DIREITO.UnB
Revista de Direito da Universidade de Brasília
University of Brasília Law Journal

VOLUME 7 - NÚMERO 3 - Setembro-Dezembro - Tomo I EDIÇÃO ESPECIAL 2023

Derecho Internacional Privado y Desarrollo Sostenible: Perspectivas Globales y Latinoamericanas

Editoras:
Verónica Ruiz Abou-Nigm y María Mercedes Albornoz

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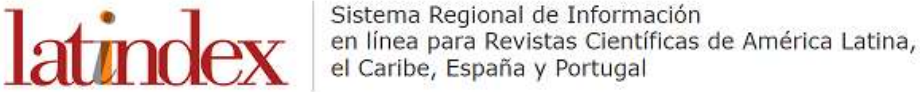
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DIREITO UnB

Direito.UnB. Revista de Direito da Universidade de Brasília.

Programa de Pós-Graduação em Direito – Vol. 7 N. 3, T. I, Edição Especial (set./dez.2023) –Brasília, DF: Universidade de Brasília, Faculdade de Direito.

Quadrimestral. 2023.

ISSN 2357-8009 (VERSÃO ONLINE)

ISSN 2318-9908 (VERSÃO IMPRESSA)

Multilíngue (Português/Inglês/Espanhol/Francês)

1. Direito – periódicos. I. Universidade de Brasília,

Faculdade de Direito.

CDU 340

Revista de Direito da Universidade de Brasília
University of Brasilia Law Journal

Revista vinculada ao Programa de Pós-graduação
em Direito da Universidade de Brasília

Setembro – Dezembro de 2023, volume 7, número 3, Tomo I, Edição Especial

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CORPO EDITORIAL

DIREITO.UnB

Revista de Direito da Universidade de Brasília
University of Brasilia Journal Law

V. 07, N. 03, Tomo I, Edição Especial

Setembro- Dezembro, 2023

SUMÁRIO

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NOTA EDITORIAL

A **Revista Direito.UnB** do Programa de Pós-graduação em Direito (PPGD) apresenta seu número especial com o dossiê temático "**Derecho internacional privado y desarrollo sostenible: perspectivas globales y latinoamericanas"**, organizado por Verónica Ruiz Abou-Nigm, professora Catedrática de Derecho Internacional Privado da Universidad de Edimburgo (Escocia, Reino Unido) e María Mercedes Albornoz, professora Investigadora Titular do Centro de Investigación y Docencia Económicas (CIDE, México).

Esta Edição Especial apresenta artigos sobre as pesquisas do dossiê temático, expostas nas *Jornadas da Associação de Direito Internacional Privado (ASADIP)* durante a XV Conferência realizada em Assunção, no Paraguai, em outubro de 2022[1]. Nessa conferência surgiu a ideia de organizar um dossiê temático na Revista Direito.UnB, visando publicar os trabalhos apresentados e divulgar as contribuições do direito internacional privado para o desenvolvimento sustentável a partir de perspectivas globais e latino-americanas.

Essa ideia foi inspirada nos trabalhos realizados em 2021, com o lançamento do livro intitulado **The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law,** editado por Ralf Michaels, Verónica Ruiz Abou-Nigm e Hans van Loon, cujo projeto foi coordenado por por Samuel Zeh. Esta obra, de forma inovadora, desvendou a importância do direito internacional privado para a realização da Agenda 2030 para uma boa governança dos 17 objetivos de desenvolvimento sustentável (ODS) e de suas 169 Metas a serem alcançadas. Os organizadores trouxeram à baila uma equívoca "marginalização" do direito internacional privado, afirmando que:

1 Ver ASADIP. https://www.asadip.org/v2/?p=6806.

> There is a near-complete absence of any reference to the role of private, including commercial, law, and the role it plays via private international law in our global economy and emerging world society. This is a significant gap. Most transactions, most investments, most destruction of our environment, happen not through public but through private action, and are governed not exclusively by public law but also, perhaps predominantly, by private law. Private law, therefore, has an important role to play in the quest for sustainability, and this is increasingly being recognised. What remains under the radar, so far, is private international law[2].

Como resultado do projeto, todos os autores envolvidos convergiram para três pontos essenciais na interligação entre o direito internacional privado e o desenvolvimento sustentável. O primeiro ponto demonstra "o direito internacional privado tem um papel a desempenhar na realização da Agenda 2030". O segundo aponta para "a subutilização, ou mesmo o desrespeito do direito internacional privado na estrutura de governança dos ODS". Além disso, os autores "lamentam o ponto cego no que diz respeito à função do direito privado e do direito internacional privado nos instrumentos globais relevantes para os ODS". Por fim, o terceiro ponto diz respeito à convicção de muitos autores "de que existe uma necessidade urgente de o direito internacional privado se tornar (muito) mais consciente e empenhado na realização dos ODS e, para esse fim, reorientar-se para estes objetivos e, se necessário, conceitualizar-se"[3].

A partir desses estudos, a proposta desta edição especial é demonstrar a importância do direito interancional privado sob as lentes de pesquisadores globais e latino-americanos. Este número apresenta o prefácio "**Hacia un derecho internacional privado comprometido con la materialización de soluciones "glocales**", de autoria das professoras Verónica Ruiz Abou-Nigm y María Mercedes Albornoz. Além disso, agraciaram a edição com a organização e revisão dos sete artigos submetidos à **Revista Direito.UnB,** conectados ao eixo Derecho internacional privado y desarrollo sostenible.

O desenvolvimento sustentável pressupõe o acesso aos bens e serviços, sem comprometer os mesmos direitos às gerações futuras, promovendo um diálogo entre o direito internacional público e o direito internacional privado. Desse modo, "para que o direito internacional privado se comprometa com os objetivos globais da Agenda 2030 da

2 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law.** Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p. 9.

3 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law**. Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p. p. 15.

ONU, é necessário mais do que mapear as metodologias e técnicas existentes”[4].

Por fim, na fase de editoração da Revista.Direito.UnB recebemos a triste notícia do falecimento da jovem pesquisadora Mathilde Brackx. Gostaríamos de registrar neste editorial a valiosa contribuição de seu artigo intitulado “Access to Remedy for Victims of Corporate Human Rights Abuse: Civil Liability Litigation in Europe, Enforcement in Latin America” (In memoriam Mathilde Brackx - 22/10/1998 - 10/10/2023). Descanse em paz! O legado da autora continuará a ressoar eternamente nas páginas deste periódico.

Boa leitura!

Inez Lopes

Editora-chefe

Revista Direito.UnB

4 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law.** Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p.p. 27.

NOTA EDITORIAL

La Revista Direito.UnB del Programa de Postgrado en Derecho (PPGD) presenta su número especial con el dossier temático **“Derecho internacional privado y desarrollo sostenible: perspectivas globales y latinoamericanas” ,** editado por Verónica Ruiz Abou-Nigm, Profesora Titular de Derecho Internacional Privado de la Universidad de Edimburgo (Escocia, Reino Unido) y María Mercedes Albornoz, Profesora Investigadora Titular del Centro de Investigación y Docencia Económicas (CIDE, México).

