Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2020: Abstracts

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

C. Wendehorst: **Digital Assets in Private International Law**

Rights with third party effect (erga omnes rights, rights in rem) in digital assets may exist at four levels: (a) the level of physical manifestation of data on a medium; (b) the level of data as encoded information; (c) the functional level of data as digital content or services; and (d) the level of data as representation of rival assets. As yet, recognized conflict-of-law rules exist only for level (c), which has always been dealt with under international intellectual property law.

As to rights in physical manifestations of data, these may be dealt with under Art. 43 EGBGB where data is stored and accessed only locally. In the case of remote access to data, especially in the case of data stored in the cloud, the law of the state where the controller is located should apply. In the case of two or more controllers located in different states, the location of the server operator (cloud provider) may decide instead, but neither of these connecting factors applies if the facts of the case indicate a closer connection with the law of another state.

Data as encoded information is a non-rival resource. Should a foreign jurisdiction recognise exclusive data ownership rights, these would have to be dealt with under international intellectual property law. For data access rights, portability rights and similar rights the rules on the territorial scope of the GDPR may provide some helpful indications as to the applicable law. However, where such rights arise within a contractual relationship or other specific framework the law applicable to this framework may prevail.

As to crypto assets, uniform conflict-of-law rules would be highly desirable. Subject to further integration of crypto assets into the existing system for

intermediated securities, rights in tokens should primarily be governed by the law referred to by conflict-of-law rules specifically addressing crypto assets, including appropriate analogies to such rules. Where no such rules exist, the closest connection must be ascertained by a connecting factor that is sufficiently certain and clearly visible to third parties, such as the law that has visibly been chosen as the applicable law for the whole ledger (elective situs), the location of the issuer (LIMA), or the place of the central administrator (PROPA) or of the sole holder of a private master key (PREMA).

R. de Barros Fritz: **The new legal tech business model of mass action litigation from the choice of law perspective**

In recent years, courts had to increasingly deal with questions of substantive law concerning a new, but in practice already well-established business model of mass action litigation, which is offered by companies such as Financialright Claims and Myright. These are often cases that have links to foreign countries. The present article has therefore taken this opportunity to examine the question of the law applicable to this business model in more detail.

P. Hay: **Forum Selection Clauses – Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law**

German and American law differ methodologically in treating exclusive forum selection clauses. German law permits parties, subject to limitations, to derogate the jurisdiction of courts and, in the interest of predictability, to select a specific court for any future disputes. The German Supreme Court emphasized in 2019 that, as a contract provision, the clause also gives rise to damages in case of breach. American law historically does not permit parties to "oust" the jurisdiction a court has by law. But the parties' wishes may be given effect by granting a party's motion to dismiss for forum non conveniens (FNC) when sued in a different court in breach of the agreement. FNC dismissals are granted upon a "weighing of interests" and in the court's discretion. The clause, even when otherwise valid, is therefore not the kind of binding obligation, enforced by contract remedies, as in German law. The case law does not give effect to its

"dual nature," as characterized by the German Supreme Court. The latter's decision correctly awarded attorneys' fees for expenses incurred by the plaintiff when the defendant had sued (and lost) in the United States in breach of a forum selection clause, especially since German jurisdiction and German law had been stipulated. Application of the "American Rule" of costs most probably would not have shifted fees to the losing party had American law been applied, although the rule is far less stringent today than often assumed.

A. Stadler/C. Krüger: **International jurisdiction and the place where the damage occurred in VW dieselgate cases**

Once again the European Court of Justice had to deal with the question of where to locate the place where the harm or damage occurred ("Erfolgsort", Article 7 no. 2 Brussels Ibis Regulation) which is particularly difficult to define in case of pure economic loss tort cases. Previous case law of the ECJ resulted in a series of very specific judgments and a high unpredictability of the international jurisdiction. In the Austrian "Dieselgate" case the referring court had doubts whether the Austrian car purchasers who had bought and received their cars in Austria suffered a "primary loss" or only an irrelevant "secondary loss". The ECJ rightly rejects the idea of a secondary loss and concludes that the place where the (primary) damage occurred is to be located in Austria. The authors criticise that the ECJ – without an obvious reason – emphasises that the case at hand is not about pure economic loss. Although they agree with the court's finding that the place where the damage occurred was in Austria as the place of acquisition of the cars, they discuss whether in future cases one might have to distinguish between the place where the sales contract was entered into or the place where the defective object became part of the purchasers' property. The authors reject any detailed approach and advocate in favour of abandoning the principle of ubiquity in cases of pure economic loss. Alternatively, the only acceptable solution is an entire consideration of all relevant facts of the individual case.

