Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2019: Abstracts

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

E. Jayme: **On the Legal Status of Indigenous Peoples in German Cultural Property Proceedings**

The Nama Traditional Leaders Association asked the Constitutional Court of the federal state Baden-Wurttemberg to issue an interim order to prevent its government from returning certain pieces of cultural property to the Republic of Namibia. These cultural goods had been taken by Germans during the colonial period and have been displayed in the Linden-Museum in Stuttgart since 1902. The Nama Association relied on the argument that these goods belonged to the Witbooi family and were part of the Nama cultural heritage. The Constitutional Court dismissed the action on procedural grounds. According to the Court, an interim order required a main action which lacked in that case. In addition, the Court remarked that the litigation was such to be better handled within Namibia. The restitution of colonial goods from European museums to the territories of their origin has been discussed widely since President Macron, in 2017, gave a speech in Ouagadougou (Burkina Faso) asking for the return of colonial goods to African countries. This idea throws up many questions of law and particularly of conflict of laws, as is evident in the Nama-case, which centres around the legal status of indigenous people in German court proceedings concerning cultural goods. The author also discusses problems of private international law, such as the law applicable to the question of property regarding such colonial goods.

M. Drehsen: **Service of judicial documents within the context of the EuMahnVO**

The intersection of the Regulation (EC) No 1896/2006 and the Regulation (EC) No 1393/2007 is the service of the European order for payment. Even if Art. 12 (5), 13 to 15 Regulation (EC) No 1896/2006 contain provisions on the service of the same, these are not complete upon closer examination, so that according to the decision of the ECJ of 6.9.2018 worthy of approval, recourse may be had to the Regulation (EC) No 1393/2007 and in particular to Art. 8 Regulation (EC) No 1393/2007 and the case-law of the ECJ issued in this regard. Even if the same legal consequences as for the absence of a corresponding translation are to apply to the non-addition of the form under Annex II of the Regulation (EC) No 1393/2007, the period for statement of opposition under Art. 16 (2) Regulation (EC) No 1896/2006 can begin differenthy for these two service defects to be distinguished.

S. Arnold/T. Garber: **A Pyrrhic victory for Greece: International Procedure and the limits of state sovereignty**

In 2012, Greek government bonds were restructured which caused enormous losses to private investors. Many of them sued the Hellenic Republic, especially in German and Austrian courts. Following a referral of the Austrian Supreme Court (OGH) the ECJ decided that actions brought by private investors against the Hellenic Republic are not covered by the scope of application of the Brussels Ibis Regulation. After the ECJ's decision, the OGH even denied international jurisdiction of Austrian courts according to the national (Austrian) rules of civil procedure. Both decisions are flawed as regards their outcomes and their reasonings. The following lines will explore these flaws and shed some light on the decisions' consequences.

Q.C. Lobach: **International jurisdiction of the courts at the place of performance of a contract of carriage for air**

passengers' claims under the Flight Compensation Reg. against a third-party operating carrier

In the Rehder/Air Baltic case, the CJEU held that the places of performance of a contract of carriage pursuant to art. 7 (1) (b) second indent Brussels I Recast Reg. are both the place of departure as well as the place of arrival of a flight. Consequently, air passengers' claims for compensation on the basis of the Flight Compensation Reg. can be pursued before a court at either place at the election of the claimant. However, divergent opinions existed on whether these principles were accordingly applicable in cases in which a journey by air consists of various legs, while the contracting air carrier on the basis of code sharing has engaged an operating air carrier for one of the legs. In such a situation, the question is whether merely the courts at the places of departure and arrival of that particular leg or rather the courts at these places of the air travel in its totality are competent to hear the passenger's claims against the operating air carrier. In the case at hand, the CJEU answers these as well as various other questions on international jurisdiction in relation to air passengers' compensation claims under the Flight Compensation Reg.

H. Roth: **Agreement of jurisdiction according to Art. 25 Brussels Ia Reg. and ex officio review by national courts**

According to German Civil Procedure law, jurisdiction is always reviewed ex officio. Hereby, the Brussels Ia Reg. leaves room for the application of the respective national civil procedure law. According to German Civil Procedure law, the plaintiff has to conclusively present the relevant facts of the case, which are sufficient to establish the international jurisdiction of the court seized. In case of an effective objection by the defendant, the court has to take evidence. The same is true in case of an international trade custom (Art. 25 par. 1 s. 3 lit. c Brussels Ia Reg.). The German Federal Supreme Court's decision is therefore

persuasive not only by its legal outcome but also by its legal reasoning.

