PAX Moot 2019

Thanks to Daniel Chan for this post.

PAX Moot 2019 is here!

PAX Moot is a specialized moot court competition focused on private international law issues. We foster a competition in which participants will be able to learn and apply first hand the complexities and nuances of this area of law. Instead of pleading primarily on the merits of the case, PAX Moot participants will be given a case geared towards jurisdictional and choice of law disputes. Instead of trying to win the whole case, clear goals will be given to each side as to which preliminary ruling they will be striving to achieve.

Private international law, or conflict of laws, is the set of legal principles, devices, modes of reasoning and rules that leads to the application of different national laws in international cases and allocates jurisdiction. This field of law has increasingly come to the foreground of significant multinational legal disputes, where sometimes the entire case hinges on jurisdiction or applicability of certain national regulations. It now plays an important role in the area of environmental regulations, labor protections, and much more.

We thank the following institutions for their support and willingness to open the competition to their students: Sorbonne University Paris I, London School of Economics, HEC, Heidelberg University, Luxembourg University, Cambridge University, University College London (UCL), King's College London, University of Antwerp, Erasmus University, Université Libre de Bruxelles (ULB), Sciences Po Law School, University of Heidelberg, University of Milan. Participation is also open to US exchange students from Harvard, Columbia, Duke, Northwestern, Northeastern, Duke and Penn law schools.

This year, we are proud to host the 7th edition of PAX Moot Competition: Jenard Round with our partner, Asser Institute. Asser Institute carries out research in private and public international law, European law, international commercial arbitration and all other related fields, such as international sports law and international humanitarian and criminal law. Registration is set to be open from November 15th to January 31st.

For further information please visit www.paxmoot.com. If you would like to contact us, please email info@paxmoot.com

Sincerely,
PAX Moot Team

4/5 December: Dispute resolution events at University of Antwerp

On 4 and 5 December 2018 the following two events will take place at the University of Antwerp:

1. On 4 December 2018, Dilyara Nigmatullina, postdoctoral researcher at the University of Antwerp, invites you to the launch of her book entitled 'Combining Mediation and Arbitration in International Commercial Dispute Resolution' published by Routledge earlier this year. The launch is organized with the support of the Law Enforcement research group and involves a discussion by an expert panel and is scheduled for 19:00 – 21:15. Participation is free of charge and there is a possibility to order the book with 20% discount. More information can be found here.
2. On 5 December 2018, Mr. Jeremy Lack, an ADR Neutral and Attorney-at-Law specialized in international dispute prevention and resolution processes, will give a seminar on 'Applying neurobiology to negotiation, mediation, arbitration and mixed mode processes'. The seminar is organised with the support of the Law Enforcement research group and will take place at 10:00 -11:30. Participation is free of charge. More information can be found here.

Those who are interested in attending any of the above events are asked to confirm their participation by Monday 26 November at the latest by sending an email to dilyara.nigmatullina@uantwerpen.be.

THE NEW YORK CONVENTION AND ITS INTERACTION WITH DOMESTIC LAWS OF THE CENTRAL ASIAN COUNTRIES

The International Court of Arbitration in affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic, in association with the the Asian International Arbitration Centre & the ICC International Court of Arbitration, is hosting an international conference on the New York Convention and its interaction with domestic laws of the Central Asian countries. The conference will take place in Bishkek on November 30, 2018.

The goals of the conference are to examine the interaction between the New York Convention and domestic
legislation of the Central Asian countries, and to facilitate the exchange between experts from different jurisdictions of their experiences in Alternative Dispute Resolution.

The program of the conference and all pertinent information regarding the event may be found here.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)

6/2018: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

D. Martiny: **Virtual currencies, particularly Bitcoins, in private international law and in the international law of civil procedure**

Virtual currencies like Bitcoins are substitute currencies that are not issued by a state and that are limited in supply. Whereas the discussion in substantive law on the classification of virtual currencies and Distributed Ledger Technology is in full progress, there is no established approach in private international law as to blockchain, smart contracts or tokens. Also, Initial Coin Offerings (ICOs) have to be classified. An examination of these digital techniques leads to a classification as a contractual obligation. Contracts which have as their object virtual currency units are, in general, subject to the Rome I Regulation. Currency is mainly a matter of the law governing the contract. Domestic finance market restrictions under the German Banking Act (Kreditwesengesetz – KWG) can intervene as overriding mandatory rules under Article 9(2) Rome I Regulation. Additionally, foreign rules may be taken into account (Article 9(3) Rome I Regulation). Jurisdiction for contractual matters is determined by the place of performance or the place of the harmful event (Article 7 No. 1, 2 Brussels I Recast).

A.S. Zimmermann: **Blockchain-Networks and Private International Law – or: the Savignian seat-doctrine and decentralized legal relations**

The ubiquitous availability of the world wide web fundamentally changed international commerce. The legal system has proven to be surprisingly flexible in dealing with the issue of digitalisation and has hence provided reasonable solutions for several problems of the modern era. The field of Private International Law is particularly challenged by the decentralism of the digitalised world. However, as the case of blockchain-networks illuminates, the classic Savignian paradigm of Private International Law is capable of coping with new phenomena and allocating them to an appropriate legal framework.

