Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2015: Abstracts

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

F. Garcimartin, **The situs of shares, financial instruments and claims in the Insolvency Regulation Recast: seeds of a future EU instrument on rights in rem?**
The location of intangible assets is a key issue for the application of certain Private International Law rules. At the EU level, Regulation 1346/2000 on Insolvency proceedings contains three uniform rules on location of assets, one of which deals with claims (Art. 2 (g) III 2000 EIR). The recast of this instrument (Regulation 2015/84) has extended this provision, which now includes eight different rules (Art. 2 (9) EIR Recast). The purpose of this paper is to analyze one set of these rules, specifically those laid down for intangible assets: shares and other financial instruments, claims and cash accounts. The relevance of this analysis is twofold. From a positive-law perspective, it may be useful to resolve some of the problems that the interpretation and application of Article 2 (9) EIR Recast may give rise to in practice. From a normative perspective, Article 2 (9) EIR Recast may be the seed of a future EU instrument on the law applicable to rights in rem. This provision establishes a detailed list of common rules on location of assets. Should the future instrument take as a starting point the traditional conflict of laws rule in this area, i.e. the *lex rei sitae*, this list would be the primary reference to determine the situs of most assets.

M. Lehmann, **A Gap in EU Private International Law? OGH and BGH on the Law Applicable to Liability for Asset Acquisition and**

Takeover of a Commercial Enterprise

The contribution discusses a recent tendency in some Member States to avoid applying European conflict laws to certain aspects of the law of obligations. In question are national rules under which persons who take over the entire property or the commercial business of another are liable for the latter's debt. The highest courts in civil matters in Germany and Austria have decided that these issues are not covered by the Rome Convention of 1980, and have instead submitted them to autonomous national conflict rules. An important strand of the literature wants to transfer this solution to the Rome I and II Regulations. It must be borne in mind, however, that both regulations establish a comprehensive regime for the law of obligations. They do not leave any room for national conflict rules, save for those areas that are expressly exempt from their scope of application. A solution must therefore be found within the regulations themselves. It is suggested here that the type of liability in question could be characterized as an overriding mandatory rule. Looking to the future, it would be preferable if the EU legislator introduced specific conflict rules to address this problem.

C. Kohler, **Special Rules for State-owned Companies in European Civil Procedure? (ECJ, 23.10.2014 – Case C-302/13 – flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautiska lidosta Riga VAS, Air Baltic Corporation AS)**

In Case C-302/13, *flyLAL-Lithuanian Airlines*, the ECJ held that an action for damages resulting from the alleged infringement of EU competition rules by two Latvian companies, *Starptautiska Lidosta Ri-ga* and Air Baltic, was civil and commercial in nature. It was irrelevant in that respect that the in fringement was said to result from the determination by the defendant *Starptautiska Lidosta Ri-ga* of airport charges pursuant to statutory provisions of the Republic of Latvia. Equally irrelevant was the fact that the defendant companies were wholly or partly owned by that Member State. Furthermore, the ECJ specified the grounds which would bar the recognition

and enforcement of a judgment ordering protective measures as being contrary to the public policy of the Member State addressed. The Court ruled that the mere invocation of serious economic consequences for state-owned companies do not constitute such grounds. The author welcomes the judgment as it clarifies that there is no special regime for state-owned companies in European civil procedure. He adds that the ECJ's opinion 2/13 on the accession of the EU to the European Convention of Human Rights, given shortly after the judgment in Case C-302/13, does, in principle, not affect the relevance of the public policy exception in Regulation Brussels I.

F. Wedemann, **The Applicability of the Brussels Ia Regulation or the European Regulation on Insolvency Proceedings in Company Law Liability Cases**

The ECJ's *G.T. GmbH* decision is important for European civil procedure law as it has significant implications for the demarcation between the scopes of the Brussels Ia-Regulation and the European Regulation on Insolvency Proceedings in company law liability cases. The author analyses these implications. First of all, she identifies and critically discusses the general guidelines established or confirmed by the decision: (1) The fact that a liability provision allows an action to be brought even where no insolvency proceedings have been opened, does not per se preclude such an action from being characterized as falling within the scope of Art. 3 (1) European Regulation on Insolvency Proceedings. Rather, it is necessary to determine whether the provision finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings. (2) In cases where no insolvency proceedings have been opened, actions fall within the scope of the Brussels Ia Regulation. (3) Cases where insolvency proceedings have been opened, but the action in question is brought by someone other than the liquidator, require a differentiating treatment. (4) The defendant's domicile is irrelevant for the applicability of Art. 3 (1) European Regulation on Insolvency Proceedings. (5)

The jurisdiction based on Art. 3 (1) European Regulation on Insolvency Proceedings is exclusive. Subsequently, the author focusses on German company law and its broad range of liability provisions and examines the consequences of *G.T. GmbH* for jurisdiction in proceedings based on these provisions.

