Key issues of the UK government's policy paper from a dispute resolution perspective

I was recently asked to shortly analyse the key issues of the UK government's policy paper on providing a cross-border civil judicial cooperation framework with the EU after Brexit from a dispute resolution perspective. The text of the inteview is available here.

Commercial Issues in Private International Law Conference, Sydney, 16 February 2018

The University of Sydney Law School is hosting a conference on Commercial Issues in Private International Law on 16 February 2018. The organisers have provided the following information about the conference's theme:

'As people, business, and information cross borders, so too do legal disputes. Globalisation means that courts need to invoke principles of private international law with increasing frequency. Thus, as the Law Society of New South Wales recognised in its 2017 report on the Future of Law and Innovation in the Profession, knowledge of private international law is increasingly important to the practice of law.

This conference will bring together members of the judiciary, the profession, academia, and government to discuss private international law as it relates to commercial law. The conversation will be timely. In late 2016, the Uniform Civil Procedure Rules were amended in respect of service outside of the jurisdiction. In 2017, Australia is likely to accede to the Hague Convention on Choice of Court

Agreements, and to implement the Hague Principles on Choice of Law in International Commercial Contracts.

The extraterritorial application of the Australian Consumer Law is under consideration by the Full Court of the Federal Court of Australia. While Brexit and the rise of Trump may have signalled a retreat from globalism, arguably, that is not the experience of private international law in Australia.'

Further details are available here: http://sydney.edu.au/news/law/457.html?eventcategoryid=39&eventid=11728

Registration will open and the full conference programme will be released later in 2017.

Issue 2017.3 of Dutch Journal on Private International Law (NIPR)

The third issue of 2017 of the Dutch Journal on Private International Law, Nederlands Internationaal Privaatrecht, contains contributions on the consequences of Brexit for the future of private international law in the UK and the EU27, the ex post evaluations of legislative actions in the European Union, the Recast of the Brussels IIa Regulation, and cross-border evidence preservation measures under Brussels I-bis.

Xandra Kramer, 'Editorial: NIPR: over Nederlands, Europees en wereldwijd IPR/NIPR: on Dutch, European, and global PIL', p. 407-410.

Jonathan Fitchen, 'The PIL consequences of Brexit', p. 411-432.

> *The UK's triggering of Article 50 TEU poses problems for the future of private international law in the UK and in the EU27. The UK's departure from the EU will end the mutual application of European private international law within the UK's legal systems and will affect the application of that EU law by the EU27 in*

matters concerning the UK as a new third State. After setting the problem in context, this article provides a political background to the events that led to the Brexit referendum of 2016 and to the UK's June 2017 general election; thereafter it illustrates certain problems posed by the threat of 'cliff-edges' arising as a consequence of a 'disorderly' UK exit from the European Union, finally it offers various possibilities concerning the future of private international law in the UK and in the EU. It is argued that if the beneficial aspects of the progress achieved for all European citizens by European private international law are to be salvaged from the Brexit process, both the UK and the EU must each consider most urgently the need for a realistic and undogmatic policy on the future of each other's private international law that reflects the political reality that, though the UK will soon be a third State relative to the EU27, many natural and legal persons will remain connected with the EU27 despite Brexit. It is argued that each side might usefully consider the unifying goals underlying private international law.

Giesela Rühl, '(Ex post) Evaluation of legislative actions in the European Union: the example of private international law', p. 433-461.

Over the last decades systematic ex post evaluations of legislative actions have become an integral part of the European law making process. The present article analyses the European Commission's evaluation practice in the field of private international law and offers recommendations for its improvement.

Thalia Kruger, 'Brussels IIa Recast moving forward', p. 462-476.

The Brussels IIa Regulation (EC 2201/2003) is currently subject to revision. This is a long and cumbersome process. The European Commission published its report on the Regulation's operation in April 2014 and its Proposal for a Recast in June 2016. The European Parliament and the Council are currently discussing the proposed amendments. In order for the Recast to be enacted, unanimity in the Council is required. This article discusses some of the issues currently on the table. These include children's rights, matters of jurisdiction and parallel proceedings in parental responsibility disputes, international child abduction, the abolition of exequatur, the coordination with the 1996 Hague Child Protection Convention, mediation, and information on foreign law.

Tess Bens, 'Grensoverschrijdend bewijsbeslag', p. 477-494.

This article analyses whether the revised Brussels I Regulation ('Recast') allows the Dutch courts to order provisional measures intended to obtain or preserve evidence located in another Member State. Recital 25 of the Recast explicitly states that the notion of provisional measures includes these type of orders. The author discusses whether Dutch measures to preserve evidence qualify as provisional measures under the Recast. Possible substantive barriers to granting these measures, such as the Evidence Regulation and territorial limitations, are taken into account in making this assessment. The author further argues that there are – in principle – no obstacles for the Dutch courts to order provisional measures aimed at obtaining or preserving evidence located in another Member State. The problems seem to begin at the enforcement stage. To illustrate this point, the author discusses the possibility of coordinating the moment of serving the order and the moment of enforcing the measure in order to retain the element of surprise and the adaptation of the measure for enforcement in France and Germany. As yet there is not a clear answer as to how the enforcement of these kind of measures in a different Member State will function in practice. Moreover, the problems described equally apply to the enforcement of other provisional measures under the Recast and can be expected to give rise to more questions in the future.

Cuadernos de Derecho Transnacional vol. 9 (2)

Cuadernos de Derecho Transnacional, vol. 9, nr. 2, has just been released. *Cuadernos* is a bi-annual electronic law journal specialized in International Private Law, Uniform Law and Private Comparative Law, open to contributions in different languages. It is edited by the Private International Law Department of the University Carlos III, Madrid.

All contents can be freely downloaded. Here is the index of the section "Estudios":

Miguel Gómez Jene, *El convenio arbitral: statu quo* (The arbitration agreement: statu quo)

Hilda Aguilar Grieder, *Problemas de Derecho Internacional Privado en la contratación de seguros: especial referencia a la reciente directiva (UE) 2016/97 sobre la distribución de seguros* (Private International Law problems of the international insurance contracts: the new directive (UE) 2016/1997 about distribution of insurance)

Isabel Antón Juárez, *La oposición del régimen económico matrimonial y la protección del tercero en Derecho Internacional Privado* (The opposition of the matrimonial property regime and the protection of the third party in Private International Law)

Ilaria Aquironi, *L'addebito della separazione nel diritto internazionale privato dell'Unione Europe*a (Judicial decisions as to the causes of separation under EU private international law)

Naiara Arriola Echaniz, *La Unión Europea y la Organización Mundial del Comercio: comenzando un diálogo proto- constitucional* (The European Union and the World Trade Organization: a budding proto-constitutional dialogue)

Irene Blázquez Rodríguez, *Libre circulación de personas y Derecho Internacional Privado: un análisis a la luz de la jurisprudencia del Tribunal de Justicia de la Unión Europea* (Free movement of persons and International Private Law: an analysis in the light of the case law of the European Court of Justice)

María Asunción Cebrián Salvat, *La competencia judicial internacional residual en materia contractual en España* (The Spanish rules of residual jurisdiction in matters related to contract)

Silvia Pilar Badiola Coca, *Algunas consideraciones sobre el régimen de la responsabilidad civil del porteador en la legislación marítima de Emiratos Árabes Unidos* (Some considerations regarding the maritime carrier liability under the United Arab Emirates maritime law)

Clara Isabel Cordero Álvarez, *Incidencia de las normas imperativas en los contratos internacionales: especial referencia a las normas de terceros*

estados desde una aproximación europea (Overriding mandatory provisions in international contracts: a special reference to foreign overriding mandatory provisions from a European approach)

Eva de Götzen, *Recognition of same-sex marriages, overcoming gender barriers in Italy and the Italian law no. 76/2016 on civil unions. First remarks* (Riconoscimento dei matrimoni omosessuali, superamento delle barriere di genere in Italia e legge n. 76/2016 sulle unioni civili. Prime riflessioni)

Carlos Manuel Díez Soto, *Algunas cuestiones a propósito del derecho de participación del autor de una obra de arte original sobre el precio de reventa (droit de suite)* (Some questions concerning the artist's resale right (droit de suite)

