Denationalisierung des Privatrechts?

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Unification of private international law in a multi-forum context

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Introduction

Two strong forces are currently reshaping the more than a century old movement towards unification of private international law:[1] globalisation and regional integration.

The concept of "globalisation" is not easy to define, yet it is difficult to dispense with.[2] It denotes the process of growing interdependence of societies and people worldwide, in practically all areas of life: economy and finance, politics and culture, and of increasing mutual awareness of this interdependence. It goes beyond the mere linking of discrete societies and markets – the background of traditional private international law – and leads to trans-national fusion of societies and markets. The process is driven primarily by technological developments that have led to an enormous acceleration, spread and cost-reduction of transport and communication. And – in contrast to the situation 30 years ago when Henri Batiffol wrote about *l'Avenir du droit international privé* and stressed the increasing role of state intervention also for private law[3] – this process of growing interdependence is not steered by government policies: globalisation is overwhelmingly a matter of private initiative, expanding markets, growing mobility and instant sharing of information through the mass media and the Internet.

[1] "Private international law" will be used here in the broad sense to include questions of adjudicatory jurisdiction, conflict of laws or choice of law, recognition and enforcement of foreign decisions, as well as international judicial and administrative co-operation.

[2] For a helpful discussion of the various connotations of the term, see *M. F. Guillén*, "Is globalisation civilizing, destructive or feeble? A critique of five key debates in the social science literature", in: Annual Review of Sociology, Vol. 27 (2001), pp. 1–41.

[3] First published in the Annuaire de l'Institut de droit international, Geneva 1973, later included in *Henri Batiffol,* Choix d'Articles, Paris 1976, pp. 315–331.

Globalisation is also linked to ideology, and as such it is not a single process. It is not just a matter of expansion of western culture, technology and open markets. There is also globalisation in the form of Islamisation and easternisation (e.g. the spread of Asian techniques of management and organisation),[4] in a complex interaction with the spread of western culture.[5]

Regional integration is in part a manifestation of globalisation because globalisation naturally permeates contiguous nations even more than countries at a distance. But it is in part also a response to globalisation. It is an attempt to bring back a form of government steering and provide cohesion and identity to fusing societies and markets, either through closer intergovernmental co-operation, as is the case for Mercosur in South America, or even by adding a new layer of governance as is the case in the European Union.

Both forces – globalisation and regional integration – have a strong impact on organizations such as the Hague Conference whose mission it is to work for the progressive unification of private international law.

Globalisation leads both to a multiplication of what Karl Kreuzer has termed "truly cross-border situations or relations"[6] and to an ever-expanding circle of actors (potentially) interested in the unification of private international law. But, since globalisation is primarily steered by private initiative and not by some form of governance, it does not – at least not directly – transform the existing institutional framework of law-formulating agencies. In other words, globalisation means new challenges for *existing* institutions: to respond to a changing environment, to re-think its "products", techniques and working methods and to co-operate more closely with other existing fora: other international organisations, governments and non-governmental bodies.

Regional integration, on the other hand, does lead to the creation of *new* institutions, new law-formulating fora, either through intergovernmental co-operation, or through the exercise of supranational powers as is the case – and so far the only case – for the European Community.

[4] See *H. P. Glenn*, Legal traditions of the world, sustainable diversity in law, Oxford 2000, pp. 47–50.

[5] See *O. Roy*, L'Islam mondialisé, Paris 2002, who argues that on the one hand the globalisation of Islam inevitably entails its westernization (growing individualism, politicization leading to secularism), while on the other the western world is increasingly exposed to manifestations of Islamic culture.

[6] See *K. Kreuzer*, "Entnationalisierung des Privatrechts durch globale Rechtsintegration?", in: *H. Dreier, H. Forkel, K. Laubenthal*, Raum und Recht, Festschrift 600 Jahre Würzburger Juristenfakultät, Berlin 2004, pp. 249–295 (p. 285).

"Communitarisation" means new competences, including in the field of private international law, which may be either competing with or complementary to existing competences.

In the first part of this contribution, I propose to discuss the impact of globalisation – how does it manifest itself in a body such as the Conference, and to what responses has it led and should it lead. In the second part, I will deal with the impact of regional integration and discuss, in particular, the evolving relationship between the Conference and the European Community. Finally, I will draw some conclusions.

