Introduction

This book identifies the various challenges that contemporary processes of globalization pose for the study and practice of property law. Along the lines of the Global Law Series, this book offers a clear and straightforward analysis of prominent legal scenarios implicating cross-border property interests and ties these quandaries to the underlying normative and institutional features of property law. The analysis throughout the book is premised on what I depict as a pragmatic and context-based view of globalization. This view underscores the quantitative and qualitative impact of the increasing movement of capital, goods, services, and persons across national borders, but at the same time, it avoids attempts to entirely undermine the role of nation-states or of domestic legal ordering. As a positive matter, we are not likely to have any time soon a single world court, legislature, or executive body with general and universal jurisdiction that would overwhelmingly preempt national legal institutions. Accordingly, the book typifies the current development of cross-border activities and processes, generally referred to as *globalization*, as inherently manifesting a fragmented and incomplete phenomenon. This means that we do not currently observe, nor should we anticipate to witness, a complete unification of the geopolitical, economic, or legal landscape. Globalization is not about turning the world into a single indivisible space, which is devoid of any local, national, or regional meaning. Consequently, processes of globalization are not expected to follow a single route in responding to pressures placed on legal systems by markets, interpersonal networks, and technology. Moreover, in contrast to much of the conventional wisdom in the literature about globalization, the book argues that some extra-legal forces, such as culture, political ideologies, and other social systems that generate values and beliefs, do not necessarily push human activity to bringing down borders or to otherwise doing away with nationally based legal systems.[1]

[1] Thus, for example, the potential political backlash against globalization has been a hot-button issue in public discourse, especially following the results of the November 2016 US

In this context, the book emphasizes the unique features of property being both a public law and a private law discipline and explains how the institutional and structural features of property law exhibit particular modes of tension between cross-border activities and current legal systems. Such tension is due particularly to the *in rem* or third-party applicability feature of property, by which property law is based on establishing a single set of rights, priorities, and powers in regard to assets. Such ranking of proprietary interests should also govern relations among distant parties that have no privity of contract or another preset legal basis for governing conflicting claims.

The *in rem* feature of property law also places practical limits on the ability of parties to engage in private ordering to circumvent potential problems of uncertainty due to differences among legal systems. Direct parties to an international commercial transaction can privately decide on the forum that would resolve contractual disputes and on the applicable law that would govern such matters, with little, if any, constraints on this exercise of party autonomy. However, such private ordering could prove of only limited value when the legal interests of third parties must also be considered. Thus, for example, if a US manufacturer sells goods to a Dutch buyer, and the buyer fails to pay and also defaults on other debts, then the insolvency proceedings would most likely take place in the debtor's "centre of main interests,"[2] which could very well be the Netherlands. This means that the legal standing of the US manufacturer as creditor vis-à-vis other creditors of the Dutch buyer would be resolved by the Dutch bankruptcy court. Moreover, the law that the court would apply in deciding how to rank and enforce the various debtors' claims – typically, the law of the state in which the insolvency proceedings were

presidential elections. *See* J. Eilperin, "Obama in Athens: 'The Current Path of Globalization Needs a Course Correction,'" *The Washington Post*, November 16, 2016; P. Baker and A. Swanson, "Trump Authorizes Tariffs, Defying Allies at Home and Abroad," *The New York Times*, March 8, 2018.

[2] This standard is based on the provisions of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, OJ (L 160/5), June 30, 2000 (2000 EC Insolvency Regulation). It establishes in Article 3(1) that "[t]he courts of the Member States within the territory of which the centre of debtor's main interests is situated shall have jurisdiction to open insolvency proceedings." A recast of the 2000 EC Insolvency Regulation was promulgated in Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on Insolvency Proceedings, OJ (L 141/19), June 5, 2015 (2015 EU Insolvency Regulation). The 2015 regulation reiterates the "centre of main interests" principle in its Article 3(1) with regard to "main insolvency proceedings."

opened – could preempt any seller–buyer specific contractual arrangements about granting the creditor priority to the debtor's assets.[3]

Therefore, any such proceedings must also consider the validity and enforceability of legal mechanisms, designed by the parties and intended to have a third-party effect. Thus, if the US seller wishes to protect itself vis-à-vis third parties by including a reservation of title clause, by which it maintains ownership of the goods until payment is made in full, regardless of whether possession in the goods has already been surrendered to the buyer, then the authorized court should account for potential differences among the relevant legal systems in recognizing and enforcing such a legal interest. Would such a right be considered a security interest, and if so, might it have required the seller to publish or register the interest, and then – in which national registry?[4]

Such a cross-border property scenario could vividly illustrate the particular challenges that property law faces in an age of increasing cross-border legal actions. On the one hand, the third-party applicability feature of property law, and the subsequent need to inform third parties of the existence of such legal interests, has traditionally led national legal systems to embrace some sort of a *numerus clausus* (closed list) principle in property law. This has typically meant that new types of legal interests that would bind third parties should be designed top-down by the legislative or judicial branches and cannot be created solely by private parties through contract. Each legal system establishes its own list of recognized property interests, which may include, alongside ownership, rights in assets owned by others (*iura in re aliena*), such as life interests, usufructs, types of leases, and security interests (mortgage, lien, etc.). Anglo-American law generally goes further than civil law in recognizing

[3] 2015 EU Insolvency Regulation, Art. 7(1). This in mind, Article 8 reads: "The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings." This provision would be, however, irrelevant to the case at hand, because the United States is not an EU Member State. Moreover, even within the EU, the creditor has to show that the asset is "situated" in another Member State and that the creditor's interest is covered as one of the *in rem* rights listed in Article 8's subsections.

