Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2019: Abstracts

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

R. Wagner: **Twenty Years of Judicial Cooperation in Civil Matters**

With the Treaty of Amsterdam entering into force on 1 May 1999 the European Union has obtained the legislative competence concerning the judicial cooperation in civil and commercial matters. This event’s 20th anniversary gives ample reason to pause for a moment to briefly appreciate the achievements and to look ahead. This article follows the contribution of the author in this journal in regard to the 15th anniversary of the entry into force of the Treaty of Amsterdam (IPRax 2014, 217).

E. Jayme/C.F. Nordmeier: **The Freedom to Make a Will as a European Human Right? – Critical Considerations on the West Thrace Decision of the European Court of Human Rights**

The article critically examines the decision of the ECHR of 19 December 2018, Molla Sali v. Greece, which deals with the special legal regime applicable to Muslims in West Thrace, a region in northern Greek. The Court considers Art. 14 ECHR in conjunction with Art. 1 of the Additional Protocol No. 1 to be violated if the will of a Muslim testator of this region, drawn up according to Greek state law, is measured against religious law. The authors are of the opinion that a human rights-protected election to state law is not permissible for individual areas of law or single legal questions. It opens up an arbitrary mixture of state and religious law, which can lead to inconsistent overall results. This is particularly the case when legal positions of third parties are affected. In addition, overarching political aspects of the protection of minorities, especially in Western Thrace, are not sufficiently taken into account in the decision.

J. Schulte: **A Wii bit illegal? International jurisdiction and applicable law for the infringement of a Community Design by several tortfeasors (ECJ**

C-24, 25/16 – Nintendo)

On 27 September 2017 the European Court of Justice decided on the international jurisdiction and applicable law with regards to the infringement of a unitary Community intellectual property right, when Nintendo Inc. sued a mother and a daughter company for replicating, advertising and selling Wii console accessories. The Court's judgement clarifies many important issues ranging from the member state courts' scope of competence in case of several defendants, to the difficult relationship between Rome II's conflict of law rules and the ones in the regulations on Community intellectual property rights as well as to the applicable law for infringing acts via the internet. Most notably, the ruling establishes a central act theory in case of multiple places of acts of infringements in the sense of Art. 8(2) Rome II.

P. Mankowski: **Choice of law clauses in the Standard Terms and Conditions of airlines**

Choice of law clauses in the Standard Terms and Conditions of airlines are commonplace in international air travel. Art. 5 (2) subpara. 2 Rome I Regulation "limits" freedom of choice in passenger contracts. Yet the CJEU's Amazon judgment has raised questions whether choice of law clause in Standard Terms and Conditions might also be challenged under the aegis of the Unfair Contract Terms Directive.

B. Heiderhoff: **Jurisdiction based on Art. 12 (3) Brussels IIbis and its consequences**

The Saponaro judgment concerns the judicial authorisation for a renouncement of succession by the parents of a minor heir whose habitual residence is not within the state of the succession proceedings. The Court confirmed that this issue falls within the scope of the Brussels IIbis Regulation and gave details on the prerequisites of jurisdiction under Art. 12 (3) Brussels IIbis Regulation. In particular, the ECJ needed to clarify the meaning of the requirement of having been "accepted expressly or otherwise in an unequivocal manner by all the parties". As Greek law, in order to secure the rights of the child, provides that a prosecutor is a party to the proceedings, the ECJ held that the acceptance of the prosecutor is necessary. The Court does not, however, even mention the necessity of the agreement of the child, an omission which must be criticised. This

contribution additionally raises the question of the applicable law. Here, we see a number of difficulties. Firstly, the prorogated jurisdiction under Art. 12 (3) Brussels IIbis Regulation poses problems for the synchronous operation of the Brussels IIbis Regulation and the 1996 Hague Convention. Secondly, the approval procedure is a constellation where the distinction between protective measures (under Article 15 of the 1996 Convention) and the exercise of parental responsibility (under Article 17 of the 1996 Convention) becomes necessary. Thirdly, the strong interlinkage between the substantive law of parental responsibility and the procedural measures to protect the child make it very complicated to combine the approaches that the different legal systems take. All in all, it generally seems easier to institute the judicial authorisation in the state of the child's habitual residence.

U.P. Gruber: **The habitual residence of infants and small children**

The ECJ has stressed in several decisions that for the purpose of Article 8(1) of Regulation No 2201/2003, a child's place of "habitual residence" has to be established by considering all the circumstances specific to each individual case. However, in a new case, the ECJ has opted for a more conclusive weighing of selected criteria. The ECJ based its assessment on the fact that the child was permanently resident in Belgium. Furthermore, the ECJ pointed to the fact that the mother, who – in practice – had custody of the child, and also the father, with whom the child also had regular contract, both lived in Belgium. Other circumstances were expressly deemed to be "not decisive", especially the stays of mother and child in Poland in the context of leave periods or holidays, the mother's cultural ties to Poland and her intention of settling in Poland in the future. In summary, it can be said that for a rather typical fact pattern, the ECJ has given valuable guidance as to where the habitual residence of children is located.

U.P. Gruber/L. Möller: **The admissibility of a custody order after the return of the child under the Hague Abduction Convention**

The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction seeks to provide a rapid procedure for the return of the child to the country of the child's former residence. Pursuant to Art. 16 of the Convention, a court in the state of refuge is not permitted to decide on the merits of any custody issue until it has been decided that there exists a reason for not ordering the

return of the child, or the application for the return of the child is not lodged within a reasonable time. This provision is based on the assumption that a procedure dealing with custody issues in the state of refuge might delay or otherwise impair the procedure on the return of the child in that state. The OLG Bremen had to decide whether Art. 16 of the Convention was still applicable when the conclusive order to return the child had already been carried out, i.e. the child had been given back to the holder of the right of custody and had returned to its state of residence prior to its removal. The court concluded that in this situation the prohibition in Art. 16 of the Convention had ceased and that therefore German courts could decide on the rights of custody. The decision is correct: When the status quo ante has been fully restored, the objectives of the Convention have been reached; therefore, there is no more need to protect the procedure on the return of the child against influences of parallel proceedings on custody issues. Subsequently, the court also assumed jurisdiction as, under German law, jurisdiction can be based solely on the German nationality of the child. At closer look, the case illustrates that German jurisdictional rules are not well-suited for child abduction cases and there is need for reform.