Dorothy Estrada Tanck, *Protección de las personas migrantes indocumentadas en España con arreglo al Derecho Internacional y Europeo de los derechos humanos* (Protection of undocumented migrant persons in Spain under international and European human rights law)

Ádám Fuglinszky, *Hungarian law and practice of civil partnerships with special regard to same-sex couples* (Das Ungarische Recht und praxis von lebenspartnerschaften mit besonderer rücksicht auf gleichgeschlechtliche pare)

Natividad Goñi Urriza, *El sometimiento de las adquisiciones minoritarias que no otorgan el control a las normas sobre el control de las concentraciones* (The control under merger rules of acquisitions of non-controlling minority shareholdings)

Luis Ignacio Gordillo Pérez, *El TJUE y el Derecho Internacional: la defensa de su propia autonomía como principio constitucional básico* (The CJEU and International Law: the defence of its own autonomy as a basic constitutional principle)

Thais Guerrero Padrón, *Sobre los funcionarios de la Unión Europea y su régimen de seguridad social: los tributos como cotizaciones sociales a efectos del TJUE* (Issues about officials of the European Union and its social security regime: taxes as social contributions to the effects of the CJEU)

Carlos María López Espadafor, *Lagunas en el Derecho Tributario de la Unión Europea* (Gaps in the tax law of the European Union)

Isabel Lorente Martínez, *Brexit y cláusulas de sumisión en los contratos internacionales* (Brexit and prorrogation clauses in international contracts)

Diana Marín Consarnau, L*as uniones registradas en España como beneficiarias del derecho de la UE a propósito de la Directiva 2004/38/CE y del Reglamento (UE) 2016/1104* (Spanish "registered partnerships" as beneficiaries of EU law according to the Directive 2004/38 (EC) and the Regulation (EU) 2016/1104)

Fabrizio Marongiu Buonaiuti, *La disciplina della giurisdizione nel Regolamento (UE) n. 2016/679 concernente il trattamento dei dati personali e il suo coordinamento con la disciplina contenuta nel regolamento "Bruxelles I-bis"* (Jurisdiction under Regulation (EU) no. 2016/679 concerning the processing of personal data and its coordination with the "Brussels I-bis" regulation)

Alfonso Ortega Giménez, *El fenómeno de la inmigración y el problema de los denominados "matrimonios de conveniencia" en España* (The phenomenon of immigration and the problem of the denominated "convenience marriages" in Spain)

Marta Requejo Isidro, *La protección del menor no acompañado solicitante de asilo: entre Estado competente y Estado responsable* (The protection of unaccompanied minors asylum-seekers: between competent state and responsible state)

Mercedes Sánchez Ruiz, *La regulación europea actual sobre emplazamiento de producto y la propuesta de reforma de la directiva de servicios de comunicación audiovisual* (The current European rules governing product placement and the new legislative proposal amending the audiovisual media services directive)

Stella Solernou Sanz, *Los límites a la autonomía privada en el marco del contrato de transporte de mercancías por carretera* (Limits on private autonomy in the framework of the contract for carriage of goods by road)

Lenka Válková, *The interplay between jurisdictional rules established in the EU legal instruments in the field of family law: testing functionality through simultaneous application with domestic law* (L'interazione tra le regole di giurisdizione all'interno degli strumenti giuridici dell'UE nell'ambito del diritto di famiglia: la prova del funzionamento attraverso l'applicazione simultanea del diritto nazionale)

Second Issue of 2017's Journal of Private International Law

The second issue of 2017's *Journal of Private International Law* has been published.

Just how free is a free choice of law in contract in the EU? by *Peter Mankowski*

> *Free choice of law appears to be the pivot and the unchallenged champion of the private international law of contracts. Yet to stop at this would be a fallacy and would disregard the challenges it has to face. Those challenges come from different quarters. In B2C contracts in the EU not only the more favourable law principles as enshrined in Article 6(2) of the Rome I Regulation must be observed, but also any requirements which the Unfair Contract Terms Directive imposes. Transparency in particular ranks high. In Verein für Konsumenteninformation v Amazon the Court of Justice of the European Union has imposed duties on businesses and professionals to inform their consumer customers about at least the existence and the basic structure of the more favourable law principle. This landmark decision might not stand on ground as firm as it implies at first sight. Its fundament might be shaken by inconsistency. But practice has to comply with it and has to observe its consequences. On a more abstract level, it raises ample necessity to reflect about the modern-day structure of "free" choice of law. In this context, it is argued that the system established for parties' choice of law in the Rome I Regulation does not allow for a content review of choice of law agreements.*

Constitutionalizing Canadian private international law – 25 years since *Morguard* by *Joost Blom*

> *Because of its structuring function, private international law tends to be given a status distinct from the ordinary rules of domestic law. In a federal system, private international law of necessity implicates some aspects of the constitution. In a series of cases beginning in 1990 the Supreme Court of Canada has engaged in a striking reorientation of Canadian private international law, premised on a newly articulated relationship between private international law and the Canadian constitutional system. This constitutional dimension has been coupled with an enhanced notion of comity. The new dynamic has meant that changes in private international law that were initially prompted by constitutional considerations have gone further than the constitutional doctrines alone would demand. This paper traces these developments and uses them to show the challenges that the Supreme Court of Canada has faced since 1990 in constructing a relationship between Canada's constitutional arrangements and its private international law. The court has fashioned the constitutional doctrines as drivers of Canadian private international law but its own recent jurisprudence shows difficulties in managing that relationship. The piece concludes with lessons to be learned from the experience of the last 25 years.*

Freedom of establishment, conflict of laws and the transfer of a company's registered office: towards full cross-border corporate mobility in the internal market? by *Johan Meeusen*

> *Cross-border corporate mobility in the internal market has developed in particular through the interpretation by the Court of Justice of the European Union of the Treaty provisions on freedom of establishment. Certain issues at the crossroads of conflict of laws and European Union (EU) law are still the subject of debate. One of these is whether freedom of establishment includes a right to solely transfer a company's registered office between Member States. As such transformation results in a change of the company's lex societatis, it is intrinsically linked to the debate on regulatory competition in the EU internal market, freedom of choice and the proper balancing of the public and private interests involved. The author defends a nuanced position, referring to the true meaning of "establishment" in the internal market, the policy of "safe"*

regulatory competition and the equivalence of the Member States' conflict of laws rules.

The recast of the Insolvency Regulation: a third country perspective by *Nicolò Nisi*

During the recasting process of the EU Insolvency Regulation, issues relating to the relationship between the Regulation and the outer world were not debated. Indeed, the new Regulation (EU) 2015/848 maintains its territorial scope of application by making the application of the Regulation subject to the location of the centre of main interests within the territory of a Member State. This article tries to highlight the drawbacks of such geographical limitation concerning different aspects of the Regulation: in particular, jurisdiction, groups of companies, recognition of insolvency proceedings, cooperation and communication among courts and insolvency practitioners. Considering various possibilities to establish a truly universal regime, the article concludes that, in the light of the objective of an efficient administration of insolvency proceedings, the preferred approach is to extend the scope of application of the Regulation unilaterally, thereby including insolvencies significantly linked with third States.

A new frontier for Brussels I – private law remedies for breach of the Regulation? by *Ian Bergson*

The English courts have held that the Brussels I Regulation confers private law rights, such that an employee may obtain an anti-suit injunction on the basis of their "statutory right" to be sued in England under the employment provisions of the Regulation. This article examines the correctness of this proposition and argues that the Regulation does not confer rights or impose obligations on private individuals that they may enforce against one another. The article goes on to consider the implications of the English decisions and their remedial consequences, including the possibility of seeking an award of damages for breach of the Regulation.

Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast

especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT by *Mukarrum Ahmed and Paul Beaumont*

> *This article contends that the system of "qualified" or "partial" mutual trust in the Hague Choice of Court Agreements Convention ("Hague Convention") may permit anti-suit injunctions, actions for damages for breach of exclusive jurisdiction agreements and anti-enforcement injunctions where such remedies further the objective of the Convention. However, intra-EU Hague Convention cases may arguably not permit remedies for breach of exclusive jurisdiction agreements as they may infringe the principles of mutual trust and effectiveness of EU law (effet utile) underlying the Brussels I Recast Regulation. The relationship between Article 31(2) of the Brussels I Recast Regulation and Articles 5 and 6 of the Hague Convention is mapped in this article. It will be argued that the Hartley–Dogauchi Report's interpretative approach has much to commend it as it follows the path of least resistance by narrowly construing the right to sue in a non-chosen forum as an exception rather than the norm. This exceptional nature of the right to sue in the non-chosen forum under the Hague Convention can be effectively reconciled with the Brussels I Recast Regulation's reverse lis pendens rule under Article 31(2). This will usually result in the stay of the proceedings in the non-chosen court as soon as the chosen court is seised. The impact of Brexit on this area of the law is uncertain but it has been argued that the likely outcome post-Brexit is that the regime applicable between the UK and the EU (apart from Denmark) in relation to exclusive jurisdiction agreements within the scope of the Hague Convention will be the Hague Convention.*

The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law by *Weizuo Chen and Gerald Goldstein*

> *The Asian Principles of Private International Law (APPIL) finalized in 2017 is a project undertaken by private international law scholars of 10 East and Southeast Asian jurisdictions to harmonize the region's private international law rules or principles. Containing principles on choice of law, international jurisdiction, the recognition and enforcement of foreign judgements, and the judicial support of international commercial arbitration, they are the first harmonization effort in Asia based on comparative analyses of the private international law of the 10 participating APPIL-Jurisdictions. Being the first*

"voice of Asia" in private international law, they may serve as a model for national and regional instruments and thus may be used by the private international law legislators of Asian jurisdictions to interpret, supplement and enact their own private international law statutes; and may even be applied by state courts and arbitral tribunals, albeit not as legally binding instrument but as "soft law". They will mainly function as a private international law model law.

The "statutist trap" and subject-matter jurisdiction by *Maria Hook*

Common law courts frequently rely on statutory interpretation to determine the cross-border effect of legislation. When faced with a statutory claim that has foreign elements, courts seek to determine the territorial scope of the statute as a matter of Parliamentary intent, even if it is clear that Parliament did not give any thought to the matter. In an article published in this journal in 2012, Christopher Bisping argued that "statutism" – the idea that statutory interpretation should determine whether a statute applies to foreign facts – is inconsistent with established principles of choice of law. The purpose of this paper is to demonstrate that, in addition to cutting across principles of choice of law, a statutist approach has the potential to obscure fundamental questions of subject-matter jurisdiction. In particular, statutism can lead to conflation of subject-matter jurisdiction and choice of law, and it impedes the development of coherent principles of subject-matter jurisdiction.

State of play of cross-border surrogacy arrangements – is there a case for regulatory intervention by the EU? by *Chris Thomale*

Mother surrogacy in and of itself, as a procreative technique, poses a series of social, ethical and legal problems, which have been receiving widespread attention. Less prominent but equally important is the implementation of national surrogacy policies in private international law. The article isolates the key ethical challenges connected with surrogacy. It then moves on to show how, in private international law, the public policy exception works as a vehicle to shield national prohibitive policies against international system shopping and how it continues to do so precisely in the best interest of the child. Rather than recognizing foreign surrogacy arrangements, national legislators with intellectual support by an EU model law, should focus on adoption reform in

order to re-channel intended parents' demand for children.

Conference Report: INSOLVENCY PROCEEDINGS WITHIN THE EU: LATEST DEVELOPMENTS, ERA, 8 to 9 June 2017

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

On 8 and 9 June 2017 the Academy of European Law (ERA), in co-operation with the Academic Forum of INSOL Europe hosted a conference in Trier on the latest developments of insolvency proceedings within the EU. The conference aimed not only at giving an in-depth analysis of the Recast EIR (EU Regulation No 2015/848), but also at discussing post-Brexit implications for insolvency and restructuring as well as examining the new Commission proposal for a Directive on insolvency, restructuring and second chance, published late 2016.

After opening and welcoming remarks by Dr. Angelika Fuchs (Head of Section – Private Law, ERA, Trier) and Prof. Michael Veder (Adviser at RESOR, Amsterdam; Professor of Insolvency Law at Radbound University Nijmegen; Chair of INSOL Europe Academic Forum), the first session of the conference dealt with recent CJEU case law on cross-border insolvency proceedings. Stefania Bariatti (Professor at the University of Milan; Of Counsel, Chiometi Studio Legale, Milan) presented the most important cases on the EIR decided in 2016 by the CJEU, as well as some cases still pending. As it was shown by Prof. Bariatti the CJEU decided on various open questions relating to Art. 3 EIR and the COMI concept in the case of *Leonmobili* (case C-353/15) in 2016. Another question regarding the interpretation of Art. 3 EIR is still pending before the CJEU in the case of *Tünkers* (C-641/16). The treatment of rights in rem, and the interpretation of Art. 5 EIR,

was object of *SCI Senior Home and Private Equity Insurance Group "SIA"* (C-156/15). After the CJEU decided the first two cases dealing with Art. 13 EIR and detrimental acts in 2015 – *Lutz* (C-557/13) and *Nike* (C-310/14) – an Italian case (*Vynils Italia* SpA, C-54/16) concerning Art. 13 is still pending before the CJEU. Other cross-border insolvency issues that went to the CJEU in 2016 concerned the Dutch prepack proceeding (*Federatie Netherlandse Vakvereiniging,* C-126/16) and the interplay between the Regulation No 800/2008 and the EIR (*Nerea SpA/Regione Marche*, C-245/16).

Subsequently, Michal Barlowski (Senior Counsel, Wardynsky & Partners, Warsaw) gave an introduction about the new EIR focusing on its scope of application especially regarding pre-insolvency and hybrid proceedings. Mr. Barlowski identified the following six changes in the Recast Regulation as most important: 1.) the revisited and expanded COMI concept, 2.) the expansion of the scope of applicability, 3.) the synchronization (coordination) of main and secondary proceedings, 4.) the introduction of group coordination proceedings, 5.) the extension of authority and duties of IP's and 6.) the ease of access to insolvency registers. Analyzing the positive and negative prerequisites of the scope of applicability as laid down in Art. 1 EIR Recast, Barlowski emphasized that it might be problematic to include certain pre-insolvency or hybrid proceedings under the scope of the EIR Recast. This is due to the fact, that Art. 1 EIR Recast requires "public" proceedings, although especially pre-insolvency proceedings more commonly seek a solution of the debtors situation rather in "private". Furthermore, Barlowski pointed out that the widened scope of application, the synchronisation of main and secondary proceedings as well as of proceedings within a group, the rising role of IPs and the higher availability of legal instruments lead to greater complexity of processes and thereby create new opportunities as well as challenges. Barlowski concluded with stating that the new EIR is characterized by "complexity vs. simplicity".

Gabriel Moss QC (Barrister, 3-4 South Square, Gray's Inn, London; Visiting Professor at Oxford University) dealt with the definition of COMI and the "Head Office Functions" test, as well as COMI shifts. There are now express provisions confirming the previous case law such as *Interedil* (Case C-396/09), although the concept of COMI remains the same under the Recast Regulation. Therefore, the "Head Office Function" test is still valid for determining the COMI. In regards to COMI shifting the EIR Recast now contains several new provisions dealing with

fraudulent or abusive moves of COMI or with “bad“ forum shopping. Whereas “good” forum shopping, usually done by a legal person, tends to benefit the general body of creditors, “bad“ forum shopping, usually done by a natural person, tends to escape the creditors or generally disadvantages them. Especially Art. 3 (1) EIR Recast now states that the registered office presumption will be disapplied, if the debtor’s registered office is moved to another Member State within three months prior to the request for opening of proceedings, respectively six months if the debtor is an individual and moves his or her habitual residence. Furthermore, Art. 4 EIR Recast now requires a court considering a request to open insolvency proceedings to examine whether it has jurisdiction under Art. 3 EIR Recast whereas Art. 5 EIR Recast gives any creditor the right to challenge the opening of main proceedings on the grounds of international jurisdiction. However, the new presumptions designed to prevent “bad” forum shopping may not be effective as cases are usually decided based on facts not presumptions. Moss concludes that both, the court’s duty to check jurisdiction and the ability of creditors to challenge an opening of a main proceeding, are powerful tools against fraudulent COMI shifts. In Moss’ view the codification of the case law relating to COMI is welcome and useful, especially in jurisdiction, that rely rather on the relevant statute than case law.

