

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)

4/2016: Abstracts

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

F. Eichel, **Private International Law Aspects of Arbitration Clauses in Favor of the Court of Arbitration for Sport**

The validity of arbitration clauses in favor of the Court of Arbitration for Sport (CAS) has been called into question by German courts in the long running proceedings of Claudia Pechstein against the International Skating Union. The courts held that the arbitration clause in the athletes’ admission form was void. They referred to provisions in German Civil Law (s. 138 German Civil Code - BGB; s. 19 Act against Restraints of Competition - GWB) which are recognized as being internationally applicable so that the German courts could apply them even though the validity of the arbitration clause was governed by Swiss law. The article reflects the Private International Law aspects of these arbitration clauses illustrating that both the relevant law of International Civil Procedure as well as the choice of law provisions primarily serve the interests of commercial arbitration and thereby reinforce the structural imbalance existing between the sports association and the athlete when signing such arbitration clauses. Against this background, the article argues that the special circumstances of sport arbitration would allow the application of the German law of standard terms (s. 307 BGB) although it is, in principle, not considered to form part of the general *ordre public*-reservation in Private International Law.

Th. Pfeiffer, **Ruhestandsmigration und EU-Erbrechtsverordnung**

From a German perspective, the most significant change that was brought about by the EU Succession Regulation is the transition from referring to the deceased’s nationality as the general connecting factor to the deceased’s habitual residence. This transition reflects an analysis of interests which is primarily based on cases of migrant professionals or workers and their families. However, there is also a large group of migrants already retired at the time of their migration (e.g. the large group of German pensioners on the Spanish island of Mallorca). Their

situation is different from migrant workers insofar as their migration occurs at a moment when the most significant decisions in their lives have been made already; as a consequence, migration at that age, usually, does not include following generations. Moreover, it is not unlikely that, in many cases, migrating pensioners, when planning for their estates, will not consider the laws of their new habitual residence. Based on this analysis, this article asks how the EU Succession Regulation addresses these particularities of migrating pensioners. In particular, it is discussed under which circumstances the laws of their home state (based on their nationality) may remain applicable. In this context, the article considers: (1) provisions which do not refer to the moment of deceased's death but to an earlier event, (2) the need for an appropriate definition of habitual residence, (3) the escape clause in Art. 21 (2) of the Regulation, (4) a choice of law by the deceased and (5) waivers of succession. The article concludes that the Regulation is open for applying the laws of the deceased's nationality to a certain extent but that this law must not be applied automatically if the principle of referring to the deceased's habitual residence is taken seriously.

A. Brand, Damages Claims and Torpedo Actions - The Principle of Priority of Art. 29 para 1 Brussels I-Regulation with a particular focus on Cartel Damages Claims.

Forum shopping by way of „Torpedo actions“ is an unwanted means of a tortfeasor to secure the jurisdiction of their home country rather than having to defend themselves before the courts at the seat of the injured plaintiff. This has gained particular relevance in proceedings concerning cartel-damages claims. The race hunt to the court could and should be avoided by strictly applying the principles of procedural efficiency and fair trial and the requirement of a justified interest for an action for (negative) declaration. As under domestic law, the principle of priority as laid down in art. 29 para. 1 of the Brussels I-Regulation cannot be applied to torpedo actions in case of tort.

W.-H. Roth, Jurisdictional issues of competition damages claims

In its CDC-judgment the Court of Justice for the first time had the chance to rule on several issues of jurisdiction concerning cartel-inflicted damages. Claimant was an undertaking specifically set up for the purpose of pursuing such damage claims that had been transferred to her by potential cartel victims. The Court deals with jurisdiction over multiple defendants (Art. 6 No. 1 Regulation EC 44/2001), the scope of tort jurisdiction (Art. 5 No. 3), based on the place where

the event giving rise to the damage occurred and on the place where the damage occurred, and with the interpretation of jurisdiction clauses (Art. 23) potentially covering cartel-inflicted damage claims. The results reached and the arguments advanced by the Court, taken all in all, deserve applause. Given that the judgment deals with a setting of a follow-on action (with a binding decision by the EU-Commission) it will have to be clarified whether the main results of the judgment can also be applied in stand-alone actions.

