Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2017: Abstracts

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

C. Thole: **The recast of the European Insolvency Regulation**

On 26 June 2017, the recast of the European Insolvency Regulation (reg. 2015/848) will enter into force. Although the recast does not entail radical changes, it is not confined to minor editorial amendments either, but adds some distinct new features to the EIR. This article sketches the corner points of the recast and attempts to identify new legal questions brought up by the new regulation.

M.-P. Weller: **The Recast of the Brussels II bis Regulation**

On 6/30/2016 the European Commission presented its draft of a revised version of the Brussels II bis Regulation. The proposals for reform primarily affect proceedings in matters of paternal responsibility. The article provides an outline and a discussion of the benefits and shortcomings of the essential changes proposed by the draft. In addition, the article critically reviews the Commission's opinion on the lack of a need for a reform of the rules on matrimonial matters.

B. Heiderhoff: **The Adjustment of German Law to the Matrimonial Property Regulations**

Before the EU regulations on matrimonial property regimes (2016/ 1103) and on property consequences of registered partnerships (2016/1104) come into force on 29th January 2019, the national law must be adjusted. This contribution makes suggestions for the alignment of the conflict of laws rules as well as the introduction of the necessary procedural complements. In essence, it recommends adopting the same conflict of laws rules contained in the regulations also for those general effects of marriage that are not covered by the regulation. The procedural implementation should be effected in a separate new law and

structured as parallel as possible to the law implementing the EU Succession Regulation.

M. Rohls/M. C. Mekat: **The interplay between the provisions of the EU Service Regulation and the German Regulation on Judicial Assistance in Civil Matters (ZRHO) concerning the service of judicial documents to foreign States**

The authors examine the interplay between the provisions of the EU Service Regulation and the German Regulation on Judicial Assistance in Civil Matters (Rechtshilfeordnung für Zivilsachen, abbreviated "ZRHO") in the field of service of judicial documents to foreign states. The authors conclude that the options of service of documents as granted by the EU Service Regulation – within their scope – cannot be restricted by the ZRHO's character as domestic administrative guidelines. Against this background, the authors call for a primary application of the provisions on the service of documents as foreseen in the EU Service Regulation, insofar as contrary national provisions in Germany (and other Member States of the EU) restrict a service of documents to foreign states.

G. Kühne: **Some Observations on the 1986 German Reform of Private International Law**

The German Private International Law Reform of 1986 has recently been the subject of discussions and contributions to this Review by various authors. The author of this article has contributed to the 1986 reform by a separate Draft, the so-called "Kühne-Entwurf" of 1980. In the following article he adds some supplementary observations on a few specific aspects concerning his Draft, in particular party autonomy in international matrimonial and succession law, where his proposals differed from those put forward by the German Council for Private International Law.

O. L. Knöfel: **Public policy – The Concept of Extrajudicial Documents – Does the European Service Regulation Apply to Private Documents?**

The article reviews a decision of the European Court of Justice (Case C-223/14 – Tecom Mican SL, José Arias Domínguez), dealing with the question whether the concept of "extrajudicial documents" (Art. 16 of the European Service Regulation of 13 November 2007) covers private documents. The Court answered this question in the affirmative, which is not convincing, as the notion of "extrajudicial

documents" is habitually considered to encompass only documents emanating from authorities and judicial officers of a State. The author analyses the background of the notion of "extrajudicial documents" in the Hague Conventions on civil procedure and in other international legal instruments, and discusses the consequences of the decision of the ECJ for international legal assistance in civil and commercial matters.

S. Burrer: **The question of cautio judicatum solvi in the case of German claimants domiciled outside of Germany and the Hague Convention on Civil Procedure**

Following the amendment in 1998 to § 110 German Code of Civil Procedure to abolish the obligation on foreign claimants to furnish cautio judicatum solvi and the implementation of a new obligation on all claimants who are not residents in the EU/the EEA to provide security for costs, a question arose as to how German claimants domiciled outside of the EU/the EEA but domiciled in one of the signatory states of the Hague Convention on Civil Procedure (HCCP) should be treated. This question was neither discussed nor solved for several years. Initial views in both jurisprudence and literature refused an exemption of such expatriate German claimants as compared to nationals from other contracting states. Dissenting with these views, the Higher Regional Court of Munich decided in 2014 that such expatriate German claimants also enjoy exemption from the obligation to provide security where they are domiciled within the area of application of the HCCP due to the general principle of equality in Art. 3 para. 1 German Basic Law. This article critically discusses both the opposing view as well as the reasoning of the Higher Regional Court of Munich and shows by way of an analysis of the historic sources, a comparison with the legal situation in Switzerland and by purposive interpretation of the HCCP, that freedom from the security requirement within the scope of the convention is the correct outcome. This is not justified by applying the exemption in Art. 17 HCCP in conjunction with § 110 para. 2 no. 1 Code of Civil Procedure, but solely as a result of the commitment of enforcement in Art. 18 HCCP in conjunction with § 110 para. 2 no. 2 Code of Civil Procedure.

U. P. Gruber: **Die Überleitung eines europäischen Mahnverfahrens in ein Erkenntnisverfahren**

Pursuant to Art. 17 of the Regulation (EC) No 1896/2006, when the defendant

lodges a statement of opposition to the European order for payment, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure. In its decision C-94/14, the ECJ emphasizes that the transfer to ordinary civil proceedings is governed by the national laws of the Member States. The laws of the Member States also govern the extent of the verification obligations to which national courts are subject when determining their international jurisdiction. European law only sets certain minimum standards that must be observed, i.e. the rights of the defence and the effectiveness of European regulations. German law meets these standards; in the author's opinion, also the claimant's obligation to designate the competent court (§ 1090 ZPO) is in accordance with European law.

