Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2018: Abstracts

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

M. Andrae: **The Scope of Application of the Regulation (EU) 2016/1103**

The Regulation (EU) 2016/1103 will be the central European legal instrument governing matters of matrimonial property regimes having cross-border implications. This includes any property relationships, between the spouses and in their relations with third parties resulting directly from the matrimonial relationship, or the dissolution thereof. From this it follows a broad objective scope of application. Excluded from the scope the Regulation (EU) 2016/1103 are inter alia: the succession to the estate of a deceased spouse and the nature of rights in rem relating to a property. This contribution discusses which typical legal relationships are covered by the regulation and which are precluded. Particular attention is given to: the responsibility of one spouse for liabilities and debts of the other spouse, the powers, rights and obligations of either or both spouses with regard to property, gratuitously allowance between spouses, undisclosed partnerships between spouses, employment contracts between spouses, the allocation of matrimonial home in case of separation, the distinctness of a matrimonial property agreement and a contract of inheritance as well as the relationship between the legal system of marriage property and the numerus clausus of rights in rem known in the national law of the Member States. The Regulation (EU) 650/2012 should be applied in the case, if the inheritance of the surviving spouse increases by a quarter under Art. 1371 para. 1 German Civil Code (BGB).

E. Jayme: **Reform of Tort Law in Germany (2017): compensation of dependent survivors of dead persons for pain and suffering: problems of jurisdiction and conflict of laws**

The German legislator has introduced, recently, the right of the surviving dependents of a person who has been killed, e.g. in a car accident, to ask for

compensation for pain and suffering. The article deals with the rules concerning jurisdiction and the applicable law in international cases such as car accidents abroad, when the survivors live in a foreign country. In addition, solutions are proposed for the question, how the personal relation are to be determined, when the person killed and his or her survivors live in a foreign country.

P. Mankowski: **Liability insurance, direct action, forum actoris: no deviating by jurisdiction clause in the insurance contract**

Liability insurance and direct claims are everyday appearances in European private international law and international procedural law. *Odenbreit* has awarded the injured party with a *forum actoris*. Now, and consequentially, *Assens Havn* supplements this with protection against derogation to the injured party's detriment: The injured party is rightly held not to be bound by a derogating urisdiction agreement in the insurance contract between the policyholder (i.e. the tortfeasor in relation to the injured party) and his insurer.

D. Coester-Waltjen: **Opportunity missed: The CJEU and private divorces**

This article comments on the decision of CJEU in the case of *Sahyouni ./. Mamisch* (C-372/16). The CJEU accepted jurisdiction because the applicability and interpretation of the Rome III-Reg. (No. 1259/2010) was at issue. However, the Court following the advice of the Advocate General decided that a private divorce does not fall within the scope of the Rome III-Reg. Consequently, the court was not concerned with the interpretation of Art. 10 Rome III-Reg. in cases where the applicable divorce law provides different rules based on gender. The Advocate General had recommended the non-application of all rules which are not gender-neutral irrespective of the fact whether the result in the case at hand was or would be discriminatory or not. This article analyses critically the reasoning of the Court and the Advocate General, especially the lack of any differentiation between the different kinds of private divorces and the emphasis put on the applicability of the Brussels IIbis-Reg. (No. 2201/2003). The author expresses regret over the interpretation of Art. 10 by the Advocate General.

M. Andrae: **Petition for divorce of marriage before a sharia court in Lebanon and Germany**

According to s. 109 of the German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Familienverfahrensgesetz*, *FamFG*)

German courts will recognize a decree of divorce of marriage given by sharia courts abroad. Therefore, a pending petition for divorce before such a court will be recognized as well. The Higher Regional Court of Hamm (*Oberlandesgericht* Hamm) had to decide in this matter. Traditionally, *lis pendens* of litigation in familiy matters in a third State is an obstacle to the decision of a German court given the following premises: The parties and the subject matter of proceedings are identical, the foreign court was seized first and the foreign court is expected to give a decision capable of recognition within reasonable time. The OLG Hamm does not comply with this established body of case law. Instead, it is guided by Art. 29 (EC) Regulation No 44/2001 and Art. 27 Lugano Convention, respectively. Drawing on the ECJ's doctrine in *Gubisch* (1987) it does not take into account whether the foreign decision is expected to be capable of recognition. The article critically analyzes this ruling.

S. Korch/M. Konstantin: **From Freedom of Establishment to Free Choice of Corporate Form – The Implications of Polbud**

The ECJ judgment in *Polbud* is a landmark decision in international corporate law. Summarizing, the ECJ no longer focuses on protecting the free establishment (of corporations) but instead embraces the idea of allowing European corporations to freely choose a corporate form from any EU Member State's legislation. This switch confronts the national legal systems with a wide range of challenges, especially with regard to the protection of creditors, transformation law, and employee co-determination. The analysis in this paper reveals that the relevant German statutes do not adequately cover these challenges.