V. Lipp: **Applicable law to child support when child changes habitual residence**

The ECJ case KP./. LO is its very first case on the interpretation of the "Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations". This "Protocol", in fact an international convention drafted by the Hague Conference on Private International Law, contains the rules on applicable law to maintenance obligations for all member states of the European Union except Denmark and the UK. The ECJ thus first clarifies the status of the Protocol as secondary law of the EU and its competence to interpret it. It then deals with Art. 4 para. 2 of the Protocol when a child changes its habitual residence and now claims support from a parent for the period before that change took place. The following article discusses these issues in the context of the new regime for international maintenance, both within the EU and outside of it.

J. Antomo: **International child abduction or homecoming: HCA caught between the best interests of the child and general prevention**

In cases of child abduction, the HCA intends to restore the status quo ante by requiring the return of the child to be ordered forthwith. Judicial authorities in the state where the child is located must order the child's return, and can only refuse to do so in strictly limited exceptional situations. This principle is based on the assumption that, as a general matter, returning the child to his or her familiar environment is in the child's best interest. In addition, establishing an expectation that return orders will swiftly issue aims to minimize any incentives for abducting children across borders. However, in cases where the child's habitual residence frequently changes, it is doubtful whether a return order

actually serves the child's best interests. Nevertheless, the Higher Regional Court of Stuttgart recently ordered the return of two children to Slovakia in a case where the children had only spent six months there, then moved back to their former home country Germany together with their mother. This article evaluates whether in such cases of removal to the former home country the interest of the individual child should take priority over the general preventive objectives of the Convention. The author shows that the stress that HCA procedures impose on children could particularly be reduced by promoting mediation and amicable settlements.

B. Hess: **Not a simple footnote: 9/11 litigation in the civil courts of Luxembourg**

On 27/3/2019, the Tribunal d'Arrondissement de Luxembourg refused to recognise two default judgments rendered by the U.S. District Court for the Southern District of New York amounting to 2.1 billion USD.2 These judgments had been given in favour of 92 victims of the 9/11 terrorist attacks. The 16 defendants included inter alia the Islamic Republic of Iran, its former heads of state and of government as well as several governmental entities and state enterprises. In a 160 pages judgment, the Luxemburg court held that recognition of the American judgment against the state defendants would amount to a violation of state immunity under customary international law. Referring to the 2012 ICJ's judgment on state immunity3 the Luxemburg court expressly stated that neither a "terrorists exception" nor a non-commercial tort exception from immunity were applicable to the case at hand. Therefore, state immunity barred the recognition of the judgment. Besides, the court declined recognition with regard to the non-state defendants because their rights of defence had not been sufficiently respected in the original proceedings as (substantial) amendments of the lawsuit had not been served on the defendants. The judgment carefully assesses the current developments of state immunity under customary international

law. It is also important for the private international law of the Grand Duchy.

I. Schneider: **EIR: The reach of the lex fori concursus in lease agreements for companies with real estate property**

In its decision in case 1 Ob 24/18p (21 March 2018) the Supreme Court of Austria dealt with various questions regarding the European Insolvency Regulation (EIR). Unfortunately, the court did not make a final statement on these questions since it was not essential to decide the case. The article attempts to reach a solution for the issues raised in the judgement which still remain unsolved by applying the EIR. That is the interpretation of the term "immoveable property" in Art. 11 para. 1 EIR, the relevance of the choice of law and the scope of the public policy-clause in Art. 33 EIR.

P.A. Nielsen: **EU PIL and Denmark 2019**

The author explains the reasons for Denmark's reservation from 1992 towards EU cooperation in civil and commercial matters and its "opt-out" nature as well as the failed attempt in 2015 to change it to an opt-in mechanism identical to the British and Irish reservations. Furthermore, the author examines the existing parallel agreements from 2005 between the EU and Denmark in respect of originally the Brussels I Regulation and the Service Regulation and gives an account of which EU instruments Denmark is bound by.

A. Wohlgemuth: **On the International Family Law of Indonesia**

Indonesia, domestically equipped with a diversity of laws, that needs internal law allocation, nearly a century after independence, has not yet even codified its Private International Law, the last project of which dates from 2015. Concerning conflict of laws Indonesia is still relying on a handful of rules mostly inherited from the Dutch colonial period. These provisions, for their part, are rooted in the

French Civil Code of 1804. International family law, especially on mixed marriages, is covered by the Marriage Law No. 1/1974. The following is a review of the scarce published case law of Indonesian courts and the more comprehensive legal Indonesian literature on the matter.