Second Issue of the Journal of Private International Law for 2024

The second issue of the *Journal of Private International Law* for 2024 has just been published. It contains the following articles:

Reid Mortensen & Kathy Reeves, The common law marriage in Australian private international law

The common law marriage is a curiosity in the private international law of marriage in the Commonwealth and Ireland. In some cases, a marriage that is invalid under the law of the place where it was solemnised (lex loci celebrationis) may nevertheless be recognised as valid if it meets the requirements of a common law marriage. These originate in the English canon law as it stood in the eighteenth century and include the central requirement of the parties' present declaration that they are married. The parties also had to meet the essentials of a Christian marriage as described in Hyde v Hyde (1866): "a voluntary union for life of one man and one woman to the exclusion of all others".

There are more reported cases on common law marriages in private international law in Australia than any other country. Although its Australian development coincided with that of other countries, in the twenty-first century the Australian common law marriage is now in an unusually amorphous condition. The preconditions for a court to ignore the lex loci have been significantly liberalised. Additional uncertainty in the nature of a common law marriage is created by a combination of repeated misinterpretations of the Marriage Act, the failure to use precedent outlining its requirements and the dismantling of the Hyde definition of marriage in the Same-Sex Marriage Case (2013). The article considers that the common law marriage might still serve a useful purpose in Australian private international law, and how it could better do so.

Stephen G. A. Pitel, The statutory assertion of exclusive jurisdiction

Statutes that create or codify causes of action sometimes contain jurisdiction provisions. The wording of these provisions can differ widely. Some of them

purport to give exclusive jurisdiction to a specific court. In the private international law context, this raises the question of whether such a provision precludes the courts of any other jurisdiction from hearing a claim under the statute. This article analyses how these provisions have been interpreted. It focuses on Canadian law but draws on American, Australian and New Zealand jurisprudence. The article contends that the Canadian jurisprudence is uneven and insufficiently rigorous. Several of the decisions cannot be reconciled with each other, such that some must be regarded as incorrect. Several of the decisions fail to identify the important questions that are posed by alleged assertions of exclusive jurisdiction and also fail to answer them. Moving forward, courts should treat the claim that such a provision deprives a court of jurisdiction with caution and even scepticism.

Charlotte Wendland, Will substitutes in EU private international law: deathbed gifts and contracts for the benefit of a third party upon death

Will substitutes exist in many legal systems, including those of Member States of the European Union. Two of these will substitutes are deathbed gifts and contracts for the benefit of a third party upon death. Both instruments are located at the intersection of succession law and contract law and are therefore difficult to characterise for the purposes of private international law. One could either characterise them as succession instruments in the sense of the EU Succession Regulation or as contracts in the sense of the Rome I Regulation. This article analyses the different options on how to characterise these will substitutes by taking into account the wording of both Regulations, comparative analysis of the substantive law, the likelihood of adaptation and the recent judgment by the Court of Justice of the European Union (CJEU) on this matter.

Jie (Jeanne) Huang, Can private parties contract out of the Hague Service Convention?

Treaties are concluded by States but often impose rights and obligations directly upon private parties. Can private parties contract out of a treaty including States' oppositions without explicit permissions granted by the treaty? The complexity between party autonomy and State sovereignty is reflected in recent cases and

unsettled debates regarding the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters of November 15, 1965 ("HSC"). The HSC contains a large number of oppositions made by 65 Contracting States including China, Germany, India, and Singapore. Combining public and private international law, this paper aims to explore the correlative relationship between party autonomy and State sovereignty in applying the HSC.

Lydia Lundstedt, The law applicable to the right of priority from a European perspective

The right of priority established in the Paris Convention for the Protection of Industrial Property allows a patent applicant to claim the filing date of a first application for any subsequent applications for the same invention filed within twelve months in another Paris Convention Contracting State. This right may be claimed by the person who has filed an application or their successor in title. If priority is not validly claimed, patent applications and patents relying on the right may be rejected, revoked or invalidated. National and regional rules governing who may claim priority, whether a priority right may be divided or shared, whether it may be transferred independently of the priority application and the rights to the invention, and the requirements for a valid transfer differ from country to country. The issue of whether priority has been validly claimed may therefore depend on which country's law applies, which depends on the characterisation of the issues. The aim of this article is to provide a European perspective on the law applicable to the right of priority.

Amy Held, The modern property situationship: Is bitcoin better off (left) alone?

In modern private international law (PIL), property and situs apparently go hand in hand in an established PIL monogamy to which there tends to be a collective commitment for all PIL aspects of a cross-border dispute for all PIL subcategories of property objects. This article argues that mechanistic deference to such apparent property-situs monogamy as an overarching rule in the PIL of property is not only misconceived; but is positively impeding progress in the modern PIL debates surrounding property rights in modern decentralised objects such as

bitcoin. It therefore examines the discrete justifications for the situs rules to show that the apparent property-situs monogamy is actually the cumulative effect of a wide variety of situation-specific considerations in what is really a property-situs situationship. Hence, from an analysis of the situs rules, and the principles underpinning international jurisdiction and applicable law more generally, it suggests alternative property PIL solutions to the intractable problems posed by decentralised phenomena based on policy considerations rather than continued focus on the property object itself as the "natural seat" of a property relationship.

Jim Yang Teo, Transnational res judicata in international commercial disputes and potential influences for BRI dispute resolution

Res judicata plays an important role in the management of complex cross-border commercial disputes. Courts and tribunals are increasingly required to grapple with the application of res judicata on the basis of a prior determination from a different, and potentially unfamiliar, legal system. These considerations come even more alive in the context of the ambitious transnational project of the Belt & Road Initiative. This paper critically examines the Singapore Court of Appeal's decision in Merck Sharp & Dohme Corp v Merck KgGA, which offers a cooperative vision of transnational res judicata that strikes a balance between comity and mutual trust between national legal systems, and each system's own sovereign and constitutional responsibilities and interests. The paper also considers the potential influences of Merck's unique transnational vision for the BRI dispute resolution ecosystem.

Chibike Amucheazi, Chidebe Matthew Nwankwo & Fochi Nwodo, A reassessment of the challenges of enforcement of foreign judgments in Nigeria: the need for legislative reform to ease business

Enforcement of foreign judgments has significant relevance in this era of increased international investments and commercial relations across borders. Focusing on Nigeria as the central jurisdiction of analysis, this paper takes the position that rules of private international law form an often understated yet important aspect of the governance system of a country often measured by the Ease of Doing Business (EDB) ranking of the World Bank. This paper further

argues that central to opening up the economy and inviting FDI into the country, the obvious matter of the inconsistency in the application of the foreign judgment enforcement statutes ought to be settled so as to create determinacy in Nigeria's legal system – a potential attraction for foreign investors who appreciate predictability in the laws of a host country. It recommends the review and adoption of the Foreign Judgment (Reciprocal Enforcement) Act 1990 in order to quell the circumspection of the investor and trade participant due to uncertain legislation.