Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2021: Abstracts

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

R. Wagner: **Judicial cooperation in civil and commercial matters after Brexit**

Brexit has become a reality. When the UK left the EU on 31 January 2020 at midnight, it entered the transition period stipulated in the UK-EU Withdrawal Agreement. During this period, EU law in the field of judicial cooperation in civil and commercial matters applied to and in the United Kingdom. The transition period ended on 31 December 2020. The following article primarily describes the legal situation in the judicial cooperation in civil and commercial matters from 1 January 2021.

Addendum: At the time when this contribution was written, the conclusion of a Trade and Cooperation Agreement between the EU and United Kingdom still was uncertain. Meanwhile, the Agreement of 24 December 2020 has come into existence. It is applicable provisionally since 1 January 2021 for a limited period and will be permanently applicable when after ratification it has formally come into force. The Agreement does not envisage any additional provisions on judicial cooperation in civil and commercial matters between the United Kingdom and the EU. Therefore, it has to be concluded that the present article reflects the current state of law as established by the Trade and Cooperation Agreement (Rolf Wagner).

K. Thorn/K. Varón Romero: **Conflict of laws in the “Twilight Zone” – On the reform of German private international law on welfare relationships**

With the government draft of 25 September 2020, a comprehensive reform of

guardianship and care law is approaching which will fundamentally modernize these areas. This reform also includes an amendment to the autonomous conflict-of-law rules in that area. The most important changes within this amendment concern the provisions of the Introductory Act to the German Civil Code (EGBGB). On the one hand, it includes a methodological change to the relevant Article 24 EGBGB which takes greater account of its role as a merely supplementary provision to prior international treaties and Union law. The authors welcome the changes that this will entail but point out that some clarifications are still needed before the reform is completed, particularly in cases of a change in the applicable law. On the other hand, a new Article 15 EGBGB is intended to create a special conflict-of-law rule for the mutual representation of spouses which is based on the also new substantive rule of Section 1358 of the German Civil Code (BGB) and is designed as a unilateral conflict-of-law rule in favour of domestic substantive law. The authors basically agree with the reasoning for this approach and in addition address questions which remain unresolved even after reading the reasoning, in particular the relationship between Article 15 of the Introductory Act to the Civil Code and the conflict-of-law rules of Union law.

D. Coester-Waltjen: **Conflict rules on formation of marriage – Some reflections on a necessary reform**

The conflict rule on formation of marriages (Article 13 Introductory Law to the Civil Code) underwent several changes during the last years. In addition, societal conditions and circumstances changed considerably. It seems at least questionable whether the cumulative application of the national law of both prospective spouses in case of a heterosexual marriage and the law of the place of registration in case of a homosexual marriage provides a reasonable solution. The article deals with a possible reform of the conflict rule on formation of marriage and envisages whether a comparable solution might be found for other (registered or factual) relationships.

U.P. Gruber: **Reflections on the reform of the conflict of laws of the registered life partnerships and other partnerships**

Under the current law, the formation of a registered life partnership, its general

effects and its dissolution are governed by the substantive provisions of the country in which the life partnership is registered. The article deals with a possible reform of this rule. In particular, it addresses the question whether there can be a convergence of the private international law for marriage and registered partnership. Moreover, the article discusses a conflict-of-law rule for de facto relationships.

F. Temming: **Payment of wage supplements in respect of annual leave constitute a civil and commercial matter within the scope of Art. 1 Brussels Regulation**

In its judgement the CJEU holds that an action for payment of wage supplements in respect of annual leave pay brought by a body competent to organize the annual leave of workers in the construction sector against an employer, in connection – among others – with the posting of workers to a Member State where they do not have their habitual place of work, can be qualified as a "civil and commercial matter" for the purpose of the Brussels Ibis Regulation and, thus, falls within the scope of its Article 1. This can even be the case if the competent body is governed by public law, such as the Construction Workers' Leave and Severance Pay Fund of Austria (hereinafter "BUAK"), provided that it does not act under a public law prerogative of its own conferred by law. This case note argues that the contested section 33h (2b) of the BUAG does not constitute such a prerogative but rather can be construed according to EU law in such a manner that an Austrian court can fully review the accuracy of a claim relied on by BUAK. The importance of the Korana judgement of the CJEU lies in the fact that it ensures the recognition and enforcement of judgments according to Art. 36 ff. of the Brussels I Regulation in favour of these above mentioned bodies. In so doing the CJEU strengthens the regulatory framework set up by the revised Posting of Workers Directive 96/71/EC. It marks the procedural keystone of a long-standing CJEU jurisprudence enabling a special, however adequate and institutionalised system of granting annual leave in the building sector. At the same time, it sends a clear signal towards the Swiss Federal Court that took a contrary view with respect to Art. 1 of the Lugano Convention 2007.

F. Maultzsch: **International Jurisdiction for Liability and Recourse Claims in the Wake of Cum-Ex Transactions**

The Higher Regional Court of Frankfurt (OLG Frankfurt a.M.) had to deal with issues of international jurisdiction for liability and recourse actions resulting from so-called cum-ex transactions that failed on a tax-based level. In doing so, the court took position on diverse jurisdictional issues under the Brussels Ibis Regulation. These issues covered the requirements of a sufficient contest of jurisdiction by the defendant in appellate proceedings, a possible jurisdiction under Art. 7 No. 5 Brussels Ibis Regulation for disputes arising out of the operations of a branch, aspects of characterization regarding the forum of the contract (Art. 7 No. 1 Brussels Ibis Regulation), as well as the standards of international jurisdiction for a recourse claim from joint and several liability for tax payments. The following article analyses the findings of the court and discusses, inter alia, the application of Art. 26 Brussels Ibis Regulation in cases of a modification of the matter in dispute.

J. Schulte: **A reinforced EU trademark through a strengthened alternative forum**

The EU trademark has been strengthened when it comes to infringements via internet by the recent ECJ decision in AMS Neve, reviving the alternative forum of the place where an act of infringement has been committed or threatened. The Court ruled out an interpretation not congruent with that in Art. 8 (2) Rome II (applicable law) or Art. 7 no. 2 Brussels Ia (international jurisdiction for national trademarks). Instead, it transferred the EU Trademark Regulation’s substantive law understanding, thus guaranteeing a uniform interpretation of the regulation. Competent are the courts of the Member State where the consumers or traders are located to whom an allegedly infringing advertising or offers for sale are directed. This reverses the unfortunate “Parfummarken”-doctrine of the German Bundesgerichtshof and gives plaintiffs more leeway for choosing a forum and the possibility of bringing actions for infringements of EU and national trademarks simultaneously at the same court.

H. Schack: **Does Art. 27 Lugano Convention permit requiring a special**

legitimate interest in actions for negative declaratory relief?

In an antitrust dispute between a Swiss watch manufacturer and a British wholesaler the Swiss Federal Court gives up its former holding (BGE 136 III 523) that a Swiss action for negative declaratory relief required a special legitimate interest. Today, at least in international cases, the plaintiff's mere interest in fixing the forum is sufficient. That strengthens the attractiveness of Swiss courts in transborder cases.