Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2016: Abstracts

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

U. Magnus: **A Special Conflicts Rule for the Law Applicable to Choice of Court and Arbitration Agreements?**
The article examines whether the German legislator should enact a separate conflicts rule which determines the law that is applicable to the conclusion and validity of choice of court and arbitration agreements. With respect to choice of court agreements the national legislator's room for manoeuvre is anyway very limited due to the regulations in Art. 25 Brussels Ibis Regulation and Art. 5 Hague Convention on Choice of Court Agreements of 2005. There is no genuine need for an additional national conflicts rule, in particular since the interpretation and exact scope of the new conflicts rule in Art. 25 (1) Brussels Ibis Regulation still requires its final determination by the CJEU. After weighing all pros and cons the article recommends not to enact a separate conflicts provision. The same result is reached for arbitration agreements. Here, the international practice that in the absence of a choice the law at the place of arbitration applies should be fixed on the international or European level.

K. Bälz: **Failing states as parties in international commercial disputes: public international law and conflict of laws**
In the aftermath of the "Arab Spring" a number of states in the immediate vicinity of Europe have turned into failing states. Using the Libya cases of the English High Court as a starting point, this article examines the practical questions that arise in commercial disputes involving failing states. The key question is how to implement the international law principles on regime change and state failure in international disputes.

U.P. Gruber: **The new international private law on the equalization of pension rights – a critical assessment**
German international private law contains an extremely complicated rule on the

equalization of pension rights. Under this rule, the equalization of pension rights of husband and wife shall be subject to the law applicable to the divorce according to the Rome III Regulation; however, an equalization shall only be granted if accordingly German law is applicable and if such equalization is recognized by the law of one of the countries of which the spouses were nationals at the time when the divorce petition was served. If one of the spouses has acquired during the subsistence of the marriage a pension right with an inland pension fund and carrying out the equalization of pension rights would not be inconsistent with equity, the equalization of pension rights of husband and wife shall be carried out pursuant to German law on application of a spouse.
Lately, Art. 17 (3) *EGBGB* was amended. Whereas in former times, Art. 17 (3) *EGBGB* referred to the law applicable to divorce determined by an autonomous German rule, the provision now makes referral to the Rome III Regulation. In the legislative process, this amendment was neither discussed nor justified. At a closer look, however, the new rule has serious flaws and should be changed.

C. Heinze/B. Steinrötter: **When does a contract fall within the scope of the „directed activity" as provided for in Art. 15 (1) (c) Regulation (EC) No 44/2001 (= Art. 17(1) (c) Regulation [EU] No 1215/2012)?**
This contribution analyses the recent *Hobohm*-judgment of the European Court of Justice (ECJ), which concerns the requirement "contract falls within the scope of such activities" in Art. 15 (1) (c) Regulation (EC) No 44/2001 (= Art. 17 (1) (c) Regulation [EU] No 1215/2012). The CJEU decided that the rules on jurisdiction over consumer contracts are applicable even if the respective contract on its own does not fall within the scope of the professional activity which has been directed to the consumer's home state, provided that it is closely linked to an earlier contract falling under Art. 17 (1) (c). The *authors* analyse the elements of this test of close connection and place it into the more general context of the jurisdiction rules for consumer disputes.

T. Lutzi: **Qualification of the claim for a 'private copying levy' and the requirement of seeking to establish the liability of a defendant under Art. 5 No. 3 Brussels I (Art. 7 (2) Brussels I recast)**
Seized with the question whether a claim for the "blank-cassette levy" under § 42b of the Austrian *Urheberrechtsgesetz* (which transposes Art. 5 (2) b of the European Copyright Directive) qualifies as delictual within the meaning of Art. 5 No. 3 of the Brussels I Regulation (Art. 7 (2) of the recast Regulation), the Court

of Justice had an opportunity to refine its well-known *Kalfelis* formula, according to which an action falls under Art. 5 No. 3 if it "seeks to establish the liability of a defendant" and is "not related to a 'contract' within the meaning of Art. 5 No. 1". Holding that the claim in question sought to establish the liability of the defendant "since [it] is based on an infringement […] of the provisions of the UrhG", the Court seems to have moved away from the more restrictive interpretation of this criterion it has applied in the past. Yet, given the implications of such a broad understanding of Art. 5 No. 3, not least for claims in unjust enrichment, a restrictive reading of the decision is proposed.

