

## CORNERSTONES FOR THE CROSS-BORDER ATTORNEY SERVICE AND THE IMPORTANCE OF THE EU-EN4S PROJECT AND PARTNER NETWORKING

**Accepted**

6. 7. 2022

**Revised**

10. 10. 2022

**Published**

1. 12. 2022

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**Keywords**En4s,  
execution of judgements,  
international law,  
attorneys,  
cross-border practice,  
networking,  
globalisation,  
sovereignty,  
European Union,  
area of freedom security  
and justice

**Abstract** Many papers and contributions identify the processes by which consistent cross-border service to the client may be achieved within globally integrated firms. The role of international attorneys is becoming very complex due to new global challenges. To surpass these obstacles, the principal solution is to cooperate and develop close collaboration with colleagues. This is why projects such as EU-En4s Diversity of Enforcement Titles in cross-border Debt Collection in EU, led by the University of Maribor, are so relevant.

## 1 Globalisation versus legal systems based on state sovereignty

Prof. Carrillo Salcedo<sup>1</sup> used to say that international law does not exist. He argued, with the intention to make us students at the Faculty of Law (Seville University) think that public international law is public and is international, but it is not law; and private international law is private and it is law, but it is not international.

He provided examples based on the Security Council of the United Nations and the right to veto granted to those countries being permanent members since they "won" the Second World War, or Resolution 377 A, "*Uniting for Peace*",<sup>2</sup> to emphasise the political character of the United Nations. Decisions are consequently based on state sovereignty and a complex system in which the concepts of democracy and the rule of law are to be seen from a very different perspective. The current invasion/war in Ukraine,<sup>3</sup> the detention and killing of Osama Bin Laden,<sup>4</sup> the constraints of the International Criminal Court,<sup>5</sup> the paralysation of the World Trade Organization<sup>6</sup> or the increasing calls for a deep reform of the system of the United Nations (African

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<sup>1</sup> Inspiring professor and wise intellectual born in Andalusia with 262 works in 560 publications in 4 languages and 1,627 library holdings, see WorldCat Identities. Carrillo Salcedo, Juan Antonio, overview, available at: <http://worldcat.org/identities/lccn-n79038479/> (last accessed Mar 27, 2022). To understand his relevance, see Carrillo Salcedo, 2005.

<sup>2</sup> Known as the "Uniting for Peace resolution", United Nations General Assembly resolution 377 A, states that in any cases where the Security Council fails to act as required to maintain international security and peace, the General Assembly shall consider the matter immediately and may issue appropriate recommendations to UN members for collective measures, including the use of armed force, when necessary, in order to maintain or restore international security and peace. Thought as a solution to the lack of unanimity among its five permanent members, it was designed to provide an alternative avenue for action when at least one permanent member uses its veto to obstruct the Security Council from carrying out its functions. Adopted on 3 November 1950, by a vote of 52 to 5, with two abstentions, the mechanism of the emergency special session has been convened under this procedure on eleven occasions, with the most recent being convened in February 2022 to address Russia's invasion of Ukraine. However, unlike the preceding sessions, the tenth ESS has been 'adjourned', and 'resumed' on numerous occasions over the past several years and remained adjourned.

<sup>3</sup> Russia's invasion of Ukraine is a clear act of aggression and a manifest violation of Article 2.4 of the UN Charter, which prohibits the "*use of force against the territorial integrity or political independence of any State*". Is it a self-defence act, as Putin is claiming?

<sup>4</sup> As it is publicly known, Osama bin Laden, the founder and first leader of the Islamist militant group al-Qaeda, was killed in Pakistan on May 2, 2011, by United States Navy SEALs of the U.S. Naval Special Warfare Development Group.

<sup>5</sup> Ukraine accepted the jurisdiction of the International Criminal Court on February 20, 2014. Therefore, the ICC would have the power to prosecute any war crimes, crimes against humanity, or crimes of genocide committed on any part of the territory of Ukraine. The question is if that will really happen and how to enforce any ruling in Russia.

<sup>6</sup> The WTO's current paralysis is evident, and the Trump administration has been particularly resolute in pursuing its "America first" policy, carrying out a frontal assault on the principles of multilateralism and the rules-based international order that the US itself had promoted in the wake of World War II. Just like NATO, the WTO is a vestige of the Cold War. Since the globalists themselves have already started talking about the need for internal reform, the lack of criticism and new proposals are hindering the development of alternatives or solutions.

