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.