Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2016: Abstracts

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

P. Huber, **The Hague Convention on Choice of Court Agreements**
The article presents the Hague Convention of 30 June 2015 on Choice of Court Agreements which entered into force on October 1st, 2015.

R. Schaub, **International Protection of Adults: Powers of Representation**
The article deals with the conflict of laws rules concerning the powers of representation granted by an adult to be exercised when the adult is no longer in a position to protect his or her interests. Especially the relevant rules of the Hague Convention on the international protection of adults are explained and analyzed, starting from the perspective of German courts or administrative authorities, with a special focus on the options of choosing the applicable law and making the necessary provisions with regard to the applicable law.

Th. Rauscher, **Ancillary Jurisdiction in Child Maintenance Cases**
In the judgment in comment the ECJ decided on conflicting ancillary jurisdiction concerning child maintenance. Ancillary jurisdiction under Article 3 of Regulation (EC) No 4/2009 should lie only in the courts exercising jurisdiction on parental responsibility (Article 3 (d)). The courts where a divorce case between the parents of the child was pending should not exercise ancillary jurisdiction under Article 3 (c) even if under the local law of the court such ancillary jurisdiction was given. As against this opinion, ancillary jurisdiction under Article 3 of said regulation should be determined only by reference to national rules of civil procedure as Article 3 (d) would not grant ancillary jurisdiction if not provided by national rules of civil procedure. Conflicting jurisdiction should be decided only under Articles 12, 13 and a court in one Member State should not be under an obligation to examine jurisdiction of other Member State's courts.

A. Piekenbrock, **The application of Art. 13 EIR in practice**
As far as avoidance in insolvency proceedings is concerned, Art. 13 EIR provides

for an exception from the basic rule laid down in Art. 4 (2)(m) EIR. Generally, the law of the State of the opening of proceedings, the lex fori concursus, is also applicable to the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors. Yet, the defendant may, to his own protection, invoke that the applicable law of another Member State does not allow any means of challenging that act in the relevant case. In 2015, the ECJ had to deal with the interpretation of the aforementioned exception for the first time. In the German-Austrian Lutz-case the ECJ has held: Art. 13 EIR applies to a situation in which the proceeds realised from a right in rem are attributed to the defendant after the opening of insolvency proceedings; the defendant may invoke that the avoidance action is time barred; the lex causae also applies to the interruption of the limitation period. In the Finish-Dutch Nike-case the ECJ has held that Art. 13 EIR only applies if the defendant can prove that under the circumstances of the case the detrimental act cannot be challenged neither under the insolvency law nor under the general provisions and principles of the lex causae. The paper analyses the Court's rulings.

W. Hau, **Jurisdiction based on defendant's property located in Germany**
Under the traditional rules, German courts claim jurisdiction for actions against defendants who are domiciled outside the EU but own property in Germany (sec. 23 Code of Civil Procedure). In this context, a recent decision of the Higher Regional Court of Munich raises interesting questions: Is it required that the assets are located in Germany at the beginning and/or at the end of the proceedings? Is it relevant that the value of the property is out of proportion to the value in litigation? Must the defendant's property be undisputed? And can even future assets suffice?

G. Schulze, **You'll never walk alone? Infringement of EU law and the duty of using the legal remedies pursuant to Art. 34 N. 1 Reg. 44 / 2001**
The Dutch Hoge Raad in Diageo Brands BV v. Simiramida-04 EOOD has referred the question concerning the interpretation of public policy in Art. 34 N. 1 of the Brussels I-Regulation to the European Court of Justice for a Preliminary Ruling according to Art. 267 TFEU. The court confirms that EU law is also part of the national conception which determines the content of public policy. In such a case the limits will be controlled by the ECJ as well as the substantive content of public policy. The court states that an error in the application of EU trademark law does not suffice to justify a refusal of recognition. The ECJ remembers the fundamental

idea that individuals are required to use all the legal remedies made available by the law of the Member State of origin. That rule is all the more justified where the alleged breach of public policy stems, as in the main proceedings, from an alleged infringement of EU law. It should be noted that the ECJ does not answer the question under which specific circumstances it is too difficult or impossible to make use of the legal remedies in the Member State of origin. All that is left to Diageo is an action in damages against Bulgaria.

