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# A Journey of Thailand to The Hague Conference on Private International Law: A Christmas Carol

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*The Hague Conference on Private International Law (HCCH) is the oldest active international organization with legal capacity in the progressive unification of Private International Law (PIL). The HCCH aims to progressively unify PIL to address legal problems in the form of universal regulations. Thailand is aware of the significance and importance of co-operation in PIL, as shown by the accession of Thailand to the HCCH in 2021. This article will examine Thailand's situation with a technique employed by Charles Dickens in his heartwarming story, 'A Christmas Carol,' which examined one character's experience with reference to events in the past, the present, and the future. The past will be examined through the genealogy of PIL and the experience of Thailand before joining the HCCH. The present will address the status of Thailand in the HCCH. The future will be discussed as suggestions for Thailand after becoming a Member of the HCCH.*

## Keywords

The Hague Conference on Private International Law, Private International Law, Thailand, Eurocentric, Conflict of Laws, Unification and Harmonization of Law

*... Private international law is not the same in all countries.*

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*There is no one system that can claim universal recognition, though there has been a significant movement in recent years towards the harmonisation of private international law rules between groups of countries.*<sup>1</sup>

## I. Introduction

The Hague Conference on Private International Law (HCCH) is the oldest active international organization with legal capacity<sup>2</sup> in the progressive unification of Private International Law (PIL).<sup>3</sup> The HCCH does not aim to affect the sovereignty of member States of the HCCH; it focuses rather on facilitating the daily lives of their nationals in cross-border civil and commercial activities. Since people travel beyond their sovereign territories, sometimes an unforeseen range of questions arises from those cross-border activities. These potential problems have been enhanced by the speedy development of the globalization era.<sup>4</sup> The HCCH's role is to ensure the legal security of those nationals and legal persons by providing a bridge for them to walk across and removing legal obstacles. Thailand is aware of the significance and importance of co-operation in PIL. It has shown good faith and global commitment by becoming a Member of the HCCH in 2021.<sup>5</sup>

Charles Dickens's novel "A Christmas Carol" contains a colorful story from the mid-Victorian era which still has much to teach us.<sup>6</sup> As Dickens's literature illustrates for readers the deepest truths about the meaning of humanity, nowhere does he do that more effectively or with greater clarity than in his book. In this article, under the fear of the chains carried by the ghost of Jacob Marley, I would humbly summon the three Ghosts of Christmas to represent the journey of Thailand and the HCCH. The Ghost of Christmas Past, represented in Parts two and three, provides a brief genealogy of PIL up to the nineteenth century in hopes of shedding light on the evolution and dynamics of the HCCH that have led us to the present. The Ghost of

<sup>1</sup> P. TORREMANS ET AL., CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 8 (15th ed. 2017).

<sup>2</sup> H. CHIU, THE CAPACITY OF INTERNATIONAL ORGANIZATIONS TO CONCLUDE TREATIES, AND THE SPECIAL LEGAL ASPECTS OF THE TREATIES SO CONCLUDED 19-48 (1966).

<sup>3</sup> HCCH Statute art. 1.

<sup>4</sup> R. Wai, *Transnational Liftoff and Juridical Touchdown: The regulatory function of private international law in an era of globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002).

<sup>5</sup> The Hague Conference on Private International Law, CGAP 2021: New Members, requests and signatures (Mar. 3, 2020), <https://www.hcch.net/en/news-archiv/details/?varevent=793>.

<sup>6</sup> C. DICKENS, A CHRISTMAS CAROL (1843).

Christmas Present, represented in Part four, draws on the organizational structure under the HCCH Statute and three main areas of the HCCH Conventions. The Ghost of Christmas Yet to Come, represented in Part five, offers possible assessments of the impact of the HCCH on Thailand's accession, suggestions as to which the HCCH Conventions should be taken into consideration and other possible outcomes of joining the HCCH.

## II. The Origins and Development of PIL

The scope of PIL<sup>7</sup> can be described through several approaches. The classical meaning would limit its scope to conflicts of laws, while the modern one has more expansive meaning including the exercise of domestic jurisdiction and enforcement of foreign judgments.<sup>8</sup> As a result, the *raison d'être* of PIL arose when the development of law became 'territorial' in its application, instead of 'personal.' A great number of separate domestic legal systems were divided from each other by various regulations.<sup>9</sup> Two major factors-municipal judicial decisions and European ideas-have contributed to and influenced the earliest historical development of PIL. The shaping of this branch of law was mainly a byproduct of juristic writings.<sup>10</sup>

In the beginning, some understanding of Roman law is an essential prerequisite for analyzing the evolution of PIL.<sup>11</sup> Even though there were no precise PIL rules

<sup>7</sup> The terminology of PIL was established in Continental Europe via European scholars such as Jean-Jacques Gaspard Foelix and Wilhelm Schaeffner, but the US and the rest of the Common Law States would rather prefer the terminology of "Conflict of Laws." See E. Zitelmann, *der Name, internationales Privatrecht*, 27 NIEMEYERS ZEITSCHRIFT FÜR INTERNATIONALES RECHT 177-96 (1918), recited from R. Michaels, *Globalizing Savigny?: The State in Savigny's Private International Law and the Challenge from Europeanization and Globalization*, in AKTUELLE FRAGEN ZU POLITISCHER UND RECHTLICHER STEUERUNG IM KONTEXT DER GLOBALISIERUNG 124 (M. Stolleis & W. Streeck eds., 2007); F. Juenger, *Private International Law or International Private Law*, 5 KING'S COLLEGE L. J. 45 (1994-95).

<sup>8</sup> P. TORREMAN ET AL., CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 6-7 (15th ed. 2017). See also D. Stewart, *Private International Law: A dynamic and developing field*, 30 U. PA. J. INT'L L. 1121-22 (2009).

<sup>9</sup> See generally P. GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (5th ed. 2014); R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (1978).

<sup>10</sup> See generally A. Mills, *The Private History of International Law*, 55 INT'L & COMP. L. Q. 1 (2006).

<sup>11</sup> F. VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 50 (W. Guthrie trans., 1880).

in the Roman law system,<sup>12</sup> it still provides an important legal methodology<sup>13</sup> and thought<sup>14</sup> that influenced contemporary legal theories.<sup>15</sup> Therefore, the ideal inspiration of PIL traces to Roman law.<sup>16</sup>

The concept of conflict of laws did not exist in the Roman times. Because the Roman Empire immediately annexed other territories into the imperial part,<sup>17</sup> it recognized neither different peoples, nor their legal systems.<sup>18</sup> As a result, Roman law was divided into *jus civile* applying to citizens<sup>19</sup> and *jus gentium* applying to non-citizens.<sup>20</sup> Also, there was *praetor peregrinus* system to hear disputes where both parties were non-citizens. Based on general principles of law, the adjudications of *praetor peregrinus* became part of *jus gentium*.<sup>21</sup> Therefore, the Roman law had a homogenized legal system without conflict of law.<sup>22</sup>

There was no territorial map before the Treaty of Westphalia.<sup>23</sup> Accordingly,

