inter alia*, tasked the Member States with negotiating a convention on the mutual recognition of judgments.[35] This is the historical origin of the successful Brussels Convention. The lesson that can be learned is that cross-border trade and the enforcement of foreign claims are interrelated. Therefore, States should promote the mutual recognition of judgments in the interest of increasing cross-border exchanges. Commercial arbitration and the enforcement of foreign arbitral awards is not enough since arbitration is not available for many disputes, in particular the ones turning on non-contractual claims and those with low values.

Second, States, as compared with other areas of judicial assistance, are less incentivized to engage in multilateral recognition treaties. Here, the situation of courts and governments differs. The enforcement of a foreign judgment is in the hands not of public applicants, but those of private parties, i.e. the winners of the foreign litigation. Neither the court addressed nor the government in the State of enforcement are reciprocally involved in the enforcement of their own judicial decisions in the country of origin of the foreign judgment. Thus, the judiciary does not dwell on the intricate situation described above in the context of mutual assistance. The consequences of non-enforcement are borne by private parties, not by States and their judiciary. It follows that their incentive to conclude and give effect to an international enforcement treaty is not the same as in the other fields of judicial cooperation.

Third, the administration of justice does not have the same quality in all countries. There is no point in pretending: in certain countries judges lack independence or income; as a consequence they are amenable to bribery and their decisions are biased. States with a high esteem for the rule of law will not want to give effect to such judgments. As a matter of diplomatic politeness, their governments do not address this issue at the stage of negotiations. Thus, the draft Hague Convention does not hint at this problem, unlike the Uniform Foreign-Country Money Judgments Recognition Act of 2005 in the US; the latter instrument clearly rules out the recognition of

[34] Treaty on the Establishment of the European Economic Community, concluded at Rome on 25 March 1957, 298 UNTS 14.

[35] On the historical background of art. 220 EEC see *Jürgen Basedow*, Internationales Wirtschaftsrecht und Justizielle Zusammenarbeit – Zur Assoziierungspolitik der Europäischen Union, in: FS Christian Kohler (2018) 9–23, 10–14.

a foreign judgment "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law".[36]

The preoccupation emerging from these words is not alien to governments in other countries. It is not voiced in public, but it will be decisive in the internal discussions at the stage of ratification unless the convention provides for some safety valve. In a recognition treaty that is open for worldwide accession, the Contracting Parties should be permitted to avoid for themselves the effects of a future accession by its non-acceptance, similar to what has been agreed upon in the Child Abduction Convention.[37] They should moreover be allowed to exclude the application of the instrument in the relationship with specific Contracting States. This is a highly delicate issue. States are usually reluctant to make any kind of negative statement about other States. More compatible with diplomatic habits might be allowing States declarations that they will apply the Convention only in relation to Contracting States contained in a positive list, thereby excluding the recognition of decisions from other jurisdictions. Such declarations should be limited in time, requiring a review and eventually a renewal when that time has elapsed. Without such a safety valve the Hague Judgments Convention is unlikely to attract a large number of ratifications.

3. Jurisdiction

A third tool of coordination of legal systems is jurisdiction. The considerations outlined above do not apply to rules on jurisdiction which have effectively been unified only recently, for few countries and in specific situations such as parental responsibility,[38] the protection of adults[39] or the parties' agreement on a choice of court.[40] In order to decide on their own jurisdiction, courts need not communicate with foreign courts and reciprocity is

[36] Uniform Foreign-Country Money Judgments Recognition Act, 2005, sec. 4(b)(1); see also sec. 4(c)(7); text and status chart can be found on the website of the Uniform Law Commission, at <www.uniformlaws.org>.

[37] See art. 38(2) of the Convention (n. 15).

[38] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and the Protection of Children, concluded on 19 October 1996; on 23 January 2018 this Convention had 47 Contracting States. Text, translations and status chart are available at <www.hcch.net>.

[39] Convention on the International Protection of Adults, concluded on 13 January 2000; on 23 January 2018 this Convention had 10 Contracting States. Text, translations and status chart are available at <www.hcch.net>.

