Book Reviews

Commercial Issues in Private International Law: A Common Law Perspective (Hart Publishing, 2019) ISBN 9781509922871 Hardback, 346 pp.

by Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds)

Interest in Australian private international law has rekindled over the past decade.[1] Australian courts are contending with more transnational litigation than ever before,[2] facilitated by the ease with which people, business and information now cross borders.[3] The integration of legal systems and jurisdictions has been helped along by 'improved and vastly cheaper travel',[4] better channels of communication, and technological advancements. In this era of globalisation, where cross-border legal disputes are bound to increase,[5] a lawyer armed with an understanding of private international law is thus better equipped to provide advice to commercial clients on the risks associated with cross-border transactions. Cast in this light, the University of Sydney Law School's decision in 2013 to require private international law as a unit of study is a fitting one.[6] Since

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1 See, eg, Thomas John, 'Streamlining Litigation Across Borders: The Future of Private International Law' (2011) 49(9) *Law Society Journal: The Official Journal of the Law Society of New South Wales* 72; Andrew Dickinson, 'Symposium Paper: The Future of Private International Law in Australia' (2012) 19 *Australian International Law Journal* 1, 2 ('Symposium Paper'); Andrew Dickinson, Mary Keyes and Thomas John (eds), *Australian Private International Law for the 21st Century: Facing Outwards* (Hart Publishing, 2014); Mary Keyes, 'The Development of Australian Private International Law', in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018) 139.

2 See, eg, Justice JJ Spigelman, 'Cross Border Issues for Commercial Courts: An Overview' (Speech, Hong Kong, 13 January 2010); Chief Justice TF Bathurst, 'Prying Open the Court Doors: Meeting the Challenges of International Commercial Litigation in Australia' (Judicial Seminar on Commercial Litigation, 21 October 2016).

3 See, eg, John (n 1) 75; Dickinson, 'Symposium Paper' (n 1) 2; Andrew Bell, 'Symposium Paper: The Future of Private International Law in Australia' (2012) 19 *Australian International Law Journal* 11, 11.

4 Bell (n 3) 11.

5 Michael Douglas, 'A Consideration of Current Issues in Private International Law' (2017) 44(3) *Australian Bar Review* 338, 338.

6 Dickinson, 'Symposium Paper' (n 1) 2.

then, Sydney Law School has reinforced this renewed interest in Australian private international law not only as a worthwhile academic discipline, but also as an increasingly indispensable area of modern legal practice.

Edited by Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson, *Commercial Issues in Private International Law: A Common Law Perspective* is the end product of a one-day conference hosted by Sydney Law School in February 2018. Judges, academics and practising lawyers from Australia, New Zealand, Singapore and the United Kingdom assembled to deliver papers addressing 'contemporary problems at the intersection of private international law and commercial practice'.[7] As one would expect, the greater part of the contributions are from Australian authors and authors affiliated with Australian institutions, or address issues with an Australian focus. In short, the contributions to this edited volume have, as the series editor Paul Beaumont rightly observes, 'a strong Australian core'.[8] It is particularly refreshing, though, to find emerging scholars represented in a volume replete with 'big names'.

The book is organised into five parts and comprises 13 substantive chapters. Two sitting judges with considerable experience and expertise in Australian private international law, Justice Steven Rares and Justice Paul Le Gay Brereton, respectively provide the introduction (Chapter 1) and the conclusion (Chapter 13).[9] The contributions sandwiched in between bring an overwhelmingly common-law perspective to bear on the three key issues of private international law: jurisdiction (Part I), the recognition and enforcement of foreign judgments (Part II), and choice of law (Part III). The second substantive chapter, written by Andrew Dickinson, is an engaging critical analysis of the new harmonised rules for service out adopted in New South Wales and in other Australian states.[10] The emergence of the case management stay in common-law jurisdictions is the subject of a thorough and absorbing account by Reid Mortensen (Chapter 4).[11] Part IV, far from being peripheral, is made up of three contributions broadly concerning issues of domestic and global law reform. The orthodox approach of common-law courts to proof of foreign law requires parties, often at considerable time and expense, to formally plead and prove the content of foreign law.

