Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2017: Abstracts

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

C. Kohler: **Limits of mutual trust in the European judicial area: the judgment of the ECtHR in Avotin?š v. Latvia**

In Avoti?š v. Latvia the European Court of Human Rights opposes the consequences of the principle of mutual trust between EU Member States which the Court of Justice of the European Union highlighted in Opinion 2/13. The ECtHR sees the risk that the principle of mutual trust in EU law may run counter to the obligations of the Member States flowing from the ECHR. In the context of judgment recognition the State addressed must be empowered to review any serious allegation of a violation of Convention rights in the State of origin in order to assess whether the protection of such rights has been manifestly deficient. Such a review must be conducted even if opposed by EU law. The author evaluates the Avoti?š judgment in the light of the recent case-law of the CJEU which gives increased importance to the effective protection of fundamental rights. In view of that case-law the opposition between the two European courts seems less dramatic as their competing approach towards the protection of fundamental rights shows new elements of convergence.

S. L. Gössl: **The Proposed Article 10a EGBGB: A Conflict of Laws Rule Supplementing the Proposed Gender Diversity Act (Geschlechtervielfaltsgesetz)**

In 2017 the German Institute for Human Rights published an expertise for the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth on the topic of “Gender Diversity in Law”. The expertise proposed several legal changes and amendments, including a conflict of laws rule regarding the determination of the legal sex of a person (art. 10a EGBGB). The proposal follows the current practise to use the citizenship of the person in question as the central connecting factor. In case of a foreigner having the habitual residence in Germany, or a minor

having a parent with a habitual residence in Germany, a choice of German law is possible, instead. The rule reflects the change of substantive law regarding the legal sex determination from a binary biological-medical to a more open autonomy-based approach.

R. Geimer: **Vertragsbruch durch Hoheitsakt: „Once a trader, not always a trader?" – Immunitätsrechtlicher Manövrierspielraum für Schuldnerstaaten?**

A debtor state's inability to invoke state immunity: The issuance of bonds constitutes an actus gestionis, which cannot be altered to an actus imperii by legislative changes that unilaterally amend the terms of the bonds.

P. Mankowski: **Occupied and annected territories in private international law**

Private international law and international law are two different cups of tea. Private international law is not bound in the strict sense by the revelations of international law. An important point of divergence is as to whether occupied territories should be regarded as territories reigned by the occupying State or not. Private international law answers this in the affirmative if that State exerts effective power in the said territory. Private parties simply have to obey its rules and must adapt to them, with emigration being the only feasible exit. The State to whom the territory belonged before the occupation has lost its sway. This applies regardless whether UNO or EU have for whichever reasons uttered a different point of view. For instance, East Jerusalem should be regarded as part of Israel for the purposes of private international law, contrary to a recent decision of the Oberlandesgericht München.

F. Eichel: **Cross-border service of claim forms and priority of proceedings in case of missing or poor translations**

In recent times, there has been a growing number of inner-European multifora disputes where the claimant first lodged the claim with the court, but has lost his priority over the opponent's claim because of trouble with the service of the claim forms. Although Art. 32 (1) (a) Brussels Ibis Regulation states that the time when the document is lodged with the courts is decisive on which court is "the court first seised" in terms of Art. 29 Brussels Ibis Regulation, there has been dissent among German Courts whether the same is true when the service has failed due

to a missing or poor translation under the EU Service Regulation (Regulation EC No 1393/2007; cf. also the French Cour de Cassation, 28.10.2008, 98 Rev. Crit. DIP, 93 [2009]). Although the claimant is responsible for deciding whether the claim forms have to be translated, the author argues that Art. 32 (1) (a) Brussels Ibis Regulation is applicable so that the claimant can initiate a second service of the document after the addressee has refused to accept the documents pursuant to Art. 8 para. 1 EU Service Regulation. The claimant does not loose priority as long as he applies for a second service accompanied by a due translation as soon as possible after the refusal. In this regard, following the Leffler decision of the ECJ (ECLI:EU:C:2005:665), a period of one month from receipt by the transmitting agency of the information relating to the refusal may be regarded as appropriate unless special circumstances indicate otherwise.

