Private International Law, the Rule of Law, and Economic Development

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THROUGHOUT his long and distinguished career, Professor John F. Murphy has taught and written about a wide range of subjects, including public international law, international business and economic regulation, the constitutional law of the European Union, and international terrorism, to name just a few. Among the persistent and unifying themes of his work have been a focus on the relationship between international and domestic law, the importance of respecting the rule of law on the international as well as domestic levels, the need to create and use effective methods of dispute settlement, and the responsibility of international lawyers to ensure that the law adapts and responds to the structure and needs of the ever-evolving international community.

In that same spirit, and in Professor Murphy's honor, I want to offer a few comments on one of the few subjects about which he has not yet written extensively—private international law. I have little doubt that he shares my views about its increasing importance to the world community. The main point of my remarks is simply to emphasize an obvious truth which in my experience is often overlooked: that the principles, instruments, and mechanisms of private international law are essential to the trans-border flow of trade, capital, people and ideas, the effective settlement of disputes, the well-being of families and children, and therefore, to global economic development and the rule of law. I am certain those are goals to which John Murphy fully and enthusiastically subscribes.

1. THE PURVIEW OF PRIVATE INTERNATIONAL LAW

The field of "private international law" is sometimes considered arcane, not least because the term itself lacks a universally agreed definition. This is hardly surprising because it is often given different meanings in different legal cultures or systems. In the traditional European conception, sometimes espoused by North American academics, it is generally (if narrowly) equated with conflicts of laws—that is, the specialized principles and rules of national law used by domestic courts to determine which of several competing laws applies to disputes involving people in different countries or of different nationalities or to transactions which cross international boundaries. In such situations, for instance, courts might need to

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decide whether to apply the law of the forum, the law of the individual’s nationality, or the law of the site of the transaction or occurrence. Many U.S. practitioners and judges think of private international law as referring primarily if not exclusively to these rules by which domestic courts make such choices.

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

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

When one takes into account the accomplishments and on-going projects of the main international organizations where private international principles and instruments are currently being developed, an even broader definition seems necessary. That more inclusive definition incorporates not only the procedural mechanisms for avoiding and overcoming divergent national rules but also the articulation of substantive principles of law aimed at promoting the harmonization and even codification of legal rules across different legal systems.

For example, with regard to the first (or procedural) aspect, most international practitioners have had some opportunity to use the mechanisms of international judicial assistance for which the Hague Conference on Private International Law (the Hague Conference) is justifiably well-known. Among its most widely adopted instruments are the 1965 Hague


2. The Hague Conference was established in 1893 and became a permanent institution in 1955. Its objective is to work for the progressive unification of private international law rules, inter alia, by “finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters
Convention on the Service Abroad of Judicial and ExtraJudicial Documents in Civil and Commercial Matters\(^3\) and the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.\(^4\) As their titles suggest, these treaties are intended to facilitate service of process and evidentiary discovery in foreign countries through agreed mechanisms of "central authorities." Even more widely ratified is the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the Apostille Convention),\(^5\) which facilitates the circulation of public documents executed in one State Party to the Convention to be accepted and given effect in another State Party to the Convention.

Within the Western Hemisphere, counterparts to the first two of these conventions have been adopted by the Organization of American States (OAS).\(^6\) The 1975 Inter-American Convention on Letters Rogatory\(^7\) and
the 1975 Inter-American Convention on the Taking of Evidence Abroad (together with its additional protocol) serve similar functions but are not as widely ratified or consistently applied as their Hague counterparts.

In the field of international commercial arbitration, the United Nations Commission on International Trade Law (UNCITRAL) has long played a leading role. UNCITRAL is a subsidiary body of the General Assembly and the UN's principal legal body in the field of international trade law. It comprises sixty Member States elected by the General Assembly and focuses on the modernization and harmonization of rules on international business, most importantly by preparing texts for use by states in modernizing their domestic laws and by commercial parties in negotiating transactions.

Among UNCITRAL's best-known achievements are the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the 1976 UNCITRAL Arbitration Rules (designed for ad hoc or non-institutional arbitrations and revised in 2010), and the 1985 UNCITRAL Model Law on International Commercial Arbitration (amended in 2009). These instruments have long served a vital function in promoting arbitration as an effective dispute settlement mechanism in international trade and commerce.

