The Book: Corporate Entities at the Market and European Dimensions

This book is a collection of papers presented at the 24th traditional conference **Corporate Entities at the Market and European Dimensions**. The conference was organized on 19-21 May 2016 in Portoroz, Slovenija, by the Institute for Commercial Law Maribor and the Faculty of Law of the University of Maribor. It was co-financed by the European Commission within the project Remedies concerning Enforcement of Foreign Judgements according to Brussels I Recast. The e-version is available for browse or download here. Many interesting topics of private international law are dealt with under the title in particular related to the implementation of the Brussels I bis Regulation. The list of papers includes:

A General Overview of Enforcement in Commercial and Civil Matters in Austria
Philipp Anzenberger

A General Overview of Enforcement in Commercial and Civil Matters in Lithuania
Darius Bolzanas & Egidija Tamosi?nien? & Dalia Vasarien?

Changed Circumstances in Slovene Case Law
Klemen Drnovsek

A General Overview of Enforcement in Commercial and Civil Matters in Italy
Andrea Giussani

Law Aspects of Servitization
Janja Hojnik

Removal of Exequatur in England and Wales
Wendy Kennett

Cross Border Service of Documents – Partical Aspects and Case Law
Urska Kezmah

Diputes regarding the use of distributable profits and ensuring a minimum

dividend and balance shee-financial aspects of canceled resolutions d.d.
Marijan Kocbek & Saša Prelic

Subscribers Liabilities to Subcontractor Under Directive 2014/24/EU and ZJN-3
Vesna Kranjc

Certan Open Issues Regarding the Refusal of Enforcement Under the Brussels I Regulation in Slovenia
Jerca Kramberger Skerl

Owerview of the Croatian Enforcement System With Focus on the Remedies
Ivana Kunda

Selected Issues of Recognition and Enforcement of Foreign Judgments from the Prespective of EU Member States
Ji?i Valdhans & Tereza Kyselovská

Editing Working Relationships of Companies Directors (Managerial Staff)
Darja Sencur Pecek

The Order Problem of the Acquisition of Derivative rights in the Event of Realestate Owner Bankruptcy
Renato Vrencur

The Brussel Regulation Recast – Abolishing the Exequatur Maintaining the Exequatur Function?
Christian Wolf

Cross-border Legal Representation as Seen in a Case Study
Sascha Verovnik

Brexit Means Brexit, But What

Does Brexit Mean? Seminar Series

The Centre of European Law at King's College London is running a series of seminars on the meaning of Brexit and its potential impact on different areas of law. It considers the options for the new legal regime between the UK and the EU, taking into account the international legal framework.

On **26 January 2017** the topic will be **Brexit and Private International Law**. The Chair will be Professor Jonathan Harris QC.

Speakers are:

Sir Richard Aikens: Brick Court Chambers and King's College London

Alexander Layton QC: 20 Essex Street Chambers and King's College London

Dr Manuel Penades Fons: King's College London

The seminar will discuss the risks which Brexit poses for the UK as a centre for dispute resolution of civil and commercial disputes, with particular reference to Jurisdiction/Enforcement; Applicable law; Procedure; and Cross-border Insolvency law.

It will take place at King's College London – Strand Campus at 6.30 p.m.

For registration and more information, see here.

ERA conference "Freezing Bank Accounts Across Europe (and Beyond)": compte-rendu

*This report has been prepared by **Martina Mantovan**i, research fellow at the MPI Luxembourg.*

On 1st and 2nd December 2016, the Academy of European Law (ERA) hosted, in Trier, the conference "***Freezing Bank Accounts Across Europe (and Beyond)"***, bringing together a wide range of academics and practitioners to discuss the new scenarios opened by the prospective implementation of the new European Account Preservation Order, which will apply from 18 January 2017.

This post provides an overview of the presentations and of the discussions on the issues raised.