M. Lieberknecht: **The blocking regulation: private international law as an instrument of foreign policy**

The EU has updated its blocking statute in order to shield European businesses from the extraterritorial reach of the reactivated U.S. secondary sanctions against Iran. The present article provides an analysis of the blocking regulation's impact on matters of private law. Concerning the issue of overriding mandatory provisions, the Regulation adds little but emphasis to the pre-existing approach. It prohibits EU-based parties to comply with the U.S. sanctions, thereby forcing them into a "catch-22" situation, which bears a particular risk of managerial liability. Indirectly, this prohibition produces lopsided results under substantive German law, while potentially nullifying prevalent contractual solutions. Finally, the article assesses the legal nature and substantive scope of the clawback provision which allows for the recovery of sanction-related damages. It concludes that, while such a claim may have some potential to trigger litigation between private parties, it fails to fulfil its actual purpose, which is to neutralize the overall effects of U.S. sanctions. The same holds true for the Regulation as a whole: It not only offers weak protection, but exposes private parties to various additional legal risks and restraints.

S. Bajrami/M. Payandeh: **The Recognition of Foreign Judgments under Private International Law in Light of the Duty of Non-Recognition under International Law**

For the recognition of foreign judgments under private international law, the question of the legality of the foreign judgment under international law is usually irrelevant. Private international law attributes recognition to foreign judgments based on factual and effective sovereign power regardless of whether the judgment has been issued by a state that is internationally not recognized or whether the judgment constitutes the exercise of jurisdiction over a territory over which the state may not exercise jurisdiction. This approach under private international law is, however, called into question when the foreign judgment constitutes an exercise of jurisdiction which is the consequence of a violation of the prohibition of the use of force under international law, as in the case of the illegal annexation of Crimea and Sevastopol by Russia. In such cases, customary international law constitutes a duty of non-recognition of the illegal situation. The present contribution analyses this conflict from the perspective of international law and comes to the conclusion that the recognition of foreign judgments, in general, is in conformity with the duty of non-recognition under international law.

M. Gebauer: **Classification of section 1371 para 1 of the German Civil Code**

as a rule falling within the scope of succession law in terms of the EU Succession Regulation and the consequential classification of the rule under the German-Turkish bilateral succession treaty

The CJEU recently classified section 1371 para 1 of the German Civil Code as a rule falling within the scope of inheritance law in terms of the European Succession Regulation. The article analyses the consequences of this classification beyond EU law for cases governed by the German-Turkish bilateral succession treaty and its interpretation by German courts. Presumably, German courts will feel obligated to classify the German substantive rule in the same way under the bilateral succession treaty when it has to be applied in combination with EU conflict rules on matrimonial property regimes.

J.A. Bischoff: **Much ado about nothing? The future of investment arbitration after Achmea v. Slovakia**

In his judgment dated March 6, 2018, the CJEU held investment arbitration proceedings incompatible with Art. 267, 344 TFEU where they arise from a bilateral investment treaty between two member states and where the seat of the arbitration is located in the European Union. The court did not concur with the Opinion of the Advocate General dated September 19, 2017. Although the judgment will promote legal certainty as far as intra-EU bilateral investment treaties are concerned, it creates new questions for the Energy Charta Treaty as well as bilateral investment treaties with third countries. Where an arbitration's seat is located outside the EU or where the ICSID Arbitration Rules apply, the judgment can create a divergent execution practice.

D. Looschelders: **International jurisdiction for the termination of co-ownership in cases regarding matrimonial property regimes**

The ECJ has recently decided over the international jurisdiction for the termination of co-ownership in undivided shares in two cases. In the Komu case, which concerned a legal dispute between the co-owners of two immovable properties located in Spain with regard to the termination of the co-ownership, the ECJ affirmed the exclusive jurisdiction of the courts of the Member State in which the immovable properties are situated. In the Iliev case, however, the ECJ concluded that a dispute between former spouses relating to the division of a movable property acquired during the marriage concerns „matrimonial property

regimes“ and therefore, according to Art. 1(2)(a) Brussels Ibis Regulation, does not fall within the scope of the Brussels Ibis Regulation. The article analyses the decisions and outlines the tension between the law of immovable property and the law of matrimonial property. The future legal situation according to the European Regulation on Matrimonial Property Regimes and the parallel problem under the European Succession Regulation are discussed, too. Overall, the author notes a tendency of the European conflict of laws Regulations to give precedence to the law applicable to matrimonial property regimes and succession over the application of the law of the Member State in which the property is located.