As important as these procedural mechanisms are—and they are clearly relevant to the promotion of the rule of law and economic development—much more is to be said about the on-going efforts of the private international law (PIL) community on the second aspect, namely, substantive harmonization and codification. In an increasingly interconnected world, the harmonization and codification functions of private international law assume ever-greater practical importance in promoting trade,
commerce, and economic development. Official development assistance and other government-to-government programs are of course vital, but at its core the process of globalization is pervasively a result of private activity. It is driven by expanding markets, increasing mobility, quick and reliable financial transactions, and virtually unlimited, instantaneous information exchange through the mass-media and the Internet.

A central goal of private international law efforts is to facilitate this activity by removing legal obstacles through greater codification and harmonization of the relevant legal norms and principles. These efforts provide transacting parties a much greater degree of legal clarity, certainty, and predictability in their civil and commercial transactions. In turn, they contribute directly to economic progress and prosperity in developing countries, especially those lacking the legal and transactional infrastructure necessary to participate fully and efficiently in the modern global economy.

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

The thesis of this paper is simply that in both of these dimensions—along the facilitative and procedural axis as well as along the substantive or harmonizing axis—the continuing efforts of the PIL community to elaborate principles and mechanisms directly contribute to promoting both the rule of law and economic development. This proposition is easily substantiated by even brief descriptions of some of the important efforts underway in the Hague Conference, UNIDROIT, UNCITRAL, and the OAS. In different ways, each reflects the commitment of private international law to principles of cooperation, coordination, and consistency.

II. Contributions to Economic Development

In clarifying and harmonizing the rules and principles that apply to transnational civil and commercial dealings, and by enhancing party autonomy in ordinary commercial contracts, private international law facilitates the successful conclusion of commercial transactions and the avoidance (as well as prompt and efficient resolution) of disputes arising thereunder. By reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, it con-

tributes directly to economic development. Consider, for instance, the following somewhat diverse but illustrative examples.

A. Principles of International Commercial Law

Differences in the domestic laws of different trading partners clearly complicate the conclusion of trans-border contractual arrangements. Harmonization of substantive commercial law principles obviously assists contracting parties in reaching agreement on the terms of their deals as well as in the resolution of disputes arising thereunder.

Most international commercial and transactional lawyers in the United States, for example, are familiar with the Convention on the International Sale of Goods and Services (CISG), adopted by UNICITRAL in 1958 and now ratified by seventy-seven UN Member States, including the United States.12 As a self-executing treaty, the CISG is the law throughout the United States with respect to contracts that fall within its scope, displacing state law to the extent of any inconsistency.13

The International Institute for the Unification of Private Law (UNIDROIT) has long been a leader in the effort to harmonize commercial law.14 UNIDROIT's stated purpose is to study needs and methods for modernizing, harmonizing, and coordinating private and in particular commercial law as between states and groups of states. To this end, in 2004, UNIDROIT adopted two sets of non-binding principles: one entitled the Principles of International Commercial Contracts (updated in 2010) and the other entitled the Principles of Transnational Civil Procedure (done in co-operation with the American Law Institute).15

While neither is binding (in the sense of a duly ratified treaty or enacted domestic law), each has gained normative legitimacy and may be described as a form of "soft law." In particular, the UNIDROIT Principles of International Commercial Contracts are increasingly used in trans-bor-

14. UNIDROIT's membership consists of sixty-three states representing a wide range of different legal, economic, and political systems as well as different cultural backgrounds. The most recent additions were the Kingdom of Saudi Arabia and the Republic of Indonesia. See generally UNIDROIT: An Overview, UNIDROIT, http://www.unidroit.org/dynasite.cfm?dsmid=103284 (last updated 2009).
under commercial dealings and often referred to by tribunals in international commercial arbitration.\textsuperscript{16}

B. Choice of Law in International Contracts

A different approach towards facilitating commercial agreements is to focus on choice of law rules rather than the substantive principles themselves. Within the OAS, for example, the latter approach is reflected in the 1994 Inter-American Convention on the Law Applicable to International Contracts (the so-called Mexico City Convention), which prescribes choice of law rules for international contracts between parties whose habitual residences or establishments are in different States Parties (or contracts with "objective ties" with more than one State Party). The Convention expressly privileges party autonomy by requiring no nexus between the chosen law and the parties, subject of course to certain exceptions. Where the parties have not selected the applicable law, or if their selection proves ineffective, the Convention provides that the contract will be governed by the law of the state with which it has the closest ties.\textsuperscript{17}

For its part, the Hague Conference recently established a Working Group on Choice of Law in International Contracts. The goal of this Working Group, which consists of various national experts from the fields of conflicts of law, applicable law, international commercial law, and international arbitration law, is to consider developing a non-binding instrument designed to promote party autonomy in international commercial contracts.\textsuperscript{18}

C. Electronic Commerce

Increasingly, international commercial transactions are carried out by means of electronic data interchange and other means of communication, commonly referred to as "electronic commerce." These involve the use of alternatives to paper-based methods of communication and storage of information. Unfortunately, domestic legislatures have on the whole been


slow to adapt to these technological innovations, and inconsistencies between national legislation have hindered transacting parties.