[40] Convention on Choice of Court Agreements, concluded on 30 June 2005; on 23 January 2018 this Convention had 30 Contracting Parties. Text, translations and status chart are available at <www.hcch.net>. It is noteworthy that two previous Hague conventions on forum selection concluded in 1958 and 1965 did not receive the required number of ratifications.

irrelevant. Moreover, it is difficult to bridge the gap between the discretionary approach to jurisdiction in common law jurisdictions and the strict concept followed in civil law countries.[41] Divergent policy approaches come on top: While in many countries courts tend to limit the parties' access by the requirement of certain contacts between a case and the court, others such as the United Kingdom consider legal services and judicial activity as part of the country's "invisible exports"[42] that contribute to national wealth, an approach that favors an extension of jurisdiction in commercial matters. All in all, the long-standing attempts made to include rules on jurisdiction in a future Hague Judgments Convention are not very promising and might imperil the whole project; this reality is reflected in the working group's 2015 decision to separate the work on jurisdiction from that on recognition and enforcement and to go ahead with the latter project, one that will hopefully lead to a new convention.[43]

4. Future cooperation projects

a) Post-convention services. – Cooperation needs a legal basis, but a treaty in itself is hardly sufficient. It is more likely to occur where the persons involved in the Contracting States establish mutual trust. That is not a matter of law, but of psychology. The judges and officials entrusted with the application of the convention should not consider a foreign request for judicial assistance as a potential infringement of their sovereign powers, but instead as an initiative in the common pursuit of justice. Therefore, they should know one another to a point where they do not hesitate to call each other on the phone, to send an email or to engage in other types of informal – but rapid and effective – communication.

The agreements on administrative cooperation between competition authorities which have been concluded in considerable number since the 1970s show that their usefulness does not so much result from their formal application by one of the authorities involved, but rather from the fact that they lower the communication threshold.[44] In a similar vein, the Hague Confer-

[41] Cf. *Ralf Michaels*, Two Paradigms of Jurisdiction, Mich.J.Int'l L. 27 (2006) 1003–1069, 1027 ff., 1038 ff.; *Arthur von Mehren*, The Hague Jurisdiction and Enforcement Convention Project Faces an Impasse – A Diagnosis and Guidelines for a Cure, IPRax 2000, 465–468, 466 f.

[42] Cf. *Michael Kerr*, Trends in Commercial Law and Practice, MLR 41 (1978) 1–24, 6 and 22; on p. 5 Kerr who served on the Commercial Court of England and Wales highlights that "in the great majority [of cases pending in that court] both or all the parties are foreign".

[43] See the Report of the Fifth Meeting of the Working Group on the Judgments Project (26–31 October 2015), available at <www.hcch.net>; the most recent 2017 Draft Convention is reproduced ibid.

[44] Cf. *Jürgen Basedow*, Antitrust or Competition Law, International, in: Max Planck Ency-

ence is supporting communication between State entities (termed "Central Authorities") entrusted with the application of treaties such as the Child Abduction Convention.[45] This appears to be a model worthy of being followed in other areas as well; wherever, in a Contracting State, a central agency is tasked with the application of an instrument and with communication with foreign agencies, the acting persons should become acquainted with each other, e.g. in international meetings where they report on their national efforts to implement the instrument in question. Such post-convention services are costly but urgently needed to foster the effectiveness of the convention at issue.

b) Legislative Projects. – The Hague cooperation instruments deal with traditional litigation in state courts. Other types of proceedings have not been targeted so far: insolvency or bankruptcy proceedings, commercial arbitration, class actions and other kinds of alternative dispute resolution (ADR). It is submitted that in the future they will attract more attention in cross-border relations.

Concerning insolvency it helps to take account of worldwide capital flows. In 1990 the inflows of foreign direct investment (FDI) amounted to US$ 205 billion. Despite the financial crisis of 2008 the FDI inflows have soared to US$ 1,750 billion in 2016.[46] These figures denote an increase of about 800 % in 25 years. In terms of commercial law, they indicate mergers and acquisitions and the establishment of affiliates in foreign countries. They signal the rising demand for legal rules on transnational corporations and, in times of crisis, for international insolvency law. The latter subject has been tackled by UNCITRAL in a model law published in 2014.[47] But it has some gaps, is not more than a non-binding blueprint for law-makers and has been approved by very few capital-exporting States. It is a well-suited subject for a future cooperation of commercial lawyers from UNCITRAL with conflict lawyers from the Hague Conference.