- <sup>12</sup> N. Hatzimihail, *On the Doctrinal Beginnings of the Conflict of Laws*, in XXI Y.B. PRIVATE INT'L L. (2019/2020) 101-2 (A. Bonomi & G. Romano eds., 2021). Cf. C. PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 192 & 265 (1911); P. VINOGRADOFF, *ON THE HISTORY OF INTERNATIONAL LAW AND INTERNATIONAL ORGANIZATION: COLLECTED PAPERS OF SIR PAUL VINOGRADOFF* 87-100 (W. Butler ed., 2009).
- <sup>13</sup> E. Rabel, *Private Laws of Western Civilization*, 10 LA. L. REV. 2-13 (1949). Another theory of PIL tradition, which pre-dates the European, had developed in China. Since the choice of law principle have been extant in Code of Tang dynasty promulgated around 630 A.D. See C. KIM, *SELECTED WRITING ON ASIAN LAW* 439 (1982). Cf. the European doctrines of PIL was introduced to China in the early 1980s. See also Q. Kong & H. Minfei, *The Chinese Practice of Private International Law*, 3 MELB. J. INT'L L. 415 (2002).
- <sup>14</sup> F. Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. INT'L & COMP. L. REV. 257 (1981).
- <sup>15</sup> E.g. The Romans used their legal tools to justify expansion of Roman Empire. See L. Benton & B. Straumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 1 L. & HIST. REV. 138 (2010).
- <sup>16</sup> See generally D. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* (2001); S. Verosta, *International Law in Europe and Western Asia between 100 and 650 A.D.*, in 113-III RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 485 (1964). See also A. Nussbaum, *The Significance of Roman Law in the History of International Law*, 100 U. PA. L. REV. 678 (1952).
- <sup>17</sup> S. Neff, *A Short History of International Law*, in INTERNATIONAL LAW 33 (M. Evans ed., 2003); J. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 14 (1992).
- <sup>18</sup> M. WOLFF, *PRIVATE INTERNATIONAL LAW* 20 (2d ed. 1950). See also H. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 300 (1953).
- <sup>19</sup> A. Sherwin-White, *The Roman Citizenship. A survey of its development into a world franchise*, in BAND 2 RECHT, RELIGION, SPRACHE UND LITERATUR (BIS ZUM ENDE DES 2. JAHRHUNDERTS V. CHR.) 23-58 (H. Temporini & W. Haase eds., 2016). See also D. Bradeen, *Roman Citizenship per magistratum*, 54 CLASSICAL J. 221-8 (1959).
- <sup>20</sup> D. Jackson, *Jus Gentium*, in ENCYCLOPEDIA OF GLOBAL JUSTICE (D. Chatterjee ed., 2011), [https://doi.org/10.1007/978-1-4020-9160-5\\_306](https://doi.org/10.1007/978-1-4020-9160-5_306). See also H. Clark, *Jus Gentium Its Origin and History*, 14 ILL. L. REV. 243 (1919-20).
- <sup>21</sup> S. NEFF, *JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW* 46 (2014); G. Sherman, *Jus Gentium and International Law*, 12 AM. J. INT'L L. 56-63 (1918).
- <sup>22</sup> C. PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 301 (1911).
- <sup>23</sup> J. Branch, *Mapping the Sovereign State: Technology, Authority, and Systemic Change*, 65 INT'L ORG. 1-36 (2011); D. Hassan, *The Rise of the Territorial State and the Treaty of Westphalia*, in Y.B. N.Z. & JURISPRUDENCE (vol. 9) 62-70 (2006).

the applicable law to a dispute was determined by the personal laws<sup>24</sup> of the disputants, not by the location of the court or of the disputed event or thing.<sup>25</sup> Then, in the eleventh century, a large number of Italian city-states<sup>26</sup> gave rise to the notion of territorial law. The increasing volume of international trade and commerce in the medieval world developed quickly within the European city-states and soon expanded to the Arab world.<sup>27</sup> This sometimes led to disputes<sup>28</sup> that included significant foreign elements.<sup>29</sup> Political and cultural diversity of European city-states did not prevent an increased level of mutual respect between distinct legal systems, which were no longer bound by the scope of Roman law.<sup>30</sup> In this regard, those emerging city-states encountered social and commercial relationships between their subjects that generated conflict of laws issues.<sup>31</sup>

This *circumsto* caused problems for the traditional legal systems in those emerging city-states. Then, there were two main types of legal development: the ancient concept of personal law and the local law. These developed together along with the growth of European city-states.<sup>32</sup> In fact, from the law that applied to persons due to their origins, there were also disruptions with the law that applied to persons based upon the territory. The conflict between personal law and territorial law opened the dawn of PIL in the late twelfth century.<sup>33</sup> After the fall of the Roman Empire, Western

<sup>24</sup> For the historical development. See J.-L. Halpérin, *Personal Laws: Undetermined Norms and Undetermined Concept?*, 40 LIVERPOOL L. REV. 254-5 (2019).

<sup>25</sup> F. JUENGER, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 7 (2001). See also J. Weinstein, *The Dutch Influence on the Conc5hghjhnbgvghjnm nb eption of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 80-1 (1990).

<sup>26</sup> S. Epstein, *The Rise and Fall of Italian City-States*, in *A COMPARATIVE STUDY OF THIRTY CITY-STATE CULTURES: AN INVESTIGATION CONDUCTED BY THE COPENHAGEN POLIS CENTRE 277-94* (M. Hansen ed., 2000). See also G. Chittolini, *Cities, "City-States," and Regional States in North-Central Italy*, 18 THEORY & SOC'Y 689-706 (1989).

<sup>27</sup> L. Blaydes & C. Paik, *Muslim Trade and City Growth before the Nineteenth Century: Comparative urbanization in Europe, the Middle East and Central Asia*, 51 BRIT. J. POL. SCI. 845-51 (2021). See also P. Lantschner, *Fragmented Cities in the Later Middle Ages: Italy and the near east compared*, 130 ENGLISH HIST. REV. 546-82 (2015).

<sup>28</sup> K. FLEET, *EUROPEAN AND ISLAMIC TRADE IN THE EARLY OTTOMAN STATE: THE MERCHANTS OF GENOA AND TURKEY* 1-12 (1999).

<sup>29</sup> W. WATT, *THE INFLUENCE OF ISLAM ON MEDIEVAL EUROPE* 17-9 (1994).

<sup>30</sup> M. George, *Roman Law, Medieval Jurisprudence and the Rise of the European Ius Commune: Perspectives on the origins of the Civil Law tradition*, 47 J. L. & POL. 22-84 (2015). See also H. Mather, *The Medieval Revival of Roman Law: Implications for contemporary legal education*, 41 CATH. LAW. 323 (2002).

<sup>31</sup> R. d. Nova, *Historical and Comparative Introduction to the Conflict of Laws*, in 118 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, 441-77 (1966). See also S. Guterman, *The First Age of European Law: The origin and character of the conflict of laws in the early Middle Ages*, 7 N.Y. L.F. 131 (1961).

<sup>32</sup> C. PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 284-5 & 295-6 (1911). See also E. Bodenheimer, *The Influence of Roman Law on Early Medieval Culture*, 3 HASTINGS INT'L & COMP. L. REV. 9 (1979); A. Chroust, *The Function of Law and Justice in the Ancient World and the Middle Ages*, 7 J. HIST. IDEAS 298-320 (1946).

<sup>33</sup> K. Lipstein, *The General Principles of Private International Law*, in 113 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 118 (1972). See also Yntema, *supra* note 18, at 302.

Europe was divided into different ethnic or tribal communities<sup>34</sup> to protect and secure themselves against the rise of the Ottoman Empire.<sup>35</sup> An exodus of Byzantine scholars and émigrés found their harbor on the Italian peninsula,<sup>36</sup> representing a kind of progress on the eve of the Middle Ages.<sup>37</sup>

With the Italian Renaissance in the fourteenth century, Roman law was re-adopted<sup>38</sup> and interpreted in many commercial law areas.<sup>39</sup> In addition, the Roman model of the settler colonies<sup>40</sup> applied in each city-state almost uniformly.<sup>41</sup> Simultaneously, local laws were widely applied in each city-state and merged into their legal system.<sup>42</sup> After the sixteenth century, there were two important developments - the fall of feudalism in Europe and the rise of the sovereign states. This resulted in the concept of domestic law, which was developed throughout Europe<sup>43</sup> as a product of the Westphalian system.<sup>44</sup> The dynamic of PIL in Europe developed against the background of the legal approaches in each nations' territory. As such, the next phase of PIL theories were shaped by each state into different approaches, *inter*

<sup>34</sup> S. Kassan, *Extraterritorial Jurisdiction in the Ancient World*, 29 AM. J. INT'L L. 237 (1935).

<sup>35</sup> J. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 82 (1992). See also B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 45 (1975).

<sup>36</sup> See generally D. HAY, THE ITALIAN RENAISSANCE IN ITS HISTORICAL BACKGROUND (2d ed. 1997).

<sup>37</sup> G. Walker, *When did 'the Medieval' End?: Retrospection, foresight, and the end(s) of the English Middle Ages*, in THE OXFORD HANDBOOK OF MEDIEVAL LITERATURE IN ENGLISH 725-38 (G. Walker & E. Treharne eds., 2010). See also D. Sullivan, *The End of the Middle Ages: Decline, crisis, or transformation?*, 14 HIST. TEACHER 551-65 (1981).

<sup>38</sup> See generally P. VINOGRADOFF, ROMAN LAW IN MEDIAEVAL EUROPE (1909).

<sup>39</sup> See generally A. SCHILLER, ROMAN LAW: MECHANISMS OF DEVELOPMENT (2011).