One often-useful approach to the challenges of legislative modernization is through formulation of proposed "model laws" at the international level, which can then be adopted by the national legislatures of diverse countries on the basis that they represent agreed international standards. This has been the approach followed by UNCITRAL in the field of electronic commerce. In 1996, it adopted a model law intended to facilitate the use of electronic commerce on a basis acceptable to states with different legal, social, and economic systems. In 2001, it adopted a second model law, aimed at legitimizing the use of electronic messaging and identification by making "electronic signatures" the functional equivalent of handwritten signatures.

Treaties can serve the same modernizing function as model laws but by comparison do impose legally binding obligations on States Parties to conform their laws to the treaty requirements. In 2005, UNCITRAL adopted the UN Convention on the Use of Electronic Communications in International Contracts. The central premise of the Convention is "functional equivalency," so that information in electronic (data message) form will not be denied legal effect, validity, or enforceability solely on the grounds of its electronic nature. To date, two countries (Honduras and Singapore) have become Parties to the treaty and sixteen others have signed, including Russia, China, and Saudi Arabia. The United States currently has it under active consideration for ratification.

D. Secured Interests

Access to adequate and affordable credit is unquestionably an essential element in economic development, and in the case of private trade and commercial transactions, access to secured credit is frequently a sine qua non. Modern transactional regimes must balance and effectively protect the interests of all participants, including the grantors of security rights, the secured and unsecured creditors, retention-of-title sellers and


Among the first international instruments to address these issues was the 2001 UN Convention on the Assignment of Receivables in International Trade.\(^{22}\) The purpose of the Convention, prepared and agreed within UNCITRAL, is to promote the development of international trade by facilitating the financing of receivables at affordable rates. It offers a comprehensive approach to the rules governing the transfer by agreement of all or part of an undivided interest in the assignor's contractual right to payment of a monetary sum ("the receivable") from a third person ("the debtor"). It applies to assignments of international receivables, and to international assignments of receivables, if, at the time of conclusion of the contract of assignment, the assignor is located in a Contracting State (or in some circumstances to subsequent assignments). However, the Convention has not been widely accepted.\(^{23}\)

Considering that the international community might be more inclined to address these issues at the domestic level (rather than through a binding treaty), UNCITRAL subsequently turned its attention to preparation of a Legislative Guide on Secured Transactions, which was adopted in 2007.\(^{24}\) The purpose of the Guide is to assist states in developing a modern and efficient legal regime for security interests in goods involved in commercial activities, including inventory. It is premised on the fact that by attracting credit from domestic and foreign lenders, such a regime promotes the development and growth of domestic businesses (in particular small and medium-sized enterprises) and generally increases trade.

In 2010, UNCITRAL adopted a Supplement to its Legislative Guide on Secured Rights in Intellectual Property,\(^{25}\) which intended to make credit more available and at a lower cost to intellectual property owners and other intellectual property rights holders, thus enhancing the value of

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\(^{23}\) To date, only Liberia has become a Party to the Assignment of Receivables Convention. The United States is one of three states that has signed but not ratified or acceded. See Status 2001 - United Nations Convention on the Assignment of Receivables in International Trade, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitraltxts/payments/2001Convention_receivables_status.html (last updated 2011).


intellectual property rights as security for credit. The Supplement seeks to help states adjust their laws to avoid inconsistencies between secured financing law and the law relating to intellectual property, without interfering with fundamental policies of law relating to intellectual property.

E. Registering Security Interests in Mobile Equipment

Along similar lines, the international community has been working for a number of years to harmonize the mechanisms for registering ownership and security interests. Registration is a central feature of the priority structure of the law applicable to security interests in most types of collateral, and the primary role of a registry is to provide for public disclosure of security interests. Widely differing approaches in national laws toward security and title reservation rights can drastically inhibit the extension of finance and can be especially harmful to trade with and investment in developing countries. Standardization promotes competition, provides greater certainty and transparency for transacting parties, reduces transaction costs, and makes credit cheaper—all important elements in the development process.