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7 'Editors' Preface', in Michael Douglas et al (eds), '*Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) xv.

8 Paul Beaumont, 'Series Editor's Preface', in Douglas et al (n 7) xi.

9 Justice Steven Rares, 'Commercial Issues in Private International Law'. in Douglas et al, (n 7) 1; Justice Paul Le Gay Brereton, 'Conclusion', in Douglas et al (n 7) 313.

10 See *Uniform Civil Procedure (Amendment No 83) Rule 2016* (NSW); *Supreme Court Amendment Rules 2017* (Tas); *Supreme Court Rules 2006 (Amendment No 32)* (SA); *Supreme Court (Service Out of Australia Amendment) Rules 2016* (Vic).

11 Reid Mortensen, 'The Case Management Stay in Private International Law', in Douglas et al (n 7) 69.

Alternatives to this orthodox approach are presented by Justin and Dominique Hogan-Doran in Chapter 10.[12]

Several departures from the volume's commercial-law theme or common-law perspective may be noted. The sixth chapter, written by Jeanne Huang, engages the commercial-law theme with an analysis of Mainland China's regime for the recognition and enforcement of foreign judgments. Huang proposes a registration model based on reciprocity and devotes considerable attention to its 'institutional design',[13] elements of which are clearly inspired by early-20th-century registration schemes that persist in Commonwealth and common-law jurisdictions.[14] The inclusion of this chapter in the collection is a little incongruous in the light of the volume's focus on common-law jurisdictions, but it may nevertheless be justified by the basic aim of China's One Belt, One Road initiative 'to enhance connections between the Asian, European and African continents and their adjacent seas to promote the free flow of economic factors'.[15] Contributions by Maria Hook (Chapter 8) and Michael Douglas (Chapter 9) on 'generally worded statutes' (in the context of domestic employee and consumer protection law) speak to the ideological divide between 'traditionalists' and 'statutists'.[16] Put another way, in determining the cross-border application of domestic statutes, common-law courts have a choice: use statutory interpretation techniques or apply traditional rules of private international law. Hook argues that these techniques are not mutually exclusive, whereas Douglas defends the statutory-interpretation approach.

A key strength of the edited collection is its attention to recent instruments developed by the Hague Conference on Private International Law. For over 30 years, Hague Conventions have changed the face of Australian private international law, marking a departure from traditional common-law rules in some areas such as marriage validity.[17] Four substantive chapters within the collection examine the Hague Convention on Choice of Court Agreements ('Hague

[12] Justin Hogan-Doran and Dominique Hogan-Doran, 'New and Alternative Approaches to Proof of Foreign Law: A Practitioners' Perspective', in Douglas et al (n 7) 231.

[13] Jie (Jeanne) Huang, 'Reciprocal Recognition and Enforcement of Foreign Judgments in China: The Proposal of a Registration System', in Douglas et al (n 7) 130, 134–138.

[14] Ibid 136, 138, 142–3. Huang notes that reciprocity may in the future provide the basis upon which China will enforce judgments rendered in common-law countries.

[15] Ibid 133.

[16] Maria Hook, 'The Conflict of Laws as a Shared Language for the Cross-Border Application of Statutes', in Douglas et al (n 7) 175; Michael Douglas, 'Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation after *Valve*', in Douglas et al (n 7) 201 ('Choice of Law in the Age of Statutes').

[17] Mary Keyes, 'Developing Australian Private International Law: The Hague Choice of Court Convention and the Hague Principles of Choice of Law in International Commercial Contracts', in Douglas et al (n 7) 277, 277.

