Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2018: Abstracts

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

H.-P. Mansel/K. Thorn/R. Wagner: **European conflict of laws 2017: The Dawning of Interstate Treaties**

The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2016 until December 2017. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the ECJ as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference on Private International Law.

S. Huber/S. Geier-Thieme: **Jurisdiction for Tort Claims under the European Rules of Jurisdiction in the case of Purely Economic Loss**

The preliminary ruling of the ECJ in the case *Universal Music* concerns a situation where a person entered into an unfavourable contract with a third party due to the negligent behaviour of the alleged tortfeasor. In this context, the ECJ has clarified that the bank account, which the injured party used in order to fulfil the disadvantageous commitment, is not the decisive factor for establishing jurisdiction for a tort claim. This part of the decision is convincing. Otherwise, the claimant would be able to influence the place of jurisdiction by the simple choice between different bank accounts. The Court, however, missed the opportunity to determine the place of jurisdiction in cases of purely economic loss at the place where the primary damage occurred. The ECJ refers to the place where the injured party concluded a settlement agreement with the third party. This

settlement agreement, however, only diminished the damage that had already occurred when the injured party had entered into the unfavourable contract with the third person. As such, the obligations that resulted from this contract to the detriment of the injured party constitute the primary damage. Under the rules of international private law, these obligations are situated where the debtor, i.e. the injured party, resides. It is true, that this allows the injured party to bring a claim in the courts of his home country, but such a result seems appropriate in situations as in the present case. The opposite approach of the ECJ leads to legal uncertainty and time-intensive disputes about the question of jurisdiction.

H. Dörner: **"One-shotter" versus „repeat player" – Elucidation of Art. 13 para. 2 and Art. 11 para. 1 lit. b of the Regulation (EU) No 1215/2012**

In the opinion of the European Court of Justice, the European "Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" grants the persons referred to in Art. 13 para. 2 and 11 para. 1 lit. b an additional place of jurisdiction at their own domicile, because this group of persons is in each case the "economically weaker and legally less experienced party". Since the granting of such a plaintiff's legal status implies an improvement in procedural law, the idea arises that this is also supposed to compensate for deficiencies in the procedure. The author proposes to describe the relationship of the litigants and the structural inferiority of the respective plaintiffs utilizing the distinction between "one-shotter" and "repeat player" introduced by *Marc Galanter*. A one-shotter is an "*Einmalprozessierer*" who only occasionally uses the help of the courts, while the repeat player, as a "*Vielfachprozessierer*", repeatedly performs similar processes in a certain area. By adopting this pair of terms, the subject matter can firstly be presented without contradiction and, in particular, the ECJ decision to be discussed here can be classified appropriately. Secondly, the diffuse construct of the "weaker party", which depends on various variables, is attributed to a single criterion that can be verified empirically and is thus accessible to evidence, namely the extent of the parties' process activity.

F. Koechel: **Art. 26 of the Brussels I Regulation: The relevant moment for the challenge to jurisdiction and the notion of entering of an appearance**

It is settled case law of the Court of Justice of the European Union that under Art. 26 of the Brussels Ibis Regulation the defendant may not challenge the

jurisdiction of the court seized after he has made the submission which under national law is considered to be his first defence. In response to a request for a preliminary ruling by the Corte di Cassazione, the CJEU has now specified that the defendant may bring the challenge to the jurisdiction of the court seized even simultaneously with his first defence and in the alternative to other objections of procedure. While the CJEU defines the relevant moment for the challenge to jurisdiction autonomously, it does not introduce an autonomous notion of entering of an appearance for the purposes of Art. 26 of the Brussels Ibis Regulation but refers to the "first defence" under the law of the forum State. Therefore, the actual stage in the national proceedings until which the defendant can raise the lack of jurisdiction depends on which procedural act of the defendant is considered to be the first defence by the *lex fori*. The case law of German civil and labour courts on the matter is inconsistent. While civil courts already consider the defendant's submissions in writing prior to the oral hearing as a "first defence", the Regional Court of Aachen recently followed a more restrictive interpretation applied by labour courts, which necessarily require a submission during the contentious oral hearing. As this article argues, both civil and labour courts should consider submissions prior to the oral hearing as possible "first defences" by the defendant. Much rather than the stage of the proceedings, it is the subject of the defendant's submission, which is decisive for its qualification as an entering of an appearance within the meaning of Art. 26 of the Brussels Ibis Regulation. The defendant should be deemed to have entered an appearance if the plaintiff and the court seized are able to objectively ascertain from the content of the submissions that it is aimed at a contested decision by the court on any question different than jurisdiction or at an amicable settlement with the participation of the court.