A key private international law instrument in this effort is UNIDROIT’s 2001 Convention on International Interests in Mobile Equipment (often referred to as the Capetown Convention). As the title indicates, its focus is on secured interests in easily identifiable, high-priced mobile equipment, which can readily move across national boundaries. Among other things, the Convention provides for the creation of a recognized international security interest sufficient to protect the interests of the creditors. It establishes the means for the electronic registration of those interests, in order to provide notice to third parties and thus to enable creditors to preserve their priority against subsequently registered interests, any unregistered interests, and potentially the debtor’s insolvency administrator. It also identifies a range of remedies for creditors in the event of default, as well as a means of obtaining speedy interim relief pending final determination of their claim on the merits. The objective is to give intending creditors greater confidence in their decision to grant credit, to enhance the credit rating of equipment receivables, and to reduce borrowing costs to the advantage of all interested parties. The Convention entered into force in 2006, and to date forty-nine states have ratified or acceded, and fifteen others have signed but not yet become Parties.


A protocol to the Capetown Convention (adopted at the same time as the Convention itself) addresses the particular issues related to security interests in aircraft equipment. To date it has been ratified by forty states and signed by sixteen others. A second protocol was concluded in 2007 covering the financing of railroad rolling stock (such as engines, freight cars, and passenger cars). Work is currently proceeding on a possible third protocol addressed to space-based assets. In time, UNIDROIT expects to turn to a fourth protocol covering mobile agricultural, construction, and mining equipment. Clearly, the Capetown system promises to have a significantly beneficial impact on the prospects for financing many types of commercial dealings.

F. Electronic Registration of Security Interests

The OAS has also been active in the field of secured interests. In 2002, as part of its CIDIP-VI efforts, it adopted a Model Inter-American Law on Secured Interests (the Model Law), aimed at regulating security interests and securing the performance of any obligations in movable property. States adopting the Model Law undertake to create a “unitary and uniform registration system applicable to all existing movable property security devices in the local legal framework.” To supplement the Model Law, proposed Model Registry Regulations were approved by CIDIP-VII in October 2009. These regulations provide solutions to questions concerning registration and uniformity, and are intended for use in both civil law and common law systems in a cohesive implementation of the Model Law. The intent is to reduce the cost of


33. Id. art. 1. Title IV of the Model Law (arts. 35-46) provides for a Registry to be called the Registry of Movable Property Security Interests. Id. arts. 35-46.

loans, to promote small- and medium-sized businesses, and to facilitate international commerce throughout the hemisphere.

G. Intermediated Securities

Promoting capital formation and enhancing the stability of national financial markets unquestionably contributes to trade and investment in developing countries. Here again, private international efforts have sought to clarify and modernize the relevant law.

In modern securities markets, the traditional concept of custody or deposit of physical certificates evidencing the holder's interests has become outmoded. The typical investor today never actually has custody of a physical certificate, but instead "holds" securities through a chain of intermediaries that are ultimately connected to the central securities depository. When transactions occur, the securities themselves are not in fact physically moved; instead, their creation and transfer take place electronically, through entries to the accounts concerned. For purposes of efficiency, operational certainty, and speed, a system of holding-through-intermediaries has been developed. In many countries, however, domestic law has lagged behind these developments, creating uncertainty and unnecessary risk with respect to trans-border transactions.

In 2006, the Hague Conference took an important step toward addressing these problems by adopting a Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary. As the title suggests, that treaty was aimed at harmonizing the choice of law rules regarding securities held by an intermediary within the territories of States Parties. It did not address issues of substantive law.

By comparison, a new UNIDROIT Convention on Substantive Rules for Intermediated Securities, adopted in 2009, is intended to harmonize the substantive rules governing the holding, transfer, and collateralization of securities in contemporary financial markets. The treaty describes the rights resulting from the credit of securities to an account, details different methods for transferring securities and establishing security and other limited interests in those securities, and clarifies the rules regarding the irrevocability of instructions to make book entries and the finality of the resulting book entries. The Convention also establishes a regime for loss

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allocation and defines the legal relationship between collateral providers and collateral takers where securities are provided as collateral.36

H. Transportation of Goods by Sea

It has long been recognized that the international legal framework governing the international carriage of goods by sea, which extends back over eighty years, lacks uniformity and has failed to adapt to modern transport practices such as containerization, door-to-door transport contracts, and the use of electronic transport documents. This outmoded legal system imposes significant costs (direct and indirect) on international commerce.

