

# THE CHALLENGES OF TEACHING PRIVATE INTERNATIONAL LAW

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*In Honor of Bob Lutz*

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Some of the most difficult problems—and therefore some of the most rewarding careers for problem solvers—can be found at the intersection of different disciplines or fields of professional endeavor. That is as true in the law as it is in other professions. It is also where Bob Lutz has spent much of his long and distinguished career: exploring substantive and procedural problems that arise where public and private interests meet along the border between domestic and international law and preparing his students to work in that challenging environment.

Bob has had the good fortune to work in many different capacities including being a law clerk to a federal judge, an attorney in private practice and in the federal government, a litigator and an arbitrator, an author and an editor, a government advisor, a highly respected law professor, and an expert and delegate to international conferences and meetings.

It has been my privilege to work with Bob in various contexts over the years, including the ABA Section of International Law under his leadership and through his participation in the North American Free Trade Agreement (NAFTA) Advisory Committee on Private Commercial Dispute Resolution,<sup>1</sup> the State Department’s Advisory Committee on International Law, and his contributions to the preparation of the RESTATEMENT (FOURTH), FOREIGN RELATIONS LAW OF THE UNITED STATES.<sup>2</sup>

In Bob’s honor, I offer the following thoughts and suggestions about teaching private international law, a field to which he has made many contributions, and which, in many ways, exemplifies the challenges of teaching and practicing law at the intersection of the domestic and the international.

## 1. THE DEFINITIONAL CHALLENGE

The field of private international law (PIL) continues to struggle for a broadly accepted definition, refusing to be cabined precisely because it deals with emergent issues, both substantive and procedural, at the intersection of the domestic and international legal regimes and with both public and private law. It also continues to develop rapidly. In fact, some

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1. The so-called NAFTA 2022 Committee, about which Professor Lutz has written: *see* SELMA LUSSENBURG & ROBERT E. LUTZ, NAFTA ADVISORY COMMITTEE ON PRIVATE INTERNATIONAL DISPUTES: A 15-YEAR RETROSPECTIVE (2022).

2. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 2018).

question whether PIL qualifies as a discrete subject or “field,” as opposed to a shifting compilation of practical and legal challenges encountered in international practice, which, at best, may require a particular methodological approach. Without engaging in that debate, I would note that on some elements, there is a measure of agreement.

In its loosest, if not most common, conception, PIL encompasses the legal rules that apply in private transnational transactions—and particularly to the resolution of disputes arising from such transactions—where the parties, facts, or circumstances are connected with more than one domestic legal system.<sup>3</sup> Typically, the main question for a court is likely to be “what law applies to this situation?”

One might think, for example, of a cross-border commercial transaction between private parties in different countries, say a contract for the manufacture and sale of goods and the provision of services, where a dispute has arisen about performance of the contractual obligations. If either of the parties chooses to litigate the issues, the relevant rules will be typically determined under the domestic law that applies in the court resolving the dispute.

It could be, of course, that the conflicts rules of that jurisdiction will direct the court to look to and apply a relevant foreign law.<sup>4</sup> It could also be that the parties to the contract have agreed on which law will govern; if so, the question would be whether their choice of law is valid and enforceable in the jurisdiction considering the dispute. A separate but related inquiry may concern how the court is to determine the content and meaning of that foreign law and to apply it to the parties’ dispute.

Another possibility is that each of the parties to the dispute has chosen to litigate in their respective domestic courts, resulting in “parallel” litigation. In cases with significant connections to more than one country, the relevant rules of domestic law will determine whether the courts of that country will have jurisdiction to address the dispute, whether or when one court might defer to the other jurisdiction, and where the eventual judgment(s) might, or might not, be recognized and enforced. Those issues are often complementary and are commonly designated as conflicts of jurisdiction and enforcement of judgments.

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3. See generally CHESHIRE ET AL., PRIVATE INTERNATIONAL LAW (Paul Torremans et al. eds., 15th ed. 2017). Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAW § 1 (AM. LAW INST. 1971).

4. In some situations, the conflicts rules of the second jurisdiction may refer the court back to its own law, in a process known as *renvoi*. There may be mandatory rules of domestic law that apply no matter what the private parties have agreed, or that prevent application of the rules they have chosen.

As the world has become more interconnected and cross-border activity is more common, such questions arise with increasing frequency. While they often concern commercial contracts or other business transactions and arrangements, they may also involve issues of tort, consumer or family law, as well as an increasing amount of issues of privacy and data protection, insolvency or succession, intellectual property, and even statutory claims. The common element is the cross-border aspect of the transaction or controversy. Yet, in many respects, the relevant rules remain largely domestic and diverse, and often conflicting, which presents challenges for courts and private parties alike.

Since uniformity and consistency can provide a measure of certainty for the transacting parties and promote transactional clarity and efficiency, regional and international harmonization is generally viewed as a desirable goal and, in fact, has been achieved in a number of areas. Within the European Union, for example, private international law issues are increasingly addressed by the EU as part of its efforts to regulate the internal market and establish a “European area of justice.”<sup>5</sup> For EU member states, the scope of private international law now includes a substantial corpus of EU regulations, directives, and decisional law.

A growing body of international instruments, including treaties and conventions, also contributes to this harmonization effort at the global level, as discussed below. The academic challenge is how to find the best way to introduce students to these issues and developments and to provide them the necessary tools to effectively deal with international private law problems in practice.

## 2. THE INSTRUCTIONAL CHALLENGE

In a number of countries around the world, private international law is taught as a discreet subject, often as a required course of study. One reason is that, particularly in civil law systems, the relevant rules are likely to have been codified by the legislature and are typically clearer in their expression and more certain in their application. In many countries, the national legislature has adopted a broad (even comprehensive) national code on private international law, while in others, the approach is less centralized.

By contrast, in common law jurisdictions, the rules are more likely to be found in judicially elaborated principles, rather than in legislation. Thus, their articulation and application are more fact-dependent and challenging

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5. Cf. GEERT VAN CALSTER, *EUROPEAN PRIVATE INTERNATIONAL LAW* 17 (2d ed. 2016).

to describe in the abstract.<sup>6</sup> In the United States, much of the relevant law is found in judicial decisions and is actually a matter of state, rather than federal, law.<sup>7</sup>

Globally, however, legal systems are increasingly engaged in “domesticating” internationally agreed rules and mechanisms—as reflected, for example, in international and regional instruments such as treaties and conventions, as well as in evolving principles of customary international law and practice.