I. The impact of globalisation

1. How does globalisation manifest itself?

A few weeks before this symposium we celebrated, both at The Hague and in Tokyo,[7] the centennial of Japan's participation in the Conference. Had it not been for Japan, the Conference for most of its history would have been a purely European – even essentially continental European – institution. Japan's early participation, in retrospect, gave additional credibility to the aspiration for universality, which drove Tobias Asser and the other founding fathers of the Conference. In fact, the rise to universality has been very gradual and relatively recent, with participation by the United States and other common law countries starting in the 60's, and Latin American countries, China and Korea following in the 70's, 80's and 90's. During the last three or four years, membership of the Conference has increased rather fast by more than a third, and almost sixty additional States – so a total of over 120–are now Parties to one or more of the thirty-five Hague Conventions negotiated since the Second World War. Among the new Member States is a number of former Eastern Block countries[8], as well as several countries whose laws are based on *Shari'a* law: Jordan and Malaysia have joined Egypt and Morocco as Members, while Pakistan, Kuwait and Brunei Darussalam have

[7] The celebration in Japan included an International Symposium on the Hague Securities Convention held on 12 October 2004 in Tokyo. Karl Kreuzer was one of the contributors.

[8] These countries did not find the Conference unprepared for their participation: in 1992 a colloquium had been organized in co-operation with the University of Osnabrück to examine the prospects of private international law after the fall of the Berlin Wall. See *C. von Bar* (ed.), Perspektiven des Internationalen Privatrechts nach dem Ende der Spaltung Europas, Köln, 1993.

also appeared on the scene, as Parties to Conventions.[9] There are still important gaps, particularly in Asia and Africa, but it is interesting that a country like India recently acceded to two Conventions[10] and is preparing for several more. There is growing interest in Southern Africa.[11]

It is true that what has so far most attracted countries are the Conventions which establish some form of judicial or administrative co-operation, and, less so the Conventions on pure conflict of laws and conflicts of jurisdiction, at least for the time being. All the same, the growth concerning the co-operation Conventions has been quite impressive: the *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* now has over 80 Contracting States; the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters* over 50; the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* over 70; and the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption* over 60, from all continents.[12] All these Conventions are apparently perceived as useful by a much larger circle of States than were involved in their original drafting. This growth reveals a clear trend towards universality and, at the same time implies a much larger diversity of legal systems interested in the work of the Conference.

The challenge is to combine the progressive unification of private international law with the "management" of this larger diversity. Fortunately, there are also unifying forces at work in the globalisation process. Recent developments in the Conference, affecting both work on new Conventions and existing Conventions, may be seen as the effect of at least two of such forces. One is mundane and pragmatic: the rapidly developing global financial and economic market – the other grounded in values and principles: the internationalisation of human rights law.

[9] Again, a colloquium organized in co-operation with the University of Osnabrück in 1998 prepared the ground for the participation of these countries. See *C. von Bar*, Islamic law and its reception by the courts in the west, Köln, 1999.

[10] *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (which will enter into force for India on 14 July 2005) and the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (which entered into force for India on 1 October 2003).

[11] South Africa became a Member in 2002, and is a Party to five Hague Conventions. Zambia was admitted in March 2004.

[12] For an up to date chart of signatures, ratifications and accessions, see the website of the Hague Conference < www.hcch.net >.

The world of finance and trade is of course a forerunner in the globalisation process. In this area diversity of laws and the patchwork of legal systems in this world tends to be seen as an obstacle to the growth and speed of transactions. The preference is for uniform substantive laws and for arbitration rather than traditional instruments on the conflicts of laws and on adjudicatory jurisdiction. The success of the 1980 *United Nations Convention on Contracts for the International Sale of Goods* has had no spill over effect on the *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*.[13] The 1958 *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards* has attracted over 130 States Parties. And yet in this global arena of commerce and finance, there are areas where private international law unification has its role to play.

The area of securities held through intermediaries offers a good example. Domestic issuers of collateral securities, investors and markets almost everywhere are part of an increasingly globalised market place, with a volume of trade and collateral transactions that exceeds, for the OECD region alone, the world's gross domestic product every 18 trading days. This integrated financial market does not support the existing variety of choice of law approaches, most based on inadequate traditional conflict of law rules which do not reflect the reality of how securities are held today, and even greater variety of substantive laws. So the Securities Convention is a first step to free market participants from the limitations of conflicting national systems of laws by providing them with party autonomy for their account agreement. There is only one, limited, exception: the relevant intermediary must have an office in the State whose law has been agreed upon.[14] The Securities Convention is a pure conflict of laws convention.[15] But not surprisingly, the next step is already being made: UNIDROIT is preparing a draft Convention on harmonised substantive rules regarding securities held

[13] It may be the very success of the CISG Convention (over 60 States Parties) that made the 1986 Convention – intended in part as a supplement, in part as a substitute – look largely redundant.

[14] In this respect the Convention goes less far than Article 8 of the American Uniform Commercial Code and makes a bow to the traditional search for location.

