Second Issue of 2017's Journal of Private International Law

The second issue of 2017's *Journal of Private International Law* has been published.

Just how free is a free choice of law in contract in the EU? by *Peter Mankowski*

> *Free choice of law appears to be the pivot and the unchallenged champion of the private international law of contracts. Yet to stop at this would be a fallacy and would disregard the challenges it has to face. Those challenges come from different quarters. In B2C contracts in the EU not only the more favourable law principles as enshrined in Article 6(2) of the Rome I Regulation must be observed, but also any requirements which the Unfair Contract Terms Directive imposes. Transparency in particular ranks high. In Verein für Konsumenteninformation v Amazon the Court of Justice of the European Union has imposed duties on businesses and professionals to inform their consumer customers about at least the existence and the basic structure of the more favourable law principle. This landmark decision might not stand on ground as firm as it implies at first sight. Its fundament might be shaken by inconsistency. But practice has to comply with it and has to observe its consequences. On a more abstract level, it raises ample necessity to reflect about the modern-day structure of "free" choice of law. In this context, it is argued that the system established for parties' choice of law in the Rome I Regulation does not allow for a content review of choice of law agreements.*

Constitutionalizing Canadian private international law – 25 years since *Morguard* by *Joost Blom*

> *Because of its structuring function, private international law tends to be given a status distinct from the ordinary rules of domestic law. In a federal system, private international law of necessity implicates some aspects of the constitution. In a series of cases beginning in 1990 the Supreme Court of Canada has engaged in a striking reorientation of Canadian private international law, premised on a newly articulated relationship between private international law and the Canadian constitutional system. This constitutional*

dimension has been coupled with an enhanced notion of comity. The new dynamic has meant that changes in private international law that were initially prompted by constitutional considerations have gone further than the constitutional doctrines alone would demand. This paper traces these developments and uses them to show the challenges that the Supreme Court of Canada has faced since 1990 in constructing a relationship between Canada's constitutional arrangements and its private international law. The court has fashioned the constitutional doctrines as drivers of Canadian private international law but its own recent jurisprudence shows difficulties in managing that relationship. The piece concludes with lessons to be learned from the experience of the last 25 years.

Freedom of establishment, conflict of laws and the transfer of a company's registered office: towards full cross-border corporate mobility in the internal market? by *Johan Meeusen*

Cross-border corporate mobility in the internal market has developed in particular through the interpretation by the Court of Justice of the European Union of the Treaty provisions on freedom of establishment. Certain issues at the crossroads of conflict of laws and European Union (EU) law are still the subject of debate. One of these is whether freedom of establishment includes a right to solely transfer a company's registered office between Member States. As such transformation results in a change of the company's lex societatis, it is intrinsically linked to the debate on regulatory competition in the EU internal market, freedom of choice and the proper balancing of the public and private interests involved. The author defends a nuanced position, referring to the true meaning of "establishment" in the internal market, the policy of "safe" regulatory competition and the equivalence of the Member States' conflict of laws rules.

The recast of the Insolvency Regulation: a third country perspective by *Nicolò Nisi*

During the recasting process of the EU Insolvency Regulation, issues relating to the relationship between the Regulation and the outer world were not debated. Indeed, the new Regulation (EU) 2015/848 maintains its territorial scope of application by making the application of the Regulation subject to the location

of the centre of main interests within the territory of a Member State. This article tries to highlight the drawbacks of such geographical limitation concerning different aspects of the Regulation: in particular, jurisdiction, groups of companies, recognition of insolvency proceedings, cooperation and communication among courts and insolvency practitioners. Considering various possibilities to establish a truly universal regime, the article concludes that, in the light of the objective of an efficient administration of insolvency proceedings, the preferred approach is to extend the scope of application of the Regulation unilaterally, thereby including insolvencies significantly linked with third States.

