Introduction

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The idea to gather a number of outstanding scholars to discuss the current role of private international law (PIL) from a global perspective first came to us during our daily coffee breaks around NYU in April 2015. We took advantage of these breaks to discuss – among a multitude of topics – possible events and publications. A subject which came up often was the evolution of PIL and, more concretely, its ability to handle contemporary and truly international problems and challenges. We were of course referring to the (often harsh, sometimes even destructive) criticism which classical PIL now repeatedly faces, and to the corresponding proposals aimed at radically changing its very foundations. After lengthy discussions, we agreed that – regardless of our respective positions in respect of said criticism and the proposed new foundations – PIL will continue to offer concrete answers for a vast array of transboundary relations on a daily basis.

The fact is that, beyond all the reasonable and less reasonable complaints against PIL, private international relationships keep on multiplying and diversifying. Traditional (and allegedly general) methodologies have proven incapable of providing both satisfactory explanations and generally acceptable solutions. In short, multilateralism and unilateralism have had their respective moments, but both have failed to convince from a global perspective in terms of fairness. The substantive approach or the constructions based on comparative methodology, once proposed as superior options, may indeed claim this title in very specific fields and under a very particular set of circumstances, but they can hardly fill the criticized gap of the traditional methodologies. Lastly, submitting the resolution of current problems to a supposed global (constitutional?) law which does not yet exist, and whose realization – even partial – remains uncertain, may well be an excellent motivation for all kinds of actors in the international arena; but it can hardly provide for real, feasible solutions. Such ascertainment, instead of showing that a simple methodology is neither possible nor useful in the complex field of PIL, has been a source of anxiety for some devotees, as well as of perplexity and contestation for less convinced PIL scholars. Questioning the usefulness of PIL to solve real, contemporary problems has become a mantra for many.

This book lays the basis for a genuine debate about the foundations of PIL without neglecting its formidable technical devices. Rather, we have tried to combine them. Additionally, this book shows that, contrary to some assumptions, PIL is more omnipresent and necessary than ever. Acknowledging that the number of specific issues to be addressed was necessarily limited, the choice was far from simple. Linda J. Silberman helped us in this crucial exercise and we managed to create an outline that we found both interesting and balanced, including both classical and less classical

topics (assuming that this distinction is acceptable). We invited colleagues from different parts of the world and allocated each topic to two of them, having in mind the possibility of varying points of view. We cannot hide our satisfaction with the results, which are contained in this book.

A first group of topics deals with general approaches to PIL. Among them is *certainty versus flexibility*, which may admittedly evoke an old discussion stemming from the American conflicts revolution and the European reactions to it. Indeed, Kermit Roosevelt III and Francesca Ragno consider the debate from the US and EU perspectives respectively. Both authors approach the opposition between certainty and flexibility with a contemporary focus, showing how eclectic both systems can be. Interestingly, Kermit Roosevelt III builds the bridge with *the question for universal values* when he states that dichotomies (e.g., certainty versus flexibility, but also rules versus standards or approaches, traditional versus modern, territorial versus policy based) are not important on their own, but rather serve "as proxies for certain clusters of values." The question is, then, if such clusters of values exist.

Mathias Reimann's effort to find these universal values within the narrow framework of Western choice of law, however, rescues certainty as one of the traditional "normative premises." Assuredly, he considers it and its three *fellow* values – namely, equality, neutrality and uniformity – as a part of the "Savignian system in decline," in contrast with three newer normative premises: party autonomy, party expectations and State self-preference. Reimann explains this shift with the transformation of private law, which "has become both more transnational and more regulated." In his conception, justice and human rights are ultimately discarded, more so because of their lack of universality than because they are not real values (though Reimann casts some doubt on the value of human rights). The current most powerful normative premise seems to be the States' preference for their own substantive policies, which he finds regrettable. As an answer, Reimann argues that recognizing fundamental fairness as a universal value might impose some limits to that regrettable preference. One may wonder if such fundamental fairness would not be a specific expression of the supreme value of justice in the transnational arena. On his side, Ralf Michaels, who remains also anchored within the realm of choice of law, proposes two (meta)values as inherent to this discipline: its responsiveness ("PIL responds to demands from foreign law") and its technical character. For him, PIL should solve value conflicts rather than look for universal values. This function is not mechanically accomplished, but ethically construed by means of those meta-values. In this way, Michaels' view is not opposed to Reimann's, but is in fact complementary.

The third topic of this group relates somehow to universal values, although it deals with them through the lens of the *global governance issues* involved in PIL. Hans van Loon and Verónica Ruiz Abou-Nigm put it clearly by focusing on justice pluralism as the pivotal axe of the current stage of PIL. While van Loon highlights the fundamental role of the Hague Conference on Private International Law in the building of a multifaceted PIL governance, Ruiz Abou-Nigm concentrates specifically on the potential contribution of PIL in migration governance without circumscribing herself to a particular organization. Both agree with taking the opportunity to put PIL in line with the 2030 United Nations Agenda for Sustainable Development; or, in other words, of

finding how PIL may offer tools to cope effectively with several of the main current concerns of the international community.