<sup>40</sup> J. Rich, *The Mommsen of the Renaissance: Sigonio, the De antiquo iure populi Romani, and Roman Republican Colonization*, in THE RENAISSANCE OF ROMAN COLONIZATION: CARLO SIGONIO AND THE MAKING OF LEGAL COLONIAL DISCOURSE 48-94 (J. Pelgrom & A. Weststeijn eds., 2020).

<sup>41</sup> F. Juenger, *The lex mercatoria and Private International Law*, 60 LA. L. REV. 1133 (2000). See also J. Baker, *The Law Merchant and the Common Law before 1700*, 38 CAMBRIDGE L. J. 295 (1979).

<sup>42</sup> A. Cordes & P. Höhn, *Extra-Legal and Legal Conflict Management among Long-Distance Traders (1250-1650)*, in THE OXFORD HANDBOOK OF EUROPEAN LEGAL HISTORY 509-27 (H. Pihlajamäki et al. eds., 2018); R. LESAFFER, EUROPEAN LEGAL HISTORY: A CULTURAL AND POLITICAL PERSPECTIVE 289-371 (J. Arriens trans., 2009).

<sup>43</sup> H. Berman & C. Reid, *Roman Law in Europe and the Jus Commune: A historical overview with emphasis on the new legal science of the sixteenth century*, 20 SYRACUSE J. INT'L L. & COM. 1 (1994).

<sup>44</sup> P. Milton, *Guarantee and Intervention: The assessment of the peace of Westphalia in international law and politics by authors of natural law and of public law, c. 1650-1806*, in THE LAW OF NATIONS AND NATURAL LAW 1625-1800, 186-226 (S. Zurbuchen ed., 2019). See also M. Filho, *Westphalia: A paradigm? A dialogue between law, art and philosophy of science*, 8 GERMAN L. J. 955-75 (2007). Cf. the author argued that Westphalian system gained universal acceptance at the mid-eighteenth century onwards. See C. Kampmann, *The Treaty of Westphalia as Peace Settlement and Political Concept: From a German security system to the constitution of international law*, in INTERNATIONAL LAW AND PEACE SETTLEMENTS 64-85 (M. Weller et al. eds., 2021).

*alia*, the French approach,<sup>45</sup> the English approach,<sup>46</sup> the Dutch approach,<sup>47</sup> the German approach,<sup>48</sup> and the Common Law approach.<sup>49</sup>

Hence, the fragmentation and dynamic have been reflected in the variety of PIL rules placed in each different territory.<sup>50</sup> The problem of choosing the applicable law for each adjudication has been seriously addressed among the jurists. The development of PIL grew from a set of doctrinal principles in the nineteenth century's European jurisprudence. Ultimately, however, it was the result of the efforts of a large group of sophisticated lawyers working in dynamic and rapidly evolving fields with direct relevance in a broad spectrum of international and transnational contexts.<sup>51</sup> The next evolution of PIL after the nineteenth century was the need for the regulatory convergence or unification and harmonization<sup>52</sup> of PIL between the scholarly endeavors that were taking place in numerous nation States.<sup>53</sup>

<sup>45</sup> J. Paul, *Comity in International Law*, 32 HARV. INT'L L. J. 20-1 (1991). See also Yntema, *supra* note 18, at 304-8.

<sup>46</sup> F. JUENGER, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 19 (2001). See also Paul, *supra* note 45, at 18; A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 28 (1954); A. Anton, *The Introduction into English Practice of Continental Theories on the Conflict of Laws*, 5 INT'L & COMP. L. Q. 534 (1956).

<sup>47</sup> F. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 20-1 (1993). See also H. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 23-4 (1966); L. v. BAR, *THEORY AND PRACTICE OF PRIVATE INTERNATIONAL LAW* 38-9 (G. Gillespie trans., 2d ed., 1892). See also R. Paul, *The Transformation of International Comity*, 71 L. & CONTEMP. PROBS. 22-3 (2008); R. Carswell, *The Doctrine of Vested Rights in Private International Law*, 8 INT'L & COMP. L.Q. 268-88 (1959); A. Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 192 (1942).

<sup>48</sup> F. VON SAVIGNY, *A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME* (W. Guthrie trans., 1880). See also S. PEARL, *THE FOUNDATION OF CHOICE OF LAW: CHOICE AND EQUALITY* (2018).

<sup>49</sup> K. Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A comment*, 5 AM. J. LEGAL HIST. 230-53 (1961). See also W. Cornish et al., *Private International Law*, in *THE OXFORD HISTORY OF THE LAWS OF ENGLAND: VOLUME XI: 1820-1914 ENGLISH LEGAL SYSTEM* 278-85 (W. Cornish et al. eds., 2010); J. Paul, *Comity in International Law*, 32 HARV. INT'L L. J. 1 (1991); A. Kuhn, *Doctrines of Private International Law in England and America Contrasted with Those of Continental Europe*, 12 COLUM. L. REV. 44-57 (1912).

<sup>50</sup> A. Delic, *Contingencies in The Rise of European and Latin American Private International Law, 1850 to 1950*, in *CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES* 507-12 (I. Venzke & K. Heller eds., 2021).

<sup>51</sup> R. BANU, *NINETEENTH CENTURY PERSPECTIVES ON PRIVATE INTERNATIONAL LAW* (2018). See also T. C. Hartley, *The Modern Approach to Private International Law. International Litigation and Transactions from a Common-Law Perspective*, in 319 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9-324 (2006); Stewart, *supra* note 8, at 1121-31.

<sup>52</sup> M. Gebauer & F. Berner, *Unification and Harmonization of Laws*, in *MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW* (2019), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1123?rskey=KIntNj&result=1&prd=MPIL>.

<sup>53</sup> A. Delic *The Role of Comparative Law in the Development of Modern Private International Law (1750-1914)*, in *INTERNATIONAL LAW IN THE LONG NINETEENTH CENTURY (1776-1914): FROM THE PUBLIC LAW OF EUROPE TO GLOBAL INTERNATIONAL LAW?* 186-213 (I. Hulle & R. Lesaffer eds., 2019). See also K. Boele-Woelki, *Unification and Harmonization of Private International in Europe*, in *PRIVATE LAW IN THE INTERNATIONAL ARENA: FROM NATIONAL CONFLICT RULES TOWARDS HARMONIZATION AND UNIFICATION* 61-78 (J. Basedow et al. eds., 2000).

### III. The Birth and Evolution of the HCCH

#### A. The Beginning

In the late eighteenth century (before HCCH), positivism and the codification movement<sup>54</sup> dominated the most part of the European continent<sup>55</sup> and Latin America.<sup>56</sup> The wave of globalization triggered by the Industrial Revolution forced countries to address a legal obstacle that had previously existed only in local provisions.<sup>57</sup> The initial attempt came from Stanislao Mancini, who called a conference on PIL in 1885 at Rome. This conference was joined by most of the European and Latin American States (with Germany being a notable exception).<sup>58</sup> The assenting countries all sent their diplomatic mission.<sup>59</sup> Although the United States (US) acknowledged the importance of the harmonization of law, it declined to participate in this conference due to the constitutional relationship between the states and the federal government.<sup>60</sup>

The movement of codification also restarted in Latin America. In 1878, the Treaty of Lima was concluded, but it failed to be ratified.<sup>61</sup> The first successful codification was the product of a diplomatic conference at Montevideo in 1889.<sup>62</sup> Afterwards, the Netherlands proposed the first European conference in The Hague as the neutral venue in 1893. The first session of the HCCH was successfully initiated by Tobias

<sup>54</sup> K. ZWEIFERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 242 (1998).

<sup>55</sup> R. Zimmermann, *Codification: The civilian experience reconsidered on the eve of a Common European Sales Law*, in CODIFICATION IN INTERNATIONAL PERSPECTIVE 17 (W. Wang ed., 2014).

<sup>56</sup> A. Garro, *Unification and Harmonization of Private Law in Latin America*, 40 AM. J. COMP. L. 587-616 (1992).

<sup>57</sup> J. Basedow, *The Hague Conference and the Future of Private International Law: A Jubilee Speech*, 82 J. COMP. L. & INT'L PRIV. L. 923-4 (2018).

<sup>58</sup> Bar, *supra* note 47, at 977.

<sup>59</sup> K. Nadelmann, *Mancini's Nationality Rule and Non-Unified Legal Systems: Nationality versus domicile*, 17 AM. J. COMP. L. 438-39 (1969).

