Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2019: Abstracts

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

D. Einsele: **The Law Applicable to Third-Party Effects of Assignments of Claims – A Critical Interjection Regarding the Commission’s Proposal**

Claims are relative rights against the debtor. Therefore, third parties are not legally affected by the assignment of a claim. However, legal systems may protect third parties’ (economic) interest in knowing who the creditor of a claim is. Insofar, essentially two different means of making the assignment public have to be distinguished, i.e. “relative” publicity, in particular by notice of the assignment to the debtor, and “absolute” publicity, in particular by registration of the assignment in a public register. Whereas means of relative publicity usually can be qualified as rules covered by Art. 14(1) and 18(1) Rome I Regulation, means of absolute publicity are generally overriding mandatory provisions. Instead of qualifying different publicity provisions, Art. 4 of the Proposal establishes one single rule for all third-party effects of assignments. Yet it distinguishes, in a conceptually erratic manner, different cases of assignments of claims and allows for party autonomy relating to third-party effects, thereby infringing basic legal principles. The Proposal will also not bring about legal certainty regarding the third-party effectiveness of assignments. This is due to the “super” conflict rules of Art. 4(1) subs. 2, Art. 4(4) of the Proposal and the lack of (explicit) rules concerning chains of assignments. Requirements for absolute publicity – qualified as overriding mandatory provisions – would in any event not be caught by Art. 4 of the Proposal.

C. Thole: **The distinction between EIR and Brussels Ia-reg. with respect to damage claims against third parties based on damages incurred by the general body of creditors**

The recent judgment of the ECJ shows, once again, the difficulties in distinguishing between civil matters (falling within the scope of the Brussels Ia

Regulation) and actions within the meaning of Art. 6 EIR which derive directly from the insolvency proceedings and are closely linked to them. The Court had to deal with a special action established under Dutch law that allows the insolvency practitioner to pursue a damage claim against third parties on the grounds of them allegedly being party to a misappropriation of assets committed by the debtor. The ECJ concluded that such a claim falls within the scope of the Brussels Ia Regulation, notwithstanding the fact that the action is brought by the liquidator in insolvency proceedings and the proceeds of the action, if the claim succeeds, accrue to the general body of creditors. Christoph Thole analyses the judgment and its consequences for other damage claims based on German law. He also argues that the ECJ is trying to more and more confine the criteria relevant under Art. 6 EIR to a sole criterion, i.e. the legal basis of the action. This shows some similarities with the approach followed by the ECJ with respect to the general distinction between civil and administrative matters under art. 1 Brussels Ia Regulation.

C.A. Kern/C. Uhlmann: **International jurisdiction and actio pauliana (avoidance action) in the absence of insolvency proceedings**

The ECJ ruled that international jurisdiction for the avoidance action of a Polish creditor against a Spanish third party which had received assets from the Polish co-contractor of the creditor can be based on Art. 7 No. 1 lit. a Brussels I bis Regulation. For the ECJ, international jurisdiction for an avoidance action against the "enriched" third party can be derived from the original contractual relationship between creditor and debtor. The authors criticize the decision of the ECJ and instead argue in favor of the general place of jurisdiction (Art. 4 para. 1 Brussels I bis Regulation).

K. Sirakova/P. Westhoven: **Do broadly worded jurisdiction clauses cover actions based on the abuse of a dominant position?**

The interpretation of jurisdiction agreements in the private enforcement of EU competition law continues to raise various questions in Member State courts even after the ECJ's decision in CDC Hydrogen Peroxide. The latest ruling of the Luxembourg court in this context was the case Apple Sales International. The judgment clarifies some of the questions that remained open in the aftermath of the CDC-ruling and provides guidance on the interpretation of jurisdiction agreements by proposing a general differentiation between claims resulting from

an infringement of Art. 101 TFEU and such based on Art. 102 TFEU. While the judgment will undoubtedly facilitate a swift decision of jurisdiction issues in many private enforcement cases, the approach of the ECJ should not be understood as entirely excluding the discretion of the national courts in interpretation matters. It remains the sole responsibility of the Member State judges to take into account the individual circumstances of each case.