Este Número Especial presenta artículos sobre las investigaciones del dossier temático, que fueron presentados en la Conferencia de la Asociación de Derecho Internacional Privado (ASADIP) durante las XV Jornadas celebradas en Asunción, Paraguay, en octubre de 2022[1]. De esta conferencia surgió la idea de organizar un dossier temático en la Revista Direito.UnB, con el objetivo de publicar los trabajos presentados y difundir las aportaciones del Derecho internacional privado al desarrollo sostenible desde perspectivas “glocales” y latinoamericanas.

Esta idea se inspiró en el trabajo realizado en 2021, con el lanzamiento del libro titulado **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law,** editado por Ralf Michaels, Verónica Ruiz Abou-Nigm y Hans van Loon, cuyo proyecto fue coordinado por Samuel Zeh. Este innovador trabajo desvela la importancia del Derecho internacional privado para la realización de la Agenda 2030 para la buena gobernanza de los 17 Objetivos de Desarrollo Sostenible (ODS) y sus 169 metas a alcanzar. Los organizadores sacaron a la luz la idea errónea de que el Derecho internacional privado ha sido “marginado”, afirmando que:

1 Véase ASADIP. https://www.asadip.org/v2/?p=6806.

> There is a near-complete absence of any reference to the role of private, including commercial, law, and the role it plays via private international law in our global economy and emerging world society. This is a significant gap. Most transactions, most investments, most destruction of our environment, happen not through public but through private action, and are governed not exclusively by public law but also, perhaps predominantly, by private law. Private law, therefore, has an important role to play in the quest for sustainability, and this is increasingly being recognised. What remains under the radar, so far, is private international law[2].

Como resultado del proyecto, todos los autores participantes convergieron en tres puntos esenciales en la interconexión entre el derecho internacional privado y el desarrollo sostenible. El primer punto demuestra que "el derecho internacional privado tiene un papel que desempeñar en la realización de la Agenda 2030". El segundo señala "la infrautilización, o incluso el desprecio del derecho internacional privado en el marco de gobernanza de los ODS. Además, los autores "lamentan el punto ciego en cuanto al papel del Derecho privado y del Derecho internacional privado en los instrumentos globales relevantes para los ODS". Por último, el tercer punto se refiere a la convicción de muchos autores "de que existe una necesidad urgente de que el Derecho internacional privado sea (mucho) más consciente y se comprometa más con la consecución de los ODS y, para ello, se reoriente hacia estos objetivos y, si es necesario, se conceptualice a sí mismo"[3].

Basándose en estos estudios, el propósito de este número especial es demostrar la importancia del Derecho internacional privado a través de la lente de investigadores mundiales y latinoamericanos. Este número cuenta con el prólogo **"Hacia un derecho internacional privado comprometido con la materialización de soluciones glocales**", escrito por las profesoras Verónica Ruiz Abou-Nigm y María Mercedes Albornoz. También colaboraron en la organización y revisión de los siete artículos presentados a la revista Direito.UnB, relacionados con el eje de derecho internacional privado y desarrollo sostenible.

El desarrollo sostenible presupone el acceso a bienes y servicios sin comprometer los mismos derechos para las generaciones futuras, promoviendo un diálogo entre el Derecho internacional público y el Derecho internacional privado. Así, "para que el Derecho internacional privado se comprometa con los objetivos globales de la Agenda 2030 de la

2 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law.** Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p. 9.

3 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law.** Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p. p. 15.

ONU, es necesario hacer algo más que mapear las metodologías y técnicas existentes"[4].

Por último, durante la fase editorial de Revista.Direito.UnB, recibimos la triste noticia del fallecimiento de la joven investigadora Mathilde Brackx. Queremos dejar constancia en este editorial de su valiosa contribución en su artículo titulado "Access to Remedy for Victims of Corporate Human Rights Abuse: Civil Liability Litigation in Europe, Enforcement in Latin America" (In memoriam Mathilde Brackx (22/10/1998 - 10/10/2023). ¡Descansa en paz! Tu legado seguirá resonando para siempre en las páginas de esta revista.

¡Buena lectura!

Inez Lopes

Jefa de Redacción

Revista Direito.UnB

4 MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans (eds.). **The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law.** Cambridge: Intersentia, 2021, https://www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p.p. 27.

AGRADECIMIENTOS

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A Revista Direito.UnB do Programa de Pós-graduação em Direito (PPGD) agradece às organizadoras desta edição especial, Verónica Ruiz Abou-Nigm, Professora Catedrática de Direito Internacional Privado da Universidade de Edimburgo (Escócia, Reino Unido), e María Mercedes Albornoz, Professora Investigadora Titular do Centro de Investigación y Docencia Económicas (CIDE, México), pelo tema "Direito internacional privado e desenvolvimento sustentável: perspectivas globais e latino-americanas». Agradecemos pela contribuição e pela revisão dos textos selecionados.

Expressamos nossa gratidão aos autores que contribuíram para a publicação desta edição especial. As contribuições vieram de professores de universidades do Brasil, da América Latina e da Europa, além de instituições como o Instituto Max Planck de Hamburgo e a Organização dos Estados Americanos (OEA).

À equipe editorial, nossos sinceros agradecimentos pela editoração dos textos. A dedicação e o empenho de todos foram cruciais para tornar esta edição possível.

O reconhecimento da qualidade da Revista Direito.UnB é fruto da contribuição contínua de nossos colaboradores, que nos incentivam a trabalhar incessantemente para manter e elevar os padrões de excelência com temas vitais à sociedade contemporânea.

Que esta publicação inspire, informe, incite novos caminhos e reflita as contribuições do direito internacional privado para o desenvolvimento sustentável.

Gratidão!

AGRADECIMiENTOS

La Revista Direito.UnB del Programa de Postgrado en Derecho (PPGD) agradece a las editoras de este número especial, Verónica Ruiz Abou-Nigm, Profesora de Derecho Internacional Privado de la Universidad de Edimburgo (Escocia, Reino Unido), y María Mercedes Albornoz, Profesora Titular de Investigación del Centro de Investigación y Docencia Económicas (CIDE, México), por el tema **"Derecho internacional privado y desarrollo sostenible: perspectivas globales y latinoamericanas**". Agradecemos a los autores sus contribuciones y la revisión de los textos seleccionados.

Expresamos nuestra gratitud a los autores que contribuyeron a la publicación de este número especial. Las contribuciones proceden de profesores de universidades de Brasil, América Latina y Europa, así como de instituciones como el Instituto Max Planck de Hamburgo y la Organización de Estados Americanos (OEA).

Nuestro sincero agradecimiento al equipo editorial por la edición de los textos. Su dedicación y compromiso han sido cruciales para hacer posible este número.

El reconocimiento de la calidad de la Revista Direito.UnB es el resultado de la continua contribución de nuestros colaboradores, que nos animan a trabajar sin cesar para mantener y elevar el nivel de excelencia con temas vitales para la sociedad contemporánea.

Que esta publicación inspire, informe, incite nuevos caminos y refleje las contribuciones del Derecho Internacional Privado al desarrollo sostenible.

¡Muchas gracias!!