Still, private international law is infrequently taught as a discrete course in the U.S. legal curriculum, even though practitioners are increasingly likely to encounter PIL issues in a surprisingly wide range of practical contexts. Lacking an appreciation of its breadth, substance, and methodology, U.S.-trained lawyers may well find themselves at a disadvantage in dealing with foreign lawyers who are comparatively well versed in the subject. The challenge for legal educators is determining how to introduce their students to this field and to provide them with a sufficient understanding of the relevant substance and methodology, as well as the opportunity to develop the appropriate analytical and critical skills.

Several approaches to the subject can be considered: from the perspective of the rules of conflicts or choice of law, as a component of a broader consideration of transactional law, as part of the available mechanisms for international dispute settlement, by focusing on the current work of the various international institutions working on PIL issues, or in the broader context of its contributions to global approach of sustainable development.

Each of the approaches has its advantages and drawbacks. None are right or wrong. Nor are they mutually exclusive. The instructional goal should be to acquaint students with the field, in its substantive, comparative, and methodological dimensions, so they are prepared to function effectively as lawyers in what will inevitably be an increasingly transnational practice.

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6. For this reason, some commentators differentiate between private international law (referring to domestic law relevant to the particular cross-border transaction or dispute) and international private law (meaning applicable international treaties, principles, and practices). Since the international rules must generally be incorporated or “domesticated” in order to apply in a national court, the distinction does not seem particularly helpful.

7. Efforts to harmonize certain aspects of the law in the United States have, of course, been undertaken. One example is the Uniform Commercial Code, which is a product of two private entities—the Uniform Law Commission and the American Law Institute. While adopted in all fifty U.S. states, it has been modified by state legislatures in various ways and consequently is not precisely “uniform.” Neither is it a complete “code.”

### 3. CONFLICTS OR CHOICE OF LAW

For many academics, and some practitioners, the core of private international law lies in the specific rules by which domestic courts resolve conflicts-of-law issues as they arise in cross-border disputes. The focus of this approach will normally be on the rules and principles of the relevant domestic legal system, and the international issues' aspects are typically addressed as one element in that system.<sup>8</sup>

The scope and content of such courses can vary significantly. Some focus primarily on the rules by which courts decide conflicts-of-law issues under domestic law, giving relatively little attention to the international dimension and the parties' autonomy to choose the applicable law, i.e., to contract out of otherwise applicable domestic rules, to consent to having their disputes adjudicated in a specific jurisdictional venue (choice of forum), or to consent to the specific rules regarding enforcement of foreign judgments (and perhaps arbitral awards).<sup>9</sup>

Increasingly, however, national courts will give effect to the parties' clearly expressed agreements on such issues, except where doing so would violate some fundamental norm of applicable domestic law, generally characterized as a matter of public policy (*ordre public*) or mandatory norms (*lois de police*), from which no derogation is permitted. By clear agreement, the parties can have a reliable understanding about the law under which their dispute will be resolved, regardless of the forum. However, not all systems recognize the validity of such agreements to the same extent.

A comparative approach to conflicts of law issues offers the possibility of acquainting students with the differences in how foreign-trained lawyers think about such issues—for instance, why those trained in civil law systems may take an approach that seems so different from the one a U.S.-

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8. Many country-specific analyses are available. *See, e.g.*, XIAOHONG LIU ET AL., CHINESE PRIVATE INTERNATIONAL LAW (2021); ADRIANA DREYZIN DE KLOR, PRIVATE INTERNATIONAL LAW IN ARGENTINA (2021); KAZUAKI NISJOKA ET AL., JAPANESE PRIVATE INTERNATIONAL LAW (Anselmo Reyes et al. eds., 2021); STELLINA JOLLY ET AL., INDIAN PRIVATE INTERNATIONAL LAW (Anselmo Reyes et al. eds., 2021); STEPHANE-LAUREN TEXTIER, DROIT INTERNATIONAL PRIVÉ LEXIFICHE: RÈGLES GÉNÉRALES (4th ed., 2022); CHUKWUMA SAMUEL ADESINA OKOLI ET AL., PRIVATE INTERNATIONAL LAW IN NIGERIA (2020). *See generally* A GUIDE TO GLOBAL PRIVATE INTERNATIONAL LAW (Paul Beaumont & Jayne Holliday eds., 2022).

9. *See generally* DANIEL GIRSBERGER ET AL., CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS (Jonathan Harris QC et al. eds., 2021); Trevor Hartley, *Basic Principles of Jurisdiction in Private International Law: The European Union, The United States and England*, 71 INT'L & COMP. L.Q. 226 (2021); ROBERT E. LUTZ, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD (Cambridge Univ. Press, 2007).

trained lawyer would likely have. However, since different legal systems approach these domestic issues differently (and in some systems, such as the United States, there may not even be internal uniformity), the undertaking can prove difficult.

A more inclusive approach would open the possibility of acquainting students with the various regional and international efforts to *harmonize* the relevant conflicts rules (whether by treaty or soft law instruments) since for many experts, adoption of standardized conflicts of law rules lies at the heart of the PIL project.<sup>10</sup> For instance, within the EU, harmonized conflict-of-law rules for both contractual and non-contractual obligations are provided in the Rome I and II Regulations.<sup>11</sup> Consideration could also be given to various soft law instruments in this area, such as the 2015 Hague Principles on Choice of Law in International Commercial Contracts,<sup>12</sup> the 2016 UNIDROIT Principles of International Commercial Contracts<sup>13</sup> and the OAS Guide on the Law Applicable to International Commercial Contracts in the Americas.<sup>14</sup>

In the United States, the existence of the federal system can present additional challenges since state, rather than federal, law governs many PIL issues. For instance, no single federal conflict or choice of law regime exists, much less a comprehensive commercial code or set of rules.<sup>15</sup> Questions of jurisdiction in civil and commercial cases involving interstate and foreign commerce have long engaged the U.S. Supreme Court, mostly from a constitutional law perspective, but they remain fact-dependent, and the recognition and enforcement of the judgments of foreign courts in civil

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10. *See generally*, SYMEON SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS (2014); PETER HAY ET AL., CONFLICT OF LAWS, PRIVATE INTERNATIONAL LAW, CASES AND MATERIALS (16th ed. 2021).

