Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2018: Abstracts

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

B. Heiderhoff: **The new EU Regulations on Matrimonial Property Regimes and on the Property Consequences of Registered Partnerships**

The two new EU Regulations on matrimonial property regimes (2016/1103) and on property consequences of registered partnerships (2016/1104) will come into force on 29th January 2019. This contribution provides an introduction to the new acts and analyses their central provisions. Firstly, the material and personal scope of the Regulations are clarified. The author then considers the conflict of laws rules. Here, the Regulation is consistent with Rome III and the 2007 Hague Protocol in allowing a limited choice of law. It is highlighted that the habitual residence at the time of the marriage is of central importance, but that several issues will need further clarification. In particular, the exact time at which the habitual residence of the couple must be established under Article 26 para 1 needs to be fixed. Furthermore, the escape clause in Article 26 para 3 is described as being too narrow. It is then shown that the formal requirements for marriage contracts in Article 25 refer to the *lex causae* which may cause difficulty. Finally, the rules on jurisdiction are briefly described. The author ends with an overall positive assessment.

T. Koops: **Res judicata under the Brussels I Recast – Can the ruling in Gothaer Allgemeine Versicherung ./. Samskip GmbH be reconciled with the Brussels I Recast Regulation?**

In *Gothaer Allgemeine Versicherung ./. Samskip GmbH* the CJEU developed a European concept of res judicata, encompassing not only the operative part of the judgment, but also its *ratio decidendi*, based on the Brussels I Regulation. This article argues contrary to the CJEU, that today’s European law of Civil Procedure cannot cope with a European concept of res judicata. Far from being a fully-fledged system of law it cannot furnish “its” concept of *res judicata* with a

corresponding system of legal protection. An autonomous concept would sever the connection between the legal effect of a decision and the legal protection of the parties under national laws. Therefore, the effect of a decision, when recognized in another member state, should in principle be determined by the law of the state in which it was rendered. On the other hand, some of the provisions of what is now the Brussels I Recast do indeed require a uniform European concept of res judicata, albeit with a narrow scope. This leaves us with a European law of Civil Procedure under which the concept of res judicata should, but cannot be entirely based on national law.

P.F. Schlosser: **Agents acting on behalf of a corporate entity or debtors jointly and severally liable together with it personally bound by jurisdiction agreements in the contract?**

The opinion of the Court of Justice in its decision of June 26, 2017, case C-436/16, is correct and cannot be subject to any doubt. A jurisdiction agreement cannot by itself bind persons acting for the respective contract partner in the capacity of a managing director or holder of a power of attorney. The solution is corresponding to what is correct in the framework of arbitration. Persons acting on behalf of the respective contracting party may only be bound by an agreement relating to them specifically and meeting the form requirements of Art. II New York Convention of 1958 or Art. 25 Brussels Ibis Regulation, respectively.

R. Magnus: **The jurisdiction at the place of performance for the repayment of a loan**

This article comments on a recent decision of the Higher Regional Court in Hamm (Germany), in which the court ruled that for the repayment of a loan Art. 5 Nr. 1 lit. b Brussel I-Regulation conferred jurisdiction upon the courts at the seat of the lender or likewise the seat of the transferring credit institution. The Court decided that the decisive element that constitutes the place of performance in accordance with Art. 5 Nr. 1 lit. b Brussel I-Regulation is the location, where the lender initiated the transfer of the money to the borrower’s bank account. This article discusses the implications of this decision, criticizes its reasoning and considers alternative foundations for the jurisdiction in the case at hand.

