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GLOBALISATION AND PRIVATE INTERNATIONAL LAW

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Forward, forward let us range,
Let the great world spin for ever
down the ringing grooves of change[1]

The English poet Tennyson captured, in these lines, something of the flavour of a changing, globalised world. One feels the excitement of progress, the giddy thrill of change, and a sense of release, of a new found freedom from constraint. But for the lawyer, and especially for the private international lawyer, the brave new world of global trade, global travel, and global communications is as unnerving as it is exciting. What is our role; what is our contribution - do we have a role at all?

That we pose such questions at all is because the legal world, as we traditionally envision it, is national, territorial, local. As lawyers our world is bounded by national frontiers. Legal systems are national, spatially limited in range, regulated by national legislatures and local courts. The case of public international law apart, laws have a national provenance. What identifies them, what defines them is ultimately their country of origin.

Certainly, as private international lawyers, the central assumption in our world-view is a sense of place. We think of the place of contracting, the place of a tort, the domicile of the defendant, the *situs* of property. Our task is to discover whether a dispute is sufficiently connected with a given legal system such that its courts may legitimately exercise jurisdiction to resolve it. Our concern is to find the substantive law which uniquely has a claim to govern.

Yet this localised, territorial, perhaps nationalistic, view of the legal world seems, at best old-fashioned, at worst redundant, in the age of liberalised trade, open markets, global capital, multinational corporations, and instant cross-border communications. It may seem especially antique in a European context, where such developments are rapidly accelerating, driven by a deeper commitment to integration. Indeed, in a European context one might say that a commitment to private international law as a technique for legal regulation is not merely unfashionable, but ideologically unsound.[2]

My task in this lecture is to examine what the role of private international might be in this world of growing social and economic integration. This is not say that my intention is to be definitive, still

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[1] Tennyson, *Locksley Hall*, 1.181.
[2] The debate concerning the proper legal vehicle for European integration continues: see, Hay, Lando, Rotunda, 'Conflict of Laws as a Technique for Legal Integration', in Cappelletti, Seccombe and Weiler, eds., *Integration Through Law*, Vol. 1 (1986), 161; Fentiman, 'Il problema dell'armonizzazione nell'ottica di un internazionalprivatista', in Stein, ed., *Il Futuro Codice Europeo dei Contratti*, (1993), 167; Israel, 'Conflicts of Law and the EC after Amsterdam: a Change for the Worse', 7 *MJ* 1(2000).

less prescriptive. But I hope at least to set an agenda for discussion, to suggest the co-ordinates of the debate.

In particular, my intention to see what truth, if any, there is in two extreme accounts which tend to dominate the current debate about the role of private international in an era of globalisation. One we might call the *complacent* view, the other the *apocalyptic* view. According to the former, private international law has the same role it has always had. We may have to do some work to bring it up to date, but the tools at our disposal are perfectly adequate to the task. According to the latter view, by contrast, the subject is moribund. It is made redundant in a world where the subject's pivotal assumption - that events, relationships, persons can be localised - has lost all meaning. And it has become undesirable because those assumptions are themselves an obstacle to globalisation.

It is perhaps obvious that neither view is correct, and I take no credit for coming that that natural conclusion. But my intention is to offer some explanation for why this is the case, and to suggest, as precisely as I can, to what extent private international law remains viable as a tool for legal regulation. As we shall see, the subject faces some potent challenges, which may require devising new techniques, and forging different conceptual assumptions. Certainly the familiar discourse of the subject, involving a trade-off between interests, connections and expectations, may be inappropriate in an environment in which the problems involved are infinitely more complex than before.

It is also possible that private international law may not long survive, at least in some areas, in a nationalistic, unilateralist form. For, however sceptical one might be about the harmonisation of private international law in principle, globalisation argues strongly for a more collective approach to the subject. Nor is it likely that private international law can offer adequate solutions at all in some areas, which argues strongly for the harmonisation of internal domestic law.

1. DEFINITIONS AND ASSUMPTIONS

As with all enquiries, we must begin by defining our terms.

1. The Purposes of Private International Law.

It is a relatively straightforward matter to define private international law. In general terms we can agree that private international law comprises that part of domestic law which is concerned with regulating events, relationships and legal disputes which have a foreign element.

As this suggests, it is not the type of legal issues involved, but their foreign-ness, which makes them issues of private international law. Indeed, the subject embraces a wide variety of matters – procedural as well as substantive, concerned with evidence and remedies, as well as rights and obligations – which have in common only the fact that they have a foreign dimension. A dispute is a conflicts dispute because the tort was committed abroad, or because the contract is to be performed in a foreign country, or because the defendant is foreign, or because the evidence is located elsewhere.

But, if we can readily grasp the scope of the subject, it is more important in the present context to understand its purpose, for only if we understand its purpose can we assess whether it can rise to the challenges of globalisation. More precisely, it is important to understand the purposes which underlie the three principal departments of private of international law: that which concerns

jurisdiction – when will the courts entertain proceedings with a foreign character? That which concerns *choice of law* – what substantive law should govern an issue which has a foreign dimension? And that which concerns the *enforcement of foreign judgments* – when will a court in one country enforce the judgments of another country?

The purpose underlying rules of *jurisdiction* is to respond to what we may call the problem of *contacts*. What connection must a dispute have with the forum in order to justify entertaining proceedings? Is it enough that one or other of the parties has a connection with the forum? What if neither party has such a connection, but the dispute has some other association with the forum, perhaps because a contract is to be performed within its territory, or because a tort has been committed there? What if the dispute has some connection with the forum, but has a stronger connection with another country?