11. Regulation (EC) No 593/2008 on the law applicable to contractual obligations, 2008 O.J. (L177) 6 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, 2007 O.J. (L 199) 40.

12. HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRINCIPLES ON CHOICE OF LAW IN INT'L COMM. CONTRACTS (2015).

13. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (INT'L INST. FOR THE UNIFICATION OF PRIVATE L., 2016) [hereinafter UNIDROIT PRINCIPLES]. *See also* Brooke Marshall, *The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law*, 66 AM. J. COMP. L. 175 (2018).

14. *See* R. STELLA CORREA PALACIO ET. AL., GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS (Inter-American Juridical Committee 2019). *See also* Inter-American Convention on the Law Applicable to Int'l Contracts, MX-U.S., March 17, 1994, O.A.S.T.S. No. 78.

15. This aspect of the federal system often poses challenges for U.S. ratification of PIL treaties and conventions, particularly when the result would be to "federalize" matters long regulated by the individual states.

and commercial matters are still primarily a matter of state law.<sup>16</sup> This distribution of authority and competence within the federal system has sometimes made ratification of PIL treaties challenging in the United States.<sup>17</sup>

#### 4. INTERNATIONAL BUSINESS LAW

The principles, instruments, and practices of private international law may also be addressed as part of a broader course on international business law, an area sometimes characterized as international business transactions (IBT) or transnational law. Such courses are typically practice-oriented and aim at introducing students to the substantive and procedural issues they are likely to encounter in the course of representing clients doing business in a globalizing world.<sup>18</sup>

Since differences in national laws and procedures governing commercial transactions often create impediments to cross-border trade, IBT courses are likely to have a comparative dimension<sup>19</sup> and to introduce students to at least some PIL efforts at international harmonization of substantive rules (for instance, the 1980 UN Convention on the International Sale of Goods<sup>20</sup>), along with a wider range of domestic and international instruments addressing such issues as trade restrictions and remedies, financing, import-export restrictions, taxation, anti-competition law, and regulation of foreign investment, perhaps even intellectual property. Most will also devote attention to mechanisms for dispute settlement within the existing international litigation and arbitration regimes.

In courses of such breadth, however, the challenge is to find a sufficient opportunity to acquaint the participants with the issues,

16. See, e.g., *Walden v. Fiore*, 134 S. Ct. 1115 (2014). See also, e.g., *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011).

17. Wholly apart from the substance, U.S. ratification of PIL treaties can be challenging since states may not welcome federal “intrusion” into areas traditionally falling within state competence. See generally Paul R. Dubinsky, *Private International Law Treaties and Federalism: Can the United States Lead?*, 54 TEX. INT’L L.J. 39 (2018). See also Charlotte Ku et al., *Even Some International Law Is Local: Implementation of Treaties Through Subnational Mechanisms*, 60 VA. J. INT’L L. 101 (2019).

18. See, e.g., Robert E. Lutz, *Comparative Observations about Transnational Legal Education and Legal Scholarship*, 46 INT’L L. 625 (2012).

19. For general background, see CHRISTIAN TWIGG-FLESNER, FOUNDATIONS OF INTERNATIONAL COMMERCIAL LAW (2019). See also U.N. COMM’N ON INT’L TRADE L., UNCITRAL, HCCH AND UNIDROIT LEGAL GUIDE TO UNIFORM INSTRUMENTS IN THE AREA OF INT’L COMM. CONTRACTS, WITH A FOCUS ON SALES, U.N. Sales No. E.21.V.3 (2021).

20. See United Nations Convention on Contracts for the International Sale of Goods, 1489 U.N.T.S. 3 (Apr. 11, 1980).



instruments, and methodology of private international law. A common way to address this challenge is through case studies or practical exercises, where the parties to the transaction come from different legal systems or traditions.

## 5. METHODS OF TRANSNATIONAL DISPUTE SETTLEMENT

From a practical perspective, one of the most consequential decisions facing counsel for parties in cross-border transnational relationships might be determining where disputes arising from such relationship can be resolved. In addition to litigation in domestic courts, or in one of the international commercial courts, the alternatives may include arbitration, conciliation, and mediation. Each has advantages and drawbacks. In each situation, the choice can be made by contract, long before any possible dispute has arisen; in others, it can only be made afterward. In either event, an understanding of the options—and of the relevant PIL instruments—is essential.<sup>21</sup>

### *a. Litigation*

The default preference of contracting parties and their lawyers may well be to litigate such disputes in their own respective domestic courts under their own domestic law.<sup>22</sup> When neither is willing to submit to the other's home courts, they may be able to agree on recourse to the courts of a third country. In all cases, counsel must consider several important issues: whether the chosen court has, and will exercise, jurisdiction over the particular dispute, what law that court is likely to apply, where the successful party might be able to enforce its judgment effectively, and to what extent the parties may effectively address those issues in their contractual agreement. Many aspects of these issues have been addressed in PIL instruments.

Jurisdiction. The question of jurisdiction can be difficult, since each legal system sets its own rules, and as a general matter, private parties cannot, by contract, enable a domestic court to exercise jurisdiction which it

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21. For an overview of the issues arising under these instruments in domestic litigation, see DAVID P. STEWART ET AL., *RISTAU'S INTERNATIONAL JUDICIAL ASSISTANCE: A PRACTITIONER'S GUIDE TO INTERNATIONAL CIVIL AND COMMERCIAL LITIGATION* (2d ed. Oxford Univ. Press 2021).

22. See generally TREVOR C. HARTLEY, *INTERNATIONAL COMMERCIAL LITIGATION: TEXT, CASES AND MATERIALS ON PRIVATE INTERNATIONAL LAW* (3d ed. 2020); GEERT VAN CALSTER, *EUROPEAN PRIVATE INTERNATIONAL LAW: COMMERCIAL LITIGATION IN THE EU* (3d ed. 2021); JOHN MERRILLS ET AL., *MERRILLS INTERNATIONAL DISPUTE SETTLEMENT* (7th ed. 2022).

does not otherwise have under its own law. Lack of certainty on this point can make the issue a challenging one to resolve in advance. The 2005 Hague Convention on Choice of Court Agreements<sup>23</sup> represents an effort to oblige the chosen domestic court to respect the parties' jurisdictional choice (to the exclusion of other courts) and to give effect to the resulting judgments, subject to various conditions and requirements.