K. Siehr: **International jurisdiction of German courts to take measures in order to enforce the right of access of the mother to meet her children living abroad**

A German couple had two sons. The couple divorced and the father got custody for the two children and moved with them to Beijing/China. The Magistrate Court of Bremen (Amtsgericht Bremen) awarded to the mother, still living in Germany, rights of access to the children and obliged the father to cooperate and send the children from Beijing to Germany in order to visit their mother. The father did not cooperate and did not send the children to Germany. The Magistrate Court of Bremen fixed a monetary penalty (Ordnungsgeld) of e 1000,00 in order to sanction the father’s misbehavior. The father lodged an appeal against this decision and the Court of Appeal of Bremen (Oberlandesgericht Bremen) vacated the decision of the Magistrate Court because of lack of international jurisdiction. The Federal Court for Civil and Criminal Matters (Bundesgerichtshof) corrected the Court of Appeal of Bremen and upheld the order for monetary penalty awarded by the Magistrate Court of Bremen. German courts are allowed to sanction their decision by awarding monetary penalties against a party living abroad.

P. Kindler/D. Paulus: **Entry of Italian partnerships into the German land register**

Under German law, following a judgment of the Federal Court of Justice (BGH) of 29 January 2001, even non-commercial partnerships (the „Gesellschaft bürgerlichen Rechts", GbR) under certain circumstances – and without being regarded a legal entity – have an extensive legal capacity. On 4 December 2008, in a second step, the Federal Court of Justice held that a GbR can not only acquire ownership of land or other immovable property or rights but may also be entered in the German land register (Grundbuch – „formelle Grundbuchfähigkeit"). Subsequently, as of 18 August 2009, the German legislator implemented a new § 899a to the German Civil Code (BGB) as well as a new section 2 to § 47 of the German Land Register Code (GBO), stating that if a GbR is to be registered, its partners must also be entered into the land register. In its judgment of 9 February 2017 concerning an Italian società semplice, the

German Federal Court of Justice held that also foreign non-commercial partnerships can be entered into the German land register. Prerequisite for this is not a full legal capacity but only that the respective partnership, according to its company statute, at least has a partial legal capacity with regard to the acquisition of real estate („materielle Grundbuchfähigkeit"). In order to determine this, a judge has to investigate foreign law ex officio. This includes not only the determination of the law itself but also of its concrete application in the respective foreign legal practice. To this end, the judge must make full use of the legal sources available to him. The authors share the position of the German Federal Court of Justice but point out that the applicable Italian law of business associations even provides for a full legal capacity of non-commercial partnerships.

K. Duden: **Jurisdiction in case of multiple places of performance: preparatory work vs. its implementation on site**

In the case of a contract for the provision of services, Art. 7 (1) (b) of the Brussels Ibis Regulation establishes jurisdiction at the place where the service is provided. In light of a decision of the Austrian Supreme Court on an architect's contract this paper analyses how jurisdiction at a single place of performance can be identified if the performance actually is provided in several places. In doing so, it is argued that a distinction should be drawn between services that have an internal as

opposed to an external variety of places of performance. Regarding architects' contracts the author agrees with the Austrian Supreme Court that the courts at the building site have jurisdiction as the courts at the place of the main performance. Furthermore, the paper discusses where jurisdiction generally should be located for services that consist of extended preparatory work at one place that culminates in its implementation at another place, but where those services do not necessarily have a comparatively strong link with the place of implementation. Finally, cases will be considered in which the place where the service is mainly provided cannot be determined. It is argued that amongst the approaches taken in such cases by the ECJ it is more convincing to grant the claimant a choice amongst the places which could be considered as the place of main performance, rather than give preference – amongst various potential places of main performance – to the jurisdiction at the seat of the characteristic performer.

L. Hübner: **Existential disputes as a case for Art. 24 no. 2 Brussels 1a Regulation – the doctrine of fictivité in the European law of jurisdiction**

The decision of the Cour de cassation deals with the exclusive jurisdiction for company-related disputes in Art. 24 No. 2 Brussels 1a Regulation. The Cour de cassation confirms the strict interpretation in accordance with the parameters of the ECJ. The subject-matter of the action is not a dispute regarding deficiencies in resolutions, which frequently is the subject-matter of action in connection with Art. 24 (2) Brussels 1a Regulation, but a so-called existential dispute arising from the French doctrine of fictivité.

P. Schlosser: **Prescription as Lack of jurisdiction of an arbitral tribunal**

In view of the expropriation of gold mines the claimant instituted arbitral proceedings on the basis of the Bilateral Agreement between Canada and Venezuela according to the Additional Facility Rules of the Word Bank Centre. The Canadians were successful. The Cour d'Appel de Paris, however, invalidated the calculation of the award, but not the further elements of the ruling. The reason therefor was a term in the Bilateral Investment Treaty, that the tribunal had only competence to consider events no more than three years prior to the institution of arbitral proceedings. In validating the damage of the Canadians, however, the tribunal had taken into consideration events of a prior occurrence. Normally the claimant had to institute new proceedings because in France the

case cannot be referred back to the arbitrators. But since the parties had found a settlement agreement no further proceedings were necessary.