Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2022: 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/)

R. Wolfram: **Achmea – neglecting of international public law – some afterthoughts**

This contribution is not meant to assess the Achmea judgment of the European Court of Justice. It intends instead to throw some light on the rules of public international law on the termination of international treaties, which have not fully been taken into account by those who attempted to implement the Achmea judgment. At the core of is the question whether the incompatibility of a treaty under international law with another international law treaty leads to the automatic non-applicability of the former. The contribution concludes this is not generally the case under the Vienna Convention on the Law of Treaties.

P. Schlosser: **Jurisdiction Agreements and other Agreements integrally Covered by European Law**

1. Certain contracts are particularly close to the law of the European Union. They include international jurisdiction agreements, contracts creating an exception in European law, to generally prohibited contracts, and contracts providing the use of European Trademarks and other European rights valid even against third persons.
2. The fundamental proposal of the author is, that the legal effects of the violation of rights, provided by such contracts, must be found in European, rather than in national law. That law is particularly concerned

about its effectiveness, if needed by a creative approach.
3. In German law the legal consequences of such a violation must include, inspired by French law, an indemnification of a lost chance and a more liberal approach to moral (immaterial) damage.

S. Schwemmer: **A conflict of laws doctrine for the transfer of bitcoin, crypto securities and other crypto assets**

Cryptoassets like Bitcoin are entries in a distributed ledger. As such, they do not fall within any of the traditional categories of property. However, most jurisdictions are slowly working their way to recognize them as property. Even German law now allows for tokenized bearer bonds and defines special transfer requirements. On the level of conflict of laws, this results in a growing need to define the applicable law relating to the assignment of cryptoassets. These questions are not regulated by the written general conflict of laws rules under German law. While § 32 eWpG now provides a special conflict of laws rule for electronic securities, there is still a regulatory gap for other types of tokens. The article discusses possible solutions for the different types of cryptoassets.

B. Heiderhoff/E. Yalcin: **International jurisdiction in cases, where services are provided in several Member States**

The determination of international jurisdiction under Article 7(1)(b), second indent, of the Brussels Ia Regulation is highly difficult in cases where services are provided in different Member States. The decision of the *OLG München* (Higher Regional Court of Munich) regarding a brokerage contract shows that it is not always possible to determine the place of main performance. This article discusses if, in such cases, the place where the service provider is domiciled should be considered as the place of performance. The authors conclude that this approach only fits if at least a part of the service was provided at the service provider’s domicile.

W. Hau: **International jurisdiction based on nationality in European family**

law

For almost a quarter of a century, there has been an intensive debate on whether the European legislator is allowed to open international jurisdiction in matrimonial matters for nationals of the forum state earlier than for nationals of other Member States. Now the CJEU has taken the view that such a rule is in line with the prohibition of discrimination provided for in Article 18 TFEU. The reasoning given for this is not particularly profound and leaves some questions unanswered, but it may at least contribute to a welcome reassurance in the area of European family law, in which very deep differences between the legal policy positions of the Member States have become apparent in recent years.

C. González Beilfuss: **Forum non conveniens in a European way: a failed dialogue**

In the decision commented on here, the CJEU decided for the first time on the interaction of Article 6(a) and Article 7(a) of the Succession Regulation and emphasized the binding effect of the decision to decline jurisdiction for the court later seized. The second court is not permitted to review the decision to decline jurisdiction by the first court. This article analyzes the decision in particular with regard to the lack of communication between the courts, which would have facilitated the smooth interplay between both jurisdiction rules.

B. Hess: **Exequatur sur exequatur vaut? The CJEU enlarges the free movement of decisions coming from third states under the Brussels Ibis Regulation**

In the judgment C-568/20, the CJEU held that a decision of a court of an EU Member State which merges a judgment of a third state is enforceable under Articles 39 ss of the Brussels Ibis Regulation. The Third Chamber argued that the concept of "judgment" in Articles 2(a) and 39 of the Brussels Ibis Regulation refers to the different procedural laws of EU Member States. *Burkhard Hess* criticizes this deviation from the uniform and autonomous interpretation of the Brussels Ibis Regulation. The solution of the Third Chamber is not compatible with the principle "exequatur sur exequatur ne vaut".

C. Thole: **The law applicable to voidable payments by third parties under Article 16 EIR**

In its judgment of 22 April 2021 the ECJ decided that Article 16 EIR must be interpreted as meaning that the law applicable to the contract also governs the payment made by a third party in performance of a contracting party's contractual payment obligation, where, in insolvency proceedings, that payment is challenged as an act detrimental to all the creditors. The following article explains the decision and its consequences for cross-border avoidance claims.