L. Hübner: **Effects of cross-border mergers on bonds**
The article deals with the complex interplay of international contract law and international corporate law exemplified by the ECJ decision in the *KA Finanz* case. Three issues will be focused on: (i) the law applicable to a bond indenture after a cross-border merger of one of the contracting parties with a third party; (ii) the law applicable to the legal consequences of such a merger (legal and asset succession as well as creditor protection); and (iii) the application of Art. 15 of Directive 78/855 to securities to which special rights are attached.

C. Thomale: **Multinational Corporate Groups, Secondary insolvency proceedings and the extraterritorial reach of EU insolvency law**
In its preliminary ruling on the *Nortel Networks* insolvency dispute, the ECJ has made important assertions on procedural and substantive aspects of secondary insolvency proceedings and their coordination with the main proceedings as well as their reach to extraterritorial assets of the debtor. At the same time, the decision fuels the general regulatory debate on corporate group insolvencies. This comment analyses the decision and develops an alternative approach.

D.-C. Bittmann: **Requirements regarding a legal remedy in terms of art. 19 of Regulation (EC) No. 805/2004 and competence for carrying out the certification of a judgment as a European Enforcement Order**
The following article examines a judgment of the ECJ, which deals with several problems regarding the interpretation of Regulation (EC) No. 805/2004 creating a European Enforcement Order (EEO) for uncontested claims. The first part of the decision regards the requirements established by Art. 19 of the regulation. The ECJ rules, that Art. 19 (1) of Regulation (EC) No. 805/2004 requires from the national legal remedy in question that it effectively and without exception allows for a full review, in law and in fact, of a judgment in both of the situations

referred to in that provision. Furthermore the EJC rules, that this legal remedy must allow the periods for challenging a judgment on an uncontested claim to be extended, not only in the event of force majeure, but also where other extraordinary circumstances beyond the debtor's control prevented him from contesting the claim in question (Art. 19 (1) (b)). In the second part of the decision the ECJ rules, that the certification of a judgment as an EEO, which may be applied for at any time, can be carried out only by a judge and not by the registrar. The latter is only allowed to carry out the formal act of issuing the standard form according to Art. 9 of Regulation (EC) No. 805/2004 after the decision regarding certification as an EEO has been taken by the judge.

S. Arnold: **Contract, Choice of Law and the Protection of the Consumer abroad when lured into business premises**

Consumer protection is a cornerstone of European Law – just like party autonomy. Even in consumer contracts, parties can choose the applicable law. Yet the choice must not be to the detriment of the consumer. This is the core idea of Art. 6 (2) Rome I-Regulation. The *OLG Stuttgart* (Higher Regional Court of Stuttgart) addressed the range of that provision which is a central tool of consumer protection through conflict of laws. During a package holiday in Turkey, an 85 year old lady had bought a carpet. Turkish substantive Law did not allow for the lady to withdraw from the contract, German substantial Law, however, did. The *OLG Stuttgart* decided that the lady could withdraw from the contract on the basis of German substantial Law. The *OLG Stuttgart* found that the Turkish seller had worked together with the German travel agency in order to lure tourists from Germany into his business premises.

C. Wendelstein: **Cross-border set-off based on counterclaim governed by Italian law**

In the context of an international set-off the German Federal Court of Justice had to deal with various questions in the field of conflict of laws. For the first time the Court had to adjudicate upon the characterization of the notion of *liquidità* in Italian law (Art. 1243 *Codice civile* = Cc). According to the Federal Court of Justice this question has to be answered by the law designated by Art. 17 Rome I Regulation. The author agrees with this finding.

