

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2017: Abstracts

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

D. Coester-Waltjen: Fighting Child Marriages - even in Private International Law

The article describes the newly enacted German law against “child marriages” and analyses the critical points. This law raises the minimum marriage age to 18 years without any option for younger persons to conclude a valid marriage. The former possibility of a dispensation by the family court has been abolished. Even more important and critical at the same time are the new provisions with regard to cases where foreign law governs the ability to marry. Despite the principal application of the spouses’ national law, German law will always govern the question of the minimum marital age. This applies to marriages formed in Germany as well as to those already validly concluded elsewhere. Thus, irrespective of the applicable national law of the spouses a marriage cannot be concluded in Germany by persons who are younger than 18. If such a marriage has been formed nevertheless, it will be null and void from the beginning if one spouse was younger than 16 at the time of the marriage. If the spouses had attained the age of 16, but at least one of them was younger than 18, the marriage will be voidable (and must be declared void) in Germany. This is true also for heterosexual marriages of minors concluded elsewhere and valid under the otherwise applicable law. German law invalidates these marriages either directly (one spouse under 16) or through annulment proceedings (one spouse over 16 but under 18). The law provides only few exceptions and applies to all persons under 18 at the time the new law entered into force.

C. F. Nordmeier: The German Law on the Modification of Rules in the Area of Private International Law and Private International Procedural Law - New Provisions for Cross-Border Civil Proceedings

By the recently enacted law on the modification of rules in the area of Private

International Law and Private International Procedural Law the German legislator created several alterations for civil procedures involving crossborder elements. The present contribution critically analyses the new rules. As far as service is concerned, the prohibition to demand the designation of an authorized recipient within the scope of application of the EU Service Regulation, the competence of judicial officers to handle incoming requests for service and new one-month periods for certain procedural measures are discussed. Also, the annulment of a European order for payment in the event that the applicant fails to indicate the competent court for the adversary proceedings is examined - as well as the possibility for the States of the Federal Republic of Germany to concentrate proceedings under the European Small Claims Regulation before certain courts. Finally, the consequences of the continued non-admission of judicial assistance for pre-trial discoveries in Germany are subject to discussion.

F. Maultzsch: International Jurisdiction and Jointly Committed Investment Torts (Art. 5 No. 3 Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 Brussels Ibis Regulation)

The German Federal Supreme Court (BGH) has denied an attribution of acts among joint participants of cross-border investment torts for the purposes of Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels *Ibis* Regulation. The judgment is based on a broad reading of the Melzer-decision of the CJEU. This article gives a critical assessment of the BGH's judgment. First of all, the Melzer-decision with its restrictive position as to attribution of tortious acts seems to be problematic in itself. Furthermore, the BGH does not consider that the case law of the CJEU has been developed for situations different from those to be judged by the BGH. The issue of attribution of tortious acts under Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels *Ibis* Regulation should be approached in a nuanced way that accounts for the nature of the tort in question. This may also include a resort to the *lex causae* for specific protective laws (*Schutzgesetze*). In the case at hand where a foreign financial service provider had relied purposefully on acts of procurement carried out by a third party in Germany, jurisdiction of the German courts should have been approved under Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels *Ibis* Regulation.

W.-H. Roth: Private international law and consumer contracts: data

protection, injunctive relief against unfair terms, and unfairness of choice-of-law provisions

In its Amazon judgment, C-191/15, the European Court of Justice deals with three conflict-of-laws issues. Firstly, it determines the international applicability of data protection laws of the Member States in the light of Directive 95/46/EEC: A Member State may apply its law to business activities of an out-of-state undertaking directed at its territory if it can be shown that the undertaking carries out its data processing in the context of the activities of an establishment situated in that Member State. Secondly, it holds that an action for an injunction directed against the use of unfair terms in general terms and conditions, pursued by a consumer protection association, has to be classified as non-contractual. The law applicable to the action and the remedy has to be determined on the basis of Article 6 (1) of the Rome II Regulation, being related to an act of unfair competition, whereas the (incidental) question of unfairness of a specific term in general terms and conditions shall be classified as a contractual issue and has to be judged on the basis of the law applicable to contracts according to the Rome I Regulation. Thirdly, the Court holds that the material scope of Directive 93/13/EEC extends to choice-of-law clauses in pre-formulated consumer contracts. Such a choice-of-law clause may be considered as unfair if it leads the consumer into error as far as the laws applicable to the contract is concerned.

***C. Thomale*: Refusing international recognition and enforcement of civil damages adjunct to foreign criminal proceedings due to irreconcilability with a domestic civil judgment**

The German Supreme Court refused to enforce a civil claim resulting from criminal proceedings seated in Italy for reasons of irreconcilability with a German judgment given between the same parties. The case illustrates the considerable legal uncertainty that persists with the application of this ground for refusal of recognition and enforcement. The paper argues for a narrow interpretation in order to strengthen free movement of judgments within the European judicial area.