D. Wiedemann: **Lex successionis or lex fori: on the classification of judicial measures in the event of uncertain inheritance relationships**

The decision concerns a classical question of classification: the delimitation of succession law from procedural law. The classification of judicial measures in the event of uncertain inheritance relationships, e.g. the appointment of a curator, decides whether such measures are to be assessed according to the procedural law of the *lex fori* or according to the *lex successionis*. That a classification is not predetermined can be inferred from different locations: While Germany regulates judicial measures regarding uncertain inheritance relationships in its substantive law (Sections 1960–1962 German Civil Code), other EU Member States and Brazil mainly address this problem in their procedural laws. In the EU, the Succession Regulation No. 650/2012 defines the boundary between succession law and procedure. It will be argued that measures only securing the estate are to be classified as procedural aspects. Measures that also involve the administration of the estate are governed by the Regulation's choice of law rules.

R. de Barros Fritz: **The characterization of gifts causa mortis under the ESR**

One of the most debated questions since the enactment of the ESR has been the question of the proper characterization of gifts *causa mortis*. The *UM* case presented the first opportunity for the CJEU to address this issue. The following case note will discuss the court's decision and show that, even after the court's

ruling, many open questions remain as to the characterization of gifts causa mortis.

C. Thomale: **Circumventing Member State co-determination rules with the Societas Europaea**

Since its introduction, the supranational legal form of the SE, provided by EU law, has been widely used to circumvent national co-determination law. The case note dicusses two German decisions, which highlight the specific arbitrage potential lying in the national component of the company law and co-determination law of the SE as well as in its autonomous co-determination rules.

D. Looschelders: **Characterization of German joint wills under the EU Succession Regulation – the Austrian perspective**

Whether the binding effects of a joint will underlie German or Austrian law is of great practical importance when successions are connected to both jurisdictions. While under German law the revocation right of an interrelated disposition lapses upon death of the other spouse, Austrian law enables the surviving spouse to revoke his interrelated disposition even after death of the other spouse. Against this background, the subsequently discussed ruling by the Austrian Supreme Court *(OGH)* deals with the crucial question regarding the connecting factor for binding effects, namely whether joint wills under German law have to be characterized as "dispositions of property upon death other than agreements as to succession" (Article 24 EU Succession Reg.) or as "agreements as to succession" (Article 25 EU Succession Reg.). The *OGH* declared itself in favour of applying Article 25 EU Succession Regulation.

F. Eichel: **International enforcement of judgments subject to a condition – exequatur proceedings and international jurisdiction**

The article deals with the international enforcement of judgments which are subject to a condition. Against the background of the exequatur proceedings, it sheds light on the question in which proceedings and in which state it is examined

whether the condition has occurred. German, Austrian and Swiss procedural law is taken into account. Furthermore, the article examines the scope of the enforcement jurisdiction (Article 24(5) Brussels Ibis Regulation/Article 22(5) Lugano Convention) for these kinds of proceedings and agrees with the decision of the Austrian Supreme Court (*OGH*, 7.6.2017 – 3 Ob 89/17k). The *OGH* held that the Austrian claim to examine the occurence of the condition falls within the scope of the enforcement jurisdiction. However, the article criticises that the OGH did not take into account the limited *res iudicata*-effect of the Austrian claim which should be decisive in determining whether the enforcement jurisdiction is applicable or not.

A. Kirchhefer-Lauber: **On the interreligious division of law and the significance of the culture-bound nature of law – illustrated by the Lebanese distinction between constitutive religious marriages and civil registration acts**

Private law systems with an interpersonal division of law always pose special challenges for conflict of laws. The article deals with the interplay between autonomous German IPR and the internal conflict of laws of a multi-jurisdictional state using the example of Lebanon, which is home to a total of 18 partial religious legal systems in addition to a "civil legal system". The author analyses, among other things, court decisions in which the distinction between constitutive religious marriage and civil documentation of marriage in Lebanon plays a central role. She also addresses the fact that the possibility of an *ordre public* violation in legal systems with a division of laws exists on two levels. Firstly, regarding the internal conflict of laws of the multi-jurisdictional state itself and secondly, with regard to the results through the application of a partial legal system. Finally, she highlights that the interpretative method of comparative law between civil and religious partial legal orders requires a special awareness of the importance of the culture-bound nature of law.

Material:

Recommendation of the European Group for Private International Law (GEDIP/EGPIL) to the European Commission concerning the Private international

law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability]

The law applicable to rights in rem in tangible assets – GEDIP – document adopted at the virtual meeting 2021

Notifications:

H. Kronke: Ulrich Drobnig (1928–2022)

M. Petersen Weiner/M.L. Tran: The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law – Conference, September 9-11th, 2021 in Hamburg

C. Kohler: Private international law aspects of Corporate Social Responsibility – Conference of the European Group for Private International Law (GEDIP/EGPIL) 2021