A. Wolf: **Arbitration clauses and actions for cartel damages before German courts**

The German District Court Dortmund dismissed an action for damages caused by an infringement of Art. 101 TFEU in the context of the so-called „Schienenkartell“. The Court found that the arbitration agreements which the parties had agreed on during their contractual relationship covered such actions so that German courts had no jurisdiction on this matter. Therefore, the Court interpreted the arbitration agreements under German law in a broad sense. Furthermore, it denied to apply the EU principle of effectiveness relating to the exercise of claims for damages in national procedures. With regard to arbitration clauses it also rejected to follow the Court of Justice in its CDC-judgment on a narrow interpretation of jurisdiction clauses in terms of Art. 25 Brussels I recast.

L. Rademacher: **Procedural Consumer Protection Against Attorneys**

In a world of open societies, legal advice in cross-border cases is in constantly increasing demand by both businesses and consumers. Skilful counselling on foreign law, however, can prove difficult to obtain from domestic attorneys, especially for consumers. In consequence, consumers may decide to retain a lawyer educated and located in the relevant foreign legal system. When problems arise in the relationship between the domestic consumer client and the attorney situated abroad, the internationally competent court has to be determined. In favour of the consumer client, the consumer protection rules of international procedural law apply under the territorial-situational requirements of Art. 15 sec. 1 lit. c Brussels I Regulation 2001 / Art. 17 sec. 1 lit. c Brussels Ibis Regulation 2015 / Art. 15 sec. 1 lit. c Lugano Convention 2007. This case note reviews two judicial rulings – one by the Higher Regional Court Düsseldorf, the other by the

Federal Court of Justice – dealing with these requirements in light of the guidelines provided by the European Court of Justice. The pivotal issues concern an attorney's activities in the state of the consumer client's domicile falling within the scope of a contract between the attorney and a client as well as an attorney's direction of activities to the state of the client's domicile.

H. Roth: **Accumulative basic requirements of the recognition of foreign decisions according to § 109 sec. 1 no. 2 FamFG are an orderly notification and the possibility to arrange an effective defense of the defendant**

The Oberlandesgericht (Higher Regional Court) Stuttgart interprets § 109 sec. 1 no. 2 FamFG (= Act on the Procedure in Family Matters and the Matters of Non-contentious Jurisdiction) in accordance with § 328 sec. 1 no. 2 ZPO (= German Civil Procedure Code) and therefore in conscious deviation to the basic assumptions of the European secondary law (e.g. Art. 45 sec. 1 lit. b Brussels Ia Reg.). Accumulative basic requirement of the recognition of foreign decisions according to § 109 sec. 1 no. 2 FamFG are an orderly notification and the possibility to arrange an effective defense of the defendant.

P. Ostendorf: **Requirements for a genuine international element in the event of a choice of law in accordance with European Private International Law**

In accordance with Art. 3 (3) Rome Convention (respectively its successor instrument, the Rome I Regulation), the parties can, in case of a purely domestic contract, not escape the mandatory provisions of their home jurisdiction by way of either the choice of a foreign law and/or a foreign forum. English courts recently had to determine whether interest rate swaps concluded by an Italian bank and an Italian municipality (providing for the application of English law and an English forum) might fall outside the ambit of Art. 3 (3) Rome Convention due to sufficient international elements of the transaction. Contrary to the High Court, the Court of Appeal (by now confirmed by the UK Supreme Court) has answered this question in the affirmative, given that the bank had utilized a standard form contract drafted by a private international association not linked to any particular country and had also entered into a back to back transaction with a foreign bank. This understanding appears misconceived against the background of a contextual and teleological interpretation of Art. 3 (3) Rome Convention.

Z. Meškic/A. Durakovic/J. Alihodžic: **Bosnia and Herzegovina as a Multi-unit State**

Bosnia and Herzegovina comprises two entities, the Federation of Bosnia and Herzegovina and Republika Srpska, and the District Br?ko, which have almost comprehensive competences in private law. Therefore, in addition to rare legislation in private law on the national level, there are three partial legal orders in private law in Bosnia and Herzegovina. The following paper presents some of the differences between the partial legal orders and explains the development of interlocal conflict rules in Bosnia and Herzegovina, which took place independently of private international law. For family, status and succession matters there is a uniform act on interlocal conflicts of laws, whereas in other areas of private law no uniform regulation exists. The solutions on interlocal conflicts of laws in the most relevant areas of private law have been analysed critically.

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60 years BIICL, 50 years Brussels Regime, 60 years New York Convention

In 2018, not only the British Institute of International and Comparative Law (BIICL) celebrates a round birthday, but also the two most important regimes for cross-border cooperation in civil and commercial litigation and arbitration – the Brussels Regime (1968), to which the United Kingdom acceded 40 years ago, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Thus, Professor *Eva Lein* (Lausanne) has convened an event at the BIICL in order to take stock and assess the effects and benefits of both regimes for citizens, businesses, lawyers and courts. Moreover, the participants will try to look into the post-Brexit future. The conference will take place at the BIICL on 29th November, 2018. For the full programme, a list of speakers and further details on registration, please click here.