F. Temming, **International jurisdiction over individual contracts of employment – How wide is the personal scope of Art. 18 et sqq. of the Brussels I Regulation?**
This case note is about the question whether or not independent sales representatives can be considered as employees for the purposes of Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC). This could be the case if an individual sales representative renders his services only to one principal and does not employ personnel on his own account. The resulting economic dependence vis-à-vis his principal could call for the jurisdictional protection that is granted by Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC) to individual employees. Whereas the Regional Higher Labour Court of Düsseldorf (*LAG Düsseldorf*) denied the analogous application of Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC) in favour of the claimant, there is a good case that – in light of recent judgements – the Court of the European Union could consider individuals, who are economically dependant on their partner of a service contract, to fall under its flexible autonomous concept of "employee", if the degree of subordination due to a right of direction was comparable to the one of an employee. If this case is referred to the Court of the European Union, it will have the potential of becoming a landmark case.

M. Fornasier, **The law applicable to employment contracts and the country of closest connection under Art. 8(4) Rome I**
In its *Schlecker* judgment (Case C-64/12), the European Court of Justice shed some light on the escape clause in the choice-of-law rule regarding employment contracts (Art. 8 (4) Rome I

Regulation). The Court held that the employment relationship may be more closely connected with a country other than that in which the habitual workplace is located even where the employee carries out the work habitually, for a lengthy period and without interruption in the same country and where, thus, the territorial connection of the employment contract with the habitual workplace is particularly strong. The following case note analyses to what extent the ruling is reconcilable with the principle of favor laboratories and whether it is consistent with the case law of the ECJ relating to the posting of workers. Moreover, the paper examines the impact of the judgment on mechanisms of collective labor law such as collective bargaining and employee participation.

J. Schilling, **The International Private Law of Freight Forwarding Contracts**

After having taken position to charter parties in its ICF-decision already, the ECJ now comments the international private law of freight forwarding contracts. In its *Haeger & Schmidt* ruling the court clarifies that those contracts, which exclusively state an obligation to arrange for transport cannot be considered contracts of carriage in the meaning of Art. 4 para. 4 Rome Convention or Art. 5 para. 1 Rome I Regulation. However a freight forwarding contract falls within the material scope of the special rule for transport contracts, if its principal purpose is the transport as such of the goods. This can be considered, if the forwarding agent is performing the transport partially or entirely by himself, or in case of freight forwarding at a fixed price. The question of qualification will particularly be relevant in cases to which the Rome I Regulation applies, because the differences between the conflict of laws regime for general contracts and that for contracts of carriage have increased. As the uniform transport law does generally not apply to freight forwarding contracts, the recent ECJ decision on the international private law of those contracts appears even more important.

J. Hoffmann, **Duties of disclosure towards contracting parties without knowledge of the contract language**
The judgement of the German Federal Labour Court discussed in this article had to determine the legal consequences of the conclusion of a standard contract with an employee who had no knowledge of the language of the contract. Although neither the validity of the contract nor the inclusion and validity of the standard terms are in question, the information imbalance should be addressed by accepting a precontractual duty to explain the contract contents in appropriate cases. Such a duty should specifically be acknowledged if the precontractual negotiations were conducted in a different language. It can also be endorsed as a contractual obligation based on the fiduciary duty of the employer towards his employee as long as the language deficit remains.

M. Zwickel, **Prima facie evidence between lex causae and lex fori in the area of the French Road Traffic Liability Act (Loi Badinter)**
The decision of the Regional Court Saarbrücken, which had already given rise to a preliminary ruling by the ECJ regarding the "effective service of notice of proceedings on the claims representative of a foreign insurer", relates to the problem of the usability of German prima facie evidence in a case to be decided in accordance with French law. The jurisprudence of the French *Cour de cassation* does not permit any reduction in the standard of proof within the framework of road traffic liability. Adducing the prima facie evidence – contrary to French civil law – therefore potentially leads to a divergence of procedural and substantive law. The decision makes it especially clear that prima facie evidence within and outside of the scope of Art. 22 (1) Rome II-Regulation can sensibly only be treated in accordance with the *lex causae*.

M. Stürner, **Enforceability of English third party costs order**
The German *Bundesgerichtshof* (*BGH*) had to deal with an application to declare enforceable a third party costs order

issued by the English High Court in the context of an insolvency proceeding. The *BGH* left open the question whether that decision falls within the scope of the Brussels I Regulation or the Insolvency Regulation as both regimes should not leave any gap between them and also provide identical grounds for refusing recognition. On that basis, the *BGH* held that the third party costs order did not violate German public policy. The author generally agrees with the decision.

H. Roth, **Actions to oppose enforcement and set-off**
Due to the close connection with the enforcement procedure, the exclusive jurisdiction of Article 22 (5) Lugano Convention of 2007 includes actions to oppose enforcement pursuant to § 767 of the German Code of Civil Procedure (*ZPO*).
Contrary to the view of the Federal High Court of Justice (BGH), § 767 ZPO can be applied even if the court seized would not be internationally competent in case of an independent legal assertion of the counterclaim.
The court is able to assess preliminary questions, which were submitted in defense, regardless of the restrictions by the law relating to jurisdiction. This principle also applies to the set-off.

H. Odendahl, **The 1961 Hague Protection of Minors Convention – How vital is the fossil?**
The Austrian Supreme Court of Justice had to decide upon the recognition of a Turkish court decision on the custody of a child of Turkish nationality living in a foster family in Austria, which was based on Art. 4 of the 1961 Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants. Recognition was rejected for reasons of public policy (Art. 16). The following article discusses the remaining scope of this outdated convention and the impact of its application in relation to its successor, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures

for the Protection of Children, as well as the 1980 Luxembourg European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children.