[4] Within an internal EU context, Article 10 of the 2015 EU Insolvency Regulation validates a reservation of title provision agreed to by the parties, where the asset is "situated" in another Member State. This, however, would not apply to the scenario of a US seller and/or when the asset is situated outside one of the EU's Member States.

the third-party effects of trusts and other types of interests, including temporary and future ones, which typically originate in the law of equity.

At the same time, however, the very need to design property law, at least to some extent, in a centralized manner, highlights the current tension between the property-related aspects of the cross-border movement of capital, goods, services, and persons, and the fragmented nature of cross-border or supranational institutions and norms designated to address such scenarios. Property law, while considered one of the most "domestic" fields of law, also requires a particularly dramatic move toward interstate ordering. This is so because property law cannot rely on private ordering to ease the friction between cross-border markets, interpersonal networks, and technology, and the *in rem* ordering of rights to assets. Accordingly, a cross-border ranking of property interests requires, to varying degrees, effective cross-border institutions – legislative, administrative, and adjudicative. Property law must therefore go a long way from old-style localism to cross-border ordering, even if it is otherwise normatively committed to preserving national lawmaking power.

The abundance of cross-border property scenarios, involving distant parties that have no privity of contract or another preset legal mechanism for resolving potential disputes, calls for a systematic evaluation of the future of property law in the age of globalization. I suggest that just as processes of globalization do not take a single route, so the appropriate legal strategy for addressing the various cross-border scenarios need not take a single form. Accordingly, the book examines four legal strategies that can be employed to decrease the gap between property law and the cross-border nature of markets, interpersonal networks, and technology. These strategies are soft law, conflict of laws, approximation, and supranationalism. The book develops methodological principles for evaluating these globalization strategies, by offering a quantitative versus qualitative analysis, emphasizing the need for an interdisciplinary approach, highlighting the role of institutions, and examining the functional/normative tradeoff in choosing a globalization strategy.

The book is structured as follows. Chapter 1, "Why Property Law Needs Globalization Strategies," starts by illustrating the prevalence of cross-border property disputes that stem from current processes of globalization, and the challenge that such scenarios pose for legal governance because of disparities across national legal systems and the limited scope of cross-border norms. This chapter then identifies the structural features of property law, and in particular the need to create a set of norms for the *in rem* ranking of rights, powers, and priorities in

regard to assets. It shows how such structural features translate to the creation of a closed list (*numerus clausus*) of property rights for each legal system, with national systems diverging from one another in the rigidity of the list, the types of rights included, and the specific content given to each such right. Showing that such disparities result not only from historical reasons, but also from economic, political, and cultural ones, Chapter 1 presents the four globalization strategies (soft law, conflict of laws, approximation, and supranationalism) that could be utilized to mitigate the gaps between the domestic basis of property law and the current economic, social, and technological processes of globalization, and defines the methodological principles that can guide the choice of strategies.

Chapter 2, "Local to Global: An Institutional Analysis," identifies the key role that institutions play, in various ways, in implementing the various globalization strategies. The nature of property rights requires a dominant role for legislative institutions and administrative agencies, alongside courts or tribunals with effective enforcement power. In a global context, this feature of property law requires a cross-border legal ordering by an array of domestic and supranational institutions. Whereas soft law instruments do not require binding supranational institutions, the need for such institutions proves critical for more ambitious strategies for globalization, such as attempts to provide supranational constitutional protection of the right to property or to establish a binding legal infrastructure for a global market in capital, goods, and services. The chapter looks, for example, at the European Union's institutions and how the structure of exclusive, shared, and supporting competences within it may apply to property law. It then looks at the broader landscape of supranational conventions and other legislative instruments and how their property provisions are enforced by supranational judiciaries, such as the European Court of Human Rights or the Inter-American Court of Human Rights. It identifies the key role that arbitration tribunals are playing in the enforcement of bilateral investment treaties and investment chapters in free-trade agreements. Chapter 2 also highlights, in the context of the various strategies for globalizing property law, the role of other international organizations, such as the World Trade Organization (WTO), United Nations Conference on Trade and Development (UNCTAD), United Nations Commission on International Trade Law (UNCITRAL), International Institute for the Unification of Private Law (UNIDROIT), and the Hague Conference on Private International Law (HCCH).

Chapters 3–5 analyze different types of assets or objects of property, while examining the key differences and similarities in regard to these assets across national legal systems, the current state of cross-border norms and institutions, and the future potential of globalization strategies.