ACCESS TO JUSTICE (SDG 16): THE ROLE OF THE HAGUE CONVENTIONS ON PRIVATE INTERNATIONAL LAW

Recebido: 06/07/2023
Aceito: 15/08/2023

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ABSTRACT

Sustainable Development Goal 16 of the UN Agenda 2030 includes an appeal to “provide access to justice for all”. This call is not limited to domestic access to justice. In our interconnected world, where people and companies must navigate an increasingly complex variety of legal systems, providing transnational access to justice is a growing challenge. This requires international cooperation including direct cross-border cooperation between courts and administrations, and a global legal infrastructure supporting such cooperation. The Hague Conventions on private international law contribute to this aim in several ways: by establishing transnational channels for administrative and judicial cooperation in civil and commercial matters generally and specifically to ensure the cross-border protection of children and vulnerable adults, and by ensuring the effectiveness of exclusive choice of court agreements concluded by commercial parties and by facilitating the effective recognition and enforcement of foreign judgments in civil and commercial matters.

Keywords: Corporate responsibility; Direct transnational cooperation between courts and administrations; Hague Conventions in the Americas; Protection of children and adults; Human rights, jurisdiction and recognition and enforcement.

1. SUSTAINABLE DEVELOPMENT GOAL 16 AND ACCESS TO JUSTICE

The Sustainable Development Goals (SDGs) of the United Nations Agenda 2030[1] are not formulated in terms of (human) rights, but mainly quantitative goals. Law is only one of several means, including economic, cultural, social, and political means, to achieve these Goals. However, many of the Goals can only be achieved through qualitative changes, not least in the way people behave towards each other and towards the environment and the planet. And this implies a crucial role for law, and hence for access to justice.

The SDGs recognize the crucial role of access to justice in SDG 16: *Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels*.

Thus, SDG 16 mentions "Providing access to justice"[2] in the same breath as "Promoting peaceful and inclusive societies". Peaceful and inclusive societies are not only based on the recognition of rights, but also provide access to justice to make these rights effective. Without access to justice, rights risk remaining a dead letter and being violated[3].

As one of the sub-Goals (Targets), Target 16.3: *Promote the rule of law at the national and international levels and equal justice for all*, links access to justice for all to the promotion of the rule of law.

Access to justice in the context of SDG 16 thus refers not only to formal, but also to substantive justice. Therefore, it is more than equal access of all to the court system. As Mauro Cappelletti, the pioneering thinker on access to justice, pointed out, access to justice also means that the justice system must lead to outcomes that are *individually and*

1 UNITED NATIONS. General Assembly. Transforming our world: the 2030 Agenda for Sustainable Development A/RES/70/1. 2015. Available at Transforming our world: the 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs (un.org)

2 As explained by SDG Indicator 16.3.3: Proportion of the population who have experienced a dispute in the past two years and who accessed a formal or informal dispute resolution mechanism, by type of mechanism, Access to Justice in SDG 16. 3 relates to "people's ability to access justice mechanisms across a wide range of disputes". Examples include access to justice needed when people "have difficulty in obtaining legal identi[t]y, such as birth registration (target 16.9), or when they experience discrimination (target 16.B)" or "when faced with discrimination in education (target 4.5), when subject to discrimination against women and girls (target 5.1), when seeking 'equal pay for work of equal value' (target 8.5), when wanting their labor rights to be upheld (target 8.8), or when demanding that equal opportunity laws be respected (target 10.3)". Available at https://unstats.un.org/sdgs/metadata/files/Metadata-16-03-03.pdf .

3 It is worth noting that a movement is gaining momentum to extend rights and access to justice to other natural entities than human beings. New Zealand, India, Ecuador, and Colombia, among others, have granted rights to rivers, among others, see https://blogs.law.columbia.edu/climatechange/2021/04/22/the-rights-of-nature-can-an-ecosystem-bear-legal-rights/

socially just and fair[4]. This starts with laws that are equitable and fair, and not arbitrary.

While the *rule of law* focuses on justice in relation to the State[5], access to justice has taken on a wider meaning and now also includes other systems of conflict resolution. For example, it extends to the world of private business. In this regard, the United Nations *Guiding Principles on Business and Human Rights* (UNGPs, or Ruggie Principles)[6] must be mentioned, which aim to implement the United Nations "Protect, Respect and Remedy" framework on the issue of human rights and transnational corporations and other business enterprises. The UNGPs are based on three "pillars":

- The State duty to protect human rights.
- The corporate responsibility to respect human rights.
- Access to *remedy* for victims of business-related abuses.

Thus, the duty to provide access to remedy, a form of access to justice, rests not only on the State but also on private business. Companies have a responsibility to remedy any rights violations to which they contribute.[7] In addition, the State should establish the legal infrastructure, not just domestically but also transnationally through cooperation with other States, to provide access to justice to victims of human rights violations including by companies.

The UNGPs have become the dominant paradigm for corporate social responsibility.

4 CAPPELLETTI, Mauro; GARTH, Bryan. **Access to Justice: the worldwide movement to make rights effective, a general report**, in CAPPELLETTI, Mauro (ed). **Access to Justice V. I: A World Survey.** Netherlands: Giuffrè Editore/Sijthoff/Noordhoff, 1978, p. 6.

5 In his book, BINGHAN, Tom. **The Rule of Law**. London/New York: Allen Lane, 2010, Tom Bingham famously set out eight principles of the Rule of Law:
(1) The law must be accessible and so far as possible intelligible, clear and predictable.
(2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
(3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
(4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
(5) The law must afford adequate protection of fundamental human rights.
(6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
(7) The adjudicative procedures provided by the state should be fair.
(8) The rule of law requires compliance by the state with its obligations in international law as in national law

6 Endorsed by the UN Human Rights Council (UNHRC) in its resolution 17/4 of 16 June 2011. Available at https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

7 See the 2016 Report by the UNHRC Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse A/HRC/32/19, which includes guidance on cross-border legal assistance for private law claims by affected individuals and communities.

Moreover, since abuses of human rights often go hand in hand with lack of care towards the environment, they also provide a model to address both State duties and business responsibilities towards the *environment*[8].

2. ACCESS TO JUSTICE IN CROSS-BORDER DISPUTES – ROLE OF THE HAGUE CONVENTIONS ON PRIVATE INTERNATIONAL LAW

With this broad concept of access to justice in mind, we will now focus on access to justice in *cross-border situations*. While SDG 16 does not specifically refer to such situations, there is no doubt that these are part of its call for "access to justice for all".[9] We limit ourselves to international *civil and commercial* matters and leave criminal matters aside[10]. The growing relevance of this topic also to the Americas is reflected in the ASADIP Principles on Transnational Access to Justice (TRANSJUS), adopted on 12 November 2016[11].

With the acceleration of global mobility of people, goods, services and capital, the expansion of global production chains and markets, and the instant sharing of information through mass media and cyberspace worldwide, transnational disputes have increased and will continue to increase, both in volume and complexity. While the entry costs of cross-border movement and activity have diminished, the transaction costs of resolving disputes arising therefrom have not notably diminished[12]. As a result, access to justice in cross-border situations is a growing practical problem, and correspondingly growing, therefore, is the need for practical solutions to it.

At the global level, much of the work of the Hague Conference on Private International Law[13] (Hague Conference, HCCH) is devoted to facilitating access to justice in cross-border situations through the adoption of multilateral treaties or conventions, as

8 See JESSE, Katinka Jesse; KOPPE, Erik. **Business Enterprises and the Environment**. The Dovenschmidt Quarterly, v. 4, 2013, p. 176-189.