LOOKING ACROSS EU BORDERS

Freezing of assets (by foreign parties) in Swiss banks – Prof. Dr. Daniel Staehelin provided valuable insights on the current situation in Switzerland. With its 276 banks, this country is still one the largest managers of offshore wealth, thus being an appealing target in the eyes of foreign creditors who seek to recover their monetary claims. Special attention was given to the procedural requirements for obtaining a Swiss freezing order and to the possible difficulties arising from the interaction with the bank secrecy regime. Pursuant to the 1889 Debt Enforcement and Bankruptcy Act, in fact, the claimant shall prove, *inter alia*, that the debtor is the client of a specific bank. In this respect, it is worth stressing that the relative weakening of the bank secrecy regime, brought along by the Treaties concluded by Switzerland over the last few years, solely concerns the requests coming from authorities of the contracting States for tax recovery claims. Conversely, in civil and commercial matters, banks can – and generally will – still invoke the professional secret against requests coming from private persons engaged in debt collection activities.

THE EUROPEAN ACCOUNT PRESERVATION ORDER (EAPO)

Scope and procedure for obtaining an EAPO, including jurisdiction and service of documents – In this second presentation, Prof. Pietro Franzina led us through the procedural steps set forth by the EAPO Regulation for the granting of a European freezing order. These latter play, in fact, a pivotal role in the overall architecture of the EAPO Regulation, as its "added value" vis-à-vis other European instruments (namely, the Brussels I bis and the Maintenance Regulations) lies precisely in the harmonized procedural framework established therein. In addition to some common rules on jurisdiction and on the substantive requirements for issuing a account preservation order, the Regulation sets forth

specific rules governing enforcement by national courts and enforcement authorities. The remedies available to the debtor and the appellate stage of the proceedings are, as well, specifically considered by the Regulation. The underlying intent is to sidestep – at least in theory – most of the practical difficulties arising out of the interaction with domestic procedural regimes, which are thus relegated to a minor gap-filling role.

Practical issues for banks operating in the Member States – The presentation by Sarah Garvey and Joseph Delhaye identified four major operational issues for the bank required to implement the order. At the outset, the identification of the assets which can be preserved through an EAPO may prove particularly challenging in the case of joint and nominee accounts. Since, pursuant to Article 30, these accounts may be preserved only to the extent permitted under the law of the Member State of enforcement, there will be significant discrepancies in the practices followed in the several Member States. Another operational difficulty arising out of the interplay between uniform and domestic regulation consists in the determination of the exempted amounts and of the legal regime governing the bank's potential liability. Pursuant to, respectively, Article 31 and Article 26 of the EAPO Regulation, both shall in fact be determined under the national law of the Member State of enforcement. Again, these provisions will generate significant divergences from State to State. Last but not least, completing the form provided for by Annex IV may raise practical issues which find no express answer in the Regulation (eg. the treatment of pledged accounts, finding a balance between the ex-parte nature of the order and the duty of care and prompt information generally owed by banks to their clients). In light of the above, the banks of the participating States will likely be unable to develop a uniform approach to the EAPO.

What are the risks for claimants? – The position of the claimant vis-à-vis the EAPO has been analysed by Philippe-Emmanuel Partsch and Clara Mara-Marhuenda, who identified four major risks arising in connection with an EAPO application. Firstly, the claimant has to take into account the possibility of having to provide a security, if the court considers it appropriate in the circumstances of the case. Secondly, he may be held liable for any damage caused to the debtor by the Preservation Order due to his fault. Although, generally speaking, the burden of proof shall lie with the debtor, the claimant might have to actively prove the lack of fault on his part in order to reverse the presumption set out by Article 13

(2) of the EAPO Regulation. The third risk is connected with the ranking of the EAPO: as it has the same rank as an "equivalent national order" of the State of enforcement, other domestic measure may hypothetically have priority over the European freezing order, if so provided by national law. Finally, the claimant shall consider that the defendant may challenge the EAPO (Article 33), or oppose to its enforcement (Article 34). If the defendant is successful, the EAPO can be, respectively, revoked (or modified) and terminated (or limited).

WORKSHOP: Freezing monies in bank accounts across Europe – During this workshop, participants were confronted with a comprehensive "freezing of bank account scenario" devised by Prof. Gilles Cuniberti. The analysis of the case brought to light many uncertainties relating to the practical functioning of the EAPO Regulation. The proper interpretation of some concepts used – but not defined – by the Regulation, the interplay with the Service Regulation, compliance with the time-frame set forth by the EU legislator, the standard of due diligence required of the bank were perceived by the participants as the most problematic aspects of the EAPO Regulation.