P.F. Schlosser: **Jurisdiction agreements binding also third beneficiaries in contracts?**

Even in the context of jurisdiction agreements, the European Court applies the

rules protecting the policy holder for the benefit of the "insured". In this respect the Court's methodology and result must be approved of. The restriction of the holding as to the consent of the insured and the qualification of the insured as an insurance company are of no practical impact and due to the narrow question referred to the Court. The holding may, however, not be transferred by a reverse argumentation to assignments of rights against consumers or employees to commercial entities.

B. Heiderhoff: **Article 15 Brussels IIbis Regulation, the Child's best interests, and the recast**

Article 15 Brussels IIbis Regulation provides that the court competent under Article 8 et seq Brussels IIbis Regulation may, under certain prerequisites, transfer the case to a court in another Member State. In the matter of EP./. FO (ECJ C-530/18) the ECJ once more explains the central notion of this rule, being the best interest of the child. The ECJ holds that the competent court must not initiate the transfer on the basis that the substantive law applied by the foreign court is more child friendly – which is, by the way, a rather unrealistic scenario for various reasons. Concerning procedural law, the ECJ points out that different rules may only be taken into account if they "provide added value to the resolution of the case in the interests of the child". Notwithstanding the ECJ's fundamental and recurrent statement that the transfer is never mandatory, it still seems reasonable for the competent court to apply a well-balanced, comprehensive approach towards the transfer. Should it deny the transfer to a court that is "better placed to hear the case" on the grounds that the foreign law is "different" or maybe that it even seems to be less in the interest of the child? According to the principle of mutual trust, the author suggests to use the public policy standard and to ignore any differences in the substantive and procedural law, as long as they do not threaten to add up to a public policy infringement. The paper also points out some changes in the new Articles 12 and 13 Brussels IIbis Recast which aim at further specifying the transfer mechanism. The resulting deletion of the comprehensive evaluation of the child's best interests by the transferring court in para 1 seems unintentional. Thus, the author recommends to keep up the current handling.

F. Koechel: **Article 26 of the Brussels Ibis Regulation as a Subsidiary Ground of Jurisdiction and Submission to Jurisdiction Through Eloquent Silence**

According to the CJEU's decision, a court may assume jurisdiction based on the entering of an appearance of the defendant only if Articles 4 ff. of the Brussels Ibis Regulation do not already provide for a concurrent ground of jurisdiction in the forum state. This restrictive interpretation complicates the assessment of jurisdiction and limits the scope of the Brussels Ibis Regulation without any substantial justification. On the contrary, a subsidiary application of Article 26 of the Brussels Ibis Regulation is systematically inconsistent with Article 25, which generally privileges the jurisdiction agreed by the parties over any concurrent ground of jurisdiction. In this decision, the CJEU confirms its previous interpretation according to which Article 26 Brussels Ibis Regulation may not be employed as a ground of jurisdiction vis-à-vis a defendant who chooses not to enter an appearance. However, the CJEU does not sufficiently take into account that in the main proceedings the court had requested the defendant to state whether or not he wanted to challenge jurisdiction. The question therefore was not simply if a defendant submits to a court's jurisdiction by not reacting at all after having been served with the claim. Rather, the CJEU would have had to answer whether a defendant enters an appearance within the sense of Article 26 of the Brussels Ibis Regulation if he does not comply with the court's express request to accept or challenge jurisdiction. The article argues that the passivity of the defendant may only exceptionally be qualified as a submission to jurisdiction if he can be deemed to have implicitly accepted the court's jurisdiction.

C. Lasthaus: **The Transitional Provisions of Article 83 of the European Commission's Succession Regulation**

The European Commission's Succession Regulation 650/2012 aims to facilitate cross-border successions and intends to enable European citizens to easily organise their succession in advance. In order to achieve this goal, the regulation – inter alia – facilitates the establishment of bilateral agreements as to succession. This is the case not only for agreements made after 17/8/2015 but – under the condition that the testator dies after this date – according to the transitional provisions in Article 83 also for those made prior. Due to these transitional

provisions, some formerly invalid agreements made prior to the effective date of the regulation turned valid once the regulation applied. In its judgment, the German Federal Court of Justice ("BGH") ruled on the legal validity of a formerly invalid bilateral agreement as to succession between a German testator and her Italian partner. This legal review inter alia deals with the distinction between Article 83 para. 2 and Article 83 para. 3 of the Regulation as well as legal aspects concerning the retroactive effect of the transitional provisions.

