Third Issue of Journal of Private International Law for 2021

The third issue of the *Journal of Private International law* for 2021 was released today. It features the following articles:

Jonannes Ungerer, "Explicit legislative characterisation of overriding mandatory provisions in EU Directives: Seeking for but struggling to achieve legal certainty"

Traditionally, the judiciary has been tasked with characterising a provision in EU secondary law as an overriding mandatory provision ("OMP") in the sense of Art 9(1) Rome I Regulation. This paradigm has however shifted recently as the legislator has started setting out such OMP characterisation explicitly, which this paper addresses with regard to EU Directives. The analysis of two Directives on unfair trading practices in the food supply chain and on the resolution of financial institutions reveals that their explicit legislative characterisations of OMPs can benefit legal certainty if properly drafted by the EU and correctly transposed into national law by the Member States. These requirements have not yet been fully met as there are inconsistencies and confusion with only domestically mandatory provisions, which need to be resolved. More generally, the paper elucidates the tensions of competence between legislators and courts on both the EU and national levels due to the explicit legislative characterisation. It also considers the side effects on pre-existing and future provisions in Directives without explicit legislative characterisation. Finally, it acknowledges that the extraterritorial effect of OMPs is intensified and therefore requires the legislator to seek international alignment.

Patrick Ostendorf, "The choice of foreign law in (predominantly) domestic contracts and the controversial quest for a genuine international element: potential for future judicial conflicts between the UK and the EU?"

The valid choice of a (foreign) governing law in commercial contracts presupposes, pursuant to EU private international law, a genuine international element to the transaction in question. Given that the underlying rationale of this requirement stipulated in Article 3(3) of the Rome I Regulation has yet to be fully

explored, the normative foundations as to the properties that a genuine international element must possess remain unsettled. The particularly low threshold applied by more recent English case law in favour of almost unfettered party autonomy in choice of law at first glance avoids legal uncertainty. However, such a liberal interpretation not only robs Article 3(3) Rome I Regulation almost entirely of its meaning but also appears to be rooted in a basic misunderstanding of both the function and rationale of Article 3(3) Rome I Regulation in the overall system of EU private international law. Consequently, legal tensions with courts based in EU member states maintaining a more restrictive approach may become inevitable in the future due to Brexit.

Darius Chan & Jim Yang Teo, "Re-formulating the test for ascertaining the proper law of an arbitration agreement: a comparative common law analysis"

Following two recent decisions from the apex courts in England and Singapore on the appropriate methodology to ascertain the proper law of an arbitration agreement, the positions in these two leading arbitration destinations have now converged in some respects. But other issues of conceptual and practical significance have not been fully addressed, including the extent to which the true nature of the inquiry into whether the parties had made a choice of law is in substance an exercise in contractual interpretation, the applicability of a validation principle, and the extent to which the choice of a neutral seat may affect the court's determination of the proper law of the arbitration agreement. We propose a re-formulation of the common law's traditional three-stage test for determining the proper law of an arbitration agreement that can be applied by courts and tribunals alike.

Amin Dawwas, "*Dépeçage* of contract in choice of law: Hague Principles and Arab laws compared"

This paper discusses the extent to which the parties may use their freedom to choose the law governing their contract under the Hague Principles on Choice of Law in International Commercial Contracts and Arab laws, namely whether they can make a partial or multiple choice of laws. While this question is straightforwardly answered in the affirmative by the Hague Principles, it is

debatable under (most) Arab laws. After discussion of the definition of dépeçage of contract, this paper presents the provisions of dépeçage of contract under comparative and international law, including the Hague Principles, and then under Arab laws. It concludes that Arab conflict of laws rules concerning contract should be reformed according to the best practices embodied in this regard by the Hague Principles.

