

# Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)

## 3/2015: Abstracts

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

*Jochen Hoffmann*, **“Button-click” Confirmation and Cross Border Contract Conclusion**

Section 312j paragraph 3 and 4 of the German Civil Code (BGB) addresses and secures effective consumer protection with regard to the issue of internet-related “cost traps”. Cost traps are websites that are designed to lead to the conclusion of contracts without the consumer’s awareness of an obligation to pay. At the same time this regulation transposes Art. 8 par. 3 of the Consumer Rights Directive into German law. In effect, this provision ensures that an e-commerce contract between a trader and a consumer cannot be concluded if the trader does not ensure that the consumer is made aware, prior to placing his order, that he is assuming an obligation to pay, in connection with internet contracts specifically by using an unambiguously labelled button. Since this regulation is applicable to all e-commerce contracts it not only applies to “cost traps”, but also to legitimate internet trading. This article addresses the problems arising from the new provision for cross border contracts in the light of the applicable conflict of laws rules.

*Jan von Hein*, **Authorization Requirements for a Guardian’s Transaction Concerning a Vulnerable Adult’s Immovable Property - Jurisdiction and Conflict of Laws**

The Court of Justice excluded, in Case C-386/12 - Siegfried Janós Schneider, the applicability of the Brussels I-Regulation to a court’s authorization that an adult’s guardian required for a transaction concerning immovable property belonging to the adult (Article 1(2)(a) of the Regulation). In his case note, von Hein agrees with the Court’s ruling because the authorization requirement was the main object of the proceedings. If the necessity to obtain an authorization arises merely as an incidental question in litigation related to property, however, the Regulation, including the forum rei sitae, remains applicable. Moreover, the author analyses

which court is competent to rule on granting an authorization to an adult's guardian for the sale of immovable property and which law is applicable to this question. He looks at this problem both from the point of view of autonomous German PIL and of the Hague Convention on the International Protection of Adults. The article shows that autonomous PIL and the Hague conflicts rules differ considerably and that in the Hague Convention's framework, authorization requirements are treated in a very differentiated manner.

*Astrid Stadler*, **A uniform concept of consumer contracts in European civil law and civil procedure law? - About the limits of a comprehensive approach**

In "Vapenik", the ECJ had to decide whether Article 6 para 1 lit. d of Regulation 805/2004 prevents the confirmation of a judgment by default as a European enforcement order if the judgment was based on a c2c-relation and the plaintiff had not sued the defendant in the Member State where he was domiciled but in the courts where the contractual obligation had to be fulfilled. The question raised was whether Article 6 para 1 lit. d applied only to b2c situations or also to cases in which both parties were consumers. The ECJ denied the application of the provision based on the reasoning that the defendant was not a "weaker party". This interpretation of the EEO Regulation was deduced from the rationale of "consumer contracts" in the Brussels I Regulation, the Rom I Regulation and Directive 93/13. The ECJ, however, provided only a very cursory comparison of the underlying policies of consumer protection. Particularly the idea of granting consumers a preferential treatment with respect to international jurisdiction differs from the purpose of consumer protection in substantive law and conflict of laws. With respect to Regulation 805/2004 the ECJ's decision does not adequately balance the interests of the two consumers involved and unnecessarily privileges the plaintiff. It increases the defendant's risk to suffer from a deficient cross-border service of documents without the chance of objecting to the enforcement of the judgment by raising grounds for non-recognition.

*Jörg Pirrung*, **Brussels Ibis Regulation and Child Abduction: Stones Instead of Bread ? - Urgent preliminary ruling procedure regarding the habitual residence of a child aged between four and six years**

After twelve mostly satisfactory decisions on the interpretation of the Brussels Ibis Regulation with respect to parental responsibility cases, the ECJ has given only conditional answers to the questions referred to it by the Irish Supreme

Court. In this case it was not adequate to use the urgent preliminary ruling procedure instead of an expedited procedure. In substance, the Court interprets Articles 2 (11), 11 of the Regulation as meaning that, where a child was removed in accordance with a judgment later overturned by an appeal judgment fixing the child's residence with the parent living in the Member State of origin, the failure to return the child to that State following the latter judgment is wrongful, if it is held that the child was still habitually resident in that State immediately before the retention, taking into account the (subsequent) appeal and that the judgment authorising the removal was (only) provisionally enforceable. If it is held, conversely, that the child was at that time no longer habitually resident in the Member State of origin, a decision dismissing the application for return based on Article 11 is without prejudice to the application of the rules established in Chapter III of the Regulation relating to the recognition and enforcement of judgments given in a Member State. On the whole, the opinion of Advocate General Szpunar stating expressly that the fact that proceedings relating to the child's custody were still pending in the State of origin is not decisive as habitual residence is a factual concept and not depending on whether or not there are legal proceedings, seems more convincing than the judgment itself.

*Marianne Andrae*, **First decisions of the ECJ to the Interpretation of Article 12(3) Regulation (EC) No 2201/2003, Comment to Cases C 436/13 and C 656/13**

Article 12 (3) of Council Regulation (EC) No 2201/2003 of 27 November 2003 applies to separated matters of parental responsibility. The ECJ classifies this rule as a prorogation of jurisdiction for the holders of parental responsibility. This paper submits several arguments against this judgment. The jurisdiction of the courts is always justified for the particular application and it does not continue after pending proceedings have been brought to a close. This acceptance must be obtained at the time the matter is seized to the courts including the specific issues of the proceeding. An agreement, after the matter was brought to court, does not justify jurisdiction. The tight time requirements must be transferred to the jurisdiction under Article 8 (1) of that regulation. An interpretation whereupon the requirements of the jurisdiction can be fulfilled after pendency and which orientates to the best interests of the child remains for an amendment of the regulation.