[15] See *K. Kreuzer*, "Das Haager Übereinkommen Über die auf Bestimmte Rechte in Bezug auf Intermediär-verwahrte Wertpapiere Anzuwendende Rechtsordnung", in: Le droit international privé: esprit et methodes, Mélanges en l'honneur de Paul Lagarde, Paris, 2005, pp. 523–545; see also *C. Bernasconi*, "Indirectly held securities: a new venture for the Hague Conference on Private International Law", in: Yearbook of Private International Law, Vol. III, 2001, p. 63.

with an intermediary which should be complementary to the Hague Securities Convention.

Providing security by permitting and respecting freedom of choice not as regards the applicable law but as regards adjudicatory jurisdiction is also the theme for the Convention on exclusive choice of court agreements, which is currently under negotiation at the Conference.[15a] It had to be accepted that it is not yet possible to agree on a worldwide level on bases of jurisdiction where the parties are *not* in agreement.[16] But research done by the International Chamber of Commerce suggests that there is a considerable interest among businesses for a Convention on choice of court agreements with a regime for recognition and enforcement in the commercial field. The price to be paid is the exclusion of transactions involving consumers and employees. On the other hand, this has made possible the inclusion of on-line commercial transactions, where there probably is an important future for digital choice of court agreements.[17]

It is quite significant, in the context of globalisation as typified above, that both the Securities Convention and the future Choice of Court Convention are largely based on a party-centred approach. It illustrates the prominent normative role of private initiative in contrast with the traditional primordial importance of the State and its territory, at least in financial and economic relations.[18]

The other unifying force in an increasingly global environment which manifests itself in the Hague Conference, in particular, in its work in the family law area, is international human rights law. The 1989 *United Nations Convention on the Rights of the Child* (CRC) is in force for all States on this planet with the exception of the United States and Somalia. Even more universally than the two less widely ratified 1966 International Covenants on Civil and Political, and on Economic, Social and Cultural Rights, the CRC gives expression to common human values. In various of its articles, it calls upon States Parties to promote the conclusion of, or to join, bilateral or multilateral agreements to reinforce the substantive provisions of the CRC, e.g., those relating to (international) child abduction (Article 11), intercountry adoption (Article 21), and recovery of maintenance (Article 27).[19]

The *Convention on the Rights of the Child* provides us with an important tool to remind countries of the need to join the Hague child protection conventions. The absence of Japan on the list of over 70 States Parties to the Child Abduction Convention, for example, is in dramatic contrast with the prominent position it plays in the Securities Project. It illustrates the different pace of globalisation in different areas and the continuing role of cultural diversity.[20]

This is particularly true in respect of countries from within the Islamic traditions. Many of them in fact, when joining the CRC, made their ratification subject to the pre-eminence of *Shari'a*. In the private international law approach of these countries there is a tendency to hold on to nationality as a connecting factor and use it as a religious connection factor in disguise.[21] It is, therefore, extremely significant that Morocco was among the first States to join the 1996 Hague Convention on International Protection of Children, which should soon also be joined by all EU Member States.

[15a] Since the time of writing the *Convention on Choice of Court Agreements* was concluded at The Hague on 30 June 2005.

[16] See e.g. *J. J. Barcelló III* and *K. M. Clermont*, A global law of jurisdiction and judgments: lessons from The Hague, The Hague, 2002.

[17] See Hague Conference on Private International Law, "Report on the preliminary draft Convention on Exclusive Choice of Court Agreements", drawn up by *T.H. Hartley* and *M. Dogauchi*.

[18] Where private initiative becomes the source of normativity in private international law, one should not be surprised at the development of "economic" trends of private international law, for contracts and torts. See e.g. *M. J. Whincop* and *M. Keys*, Policy and pragmatism in the conflict of laws, Aldershot, 2001, referring to a new "transactional private international law". See also *H. Muir Watt*, "Concurrence d'ordres juridiques et conflits de lois de droit privé", in: Le droit international privé: esprit et méthodes, Mélanges en l'honneur de Paul Lagarde, Paris 2005, pp. 615–633.

[19] The Committee on the Rights of the Child, which receives and comments on periodic reports on the implementation of the CRC, has made it a practice to recommend that States Parties join the Child Abduction and Intercountry Adoption Conventions.

[20] One of the reasons why Japan has not yet ratified the Child Abduction Convention relates to its law of civil procedure. Conciliation is, in matters of family law, mandatory and has to take place before a return order is issued – but by that time the child may be settled in its new environment thus pre-empting a return order. See *H. van Loon*, "The Implementation and Enforcement of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction in comparative perspective: It's Japan's move!", in: Gender Law and Policy Annual Review, 2/2004, pp. 189–209.