<sup>60</sup> K. Nadelmann, *Ignored State Interests: The federal government and international efforts to unify rules of private law*, 102 U. PA. L. REV. 328 (1954). See also J. Ku, *The Crucial Role of the States and Private International Law Treaties: A model for accommodating globalization*, 73 MO. L. REV. 1063 (2008).

<sup>61</sup> E. Lorenzen, *Pan-American Code of Private International Law*, 4 TUL. L. REV. 499 (1929-30).

<sup>62</sup> M. Argüas, *The Montevideo Treaties of 1889 and 1940 and their Influence on the Unification of Private International Law in South America*, in THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 345-60 (M. Bos ed., 1973). See also W. Bewes, *The Treaties of Montevideo (1889)*, 6 TRANSACTIONS OF THE GROTIUS SOC'Y 59-79 (1920).



Michael Carel Asser<sup>63</sup> together with his eminent friends<sup>64</sup> and the political will of the participating governments.<sup>65</sup> The HCCH inspired the first International Peace Conference, which took place in 1899.<sup>66</sup> The HCCH extended its membership to Japan as the first non-European state during the fourth Hague Conference in 1904.<sup>67</sup> Due to the imperialism, however, the European nations dominated the world beyond the shores of Continental Europe.<sup>68</sup> The HCCH finally influenced not only their colonized countries but also extended across the globe.<sup>69</sup>

Those first four HCCH sessions, all presided over by Asser, achieved seven Conventions which have been called the ‘old’ Conventions.<sup>70</sup> Asser proposed that other nations appoint permanent commissions to prepare for the work of the HCCH according to the Dutch example. His vision was to lay the foundation for an international organization to codify international civil law without any domination and interference from any states.<sup>71</sup> The progressive works of the HCCH stumbled during the two World Wars,<sup>72</sup> because some members withdrew from Conventions and no new Conventions were adopted at the fifth and sixth Hague Conferences. The HCCH only had a loose structure. Each session was organized *ad hoc* on the call of the Dutch Government with a temporary secretariat. In this course, Asser’s hopes for the HCCH finally became visible during the seventh Hague Conference in 1951,

<sup>63</sup> H. van Loon, *The Hague Conference on Private International Law: Asser’s vision and an evolving mission*, in THE HAGUE YEARBOOK OF INTERNATIONAL LAW (Vol. 24) 3-10 (N. Lavranos & R. Kok eds., 2012). See generally A. EYFFINGER, T.M.C. ASSER [1838-1913] FOUNDER OF THE HAGUE TRADITION: DREAMING THE IDEAL, LIVING THE ATTAINABLE (2011).

<sup>64</sup> They were Louis Renault (France), Augusto Pierantoni (Italy), and Friedrich Martens (Russia). See H. van Loon, *The Hague Conference on Private International Law*, 2 HAGUE JUST. J. 76 (2007).

<sup>65</sup> G. Baere & A. Mills, *T.M.C. Asser and Public and Private International Law: The life and legacy of ‘a practical legal statesman’*, in NETH. Y.B. INT’L L. 2011, 3-36 (I. Dekker & E. Hey eds., 2012). See also K. Nadelmann, *Multilateral Conventions in the Conflicts Field: An historical sketch*, 19 NETH. INT’L L. REV. 107 (1972).

<sup>66</sup> H. van Loon, *The Hague Conference on Private International Law*, in THE HAGUE: LEGAL CAPITAL OF THE WORLD 518 (P. von Krieken & D. McKay eds., 2005).

<sup>67</sup> Delic, *supra* note 53, at 501. See also H. Sono, *Going Forward with Uniform Private Law Treaties: A Study in Japan’s Behavioral Pattern*, 60 JAPANESE Y.B. INT’L L. 14-5 (2017).

<sup>68</sup> See generally INTERNATIONAL LAW AND EMPIRE: HISTORICAL EXPLORATIONS (M. Koskeniemi et al. eds., 2016); J. Whitman, *Western Legal Imperialism: Thinking about the deep historical roots*, 10 THEORETICAL INQUIRIES IN L. 305-32 (2009); E. Jouannet, *Universalism and Imperialism: The true-false paradox of international law?*, 18 EUR. J. INT’L L. 379-407 (2007); A. ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

<sup>69</sup> Basedow, *supra* note 57, at 924. See also R. Oppong, *Private International Law in Africa: The past, present, and future*, 55 AM. J. COMP. L. 677-78 (2007).

<sup>70</sup> HCCH, The ‘old’ Conventions, <https://www.hcch.net/en/instruments/the-old-conventions>. See generally K. Lipstein, *One Hundred Years of Hague Conferences on Private International Law*, 42 INT’L & COMP. L.Q. 553 (1993).

<sup>71</sup> Presentation Speech by Jørgen Gunnarsson Løvland, Chairman of the Nobel Committee (Dec. 10, 1911), <https://www.nobelprize.org/prizes/peace/1911/ceremony-speech>.

<sup>72</sup> D. Jitta, *The Development of Private International Law Through Conventions*, 29 YALE L. J. 497-508 (1920).

when the HCCH was transformed from an *ad hoc* conference into an international organization under the Statute of the HCCH which came into force in 1955.<sup>73</sup>

## B. The Expansion of HCCH Membership

At a session of The Hague Conference in 1956, the US delegation, as an observer, pleaded for non-binding instruments as uniform law, since it would be hard for American to bind itself to treaties considering the prerogatives of the states within the federal system.<sup>74</sup> The proposal was not rejected outright, but rather only duly noted. The HCCH has continued to work on binding multilateral treaties. Today, the US is a contracting party to seven instruments. This is the outcome of the American process rethinking the relationships within its quasi-federal system on private law,<sup>75</sup> as called the choice of law revolution.<sup>76</sup>

The sole official language in the initial stages was French, but English was adopted as the second official language when the US, Canada, and the other Common Law States joined the HCCH in the 1960s.<sup>77</sup> With the increasing number of the HCCH Member States including Asian and Latin American States, the Conference has gradually encompassed a broader circle of legal systems. In this course, the gap between Common Law and Civil Law systems has become a point at issue.<sup>78</sup> A similar gap has occurred between states employing either unitary or federal system. Progress in closing those gaps began with an effort to narrow the different characters of those legal systems.<sup>79</sup> Finally, the status of the HCCH has been changing from a traditionally

<sup>73</sup> See generally D. Martiny, *Hague Conference on Private International Law*, in MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW (2009), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e941?rskey=fht9ep&result=1&prd=MPIL>.

<sup>74</sup> K. Nadelmann, *The United States Joins the Hague Conference on Private International Law: A history with comments*, 30 L. & CONTEMP. PROBS. 299-301 (1965), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3057&context=lcp>.

<sup>75</sup> P. Pfund, *Contributing to Progressive Development of Private International Law: The international process and the United States approach*, 249 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 51 (1994).

<sup>76</sup> A. Mills, *The Identities of Private International Law: Lessons from the U.S. and EU Revolutions*, 23 DUKE J. COMP. & INT'L L. 453-61 (2013). See also P. Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L. J. 268-88 (1959).

<sup>77</sup> K. Nadelmann, *The United States at the Hague Conference on Private International Law*, 51 AM. J. INT'L L. 618 (1957).

<sup>78</sup> D. Cavers, *Habitual Residence: A Useful Concept Symposium on the Conflict of Laws*, 21 AM. U. L. REV. 475 (1971-72). See also E. Gallagher, *A House Is Not (Necessarily) a Home: A discussion of the Common Law approach to habitual residence*, 2 N.Y.U. J. INT'L L. & POL. 463 (2015).

<sup>79</sup> A. Gagnon & R. Iacovino, *Quebec and Canada: understanding the federal principle*, in THE ETHNICITY READER: NATIONALISM, MULTICULTURALISM AND MIGRATION (M. Guibernau & J. Rex eds., 2010). See also W. Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (codified and uncoded)*, 60 LA. L. REV. 677 (1999-2000).

closed club with a Eurocentric character<sup>80</sup> to becoming a global organization.

