Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2022: 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/)

J. Richter: **Cross-border service of writs of summons according to the revised EU Service Regulation**

The service of judicial documents, particularly the service of writs of summons, is of central importance in civil proceedings. In cross-border proceedings, service of legal documents poses particular problems, which are addressed by the European Regulation on the Service of Documents. The revision of this regulation, which will enter into force on 1 July 2022, provides an opportunity to examine the current and future rules by taking the example of the international service of writs of summons.

G. van Calster: **Lex ecologia. On applicable law for environmental pollution (Article 7 Rome II), a pinnacle of business and human rights as well as climate change litigation.**

The European Union rules on the law that applies to liability for environmental damage, are an outlier in the private international law agenda. EU private international law rules are almost always value neutral. Predictability is the core ambition, not a particular outcome in litigation. The rules on applicable law for environmental damage, contained in the Rome II Regulation on the law that applies to non-contractual obligations, are a clear and considered exception. Courts are struggling with the right approach to the relevant rules. This contribution maps the meaning and nature of those articles, their application in

case-law, and their impact among others on business and human rights as well as climate change litigation.

M. Castendiek: **"Contractual" rights of third parties in private international law**

Although contractual rights are usually limited to the parties, almost all jurisdictions in Europe recognize exceptions of this rule. Whereas those "contractual" rights of third parties are strictly limited in common law countries, German and Austrian Law even extend contractual duties of care on third persons related to the parties. Prior to the Rome Regulations, the conflict-of-law judgments on those "contracts with protective effect in favour of third parties" differed between German and Austrian courts.

The article points out that a consistent jurisdiction on this issue needs a clear distinction between contractual and non-contractual rights even between the parties of the contract. It points out that the Regulation Rome I covers only obligations that would not exist without the contract. Those obligations remain contractual even if they entitle a third party.

"Contractual" duties of care corresponding with negligence in tort, on the other hand, fall within the scope of the Regulation Rome II. For the contracting parties as well as for third parties, the conflict-of-laws in claims following the disregard of such duties is determined by the application of Article 4 Regulation Rome II. The article provides criteria to determine whether the close connection rule in Article 4(3) Regulation Rome II can lead to the application of the law governing the contract.

C. von Bary: **News on Procedural Consumer Protection from Luxemburg: Consumer Status and Change of Domicile**

In two recent decisions, the CJEU continues to refine the contours of procedural consumer protection in cross-border disputes. In the case of a person who spent on average nine hours a day playing – and winning at – online poker, the court clarified that factors like the amount involved, special knowledge or the regularity

of the activity do not as such lead to this person not being classified as a consumer. It remains unclear, however, which criteria are relevant to determine whether a contract is concluded for a purpose outside a trade or profession. Further, the CJEU stated that the relevant time to determine the consumer's domicile is when the action is brought before a court. This seems to be true even if the consumer changes domicile to a different member state after the conclusion of the contract and before the action is brought and the seller or supplier has not pursued commercial or professional activities or directed such activities at this member state. This devalues the relevance of this criterion to the detriment of the professional party.

W. Voß: **The Forum Delicti Commissi in Cases of Purely Pecuniary Loss – a Cum-Ex Aftermath**

Localising the place of damage in the context of capital investment cases is a perennial problem both under national and European civil procedural law. With prospectus liability having dominated the case law in the past decades, a new scenario is now increasingly coming into the courts' focus: liability claims resulting from cum-ex-transactions. In its recent decision, the Higher Regional Court of Munich confirms the significance of the place of the claimant's bank account for the localisation of purely financial loss in the context of sec. 32 German Civil Procedure Code but fails to provide any additional, viable reasoning on this notoriously debated issue. The decision does manage, however, to define the notion of principal place of business as delimitation of the scope of application of the Brussels regime convincingly. Incidentally, the text of the judgment also proves an informative lesson for the recently flared-up debate about anonymization of judicial decisions.