S. Mock, **Qualification of Insolvency-Based Instruments of Creditor Protection in Corporate Law**

In the last few years, the European Court of Justice (ECJ) changed the fundaments of European company law dramatically due to its interpretation of the Freedom of Establishment (Art. 49, 54 Treaty on the Functioning of the European Union). Since the Centros, Überseering and Inspire Art decisions of the ECJ European corporations enjoy a general mobility especially allowing them to transfer their real seat to another Member States without a change of the applicable corporate law. However, this shift from the real seat to the incorporation theory in the international corporate law of the Member States is not reflected by European insolvency law under which the applicable law is generally determined by the center of main interest (Art. 3 f. European Insolvency Regulation) and therefore often by the real seat of the corporation. This difference becomes especially relevant in the context of insolvency-based instruments of creditor protection in corporate law since these instruments cannot be completely allocated to corporate or to insolvency law. In its decision of December 10, 2015 (C-594/14) the ECJ had to deal with such an insolvency-based instrument of creditor protection in German corporate law and considered it as insolvency law according to Art. 4 European Insolvency Regulation. The following article analyses this decision and shows that the insolvency-based instruments of creditor protection in corporate law generally – in contrast to the decision of the ECJ – have to be considered as part of corporate and not of insolvency law.

M. Andrae, **Enforcement of a Polish maintenance obligation decision against a debtor who is living in Paraguay**

The Oberlandesgericht (Higher Regional Court) Nürnberg had to decide on the appeal of the debtor against the declaration of enforceability of two Polish maintenance obligation decisions. The following legal issues were to be discussed and are treated in this note. In which cases is a judgment that was given in a

Member State since 18 June 2011 subject to the declaration of enforceability under Chapter IV Section 2 of Regulation (EC) No 4/2009 of 18 December 2008 (EuUnterhVO)? Which evidentiary value does a report prepared by the court of origin using the form in Annex II EuUnterhVO have? Is the child a creditor in the process of enforcement if the decision for child maintenance has been issued in the parents' matrimonial proceedings? In what period should an appeal be lodged in accordance with Article 32 (5) Regulation (EC) No 4/2009 of 18 December 2008 if the party against whom enforcement is sought has its habitual residence in a third country? What is the correct interpretation of the rule in Article 24 (b) Regulation (EC) No 4/2009 of 18 December 2008 according to which there is not a ground for refusing recognition insofar as the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so.

G. Hohloch, **Court Orders Refusing the Return of the Child Abducted in Spite of "Certificate of Wrongfulness" (Hague' Convention Articles 3, 12, 13, 15)**

The main object of the Hague Convention on the Civil Aspects of International Child Abduction is "to secure the prompt return of children wrongfully removed or retained in any Contracting State". Wrongfulness of removal or retention (Article 3 of the Convention) can be certified to the authorities in the sense of Articles 12 and 13 of the Convention by presentation of a "decision or other determination that the removal or retention was wrongful" ("certificate of wrongfulness") in accordance with Article 15 of the Convention. The Supreme Court of Austria now confirms the existence of such a "certificate of wrongfulness" in Austrian law. According to the new decision in Austria the "Central Authority" and not any court has the competence to make out such "certificates". The essay shows the consequences for cases of international abduction relating to Austria and also deals with the limited importance of such "certificates of wrongfulness" when – e.g. in the case of the Court of Hamburg – the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views (Article 13 subs. 2 of the Convention).

F. Wedemann, **Undisclosed partnerships (between spouses), allotments relating to marriage and family cooperation contracts in the conflict of laws**

The German Federal Court of Justice (BGH) has held that implicitly negotiated

undisclosed partnerships between spouses – a peculiarity of German law developed by the courts in order to mitigate unfair outcomes resulting from matrimonial property law – are to be characterised as a contractual matter for conflict of laws purposes. The author agrees in principle with this characterisation of undisclosed partnerships provided these are marked by the following two features: (1) nonparticipation of the partnership in legal relations, (2) absence of joint property. However, she argues that implicitly negotiated undisclosed partnerships between spouses should be characterised as a matter of international matrimonial property law. The same goes for two other peculiarities of German law: allotments relating to marriage as well as family cooperation contracts between spouses. Finally, the author deals with the characterisation of the three legal institutions – implicitly negotiated undisclosed partnerships, allotments relating to cohabitation and cooperation contracts – in cases of extra-marital cohabitation. The characterization depends on the handling of extra-marital cohabitation in international private law. If one accepts a special conflict rule for property matters of cohabitees, the three institutions should be governed by this rule. If one rejects such a rule and instead characterises the relations between cohabitees as a matter of international contract law, they are to be characterised as a contractual matter.

J. Samtleben, **A New Codification of Private International Law in Argentina**
A new "Civil and Commercial Code" containing a codification of private international law is in force in Argentina from 1 August 2015. The ambitious efforts, which persisted for a long time in Argentina, to create a distinct law for private international law have been replaced by the more practical attempt to regulate this area of law within the new Civil Code. This has substantial implications, as for instance the enforcement of foreign judgments is not regulated in the new codification. On the other hand, it contains not only provisions on the applicable law, but also on international jurisdiction. This topic is regulated in a general way in a separate chapter, but also in detail combined with the articles on the applicable law as concerns the individual fora. While the old Civil Code had only scattered provisions on conflict of laws, the new regulation is aimed at systematizing and modernizing this area of law within a cohesive text, considering the doctrine and jurisprudence in Argentina together with comparative law and international conventions.