Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2018: Abstracts

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

A. Dickinson: **Tough Assignments: the European Commission’s Proposal on the Law Applicable to the Third-Party Effects of Assignments of Claims**

In March 2018, the European Commission published its long awaited Proposal on the law applicable to the third-party effects of assignments of claims. The proposal aims to fill the gap left in EU private international law following the adoption of the Rome I Regulation, when it was not possible to reach a settlement of this difficult and controversial issue. It is a welcome, and overdue, step. This article seeks to address two aspects of the Commission Proposal, which give rise to issues of some complexity. The first point involves questions of characterisation, and the second questions concerning the definition of the connecting factor. Unfortunately, neither the Proposal nor the accompanying Impact Assessment provide a clear indication as to the Commission’s drafting intentions with respect to these questions.

M. Gebauer: **The German-Turkish bilateral succession treaty in the wake of developments in European private international law**

The EU Succession Regulation, in terms of Art. 75 (1), afforded priority to those existing treaties concerning international succession already entered into by one or more EU member states. This provision has been particularly relevant for Germany in so far as the long-standing German-Turkish bilateral succession treaty of 1929 is concerned. The treaty’s choice of law rules differ starkly from those found in the EU Succession Regulation. The article primarily considers the interplay between the EU Succession Regulation and the German-Turkish bilateral succession treaty. Despite the treaty appearing, on the face of it, to have continuing relevance in cases with Turkish elements, the article demonstrates that the EU Succession Regulation’s choice of law rules will nonetheless often be applicable in Germany, and in important situations. The reason for this is that the

scope of the German-Turkish bilateral succession treaty is limited. The problem is particularly acute in so far as the interplay between matrimonial property law and succession law is concerned, both in terms of German-Turkish couples and dual nationals. In light of this background, the article questions whether the treaty's continued existence can be justified.

B. Hess: **Abgrenzung der acta iure gestionis und acta iure imperii: Der BGH verfehlt die völkerrechtliche Dimension der Staatenimmunität**

This article reviews a recent German decision on state immunity. In this judgment, the *Bundesgerichtshof* delineated *acta iure gestionis* from *acta iure imperii* according to the *lex fori*. Although the judgment follows a longlasting line of reasoning in German case law, the article demonstrates that international law has developed more sophisticated criteria. These are found in the UN Convention on State Immunity of 2004. Although the convention has not yet entered into force, it is of great importance as it has the ambition to codify and clarify the state of customary international law. Unfortunately, the *Bundesgerichtshof* mainly refers to a decision of the German Constitutional Court of 1963 which today seems to be outdated. Furthermore, the *Bundesgerichtshof* does not sufficiently consider the case-law of foreign and international courts which consider state loans as *acta iure gestionis* – even in the case of subsequent state intervention. All in all, a more international and comparative approach is needed to comprehensively assess the modern state of customary international law.

P. Mankowski: **Orthodoxy and heresy with regard to exclusive jurisdiction for registered IP rights and ownership claims**

All quiet on the Luxembourgian front: Ownership claims regarding trademarks are not subject to exclusive jurisdiction under Art. 24 No. 4 Brussels Ibis Regulation, following the footsteps of *Duijnstee* ./. Goderbauer of 1983 on ownership claims regarding patents. Yet closer scrutiny reveals that some parts of the underlying fundament have changed since *GAT* ./. *LuK* and its legislative offspring. Even a surprise candidate might enter the ring: namely Art. 24 No. 3 Brussels Ibis Regulation, hitherto rather not in the spotlight, but worth to be reconsidered and reconstrued heretically, taking into account Art. 1 (1) Brussels Ibis Regulation.

D. Looschelders: **Jurisdiction for Actions Brought by the Injured Party**

Against Compensation Bodies and Green Card Bureaus Located in Foreign States

Since the ECJ judgment in the *Odenbreit* case, it has been acknowledged that according to the Brussels I Regulation, the injured party can assert its direct claim against the insurer of the injuring party before the court of jurisdiction of his own residence. In the event of traffic accidents that display a cross-border element, the injured party may also approach the compensation body in his country of residence established in accordance with the Motor Insurance Directive or the Bureau in the accident state according to the Green Card System. Against the background of a decision of the Regional Court of Darmstadt, the article deals with the question of whether the injured party can also sue a compensation body or a Green Card Bureau located in a foreign state at its own place of residence according to the Brussels I Regulation, answering it in the negative.