In 2008, UNCITRAL completed several years of intense negotiations by agreeing on a new treaty to replace the antiquated rules contained in such earlier agreements as the Hague, Hague-Visby, and Hamburg Rules.37 The new UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was opened for signature following a formal signing ceremony in Rotterdam in the fall of 2009 (and thus was quickly denominated the Rotterdam Rules).38 Spain became the first State Party, in January 2011; to date, twenty-three others (including the United States) have signed the treaty.39

The Convention is intended to provide both shippers and carriers with a modernized, balanced, and universal regime to support the operation of maritime contracts of carriage including those involving other

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modes of transport (such as road or rail). In scope, it covers the entire contract of carriage, including: liability and obligations of the carrier, obligations of the shipper to the carrier, transport documents and electronic transport records, delivery of the goods, rights of the controlling party and transfer of rights, limits of liability, and provisions regarding the time for suit to be filed, jurisdiction, and arbitration.

This new treaty, if widely adhered to, could bring significant benefits for trade with developing countries, many of which are currently Party to the 1976 Hamburg Rules.

1. Public Procurement

Yet another area of UNCITRAL's work with particular significance to economic development concerns public procurement and infrastructure development.

Efforts continue, for example, to revise UNCITRAL's 1994 Model Law on Procurement of Goods, Construction and Services.40 In most states, government procurement constitutes a large portion of public expenditure. Fair, objective, and efficient rules and procedures foster integrity, confidence, and transparency. They also promote economy, efficiency, and competition and thus lead to increased economic development. The lack of such rules and procedures invites fraud, waste, and corruption. The Model Law offers states with disparate legal, social, and economic systems a set of "state of the art" legislative provisions as a means of enhancing their existing procurement laws (or formulating such laws where none currently exist).

Sustainable economic development depends, among other things, on creating a receptive environment that encourages private investment in infrastructure while safeguarding the legitimate public interests of the developing country in question. Viable public-private partnerships require a legislative framework that guarantees transparency, fairness, and long-term sustainability, removes undesirable restrictions on private sector participation, and provides effective procedures for the award of privately financed infrastructure projects as well as the resolution of the inevitable disputes which arise thereunder. Recognizing these principles, UNCITRAL adopted in 2002 a Legislative Guide on Privately Financed Infrastructure Projects, intended to assist in the establishment of such a legal framework.41 The Guide was supplemented in 2003 by Model Legislative


Provisions drafted to assist domestic legislative bodies in the establishment of the necessary legal framework.\textsuperscript{42}

J. Cross-Border Business Insolvency Law

By the same token, the contemporary international legal system must provide effective mechanisms for cross-border cooperation in insolvency proceedings where debtors have assets, subsidiaries, or inter-linked corporate entities in more than one state. Those mechanisms also need to ensure the coordination of collective proceedings and the efficient supervision and administration of the assets, including provisions for multiple parallel insolvency proceedings when they arise. The absence of such laws in many countries has contributed to the economic difficulties recently encountered by many economic entities.

UNCITRAL has actively supported the promotion of legal concepts necessary for reorganization and refinancing to be available as a means to retain operation of failed businesses. Here, one may point to its 1997 Model Law on Cross-Border Insolvency, followed by its 2004 Legislative Guide on Insolvency Law.\textsuperscript{43} The guide is intended to be used as a reference by national authorities and legislative bodies in preparing new laws and regulations or reviewing the adequacy of existing laws and regulations.

More recently, in 2009, the Commission adopted a Practice Guide on Cross-Border Insolvency Cooperation. Based upon collected experience and practice, this guide illustrates how to facilitate the resolution of issues and conflicts arising in cross-border insolvency cases through cross-border cooperation, in particular the use of various international agreements. It also includes summaries of the cases in which the cross-border agreements that form the basis of the analysis were used.\textsuperscript{44}

III. Contributions to the Rule of Law

International efforts to promote and develop the “rule of law” generally aim at institutional and capacity building. The ultimate objective is to establish a system that guarantees that, in their dealings with the government and each other, individuals and other entities enjoy liberty, justice, and the protection of fair and impartial laws and procedures. The con-


\textsuperscript{44} For information on UNCITRAL's 2009 Practice Guide and its more recent Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency, see id.
cept of rule of law is premised on governmental integrity, accountability, legitimacy, and transparency. It works to ensure that governmental authority is exercised in accordance with clear, objective, and publicly disclosed laws. Those laws must be adopted and enforced through established procedures and in compliance with internationally recognized standards. One universally accepted standard is an independent and impartial judiciary, but alternative dispute settlement mechanisms, including (but not necessarily limited to) arbitration, may also contribute effectively to the protection of personal and property rights.