9 See WHYTOCK, Christopher. **Transnational Access to Justice**. Berkeley Journal of International Law, v. 38, 2020, p. 154-184, rightly pointing out the importance and distinctiveness of the transnational aspect of access to justice, and "To understand the full range of access-to-justice problems that exist in the world, access to justice studies must include the perspective of parties in transnational disputes, understand these problems in the context of the global legal system, and treat them as problems of global governance, not only domestic governance", at p. 156.

10 Access to justice in criminal matters is of course, also crucial. In fact, SDG 16 and its Targets and Indicators lay emphasis on access to justice in those matters.

11 Available at http://www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf.

12 HERRUP, P. **Transnational Litigation: Trends and Challenges, in Liber amicorum Linda Silberman**. (forthcoming 2023).

13 See www.hcch.net.

well as some non-binding international instruments[14], and monitoring and supporting their practical operation, including regarding the Americas through its regional office for Latin America and the Carib[15]bean (ROLAC), created in 2005 and headed by Representative Ignacio Goicoechea, assisted by Florencia Castro.

We examine here the Conventions that contribute to access to justice through administrative and judicial cooperation in cross-border disputes in general (below, **3.**), then those that provide for enhanced access to justice in the context of certain cross-border disputes involving the protection of children and vulnerable adults (below, **4.**), and finally, we pay attention to issues related to the international jurisdiction of the courts and the recognition and enforcement of foreign judgments (below, **5.**).

3. HAGUE CONVENTIONS CONTRIBUTING TO ACCESS TO JUSTICE THROUGH TRANSNATIONAL ADMINISTRATIVE AND JUDICIAL COOPERATION IN GENERAL

Attempts to resolve, through multilateral treaties, issues litigants may face regarding the service of process and the taking of evidence abroad, or as a result of discrimination between foreigners and nationals in respect of access to the courts, go back to the late nineteenth century. Initially, these issues were dealt with together in one single instrument, the *Convention relative à la procédure civile*. This Convention first saw the light of the day in 1896; it was revised in 1905, and then again in 1954[16].

Subsequently, the 1954 Convention on Civil Procedure was revised in three stages, from which the 1965 *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, the 1970 *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, and the 1980 *Convention on International Access to Justice* emerged.

Together, these three multilateral instruments *form a basic global infrastructure for*

14 Notably, the 2015 Principles on Choice of Law in International Commercial Contracts. Available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.

15 See, generally, VAN LOON, Hans. **The Global Horizon of Private International Law**. Inaugural Lecture, Recueil des Cours de l'Académie de La Haye. Leiden/Boston: Brill Nijhoff v. 380, 2016, p. 9-108. In Spanish: VAN LOON, Hans. **El Horizonte Global del Derecho Internacional Privado**. OCHOA MUÑOZ, Javier et al. (trans.). ASADIP - Revista Venezolana de Legislación y Jurisprudencia, Caracas, 2020, p. 141. Available at Hans-van-Loon-Horizonte-Global-del-Derecho-Internacional-Privado-Traduccion-al-espanol-2020.pdf (asadip.org).

16 The text of this and all other Hague instruments mentioned in this contribution, can be found on the Conference's website. Available at www.hcch.net.

access to justice across the full breadth of "civil and commercial"[17] *disputes*[18], including those on family, family property and inheritance issues, employment, commercial transactions, tenancy or landlord, financial, and environmental issues, and many others.

3.1. Service of Documents Abroad

The 1965 Service Convention facilitates the transmission of legal documents, in particular of the initial document by which the action is started, from one State Party to the Convention, the State of origin, to another State Party, the State of destination, for service in the latter State. To that end, the Convention sets up a system of cooperation between Central Authorities, to be designated by each State Party. This system simplifies and speeds up the traditional method of service through diplomatic and consular agents, the use of which the Convention nevertheless continues to permit[19].

The Convention does not alter the substantive rules relating to service of process of the States Parties. However, where the defendant has not appeared, it provides for their protection by ensuring that service has indeed been effected, and in sufficient time to enable them to defend themselves, or even, when a judgment has been rendered against a defaulting defendant, to relieve them from the expiration of the time for appeal.

These provisions, although they do not explicitly refer to the right to a fair trial recognized in global and regional human rights instruments, in fact *confirm the right of everyone to defend themselves, including in cross-border situations*. Moreover, they provide a *remedy* to ensure the effective exercise of this right, and thereby access to justice in the cross-border context.

17 On the notion of "civil or commercial matters", see Information Document No 4 of June 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments. Available at Info. Doc. No 4.pdf, and, in particular, the Annex (supporting documents for information Document no 4). Available at Info. Doc. No 4_Annex.pdf

18 They thus constitute (part of) a Transnational Legal Order, see WHYTOCK, Christopher. C**onflict of Laws, Global Governance and Transnational Legal Order**. UC Irvine Journal of International, Transnational, and Comparative Law, v. 1, 2016, p. 117, 119, and VAN LOON, Hans. **The present and prospective contribution of global private international law unification to global legal ordering**, in FERRARI, Franco; FERNANDEZ ARROYO, Diego (eds). **Private International Law – Contemporary Challenges and Continuing Relevance**. Cheltenham: Edward Elgar, 2019, p. 214-234.

19 In addition, the Convention provides for the use of two other channels, provided the State of destination does not object: by post directly to the addressee, and by service by process servers or other competent persons, through process servers or other competent persons of the State of destination.

The Hague Conference's Permanent Bureau monitors and supports the operation of the Convention, including developments such as electronic service of documents[20].

3.2. Taking of Evidence Abroad

The 1970 Evidence Convention facilitates the taking of evidence in cross-border situations, to examine persons (whether parties, witnesses, or experts) or to secure the inspection of documents or other property. Like the Service Convention, it provides for a system of cooperation between States Parties, in this case between the judicial authority of the State of origin requesting the assistance of the Central Authority of the State where the evidence is to be obtained.

The Convention thus provides a bridge between legal systems that differ considerably in their methods and procedures to obtain information for use in proceedings. This is especially true as between legal systems belonging, on the one hand, to the civil or continental law tradition, where evidence is normally obtained by the court, and, on the other, those of the common law, where evidence is typically obtained by the parties.

In addition to the primary route through Central Authorities, the Convention enables the taking of evidence by diplomats and consular agents –the traditional way of taking evidence in international cases– and by commissioners, persons appointed by the court in common law systems to take evidence. As in the case of the Service Convention, the HCCH's Permanent Bureau continues to monitor and support the operation of the Convention, including its role in the taking of evidence through the use of video-link[21].

3.3. Legal Aid and Security for Costs

For our purposes, the 1980 Hague Convention on International Access to Justice is particularly relevant because it addresses, in so many words, SDGs 16 key notion of access to justice.

The Convention ensures that foreign parties, i.e., both nationals of, and persons having their habitual residence in, States Parties (hereinafter: foreigners), are entitled to legal aid for court proceedings in another State Party on the same footing as nationals

20 See the special section on the Hague Conference website. Available at https://www.hcch.net/en/instruments/specialised-sections/service.