[21] See, e.g., *A. Mezghani*, "La démocratisation d'un ‚droit savant'", in: International Law Forum de droit international, 6 No 3/4 (2004), pp. 163–168.

2. How should we respond to globalisation?

I would like to discuss briefly four aspects: Will Conventions still be useful? What about working methods? What about the impact of globalisation on existing instruments? Finally, I will say a word on the need for co-operation among international organisations.

a. Conventions and other instruments

Is there a need against this complex background of globalisation to re-think the Convention as a principal vehicle for the unification of private international law? Some Asian countries have recently made this point.[22] In our view, it all depends on the results that one seeks to achieve. It is true that a Convention instrument often requires intense negotiations and governmental and parliamentary approval. There are in fact dozens of examples where Hague Conventions have served as model laws without being ratified: the Belgian Code on Private International Law, which entered into force on 2 October 2004, offers several examples.[23]

Where Conventions contain an element of reciprocity, the treaty vehicle cannot be easily dispensed with. When it comes to the recognition and enforcement of decisions, or the creation of permanent channels for judicial and administrative co-operation, a binding instrument is if not indispensable, at least highly desirable. But this is also true where the challenge is to ensure broad and uniform respect for party autonomy. No one has contested the need for a treaty for the Securities or for the Choice of Court Projects.

In areas outside finance and trade, we see a development towards combining the Convention instrument with "soft law" techniques, to provide flexible guidance to governments and their citizens. On the basis of the Hague Child Abduction Convention, *e.g.* detailed non-binding recommendations have been formulated,[24] now followed by Guides to Good Practice.[25]

[22] The question is not new. Since the United States joined the Conference, the use of model laws has been, from time to time, discussed at the Conference. See e.g., Actes et Documents IXth Session (1960) Tome I, pp. 314–315.

[23] *J. Erauw* and *M. Fallon*, La nouvelle loi relative au droit international privé, passim.

[24] See <www.hcch.net >, Child Abduction Home Page.

[25] On Implementation, Central Authority Practice and Prevention (forthcoming).

To some countries, the issue of international child abduction is so sensitive that, at least during a transitional period, it will be difficult to make effective binding arrangements other than on matters like conciliation and mediation. The "Malta Judicial Conference on Cross-frontier Family Law Issues" held in March 2004, which brought together a number of States from within the Islamic tradition and European States and adopted a Declaration of principles, was a first step towards an effective legal framework which in turn could prepare the ground for further adherence to the Child Abduction Convention.[26]

b. Working methods

Is there a reason to re-think working methods? There has always been a strong empirical element in the Conference's working methods: comparative law research, increasingly combined with "market research", by the Permanent Bureau, input from professionals and interested groups during negotiations – perhaps even at times a little too much and too diverse – study of the Convention's operation once it is in force and, where necessary, review or even revision of the Convention. That aspect of the Conference's work has not changed, despite important other changes in the Conference's environment, in particular increasing co-operation within the European Union. It is true that this had an effect upon the decision-making process, in that the traditional voting system has given way to operating by consensus. But, after a somewhat difficult transition period, it is probably fair to say that the consensus method, while slower, may increase the acceptability of the end result. The Securities Convention was adopted without one vote being taken, but also with a great deal of input from the "financial industry". The current work on Conventions on choice of court and maintenance obligations[27] also aims at ensuring, already during the negotiations, broad acceptability of the end product, the Convention to be adopted.

What should be maintained is also the precision of the Convention texts. Drafting simultaneously in English and French is essential to achieve precise texts. And such texts are necessary because they must be capable of providing *ex ante* security and predictability – national

[26] See *M. Thorpe*, "The Malta Judicial Conference: 14–17 March 2004" [2004] IFL pp. 60–62.

[27] See *W. Duncan*, "The development of the new Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance", in: Family Law [2004] Quarterly Vol 38 No 3, pp. 663–687.

courts must be able to apply them directly, where possible without the need for the intervention of the national legislature – moreover, there is no supranational global court that can help to interpret them.

