Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2022: Abstracts

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

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

E.-M. Kieninger: **Climate Change Litigation and Private International Law**

The recent Shell ruling by the District Court of The Hague raises the question whether Carbon Majors could also be sued outside the state of their corporate home and which law would be applicable to claims for damages or injunctive relief. In particular, the article discusses possible restrictions of the right to choose between the law of the state in which the damage occurred and the law of the state in which the event giving rise to the damage took place (Art. 7 No. 2 Brussels Ia Regulation and Art. 7 Rome II Regulation). It also considers the effects of plant permits and the role that emissions trading should play under Art. 17 Rome II Regulation.

S. Arnold: **Artificial intelligence and party autonomy – legal capacity and capacity for choice of law in private international law**

Artificial intelligence is already fundamentally shaping our lives. It also presents challenges for private international law. This essay aims to advance the debate about these challenges. The regulative advantages of party autonomy, i.e. efficiency, legal certainty and conflict of laws justice, can be productive in choice of law contracts involving artificial intelligence. In the case of merely automated systems, problems are relatively limited: the declarations of such systems can simply be attributed to their users. Existence, validity or voidability of choice of law clauses are determined by the chosen law in accordance with Art. 3(5), 10(1)

Rome I Regulation. If, however, the choice of law is the result of an artificial "black box" decision, tricky problems arise: The attribution to the persons behind the machines might reach its limit, for such artificial decisions can neither be predicted nor explained causally in retrospect. This problem can be solved in different ways by the substantive law. Clearly, national contract laws will differ substantially in their solutions. Thus, it becomes a vital task for private international law to determine the law that is decisive for the question of attribution. According to one thesis of this article, two sub-questions arise: First, the question of legal capacity for artificial intelligence and second, its capacity for choice of law. The article discusses possible connecting factors for both sub-questions de lege lata and de lege ferenda. Furthermore, it considers the role of ordre public in the context of artificial choice of law decisions. The article argues that the ordre public is not necessarily violated if the applicable law answers the essential sub-questions (legal capacity and capacity for choice of law) differently than German law.

M. Sonnentag/J. Haselbeck: **Divorce without the involvement of a court in Member States of the EU and the Brussels IIbis- and the Rome III-Regulation**

In recent years some Member States of the European Union such as Italy, Spain, France, and Greece introduced the possibility of a divorce without the involvement of a court. The following article discusses the questions whether such divorces can be recognised according to Art. 21 Regulation No 2201/2003 (Brussels-IIbis), Art. 30 Regulation No 2019/1111 (Brussels-IIbis recast) and if they fall within the scope of the Regulation No 1259/2010 (Rome III).

W. Hau: **Personal involvement as a prerequisite for European tort jurisdiction at the centre of the plaintiff's interests**

The case Mittelbayerischer Verlag KG v. SM gave the ECJ the opportunity to further develop its case law on the European forum delicti under Art. 7 No. 2 Brussels Ibis Regulation for actions for alleged infringements of personality rights on the internet. The starting point was the publication of an article on the homepage of a Bavarian newspaper, which misleadingly referred to "Polish

extermination camps" (instead of "German extermination camps in occupied Poland"). Strangely enough, Polish law entitles every Polish citizen in such a case to invoke the "good reputation of Poland" as if it were his or her personal right. The ECJ draws a line here by requiring, as a precondition of Art. 7 No. 2, that the publication contains objective and verifiable elements which make it possible to individually identify, directly or indirectly, the person who wants to bring proceedings at the place of his or her centre of interest. While this approach allows for an appropriate solution to the case at hand, it leaves several follow-up questions open.

A. Hemler: **Which point in time is relevant regarding the selection of a foreign forum by non-merchants according to § 38(2) German Code of Civil Procedure (ZPO)?**

38(2) German Code of Civil Procedure (ZPO) permits the selection of a foreign forum only if at least one party does not have a place of general jurisdiction in Germany. In the case discussed, the defendant had general jurisdiction in Germany only when the claim was filed. However, there was no general jurisdiction in Germany when the choice of forum clause was agreed upon. The Landgericht (district court) Frankfurt a.M. therefore had to decide on the relevant point in time regarding § 38(2) ZPO. Given the systematic structure of § 38 ZPO and the law's purpose of advancing international legal relations, the court argued in favour of the point in time in which the choice of forum clause was agreed upon. The author of the paper rejects the court's view: He argues that the systematic concerns are less stringent on closer inspection. More important, however, is the fact that the law also calls for the protection of non-merchants. This can only be sufficiently achieved if the point in time in which the claim was filed is regarded as the crucial one.