Union, 2020)<sup>7</sup> to face modern global challenges are good examples of the predominant interest inspiring international public law.

Regarding private international law limitations, Prof. Carrillo Salcedo explained how our rights as citizens vary from one jurisdiction to another. Just let us imagine any person arriving in any country in the world and a suitcase full of rights may be left at the customs office of entry. Consequently, your rights and private law will mainly depend on the local rules of residence. Sexual orientation (Reid, 2014),<sup>8</sup> abortion (Council on Foreign Relations),<sup>9</sup> private property or family law (Your Europe) can provide a decent understanding of the effect of private law on foreigners in any jurisdiction.

Thus, nowadays, a radical opposition between two models of social structures and two paradigm legal systems remains. On the one side, the centralised institutionalised internal order, and on the other, coexisting, the decentralised, poorly institutionalised international order (Carrillo Salcedo, 1997: 583). Prof. Carrillo Salcedo concluded that *"Yet the evolution of the international community and its legal order, international law, has had the consequence of increasingly clearly bringing out the insufficiency of classical international law, which is fundamentally individualist, and the need for a common order adapted to the dimensions of the planet and charged with protecting the general interest, if not indeed guaranteeing the survival of humanity."* (Carrillo Salcedo, 1997: 595). Prof. Carrillo's contributions and original thoughts are also very relevant for practitioners since, in this context, networking seems to be particularly important and the main tool we have to face cross-border cases.

Practising attorneys face the same challenges considering a system based on the principle of sovereignty, supreme authority within a territory, as the pivotal principle of modern international law.<sup>10</sup> Legal conflicts are more and more complex and

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<sup>7</sup> See also Yee, 2020: 359-369. Among the extensive literature on this matter, see also Clark, 2018: 418-435. And finally, see Kumar Singh, R. Negative Impacts of Power of Veto, How to Reform It.

<sup>8</sup> Yet some 76 countries around the world maintain discriminatory LGBT laws.

<sup>9</sup> "Although the legal status of abortion varies considerably by region, a large majority of countries permit abortion under at least some circumstances; globally, two dozen countries ban abortion entirely. Most industrialised countries allow the procedure without restriction. Around one hundred countries have some restrictions, typically permitting abortion only in limited situations, including for socioeconomic reasons, risks to the physical or mental health of the woman, or the presence of fetal anomalies. However, the legal language concerning exemptions for fetal impairment is often vague, resulting in uncertainty for medical professionals about whether performing certain abortions is legal".

<sup>10</sup> This is not just an EU problem, it is a global issue. See Nelson, 1998: 71-80.

transnational. Cases with foreign elements of different legal natures are on everyone's desks. Therefore, the international practice of law requests relevant cost-benefit analyses since only those having great interest and means may be entitled to solve certain cross-border matters.<sup>11</sup> In fact, often, the fees and costs of international legal proceedings cannot be afforded by clients.

Throughout this contribution within the framework of the project "EU-EN4s, Diversity of Enforcement Titles in cross-border Debt Collection in EU" led by the University of Maribor,<sup>12</sup> the cornerstones for the cross-border attorney service are reviewed from a practitioner perspective. The idea behind this research, financed by the European Commission, is to analyse these differences and tackle identified problems, with the primary goal of strengthening mutual trust.<sup>13</sup> Of the many obstacles faced in cross-border enforcement, perhaps the most pertinent is the lack of mutual trust between national authorities of different EU Member States regarding the enforcement of titles. However, the limitations of the rule of law go far beyond this matter since, nowadays, attorney service needs to be preventive since the high cost of solving problems is inefficient for clients. As the Code of Conduct for European Lawyers<sup>14</sup> of the Council of Bars and Law Societies of Europe establishes regarding attorneys' functions, the ambitious aim of serving the interests of justice, the role of advising might be as important as asserting or defending a cause:

*"In a society founded on respect for the rule of law, the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must*

<sup>11</sup> Many studies have tried to standardise criteria and regulatory parameters based on GATT, NAFTA, EU and other institutions; see Kilimnik, 1994: 269-325.