The focus of these efforts is typically at the domestic level, to improve the situation in a given country where the attributes of an effective rule of law have been lacking or circumscribed. The international dimension often receives less attention. The preceding discussion demonstrates, however, how private international law contributes not only to economic development but also to the strengthening of the rule of law at the intra- and inter-state levels.

For one example, one need only to consider UNCITRAL’s contributions to international commercial arbitration through the 1958 UN Convention on the Recognition and Enforcement of Arbitral Awards, the 1976 UNCITRAL Arbitration Rules, and the 1985 Model Law on International Commercial Arbitration—all of which are foundational instruments governing the process of settling transnational commercial disputes through arbitration rather than domestic court litigation.

A. Consumer Protection

Another current example of the contributions of private international law to rule of law institution building is provided by the on-going negotiations within the OAS on improving consumer protection within the hemisphere. In 2003, when CIDIP-VII was convened by the OAS General Assembly, states agreed to focus, inter alia, on the topic of consumer protection, and in particular on means of facilitating the effective resolution of disputes in cross-border consumer transactions. The goal, of course,


48. Article 39 of the OAS Charter recognizes “the close interdependence between foreign trade and economic and social development” and calls upon Member States to work toward “economic and social development” through “orderly marketing procedures that avoid the disruption of markets, and other measures designed to promote the expansion of markets and to obtain dependable incomes
is to provide consumers with effective, economical, and expeditious alternatives to traditional forms of litigation in their domestic courts, while at the same time facilitating cross-border trade and lowering transaction costs.

Since then, an OAS Working Group has been considering several possible approaches. One, put forward by Brazil, Argentina, and Paraguay, proposed a new multilateral Convention on Consumer Protection and Choice of Law. Alternatively, Canada offered a draft Model Law on Jurisdiction and Choice of Law for consumer contracts. For its part, the United States promoted a Model Law on Consumer Dispute Settlement and Redress which would, among other things, establish an expeditious, low-cost, and "user-friendly" procedure for resolving "small claims" in cross-border consumer contracts as an alternative to litigation in domestic courts.

These three proposals (which remain under active consideration) represent markedly different approaches to resolving the problem faced by individual consumers who purchase goods or services transnationally. Whichever of these proposals (or combination of proposals) is ultimately approved, the outcome should contribute to the orderly and expeditious resolution of cross-border consumer disputes for individuals within the Americas.

B. Access to Information

A key component in any system characterized by the rule of law is guaranteeing citizens access to government information. In a democracy, such access is considered an indispensable political right, allowing the electorate to make informed decisions. It works to ensure government accountability and responsiveness to public needs. It also serves to protect individual rights. Lack of access undermines trust, fosters inefficiency, and invites corruption.

Here again, the OAS is making an important contribution to rule of law promotion within the hemisphere. The Inter-American Democratic Charter recognizes that transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential for producers, adequate and dependable supplies for consumers, and stable prices that are both remunerative to producers and fair to consumers. Charter of the Organization of American States, Feb. 27, 1976, 119 U.N.T.S. 3, available at http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm.

49. For general information on this effort, see Work Areas, Dep't of Special Legal Programs, http://www.oas.org/dil/department_special_legal_programs_consumer_protection.htm (last updated 2011).

components of the exercise of democracy. In 2009, the OAS General Assembly directed the preparation of a draft Model Law on Access to Information, together with an implementation guide, for the consideration of Member States. The final versions of both documents were completed in the spring of 2010 and have recently been approved by the OAS’s Committee on Juridical and Political Affairs.

C. Choice of Forum in Commercial Contracts

As indicated at the outset of this discussion, a trio of topics lies at the core of many, perhaps most, private international law issues: the jurisdiction of courts, the choice of law, and the enforceability of judicial judgments. Despite their centrality, these topics remain among the most difficult.

To date, for example, the international community has been unable to reach general agreement about (i) the permissible bases of domestic court jurisdiction over civil and commercial cases involving foreign parties or transactions, (ii) a unified approach to choice of law issues in cross-border transactions, or (iii) the specific grounds on which foreign judicial judgments will be recognized or enforced in domestic courts. For a number of years, negotiations on a multilateral treaty covering these areas were conducted at the Hague Conference, but ultimately failed. Thus, at the global level, there is still no “civil litigation” analogue to the United Nations Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention) or its OAS counter-part, the Inter-American Convention on International Commercial Arbitration.

51. See Inter-American Democratic Charter, 28th Spec. Sess., OAS Doc. OEA/Ser.P/AG/RES.1 (Sept. 11, 2001), available at http://www.oas.org/charter/docs/resolution1_en_p4.htm. In the case of Claude-Reyes v. Chile, the Inter-American Court of Human Rights noted that, in accordance with Article 13 of the American Convention on Human Rights, “the State’s actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately.” Claude-Reyes v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 86 (Sept. 19, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf (providing English translation).