### C. The Impact of Secular and Religious Legal Systems

When the increasing number of states whose legal systems are built on religion such as Jewish or Sharia law participated in this forum, the HCCH needed to build bridges between the religious and secular legal systems.<sup>81</sup> To close these gaps, the HCCH introduced a new path to better protection for inter-state issues. For example, repudiations as religious unilateral divorces have been recognized. The Divorces Convention<sup>82</sup> is the first HCCH treaty that contains the provisions applicable for different legal systems and different categories of persons.<sup>83</sup> This Convention provides legal effect for divorces and legal separations, including religious unilateral divorces under certain conditions, without the term of repudiation.<sup>84</sup>

Moreover, legal adoption is prohibited under the interpretation of the Qur'an,<sup>85</sup> but Islam allows an alternative institution called 'kafala (نظام الكفالة)'.<sup>86</sup> These differences make kafala closer in legal effect to foster care than adoption. The HCCH faced such complex and delicate topic by adopting the Children Protection Convention.<sup>87</sup> This Convention opens another route for cross-border kafala agreements as a functional substitute that was not included in the Adoption Convention.<sup>88</sup> For commercial

<sup>80</sup> See Generally M. Koskeniemi, *Histories of International Law: Dealing with Eurocentrism* 19 RECHTSGESCHICHTE 176 (2011); A. Lorca, *Eurocentrism in the History of International Law*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 1034-57 (B. Fassbender & A. Peters eds., 2013).

<sup>81</sup> H. van Loon, *The Accommodation of Religious Laws in Cross-Border Situations: The contribution of the Hague Conference on Private International Law*, 2 CUADERNOS DERECHO TRANS. 261-2 (2010).

<sup>82</sup> The Convention on the Recognition of Divorces and Legal Separations, June 1, 1970, 978 U.N.T.S. 393.

<sup>83</sup> *Id.* arts. 15 & 16.

<sup>84</sup> P. Wautelet, *The HCCH and its Conventions relating to Marriages*, in THE ELGAR COMPANION TO THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 173-82 (T. John et al. eds., 2020).

<sup>85</sup> Qur'an, 33: 4-5. See THE QUR'AN 266 (M. Abdel Haleem, trans., 2004).

<sup>86</sup> See generally K. Eadie, *The Application of Kafala in the West*, in RESEARCH HANDBOOK ON ISLAMIC LAW AND SOCIETY 48-76 (N. Hosen ed., 2018). For the recent development of this issue in the Gulf Cooperation Council, see H. Malaeb, *The Kafala System and Human Rights: Time for a decision*, 29 ARAB L.Q. 307 (2015).

<sup>87</sup> Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996. See G. DeHart, *Hague Conference on Private International Law: Final Act of the Eighteenth Session with the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference*, 35 I.L.M. 1391-405 (1996). See also P. Nygh, *The Hague Convention on the Protection of Children*, 45 NETH. INT'L L. REV. 1-28 (1998); D. v. Iterson, *The New Hague Convention on the Protection of Children: A view from the Netherlands*, 2 UCC L. REV. 474-86 (1997).

<sup>88</sup> Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167. See generally S. v. Wichelen, *Moving Children through Private International Law: Institutions and*

topics such as securities, Islamic law was specifically considered under the Securities Convention,<sup>89</sup> which includes the definition of securities.<sup>90</sup>

Another dilemma was the suffering of children who are separated from their parents. The HCCH provided a solution by the Child Abduction Convention and the Protection of Children Convention. However, due to the effects of the September 11 incident, Sharia law States were hesitant to join any HCCH Conventions. The HCCH then provided an alternative path through the Malta Process,<sup>91</sup> whose objective is to find solutions if the relevant international legal framework of Islamic legal tradition is not applicable. The success of the Malta Process has been cited as a model for building a bridge between disparate legal systems to solve cross-border family disputes.<sup>92</sup>

## D. The Accession of the European Union

During the twentieth session of the HCCH in 2005, the HCCH Statute was amended and entered into force the year after that. The main purpose of the amendments was to find possibility to build a regional economic integration organization (REIO)<sup>93</sup> to become members of the HCCH.<sup>94</sup> Since the amendment, the European Union (EU) was the only REIO to become a member of the HCCH in 2007.<sup>95</sup> After the admission of the EU, all its Member States also became individual parties of the HCCH.

## E. The Present

The principal goal of the HCCH is the progressive unification of the rules of PIL.<sup>96</sup> The

*the enactment of ethics*, 53 L. & Soc'y REV. 671-705 (2019); W. Duncan, *The Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption*, 17 ADOPTION & FOSTERING 9-13 (1993).

<sup>89</sup> The Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, July 5, 2006, 46 I.L.M. 649 (2007).

<sup>90</sup> *Id.* art. 1(1)(a). See generally G. Morton, *The 2006 Securities Convention: Background, purpose and future*, in John et al., *supra* note 84, at 336-48; C. Bernasconi & T. Keijser, *The Hague and Geneva Securities Conventions: A modern and global legal regime for intermediated securities*, 17 UCC L. REV. 549-60 (2012).

<sup>91</sup> The Malta Process depends for its funding essentially on support from outside the regular budget of the HCCH.

<sup>92</sup> W. Duncan, *Reflections on the Malta Process*, in *ESSAYS IN HONOUR OF HANS VAN LOON: A COMMITMENT TO PRIVATE INTERNATIONAL LAW* 135-42 (2013).

<sup>93</sup> HCCH Statute art. 3(9). For the terminology and definition of REIO, see A. Schulz, *The Accession of the European Community to The Hague Conference on Private International Law*, 56 INT'L & COMP. L. Q. 943-49 (2007).

<sup>94</sup> *Id.* art. 3.

<sup>95</sup> Council Decision of 5 October 2006 on the Accession of the Community to The Hague Conference on Private International Law, 2006 O.J. (L 297) 1. See J.-J. Kuipers, *The European Union and The Hague Conference on Private International Law-Forced Marriage or Fortunate Partnership?*, in *THE EUROPEAN UNION'S EMERGING INTERNATIONAL IDENTITY* 159-86 (H. Waele & J.-J. Kuipers eds., 2013).

<sup>96</sup> HCCH Statute art. 1.

HCCH does not deal with substantive law, but rather builds bridges across various legal systems that are widely representing its Member States. Nevertheless, the HCCH has made a meaningful contribution to establishing the universal set of PIL's rules with its experience. As of 2021, the HCCH includes eighty-eight Members States and the EU.<sup>97</sup> The HCCH also allows States to sign, ratify or accede to its Conventions without becoming a member of the HCCH, referring to them as Connected Parties. As a result, sixty-seven non-Members of HCCH are Connected Parties to at least one Convention.<sup>98</sup> The HCCH thus represents approximately three-quarters of the independent States harmonizing different legal traditions and systems.

Although the divergence of PIL has acted as a means for regulatory competition, the HCCH is not the sole international organization to conclude the treaty.<sup>99</sup> There are other two main international organizations in the global platform—the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL).<sup>100</sup> This trio of organizations is often regarded as the “three sisters of PIL”<sup>101</sup> for their cooperative works<sup>102</sup> in both binding and non-binding international legal instruments.<sup>103</sup>

## IV. The HCCH's Structure and Its Works

### A. The Organizational Structure of HCCH

The Council on General Affairs and Policy operates through a Permanent Bureau.<sup>104</sup>

<sup>97</sup> HCCH, HCCH Members, <https://www.hcch.net/en/states/hcch-members>.

<sup>98</sup> HCCH, Other Connected Parties, <https://www.hcch.net/en/states/other-connected-parties>.

<sup>99</sup> A. MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW* 186 (2009).

<sup>100</sup> J. Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration-General Report*, 1 UCC L. REV. 31 (2003). See also G. Bayraktaroglu, *Harmonization of Private International Law at Different Levels: Communitarization v. International Harmonization*, 5 EUR. J. L. REFORM 127 (2003).

<sup>101</sup> W. Brydie-Watson, *The Three Sisters of Private International Law: An increasingly co-operative family rather than sibling rivals*, in John et al., *supra* note 84, at 23-40. See also U. Gruber, *International Institute for the Unification of Private Law*, in *HANDBOOK OF TRANSNATIONAL ECONOMIC GOVERNANCE REGIMES* 169-76 (C. Tietje & A. Brouder eds., 2010).

<sup>102</sup> For details, see S. Block-Lieb & T. Halliday, *Contracts and Private Law in the Emerging Ecology of International Lawmaking*, in *CONTRACTUAL KNOWLEDGE: ONE HUNDRED YEARS OF LEGAL EXPERIMENTATION IN GLOBAL MARKETS* 350-99 (G. Mallard & J. Sgard eds., 2016).