B. Rentsch/M.-P. Weller: **Recognition of judgments in International Family Law – regulatory levels in Brussels IIbis vs. leveled balancing of public policy**

The Brussels IIbis Regulation is unique in its intertwinement with both European and International Family Law instruments. Despite its independence both from International treaties on child protection and neighboring EU instruments, all regimes of child protection tend to coincide in International family law litigation. In its judgment P ./. Q, the ECJ makes an effort to distinguish, namely, protection mechanisms of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, and the return regime provided by Art. 10 Brussels IIbis-Regulation. Given its advocacy for a clear-cut separation, the judgment still evidences how both regimes may end up converging on the level of public policy.

P. F. Schlosser: **Standard Forms and unclearly drafted choice of law stipulations**

Regarding private international law the court makes three statements of general interest.
1. The issue whether the applicability of a national legal system has validly been agreed is to be dealt with according to the law possibly designated.
2. This rule includes the inference of unclear drafting which, according to § 305c (German) BGB, leads to the solution, and hence in the case of choice of law stipulations, to the law most favorable for the partner of the user of general trade terms.
3. In this specific case the judgment relied on the common view of both parties

that German law was the most favorable for the co-contracting partner. By arguing in this way the court could not reach the more general issue, which solution should be "more favorable" for the co-contracting party if the unclear stipulation refers to a complex multitude of terms or to a national legal system encompassing both, elements favorable as well as unfavorable for the co-contracting party. The author's proposition is: to grant an option to the co-contracting party; but only to choose between the respective entirety of the standard terms or of the dispositions of a national legal system.

P. Huber: **CISG: traditional analysis on the right to avoid and a new approach to set off (note on a judgment by the German Bundesgerichtshof)**

The article discusses a judgment by the German Bundesgerichtshof on the Convention for the International Sale of Goods (CISG). The main issues covered are the buyer's right to avoid the contract for non-conforming delivery by the seller and the issue of set off in a CISG contract. With regard to avoidance, the court mainly affirms the prevailing opinion. A rather new aspect, however, is that the court requires the seller who wishes to cure the non-conformity to give notice of that intention to the buyer. The author agrees with this part of the decision. With regard to set off, the court explores new ground by assuming that set off is governed by (general principles underlying) the CISG in cases where both claims are based on the same contractual relationship and where this contract is governed by the CISG. The author criticizes this part of the judgment and argues that set off should be left to the applicable (national) law.

A. Reinisch: **On the Scope of Immunity of the Swiss National Bank before Austrian Courts and Central Banks in General. Case Comment on Austrian Supreme Court, 17 August 2016 – 8 Ob 68/16g.**

The Austrian Supreme Court had an opportunity to rule on a novel issue of immunity from jurisdiction enjoyed by foreign central banks. It decided that public statements formulated by central bank officials supporting and explaining its foreign exchange policy were so closely connected to the bank's sovereign tasks that they also qualified as non-commercial, iure imperii activities justifying their exemption from judicial scrutiny as a result of sovereign immunity principles. It thereby also confirmed the settled Austrian jurisprudence that foreign states enjoyed a limited, restrictive immunity for iure imperii acts only

and that this standard was specifically relevant for foreign central banks where the 1972 Council of Europe Convention on State Immunity was applicable.

S. Corneloup: **Validity and Third-Party Effect of Choice of Court Agreements. The Cour de cassation between European and national interpretation**

The national courts of the Member States are often torn between, on the one hand, the necessity to respect the autonomous interpretation of EU law given by the ECJ and, on the other hand, the temptation to translate their own visions based on national particularities. This tension has become particularly obvious in the recent case-law of the French Cour de cassation with respect to the validity and third-party effect of choice of court agreements. In the matter of third-party effect of choice of court agreements, the Cour de cassation implements the restrictive rulings of the ECJ regarding international chains of contracts even though they are in contradiction with French civil law. In contrast, for asymmetric choice of court agreements the court lays down its own conditions of validity without concern for European harmonization. On both topics the current French case-law is subject to critical analysis.

S. Krebber: **Jurisprudence for suits of an employee against the third person in tripartite constellations of employment law.**

The decision of the chambre sociale of the Cour de cassation deals with jurisdiction under the regime of the Brussels Ibis regulation for suits of an employee against the third person in tripartite constellations. In such tripartite constellations, employment law may be applicable against the third party either because the third party is considered as an employer or because rights and duties also vis-à-vis the third party are vested in the employment relationship between the employer and his employee. Art. 20 et seq. Brussels Ibis regulation are applicable to such suits even though Art. 20 requires an employment contract.

K. Bälz: **DIFC Court of Appeal, Urteil vom 25. Februar 2016 in Sachen DNB Bank ASA v (1) Gulf Eyadah Corporation (2) Gulf Navigations Holdings PSJC**

A recent decision of the DIFC Court of Appeals opens up the possibility to recognize and enforce German court decisions in civil matters in the UAE by using the courts of the financial free zone DIFC as a conduit jurisdiction. In view

thereof, there is now reciprocal enforcement in relation to the Emirate of Dubai within the meaning of sec. 328 of the German Code of Civil Procedure (ZPO).