***U. P. Gruber*: Recognition of provisional measures under Brussels IIa**

In Purrucker, the ECJ established criteria for the recognition of provisional measures in matters of parental responsibility. Pursuant to the ECJ, if the court

bases its jurisdiction on Art. 8 to 14 of the Brussels IIa Reg., the judgement containing provisional measures will be recognized and enforced in other Member States by way of Art. 21 et seqq. of the Regulation. If, however, the judgement does not contain an unambiguous statement of the grounds in support of the substantive jurisdiction of that court pursuant to Art. 8 to 14 Brussels IIa, the judgement does not qualify for recognition and enforcement under Art. 21 et seqq. Nevertheless, recognition and enforcement of the judgement are not per se excluded in this case. Rather, it has to be examined whether the judgement meets the prerequisites of Art. 20 Brussels IIa. If this is the case, the judgement can be recognized by use of other international instruments or national legislation. In a new decision, the Bundesgerichtshof applied this two-step-approach established by the ECJ to a Polish judgement, consequently denying any possibility to recognize the Polish judgement in Germany.

W. Hau: Enforcement of penalty orders protecting parental rights of access within the European Union

A dispute over the enforcement in Finland of a Belgian penalty order protecting parental rights of access has uncovered a loophole in the European law of international civil procedure: The Brussels I resp. Brussels Ibis Regulation deals with the preconditions of the enforcement of foreign penalty orders (especially as regards the final determination of the payable amount), but only in the context of civil and commercial matters, excluding family matters. The Brussels IIbis Regulation, on the other hand, covers disputes over parental rights of access but remains silent about penalty orders. The CJEU proposes an appropriate solution, bridging the gap in the regulations.

R. Geimer: Ordre public atténué de la reconnaissance in adoption law

The relevance of timing by reason of recognizing child adoptions of foreign states despite violation of public order in the original proceedings.

C. A. Kern: The enforceability of foreign enforcement orders arising from family relationships

In Germany, various regimes govern the enforceability of foreign enforcement orders arising from family relationships. The traditional way is to have the foreign enforcement order declared enforceable on the basis of adversarial proceedings. Various supranational texts and international treaties provide for a more

advanced solution under which the foreign enforcement order is declared enforceable *ex parte*. The most progressive solution is automatic enforceability. Moreover, depending on the applicable regime, the remedies and the requirements governing their admissibility differ. Two recent decisions of the German Federal Supreme Court (Bundesgerichtshof) illustrate how complex the situation is. It is advisable to unify the applicable procedural rules at least insofar as the complexity is the consequence of diverging national rules.

R. Schaub: Traffic Accidents with an International Element: The Complex Interaction of European and National Rules in two Cases from the Austrian Supreme Court

Traffic accidents with an international element are common occurrences but still raise a lot of questions as to the applicable law. In Europe, different sets of rules have been created to facilitate the compensation of victims in such cases. The complex interaction of EU and national rules on substantive law as well as private international law can be seen in two cases from the Austrian Supreme Court.

M. Andrae: Again on the term „obligations arising out of matrimonial property regimes“

The article deals with the characterization of claims between spouses living apart, which concern the joint property marital home and its financing through a credit. It involves: (1) compensation between spouses, in case they are jointly and severally liable for their obligations from the contract; (2) reimbursement of expenses for the matrimonial home, in case of the sole use of the matrimonial home by one of the spouses and (3) cases in which one spouse may demand from the other compensation for use of the matrimonial home. The main problem is whether this claim can be subsumed as “obligations arising out of matrimonial property regimes” with the consequence that it would be excluded from the scope of the Rome I and Rome II Regulation. For this the article presents a number of arguments. Finally, a solution will be discussed, insofar as the Brussels *Ibis* Regulation for the jurisdiction and the Rome I and Rome II Regulations referring to conflict-of-laws rules are not applicable.

L. M. Kahl: Differences in dealing with foreign law in German and Italian jurisprudence

The article compares two cases in which the German Federal Court of Justice

(BGH) and the Italian Supreme Court had to decide on the requirements for dealing with foreign law. The BGH only reviews whether the court of lower instance correctly determined the foreign law under Section 293 German Code of Civil Procedure (ZPO), whereas the Corte di Cassazione reviews if the court correctly applied foreign law under Art. 15 Italian law on Private International Law (legge numero 218/1995). In practice, the criteria set out by the BGH provide for a more in-depth review of judgments on foreign law than the criteria of the Corte di Cassazione. The BGH's approach on review of judgments on foreign law promotes international harmony of judgments.