C. Thomale: **The "Centre of Main Interests" in international corporate insolvency proceedings**

The *Landgericht* Berlin has used the *Niki* insolvency proceedings, which have been attracting wide public attention, for a deep discussion of the criterion "Centre of main interest" as contained in the European Regulation on Insolvency Proceedings. This case note carefully evaluates the decision and tries to highlight possible venues for legal reform.

E. Jayme/C.F. Nordmeier: **Greek Muslims in Thrace: dépeçage and new opt-in-requirement in family and inheritance**

In the northern Greek region of Thrace, Greek citizens enjoy a special status in

family and inheritance law. The Greek law 1920/1991 of 24 December 1990 regulates the jurisdiction of the Mufti and thus the application of Islamic law in the execution of international treaties after the end of the Greek-Turkish war. The provisions of Law 1920/1991 have been significantly amended by Law 4511/2018 of 15 January 2018. The focus is on the need to agree on the mufti's jurisdiction in family matters. In the absence of an agreement, the state courts have sole competency. In matters of succession, the testator must have opted for the application of Islamic law. The present article presents the new rules in greater detail and examines their effects in European international private and procedural law. In addition, the question of what impact they have on the practice of German family and probate courts is examined.

F. Heindler: **The right of direct action in international road accidents**

The annotated judgement focuses on the scope of application of Art. 9 Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents. The Austrian Surpreme Court in Civil and Criminal Matters *(Oberster Gerichtshof)* has ruled that the law applicable under Art. 9 does not oust the law applicable to the insurance contract in relation to the extent of the insurer's liability. In contrast, Art. 9 merely determines whether a claim can be brought directly against the insurer. By way of obiter dictum, the *Oberster Gerichtshof* suggested that it would adopt the same position when applying Art. 18 Rome II which was not applicable in the current case since the Convention has priority in accordance with Art. 28 s. 1 Rome II and the EU Member States' international law obligations.

M. Komuczky: **Dogmatic Assessment of Surrogacies undertaken abroad in Austria**

The article discusses the family law consequences of surrogacy conducted abroad from an Austrian perspective. This question is discussed in the light of the ECtHR's jurisprudence. If a court order was rendered in the state where surrogacy was performed, this decision may be capable of being recognized in Austria, provided that the child obtained the citizenship of the other state. In all other cases, a conflict of law analysis according to the principle of the strongest connection is necessary, as §§ 21, 21 autIPRG only apply to naturally conceived children. It is of pivotal importance that the child maintains effective family relationships. Only in exceptional cases, Austrian public policy may be invoked.

D.B. Adler: **Post Daimler: Foreign companies still run the risk to be subject to U.S. general jurisdiction throughout the US.**

In *Daimler AG* v. *Bauman*, the U.S. Supreme Court overturned nearly seventy years of law on general jurisdiction. According to Daimler, the general jurisdiction inquiry is no longer whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic, but rather whether that corporation's affiliation with the forum is so continuous and systematic as to render it essentially at home in the forum. Except in rare situations, general jurisdiction henceforth should be proper over a corporation only in the corporation's state of incorporation or principal place of business. This article proceeds in three main sections. Part one provides a brief analysis of the *Daimler* decision, including a critique on both its shortcomings and the court's rationale. Part two focuses on the post-*Daimler* developments highlighting three points. First, the article evaluates how lower courts throughout the US have adapted to the newly developed "at home" standard. Second, it shows how litigants are more often than not successful at circumventing Daimler's "at home" test by reviving century-old cases in order to establish general jurisdiction on a "consent-by-registration" theory. According to this theory, foreign corporations consent to general jurisdiction when they register to do business in states outside their place of incorporation or principal place of business. The author critically assesses this theory and its effects on foreign companies and banks in the context of *Daimler's* rationale and questions its validity as a basis for general jurisdiction. He then evaluates a recent New York State legislative initiative, which attempts to further "clarify" *Daimler* and to strengthen the validity and foundation of the "consent-by-registration" theory. Part three summarizes the findings.

A. Anthimos: **The application of the Rome I Regulation in Greece**

The present article serves as an inventory of published and unpublished case law in regards to the application of Rome I Regulation in Greece. It focuses solely on provisions, which were examined and interpreted by domestic courts. The author's purpose is to provide a concise report of the existing trends in the application of the EU Regulation.

Z. Csehi: **New Hungarian Legislation on conflict of laws, jurisdiction and procedure in private international law matters**

In Hungary, Private International Law has been changed fundamentally by Act No XXVIII, which entered into force on 1 January 2018. These legislative changes are related to the recent reform of Hungarian civil law, which made modifications in the area of Private International Law necessary. From now on, rules regarding the conflict of laws, the international procedural law as well as the recognition and enforcement of foreign judgments are codified in a single legal act. The aim of this new codification of Private International Law was also to bring Hungarian legislation in line with the relevant European regulations, which was not entirely the case with the previous provisions. The present contribution describes the legal modifications in Hungarian Private International Law and the key changes of the reform.