Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2019: 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 2018: Final Spurt!**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from January 2018 until December 2018. It provides an overview of newly adopted legal instruments and summarizes current projects 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 CJEU as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article treats current projects and the latest developments at the Hague Conference of Private International Law.

C. Kohler: **Lis pendens of a complaint seeking to join a civil claim for damages to criminal proceedings before the investigating magistrate**

Case C-523/14 raised the issue whether a complaint seeking to join a civil claim for damages to criminal proceedings before the investigating magistrate is lis pendens in respect of subsequent proceedings brought in another Member State involving the same cause of action. The ECJ held at the outset that such a complaint falls within the scope of Regulation No 44/2001 in so far as its object is to obtain monetary compensation for harm allegedly suffered by the complainant. On the point of lis pendens the ECJ ruled that under Art. 27(1) of the Regulation proceedings are brought when the complaint seeking to join the civil action has been lodged with an investigating magistrate, even though the judicial investigation of the case at issue has not yet been closed. The Court further held that according to Article 30 of the Regulation, where the complaint seeking to join

a civil action is initiated by lodging a document which need not, under the applicable national law, be served before that lodging, the relevant time for holding the investigating magistrate to be seised is the time when the complaint was lodged. The author approves the ECJ's interpretation of the relevant provisions of Regulation No 44/2001. However, he considers that the rule which gives jurisdiction to the court seised of criminal proceedings to rule on a civil claim for damages deserves criticism. That rule is an alien element within the Brussels-Lugano system which favours the plaintiff whereas the defendant may be sued in exorbitant jurisdictions and cannot oppose the recognition and enforcement of the civil judgment given by the criminal court.

S. Kurth: **Determining the habitual residence of a testator who alternately lived in two states**

The article critically analyses the decision of the German Higher Regional Court (Oberlandesgericht) Hamm (reference number: 10 W 35/17) on the interpretation and application of the habitual residence concept to establish jurisdiction under Art. 4 (EU) Regulation No 650/2012. The Court relies on the concept to determine the habitual residence of a German testator who for several decades spent extended periods of time on the Spanish Costa Brava and in the German backcountry. The author argues for an autonomous interpretation of the Regulation and expresses regret over the approach taken by which the "habitual residence of the deceased" as the connecting factor under the Regulation is construed in line with national law. Moreover, the article examines the two definitions of habitual residence used by the Court and demonstrates that on closer scrutiny none of them is persuasive in light of the established canons of interpretation. The author argues to instead define the habitual residence of the deceased as the place where he is primarily integrated as well as regularly and consistently spends time. Further, the article criticises the Court's findings on circumstantial evidence and, among others, demonstrates the importance of the deceased's re-lationships with family and friends as pieces of circumstantial evidence neglected by the Court.

D. Coester-Waltjen: **Marriages of Minors – Against the Legislative Furore**

The German law against "child marriages" of 2017 was the subject matter of some recent court decisions. The German Supreme Court doubts in its decision the constitutionality of the "Law against Child Marriages" regarding the

invalidation of marriages validly formed under the applicable foreign law, but void under the new German law in case one of the spouses was below the age of fourteen at the time of formation. The other cases concerned marriages each validly formed under the applicable law by two EU citizens in their respective home country. Since the bride in both cases was only 16, respectively 17 years old, the new German law obliges the German courts to invalidate these marriages, unless under extraordinary circumstances such invalidation would cause extreme hardship to the still minor spouse (or the spouse has reached majority and wants to stay in the marriage). Only in those cases, by way of exception, no invalidation should take place. Despite the pitfalls of the new law the courts succeed in reaching a sensible and adequate result. This article analyses how the courts struggle with the interpretation of the relevant provisions. Emphasis is placed on the European dimension of the topic as well as on the constitutional aspects in the relevant situations.

C. Benicke: **The need for Adaptation (Anpassung) to cure deficiencies in the protection of the child's financial interests caused by the parallel application of German inheritance law and English child custody law**

The decision of the Munich Higher Regional Court raises the question of the extent of the father's power of representation for his minor son under English law when he sells the interest in a German partnership which the son has inherited under German law. The parallel application of English law for the parental responsibility issues on the one hand and of German law as inheritance law for the acquisition of the partnership interest on the other hand leads to a legal gap in respect to the provisions aiming at the protection of the child's financial interests. As German law regulates this issue in its child custody law through provisions limiting the extent of the parents' powers to act as legal representatives, and English law protects the child's interests in its inheritance law through provisions about the administration of the estate, neither of these provisions are invoked by the relevant choice of law rules. This raises the question of adaptation (Anpassung) as an instrument of private international law to avoid outcomes that are inconsistent with both legal orders at stake.

L. Rademacher: **Multilocal Torts, Favor Laesi, and Renvoi**

In the case of a multilocal tort, the defendant commits the tortious act in a state different from the state in which the claimant suffers the resulting injury. In such

a scenario, identifying the applicable law can prove difficult. Under Art. 4 para. 1 Rome II Regulation, the defendant's liability is determined by the law of the state in which the claimant was injured. By contrast, Art. 40 para. 1 sent. 1 EGBGB (Introductory Act to the German Civil Code) relies on the location of the defendant's tortious act as the relevant connecting factor. The injured party, however, can demand the application of the law of the state where the injury was sustained according to Art. 40 para. 1 sent. 2 EGBGB. Since the codification of German international tort law in 1999, it has been in dispute whether in the case of a multilocal tort the references in Art. 40 para. 1 EGBGB encompass a foreign legal system's conflict-of-laws rules or refer to foreign substantive law only. This case note, on the occasion of a decision of the Higher Regional Court of Hamm, critically evaluates the arguments for and against the acceptance of renvoi in this context. Contrary to the court, it argues in favour of a reference that includes foreign private international law. It is submitted that only this view can be reconciled with the general rule on renvoi laid down in Art. 4 EGBGB and with the absence of a strict notion of favor laesi in Art. 40 para. 1 EGBGB.

P. Hay: **Foreign Law as Fact in American Litigation – Foreign Government's Interpretation of Its Own Law is Not Conclusive**

The U.S. Supreme Court confirmed unanimously that foreign law is to be treated as fact, not law, in federal civil litigation. In determining the content and in interpreting foreign law, the lower court may consider all relevant materials. The interpretation of the foreign government of its own law is to be received with respect under principles of comity, but it is not conclusive. The Court reversed and remanded an appellate court's decision that had concluded that courts were "bound to defer" to the "reasonable" interpretation of the Chinese government of its own law. The Supreme Court ruled that Federal Rule of Civil Procedure 44.1 does not go this far, but continues to embody the traditional American fact-orientation with regard to foreign country law.

M. Stürner/A. Hemler: **Recognition of a French astreinte in California**

The French astreinte is a private penalty payable to the creditor designed to bend the debtor's will. In the case discussed, the U.S. Court of Appeals for the Ninth Circuit examines the enforceability of a French judgement condemning Californian editor Wofsy to pay an astreinte in favour of French publisher de Fontbrune. First, the Court of Appeals considers the determination of foreign law

in accordance with Rule 44.1 FRCP, which permits the decision on foreign law using “any relevant material or source”, thus classifying it as “question of law”. Given this explicit departure from the question of fact doctrine, the Court of Appeals holds that the ascertaining of foreign law is permitted outside the pleading stage as well. Since foreign penal judgements are not enforceable under Californian law, the Panel also examines whether the astreinte is punitive in nature. In view of its characterisation as predominantly inter partes and its connection to the fulfilment of the debtor’s obligation, the Court of Appeals concludes that the enforcement of the astreinte in question cannot be denied.