Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2020: Abstracts

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

D. Coester-Waltjen: **Some Thoughts on Recital 7 Rome I Regulation and a Consistent and Systematic Interpretation of Jurisdictional and Choice of Law Rules.**

Decisions of the ECJ in recent years have cast some new light on recital 7 of the Rome I Regulation. These decisions will be analysed regarding the limits of and the guiding principles for a consistent and systematic interpretation of the rules in the Brussels Ibis Regulation on the one hand and the Rome I Regulation on the other. The analysis proves that the understanding of a term in the jurisdictional framework need not necessarily influence the interpretation for private international purposes.

*U.P. Gruber/L. Möller***: Brussels IIbis Recast**

After complicated negotiations, the Council of the EU has finally adopted a recast of the Brussels IIbis-Regulation. The amendments focus primarily on parental responsibility. As far as the enforcement of foreign judgements is concerned, the new regulation provides for a delicate balance between different positions of the Member States. While the new regulation abolishes exequatur, it also introduces new reasons which can be invoked against the enforcement of foreign decisions. At first, the reform did not aim at changes in the field of divorce, legal separation or marriage annulment. However, in the course of the legislative procedure, new provisions allowing for the recognition of extra-judicial agreements on legal separation and divorce were added.

C. Kohler: **Mutual trust and fundamental procedural rights in the framework of mutual assistance between EU Member States and beyond**

In case C-34/17, Donnellan, the ECJ ruled that the recovery of a fine by way of mutual assistance between EU Member States pursuant to Directive 2010/24 may be refused by the requested authority if the decision of the applicant authority imposing the fine was not properly notified to the person concerned, so that the person's right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights has been infringed. The Court restricts the principle of mutual trust which, pursuant to Opinion 2/13, prevents the requested authority in principle to check whether the applicant Member State has infringed a fundamental right of Union law. The ECJ's ruling takes into account the case-law of the ECtHR and, by admitting a "second look", strengthens the protection of fundamental rights in the internal market and within the framework of the judicial cooperation in civil matters.

S. Huber: **Broad Interpretation of the European Rules on Jurisdiction over Consumer Contracts**

The jurisdiction rules for consumer contracts established in Articles 17 to 19 of the Brussels Ibis Regulation and 15 to 17 of the Lugano Convention respectively lead to the question whether the trader has directed his professional activities to the jurisdiction in which the consumer is domiciled. The German Federal Court of Justice had to decide on this question in the context of several similar cases where Swiss solicitors had concluded a contract with several persons living in Germany. The crucial point was a document that the Swiss solicitors had sent to these persons via their German solicitors. The question was whether this document was a sufficiently clear expression of the Swiss solicitors' intention to conclude contracts with consumers domiciled in Germany. In this context, the German Federal Court of Justice (cf., for example, the case IX ZR 9/16) held that the intention to conclude contracts with consumers living abroad could not only be expressed by general forms of advertising addressed to the public abroad, but also y documents that are sent to individual consumers. The line of reasoning of the Court reveals a certain sympathy for the position that even one single document sent to one individual consumer in a foreign jurisdiction might constitute a sufficient expression of the trader's intention to conclude contracts

with consumers of that jurisdiction – but this was of no relevance in the cases at hand where the document had been sent to a group of 60 to 100 persons. Whether the document is sent on the initiative of the trader or at the request of the consumer seems to be of no importance. In addition, the court argued that the acts of the German solicitors were to be attributed to their Swiss colleagues as both law firms had cooperated with the aim of permitting the Swiss solicitors to conclude contracts with clients from Germany. Finally, the court was confronted with the question whether in case of a reorganisation of the trader's business, a consumer can bring a claim against the newly created company in the courts of its domicile. The Court answered this question in the affirmative even for the situation in which the trader's entity that had concluded the consumer contract remained liable besides the new company. The analysis of the Court's decisions shows that the Court has formulated guidelines which are based on the case law of the European Court of Justice and allow the lower courts to apply the rules on jurisdiction over consumer contracts in a way which implements the idea of consumer protection and at the same time takes into account the traders' interests under the general principles of procedural fairness. The clarifying guidelines have enhanced legal certainty and might thus contribute to reducing time and cost-intensive discussions about jurisdiction issues.

K. Duden: **Amazon Dash Buttons and Collective Injunctive Relief in E-Commerce: Ju-risdiction and Preliminary Questions**

The decision of the Munich Court of Appeals relates to a preventive action brought by a consumer protection association against the so-called Amazon Dash Buttons. The decision is guided by the 2016 ECJ decision in Amazon (C-191/15), which it develops further. The Munich decision contains far-reaching statements that are of vital importance to e-commerce and the internet of things. On a substantive level the Court of Appeals finds the Dash Buttons to be an infringement of consumer protection laws. This finding has already led to Amazon's withdrawal of Dash Buttons from the German market. On the level of conflict of laws and international civil procedure, which this paper focusses on, the court starts by rightfully declaring a nationwide jurisdiction under article 7(2) Brussels Ibis-Regulation for preventive actions brought by consumer protection associations. Since the associations pursue the collective interests of all consumers the place where the harmful event may occur is, after all, any place

where a potential consumer might be injured. In determining the applicable law, the court distinguishes between the main question of a claim to injunctive relief and the preliminary question of an infringement of consumer protection laws. In doing so it qualifies the pre-contractual obligations of § 312j BGB as part of the law applicable to consumer contracts, even though a qualification under Art. 12 Rome II-Regulation would be more convincing. Because of the potential importance of the content of the decision to the business model of Amazon it can be assumed that Amazon will pursue this case further and try for its reversal.