21 See further https://www.hcch.net/en/instruments/specialised-sections/evidence.

living in that State. This also applies to foreigners who *formerly* had their habitual residence in that State and the cause of action arose out of that former residence, as may notably be the case for foreign workers, e.g., when they claim unpaid salaries or other benefits. Again, like the Service and Evidence Conventions, the Convention establishes a system of cooperation between Central Authorities, in this case for the purpose of transmitting and executing legal aid requests, free of charge to the State where the court sits.

The Convention also eliminates discrimination of foreigners regarding legal advice provided the person needing it is present in the State.

Moreover, the Convention removes another important procedural obstacle to foreigners, namely the mandatory deposit of a sum of money as a security for costs of proceedings, which they otherwise may have to pay before starting such proceedings. As a counterpart, an order for payment of costs and expenses of proceedings made against a foreigner exempted from the security requirement, will be enforced free of charge in other States Parties. Once more, a system of cooperation through Central Authorities is offered to facilitate the enforcement abroad of such an order[22].

Even a State that does provide for non-discrimination of foreigners regarding legal aid and security for costs has an interest in joining the Convention, because nationals and residents of such a State may not automatically count on non-discrimination in other jurisdictions but may have to rely on a tool such as the Convention. Remarkably, however, the 1980 Convention is the least widely ratified instrument of the trio. While the Service Convention has attracted 80 States Parties, and the Evidence Convention 65, the Access to Justice Convention, for now, remains stuck at 28 States only.

If we look specifically at the Americas, we see that the Service Convention is in force for Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Brazil, Canada, Colombia, Costa Rica, Mexico, Nicaragua, St Vincent and the Grenadines, the United States and Venezuela, the Evidence Convention for the same countries except Antigua and Barbuda, Bahamas, Belize, Canada and St Vincent and the Grenadines, as well as for El Salvador, and the Access to Justice Convention for Brazil and Costa Rica only.

Why then has the Access to Justice Convention not yet found more support? A lack of understanding may explain its low rate of ratification. It might be thought that the Convention obliges States to offer more benefits to foreigners than to their nationals. But this is not the case. It simply offers the *same* benefits to foreigners as to nationals. Thus, if a State does not provide legal assistance to its nationals living in that State, or only limited aid, the Convention does not offer (more) legal aid to foreigners of other States Parties than to its nationals. Nevertheless, that State's nationals and residents will benefit from

22 See https://www.hcch.net/en/instruments/specialised-sections/access-to-justice.

the legal aid schemes that the other States Parties make available to their nationals.

With the global expansion of cross-border disputes, the Access to Justice Convention has significant potential. Several SDGs may be involved in ensuring access to justice across borders in such disputes, e.g., when it comes to ensuring gender equality (SDG 5), availability and sustainable management of water (SDG 6), decent work (SDG 8), or combating pollution, loss of biodiversity and global warming (SDGs 12-15).

3.4. Costs of Convention services and Access to Legal Documents and Information

The Service, Evidence and Access to Justice Conventions all provide that services rendered under the cooperative machinery provided by the Convention are, essentially, *free of charges*. This has become a general principle of the Hague Conventions involving administrative and judicial cooperation, with an important reservation option in the Child Abduction Convention[23].

Several Hague Conventions provide rules on *access to documents and information*, including confidentiality and non-disclosure thereof. The 1980 Access to Justice Convention contains a non-discrimination provision concerning *access to documents*. It puts foreigners on the same footing as nationals regarding the right to obtain "copies of or extracts from entries in public registers and decisions relating to civil or commercial matters", with the right to have them legalized[24]. The 1993 Adoption Convention requires States Parties to preserve crucial *information* concerning the child's origin including the identity of their parents and medical history, and to ensure that the child has access to such information under certain conditions[25].

The rule, common to the Service, Evidence and Access to Justice Conventions, that documents forwarded under the Convention are exempt from legalisation or other equivalent/analogous formality, has become a general provision in the Hague Conventions. An exception is the 1993 Adoption Convention, where due to opposition from certain Latin American States at the time, most strongly Brazil, such a rule is missing. This opposition having gradually disappeared, those Latin American States, including Brazil, now have joined the many other States around the world that have joined the 1961 *Convention*

23 1980 Child Abduction Convention, Art. 26. The provision on costs of the 1993 Adoption Convention does not expressly provide that Central Authorities and other public authorities shall bear their own costs, but there is no doubt that this principle is implied in the instrument.

24 1980 Access to Justice Convention, Art. 18.

25 1993 Adoption Convention, Arts. 30 and 31. The Convention also regulates the information to be provided to, and collected and transmitted about, the birth parents, prospective adoptive parents, and the child, as well as confidentiality thereof and non-disclosure of sensitive information, Arts. 4,9,16 and 21. See also Arts. 38-40 of the 2007 Child Support Convention.

Abolishing the Requirement of Legalisation for Foreign Legal Documents, also referred to as *Apostille Convention*. It replaces the cumbersome legalisation requirement for public documents such as birth, marriage and death certificates, by a simple formality, the apostille, now also in electronic form, and thereby facilitates cross-border transmission of and access to documents. The Convention now applies among 125 States, including the quasi-totality of the Americas, with the notable exception of Canada[26].

4. ENHANCED ACCESS TO JUSTICE IN CROSS-BORDER DISPUTES ON CHILDREN AND VULNERABLE ADULTS ENHANCED ACCESS TO JUSTICE IN CROSS-BORDER DISPUTES ON CHILDREN AND VULNERABLE ADULTS

While the Conventions on Service, Evidence and Access to Justice provide essential *procedural* assistance to the parties involved in cross-border proceedings, several Hague Conventions, building on the cooperation systems of those instruments, go even further. They aim to ensure or promote desired *substantive outcomes*: the return of wrongfully removed children, the protection of children in general, and in the context of adoption, the recovery of maintenance for children and families, and the protection of adults[27].

4.1. International Child Abduction

The 1980 Child Abduction Convention breaks new ground by considerably extending the role of the Central Authorities and entrusting them with a wide range of tasks, e.g., assisting left behind parents by locating the abducted child, securing the child's voluntary return, or instituting proceedings to obtain the return of the child. The Convention also

26 See further, https://www.hcch.net/en/instruments/specialised-sections/apostille.

27 The 1980 Hague Convention on the Civil Aspects of International Child Abduction, 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, 1993 Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (with its 2007 Protocol on Applicable Law to Maintenance Obligations), and the 2000 Convention on the International Protection of Adults. The Hague Children's Conventions may be said to constitute, together, another Transnational Legal Order, see WHYTOCK, Christopher. **Conflict of Laws, Global Governance and Transnational Legal Order**. UC Irvine Journal of International, Transnational, and Comparative Law v. 1, 2016, p. 117, 119, and VAN LOON, Hans. **The present and prospective contribution of global private international law unification to global legal ordering**, in FERRARI, Franco; FERNANDEZ ARROYO, Diego (eds). **Private International Law – Contemporary Challenges and Continuing Relevance**. Cheltenham: Edward Elgar, 2019, p. 214-234.

establishes detailed duties for the courts and administrative authorities of the requested State regarding any proceedings for the return of children. It also provides, in principle, for free legal aid in such proceedings[28].

The Convention currently has 103 States Parties, including the **quasi-totality of Latin America**, plus the **United States** and **Canada**, which is truly remarkable.