52. For information on the Model Law on Access to Information and accompanying legislative guide, see Access to information, Dep’t of Int’l L., http://www.oas.org/dil/access_to_information_model_law_final.htm (last updated 2011).

53. For background information on the proposed jurisdiction and judgments convention, see Ronald A. Brand, Due Process, Jurisdiction and a Hague Judgments Convention, 60 U. Prrr. L. Rev. 661 (1999).


But from the failed negotiations in the Hague over a possible multilateral "jurisdiction and judgments" treaty arose a new and ultimately successful proposal for a convention addressed specifically to contractual "choice of court" clauses in international civil and commercial contracts. The Hague Conference on Private International Law adopted this new Convention on Choice of Court Agreements in June 2005, and it is now open for signature and ratification.56

The Convention on Choice of Court Agreements addresses a gap in the current fabric of international commercial dispute settlement by providing that States Parties must recognize and give effect to "exclusive choice of court agreements" (in U.S. parlance, these are sometimes called "forum selection clauses"). Such clauses are often employed when contracting parties do not wish to utilize non-judicial mechanisms such as arbitration. Obviously, they will agree to litigate in a specific court or judicial system only if they have a substantial measure of assurance that the chosen jurisdiction will in fact hear the case and that the resulting judgment will be recognized and enforced in other countries.

Thus, the new Convention sets forth three basic rules to be applied in all Contracting States with respect to choice of court agreements falling within its scope: (i) the court chosen by the contracting parties has (and must exercise) jurisdiction to decide a covered dispute, (ii) courts not chosen by the parties do not have jurisdiction and must suspend or dismiss proceedings if brought, and (iii) a judgment from a chosen court rendered in accordance with such an agreement must be recognized and enforced in the courts of other Contracting States. By its terms, the Convention applies only to exclusive choice of court clauses, but States Parties have the option of permitting their courts to recognize and enforce judgments of courts of other States Parties designated in non-exclusive choice of court agreements.


The potential benefits of the Convention for private parties to qualifying transnational contracts are significant. Resting on the principle of party autonomy, it will ensure that the dispute settlement arrangements agreed to by those private contracting parties are honored in the case of domestic court litigation in much the same way as agreements to arbitrate are respected and given effect, thereby promoting certainty and predictability in international trade. Moreover, it will enhance the enforceability of the resulting judgments in the courts of other States Parties, helping to redress the "lack of reciprocity" problem that arises when foreign judgments are given more favorable consideration in some national courts than the judgments those courts receive in foreign courts.

D. International Family Law

The rule of law is arguably most important at those junctures where the interests and activities of the state intersect with those of the individual. Few such intersections are more sensitive than those involving families. In a world characterized by rapidly increasing transnational contacts and mobility, international family law has begun to emerge as a field of specialization in its own right. Here again, one finds private international law working to bridge gaps, reduce conflicts, and provide orderly and efficient mechanisms of dispute resolution.

The Hague Conference has long been at the center of these efforts. It has, for instance, promulgated a number of important multilateral instruments aimed at the protection of children and other family members. Two of these, both widely ratified, constitute the cornerstones of the still emerging international regime of child protection: the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The former works to prevent the re-


moval of a child by one parent from the country of its habitual residence in violation of the other parent’s custodial rights, and the other serves to regularize the process of transnational adoptions, protecting the legitimate interests of all concerned. The United States is a party to both, and both are applied and respected in practice.59

In an increasingly globalized world, families frequently span continents. So do family disputes and dissolutions. How are trans-border maintenance and support arrangements to be handled in such cases? Some countries address this issue primarily through bilateral agreements providing for reciprocal recognition and enforcement of support orders in defined circumstances. The United States, for example, is party to more than twenty such agreements with other countries.60 Within the OAS, the 1989 Inter-American Convention on Support Obligations has thirteen States Parties.61 But until recently, a global approach has been lacking.

In November 2007, the Hague Conference adopted a new multilateral instrument, the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.62 As in other family law agreements, the basic principle is one of reciprocity: a decision on child maintenance and support made in one Contracting State must be recognized and enforced in other Contracting States if the first state's jurisdiction was based on one of the accepted grounds enumerated in the Convention. In the United States, courts generally do recognize and enforce foreign child support obligations as a matter of comity, even though U.S. orders may not be given comparable treatment in the originating country. The Convention would regularize this imbalance among all states that adhere to it and will in general work in favor of the children in question. The United States has signed the Convention and is actively pursuing ratification.63

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While far from a complete description of the growing list of international family law agreements and projects (others include protection of the elderly, recognition of same sex unions, and protection of international migrants), the foregoing serves to illustrate the many ways in which private international law works to promote rule of law objectives directly as well as in tandem with economic development.

