Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2018: Abstracts

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

S.H. Elsing/A. Shchavelev: **The new DIS Arbitration Rules 2018**

On 1/3/2018, the new arbitration rules of the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit e.V. – DIS) came into force. The revision process took almost two years and resulted in a comprehensive overhaul of the former arbitration rules which date back to the year 1998. The new rules combine well-tried elements of the former regime with much-anticipated improvements which will help the DIS and the arbitration practice in Germany in general to keep up with the changes and developments in domestic and international arbitration. Notably, the DIS now has two authentic versions of its arbitration rules: a German and an English one. The most relevant amendments include (1) several provisions aimed at enhancing the efficiency of the proceedings and promotion of early settlements; (2) the foundation of a new body, the Arbitration Council, which will now decide, inter alia, on the challenge and removal of arbitrators, the arbitrators’ fees and the amount in dispute; and (3) new comprehensive provisions on consolidation, multi-party and multi-contract proceedings and the joinder of additional parties. In addition, the DIS will now be more closely involved in the administration of the arbitration after the constitution of the arbitral tribunal. With these amendments, the new arbitration rules will arguably become more accessible and thus more appealing to foreign users and will help the DIS to expand its position beyond the German speaking countries towards a truly international arbitral institution.

E. Jayme: **Draft of a German statute against the validity of polygamous marriages celebrated abroad – critical remarks**

The draft of a German statute against polygamous marriages does not take into account the bilateral treaty on social security between Germany and the Kingdom of Morocco, which presupposes the validity of polygamous marriages: both

widows share the social security benefits. In view of current court practice there is no need for a German statute, which in situations in which both spouses have their habitual residence in Germany, provides for court action in order to declare the second marriage null and void. The general clause of public policy (art. 6 of the Introductory Act to the German Civil Code [EGBGB]) seems to be sufficient for dealing with polygamous marriages.

A. Wolf: **Jurisdiction of German Courts for cartelists' recovery claims due to a joint and several liability**

In its decision, the Higher Regional Court Hamm determined under § 36 Sec. 1 No. 3 ZPO on the so-called „Schienenkartell" that the German District Court Dortmund has international jurisdiction for recovery claims between jointly and severally liable cartelists from Germany, Austria and the Czech Republic. Therefor it applied Art. 8 No. 1 Brussels I recast together with German rules on subject matter jurisdiction and interpreted § 32 ZPO following the Court of Justice in its CDC-judgment with regard to Art. 7 No. 2 Brussels I recast.

W. Wurmnest/M. Gömann: **Shaping the conflict of law rules on unfair competition and trademark infringements: The "Buddy-Bots" decision of the German Federal Supreme Court**

On 12 January 2017 the German Federal Supreme Court (Bundesgerichtshof) rendered its judgment on the unlawful distribution of supporting gaming software – so-called "Buddy-Bots" – for the multiplayer online role-playing game "World of Warcraft". This article takes a closer look at the application of Art. 6 and Art. 8 Rome II Regulation by the Supreme Court. The authors argue that the principle of uniform interpretation could be threatened by the Court's tendency to align its reading of European conflict of law rules with the interpretation of the "old" German law now superseded by the Rome II Regulation, especially with regard to the market effects principle under Art. 6(1) Rome II Regulation.

O.L. Knöfel: **Delegated Enforcement vs. Direct Enforcement under the EU Maintenance Regulation No. 4/2009 – The Role of Central Authorities**

The article reviews a decision of the European Court of Justice (Case C-283/16), dealing with questions of international judicial assistance arising in enforcement procedures under the European Maintenance Regulation No. 4/2009. The Court held that a maintenance creditor is entitled to seek cross-border enforcement

directly in a court, without having to proceed through the Central Authorities of the Member States involved. National regulations such as the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, demanding applications to be submitted to the Central Authority of the requested Member State, must be interpreted in the light of the European Maintenance Regulation. The author analyses the relevant issues of cross-border recovery of maintenance and explores the decision's background in European Union law.

R.A. Schütze: **Cautio iudicatum solvi in case of uncertainty of seat of companies**

110 German Code of Civil Procedure requires plaintiffs with an ordinary residence or seat (if a company or other legal entity) outside the European Union or the European Economic Area (EWR) to provide – on request of the defendant – a cautio iudicatum solvi. In two judgments – commented below – the Bundesgerichtshof and the Oberlandesgericht Düsseldorf have decided on the ratio of security for costs under German law and on important issues of proof in case that the seat of the plaintiff (inside or outside EU or EWR) is contested. The Oberlandesgericht Düsseldorf qualifies the right of the defendant to demand security of cost from the plaintiff as an exceptio for which the burden of proof lies with the defendant. But as the plaintiff is more familiar with its organization and activities it has a secondary burden of asserting relevant facts (sekundäre Vortragslast). However, this does not change the burden of proof.

L. Kopcznyski: **Confusion about the reciprocity requirement**

According to domestic German law, the recognition and enforcement of foreign judgments is dependent on the requirement of reciprocity (sec. 328 (1) no. 5 of the German Code of Civil Procedure). It is, however, not an easy task to assess whether a foreign state would recognise a German judgment in similar circumstances. Courts regularly struggle to apply correctly the specific prerequisites which have to be met in this regard. A recent judgment of the Regional Court in Wiesbaden demonstrates that. In its decision, the court refused to enforce a Russian judgment because it set the bar for reciprocity far too high.