By contrast the purpose of rules for choice of law is to respond to what we may call the problem of *diversity*. Their task is to contain and to regulate the confusion which might otherwise follow from the fact that the world's legal systems are different from each other. Conflicts of law arise because laws conflict, because different laws offer different solutions to the same problem.

Finally, the purpose underlying rules for the enforcement of judgments is to respond to the problem of *enforceability*. Under what circumstances will a foreign judgment be accorded the same respect as a domestic judgment?

It should be observed, however, that these problems are, in a sense, artificial; they are problems of our own making. They could have been avoided if things had been different. Thus, the problem of contacts arises only because all legal systems have abandoned the practice of assuming jurisdiction in all cases on the grounds familiar in purely domestic cases. More precisely, we have abandoned the idea that the requirements for initiating proceedings in domestic proceedings are sufficient to warrant assuming jurisdiction.

Again, the problem of *enforceability* arises only because we are prepared to enforce foreign judgments at all. We are used to doing so, although some legal systems do so more readily than others. But things could have been otherwise, and at one time they were otherwise.

So also the problem of *diversity* is an artificial problem. It arises because in every legal system, and for most purposes, we have elected not merely to apply the law of the forum in cases having a foreign element. It would be easy to assume that the lex fori should apply, provided that the rules of jurisdictional competence are satisfied. But modern legal systems do not do so. Indeed, perhaps the most important assumption upon which modern approaches to private international law depend is that the lex fori should not automatically govern. In that sense, private international law is not so much a response to the problem of diversity; it is a response to the problem of diversity which arises when legal systems jettison the assumption that the law of the forum is always appropriate.

That we pose these questions at all suggests how the world's legal systems have responded to globalisation, if only by recognising the phenomenon; private international law is, and always has been, a reaction to globalisation. That any legal system employs conflicts rules is also a signal that it is not parochial, narrowly territorial, chauvinistic. It should always be remembered, however, that we might as easily have ignored these problems altogether. Private international law is not an inevitable feature of the legal landscape, or a self-evident response to globalisation, however valuable it might be.

2. Globalisation or Integration?

Globalisation is harder to define. It might be taken to refer as much to the world's growing cultural and social homogenisation, as to more tangible developments, such as the evolution of the internet, and the development of a more flexible regime governing world trade. For present purposes, we are perhaps concerned only with two aspects of the phenomenon: *socio-economic globalisation*, and *legal globalisation*.

Socio-economic globalisation occurs with the dismantling of barriers to cross-border interaction, both social and economic.

Legal globalisation occurs when legal boundaries dissolve. It occurs when the laws of distinct national legal systems become uniform, or when they are harmonised. Legal globalisation is in part a way to regulate socio-economic globalisation, but it also has a role in encouraging such cross-border interaction.

It might be objected that a third type of globalisation, *technological globalisation*, deserves attention. But this is to misunderstand the problem, for technical developments such as the internet are but a vehicle for creating the social and economic integration which is the lawyer's concern.

It will be necessary to return to the issues associated with legal globalisation in due course. For present purposes, however, it is convenient to understand the phenomenon in social and economic terms.

It is important to appreciate that socio-economic globalisation is (paradoxically) not necessarily a global phenomenon. The process of globalisation, the disintegration of national boundaries occurs – indeed is more likely to occur – at a local or regional level. Although politically and constitutionally a different case, the United States is an instance of globalisation, as is the evolution of the European Union. Indeed the term globalisation may be a misnomer. What it truly refers to is the process of eroding national barriers – cultural, legal, economic. Indeed the best modern example of globalisation is, paradoxically, also an instance of regionalisation, namely the growth (better, the deepening) of the European Union.

We should understand therefore that *integration* and globalisation are for present purposes the same phenomenon; both describe the collapse of national legal frontiers. Indeed, it is perhaps more helpful to think in terms of the relationship between *integration* and private international law, than *globalisation* and private international law.

Nor, importantly, is globalisation a new phenomenon. It is a natural, inevitable and long-standing feature of human society. Globalisation (in the sense that it matters to lawyers) has existed as long as humankind has constructed frontiers, for as long as different laws have operated behind those frontiers, and for as long as human activity has transcended those frontiers. But this is not to deny that globalisation has acquired a new character in recent years, although the origins of the phenomenon are many and various. The state of globalisation has altered. The last decade has witnessed an exponential growth in cross border trade, travel, and communication. At one end of the spectrum we may cite the growth of low cost travel as a cause. More significantly, the liberalisation of world trade through the WTO, and the steady deregulation of national markets, has led to an upsurge in international commerce. More locally, in the European context, it may be attributed to the steady deepening of European union, a phenomenon which is neither technological, nor purely economic in its origins, but political.

Above all, however, the process which we now recognise as globalisation owes much to the remarkable growth in global communications made possible by digital technology. We should beware of thinking that the internet (or other manifestations of the digital revolution) is the only manifestation of this phenomenon; we are speaking of a wider transformation in global communications. And it is perhaps important to resist the idea that globalisation is entirely the product of the revolution in information technology and communications. But it is impossible to underestimate the change in our lives which digital technology brings, and with its effect on the phenomenon of globalisation.[3]

The combined effect of these changes has been a change in the form, the pace, the scale, and the reach of globalisation. There has been a change in what one might call the *controllability* of globalisation, which is in large part attributable to the technological innovation which provides the medium for such change. Although it would be wrong to see the revolution in global communications as the sole cause of increasing globalisation, none should doubt the significance of the change which digitisation has created. In part, as we shall see, such technological developments mean that legislators are faced with a host of unfamiliar problems; however familiar the essential issues may be, they now occur in novel, even baffling ways. But the more important point is perhaps that the digital revolution has created a world in which cross-border interaction is, or is potentially, uncontrolled. Or, at least, the markets, and the social practices, which it facilitates (and encourages), tend to evolve faster than the capacity of legislators to regulate them.