ROUND TABLE (*Partsch, Delhaye, Raffelsieper, Weil*): Maintaining surprise vs protecting the debtor – As of January 2017, the EAPO Regulation will provide creditors with the possibility of obtaining an ex parte freezing order easily enforceable throughout the EU. This measure evidently purports to overcome the practical limitations arising out of the case *Denilauer,* where the ECJ held that the respect of the rights of the defence necessarily implies the prior hearing of the defendant. In this round-table, the speakers and participants brought attention to the downside of this case-law, insofar as it undermines the *effectiveness* of the protection of creditors' interests. The discussion focused on the system of procedural safeguards set in place by the EAPO Regulation. The speakers agreed on the fact that the Regulation provides for an adequate balance between the interests all the parties involved, while limiting, at the same time, the risk of procedural abuses.

WORLDWIDE FREEZING ORDERS

US freezing orders in practice: a primer – In his presentation, Brandon O'Neil provided some useful insights on the system (or, rather, on the lack thereof) governing the attachment of assets in the US. The lack of a uniform Federal approach to the matter results into a piecemeal legal framework, where

attachment of assets is generally seen as an extraordinary remedy whose legal regime differs from State to State. Although several "Model laws" have been proposed over the years, the State legislatures have been strenuously reluctant to give up their restrictive and specific national regimes. As a result, obtaining a freezing order in the US may require the filing of multiple actions in several States. The speaker provided for positive examples of this legal diversification, by giving a brief account of some "domestic peculiarities" – ie Columbia's ex parte procedure, Delaware's business-friendly regime and Florida's standard of the "fraudulent intents". In the second part of the presentation, Mr. O'Neil focused on the standards and procedure set forth by the law of the State of New York.

English freezing orders: the weapon of choice for claimants? – Ms. Sarah Garvey described the substantive and procedural requirements for the granting of English freezing orders, also known as Mareva injunctions. The speaker especially focused on the duty of full and frank disclosure owed by the applicant's solicitors, which factually ensures the adequate protection of the defendant's interests within the framework of an ex parte procedure. Some relatively recent trends of the English practice were as well investigated, such as the possibility of combining freezing injunctions with "search orders", in order to identify and freeze the relevant assets in one go. According to Ms. Garvey, English freezing injunctions may be an appealing alternative to the EAPO. They present, in fact, considerable "competitive advantages" over the European Instrument, namely: (i) their broader scope as to the kinds of assets covered by the measure; (ii) their potential worldwide reach; (iii) the swift and informal nature of the procedure (iv) the tough sanctions for non-compliance with the order.

ROUND TABLE (Hess, Franzina, Garvey, O'Neil): EAPO vs freezing orders – Which path to take? The discussion focused on the legal treatment reserved by the EAPO Regulation to the domiciliaries of non- Participating Member States, who cannot avail themselves of an EAPO but may nevertheless be affected by such a measure if their bank account is held in a Participating State. The concern has been voiced that the exercised of a legal prerogative of some Member States (the right of opting in/opting out) *de facto* results, in this case, in a discriminatory treatment of their domiciliaries, in particular when these latter apply for an EAPO as maintenance creditors. The speakers expressed diverging opinion on this point.

The concluding remarks were made by Prof. Gilles Cuniberti, who expressed cautious optimism as to the prospects of success of this new European

instrument.

Kotuby & Sobota on “General Principles of Law and International Due Process”

This is a shameless plug for my new book. It is available for pre-order on the Oxford University Press website and on Amazon.com. I was fortunate enough to co-author this work with my friend and colleague Luke Sobota from Three Crowns.

This book is intended to be a modern update of Bin Cheng’s seminal book on general principles from 1953–identifying, summarizing and analyzing the core general principles of law and norms of international due process, with a particular focus on developments since Cheng’s writing. The aim is to collect and distill these principles and norms in a single volume as a practical resource for international law jurists, advocates, and scholars. The book includes a Foreward by Judge Stephen M. Schwebel.

We’ve been fortunate to receive some wonderful praise thus far. Judge Schwebel has called it “a signal contribution to the progressive development of international law, . . . [done] with scholarship, insight, and panache.” Pierre Marie Dupuy has deemed it a “most useful study on the place and role of general principles of law in contemporary international arbitration,” while Judge James Crawford expects it to become a “work that will benefit both scholars and practitioners.”