<sup>12</sup> For detailed info, visit its official website at <https://www.pf.um.si/en/acj/projects/pr09-eu-en4s/> (last visited on April 18, 2022). The project is the fifth EU-Justice project successfully coordinated by the University of Maribor, Faculty of Law, project coordinator prof. dr. Vesna Rijavec. The consortium features a large network of acclaimed universities and other institutions from 13 different EU Member States and one Candidate Country, consisting of the following partners: University of Maribor, Faculty of Law, Slovenia; Leibniz University of Hannover, Germany; Masaryk University, Faculty of Law, the Czech Republic; Mykolas Romeris University, Lithuania; Portugalense University, Portugal; UCLan, Cyprus; University of Graz, Austria; University of Maastricht, the Netherlands; University of Rijeka, Faculty of Law, Croatia; University of Tirana, Albania; University of Wroclaw, Poland; Uppsala University, Sweden; Institute for Comparative Law at the Faculty of Law in Ljubljana, Slovenia; Boleo Global SL, Spain; CEPRIS, Slovenia; and the Chamber of Notaries of Slovenia.

<sup>13</sup> *Id.*

<sup>14</sup> Originally adopted at the CCBE Plenary Session held on 28 October 1988, it was subsequently amended on 28 November 1998, 6 December 2002 and 19 May 2006. See at <https://www.abogacia.es/wp-content/uploads/2012/06/cod-deontologico-abogados-UE-INGLES.pdf> (Accessed 18 April 2022).

*serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend, and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society".*

However, the variability of the concept of justice, the diversity of legal orders, the international limitation of national courts and the deficiencies of international courts, among other challenges and circumstances, make these honourable aims and attorneys' roles a complex assignment. Thus, on 25 November 2006, the CCBE unanimously adopted a "**Charter of Core Principles of the European Legal Profession**" (Council of Bars & Law Societies of Europe, 2019)<sup>15</sup> containing a list of ten principles common to the whole European legal profession. In fact, respect for these principles is the basis of the right to a legal defence, which is the cornerstone of all other fundamental rights in a democracy.

*The core principles are, in particular:*

- (a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case;*
- (b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy;*
- (c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer;*
- (d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer;*
- (e) loyalty to the client;*
- (f) fair treatment of clients in relation to fees;*
- (g) the lawyer's professional competence;*
- (h) respect towards professional colleagues;*
- (i) respect for the rule of law and the fair administration of justice; and*
- (j) the self-regulation of the legal profession.*

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<sup>15</sup> The Charter was adopted in Brussels by the CCBE to establish their independence and to increase understanding among lawyers of the importance of the lawyer's role in society.

In any case, the European Union, as the most developed supranational legal system, is probably an exception. The 27 Member States have developed a unique system where the Court of Justice of the European Union ensures the rule of law and oversees the uniform application and interpretation of legislation.<sup>16</sup>

To enable it properly to fulfil its tasks, the Court has been given clearly defined jurisdiction, which it exercises on references for preliminary rulings and in various categories of proceedings such as actions for failure to fulfil obligations, annulment, appeals, *etc.* Furthermore, with the establishment of the *Area of Freedom, Security and Justice*,<sup>17</sup> announced under article 67 of the Treaty on the Functioning of the European Union (TFEU), the main conditions are to respect the fundamental rights and the different legal systems and traditions of the Member States.<sup>18</sup> However, considering the sensitive nature of the *Area of Freedom, Security and Justice*, some of the member states decided not to take their full part in the decisions made in this area. Thus, the United Kingdom, Ireland and Denmark negotiated exceptions, and so the adopted decisions did not affect them (Adler-Nissen, 2014: 114-146).

In any case, since the Treaty of Amsterdam conferred competence to the European Union to legislate in private international law, an important number of European legislative acts have been adopted, taking precedence over the domestic laws of the Member States to establish common minimum procedural standards in specific legal areas at Union level. In fact, European private international law is of practical relevance for legal practitioners, and not just lawyers, who are making decisions about matters of civil and commercial law or are advising and acting for clients in such matters. The "*acquis Communautaire*", the body of legislation in the area of judicial cooperation in civil and commercial matters, has grown significantly over the last years. Fortunately, legal instruments exist which govern jurisdiction, mutual recognition and enforcement of judgments and applicable law in a broad range of matters, extending from contract to successions and maintenance obligations. Furthermore, European legislation also provides for direct cooperation between the courts and competent authorities of Member States, for example, when taking

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<sup>16</sup> For further info and full details on the Court of Justice of the European Union and its case law, visit its official web page: [https://curia.europa.eu/jcms/jcms/i\\_6/en/](https://curia.europa.eu/jcms/jcms/i_6/en/).

<sup>17</sup> Previously known as the justice and home affairs cooperation, it was established to put in place common policies in relation to asylum, immigration, border control, judicial cooperation in civil and criminal matters and law enforcement cooperation.