G. Schulze: **The personal statute in case of ineffective dual nationalities (case note on a judgment given by the Federal Court of Justice of Germany on 24th June 2015 – XII ZB 273/13)**

The applicant had been living in Germany since his birth. As he had a double name (according to Spanish customs) registered in the civil registry in Spain he wanted to go by his Spanish family name in Germany as well. The case raises the question of how to determine the personal statute of a multinational person having both a Spanish and a Moroccan nationality if the person has no connections whatsoever to the countries in question. The Federal Court of Justice of Germany (*Bundesgerichtshof, BGH*) held: That in default of an "effective" citizenship the law of habitual residence shall be applicable, *in casu*: German law. That the "limping" name does not violate EU law. There are doubts about this solution: The effectiveness of nationality does not form a part of the elements of Art. 10 (1) of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB*). Effectiveness serves only to clearly define the personal statute for given connecting factors, viz. in order to choose between several citizenships in Art. 5 (1) sentence 1 or to determine the (closer connected) habitual residence in Art. 5 (2) *EGBGB*. *De lege lata* there is no well-founded basis for a supported rejection of the application of law of nationality. However the general tendency to apply the law of habitual residence is not a reason to apply Art. 5 (2) *EGBGB* in analogy given multiple ineffective nationalities. It is not suitable to extend the escape clause in Art. 5 (2) *EGBGB*. In any case it is not a solution if the nationalities are EU nationalities. A former opportunity for choice of law which was unknown by the tenants does not eliminate an infringement of Art. 18 TEU (discrimination) and 21 TEU (freedom of movement).

M. Andrae: **The matrimonial property regime of the spouses with former Yugoslav nationality**

For the determination of the law applicable to matrimonial property referring to spouses who had at the time of marriage the Yugoslav nationality, two principles have a special significance: 1. The law of the former Yugoslavia shall not apply, including its interregional law and its conflict of laws principles. 2. An automatic change of the applicable law must be avoided, if possible and if it is not the consequence of a choice of law. Priority is given to the first principle. The connecting factor of the common nationality pursuant to Art. 15 (1) and 14 (1) No. 1 *EGBGB* must be supplemented. For this it is suitable to use the principle of closest connection by analogy to Art. 4 (3) sentence 2 *EGBGB*. Reference is made to the right of a successor State, if the spouses have had at the time of entering the marriage the Yugoslav nationality and a common closest connection to an area of the former Yugoslavia, which is now the territory of successor state. If

such a connection is absent, then the applicable law has to be determined in accordance with Art. 15 (1) and 14 (1) No. 2 of the *EGBGB*, if necessary by Art. 14 (1) No. 3 *EGBGB*.

A. Reinstadler/A. Reinalter: **The decision opening the debtor-in-possession proceeding pursuant to § 270a German Insolvency Act is not an insolvency proceeding pursuant to the European Insolvency Regulation (2002)**
The Court of Appeal of Trento, local section of Bolzano (Italy) had to rule on the question whether the debtor-in-possession proceeding/*Verfahren auf Eigenverwaltung* (§ 270a German Insolvency Act) can be qualified as decision opening an insolvency proceeding pursuant to art. 16 European Insolvency Regulation (2002) and has, therefore, to be recognized automatically by operation of law by the courts of other Member States. Judge-Rapporteur *Elisabeth Roilo* concluded (implicitly referring to the *Eurofood*-formula) that the decision issued by the German district court in which opened the debtor-in-possession proceeding pursuant to § 270a German Insolvency Act is neither listed in Annex A of the Regulation nor is the appointed provisional liquidator (*vorläufiger Sachwalter*) included in Annex C of the Regulation. Since the decision, furthermore, foresees neither the divestment of debtor's assets nor the forfeiture of the powers of management which he has over his assets, the criteria set down in the *Eurofood*-judgment are not fulfilled. The result is that the decision may not be qualified as a decision opening an insolvency procedure under the terms of art. 16 European Insolvency Regulation (2002).