Netherlands Commercial Court: English proceedings in The Netherlands

By Friederike Henke, Advocaat & Rechtsanwältin at Buren in Amsterdam

The international demand for English language dispute resolution is increasing as the English language is commonly used in international trade and contracts as well as correspondence, not only between the trading partners themselves, but also by international parties, their legal departments and their advisors. Use of the English language in legal proceedings is expected to save time and money for translations and language barriers in general.

We would like to note that Dutch courts tend to allow parties to provide exhibits in the English language and often allow parties to conduct hearings in English, at least in part. Moreover, the district courts in Rotterdam and The Hague offer the possibility for proceedings in certain types of cases to be held in English: maritime, transportation and international trade cases in Rotterdam and intellectual property rights cases in The Hague. The courts render their judgments in the Dutch language with an English summary.

In order for the Dutch courts to be able to render valid and binding judgments in the English language, the Dutch code of civil procedure needs to be amended.

Netherlands Commercial Court: draft legislation

As mentioned in earlier posts on this blog (see here) in the Netherlands, legislation is on its way for the introduction of English language courts for the settlement of commercial disputes: the Netherlands Commercial Court ("**NCC**") and the Netherlands Commercial Court of Appeal ("**NCCA**").

On 8 March 2018, the Dutch parliament adopted the draft legislation, following which it was expected to be approved by the Dutch senate soon. However, to date, despite earlier optimism, the legislation has not yet been passed. The (draft)

rules of procedures are ready though (see here) and the judges have been selected as well. The courts are now expected to open their doors in 2019.

In anticipation to the adoption and effectiveness of the draft legislation, the below blog offers an overview of the key characteristics of the proceedings with the NCC and NCCA.

The NCC and NCCA: structure and location

The NCC and NCCA will be imbedded in the ordinary judiciary. The NCC will thus be a chamber of the Amsterdam district court and the NCCA will be a chamber at the Amsterdam court of appeals. Any appeal from a judgment by the NCC will go to the NCCA. An appeal (cassation) from the NCCA to the highest court of the Netherlands (*Hoge Raad*) will take place in the Dutch language.

The judges of the NCC and NCCA who have already been selected, will be from the ordinary judiciary. No lay judges will be appointed. The selected judges (six for each instance) are judges who have vast experience in commercial disputes and excellent language skills.

Situating the chambers with the courts of Amsterdam has mostly practical reasons: Amsterdam is the financial capital of the Netherlands and a lot of international companies have their corporate seats there. Also, practical reasons have been mentioned: Amsterdam is easy to reach and internationally active law firms have their offices in Amsterdam.

The NCC procedure

Proceedings with the NCC and NCCA will in principle be held in the English language. All legal documents will be in English. Evidence may be handed in in the French, German or Dutch language, without a translation being required. The court hearing will be held in English and the judgment will be rendered in English.

In addition to the NCC's rules of procedure, the NCC will apply Dutch procedural law and the substantive rules of Dutch private international law. The proceedings will be paperless and legal documents will be submitted electronically.

According to article 1.2.1 of the NCC's draft rules of procedure, an action may be initiated in the NCC in case the following three requirements have been met:

1. the action is a civil or commercial matter within the autonomy of the parties and is not subject to the jurisdiction of the cantonal court (*kantongerecht*, the court for small claims) or the exclusive jurisdiction of any other chamber or court;
2. the matter has an international aspect;
3. the parties to the proceedings have designated the Amsterdam District Court as the forum to hear their case or the Amsterdam District Court has jurisdiction to hear the action on other grounds; and
4. the parties to the proceedings have expressly agreed that the proceedings will be in English and will be governed by the NCC's rules.

The NCC has jurisdiction in any commercial case, regardless the legal ground. So it may hear both contractual disputes – claims for performance or breach of contract, rescission of a contract, termination or damages – as well as claims for unlawful acts.

In line with the case law of the Court of Justice of the EU, the internationality requirement is to be interpreted broadly. Only if all relevant aspects of a case refer to one case, it will thus be considered an internal dispute. An international aspect can e.g. be that one of the parties has its seat outside of the Netherlands or was incorporated under foreign law, that the contract language is not Dutch or a foreign law applies to the contract, that more than 50% of the employees works outside of the Netherlands, etcetera.

The NCC is only competent if the Parties have agreed to settle their dispute under the procedural rules of the NCC. Such agreement may be done in a procedural agreement, before or after a dispute has arisen. The NCC's rules of procedure contain a template clause for a forum choice reflecting such procedural agreement in Annex I:

"All disputes arising out of or in connection with this agreement will be resolved by the Amsterdam District Court following proceedings in English under that Court's Rules of Procedure of the Chamber for International Commercial Matters ("Netherlands Commercial Court" or "NCC"). Application for provisional measures, including protective measures, available under Dutch law may be made to the NCC's Preliminary Relief Judge in proceedings in English in accordance with the Rules of Procedure of the NCC."

The choice of parties to conduct proceedings with the NCC is thus not a forum choice but rather a procedural agreement between the parties.