Choice of Court Convention'), the Hague Principles of Choice of Law in International Commercial Contracts ('Hague Principles'), and the recently concluded Hague Judgments Convention.[18] While yet to accede to these Conventions, Australia *may* do so by way of an *International Civil Law Act*.[19] The passage of an *International Civil Law Act* was first proposed in November 2016, when Federal Parliament's Joint Standing Committee on Treaties recommended accession to the Hague Choice of Court Convention.[20] The Act is now likely to embrace the Hague Principles and, perhaps too, the Hague Judgments Convention.[21] The introduction of an International Civil Law Bill to Federal Parliament was anticipated in 2017,[22] 2018[23] and 2019,[24] but as of early 2020 it is yet to materialise.

The relevance of a foreign judgment's enforceability to the court's exercise of jurisdiction is systematically analysed by Vivienne Bath in Chapter 3, part of which considers the Hague Judgments Convention. The fifth chapter by Brooke Marshall is a masterful analysis of the Hague Choice of Court Convention's potential application to non-exclusive and asymmetric jurisdiction agreements.[25] Marshall offers a compelling argument contradicting a recent claim in English courts that the Convention applies to asymmetric jurisdiction agreements[26] —

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[18] At the time of the collection's publication, the Hague Judgments Convention was still being negotiated but was concluded on 2 July 2019.

[19] See, eg, 'National Interest Analysis: Australia's Accession to the Convention on Choice of Court Agreements' [2016] ATNIA 7; Yuko Nishitani, 'Party Autonomy in Contemporary Private International Law: The Hague Principles on Choice of Law and East Asia' (2016) 59 *Japanese Yearbook of International Law* 300; Michael Douglas, 'Will Australia Accede to the Hague Convention on Choice of Court Agreements?' (2017) 17 *Macquarie Law Journal* 148, 148; Michael Douglas, 'Choice of Court Agreements under an *International Civil Law Act*' (2018) 34(3) *Journal of Contract Law* 186, 187; Michael Douglas and Nicholas Loadsman, 'The Impact of the *Hague Principles on Choice of Law in International Commercial Contracts*' (2018) 19(1) *Melbourne Journal of International Law* 1, 1–2; Douglas, 'Choice of Law in the Age of Statutes' (n 16) 202.

[20] Keyes (n 17).

[21] Michael Douglas et al, 'The HCCH Judgments Convention in Australian Law' (2019) 47(3) *Federal Law Review* 420, 433.

[22] Brooke Adele Marshall and Mary Keyes, 'Australia's Accession to the *Hague Convention on Choice of Court Agreements*' (2017) 41(1) *Melbourne University Law Review* 246, 248.

[23] Michael Douglas et al, 'The HCCH Judgments Convention in Australian Law' (2019) 47(3) *Federal Law Review* 420, 433, 436 n 4.

[24] See P Sooksripaisarnkit, 'CISG's Place in the Content of the Anticipated International Civil Law Act in Australia', in P Sooksripaisarnkit and SR Garmella (eds), *Contracts for the International Sale of Goods: A Multidisciplinary Perspective* (Sweet & Maxwell, 2019) 115.

[25] Brooke Marshall, 'The 2005 Hague Convention: A Panacea for Non-Exclusive and Asymmetric Jurisdiction Agreements Too?', in Douglas et al (n 7) 91.

[26] See, eg, *Commerzbank AG v Liquimar Tankers Management Inc* [2017] 1 WLR 3497, 3512 [74] (Cranston J) (EWCA); *Etihad Airways PJSC v Flöther* [2019] EWHC 3107 (Comm), [201] (Jacobs J); Louise Merrett, 'The Future Enforcement of Asymmetric Jurisdiction Agreements' (2018) 67 *International and Comparative Law Quarterly* 37, 58.

that is to say, an agreement that binds one party to the exclusive jurisdiction of an anchor court (non-option holder), but which confers on the other party the option of commencing proceedings in either the anchor court or another competent jurisdiction (the option holder).[27]