The point here is not that the internet is unregulated (still less that it should be). The point is that the impetus for globalisation in recent years has not been political, still less, legal, but technological. More precisely, we have witnessed in recent years the rapid exploitation of the economic possibilities inherent in digital technology. We have grown used to the idea that globalisation is deliberate, planned, and its consequences at least in part anticipated. However, the revolution in information technology, and the market forces which drive it, is different. It is a phenomenon created by a combination of technical change, marketing (by manufacturers and on-line service providers), and consumer demand. It is an event to which governments have been forced to respond, not a development of their making.

So globalisation is hardly new. But we are now witnessing globalisation on a scale, at a speed, and (in part) of a type which is novel. In particular, perhaps, globalisation of this sort has a degree of penetration, to borrow a phrase from marketing, which is unparalleled. Cross border trade, cross border relationships are now in the hands of everyone – or, at least, everyone with a computer, or even a mobile telephone. This state of affairs is perhaps sufficiently different that it warrants a new term. We are witnessing what may be called *hyper*-globalisation.

But, whatever the nature of globalisation, we must remember that globalisation is both a *phenomenon* – perhaps a *problem* - and a *goal*, something which must be controlled, yet also something to be aspired to, something to which we must react, and something which we may seek to promote. Increased interaction across borders creates difficulties, it is something which legislators and courts must inevitably seek to regulate; it is that sense problematic. But it may also be regarded as something to encourage, a spur to free trade, an engine of social and economic improvement, even an expression of human freedom. Indeed, in the European context, integration is not merely a phenomenon but an ideology.

[3] For an arresting account, see Cairncross, *The Death of Distance* (1998).

3. Globalisation and Private International Law.

What then is the relationship between private international law and (socio-economic) globalisation?

Private international law has two functions in this context, reflecting the fact that globalisation is at once a vice and a virtue, a problem and a goal. One role is *regulatory*. A task of private international law is to regulate, perhaps to contain, the *problem* of globalisation, to supply a legal framework for the consequences of increased cross-border interaction.

But another role of private international law is *facultative*. Its task is to foster globalisation, to enable economic growth in a world of legal diversity and national borders. Private international law is at once a solution to the *problem* of globalisation, and a means to promote the *goal* of globalisation.

For present purposes it is, however, helpful to ignore this distinction and its possible implications. In a sense private international law serves the *goal* of globalisation precisely because it adequately regulates the *phenomenon* of globalisation. If private international law successfully regulates globalisation, it necessarily fosters globalisation by making it possible.

But it must be emphasised that the relationship between globalisation and private international law is not new. Each has sustained the other throughout history. Globalisation is the reason we have private international law; private international law is a means of fostering globalisation, and it was ever thus. The question, however, is whether the advent of *hyper*-globalisation has altered that relationship: to what extent does it herald new challenges for the subject; does it signal the end of private international law, at least as we know it?

Before answering that question, however, it is important to deal with the fallacy that globalisation is somehow beyond legal regulation, and in particular beyond regulation by employing the rules of private international law. Some would argue that globalisation – or, at least, *hyper*-globalisation – poses a potentially fatal challenge to private international law. Some would say that regulation by reference to the traditional mechanisms of private international is no longer feasible. Arguably, the explosion in social and commercial interaction across national frontiers challenges the subject by depriving national boundaries of their legal significance. If so, it may herald the end of a subject whose central conceptual assumption is that persons, events, relationships, items of property, and the legal disputes which surround them, must be connected uniquely with a particular country - or at least that one country's laws must have a stronger claim to govern than any other.

This apocalyptic view has achieved some currency in recent years, with the rapid development in global communication, and the withering of national barriers to world trade. But the challenge of globalisation may be neither as great, nor as novel, as this suggests. It is untrue that the modern world, in which goods and persons move relatively freely, is a world without frontiers. It remains a world of sovereign states and autonomous legal systems, notwithstanding a growing trend for such states to unite for particular purposes. Indeed, the very notion of cross border interaction assumes a world of borders.

Nor does the de-materialised, digital nature of so much cross-border interaction mean that it has no territorial connection. The events and relationships – and, ultimately, the legal disputes – which are the subject of legal regulation are initiated by individuals, while their consequences are felt in time and space. Moreover, given the nature of digital technology it is likely, however, that particular events or relationships will have many locations. It may also be hard to conclude that a given situation is meaningfully connected with any one of them.

This more benign view of the relationship between globalisation and private international law is surely more accurate, and more compelling. There is nothing new in globalisation. Nor is it accurate to see it as a threat to private international law. Indeed the opposite is true; it is the reason for its existence.

But this does not mean that we should ignore the recent trend to greater globalisation. Certainly, both the pace of globalisation and its form, principally through the internet, mark significant changes in the nature of the phenomenon. This is not to say that the problems are new, or the challenge greater than before. Both, however, are different. What challenges does the subject face?

2. THE CHALLENGE OF GLOBALISATION

Globalisation poses several challenges for the private international lawyer. Three perhaps particular attention: the challenge of *design*; the challenge of *capacity*; the challenge of *proportionality*; the challenge of *alternative strategies*.

1. The Challenge of Design[4]

Globalisation may require us to devise new conflicts rules as a response to novel situations. In one sense these are merely problems of *novelty*. Conflicts problems are likely to arise in future in new forms. This may require new conflicts rules, or the proper application of existing rules in new situations.

