Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2023: 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/)

B. Heiderhoff: **Care Proceedings under Brussels IIter – Mantras, Compromises and Hopes**

Against the background of the considerable extension of the text of the regulation, the author asks whether this has also led to significant improvements. Concerning jurisdiction, the “best interests of the child” formula is used a lot, while the actual changes are rather limited and the necessary compromises have led to some questions of doubt. This also applies to the extended possibility of choice of court agreements, for which it is still unclear whether exclusive prorogation is possible beyond the cases named in Article 10 section 4 of the Brussels II ter Regulation. Concerning recognition and enforcement, the changes are more significant. The author shows that although it is good that more room has been created for the protection of the best interests of the child in the specific case, the changes bear the risk of prolonging the court proceedings. Only if the rules are interpreted with a sense of proportion the desired improvements can be achieved. All in all, there are many issues where one must hope for reasonable clarifications by the ECJ

G. Ricciardi: **The practical operation of the 2007 Hague Protocol on the law applicable to maintenance obligations**

Almost two years late due to the COVID-19 pandemic, in May 2022 over 200

delegates representing Members of the Hague Conference on Private International Law, Contracting Parties of the Hague Conventions as well as Observers met for the First Meeting of the Special Commission to review the practical operation of the 2007 Child Support Convention and the 2007 Hague Protocol on Applicable Law. The author focuses on this latter instrument and analyses the difficulties encountered by the Member States in the practical operation of the Hague Protocol, more than ten years after it entered into force at the European Union level. Particular attention is given to the Conclusions and Recommendations of the Applicable Law Working Group, unanimously adopted by the Special Commission which, in light of the challenges encountered in the implementation of the Hague Protocol, provide guidance on the practical operation of this instrument.

R. Freitag: **More Freedom of Choice in Private International Law on the Name of a Person!**

Remarks on the Draft Bill of the German Ministry of Justice on a Reform of German Legislation on the Name of a PersonThe German Ministry of Justice recently published a proposal for a profound reform of German substantive law on the name of a person, which is accompanied by an annex in the form of a separate draft bill aiming at modernizing the relevant conflict of law-rules. An adoption of this bill would bring about a fundamental and overdue liberalization of German law: Current legislation subjects the name to the law of its (most relevant) nationality and only allows for a choice of law by persons with multiple nationalities (they max designate the law of another of their nationalities). In contrast, the proposed rule will order the application of the law of the habitual residence and the law of the nationality will only be relevant if the person so chooses. The following remarks shall give an overview over the proposed rules and will provide an analysis of their positive aspects as well as of some shortcomings.

D. Coester-Waltjen: **Non-Recognition of "Child Marriages" Concluded Abroad and Constitutional Standards**

The Federal Supreme Court raised the question on the constitutionality of one

provision of the new law concerning “child marriages” enacted by the German legislator in 2017. The respective rule invalidated marriages contracted validly according to the national law of the intended spouses if one of them was younger than 16 years of age (Art. 13 ss 3 no 1 EGBGB). The Federal Supreme Court requested a ruling of the Federal Constitutional Court on this issue in November 2018. It took the Federal Constitutional Court nearly five years to answer this question.

The court defines the structural elements principally necessary to attain the constitutional protection of Art. 6 ss 1 Basic Law. The court focuses on the free and independent will of the intended spouses as an indispensable structural element. The court doubts whether, in general, young persons below the age of 16 can form such a free and independent will regarding the formation of marriage. However, as there might be exceptionally mature persons, the protective shield of Art. 6 ss 1 Basic Law is affected (paragraphs 122 ff.) and their “marriage” falls under the protective umbrella of the constitution. At the same time, the requirement of a free and meaning ful will to form a marriage complies with the structural elements of the constitutionally protected marriage. This opens the door for the court to examine whether the restriction on formation of marriage is legitimate and proportionate.

After elaborating on the legitimacy of the goal (especially prevention and proscription of child marriages worldwide) the court finds that the restriction on the right to marry is appropriate and necessary, because comparable effective other means are missing. However, as the German law does not provide for any consequence from the relationship formed lawfully under the respective law and being still a subsisting marital community, the rule is not proportionate. In addition, the court demurs that the law does not provide for transformation into a valid marriage after the time the minor attains majority and wants to stay in this relationship. In so far, Art. 13 ss 3 no 1 affects unconstitutionally Art. 6 ss 1 Basic Law. The rule therefore has to be reformed with regard to those appeals but will remain in force until the legislator remedies those defects, but not later than June 30, 2024.

Beside the constitutional issues, the reasoning of the court raises many questions on aspects of private international law. The following article focuses on the impact of this decision.