A new frontier for Brussels I – private law remedies for breach of the Regulation? by *Ian Bergson*

The English courts have held that the Brussels I Regulation confers private law rights, such that an employee may obtain an anti-suit injunction on the basis of their "statutory right" to be sued in England under the employment provisions of the Regulation. This article examines the correctness of this proposition and argues that the Regulation does not confer rights or impose obligations on private individuals that they may enforce against one another. The article goes on to consider the implications of the English decisions and their remedial consequences, including the possibility of seeking an award of damages for breach of the Regulation.

Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT by *Mukarrum Ahmed and Paul Beaumont*

This article contends that the system of "qualified" or "partial" mutual trust in the Hague Choice of Court Agreements Convention ("Hague Convention") may permit anti-suit injunctions, actions for damages for breach of exclusive jurisdiction agreements and anti-enforcement injunctions where such remedies further the objective of the Convention. However, intra-EU Hague Convention cases may arguably not permit remedies for breach of exclusive jurisdiction agreements as they may infringe the principles of mutual trust and effectiveness of EU law (effet utile) underlying the Brussels I Recast Regulation.

The relationship between Article 31(2) of the Brussels I Recast Regulation and Articles 5 and 6 of the Hague Convention is mapped in this article. It will be argued that the Hartley–Dogauchi Report's interpretative approach has much to commend it as it follows the path of least resistance by narrowly construing the right to sue in a non-chosen forum as an exception rather than the norm. This exceptional nature of the right to sue in the non-chosen forum under the Hague Convention can be effectively reconciled with the Brussels I Recast Regulation's reverse lis pendens rule under Article 31(2). This will usually result in the stay of the proceedings in the non-chosen court as soon as the chosen court is seised. The impact of Brexit on this area of the law is uncertain but it has been argued that the likely outcome post-Brexit is that the regime applicable between the UK and the EU (apart from Denmark) in relation to exclusive jurisdiction agreements within the scope of the Hague Convention will be the Hague Convention.

The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law by *Weizuo Chen and Gerald Goldstein*

The Asian Principles of Private International Law (APPIL) finalized in 2017 is a project undertaken by private international law scholars of 10 East and Southeast Asian jurisdictions to harmonize the region's private international law rules or principles. Containing principles on choice of law, international jurisdiction, the recognition and enforcement of foreign judgements, and the judicial support of international commercial arbitration, they are the first harmonization effort in Asia based on comparative analyses of the private international law of the 10 participating APPIL-Jurisdictions. Being the first "voice of Asia" in private international law, they may serve as a model for national and regional instruments and thus may be used by the private international law legislators of Asian jurisdictions to interpret, supplement and enact their own private international law statutes; and may even be applied by state courts and arbitral tribunals, albeit not as legally binding instrument but as "soft law". They will mainly function as a private international law model law.

The "statutist trap" and subject-matter jurisdiction by *Maria Hook*

Common law courts frequently rely on statutory interpretation to determine the

cross-border effect of legislation. When faced with a statutory claim that has foreign elements, courts seek to determine the territorial scope of the statute as a matter of Parliamentary intent, even if it is clear that Parliament did not give any thought to the matter. In an article published in this journal in 2012, Christopher Bisping argued that "statutism" – the idea that statutory interpretation should determine whether a statute applies to foreign facts – is inconsistent with established principles of choice of law. The purpose of this paper is to demonstrate that, in addition to cutting across principles of choice of law, a statutist approach has the potential to obscure fundamental questions of subject-matter jurisdiction. In particular, statutism can lead to conflation of subject-matter jurisdiction and choice of law, and it impedes the development of coherent principles of subject-matter jurisdiction.

State of play of cross-border surrogacy arrangements – is there a case for regulatory intervention by the EU? by *Chris Thomale*

Mother surrogacy in and of itself, as a procreative technique, poses a series of social, ethical and legal problems, which have been receiving widespread attention. Less prominent but equally important is the implementation of national surrogacy policies in private international law. The article isolates the key ethical challenges connected with surrogacy. It then moves on to show how, in private international law, the public policy exception works as a vehicle to shield national prohibitive policies against international system shopping and how it continues to do so precisely in the best interest of the child. Rather than recognizing foreign surrogacy arrangements, national legislators with intellectual support by an EU model law, should focus on adoption reform in order to re-channel intended parents' demand for children.