Choice of Law. As indicated above, the effectiveness of a contractual stipulation of the relevant law has also been addressed in a number of PIL soft law instruments, such as the 2015 Hague Principles on Choice of Law in International Commercial Contracts, the 2016 UNIDROIT Principles of International Commercial Contracts and the OAS Guide on the Law Applicable to International Commercial Contracts in the Americas,<sup>24</sup> all of which reflect an increasing acceptance of the principle of party autonomy in this area.

Enforcement of Judgments. Knowing where the successful party to the litigation might be able to enforce a judgment in its favor is of clear practical importance and needs to be considered by counsel at the outset. In some instances, countries have concluded bilateral agreements with their neighbors incorporating such obligations (for example in judicial assistance treaties); within the EU, the subject is governed by regulation.<sup>25</sup> Globally, the 2019 Hague "Judgments Convention" aims at facilitating "the circulation of judgments" in civil and commercial disputes by establishing conditions for recognition and enforcement of judgments rendered by the courts in contracting parties, together with grounds for their refusal.<sup>26</sup>

These three sets of issues (jurisdiction, applicable law, and enforcement of judgments) are, of course, not the only areas in which PIL efforts have been undertaken to reduce the procedural obstacles parties may

23. See Convention on Choice of Court Agreements, June 30, 2005, HCCH, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>. See RONALD A. BRAND ET AL., THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENT: COMMENTARY AND DOCUMENTS (2008), for background.

24. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 12. See also UNIDROIT PRINCIPLES, *supra* note 13. See also Inter-American Convention on the Law Applicable to Int'l Contracts, *supra* note 14.

25. Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Comm. Matters, 2012 O.J. (L. 351) 1, 32.

26. See Convention on the Recognition and the Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, HCCH, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>. See also Status Table: Contracting Parties to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>.

encounter when litigating disputes with transnational dimensions. Consider the following.

Service. Different legal systems have different requirements, and rely on different methods, for notifying a litigant's opposing party of developments in the course of litigation, starting with formal notice that the proceeding has begun. U.S. practitioners are sometimes surprised to learn that, in many foreign legal systems, service of process can only be made by a government official and only by specified methods, not including personal service. Failure to observe local requirements may preclude enforcement of any resulting judgment.

To help bridge the differences, the 1965 Hague Service Convention<sup>27</sup> created an international framework for serving process outside of a home State. It applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad,"<sup>28</sup> subject to some exceptions. The United States is a party, and as a matter of U.S. law, when the Convention applies, it is both mandatory and exclusive; that is, service must be made through the channels it authorizes.<sup>29</sup>

Within the OAS, the Inter-American Convention on Letters Rogatory provides analogous methods for service of process, summons or subpoenas abroad, provided that the acts are not "acts of compulsion."<sup>30</sup> These issues have also been addressed in the Principles of Transnational Civil Procedure adopted by the American Law Institute and UNIDROIT in 2004 and subsequently modified by the European Law Institute and UNIDROIT in regard to "the particularities of specific legal systems."<sup>31</sup>

Evidence. Similarly, different legal systems have different rules for obtaining evidence in preparation for trial, and American students and

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27. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, HCCH, <https://assets.hcch.net/docs/f4520725-8cbd-4c71-b402-5aae1994d14c.pdf>. [hereinafter Hague Service Convention].

28. *Id.* art. 1.

29. See *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522 (1987). The Convention does not apply, however, where the address of the person being served is not known or where service does not cross borders, or in criminal, penal, or administrative matters.

30. See Inter-American Convention on Letters Rogatory, arts. 2a, 3, Jan. 30, 1975, O.A.S.T.S. No. 43. See also Additional Protocol to the Inter American Convention on Letters Rogatory, May 8, 1979, O.A.S.T.S. No. 56.

31. See Int'l Institute for the Unification of Private Law, *ALI/UNIDROIT Principles of Transnational Civil Procedure*, UNIDROIT <https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/> (last visited Nov. 2, 2022); and see Int'l Institute for the Unification of Private Law, *ELI/UNIDROIT Rules*, UNIDROIT, <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules/> (last visited Nov. 2, 2022).

practitioners are often surprised to find that the kind of extensive party-directed pre-trial discovery typical in U.S. courts is impermissible in many foreign jurisdictions. The 1970 Hague Evidence Convention<sup>32</sup> was designed to help bridge these differences by establishing agreed mechanisms for asking foreign authorities to carry out requests in accordance with local law. Analogous arrangements have been established within the EU<sup>33</sup> and the OAS.<sup>34</sup>

Legalization. The purpose of the 1961 Hague Apostille Convention<sup>35</sup> is to simplify the process of authenticating public documents issued in one legal system so they can be given effect in another. Such documents include birth, death, marriage, and citizenship records, graduation diplomas, certificates of incorporation, patents, and judicial documents.<sup>36</sup> The Hague Apostille Section keeps a current list of authorities designated to issue apostilles in each State Party's jurisdiction.<sup>37</sup> An electronic apostille program (e-APP) was launched in 2006.

International Commercial Courts. As an alternative to litigation in foreign domestic courts, practitioners today need to consider the possibility of litigating their disputes in one of the international commercial courts that have recently been established. Some are specialized bodies, or chambers, within domestic legal systems and others are independent, but all seek to attract commercial disputes that would otherwise be submitted to domestic litigation or international commercial arbitration.<sup>38</sup>

32. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, HCCH, <https://assets.hcch.net/docs/dfed98c0-6749-42d2-a9be-3d41597734f1.pdf> [hereinafter Hague Evidence Convention].

33. See, e.g., Council Regulation 1206/2001, of 12 December 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, arts. 1, 2, 17, 2001 O.J. (L 174) 1, 24.

34. See Inter-American Convention on Taking Evidence Abroad, Jan. 30, 1975, O.A.S.T.S. No. 44. See also Additional Protocol to the Inter-American Convention on Taking Evidence Abroad, May 24, 1984, O.A.S.T.S. No. 65.

35. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 2884 U.N.T.S., 142 [hereinafter Apostille Convention].