*Tobias Helms*, **The independent contestability of interlocutory judgments**

### **on international jurisdiction in family law cases**

The Stuttgart Higher Regional Court correctly held in its judgment of May 6, 2014 that, contrary to the wording of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG), German courts can pass interlocutory judgments on questions of their international jurisdiction in all family law cases. This conclusion can rightly be reached – in light of the statutory history of the FamFG – by way of an analogous application of Sec. 280 of the Code of Civil Procedure (ZPO).

### *Rainer Hüßtege, Grenzüberschreitende Wohngeldzahlungen*

#### *Wulf-Henning Roth, Applicable contract law in German-Danish trade*

Given the opt-out of Denmark from the Area of Freedom, Security and Justice, Danish courts do not apply the conflict rules of the Rome I-Regulation, but still the EC Convention on the Law Applicable to Contractual Obligations of 1980 (Rome Convention). As Germany has not yet given notice of a termination of the Rome Convention, it appears to be not beyond doubt whether in settings relating to Denmark German courts have to apply the conflict rules of the Rome I-Regulation, given its call for universal application (Article 2) and in the light of Article 24 (1), whereby the Rome Convention shall (“in the Member States”) be deemed replaced by the Rome I-Regulation. In contrast, the OLG Koblenz, pointing to Article 1 (4), holds Article 24 (1) to be inapplicable in the specific case as Denmark may not be regarded as a “Member State”. The Appellate Court applies the Rome Convention despite the fact that the German legislator has explicitly excluded the direct applicability of the Rome Convention.

#### *Malte Kramme, Conflict law aspects of the successor’s responsibility for debts of the acquired business, before and after the Rome-Regulations*

The German Federal Court of Justice deals, in its decision of 23 October 2013, with several current questions in the field of private international law. Firstly, the court adopts a position on the question of which conflict rule applies to the liability claim against the successor to a mercantile business carrying on the business under an identical trade-name (section 25 para. 1 sentence 1 German Commercial Code). Furthermore, the court decided which law applies to forfeit and limitation of claims underlying the United Nations Convention on Contracts for the International Sale of Goods. As the court applied the old legal regime prior to the entry into force of the Rome-Regulations, the article focuses on the question of how the case has to be solved under the new legal regime. This

analysis shows that the Regulations “Rome I” and “Rome II” do not cover the law of obligations in an exhaustive manner. Remaining gaps need to be filled applying nonunified German private international law.

*Dieter Henrich, **Children of Surrogate Mothers: Whose Children?***

The legal parentage of children, born by surrogate mothers and handed over to the intended parents, is a highly debated question. Strictly forbidden in Germany, surrogacy is allowed in other countries. In a case of children born by a surrogate mother in California the German intended fathers (a same sex couple) applied for recognition of the decision of the California court, which established a parent-child relationship between the child and the couple. While the lower courts in Germany denied the application because of incompatibility with German public policy (cf KG IPRax 2014, 72) the Bundesgerichtshof (the Federal Court of Justice) decided in favour of the applicants, but restrained explicitly the recognition on cases of foreign court decisions and to cases, where at least one of the intended parents is the biological parent of the child. So the recognition of foreign birth certificates (e.g. from the Ukraine) is still an open question as well as the recognition of parentage decisions, if neither of the intended parents is a biological parent.

*Susanne Lilian Gössl, **Constitutional Protection of ‚Limping‘ Marriages and the ‚Principle of Approximation‘***

The Court decides how to treat a “limping” marriage which is not valid under German law but nevertheless falls in the scope of and is therefore protected by the concept of “marriage” of the German Constitution (Art. 6 para. 1 Basic Law). The article examines how the German status registration law over the last four decades has subsequently been adapted to the needs of cross-border status questions.

*Susanne Lilian Gössl, **Adaptation of Status Registration Rules in Cases of ‚Limping‘ Status***

The subject of this article is how to handle the birth registration of a child born by a surrogate mother according to German and Swiss law. Both legal systems are absolutely opposed to surrogacy but also under the obligation to protect the child’s right to know his/her decent. The Swiss Court found a possibility to resolve the resulting legal tension. The author shows that the court’s resolution, an adaptation of the national civil status registry law, is a mechanism which has already been frequently used by German courts in other situations of “limping”

status. She proposes to extend that existing jurisprudence to cases of cross-border surrogacy.

*Alexander R. Markus*, **Jurisdiction in Matters Relating to a Contract Under the Brussels/Lugano Regime: Agreements on the Place of Performance of the Obligation in Question and the Principle of Centralisation of Jurisdiction**

According to the Swiss Federal Supreme Court, parties can by agreement only specify the place of performance of the characteristic obligation under article 5(1)(b) of the 2007 Lugano Convention; contractual specifications of the place of performance of non-characteristic obligations are irrelevant in terms of jurisdiction.

*Jörn Griebel*, **Investment Arbitration Awards in Setting Aside Proceedings in the US - Questions Regarding the Review of Local Remedies Clauses Within Investment Treaties**

National setting aside proceedings are more and more often concerned with investment arbitration awards. This is due to a constant rise of investment arbitration proceedings. Although two thirds of all investment disputes are adjudicated according to the ICSID rules, which provide for a special review mechanism, the remaining awards may be subject to review before national courts. The US Supreme Court decision had to decide on the degree of review in a dispute concerning local remedies clauses within an investment treaty and the possible impact of such clauses on the consent to arbitrate. The Court held that it had no competence to review the award in respect of such clauses.