M. Gebauer: **Can a jurisdiction agreement prevent the right of a defendant to set-off before German courts?**

The decision, rendered by the German Federal Supreme Court (BGH), illustrates some of the problems that arise when the BGH is confronted with a claim of a substantive right to set-off by a German based defendant. The case involved a Chinese plaintiff seeking the purchase price of X-ray equipment delivered to a German defendant. The German defendant alleged deficiencies in the equipment and sought damages in an amount exceeding the plaintiff's initial claim. The contract contained a jurisdiction agreement in favour of the courts of their

respective domiciles. The BGH declined jurisdiction with regards to the setoff claim, despite a close connection between the alleged claim and the alleged right to set-off. The author considers a line of German jurisprudence dating back over forty years, in terms of which the BGH has consistently worked on the basis that a jurisdiction agreement in favour of the courts of the parties' respective domiciles prevents any right of a German domiciled defendant to claim substantive set-off, in so far as the contract does not explicitly and unambiguously allow such a right. The author specifically questions the decision of the BGH in this case, together with its long-standing jurisprudence on the matter, in light of the Brussels I Regulation and wider European Union law, suggesting that the time is ripe for the matter to be re-visited by the Court of Justice of the European Union in the form of a preliminary reference.

W.-H. Roth: **Drittstaatliche Eingriffsnormen und Rom I-Verordnung**

The application of overriding mandatory provisions of states other than the forum is one of the much-discussed topics in academia, whereas its practical relevance, as yet, seems to be rather limited In the negotiations on the Rome I-Regulation a compromise with the United Kingdom led to Art. 9 (3), allowing for the application of such overriding mandatory provisions only under the very restrictive conditions set forth therein. In its *Nikiforidis* judgment the Court of Justice of the European Union stresses the exceptional character of Art. 9 *vis-à-vis* party autonomy and its relevance for legal certainty. Art. 9 (3) is attributed exhaustive character which prevents Member States to take any way around. In contrast, Member States are not precluded to take overriding mandatory rules into account as a matter of fact if provided for by the substantive law applicable to the contract (according to the general rules of the Rome I- Regulation). The principle of sincere cooperation (Art. 4 (3) EUT) does not lead to a different conclusion. It does not authorise the Member States to circumvent the preconditions set forth by Art. 9 Rome I-Regulation. The judgment of the Court is criticised for dealing with this fundamental principle just in a rather formal manner.

M. Makowsky: **Land registration of fractional ownership in cases of a foreign matrimonial property regime**

Land acquisition by spouses with a foreign matrimonial property regime plays an increasing role in practice. Yet, the land registration often causes difficulties, if

the spouses wish the registration of sole or fractional ownership although the matrimonial property regime (regularly) provides for joint property. In this context, the decision of the Higher Regional Court of Munich confirms that the land registry must obtain knowledge of the applicable foreign law ex officio. Contrary to the Court's opinion, however, an interim order, which obliges the applicant to obtain a legal opinion, should not be regarded as generally inadmissible by law. According to the predominant view, the land registry may only refuse the registration of sole or fractional ownership, if it is convinced that this would make the land register inaccurate with regard to the matrimonial property regime. In case of mere doubts regarding the foreign law, the registration is nonetheless subject to prior clarification. The opposing view of the Court is not convincing. Furthermore, the Higher Regional Court correctly affirms that the acquisition of sole or fractional ownership is possible under the Polish statutory matrimonial property regime. Contrary to the view of the Court, however, the land registry does not have to register sole or fractional ownership only because, in the abstract, the law provides for such an acquisition.