Jan Ciaptacz, "*Actio pauliana* under the Brussels Ia Regulation – a challenge for principles, objectives and policies of EU private international law"

The paper discusses international jurisdiction in cases based on *actio pauliana* under the Brussels Ia Regulation, especially with regard to the principles, objectives and policies of EU private international law. It concentrates on the assessment of various heads of jurisdiction that could possibly apply to *actio pauliana*. To that end, the CJEU case law was thoroughly analysed alongside international legal scholarship. As to the jurisdictional characterisation of *actio pauliana*, the primary role should be assigned to teleological and systematic considerations. *Actio pauliana* can neither be characterised as an issue relating to torts nor as a right *in rem* in immovable property. Contrary to the recent position adopted by the CJEU, it should also be deemed not to fall within matters relating to a contract. The characterisation of *actio pauliana* as a provisional measure or an enforcement mechanism for jurisdictional purposes is equally incorrect.

Harry Stratton, "Against renvoi in commercial law"

The doctrine of renvoi is rightly described as "a subject loved by academics, hated by students and ignored (when noticed) by practising lawyers (including judges)". This article argues that the students have much the better of the argument. English commercial law has rightly rejected renvoi as a general rule, because it multiplies the expense and complexity of proceedings, while doing little to deter forum-shopping and enable enforcement. It should go even further to reject renvoi in questions of immovable property, because the special justification that this enables enforcement of English judgments against foreign land ignores the fact that title or possession of such land is generally not justiciable in English

courts and such judgments will not be enforced irrespective of whether renvoi is applied.

Yun Zhao, “The Singapore mediation convention: A version of the New York convention for mediation?”

Settlement agreements have traditionally been enforced as binding contracts under national rules, a situation considered less than ideal for the promotion of mediation. Drawing on the experience of the 1958 New York Convention on international arbitration, the 2019 Singapore Mediation Convention provides for the enforcement of settlement agreements in international commercial disputes. Based on its provisions and the characteristics and procedures of mediation, this article discusses the impact of the Singapore Mediation Convention on the promotion of mediation and its acceptance by the international community. It is argued that the achievements of the New York Convention do not necessarily promise the same success for the Singapore Mediation Convention.

Jakub Pawliczak, “Reformed Polish court proceedings for the return of a child under the 1980 Hague Convention in the light of the Brussels IIb Regulation”

In recent years a significant increase in applications sent to Polish institutions to obtain the return of abducted children under the 1980 Hague Abduction Convention can be observed. Simultaneously, Poland has struggled with a problem of excessively long court proceedings in those cases and the lack of specialisation among family judges. Taking these difficulties into consideration, in 2018 the Polish Parliament introduced a reform aimed at improving the effectiveness of the court proceedings for the return of abducted children. The work on the amendment of the Polish legal regulations was carried out in parallel to the EU legislative process in the field of international child abduction. Although the Polish reform had been introduced before Council Regulation (EU) 2019/1111 of 25 June 2019 (Brussels IIb) was adopted, the 2016 proposal for this Regulation had been known to the national legislature. When discussing the amended Polish legal regulations, it should be considered whether they meet their goals and whether they are in line with the new EU law.

Elaine O'Callaghan, "Return travel and Covid-19 as a grave risk of harm in Hague Child Abduction Convention cases"

Since February, 2020, courts have been faced with many novel arguments concerning the Covid-19 pandemic in return proceedings under the "grave risk exception" provided in Article 13(1)(b) of the 1980 Hague Convention. This article presents an analysis of judgments delivered by courts internationally which concern arguments regarding the safety of international travel in return proceedings during the Covid-19 pandemic. While courts have largely taken a restrictive approach, important clarity has been provided regarding the risk of contracting Covid-19 as against the grave risk of harm, as well as other factors such as ensuring a prompt return despite practical impediments raised by Covid-19 and about quarantine requirements in the context of return orders. Given that the pandemic is ongoing, it is important to reflect on this case law and anticipate possible future issues.

Chukwudi Paschal Ojiegbe, "The overview of private international law in Nigeria" (Review Article)