1st Issue of Journal of Private International Law for 2025

The first issue of the Journal of Private International Law for 2025 was published today. It contains the following articles:

Pietro Franzina, Cristina González Beilfuss, Jan von Hein, Katja Karjalainen & Thalia Kruger, "Cross-border protection of adults: what could the EU do better?†"

On 31 May 2023 the European Commission published two proposals on the protection of adults. The first proposal is for a Council Decision to authorise Member States to become or remain parties to the Hague Adults Convention "in the interest of the European Union." The second is a proposal for a Regulation of the European Parliament and the Council which would supplement (and depart from, in some respects) the Convention's rules. The aim of the proposals is to ensure that the protection of adults is maintained in cross-border cases, and that their right to individual autonomy, including the freedom to make their own choices as regards their person and property is respected when they move from one State to another or, more generally, when their interests are at stake in two or more jurisdictions. This paper analyses these EU proposals, in particular as regards the Regulation, and suggests potential improvements.

Máire Ní Shúilleabháin, "Adult habitual residence in EU private international law: an interpretative odyssey begins"

This article examines the first three CJEU cases on adult habitual residence in EU private international law, against the background of the pre-existing (and much more developed) CJEU jurisprudence on child habitual residence. While the new trilogy of judgments provides some important insights, many questions remain, in particular, as to the scope for contextual variability, and on the role of intention. In this article, the CJEU's treatment of dual or concurrent habitual residence is analysed in detail, and an attempt is made to anticipate the future development of what is now the main connecting factor in EU private international law.

Felix Berner, “Characterisation in context – a comparative evaluation of EU law, English law and the laws of southern Africa”

Academic speculation on characterisation has produced a highly theorised body of literature. In particular, the question of the governing law is the subject of fierce disagreement: Whether the lex fori, the lex causae or an “autonomous approach” governs characterisation is hotly debated. Such discussions suggest that a decision on the governing law is important when lawyers decide questions of characterisation. Contrary to this assumption, the essay shows that the theoretical discussion about the governing law is unhelpful. Rather, courts should focus on two questions: First, courts should assess whether the normative context in which the choice-of-law rule is embedded informs or even determines the question of characterisation. Insofar as the question is not determined by the specific normative context, the court may take into account any information it considers helpful, whether that information comes from the lex fori, the potential lex causae or from comparative assessments. This approach does not require a general decision on the applicable law to characterisation, but focuses on the normative context and the needs of the case. To defend this thesis, the essay offers comparative insights and analyses the EU approach of legislative solutions, the interpretation of assimilated EU law in England post-Brexit and the reception of the via media approach in southern Africa.

Filip Vlcek, “The existence of a *genuine* international element as a pre-requisite for the application of the Brussels Ia Regulation: a matter of EU competence?”

Under Article 25(1) of the Brussels Ia Regulation, parties, regardless of their domicile, may agree on a jurisdiction of a court or the courts of an EU Member State to settle any disputes between them. The problem with this provision is that it remains silent on the question of whether it may be applicable in a materially domestic dispute, in which the sole international element is a jurisdictional clause in favour of foreign courts. Having been debated in the literature for years, the ultimate solution to this problem has finally been found in the recent judgment of the ECJ in Inkreal (C-566/22). This article argues that the ECJ should have insisted on the existence of a material international element in order for Article 25 of the Regulation to apply. This, however, does not necessarily stem from the interpretation of the provision in question, as Advocate General de la Tour

seemed to propose in his opinion in Inkreal. Instead, this article focuses on the principle of conferral, as the European Union does not have a legal base to regulate choice-of-court clauses in purely internal disputes. Accordingly, with the Regulation applying to legal relationships whose sole cross-border element is a prorogation clause, the Union legislature goes beyond the competence conferred on it by Article 81 TFEU. Such an extensive interpretation of the Regulation's scope, which is, in reality, contrary to the objective of judicial cooperation in civil matters, is moreover prevented by the principle of subsidiarity as well as the principle of proportionality. Finally, this approach cannot be called into question by the parallel applicability of the Rome I and II Regulations in virtually analogous situations as those Regulations become inherently self-limiting once the international element concerned proves to be artificial.