The EUPILLAR Database is live

The EUPILLAR Database, one of the outputs of the EUPILLAR Project funded by the European Union within the scope of the European Commission Civil Justice Programme (JUST/2013/JCIV/AG/4635) and led by the Centre for Private International Law at the University of Aberdeen, is now live. The Database contains summaries in English of over 2300 judgments that were rendered between 1 March 2002 and 31 December 2015 concerning the Brussels I (Brussels I Recast), Brussels IIa, Maintenance, Rome I and Rome II Regulations and the Hague Maintenance Protocol in the Court of Justice of the European Union and in Belgium, Germany, England and Wales, Italy, Poland, Scotland and Spain.

The EUPILLAR Database, established and maintained by the University of Aberdeen, is available at https://w3.abdn.ac.uk/clsm/eupillar/#/home.

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eAccess to Justice – Arbitration in Hungary – Labour Migration

Dear readers, my apologies for the puzzling title of this post, but I take the opportunity to bring the following three unrelated publications to your attention before this year ends. **HAPPY 2017!**

A few months ago the book ***eAccess to Justice*** was published (eds. Karim Benyekhlef, Jane Bailey, Jacquelyn Burkell, Fabien Gélinas; University of Ottawa Press 2016), including a few papers on cross-border litigation. More information is available here. The blurb reads:

> *Part I of this work focuses on the ways in which digitization projects can affect fundamental justice principles. It examines claims that technology will improve justice system efficiency and offers a model for evaluating e-justice systems that incorporates a broader range of justice system values. The emphasis is on the*

complicated relationship between privacy and transparency in making court records and decisions available online. Part II examines the implementation of technologies in the justice system and the challenges it comes with, focusing on four different technologies: online court information systems, e-filing, videoconferencing, and tablets for presentation and review of evidence by jurors. The authors share a measuring enthusiasm for technological advances in the courts, emphasizing that these technologies should be implemented with care to ensure the best possible outcome for access to a fair and effective justice system. Finally, Part III adopts the standpoints of sociology, political theory and legal theory to explore the complex web of values, norms, and practices that support our systems of justice, the reasons for their well-established resistance to change, and the avenues and prospects of eAccess. The chapters in this section provide a unique and valuable framework for thinking with the required sophistication about legal change.

Csongor István Nagy (University of Szeged) has published **The Lesson of a Short-Lived Mutiny: The Rise and Fall of Hungary's Controversial Arbitration Regime in Cases Involving National Assets** (27 The American Review of International Arbitration 2 2016, 239-246), available on SSRN. The blurb reads:

This paper presents and analyzes Hungary's recent legislative efforts and failure to exclude arbitration in matters involving (Hungarian) national assets, demonstrating the difficulties a country faces if it attempts to defy the prevailing pattern of dispute settlement in international trade. The lesson of the Hungarian saga is that, unsurprisingly, arbitration is not only a 'take it or leave it' but even a 'take it or leave' rule of the club of international economic relations.

Last October, INT-AR Paper 6, authored by Veerle Van Den Eeckhout (University of Antwerp), was published and is entitled "**Toepasselijk arbeidsrecht bij langdurige detachering volgens het wijzigingsvoorstel voor de Detacheringsrichtlijn. Enkele beschouwingen vanuit ipr-perspectief**" (in English: "The draft proposal to amend the Posting of Workers Directive assessed from the private international law perspective"). The paper is written in Dutch and is downloadable here and on SSRN.

Geneva Internet Dispute Resolution Policies

Geneva Internet Dispute Resolution Policies (GIDRP) is a project of the University of Geneva, which looks into selected legal topics relating to internet disputes and puts forward policy proposals. So far, their expert team has developed the GIDRP 1.0 where one of the topics is particularly relevant for this blog readers (Topic 1: Which national courts shall have jurisdiction in internet-related disputes?). The website is inviting online endorsements and comments. Besides, interested experts are welcome to join the project in the development of the GIDRP 2.0. They may be contacted by e-mail: gidpr@unige.ch.

The relating document is available here.