Particular difficulty can arise because novel situations can give rise to novel questions of *policy*. Problems of policy are inherent in the design of conflicts rules. But it is worth mentioning that problems of a particularly acute kind can arise in the modern context. A recent example, one of many, concerns the decision in Article 15 of the forthcoming Council Regulation on jurisdiction and the enforcement of judgments to favour the interests of consumers over those of on-line suppliers.[5]

More specifically, globalisation gives rise to a particular problem which affects the design of conflicts rules - the problem of *multiplicity*. A feature of globalisation is that persons, events, relationships, and disputes may no longer have a decisive connection with any one legal system. They may instead have connections with many countries. In consequence it becomes difficult to answer the questions with which the subject is primarily concerned: does any one state have a connection with a dispute which justifies exercising jurisdiction; which law is it most appropriate to apply?

The problem of *multiplicity* arises when events, persons relationships and disputes are connected with several, perhaps many, different countries. Given this multiplicity of connections it may be impossible to discern the country with which the issue has the most significant connection with the issue. This may arise either because the issue appears to be equally connected with many countries, or because it is difficult to ascertain whether it has a significant connection with any one country. The consequence is that it may be impossible to identify the applicable law, or the most appropriate forum. More particularly, it becomes difficult to employ the traditional tools of choice of law methodology; the parties' expectations may be unclear (or conflicting); the interests of the competing legal systems may be obscure (or conflicting). This challenges the fundamental

[4] The literature is growing. See, e.g., Boele-Woelki and Kessedjian, *Internet, Which Court Decides, Which Law Applies* (1998).
[5] OJ L-12, 16.1.01

assumption of conflicts methodology, which is that a single country's law will have a unique claim, or the most significant claim, to govern any issue.

This is not to say that situations involving multi-state contacts are novel. Anyone familiar with complex, multi-forum litigation will recognize the problem, as will those familiar with cases involving cross-border defamation or copyright infringement. But such cases are likely to be more numerous in a globalised world, and involve relatively mundane events. Not least this is because of the ubiquitous nature of modern communication, and the globalised nature of the world economy. Moreover, experience suggests that the majority of conflicts disputes have not in the past been of this type. Generally, the choice lies between litigating in the forum, or applying its laws, or litigating in one other location, or applying its laws.

The problem of multiplicity may take several forms. Most prominently, it is reflected in the problem of *multi-state defendants*, the problem of *multi-state contacts*, and the problem of *multi-state contacts*.

The problem of *multi-state defendants* arises because of two related phenomena. The rise of the multi-national corporation, and the tendency of companies which trade internationally to establish agencies or branches elsewhere. A variety of problems arise from the globalisation of corporate structures. Should the courts of a parent's company's seat have jurisdiction over the wrongs of its foreign subsidiaries?[6] Should a judgment given against the parent be enforceable at its seat when the foreign court which gave judgment exercised jurisdiction by virtue of the presence of a subsidiary?[7]To what extent is a corporation amenable to suit in a country where it has a branch? Should it answerable only for the activities of its branch, or for its activities elsewhere?[8]

There is, again, the growing problem of *multi-state litigation*. The possibility of parallel proceedings in different countries is not, of course, a new phenomenon. But it is likely to increase with the globalisation of trade, travel and communications. This gives new impetus to old, but still unresolved, questions. When is it appropriate to decline jurisdiction on the basis that proceedings are underway in another forum? When is it proper to restrain a claimant from commencing proceedings in another court?[9]

Moreover, a particular aspect of the problem of multi-state litigation is likely to become prominent in future: the problem of global assets. A feature of globalisation, especially in the corporate sphere, is that potential defendants are increasingly likely to hold assets in different jurisdictions. This possibility is increased with the dismantling of exchange control mechanisms, and the technical ease of transferring funds. This highlights a number of problems relating to the grant of interim relief in respect of a defendant's assets.[10] When is it appropriate to enforce in one country an asset-freezing order made elsewhere? When is it appropriate to grant relief in support of substantive proceedings in another jurisdiction? In particular, when is it permissible to grant such relief in respect of assets located outside the forum?

Again, there is an aspect of the problem of multiplicity which has achieved some prominence in recent years – the problem of *multi-state contacts*.

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[6] A problem vividly illustrated in a recent English case: *Lubbe v. Cape plc.* [2000] 1 WLR 1545 (HL).
[7] See, e.g., *Adams v. Cape Industries plc* [1990] Ch. 433 (CA).
[8] *Saab v. Saudi American Bank* [1998] 1WLR 937 (CA).
[9] Problems explored in a landmark Canadian decision: *Amchem v. Workers Compensation Board* (1993) 102 DLR (4th) 96 (Sup. Ct. Can.).
[10] Exemplified in such cases as Case C-391/95, *Van Uden Maritime BV v. Firma Deco-Line* [1998] ECR I-7091; *Credit Suisse Fides Trust SA v. Cuoghi* [1998] QB 818 (CA).

The problem of *multi-state contacts* arises when an issue appears to be connected with several different countries, such that it is no longer possible to identify the applicable law. Sometimes the problem is that traditional conflicts rules may provide an inconvenient solution in such cases. The classic example concerns copyright ownership and infringement - although equivalent problems arise concerning the worldwide distribution of defamatory material.

In the case of copyright, orthodoxy has it that the *lex protectionis* governs the existence of such rights, and that the *lex loci delicti* governs infringement.[11] But this has an awkward consequence in the event that questions arise concerning rights in copyright material which has been distributed, and potentially, infringed in numerous jurisdictions. Applying traditional principles, the right-holder's rights in each country of distribution and infringement fall to be determined under each country's laws. But suppose, for example, that the copyright owner brings proceedings against a single infringer for infringements in all such countries. Different laws – perhaps many different laws – would have to be applied to determine the wrongdoer's liability for (effectively) the same wrong committed in each place of infringement.