Chapter 3, "Land," identifies the changing landscape of real-estate markets and the need to accommodate land systems to numerous types of cross-border activities. These actions include mass-scale transactions in arable and other extractable lands, mostly in developing countries in sub-Saharan Africa and some parts of Latin America and Southeast Asia, referred to critically as *land grabs*. There are, however, many other types of foreign interests in real estate, including investments by sovereign wealth funds and private investors coming from emerging economies, as well as thousands of bilateral investment treaties (BITs) which implicate the power of host governments to take, regulate, or distribute land while protecting cross-border investments. Chapter 3 also studies the complex relations between customary land tenure, national lawmaking, and human rights conventions, and how bodies such as the Inter-American Court of Human Rights become involved in such matters. Examining the various globalization strategies, the chapter explains why the *lex rei sitae* rule (law of the place where the asset is located) is likely to continue to dominate the conflict of laws strategy for land, and how the supranationalism strategy invokes complex normative and institutional questions about the private/public interface in land law.

Chapter 4, "Tangible Goods, Monetary Claims, and Investment Securities," studies the cross-border proprietary aspects of various types of movable assets. It looks at tangible assets (chattels), intangible financial assets (such as monetary claims), and investment securities (such as shares or bonds). Identifying the enormous scope of cross-border movement of such assets in today's economy, the chapter shows the limited role that the *lex rei sitae* rule can play in governing proprietary disputes. This is especially so because of the growing role of bulks of chattels such as inventories or portfolios of monetary claims in contemporary trade and finance, meaning that it is normatively and practically difficult to identify a single locus for the assets. The chapter focuses on conflicting transactions and *bona fide* purchases of stolen/embezzled movable assets, and analyzes distinct cross-border norms that developed in the context of artwork and cultural artifacts.

Chapter 5, "Intellectual Property, Data, and Digital Assets," analyzes the apparent tension between the borderless nature of technology,

innovation, and digitization, and the fragmentation of legal norms in regard to intellectual property, data, and digital assets. In some cases, the move toward a globalization strategy evolves over time, when the political, economic, or technological circumstances so permit, such as in the case of the 1994 signing of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement as part of the establishment of the World Trade Organization (WTO). That said, national differences, even for new resources such as digital assets, may reflect core normative choices and ideological bents, such as those applying to the tension between strong monopoly rights for pharmaceutical innovators and affordable access to life-saving medicines, or the conflict between the benefits of data processing and protection of privacy. The chapter identifies the unique role that the blockchain technology may play in establishing a new decentralized, yet verifiable and transparent, system for cross-border *in rem* rights in such assets.

Chapter 6, "Security Interests and Proprietary Priorities in Insolvency," highlights the changing role of financial institutions and other providers of credit in a globalizing economy; the growth of economic instruments, such as portfolio financing, syndication of loans, or securitization of mortgages; and the challenges that these developments pose for the ranking of creditors and distribution of assets upon cross-border insolvency in view of the local basis of property law. The chapter examines the different types of assets that serve as collaterals, analyzes the disparities among national legal systems about the status of quasi-security interests, such as reservation of title or transfer of ownership for security purposes, and underscores the normative considerations that drive national systems to establish a particular ordering of creditors upon insolvency. The chapter then identifies the various globalization strategies employed to govern cross-border settings, which involve security interests and proprietary priorities in insolvency, from soft law and conflict of laws instruments promoted by bodies such as UNCITRAL, Organization of American States (OAS), or the European Union, up to more ambitious strategies, such as the one embedded in the creation of a single registry for international security interests in aircrafts under the UNIDROIT Cape Town Convention on International Interests in Mobile Equipment. In the context of cross-border insolvencies, Chapter 6 shows that the future of cross-border norms may lie not only in promoting conflicts of laws principles such as the debtor's "centre of main interests" (COMI), but also in innovative bottom-up schemes that foster information exchange and interjurisdictional coordination among

stakeholders, such as in the case of the *Lehman Brothers Protocol*, or among national bankruptcy courts, such as in the *Nortel* cross-border bankruptcy trial.

***

It is my hope that the book will appeal to a broad audience coming from a cross-section of disciplines, such as law, economics, business, political science, and cultural studies, and that it will generate interest not only among scholars and students, but also among practitioners, public officials, and NGO members in various countries.

Chapters 1–3 are based in part on my earlier writing: "Unbundling Harmonization: Public versus Private Law Strategies to Globalize Property," *Chicago Journal of International Law* (2015); "Land Law in the Age of Globalization and Land Grabbing," *in* M. Graziadei & L. Smith (eds.), *Comparative Property Law: Global Perspectives* (Edward Elgar Publ., 2017); and "Globalizing Property Law: An Institutional Analysis," *Vanderbilt Journal of Transnational Law* (2017).

I wish to thank the general editors of the Global Law Series, and in particular Morag Goodwin and Randall Lesaffer for promoting this project, and the editorial team of Cambridge University Press for its great help throughout the process. Thanks to Ariel Amir for her research assistance. Finally, I thank my wife Sharon and daughter Lia – this book is dedicated to you with much love.