

## PROPERTY LAW IN A GLOBALIZING WORLD

*Property Law in a Globalizing World* identifies the paramount challenges that contemporary processes of globalization pose for the study and practice of property law. It offers a straightforward analysis of legal scenarios implicating cross-border property rights, covering a broad range of resources, from land, goods, and intangible financial assets to intellectual property, data, and digital assets. This is the first scholarly book offering a detailed study of legal strategies that can decrease the gap between the domestic tenets of property law and the cross-border nature of markets, interpersonal networks, and technology. It shows how strategies of soft law, conflict of laws, approximation, and supranationalism rely to various degrees on cross-border property norms and institutions, and studies the proprietary features of security interests and priorities to assets in insolvency in a global setting. It also shows how digital technology such as blockchain can revolutionize the system of cross-border property rights.

AMNON LEHAVI is Dean and Atara Kaufman Professor of Real Estate, Harry Radzyner Law School, and Academic Director, Gazit-Globe Real Estate Institute, Interdisciplinary Center (IDC) Herzliya, Israel. Lehavi is a leading authority on property, real estate, land use controls, international economic law, and law and globalization. He is the author of *The Construction of Property: Norms, Institutions, Challenges* (2013) and editor of *100 Years of Zoning and the Future of Cities* (2018) and *Private Communities and Urban Governance: Theoretical and Comparative Perspectives* (2016). Lehavi serves as a copresident of the Law Schools Global League (2018–2020).

## GLOBAL LAW SERIES

The series provides unique perspectives on the way globalization is radically altering the study, discipline, and practice of law. Featuring innovative books in this growing field, the series explores those bodies of law that are becoming global in their application, and the newly emerging interdependency and interaction of different legal systems. It covers all major branches of the law and includes work on legal theory, history, and the methodology of legal practice and jurisprudence under conditions of globalization. Offering a major platform on global law, these books provide essential reading for students and scholars of comparative, international, and transnational law.

### ***Series Editors***

M. E. A. Goodwin

*Tilburg University*

Randall Lesaffer

*Tilburg University*

David Nelken

*King's College London*

Han Somsen

*Tilburg University*

### ***Books in the Series***

*Intimations of Global Law*

Neil Walker

*Legalized Families in the Era of Bordered Globalization*

Daphna Hacker

*Transnational Sustainability Laws*

Phillip Paiement

*The Sociology of Law and the Global Transformation of Democracy*

Chris Thornhill

*Authority and the Globalisation of Inclusion and Exclusion*

Hans Lindahl

# PROPERTY LAW IN A GLOBALIZING WORLD

AMNON LEHAVI

*Harry Radzyner Law School  
Interdisciplinary Center (IDC) Herzliya*



CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press  
978-1-108-42512-4 — Property Law in a Globalizing World  
Amnon Lehavi  
Frontmatter  
[More Information](#)

CAMBRIDGE  
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom  
One Liberty Plaza, 20th Floor, New York, NY 10006, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India  
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)  
Information on this title: [www.cambridge.org/9781108425124](http://www.cambridge.org/9781108425124)  
DOI: 10.1017/9781108595391

© Amnon Lehavi 2019

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

*A catalogue record for this publication is available from the British Library.*

*Library of Congress Cataloging-in-Publication Data*

Names: Lehavi, Amnon, author.

Title: Property law in a globalizing world / Amnon Lehavi, Harry Radzyner Law School.

Description: Cambridge, United Kingdom ; New York, NY : Cambridge University Press, 2018. | Series: Global law series | Includes index.

Identifiers: LCCN 2018026582 | ISBN 9781108425124 (hardback : alk. paper) | ISBN 9781108441193 (pbk. : alk. paper)

Subjects: LCSH: Property (International law) | Real property. | Intellectual property (International law)

Classification: LCC K720 .L47 2018 | DDC 346.04/8–dc23

LC record available at <https://lcn.loc.gov/2018026582>

ISBN 978-1-108-42512-4 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

## CONTENTS

|   |           |
|---|-----------|
| <b>Introduction</b>   | <b>1</b>  |
| <b>1 Why Property Law Needs Globalization Strategies</b>                    | <b>9</b>  |
| 1.1 What Property Law Conflicts Increasingly Look Like                      | 9         |
| 1.2 The Structure of Property Law   | 13        |
| 1.2.1 Third-Party Applicability   | 13        |
| 1.2.2 Constraints on Private Ordering                                       | 15        |
| 1.2.3 The Public/Private Interface  | 17        |
| 1.3 The Closed (but Country-Specific) List of Property Rights               | 18        |
| 1.3.1 Ownership   | 20        |
| 1.3.2 Possessory Rights   | 22        |
| 1.3.3 Usufruct (and Other Personal Servitudes)                              | 23        |
| 1.3.4 Real Servitudes   | 24        |
| 1.3.5 Security Interests  | 25        |
| 1.3.6 Trust   | 26        |
| 1.3.7 New Property  | 27        |
| 1.4 Why Interstate Differences Linger in Property Law                       | 28        |
| 1.5 Different Strategies for the Globalization of Property                  | 34        |
| 1.6 Choosing Globalization Strategies: Methodological Principles            | 37        |
| 1.6.1 Quantitative versus Qualitative Analysis                              | 37        |
| 1.6.2 Need for an Interdisciplinary Approach                                | 38        |
| 1.6.3 Key Role of Institutions  | 40        |
| 1.6.4 Normative-Functional Trade-Off  | 40        |
| <b>2 Local to Global: An Institutional Analysis</b>                         | <b>42</b> |
| 2.1 The Complete Nature of Domestic Institutions                            | 42        |
| 2.2 The Global Setting: Incomplete Institutions and Normative Fragmentation | 45        |
| 2.2.1 Sovereignty and Institutions: An International Perspective            | 46        |
| 2.2.2 Top-Down and Bottom-Up Institutions                                   | 48        |
| 2.2.3 <i>In Rem</i> Effect of Property Law: Institutional Implications      | 51        |