IV. Conclusion

This brief overview has been intended to substantiate the proposition that the principles, instruments, and mechanisms of private international law, as reflected in its disparate endeavors, contribute directly to the transborder flow of trade, capital, people and ideas, the effective settlement of disputes, the well-being of families and children, and therefore to global economic development and the rule of law. By focusing primarily on the relationship between international and domestic law, the broad private international law project adds an essential element to efforts to promote economic progress and the legitimacy of the law internationally as well as domestically. Private international law plays a critical role in helping to ensure that the law can adapt and respond effectively to the changing needs and structure of the international community.

It also suggests that the field of private international law—viewed comprehensively—has several important characteristics. First, the subject matters it covers are diverse, as different as family law, dispute settlement, assets financing, international trade, and consumer protection. Second, they generally involve both substance and procedure, melding questions of conflicts of law, jurisdiction, and enforcement of judgments with disposi-tive principles and rules that speak to the merits of the subjects they treat. Third, in working towards the goals of coordination, unification, and harmonization, the international community employs a range of different modalities: formally binding conventions and protocols, non-binding model laws and rules, hortatory principles and legislative guidance, and “best practices”—depending on which might be considered most likely to achieve the objective most effectively in light of the circumstances. Fourth, this work takes place in a range of institutional and multilateral forums, rather than simply in national courts or legislatures. This structure permits the active and productive involvement of a wide range of interested parties and other stakeholders, from governments and government agencies to international organizations, non-governmental organizations, and relevant elements of the private sector.

Today, private international law is a central, indeed critical field for any international law practitioner, one of growing relevance and importance. In many respects, it represents the future development of transna-tional legal mechanisms and principles. Wrongly viewed as a rather musty set of doctrinal principles rooted in nineteenth century European jurisprudence, it is in fact a dynamic and rapidly evolving field of direct rele-
vance to sophisticated lawyers working in a broad spectrum of international and transnational contexts.

Some observers contend that the conceptual boundary between public and private international law is eroding. It is no longer the case, they suggest, that public international law deals only with relations between sovereign states and international organizations, while private international law, by distinction, concerns only the transactions and relationships between individuals and private entities. As the foregoing review demonstrates, the sharp “public/private” distinction is no longer accurate, if it ever was. From choice of court agreements to child support and family maintenance, from consumer protection to the transportation of goods by sea and the regulation of intermediated securities, the international community is increasingly involved in formulating rules and procedures applicable to private individuals, transactions, and relationships for use by domestic courts and tribunals rather than in international bodies.

In his recent work The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law, Alex Mills emphasizes these points. He notes that the classic distinction between public and private international law obscures the important function of private law in public ordering as well as in regulating private international transactions and disputes. He contends that one should view private international law “not as a series of separate national rules, but as a single international system, functioning through national courts.” From this perspective, Mills contends, private international law is properly considered as reflecting concepts of “justice pluralism” based on principles of tolerance and mutual recognition.

Mills thus approaches the issue from the perspective of a single functional system in which rules of private international law reflect “openness to the legitimacy of foreign norms” and work to promote what he calls justice pluralism in a distributed network of international ordering. “[T]he operation of private international law constitutes an international system of global regulatory ordering[,] . . . a system of secondary legal norms for the allocation, the ‘mapping,’ of regulatory authority.” On this view, he contends, rules of private international law are not concerned merely, or primarily, with private rights but rather with public powers, especially the allocation of national regulatory authority in a transnational context. In making this argument, Mills harkens back to the origins of

65. Id. at 2.
66. Id. at 3.
67. Id. at 40.
68. Id. at 299-300.
69. See id. at 300-01 (“[R]ules of private international law are not primarily concerned with questions of private justice or fairness (although such concerns
private international law in Roman law and pre-positivist concepts of "natural law."

One need not subscribe to natural law principles, however, much less to Mills's concepts of justice pluralism, to acknowledge the growing functional importance of private international law in an increasingly globalized, interconnected society. The thesis of this Article has been slightly different. Private international law, the rule of law, and economic development are not three separate endeavors, only tangentially related. To the contrary, each directly supports the other. They are, in other words, properly considered as the three points of a triangle.

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