O.L. Knöfel: **Discover Something New: Obtaining Evidence in Germany for Use in US Discovery Proceedings**

The article reviews a decision of the Bavarian Higher Regional Court (101 VA 130/20), dealing with the question whether a letter rogatory for the purpose of obtaining evidence for pre-trial discovery proceedings in the United States District Court for the District of Delaware can be executed in Germany. The Court answered this question in the affirmative. The author analyses the background of the decision and discusses its consequences for the long-standing conflict of procedural laws (Justizkonflikt) between the United States and Germany. The article sheds some light on the newly fashioned sec. 14 of the German Law on the Hague Evidence Convention of 2022 (HBÜ Ausführungsgesetz), which requires a person to produce particular documents specified in the letter of request, which are in his or her possession, provided that such a request is compatible with the fundamental principles of German law and that the General Data Protection Regulation of 2018 (GDPR) is observed.

W. Wurmnest/C. Waterkotte: **Provisional injunctions under unfair competition law**

The Higher Regional Court of Hamburg addressed the delimitation between Art. 7(1) and (2) of the Brussels Ibis Regulation after Wikingerhof v. Book ing.com and held that a dispute based on unfair competition law relating to the termination of an account for an online publishing platform is a contractual dispute under Art. 7(1) of the Brussels Ibis Regulation. More importantly, the court considered the requirement of a "real connecting link" in the context of Art. 35 of the Brussels Ibis Regulation. The court ruled that in unfair competition law disputes of contractual nature the establishment of such a link must be based on the content of the measure sought, not merely its effects. The judgment shows that for decisions on provisional injunctions the contours of the "real connecting link" have still not been conclusively clarified.

I. Bach/M. Nißle: **The role of the last joint habitual residence on post-**

marital maintenance obligations

For child maintenance proceedings where one of the parties is domiciled abroad, Article 5 of the EuUnterhVO regulates the – international and local – jurisdiction based on the appearance of the defendant. According to its wording, the provision does not require the court to have previously informed the defendant of the possibility to contest the jurisdiction and the consequences of proceeding without contest – even if the defendant is the dependent minor child. Article 5 of the EuUnterhVO thus not only dispenses with the protection of the structurally weaker party that is usually granted under procedural law by means of a judicial duty to inform (such as Article 26(2) EuGVVO), but is in contradiction even with the other provisions of the EuUnterhVO, which are designed to achieve the greatest possible protection for the minor dependent child. This contradiction could already be resolved, at least to some extent, by a teleological interpretation of Article 5 of the EuUnterhVO, according to which international jurisdiction cannot in any case be established by the appearance of the defendant without prior judicial reference. However, in view of the unambiguous wording of the provision and the lesser negative consequences for the minor of submitting to a local jurisdiction, Article 5 of the EuUnterhVO should apply without restriction in the context of local jurisdiction. De lege ferenda, a positioning of the European legislator is still desirable at this point.

C. Krapfl: **The end of US discovery pursuant to Section 1782 in support of international arbitration**

The US Supreme Court held on 13 June 2022 that discovery in the United States pursuant to 28 U.S.C. § 1782 (a) – which authorizes a district court to order the production of evidence "for use in a proceeding in a foreign or international tribunal" – only applies in cases where the tribunal is a governmental or intergovernmental adjudicative body. Therefore, applications under Section 1782 are not possible in support of a private international commercial arbitration, taking place for example under the Rules of the German Arbitration Institute (DIS). Section 1782 also is not applicable in support of an ad hoc arbitration initiated by an investor on the basis of a standing arbitration invitation in a bilateral investment treaty. This restrictive reading of Section 1782 is a welcome end to a long-standing circuit split among courts in the United States.

L. Hübner/M. Lieberknecht: **The Okpabi case — Has Human Rights Litigation in England reached its Zenith**

In its Okpabi decision, the UK Supreme Court continues the approach it developed in the Vedanta case regarding the liability of parent companies for human rights infringements committed by their subsidiaries. While the decision is formally a procedural one, its most striking passages address substantive tort law. According to Okpabi, parent companies are subject to a duty of care towards third parties if they factually control the subsidiary's activities or publicly convey the impression that they do. While this decision reinforces the comparatively robust protection English tort law affords to victims of human rights violations perpetrated by corporate actors, the changes to the English law of jurisdiction in the wake of Brexit could make it substantially more challenging to bring human rights suits before English courts in the future.

Notifications:

H. Kronke: Obituary on Jürgen Basedow (1949–2023)

C. Rüsing: Dialogue International Family Law on April 28 and 29, 2023, Münster