Reinhard Dammann (Avocat à la Cour, Partner, Clifford Chance Europe LLP, Paris) analysed the coordination of main and secondary proceedings as well as tools to prevent secondary proceedings. Dammann started out with assessing that secondary proceedings are not weakened in the Regulation Recast, but rather strengthened. On the one hand, the Member States understand secondary proceedings as a defence against the universal main proceedings, on the other hand secondary proceedings might prove useful in ensuring an effective administration, especially in cases of a complicated estate or an intended eradication of the protection of rights in rem through Art. 8 EIR Recast. But, the EIR Recast includes two new tools to prevent secondary proceedings: the giving of an undertaking pursuant to Art. 36 EIR Recast and a stay of the opening of secondary proceedings pursuant to Art. 38 III EIR Recast. However, Dammann heavily criticized both tools. Although the Regulation of the undertaking in Art. 36 EIR recast may be used to facilitate a sale of the assets in a combined set allowing for going concern of the insolvent company, it shows several inconsistencies and flaws: it might be difficult to identify the “known” local creditors in terms of Art. 36 EIR Recast; Art. 36 EIR Recast is discriminating the non-local creditors;

pursuant to Art. 36 (5) EIR Recast the rules on majority and voting that apply to the adoption of restructuring plans shall also apply to the approval of the undertaking, whereas the matter of subject is not a restructuring, but an asset sale, and lastly the relationship between the undertaking and Art. 8 EIR Recast is unclear. Therefore, if an asset sale is intended in the main proceeding, it should be more effective to execute an asset sale in the main proceeding and subsequently open secondary proceedings and distribute the proceeds in the single proceedings. If a debt restructuring is intended in the main proceeding, the opening of a secondary proceeding, as well as an undertaking would frustrate the debt restructuring. In such cases a stay of the opening of secondary proceedings pursuant to Art. 38 (3) EIR Recast might prove helpful. However, the scope of applicability of Art. 38 (3) EIR Recast is unclear as it is specifically designed after the Spanish pre-insolvency proceeding pursuant to Art. 5bis Ley Concursal.

Bob Wessels (Independent Legal Counsel, Adviser and Arbitrator; Professor emeritus at University of Leiden) continued with practical concerns surrounding the publication of insolvency proceedings. Whereas the publicity of proceedings and the lodging of claims was one of the major shortcomings of the EIR, the Regulation Recast now requires the Member States to publish all relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers, as well as introduces standard forms for the lodging of claims. Wessels then gave a detailed analysis of Art. 24 to 27 concerning the establishment of insolvency registers and the interconnection between insolvency registers. Both Art. 24 (1) EIR Recast (establishment of insolvency registers) as well as Art. 25 (1) EIR Recast (interconnection between insolvency registers) will not apply from 26 June 2017, but from June 2018 and 26 June 2019. The wording of recital 76 of the EIR Recast, as well as the requirements of Art. 24 (2) EIR Recast seem to indicate that only proceedings found in Annex A will be taken into the register that have extra-territorial effect. Whereas Art. 24 (2) EIR Recast provides for mandatory information, Member states are not precluded to include additional information (see Art. 24 (3) EIR Recast). The information that has to be taken into the registers differs depending on whether the debtor is an individual exercising an independent business or a professional activity, a legal person, or a consumer (Art. 24 (4) EIR Recast intends to protect the privacy of consumers). Pursuant to Art. 24 (5) EIR Recast, the publication of information in the registers has only the legal effects laid down in Art. 55 (6) EIR Recast and in national law. However, it is

unclear whether this applies only to the mandatory information or to optional information as well. After all the access to EU-wide insolvency registers through the European e-Justice Portal should improve the efficiency and effectiveness of cross-border insolvency proceedings with benefits such as a quicker, real-time access to information crucial for business decisions, the free availability of key insolvency information and clear explanations on the insolvency terminology and the systems of the different Member States facilitating a better understanding of the content. As a last point Wessels presented the requirements for lodging claims as laid down in Art. 53 to 55 EIR Recast.

After lunch Alexander Bornemann (Head of Division, Federal Ministry of Justice and Consumer Protection, Berlin) scrutinized the treatment of corporate groups under the EIR Recast. The Recast's approach to corporate groups rests on two pillars. The first pillar may be described as the centralization of venue, in cases where there is a common COMI or an undertaking pursuant to Art. 36 EIR Recast is given. The centralization of venue avoids costs, delays and frictions associated with coordination of proceedings across borders. The second pillar may be described as the coordination of decentralized main proceedings, either through "centralized" coordination with coordination proceedings pursuant to Art. 61 to 77, or through "decentralized" coordination with cooperation and coordination between courts and IPs pursuant to Art. 56 to 59 or participation and invention rights pursuant to Art. 60. However, the EIR Recast still lacks the next logical step in the treatment of corporate groups, namely the consolidation of proceedings. The new group coordination proceeding is inspired by the German *Koordinationsverfahren* as laid down in §§ 269d et seqq. of the German Insolvency Code and provides a procedural framework for the centralization of some of the functions of coordination such as the development of a plan, recommendations and mediation. However, the coordinated proceedings remain autonomous and thus combines centralized coordination with decentralized implementation. Ultimately the new coordination proceeding provokes significant difficulties in the practical administration of the proceeding and the complex system of procedural requirements and safeguards may offset the aspired advantages. The new regime should therefore be viewed as a field trial and a first modest step towards a "real" framework for groups. New perspectives may be opened for private autonomous (synthetic) replications by way of agreements and protocols as laid down in Art. 56 (2) EIR Recast. Other further developments will be based upon the experiences made or not made under the EIR Recast (see evaluation clause Art. 90 (2) EIR

Recast).

During the next panel Nicolaes Tollenaar (RESOR, Amsterdam) presented a case study dealing with the restructuring of a group of companies based on real facts. The concerned group consisted of a holding company incorporated in the Netherlands, where it has its COMI as well, and two subsidiaries one based in Delaware (USA) and one based in Germany. The financial debt is mainly located at the level of the holding company, but the subsidiaries are guarantors of such debt and some obligations are secured by pledges over the shares or participations in those subsidiaries. Due to financial difficulties suffered by the group, the Dutch Company obtained a court moratorium in the Netherlands in order to be able to conduct negotiations with its creditors. However, the Dutch Company has a significant portion of its assets outside the Netherlands. The conference audience then had to discuss the cross-border effects of the Dutch moratorium. The case was a perfect example of how easily cross-border insolvency issues might get very complicated, but with the help of experts such as Michael Veder, Gabriel Moss, Jenny Clift, Bob Wessels and many other present, probably no case is too complicated. However, the lesson to be learned was that the scope of applicability of the EIR Recast regarding pre-insolvency or hybrid proceedings might turn out to be problematic, due to its requirements as laid down in Art. 1 EIR Recast. Additionally, the case showed that the protection of rights in rem through Art. 8 EIR Recast and the new provisions in Art. 2 EIR Recast about the location of assets might lead to difficulties in cases where assets are situated in another Member State and the debtor does not possess an establishment in this Member State and therefore the opening of a secondary proceeding is not possible.