4.2. International Protection of Children and Adults

The 1996 Child Protection Convention has a much wider scope regarding measures for the protection of children than the 1980 Child Abduction Convention, and provides rules on adjudicatory jurisdiction, applicable law and recognition and enforcement of decisions on such measures and on parental responsibility. Because of its broad scope, its provisions on cooperation through Central Authorities are more general and less detailed than those of the Child Abduction Convention, but they can still be a great help in securing effective access to justice[29].

The 1996 Convention now has 54 States Parties, including from the Americas, Barbados, Costa Rica, Cuba, Dominican Republic, Ecuador, Guyana, Honduras, Nicaragua, Paraguay, and Uruguay, while Argentina, Canada and the United States have signed but not yet ratified the instrument.

The 2000 Convention on the international Protection of Adults largely follows the scheme of the 1996 Convention, thus facilitating, *inter alia*, continuity of any protective regime established under the latter instrument when a child reaches the age of 18 years[30]. The 2000 Convention is in force for 14 States, but none from the Americas.

4.3. International Adoption

The 1993 Intercountry Adoption Convention goes even further than the Child Abduction regarding the tasks of Central Authorities. Under the Convention no adoption from one State Party to another State Party is allowed except where the Central Authorities of both the State of origin of the child and the State receiving the child have given

28 See further, https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction.

29 See further, https://www.hcch.net/en/instruments/specialised-sections/child-protection.

30 See further, https://www.hcch.net/en/instruments/specialised-sections/adults/.

their agreement that the adoption may proceed. The Convention provides mandatory safeguards, including rules on the adoptability of the child, an obligation to give due consideration to alternative possibilities for placement of the child within the State of origin (the "subsidiarity principle"), informed consent to the adoption by the birth parents and the child, eligibility and suitability of prospective adoptive parents, and authorization of the child to enter and reside permanently in the receiving State. The instrument also regulates public and private intermediaries and their roles and establishes mandatory procedural requirements in intercountry adoption[31].

There are now 105 States Parties to this Convention, including in the Americas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela.

4.4. International Recovery of Child Support and other forms of Family Maintenance

Like the Child Abduction Convention, the 2007 Child and Family Support Convention provides for cooperation via Central Authorities and courts to help a spouse/parent –often the mother– and children in one State Party recover maintenance from the other spouse/parent –usually the father– in another State Party. The Convention provides for the transmission and processing of applications for the recognition and enforcement of decisions by the requested State and, where there is no decision, applications for the establishment of such a decision by that State. The requested State must provide applicants with "effective access to procedures, including enforcement and appeal procedures" arising from those applications, and, in principle, free legal assistance, which must be no less than that available in equivalent domestic cases.

As for all the preceding Conventions, the Permanent Bureau has deployed a pioneering, and very comprehensive monitoring and support system, including in particular the *iSupport Project*, an electronic case management and secure communication system[32].

This Convention not only promotes the aim of SDG 16.3, like the preceding instruments, but also may contribute to ending poverty (SDG 1), providing food security (SDG 2) and gender equality (SDG 5) among others.

31 See further, https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption.

32 See further https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support.

There are now 46 States Parties to this instrument, including from the Americas, Brazil, Ecuador, Guyana, Honduras, Nicaragua, and the United States.

5. ACCESS TO JUSTICE REGARDING THE JURISDICTION OF THE COURTS AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Accessible rules on adjudicatory jurisdiction and on enforcement of judgments are crucial when it comes to litigation in a cross-border setting. Establishing common rules on jurisdiction and recognition and enforcement, like the preceding common rules, is one of the ways of implementing SDG 16's access to justice Target[33].

The Resolution of 4 September 2021 of the *Institut de Droit International on Human Rights and Private International Law*[34] defines several basic principles regarding both adjudicatory jurisdiction and recognition and enforcement of judgments in the context of the right to access of justice:

> Article 3 Jurisdiction
>
> 1. Heads of jurisdiction in international cases shall be based upon substantial connections with the case or the parties thereto, taking into consideration the parties' human right of access to a court.
>
> 2. The immunity of States should not deprive the victims of human rights violations in cross-border relations of their right of access to a court and to an effective remedy.
>
> and:
>
> Article 20 Recognition and enforcement of foreign judgments
>
> 1. The right to a fair hearing encompasses effective legal protection including with respect to the recognition as well as to the enforcement of foreign judgments.
>
> 2. A foreign judgment shall not be recognized or enforced against a party's will if the proceeding in the foreign court violated that party's right to a fair hearing, or the competence of the court that rendered the judgment had no significant connection to the dispute.
>
> 3. States shall promote accession to existing international instruments or the conclusion of agreements on the recognition and enforcement of foreign judgments in civil and commercial matters.

33 See also MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans. (eds). **The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law**. Cambridge: Intersentia, 2021. Available at Intersentia Online | Library - The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law (open access), passim.

34 Available at https://www.idi-iil.org/app/uploads/2021/09/2021_online_04_en.pdf.

5.1. Access to Justice in relation to adjudicatory jurisdiction

Several Hague Conventions in the field of the law of persons and families establish helpful rules, *"based upon substantial connections with the case or the parties thereto"*, (Article 3 of the IDI Resolution), regarding the courts that may be addressed in cross-border situations. The two most important Conventions in this regard are those of 1996 and 2000 on the international protection of children and adults (see **4.2.** above). Both provide in their Chapters II, as a basic rule of access, that the judicial or administrative authorities of the State of the habitual residence, the center of life, of the child or adult have jurisdiction to take measures directed to the protection of the child's or adult's person or property. They also provide a special rule for jurisdiction regarding refugees or internationally displaced persons –their mere presence is sufficient to establish such jurisdiction.

Both Conventions have innovative rules enhancing the child's or adult's access to justice: jurisdiction may be transferred to the courts or authorities of another State under certain conditions, if that is in the child's best interests or in the interest of the adult. Aside from this regulated transfer mechanism, the jurisdiction criteria are fixed and leave no room for declining jurisdiction under the *forum non conveniens* doctrine.

Other Hague Conventions deal with jurisdiction in an *indirect*, retrospective way. That is, as a condition for the recognition and enforcement of a foreign judgment, they may impose certain requirements on the grounds on which the court of origin must have based its judgment to be recognised or enforced (see 5.2.). Litigants seeking to ensure the effect across borders of a judgment they hope to obtain, can take these requirements into account when choosing the court where they wish to bring the action.

5.2. Access to Justice in relation to recognition and enforcement of judgments

That *"the right to a fair hearing encompasses effective legal protection including with respect to the recognition as well as to the enforcement of foreign judgments"* (Article 20 of the 2021 IDI Resolution) has been confirmed on several occasions by the European Court of Human Rights (ECtHR).

According to the ECtHR, access to justice implies that the recognition and enforcement by a State of a judgment delivered by another State is a means of ensuring legal certainty in international relations between private parties[35]. Therefore, anyone

35 The European Court of Human Rights. Ateş Mimarlik Mühendislik A.Ş. v Turkey, No. 33275/05, 2012, § 46.

with a legal interest in the recognition of a foreign judgment must be able to make an application to that end[36]. On the other hand, a decision to enforce a foreign judgment is not compatible with the requirements of access to justice if it was taken without any opportunity to lodge a complaint as to the unfairness of the proceedings leading to that judgment, either in the State of origin or in the State addressed[37].