Court fees
The court fees for proceedings with the NCC will amount to EUR 15,000.- for substantive proceedings and EUR 7,500.- for summary proceedings. The court fees for proceedings with the NCCA will amount to EUR 20,000.- for substantive proceedings and EUR 10,000.- for summary proceedings.

When compared to other courts in the Netherlands, the court fees for the NCC and NCCA are relatively high. In comparison: the highest court fee for cases in first instance currently amount to EUR 3,946.- and for appeal cases to EUR 5,270.-. Within the international playing field, the NCC and NCCA courts fees are however relatively low, especially when compared to arbitration.

A conference at NYU on the Continuing Relevance of Private International Law and Its Challenges

The Center for Transnational Litigation, Arbitration and Commercial Law at the New York University School of Law will host a conference, on 15 and 16 November 2018, titled *The Continuing Relevance of Private International Law and Its Challenges*.

The conveners are Franco Ferrari (New York University, Executive Director of the Center for Transnational Litigation, Arbitration and Commercial Law) and Diego P. Fernández Arroyo (Science Po, Paris).

Speakers include George A. Bermann (Columbia University), Andrea Bonomi (Lausanne University), Ronald A. Brand (University of Pittsburgh), Hannah L.

Buxbaum (Indiana University, Bloomington), Giuditta Cordero-Moss (Oslo University), Horacio Grigera Naón (Director, Center on International Commercial Arbitration, Washington College of Law, American University, Washington DC), Burkhard Hess (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law), Matthias Lehmann (Bonn University), Hans van Loon (Former Secretary-General, Hague Conference on Private International Law), Ralf Michaels (Duke University), Yuko Nishitani (Kyoto University), Francesca Ragno (Verona University), Mathias W. Reiman (University of Michigan), Kermit Roosevelt (University of Pennsylvania), Verónica Ruiz Abou-Nigm (University of Edinburgh), Linda J. Silberman (New York University), Symeon C. Symeonides (Willamette University) and Louise Ellen Teitz (Roger Williams University).

Nagy on intra-EU BIT's after Achmea

Csongor István Nagy (University of Szeged, Faculty of Law) has posted on SSRN a paper titled *Intra-EU Bilateral Investment Treaties and EU Law after Achmea: 'Know Well What Leads You Forward and What Holds You Back'*, which appeared in 19(4) *German Law Journal* 2017, pp. 981-1016.

The abstract reads as follows.

This paper analyzes the compatibility of intra-EU bilateral investment treaties – intra-EU BITs – with EU law. The status and validity of intra-EU BITs gave rise to a heated debate in Europe, which culminated in the CJEU's recent controversial judgment in *Achmea*. This Article demonstrates that although the CJEU approached intra-EU BITs from the angle of federalism – where they are both redundant and illegitimate – the reality is that EU law does not provide for the kind of protection afforded by BITs. The paper gives both a positivist and a critical assessment of the *Achmea* ruling. It argues that the judgment should be construed in the context of the underlying facts and, hence, notwithstanding the

CJEU's apparently anti-arbitration attitude, its holding is rather narrow. It gives an alternative theory on intra-EU BITs' fit in the EU internal market – based on European reality – showing that the complete invalidation of intra-EU BITs is flawed because the overlap between BITs and EU law is merely partial: BITs address a subject EU law does not. This Article's central argument is that intra-EU BITs accelerate the internal market and, hence, their suppression does not lead the European integration further, but holds it back. Finally, this Article argues that the prevailing pattern of investment protection is a global scheme that cannot be arrested through regional unilateralism as essayed by the CJEU.

International commercial courts: should the EU be next? – EP study building competence in commercial law

By Erlis Themeli, Xandra Kramer, and *Georgia Antonopoulou¸ Erasmus University Rotterdam (postdoc researcher, PI, and PhD candidate ERC project Building EU Civil Justice)*

Previous posts on this blog have described the emerging international commercial and business courts in various Member States. While the primary aim is and should be improving the dispute resolution system for businesses, the establishment of these courts also points to the increase of competitive activities by certain Member States that try to attract international commercial litigation. Triggered by the need to facilitate business, prospects of financial gain, and more recently also by the supposed vacuum that Brexit will create, France, Germany, the Netherlands, and Belgium in particular have been busy establishing outlets for international commercial litigants. One of the previous posts by the present authors dedicated to these developments asked who will be next to enter the competition game started by these countries. In another post, Giesela Rühl

suggested that the EU could be the next.