International commercial arbitration is equally covered by some UNCITRAL instruments.[48] However, conflicts between different arbitration pan-

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clopedia (n. 32) paras. 24–28. At an early stage the topic was thoroughly investigated by *Peter Mozet*, Internationale Zusammenarbeit der Kartellbehörden (1991); for his balanced conclusions see pp. 90 ff.

[45] See above at n. 15; alongside various other activities to be performed by the central authorities, the Convention even requires an agreement between them; see art. 17(c) and *Hans van Loon*, International Co-operation and Protection of Children, Recueil des cours 244 (1993) 191–456, 354–374.

[46] See *United Nations Conference on Trade and Development (UNCTAD)*, World Investment Report 2017, Annex Table 01, FDI Inflows, available at <www.unctad.org>.

[47] *United Nations Commission on International Trade Law*, UNCITRAL Model Law on Cross-border Insolvency with Guide to Enactment and Interpretation, New York (2014).

[48] Alongside the New York Convention (n. 30) the UNCITRAL Model Law on Interna-

els or the courts of different countries dealing with arbitration are white spots on the map: think of *lis pendens* between two arbitrations in the same case, between an arbitration in State A and proceedings in a State court in State B, or the conflict, in the same case, between annulment proceedings in one State and enforcement proceedings in another. Against the backdrop of a rising number of arbitrations,[49] these issues signal another promising field for cooperative efforts of UNCITRAL and the Hague Conference.

Collective redress, in particular the US-style opt-out class action, is still very controversial at the international level. However, recent legislation in some EU countries, such as Belgium[50] and the United Kingdom,[51] indicates that resistance is lessening. This will sooner or later raise the question of judicial cooperation where the class of plaintiffs is itself multinational: Will individuals living in State A who are represented in a class action in State B lose their individual right of action? Will they be bound by the judgment resulting from the class action? Will the courts of State A provide assistance to the court in State B concerning the publication of the certificate of the class or the procurement of evidence? For the time being courts have to answer these questions on the basis of existing instruments, which are however silent on collective actions. The time will come for the Hague Conference to focus on specific issues of collective redress.

The same can be predicted with regards to the various types of ADR proceedings, in particular in cyberspace. Where Brazilian consumers purchase goods or digital content in e-commerce from a Portuguese trader, distance renders ineffective the regulation of claims enforcement as achieved traditionally through rules on jurisdiction and the recognition of judgments; electronic dispute settlement is needed. The approach taken by the World Intellectual Property Organization in the field of disputes on domain names might be a source of inspiration for certain sectors of cross-border consumer litigation.[52]

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tional Commercial Arbitration of 1985 with Amendments in 2006 has been successful; see <www.uncitral.org>.

[49] The numbers of cases decided under the auspices of some major arbitration institutions indicate that arbitrations have quadrupled over 20 years from 1992 onwards; see *Jürgen Basedow*, EU Law in International Arbitration: Referrals to the European Court of Justice, J.Int'l Arb. 32 (2015) 367–386, 382.

[50] See art. XVII.39 Code de droit économique, added by Loi du 28 mars 2014 portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" etc., Moniteur belge of 29 April 2014, p. 35201, which bestows standing in class actions on certain institutions.

[51] Art. 81 and Schedule 8 Consumer Rights Act 2015 (c. 15) has introduced the opt-out class action for damages claims resulting from breaches of competition law.

[52] *Johannes Christian Wichard*, WIPO and Private International Law, in: Encyclopedia (n. 20) vol. II, pp. 1835–1843, 1842 f., with further references.

III. Choice of law

1. Appreciation outside Europe

In the earlier history of private international law the predominant issue in academic writings was the determination of the law governing a legal relation. The "old" Hague Conventions of the pre-World War I period were almost exclusively dedicated to this issue. They were inspired by the idea voiced by Savigny and others that the outcome of a dispute should be the same regardless of which court decides;[53] moreover, procedure was considered to perform not more than a service function relative to the role of substantive law. From this perspective, the choice of the applicable substantive law became the main or even the sole relevant issue.