P. Huber: **A new judgment on a well-known issue: contract and tort in European Private International Law**

The article discusses the judgment of the ECJ in the Granarolo case. The core issue of the judgment is whether an action for damages founded on an abrupt termination of a long-standing business relationship qualifies as contractual or as a matter of tort for the purposes of the Brussels I Regulation. The court held that a contract need not be in writing and that it can also be concluded tacitly. It stated further that if on that basis a contract was concluded, the contractual head of jurisdiction in Art. 5 Nr. 1 Brussels I Regulation will apply, even if the respective provision is classified as a matter of tort in the relevant national law. The author supports this finding and suggests that it should also be applied to the distinction between the Rome I Regulation and the Rome II Regulation.

D. Martiny: **Compensation claims by motor vehicle liability insurers in tractor-trailer accidents having German and Lithuanian connections**

The judgment of the ECJ of 21/1/2016 deals with multiple accidents in Germany caused by a tractor unit coupled with a trailer, each of the damage-causing vehicles being insured by different Lithuanian insurers. Since in contrast to Lithuanian law under German law also the insurer of the trailer is liable, after having paid full compensation the Lithuanian insurer of the tractor unit brought an indemnity action against the Lithuanian insurer of the trailer. On requests for a preliminary ruling from Lithuanian courts, the ECJ held that Art. 14 of the Directive 2009/103/EC of 16/9/2009 relating to insurance against civil liability in

respect of the use of motor vehicles deals only with the principle of a "single premium" and does not contain a conflict rule. According to the ECJ there was no contractual undertaking between the two insurers. Therefore, there exists a "non-contractual obligation" in the sense of the Rome II Regulation. Pursuant to Art. 19 Rome II, the issue of any subrogation of the victim's rights is governed by the law applicable to the obligation of the third party – namely the civil liability insurer – to compensate that victim. That is the law applicable to the insurance contract (Art. 7 Rome I). However, the law applicable to the non-contractual obligation of the tortfeasor also governs the basis, the extent of liability and any division of his liability (Art. 15 [a] [b] Rome II). Without mentioning Art. 20 Rome II, the ECJ ruled that this division of liability was also decisive for the compensation claim of the insurer of the tractor unit. A judgment of the Supreme Court of Lithuania of 6/5/2016 has complied with the ruling of the ECJ. It grants compensation and applies also the rule of German law on the common liability of the insurers of the tractor unit and trailer.

P.-A. Brand: **Jurisdiction and Applicable Law in Cartel Damages Claims**

It can be expected that the number of cartel damages suits in the courts of the EU member states will substantially increase in the light of the EU Cartel Damages Directive and its incorporation in the national laws of the EU member states. Quite often the issues of jurisdiction and the applicable law play a major role in those cases, obviously in addition to the issues of competition law. The District Court Düsseldorf in its judgement on the so-called "Autoglas-cartel" has made significant remarks in particular with regard to international jurisdiction for claims against jointly and severally liable cartelists and on the issue of the applicable law before and after the 7th amendment of the German Act against Restraints of Competition (GWB) on 1 July 2005. The judgement contributes substantially to the clarification of some highly disputed issues of the law of International Civil Procedure and the Conflict of Law Rules. This applies in particular to the definition of the term "Closely Connected" according to article 6 para 1 of the Brussels I Regulation (now article 8 para 1 Brussels I recast) in the context of international jurisdiction for law suits against a number of defendants from different member states and the law applicable to cartel damages claims in cross-border cartels and the rebuttal of the so-called "mosaic-principle".

A. Schreiber: **Granting of reciprocity within the German-Russian recognition practice**

Germany and the Russian Federation have not concluded an international treaty which would regulate the mutual recognition of court decisions. The recognition according to the German autonomous right requires the granting of reciprocity pursuant to Sec. 328 para. 1 No. 1 of the German Code of Civil Procedure. The Higher Regional Court of Hamburg has denied the fulfilment of this requirement by (not final) judgement of 13 July 2016 in case 6 U 152/11. The comment on this decision shows that the estimation of the court is questionable considering the – for the relevant examination – only decisive Russian recognition practice.

K. Siehr: **Marry in haste, repent at leisure. International Jurisdiction and Choice of the Applicable Law for Divorce of a Mixed Italian-American Marriage**

An Italian wife and an American husband married in Philadelphia/Pennsylvania in November 2010. After two months of matrimonial community the spouses separated and moved to Italy (the wife) and to Texas (the husband). The wife asked for divorce in Italy and presented a document in which the spouses agreed to have the divorce law of Pennsylvania to be applied. The Tribunale di Pordenone accepted jurisdiction under Art. 3 (1) (a) last indent Brussels II-Regulation and determined the applicable law according to Rome III-Regulation which is applicable in Italy since 21 June 2012. The choice of the applicable law as valid under Art. 5 (1) (d) Rome III-Regulation in combination with Art. 14 lit. c Rome III-Regulation concerning states with more than one territory with different legal systems. The law of Pennsylvania was correctly applied and a violation of the Italian ordre public was denied because Italy applies foreign law even if foreign law does not require a legal separation by court decree. There were no effects of divorce which raised any problem.