Jenny Clift (Senior Legal Officer, International Trade Law Division, UNCITRAL Secretariat, Vienna) reported on harmonisation trends on security rights and insolvency law at an international level. Topics considered for harmonization efforts, include both current and future work and national law reform efforts on insolvency and secured transactions. Currently, work is being undertaken on a model law on recognition and enforcement of insolvency-related judgments, and it is hoped that it can be finalised for adoption, together with a guide to enactment, at the 2018 Commission session. UNCITRAL is as well working on a set of draft legislative provisions on facilitating the cross-border insolvency of enterprise groups. However, areas still requiring further discussion include the use of

“synthetic” proceedings to minimise the commencement of both main and non-main proceedings, the powers of the group representative appointed in a planning proceeding to coordinate the development of a group insolvency solution and the approval of a group insolvency solution. Furthermore, part four of Legislative Guide will be extended to include obligations of directors of enterprise group companies in the period approaching insolvency. Moreover, the Commission has agreed that work should be undertaken on the insolvency of micro, small and medium-sized enterprises (MSMEs). Possible future topics include choice of law in insolvency, a review of the Legislative Guide in regard to insolvency treatment of financial contracts and netting, the treatment of intellectual property contracts in cross-border insolvency cases, the use of arbitration in cross-border insolvency cases and sovereign insolvency. On a national level, there are now 43 states that enacted the UNCITRAL Model Law on Cross-Border Insolvency. Topics being considered for harmonization efforts regarding secured transactions include the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions. Possible future topics entail contractual issues, transactional and regulatory issues, finance for MSMEs, warehouse receipt financing, intellectual property licensing, as well as alternative dispute resolution in secured transactions. On a national level, there has been significant activity in secured transactions law reform and in the establishment of collateral registries, as well as interest in the enactment of the Model Law on Secured Transactions.

The conference day ended with a “Brexit Dialogue” between Gabriel Moss and Bob Wessels, discussing potential effects of Brexit on European cross-border insolvency law and possible solutions to caused problems. Moss argued that from a rational point of view the EU Regulations and Directives are a “win-win” for all parties, and should therefore be kept. However, some EU politicians refuse “cherry-picking” and consider that the UK must be seen worst off outside the EU. Currently, the UK intends a “Great Reform Bill” which will keep all EU law as domestic UK law. Nevertheless, this will only be temporary and subject to change and the Regulations and Directives then cannot be applied on a unilateral basis, so reciprocity will no longer exist, unless otherwise agreed between the UK and the EU. If the UK loses the EU legislation it may fall back to s. 426 UK Insolvency Act 1986, the Model Law and the Common Law. However, the 27 Member States do not have s. 426 UK Insolvency Act 1986 or common law (except Ireland) and only some have adopted the Model Law. This would result in a “win” for the EU Member States and a “lose” for the UK. Wessels (see also) then proposed three

solutions including only the Member States and three solutions including the EU. One could be a revival of existing treaties such as listed in Art. 85 EIR Recast. Another option is that the UK is treated as a third country making it subject to the national legislation of each Member State. However, the Member States then might enact the Model Law. Last, but not least one could think about reviving the Istanbul Convention. As an EU oriented solution, one could consider a transitional rule similar to Art. 84 (2) EIR Recast, i.e. that the EIR Recast continues to apply up to certain date in the future. Another solution could be found in a new multiparty initiative by academics and practitioners. It also seems possible to strengthen the role of courts, relying much stronger on court-to-court cooperation and communication.

The first conference day ended with a guided tour of the Karl-Marx-Haus and a joint dinner at the "Weinhaus".

The second conference day dealt with the new Commission proposal for a Directive on insolvency, restructuring and second chance and pre-insolvency restructuring in general.

Alexander Stein (Head of Unit, Civil Justice Policy, DG Justice and Consumers, European Commission, Brussels) began with a presentation of the new Commission proposal for a Directive on insolvency, restructuring and second chance. Its main objectives are reducing the barriers for cross-border investment, increasing investment and job opportunities in the internal market (Capital Markets Union Action Plan), decreasing the cost and improving the opportunities for honest entrepreneurs to be given a fresh start (Single Market Strategy) and supporting efforts to reduce future levels of non-performing loans (ECOFIN Council Conclusions of July 2016). The proposal provides for the harmonisation of preventive restructuring procedures and contains seven main elements to ensure efficient and fast proceedings with low cost: Early access to the procedure, strong position of the debtor, a stay of individual enforcement actions, the adoption of restructuring plans, encouraging new financing and interim financing, court involvement and rights of shareholders. Other efficiency elements include early warning tools. The proposal touches upon discharge periods for over-indebted entrepreneurs, the training and specialisation of judges and IPs, the appointment, remuneration and supervision of IPs and the digitalisation of procedures. It also

contains provisions about data collection to allow a better assessment of how Member States are implementing the directive, how it is performing, and how it would need to be improved in the future. Stein reported that on 8 June the Council already discussed the role of courts and the debtor-in-possession principle. The next step is a hearing on 20 June before the European Parliament. Points that will be discussed once more include the role of the IP and the court involvement. However, the Commission plays a constructive role and intends a quick adoption of the proposal.

Nicolaes Tollenaar then took over again and presented the procedural steps of preventive restructuring proceedings with a view to the new Commission proposal. Although, Tollenaar welcomed the proposal as such, he has some significant critique as well. Firstly, the proposal only provides the debtor with the right to propose a restructuring plan. Thus, the debtor might use the right to propose a plan in an abusive manner. Secondly, it is unclear what exactly is meant with a minimum harmonisation in regard to pre-insolvency proceeding: May Member States grant creditors the right to propose a plan as well? Thirdly, the "likelihood of insolvency" is sufficient to open a pre-insolvency proceeding and use a cross-class cram down to adopt a restructuring plan. However, it is questionable if the "likelihood of insolvency" justifies a cross-class cram down. Tollenaar therefore recommends giving creditors the right to propose a plan and to distinguish between two phases: The "likelihood of insolvency", where only the debtor has the right to propose a plan and no cram down is available and "Insolvency or inevitable insolvency", where creditors have the right to propose a plan and cram down is available. Furthermore, he recommends giving a wide right to seek early (non-public) court directions on issues such as jurisdiction, admittance of claims or permissible content of the plan and confirmation criteria and to established specialized courts.

Next, Florian Bruder (Rechtsanwalt, Counsel, DLA Piper, Munich) spoke about creditor's rights and the protection of new and interim finance in the restructuring process in the proposal. From a creditor's point of view the proposal provides a framework procedure allowing the debtor to pursue a quasi-consensual (financial) restructuring, addressing creditor hold outs and shareholder opposition as the most practical issues. Creditors and the debtor may prepare and lead the restructuring process supported by new finance. However, there is a substantial risk of deterioration of the value of the business and therefore

recovery for the creditors due to the stay. The suspension of creditor's rights to file for insolvency and to accelerate, terminate or in any other way modify executory contracts to the detriment of the debtor severely restricts the creditor's rights to control the procedure. Therefore, adequate protection is crucial. Eventually safeguards for the creditors mostly rely on active intervention of the creditors and are available quite late. Hence, the adequate protection of the creditor's interests depends even more on the access to commercially-minded and experienced courts.

Michael Barlowski then focused on the interplay between the proposed Directive and the Recast Insolvency Regulation. Both instruments will overlap regarding cross-border aspects of restructuring proceedings. Practical problems which need to be further examined include rights in rem (1), territorial proceedings (2) and the effectiveness in third-countries (3): 1.) While Art. 6 (2) of the proposal provides for a stay of individual enforcement actions in respect of secured creditors as well, Art. 8 (1) EIR Recast exempts the rights in rem of creditors from the effects of the opening of proceedings, resulting in a paradox situation. 2.) Admittedly, Art. 7 of the proposal provides for a general stay covering all creditors that shall prevent the opening of insolvency procedures at the request of one or more creditors, however this covers only "principle" proceedings, but not "territorial proceedings", which therefore may frustrate the negotiations between the creditors and the debtor. Art. 38 (3) EIR Recast is no help either, as its scope of applicability is unclear. 3.) If the debtor has assets outside the EU, it may be essential to ensure that the effects of the stay and the restructuring plan cover those assets as well. However, there is no EU agreement, and therefore the domestic law of the concerned third country applies.

Finally, a round table consisting of Michal Barlowski, Florian Bruder, Andreas Stein, Michael Veder and Alexander Bornemann discussed the question of how the insolvency landscape in the EU is changing. It was agreed upon that the Commission proposal tries to strike a balance between cost-efficiency and the protection of the involved parties' interests. The proposal is flexible as well, and covers not only one proceeding but a variety of different proceedings. It was proposed that the Member States should provide for different types of proceedings for different situations, i.e. proceedings for small and medium enterprises and proceedings for bigger companies, similar to the UK regime of the Company Voluntary Arrangement and the Scheme of Arrangement.