At present we know that this was an overestimation, driven by a theoretical approach of civil law professors, a negative aspect of *Gelehrtenrecht*, i.e. scholarly law. The unification of choice-of-law rules is not more than one element in the overall coordination of legal systems.[54] A look at the status tables of the various Hague conventions shows that choice rules are even less appreciated outside Europe. For this purpose the numerous "package" conventions that contain both cooperation rules and choice rules should be distinguished from the "pure" choice-of-law instruments. Among the latter conventions only the one dealing with the form of wills has received noteworthy approval in non-European countries; 14 out of 42 Contracting States are located outside Europe.[55] But the number of non-European parties to other "pure" choice-of-law instruments, such as the one on traffic accidents of 1971,[56] on products liability of 1973[57] or on maintenance obligations of 2007,[58] is next to nil.

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[53] *Friedrich Carl von Savigny*, System des heutigen römischen Rechts, vol. VIII (1849) 27 (§ 348).

[54] The coordination methods are in fact much more varied; see *Paolo Picone*, Les méthodes de coordination entre ordres juridiques en droit international privé, Recueil des cours 276 (1999) 9–296, see in particular the survey at p. 25.

[55] Convention on the Conflict of Laws Relating to the Form of Testamentary Provisions, concluded on 5 October 1961; on 23 January 2018 this Convention had 42 Contracting States. Text, translations and status chart are available at <www.hcch.net>.

[56] Convention on the Law Applicable to Traffic Accidents, concluded on 4 May 1971; on 23 January 2018 this Convention had 21 Contracting States including a single non-European country (Morocco). Text, translations and status chart are available at <www.hcch.net>.

[57] Convention on the Law Applicable to Products Liability, concluded on 2 October 1973; on 23 January 2018 this Convention had 11 Contracting States, all European. Text, translations and status chart are available at <www.hcch.net>.

[58] Protocol on the Law Applicable to Maintenance Obligations, concluded on 23 November 2017; on 23 January 2018 this Convention had 30 Contracting Parties including two non-European countries (Brazil and Kazakhstan). Text, translations and status chart are available at <www.hcch.net>.

This finding certainly gives evidence of an underestimation of the role that unified choice rules play for legal certainty, i.e. for the predictability of the outcome of disputes and for the planning of legal relations. Nevertheless it is also a warning to the Hague Conference: wherever possible it should frame its future instruments as "package" conventions including both cooperation rules and choice rules. This may attract approval from non-European countries, which is urgently needed since exclusively European conventions will be superseded by EU Regulations and are therefore redundant. An alternative might be the adoption of non-binding principles or model laws that signal a certain regulatory need and at the same time provide an internationally approved blueprint while leaving some leeway to national legislation.

2. Legislative projects

When considering future projects one might depart from the list of areas treated by the Hague Conference so far and look for the subjects omitted or unsuccessfully dealt with in the past. From this perspective there might not be too much room for new initiatives in the field of family and succession law. Projects on some of the hot spots of current debate, such as surrogate motherhood or cohabitation outside marriage have already been proposed.[59] By contrast, contract law, tort law, corporate law and the law of property have been neglected in the past and appear to lend themselves to unification projects. Caution is appropriate, however.

As far as the law of obligations is concerned, the experience gathered in tort law does not suggest to continue in this field, unless regulatory provisions playing an important role in the sector at issue can be taken account of.[60] In contract law the parties' choice of the applicable law is recognized in most countries. It is also the basis of the Hague Principles,[61] which may serve as a blueprint for national legislation and which have done so already in Paraguay.[62] There is less unanimity with regards to the connecting factor indicating the applicable law in the absence of choice, although the Rome Convention of the EU Member States of 1980[63] has served as a guideline to more

[59] See the list of "projects" on the website of the Hague Conference, at <www.hcch.net>.

[60] See below sub III.3.

[61] Principles on Choice of Law in International Commercial Contracts, approved on 19 March 2015. Text, translations and status chart are available at <www.hcch.net>.

[62] Ley no. 5393 sobre el derecho aplicable a los contratos internacionales, Gaceta Oficial de la República del Paraguay no. 13 del 20 de enero de 2015, p. 2; an English translation is published in Encyclopedia (n. 20) vol. IV, pp. 3611–3613. That law is not confined to the choice of the applicable law but also deals with the law applicable in the absence of such choice.