A recently published study of the European Parliament's Committee on Legal Affairs (JURI Committee) on Building Competence in Commercial Law in the Member States, authored by Giesela Rühl, focuses on the setting up of commercial courts in the Member States and at the EU level with the purpose of enhancing the enforcement of commercial contracts and keeping up with the judicial competition in and outside Europe. This interesting study draws the complex environment in which cross-border commercial contracts operate in Europe. From existing surveys it is clear that the laws and the courts of England and Switzerland are selected more often than those of other (Member) States. While the popularity of these jurisdictions is not problematic as such, there may be a mismatch between the parties' preferences and their best available option. In other words, while parties have clear ideas on what court they should choose, in reality they are not able to make this choice due to practical difficulties, including a lack of information or the costs involved. The study recommends reforming the Rome I and Rome II Regulations to improve parties' freedom to choose the applicable law. In addition, a European expedited procedure for cross-border commercial cases can be introduced, which would simplify and unify the settlement of international commercial disputes. The next step, would be to introduce specialised courts or chambers for cross-border commercial cases in each Member State. In addition to these, the study recommends the setting up of a European Commercial Court equipped with experienced judges from different Member States, offering neutrality and expertise in cross-border commercial cases.

This study takes on a difficult and complicated issue with important legal, economic, and political implications. From a pure legal perspective, expanding – the already very broad – party autonomy to choose the law and forum (*e.g.* including choosing a non-state law and the possibility to choose foreign law in purely domestic disputes) seems viable but will likely not contribute significantly to business needs. The economic and political implications are challenging, as the example of the Netherlands and Germany show. In the Netherlands, the proposal for the Netherlands Commercial Court (NCC) is still pending in the Senate, despite our optimistic expectations (see our previous post) after the adoption by the House of Representatives in March of this year. The most important issue is the relatively high court fee and the fear for a two-tiered justice system. The

expected impact of Brexit and the gains this may bring for the other EU Member States should perhaps also be tempered, considering the findings in empirical research mentioned in the present study, on why the English court is often chosen. A recently published book, *Civil Justice System Competition in the EU*, authored by Erlis Themeli, concludes on the basis of a theoretical analysis and a survey conducted for that research that indeed lawyers base their choice of court not always on the quality of the court as such, but also on habits and trade usage. England's dominant position derives not so much from its presence in the EU, but from other sources.

The idea of a European Commercial Court that has been put forward in recent years and is promoted by the present study, is interesting and could contribute to bundling expertise on commercial law and commercial dispute resolution. However, it is questionable whether there is a political interest from the Member States considering other pressing issues in the EU, the investments made by some Member States in setting up their own international commercial courts, and the interest in maintaining local expertise and keeping interesting cases within the local court system. Considering the dominance of arbitration, the existing well-functioning courts in business centres in Europe and elsewhere and the establishment of the new international commercial courts, one may also wonder whether a further multiplicity of courts and the concentration of disputes at the EU level is what businesses want.

That this topic has a lot of attention from practitioners, businesses, and academics was evident at a very well attended seminar (Rotterdam, 10 July 2018) dedicated to the emerging international commercial courts in Europe, organized by Erasmus University Rotterdam, the MPI Luxembourg, and Utrecht University. For those interested, in 2019, the papers presented at this seminar and additional selected papers will be published in an issue of the *Erasmus Law Review*, while also a book that takes a European and global approach to the emerging international business courts in being prepared (more info here). At the European Law Institute's Annual Conference (Riga, 5-7 September 2018) an interesting meeting with vivid discussions of the Special Interest Group on Dispute Resolution, led by Thomas Pfeiffer, was dedicated to this topic. An upcoming conference "Exploring Pathways to Civil Justice in Europe" (Rotterdam, 19-20 November 2018) offers yet another opportunity to discuss court specialisation and international business courts, along with other topics of dispute resolution.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2018: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

S.H. Elsing/A. Shchavelev: **The new DIS Arbitration Rules 2018**

On 1/3/2018, the new arbitration rules of the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit e.V. – DIS) came into force. The revision process took almost two years and resulted in a comprehensive overhaul of the former arbitration rules which date back to the year 1998. The new rules combine well-tried elements of the former regime with much-anticipated improvements which will help the DIS and the arbitration practice in Germany in general to keep up with the changes and developments in domestic and international arbitration. Notably, the DIS now has two authentic versions of its arbitration rules: a German and an English one. The most relevant amendments include (1) several provisions aimed at enhancing the efficiency of the proceedings and promotion of early settlements; (2) the foundation of a new body, the Arbitration Council, which will now decide, inter alia, on the challenge and removal of arbitrators, the arbitrators’ fees and the amount in dispute; and (3) new comprehensive provisions on consolidation, multi-party and multi-contract proceedings and the joinder of additional parties. In addition, the DIS will now be more closely involved in the administration of the arbitration after the constitution of the arbitral tribunal. With these amendments, the new arbitration rules will arguably become more accessible and thus more appealing to foreign users and will help the DIS to expand its position beyond the German speaking countries towards a truly international arbitral institution.

E. Jayme: **Draft of a German statute against the validity of polygamous marriages celebrated abroad – critical remarks**

The draft of a German statute against polygamous marriages does not take into account the bilateral treaty on social security between Germany and the Kingdom of Morocco, which presupposes the validity of polygamous marriages: both widows share the social security benefits. In view of current court practice there is no need for a German statute, which in situations in which both spouses have their habitual residence in Germany, provides for court action in order to declare the second marriage null and void. The general clause of public policy (art. 6 of the Introductory Act to the German Civil Code [EGBGB]) seems to be sufficient for dealing with polygamous marriages.

