Third Issue for Journal of Private International Law for 2022

The third issue for the *Journal of Private International Law* for 2022 was published today. It contains the following articles:

K Takahashi, "Law Applicable to Proprietary Issues of Crypto-Assets"

Crypto-assets (tokens on a distributed ledger network) can be handled much in the same way as tangible assets as they may be held without the involvement of intermediaries and traded on a peer-to-peer basis by virtue of the blockchain technology. Consequently, crypto-assets give rise to proprietary issues in the virtual world, as do tangible assets in the real world. This article will consider how the law applicable to the proprietary issues of crypto-assets should be determined. It will first examine some of the cases where restitution was sought of crypto-asset units and consider what issues arising in such contexts may be characterised as proprietary for the purpose of conflict of laws. Finding that the conventional connecting factors for proprietary issues are not suitable for crypto-assets, this article will consider whether party autonomy, generally rejected for proprietary issues, should be embraced as well as what the objective connecting factors should be.

GV Calster, "*Lis Pendens* and Third States: the Origin, DNA and Early Case-Law on Articles 33 and 34 of the Brussels Ia Regulation and its "*forum non conveniens*-light" Rules"

The core European Union rules on jurisdiction have only in recent years included a regime which allows a court in an EU Member State temporarily or definitively to halt its jurisdiction in favour of identical, or similar proceedings pending before a court outside the EU. This contribution maps the meaning and nature of those articles, their application in early case-law across Member States, and their impact among others on business and human rights litigation, pre and post Brexit.

F Farrington, "A Return to the Doctrine of *Forum Non Conveniens* after Brexit and the Implications for Corporate Accountability"

On 1 January 2021, the European Union's uniform laws on jurisdiction in cross-border disputes ceased to have effect within the United Kingdom. Instead, the rules governing jurisdiction are now found within the Hague Convention 2005 where there is an exclusive choice of court agreement and revert to domestic law where there is not. Consequently, the doctrine of forum non conveniens applies to more jurisdictional issues. This article analyses the impact forum non conveniens may have on victims of human rights abuses linked to multinational

enterprises and considers three possible alternatives to the forum non conveniens doctrine, including (i) the vexatious-and-oppressive test, (ii) the Australian clearly inappropriate forum test, and (iii) Article 6(1) of the European Convention on Human Rights. The author concludes that while the English courts are unlikely to depart from the forum non conveniens doctrine, legislative intervention may be needed to ensure England and Wales' compliance with its commitment to continue to ensure access to remedies for those injured by the overseas activities of English and Welsh-domiciled MNEs as required by the United Nation's non-binding General Principles on Business and Human Rights.

A Kusumadara, "Jurisdiction of Courts Chosen in the Parties' Choice of Court Agreements: An Unsettled Issue in Indonesian Private International Law and the way-out"

Indonesian civil procedure law recognises choice of court agreements made by contracting parties. However, Indonesian courts often do not recognise the jurisdiction of the courts chosen by the parties. That is because under Indonesian civil procedure codes, the principle of actor sequitur forum rei can prevail over the parties' choice of court. In addition, since Indonesian law does not govern the jurisdiction of foreign courts, Indonesian courts continue to exercise jurisdiction over the parties' disputes based on Indonesian civil procedure codes, although the parties have designated foreign courts in their choice of court agreements. This article suggests that Indonesia pass into law the Bill of Indonesian Private International Law that has provisions concerning international jurisdiction of foreign courts as well as Indonesian courts, and accede to the 2005 HCCH Choice of Court Agreements Convention. This article also suggests steps to be taken to protect Indonesia's interests.

Mohammad Aljarallah, "The Proof of Foreign Law before Kuwaiti Courts: The way forward"

The Kuwaiti Parliament issued Law No. 5/1961 on the Relations of Foreign Elements in an effort to regulate the foreign laws in Kuwait. It neither gives a hint on the nature of foreign law, nor has it been amended to adopt modern legal theories in ascertaining foreign law in civil proceedings in the past 60 years. This study provides an overview of the nature of foreign laws before Kuwaiti courts, a subject that has scarcely been researched. It also provides a critical assessment of the law, as current laws and court practices lack clarity. Furthermore, they are overwhelmed by national tendencies and inconsistencies. The study suggests new

methods that will increase trust and provide justice when ascertaining foreign law in civil proceedings. Further, it suggests amendments to present laws, interference of higher courts, utilisation of new tools, reactivation of treaties, and using the assistance of international organisations to ensure effective access and proper application of foreign laws. Finally, it aims to add certainty, predictability, and uniformity to Kuwaiti court practices.

CZ Qu, "Cross Border Assistance as a Restructuring Device for Hong Kong: The Case for its Retention"

An overwhelming majority of companies listed in Hong Kong are incorporated in Bermuda/Caribbean jurisdictions. When these firms falter, insolvency proceedings are often commenced in Hong Kong. The debtor who wishes to restructure its debts will need to have enforcement actions stayed. Hong Kong does not have a statutory moratorium structure for restructuring purposes. Between 2018 and 2021, Hong Kong's Companies Court addressed this difficulty by granting cross-border assistance, in the form of, inter alia, a stay order, to the debtor's offshore officeholders, whose appointment triggers a stay for restructuring purposes. The Court has recently decided to cease the use of this method. This paper assesses this decision by, inter alia, comparing the stay mechanism in the UNCITRAL Model Law on Cross Border Insolvency. It concludes that it is possible, and desirable, to continue the use of the cross-border assistance method without jeopardising the position of the affected parties.

Z Chen, The Tango between the Brussels Ia Regulation and Rome I Regulation under the beat of directive 2008/122/EC on timeshare contracts towards consumer protection

Timeshare contracts are expressly protected as consumer contracts under Article 6(4)(c) Rome I. With the extended notion of timeshare in Directive 2008/122/EC, the question is whether timeshare-related contracts should be protected as consumer contracts. Additionally, unlike Article 6(4)(c) Rome I, Article 17 Brussels Ia does not explicitly include timeshare contracts into its material scope nor mention the concept of timeshare. It gives rise to the question whether, and if yes, how, timeshare contracts should be protected as consumer contracts under

Brussels Ia. This article argues that both timeshare contracts and timeshare-related contracts should be protected as consumer contracts under EU private international law. To this end, Brussels Ia should establish a new provision, Article 17(4), which expressly includes timeshare contracts in its material scope, by referring to the timeshare notion in Directive 2008/122/EC in the same way as in Article 6(4)(c) Rome I.

Review Article

CSA Okoli, The recognition and enforcement of foreign judgments in civil and commercial matters in Asia

Many scholars in the field of private international law in Asia are taking commercial conflict of laws seriously in a bid to drive harmonisation and economic development in the region. The recognition and enforcement of foreign judgments is an important aspect of private international law, as it seeks to provide certainty and predictability in cross-border matters relating to civil and commercial law, or family law. There have been recent global initiatives such as The Hague 2019 Convention, and the Commonwealth Model Law on Recognition and Enforcement of Foreign Judgments. Scholars writing on PIL in Asia are making their own initiatives in this area. Three recent edited books are worthy of attention because of their focus on the issue of recognition and enforcement of foreign judgments in Asia. These three edited books fill a significant gap, especially in terms of the number of Asian legal systems surveyed, the depth of analysis of each of the Asian legal systems examined, and the non-binding Principles enunciated. The central focus of this article is to outline and provide some analysis on the key contributions of these books.