<sup>103</sup> H. Gabriel, *Advantages of Soft Law in International Commercial Law: The role of UNIDROIT, UNCITRAL, and the Hague Conference*, 34 BROOK. J. INT'L L. 655 (2009). See also S. Sucharitkul, *Unification of Private Law and Codification of International Law*, 3 UCC L. REV. 693 (1998).

<sup>104</sup> HCCH Statute art. 4(2).

It examines all of the proposals to be considered for inclusion on the Agenda of the Conference.<sup>105</sup> The Council on General Affairs and Policy meets on a yearly basis.

There are two types of Diplomatic Sessions of The Hague Conference: Ordinary Sessions and Extraordinary Sessions. The Government of the Netherlands covers the expenses of those Diplomatic Sessions,<sup>106</sup> which are the forums for debate and negotiation before the adoption of a new Convention.

The plenary sessions are held every four years.<sup>107</sup> Traditionally, the President of plenary session has always been the head representative from the Netherlands. At the plenary session, each Member State has one vote, and the Non-Member States, invited to participate on an equal footing, also have a vote. Upon the decision of the Standing Government Committee<sup>108</sup> after consultation with its Members,<sup>109</sup> an Extraordinary Session may be held between plenary sessions upon request from the Council.<sup>110</sup>

The Permanent Bureau is composed of a Secretary-General and four Secretaries.<sup>111</sup> It is located in The Hague.<sup>112</sup> There are also two Regional Offices: Regional Office for Asia and the Pacific (ROAP)<sup>113</sup> and Regional Office for Latin America and the Caribbean (ROLAC).<sup>114</sup> They support the Permanent Bureau's activities. Two regional offices aim to strengthen the HCCH's inclusiveness and increase the HCCH's visibility, capability, and relevance within the region that they serve.<sup>115</sup> The tasks of the Permanent Bureau include, *inter alia*, researching new topics or the agenda of the Conference, assisting the Member States and observers in the negotiations of Conventions, and their subsequent monitoring for the plenary sessions and the Special Commissions. Because more States Parties joined the HCCH Conventions, the Permanent Bureau should do more to monitor the existing Conventions and

<sup>105</sup> *Id.* art. 4(3).

<sup>106</sup> *Id.* art. 9(1).

<sup>107</sup> *Id.* art. 4(6).

<sup>108</sup> P. Vlas, *The Netherlands Standing Government Committee on Private International Law*, in John et al., *supra* note 84, at 3-10.

<sup>109</sup> HCCH Statute art. 4(4).

<sup>110</sup> *Id.* art. 4(7).

<sup>111</sup> *Id.* art. 5(3).

<sup>112</sup> *Id.* art. 5(1).

<sup>113</sup> See generally Y. Nishitani, *The HCCHs Development in the Asia-Pacific Region*, in John et al., *supra* note 84, at 61-77.

<sup>114</sup> See generally N. Gonzalez-Martin, *The HCCHs Development in Latin America and the Caribbean*, in John et al., *supra* note 84, at 42-51.

<sup>115</sup> HCCH, Rules for the Establishment of Regional Offices, <https://www.hcch.net/es/governance/establishment-ro>. Noting that African is still missing its regional office. See generally R. Oppong & P. Okoli, *The HCCHs development in Africa*, in John et al., *id.* at 52-60.

answer requests for information submitted by not only government officials, but also practicing lawyers, private individuals, and other governmental or non-governmental organizations as well.<sup>116</sup>

The Special Commissions are attended by representatives, who are mostly experts, from the Members of the HCCH, the Contracting States to the Convention, and the Non-Contracting States. Those experts gather to discuss, negotiate, and draft text, and are used frequently to monitor the practical operation of Conventions.<sup>117</sup> The Council of Diplomatic Representatives approves the annual budget.<sup>118</sup> The HCCH receives contributions mainly from its Members<sup>119</sup> and income derived from other sources.

Besides drafting the instruments, the HCCH has been active in its outreach activities including seminars. Another important task of the HCCH is to oversee the effective implementation, operation, and enforcement of the HCCH Conventions to ensure that the Contracting Parties or Connected Parties obtain full benefit from them.<sup>120</sup>

## B. The HCCH Instruments

In the early days of PIL, dominant number of legal writings focused on the choice of law. As time has passed, however, the concept of PIL has grown and the HCCH Conventions have flourished. The HCCH Conventions have unified diverse national laws and practices, facilitating the movement of goods, services, and peoples around the world. As a result, the HCCH has transcended its traditional frontier from trade and commerce to human rights.<sup>121</sup>

The HCCH has been elaborating new methods to cope with the wave of globalization, where the State is no longer the sole player in international law. Therefore, modern Conventions have supplemented the first seven HCCH Conventions, known as the 'old' Conventions. The HCCH's instruments cover subject matters in the three pillars: cross-border commercial and finance law; cross-border family law and child protection; and cross-border civil procedure and legal cooperation. Among the forty legal instruments plus one unique non-binding instrument<sup>122</sup> adopted by HCCH, only eight Conventions have not yet entered into

<sup>116</sup> HCCH Statute art. 7.

<sup>117</sup> *Id.* art. 8.

<sup>118</sup> *Id.* art. 10(1).

<sup>119</sup> *Id.* art. 9(1).

<sup>120</sup> HCCH, Vision, Mission, Strengths & Values, <https://www.hcch.net/en/about/vision-and-mission>.

<sup>121</sup> M. Groff, *The Hague Conventions: Giving effect to human rights through instruments of private international law*, in *MOBILISING INTERNATIONAL LAW FOR 'GLOBAL JUSTICE'* 89-118 (J. Handmaker & K. Arts eds., 2018).

<sup>122</sup> J. Basedow, *The Hague Principles on Choice of Law: Their addressees and impact*, 22 UCC L. REV. 304-15 (2017).

force.<sup>123</sup> PIL is an ongoing process, changing under the transnational sphere<sup>124</sup> to adjust the balance between the public and private and always considering the politics of international law.<sup>125</sup> Therefore, the task of the HCCH to codify law has never been finished and HCCH Conventions will continue to develop.

The following HCCH Conventions are noticeable due to a number of State Parties and Connected Parties: the Apostille Convention;<sup>126</sup> the Taking of Evidence Convention;<sup>127</sup> the Access to Justice Convention;<sup>128</sup> the Child Abduction Convention;<sup>129</sup> the Divorces Convention; and the Adoption Convention.<sup>130</sup> However, the value of HCCH Conventions should not be judged only by the number of the States Parties or Connected Parties of those Conventions,<sup>131</sup> since the HCCH does not require the promulgation of regulations or Conventions into States Parties' legal systems. Those states must process Conventions via the state's constitutional procedures to enforce them in State Parties. The real value should rather include domestic laws from the states that just borrow the text, or some of the rules therein, and incorporate them into their internal laws without formally adopting a Convention.<sup>132</sup> After all, the harmonization of law in practice generates the benefit more than non-implementation and those signatures turn into the white elephant.

## V. The Potential Impact of the HCCH on Thailand

Thailand has sent their delegates to participate as Observers of Invited States at the invitation of the Government of the Netherlands, beginning with the Nineteenth

*See also* G. Saumier, *The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract*, 40 *BROOK. J. INT'L L.* 1-29 (2014); S. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some preliminary comments*, 61 *AM. J. COMP. L.* 873-99 (2013).

<sup>123</sup> HCCH, Conventions, Protocols and Principles, <https://www.hcch.net/en/instruments/Conventions>.

<sup>124</sup> G. Gozzi, *RIGHTS AND CIVILIZATIONS. A HISTORY AND PHILOSOPHY OF INTERNATIONAL LAW* 137-39 (F. Valente trans., 2019). *See also* P. North, *Private International Law: Change or decay?*, 50 *INT'L & COMP. L.Q.* 477-508 (2001).

<sup>125</sup> H. Watt, *Private International Law beyond the Schism*, 2 *TRANSNAT'L LEGAL THEORY* 347-428 (2011).

<sup>126</sup> Convention Abolishing of the Requirement of Legalisation of Foreign Public Documents, Oct. 5, 1961, 527 *U.N.T.S.* 189.

<sup>127</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 847 *U.N.T.S.* 231.

<sup>128</sup> Convention on International Access to Justice, Oct. 25, 1980, 1510 *U.N.T.S.* 359.

<sup>129</sup> Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 *U.N.T.S.* 89.