G. Schulze: **Attributability of a declaration of intent in cases of doubtful agency – triple relevance of the same fact (dreifach relevante Tatsache)**

The matter in question was whether a business woman's declaration of intent should be attributed to herself or to a Spanish joint-stock company (S.L.) which she was an agent of. This question was decisive for jurisdiction (jurisdiction clause, Art. 23, and special jurisdiction, Art. 5 Regulation (EC) No 44/2001) as well as the decision on the merits (payment of remuneration for work). Therefore, the ECJ's ruling in *Kolassa* applied (28.1.2015 C-375/13, IPRax 2016, 143) which allows accordingly to the *lex fori* different requirements for fact adjudication in "good arguable cases". Given the unional concept of res judicata in *Gothaer Versicherungs AG* (15.11.2012 C-456/11, IPRax 2014, 163) the ratio of this ruling seems to be outdated, at least in cases within the Single Market.
In private international law the issue at stake is: Which law governs the consequences of a declaration of intent in cases of doubtful agency? Therefore, the German law applicable to contracts and the Spanish law applicable to companies should be considered. Multiple and indirect representation are both questions of substantive law of agency. Nevertheless, the issue should be characterized as a question of contract law: The heart of the problem is who should be a party to the contract. The recently enacted provision on the conflict of laws of agency does not contain any ruling on this problem (Art. 8 Introductory Act to the Civil Code). The Higher Regional Court held rightly that German contract law is applicable to the defendant's capacity to be sued and, *in casu*, this capacity was denied.

D. Martiny: **Jurisdiction and habitual residence in respect of a deceased cross-border commuter**

The case concerns a conflict of local jurisdiction between the Local Court of Pankow/Weißensee, where the succession-waiving daughter of the deceased had her domicile, and the Local Court of Wedding, in whose district the deceased had lived prior to relocating to Poland. The Berlin Court of Appeal (Kammergericht) rules that the deceased still had his habitual residence in Germany despite the fact that he lived in a flat in a rented storage depot in Poland. The court identifies the criteria relevant to the determination, particularly his activities as a "cross-border commuter" in and out of Germany and his not having integrated in Poland. The international competence and local jurisdiction of the Local Court of Pankow/Weißensee for the declaration of a waiver of succession is based on Art. 13 European Succession Regulation in conjunction with § 31 International Succession Proceedings Act (Internationales Erbrechtsverfahrensgesetz;

IntErbRVG), independent of Art. 4 European Succession Regulation. Local jurisdiction of the Local Court of Wedding for protective measures can be based on the former habitual residence of the deceased in this district (§ 343 para. 2 Family Proceedings Act – *Familienverfahrensgesetz*; FamFG).

B. Haidmayer: **Parallel divorce proceedings in Germany and Switzerland**

The judgment deals with the issue of *lis alibi pendens* of parallel crossborder divorce proceedings. Under European Union law and domestic law, the first-in-time rule determines the precedence of a proceeding. The moment defining *lis alibi pendens* is decisive for the priority rule; however, in this regard the two coordination systems of the supranational and the domestic jurisdiction diverge. This contribution analyses the approach taken by the court and particularly examines whether the Brussels IIbis Regulation contains any requirements for parallel divorce proceedings in non-member states.

H. Roth: **Vollstreckungsbefehle kroatischer Notare und der Begriff „Gericht" in der EuGVVO und der EuVTVO**

The two important decisions of the ECJ deserve approval. A Croatian notary, acting on the foundation of a "credible deed" by issuing a writ of execution is not a "court" within the meaning of the Brussels Ia Reg. Furthermore, a proceeding concerned with the enforcement of a judgment falls as a "civil matter" within the scope of Art. 1 (1) Brussels Ia Reg., even if a parking fee is charged for a public parking lot, which belongs to the property of the municipality.

