Private-Public Divide in International Dispute Resolution. A 2017 Hague Lecture, Out Now

The 2017 Hague Lecture of Prof. Burkhard Hess, just published in the *Recueil des Cours*, addresses dispute resolution in international cases from the classical perspective of the private-public divide. This distinction is known in almost all legal systems of the world, and it operates in both domestic and in international settings. The main focus of the Lecture relates to overlapping remedies available under private international and public international law; it maps out the growing landscape of modern dispute resolution, where a multitude of courts and arbitral tribunals operating at different levels (domestic, international and transnational) is accessible to litigants in cross-border settings. Today, a comprehensive study of these developments is still missing. This Lecture does not aim to provide the whole picture, but focusses instead on some basic structures, revealing three main areas where the distinction between private and public disputes remains applicable today:

First, the divide delimitates the jurisdiction of domestic courts in cases against foreign states and international organisations (immunities); it equally limits the possibilities of foreign and international public entities to enforce public law claims in cross-border settings. As a matter of principle, public law claims cannot be brought before civil domestic courts of other states. However, this rule has been challenged by recent developments, especially by the private enforcement of (public) claims and by the cross-border cooperation of public authorities. Moreover, the protection of human rights and the implementation of the rule of law in cross-border constellations entail a growing need for a judicial control of *acta iure imperii* – even if only by the courts of the defendant state.

The second area of application of the divide relates to the delineation between domestic and international remedies. In this field, the distinction has lost much of its previous significance because nowadays individual commercial actors may bring their claims directly (often assisted by experienced actors like litigation funders) before international arbitral tribunals, claims commissions and human rights courts. In this area of law, individuals' access to international dispute

resolution mechanisms has been considerably reinforced. Here, Prof. Hess argues that it would be misleading to qualify parts of the current dispute resolution system as purely "commercial" and other parts as purely "public or administrative". There are revolving doors between the systems and the same procedures are often applied; what really matters is the proper delineation of different remedies which functionally protect the same interests and rights.

The third area relates to the privatization of dispute settlement, especially in the context of private ordering. At present, powerful stakeholders often regulate their activities *vis à vis* third parties (including public actors) by globalized standard terms. Pertinent examples in this respect are financial law (i.e. ISDA), the organization of the internet (i.e. ICANN) and sports law (i.e. CAS). In this context, there is a considerable danger that the privatization of law-making and of the corresponding dispute settlement schemes does not sufficiently respect general interests and the rights of third parties. A residual judicial control by independent (state) courts is therefore needed. Data protection in cyberspace is an interesting example where the European Union and other state actors are regaining control in order to protect the interests of affected individuals.

Finally, the Lecture argues that the private-public divide still exists today and – contrary to some scholarly opinions – cannot be given up. At the same time, one must be aware that private and public international law have complementary functions in order to address adequately the multitude of disputes at both the cross-border and the international level. In this context the private-public divide should be understood as an appropriate tool to explain the complementarity of private and public international law in the modern multilevel legal structure of a globalized world.

The Lecture has been published in vol. 388 of the *Recueil*, pg. 49-266. A pocket book will be available in the coming months.