In Chapter 10, Yeo considers the greater effect given to party autonomy internationally by examining two prominent trends in international commercial law: first, the internationalisation of private international law through new Hague instruments; and, secondly, the creation of international commercial courts.[28] The Hague Choice of Court Convention upholds the principle of party autonomy in the parties' selection of forum for litigation and the resulting judgment's international circulation.[29] Likewise, the Hague Principles reinforce the role of party autonomy by ensuring that the parties' choice of the law to govern their international commercial contract is respected — subject, as always, to limited exceptions. In Chapter 12, Keyes usefully explores whether Australian law would benefit from accession to the Hague Choice of Court Convention and the Hague Principles. Keyes does well to highlight the shortcomings of current Australian law with respect to choice of law and choice of court agreements that accession would not itself cure.

In the final chapter, as adverted to earlier, Justice Brereton gives closing observations on several issues explored within the volume. Of particular interest is the emphasis placed on Andrew Dickinson's 'challenging and entertaining'[30] chapter on the harmonised rules for service of process out of Australia. The harmonised rules, which govern adjudicatory jurisdiction over absent defendants, were finalised and approved by the Council of Chief Justices of Australia and New Zealand's Harmonisation of Rules Committee early in 2016 before their later adoption by the rule committees of New South Wales, Victoria, Tasmania and South Australia.[31] Brereton spends the first three-and-a-half pages of his closing remarks strongly defending the legislative processes leading up to the adoption of the harmonised rules and the rules' substantive content — and understandably so. Not only is Brereton a member of the Harmonisation of Rules Committee, he was on the working group that drafted the rules.[32]

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[27] Marshall (n 25) 101.

[28] Yeo Tiong Min, 'The Rise of Party Autonomy in Commercial Conflict of Laws', in Douglas et al (n 7) 257, 257–8.

[29] Ibid 259.

[30] Brereton (n 9) 313.

[31] Andrew Dickinson, 'In Absentia: The Evolution and Reform of Australian Rules of Adjudicatory Jurisdiction', in Douglas et al (n 7) 13, 30–3.

[32] Brereton (n 9) 313, n 1.

Taking New Zealand's *High Court Rules 2009* as its model,[33] the harmonised rules authorise service out of Australia without the court's prior leave in defined categories of case with a connection to '*Australia*'. So, the New South Wales rules allow service of an originating process out of Australia when 'the claim is founded on a tortious act of omission … in respect of which the damage was sustained wholly or partly in *Australia*'.[34] There are ample grounds to be critical, first, of the nexus to 'Australia' in State jurisdictional rules and, secondly, of Brereton's claim that the nexus merely reflects the reality that 'each State Supreme Court now has nationwide jurisdiction'.[35] Fundamentally, though, the harmonised rules' extension of State courts' jurisdiction to 'situations connected to Australia but not to the State' raises a question of constitutional validity.[36]

Commercial Issues in Private International Law will be of interest to those seeking a well-reasoned analysis of some contemporary issues in commercial private international law. One message that is likely to resonate is the importance of private international law to modern legal practice in Australia.

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Heydon on Contract (Thomson Reuters, 2019) ISBN 9780455500201 Hardback, 1238 pp.

by The Hon Dyson Heydon

This eponymous book on the *general part of the law of contract* will be the standard Australian work for some time to come.

It aims to provide a guide to that legion of legal readers 'who are searching for basic statements of contract law'.[37] It purports to eschew any attempt to be historic, or fatidic. It does not look to suggest reform. It merely seeks to 'expound the law … deliberately and often dogmatically'.[38] Heydon wryly observes that this aim may seem 'modest', but it is 'actually very difficult to achieve'. Throughout a long journey the author displays his literary hallmarks: elegant and accurate

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33 Dickinson (n 31) 32.
34 See, eg, *Uniform Civil Procedure (Amendment No 83) Rule 2016* (NSW) sch 6, item (a)(ii).
35 Brereton (n 9) 316.
36 Dickinson (n 31) 33.
37 JD Heydon, *Heydon on Contract* (Thomson Reuters, 2019) i.
38 Ibid.