<sup>18</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

evidence abroad or providing access to justice in cross-border cases, through provisions on legal aid, mediation and simplified procedures or with the development of low-cost procedures for small and uncontested claims.

In parallel with the adoption of instruments mainly in the area of civil and commercial law, the European Union's exclusive external competence to negotiate and conclude international conventions has also increased. Consequently, the EU (represented by the Commission) has gradually replaced the Member States internationally, and even where the EU cannot be formally a Contracting Party to an international Convention - because the participation of regional/international organisations is not foreseen in the convention-, the EU exercises its competence through its Member States.<sup>19</sup>

Therefore, beyond the European Union, global or cross-border cases must be solved considering private international law, comparative law, alternative dispute resolution and other means and tools based on state sovereignty. Although states are not the only entities with international legal standing and are not exclusive international actors, they remain the primary subjects of international law and keep possessing the greatest range of rights and obligations. Actually, jurisdiction refers to the power of a state to affect persons, property, and circumstances within its territory, and consequently, it may be exercised through legislative, executive, or judicial actions; thus, international law essentially leaves civil jurisdiction to national control. The result is that international law is made largely on a decentralised basis by the actions of the 192 States which make up the international community.

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<sup>19</sup> Four major multilateral conventions have been negotiated by the Commission on behalf of the Union: the Lugano Convention with Norway, Switzerland and Iceland on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters, basically extending the Union's system to these three countries; the 2007 Hague Child Support Convention (ratified by the EU in 2014) and its Protocol on applicable law (concluded in 2010) ensuring the protection of children and spouses in need to maintenance beyond the EU's borders; the 2005 Hague Choice of Court Convention, ratified by the EU in 2015, which ensures that a court chosen by parties is respected, and the resulting judgment is recognised and enforced by the 2019 Hague Judgments Convention, which sets up a comprehensive system for the recognition and enforcement of foreign judgments in civil or commercial matters. The main international partner of the EU on civil justice cooperation is the Hague Conference on Private International Law, of which the EU has been a full Member since 2007. Besides other relevant organisations are UNCITRAL (United Nations Commission on International Trade Law) and UNIDROIT (International institute for the unification of private law), where the EU has observer status. Among others, conventions developed by these international organisations cover issues such as child protection (in particular, child support and prevention of child abduction), choice of court, recognition and enforcement of foreign judgments, security interests, insolvency or protection of vulnerable adults. Recently, the Commission proposed on 16 July 2021 that the EU accedes to the Judgments Convention. The EU's accession to this convention aims at facilitating the recognition and enforcement of judgments given by courts in the EU in non-EU countries while allowing foreign judgments to be recognised and enforced in the EU only where fundamental principles of EU law are respected.

The Statute of the International Court of Justice, Art. 38, identifies several sources of international law:

- a) Treaties between States;
- b) Customary international law derived from the practice of States;
- c) General principles of law recognised by civilised nations; and, as subsidiary means for the determination of rules of international law:
- d) Judicial decisions and the writings of "*the most highly qualified publicists.*"

This list is no longer thought to be complete. It provides a useful starting point and is relevant to provide attorney services. Nevertheless, limitations on legal practice are nowadays more relevant than ever, considering the levels of globalisation and world integration. Also, state sovereignty is changing, and international lawyers are acutely aware of the failure to adequately address the implications for international law of both the changing internal role of the state and the changing nature and structure of global rules and economy (Alston, 1997: 435-448).

## **2 Understanding the complexity of transnational legal service and compliance with clients' needs**

Much has been written about the national and transnational processes transforming legal systems globally and the role of lawyers considering the "rule of law", not as a normative ideal that must be accomplished and realised but rather as a field of action and discourse that emerges through complex relationships among experts, national elites and global institutions (Dezalay and Garth, 2011). In fact, these studies focus on lawyers and their relation with the efficacy of the rule of law (Dezalay and Garth, 2011: 17-90). Many consider lawyers as a business activity instead of a profession, as it was always considered (Moore, 2012: 217-239). The debate is open and very far from being closed in the coming years. Actually, law schools that fail to prepare their students for this new environment and challenges are falling behind (Stevelman, 2008: 852). Regarding the education of lawyers, the discussion is also on the table (Nesiah, 2012: 371-390; Silver, 2009).<sup>20</sup> In fact, there is a well-established thought that lawyers must first master their domestic systems and learn to be effective within

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<sup>20</sup> Many studies focus on the role of attorneys in developing countries and social causes; see Munger, 2008: 754-804. See also Cunha, Gabbay *et al.*, 2018: 1-32 or Wilkins, Trubek and Fong, 2020: 281-355.



the national framework before having opportunities to contribute in a global setting (Silver, 2009: 22).