36. In other words, documents from a court or tribunal, administrative documents, notarial acts, or official certificates. See *Outline – HCCH 1961 Apostille Convention*, HCCH (Oct. 5, 1961), <https://assets.hcch.net/docs/80d0e86f-7da8-46f8-8164-df046285bccd.pdf>.

37. *Id.*

38. See, e.g., *Overview of the SICCC*, THE SINGAPORE INT'L COM. COURT, <https://www.sicc.gov.sg/about-the-sicc/overview-of-the-sicc> (last visited Nov. 3, 2022); *A Brief Introduction of China International Commercial Court the China International Commercial Courts*, CHINA INT'L COM. COURT, <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (last visited Mar. 14, 2022). See also *About Us*, STANDING INT'L FORUM COM. COURTS, <https://sifocc.org/about-us/> (last visited Nov. 3, 2022); Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227 (2020).

*b. Arbitration*

Alternatively, parties to international transactions may decide to forego litigation in domestic courts altogether by agreeing to submit any disputes under their contract to international commercial arbitration. While they can create their own ad hoc tribunal, it is far more common today to choose institutional or “administered” arbitration, where an existing entity (such as the International Chamber of Commerce, the Permanent Court of Arbitration, or the London Court of International Arbitration) provides not only the rules but also administrative support and assistance for the arbitration.<sup>39</sup> Some entities (such as the Stockholm Chamber of Commerce or the Singapore International Arbitration Centre) specialize on a regional basis.<sup>40</sup>

The attraction of international commercial arbitration has been strengthened by the widespread adherence of states to international agreements requiring their courts to give effect to such choices, *inter alia*, by precluding domestic suits on the same issues and enforcing the resulting arbitral awards. Among these are the New York Convention and the Inter-American Convention on International Commercial Arbitration (Panama Convention).<sup>41</sup>

Where the issues arise out of contracts that are not between private parties but between States and foreign investors, they may be eligible for arbitration according to the provisions of specialized bilateral investment treaties (BITs)<sup>42</sup> or under the rules of the International Center for the Settlement of Investment Disputes (ICSID).<sup>43</sup>

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39. See *Arbitration Rules (2021)*, ICC Blog, <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration> (last visited Nov. 3, 2022). See also *About Us*, PERMANENT COURT OF ARB, <https://pca-cpa.org/en/about/> (last visited Nov. 3, 2022). See also *LCIA*, LONDON COURT INT’L ARB., [www.lcia.org](http://www.lcia.org) (last visited Nov. 3, 2022).

40. See *About the SCC*, ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COM., <https://sccinstitute.com/about-the-scc/> (last visited Nov. 3, 2022); see also *About Us*, SINGAPORE INT’L ARBITRATION CENTRE, <https://siac.org.sg/about-us/about-us> (last visited Nov. 3, 2022); see also *China Int’l Econ. and Trade Arb. Com.*, CIEAC, [www.cietac.org](http://www.cietac.org) (last visited Nov. 3, 2022).

41. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter *Foreign Arbitral Awards Convention*].

42. See *Database of Bilateral Investment Treaties*, ICSID, <https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties> (last visited Nov. 3, 2022).

43. ICSID arbitration is governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) and specialized rules and regulations. See generally *International Centre for Settlement of Investment Disputes*, WORLD BANK GROUP, <https://icsid.worldbank.org> (last visited Nov. 3, 2022).

### c. Mediation

As a recently developed alternative to arbitration, international mediation of commercial disputes appears to be gaining in popularity, particularly with the adoption of the 2018 UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention),<sup>44</sup> which provides a legal framework for recognizing and enforcing international mediation agreements. Other relevant instruments include the EU Directive on Mediation<sup>45</sup> and UNCITRAL's 2018 Model Law on International Commercial Mediation.<sup>46</sup>

### d. Online Dispute Settlement

The emergent field of online dispute resolution (ODR) may offer an attractive method for addressing disputes arising out of low-value cross-border e-commerce transactions. UNCITRAL's Technical Notes on Online Dispute Resolution describe the stages of an ODR proceeding, discussing such aspects as the appointment, powers, and functions of the neutral ODR administrator.<sup>47</sup> The EU has also established an ODR platform intended to "make online shopping safer and fairer through access to quality dispute resolution tools."<sup>48</sup>

## 6. INSTITUTIONAL DEVELOPMENTS

Still, another way to introduce students to the field of PIL is by focusing on the recent activities of the main international institutions dedicated to creating or refining relevant rules and instruments. In different areas and in different ways, these organizations work on creating harmonized rules, recommended principles, or model laws in order to facilitate private cross-border activity. Practitioners should be aware of their

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44. G.A. Res 73/198, Singapore Convention (Dec. 20, 2018). See Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 30 AM. REV. INT'L ARB. 265 (2019).

45. See, e.g., Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 52, 2008, O.J. (L. 136) 3, 8.

46. See G.A. Res. 73/199, Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law (Dec. 20, 2018).

47. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL TECHNICAL NOTES ON ONLINE DISPUTE RESOLUTION (2017).

48. Online Dispute Resolution, EUR. COMM'N, <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register> (last visited Nov. 3, 2022).

activities; for student participants in seminars, the agendas of these organizations provide a trove of potential paper or presentation topics.

*a. UNCITRAL*

The UN Commission on International Trade Law (UNCITRAL) was established in 1966 for “the promotion of the progressive harmonization and unification of the law of international trade.”<sup>49</sup> Its main activity is to prepare and promote the adoption and use of legislative and non-legislative instruments related to key parts of commercial law.

Its focus has largely been on dispute resolution, international contract practices, transport, insolvency, e-commerce, international payments, secured transactions, procurement, and the sale of goods. Two widely adopted examples are the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)<sup>50</sup> and the 1980 UN Convention on the International Sale of Goods (CISG).<sup>51</sup> Its current focus includes ISD reform and electronic commerce, among other topics.

*b. UNIDROIT*

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental institution devoted to studying the needs and methods for modernizing, harmonizing, and coordinating private law, particularly commercial law.<sup>52</sup> Over the years, it has produced a range of conventions, model laws, principles, and legal and contractual guides on a variety of PIL topics, including the Convention on International Financial Leasing in 1988 and the Convention Providing a Uniform Law on the Form of an International Will in 1973.<sup>53</sup>

One of its most interesting accomplishments is the 2001 Cape Town Convention on International Interests in Mobile Equipment.<sup>54</sup> Large-scale

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49. G.A. Res. 2205 (XI), at art. I (Dec. 17, 1966). *See generally* U.N. COMM’N ON INT’L TRADE LAW <https://uncitral.un.org/>.