[63] Convention on the Law Applicable to Contractual Obligations, concluded at Rome on 19 June 1980, OJ 1980 L 266/1.

recent national conflicts legislation outside Europe. If the Hague Conference embarks on this road, it should confine the project to commercial contracts, excluding, for example, consumer contracts and labour contracts.

In corporate law the huge amount of foreign direct investment[64] creates a need for uniform conflict rules. On the other hand, the gap between countries designating the law of incorporation and countries looking to the real seat of a company has still not been bridged, neither in the Hague Convention of 1956, which never took effect,[65] nor in later developments in the European Union. Even in the EU, where the freedom of establishment as applied to corporations restricts the scope of the governing law, there are States such as Belgium[66] and Poland[67] which still abide by the real seat theory in recent laws. A Hague convention is unlikely to attract approval from both sides.

In the field of property rights the 2005 Securities Convention[68] has been approved by Switzerland and the US, two major capital markets. After Brexit, its liberal approach may attract the United Kingdom and, under competitive pressure, eventually also the EU. The example demonstrates that here as well, new projects should not tackle whole areas of private law, but rather focus on specific sectors or fact situations involving homogeneous commercial interests. The traditional adherence to the *lex situs* as the law governing property rights has given way to more varied conflict rules in specific contexts.[69] Thus, the Hague Conference might tackle projects relating to the law governing proprietary rights in cultural objects or the effect of retention of title clauses in cross-border trade in goods.

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[64] See above at n. 46.

[65] Convention concerning the recognition of the legal personality of foreign companies, associations and institutions, concluded on 1 June 1956. Text, translations and status chart are available at <www.hcch.net>.

[66] See arts. 110 f. Belgian Loi du 16 juillet 2004 portant le Code de droit international privé; English translation in Encyclopedia (n. 20) vol. IV, pp. 2967–2995; for a recent judicial confirmation see Hof van Cassatie 16 November 2015 – C.14.0303.F, Rechtskundig Weekblad 2017/18, 704.

[67] See art. 17 Polish Act on Private International Law of 4 February 2011, English translation in Encyclopedia (n. 20) vol. IV, pp. 3621–3633.

[68] Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, concluded on 5 July 2006. Text, translations and status chart are available at <www.hcch.net>.

[69] See *Jürgen Basedow*, The Lex Situs in the Law of Movables: A Swiss Cheese, Yrbk.Priv. Int'l L. 18 (2016/2017) 1–17.

3. Overriding mandatory provisions

Ever since the 1978 Hague Agency Convention,[70] international instruments have embodied the concept of overriding mandatory provisions, i.e. rules of a legal system that require application irrespective of the law otherwise governing the legal relation in question.[71] Such provisions usually establish their own scope of application by means of unilateral scope rules. Analogous provisions of legal orders other than the governing law and the law of the forum *may* be given effect where a close relation with the case at issue can be ascertained; but that is in the discretion of the court. The concept is most clearly spelled out in the Rome I and II Regulations of the EU.[72]

The international instruments usually neither identify the provisions in question nor determine their scope of application; both issues are left to national law. Thus, the respective provisions of the international instruments are not more than vague reservations. But they endanger the workability of the conventions' bilateral conflict rules; where a court applies the overriding mandatory provisions of the forum, the uniformity of outcome is often excluded.

The existence of such general reservations is an invitation to national legislatures to declare new mandatory laws as overriding and to prescribe a wide scope of application. That is indeed what increasingly happens. States tend to declare their own policies to be absolute not only in the domestic context but also in international settings. This is usually designated as an extraterritorial application. An early case was the application of antitrust law under the so-called effects doctrine.[73] More recent examples can be found in capital market law and in data protection. In capital market law the listing of securities in a domestic market and other connections with the forum State are used as a lever for the imposition of information and disclosure duties on foreign companies.[74] The new General Data Protection Regulation of the

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[70] See art. 16 Convention on the Law Applicable to Agency, concluded on 14 March 1978. Text, translations and status chart are available at <www.hcch.net>.

[71] Art. 16 Convention on the Law Applicable to Trusts and on Their Recognition, concluded on 1 July 1985; art. 15 Convention on the Law Applicable to Succession to the Estates of Deceased Persons, concluded on 1 August 1989; art. 20 Convention on the International Protection of Adults, concluded on 13 January 2000; art. 11 Securities Convention (n. 68).