In a very narrow sense such difficulties are not difficulties for private international law, because private international law clearly supplies an answer in such cases. The problem, however, is that answer is perhaps inadequate in a world where protected material is distributed globally in a digital form. Moreover the problem posed by the international protection of copyright material is especially instructive because it illustrates so well the distinctive problems of globalisation in the modern sense. Thus, the origins of the problem are in part technological, because of the ease, speed, and penetration of digital communication. But they are also conceptual, in a telling way: the problem arises because of the insistence in traditional conflicts methodology that property must have a *situs*, and wrongdoing a *locus*.

Thus described, the problem of multi-state contacts arises because the answer traditionally offered in private international law is clear, but inadequate. But very different problems arise when novel situations arise, implicating many different countries, and it is difficult to determine which countries law should govern. Problems of this type have arisen in connection with the legal regulation of the global securities market.[12] The operation of the global securities system is notoriously complex. Suffice to say that profound difficulties arise because of the truly global nature of the modern financial system. Securities are commonly traded in the international financial markets in bulk, by electronic means, across borders, and in such a way that it is not the securities themselves which are traded, but interests therein. Moreover, the global securities market is lubricated by an endless flow of margin lending, normally secured on the securities held within the system. The upshot is a host of conflicts problems of a novel kind: which law governs the transfer of such globally traded interests; which law governs when a subsequent liquidator of a market participant seeks to challenge the collateral of a margin lender?

It would be inappropriate – indeed, impossible – to seek to answer such questions here. But it is instructive to notice the nature of the problem: it concerns, in part, whether it is any longer appropriate to assume that intangible property should have a *situs*. But difficulty arises because, in a scenario which touches so many countries, and implicates many different actors, it is no longer easy to engage in the balancing of interests, the ascertainment of expectations which has always been the currency of the conflicts process. Indeed, such situations are so complex, that we may

[11] See generally, Ulmer, *Intellectual Property Rights and the Conflict of Laws* (1978).
[12] See generally, *The Oxford Colloquium on Collateral and Conflict of Laws*, Supplement to JIBFL, September 1998.

truly know the facts at all, an arresting possibility which hobbles the conflicts process from the start.[13]

In a sense, such difficulties have always existed. But as so often the phenomenon of globalisation – in this case the globalised nature of modern finance – gives them fresh urgency. How urgent it is may be underlined with a simple statistic. Every day more than one trillion pounds of securities are traded in this way, yet it remains profoundly unclear what conflicts regime governs such transactions.

The problems associated with multiplicity are in a sense old problems. They require us to identify the appropriate law, the appropriate forum. But they are old problems fresh minted in new circumstances. Indeed, they are *new* problems in two senses. First, they reflect difficulties which in the past may have seemed tolerable, or of largely academic interest, but which may no longer be sustainable in a world where litigation with a foreign element is likely to arise more often, and to affect an increasing number of people and enterprises.

Secondly, even if private international can respond to these new situations it must perhaps do so by employing a reconstituted methodology. In a world of multi-state contacts the traditional language of party interests and expectations may be inapt. What may be required is an approach more attuned to considerations of public policy, and to furthering the interests not of any one state, or of the parties, but of a global market. Certainly, as the examples of intellectual property and global securities suggest, the ultimate question in devising adequate rules for choice of law is to determine whose market interests to prefer, which policy to favour – copyright owners or users, transferors or transferees of interests in globalised securities (or third parties).

But these are not only problems for private international law. It is arguable, for instance, that the problem which ultimately underlies many of the problems of multiplicity would disappear if the internal domestic law of the countries concerned were harmonized. The problem of securities collateral would be removed (in part) if approaches to the nature and effect of such transactions did not differ so much between jurisdictions. The same could be said of the problems associated with copyright infringement and defamation. Again, the harmonization of the relevant rules of private international law would doubtless remove many of the problems of multiplicity. The problems associated with parallel proceedings would certainly be alleviated if there was a common approach to jurisdiction in each of the courts where proceedings are commenced. We shall return below to how such strategies might solve the problems for private international law caused by globalisation.

2. The Challenge of Capacity

Globalisation creates a problem of efficiency for any legal system by challenging its *capacity* to handle a large volume of complex litigation. Disputes involving questions of private international law are likely to arise with increasing frequency in future, imposing a degree of strain on the resources of national legal systems. A recent English case suggests that particular difficulty is likely to arise when proceedings are commenced against a parent company in respect of the alleged wrongdoing of a subsidiary in a foreign country.[14] Especially where such proceedings are complex, as in group actions involving a multitude of claimants, it may be questioned whether the resources of the forum are appropriately deployed in adjudicating such disputes.

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[13] See, Rogers, *Of Normalcy and Anomaly*, in *The Oxford Colloquium on Collateral and Conflict of Laws*, above.
[14] *Lubbe v. Cape plc*, above.

In principle, therefore, the solution to the problem of capacity may lie in paying closer attention to the public interest considerations which might affect the location of the appropriate forum. It lies in declining to exercise jurisdiction in cases which have such an insignificant connection with the forum that the public interest of the forum would not be served by hearing the case.

3. The Challenge of Proportionality

Globalisation also creates a problem for prospective litigants, by making the cost and inconvenience of litigation disproportionate to the outcome. This problem of *proportionality* arises because a feature of globalisation in its contemporary form is that cross border interaction affects a larger number of people than previously. Cross border torts are as likely to affect those holidaying abroad as commercial enterprises. International sales contracts are as likely to involve consumers, or to be between private individuals, as to be of a commercial nature. This has implications for the resolution of cross border disputes because the amounts involved may be relatively small, too small in many cases to justify the expense associated with litigating issues of private international law. The problem is partly one of efficiency; is it cost-effective to litigate on such a scale. But it also bears on the question of access to justice, for prospective litigants may be deterred from pursuing or defending claims by the disproportionate expense of doing so.