50. *See* Foreign Arbitral Awards Convention, *supra* note 41.

51. U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

52. UNIDROIT, Statute Incorporating the Amendment to Article 6(1) (entered into force Mar. 26, 1993).

53. *See* UNIDROIT, [www.unidroit.org](http://www.unidroit.org) (last visited Nov. 3, 2022), for more information about these PIL instruments.

54. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285 (separate protocols apply to aircraft, rail, and space equipment and equipment specific to mining, agricultural, and construction equipment).

mobile equipment, such as aircraft, railroad rolling stock, satellites, and construction vehicles, is costly to build, use, and maintain; it is therefore often leased rather than purchased outright. Moreover, it frequently crosses national borders: not surprisingly, the laws concerning secured interests differ from jurisdiction to jurisdiction. The Convention creates an international interest that all contracting States must recognize; to provide notice of security interests, the Convention also provides for an electronic register.<sup>55</sup>

*c. The Hague Conference*

The Hague Conference on Private International Law (HCCH) works for the progressive unification of the rules of private international law.<sup>56</sup> Its membership and its reach are global. Its goal is to contribute to “a world in which, despite the differences between legal systems, persons—individuals as well as companies—can enjoy a high degree of legal security.”<sup>57</sup>

Some of the most widely ratified Hague conventions, and, as mentioned above, some of the most useful to international practitioners, involve legalization of foreign public documents through the use of apostilles,<sup>58</sup> the rules and methods for cross-border service of legal process,<sup>59</sup> the mechanisms for obtaining evidence from abroad,<sup>60</sup> and, most recently, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.<sup>61</sup>

Another particular focus of the HCCH’s activities has been international family law, an increasingly important area of transnational practice. Here, three multilateral treaties (to all of which the United States is a party) provide important mechanisms for international cooperation:

Child Support. The 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, together with its Protocol on the Law Applicable to Maintenance Obligations, are aimed at

55. INT’L REGISTRY OF MOBILE ASSETS, <https://www.internationalregistry.aero/ir-web> (last visited Nov. 3, 2022).

56. Statute of the Hague Conference on Private International Law, Oct. 31, 1951, 220 U.N.T.S. 121.

57. *See About HCCH*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <https://www.hcch.net/en/about> (last visited Nov. 3, 2022).

58. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 2884 U.N.T.S., 142 (“Apostille Convention”).

59. *See* Hague Service Convention, *supra* note 27.

60. *See* Hague Evidence Convention, *supra* note 32.

61. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, HCCH, <https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf> [hereinafter Hague Judgments Convention].



establishing a functional system for the cross-border recovery of child support and other forms of family maintenance.<sup>62</sup> The United States became a party to this Convention in 2016; it is given domestic effect by the 2008 Uniform Interstate Family Support Act (UIFSA).<sup>63</sup>

Child Abduction. The 1980 Convention on the Civil Aspects of International Child Abduction is intended to deter the illegal removal of children (under sixteen years of age) across borders, to ensure their prompt return, and to establish reciprocal mechanisms for enforcing custodial rights in Contracting States.<sup>64</sup> In the United States, the Convention is implemented by the International Child Abduction Remedies Act (ICARA).<sup>65</sup> The Office of Children's Issues in the U.S. Department of State's Bureau of Consular Affairs serves as the U.S. Central Authority.

Intercountry Adoption. The 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption<sup>66</sup> is aimed at protecting children, and their families, against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. Contracting Parties must establish a central authority to deal with cross-border child adoption issues; as long as an adoption is made in accordance with the procedures outlined in the Convention, all other Contracting Parties must recognize the adoption "by operation of law."<sup>67</sup> In U.S. law, the Convention is implemented by the Intercountry Adoption Act of 2000 (IAA).<sup>68</sup>

Other on-going Hague efforts concern access to justice, reciprocal recognition of divorces, protection of international tourists and visitors, cross-border recognition, and enforcement of agreements in family matters involving children, legal parentage of children, and surrogacy, the form of testamentary dispositions, and recognition and enforcement of foreign civil protection orders.

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62. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, HCCH, <https://assets.hcch.net/docs/14e71887-0090-47a3-9c49-d438eb601b47.pdf>; Protocol on the Law Applicable to Maintenance Obligations, Nov. 23, 2007, HCCH, <https://assets.hcch.net/docs/d5f89587-f5f1-4c86-aa40-70472892cf11.pdf>.

63. See UNIF. INTERSTATE FAMILY SUPPORT ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2008).

64. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, HCCH, <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>.

65. See 22 U.S.C. § 9001 *et seq.* (2021). A substantial body of U.S. case law has emerged under this statute. See, e.g., *Monasky v. Taglieri*, 140 S.Ct. 719 (2020).

66. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, HCCH, <https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf>.

67. *Id.* art. 23.

68. See Pub. L. No. 106-279 (Oct. 6, 2000) (codified at 42 U.S.C.A. §§ 14901 *et seq.* (2021)).

#### d. Regional Organizations

The European Union has been active in adopting community-wide codifications of law on various private law topics, including contracts, torts, family law, and insolvency as well as jurisdiction, choice of law, and judgments.<sup>69</sup> In practice, those rules also have considerable influence over activities and transactions affecting private parties outside the EU, especially if they do business within the EU or with EU partners. The corpus and influence of EU private law instruments and initiatives is extensive and is often addressed as a separate course.