M. Wietzorek: **Concerning the Recognition and Enforcement of German Decisions in the Republic of Zimbabwe**

The present contribution is dedicated to the question of whether decisions of German courts – in particular, decisions ordering the payment of money – may be recognized and declared enforceable in the Republic of Zimbabwe. An overview of the rules under Zimbabwean statutory law and common law (including a report on the interpretation of the applicable conditions, respectively grounds for refusal, in Zimbabwean case law) is followed by an assessment of whether reciprocity, as required by section 328 subsection 1 number 5 of the German Civil

Procedure Code, may be considered as established with respect to Zimbabwe.

A. Anthimos: **Winds of change in the recognition of foreign adult adoption decrees in Greece**

On September 22, 2016, the Plenum of the Greek Supreme Court published a groundbreaking ruling on the issue of the recognition of foreign adult adoption decrees. The decision demonstrates the respect shown to the judgments of the European Court of Human Rights, especially in the aftermath of the notorious Negrepontis case, and symbolizes the Supreme Court's shift from previous rulings.

Operating Law in a Global Context – Comparing, Combining and Prioritising

A book by Jean- Sylvestre Bergé and Geneviève Helleringer, Elgar Publishing 2017, just published.

Lawyers have to adapt their reasoning to the increasingly global nature of the situations with which they deal. Often, rules formulated in a national, international or European environment have all to be jointly applied to a given case. In a single situation, several laws must be mobilised, alternatively, cumulatively, at the same time or at different moments, in or on one or several spaces or levels, by one or by multiple actors. The book seeks to make explicit the analysis the lawyer engages in every time he is confronted by the operation of several laws in different contexts.

The subject matter of the book is not the definition or description of a so-called 'global law'. The book focuses on the needs of a global lawyer who is required to reach conclusions in a pluralistic context. It makes explicit the required global reasoning. Readers are presented with concrete cases involving more than one legal rule and different levels as well as a *modus operandi* that the authors found to be invariant in global contexts. Legal reasoning in a global context has to be organised according to a basic three-step approach, consisting of the comparison (Part I), then the combination (Part II) and, finally, the ordering or 'prioritisation' (Part III) of the methods and solutions of national, international and European law to be used to solve the case. The book

conveys in detail how the law is operated through a wide range of situations and concrete examples cutting across domains, including criminal law, contract law, fundamental rights, internal market, international trade, procedure.

The book is aimed at an international audience. Illustrations of how lawyers have to combine different contexts are taken in various domestic case law including the UK, Germany, Belgium, Italy, Spain, the US, as well as France. The book is adapted from an analytical framework that was developed in a book written in French by Jean-Sylvestre Bergé, *L'application du droit national, international et européen*, Paris: Dalloz, Méthodes du droit, 2013.

Academic lawyers as well as practitioners often realise that some cases trigger uncertainty as to the applicable legal reasoning. For example, in cases presented before an international court, lawyers may wonder whether the effects produced by a law applied at a national or European level may be considered. In a European context, lawyers need to be able to determine precisely whether the methods and solutions that have been developed over the last 60 years substitute or add to the legal constructions defined at other levels which came before: national or international.

The difficulty facing lawyers increases even more when a case might fall to be decided under a series of different legal environments. Thus, a case presented before a national judge can sometimes give rise to proceedings before a European court, for example, a preliminary ruling on the interpretation or validity of EU law brought before the Court of Justice of the European Union or an application made to the European Court of Human Rights after the exhaustion of all national remedies. More rarely, a national conflict may become an interstate conflict brought before the International Court of Justice. In the same way, a situation addressed by a public or private international court may have consequences for European and/or national courts (for example, a sanction announced by the United Nations and executed at a European and national level or an international arbitral award presented to a national judge who decides to apply European Union law and to consult, in that capacity, the Court of Justice of the European Union).