V. Pickenpack/A.-G. Zimmermann: **Translation requirements for the service of judicial documents to legal entities**

According to Art. 8 (1) lit. a of the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13/11/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, the addressee has a right to refuse the acceptance of judicial documents in case that the document is not drafted in a language which the addressee understands. However, the Regulation does not itself stipulate who the authorized addressee is. In particular, in case of service to legal entities and companies the question arises whose linguistic knowledge is decisive. It is also unregulated whether the addressee of the document is allowed to decide for himself whether he has appropriate language skills or that this has to be decided by the court on the basis of indications. The District Court of Berlin-Mitte has – in its decision of 8/3/2017 – recently dealt with the right to refuse acceptance of judicial documents under Art. 8 (1) lit. a Council Regulation (EC) No 1348/2000 in case of service to legal entities. The Court has assessed the right of the Irish-based Facebook Ireland Limited to refuse acceptance of the service on the basis of objective criteria and based on the actual language skills of its legally trained employees. The Court applied the criteria in a convincing manner. However, a more specific legal framework would nevertheless be favorable as this would avoid existing

uncertainties in the application of the rules for the serving party especially in case of service to legal entities. Unnecessary translations as well as time and costs incurred would become redundant.

A. Staudinger/S. Friesen: **International jurisdiction and applicable law concerning a road traffic accident abroad with debtors from several countries**

The article at hand deals with the judgement of the Higher Regional Court Brandenburg of 18/2/2016 (reference number: 12 U 118/15). The ruling refers to a traffic accident abroad. Apart from the place of general jurisdiction (Art. 2 [1] Brussels I Regulation) the court discussed the option of a coherence action (Art. 6 No. 1 Brussels I Regulation) as well as of a direct claim (Art. 11 [2] in conjunction with Art. 9 [1] lit. b Brussels I Regulation). Moreover, the issue of the scope of the consumer protection jurisdiction (Art. 16 [2] in conjunction with 15 [1] lit. c Brussels I Regulation) was raised. In addition, the article illustrates the advantages of the supranational jurisdictional regime in cases where the damaged party claims directly against the liability insurer.

Even though the ruling refers to the legal situation before the unification of international tort law by the Rome II Regulation. The points made by the court of appeal can be cautiously transferred on this act of law. In particular, the case demonstrates that not all claims of a damaged party against different drivers and vehicle owners are necessarily governed by a uniform national tort law even if the damage is caused by a single accident.

Y. Diehl: **Transnational Skiing Accidents in Private International Law**

The present article criticizes the higher regional Court *(Oberlandesgericht)* Munich’s decision regarding the interpretation and use of the so-called FIS rules for conduct. The court had to deal with an accident of two German citizens in the Austrian alps. German law was applicable. Art. 17 Rome II states independently that rules of safety and conduct at the place of conduct must be taken into account. Therefore, the court based its decision on rule 3 of the FIS rules for conduct presuming local Austrian law to appeal the FIS rules. Besides the complicated methodical problems arising by the need to take the rules and norms into account, Art. 17 Rome II harbors difficulties in defining the scope of the term “rules of safety and conduct”. According to some scholars this term should be

interpreted in a very broad way, including “private” or even non-binding norms. Therefore, most of the authors plead for the possibility of taking into account the FIS rules in transnational Skiing-accidents under Art. 17 Rome II. As it is debatable whether the FIS rules are binding at all, the article at hand first defines the legal nature of those rules by investigating different possibilities in national law. The author’s conclusion that there is not a binding character of the FIS rules at all subsequently raises the question whether they can fit in the scope of Art. 17 Rome II after all. According to the author, there is neither a possibility nor a need for private international law to take into account the FIS rules. Therefore, national law applies. The national tort law systems provide a general clause for judging tortfeasor’s behavior and conduct. Accordingly the FIS rules therefore function as aid in interpretation.

S.L. Gössl: **A further piece in the mosaic regarding the recognition of a status acquired abroad or: under which circumstances is a name “legally acquired”?**

In *“Freitag”* the CJEU again had to deal with the question whether and under what condition a name acquired in a Member State has to be recognised in another Member State. The decision clarifies one question in the ongoing debate: only “legally acquired” names have to be recognised. Whether a name has been “legally acquired” has to be determined via a referral en bloc to the law of the country in which the name potentially has been acquired. Furthermore, the Court hints indirectly at an exception of such an obligation to recognize, i.e. in the case of circumvention of law when there is no connection to the original Member State at all.

M. Andrae/U. Ising: **Modalities of choice of law under Art. 10 (2) EGBGB**

Under Art. 10 (2) EGBGB (Introductory Act to the Civil Code) the spouses may choose the law applicable to their married name. By their choice, the parties can determine 1. the law of the country which one of the spouses is a national of or 2. German law given one of them has their habitual residence in Germany. Requirements as to time and proper form of their choice are specified by law. In addition, the choice of law shall be declared to the Registrar’s Office *(Standesamt)*. The law does not lay out any additional details. This problem led to two decisions by the *Kammergericht* and the *Oberlandesgericht* (Higher Regional Court) Nürnberg dealing with the legitimacy and the requirements for a tacit

choice of law, the law applicable to its validity, contractual annulment or change *ex nunc* and its voidability by the spouses. This review focuses on these problems.

C. Thole: **Art. 16 EIR 2017 (Art. 13 EIR 2002) between lex causae and lex fori concursus**

In its judgment, the ECJ strengthens the procedural autonomy of the Member States in the context of the objection to an avoidance claim pursuant to Art. 16 EIR 2017 (Art. 13 EIR 2002). The Court decided on the applicability of Art. 3 para. 3 Rome I Regulation with respect to determining the applicable law *(lex causae*) and thus whether a choice of law clause may be validly relied upon if any other elements relevant to the situation in question are not located in the state whose law is chosen. *Christoph Thole* finds the judgment to be only partly convincing.