M. Gebauer: **Compulsory recognition procedure according to Section 107 FamFG in order to determine the validity of a divorce registered at a foreign consulate located in Germany**

German law requires that foreign decisions (originating beyond the EU) affecting the status of a marriage, e.g. divorce judgements, are subject to a compulsory recognition procedure (Anerkennungsverfahren), according to paragraph 107 of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction (FamFG). This requires a free-standing application by an interested party to the relevant state authority which is responsible for determining the application. The decision, rendered by the Court of Appeal (Oberlandesgericht) in Nuremberg, reinforced long-standing judicial reasoning, albeit made with reference to a previous similarly worded statute, that the recognition procedure is also required where a foreign diplomatic mission situated in Germany is responsible for an official act potentially affecting the parties' marriage in Germany. The Court of Appeal in Nuremberg correctly reasoned by way of analogy that while the paragraph does not specifically deal with circumstances where a divorce is registered by a foreign diplomatic mission situated in Germany, the legislator had not intended for the previous judicial approach to be reviewed. Thus, courts should continue to treat divorces in which a foreign diplomatic mission situated in Germany has been involved in the same way as judgements issued in foreign countries. This meant that the local court had no jurisdiction to determine the validity of a divorce registered at the Thai consulate located in Frankfurt. An application to the relevant state authority in terms of the compulsory recognition procedure must first be disposed of before matters can be considered by the local court

K. Siehr: **„Wrongful Retention" of a Child According to Article 3 of the Hague Abduction Convention of 1980**

A couple habitually resident in South Africa had two children living with them. The couple separated but had joint custody for the children. The mother travelled to Senegal with the children but did not return them until January 3, 2016. In August 2016 mother and children took refuge in Germany. On January 2, 2017 the father in South Africa asked German authorities to return the wrongfully retained children to South Africa. The court of first instance (Amtsgericht Pankow-Weißensee) refused to do so because the children were not wrongfully retained because Senegal is no State Party of the Hague Abduction Convention of 1980. The Court of Appeal in Berlin (Kammergericht) reversed the decision of first instance and correctly interpreted Art. 3 Hague Abduction Convention as not requiring abduction wrongfully committed in a State Party. According to Art. 4

Hague Abduction Convention, the abducted or retained child must have had his/her habitual residence in a State Party immediately before the removal or retention. Art. 3 and 4 Hague Abduction Convention are discussed and analyzed, also with respect to the more restricted wording of Art. 2 No. 11 Hague Custody Convention of 1996. Finally, it is stressed that it does not matter whether the wrongfully abducted child spent some time in States not being State Parties to the Hague Abduction Convention as soon as the one year time limit for the application of return (Art. 12 sec. 1 Hague Abduction Convention) has been met.

A. Piekenbrock: **Jurisdiction for damage claims regarding forum shopping in European Insolvency Law: commentaries on Court of Cassation, Social Chamber, 10.1.2017**

The paper deals with a decision delivered by the French Court of Cassation regarding damage claims within the context of the initiation of English administration proceedings for all EU companies of the Canadian Nortel Networks Group including the French Nortel Networks SA in January 2009. The Social Chamber has come to the conclusion that English Courts have exclusive jurisdiction regarding damage claims of a former employee of the French company based on alleged falsehood by the opening of the main insolvency proceedings in England. The decision emphasises correctly the binding force of the English opening decision. Yet, the reasoning seems erroneous insofar as the claim is not directed against the insolvent company itself or its liquidator, but rather against another company of the same group (the British Nortel Networks UK Limited) and the insolvency practitioners involved (Ernst & Young). At least the Court of Cassation as a court of last resort should have referred the case to the C.J.E.U. pursuant to Art. 267(3) TFEU.

K. Lilleholt: **Norwegian Supreme Court: The Law of the Assignor's Home Country is Applicable to Third-Party Effects of Assignments of Claims**

In its judgment of 28/6/2017, the Norwegian Supreme Court held that the effects in relation to the assignor's creditors of an assignment of claims by way of security was governed by the law of the assignor's home country under Norwegian choice of law rules. This issue has not been dealt with in Norwegian legislation, and earlier case law is sparse and rather unclear. Application of the law of the assignor's home country has been recommended by legal scholars, but these views are not unanimously held. The Supreme Court's decision is in line

with the later proposal for an EU regulation on the law applicable to the third-party effects of assignments of claims. The proposed regulation will not be binding on Norway, as it will not form part of the EEA agreement. This is also the case for other EU instruments regarding private international law, like the Rome I and Rome II Regulations and the Insolvency Regulation. In several recent judgments, however, the Supreme Court has stated that EU law should provide guidance where no firm solution can be found in Norwegian choice of law rules (IV.). The case also raised a jurisdiction issue. The Supreme Court found that the insolvency exception in the Lugano Convention Art. 1(2)(b) applied and that Norwegian courts had jurisdiction because the insolvency proceedings were opened in Norway. This article will record the facts of the case (II.) and present the jurisdiction issue (III.) before the Supreme Court's discussion of the choice of law rule is presented and commented upon (IV.).

K. Thorn/M. Nickel: **The Protection of Structurally Weaker Parties in Arbitral Proceedings**

In its judgment, the Austrian Supreme Court of Justice (OGH) ruled on the legal validity of an arbitration agreement between an employer based in New York and a commercial agent based in Vienna acquiring contracts in the sea freight business. The court held that the arbitration agreement was invalid and violated public policy due to an obvious infringement of overriding mandatory provisions during the pending arbitral proceedings in New York. The authors support the outcome of the decision but criticize the OGH's reasoning that failed to address key elements of the case. In the light of the above, the article discusses whether the commercial agent's compensation claim relied on by the court constitutes an overriding mandatory provision although the EU Commercial Agents Directive does not cover the sea freight. Further, the article identifies the legal basis for a public policy review of arbitration agreements and elaborates on the prerequisites for a violation of public policy. In this regard, the authors argue that arbitration agreements can only be invalidated due to a violation of substantive public policy if a prognosis shows that it is overwhelmingly likely and close to certain that the arbitral tribunal will neglect applicable overriding mandatory provisions.