Applying the UNIDROIT Principles in International Arbitration: An Exercise in Conflicts

Prof. Massimo Benedetelli (Professor of International Law, University 'Aldo Moro', Bari. ARBLIT, Milan, partner) has just drawn my attention to this piece of his, published in the Journal of International Arbitration 33, no. 6 (2016), pp. 653–686. The abstract reads as follows:

The International Institute for the Unification of Private Law, which recently celebrated its 90th anniversary, published in 1994 the Principles of International Commercial Contracts. Since then the UNIDROIT Principles have been more and more often referred to by arbitral tribunals when settling contractual disputes. As

a non-binding instrument of soft law, however, the UNIDROIT Principles may play a very different function depending on whether they are used as "rules of law" for the regulation of a contractual relationship, are incorporated as terms of a contract governed by a state contract law, or are means to interpret and supplement the applicable contract law or the 1980 United Nations Convention on Contracts for the International Sale of Goods. Moreover, they can be applied pursuant to an express or implied choice made by the parties, either in the contract or after the dispute has arisen, or when the arbitral tribunal so decides by its own motion. In all such different scenarios different problems may arise for the coordination of the UNIDROIT Principles with sources of state law that have title to regulate the contractual relationship in dispute. Understanding such problems and finding a solution to them is essential in order to avoid the risk that the award may be later challenged or refused recognition. Such understanding could also foster the legitimacy of requests made by a party, or decisions taken by the arbitral tribunal, to apply the UNIDROIT Principles. It is submitted that private international law, taken as a technique for the coordination of legal systems, may offer a useful know-how to parties, counsel, arbitrators and courts for mastering such problems in a reasoned and sound way. This may result in enhancing the effectiveness of the UNIDROIT Principles, while balancing party autonomy with the sovereign interest of states in regulating international business.

Supreme Court of Latvia: Final Outcome of "flyLAL Lithuanian Airlines"

By Baiba Rudevska

On 23 October 2014 the European Court of Justice (hereinafter referred to as the "ECJ") delivered its judgment in the case "**flyLAL Lithuanian Airlines AS v. Starptautiska lidosta Riga VAS (Riga International Airport)**" (C-302/13).

The request for a preliminary ruling was made by the Supreme Court of Latvia (*Latvijas Republikas Augstaka tiesa*) in proceedings concerning recognition and enforcement of a Lithuanian court's judgment (ordering provisional and protective measures) in the territory of Latvia. This request concerned the interpretation of Articles 1, 22(2), 34(1) and 35(1) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).

The ECJ answered the questions in the following way:

- Article 1(1) of the Brussels I Regulation must be interpreted as meaning that an action seeking legal redress for damage resulting from alleged infringements for EU competition law, **comes within the notion of "civil and commercial matters"**;
- Article 22(1) must be interpreted as meaning that an action seeking legal redress for damage resulting from alleged infringements of EU competition law, **does not constitute proceedings** having as their object the validity of the decisions of organs of companies within the meaning of that provision;
- Article 34(1) must be interpreted as meaning that **neither** the detailed rules for determining the amount of the sums which are the subject of the provisional and protective measures granted by a judgment in respect of which recognition and enforcement are requested, **nor** the mere invocation of serious economic consequences constitute grounds for refusal of recognition and enforcement of a judgment based on **public policy** of the Member State in which recognition is sought.

On 20 October 2015 the Supreme Court of Latvia delivered its decision (which is final) in this case (No SKC 5/2015) deciding neither to recognise nor to enforce the judgment of the Lithuanian court in Latvia (two lower courts of Latvia had previously decided to recognise and to enforce the judgment). The legal ground for the non-recognition was the *public policy* clause of Article 34(1) of the Regulation.

Let us look at the main reasoning of the Supreme Court of Latvia in this case.

Reasoning No 1 (Article 1 of the Constitution of the Republic of Latvia)**: State security**. The defendant, "*Starptautiska lidosta Riga*" ("Riga International

Airport"), also owns a property which is necessary for the purpose of the Latvian state security. If the judgment of the Lithuanian court is recognised and enforced in Latvia, then the preventive attachment order regarding this property will probably be enforced. From Article 1 of the Constitution of the Republic of Latvia it follows that property which is necessary for the state security interests cannot be transferred or subject to a private law burden that might, even hypothetically, hinder, weaken or otherwise threaten the fulfilment of the State functions in guaranteeing the security of the State and the society.

