Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2023: 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/)

R. Wagner: **European account preservation orders and titles from provisional measures with subsequent account attachments**

The enforcement of a claim, even in cross-border situations, must not be jeopardised by the debtor transferring or debiting funds from his account. A creditor domiciled in State A has various options for having bank accounts of his debtor in State B seized. Thus, he can apply for an interim measure in State A according to national law and may have this measure enforced under the Brussels Ibis Regulation in State B by way of attachment of accounts. Alternatively, he may proceed in accordance with the European Account Preservation Order Regulation (hereinafter: EAPOR). This means that he must obtain a European account preservation order in State A which must be enforced in State B. By comparing these two options the author deals with the legal nature of the European account preservation order and with the subtleties of enforcement under the EAPOR.

H. Roth: **The „relevance (to the initial legal dispute)“ of the reference for a preliminary ruling pursuant to Article 267 TFEU**

The preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU) exists to ensure the uniform interpretation and application of EU law. The conditions under which national courts may seek a preliminary ruling are based on the established jurisdiction of the European Court of Justice (CJEU) and are summarised in Article 94 of the

Rules of Procedure of the CJEU. One such condition is that the question referred to the court must be applicable to the decision in the initial legal dispute. Any future judgement by the referring court must thereafter be dependant on the interpretation of Union law. When cases are obviously not applicable, the European Court dismisses the reference for a preliminary ruling as inadmissible. The judgement of the CJEU at hand concerns one of these rare cases in the decision-making process. The sought-after interpretation of Union law was not materially related to the matter of the initial legal dispute being overseen by the referring Bulgarian court.

S. Mock/C. Illetschko: **The General International Jurisdiction for Legal Actions against Board Members of International Corporations – Comment on OLG Innsbruck, 14 October 2021 – 2 R 113/21s, IPRax (in this issue)**

In the present decision, the Higher Regional Court of Innsbruck (Austria) held that (also) Austrian courts have jurisdiction for investors lawsuits against the former CEO of the German Wirecard AG, Markus Braun. The decision illustrates that the relevance of the domicile of natural persons for the jurisdiction in direct actions for damages against board members (Art 4, 62 Brussels Ia Regulation) can lead to the fact that courts of different member states have to decide on crucial aspects of complex investor litigation at the same time. This article examines the decision, focusing on the challenges resulting from multiple residences of natural persons under the Brussels Ia Regulation.

C. Kohler: **Lost in error: The ECJ insists on the "mosaic solution" in determining jurisdiction in the case of dissemination of infringing content on the internet**

In case C-251/20, Gtflix Tv, the ECJ ruled that, according to Article 7(2) of Regulation No 1215/2012, a person, considering that his or her rights have been infringed by the dissemination of disparaging comments on the internet, may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seized, even though those courts do not have jurisdiction to rule on an application for rectification and removal of the content placed online. The ECJ

thus confirms the “mosaic solution” developed in case C-509/09 and C-161/10, eDate Advertising, and continued in case C-194/16, Bolagsupplysningen, for actions for damages for the dissemination of infringing contents on the internet. The author criticises this solution because it overrides the interests of the sound administration of justice by favouring multiple jurisdictions for the same event and making it difficult for the defendant reasonably to foresee before which court he may be sued. Since a change in this internationally isolated case law is unlikely, a correction can only be expected from the Union legislator.

T. Lutzi: **Art 7 No 2 Brussels Ia as a Rule on International and Local Jurisdiction for Cartel Damage Claims**

Once again, the so-called “trucks cartel” has provided the CJEU with an opportunity to clarify the interpretation of Art. 7 No. 2 Brussels Ia in cases of cartel damage claims. The Court confirmed its previous case law, according to which the place of damage is to be located at the place where the distortion of competition has affected the market and where the injured party has at the same time been individually affected. In the case of goods purchased at a price inflated by the cartel agreement, this is the place of purchase, provided that all goods have been purchased there; otherwise it is the place where the injured party has its seat. In the present case, both places were in Spain; thus, a decision between them was only necessary to answer the question of local jurisdiction, which is also governed by Art. 7 No. 2 Brussels Ia. Against this background, the Court also made a number of helpful observations regarding the relationship between national and European rules on local jurisdiction.