<sup>130</sup> Convention on Protection of Children and Cooperation in respect of Intercountry Adoption.

<sup>131</sup> W. Reese, *The Hague Conference on Private International Law: Some observations*, 19 *INT'L LAW.* 885 (1985).

<sup>132</sup> Loon, *supra* note 64, at 82.



Session of the HCCH in 2002.<sup>133</sup> Before joining the HCCH, Thailand acceded to the Child Abduction Convention in 2002<sup>134</sup> and ratified the Child Adoption Convention in 2004.<sup>135</sup> Today, Thailand is ready to show her further commitment to the development of PIL in transnational business and personal relations through the HCCH. Finally, Thailand deposited her Instrument of Acceptance to the Government of the Netherlands, thereby joining the HCCH as the 88th Member on March 3, 2021.<sup>136</sup>

In the post Covid-19 pandemic era, the cross-border activities are expected to be accelerated as a result of the long lockdowns. Globalization does need legal certainty for dispute settlement<sup>137</sup> because of already built legal barriers<sup>138</sup> to both commercial matters and other transnational agendas.<sup>139</sup> Becoming a Member of the HCCH should be the cornerstone to develop the PIL.

## A. Brief Observation of PIL Studies

Unfortunately, PIL in Thailand is underrated compared to the neighboring subject -Public International Law. There are few studies and materials on PIL in Thai language and only a handful of people are qualified as PIL scholars. Most of the PIL curriculums at the undergraduate level mainly focus on the Thai Act on Conflict of Laws<sup>140</sup> and the Thai Nationality Act.<sup>141</sup> In some universities, the PIL course is

<sup>133</sup> HCCH, PROCEEDINGS OF THE NINETEENTH SESSION, MISCELLANEOUS MATTERS 35 (2002), <https://assets.hcch.net/docs/923bc358-cbf8-4cd5-9435-d41d4bc3d29c.pdf>.

<sup>134</sup> Thailand made a reservation in accordance with Articles 24 and 42; it accepts only the use of the English language in any application, communication or other document sent to its Central Authority. See HCCH, General Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Country Profile-Thailand, <https://assets.hcch.net/docs/df470cf7-2fce-435c-aaa3-2b88cc5616dc.pdf>.

<sup>135</sup> HCCH, Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption: Country Profile-Thailand, [https://assets.hcch.net/upload/wop/adop2015cp\\_th.pdf](https://assets.hcch.net/upload/wop/adop2015cp_th.pdf).

<sup>136</sup> Ministry of Foreign Affairs, Kingdom of Thailand, Thailand Became the 88th Member of the Hague Conference on Private International Law (HCCH) to Develop Rules of Private International Law and Efficiently Facilitate Cross-Border Activities (Mar. 16, 2021), <https://www.mfa.go.th/en/content/thailand-member-hague-conference-hcch?cate=5d5bcb4e15c39c306000683e>.

<sup>137</sup> A. Cutler, *Global Capitalism and Liberal Myths: Dispute settlement in private international trade relations*, 24 MILLENNIUM 377-97 (1995).

<sup>138</sup> L. Gruszczynski, *The COVID-19 Pandemic and International Trade: Temporary turbulence or paradigm shift?*, 11 EUR. J. RISK REG. 337-42 (2020). See also T. Meyer, *Trade Law and Supply Chain Regulation in a Post-COVID-19 World*, 114 AM. J. INT'L L. 637-46 (2020); W. Kerr, *The COVID-19 Pandemic and Agriculture: Short-and long-run implications for international trade relations*, 68 CAN. J. AGR. ECON. 225-29 (2020).

<sup>139</sup> P. Danchin et al., *The Pandemic Paradox in International Law*, 114 AM. J. INT'L L. 598-607 (2020).

<sup>140</sup> Act on Conflict of Laws, B.E. 2481 (1938), Government Gazette (Vol. 55), at 1021, Mar. 20, B.E. 2481 (1938). See Unofficial translation of Act on Conflict of Laws, B.E. 2481 (1938), [http://web.krisdika.go.th/data/outsidedata/outsite21/file/Act\\_on\\_Conflict\\_of\\_Law,\\_B.E.\\_2481.pdf](http://web.krisdika.go.th/data/outsidedata/outsite21/file/Act_on_Conflict_of_Law,_B.E._2481.pdf).

<sup>141</sup> Nationality Act B.E. 2508 (1965), Government Gazette (Vol. 82, pt. 63), Special Edition, at 1, Aug. 4, B.E. 2508

combined with international criminal law and taught within one course. Because Thailand joined the HCCH, the PIL curriculum should be revised adding the content on the harmonization of law. Also, the Act on Conflict of Laws and the Nationality Act both of which were adopted many decades ago, are too much out of date. It is thus high time to revise Thai domestic laws relating to PIL. Law is not like classical music, which retains its power and relevance throughout the ages. It requires periodic reviews to ensure the provisions remain relevant and appropriate.

## B. Suggestion on the Path Forward

A question for Thailand as a rookie in the HCCH club is what will happen next after joining the HCCH. The answer may simply be the accession to or ratification of more Conventions. Which ones among the thirty-eight remaining Conventions then should Thailand take into consideration? One practical solution may be to follow the lead of other senior players taking into consideration more popular Conventions.

As the founder of the Association of Southeast Asian Nations (ASEAN),<sup>142</sup> Thailand should visit the previous practices from other ASEAN Members in the HCCH. The legal systems in ASEAN are rooted in diverse traditions.<sup>143</sup> The mandate under the ASEAN Charter<sup>144</sup> does not provide legislation and the ASEAN treaties are only concerned with the matters within the region. Marching together with the HCCH may be a solution to drive ASEAN to engage with globalization.<sup>145</sup> The HCCH is not a stranger to the ASEAN Members. The ASEAN Members are connected with the HCCH Conventions such as the Apostille Convention, the Form of Wills Convention,<sup>146</sup> the Service Aboard Convention, the Child Abduction Convention, the Evidence Convention, the Child Abduction Convention, the Child Adoption Convention, and the Choice of Court Convention.<sup>147</sup>

Before Thailand changed its status from Connected Party to Member, four ASEAN

(1965). See Unofficial Translation of Nationality Act B.E. 2508 (1965), [http://web.krisdika.go.th/data//document/ext810/810050\\_0001.pdf](http://web.krisdika.go.th/data//document/ext810/810050_0001.pdf).

<sup>142</sup> See generally P. Malanczuk, *Association of Southeast Asian Nations (ASEAN)*, in MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW (2017), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e898?rskey=5LQc8z&result=4&prd=MPIL>.

<sup>143</sup> L. RICCARDI & G. RICCARDI, *INVEST IN ASEAN: COUNTRIES ANALYSIS AND TREATIES* 3-198 (2020).

<sup>144</sup> Charter of the Association of Southeast Asian Nations (with annexes), Nov. 20, 2007, 2624 U.N.T.S. 223.

<sup>145</sup> A. Reyes, *ASEAN and The Hague Conventions*, 22 ASIA PAC. L. REV. 25-44 (2014).

<sup>146</sup> Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, Oct. 5, 1961, 510 U.N.T.S. 175.

<sup>147</sup> Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

Member States including Malaysia,<sup>148</sup> the Philippines, Vietnam, and Singapore had been already in the HCCH. Cambodia and Brunei Darussalam still hold their status as Connected Parties. Although the rest of the ASEAN members may not have an official relationship with the HCCH, they have engaged with the HCCH's activities. Indonesia is currently preparing for the domestic legislation process to accede to the Apostille Convention.<sup>149</sup> Myanmar supports the HCCH's works and acknowledges a need to develop PIL principles to enhance the business environment.<sup>150</sup> The representatives from Laos take part in the HCCH's regional activities.<sup>151</sup> Recently, there was the HCCH-ASEAN Masterclass focusing on the Evidence Convention and the Judgments Convention<sup>152</sup> that included delegates from all over the ASEAN region.<sup>153</sup>

In general, I am skeptical about whether governmental interests and policies can be synchronized with academic interests and policies in Thailand. It is not a mere dream to assume that every policymaker truly has an interest in the best interest of people. Considering the global and regional trends, Thailand should adopt the following HCCH Conventions.

The Apostille Convention has been supported by the World Bank Group<sup>154</sup> and the International Chamber of Commerce for states to ratify<sup>155</sup> It would facilitate and expedite the legalization requirements of foreign public documents to replace the cumbersome formalities between Thailand and other States Parties. Also, the Service Convention,<sup>156</sup> the Evidence Convention, and the Access to Justice Convention are the

<sup>148</sup> Since joining the HCCH in 2002, Malaysia have not been a signatory to any HCCH Convention.

