Course Description:

The Private Public Divide in International Dispute Resolution

The Hague Academy August 2017

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The relationship between private and public international law is marked by two conflicting tendencies: separation and convergence. Traditionally, these areas of law are clearly separated by different actors, concepts and perspectives: Public international law is mainly oriented to the legal intercourse between states and international organisations and, consequently, dispute resolution takes place in specific adjudicative bodies for subjects of international law. Private international law addresses the rights and interests of private parties and tends to accommodate cross-border relations by looking for the closest connecting link between the subject matter, the competent national court and the applicable law.

Today, growing overlap has become a landmark in the relation between both areas of law[1]: Modern public international law tends to address rights and obligations of individuals and of corporations. These issues are mainly dealt with before domestic courts. As a consequence, domestic courts are confronted with an increasing number of disputes involving foreign public interests as well as the exercise of international public authority. Traditionally, these disputes were excluded from domestic courts by sovereign immunity, non-justiciability, comity, political question and similar doctrines. However, commercial activities of states are no longer exempted from civil courts (while the situation with regard to commercial activities of international organisations is still unsettled). The exemption of so-called “acta iure imperii” from civil litigation refers to the private public divide. On the other hand, states were traditionally not permitted to enforce their public claims in foreign domestic courts. These disputes

[1] *Mills*, The Confluence of Public and Private International Law (2009); *O’Connell,* The Power & Purpose of International Law (2011), p. 327 ff. (enforcement of international law by domestic courts).

were considered to be resolved by international dispute settlement[2]. Today, the situation has become more complicated as additional criteria are discussed: for instance, a human rights exception from immunity and the need to offer alternative remedies to private parties when immunity is granted to a defendant state or international organisation.[3] Besides, there is a growing tendency that states and international organisations use private law remedies for the cross-border enforcement of international legal standards. Nevertheless, the distinction between commercial and non-commercial disputes remains an important criterion to distinguish between domestic and international settlement of disputes.

The private public divide is also identifiable in instruments of private international law. International conventions and other instruments usually apply to "civil and commercial matters"[4] or to "commercial arbitration"[5]. Although there is a consensus that these notions are to be interpreted autonomously, the underlying legal concept of "civil and commercial matters" refers to the public-private law divide. In recent practice, the uncertainties of the concept have become more evident, especially when public authorities are involved in cross-border litigation or when claims based on public law are enforced cross-border.[6] On the other hand, there is a tendency to setting up direct cross-border cooperation mechanisms where public bodies exchange information and enforce claims in transnational situations.[7] These constellations are found in the instruments concerning family law, especially in the Regulations Brussels II^{bis}[8] and on Maintenance.[9] It is an open question whether this development qualifies as a genuine shift from private to public enforcement.

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[2] This delineation is based on the public-private law divide although the concept was never clear – neither in the domestic laws nor at the international level.

[3] The issue is largely unsettled, see International Court of Justice, judgment of 2/3/2012, *Jurisdictional Immunities of the State, Germany v. Italy, Greece intervening*.

[4] The most prominent example is Article 1 of the Regulation Brussels I^{bis} (Reg. EU 2012/2015), see ECJ, 2/15/2007, case C-292/05, *Lechouritou*, EU:C:2007:102. Some instruments of private international law are not expressly confined to civil and commercial matters, See Article 1 of the Insolvency Regulation (Reg. EU 1346/2000), *Hess/Oro*, Civil and Commercial Matters, in: European Encyclopedia of Private International Law (2017).

[5] See Article I (3) of the New York Convention of 1958.

[6] A pertinent example is the cross-border enforcement of tax claims based on tort or on unjust enrichment, see ECJ, 9/12/2013, case C-49/12 *Sunico*, EU:C:2013:545, para 33.

[7] In the area of international judicial assistance, private international law borrows from recent developments in international administrative law.

[8] The ECJ qualified the decision of a public administration to take a child into care and place him outside his original home as a "civil matter" in the sense of the Brussels II^{bis} Regulation, ECJ, 11/27/2007, case C-435/06, *C*, EU:C:2007:714, paras 45 ff.

Moreover, the private public divide does not only occur in the context of litigation in domestic courts: it is also visible at the international level. Here, dispute settlement is characterised by a considerable fragmentation and specialisation of dispute resolution bodies. The delineation between these courts and (arbitral) tribunals does not openly operate on the basis of the public-private law divide, but is based on the specific competences attributed to the different institutions. Nevertheless, the private public divide re-appears in a different context: One prominent example is international investment law, where arbitration procedures are largely influenced by international commercial arbitration although the subject matter mainly relates to expropriation. Recently, the proceedings applied in investment arbitration have been criticised due to lack of transparency; also, for being unapt to address the considerable impact of the arbitral awards on the economic and political systems of the states involved.[10] From the perspective of the private public divide the question is whether proceedings conceived for the resolution of private disputes are also suitable to resolve issues of public (international) law.[11] This example demonstrates that the private public divide is not only a technical issue, but is closely related to the overall framework of dispute settlement.

The Hague lecture shall explore the involvement of private and public actors, domestic and international adjudicative bodies as well as the different procedures applied in the settlement of international disputes. It aims at elaborating a systematic approach of international dispute settlement and to reveal the underlying interests and core values. As a result, the delimitation between the different fora of dispute resolution shall be clarified by a systematic perspective.

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[9] Regulation (EU) 4/2009: Articles 49–63, the new forms of cooperation are described by *Hess & Spancken*, in: Beaumont, Hess, Spancken & Walker (ed.), The Recovery of Maintenance in the EU and Worldwide (2014), p. 331 ff.

[10] Similar critics can be formulated with regard to the enforcement of sports law by the Court of Arbitration for Sport which is largely detached from a residual control of state authorities.

[11] *Schill*, Introduction, in: Schill (ed.), International Investment Law and Comparative Public Law (2010), p. 3 ff.