C. Danda: **The concept of the weaker party in direct actions against the insurer**

In its decision T.B. and D. sp. z. o. o. ./. G.I. A/S the CJEU iterates on the principle expressed in Recital 18 Brussels I bis Regulation that in cross-border insurance contracts only the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules. In the original proceedings – a joint case – the professional claimants had acquired insurance claims from individuals initially injured in car accidents in Poland. The referring court asked

the CJEU (1) if such entities could be granted the forum actoris jurisdiction under Chapter II section 3 on insurance litigation against the insurer of the damaging party and (2) if the forum loci delicti jurisdiction under Art. 7(2) or 12 Brussels I bis Regulation applies under these conditions. Considering previous decisions, the CJEU clarified that professional claimants who regularly receive payment for their services in form of claim assignment cannot be considered the weaker party in the sense of the insurance section and therefore cannot rely on its beneficial jurisdictions. Moreover, the court upheld that such claimants may still rely on the special jurisdiction under Art. 7(2) Brussels I bis Regulation.

C. Reibetanz: **Procedural Consumer Protection under Brussels Ibis Regulation and Determination of Jurisdiction under German Procedural Law (Sec. 36 (1) No. 3 ZPO)**

German procedural law does not provide for a place of jurisdiction comparable to Article 8 (1) Brussels Ibis Regulation, the European jurisdiction for joinder of parties. However, according to Sec. 36 ZPO, German courts can determine a court that is jointly competent for claims against two or more parties. In contrast to Art. 8 (1) Brussels Ibis Regulation, under which the plaintiff has to choose between the courts that are competent, the determination of a common place of jurisdiction for joint procedure under German law is under the discretion of the courts. Since EU law takes precedence in its application over contrary national law, German courts must be very vigilant before determining a court at their discretion. The case is further complicated by the fact that the prospective plaintiff can be characterised as a consumer under Art. 17 et seq. Brussels Ibis Regulation. The article critically discusses the decision of the BayObLG and points out how German judges should approach cross-border cases before applying Sec. 36 ZPO.

M.F. Müller: **Requirements as to the „document which instituted the proceedings“ within the ground for refusal of recognition according to Art 34 (2) Brussels I Regulation**

The German Federal Court of Justice dealt with the question which requirements a document has to comply with to qualify as the “document which instituted the

proceedings" within the ground for refusal of recognition provided for in Art 34 (2) Brussels I Regulation regarding a judgment passed in an adhesion procedure. Such requirements concern the subject-matter of the claim and the cause of action as well as the status quo of the procedure. The respective information must be sufficient to guarantee the defendant's right to a fair hearing. According to the Court, both a certain notification by a preliminary judge and another notification by the public prosecutor were not sufficiently specific as to the cause of action and the status quo of the procedure. Thus, concerning the subject matter of the claim, the question whether the "document which instituted the proceedings" in an adhesion procedure must include information about asserting civil claims remained unanswered. While the author approves of the outcome of the case, he argues that the Court would have had the chance to follow a line of reasoning that would have enabled the Court to submit the respective question to the ECJ. The author suggests that the document which institutes the proceedings should contain a motion, not necessarily quantified, concerning the civil claim.

B. Steinbrück/J.F. Krahé: **Section 1032 (2) German Civil Procedural Code, the ICSID Convention and Achmea – one collision or two collisions of legal regimes?**

While the ECJ in Achmea and Komstroy took a firm stance against investor-State arbitration clauses within the European Union, the question of whether this will also apply to arbitration under the ICSID Convention, which is often framed as a "self-contained" system, remains as yet formally undecided. On an application by the Federal Republic of Germany, the Berlin Higher Regional Court has now ruled that § 1032 (2) Civil Procedural Code, under which a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings, cannot be applied to proceedings under the ICSID Convention. The article discusses this judgment, highlighting in particular that the Higher Regional Court chooses an interpretation of the ICSID Convention which creates a (presumed) conflict between the ICSID Convention and German law, all the while ignoring the already existing conflict between the ICSID Convention and EU law.