|          |   |            |
|----------|---|------------|
| 2.3      | Institutional Analysis of Cross-Border Property Norms                   | 53         |
| 2.3.1    | Soft Law Strategy   | 53         |
| 2.3.2    | Conflict of Laws Strategy   | 63         |
| 2.3.3    | Approximation Strategy  | 71         |
| 2.3.4    | Supranationalism Strategy   | 74         |
| 2.4      | Conclusion: Aligning Cross-Border Property Strategies with Institutions | 89         |
| <b>3</b> | <b>Land</b>   | <b>91</b>  |
| 3.1      | Cross-Border Land Deals: Global Market or Land Grabbing?                | 91         |
| 3.2      | Land Law as a National Construct  | 98         |
| 3.3      | Land Law and Supranational Constitutionalism                            | 103        |
| 3.4      | The European Union and Degrees of Land Law Synchronization              | 108        |
| 3.5      | Bilateral Investment Treaties and Foreign Investment in Land            | 113        |
| 3.6      | Traditional Land Tenure, Globalization, and the Human Rights Discourse  | 117        |
| 3.7      | Policy Analysis: Adopting Strategies for Land Law in a Global Setting   | 120        |
| <b>4</b> | <b>Tangible Goods, Monetary Claims, and Investment Securities</b>       | <b>126</b> |
| 4.1      | The Challenge of Cross-Border Movement of Tangible and Intangible Goods | 126        |
| 4.2      | Current Scope of Cross-Border Transfer of Movable Assets                | 127        |
| 4.3      | National Laws on Movable Assets: Similarities and Differences           | 133        |
| 4.3.1    | Tangible Goods  | 134        |
| 4.3.2    | Intangible Financial Assets: Monetary Claims                            | 139        |
| 4.3.3    | Investment Securities   | 143        |
| 4.4      | The Limited Role of the <i>Lex Rei Sitae</i> Rule for Movable Assets    | 148        |
| 4.4.1    | Tangible Assets   | 149        |
| 4.4.2    | Monetary Claims   | 151        |
| 4.4.3    | Negotiable Instruments  | 152        |
| 4.4.4    | Investment Securities   | 153        |
| 4.5      | Cross-Border Norms on Conflicting Transactions and Bona Fide Purchases  | 157        |
| 4.5.1    | Scope of the Problem and Lingering Differences across Borders           | 157        |
| 4.5.2    | The Special Case of Artwork and Cultural Artifacts                      | 160        |
| 4.6      | Policy Analysis: Old Paradigms and New Challenges for Movable Assets    | 169        |

|          |  |            |
|----------|--|------------|
| <b>5</b> | <b>Intellectual Property, Data, and Digital Assets</b>                               | <b>172</b> |
| 5.1      | How Intellectual Property, Innovation, and Digitization Defy National Borders        | 172        |
| 5.2      | Globalizing Intellectual Property: From Paris and Berne to TRIPS and Beyond          | 177        |
| 5.2.1    | Sequential/Simultaneous Applications and Regional IP Offices                         | 178        |
| 5.2.2    | Minimum Protection and Interstate Dispute Resolution: TRIPS and WTO                  | 183        |
| 5.2.3    | Current Intellectual Property: Cross-Border Norms and Institutions                   | 185        |
| 5.2.4    | The Landscape of Globalization Strategies in Intellectual Property                   | 195        |
| 5.3      | Data and Digital Assets in a Global Context  | 199        |
| 5.3.1    | Data and Digital Assets as Objects of Property Rights                                | 200        |
| 5.3.2    | Cross-Border Ordering of Data and Digital Assets                                     | 205        |
| 5.3.3    | Blockchain as a New Platform for the Globalization of Property?                      | 212        |
| 5.4      | Policy Analysis  | 215        |
| <b>6</b> | <b>Security Interests and Proprietary Priorities in Insolvency</b>                   | <b>217</b> |
| 6.1      | The Growing Need for Cross-Border Norms on Security Interests and Insolvency         | 217        |
| 6.2      | National Approaches to Security Interests: Scope, Creation, and <i>In Rem</i> Effect | 223        |
| 6.2.1    | Types of Assets Used as Collaterals  | 224        |
| 6.2.2    | Security and Quasi-Security Interests: Functional versus Formalistic Approaches      | 232        |
| 6.2.3    | Priorities among Creditors and Other Stakeholders                                    | 235        |
| 6.3      | Current Strategies for the Global Governance of Security Interests                   | 238        |
| 6.3.1    | Soft Law   | 239        |
| 6.3.2    | Conflict of Laws   | 244        |
| 6.3.3    | Approximation  | 250        |
| 6.3.4    | Supranationalism   | 253        |
| 6.4      | <i>In Rem</i> Rights and Priorities to Assets in Cross-Border Insolvencies           | 255        |
| 6.4.1    | Insolvency between Territorialism and Universalism                                   | 258        |
| 6.4.2    | Globalization Strategies for Cross-Border Insolvencies                               | 261        |
| 6.5      | Policy Analysis  | 272        |
|          | <i>Index</i>   | 275        |

Cambridge University Press  
978-1-108-42512-4 — Property Law in a Globalizing World  
Amnon Lehavi  
Frontmatter  
[More Information](#)

---