There may be no single solution to the problem of proportionality. In part the answer lies in reducing the cost of litigation generally. But it also lies in reducing the burden of litigating disputes having a foreign element. In principle, the element of judicial discretion involved in such proceedings might be reduced – although caution should be exercised in this respect, given the importance of maintaining flexibility in this area. Again, the codification of rules for choice of law - unilaterally, or through harmonisation - might to some degree reduce the uncertainty surrounding their formulation.

Again, particular steps might be taken to protect those who are most likely to be affected by the problem of proportionality, notably consumers and employees. Such parties are already afforded a degree of protection from the problem of proportionality in a European context, where the relevant pan-European rules tend to ensure that proceedings involving a consumer will always be brought in a consumer's home court, under local law. In the case of consumers, for example, Article 5 of the 1980 Rome Convention ensures that the mandatory rules of a consumer's habitual residence will always apply. Similarly the regime contained in Articles 13-15 of the 1968 Brussels Convention permits consumers to proceed in the courts of their domicile, and ensures that normally they can only be sued there.

3. The Challenge of Alternative Strategies

Does private international law provide a satisfactory means for regulating globalisation in its contemporary form, faced with the challenge of design, and the challenge of efficiency? There are three possible answers: first, that the subject will absorb these developments, and adapt as it has always done; secondly, that private international law is inadequate to the task; and, thirdly, that private international law has a role, but only if we adopt a collective rather than unilateral approach.

There is some evidence that private international law is as capable of adapting to changed circumstances as it has always been. But there are nonetheless grounds for thinking that is has been placed under considerable strain, and that a collective, harmonised approach may be necessary. But we should beware of responses that are either too simplistic or too apocalyptic. There will be areas

in which private international law in its traditional form is adequate; others were harmonisation is necessary; and others (perhaps) in which it has no role. The important question is not whether private international law has run its course; the important enquiry is to identify the circumstances in which it may have no role and those where harmonisation is desirable.

But if private international law has a role it is likely to affected by three trends: the trend to *de-legalisation*, and the trend to *harmonisation in domestic law*, and the trend towards *harmonisation in private international law*. These trends, themselves responses to globalisation, at once limit the sphere of operation of private international law, and offer alternative strategies for regulating (and fostering) globalisation.

(1) De-legalisation

An alternative response to globalisation lies in the de-legalisation of international dispute resolution. Globalisation also challenges the assumptions of private international law by encouraging new forms of dispute resolution in which the troublesome, perhaps discredited norms of private international law play no part.

Globalisation, and the perceived inadequacy of private international law in responding to its challenges, has led to a growing belief that adjudication should be delocalised and, indeed, de-legalised. Such non-legal methods of adjudication, such as alternative dispute resolution, and expert determination are sometimes advocated. And many would prefer to resolve their differences by free-standing forms of arbitration, in which the arbitral process is exempt from judicial control, and in which neither the arbitral process, nor the substantive determination, are subject to the law of any particular country.[15]

De-legalisation suffers from the fact that (ironically) it may not always be legally possible. It is also unclear whether such informal means of dispute resolution are cheaper or more effective than others. There is also the difficulty that, however, much such informal regimes may offer a means for resolving disputes, they serve no prophylactic role; they do not supply norms for guiding conduct.

(2) The harmonisation of internal domestic law

The harmonisation of domestic law is equally problematic. There is a burgeoning literature on the merits and demerits of such a strategy, especially in the context of the trend towards greater legal integration in Europe. It is unnecessary to reprise that debate here.[16]

But it is perhaps appropriate to emphasise two reasons why the harmonisation of private international law offers a more realistic means of regulating and fostering globalisation.[17] First, the harmonization of internal domestic law often encounters the what might be called the problem of specificity. To be worthwhile such harmonisation must be relatively specific, yet the more specific it is, the harder it is to achieve. By contrast, as many examples suggests, it is tolerably easy to achieve the harmonisation of private international law, which tends to be more generalised. Secondly, private international responds directly to perhaps the greatest difficulty underlying the harmonisation of domestic law. The difficulty of disturbing the traditional cultural and conceptual

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[15] See, in this regard, the changes introduced by the UK Arbitration Act 1996, s. 46(1)(b).

[16] See, e.g., Legrand, 'Sens et non-sens d'un code civil europeen', *Rev. int. dr. comp.* 1996, 779; Zeno-Zencovich, 'The European Civil Code, European legal traditions and neo-positivism', European Rev. Pr. L. 4: 349-362, 1998.

[17] See further, Hay, Lando, Rotunda, 'Conflict of Laws as a Technique for Legal Integration', in Cappelletti, Seccombe and Weiler, eds., *Integration Through Law*, Vol. 1 (1986), 161.

assumptions of national legal systems is the primary obstacle to the harmonisation of internal domestic law. Yet it is in the nature of the choice of law process that the separateness of national law is preserved.

(3) The harmonisation of private international law[18]

As the foregoing discussion suggests, the phenomenon of *hyper*-globalisation poses particular challenges for the private international lawyer. But they are not necessarily fatal; certainly they do not pose problems of principle. But if private international has a continued role in regulating global interaction, this merely begs a further question: is it possible to regulate the global world using national, unilateral conflicts rules? Or is it time to recognise that only the harmonisation of the rules of private international law will suffice? We have so far assumed that each country should adopt a unilateral response to private international law. We have suggested how individual legal systems might respond, in particular, to the challenge of multiplicity. But this might not be enough, for the results may itself create a problem – the problems of multiple solutions.

