# Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2024: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts“ (IPRax) features the following articles:

*H.-P. Mansel/K. Thorn/R. Wagner:* **European Conflict of Law 2023: Time of the Trilogue**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from January 2023 until December 2023. 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 both important decisions and pending cases before the CJEU as well as important decisions from German courts 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.

*H. Kronke:* **The Fading of the Rule of Law and its Impact on Choice of Court Agreements and Arbitration Agreements**

Against the background of declining standards of the rule of law in an increasing number of jurisdictions, the article identifies and discusses problematic choices of a forum or of an arbitral seat as well as solutions developed by courts and legal doctrine in private international law, civil procedure and arbitration law. Businesses and their legal advisers are encouraged to anticipate risks and consider appropriate measures when drafting contracts.

*L. van Vliet/J. van der Weide:* **The Crimean treasures**

In 2013, a collection of highly important archaeological objects, the "Crimean treasures" had been loaned by four Crimean museums to the LVR-Landesmuseum in Bonn, Germany, and the Allard Pierson Museum in Amsterdam for exhibition purposes. During the exhibition at the Allard Pierson Museum, the Crimean Peninsula was illegally annexed by the Russian Federation. The question then arose to whom the Crimean treasures should be returned by the Allard Pierson Museum: to the Crimean museums (de facto in possession of the Russian Federation) or to the State of Ukraine? The legal proceedings concentrated on the interpretation of the notion of "illicit export" in the UNESCO Convention 1970 and on the application of the concept of overriding mandatory rules in the area of property law. As to the UNESCO Convention 1970, the question was whether the concept of illicit export includes the case where protected cultural property is lawfully exported on the basis of a temporary export licence and is not returned to the country that issued the licence after the expiry of the term in the licence. The drafters of the UNESCO Convention did not consider this case. These proceedings are most probably the first to raise and answer this question. The 2015 Operational Guidelines to the UNESCO Convention contain a definition of illegal export that explicitly includes the case of non-return after temporary export. In our opinion, this allows for a broad interpretation of the UNESCO Convention.

The Dutch courts had international jurisdiction because the claims of the Crimean museums were based on the loan agreements and the real right of operational management falling within the scope of the Brussels I Regulation. For the claims of the State of Ukraine, a clear basis for international jurisdiction does not exist when it acts in its state function. Claims iure imperii do not fall under Brussels I or Brussels I bis.

Having ruled that there was no illicit export, the Court of Appeal Amsterdam had to decide whether the contractual and property rights of the Crimean museums to restitution might be set aside by Ukrainian laws and regulations, including Order no. 292 requiring that the Crimean treasures be temporarily deposited with the National Museum of History of Ukraine in Kiev. The Court held that this Order applied at least as an overriding mandatory rule within the meaning of art. 10:7 of the Dutch Civil Code. The Dutch Supreme Court upheld the Court of Appeal's

judgment, agreeing with the Court of Appeal's application of the concept of overriding mandatory rules. However, the Supreme Court could not give its view on the interpretation of the UNESCO Convention 1970.

### *W. Hau:* **Litigation capacity of non-resident and/or foreign parties in German civil proceedings: current law and reform**

This article deals with the litigation capacity (Prozessfähigkeit) of non-resident and/or foreign parties in German civil proceedings, both de lege lata and de lege ferenda. This question can arise for minors and for adults who are under curatorship or guardianship. Particular attention is paid here to the determination of the law applicable to the litigation capacity in such cases, but also to the relevance of domestic and foreign measures directed to the protection of the party.

### *S. Schwemmer:* **Jurisdiction for cum-ex liability claims against Non-EU companies**

In the context of an action for damages brought by investors in a cum-ex fund against the Australian bank that acted as leverage provider, the German Federal Supreme Court (BGH) had to deal with questions regarding the application of the Brussels Ibis Regulation to non-EU companies. The court not only arrived at a convincing definition of the concept of principal place of business (Article 63 (1) c) Brussels Ibis-Regulation), but also ruled on the burden of proof with regard to the circumstances giving rise to jurisdiction. However, one core question of the case remains open: How should the conduct of third parties, especially senior managers, be taken into account when determining the place of action in the sense of Article 7(2) of the Brussels Ibis Regulation?