The event ended with warm words of thanks and respect to the organizers and speakers for an outstanding conference.

 Gabriel Moss

 Reinhard Dammann

 Michal Barlowski

 Bob Wessels

Gabriel Moss and Bob Wessels

Netherlands International Law Review (NILR) 1/2017: Abstracts

In the recent issue of the *Netherlands International Law Review* (NILR) three articles on private international law issues were published.

Peter Mankowski (The European World of Insolvency Tourism: Renewed, But Still Brave?, NILR 2017/1, p. 95-114) discusses the cross border insolvency tourism under the Insolvency Regulation. He also pays attention to the upcoming changes after Brexit to the Recast Insolvency Regulation.

The abstract of his article reads:

“Insolvency tourism and COMI migration have become key features in modern European international insolvency law. Fostered, in particular, by the ingenuity of the English insolvency industry. Yet it has not gone unanswered. The Recast European Insolvency Regulation introduces a not insignificant number of counter-measures as well as an antidote in the shape of a look-back period. Furthermore, as a prospective aftermath of Brexit, the race is on once more in the field of pre-insolvency restructuring measures.”

Marek Zilinsky (Mutual Trust and Cross-Border Enforcement of Judgments in Civil Matters in the EU: Does the Step-by-Step Approach Work?, NILR 2017/1, p. 116-139) deals with the question on the implementation of the principle of mutual trust in different EU instruments in the field of cross border recognition and enforcement of judgments. He points out that the EU legislator has chosen different approaches for implementation. Special attention is paid to three instruments: the Brussels I Regulation Recast, the Brussels IIbis Regulation and the Maintenance Regulation.

The abstract of this article reads:

"Mutual trust is one of the cornerstones of cooperation in the field of European Union private international law. Based on this principle the rules on the cross-border recognition and enforcement of judgments in the European Union are still subject to simplification. The step-by-step approach of the implementation of this principle led to the abolition of the exequatur, often accompanied by a partial harmonization of enforcement law to improve and support the smooth working of cross-border enforcement without exequatur. In this regard, it seems that the Member States still want to have control over the 'import' of judgments which results in maintaining the ground for non-recognition and the possibility of relying on them in the Member State of enforcement. This article considers the implementation of the principle of mutual recognition in three areas of justice: civil and commercial matters, family law and maintenance. In these areas the European Union legislator has chosen three different approaches for the implementation of this principle."

Jacobien Rutgers (NILR 2017/1, p. 163-175) discusses the *VKI/Amazon* Case of the European Court of Justice (Case C-191/15) where the Court gave its interpretation of Art 6(1) of the Rome II regulation and Art 6(1) Rome I Regulation in a procedure started by a consumer organization based on allegedly unfair terms in general terms and conditions of the seller.

The abstract to this article reads:

"In Amazon the CJEU decided which conflict rules applied to a claim in collective

proceedings that was initiated by a consumer organization to prohibit allegedly unfair terms contained in the general terms and conditions of a seller. The terms were used in electronic b2c contracts, where the seller targeted consumers in their home country. The CJEU distinguished between the conflict rule concerning collective action, Article 6(1) Rome II, and the conflict rule concerning the fairness of the term, Article 6(2) Rome I. In addition, the CJEU introduced a new test to assess the fairness of a choice-of-law term under Directive 93/13 on unfair contract terms. In the note, it is argued that the CJEU's distinction between those two conflict rules is unnecessary and that the test that the CJEU formulated to assess whether a choice-of-law term is unfair, is less favourable to the consumer than the tests formulated in prior decisions."

The text of the articles is free available on the website of the publisher of the *Netherlands International Review.*

Thanks go to Marek Zilinsky for providing the above-noted abstracts.

The Justice Initiative Frankfurt am Main 2017

Written by Prof. Dr. Dres. h.c. Burkhard Hess, Executive Director Max Planck Institute Luxembourg for Procedural Law

Against the backdrop of Brexit, an initiative has been launched to strengthen Frankfurt as a hot spot for commercial litigation in the European Judicial Area. On March 30, 2017, the Minister of Justice of the Federal State Hessen, Ms Kühne-Hörmann, organized a conference at which the Justice Initiative was presented. More than 120 stakeholders (lawyers, judges, businesses) attended the conference. The original paper was elaborated by Professors Burkhard Hess (Luxembourg), Thomas Pfeiffer (Heidelberg), Christian Duve (Heidelberg) and Roman Poseck (President of the Frankfurt Court of Appeal). Here, we are pleased

to provide an English translation of the position paper with some additional information on German procedural law for an international audience. The proposal has, as a matter of principle, been endorsed by the Minister of Justice. Its proposals are now being discussed and shall be implemented in the next months to come. The paper reads as follows:

1. Background Information

In the European Judicial Area, London has positioned itself as the most important hub for cross-border disputes arising from the European internal market. According to statistics, in around 80% of all commercial cases at least one party is foreign, while almost 50% of all claims issued in the London court concern only foreigners. The value of disputes before the London Commercial Court is regularly in the 6 – 7-digit range. The court hears approximately 1,000 procedures per year, of which almost 200 concern parties from the continent (see here). A key focus is on financial disputes. Often, the jurisdiction of the High Court of London is based on jurisdiction agreements (Article 25 Brussels I^{bis} Regulation).

The upcoming Brexit will change this situation in relation to parties from the continent. In the future, the United Kingdom as a state will no longer benefit from the benefits of the European Judicial Area; the UK will rather be a third country. Parties to civil disputes must already consider whether they prefer to choose other courts within the European Judicial Area. The liberal rules of jurisdiction laid down in Article 25 of the Brussels I^{bis} Regulation and the special jurisdiction rules established in Articles 7 and 8 of the Brussels I^{bis} Regulation promote appropriate strategies. In financial contracts, jurisdiction clauses do not only provide for London, but also for other courts in the European Judicial Area, such as Frankfurt. Therefore, Germany can become a competing judicial hub. With the expected relocation of the financial center from London to Frankfurt (and indeed, likely to other European locations) a relocation of the judicial hub is also to be expected. It is submitted that one should strive for a shift of financial disputes to Frankfurt; even today, the Frankfurt judiciary is characterized by the existence of its special expertise in commercial areas. Indeed, the Frankfurt civil courts already have a high degree of specialization to hear financial and banking disputes.

Attracting high-profile, commercial disputes entails positive effects with regard to the legal services sector, in particular the legal profession, but also the courts of ordinary jurisdiction. Corresponding developments can be observed with regard to patent litigation. In this highly-specialized area of law, the courts of Düsseldorf, Mannheim and Munich have already established themselves as sought-after throughout Europe.

For these reasons, the Justice Initiative proposes that the attractiveness of the civil and commercial courts of Frankfurt should be strengthened through some targeted (mainly organizational) measures. A simultaneous information campaign would also increase Frankfurt's visibility as an attractive place for the solution of international commercial disputes. Our considerations are linked to and continue to advance earlier initiatives ("Law Made in Germany") that aim to strengthen Germany as a compelling place for dispute resolution.

In particular, the authors propose the following measures:

A. A comprehensive strategy to strengthen Frankfurt as a hub for international dispute settlement

I. The core concern relates to the further specialization of the dispute resolution bodies within the state courts in order to promote the efficient resolution of cross-border commercial disputes. A combination of targeted measures, including the provision of a well-equipped court and experienced judges with good language skills as well as a modern process design shall enable a practical, user-friendly framework for the settlement of international commercial disputes

II. The initiative shall be accompanied by the comprehensive involvement of the judiciary, of the business sector (the Chamber of Industry and Commerce) as well as of the legal profession (including lawyers' associations and lawyers' chambers).

III. Simultaneous strengthening of arbitration in Frankfurt (via the creation of a Center for International Dispute Resolution).

B. Establishment of Chambers for International Commercial Matters at LG Frankfurt as well as of appropriately specialized senates at OLG Frankfurt

I. Composition of the Chamber for International Commercial Disputes with judges

who have:

1. In-depth experience of business law (and, if possible also experience as lawyers) as well as;
2. Good English language skills.