L. Hornkohl: **International jurisdiction for permission proceedings under the German Telemedia Act (TMG) in cases of suspected abusive customer complaints on online marketplaces**

In its decision of 11 March 2021, the Cologne Higher Regional Court denied the international jurisdiction of the Cologne courts for permission proceedings under the German Telemedia Act (TMG) in cases of suspected abusive customer

complaints in online marketplaces. The Cologne court decision combined several precedents of the German Federal Court and the European Court of Justice. Although the Cologne Higher Regional Court decided that permission proceedings constitute a civil and commercial matter within the meaning of the Brussels I Regulation, international jurisdiction could not be established in Germany. The place of performance according to Art. 7 No. 1 lit. b second indent Brussels Ibis Regulation must, in case of doubt, uniformly be determined at the place of establishment of the online marketplace operator in Luxembourg. Article 7 No. 2 of the Regulation also does not give jurisdiction to German courts. The refusal to provide information per se is not a tort in the sense of Article 7 No. 2. Furthermore, there is no own or attributable possibly defamatory conduct of the platform operator. Contradictory considerations of the German legislator alone cannot establish jurisdiction in Germany.

A. Spickhoff: Contract and Tort in European Jurisdiction – New Developments

The question of qualification as a matter of contract or/and of tort is among others especially relevant in respect to the jurisdiction at place of performance and of forum delicti. The decision of the court of Justice of the European Union in res Brogsitter has initiated a discussion of its relevance and range to this problem. Recent decisions have clarified some issues. The article tries to show which. The starting point is the fraudulent car purchase.

R.A. Schütze: Security for costs for UK plaintiffs in German civil proceedings after the Brexit?

The judgment of the Oberlandesgericht Frankfurt/Main deals with one of the open procedural questions of the Brexit: the obligation of plaintiffs having permanent residence in the United Kingdom to provide security of costs in German civil proceedings. The Court has rightly decided that from January 1st, 2021 plaintiff cannot rely on sect. 110 par. 1 German Code of Civil Procedure (CCP) anymore as the United Kingdom is no longer member of the EU. If the plaintiff has lodged the complaint before January 1st, 2021, the obligation to provide security of costs arises at that date and security can be claimed by respondent according to sect.

110 CCP. However, the Court has not seen two exceptions from the obligation to provide security for costs according to sect. 110 par. 2 no. 1 and 2 CCP which relieve plaintiff from the obligation to provide security of costs if an international convention so provides (no. 1) or if an international convention grants the recognition and execution of decisions for costs (no. 2). In the instant case the court had to apply art. 9 par. 1 of the European Convention on Establishment of 1955 and the Convention between Germany and the United Kingdom on Recognition and Execution of Foreign Judgments of 1960, both Conventions not having been touched by the Brexit. Facit therefore: claimants having permanent residence in the United Kingdom are not obliged to provide security for costs in German Civil proceedings.

H. Roth: **Qualification Issues relating to § 167 Civil Procedure Code (Zivilprozessordnung, ZPO)**

§ 167 of the Civil Procedure Code (ZPO) aims to relieve the parties of the risk accruing to them through late official notification of legal action over which they have no control. This norm is part of procedural law. It is valid irrespective of whether a German court applies foreign or German substantive law. The higher regional Court (Oberlandesgericht) of Frankfurt a.M. found differently. It holds that § 167 should only be considered when German substantive law and thus German statute of limitations law is applied.

A. Hemler: **Undisclosed agency and construction contract with foreign building site: Which law is applicable?**

Does the term “contract for the provision of services” in Art 4(1)(b) Rome I Regulation include a building contract with a foreign building site? Or should we apply the exception clause in Art 4(3) Rome I Regulation if the building site is abroad? Which law governs the legal consequences of undisclosed agency, i.e. how should we treat cases where a contracting party acts as an agent for an undisclosed principal? Furthermore, what are the legal grounds in German law for a refund of an advance payment surplus in such a building contract? In the case discussed, the Oberlandesgericht (Higher Regional Court) Köln only addressed the latter question in detail. Unfortunately, the court considered the

interesting PIL issues only in disappointing brevity. Therefore, based on a doctrinal examination of the exception clause in Art 4(3) Rome I Regulation, the paper discusses whether the scope of the general conflict of laws rule for contracts for the provision of services should exclude building contracts with a foreign building site by virtue of a teleological limitation. It also sheds light on the dispute around the law governing cases of undisclosed agency. The paper argues that Art 1(2)(g) Rome I Regulation is not applicable in this regard, i.e. the issue is not excluded from the Rome I Regulation's scope. Instead, it is covered by Art 10(1) Rome I Regulation; hence, the law governing the contract remains applicable.