It may be therefore, at least in certain areas, that only the harmonisation of private international law will yield satisfying solutions. If so, the future of private international law depends upon the possibility of harmonisation in this area.

It is worth making three observations: first, harmonisation may have a particular role in resolving at least some of the problems faced by private international law in an age of *hyper*-globalisation; secondly, harmonisation of private international law may have advantages over the harmonisation of internal domestic law; thirdly, in the European context we are embarking upon a new project - the centralised, wholesale harmonisation of European private international law, as a tool of European integration.

As to the first, two things need be said. First it is pointless to speculate in widely general terms about whether a collective approach is inherently preferable to a unilateral approach; or about whether the harmonisation of private international law is preferable to the harmonisation of internal law. But, secondly, it is possible to see how the harmonisation of private international law has a role in meeting the particular problems to which hyper-globalisation gives rise.

Thus, it is possible that the problems associated with parallel proceedings might only be resolved with certainty, and with no threat to international comity, if both courts concerned share the same rules relating to jurisdiction. Again, it might be said that uniformity in the rules concerning the enforcement of judgments is necessary to reduce the risk associated with global trade and commerce.

As to the virtues in principle of the harmonisation of private international law, as distinct from internal law, the arguments are familiar, but attractive. Such harmonisation preserves the integrity of internal law. If harmonisation is to be embarked upon it is relatively simple, and more likely to lead to agreement. It is especially apt for securing two significant objectives: party autonomy, and party protection.

In many respects the objections to harmonising private international law are not what they seem. Some are objections which could be levelled at any instance of legal unification - such as the difficulty of achieving a workable compromise between different legal cultures, idioms and national policies. Others are in truth objections to employing rules of private international law at all, to be considered below.

[18] See generally, Hay, Lando, Rotunda, op. cit..

3. THE SCEPTICAL CHALLENGE

The future, then, lies in a patchwork of regulatory techniques. The future does not lie in one strategy or another. This may be obvious, although it will not satisfy the idealists. But it depends upon on an assumption: that private international law is in principle a sound technique for regulation. But this begs a question with which I should perhaps have started: is private international law a flawed technique of integration?[19]

Some would say that private international law as a technique for regulating trans-national disputes has always been flawed, and that hyper-globalisation merely exaggerates and exposes its inherent deficiencies. Alternatively expressed, private international may *never* have offered a real solution to the age-old phenomenon of globalisation, although it is only now, in an era of wholesale globalisation, that this has become apparent. The criticism that private international is deficient as a regulatory technique, as a response to globalisation, echoes the charge that it is inherently defective as a means of pursuing the *goal* of globalisation.

The case against private international law as a regulatory tool has several limbs.

1. The Form of Conflicts Rules

The formulation of conflicts rules can cause surprising difficulty. The problem lies in the complexity of the situations involved. In particular, a given issue will be connected with at least two countries (the forum and one other), and possibly more. is likely to be connected. It is inherently difficult to determine the country with which the matter is best connected. Even apparently slight variations in the fact of particular cases may alter the balance of interests, expectations and connections. Private international law is thus an area of law in which certainty and predictability is sometimes neither possible nor desirable.

This gives rise to two different problems, the problem of *extremism*, and the problem of *contradiction*. The former arises because the complexity of the fact patterns involved can produce of one of two reactions: the desire to impose a degree of certainty, or the desire to reflect the complexity in rules of extreme flexibility. A related problem is that of trying to devise rules which are both sensitive rules for adjudicatory purposes, and definite rules for the purpose of prospective planning.

An example of a rule which aspires to certainty, at the expense of any flexibility is Article 21 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Another is Article 5(1) of the Brussels Convention. An example of the opposite extreme, a preference for flexibility over certainty, is perhaps Section 6 of the American Restatement on Conflict of Laws. Another may be the doctrine of forum non conveniens, which governs many aspects of jurisdiction in common law jurisdictions.

The problem of contradiction arises when, in an effort to achieve both certainty and flexibility, conflicts rules aspire to both certainty and flexibility simultaneously, leading to self-contradiction. An example is Article 4 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, in which the flexibility imported by Article 4(5) apparently destroys the certainty

[19] Hay, Lando, Rotunda, op. cit..

Again, there may be cases in which the meaningful application of foreign law is impossible. There may be three somewhat exceptional types of case in which real difficulty arises: first, those where the answer depends not merely upon understanding the rules of a foreign system, but its underlying, embedded principles; secondly, those where a court cannot have access to the considerations on which the answer depends, as where questions of public policy are involved; and, thirdly, those where the state whose law is in question has a public interest in the accuracy of the outcome.

That such difficulties exist does not mean, however, that they cannot be solved - or that they cannot be solved in most cases. A combination of strategies might ease the situation. It is important, for example, that litigants should be allowed as much freedom as possible to ignore the foreign elements in a case by not pleading foreign law. This allows them, up to a point, to assess the cost and difficulty of introducing a conflicts element into proceedings. Again, in common law jurisdictions, the doctrine of forum non conveniens allows a court to exclude cases in which the proof of foreign law is disproportionately costly, on in which it is inappropriate because of the complexity of the issues involved.

This suggests that the proof of foreign law is not the fatal flaw in the conflicts process that some would suppose. But we should not be complacent. The likely increase in the volume of litigation which globalisation is likely to engender may bring the problems associated with the process of applying foreign law into sharp relief. Certainly, the twin problems of capacity and proportionality, referred to above, arise largely because of the difficulty of establishing and applying foreign law. In response, we may all be forced to examine our procedures for establishing foreign law, to test their efficiency and effectiveness. More intriguingly, it may be necessary to reconsider the possibilities of judicial assistance in this area. The existing facilities for seeking judicial assistance in matters of foreign law are notoriously defective. But it may be necessary to consider more radical forms of judicial co-operation. Moreover, it may be necessary, even in countries where such a possibility is presently unheard of, to consider whether it may be necessary to decline to exercise jurisdiction in cases where the proof of foreign law is unlikely to be efficient or effective.