[72] The Rome Convention (n. 63) has been transferred into the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation), OJ 2008 L 177/6, see art. 9; only for overriding mandatory provisions of the law of the forum, art. 16 Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40.

[73] See the survey in *Basedow*, Antitrust (n. 44) para. 10; the effects principle was first espoused in *US v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[74] See in the US sec. 10(b) Securities Exchange Act 1934, 15 U.S.C. § 78j; see *Morrison v. National Australia Bank*, 561 U.S. 247, 267, 273 (2010); see the Comments by *Kal Raustiala*,

EU applies, *inter alia*, to the processing of data in any country of the world by controllers from non-EU countries provided that the data subjects "are in the Union".[75] The US government, for its part, has recently been enabled by the CLOUD Act 2018 to require the providers of electronic communication services to disclose data stored on servers located outside the country.[76] In all three areas, territorial measures of *public* enforcement go hand in hand with an extension of the scope of application of the relevant laws, in *private* enforcement, to extraterritorial fact situations.

Since such developments challenge the operation of bilateral conflict rules, they deserve closer attention in the future. The evolution of international competition law is instructive: what used to be an entirely unilateral approach in the beginning does not exclude a later turn to bilateralism when a certain approximation of substantive laws occurs. In fact, the gradual proliferation of antitrust laws from the US first into Western Europe and gradually across the whole globe nowadays allows for the application of foreign antitrust laws in civil litigation. And both Swiss law[77] and the Rome II Regulation of the EU[78] contain conflict rules that, in appropriate situations, may designate foreign competition law. What has happened in antitrust law may be achieved in other areas as well.

What is needed is a precise functional comparison of the substantive laws of the various jurisdictions: do they really differ that much or do they provide equivalent protection? We further need a review of claims of extraterritorial application in view of what has been called negative comity: is every policy pursued at home absolute in international relations? A third basic issue concerns the relation between public and private enforcement: should

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George Conway III, *William Dodge*, *Austen Parrish* and *Hannah Buxbaum*, Harmony and Dissonance in Extraterritorial Regulation, in: American Society of International Law, Proceedings of the 105th Annual Meeting, 2011, 393–405.

[75] Art. 3(2) Regulation (EU) No 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), OJ 2016 L 119/1; cf. *Daniel Rücker / Tobias Kugler*, New European General Data Protection Regulation (2018) 38–40; *Christian Kohler*, Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union, Riv. Dir. Int'le Priv. & Proc. 52 (2016) 653–675.

[76] The Clarifying Lawful Overseas Use of Data (or "CLOUD") Act of 2018 was enacted by Congress in response to certiorari granted in the case *Microsoft Corp. v. United States*, Docket no. 17-2, where the extraterritorial reach of the 1986 Stored Communications Act was in dispute. The CLOUD Act inter alia adds a new section to that Act clearly stipulating the extraterritorial reach, see 18 USC § 2713; as a consequence the case cited above became moot, see the final opinion of 17 April 2018, 584 U.S. __ (2018).

[77] See art. 137 Swiss Federal Act on Private International Act of 18 December 1987, SR 291; for an English translation see Encyclopedia (n. 20) vol. IV, pp. 3836–3879.

[78] See art. 6(3) Rome I Regulation. In accordance with its art. 2, the conflict rules of the Regulation also apply where the designated law is the law of a non-Member State.

the extraterritorial extension of the scope of a law for the purposes of *ex ante* public enforcement generally be transferred to private enforcement, i.e. to remedies granted *ex post*? A fourth point resulting from the others could be the basic inclination to give effect to foreign legal rules (in the field at issue) which pursue similar objectives. Much research and discussion is required; the Hague Conference could provide a platform for such activities.

IV. Human rights and private international law

1. General survey

The application of cooperation rules and the interplay of choice rules with the designated law sometimes infringes basic notions of justice. To the extent that they are not confined to a single jurisdiction, human rights as laid down in the positive law of various international instruments may be affected.[79] Among the regional treaties the European Convention on Human Rights plays a special role, allowing for individual complaints of aggrieved persons to be brought before the European Court of Human Rights.[80] On this basis the Court has repeatedly dealt with the compatibility of private international law with human rights.[81] In various contexts single provisions of private international law have been held to infringe human rights.