C. Mayer: **Pitfalls of public service and of choice of court agreements in international business transactions**

In order to guarantee the applicant effective legal protection, the possibility of public service is indispensable, particularly in cross-border legal relations with non- EU Member States. However, in order to protect the defendant's right to be heard, public service is permissible only under strict conditions, otherwise service is ineffective. A hasty recourse to this procedural means can therefore have considerable procedural, but also material legal consequences for an applicant entitled to claim, because ineffective service does not start the course of appeal periods nor the limitation period. The decision of the higher regional court of Hamburg discussed below shows that even small mistakes in allegedly simple procedural steps can be fatal to the plaintiff.

M. Brinkmann: **Counterclaims under the Brussels I Regulation**

In Petronas Lubricants Italy SpA ./. Livio Guida, the ECJ had the opportunity to refine the Court's understanding of the relationship between claim and counter-claim required by Art. 8 Nr. 3 Brussels Ia Regulation. As in Northartov(C-306/17), a decision which had been published shortly before, the ECJ relied on the wording established in the Kostanjevec-case by asking whether the original claim and the counter-claim share a "common origin". Such a common origin exists, according to the ECJ, even if the original claim is based on a contractual relationship and the counter-claim is based on a different contractual relationship as long as they arise from the "same facts". If this requirement is met, the fact that the claim of the counter-claimant has previously been assigned to him by a third party, is irrelevant. The reasoning of the Court gives cause to revisit the basics of the jurisdiction for counter-claims in European Civil Procedure and to reflect on the admissibility of counter-claims against third parties under the Brussel Ia Regulation.

B. Heiderhoff: **The „tricky" subjective element of habitual residence**

The concept of habitual residence still poses problems for German courts. While the CJEU strongly favours a fact-based approach, national courts show a tendency to give greater weight to so-called subjective elements, i.e. factors such as attachment to the home state or the vague intention to move „back home". Based on the analysis of several court decisions, including the CJEU's UD ./. XB judgment, the article aims at clarifying the rather limited role of subjective criteria within the concept of habitual residence.

D. Looschelders: **Waiving an inheritance before German courts in cases of international successions**

Accepting or waiving an inheritance may pose considerable practical difficulties to heirs with habitual residence in a Member State different from the one in which the succession according to the European Succession Regulation is settled. In order to facilitate the acceptance or waiver of the succession, Article 13 of the European Succession Regulation assigns special jurisdiction to the court at the habitual residence of the person making the declaration. However, the interpretation of this provision raises some unresolved issues. The present decisions of the Higher Regional Courts of D sseldorf and Koblenz are the first statements by higher German courts in relation to this matter. Specifically, they deal with local jurisdiction, the effects of a waiver before a court at the habitual residence of the person making the declaration on the inheritance procedure of the competent court at the last habitual residence of the deceased and the necessity of court approval for waivers of minors. The article presents by means of these judgments that waivers of succession before German courts in cases of international successions lead to significant imponderability. Yet the author opines that the person making the declaration can counteract most of the uncertainties by following a careful approach.

C. Möllnitz: **Violation of the national public policy by the registration of a noble name changed by deed poll and its effects on European fundamental rights**

The current decision of the German Federal Court restricts the European right of freedom of movement by proscribing the registration of a name in Germany containing a former title of nobility due to a violation of the national public policy,

even if the name is lawfully registered in another member state of the European Union. While the arguments on a violation of the national public policy are convincing, the justification of the restriction of the freedom of movement is questionable in the light of the European jurisprudence. The fact that former titles of nobility, as part of a name, are not completely banned in Germany raises doubts as to the necessity of this restriction.