Reasoning No 2 (Article 91 and 105 of the Constitution of the Republic of Latvia)**: the insolvent Lithuanian company**. The Lithuanian company "flyLAL Lithuanian Airlines" is an insolvent company which has lodged a claim for an amount of EUR 58,003,824. This company has no property or assets to compensate the defendant's possible losses in the case if the claim later appears to be unsubstantiated. This creates an important disproportion of rights and of the provisional and protective measures applied in the case. Such possible damages sustained by the defendant may seriously endanger not only its economic activities but even its existence as a company.

Additional reasoning (Article 91 and 105 of the Constitution of the Republic of Latvia)**: the length of the main proceedings before the Lithuanian court.** The Lithuanian court had issued an order for sequestration, on a provisional and protective basis, of the movable/immovable assets and property rights of "Air Baltic" and "*Starptautiska lidosta Riga*" ("Riga International Airport") seven years ago; until now the case has not yet been resolved and there is no further information about when this case could be resolved. For the provisional and protective measures this period of time is too long and might aggravate the violation of the defendant's property rights in this case. As the Lithuanian company is insolvent, there cannot be an adequate protective measure to secure the payment of damages. It can be considered as a potentially disproportionate interference with the defendant's property rights within the meaning of Articles 91 and 105 of the Latvian Constitution

In this case, the Supreme Court of Latvia has established that, **firstly**, state security constitutes one of the most important elements of the public policy of Latvia (Article 1 of the Constitution); **secondly**, fundamental rights laid down in the Constitution of the Republic of Latvia also is a part of the Latvian public policy. In this case these were the equal rights of the parties before the law and

the courts (Articles 91 and 105 of the Constitution). For this reason such a judgment of the Lithuanian court is manifestly contrary to the Latvian public policy. Therefore the recognition and enforcement of the Lithuanian judgment in Latvia must be denied on the basis of Article 34(1) of the Brussels I Regulation.

For information:

Constitution of the Republic of Latvia:

Article 1 – "Latvia is an independent democratic republic".

Article 91 – "All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind".

Article 105 – "Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation".

Brexit, but rEEAmain? The Effect of Brexit on the UK's EEA Membership

Ulrich G. Schroeter, Professor of Law at the University of Mannheim (Germany) and Heinrich Nemeczek, Research Fellow at the University of Mannheim (Germany) and an Academic Visitor at the Law Faculty of the University of Oxford, have authored an article on "'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area". Published

in issue 7 [2016] of Kluwer's *European Business Law Review*, pp. 921–958, the authors analyze how the UK's withdrawal from the EU will affect the UK's status as Contracting Party to the EEA Agreement.

The authors have kindly provided us with the following abstract:

Until recently, most legal analyses of Brexit have assumed that the UK's EEA membership will be terminated ipso iure should the UK decide to withdraw from the EU. According to this view, the UK subsequently could (re-)apply for EEA membership should its government so choose – an option commonly referred to as the 'Norway option'.

Our article challenges the assumption that the UK's withdrawal from the EU will automatically result in its withdrawal from the EEA. In short, we reach the conclusion that the UK's EEA membership will continue despite of Brexit unless the UK government chooses to also unilaterally withdraw from the EEA in accordance with Article 127(1) of the EEA Agreement – a step it is not obliged to take. Its continuing EEA membership would mean that many rules of EU law would continue to apply in form of EEA law, including (subject to certain conditions) the much-discussed rules about the 'European passport' for UK financial institutions. In contrast, the Court of Justice of the EU would have no jurisdiction over the interpretation of EEA law in the UK. At the same time, the rules governing the free movement of workers are more flexible under EEA law than under EU law, potentially allowing the UK to limit this freedom by way of unilaterally imposed 'safeguard measures'.

In summary, 'Brexit' and 'rEEAmain' are in no way irreconcilable. The result may affect the negotiation positions during the upcoming Brexit negotiations in accordance with Article 50 of the TEU, as a continuing EEA membership could be viewed as an attractive alternative to a 'hard Brexit', for both businesses in the UK and the rest of the EEA.

The EEA Agreement as a 'mixed agreement'

It is an important feature of the EEA Agreement that, on the 'EU side', it neither comprises only the EU nor only its Member States as Contracting Parties, but rather the EU and each of its individual Member States, including the UK. The UK is, therefore, not merely an EEA Member because of its membership in the EU, but because the EEA Agreement's Preamble explicitly

lists the UK as a separate Contracting Party. Any modification or termination of this Contracting Party status would require a basis in treaty law.