D. Henrich: **News on private divorces in and outside the EU**

In two decisions the German Federal Court of Justice ("BGH") had to deal with the recognition of private divorces (divorces without involvement of a state authority). In the first case (XII ZB 158/18) a couple of both Syrian and German nationality had been divorced in Syria by repudiation. While recognition of foreign

public divorces (divorces by a state court or other state authority) is a question of procedure, private divorces are recognized if they are effective according to the applicable law, here the Rules of the Rome III Regulation (Article 17(1) Introductory Act to the Civil Code). Because the couple had no common ordinary residence, the Court applied Article 8 lit. c Rome III Regulation. German Law dominating, the Court denied recognition.

In the second case (XII ZB 187/20) the BGH made a reference for a preliminary ruling of the European Court of Justice regarding the recognition of a divorce in Italy in the register office in front of the registrar. The BGH follows the opinion that in such cases it is the consent of the parties that dissolves the marriage, the divorce being a private one. The BGH questions whether in spite of that the divorce could be recognized according to Sec. 21 Council Regulation (EC) No. 2201/2003 or, if not, according to Sec. 46 of the Council Regulation.

C. Budzikiewicz: **On the classification of dowry agreements**

Agreements on the payment of a bride's dowry are a recurring topic in German courts. It usually becomes the subject of a legal dispute in connection with or after a divorce. This was also the case in the decision to be discussed here, in which the applicant demands that her divorced husband pay for the costs of a pilgrimage to Mecca. Since the case has an international connection due to the husband's Libyan nationality, the Federal Supreme Court first addresses the controversial question of the characterization of dowry. However, since all connection options lead to German law in the present case, the Court ultimately refrains from deciding the question of characterization. It explains that the agreement on the payment of dowry is to be classified under German law as a sui generis family law contract, which requires notarization in order to be effective. The article critically examines the decision. In doing so, it addresses both the question of characterization of dowry and the need for form of agreements on the payment of dowry under German law.

E. Jayme/G. Liberati Buccianti: **Private Divorces under Italian Law: Conflict of Laws**

Divorce, under German law, is only permitted by a decision of a judge, even in cases where a foreign law is applicable which would allow a private divorce based on the agreement of the spouses. Italy, however, has introduced, in 2014, a divorce by private agreement in two procedures: the agreement of the spouses can be submitted to the public prosecutor who, in case he agrees, will send it to the civil registrar, or, secondly, by a direct application of the spouses to the civil registrar of the place where the marriage had been registered.

The article discusses the problems of private international law and international civil procedure, particularly in cases where Italian spouses living in Germany intend to reach a private divorce in Italy. The discussion includes same-sex-marriages of Italian spouses concluded in Germany which are permitted under German law, but not under Italian law, according to which only a "civil union" is possible. The Italian legislator has enacted (2017) a statute according to which the same-sex-marriage concluded by Italian citizens abroad will have the effects of a civil union under Italian law. The question arises of whether the Italian rules on terminating a civil union will have an effect on the spouses marriage concluded in Germany.

The article also discusses the validity of private divorces obtained in Third States which are not members of the European Union, particularly with regard to religious divorces by talaq expressed by the husband, and the problem whether such divorces are compatible with the principles of public policy. The authors mention also the specific problems of Italian law with regard to religious (catholic) marriages concluded and registered in Italy, where a divorce by Italian law is possible which, however, may be in conflict with a nullity judgment of the catholic church.

G. Mäsch/C. Wittebol: **None of Our Concern? – A Group of Companies' Cross-border Environmental Liability Before Dutch Courts**

The issue of cross-border corporate responsibility has been in the limelight of legal debate for some time. In its decision of 29 January 2021, the Court of Appeal of The Hague (partially) granted a liability claim against the parent company Royal Dutch Shell plc with central administration in The Hague for environmental damages caused by its Nigerian subsidiary. In particular, the Dutch court had to

address the much-discussed question to what extent domestic parent companies are liable before domestic courts for environmental damage committed by their subsidiaries abroad, and whether domestic courts have international jurisdiction over the subsidiary. With this precedent, the number of cross-border human rights and environmental claims is likely to rise in the near future.

H. Jacobs: **Article 4(2) and (3) Rome II Regulation in a case involving multiple potential tortfeasors**

In Owen v Galgey, the High Court of England and Wales engaged in a choice of law analysis in a case involving multiple potential tortfeasors. The claimant, a British citizen habitually resident in England, was injured in France when he fell into an empty swimming pool. In the proceedings before the High Court, he claimed damages from, inter alia, the owner of the holiday home and his wife, both British citizens habitually resident in England, and from a French contractor who was carrying out renovation works on the swimming pool at the material time. The judgment is concerned with the applicability of Article 4(2) Rome II Regulation in multi-party tort cases and the operation of the escape clause in Article 4(3) Rome II Regulation. While the High Court's view that Article 4(2) requires a separate consideration of each pair of claimants and defendants is convincing, it is submitted that the court should have given greater weight to the parties' common habitual residence when applying Article 4(3).