A second group of topics concentrates on legislative and decisional options as concrete PIL solutions. The former represents a pervasive issue of PIL: the treatment of *foreign law in domestic courts*. Yuko Nishitani – who has recently edited the impressive volume *Treatment of Foreign Law – Dynamics towards Convergence*, within the framework of the *Ius Comparatum* series of the International Academy of Comparative Law – approaches the topic from a full-fledged comparative perspective seeking to find ways for future developments. Concretely, she analyzes whether and to what extent conflict of laws rules are applied *ex officio*, how foreign law is introduced in court proceedings and how foreign law is ascertained. Based on her findings, Nishitani tackles contemporary challenges on how to ensure an effective operation of uniform or harmonized conflicts rules at regional or international levels. Conversely, Louise Ellen Teitz remains within the US legal system to offer an equally interesting report about the evolution of the treatment of foreign law in the US over the past few years.

Hannah L. Buxbaum and Matthias Lehmann deal with *new challenges of extra-territoriality*. Once again, the topic appears as an ideal field for cross-evaluations from and to the US and the EU. Also, the choice of authors demonstrated itself to be accurate. Indeed, Buxbaum, an American educated in Germany, and Lehmann, a German educated in the US, manage to offer accessible, complementary – rather than opposing – views regarding this intricate topic. Besides highlighting controversial points on how the respective regulatory laws operate, both chapters stress the impressive development of private enforcement in the matter, which is perhaps – quite paradoxically – the matter most influenced by public and private international law. Remarkably, extraterritoriality became a feature avoidable only through the cooperation and coordination of States.

The remaining discussion of the second group of topics addresses the *foundations, limits and scope of party autonomy*, not as a "myth" – on which we have insistently heard inconsistent discussions during the past 40 years, though the notion is of course much older – but as a ubiquitous reality in PIL. Unsurprisingly, Giuditta Cordero-Moss and Symeon C. Symeonides offer plenty of points of convergence in developing the topic. Both circumscribe the analysis of party autonomy to international contracts (notwithstanding the considerable success of party autonomy outside this field) and recognize its obvious usefulness. More interestingly, both highlight the different ways in which States deal with party autonomy and the multiplicity of limits and exceptions it encounters – factors stressing the necessity of a correct evaluation of the legal systems involved in a given situation. Furthermore, Cordero-Moss makes the connection with international arbitration, one of the topics of the third group.

Indeed, the third group of issues relates to different aspects of international dispute settlement and the effectiveness of adjudicatory decisions. The first topic of this group refers to the initial practical step of judicial resolution by addressing the *current development in forum access*. Linda J. Silberman offers a remarkable panorama of the current stage of US jurisdiction, which, according to her, expresses the counter-revolution in progress by mitigating rampant forum shopping (specifically after the *Daimler* and *Bristol-Myers* Supreme Court cases). Additionally, she explains how recent jurisdictional developments in the US "are likely to result in a more predictable

and efficient system than the case law that has emerged in both the EU and in Canada" as to disputes involving internet defamation and privacy. Martina Mantovani and Burkhard Hess approach the topic from a European human rights perspective. In doing so, they primarily base the impact of the right of access to a court under Article 6 of the European Convention on Human Rights on the margin of judicial discretion in the exercise of jurisdiction of necessity. They further analyze the new procedural strategies that arise in this context, seizing the opportunities created by Article 4(1) of the Brussels I bis Regulation. They also discuss the emergence of new plaintiff-friendly approaches and consider their possible consequences.

Recognition and enforcement of judgments is – notwithstanding its broadness – an unavoidable topic at a time when the Hague Conference is finally adopting a general convention on this very issue. Ronald A. Brand deals with the subject by drawing a general picture of the US, EU and Chinese systems and offering a personal assessment of the Draft Hague Convention. In this regard, he complains about the drafters' choice to follow EU-fashioned grounds of indirect jurisdiction, which in Brand's opinion is risky given the lack of a single court with authoritative interpretation power (as is the case with the EU). Andrea Bonomi also tackles the issue in a comparative manner. According to him, the key factor for the success of any international attempt to regulate recognition and enforcement is the mutual trust between the States involved therein. Therefore, although using different arguments, both authors seem to agree on a rather pessimistic assessment of the Draft Hague Convention on the matter.

One could speculate if it was not our personal involvement in the teaching and practice of international arbitration that led us to include a section on *PIL and international arbitration*. The reason is, however, quite obviously a different one: the growing significance this mechanism has come to gain in the settlement of PIL disputes today. The main question here is whether classical and not-so-classical PIL remains relevant when cases are adjudicated not by State courts, but rather by international arbitrators. While George A. Bermann sees many "twilight issues" and a "work in progress," Horacio A. Grigera Naón stresses the freedom in choice of law matters in the arbitration context. Beyond this apparent contradiction, what seems clear is the particular ability of PIL scholars to deal with both theoretical problems and real cases in international arbitration. It cannot be a coincidence that some of the most reputable international arbitrators have also been, since the very beginning of the modern era of arbitration, outstanding PIL scholars.

All in all, the contributions to the present book confirm what its title wants to convey: whenever new challenges arise and are put to scrutiny, PIL does not fail in demonstrating its potential to provide effective answers. If there were something to blame for a possible failure to transform such potential into concrete solutions, it certainly would not be PIL itself. That responsibility belongs to a large array of State, non-State, national, international and transnational actors which seem to be more aware than ever of the potential of PIL tools. Taking advantage of the latter – and, more importantly, doing so in a cooperative manner – would help to cope with at least some of the contemporary global concerns and challenges.