<sup>149</sup> P. Penasthika, Indonesia to Accede to The Hague Apostille Convention, <https://capil.org/2021/03/09/indonesia-to-accede-to-the-hague-apostille-convention>.

<sup>150</sup> Council on General Affairs and Policy, Report on the activities of the Regional Offices for Latin America and the Caribbean and the Asia Pacific (Jan. 1-Dec. 31, 2019), Mar. 2020, <https://assets.hcch.net/docs/4fccb38d-8795-4100-9d57-835d81bf536.pdf>.

<sup>151</sup> E.g. HCCH, Asia-Pacific Regional Meeting on the work of The Hague Conference on Private International Law (Sept. 14, 2007), <https://www.hcch.net/pt/news-archive/details/?varevent=136>.

<sup>152</sup> HCCH, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>.

<sup>153</sup> Press Statement of the Malaysian Judiciary, HCCH-ASEAN 2021 Masterclass (Aug. 19, 2021), <https://www.kehakiman.gov.my/sites/default/files/PRESS%20STATEMENT%20-%20HCCH%20CACJ%202021%20MASTERCLASS.docx.pdf>.

<sup>154</sup> P. Trooboff & F. E.M. Stikkelbroeck, *Reflections on the Hague Conference on Private International Law at 140-20 Years Forward*, in 25 HAGUE Y.B. INT'L L. 72-4 (2012).

<sup>155</sup> See ICC urges States to ratify Apostille Convention for simplified authentication of public documents, <https://iccwbo.org/media-wall/news-speeches/icc-urges-states-to-ratify-apostille-convention-for-simplified-authentication-of-public-documents>.

<sup>156</sup> The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 658 U.N.T.S. 163.

three musketeers to close the space between Thailand and other legal systems for the benefit of commerce and personal relations.

There are four HCCH Conventions, namely the Child Abduction Convention, the Child Protection Convention, the Child Adoption Convention, and the Child Support Convention,<sup>157</sup> that are often called The Hague Children's Conventions.<sup>158</sup> Each of these instruments provides essential safeguards, procedures, and cooperative machinery to protect children's rights across frontiers that are embedded in the UN Convention on the Rights of the Child (CRC).<sup>159</sup> All of them should be grouped as a tool package.<sup>160</sup> Thailand has been a Contracting Parties to CRC and other two HCCH Conventions: the Child Abduction Convention and the Child Adoption Convention. Therefore, Thailand should seriously consider the Child Protection Convention and the Child Support Convention as the missing pieces for the protection of children to be a complete package.

The Divorces Convention and the Marriages Convention<sup>161</sup> are also important for Thailand, since the family relationship should be universally recognized. Laws that may have power over one or some states may violate fundamental rights.<sup>162</sup> Both Conventions should ensure the basic rights of the cross-border family relationship

Thailand has acceded to the New York Convention.<sup>163</sup> It has also adopted the UNCITRAL Model Law<sup>164</sup> as a model for the Thai Arbitration Act.<sup>165</sup> However, the Judgments Convention would be a point of contention in Thailand, because the judgment of the Constitutional Court of Thailand still holds outdated sovereignty concerns, without recognizing foreign judgments.<sup>166</sup> As a result, under the doctrine

<sup>157</sup> Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131>.

<sup>158</sup> L. Silberman, *Co-Operative Efforts in Private International Law on Behalf of Children: The Hague Children's Conventions*, in 323 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 261-477 (2006).

<sup>159</sup> United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>160</sup> H. van Loon, *Protecting Children across Borders: The Interaction between the CRC and the Hague Children's Conventions*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: TAKING STOCK AFTER 25 YEARS AND LOOKING AHEAD 31-46 (T. Liefgaard & J. Sloth-Nielsen eds., 2007).

<sup>161</sup> Convention on Celebration and Recognition of the Validity of Marriages, Mar. 14, 1978, 1901 U.N.T.S. 131.

<sup>162</sup> Universal Declaration of Human Rights, art. 16. See J. MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 252-7 (1999).

<sup>163</sup> Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

<sup>164</sup> UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985), WITH AMENDMENTS AS ADOPTED IN 2006 (2008).

<sup>165</sup> Arbitration Act B.E. 2545 (2002), Government Gazette, Vol. 119, Part 39a, Apr. 29, 2002. See Unofficial Translation of Thai Arbitration Act B.E. 2545 (2002), [http://web.krisdika.go.th/data/document/ext825/825530\\_0001.pdf](http://web.krisdika.go.th/data/document/ext825/825530_0001.pdf).

<sup>166</sup> M. Ruffles, *Australian jail time no barrier to cabinet post, Thai court rules*, SYDNEY MORNING HERALD, May 5, 2021, <https://www.smh.com.au/national/australian-jail-time-no-barrier-to-cabinet-post-thai-court-rules-20210505-p57p1e.html>.

of *stare decisis* and the lack of political will, the Judgments Convention seems to face a heavy legal barricade and may not receive attention at any time soon.

In addition, Thailand as a Member of the HCCH could participate in addressing two topics. First, because some Conventions were drafted in the last century and are now expiring, they require possible amendments as a practical solution.<sup>167</sup> Second, more Asian Members should make significant contributions with their voice<sup>168</sup> to creating a uniform and harmonized legal order.<sup>169</sup>

There are only a few members in the Thai PIL community most of whom are not very experienced with the HCCH. Thailand does not pay much attention to the harmonization of law. During this pandemic, social media channels and online learning platforms are introducing its work as well as providing promotional tools for each of the HCCH's core instruments. For practical application, all that needs to be in the Thai language to disseminate information and promote the agenda nationwide.

Because there are few PIL specialists in Thailand, the National Organ of Thailand should collaborate with ROAP for encouraging the capacity building in PIL and promoting of the practical operation of the HCCH Conventions and instruments, including post-Convention assistance and the development of technical expertise. Capacity building is an effective and economical approach to introduce the HCCH.

## VI. Conclusion

Divergent territorial laws require legal certainty for the steady flow of the global movement of people and goods. Since the establishment of the HCCH, there have been adjustments to change a Eurocentric model to its worldwide orientation. This was accomplished through the “melting pot” approach to various legal and cultural traditions. The HCCH has continually linked the spaces in a multicultural legal

<sup>167</sup> J. Basedow, *International Economic Law and Commercial Contracts: Promoting cross-border trade by Uniform Law Conventions*, 23 UNIF. L. REV. 12-4 (2018).

<sup>168</sup> N. Takasugi & B. Elbalti, *Asian Principles of Private International Law*, in CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS 399-413 (D. Girsberger et al. eds., 2021). See also A. CHONG (ED.), ASIAN PRINCIPLES DIFFERENT FROM RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS (2020); W. Chen & G. Goldstein, *The Asian Principles of Private International Law: Objectives, contents, structure and selected topics on choice of law*, 13 J. PRIV. INT'L L. 411-34 (2017). For the overview of South Asia region perspective, see B. Zeller, *Private International Law in South Asia-A Few Pointers for Harmonization*, in PRIVATE INTERNATIONAL LAW: SOUTH ASIAN STATES' PRACTICE 435-42 (S. Garimella & S. Jolly eds., 2016).

<sup>169</sup> H. Rajwanshi, *Development of Private International Law in Asia-Envisioning the Asian Principles of Private International Law*, 10 GNLU J. L. DEV. & POL. 95 (2020).

society. To join the core Conventions of the HCCH will be beneficial to Thailand by raising of the recognition of the HCCH. Hopefully, Thailand should not fall off the edge of globalization because domestic laws are unfriendly to transnational business and cross-border family relationships. However, the current political climate presents obstacles for the adoption of any treaty, due to the herculean efforts demanded from numerous staffs in various agencies, all requiring countless hours of preparation.

A Christmas Carol represents good cheer and warmth of feeling. It is even more vivid with a contrasting chill of the wintry darkness in which its radiant scenes are framed. The Ghosts of Christmas demonstrate the consequences of Scrooge's past, present, and future. In the end of the story, Scrooge transforms into a good man. In our reality, however, a happy ending would not come easily. Enormous transformation is thus required for Thailand to make a happy ending since the Ghost of Christmas Present has already completed his visit.

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