Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2018: Abstracts

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

D. Martiny: **Virtual currencies, particularly Bitcoins, in private international law and in the international law of civil procedure**

Virtual currencies like Bitcoins are substitute currencies that are not issued by a state and that are limited in supply. Whereas the discussion in substantive law on the classification of virtual currencies and Distributed Ledger Technology is in full progress, there is no established approach in private international law as to blockchain, smart contracts or tokens. Also, Initial Coin Offerings (ICOs) have to be classified. An examination of these digital techniques leads to a classification as a contractual obligation. Contracts which have as their object virtual currency units are, in general, subject to the Rome I Regulation. Currency is mainly a matter of the law governing the contract. Domestic finance market restrictions under the German Banking Act (Kreditwesengesetz – KWG) can intervene as overriding mandatory rules under Article 9(2) Rome I Regulation. Additionally, foreign rules may be taken into account (Article 9(3) Rome I Regulation). Jurisdiction for contractual matters is determined by the place of performance or the place of the harmful event (Article 7 No. 1, 2 Brussels I Recast).

A.S. Zimmermann: **Blockchain-Networks and Private International Law – or: the Savignian seat-doctrine and decentralized legal relations**

The ubiquitous availability of the world wide web fundamentally changed international commerce. The legal system has proven to be surprisingly flexible in dealing with the issue of digitalisation and has hence provided reasonable solutions for several problems of the modern era. The field of Private International Law is particularly challenged by the decentralism of the digitalised world. However, as the case of blockchain-networks illuminates, the classic Savignian paradigm of Private International Law is capable of coping with new phenomena and allocating them to an appropriate legal framework.

M. Lieberknecht: **The blocking regulation: private international law as an instrument of foreign policy**

The EU has updated its blocking statute in order to shield European businesses from the extraterritorial reach of the reactivated U.S. secondary sanctions against Iran. The present article provides an analysis of the blocking regulation's impact on matters of private law. Concerning the issue of overriding mandatory provisions, the Regulation adds little but emphasis to the pre-existing approach. It prohibits EU-based parties to comply with the U.S. sanctions, thereby forcing them into a "catch-22" situation, which bears a particular risk of managerial liability. Indirectly, this prohibition produces lopsided results under substantive German law, while potentially nullifying prevalent contractual solutions. Finally, the article assesses the legal nature and substantive scope of the clawback provision which allows for the recovery of sanction-related damages. It concludes that, while such a claim may have some potential to trigger litigation between private parties, it fails to fulfil its actual purpose, which is to neutralize the overall effects of U.S. sanctions. The same holds true for the Regulation as a whole: It not only offers weak protection, but exposes private parties to various additional legal risks and restraints.

S. Bajrami/M. Payandeh: **The Recognition of Foreign Judgments under Private International Law in Light of the Duty of Non-Recognition under International Law**

For the recognition of foreign judgments under private international law, the question of the legality of the foreign judgment under international law is usually irrelevant. Private international law attributes recognition to foreign judgments based on factual and effective sovereign power regardless of whether the judgment has been issued by a state that is internationally not recognized or whether the judgment constitutes the exercise of jurisdiction over a territory over which the state may not exercise jurisdiction. This approach under private international law is, however, called into question when the foreign judgment constitutes an exercise of jurisdiction which is the consequence of a violation of the prohibition of the use of force under international law, as in the case of the illegal annexation of Crimea and Sevastopol by Russia. In such cases, customary international law constitutes a duty of non-recognition of the illegal situation. The present contribution analyses this conflict from the perspective of international law and comes to the conclusion that the recognition of foreign judgments, in

general, is in conformity with the duty of non-recognition under international law.

M. Gebauer: **Classification of section 1371 para 1 of the German Civil Code as a rule falling within the scope of succession law in terms of the EU Succession Regulation and the consequential classification of the rule under the German-Turkish bilateral succession treaty**

The CJEU recently classified section 1371 para 1 of the German Civil Code as a rule falling within the scope of inheritance law in terms of the European Succession Regulation. The article analyses the consequences of this classification beyond EU law for cases governed by the German-Turkish bilateral succession treaty and its interpretation by German courts. Presumably, German courts will feel obligated to classify the German substantive rule in the same way under the bilateral succession treaty when it has to be applied in combination with EU conflict rules on matrimonial property regimes.

J.A. Bischoff: **Much ado about nothing? The future of investment arbitration after Achmea v. Slovakia**

In his judgment dated March 6, 2018, the CJEU held investment arbitration proceedings incompatible with Art. 267, 344 TFEU where they arise from a bilateral investment treaty between two member states and where the seat of the arbitration is located in the European Union. The court did not concur with the Opinion of the Advocate General dated September 19, 2017. Although the judgment will promote legal certainty as far as intra-EU bilateral investment treaties are concerned, it creates new questions for the Energy Charta Treaty as well as bilateral investment treaties with third countries. Where an arbitration's seat is located outside the EU or where the ICSID Arbitration Rules apply, the judgment can create a divergent execution practice.

