

INTERNATIONAL JUDICIAL COOPERATION IN RESPONSE TO TRANSNATIONAL CRISES¹

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1. INTRODUCTION

This essay mainly focuses on global crises that give rise to conflicts that cross borders and therefore call on States to perfect their administrative and judicial tools of international cooperation to ensure that the law is applied and rights are protected in cross-border areas.

I intend to discuss this topic in three sections: 1. What contemporary international judicial cooperation is like; 2. The extent to which international judicial cooperation depends on harmonization and uniformity among jurisdictions; 3. Examples of how the 2007-2009 financial crisis and multifaceted crisis caused by the Covid-19 pandemic increased international judicial cooperation and how they managed to stimulate convergence among jurisdictions.

2. WHAT IS CONTEMPORARY INTERNATIONAL JUDICIAL COOPERATION LIKE?

This paper discusses international cooperation as a practice between courts and administrative bodies of different States, with the objective of facilitating the effectiveness of public powers that, due to the transnational nature of the interests involved, need to go beyond the borders of a single State.

To understand the scope of the expression “international judicial cooperation”, we shall use the term “public powers” to mean the dispute-resolution authorities powers intended to protect rights typical of the Judiciary and also assigned to certain administrative authorities, as well as executive administrative powers of law enforcement, including powers of criminal prosecution.

Examples of international judicial cooperation in civil, commercial, administrative and criminal matters: communications and service of process; exchange of information about

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documents and proceedings; evidence-taking; joint criminal investigation between States; recognition and implementation of foreign decisions; cross-border insolvency of companies and financial institutions; judicial measures of interim relief; and extradition.

3. TO WHAT EXTENT IS INTERNATIONAL JUDICIAL COOPERATION FACILITATED BY HARMONIZATION OR UNIFORMITY AMONG JURISDICTIONS?

For Ghio, harmonization is an umbrella term encompassing a variety of different regulatory mechanisms, including approximation (top-down, i.e. it starts at the supranational level and progresses down, to the level of States) and convergence (bottom-up). The latter is a spontaneous phenomenon in which States borrow standards, principles and rules from other jurisdictions, without abandoning their national concepts. Importantly, neither convergence nor approximation necessarily result in legal uniformity but rather, aim at achieving increased legal similarity.³

In this context, harmonization among national jurisdictions in matters of international judicial cooperation will be analyzed from two different perspectives. Firstly, the topic will be examined from the point of view of substantive aspects of cooperation, that is to say, the content of the measures of cooperation, and then it will be examined from standpoint of the procedural aspects of the measures of cooperation.

International judicial cooperation makes it possible for powers, duties, rights and obligations instituted under the norms of one jurisdiction to be effective in another national jurisdiction.

Thus, the recognition by one State of foreign judicial decisions and claims related to the rights that are provided for only in another State may serve as a premise for future convergence, because it leads States to become familiar with the laws, rights, obligations and duties of other States.

³ This understanding is based on the etymological and literal meanings of the words. See Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699 (1991). See also the definition of “harmonization” in the Cambridge dictionary (“the act of making different people, plans, situations, etc. suitable for each other” and “the act of making systems or laws similar in different companies, countries, etc. so that they can work together more easily”); see the definition of “approximation” in the Merriam-Webster dictionary (“a process of drawing together” which results in “a thing that is similar to something else, but is not exactly the same”); see the definition of convergence in the Cambridge dictionary (“[the] fact that two or more things, ideas, etc. become similar or come together”) (emphases added). See generally, EMILIE GHIO, RETHINKING HARMONISATION. LESSONS FROM EUROPEAN INSOLVENCY LAW (forthcoming 2022).

Regarding international judicial cooperation procedures, however, it is possible to identify convergence, uniformity or approximation among national jurisdictions, according to the national, international or supranational nature of the normative sources of the cooperation procedures.

It should be pointed out that procedures of international judicial cooperation enshrined in national norms are guided by legal values and principles that form part of fundamental human duties. One State, by cooperating with another, will be promoting the fundamental rights of its own Constitution, although the foreign rights and decisions do not fully coincide with its own laws.

This being the case, international judicial cooperation is a *prima facie* duty to be honored by States, and refusing to cooperate must be an exceptional, proportional measure based on the need to respect certain limits imposed by the international public policy (*ordre public*) of the State asked to cooperate.

What motivates or limits international judicial cooperation, however, are fundamental legal values and principles that depend on a *convergent interpretation* between cooperating States. Convergence is essential in international judicial cooperation when based on norms of national origin.