II. Occupation of the commercial lay judges in consultation with the Chamber for Commerce with experts from the fields:

1. Finance and banking;
2. International commercial matters;
3. Auditing.

Here again, adequate language skills must be ensured.

III. Sufficient equipment of the Chamber for International Commercial Disputes:

1. Comprehensive use of the electronic support system, for example by providing an IT tool in order to enable an "electronic process and case file management";
2. Adequate equipment of the registrar of the Chamber / Senate with a staff, which also disposes of a sufficient knowledge of foreign languages and is able to manage (partially or partly) foreign-language files;
3. Borrowing best practices from arbitration with regard to the secretary/registry who adopts active support functions (as a case manager).

C. Process design

I. In respect of its own procedural practice, the Kammer für international Handelssachen should borrow "best practices" from patent litigation and international commercial arbitration:

1. The court should establish a "road map" with the parties at the start of the process; this would structure the course of the procedure. In this respect, it would seem to be a good idea to use the first hearing as a "Case Management Conference" with the parties:
2. Intensive use of the obligation of the court to provide information on open legal and factual issues under section 139 ZPO (German Code of Civil Procedure – the text is reproduced at the end of the document), in order

to facilitate a speedy and transparent procedure;
3. Written preparation statements of witnesses shall generally be permitted (see § 377 (3) ZPO);
4. Increased use of sections 142 to 144 ZPO to enable a (structured) exchange of evidence between the parties under the control of the court ("German disclosure");
5. Recording of the hearing and preparation of a textual record (sections 160 to 164 ZPO) – as an electronic document.

II. Extensive use of the English language within the existing framework of sections 184 and 185 (2) of the Court Organisation Act (but no English-speaking hearings per se). The court should decide at its own discretion whether and to what extent the hearing is held in English. The proposals of the parties must be respected as far as possible.

1. No translation of documents which are drafted in the English language (as already foreseen by section 142 (3) ZPO):
2. Witness will be heard in their original tongue or in English;
3. Extensive use of video conferencing:
4. Elaboration of judgments in a way which allows for their speedy translation into foreign languages.

D. The implementation of the initiative

I. Obtaining the support of lawyers, the judiciary and politicians in Hesse (Fall 2016)

II. Opening symposium on the 30th of March 2017;

III. Establishment of a working group with the aim of defining the necessary measures to be taken;

IV. Development and implementation of an accompanying communication strategy;

V. Establishment of a chamber for international trading at Regional Court of Frankfurt and a parallel specialization at the the Heigher Regional Court preferably on January 1, 2018 (within the business distribution plan of 2018).

All in all, the undertaking of the necessary organizational endeavor as well as the timetable for the implementation of the initiative both appears to be feasible. The implementation requires, in particular, the establishment of the Chamber for International Commercial Disputes (Kammer für international Handelssachen) within the District Court of Frankfurt. The following disputes could be assigned to the Chamber from the date of its establishment: international disputes, where the jurisdiction of the Landgericht Frankfurt (District Court of Frankfurt) is based on the Brussels I^{bis} Regulation or the Lugano Convention. Within the District Court, the respective disputes would be allocated to the specialized chamber via the business distribution plan of the court.

Annex: The pertinent provisions of the German Code of Civil Procedure and the Court Organisation Act

Code of Civil Procedure (Zivilprozessordnung – ZPO)

Section 139 Direction in substance of the course of proceedings

(1) To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.

(2) The court may base its decision on an aspect that a party has recognisably overlooked or has deemed to be insignificant, provided that this does not merely concern an ancillary claim, only if it has given corresponding notice of this fact and has allowed the opportunity to address the matter. The same shall apply for any aspect that the court assesses differently than both parties do.

(3) The court is to draw the parties' attention to its concerns regarding any items it is to take into account ex officio.

(4) Notice by the court as provided for by this rule is to be given at the earliest

possible time, and a written record is to be prepared. The fact of such notice having been given may be proven only by the content of the files. The content of the files may be challenged exclusively by submitting proof that they have been forged.

(5) If it is not possible for a party to immediately make a declaration regarding a notice from the court, then the court is to determine a period, upon the party having filed a corresponding application, within which this party may supplement its declaration in a written pleading.

Section 142 Order to produce records or documents

(1) The court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference. The court may set a deadline in this regard and may direct that the material so produced remain with the court registry for a period to be determined by the court.

(2) Third parties shall not be under obligation to produce such material unless this can be reasonably expected of them, or to the extent they are entitled to refuse to testify (…).

(3) The court may direct that records or documents prepared in a foreign language be translated by a translator who has been authorised or publicly appointed by the authorities of a Land, under the stipulations of Land law, for the preparation of translations of the nature required, or who is deemed to have equivalent qualifications. The translation shall be deemed to be true and complete where this is confirmed by the translator. The confirmation is to be set out on the translation, as are the place and date of the translation and the translator's authorisation/appointment/equivalency, and the translated document is to be signed by the translator. It is admissible to prove that the translation is incorrect or incomplete. The order provided for in the first sentence hereof may not be issued to the third party.

Section 143 Order to transmit files

The court may direct the parties to the dispute to produce the files in their possession to the extent they consist of documents concerning the hearing on the matter and the decision by the court.

Section 144 Visual evidence taken on site; experts

(1) The court may direct that visual evidence is to be taken on site, and may also direct that experts are to prepare a report. For this purpose, it may direct that a party to the proceedings or a third party produce an object in its possession, and may set a corresponding deadline therefor. The court may also direct that a party is to tolerate a measure taken under the first sentence hereof, unless this measure concerns a residence.

(2) Third parties are not under obligation to so produce objects or to tolerate a measure unless this can be reasonably expected of them, or to the extent they are entitled to refuse to testify pursuant to sections 383 to 385. Sections 386 to 390 shall apply mutatis mutandis.

(3) The proceedings shall be governed by the rules applying to visual evidence taken on site as ordered upon corresponding application having been made, or by those applying to the preparation of reports by experts as ordered by the court upon corresponding application having been made.

Section 377 Summons of a witness

(3) The court may instruct that the question regarding which evidence is to be taken may be answered in writing should it believe that, in light of the content of the question regarding which evidence is to be taken and taking into consideration the person of the witness, it suffices to proceed in this manner. The attention of the witness is to be drawn to the fact that he may be summoned to be examined as a witness. The court shall direct the witness to be summoned if it believes that this is necessary in order to further clear up the question regarding which evidence is to be taken.

Court Organisation Act

Section 184

The language of the court shall be German. The right of the Sorbs to speak Sorbian before the courts in the home districts of the Sorbian population shall be guaranteed.

Section 185

(1) If persons are participating in the hearing who do not have a command of the German language, an interpreter shall be called in. No additional record shall be made in the foreign language; however, testimony and declarations given in the foreign language should also be included in the record or appended thereto in the foreign language if and to the extent that the judge deems this necessary in view of the importance of the case.(…)

(2) An interpreter may be dispensed with if all the persons involved have a command of the foreign language.

ERA Conference on European Insolvency Law

On 8-9 June 2017, the Academy of European Law (ERA) will host a conference on European Insolvency Law under the title:

“Insolvency Proceedings within the EU: Latest Developments”

at the ERA conference center in Trier (Germany).

The conference will give an in-depth analysis of the recast EU Regulation No 2015/848 on insolvency proceedings which will become applicable from 26 June 2017, in particular

- scope of the Regulation, pre-insolvency and hybrid proceedings
- main, secondary and synthetic proceedings
- groups of companies and the new group coordination proceeding
- Furthermore it will discuss the
- new Commission proposal for a Directive on insolvency, restructuring and second chance, published late 2016, and
- post-Brexit implications for insolvency and restructuring

This conference aims to meet the requirements of insolvency lawyers to stay informed on the latest developments in jurisprudence and legislation in insolvency

matters at EU level. It will examine practical problems in applying the recast Insolvency Regulation, consequences of Brexit and the recent EU proposal on business insolvency.