L. Kuschel: **Blocking orders against host providers: Content and territorial scope under the E-Commerce-Directive**

In its recent decision (C-18/18) on hosting provider liability, the ECJ set out guidelines on the substantial extent and territorial reach of court orders in cases of online personality rights violations under the E-Commerce Directive. The court held that a hosting provider can be ordered to remove not only identical but also information that is equivalent to the content which has been declared unlawful. Moreover, the E-Commerce Directive does not preclude a court from ordering a hosting provider to remove information worldwide. The article examines critically the broad substantial scope of potential takedown orders and in particular the possibility of worldwide court orders. As to the latter, the article argues that there is neither a contradiction to the ECJ's previous decision in Google v. CNIL nor a conflict with European jurisdiction law, namely the Brussels Ibis Regulation. A national court should, however, take into consideration the highly differing views among jurisdictions on what content is unlawful and what is protected as free speech, before issuing a global take-down order. The article thus pleads for a nuanced treatment of the subject matter by courts and legislators.

L. Colberg: **Damages for breach of an exclusive jurisdiction agreement**

In a recent decision, the Federal Court of Justice ("FCJ") decided for the first time that the violation of a choice-of-court agreement can give rise to damages claims. The question had previously been the subject of intense discussions in German academic literature. In the case before the FCJ, a US party violated a jurisdiction clause in favor of the courts of Bonn, Germany by bringing a claim in a US District

Court. Based on the valid and unambiguous choice-of-court agreement, the US court held it lacked jurisdiction. As US courts do not award costs to the winning party, the German party, however, had to bear its own lawyers' fees. When the US party brought the same claim in Germany, the German party counter-claimed for damages. The FCJ decided that parties who are sued abroad despite the existence of a choice-of-court agreement in principle have a right to damages. However, some uncertainty remains as to the exact terms under which courts will award damages. The academic debate therefore is likely to continue.

J.D. Lüttringhaus: **Jurisdiction and the Prohibition of Abuse of Rights**

Does the Lugano Convention allow for an abuse of rights exception? A recent decision by the Higher Regional Court of Karlsruhe draws upon the principle of good faith and the prohibition of abuse of rights in order to disregard the defendant's attempt to challenge jurisdiction pursuant to Art. 24 Lugano Convention. The Court found the defendant's contesting of jurisdiction in the main proceedings irreconcilable with his pre-trial application for independent proceedings for the taking of evidence in the same jurisdiction. This reasoning does, however, not take into account that jurisdiction for independent proceedings for the taking of evidence may well differ from jurisdiction for the main proceedings. Against this backdrop, the article provides a critical analysis of the abuse of rights exception under both, the Lugano Convention and the Brussels Ibis Regulation.

F. Maultzsch: **International Jurisdiction and Service of Process in Cross-Border Investment Torts under the Lugano Convention 2007/Brussels Ibis Regulation**

The Supreme Court of Justice of the Republic of Austria (OGH) had to deal with issues of international jurisdiction for cross-border investment torts. Besides general problems of jurisdiction under Art. 5 No. 3 of the Lugano Convention 2007/Art. 7 No. 2 of the Brussels Ibis Regulation, the case touched upon the relation between service of process and possible jurisdiction by way of submission according to Art. 24 of the Lugano Convention 2007/Art. 26 of the Brussels Ibis Regulation. The OGH has decided that jurisdiction by way of submission may not

be inhibited by a preceding denial of service of process. This article outlines the state of discussion under Art. 5 No. 3 of the Lugano Convention 2007/Art. 7 No. 2 of the Brussels Ibis Regulation concerning problems in investment torts (in particular regarding the location of the place in which pure economic loss occurs) and agrees with the OGH's account of the relation between service of process and jurisdiction by way of submission. This account is consistent with the concept of jurisdictional submission as being akin to an ex post choice of court agreement.

J. Rapp: **The recovery of erroneously paid insurance benefits under the Brussels Recast Regulation**

In what is probably one of the last judgments of the UK Supreme Court on the Brussels Ibis Regulation, the Court addressed three fundamental questions on Article 10 et seq., 25: Is an assignee and loss payee bound by an exclusive choice of court agreement in an insurance contract between the insurer and the policyholder? And is the insurer's claim for the recovery of erroneously paid insurance benefits against the assignee a "matter relating to insurance" within chapter II, section 3 of the Regulation? If so, is the assignee entitled to rely on section 3 even if he cannot be regarded as the economically weaker party vis-à-vis the insurer? In the given judgment, the Supreme Court ruled that the assignee is usually not bound by a choice of court agreement between the insurer and the policyholder; rather, pursuant to Article 14 of the Regulation, he can only be sued in the courts of the member state in which he is domiciled, even if the protection of the economically weaker party as basic concept enshrined in Art. 10 et seq. of the Regulation does not apply to him.

C. Madrid Martínez: **The political situation in Venezuela and the Conventions of the Inter-American Specialized Conference on Private International Law of the OAS**

The government of Nicolás Maduro withdraws Venezuela from the OAS and it has an impact on the Venezuelan system of Private International Law, particularly in the application of Inter-American conventions. In this article, we want to show the erratic way the Case Law has taken and the dire consequences that a political decision has had on the Venezuelan Private International Law.