Indeed, unless States apply the common principles that guide international judicial cooperation in a convergent manner, such cooperation will have little chance of being realized if based solely on national norms. Model laws on this topic, such as the UNCITRAL Model Law on Cross-Border Insolvency and the Model Code of Interjurisdictional Cooperation for Ibero-America, strengthen the mission of convergence among national legal systems of international judicial cooperation.

Without such convergence, the alternative is to go back to the origins of international judicial cooperation and promote express reciprocity, in other words, international judicial cooperation conditional on a specific pre-existing treaty among States who intend to collaborate with one another. These days, there are countless bilateral and even multilateral treaties in this subject area, as shown by the conventions of Mercosul, Interamerican Specialized Conferences on Private International Law, the Hague Conference on Private International Law (HCCH) and the United Nations Organization (UN).

In this particular scenario, where the cooperation procedures are based on a treaty, the objective is not convergence or approximation but rather uniformization entre among the jurisdictions of the cooperating States.

Finally, within the European Union, Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and Regulation 848/2015 on Insolvency Proceedings are examples of supranational rules concerning procedures for international judicial cooperation.

As States commit to such regulations, they will tend to incorporate European procedural rules of international judicial cooperation into their jurisdictions. This is typically a phenomenon of approximation among jurisdictions.

4. EXAMPLES OF HOW CRISES INTENSIFY INTERNATIONAL JUDICIAL COOPERATION

4.1. The 2007-2009 financial crisis

The 2007-2009 financial crisis revealed the lack of legal instruments necessary for States to promote a coordinated action on the transnational insolvency of financial institutions. Applying the rules of transnational insolvency to financial institutions is not always a good choice, although such procedures may be a feasible alternative these days.

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, clearly resulted from the 2007-2009 financial crisis.

With the advent of the 2007-2009 financial crisis, international organizations carried out studies on the convergence of national jurisdictions with respect to the insolvency of financial institutions, including the Basel Committee on Banking Supervision,⁴ the Financial Stability Council,⁵ the United Nations Commission on International Trade Law⁶ and the International Monetary Fund.⁷

In a nutshell, it may be said that the 2007-2009 crisis promoted a consensus in the international legal community that it is necessary to adopt common principles on the

⁴ Basel Committee on Banking Supervision [BCBS], *Report and Recommendations of the Cross-border Bank Resolution Group*, <https://www.bis.org/publ/bcbs169.pdf>.

⁵ Financial Stability Board [FSB], *Key attributes of effective resolution regimes for financial institutions* (Oct. 2011), https://www.fsb.org/wp-content/uploads/r_111104cc.pdf.

⁶ Recent developments concerning the global and regional initiatives regarding the insolvency of large and complex financial institutions.

⁷ INTERNATIONAL MONETARY FUND [IMF], RESOLUTION OF CROSS-BORDER BANKS — A PROPOSED FRAMEWORK FOR ENHANCED COORDINATION, 2010 POLICY PAPERS, no. 63, at. 1 (2010), <https://www.elibrary.imf.org/view/journals/007/2010/063/article-A001-en.xml>.

transnational insolvency of financial institutions and the regulation thereof through convergent national norms.

Moreover, it is important to point out that the conclusions expressed on this topic by international organizations are leading to new guidelines for contemporary international judicial cooperation in general, and not just for the transnational insolvency of financial institutions.

For example, Recommendation 4 of the Basel Committee on Banking Supervision reads as follows: “Cross-border effects on national decisions: To promote better coordination among national authorities in cross-border resolutions, national authorities should consider the development of procedures to facilitate the mutual recognition of crisis management and resolution proceedings and/or measures.”

In fact, it is an extraordinary advance for contemporary international judicial cooperation to admit that techniques involving the mutual recognition of foreign administrative and judicial decisions around the world are essential instead of the current view that mutual recognition is a privilege of States that have previously signed treaties with each other or that belong to certain communities such as the European Union.

4.2 The multifaceted crisis caused by the Covid-19 pandemic

The multifaceted crisis caused by the Covid-19 pandemic is a fine example of the important role to be performed by international administrative and judicial cooperation in the various spheres of public and private law.

International organizations promoting the harmonization of international systems of judicial cooperation, such as the HCCH, the UN and the European Union, are developing studies, principles and guidelines intended to uniformize the interpretation and application of new measures of international judicial cooperation in the context of the Covid-19 Pandemic.