A. Wolf: **Jurisdiction of German Courts for cartelists' recovery claims due to a joint and several liability**

In its decision, the Higher Regional Court Hamm determined under § 36 Sec. 1 No. 3 ZPO on the so-called „Schienenkartell" that the German District Court Dortmund has international jurisdiction for recovery claims between jointly and severally liable cartelists from Germany, Austria and the Czech Republic. Therefor it applied Art. 8 No. 1 Brussels I recast together with German rules on subject matter jurisdiction and interpreted § 32 ZPO following the Court of Justice in its CDC-judgment with regard to Art. 7 No. 2 Brussels I recast.

W. Wurmnest/M. Gömann: **Shaping the conflict of law rules on unfair competition and trademark infringements: The "Buddy-Bots" decision of the German Federal Supreme Court**

On 12 January 2017 the German Federal Supreme Court (Bundesgerichtshof) rendered its judgment on the unlawful distribution of supporting gaming software – so-called "Buddy-Bots" – for the multiplayer online role-playing game "World of Warcraft". This article takes a closer look at the application of Art. 6 and Art. 8 Rome II Regulation by the Supreme Court. The authors argue that the principle of uniform interpretation could be threatened by the Court's tendency to align its reading of European conflict of law rules with the interpretation of the "old" German law now superseded by the Rome II Regulation, especially with regard to the market effects principle under Art. 6(1) Rome II Regulation.

O.L. Knöfel: **Delegated Enforcement vs. Direct Enforcement under the EU Maintenance Regulation No. 4/2009 – The Role of Central Authorities**

The article reviews a decision of the European Court of Justice (Case C-283/16),

dealing with questions of international judicial assistance arising in enforcement procedures under the European Maintenance Regulation No. 4/2009. The Court held that a maintenance creditor is entitled to seek cross-border enforcement directly in a court, without having to proceed through the Central Authorities of the Member States involved. National regulations such as the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, demanding applications to be submitted to the Central Authority of the requested Member State, must be interpreted in the light of the European Maintenance Regulation. The author analyses the relevant issues of cross-border recovery of maintenance and explores the decision's background in European Union law.

R.A. Schütze: **Cautio iudicatum solvi in case of uncertainty of seat of companies**

110 German Code of Civil Procedure requires plaintiffs with an ordinary residence or seat (if a company or other legal entity) outside the European Union or the European Economic Area (EWR) to provide – on request of the defendant – a cautio iudicatum solvi. In two judgments – commented below – the Bundesgerichtshof and the Oberlandesgericht Düsseldorf have decided on the ratio of security for costs under German law and on important issues of proof in case that the seat of the plaintiff (inside or outside EU or EWR) is contested. The Oberlandesgericht Düsseldorf qualifies the right of the defendant to demand security of cost from the plaintiff as an exceptio for which the burden of proof lies with the defendant. But as the plaintiff is more familiar with its organization and activities it has a secondary burden of asserting relevant facts (sekundäre Vortragslast). However, this does not change the burden of proof.

L. Kopcznyski: **Confusion about the reciprocity requirement**

According to domestic German law, the recognition and enforcement of foreign judgments is dependent on the requirement of reciprocity (sec. 328 (1) no. 5 of the German Code of Civil Procedure). It is, however, not an easy task to assess whether a foreign state would recognise a German judgment in similar circumstances. Courts regularly struggle to apply correctly the specific prerequisites which have to be met in this regard. A recent judgment of the Regional Court in Wiesbaden demonstrates that. In its decision, the court refused to enforce a Russian judgment because it set the bar for reciprocity far too high.

M. Gebauer: **Compulsory recognition procedure according to Section 107 FamFG in order to determine the validity of a divorce registered at a foreign consulate located in Germany**

German law requires that foreign decisions (originating beyond the EU) affecting the status of a marriage, e.g. divorce judgements, are subject to a compulsory recognition procedure (Anerkennungsverfahren), according to paragraph 107 of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction (FamFG). This requires a free-standing application by an interested party to the relevant state authority which is responsible for determining the application. The decision, rendered by the Court of Appeal (Oberlandesgericht) in Nuremberg, reinforced long-standing judicial reasoning, albeit made with reference to a previous similarly worded statute, that the recognition procedure is also required where a foreign diplomatic mission situated in Germany is responsible for an official act potentially affecting the parties' marriage in Germany. The Court of Appeal in Nuremberg correctly reasoned by way of analogy that while the paragraph does not specifically deal with circumstances where a divorce is registered by a foreign diplomatic mission situated in Germany, the legislator had not intended for the previous judicial approach to be reviewed. Thus, courts should continue to treat divorces in which a foreign diplomatic mission situated in Germany has been involved in the same way as judgements issued in foreign countries. This meant that the local court had no jurisdiction to determine the validity of a divorce registered at the Thai consulate located in Frankfurt. An application to the relevant state authority in terms of the compulsory recognition procedure must first be disposed of before matters can be considered by the local court