Another important regional contributor to the development of private international law is the Organization of American States (OAS).<sup>70</sup> While it does not have the same mandate with respect to political or economic integration as the EU, the OAS has nonetheless adopted many important PIL instruments, beginning with the Bustamante Code in 1928.<sup>71</sup> More recently, it promulgated the 1979 Inter-American Convention on General Rules of Private International Law, the 1975 Inter-American Convention on International Commercial Arbitration, and the 1994 Convention on the Law Applicable to International Contracts.<sup>72</sup> It has also adopted a number of important non-binding PIL instruments, such as the Principles for Electronic Warehouse Receipts for Agricultural Products, intended to highlight the importance of pursuing legislative reform as a means of promoting economic development in the agricultural sector;<sup>73</sup> the Model Law on the Simplified Corporation, aimed at encouraging States to enact legislation permitting an alternative to complicated formal requirements for

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69. See generally MICHAEL BOGDAN & MARTA PERTEGÁS SENDER, *CONCISE INTRODUCTION OF EU PRIVATE INTERNATIONAL LAW* (4th ed. 2019); FELIX WILKE, *A CONCEPTUAL ANALYSIS OF EUROPEAN PRIVATE INTERNATIONAL LAW: THE GENERAL ISSUES IN THE EU AND ITS MEMBER STATES* (2019); HOW EUROPEAN IS EUROPEAN PRIVATE INTERNATIONAL LAW? (Jan van Heine et al., eds., 2019). See also *International Law*, EUR. E-JUSTICE PORTAL, [https://e-justice.europa.eu/content\\_international\\_law-10-en.do](https://e-justice.europa.eu/content_international_law-10-en.do) (last visited Nov. 3, 2022); *EUPILLAR (European Union Private International Law: Legal Application in Reality)*, UNIV. OF ABERDEEN, <https://www.abdn.ac.uk/law/research/eupillar/.ph> (last visited Nov. 3, 2022).

70. See generally *Department of International Law: Private International Law*, OAS [http://www.oas.org/en/sla/dil/private\\_international\\_law.asp](http://www.oas.org/en/sla/dil/private_international_law.asp) (last visited Nov. 3, 2022).

71. Convention on Private International Law, Feb. 20, 1928, O.A.S.T.S. No. 23.

72. Inter-American Convention on General Rules of Private International Law, art. 2, May 8, 1979, O.A.S.T.S. No. 54; Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, O.A.S.T.S. No. 78; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42.

73. Inter-American Juridical Comm., *Report on Electronic Warehouse Receipts for Agricultural Products*, CJI/doc. 505/16 rev. 2 (Sept. 27, 2016); cf. O.A.S. Gen. Ass. Res. on International Law, AG/RES. 2926 (XLVIII-O/18) (June 5, 2018).

incorporation;<sup>74</sup> and a Guide on the Law Applicable to International Commercial Contracts in the Americas.<sup>75</sup>

In Africa, several regional bodies deal with private international law. The Organization for the Harmonization of African Business Law in Africa (OHADA) works to “harmonize business Law in Africa in order to guarantee legal and judicial security for investors and companies in its Member states.”<sup>76</sup> In 2015, OHADA created a Common Court of Justice and Arbitration (CCJA), based in Abidjan, Côte d’Ivoire, with three functions: judicial, advisory, and arbitration.<sup>77</sup> In 2012, the Southern African Development Community (SADC) created a model Bilateral Investment Treaty. Although it is non-binding and aimed primarily at adoption by States, this treaty can serve to help resolve disputes over the rights and obligations of private international investors.<sup>78</sup> The Common Market for Eastern and Southern Africa (COMESA) Treaty also includes provisions on private investment.<sup>79</sup>

The Asia-Pacific Economic Cooperation (APEC) has been active in a number of PIL areas, including cross-border privacy issues, investment law, and on-line dispute resolution.<sup>80</sup> In East and Southeast Asia, scholars from 10 different countries recently created the Asian Principles of Private International Law (APPIL), a project aimed at harmonizing the region’s PIL rules and principles.<sup>81</sup> Although APPIL activities remain soft law—

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74. See OEA Secretary-General, Model Law on the Simplified Corporation: Status of Reforms in the Region, DDI/doc. 3/21 rev. 1 (June 14, 2021).

75. See *Department of International Law*, OAS, [http://www.oas.org/en/sla/dil/publications\\_Guide\\_Law\\_Applicable\\_International\\_Commercial\\_Contracts\\_Americas\\_2019.asp](http://www.oas.org/en/sla/dil/publications_Guide_Law_Applicable_International_Commercial_Contracts_Americas_2019.asp) (last visited Nov. 3, 2022), for access to the Guide.

76. See *General Overview*, OHADA, <https://www.ohada.org/index.php/en/ohada-in-a-nutshell/general-overview> (last visited Nov. 3, 2022).

77. See *Bibliothèque Numérique de L’OHADA: Actualités*, OHADA, [http://biblio.ohada.org/pmb/opac\\_css/index.php](http://biblio.ohada.org/pmb/opac_css/index.php) (last visited Nov. 3, 2022) (for reports of CCJA cases in French only).

78. See SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY (2012), <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>.

79. See Treaty Establishing the Common Market for Eastern and Southern Africa, art. 158, Nov. 5, 1993, COMESA, <https://www.comesa.int/wp-content/uploads/2020/07/Comesa-Treaty.pdf>.

80. See generally, *About APEC*, ASIAN-PACIFIC ECON. COOPERATION, <https://www.apec.org/About-Us/About-APEC> (last visited Nov. 3, 2022).

81. See generally Weizuo Chen & Gerald Goldstein, *The Asian Principles of Private International Law: Objectives, Contents, Structure, and Selected Topics on Choice of Law*, 13 J. PRIV. INT’L L. 411 (2017); Uematsu Mao, *APPIL (Asian Principles of Private International Law) and its Perspective Regarding International Jurisdiction*, 37 RITSUMEIKAN L. REV. 35 (2019); CONVERGENCE AND DIVERGENCE OF PRIVATE LAW IN ASIA (Gary Low ed., Cambridge Univ. Press) (2021).

nothing APPIL creates is binding on any State—its activities and instruments are persuasive and may function as models for various domestic jurisdictions.<sup>82</sup>

## 7. GLOBAL GROWTH AND DEVELOPMENT

Finally, a different approach (but one well suited for law school seminars and practicums) is to consider private international law from the perspective of the roles it can play in (and more precisely, the contributions it can make to) global economic growth and development. This is an understudied but increasingly important area, with great potential for introducing students to the broader implications of the field.<sup>83</sup>

A useful point of reference for such an approach is offered by the UN Sustainable Development Goals (SDGs), first adopted in 2000 and revised in 2015.<sup>84</sup> The seventeen goals at the core of Agenda 2030 constitute a suggested blueprint for achieving global economic progress in a manner consistent with social justice and the planet's environmental limits. Many of its recommendations and objectives implicate PIL issues, directly or indirectly.