B. Lurger: **The Hypothetical Violation of EU Fundamental Freedoms Leads to a New Rule: Non-Possessory (German) Security Ownership Finally Survives the Transport to Austria**

In its judgment of 23 January 2019 (3 Ob 249/18s), the Austrian Supreme Court (OGH) changed its line of decisions concerning the validity of nonpossessory security rights in movables which are brought to Austria. Before 2019, the Supreme Court (3 Ob 126/83) held that the (German) non-possessory security ownership („Sicherungseigentum“) of a German creditor in a movable became extinct the moment the movable (transported by the debtor) crossed the border from Germany to Austria. This was due to the Austrian “principle of possession of security objects”: Under Austrian law, pledges and security ownership are only valid when the security object rests in the “fists” of the creditor (= “Faustpfandprinzip” = “principle of fist pledge”). This principle was determined to apply as soon as the security object – in the hands of the debtor – entered Austrian territory. According to the judgment of 23 January 2019 the opposite is now correct: The non-possessory (German) security ownership now survives the transgression of the Austrian frontier. The Austrian “fist principle” does not apply. The validity of the foreign security right is solely based on the foreign (German) rules for security rights which applied due to the lex rei sitae when the security right was created (§ 31 Austrian IPRG) and which continue to apply. The main argument of the court for this about turn is the Austrian accession to the EU in 1995 which led to application of the fundamental freedoms of the TFEU. The (former pre-EU) application of the Austrian fist principle to imported security objects constituted (from 1995 onwards) an unjustified violation of the EU fundamental freedoms in most cases, according to the court. This argumentation is plausible and in line with major literature. The 2019 judgment establishes the recognition of non-possessory security rights in movables in Austria once these rights where validly created under the law of another EU Member State. This leads to less transparency and security on the credit security market in Austria

with respect to movables. The question of whether the new PIL rule also applies to relations with Non-Member States can be answered in the affirmative.

M. Makowsky: **The limitation of succession proceedings in cases of assets located in a third State pursuant to Art. 12 EU Succession Regulation**

In principle, the EU Succession Regulation grants the courts of the member states jurisdiction to rule on the succession as a whole regardless of the location of the estate. If assets are located in a non-EU state, however, Art. 12 of the Regulation allows the court, at the request of the parties, to decide not to rule on these assets if it may be expected that its decision will not be recognised or declared enforceable in that third state. The Austrian Supreme Court has approved the limitation of succession proceedings in a case where part of the estate was located in Switzerland and the Swiss authorities had already issued a certificate of inheritance and appointed an executor. The Court argues that, due to these prior acts, a later decision by the Austrian probate court in respect of the Swiss estate could not be recognised in Switzerland. The article points out that firstly, it has to be determined whether the acts in the Swiss succession proceedings need to be recognised and therefore have a (res judicata) effect on the proceedings held in Austria. If the Swiss authorities' acts, especially the certificate of inheritance, do not qualify as „decisions" capable of recognition, they can hardly constitute a ground for non-recognition.

F. Fuchs: **Cross-border effects of third-party notices and actions on a warranty with a special regard to the Portuguese Code of Civil Procedure**

Under the Brussels Ia Regulation, a person domiciled abroad may be invited to join proceedings before the courts of a Member State pursuant to that Member State's rules on third-party notice. The third-party notice enables the claimant, if he loses the case, to have a recourse against the third party with that third party being bound by the outcome of the first proceedings. Instead of rules on third-party notice, some Member States allow actions on a warranty. Both concepts aim to protect the interest of that party whose claim would be dismissed twice if the proceedings against two or more adversaries could not be combined. The situation in Portugal is quite interesting, given that its national law provides for both, third-party notices and actions on a warranty. This article offers an insight into the Portuguese Code of Civil Procedure. Moreover, it examines how the effects of a German third-party notice are recognized in other Members States

and how a judgment on a warranty rendered in Portugal is recognized in Germany.