

The Privatisation of Private (and) International Law

Alex Mills*

Abstract Privatisation is much studied and debated as a general phenomenon, including in relation to its legal effects and the challenges it presents to the boundaries of public and private law. Outside the criminal context there has however been relatively limited focus on privatisation of the governmental functions which are perhaps of most interest to lawyers—law making, law enforcement and dispute resolution—or on the international legal implications of privatisation. This article argues that modern legal developments in the context of private law and cross-border private legal relations—generally known as party autonomy in private international law—can be usefully analysed as two distinct forms of privatisation. First, privatisation of certain allocative functions of public and private international law, in respect of both institutional and substantive aspects of private law regulation, through the legal effect given to choice of court and choice of law agreements. Second, privatisation of the institutional and substantive regulation of private legal relationships themselves, through arbitration and the recognition of non-state law. Together, these developments have established a global marketplace of state and non-state dispute resolution institutions and private laws, which detaches private law authority from its traditional jurisdictional anchors. Analysing these developments through the lens of privatisation highlights a number of important critical questions which deserve greater consideration—this article further examines in particular whether this form of privatisation in fact increases efficiency in either private international law decision-making or private law dispute resolution, as well as its distributive and regulatory effects.

Keywords: privatisation, marketisation, private international law, conflict of laws, party autonomy, international law, private law, arbitration, non-state law

1. Introduction

In modern international contracting practice, parties very frequently specify which court has authority to resolve their disputes, or whether that authority is instead given to an arbitral tribunal, and what set of rules should be applied by that court or tribunal. Historically these

* Professor of Public and Private International Law, Faculty of Laws, UCL. This article is based on an inaugural lecture delivered at the UCL Faculty of Laws on 6 February 2020. Thank you to the anonymous CLP referees for their comments.

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