In this regard, a source of uncertainty is that the EEA Agreement does not contain any specific provision addressing the effect, if any, of a EU Member State leaving the EU. Article 50 of the TEU fails to indicate that a withdrawal from the EU would have any consequence for the withdrawing State's membership in the EEA. As we demonstrate in detail in our article, a 'Brexit' notification in accordance with Article 50 of the TEU can also not be interpreted as also resulting in a withdrawal from the EEA, inter alia because such a result would affect treaty rights of the three EFTA States within the EEA – Iceland, Liechtenstein and Norway – that are not parties to the TEU.

As far as some provisions in the EEA Agreement only refer to 'EC Member States' and/or 'EFTA States', we argue in some detail that these terms are to be interpreted as referring to EU States and non-EU States within the EEA in accordance with both the EEA Agreement's purpose and past treaty practice under the Agreement.

No Right of Other EEA Contracting Parties to Suspend Operation or Terminate the EEA Agreement in Relation to the UK

The UK's withdrawal from the EU does not entitle other EEA Contracting Parties to suspend operation or terminate the EEA Agreement in relation UK, neither under the EEA Agreement nor under customary public international law. Under customary treaty law as codified in the 1969 Vienna Convention on the Law of Treaties (VCLT), the UK for once has committed no 'material breach' of the EEA Agreement (Article 60 of the VCLT), as Brexit is merely the use of a right explicitly granted to the UK by a different treaty, namely Article 50 of the TEU. Also, Brexit does not constitute a fundamental change according to the clausula rebus sic stantibus doctrine enshrined in Article 62 of the VCLT as the EEA Agreement's core elements can still be performed. Although the UK's withdrawal from the EU will create certain difficulties because the country's representation in organs like the EFTA Court or the EFTA Surveillance Authority requires clarification, these changes neither radically modify the obligations still to be performed under the EEA Agreement nor imperil the existence or vital development of other EEA Contracting Parties.

Post-Brexit situation ('rEEAmain')

In our article, we further outline the consequences that Brexit would have for the future application of the EEA Agreement. Because the UK's Contracting Party status would remain unaffected, UK companies would still have access to the EEA internal market. Inter alia, the legal capacity of UK companies with their 'real seat' elsewhere within the EEA would continue to be recognised in all other EEA States under the EEA Agreement's freedom of establishment. The same would, of course, apply in the 'opposite direction', giving continued freedom of establishment in the UK for companies from elsewhere in the EEA.

The freedom of movement for workers under Article 28 of the EEA Agreement may be unilaterally limited by the UK by way of appropriate safeguard measures in accordance with Article 112 of the EEA Agreement (e.g. a quota system), if 'serious economic, societal or environmental difficulties' are arising – a possibility that does not exist under EU law. (It is foreseeable that the interpretation of the legal prerequisites will give rise to disputes.) In any case, safeguard measures taken by the UK may come at a price, as other EEA Contracting Parties would be authorized to take proportionate 'rebalancing measures' in order to remedy any imbalance between rights and obligations under the EEA Agreement created by the safeguard measures.

Our interpretation should not be misunderstood as indicating that no difficulties would arise under a 'rEEAmain' scenario. Such difficulties would indeed appear, primarily because certain institutional arrangements in the EEA Agreement and related agreements do not explicitly envisage an EEA Contracting Party that is neither a member state of the EU nor of the EFTA. If the UK does not accede to the EFTA Agreement and the Surveillance and Court Agreement, EEA law within the UK would have to be supervised and interpreted solely by British domestic courts and authorities. Also, the issue of financial contributions by the UK would arguably necessitate a renegotiation of protocols to the EEA Agreement: After Brexit, the UK will no longer contribute to the EU budget, but neither Article 116 of the EEA Agreement nor Protocols 38–38c explicitly provide for an obligation of the UK to contribute to the EEA Financial Mechanism. As it is difficult to argue that the UK would profit from its continuing EEA membership without contributing to the connected Financial Mechanism, the exact amount of the UK's contribution would need to be fixed through an adjustment of the Protocols 38–38c.