The confirmed Speakers are:

- **Stefania Bariatti**, Professor at the University of Milan; Of Counsel, Chiomenti Studio Legale, Milan
- **Alexander Bornemann**, Head of Division, Federal Ministry of Justice and Consumer Protection, Berlin
- **Florian Bruder**, *Rechtsanwalt*, Counsel, DLA Piper, Munich
- **Jenny Clift**, Senior Legal Officer, International Trade Law Division, UNCITRAL Secretariat, Vienna
- **Reinhard Dammann**, *Avocat à la Cour*; Partner, Clifford Chance Europe LLP, Paris
- **Francisco Garcimartín**, Professor of Private International Law at the Autonomous University of Madrid
- **Gabriel Moss QC**, Barrister, 3-4 South Square, Gray's Inn, London; Visiting Professor at Oxford University
- **Andreas Stein**, Head of Unit, Civil Justice Policy, DG Justice and Consumers, European Commission, Brussels
- **Nico Tollenaar**, RESOR, Amsterdam
- **Michael Veder**, Adviser at RESOR, Amsterdam; Professor of Insolvency Law at Radboud University Nijmegen; Chair of INSOL Europe Academic Forum
- **Bob Wessels**, Independent Legal Counsel, Adviser and Arbitrator; Professor emeritus at the University of Leiden

The conference language will be English. The event is organized by Dr *Angelika Fuchs* (ERA). The programme of the conference, together with a registration form, can be found here.

Conference Report – Property regimes of international couples and the law of succession

On the 9th and 10th of March 2017, the Academy of European Law (ERA) hosted the conference "Property regimes of international couples and the law of succession" in Trier, Germany. It gave an opportunity to more than 60 academics and practitioners of 24 different nationalities to discuss property aspects of marriage and registered partnerships at European level. The focus has been put on the two new additions to European family, i.e. the property regime Regulations (No 2016/1103 and 2016/1104) and their interplay with the already applicable Succession Regulation (No 650/2012).

This post by ***Amandine Faucon***, research fellow at the MPI Luxembourg, provides an overview of the presentations and the discussions held at the Conference.

Setting the scene

Enhanced cooperation in family matters: genesis of the Regulations – María Vilar Badia (EU Commission) explained that the aim of the Regulations was to complete the existing European family law framework. In that perspective, two texts were proposed to the European legislator in 2011 but were rejected, after four years of negotiations, by Poland and Hungary. The main obstacle was the indirect recognition of same-sex couples. Given the lack of necessary unanimity, the Council suggested adopting the already negotiated texts through the enhanced cooperation process. This approach was supported and six months later, in June 2016, the instruments were adopted by eighteen Member States.

A comprehensive set of EU rules on international family estate law – Prof. Dieter Martiny acknowledged the broad scope of EU Regulations, now covering almost all aspects of family life. He briefly presented each of these instruments as well as their material scope. Furthermore, he discussed the interplay of the new Regulations with the already applicable ones, especially with regard to characterization matters, since one act can raise questions that have to be solved under different texts (e.g.: donation). He then presented the recurrent features of

all existing instruments, e.g. the existence of party autonomy, and pointed out some issues such as the lack of common general provisions.

New rules on matrimonial property regimes

Jurisdiction in case of death or divorce and in all other cases – Prof. Costanza Honorati illustrated the characterisation issue notably with the concept of marriage and registered partnership. Regarding jurisdiction, she stated that the new Regulations fulfil classical private International law objectives by aiming at concentrating jurisdiction, through a reference to the forum successionis and the forum divortii, and at favoring the application of the lex fori by making a detour by the applicable law, in case it is a chosen one. For the rest, habitual residence and nationality are the main criteria.

Applicable law, its scope and effects in respect of third parties and which choices can be made? – Dr. Ian Summer first explained the difficulty of knowing which Regulation to apply through the example of a relationship being considered as a marriage in a country and a registered partnership in a second. He then criticized the exclusion of pension rights which are a significant part of patrimonial disputes. As regard to applicable law, he explained the main features of the new Regulations: unity, universality and a hierarchy of connecting factor in the absence of a choice of law. The latter, being the privileged factor, was particularly detailed notably as regard to the different choice possible and the formal conditions to be fulfilled. The effects of the law applicable with respect to third party were also addressed.

Special rules for property consequences of registered partnerships – María Vilar Badia laid out the differences existing between the Regulation on matrimonial property regime (No 2016/1103) and the Regulation on the property consequences of registered partnerships (No 2016/1104). The overall objective of the legislator was to have very similar text so that both types of relationships are treated equally. The differences are therefore rare and consist of additional safeguards to protect registered partners, as this status does not exist in every participating State.

Crossover: property regimes and succession law

Workshop: Making the right choice – party autonomy in property & succession law

Within the workshop the following case has been set as working hypothesis: An Italian and an Austrian got married in Belgium where they lived for six months before moving to Germany. The wife bought a holiday apartment in Antibes and received a flat in Italy. After a while, they separated and the wife moved back to Italy. The participants addressed the relevant questions of property regime, divorce, succession and maintenance. The concept of habitual residence and the application of party autonomy as a tool to achieve some coherence were particularly examined. The participants concluded that there is no unique answer to the case and that the final outcome largely depends on the will of the parties involved. It is, therefore, fundamental for practitioners to carefully provide legal advises to their clients.

Equalization of accrued gains and pension rights adjustment – Peter Junggeburth discussed the characterization problem regarding pension rights and its impact on the increase in the share of the succession or divorce. The presentation was given from the point of view of German inheritance and matrimonial property law but contemplated the impact of the questions raised in cross-border situations.

Planning cross-border successions

Options for drafting a last will under the EU Succession Regulation: first experiences – Dr. Julie Francastel first considered the general rule – the law of the last habitual residence of the deceased – and raised the issue of determining the habitual residence. She used the case of a retired person living part-time in Mallorca and part-time in Germany as an example. In that situation, choosing the law applicable can be advisable. She stressed the impact of such a choice on jurisdiction and added that a choice should be considered even if a situation does not bear cross-border elements at first sight. The formal conditions of the choice and the issue of succession contracts (that do not exist in every Member States) were also addressed.

European Certificate of Succession and the division of the estate – Dr. Jan-Ger Knot presented the European Certificate of Succession (hereafter ECS) and its objectives. He stressed that its operation in practice remains very unclear and leads to many difficulties for practitioners. It was also recalled that depending on the Member State, the authorities issuing the ECS can be a Notary or a Court. He then described the effects of the ECS and the different means to challenge it. The

problem of conflicting ECS was also addressed and in this respect the European Network of Registers of Wills Association has been introduced as a possible solution.

Paying inheritance tax twice? – Prof. Alain Steichen first gave an overview of the main reasons leading to double taxation: the location of the deceased, heirs and assets in Member States having different taxation systems. Given the increasing mobility of citizens and purchases abroad, the problem is expanding but there are no possibilities to force Member States to avoid double taxation. He presented the Model for treaties on double taxation on inheritance from the OECD (1982) and the EU recommendation (2011) favoring the taxation at the residence of the heir but their impact is limited. A common rule to be followed by every State should be imposed to avoid the problem.

Hands-on experience: Planning cross-border successions with a view to third states and offshore jurisdictions

EU and Switzerland – Tobias Somary first indicated that internationality is becoming normality and therefore stressed the importance of estate planning. In that regard, the law applicable to matrimonial property regime should be carefully considered, as it can significantly impact the size of the estate and its distribution at the dissolution of the matrimonial regime. He then turned to the inheritance question and stressed that according to the Succession Regulation the law of a non-member State, such as Switzerland, can be applied to the inheritance. He, therefore, advised to plan the succession carefully and gave some examples as an illustration of the possible difficulties.

UK before & after BREXIT and off-shore jurisdictions – Alex Ruffel explained that the UK is not part of the Succession Regulation and therefore applies its own private International law. She presented the related English provisions and illustrated them with practical examples. She then stressed out the present uncertainty as to whether the UK should be considered as a third State with regard to the application of Article 34 of the Succession Regulation (renvoi). This problem will vanish post-Brexit and is the only before/after difference regarding successions. Concerning off-shore jurisdictions, she explained that although most have a common law system, creating a trust or a company is advisable to avoid further complications.

The concluding remarks were presented by Prof. Dieter Martiny who noted the willingness of the EU to ease the life of European citizens but stressed that many uncertainties remain and lay in the hands of the European Court of Justice.