Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2019: Abstracts

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

M. Wendland: **Procedural challenges within the system of international jurisdiction according to the new European regulations on matrimonial property regimes and the property consequences of registered partnerships: Well-known and innovative instruments from the experimental laboratory of the European Commission**

As from 29th January 2019 two new EU regulations will apply establishing a comprehensive legal framework which regulates jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (2016/1103) and of the property consequences of registered partnerships (2016/1104). The two regulations will close one of the last remaining gaps within the system of International Private and Procedural Law in family matters. Its regulative approach is as new as innovative even though not entirely unproblematic. This paper examines selected problems of both regulations from the perspective of International Procedural Law and presents possible solutions.

R. Magnus: **The implied choice of law in international succession and family law**

Recent EU Regulations have led to major changes in international succession and family law. This article compares the conflict of laws rules of the different Regulations dealing with the possibility to choose the applicable law implicitly. The main focus lies on a question not yet much discussed, namely whether or not the validity of the implied choice depends on the validity of the legal act from which it is inferred (e.g. will, agreement as to the succession, marriage contract, prenuptial agreement). As conclusion it is proposed that careful distinctions should be made taking into account the different reasons that might hinder the validity of a legal act (in particular the distinction between invalidity because of a lack of the required form and invalidity due to a conflict with public policy) and

specific particularities of family and succession law.

F.Eichel: **The jurisdictional concept of 'the place of the event giving rise to the damage' and international trade mark infringements spread through digital media**

Both the German Federal Court (BGH, 19.11.2017 – I ZR 164/16) and the Austrian Supreme Court (OGH, 20.12.2016 – 4 Ob 45/16w) have applied to Article 125(5) of Regulation No 2017/1001 (EU trade mark regulation) the general case law on the determination of "the place of the event giving rise to the damage" in terms of Art. 7(2) of the Recast Brussels Regulation. If that was correct, Art. 125(5) would, to a large extent, lose its effectiveness. Contrary to the position of the OGH and the BGH, the ECJ rulings "Hejduk" and "Wintersteiger" on Art. 7(2) Brussels Regulation are not applicable to Art. 125(5), and neither is the ECJ ruling "Nintendo ./. BigBen" which has no jurisdictional dimension. Instead, Art. 125(5) Regulation No 2017/1001 (as well as Art. 82(5) Regulation No 6/2002) must be interpreted independently and should be aligned with Article 2:202 of the "CLIP Principles". This latter model rule places jurisdiction for infringement claims upon the courts of a state when an alleged infringer who has not acted in this state has directed his or her activities to the forum.

P. Schlosser: **International Jurisdiction in case of Transborder Transportation in Execution of a Single Order**

The direct claim of the injured party, or its insurer, may be introduced alternatively in the court or the place of dispatch or in the court of the place of destination.

K. Thorn/C. Lasthaus: **Legal Succession concerning Immovable Property under the European Commission's Succession Regulation**

The European Commission's succession regulation 650/2012 aims to harmonise the application of succession law among EU member states. However, its material scope, in particular the ambit of the exemptions under Art. 1 para. 2, has remained contentious. In recent decisions, the European Court of Justice (ECJ) and the Austrian Supreme Court (OGH) leaned towards a narrow interpretation of the exemptions provided by Art. 1 para. 2 lit. k and l thereby extending the Regulation's scope. The ECJ held that under Art. 1 para. 2 lit. k and l, 31 a legacy "by vindication", which directly grants a proprietary interest in the bequeathed,

in this case immovable, property to the legatee, should be given effect even in member states where proprietary interests cannot be directly transferred by legacy. The OGH discussed the scope of Art. 1 para. 2 lit. l concerning the constitutive effect of a recording in the public register provided by the law of the Member State in which the register is kept. In this legal review, the authors argue that while the courts' intention to strengthen the Regulation's objective is to be supported, their reasoning should have been more precise.

A. Golab: **Cross-border implications of fictitious service and unreasoned judgements in the EU**

In the present case the Federal Court of Justice addressed the issue of acceptability of effects produced by a Polish court's recourse to fictitious service of documents from the perspective of German procedural public policy. The aim of the annotation is to assess whether the application of Article 1135 (5) of the Polish Code of Civil Procedure met the criteria of public policy exception and how the conclusion of this analysis might apply to other similar instances where fictitious service is at play with regard to recognition or enforcement of judgements in the Brussels regime. In addition, the annotation will also address the issue of an unreasoned Polish judgment, which was also expounded on by the Federal Court of Justice.

A.-S. Tietz: **The notarisation of articles of association incorporating a German Limited Liability Company (GmbH) by a Swiss notary based in the Canton of Berne**

The Higher Regional Court of Berlin (Kammergericht) held that a German Limited Liability Company (GmbH) had been properly incorporated, even though its articles of association had been notarised by a Swiss notary in the Cantone of Berne in Switzerland. It reversed the decision of the District Court (Amtsgericht) of Charlottenburg which had refused to enter the company into the Commercial Register as it had deemed the content of the foreign deed invalid. The Higher Regional Court held that the foreign notarisation had substituted a notarisation carried out by a German notary, as the notarial deed had been read aloud to the participants in the presence of the notary, and subsequently approved and signed personally by the participants. It therefore ordered the District Court to enter the company into the German Commercial Register. Although this was the first time that a German Higher Regional Court had been confronted with this question, the

decision has revived the debate on the “recognition” of legal relationships evidenced by foreign deeds under German corporate law. The article contributes to the discussion by addressing the legal questions resulting from the decision, which concern the applicable law to the formal requirements as well as the “substitution” of a notarisation by a German notary by a Bernese notary within the meaning of Sec. 2 German Limited Liability Companies Act.

S.L. Gössl: **Regulatory Gaps and Analogies in Conflict of Laws – Example: Embryo Parenthood**

The German Supreme Court (BGH) had to decide which law to apply to the (assumed) parenthood on embryos in California. The court developed a conflict of laws rule not reflecting the German substantive law regarding this issue. The article analyses and criticizes the decision. It focuses on the question how, from a methodological point of view, private international law deals with regulatory gaps, and how to close them by analogy. Eventually, the article proposes an alternative characterization of the issue and, consequently, an alternative conflict of laws rule. It furthermore shows that the most important gap lies in the (deficient) substantive law where regulation is needed urgently.