The case law relates mainly to rules on jurisdiction and procedure but in some instances also to choice of law. It enunciates certain minimum standards. The declaration that a certain rule infringes a human right often relates to a specific factual situation and the result produced by the rule in that context. It is generally the result that offends justice and human rights, not the abstract rule as such. This makes it difficult to infer new and better conflict rules from that case law. The Court's judgments should rather be taken as impulses directed toward the defendant State to reconsider the regulation of a specific area of the law. That may occur at the national level, but an international regulation is often more suited for the cross-border situations at issue.

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[79] For the universal treaties see the inventory in the United Nations Treaty Collection: <https://treaties.un.org>.

[80] European Convention for the Protection of Human Rights and Fundamental Freedoms, concluded on 4 November 1950, 213 UNTS 221; an amended version is reproduced on the website of the European Court of Human Rights: <http://www.echr.coe.int>.

[81] For a detailed and thorough analysis see *James Fawcett / Máire Ní Shúilleabháin / Sangeeta Shah*, Human Rights and Private International Law (2016); see also *Petra Hammje*, La Cour européenne des droits de l'homme et la coopération transfrontière, Journal européen des droits de l'homme 2013, 403–410; *Jürgen Basedow*, Droits de l'homme et droit international privé, Annuaire de l'Institut de droit international 2016 (2017) 391–453.

2. The example of surrogate motherhood

A good example of the interplay of human rights with private international law is the Court's jurisprudence on surrogate motherhood. Surrogacy is prohibited in some countries but is lawful in others, sometimes subject to certain procedures.[82] In light of the prohibition in their own State, would-be parents from the former countries often enter into surrogacy agreements with women from the latter jurisdictions, e.g. California or Russia. After the child has been registered in the country of birth as the child of the intended parents, the couple will usually take the child to their country of residence and lodge an application for the recognition of the foreign birth certificate. Is the dismissal of such an application, based on the prohibition of surrogacy, a violation of human rights, in particular of the child's right to respect for private life? The European Court of Human Rights has answered this question in the affirmative,[83] but in different circumstances also in the negative.[84]

The Hague Conference has started work on this matter.[85] It considers the issue as one of recognition of a personal status acquired abroad in accordance with the law of the foreign country.[86] The case law appears to endorse a principle of recognition, perhaps mitigated by some restrictions, that is imposed by human rights law. But adjudication *ex post* is different from legislation *ex ante*. A principle of recognition enshrined in a treaty would have difficulty in overcoming, at the stage of ratification by States, the strong political opposition against surrogacy that is motivated by socialist, feminist and religious policy considerations.

Viewing the relation between the States as one of "supply" and "demand" might yield better results with a view to the future approval of a binding instrument by States from both sides. It would require a regulation that transcends the *ex-post* perspective of recognition. It should establish procedural arrangements, following for example the Uniform Parentage Act in the US.[87] That Act requires a check of the intended parents with regards to their

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[82] See e.g. in the US art. 8 Uniform Parentage Act of 2002, drafted by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) and reproduced on its website: <http://www.uniformlaws.org>; the 2002 version has been enacted in 11 US states.

[83] ECHR (5th Chamber) 26 June 2014 – 65192/11 (*Mennesson v. France*); cf. *Konrad Duden*, International Surrogate Motherhood – Shifting the Focus to the Child, ZEuP 23 (2015) 637–660.

[84] ECHR (Grand Chamber) 24 January 2017 – 25358/12 (*Paradiso and Campanelli v. Italy*).

[85] See <www.hcch.net>, Legislative Projects, Parentage / Surrogacy.

[86] See Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 6–9 February 2018), prepared for the meeting of Council on General Affairs and Policy of March 2018, Preliminary document No 2 of February 2018, see <www.hcch.net>.

[87] See above at n. 82. The 2002 Act was revised in 2017, but the new version has not yet been enacted in a state.

physical, medical, and social fitness, and a check of the gestational mother in respect of her age, her health, her free will and her ability to give birth to a child. Such checks could be carried out on behalf of central authorities in the countries involved. Following the cooperation pattern established by the Intercountry Adoption Convention[88] the central authorities would communicate with each other and benefit from the other's knowledge. Thus, inspiration could be gained from the American Uniform Parentage Act and the Hague Adoption Convention, taken together. The resulting Hague instrument would be a "package" convention as outlined above.[89]

What matters in our context is that human rights case law is hardly more than a first impulse. It may and should trigger national or international conflicts legislation, but it cannot replace it and is not equivalent to such legislation.