The Hague Conference has drawn up many Conventions facilitating the recognition and enforcement of foreign judgments, with, among other defences, procedural safeguards to ensure that the respondent can raise a complaint regarding the unfairness of the proceedings in the State of origin. These instruments include:

(1) On the law of persons and families:

- The 1970 Divorce Convention[38] (20 States Parties, but none from the Americas)
- The 1993 Intercountry Adoption Convention (Recognition only, Chapter V) (see above, **4.3.**)
- The 1996 Convention on the International Protection of Children (in particular: Chapter IV) (see above, **4.2.**)
- The 2000 Convention on the International Protection of Adults (in particular: Chapter IV) (ibidem)
- The 2007 Convention on the Recovery of Child Support and other forms of Family Maintenance[39] (see above, **4.4.**)

All these Conventions establish conditions as to whether the foreign decision will be given effect, including about the grounds upon which the court of origin based its jurisdiction.

(2) On other civil and commercial matters:

- The 2005 Convention on Choice of Court Agreements
- The 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

5.3. The 2005 Choice of Court Convention

36 The European Court of Human Rights. Selin Aslı Öztürk v Turkey, No. 39523/03, 2009, §§ 39-41, concerning the recognition of a divorce decree issued abroad.

37 The European Court of Human Rights. Pellegrini v Italy, No. 30882/96, 2001, § 40.

38 1970 Convention on the Recognition of Divorces and Legal Separations.

39 Preceded by the 1958 Convention on the Recognition and Enforcement of Child Support Decisions, and the 1973 Convention on the Recognition and Enforcement of Maintenance Decisions, both still in force, but not for any States from the Americas.

Thirty years ago, the Hague Conference started work on a global Convention both on original jurisdiction of the courts and recognition and enforcement of their judgments. That turned out to be too ambitious, and so, it was decided to switch gears and, first, to negotiate a Convention on choice of court agreements only.

That became the 2005 *Convention on Choice of Court Agreements*. It still deals with both jurisdiction of the courts and enforcement of the resulting judgments, but in a limited field, namely agreements, often clauses in contracts, whereby the parties agree on the court that will have exclusive jurisdiction to settle their disputes. It provides that, unless the parties have expressly agreed otherwise –in which case the Convention does not apply– their choice of court agreement will be held to be exclusive. The resulting judgment will in principle be recognized and enforced in all States Parties.

Choice of court agreements should also be consistent with principles of access to justice. The 2021 IDI Resolution requires that choice of court agreements and other dispute settlement clauses must be consistent with basic principles of access to justice:

> Article 5 Dispute settlement clauses
>
> Any contractual dispute settlement clause leading to a denial of justice, including in particular clauses unilaterally imposing exclusive jurisdiction to a court or an arbitral tribunal or certain asymmetric clauses, are incompatible with the right of access to a court.

The Choice of Court Convention applies to commercial parties but seeks to protect weaker parties. Thus, it does not apply to choice-of-law agreements in consumer and employment contracts. Nor does the Convention apply to "asymmetric" choice of court agreements, i.e., agreements drafted to be exclusive as regards proceedings brought by one party but not as regards proceedings brought by the other party[40].

Choice of court agreements, like arbitration agreements, are quite common. For the cross-border circulation of awards based on arbitration agreements, there is the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, which is in force throughout the Americas. For agreements on ordinary courts there was in the past no parallel instrument. But now there is the 2005 Hague Convention. And so, the Choice

40 E.g., a clause like: "Proceedings by the borrower against the lender may be brought exclusively in the courts of State X; proceedings by the lender against the borrower may be brought in the courts of State X or in the courts of any other State having jurisdiction under its law", see the Explanatory Report by HARTLEY, Trevor; DOGAUCHI, Masato, paragraphs 105-106. Available at https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf.

of Court Convention is intended to do for choice of court agreements what the New York Convention does for arbitration agreements.

This is especially important to the **Americas**. First, because not all of the American States admit that the parties have the right to choose themselves the court that will decide on their disputes. Secondly, because the American States that do admit this freedom will not always accept that that choice is exclusive.

Respecting party autonomy in choice of court, including by rejecting the *forum non conveniens* mechanism, serves certainty, predictability, and security to both parties. It is also a means of risk mitigation for financiers and investors. In the relations between the Global North and the Global South this may give rise to tensions, also in light of the SDGs and the UNGPs (above **1.**)[41]. The Convention provides safeguards enabling the setting aside of a choice of court agreement that could lead to manifest injustice or would be manifestly contrary to public policy of the State of the court seized if that is not the chosen court. The Convention also enables refusal of recognition or enforcement of a judgment of the chosen court that did not respect the right to a fair hearing or was manifestly incompatible with the public policy of the requested State.

Mexico was the first State to join this Convention, which now has 32 States Parties. The **US** has signed but not yet ratified the Convention.

5.4. The 2019 Convention on the Recognition and Enforcement of Foreign Judgments

Contrary to the original Judgments project and the Choice of Court Convention, the 2019 Hague *Convention on the recognition and enforcement of foreign judgments in civil or commercial matters* does not deal with the jurisdiction of the court of origin of judgments: it only applies to the recognition and enforcement of foreign judgments. But, as we have seen (above **5, 5.2.**), that is also an important aspect of access to justice. Thus, the 2019 Convention is potentially an essential part of global access to justice. Significantly, its Preamble expressly states: “Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial cooperation.”

41 Several chapters address those tensions, in relation to SDGs 4, 6 and 9 in particular, in MICHAELS, Ralf; RUIZ ABOU-NIGM, Verónica; VAN LOON, Hans. (eds). **The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law**. Cambridge: Intersentia, 2021.

5.4.1. Basic structure

Its basic structure is relatively simple and rests on two pillars. The *first* concerns the connection between the judgment and the foreign court which rendered it. A foreign judgment qualifies for recognition and enforcement only if it has a significant connection with the court of origin. That is so, for example, if the defendant was based in that country, or agreed to the jurisdiction of the court, or the contract or tort in dispute are linked to the State of origin of the judgment and there was also a link with the defendant (Article 5, Bases for recognition and enforcement). For disputes about immovables the judgment only qualifies if it was handed down by a court in the State where the immovable was situated (Article 6, Exclusive basis for recognition and enforcement). Thus, the court of the requested State will, indirectly, check the jurisdictional basis of the foreign judgment as required by the Convention.

The *second* pillar concerns the grounds upon which the recognition and enforcement of a judgment, (though based on a sufficient indirect ground of jurisdiction) may nevertheless be refused. They include, for example, insufficient notice of the defendant of the beginnings of the proceedings, or the judgment is manifestly incompatible with the public policy of the requested State, obtained by fraud, contrary to a choice of court agreement, or inconsistent with another judgment (Article 7, Refusal of recognition and enforcement).

Thus, the Convention contributes to access to justice by creating *uniformity at the global level* both regarding the *conditions* for the recognition and enforcement of foreign judgments and regarding the *grounds for refusal*. And that is no luxury: around the world, both differ from one jurisdiction to another[42].