More broadly ratified Conventions mean more post-Convention work. This is what the Permanent Bureau is doing in particular in the fields of judicial and administrative co-operation and child protection. Practical handbooks and Guides to Good Practice, electronic databases of case law, the establishment of liaison judges and a global network of judges and judges' conferences such as the above-mentioned Malta Conference in addition to the holding of Special Commission meetings on the practical operation of Conventions, are examples. All of these activities provide feedback which can be used to improve the life of the Conventions and thereby the life of our citizens.

c. The impact of globalisation on Hague Conventions: Internet and e-commerce

Globalisation may affect existing Conventions. This is very clear with regard to the Internet and e-commerce. In October 2003, the Hague Conference organised a Special Commission and an expert workshop to examine the many possibilities and advantages of using modern technologies in the context of the Service, Evidence and Apostille or Legalisation Conventions – all three having come into force long before electronic technology was widely used. The Special Commission noted, for example, the positive effect on the cost side of delivering *apostilles* and on the efficiency of the creation and registration of *apostilles* as a result of the use of such techniques. The discussion continues on the use of electronic signatures or even electronic *apostilles*.[28] It is clear that there are enormous possibilities to facilitate communication and transmission of data in respect of all Hague Conventions on co-operation. The method of "functional equivalence" developed by UNCITRAL will be our guide in this respect, so that this technology need not lead to a revision of the text of existing Conventions.

Much more controversial, however, is the question of the jurisdiction of the courts over disputes in Internet and e-commerce cases.[29] This is because jurisdictional issues depend heavily on the location of

[28] The first international forum on e-notarisation and e-apostilles, jointly organized with the International Union of Latin Notaries, will be held in Las Vegas (Nevada) in May 2005.

[29] See e.g., *P.J. Borchers*, "Tort and Contract Jurisdiction via the Internet: The ‚Minimum Contracts' Test and the Brussels Regulation Compared", in: Netherlands International Law Review, L: 401–418, 2003.

acts that give rise to a dispute. A website located in New Jersey in the US is accessible with equal ease from there as it is from Würzburg, so if it deceptively describes a product sold in Germany or defames a person in Germany, should the operator of the website be sued in the US or in Germany, or can he be sued in both courts? And with regard to the deceptive product description: should it make a difference whether the buyer is a consumer or not? If the jurisdictional issue is resolved, the further question arises of the recognition and enforcement abroad of any decision. The experience of the negotiations on a worldwide Convention on jurisdiction and enforcement of judgments has shown that consensus is still far away, in particular between the US and other parts of the world. This is why it was decided, for the time being, to limit the scope of the project to choice of court agreements and the recognition and enforcement of the resulting judgment in a business-to-business context.

d. Co-operation with other fora

One thing is certain: in the absence of institutional reform at the global level, closer co-operation among existing international institutions is a must.

There used to be a time when *e.g.* UNCITRAL was supposed to concentrate exclusively on the unification of substantive law and the Hague Conference on private international law. Those days are over. In the area of international commercial and financial law, co-operation between UNCITRAL, UNIDROIT and the Hague Conference has become far closer than in the past. In May 1998, the Hague Conference for the first time organised a working group at the Permanent Bureau to assist UNCITRAL in the preparation of rules on applicable law for its Convention on the Assignment in Receivables Financing. In December 2003, a delegation from the Hague Conference helped to draw up conflict rules for the UNCITRAL legislative guide on insolvency adopted in June 2004. Similarly, the Conference is since August 2004 assisting in the preparation of such rules for the draft legislative guide on secured transactions. With UNIDROIT, a close co-operation has developed in the field of securities held with an intermediary, where UNIDROIT has assisted in the drawing up of the Hague Securities

Convention, and its promotion, and the Hague Conference participates in the ongoing work on the substantive harmonisation in that field.

And there is more to come. The Secretaries General of the three organisations are now meeting at least once a year to co-ordinate the activities of the three organisations and to discuss new ideas. One such new idea concerns that of organising, at regular intervals, common seminars or workshops in different regions of the world where we would present our work. We have also started to intensify our co-operation with the WTO and with the World Bank with a view to promoting together the modernisation of commercial laws for developing countries. Training and technical assistance and promoting uniform interpretation will increasingly be topics of common concern. In other fields, for example in the family law areas, where UNCITRAL and UNIDROIT are not active, we co-ordinate with the UN and its specialised agencies (UNCHR, UNICEF), as well as with regional organisations, not only in Europe but also, for example, the Organization of American States and the Commonwealth Secretariat.

All this implies closer co-operation with governments and their citizens, in particular in developing countries and countries in transition. Joining the Convention is often not the end but the beginning of the process of unification of law. Hence the increasing importance of the post-Convention work mentioned above.

II. The impact of regional integration

The globalisation process affects in particular contiguous nations. It is therefore understandable that we see regional legislative activity, including in the field of private international law, in several parts of the world. In South America, Mercosur – including Argentina, Brazil, Uruguay and Paraguay, and Chile and Bolivia as associates – has favoured the adoption of uniform law instruments mainly in the commercial area, the Inter-American conferences on private international law remain active in a wider range of matters, and in Africa the Council of Ministers of the Organisation for the Harmonization of Business Law in Africa (OHADA) may adopt uniform law instruments, again in the commercial field, which take effect in all Member States, bypassing the normal ratification requirements. The Commonwealth of Independent States is also becoming active. All this is based on intergovernmental co-operation.