S.L. Gössl: **Uniqueness and subjective components – Some notes on habitual residence in European conflict of laws and procedural law**

The article deals with the case law of the ECJ on the habitual residence of adults, as addressed in a recent decision. The ECJ clarified that there can only ever be one habitual residence. Furthermore, it confirms that each habitual residence has to be determined differently for each legal acts. Finally, in the case of the habitual residence of adults, subjective elements become more paramount than in the case of minors. In autonomous German Private International Law, discrepancies with EU law may arise precisely with regard to the relevance of the subjective and objective elements. German courts should attempt to avoid such a discrepancy.

D. Wiedemann: **Holidays in Europe or relocation to Bordeaux: the habitual residence of a child under the Hague Convention on International Child Abduction**

A man of French nationality and a woman of Chilean nationality got married and had a daughter in Buenos Aires. A few months after the birth of their daughter, the family travelled to Europe, where they first visited relatives and friends and finally stayed with the man's family in Bordeaux. One month and a few days after they arrived in Bordeaux, mother and daughter travelled to Buenos Aires and, despite an agreement between the spouses, never returned to Bordeaux. The father in France asked Argentinean authorities for a return order under the HCA. According to the prevailing view, the HCA only applies, if, before the removal or

retention, the child was habitually resident in any contracting state except for the requested state. The court of first instance (Juzgado Civil) assumed a change of the child's habitual residence from Argentina to France, but, considering that the lack of the mother's consent to move to France results in a violation of the Convention on the Elimination of All Forms of Discrimination against Women, it granted an exception under Art. 20 HCA. The higher court (Cámara Nacional de Apelaciones en lo Civil) and the Argentinian Supreme Court (Corte Suprema de Justicia de la Nación) required the manifestation of both parents' intent for a change of the child's habitual residence. The higher court saw a sufficient manifestation of the mother's intent to move to France in the termination of her employment in Buenos Aires and ordered the return. In contrast, the CSJN refused to give weight to the termination of employment as it happened in connection with the birth of the daughter.

H.J. Snijders: **Enforcement of foreign award (in online arbitration) ex officio refused because of violation of the defendant's right to be heard**

With reference to (inter alia) a judgement of the Amsterdam Court of Appeal, some questions regarding the consideration of requests for recognition and enforcement of foreign arbitral awards in the Netherlands are discussed. Should the State Court ex officio deal with a violation of public order by the arbitral tribunal, in particular the defendant's right to be heard, also in default proceedings like the Amsterdam one? In addition, which public order is relevant in this respect, the international public order or the domestic one? Furthermore, does it matter for the State Court's decision that the arbitral awards dealt with were issued in an online arbitration procedure (regarding a loan in bitcoin)? Which lessons can be derived from the decision of the Amsterdam Court for drafters of Online Arbitration Rules and for arbitral tribunals dealing with online arbitration like the arbitral e-court in the Amsterdam case? The author also points out the relevance of transitional law in the field of arbitration by reference to a recent decision of the Dutch Supreme Court rejecting the view of the Amsterdam Court of Appeal in this matter; transitional law still is dangerous law.

Notifications:

E. Jayme/E. Krist: The War of Aggression on Ukraine: Impact on International Law and Private International Law –Conference, March 31st, 2022 (via Zoom)

C. Budzikiewicz/B. Heiderhoff: „Dialogue International Family Law"- Conference, April 1st-2nd, 2022 in Marburg