D. Looschelders: **International jurisdiction for the termination of co-ownership in cases regarding matrimonial property regimes**

The ECJ has recently decided over the international jurisdiction for the termination of co-ownership in undivided shares in two cases. In the Komu case, which concerned a legal dispute between the co-owners of two immovable properties located in Spain with regard to the termination of the co-ownership, the ECJ affirmed the exclusive jurisdiction of the courts of the Member State in which the immovable properties are situated. In the Iliev case, however, the ECJ

concluded that a dispute between former spouses relating to the division of a movable property acquired during the marriage concerns „matrimonial property regimes“ and therefore, according to Art. 1(2)(a) Brussels Ibis Regulation, does not fall within the scope of the Brussels Ibis Regulation. The article analyses the decisions and outlines the tension between the law of immovable property and the law of matrimonial property. The future legal situation according to the European Regulation on Matrimonial Property Regimes and the parallel problem under the European Succession Regulation are discussed, too. Overall, the author notes a tendency of the European conflict of laws Regulations to give precedence to the law applicable to matrimonial property regimes and succession over the application of the law of the Member State in which the property is located.

A. Wolf: **Arbitration clauses and actions for cartel damages before German courts**

The German District Court Dortmund dismissed an action for damages caused by an infringement of Art. 101 TFEU in the context of the so-called „Schienenkartell“. The Court found that the arbitration agreements which the parties had agreed on during their contractual relationship covered such actions so that German courts had no jurisdiction on this matter. Therefore, the Court interpreted the arbitration agreements under German law in a broad sense. Furthermore, it denied to apply the EU principle of effectiveness relating to the exercise of claims for damages in national procedures. With regard to arbitration clauses it also rejected to follow the Court of Justice in its CDC-judgment on a narrow interpretation of jurisdiction clauses in terms of Art. 25 Brussels I recast.

L. Rademacher: **Procedural Consumer Protection Against Attorneys**

In a world of open societies, legal advice in cross-border cases is in constantly increasing demand by both businesses and consumers. Skilful counselling on foreign law, however, can prove difficult to obtain from domestic attorneys, especially for consumers. In consequence, consumers may decide to retain a lawyer educated and located in the relevant foreign legal system. When problems arise in the relationship between the domestic consumer client and the attorney situated abroad, the internationally competent court has to be determined. In favour of the consumer client, the consumer protection rules of international procedural law apply under the territorial-situational requirements of Art. 15 sec. 1 lit. c Brussels I Regulation 2001 / Art. 17 sec. 1 lit. c Brussels Ibis Regulation

2015 / Art. 15 sec. 1 lit. c Lugano Convention 2007. This case note reviews two judicial rulings – one by the Higher Regional Court Düsseldorf, the other by the Federal Court of Justice – dealing with these requirements in light of the guidelines provided by the European Court of Justice. The pivotal issues concern an attorney's activities in the state of the consumer client's domicile falling within the scope of a contract between the attorney and a client as well as an attorney's direction of activities to the state of the client's domicile.

H. Roth: **Accumulative basic requirements of the recognition of foreign decisions according to § 109 sec. 1 no. 2 FamFG are an orderly notification and the possibility to arrange an effective defense of the defendant**

The Oberlandesgericht (Higher Regional Court) Stuttgart interprets § 109 sec. 1 no. 2 FamFG (= Act on the Procedure in Family Matters and the Matters of Non-contentious Jurisdiction) in accordance with § 328 sec. 1 no. 2 ZPO (= German Civil Procedure Code) and therefore in conscious deviation to the basic assumptions of the European secondary law (e.g. Art. 45 sec. 1 lit. b Brussels Ia Reg.). Accumulative basic requirement of the recognition of foreign decisions according to § 109 sec. 1 no. 2 FamFG are an orderly notification and the possibility to arrange an effective defense of the defendant.

P. Ostendorf: **Requirements for a genuine international element in the event of a choice of law in accordance with European Private International Law**

In accordance with Art. 3 (3) Rome Convention (respectively its successor instrument, the Rome I Regulation), the parties can, in case of a purely domestic contract, not escape the mandatory provisions of their home jurisdiction by way of either the choice of a foreign law and/or a foreign forum. English courts recently had to determine whether interest rate swaps concluded by an Italian bank and an Italian municipality (providing for the application of English law and an English forum) might fall outside the ambit of Art. 3 (3) Rome Convention due to sufficient international elements of the transaction. Contrary to the High Court, the Court of Appeal (by now confirmed by the UK Supreme Court) has answered this question in the affirmative, given that the bank had utilized a standard form contract drafted by a private international association not linked to any particular country and had also entered into a back to back transaction with a foreign bank.

This understanding appears misconceived against the background of a contextual and teleological interpretation of Art. 3 (3) Rome Convention.

Z. Meškic/A. Durakovic/J. Alihodžic: **Bosnia and Herzegovina as a Multi-unit State**

Bosnia and Herzegovina comprises two entities, the Federation of Bosnia and Herzegovina and Republika Srpska, and the District Br?ko, which have almost comprehensive competences in private law. Therefore, in addition to rare legislation in private law on the national level, there are three partial legal orders in private law in Bosnia and Herzegovina. The following paper presents some of the differences between the partial legal orders and explains the development of interlocal conflict rules in Bosnia and Herzegovina, which took place independently of private international law. For family, status and succession matters there is a uniform act on interlocal conflicts of laws, whereas in other areas of private law no uniform regulation exists. The solutions on interlocal conflicts of laws in the most relevant areas of private law have been analysed critically.