With the European Union the situation is different. What started, under the Treaty of Maastricht, as intergovernmental co-operation via the instrument of Conventions, just as in Mercosur, CIDIP, etc., has since the Treaty of Amsterdam become "communitarised": the European Community has acquired legislative competence in "civil matters having cross-border implications and insofar as necessary for the proper functioning of the internal market" as Article 65 puts it. This has led to a rather ambitious programme of legislative activity, extending beyond matters related to trade and commerce into the field of persons and family law. This programme has been strongly driven by political motives and perhaps not always by analysis of real needs and of available alternatives, whether "below" at the national level or "above" at the global level.

As regards the choice between community legislation and national activity, at least in theory this choice is supposed to be guided by the subsidiarity principle enshrined in Article 5 of the EC Treaty. In practice, its significance is limited. It has been argued that the subsidiarity principle should also guide the choice between community legislation and legislative activity by global international organisations. But it may not be very realistic to think that one general principle can inform this choice. It seems useful to make distinctions: first, in respect of the areas to be covered by the regulation (or directive) and, second, within those areas, between unification of conflict of laws on the one hand and adjudicatory jurisdiction and recognition of decisions, and judicial and administrative co-operation on the other.[30]

As regards economic matters relating to the core of the internal market, it is beyond question that the European Community had to act, also by way of legislation, in the field of private international law. The Brussels Convention, now Council Regulation, on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,[31] "Brussels I", is perhaps the jewel in the crown here. But even a common market does not operate in a vacuum, but in a wider global market.

It is therefore interesting to see that the European Community, after having adopted several directives on financial transactions,[32] is now preparing for its common signature of the Hague Securities Conven-

[30] See *E. Pataut*, "De Bruxelles à La Haye – Droit International Privé Communautaire et Droit International Privé Conventionnel", in: Le droit international privé: esprit et methodes, Mélanges en l'honneur de Paul Lagarde, Paris, 2005, p. 661.

[31] (EC) No 44/2001 of 22 December 2000.

[32] EC Directive on Settlement Finality in Payment and Security Systems, "Settle-

tion, which is a global response to a global problem. Since this Convention creates a universally applicable law regime,[33] its rules cannot coexist with conflicting applicable law rules, whether of national or regional origin.[34] That means that the conflicting provisions of Community legislation – which are not based on (qualified) party autonomy but on a determination of where an account is located or maintained – will have to be amended. Fortunately, a great advantage of directives, and regulations, over Conventions is that they can be so easily adopted and amended, with immediate effect throughout the Community. The European Commission has indeed announced that it will take the steps necessary to bring the Settlements Finality and the Financial Collateral Directive in line with the Securities Convention to the regime of the Convention. This is a good example of a rational approach in respect of the question of who should act at what level. The global securities market is of such importance that it necessitates a global conflicts regime.

The Securities Convention, of course, is a brand new instrument and the first Hague Convention to provide that it may be joined by the Community itself.[35] What about older Hague Conventions on applicable law, without such a clause? There is a certain mood now to say: that is the past, let us have a "new" uniform regime for the whole Union. But I would argue that one has to look at the merits of each instrument, and in particular compare the advantages of detailed Convention conflict rules, with a high degree of precision and predictability, with the often more flexible Community rules. Are we sure that the *Conventions of 2 October 1973 on the Law Applicable to Products Liability* and *of 4 May 1971 on the Law Applicable to Traffic Accidents* are out of date and should be substituted by a probably far less detailed Rome II Regulation on the law applicable to torts (or non-contractual obligations)? Have we consulted the industry, and insurance companies? Will we not have instead more litigation – including before the European Court of Justice? Would it not be wiser to give European-wide application to the Products Liability and Traffic Accidents Conventions, thus extending the benefits of regimes that have proven their utility?

ment Finality Directive" (1998) and EC Directive on Financial Collateral Arrangements, "Collateral Directive" (2002).

[33] As in all modern Hague Conventions, Article 9 provides that it "applies whether or not the applicable law is that of a Contracting State".

[34] "En matière de conflits de conventions, convention universelle sur convention universelle ne vaut", *G.A.L. Droz*, Regards sur le droit international privé comparé, RCADI, tome 229 (1991–IV), p. 390.

[35] Following the example of the UNIDROIT *Convention on International Interests in Mobile Equipment* (Cape Town, 2001).

The choice between legislative activity at the Community or at the global level presents itself somewhat differently for the law of persons, family relations and family property. A balance must be sought here between the need to facilitate the free circulation of persons and families within the Community and the need to respect family relations which extend beyond the Community.

