Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2023: 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/)

H.-P. Mansel/K. Thorn/R. Wagner: **Europäisches Kollisionsrecht 2022: Bewegung im internationalen Familienrecht**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from January 2022 until December 2022. It presents newly adopted legal instruments and summarizes current projects that are making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss important decisions and pending cases before the CJEU pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

N. Elsner/H. Deters: **Of party requested service by post and courts as transmitting agencies under the EU Service Regulation**

On 1 July 2022, the EU Regulation on the Service of Documents No. 1784/20 (Recast) (EU Service Regulation) took effect and changed the law on service by postal services in cross-border proceedings. This calls for a revisiting of the divergent opinions and ways of interpretation of service by postal services according to Art. 14 EU Service Regulation 2007 and its relation to Art. 15 EU Service Regulation 2007. Against this background, this article discusses a

decision of the Higher Regional Court Frankfurt (OLG Frankfurt) holding that service by postal services pursuant to Art. 14 EU Service Regulation 2007 is in principle only open to a court when effecting service in cross-border proceedings. A party shall effect service according to Art. 15 EU Service Regulation 2007 by contacting directly the foreign authorities designated to effect service in the other member state.

Firstly, the reasoning of the court and the opinions in legal scholarship on the admissibility of service by postal services effected by parties are assessed critically. Subsequently, the authors propose a different application of Art. 14 and 15 EU Service Regulation 2007 in Germany. It will be argued that the OLG Frankfurt was indeed correct in stating that service by postal services must be effected through a transmitting agency according to Art. 2 EU Service Regulation 2007. Under German law, only courts are considered transmitting agencies. However, this does not preclude parties from effecting this type of service. When parties are required to effect service themselves under German law, they may send the documents to the court, inform the court of the address of the other party and apply for service in accordance with Art. 14 EU Service Regulation 2007. The court then acts as a mere transmitting agency on behalf of the party, and thus, in its administrative capacity.

S. Schwemmer: **Direct tort claims of the creditors of an insolvent company against the foreign grandparent company**

In its ruling of 10 March 2022 (Case C-498/20 – ZK ./. BMA Nederland), the ECJ had to deal with a so-called Peeters/Gatzen-claim under Dutch law brought by the insolvency administrator. The court had already ruled in an earlier judgement that these claims fall under the Brussels I Regulation (recast). So the main question was now where the harmful event occurred within the meaning of Art. 7 para. 2 of the Regulation. The ECJ opts for the seat of the insolvent company, basing its analysis on the differentiation between primary damage and consequential damage. The same analysis is also used to determine the applicable law under the Rome II Regulation. In this context, however, the ECJ examines more closely the specific breach of duty of care to determine whether the claim falls under the scope of the Rome II Regulation or under the rules of international company law.

A. Kronenberg: **Disapproved overriding mandatory provisions and factual impossibility**

Two years after the Higher Regional Court (Oberlandesgericht, OLG) of Frankfurt am Main, the OLG Munich also had to rule on a lawsuit filed by an Israeli against Kuwait Airways. The plaintiff had demanded to be flown from Munich to Sri Lanka with a stopover in Kuwait City in accordance with the contract the parties had concluded. The OLG Munich dismissed the claim with regard to a Kuwaiti Israel boycott law, which, although inapplicable, according to the court had the effect that it was factually impossible for the defendant airline to transport Israeli nationals with a stopover in Kuwait. The ruling shows that in cases of substantive law level consideration of disapproved foreign overriding mandatory provisions the legally required result can be undesirable. However, this result depends on the circumstances of the individual case as well as on certain prerequisites that must be observed when taking into consideration overriding mandatory provisions. The article sets out these prerequisites and shows why the OLG Munich probably should have ordered the defendant to perform its obligation. It also explains why, in cases in which factual impossibility indeed exists, the result of the dismissal of the action most likely cannot be changed even by enacting a blocking statute.

C. Thomale/C. Lukas: **The pseudo-foreign British one man-LLC**

The Higher Regional Court of Munich has decided that a Bristish one man-LLC, which has its real seat in Germany, under German conflict of laws and substantive rules lacks legal personality altogether. This case note analyzes this decision’s implications for the conflict of company laws, notably for the interpretation of the TCA and application of the so-called “modified real seat theory”.

M. Brinkmann: **Discharge in England and subsequent declaratory judgement against debtor in Germany – Binding effects of judgement trump recognition of prior bankruptcy proceedings**

The Higher Regional Court Düsseldorf (OLG Düsseldorf) had to decide upon an action for the payment of damages based on a declaratory judgement. The declaratory judgement had established the defendant's liability and was, at the time, not challenged by the defendant. In his defense against the action for payment the defendant now tries to invoke a discharge, which he had already obtained in insolvency proceedings in the UK in March 2012, i.e. prior to the declaratory judgement.

The OLG argued that under the applicable EIR, the English insolvency proceedings were, in principle, subject to automatic recognition. Under Art. 17 EIR 2002, these proceedings produce the same effects in all Member States. The OLG Düsseldorf nevertheless precluded the defendant from invoking the discharge. As the English bankruptcy proceedings were concluded before the action for the declaratory judgement was initiated, the defendant should have invoked the discharge already in the proceedings that led to the declaratory judgement in March 2013.

The OLG correctly found that the declaratory judgement was procedurally binding between the parties and hence barred the defendant from invoking the discharge in subsequent proceedings.

M. Andrae: **Modification or suspension of enforcement of a decision under Article 12 of the Hague Child Abduction Convention?**

The article discusses which procedural options exist if, after a final decision pursuant to 12 Hague Convention on the Civil Aspects of International Child Abduction, circumstances arise which would justify the refusal of an application for the return of the child. A procedure to change the decision is only permissible if the international jurisdiction of the German courts exists. For child abduction from EU Member States, this is determined in principle according to Art. 9 of the Regulation (EU) n 1111/2019 and for child abduction from other Contracting States of The Hague Protection of Children Convention according to Art. 7 of the Convention. As long as jurisdiction thereafter lies with the courts of the state in which the child was habitually resident immediately before the removal or retention keep, the German courts are limited to ordering the temporary stay of enforcement.

J. Oster: **Facebook dislikes: The taming of a data giant through private international data protection law**

Just as the Data Protection Directive 95/46/EC, the General Data Protection Regulation (GDPR) suffers from a deficit concerning both its public and its private enforcement. Among other things, this deficit is owed to the fact that European data protection law still raises many questions regarding jurisdiction and the applicable law. In its interlocutory judgment that will be discussed in this article, the Rechtbank Amsterdam established its jurisdiction and declared the GDPR as well as Dutch data protection and tort law applicable to a lawsuit by the Dutch Data Protection Foundation for alleged violations of rules of data protection and unfair competition. This article agrees with the Rechtbank's findings, but it also draws attention to weaknesses in its reasoning and to unresolved questions of European private international data protection law.