R. Hüßtege, **A tree must be bent while it is young**

The Federal Constitutional Court of Germany reprimands that the district court in an adoption procedure did not use all sources of knowledge in accordance to the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters and to the European Judicial Network, in order to determine whether an effective Romanian adoption exists. Due to this omission fundamental rights of the complainant were injured in the adoption case concerning the recognition of the Romanian decision. This case shows that instruments, like the mentioned regulation and the European Judicial Network in commercial and civil matters are not well known to courts. There is an urgent need for training of judges.

C. F. Nordmeier, **Lis pendens under art. 16 Brussels IIa and Art. 32 Brussels Ia when proceedings are stayed**

The case at hand deals with the decisive moment for lis pendens according to art. 16 (1) (a) Brussels IIa (equivalent to art. 32 (1) (a) Brussels Ia) if proceedings are stayed before service in order to reach an amicable arrangement. The provision contains an own obligation of the applicant. Whether a delay of service restrains lis pendens depends on the breach of this obligation being imputable to the applicant. Intention or negligence should not serve as a basis to impute the breach. The present contribution analyses different types of delay and its imputability: stay of proceedings to reach an amicable arrangement, deficiencies of the documents submitted for service and mistakes of the court while effecting service. For the continuance of lis pendens the author argues that a stay or an interruption of proceedings does not abolish the effects of lis pendens.

B. Heiderhoff, **Perpetuatio fori in custody proceedings**

Even if parents, as in the case at hand, have joint parental responsibility with the exception of the right to determine the child's place of residence, the parent who has the sole right to determine the child's place of residence may lawfully move

abroad with the child. The other parent has to accept the complications in exercising parental responsibility. If the child is relocating its habitual residence to a state that is not a member state of the EU, but a signatory state to the Hague 1996 Children's Convention, the Convention must be applied. This is clearly stated in Art. 61 Brussels II-Regulation. Unlike Art. 8 Brussels II-Regulation, the 1996 Children's Convention does not follow the principle of *perpetuatio fori*. In order to prevent a parent from taking a child abroad during ongoing court proceedings, the courts should regularly consider an injunction by which the right to determine residence of the child is limited to Germany. This applies particularly when both parents have joint responsibility and merely the isolated right to determine the child's place of residence is assigned to one parent. If one parent has sole custody at the beginning of the procedure, the interests must be weighed differently. The right to move abroad with the child during the proceedings should, in general, only be excluded if there is a rather serious chance for the affected parent to lose sole custody.

U. P. Gruber, **How to modify decisions on maintenance obligations**

In scholarly writing, proceedings to modify decisions on maintenance obligations have only attracted limited attention. However, these proceedings raise very intricate and unsolved problems of characterization. The Bundesgerichtshof, in a new decision, has tackled some of the questions while leaving others unanswered. In the author's opinion, the modification of decisions on maintenance obligations is governed by the Hague Protocol of 23 November 2007. The convention's predecessor, the Hague Convention of 2 October 1973, also covered the modification of decisions, and it can be presumed that the Hague Protocol, as far as its scope is concerned, follows the Hague Convention. The procedural framework of the proceedings to modify decisions on maintenance obligations, however, is governed by the *lex fori*, i.e. the law of the state in which the proceedings to modify the decision are brought. The Hague Protocol of 23 November 2007 is part of EU law. Therefore, it seems likely that the ECJ will be requested to decide on the issue. Whether or not the ECJ will support the application of the Hague Protocol seems impossible to predict.

K. Siehr, **Execution of Foreign Order to Return an Abducted Child**

A child was abducted by his mother from Germany to Poland and after one year re-abducted by his father to Germany. Instead of asking German courts for a return order under the EU Regulation No. 2201/2003 on Matrimonial Matters and