V. Institutional recommendations

The Hague Conference emerged as an intergovernmental event and – later – an organization at a time when States appeared to be the sole and almighty framers of human societies. International private relations could be ordered only by allocating competence to one of the States involved. This allocation method helped to increase legal certainty in the interest of private actors, and it helped to affirm the sovereign powers of States by recognizing their national private law. Does this model still appropriately describe the current situation? In light of more recent developments, institutional modifications suggest themselves.

In several areas the allocation method has been supplemented by the unification of substantive law promoted by numerous international organizations, some of them with a sector-specific and others with a general purview. The overall legal framework should however be consistent; substantive uniform law and private international law dealing with the same sector should be adapted to each other. This requires a close cooperation of the organizations involved, cooperation that has already been put into effect in some areas recently. For instance, the Hague Conference should not assess the law applicable to proprietary rights in cultural objects without taking into account the work of UNESCO and UNIDROIT; both should participate.

The all-embracing sovereignty of States in respect of social ordering has in reality also ceded to a mix of influences exercised by social and economic groups on the one side and public administrations on the other. The influence of interest groups can be clearly ascertained at the national level. Where

[88] See above at n. 14.
[89] See above part III.1.

States, in international organizations, prepare international instruments without taking the special interests of such groups into account, those groups will prevent the national ratification later on. The Hague Conference might therefore be better off if it establishes, for certain projects, advisory committees that permit organized group interests to voice their concern. This is particularly important where specific subjects are treated which involve groups representing homogeneous interests.

This proposal may also help to include the Islamic world into the deliberations relating to personal status, family relations and succession law. In Europe and the Western world secularization has subjected these areas to State law. But one cannot close one's eyes to the fact that, particularly in some countries of the Middle East, these subjects are under a strong or even an exclusive influence of religion. Governments from those States are therefore not interested in Hague deliberations on matters of personal status, notwithstanding Muslims also being very much involved in cross-border migration. The Hague Conference should try to open channels of information and discussion with the Islamic world. The suggested advisory commissions could serve this purpose.

Further recommendations relate to the growing number of members of the Hague Conference. Some of the new member States have little experience in private international law or, more generally, in the administration of a judiciary working under the rule of law. They need advice on the publication of legislation and jurisprudence, and their judicial personnel need training in conflict of laws where such training is not available in the respective country. The Hague Conference should initiate, perhaps together with other international organizations, capacity-building programmes which are geared towards the formation of judiciaries that are able to handle the legislative texts approved by their governments.

Finally, the anniversary of the Hague Conference draws attention to the inevitable problem of aging conventions. The Hague Conference should consider ways of achieving a simplified amendment of its instruments. In practice, requiring formal ratification of every amendment will lead either to a disintegration of uniform law or to a petrification of outdated rules, the former when not all Contracting Parties ratify an amendment of a basic convention and the latter where the Contracting Parties abstain from an amendment that would appear appropriate in light of changed circumstances. Simplified amendment procedures are of course confined to very specific points; but they are needed and they exist in various forms in other sectors of uniform law.[90]

[90] See *Jürgen Basedow*, Internationales Einheitsprivatrecht im Zeitalter der Globalisierung, RabelsZ 81 (2017) 1–31, 27–29; *idem*, International Economic Law and Commercial Contracts: Promoting Cross-Border Trade by Uniform Law Conventions, Unif.L.Rev. 23 (2018) 1–14, 12 f.

VI. Conclusion

125 years ago the Hague Conference began as a Eurocentric undertaking of a dozen States having similar legal and cultural traditions. It has been a long way from there to the present worldwide organization that numbers more than 80 member States from very divergent legal backgrounds. While the Conference still faces the same basic problem, i.e. the coordination of different legal orders, the institutional environment has undergone profound changes. The Hague Conference will have to adjust by undertaking the institutional changes outlined above and by focusing on universal instead of European demand. It has to address the universal need for cooperation rules and for what I have designated as "package" instruments. Its future task is not only coordinating State behaviour but also servicing an international private community that requires legal certainty in a world where divergent territorial laws impair the steady flow of global movements.