A. Piekenbrock: **The treatment of assets situated abroad in local insolvency proceedings**

The paper deals with two recent decisions delivered by the German Federal Court of Justice *(BGH)* regarding the treatment of assets situated abroad in insolvency proceedings opened in Germany. The Court has correctly stated that notwithstanding Art. 7 EIR 2015 the debtor's rights in rem regarding real estate situated in another Member State are governed by the *lex rei sitae*. As far as pensions in Switzerland are concerned, the Court has correctly come to the conclusion that the question whether or not the claim is attachable and thus part of the debtor's insolvency estate has to be answered in accordance with the *lex fori concursus*. Unfortunately, the Court has only applied German conflict law. Yet, the preliminary question to answer would have been whether or not Art. 7 EIR also applies in cases concerning third countries such as Switzerland. That question should have been referred to the E.C.J.

H. Wais: **Compatibility of damages for willful litigation under Italian law with the German ordre public**

Pursuant to Art. 91 (3) c.p.c. (Italy), a party who unjustifiably files a claim or unjustifiably defends himself can, under certain conditions, be ordered to pay to the other party a certain sum the amount of which is established by the court. In a case litigated before the courts of Milan the claimant was ordered to pay the defendant € 15.000 on the basis of the aforementioned provision. The defendant subsequently sought recognition and enforcement of the judgment in Germany.

The claimant argued that the judgment was against the German *ordre public* since Art. 91 (3) c.p.c. provided for punitive damages and deterred the parties from seeking judicial relief. The *Bundesgerichtshof*, however, rightly held that the judgment was compatible with the German *ordre public*.

P. Franzina/E. Jayme: **The International Protection of Reproduction Rights Claimed by Museums Over their Works of Art: Remarks on the Decision Given by the Tribunal of Florence on 26/10/2017 in the 'David' Case**

The law of some countries, like Italy, explicitly grants museums and other cultural institutions exclusive reproduction rights over works of art exhibited or stored therein. In 2017, at the request of the Italian Ministry for Culture and Heritage, the Tribunal of Florence issued an injunction prohibiting a travel agency based in Italy from further using "in Italy and in the rest of Europe" an unauthorised reproduction of the *"David"*, a statue by Michelangelo, which the agency had included in its website and in advertising material distributed in Italy and abroad. The paper discusses the issues surrounding the protection of reproduction rights in cross-border cases under the Rome II Regulation. It also hints at the advantages that the adoption of harmonised substantive standards at EU level regarding the exploitation of these rights would entail for the effective protection of cultural heritage, while giving due account to competing rights, such as the so-called freedom of panorama, i.e., the right to take and reproduce pictures of works of art located in, or visible from, a public place.

O.L. Knöfel: **Cross-Border Online Defamation Claims Cases in Austrian Civil Procedure: The Austrian Supreme Court on the Autocomplete Function of Search Engines**

The article reviews a decision of the Supreme Court of the Republic of Austria (Case 6 Ob 26/16s), dealing with questions of cross-border litigation raised by the autocomplete function of a search engine. The mere accessibility of a website normally does not suffice for conferring international jurisdiction on any State's courts. But in the case at hand, the Supreme Court applied domestic Austrian rules on jurisdiction, namely sec. 83c *Jurisdiktionsnorm* (JN). If an online statement brought about by a search engine is considered defamatory, Austrian Courts are said to gain jurisdiction to entertain lawsuits against the alleged perpetrator, simply by assuming that a tort was committed in Austria. What the Supreme Court's decision boils down to is that Austrian procedural law opens an

exorbitant head of jurisdiction. The Supreme Court also held that Austrian substantive law applied. The author analyses the relevant issues of Austrian law and explores the decision's relation to international case-law on the autocomplete feature of search engines.

L. Hübner: **Substitution in French Mortgage Law**

The following article deals with the requirements of the substitution in French and German PIL. In the specific judgment, the *Cour de cassation* applies the method of *équivalence*. The ruling concerns the substitution of a French notary by an Australian notary public as regards the authorisation to create a mortgage *(Hypothek)* by formal act. This case offers the opportunity to sketch not only the PIL solution in the French and German legal order but also solutions provided by each substantive law.

H. Odendahl: **New international regulations on conflict of law and their impact in the field of family and inheritance law in relation to Turkey**

At the international level, a number of new regulations have entered into force over the past six years, relating – *inter alia* – to the conflicts of law provisions regarding divorce, custody, alimony, matrimonial property and inheritance law. Even to the extent Turkey is not directly bound by such regulations, they have an effect on Turkey and Turkish nationals – in particularly in the context of substantive law provisions providing for choice of law rules. Any migration event, in one direction or the other, may trigger an assessment of the effects due to such statutory changes.