Lawyers may therefore be worried that in spite of all their efforts to put into operation the legal methods and solutions applied in a given context, their analysis could be challenged on the occasion of the re-examination of the case in another national, international or European context. To prevent a new examination from entirely escaping, or weakening, their expertise, what can lawyers (including students training to practice in a global environment) do? Should they open themselves up to other legal environments beyond the one in which they are used to? Or should they revert to the one context that they know best and will therefore provide for a solution with a maximum degree of foreseeability? The book provides a method for tackling these questions.

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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

Book: Rethinking International Commercial Arbitration – Towards Default Arbitration

Professor *Gilles Cuniberti* (University of Luxembourg) has just published a new monograph on default arbitration in the *Rethinking Law* series of Edward Elgar Publishing.

The official abstract kindly provided by the publisher reads as follows:

> *This innovative book proposes a fundamental rethink of the consensual foundation of arbitration and argues that it should become the default mode of resolution in international commercial disputes.*
>
> *The book first discusses the most important arguments against this proposal and responds to them. In particular, it addresses the issue of the legitimacy of arbitrators and the compatibility of the idea with guarantees afforded by European human rights law and US constitutional law. The book then presents several models of non-consensual arbitration that could be implemented to afford neutral adjudication in disputes between parties originating from different jurisdictions, to offer an additional alternative forum in the doctrine of forum non conveniens or to save judicial costs.*

> *The first dedicated exploration into the groundbreaking concept of default arbitration, Rethinking International Commercial Arbitration will appeal to scholars, students and practitioners in arbitration and international litigation.*

Further information, including a table of contents and some extracts, is available on the publisher's website.

Private International Law & the current migratory context: workshop 20 June 2017

The European Parliament's Policy Department for Citizens Rights and Constitutional Affairs of the is organising a **workshop** on **Potential and challenges of private international law in the current migratory context** on 20 June 2017 from 3 to 6.30 p.m.

The reason behind the initiative for this workshop is the tensions and overlaps between the areas of private international law and migration law. These overlaps have become more visible in the context of recent increases of migration. Issues include jurisdiction, cooperation between authorities, recognition of personal status, family tracing, child marriages, guardianship, kafala, the application of foreign law.

At the workshop two studies will be presented:

- Private international law in a context of increasing international mobility: challenges and potential, and
- Protecting children on the move: a private international law perspective.

For those readers unable to come to Brussels, the studies are available here and the event will be livestreamed here.

Book: International Banking Transactions with Consumers (in German)

Florian Heindler and Bea Verschraegen have just published the proceedings of the **IACPIL conference** which took place in October 2016 in Vienna: *Internationale Bankgeschäfte mit Verbrauchern*, Florian Heindler, Bea Verschraegen (Eds.), IACPIL (Interdisciplinary Association for Comparative and Private International Law) Series 5, Jan Sramek, 2017, 201 pp. ISBN 978-3-7097-0140-9

English translation of the **Table of Contents**:

- Preface (Bea Verschraegen & Florian Heindler)
- Choice of Court Clauses in Banking Contracts with Consumers (Peter Mankowski, Hamburg)
- Choice of Law Clauses in Banking Contracts with Consumers (Dietmar Czernich, Innsbruck)
- International Jurisdiction and the Law Applicable to Outsourced Distribution of Financial Products (Georg Kodek, Vienna)
- The Law Applicable to Prospectus Liability (Judith Schacherreiter, Vienna)
- Crowdfunding and Crowdinvesting and Conflict of Laws (Gerald Spindler, Göttingen)
- International Jurisdiction and the Law Applicable to Distance Selling of Financial Products and Services (Florian Heindler, Vienna)

See:
http://www.jan-sramek-verlag.at/Buchdetails.411.0.html?buchID=278&cHash=299ec37e58

The Applicability of the Alien Tort Statute to Human Rights Violations by Private Corporations

Hannah Dittmers, LL.M. candidate at the University of Michigan (USA) and doctoral candidate at the University of Freiburg (Germany), has just published an interesting paper on recent developments concerning corporate liability under the Alien Tort Statute in the Journal of Science, Humanities and Arts (JOSHA). On April 3rd 2017, the New York Times published an article with the heading: "Supreme Court to Weigh if Firms Can be Sued in Human Rights Cases". On the same day, the Supreme Court of the United States had granted the petition for certiorari to consider an issue that now has come before the highest US court already for the second time. The Second Circuit through the case *In re Arab Bank* has again brought the question before the Justices whether private corporations can be sued under the Alien Tort Statute of 1789 (ATS) for aiding and abetting human rights violations that occurred outside the territory of the United States. The Supreme Court is now to provide guidance on the issue that is not uniformly assessed by the US Circuit Courts. The full article is available here.