L. Kuschel: **Copyright Law on the High Seas**

The high seas, outer space, the deep seabed, and the Antarctic are extraterritorial – no state may claim sovereignty or jurisdiction. Intellectual property rights, on the other side, are traditionally territorial in nature – they exist and can be protected only within the boundaries of a regulating state. How, then, can copyright be violated aboard a cruise ship on the high seas and which law, if any, ought to be applied? In a recent decision, the LG Hamburg was confronted with this quandary in a dispute between a cruise line and the holder of broadcasting rights to the Football World Cup 2018 and 2019. Unconvincingly, the court decided to circumnavigate the fundamental questions at hand and instead followed the choice of law agreement between the parties, in spite of Art. 8(3) Rome II Regulation and opting against the application of the flag state's copyright law.

T. Helms: **Validity of Marriage as Preliminary Question for the Filiation and the Name of a Child born to Greek Nationals in Germany in 1966**

The Higher Regional Court of Nuremberg has ruled on the effects of a marriage on the filiation and the name of a child born to two Greek nationals whose marriage before a Greek-orthodox priest in Germany was invalid from the German point of view but legally binding from the point of view of Greek law. The court is of the opinion that – in principle – the question of whether a child's parents are married has to be decided independently applies the law which is applicable to the main question, according to the conflict of law rules applicable in the forum. But under the circumstances of the case at hand, this would lead to a result which would be contrary to the jurisprudence of the Court of Justice on names lawfully acquired in one Member State. Therefore – as an exception – the preliminary question in the context of the law of names has to be solved according to the same law which is applicable to the main question (i.e. Greek law).

K. Duden: **PIL in Uncertainty – failure to determine a foreign law, application of a substitute law and leaving the applicable law open**

A fundamental concern of private international law is to apply the law most

closely connected to a case at hand – regardless of whether this is one's own or a foreign law. The present decision of the Hanseatic Higher Regional Court as well as the proceedings of the lower court show how difficult the implementation of this objective can become when the content of the applicable law is difficult to ascertain. The case note therefore first addresses the question of when a court should assume that the content of the applicable law cannot be determined. It examines how far the court's duty to investigate the applicable law extends and argues that this duty does not seem to be limited by disproportionate costs of the investigative measures. However, the disproportionate duration of such measures should limit the duty to investigate. The comment then discusses which law should be applied as a substitute for a law whose content cannot be ascertained. Here the present decision and the proceedings in the lower court highlight the advantages of applying the lex fori as a substitute – not as an ideal solution, but as the most convincing amongst a variety of less-than-ideal solutions. Finally, the note discusses why it is permissible as a matter of exception for the decision to leave open whether German or foreign law is applicable.

M. Weller: **Kollisionsrecht und NS-Raubkunst: U.S. Supreme Court, Entscheidung vom 21. April 2022, 596 U.S. ____ (2022) – Cassirer et al. ./. Thyssen-Bornemisza Collection Foundation**

In proceedings on Nazi-looted art the claimed objects typically find themselves at the end of a long chain of transfers with a number of foreign elements. Litigations in state courts for recovery thus regularly challenge the applicable rules and doctrines on choice of law – as it was the case in the latest decision of the U.S. Supreme Court in Cassirer. In this decision, a very technical point was submitted to the Court for review: which choice-of-law rules are applicable to the claim in proceedings against foreign states if U.S. courts ground their jurisdiction on the expropriation exception in § 1605(3)(a) Federal Sovereign Immunities Act (FSIA). The lower court had opted for a choice-of -aw rule under federal common law, the U.S. Supreme Court, however, decided that, in light of Erie and Klaxon, the choice-of-law rules of the state where the lower federal courts are sitting in diversity should apply.