Adrian Hemler, "Deconstructing blocking statutes: why extraterritorial legislation cannot violate the sovereignty of other states"

Blocking statutes are national provisions that aim to combat the legal consequences of foreign, extraterritorial legislation. They are often justified by an alleged necessity to protect domestic sovereignty. This article challenges this assumption based on an in-depth discussion of the sovereignty principle and its interplay with the exercise of state power regarding foreign facts. In particular, it shows why a distinction between the law's territorial scope of sovereign validity and its potentially extraterritorial scope of application is warranted and why, based on these foundations, extraterritorial legislation cannot violate foreign sovereignty. Since Blocking Statutes cannot be understood to protect domestic sovereignty, the article also discusses how they serve to enforce international principles on extraterritorial legislation instead.

Michiel Poesen, "A Scots perspective on *forum non conveniens* in business and human rights litigation: *Hugh Campbell KC v James Finlay (Kenya) Ltd*"

In Hugh Campbell KC v James Finlay (Kenya) Ltd the Inner House of the Court of Session, the highest civil court in Scotland subject only to appeal to the UK Supreme Court, stayed class action proceedings brought by a group of Kenyan employees who claimed damages from their Scottish employer for injuries

suffered due to poor labour conditions. Applying the forum non conveniens doctrine, the Court held that Kenya was the clearly more appropriate forum, and that there were no indications that the pursuers will suffer substantial injustice in Kenya. Campbell is the first modern-day litigation in Scotland against a Scottish transnational corporation for wrongs allegedly committed in its overseas activities. This article first observes that the decision of the Inner House offers valuable insight into the application of forum non conveniens to business and human rights litigation in Scotland. Moreover, it argues that the decision would have benefitted from a more rigorous application of the jurisdictional privilege in employment contract matters contained in section 15C of the Civil Jurisdiction and Judgments Act 1982

Hasan Muhammad Mansour Alrashid, "Appraising party autonomy in conflict-of-laws rules in international consumer and employment contracts: a critical analysis of the Kuwaiti legal framework"

Party autonomy plays a vital role in international contracts in avoiding legal uncertainty and ensuring predictability. However, its application in international employment and consumer contracts remains a subject of debate. Consumers and employees are typically the weaker parties in these contracts and often lack the expertise of the other party, raising questions about their autonomy to choose the applicable law. Globally, legal systems differ on this point with some permitting full party autonomy, others rejecting it outrightly and some allowing a qualified autonomy with domestic courts empowered to apply a different law in deserving cases to protect the employee or consumer. Kuwaiti law allows full autonomy only in international consumer contracts but prohibits it in international employment contracts. This paper critically analyses Kuwait's legal approach to find an appropriate balance between the principle of party autonomy in the choice of law and the protection of employees and consumers.

Alexander A. Kostin, "Recognition and enforcement of foreign judgments in bankruptcy and insolvency matters under Russian law"

This article addresses the role of certain Russian Federal Law "On Insolvency (Bankruptcy)" provisions (eg Article 1(6)) for resolving bankruptcy and insolvency

matters under Russian law. The author argues that the "foreign judgment on the insolvency matters" term covers not only the judgments on initiation of bankruptcy/insolvency, but also other related judgments like those on vicarious liability, avoidance of transactions and settlement agreements. The issues associated with enforcing foreign judgments on the grounds of reciprocity under Article 1(6) of the Federal Law "On Insolvency (Bankruptcy)" are being explored and valid arguments in favour of recognition simpliciter (recognition of foreign judgments without extra exequatur proceedings at the national level) are provided. The legal effects of foreign judgments on the initiation of bankruptcy/insolvency proceedings recognition are analysed as well as the interconnection between relevant provisions of the Russian legislation on lex societatis of a legal entity and the rules for recognising foreign judgments on the initiation of bankruptcy/insolvency proceedings.