Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2020: Abstracts

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

H. Schack: **The new Hague Judgment Convention**

This contribution presents the new Hague Convention on the recognition and enforcement of foreign judgments in civil or commercial matters adopted on 2 July 2019 by the Hague Conference on Private International Law. This Convention simple with a positive list of accepted bases for recognition and enforcement supplements the 2005 Hague Convention on choice of court agreements. The benefit of the 2019 Convention, however, is marginal, as its scope of application is in many ways limited. In addition, it permits declarations like the “bilatéralisation” in Art. 29 further reducing the Convention to a mere model for bilateral treaties. If at all, the EU should ratify the 2019 Convention only after the US have done so.

F. Eichel: **The Role of a Foreign Intervener in Establishing a Cross-Border Case as a Requirement for the Application of European Legislation on Civil Procedure**

The Small-Claims Regulation (No. 861/2007) is only applicable in crossborder cases. The European Court of Justice (ECJ) in its judgment in ZSE Energia has decided that the foreign seat of an intervener does not turn an otherwise purely domestic case into a cross-border case. The IPRax article agrees with this decision, but criticizes the reasons given by the ECJ. Without specific need, the ECJ stated that the participation of an intervener would be inconsistent with the Small-Claims Regulation at all, although general procedural issues are governed by the procedural law of the lex fori (cf. article 19 Small-Claims Regulation). In addition, the article analyses the impact of the ECJ’s ruling on other European legal acts such as the European Order for Payment Regulation (No. 1896/2006), the European Account

Preservation
Order Regulation (No. 655/2014), the Directive on the right to legal aid (RL 2002/8/EC), and the Mediation Directive (RL 2008/52/EC).

C.A. Kern/C. Uhlmann: **When is a court deemed to be seised under the Brussels Ia Regulation? Requirements to be met by the claimant and pre-action correspondence**

In the aftermath of the VW-Porsche takeover battle, an investor based on the Cayman Islands announced to sue Porsche SE in the High Court of England and
Wales. Probably in an attempt to secure a German forum, Porsche initiated a negative declaratory action in the Landgericht Stuttgart. However, the complaint could not be served on the investor for lack of a correct address. The German Federal Supreme Court held that Porsche had not met the requirements
of Art. 32 no. 1 lit. a of the recast Brussels I Regulation and asked the lower court to determine whether the „letter before claim“ sent by the investor had already initiated proceedings in England so that parallel proceedings in Germany were barred. The authors agree that Art. 32 no. 1 must be interpreted strictly, but doubt that a „letter before claim“ is sufficient to vest English courts with priority under the Brussels Regulation.

C. Thomale: **Treating apartment-owner associations at Private International Law**

In its recent Brian Andrew Kerr ./. Pavlo Postnov and Natalia Postnova decision, the CJEU has taken a position on how to handle apartment owners' obligations to contribute to their association in terms of international jurisdiction and choice of law. The casenote analyses the decision, notably assessing the relationship of international jurisdiction and choice of law, the concept of "services" as contained in the Brussels I Regulation and the Rome I Regulation respectively, as well as the company law exception according to Art. 1 (2) (f) Rome I Regulation.

H. Roth: **The Probative Value of Certificates as per Art 54 Brussels I and Art 53 Brussels Ia**

According to the European rules on recognition and enforcement of

judgments in civil and commercial matters, the probative value of both certificates is determined as mere information provided by the court of origin. At the second step of assessing whether there are grounds to refuse recognition (appeal or refusal of enforcement), the court of the member state in which enforcement is sought will have to verify itself the factual and legal requirements for service of process.

M. Brosch: **Public Policy and Conflict of Laws in the Area of International Family and Succession Law**

The public policy-clause is rarely applied in private international law cases. Relevant case law often concerns matters of international family and succession law. This also applies to two recent decisions of the Court of Appeal in Berlin and the Austrian Supreme Court relating, respectively, to the recognition of a Lebanese judgement on the validity of a religious marriage and the applicability of Iranian succession law. Although systemically coherent, the courts' findings give rise to several open questions. Furthermore, it is argued that two opposite tendencies can be identified: On the one hand, the synchronisation between forum and ius as well as the prevalence of the habitual residence as connecting factor in EU-PIL leave little room for the application of the public policy-clause. On the other hand, its application may be triggered in areas where the nationality principle still prevails, i.e. in non-harmonised national PIL and PIL rules in bilateral treaties.

E.M. Kieninger: **Vedanta v Lungowe: A milestone for human rights litigation in English courts against domestic parent companies and their foreign subsidiary**

In Vedanta v Lungowe, a case involving serious health and environmental damage due to emissions into local rivers from a copper mine in Sambia, the UK Supreme Court has affirmed the jurisdiction of the English courts, in relation to both the English parent company and the subsidiary in Sambia. In the view of the Supreme Court, the claim against the parent company has a real issue to be tried and denying access to the English courts would equal a denial of substantive justice.
The decision is likely to have consequences not only for the appeal against the Court of Appeal's denial of access to the English courts in Okpabi v Royal Dutch

Shell, but also for the development of a more general duty of care of parent companies
towards employees and people living in the vicinity of mines or industrial plants run by subsidiaries.

B. Lurger: **How to Determine Foreign Legal Rules in Accelerated Proceedings in Austrian Courts**

In a rather lengthy proceeding initiated in 2014 in the district court Vienna Döbling the wife claimed maintenance from her husband. The Austrian Supreme Court (OGH) examined the special conditions of the application of foreign law in accelerated proceedings (motion for injunctive relief). The Court first clarified the construction of Art. 5 Hague Maintenance Protocol in relation to a pending divorce proceeding in which Austrian law applied, whereas the habitual residence of the claimant was situated in the United Kingdom. The OGH held that in accelerated proceedings, the question of whether foreign law had to be applied (the choice of law question) can regularly be answered without considerable effort. As the next step, the determination of the content of the foreign law must be undertaken by the lower courts with reasonable means and effort. As in ordinary proceedings, the parties do not have any particular duties to assist the court in this determination. Considering the special circumstances of the case, which consisted in the considerable wealth of the parties and the divorce and maintenance proceedings going up and down the instances in Vienna already for years, the Supreme Court arrived at the conclusion
that the application of English law by the Austrian courts was appropriate even in the accelerated proceeding at hand.