K. Siehr: **Greek Reduction of Salaries and Employment Contracts Governed by German Law**

In some German cities there are Greek schools in which teachers teach the Modern Greek language. These teachers are employed by the Greek government which pays the teachers in Germany, accepts German law as the law governing the labour contracts and agrees to German jurisdiction. In 2009, Greece started to reduce the salaries of teachers and applied this legislation also to teachers in Germany. Some of these teachers sued the Greek Republic in Germany and asked for full payment without the reduction provided in recent legislation. The Federal Labour Court asked the European Court of Justice for a preliminary ruling on Art. 9 Rome I Regulation. The ECJ decided in the case of *Greece v. Nikiforidis* on 18/10/2016 that foreign overriding mandatory rules, except those of the country

of performance (Art. 9 no. 3 Rome I Regulation), cannot be applied directly but may be indirectly taken into account by the substantive law governing the contract. The German Federal Labour Court on 26/4/2017 decided the payment claim of *Grigorios Nikiforidis* in his favour and declined to recognize Greek legislation of reduction of salaries directly and also decided that under German law no employee is obliged to accept a reduction of his salary without a new contract stipulated between the parties.

J. von Hein/B. Brunk: **Shall we let her go? Legal conditions for the cross-border movement of companies**

The ECJ cases *Cartesio* (C-210/06) and *Vale* (C-378/10) established guidelines for cross-border changes of legal form within the EU. Subsequently, the German Higher Regional Courts Nuremberg and Berlin were confronted with the issue of cross-border movement of companies from other Member States to Germany. Conversely, the OLG Frankfurt judgment concerns the outward migration of a German company for the first time. The company's decision to transfer its statutory seat to Italy was refused to be registered by the German authorities for reasons of noncompliance with German transformation laws. The OLG Frankfurt allowed the company's appeal against this refusal arguing that it violated the company's freedom of establishment (Art. 49, 54 TFEU). The following article discusses the OLG Frankfurt judgment against the background of the ECJ Cases *Cartesio* and *Vale* while examining the premises posed by private international law and substantive law.

F. Heindler: **International Jurisdiction over Claims of Shareholders relating to the Dieselgate-Scandal**

The annotated judgement focuses on the international jurisdiction of Austrian courts for damage claims brought against *Volkswagen* in the aftermath of the Dieselgate scandal. *Volkswagen*, by cheating pollution emissions tests, allegedly was in breach of applicable ad-hoc announcement requirements and caused damages to shareholders situated in Austria. The Austrian Surpreme Court in Civil and Criminal Matters (*Oberster Gerichtshof*), however, referring inter alia to the place where the harmful event occurred, rejected jurisdiction of Austrian courts under the Brussels Ibis Regulation.

F. Koechel/B. Woldkiewicz: **Submission by appearance in European**

Procedural Law and lex fori

Jurisdiction under Art. 26 of the Brussels Ibis Regulation is based on the defendant's entering of appearance – a procedural act under domestic law. Art. 26 of the Brussels Ibis Regulation and the *lex fori* are therefore closely interlinked. In a recent judgment, the Polish Supreme Court (*Sa˛d Najwyz?szy*, 3.2017 – II CSK 254/16) ruled on the interplay of Art. 26 of the Brussels Ibis Regulation and the national rules governing the status of a party and the legal capacity of a defendant. One can only enter an appearance within the meaning of Art. 26 of the Brussels Ibis Regulation, if they are considered as the defendant under domestic law. The question arises, whether the defendant enters an appearance according to Art. 26 of the Brussels Ibis Regulation by submitting factual or legal allegations in writing with regard to his status as a party and his legal capacity. Contrary to the European Court of Justice's caselaw, the notion of the entering of an appearance should be interpreted autonomously, without unnecessary recourse to the law of the forum State. Generally, written submissions by the defendant on his status as a party to the proceedings and his legal capacity are to be considered as an entering of an appearance within the meaning of Art. 26 of the Brussels Ibis Regulation. Nevertheless, the determination of whether the defendant, in making such submissions implicitly contests the court's jurisdiction is one that needs to be examined carefully in each single case. The defendant is deemed to implicitly contest jurisdiction according to Art. 26 of the Brussels Ibis Regulation if, from the defendant's allegations it is objectively apparent for the court and the claimant that the defendant invokes the lack of jurisdiction.