P. Kindler: **The obligation to restore or account for gifts and advancements under Italian inheritance law: questions of applicable law and international civil procedure, including jurisdiction and the law applicable to pre-judgment interest**

The present decision of the Higher Regional Court of Munich deals with the obligation to restore or account for gifts and advancements when determining the shares of different heirs under Italian law (Article 724 of the Italian Civil Code). Specifically, it addresses a direct debit from the bank account held by husband and wife and payed to the wife alone a few days before the husband's death. The husband was succeeded on intestacy by his wife and three descendants one of which sued the deceased's wife in order to obtain a declaratory judgment establishing that half of the amount payed to the wife by the bank is an advancement, received from the deceased during his lifetime, and that such advancement has to be adjusted in the partitioning between the heirs. The article presents the related questions of applicable law under both the European Succession Regulation and the previous conflict rules in Germany and Italy. Side aspects regard, inter alia, the law applicable to interest relating to the judicial proceedings (Prozesszinsen) and how the Court determined the content of the foreign substantive law.

P. Mankowski: **Securing mortgages and the system of direct enforcement under the Brussels Ibis Regulation**

On paper, the Brussels Ibis Regulation's turn away from exequatur to a system of direct enforcement in the Member State addressed was a revolution. In practice, its consequences have still to transpire to their full extent. The interface between

that system and every-day enforcement practice is about to become a fascinating area. As so often, the devil might be in the detail, and in the minute detail at that. The Sicherungshypothek (securing mortgage) of German law now stars amongst the first test cases.

E. Jayme: **Registration of cultural goods as stolen art: Tensions between property rights and claims of restitution – effects in the field of international jurisdiction and private international law**

In 1999, the plaintiff, a German art collector had acquired a painting by the German painter Andreas Achenbach in London. In 2016 the painting was registered in the Madgeburg Lost Art Database according to the request of the defendant, a (probably) Canadian foundation. The painting was owned, between 1931 and 1937, by a German art dealer who had to leave Germany and was forced to close his art gallery in Düsseldorf. The plaintiff based his action on a violation of his property rights. The court dismissed the action: the registration, according to the court, did not violate the plaintiff's property rights. The case, at first, involves questions of international civil procedure. The court based jurisdiction, according to para. 32 of the German Code of Civil Procedure, on the place of the pretended violation of property, i.e. the seat of the German foundation, which had registered the painting in its lost art register. The European rules were not applicable to a defendant having its seat outside the European community. The author follows the Magdeburg court as to the question of jurisdiction, but criticises the outcome of the case and the arguments of the court for generally excluding the violation of property rights. A painting registered as lost art loses its value on the art market, it cannot be sold. In addition, the registration of a painting as lost art may perhaps violate property rights of the German plaintiff in situations where there has been, after the Second World War, a compensation according to German public law, or where the persons asking for the registration did not sufficiently prove the legal basis of their claim. However, the Magdeburg registration board has developed some rules for cancelling registration based on objective arguments. Thus, the question is still open.

I. Bach/H. Tippner: The penalty payment of § 89 FamFG: a wanderer between two

worlds

For the second time within only a few years, the German Federal Supreme Court (BGH) had to decide on a German court's jurisdiction for the enforcement of a (German) judgment regarding parental visitation rights. In 2015, the BGH held that under German law the rule regarding the main proceedings (§ 99 FamFG) is to be applied, because of the factual and procedural proximity between main and enforcement proceedings. Now, in 2019, the BGH held that under European law the opposite is true: The provisions in Articles 3 et seq. Brussels IIbis Regulation are not applicable to enforcement proceedings. Therefore, the question of jurisdiction for enforcement proceedings is to be answered according to the national rules, i.e. in the present case: according to § 99 FamFG.

D.P. Fernández Arroyo:**Flaws and Uncer tain Effectiveness of an Anti-Arbitration Injunction *à l'argentine***

This article deals with a decision issued by an Argentine court in the course of a dispute between an Argentine subsidiary of a foreign company and an Argentine governmental agency. The court ordered the Argentine company to refrain from initiating investment treaty arbitration against Argentina. This article addresses the conformity of the decision with the current legal framework, as well as its potential impact on the ongoing local dispute. Additionally, it briefly introduces some contextual data related to the evolution of Argentine policies concerning arbitration and foreign investment legal regime.