K. Siehr: **„Wrongful Retention" of a Child According to Article 3 of the Hague Abduction Convention of 1980**

A couple habitually resident in South Africa had two children living with them. The couple separated but had joint custody for the children. The mother travelled to Senegal with the children but did not return them until January 3, 2016. In August 2016 mother and children took refuge in Germany. On January 2, 2017 the father in South Africa asked German authorities to return the wrongfully retained children to South Africa. The court of first instance (Amtsgericht Pankow-Weißensee) refused to do so because the children were not wrongfully retained because Senegal is no State Party of the Hague Abduction Convention of 1980.

The Court of Appeal in Berlin (Kammergericht) reversed the decision of first instance and correctly interpreted Art. 3 Hague Abduction Convention as not requiring abduction wrongfully committed in a State Party. According to Art. 4 Hague Abduction Convention, the abducted or retained child must have had his/her habitual residence in a State Party immediately before the removal or retention. Art. 3 and 4 Hague Abduction Convention are discussed and analyzed, also with respect to the more restricted wording of Art. 2 No. 11 Hague Custody Convention of 1996. Finally, it is stressed that it does not matter whether the wrongfully abducted child spent some time in States not being State Parties to the Hague Abduction Convention as soon as the one year time limit for the application of return (Art. 12 sec. 1 Hague Abduction Convention) has been met.

A. Piekenbrock: **Jurisdiction for damage claims regarding forum shopping in European Insolvency Law: commentaries on Court of Cassation, Social Chamber, 10.1.2017**

The paper deals with a decision delivered by the French Court of Cassation regarding damage claims within the context of the initiation of English administration proceedings for all EU companies of the Canadian Nortel Networks Group including the French Nortel Networks SA in January 2009. The Social Chamber has come to the conclusion that English Courts have exclusive jurisdiction regarding damage claims of a former employee of the French company based on alleged falsehood by the opening of the main insolvency proceedings in England. The decision emphasises correctly the binding force of the English opening decision. Yet, the reasoning seems erroneous insofar as the claim is not directed against the insolvent company itself or its liquidator, but rather against another company of the same group (the British Nortel Networks UK Limited) and the insolvency practitioners involved (Ernst & Young). At least the Court of Cassation as a court of last resort should have referred the case to the C.J.E.U. pursuant to Art. 267(3) TFEU.

K. Lilleholt: **Norwegian Supreme Court: The Law of the Assignor’s Home Country is Applicable to Third-Party Effects of Assignments of Claims**

In its judgment of 28/6/2017, the Norwegian Supreme Court held that the effects in relation to the assignor’s creditors of an assignment of claims by way of security was governed by the law of the assignor’s home country under Norwegian choice of law rules. This issue has not been dealt with in Norwegian

legislation, and earlier case law is sparse and rather unclear. Application of the law of the assignor's home country has been recommended by legal scholars, but these views are not unanimously held. The Supreme Court's decision is in line with the later proposal for an EU regulation on the law applicable to the third-party effects of assignments of claims. The proposed regulation will not be binding on Norway, as it will not form part of the EEA agreement. This is also the case for other EU instruments regarding private international law, like the Rome I and Rome II Regulations and the Insolvency Regulation. In several recent judgments, however, the Supreme Court has stated that EU law should provide guidance where no firm solution can be found in Norwegian choice of law rules (IV.). The case also raised a jurisdiction issue. The Supreme Court found that the insolvency exception in the Lugano Convention Art. 1(2)(b) applied and that Norwegian courts had jurisdiction because the insolvency proceedings were opened in Norway. This article will record the facts of the case (II.) and present the jurisdiction issue (III.) before the Supreme Court's discussion of the choice of law rule is presented and commented upon (IV.).

K. Thorn/M. Nickel: **The Protection of Structurally Weaker Parties in Arbitral Proceedings**

In its judgment, the Austrian Supreme Court of Justice (OGH) ruled on the legal validity of an arbitration agreement between an employer based in New York and a commercial agent based in Vienna acquiring contracts in the sea freight business. The court held that the arbitration agreement was invalid and violated public policy due to an obvious infringement of overriding mandatory provisions during the pending arbitral proceedings in New York. The authors support the outcome of the decision but criticize the OGH's reasoning that failed to address key elements of the case. In the light of the above, the article discusses whether the commercial agent's compensation claim relied on by the court constitutes an overriding mandatory provision although the EU Commercial Agents Directive does not cover the sea freight. Further, the article identifies the legal basis for a public policy review of arbitration agreements and elaborates on the prerequisites for a violation of public policy. In this regard, the authors argue that arbitration agreements can only be invalidated due to a violation of substantive public policy if a prognosis shows that it is overwhelmingly likely and close to certain that the arbitral tribunal will neglect applicable overriding mandatory provisions.