These implications have recently been explored in a remarkable anthology entitled *THE PRIVATE SIDE OF TRANSFORMING OUR WORLD—UN SUSTAINABLE DEVELOPMENT GOALS 2030 AND THE ROLE OF PRIVATE INTERNATIONAL LAW*, edited by Ralf Michaels, Verónica Ruiz Abou-Nigm, and Hans van Loon.<sup>85</sup> In their introductory chapter, the editors observe that, while the SDG's have attracted world-wide support and constitute "the most authoritative and comprehensive global guide humanity has ever had," they give scant attention to the role private international law can—and should—play in achieving them.<sup>86</sup>

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

82. Chen & Goldstein, *supra* note 81, at 433.

83. See generally David P. Stewart, *Private International Law, the Rule of Law, and Economic Development*, 56 VILL. L. REV. 607 (2011).

84. See G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Sept. 25, 2015).

85. *THE PRIVATE SIDE OF TRANSFORMING OUR WORLD* (Ralf Michaels et al., eds. 2021) (hereinafter *THE PRIVATE SIDE*) (the contributions were presented at a conference organized by the Max Planck Institute for Comparative and Private International Law).

86. *Id.* at 9 ("The SDGs are ambitious, and it will take enormous efforts on multiple levels to achieve them. It is therefore striking, given the multilevel governance model, that nearly all instruments and institutions mentioned throughout the targets belong to the realm of public international law").

law. Private law, therefore, has an important role to play in the quest for sustainability, and this is increasingly being recognized ....

We see an important, constructive role for private international law as an indispensable part of the global legal architecture. It is needed to turn the SDGs into reality, to reduce the tension between development and sustainability, and to reinforce the human rights component of the SDGs in cross-border situations, in short: to do its part to strengthen the SDGs' plan of action.<sup>87</sup>

The overall focus of the volume is on the role and specific application of PIL instruments, doctrines, and techniques with recommendations for reform. Each of the substantive chapters explores a specific SDG from that perspective, addressing in turn issues of poverty, hunger, health and well-being, education, gender equality, clean water and sanitation, energy, work and economic growth, innovation and infrastructure, inequality, sustainable cities and communities, consumption and production, climate, life on land and below water, peace and justice, and “partnership for the goals.” Such partnership signifies the “interplay between multi-stakeholder partnerships and private international law” and indicates “how transformative and innovative partnering initiatives can shape the implementation” of the SDG's.<sup>88</sup>

An overarching theme is that insufficient use has been made of private international law in the SDGs and more generally in international governance instruments. Among the book's objectives is to address this “underutilization” by making “the implicit role of private international law explicit and to demonstrate concretely in what ways private international law already exists with regard to the SDGs.”<sup>89</sup> To accomplish that goal, the editors contend that some “rethinking, re-conceptualizing and re-configuring” will be necessary in order for private international law to contribute to the accomplishment of these goals.<sup>90</sup>

In that regard, the editors distinguish between PIL's “regulating” and “enabling” functions: on the one hand, how it contributes to protecting the vulnerable or weaker parties in a transactional situation and, on the other, how it facilitates cross-border relations and transactions by enabling parties to transcend the boundaries of their legal orders and systems. Party autonomy is an example of how private international law can enable the

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87. *Id.*

88. Fabricio B. Pasquot Polido, *Partnership for the Goals*, in *THE PRIVATE SIDE OF TRANSFORMING OUR WORLD* 541, 543 (Ralf Michaels et al., eds. 2021).

89. *THE PRIVATE SIDE*, *supra* note 85, at 11.

90. *Id.* at 26.

parties to choose a competent court or arbitral tribunal.<sup>91</sup> The editors note that most, if not all, of the multilateral treaties adopted by the Hague Conference, UNIDROIT, and UNCITRAL do in fact serve one or more purposes of the SDG's.

On the other hand, they observe that “traditional private international law approaches offer little integration of sustainability concerns.”<sup>92</sup> For example, they point in particular to the absence of harmonization efforts in relation to environmental damage, both at the global level in the context of the Hague Conference and, with the exception of the EU, at the regional level. Consideration of SDG 15 should accordingly “provoke a reconceptualization of how regulatory private international law rules on jurisdiction, applicable law and enforcement of judgments could play a greater governance role ‘geared at environmental protection and sustainability... rather than its apparently neutral basis, commonly undergirded in a trade context by deference to party autonomy.’”<sup>93</sup>

The volume identifies a number of areas where PIL may be seen as underutilized or even disregarded—and where it might accordingly play a more constructive role in overcoming the “public/private divide,” including, *inter alia*, questions related to labor contracts and labor market issues, cross-border migration, tort issues resulting from medical malpractice in healthcare, and contractual freedom and dispute resolution facilitated by digitization and other developments resulting from international flows of information.

In particular, a number of chapters discuss how the private sector can and should engage more effectively with issues of responsible business conduct in the context of the various global, regional and national initiatives aimed at reinforcing corporate responsibility for human rights violations and damage to the environment. As the editors note, “this reinforcement of corporate social responsibility (CSR) has many implications for private international law: it affects rules on jurisdiction, the law applicable to contracts and torts (including the correcting mechanisms of overriding mandatory rules and public policy), and the enforcement of judgments, all of which may need to be revisited to see whether they are still ‘fit for purpose.’”<sup>94</sup>

In short, the volume articulates an important constructive role for private international law as an indispensable part of the global legal architecture. The most pressing challenge for PIL is to provide greater

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91. *Id.* at 14.

92. *Id.* at 22.

93. *Id.*

94. *Id.* at 21.

clarity, security, and protection to the weaker parties in relationships, whether contractual or not. The volume underscores the need for private international lawyers to be aware of, and to engage with, the larger political, social, economic, cultural, and public international law context of their daily work when dealing with cross-border private law relationships and transactions.<sup>95</sup> This perspective and exhortation make the volume particularly relevant for those engaged in preparing law students for an internationally oriented career.

#### 8. CONCLUSION

Introducing our law students to the issues, methodology, and challenges of private international law must be an important component of preparing them to practice in an increasingly internationalized society. As an homage to Bob Lutz's creative approach to training the next generations of international practitioners, this essay has outlined several possible approaches to introducing them to the substantive and procedural problems that arise where public and private interests meet along the border between domestic and international law.

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95. *Id.* at 27.