Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2023: 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/)

C. Budzikiewicz/K. Duden/A. Dutta/T. Helms/C. Mayer: **The European Commission’s Parenthood Proposal – Comments of the Marburg Group**

The Marburg Group – a group of German private international law scholars – reviewed the European Commission’s Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood. The Group welcomes the initiative of the Commission and embraces the overall structure of the Parenthood Proposal. Nevertheless, it suggests some fundamental changes, apart from technical amendments. The full article-by-article comments of the Group with redrafting suggestions for the Commission Proposal are available at www.marburg-group.de. Building on the comments, the present article authored by the members of the Marburg Group focuses on the main points of critique and considers the present state of discussion on the proposed Regulation.

U.P. Gruber: **A plea against ex post-adaptation of spousal inheritance rights**

Adaptation is recognized as a tool to eliminate the lack of coordination between the provisions of substantive law derived from different legal systems. According to a widespread view, adaption is very often necessary with regard to the spouse’s

share in the deceased's estate, namely if the matrimonial property regime and questions relating to succession are governed by different laws. However, in this article, the author takes the opposite view. Especially in light of the ECJ's classification of paragraph 1371(1) BGB as a provision dealing with succession, there are new solutions which render ex post adaptations superfluous.

M. Mandl: **Apparent and virtual establishments reflected through Art. 7 No. 5 Brussels Ia Regulation and Art. 19 (2) Rome I Regulation**

The Federal Court of Justice (Bundesgerichtshof – BGH) has ruled that a dispute has the required connection to the operation of an (existing) establishment pursuant to Article 7 (5) Brussels Ia Regulation if the business owner operates an internet presence that gives the appearance of being controlled by this establishment instead of the company's central administration and the contract in dispute was concluded via this internet presence. This decision provides an opportunity to examine the prerequisites and legal consequences of apparent establishments and so-called virtual establishments (internet presences) from a general perspective, both in the context of Article 7 (5) Brussels Ia Regulation and in connection with Article 19 (2) Rome I Regulation.

D. Nitschmann: **The consequences of Brexit on Civil Judicial Cooperation between Germany and the United Kingdom**

The United Kingdom's withdrawal from the European Union has far-reaching consequences for international civil procedure law. This is exemplified by the decisions of the Higher Regional Court of Cologne for the international service of process. Since the European Regulation on the Service of Documents no longer applies to new cases, the Brexit leads to a reversion to the Hague Service Convention and the German-British Convention regarding Legal Proceedings in Civil and Commercial Matters. Of practical relevance here is, among other things, the question of whether and under what conditions direct postal service remains permissible.

R.A. Schütze: **Security for costs of english plaintiffs in Austrian litigation**

The judgment of the Austrian Supreme Court (Oberster Gerichtshof – OGH) of 29 March 2022 deals with the obligation of English plaintiffs to provide security for costs according to sect. 57 Austrian Code of Civil Procedure. The principle stated in para. 1 of this section is that plaintiffs of foreign nationality have to provide security for costs. But an exception is made in cases where an Austrian decision for costs can be executed in the country of residence of the plaintiff.

The OGH has found such exception in the Hague Convention 2005 on Choice of Court Agreements. As the United Kingdom has, on 28 September 2020, declared the application of the Hague Convention 2005 for the United Kingdom, the Convention is applicable between Austria and the United Kingdom despite the Brexit. The Hague Convention opens the possibility to recognition and execution of judgments rendered under a choice of court agreement including decisions on costs.

Th. Garber/C. Rudolf: **Guardianship court authorisation of a claim before Austrian courts ¬– On international jurisdiction and applicable law for the grant of a guardianship court authorization**

The Austrian court has requested court approval for the filing of an action by a minor represented by the parents. The international jurisdiction for the granting of a guardianship court authorisation is determined according to the Brussels II-bis Regulation or, since 1.8.2022, according to the Brussels II-ter Regulation. In principle, the court competent to decide on the action for which authorization by the guardianship court is sought has no corresponding annex competence for the granting of the authorization by the guardianship court: in the present case, the Austrian courts cannot therefore authorize the filing of the action due to the lack of international jurisdiction. If an Austrian court orders the legal representative to obtain the authorization of the guardianship court, the courts of the Member State in which the child has his or her habitual residence at the time of the application have jurisdiction. In the present case, there is no requirement for approval on the basis of the German law applicable under Article 17 of the Hague Convention 1996 (§ 1629 para 1 of the German Civil Code). The Cologne Higher Regional Court nevertheless granted approval on the basis of the escape clause

under Article 15 para 2 of the Hague Convention 1996. In conclusion, the Cologne Higher Regional Court must be agreed, since the escape clause can be invoked to protect the best interests of the child even if the law is applied incorrectly in order to solve the problem of adaptation.

M. Fornasier: **The German Certificate of Inheritance and its Legal Effects in Foreign Jurisdictions: Still Many Unsettled Issues**

What legal effects does the German certificate of inheritance („Erbschein“) produce in other Member States of the EU? Is it a reliable document to prove succession rights in foreign jurisdictions? More than one decade after the entry into force of the European Succession Regulation (ESR), these questions remain, for the most part, unsettled. In particular, commentators take differing views as to whether the Erbschein, being issued by the probate courts regardless of whether the succession is contentious or non-contentious, constitutes a judicial decision within the meaning of Article 3(1)(g) ESR and may therefore circulate in other Member States in accordance with the rules on recognition under Articles 39 ESR. This article deals with a recent ruling by the Higher Regional Court of Cologne, which marks yet another missed opportunity to clarify whether the Erbschein qualifies as a court decision capable of recognition in foreign jurisdictions. Moreover, the paper addresses two judgments of the CJEU (C-658/17 and C-80/19) relating to national certificates of inheritance which, unlike the German Erbschein, are issued by notaries, and explores which lessons can be learned from that case-law with regard to certificates of inheritance issued by probate courts. In conclusion, it is submitted that, given the persisting uncertainties affecting the use of the Erbschein in foreign jurisdictions, the European Certificate of Succession provided for by the ESR is better suited for the settlement of cross-border successions.

E. Vassilakakis/A. Vezyrtzi: **Innovations in International Commercial Arbitration – A New Arbitration Act in Greece**

On 4.2.2023 a new Arbitration Act came into effect in Greece. It was approved by means of Law No. 5016/2023 on international commercial arbitration, and was enacted in order to align the regime of international commercial arbitration with

the revision of the UNCITRAL Model Law on International Commercial Arbitration adopted in 2006 (hereinafter the revised Model Law). The new law contains 49 arbitration-related provisions and replaces the Law No. 2735/1999 on international commercial arbitration, while domestic arbitration continues to be regulated by Art. 867–903 of the Greek Code of Civil Procedure (hereinafter grCCP). A reshaping of Art. 867 ff. grCCP was beyond the "mission statement" of the drafting Committee.1 Besides, it should also be associated with a more extensive and, in consequence, time-consuming reform of procedural law. Hence, the dualist regime in matters of arbitration was preserved.

Pursuant to Art. 2, the new law incorporates on the one hand the provisions of the revised Model Law and on the other hand the latest trends in international arbitration theory and practice. Therefore, it is not confined to a mere adjustment to the revised Model Law, but also includes several innovative provisions that merit a brief presentation.

Notifications:

C. Rüsing: Dialogue International Family Law, 28th – 29th April, Münster, Germany.