Matters of Parental Responsibility the father turned to Polish courts and asked for a return order. Such an order was turned down because the child, in the meantime, had been abducted by the father to Germany. The mother asked the Polish court for a return order and got it as an urgent order because of the habitual residence of the child in Poland. The mother asked German courts to recognize and enforce this Polish order to return the child to Poland. The Court of Appeals of Munich recognized and enforced the Polish return order. The Munich court did not recognize the return order neither under Art. 42 nor under Art. 28 et seq. Regulation 2201/2003 because relevant certificates were missing or some enforcement obstacles (hearing of the father in Poland) were given. The German court decided that the Polish return order should be recognized and enforced under the Hague Convention of 1996 on the Protection of Children without taking care of Art. 61 of the Regulation 2201/2003 which give precedence to the Regulation in this case. Jurisdiction of the Polish court is determined according to Art. 20 of the Regulation and Art. 11 of the Hague Convention of 1996 which granted only territorially limited jurisdiction to local courts in urgent matters. In this case, however, the child was not any more in Poland but in Germany. The German court is criticized because of not explaining properly the application of the Hague Convention of 1996 under Art. 61 of Regulation 2201/2003 and because of misinterpreting Art. 20 of the Regulation 2201/2203 and of Art. 11 Hague Convention by giving them universal jurisdiction.

D. Looschelders, Problems of Characterization and Adaptation in German-Italian Successions

German-Italian successions often raise difficult legal questions. In its decision, the Higher Regional Court of Duesseldorf firstly deals with the invalidity of joint wills under Italian law. The main part of the decision is concerned with problems of characterization and adaptation. In the present case, these problems arise due to the parallel applicability of Italian Succession Law and German Matrimonial Property Law. The author supports the decision in general. However, it is stated that the courts considerations with regard to the necessity of adaptation are not convincing in all respects. Finally, it is shown how the problems of the case were to be solved in accordance with the European Succession Regulation which was not yet applicable.

C. Mayer, Ancillary matrimonial property regime and conflict of laws - characterization of claims arising from an undisclosed partnership

between spouses.

While it is generally agreed that the legal regime for undisclosed partnerships follows the law applicable to contractual obligations, there is debate as regards undisclosed partnerships between spouses. Due to their special connection with the matrimonial property regime, it is argued that compensation claims arising from undisclosed partnerships between spouses are to be characterized as matrimonial. Along with the prevailing opinion, the German Federal Court of Justice now correctly supports a characterization as contractual. Given, however, the close relation to the matrimonial property regime, the court proposes an accessory connection: the partnership agreement is closest connected to the law governing matrimonial property. Subject to criticism is, however, the far-reaching willingness of the court to find an implied choice of law by the spouses.

M. Stöber, Discharge of Residual Debt and Insolvency Avoidance Actions in Cross-Border Insolvencies with Main and Secondary Proceedings

15 years after the adoption of the European Regulation on Insolvency Proceedings in the year 2000, it is still difficult to answer the question which national insolvency law applies to cross-border insolvency proceedings within the European Union. The case that - in addition to main insolvency proceedings in one member state - secondary insolvency proceedings have been opened in another member state of the European Union is of particular complexity. In two recent judgments, the German Supreme Court has decided on the impact the opening of secondary proceedings in another state has on a discharge of residual debt (judgement of 18 September 2014) and on insolvency avoidance actions respectively (judgement of 20 November 2014) granted by the national law applicable to the main proceedings opened in the first state.

C. Kohler, Claims for the payment of holiday allowances by a public fund for paid leave for workers: “civil and commercial” or “administrative” matters?

By its ruling in BGE 141 III 28 the Swiss Federal Court refused to enforce in Switzerland an Austrian judgment according to which a Swiss company had to make payments to the Austrian fund for paid leave for workers in the construction industry that were due for workers posted to Austria by the defendant company. According to the Federal Court, the judgment is outside the scope of the Lugano-Convention as it has not been given in a “civil and commercial matter” as required by art. 1 thereof. The ways and means by which the Austrian fund

claimed the payments constituted the exercise of public powers and differed from the legal relationship between the parties to an employment contract. The author submits that the judgment of the Federal Court is not in line with the ECJ's case-law on art. 1 of the Brussels instruments. In order to assess whether a case is a "civil and commercial matter", one has to look not at the modalities for the enforcement but at the origin of the right which forms the subject matter of the proceedings. In the instant case the right to paid leave stems from the employment contract and is of a private law character. As the Federal Court sees no legal basis for the enforcement of the Austrian judgment outside the Lugano-Convention, its judgment leaves a gap in the judicial protection of posted workers' rights as between Austria and Switzerland contrary to the objective of Directive 96/71 which applies according to the bilateral agreements between Switzerland and the EU.