Ethics and deontology are also very complex but fundamental matters regarding the cross-border practice of law (Boon and Flood, 2009: 29-57). In relation to conflicts of interest prohibition and secrecy/confidentiality obligation, which are both core values of the legal profession, the core is identical; the margins, however, differ from country to country (Hellwig, 2008: 398; Regan, 2016: 133-152). Even the connections of lawyers with power, corruption, tax avoidance and their determinative role as elites are also often questioned with solid arguments (Munger, 2012: 496).<sup>21</sup> Developing countries blame the role of lawyers, as is the case in Africa since the Bar in Paris emerges as a microcosm of such interconnected and enduring histories of legal globalisation, and it is a good example of a cross-roads space across politics and economics, shaped by the legacies of the ties between the *metropole* and its former African colonies (Dezalay, 2018: 639).

*Acting locally but thinking globally*, the concept coined by the environmentalist Patrick Geddes in 1915 (Stephen, 2015), also applies to practising lawyers. Therefore, it is important that global lawyers do not concentrate on exporting their home jurisdictions' law and legal culture as arrogant bearers of knowledge but on enabling their clients to understand and adapt to local opportunities (Kilimnik, 1994: 325).

Therefore, the need for local collaborators is fundamental for attorneys willing to serve their clients' demands and provide proper cross-border legal services. Beyond private law, the global distrust of hierarchical authority and concentrated public and private power generates growth in administrative law, constitutional and other rights law, and the legal regulation of economic enterprise (Saphiro, 1993: 61). Understanding the complexity of the international practice of law drives us to the relevance of transnational independent attorneys' networks and the modern collaboration schemes facilitated by new technologies. Innovative models of law

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<sup>21</sup> Considering the studies of Dezalay and Garth, many authors have developed their view on elite lawyers' global influence: "Dezalay and Garth offer a new and powerful theory challenging those who conduct research in order to establish the liberal promise of law. They have described a political process by which lawyers reach for power in new states as well as old through "double agency." They have shown how lawyers, as elites, technicians, and symbolic entrepreneurs, have taken root on non-Western, and non-northern, political soil, though law itself may be given new meanings and play different roles. Despite my concerns about their point of entry to this research, I have found their work an enormously valuable, and provocative, resource for my own research. Their work will be an important starting point not only for other scholars deeply interested in the globalisation of law, but for all scholars examining the emergence of authority in new states and in the global fields of law".

firms trying to extend their tentacles all over are being developed throughout all kinds of agreements and strategies (Turner, 2006: 985-1032; Raustiala, 2002; Meili, 2001: 307)

### **3 Conclusions**

The analysis, as already reflected by other authors, reflects a failure to adequately address the implications for international law of both the changing internal role of the state and the changing nature and structure of the global economy (Alston, 1997: 435-448). Actually, studies of the globalisation of law will depend as much on a subtle appreciation of differences among peoples of the globe as on similarities (Saphiro, 1993: 64). But once we are comfortable with the globalisation of domestic constitutional law, the question of how we fit it into our separation of powers theories will become uninteresting (Tushnet, 2008: 985-1006). However, being far from there now, networking seems to be the main option for international attorneys and law firms.

Many papers and contributions identify the processes by which consistent cross-border service to the client may be achieved within globally integrated firms (Segal-Horn and Dean, 2007). Others claim the importance of law firms combining national and foreign lawyers (Silver, 2004: 897). Even for the study of lawyers and globalisation, the processual theory provides a new research agenda that shifts the focus to ordinary practitioners, from global firms to local firms, and from advanced economies to emerging economies in order to emphasise the hybridisation of global norms and local expertise (Liu, 2013: 689). Consequently, any EU project should be sustainable based on a solid network and interest that last long after the public economic contributions are finished, and the conclusion of this paper has to insist on the need to create a new source of collaboration throughout the EN4S ATTORNEYS NETWORK. This is the best way to serve our clients but also the European Union since policy decisions based on empirical evidence and real cases will improve the regulatory regime, lining not just practitioners but also legal scholars, law schools, students, regulators, and bar associations, among others (Silver, 2010: 1009, 1072).

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