### *M. Fehrenbach:* **In the Thicket of Concepts of Establishments: The Principal Place of Business within the Meaning of Art. 3 (1) III EIR 2017**

The Federal Court of Justice (Bundesgerichtshof) referred to the CJEU, among other things, the question whether the concept of principal place of business

(Hauptniederlassung) within the meaning of Art. 3 (1) III EIR 2017 presupposes the use of human means and assets. This would be the case if the principal place of business were to be understood as an elevated establishment (Niederlassung) within the meaning of Art. 2 (10) EIR 2017. This article shows that the principal place of business within the meaning of Art. 3 (1) III EIR 2017 is conceived differently from an establishment within the meaning of Art. 2 (10) EIR 2017. Neither follows a requirement of the use of human means and assets from the desirable coherent interpretation with Art. 63

### *M. Lieberknecht:* **Jurisdiction by virtue of perpetuatio fori under the Insolvency Regulation**

In this decision, the German Federal Supreme Court weighs in on the doctrine of perpetuatio fori in the context of international insolvency law. The court confirms that, once the insolvency filing is submitted to a court in the Member State that has international jurisdiction under Art. 3(1) EU Insolvency Regulation, the courts of that Member State remain competent to administer the insolvency proceedings even if the debtor shifts its centre of main interest (COMI) to a different Member State at a later point in time. In line with the EJC's recent decision in the Galapagos case, the ruling continues the approach to perpetuatio fori established under the previous version of the EU Insolvency Regulation. In addition, the court clarifies that international jurisdiction established by way of perpetuatio fori remains unaffected if the initial insolvency filing has been submitted to a court lacking local jurisdiction under the respective national law.

### *D. Martiny:* **Arbitral agreements on the termination of sole distribution agreements in Belgium**

The Belgian Supreme Court has ruled that disputes on the termination of sole distribution agreements can be submitted to arbitration (April 7, 2023, C.21.0325.N). The Court followed the reasoning of the Unamar judgment of the European Court of Justice of 2013 and applied it to the relevant provisions of Article X.35–40 of the Belgian Code of Economic Law. According to the judgment, these provisions mainly protect "private" interests. Since they are not essential for safeguarding Belgian fundamental public interests, they are therefore not to

be considered as overriding mandatory provisions in the sense of Article 9 para. 1 Rome I Regulation. Hence, the question whether a dispute can be subject to arbitration does not depend on whether the arbitrator will apply Belgian law or not. It is also not necessary that foreign law gives the distributor the same level of protection as Belgian law. This means that disputes on the termination of exclusive distribution agreements with Belgian distributors are now arbitrable and that choice of law clauses will be respected.

### *Th. Granier:* **The Strabag and Slot judgments from the Paris Court of Appeal: expected but far-reaching decisions**

In two decisions issued on 19.4.2022, the Paris Court of Appeal held that it was sufficient for an investment protection agreement not to expressly exclude the possible application of laws of the European Union to establish the incompatibility of dispute settlement clauses in investment protection treaties with laws of the European Union. That incompatibility therefore applies to all clauses in those treaties that do not expressly exclude the application of the laws of the European Union by the arbitral tribunal. The Court of Appeal followed decisions of the ECJ in Achmea, Komstroy and PL Holding, by which it is bound. These decisions highlight the increasing difficulties in the recognition and enforcement of arbitral awards rendered pursuant to investment treaties in the European Union.

### *E. Schick/S. Noyer:* **Acquisition of property according to the law applicable to contracts? A critical analysis of thte existing French private international property law in the light of oft he 2022 draft law**

While the private international law of contracts is unified in the Rome I Regulation, the conflict of laws rules for property are still defined individually by member states of the European Union. Autonomous French private international law remains largely uncodified and the product of the jurisprudence of the Cour de cassation, with significant regulatory gaps. The draft legislation for private international law issued by the responsible committee on 31.3.2022 aims to codify large parts of this established jurisprudence and therefore also sheds new light on the conflict rules applicable in France de lege lata. In the field of private international property law, the proposed art. 97–101 feature conflicts rules which

do not only appear to the German jurist as exotic, but even raise questions as to the scope of application of the Rome I Regulation. Focusing on the contractual transfer of movable property – an area where contract law and property law are intricately linked – this article offers an account of the applicable French conflicts of laws rules by examining the relevant jurisprudence and scholarly doctrine. The codification proposal and the problems it creates will also be critically analysed.

*N. Dewitte/L.Theimer:* **A century of the Hague Academy, 31 July to 18 August 2023, The Hague.**