In the words of the Permanent Bureau of the HCCH,⁸

With international borders closed and containment measures in place, cross-border movement of people and goods is subject to unprecedented restrictions. In many jurisdictions, children and families remain stranded. Access to government services remains limited. Legal procedures have been delayed or suspended. Flows of goods have been reduced or restricted and businesses left

⁸ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW [HCCH], HCCH COVID-19 TOOLKIT 1 (2020), <https://assets.hcch.net/docs/538fa32a-3fc8-4aba-8871-7a1175c0868d.pdf>.

unable to fulfil contractual obligations. However, even as we witness a surge in the use of technology to assist in these uncertain times, the fact remains that questions of private international law abound.

Various HCCH Conventions and their supporting documentation provide valuable assistance as we navigate this crisis together and adjust to the new reality in which we find ourselves – a reality which will undoubtedly continue to have an impact on our everyday lives long after COVID-19.

In this context, the HCCH has developed a COVID-19 Pandemic Toolkit, covering the following topics:⁹

International Child Protection and Family Matters:
Child Abduction and Child Protection;
Child Support and Family Maintenance;
Intercountry Adoption.

International Legal Cooperation, Litigation and Dispute Resolution:
Apostilles (authentication of public documents);
Service of Documents and Taking of Evidence;
International Commercial Contracts.

Here is one of the conclusions of the “Report on the meeting of the Working Group on International Cooperation on the Impact of the Corona Virus (COVID-19) on International cooperation in criminal matters: a one-year overview” held in Vienna on 25 and 26 March 2021 by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime.

The report referred to the impact of the COVID-19 pandemic on the transformation of the *modus operandi* of organized criminal groups. It stressed that the pandemic resulted in a significant increase in crimes such as trafficking in fake and counterfeit medical products, corruption, drug trafficking and cybercrime. In addition, the report observed that one sector of judicial cooperation that had been affected by the pandemic, in particular by flight cancellations and other limitations resulting from it, was that of the surrender of persons sought in extradition proceedings, as well as proceedings relating to the execution of European arrest warrants. It highlighted that, in general, the feasibility of any transfer by air needed to be assessed on a case-by-case basis and often depended on ad hoc flights and the practical arrangements in place.¹⁰

⁹ HCCH, *supra* note 8, at 2.

¹⁰ Conference of the Parties to the United Nations Convention against Transnational Organized Crime. *Report on the meeting of the Working Group on International Cooperation*, U.N. Doc. CTOC/COP/WG.3/2021/3 (Apr. 8, 2021) at 6, https://www.unodc.org/documents/treaties/International_Cooperation_2021/Report/V2102254.pdf.

Within the European Union, regarding digital technologies, the European Commission has initiated the process of creating a norm that will boost the efficiency of international judicial cooperation in cross-border processes in the EU and make it more resistant to crises such as the COVID-19 pandemic. The public consulting phase of this legislative phase ended on May 11, 2021.¹¹

In fact, self-isolation and travel restrictions have undermined conventional face-to-face legal services in court and accelerated the implementation of remote audiovisual communication processes worldwide, which has increased the frequency of access to [virtual] courts. As a result, digital electronic international judicial cooperation proceedings are no longer the exception but have become the rule.

5 LESSONS TO BE DRAWN FROM THE GLOBAL CRISES FOR INTERNATIONAL JUDICIAL COOPERATION

The 2007-2009 financial crisis and the multifaceted crisis caused by the Covid-19 Pandemic made it urgently necessary for international entities to publish studies and recommendations capable of promoting convergence among national jurisdictions of regarding cooperation measures imposed by the new situations of cross-border conflict.

In fact, the international community's efforts to reach a consensus on new measures of international judicial cooperation attest to the importance of its role in dealing with crises.

Yet not only has international judicial cooperation displayed leadership in resolving conflicts triggered by global crises but incredible developments have been achieved in the general principles of international judicial cooperation, such as the mutual recognition of decisions, increasing its effectiveness.

In times of crisis, urgent solutions are indispensable. International judicial cooperation could be made more effective by overcoming the old dogma that such cooperation is only possible between States who have established pre-existing treaties to that purpose.

¹¹ Proposal for a regulation: Modernising judicial cooperation between EU countries – use of digital technology, Ref. Ares(2021)172677 (Jan. 8, 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12685-Modernising-judicial-cooperation-between-EU-countries-use-of-digital-technology_en.

List of Abbreviations

EU - European Union

HCCH - Hague Conference on Private International Law

UN - United Nations Organization

UNCITRAL - United Nations Commission on International Trade Law