If it were only a matter of facilitating the free circulation of Community citizens within the Community, things would be relatively simple, even with respect to the conflict of laws. As Paul Lagarde has observed, there is a growing indifference as regards the traditional debate on the appropriate connecting factor: nationality, habitual residence, domicile, and national identities within the Community are less important than they used to be.[36] But there is another factor that needs to be taken into consideration, and that is, in fact, again, a manifestation of globalisation. Many countries in Europe continue to have significant populations with strong links outside the EU and outside Europe, first for historical reasons (former colonies), secondly, because of migrant workers, refugees and asylum seekers, or finally simply because they have non EU neighbours.[37]

Flows of people and values connect all EU countries with non-EU countries. Those connections in some cases are stronger than the links some EU countries have with some of their partners in the Community. Legislative activity by the Community in the area of persons and families must take this global context into account and this is a field where co-ordination with global organisations, such as the Conference, is very important.[38] Let us look at a few aspects: child protection, maintenance obligations, succession and divorce.

[36] *P. Lagarde*, "Développements futures du droit international privé dans une Europe en voie d'unification: quelques conjectures", in: RabelsZ, 68 (2004) pp. 225–243 (at pp. 226–227).

[37] The UK, for example, has a foreign population of 1.7 million, i.e. almost 3% of its population, only from India, Pakistan and the West Indies. The Netherlands has a foreign population of non-Western origin of 1.5 million or 9%: Turks, Moroccans, Surinamers, Indonesians. Germany has almost 2 million registered Turks and almost a million from the former Yugoslavia. Similarly, France, Spain and Portugal have increasing numbers of populations from former colonies in Africa, Asia and Latin America, etc. The new EU members in Eastern Europe have links with countries further east (Ukraine, Russia), Cyprus and Malta with their neighbours south and east of the Mediterranean.

[38] The encouragement given to the Commission and the Council in the recently

As regards protection of children it was very important that, after long and difficult negotiations, EU Member States agreed that to the extent that the new Regulation on parental responsibility[39] ("Brussels II *bis*", entry into force 1 March 2005) deals with questions of child abduction, the principle remains that the Hague Child Abduction Convention binds EU Member States also in intra-Community cases. One may hope that in this way there will continue to be uniformity of approach to issues which are not in any specific way related to the Community. The Regulation makes it possible to further limit the restrictions to which the return of a child may be subject, but that is in accordance with the provisions of the Child Abduction Convention itself.[40] The Community has chosen for a slightly different approach in respect of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*. Here, there is a decision in principle to collectively ratify this Convention, but the main provisions of this Convention, except for those on applicable law, have already been included into Brussels II *bis*. The result is that the provisions on jurisdiction, recognition and enforcement and co-operation of the 1996 Convention once they also come into force for EU Member States will deal with extra-Community child protection issues. Moreover the 1996 Convention will provide the applicable law regime for intra-Community cases. One can live with this result – although it is complicated. As long as the Community regime is in substance identical to the external regime, there is not much ground for concern.

It is interesting to see that the current work at The Hague on a new global instrument on child support and other forms of family maintenance has prompted the Community to take the initiative for a possible European instrument. But there is now, more than in the past, consultation between the Permanent Bureau and the European Commission and there is an idea for a joint conference to examine what could best be done at the global level, in the Conference, and what at the regional level. Consistent with the approach in respect of the 1996 Convention, it is now envisaged that the new instrument may contain an opt-in chapter on applicable law (which would replace the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*) – that aspect would therefore be dealt with at the global level.

adopted "Hague Programme – Strengthening freedom, security and justice in the EU" to ensure in the context of co-operation in civil matters the coherence between the EU legal order and the international legal order and to continue aiming at strengthening co-operation with other international organizations such as the Hague Conference is of particular interest here. See "Hague Programme" 2005/C53/01, point 3.4.5.

[39] Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[40] See Article 36: "Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction."

It will be interesting to follow the Community private international law work on succession to the estates of deceased persons and marital property. As far as succession is concerned, it looks as if the last habitual residence of the deceased will be the cornerstone of the Community regulation. This is what the Hague Conference tried to achieve when the Hague Successions Convention was negotiated in the 1980's, but it ended up with a compromise between habitual residence and nationality. It would be enormous progress if it were possible now to go a step further. One could hope that that would be the basis for a renewed effort at the global scale.