Droit International Privé et Droit de l'Union Européenne (Répertoire Dalloz)

The Répertoire Dalloz has just published the voice "Droit international privé et droit de l'Union européenne" (in French), by J.S. Bergé, D. Porcheron and G. Vieira da Costa Cerqueira. Here is the English summary. The ToC is available

here.

The law of the European Union offers itself as a new legal context in which the constructions of private international law are now massively deployed. In addition to pre-existing national contexts and pre-established international or transnational environments, the European Union is likely to dramatically change the substance and conditions of the implementation of conflicts of laws. The changes brought about by the emergence of this new European legal reference framework are far from having delivered all their manifestations. The three generations of European law which have so far succeeded are not sufficient to shed light on all the areas of shadow left behind by the two major legal areas of the European Union, namely the internal market space and the area of ??freedom, security and justice. But the process is on the way, which suggests dialectical games which can reasonably be expected to be well established today.

These dialectical reports, at the first level, present a confrontation of the methods and solutions of private international law and the legal system of the European Union. A historical approach requires a distinction between the three major stages that marked the Europeanization of private international law. The question of the competence of the European Union to legislate in this area must also be asked. There remains the crucial question of methods: the irreducibility of the two subjects of European law and private international law suggests a cross-game of influence on one another. At the second level, the construction of private international law at a European level needs to be re-examined. The presence of a European judge and the European codification movement are likely to explain the transformations currently taking place.

Judicial Training on International Child Abduction, Milan, 8 and 9

June 2017

The **University of Milano-Bicocca** will host on June 8th and 9th a Judicial Training on International Child Abduction as part of the Project "*EU Judiciary Training on Brussels IIa Regulation: from South to East*", co-funded by the Justice Programme of the European Union.

The Project, carried out by a net of four Universities led by Professor Costanza Honorati, aims to promote uniformity in the application of Regulation No 2201/2003 on Separation, Divorce and Parental Responsibility, through the organization of training events and the realization of a final handbook.

On **June 8th** the workshop will focus on the **Hearing of the Child**, a very sensitive issue and an essential part of a modern protection of children's rights. Qualified Judges, Psychologists and Social Services will explore on all relevant concrete issues. Experts include, in particular: Martina Erb-Klünemann (Judge at the District Court Hamm, Liaison Judge of the Hague Network and ENJ Member), Maria Domenica Maggi (Psychologist, Honorary Judge Juvenile Court of Milan), Sara Lembrechts & Katrien Herbots (KeKi – Children's Right Knowledge Centre, Ghent), Michael Ford (MiKK – International Mediation Centre for Family Conflict and Child Abduction).

On **June 9th**, Italian and foreign academics will address to International Child Abduction. Speakers include: Prof. Costanza Honorati (University of Milano-Bicocca), Prof. Maria Caterina Baruffi (University of Verona), Prof. Cristina Gonzalez Beilfuss & Dr. Maria Alvarez Torné (University of Barcellona), Prof. Mirela Zupan (University J. J. Strossmayer of Osijek), Prof. Ivana Kunda (University of Rijeka), Dr. Agne Limante (Law Institute of Lithuania).

Judges and Lawyers will solve practical cases and discuss with trainers, bringing their professional experience and working methods to the benefit of all participants.

Further information and the flyer of the initiative are available here.

International Law Association: New Website and Annual Meeting of the German Branch

The International Law Association (ILA) has a new website (please click here) with an improved look. The ILA hopes that visitors will find the site more informative and easier to navigate; in particular, the Members Only Area has been upgraded and will continue to be developed in order to provide members with more targeted and relevant information.

The ILA was founded in Brussels in 1873. Its objectives, under its Constitution, are "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law". The ILA has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies. For further information and a welcome address from ILA chairman *Lord Mance*, please click here.

The German branch of the ILA will hold its annual meeting on 23 June, 2017, in Frankfurt (Main). This year's topic is „Human Rights in International Business". The list of distinguished speakers will include Professors *Marc-Philippe Weller* (Heidelberg) and *Karsten Nowrot* (Hamburg) as well as lawyers Dr. *Birgit Spießhofer* and Prof. Dr. *Remo Klinger* (both from Berlin). You may find the full programme and further information here.