4. Answering the Sceptical Challenge

The answer to the sceptical challenge is that none of these objections, not even the last, is decisive. Each has an answer, or a partial answer. If any (or all) are difficulties at all they are marginal difficulties, which are likely to manifest themselves only rarely. Even if, at its worst, they give cause for concern about certain cases, they are not structural objections to the use of private international law as a means of regulating - and promoting - globalisation.

4. CONCLUSION: THE FUTURE OF PRIVATE INTERNATIONAL LAW

What conclusions are suggested by our consideration of the role of private international in an age of globalisation?

The first is that private international law indeed has a role, despite some predictions to the contrary. Globalisation, in its contemporary form, is not inherently unsuited to regulation using conflicts techniques. True, other regulatory strategies may acquire a greater degree of prominence than they have hitherto enjoyed, but they may not in most cases offer an alternative. They harbour their own difficulties – especially where the harmonisation of internal domestic law is concerned. And they may not in end be as suitable as regulatory tools as the rules of private international law, not least

supplied by Article 4(2). Another may be the relationship between Sections 11 and 12 of the (UK) Private International Law (Miscellaneous Provisions) Act 1995, concerning choice of law in tort.

In practice the solution to these difficulties is surprisingly elusive. In principle, however, it lies in designing threshold requirements of sufficient certainty.

2. The Problem of Forum-centricity

It is sometimes said that an inherent flaw in the conflicts process is the homeward trend, which leads courts to apply their own law, or to exercise jurisdiction. It is unclear, however, (and doubtful) whether this is in practice as great a problem as is sometimes supposed, or is as great a problem as it might have been. Nor is it clear why such a tendency should be regarded as a deficiency, at least when it reflects the legitimate interests of the forum. Those who argue that this is a deficiency do so perhaps because they espouse a particular position on the purpose of the conflict of laws, which regards multilateralism as a self-evident good, and disparages the idea that the forum may have distinctive interests in the conflicts process.

3. The Problem of Foreign Law[20]

A potentially devastating charge against the conflicts process is that it rests ultimately upon a false assumption. More precisely, the choice of law process may be fatally flawed. This is because the assumption upon which it rests, that the courts of one country may apply the laws of another country, may false. Some would say that the effective, accurate application of foreign law is impossible. This may not be true in all cases, but often enough that the aspirations of the process are undermined. It would not be appropriate to expand on the foreign law problem in the present context. But the argument that the proof of foreign law is unfeasible is central to the case of those who doubt the viability of the conflicts process. It deserves some attention.

Inspection suggests that this charge is not as unanswerable as it might appear. At one level, it may rest on a misunderstanding of a fundamental nature. It may reflect the dubious belief that a court can never arrive at the 'correct' answer to a question of foreign law, something which a court in the country whose law is in question is capable of achieving. But this view is doubly mistaken. It makes the philosophically dubious assumption that a 'correct' answer exists at all; it may be true that a court cannot arrive at the correct answer to a question of foreign law, but that is because no such answer exists, something which is as true in the court whose is in question as anywhere else. This view also erroneously assumes that the proof of foreign law is incapable of replicating the process whereby a court applies its own law.

In truth, some may see in the proof of foreign law failings and uncertainties which exist as much if a court is required to apply its own law. The reality is that in many cases the application of foreign law is no more unpredictable and uncertain the application of local law. This may not be true in all cases - although such intractable cases might be addressed in other ways - but we should not cloud our judgment of the proof of foreign law by having false expectations of what it can achieve.

This is not to deny, however, that the proof of foreign law may be problematic. On the one hand, the process may be costly. More precisely, the cost may be such that it would be disproportionate to the ends that might be achieved.

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[20] See generally, Fentiman, *Foreign Law in English Courts* (1998), esp. chs. 1, 10.

because it is of the essence of choice of law process to leave the rules of internal domestic law intact. Most importantly, perhaps, it is apparent that the supposed failings of private international law as a means of controlling and furthering integration are misplaced; rumours of the subject's death are exaggerated.

But this is not to deny that globalisation poses particular challenges for private international law. In particular it may be necessary to adopt greater flexibility in outlook and approach in the design of conflicts rules than has sometimes been the case. We may also be required finally to address questions of a fundamental nature which have hitherto been largely ignored, but which it is no longer possible to avoid – such as the implications of the tension between comity and justice, certainty and flexibility, which underlie the problem of parallel proceedings. The likely increase of cases involving a foreign element might make such questions unavoidable.

It may also be necessary to adopt a more policy-centred approach than has been traditional, at least in European legal systems. Private international law may in future have an increasingly 'public' character. Certainly the familiar choice-of-law equation, in which connections are weighed, private expectations assessed may no longer be sufficient. As this suggests, a more collectivist approach may be required, especially where the functioning of important global markets is concerned. It may be necessary to contemplate a greater degree of harmonisation than has sometimes been thought desirable in some countries.

Above all, perhaps, it may be necessary to explore the consequences of the fact that the reach of private international law, its penetration into everyday life is likely to be greater than in the past. The volume of conflicts disputes is likely to increase. They will no longer be rare, affecting largely commercial matters, but commonplace, touching the lives of ordinary litigants, particularly employees and consumers. As this perhaps suggests the challenge to private international law from the phenomenon of globalisation is not that the subject is threatened with extinction, but that it is of vastly greater importance than ever before.