For example, the principle of checking the jurisdictional basis of a foreign judgment is not part of the procedure for recognition and enforcement in the Philippines, Tunisia, or Brazil. Other MERCOSUR countries (Argentina, Paraguay, and Uruguay) have a tradition of applying the grounds for *direct* jurisdiction also as *indirect* grounds of jurisdiction. The Convention's grounds for indirect jurisdiction may well be somewhat wider than those domestic grounds for direct jurisdiction. So, the Convention may provide a more liberal framework for the conditions which a foreign judgment must meet in order to be enforced[43].

Likewise, the grounds of refusal of a foreign judgment vary from country to country.

42 For a comparative analysis see, WELLER, Matthias et al. (eds). T**he HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlook**. Oxford: Hart Publishing, 2023, including VAN LOON, Hans. **General Synthesis and Future Perspectives**, Chapter 17.

43 See RUIZ ABOU-NIGM, Verónica, **Gains and Opportunities for the MERCOSUR Region**. Chapter 11, in WELLER, Matthias et al. (eds). **The HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlook**. Oxford: Hart Publishing, 2023.

For example, inconsistency of a foreign judgment with another judgment between the same parties on the same subject matter is not a general ground for refusal in the Arab States or in the US or Canada. Another example: the distinction between a jurisdiction's *domestic* public policy, which should not be a ground for refusal of a foreign judgment, and its *international* public policy which may be a ground for refusal, is not well known worldwide[44]. While Latin American legal systems are familiar with the concept of international public policy, which for them encompasses fundamental values enshrined in public international law, this is uncharted territory to many Asian and African legal systems.

Contrary to the tradition in Common Law countries, the Convention is not limited to money judgments, but helpfully also includes non-monetary judgments such as those ordering specific performance or injunctions.

5.4.2. Protection of consumers and employees

Also worth noting, in the context of access to justice, is that the Convention introduces specific protective rules for employees and consumers. An employee who has obtained a judgment against her employer or a consumer having obtained a judgement against a producer or service provider may benefit from the rules of the Convention. But enforcement of judgements against an employee or consumer is possible only under more restricted rules. For example, the consent of the employee or consumer to a choice of court is only valid if it was addressed to the court, not to the other party. This protection of employees fits well with SDG 8, *Promote Sustained, inclusive, and sustainable economic growth, full and productive employment, and decent work for all*.

5.4.3. Limitations of the Convention

Of course, the Convention has its limitations. It does not apply to provisional matters, or interim judgments, despite their important in practice. Intellectual property is excluded, just as, among other matters, transport, defamation, and privacy.

Another limitation relates to the Convention's application to non-contractual obligations, to torts in particular. The Convention only applies to judgments that ruled on non-contractual obligations 'arising from death, physical injury, damage to or loss of

44 As the Explanatory Report to the Convention points out, the public policy ground of refusal of the Convention should not be triggered by every mandatory rule of the requested State ("internal public policy"), but only "where such a mandatory rule reflects a fundamental value, the violation of which would be manifest if [recognition or] enforcement was permitted…" ("international public policy").

tangible property'. That means that it will play a limited role in commercial tort litigation, which often revolves around economic and financial loss rather than personal injuries and damage to property[45]. A further major constraint of this rule is that it requires that the act or omission directly causing the harm occurred in the State or origin. This excludes judgments rendered by the court of the State, or States, where the harm occurred if that is different from the State where the harm was caused. This may reduce the Convention's usefulness in environmental litigation, including climate change cases.

5.4.4. Residual role of national law

The Convention creates a bottom, not a ceiling, for the recognition and enforcement of foreign judgments. That means, that if the rules on recognition and enforcement of foreign judgments of a State Party are more liberal than those of the Convention, those rules may be applied. So, for example, if such rules allow for the recognition and enforcement of judgments rendered by the court of the place where environmental harm occurred, then such judgments may continue to be enforced under domestic rules on enforcement of foreign judgments.

5.4.5. The Convention and access to justice in the broader context of the SDGs

Within the limits of its scope, the Convention not only favours the *circulation* of judgments, which will generally serve the SDGs, it may also be used as a shield to *refuse* the recognition and enforcement of judgments that, for example, lead to unsustainable outcomes. According to the UNGPs (above **1.**), corporations must respect "the core internationally recognized human rights" contained in the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, coupled with the principles concerning fundamental rights in the eight core conventions of the International Labour Organisation (ILO) as set out in the Declaration on Fundamental Principles and Rights at Work[46].

Here the Latin American tradition of giving prominence in the application of the public policy clause to public policy rooted in public international law may provide

45 See FRANZINA, Pietro. The Jurisdictional Filters. Chapter 3, in WELLER, Matthias et al. (eds). T**he HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlook**. Oxford: Hart Publishing, 2023.

46 ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2022.

important guidance. One could well imagine that, even if the requested State has not formally ratified, for example, the Conventions of the International Labour Organisation referred to in the ILO Declaration, it might still use the public policy exception to refuse enforcement of a foreign judgment against an employee, habitually resident in that State[47] , that was incompatible with one of the ILO Conventions

The 2019 Convention on the recognition and enforcement of foreign judgments in civil or commercial matters has been signed by three countries in the Americas, **Costa Rica**, **Uruguay**, and the **United States**. Following its ratification by the European Union and Ukraine, the Convention will come into effect on the international plane on 1st September 2023. In March 2023, the Senate and House or Representatives of Uruguay approved the ratification of the Convention. Uruguay may therefore soon be the (first) State from the Americas to deposit its instrument of ratification and join the 2019 Convention.

6. CONCLUSION

The need to "ensure access to justice for all" in response to the call of SDG 16.3. does not stop at State borders. On the contrary, the increasing transnational mobility of people, goods, services, capital, and information inevitably results in an increase in both the volume and complexity of transnational disputes, which therefore raise issues of access to justice.

Access to justice in cross-border situations is a growing issue calling for practical, concrete solutions. The Hague Conventions presented in this article offer such solutions not in all, but in many such situations.

Whether the question is how to serve legal documents or obtain evidence abroad, have access to free legal aid or legal advice, or how to produce a marriage certificate or another public document in a foreign jurisdiction, Hague Conventions are there to resolve the access to justice issues that may arise. When existential cross-border issues arise, such as the wrongful removal of children, or children and vulnerable adults in need of protection, including in adoption cases, or the recovery of child support, effective Hague Conventions may be key to justice being done. Also, Hague Conventions can ensure access to justice when the issue is: in which court to litigate when more than one jurisdiction is involved, or: how to obtain (or prevent!) the recognition or enforcement of a foreign judgment.

Together, the Hague Conventions presented in this article constitute a basic legal infrastructure for access to justice in cross-border situations. All these treaties respect

47 Under Article 5 (1) (a), not excluded by 5 (2).

the sovereignty and security of States[48], so States that have not already done so should not hesitate to join them. In doing so, they will render a great service to their citizens and contribute to achieving the Goals of the UN Agenda 2030 –and beyond.

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48 See e.g., in relation to the 2005 and 2019 Conventions, OYARZABAL, Mario. T**he influence of public international law upon private international law in history and theory and in the formation and application of the law**. in **Recueil des Cours de l'Académie de La Haye**. Leiden/Boston: Brill Nijhoff, v. 428, 2023, p. 129-525 (at 365-375).

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