"Brussels II" has created a wide variety of jurisdictional bases, and thereby invites forum shopping. That is, on reflection, not a desirable outcome. But is it wise to look for the remedy to a uniform applicable law regime? Firstly, several EU Member States, in particular those with a common law tradition, do not apply foreign law in divorce matters at all. Ireland would have to change its Constitution to make this possible. Moreover, common law courts do not handle foreign law easily. Secondly, the main criterion is likely to be the common habitual residence: Is that a good idea in respect of nationals of third countries? Is this not a matter where national identity of these third nationals *does* matter? Would it not be better, rather than to go through the difficult process of drawing up a regulation on the law applicable to divorce, to restrict the bases of jurisdiction of Brussels II (*bis*) and not touch upon applicable law?

The communitarisation of private international law does not only concern the intra-Community relations, it also has external effect. Curiously enough, this does not follow from the Amsterdam/Nice Treaty but from case law of the European Community developed in the area of commerce and trade (the so-called EART doctrine)[41]. For the

[41] ECJ 31 March 1971, case 22/70 (AETR-EART), [1971] European Court Reports, 263.

Hague Conference this means that for matters for which the Community has acquired competence non-Community States find themselves negotiating with the European Community instead of with its Member States. In the beginning this change has raised concern and has indeed led to some difficulties, in particular during the negotiations on the Judgments Convention. But the new system may also have advantages. While it is true that for some matters the EU Member States at the negotiation table have to leave the floor to the Commission, they remain involved through co-ordination meetings both at The Hague and in Brussels and the ultimate decision on the ratification of a treaty remains that of the Council. The net effect may well be that more often than in the past many or all EU Member States will sign and ratify the Convention as adopted at The Hague.

The fact that the European Community is building up external competence in the field of private international law does not fit well with its status as an observer within the Hague Conference. It is therefore understandable that the European Community has expressed the desire to become a Member of the Conference. Since the Statute of the Conference only refers to Member States, however, this requires, in the view of most Member States, a modification of the Statute, which is currently under preparation.[41a]

Conclusions

1) While globalisation is largely driven by private initiative and much less steered by government policies, regional integration aims at bringing back a form of government steering, including in the field of private international law. One possible scenario for the future is that this regional activity will grow faster than global harmonisation.[42] But as more and more private international law issues will take on a global dimension, legislation at the regional level, much like that at the national level, will meet its limitations.[43] Moreover, it is not certain that other

[41a] Since the time of writing the text of the Statute has been modified to this effect by the XXth Session of the Hague Conference on 30 June 2005.

[42] See *J. Basedow*, "Worldwide Harmonisation of Private Law and Regional Economic Integration – General Report", in: Uniform Law Review (2003) – 1/2 pp. 31–49.

[43] On the importance of selecting the right level of legislative activity, see *K. Kreuzer*, "Entnationalisierung", supra footnote 6.

regions in the world will wish to follow the EC communitarisation model. The need for global fora for unification of private (international) law, such as the Hague Conference, UNIDROIT and UNCITRAL will therefore increase, with the European Union as a special, quasi-federal player.

2) Co-operation between global organisations will be more and more important for several reasons. First, in order to avoid duplication of efforts. Second because unification of substantive law and private international law can no longer be compartmentalised. Third, because we are all faced with a huge challenge: to assist developing countries and countries in transition in absorbing Conventions and other instruments.

3) As regards the development of private international law at the global level, given the large diversity not only of legal traditions but also of degree of sophistication, progress will probably best be made in relatively narrow problem areas where the need is very clear: the Securities Convention is a good example. The example also illustrates that it would be wrong to think that there will be no room any more for the unification of conflict rules at a global level. Depending on the issue, different techniques or a mixture (as in the 1996 Child Protection Convention) will be used. It does imply that we will need to be even more attentive to maintain a certain coherence in all these different projects.

4) As regards the relationship between global and regional fora, in particular the European Community, there is reason to be particularly attentive to the strong personal and cultural links between many European countries and third countries. A balance must be found between the promotion of free circulation of persons within the Community – where national identity becomes less and less important – and of harmonious personal and family relationships beyond community borders, where respect for national identity remains important. It is hoped that EC membership of the Conference will help to maintain that balance and keep the global perspective.

Global unification of private international law will never be easy. Karl Kreuzer has experienced and lived through this more than he may have liked in his involvement in genesis of the Hague Securities Convention, in particular as a co-rapporteur of the excellent Explanatory Report.[44] The Hague Conference and its Permanent Bureau are im-

[44] See *Roy Goode*, *Hideki Kanda* and *Karl Kreuzer*, assisted by *Christophe Bernasconi*,

mensely grateful to him for his enormous contribution to an exceptionally difficult project.

"Explanatory Report on the Hague Securities Convention", accessible pending its publication in the Proceedings of the Hague Conference, on the Hague Conference website <www.hcch.net>.