Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2024: Abstracts

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

Erik Jayme †

T. Lutzi: **Unilateralism as a structural principle of the Digital Single Market?**

While the body of instruments through which the European legislator aims to create a Digital Single Market keeps growing, it remains strangely devoid of multilateral conflicts rules. Instead, directives in this area usually contain no conflict-of-laws provisions at all, while regulations limit themselves to a unilateral definition of their territorial scope of application. As the instruments do not regulate the matters falling into their material scope of application conclusively, though, they continue to rely on, and interact with, national systems of private law. The existing, general conflict-of-laws rules do not coordinate between these systems satisfactorily. In order to realise a genuine Digital Single Market with uniform standards of liability, specific universal conflicts rules thus seem indispensable

L. Theimer: **The last arrow in the English courts’ quiver? ‘Quasi-anti-suit injunctions’ and damages for breach of exclusive choice of court agreements**

This article analyses the last instance of failed integration of English common law instruments into the jurisdictional system of the Brussels regime. In its decision in

Charles Taylor Adjusting, the ECJ held that decisions granting provisional damages for bringing proceedings in another Member State, where the subject matter of those proceedings is covered by a settlement agreement and the court before which proceedings were brought does not have jurisdiction on the basis of an exclusive choice of court agreement, are contrary to public policy under Art 34 (no 1) and Art 45(1) Brussels I Regulation. More specifically, they violate the principle of mutual trust by reviewing the jurisdiction of a court of another Member State and interfering with its jurisdiction. Such decisions also undermine access to justice for persons against whom they are issued. By and large, the decision merits approval as it unmasks the English decisions as "quasi-anti-suit injunctions" which are incompatible with the Brussels Regulation, just like their "real" siblings, anti-suit injunctions. The ECJ's analysis is, however, not in all respects compelling, particularly with regard to the point of reviewing another court's jurisdiction. Moreover, the Court's and the Advocate General's reluctance to engage with the English view on the issue is regrettable. In conclusion, the ECJ's decision may well – in terms of EU law – have broken the last arrow in the English courts' quiver. It is unlikely, however, that English courts will be overly perturbed by this, considering that, following Brexit, their arsenal is no longer constrained by EU law.

W. Hau: **The required cross-border implication in Article 25 Brussels I Regulation: prerequisite for application or measure against abuse?**

It has long been debated whether two parties domiciled in the same Member State can agree on the jurisdiction of the courts of another Member State pursuant to Art. 25 Brussels Ibis Regulation if, apart from this agreement, the facts of the case have no other cross-border implications. The ECJ has now convincingly answered this question in the affirmative. This ruling provides an opportunity to take a closer look at the function of the requirement of an international element in the context of Art. 25 Brussels Ibis Regulation and some questionable arguments that are derived from other legal instruments.

A. Hemler: **The "consumer jurisdiction of the joinder of parties" in the Brussels Ia Regulation and the comparison between the law applicable to**

consumer contracts and other contracts in the Rome I Regulation

In the cases Club La Costa and Diamond Resorts, Spanish courts referred various questions to the ECJ on timeshare contracts between consumers and businesses residing in the UK concerning the right to use holiday accommodations in Spain. In Club La Costa, the ECJ primarily discussed whether the consumer jurisdiction of Art 18(1) Brussels Ia Regulation permits an action in front of Spanish courts against the consumer's contractual partner if the latter is not established in Spain and if the co-defendant, who is only connected to the consumer via an ancillary contractual relationship, has a registered office in Spain. In both proceedings, the question also arose as to whether the law applicable under the general rules of Art 3, 4 Rome I Regulation can be applied instead of the law applicable under Art 6 Rome I Regulation if the former is more favourable to the consumer in the specific case. The ECJ answered both questions in the negative and with somewhat generalised reasoning. Both decisions can be endorsed above all because both International Civil Procedural Law and the Conflicts of Laws realise consumer protection through abstract rules on the access to domestic courts or the applicable law, which means that, in principle, choosing the most favourable forum or legal result in each individual case is not a valid option.

C. Uhlmann: **The contract to enter into a future contract in Private International Law and International Civil Litigation**

In EXTÉRIA, the ECJ decided upon the question of whether a contract to enter into a future contract relating to the future conclusion of a franchise agreement, which provides for an obligation to pay a contractual penalty based on non-performance of that contract to enter into a future contract, is a service contract in accordance with Art. 7(1)(b) Brussels Ia-Regulation. The ECJ answered this question in the negative on the grounds that the contract to enter into a future contract does not stipulate the performance of any positive act or the payment of any remuneration; in the absence of any actual activity carried out by the co-contractor, the payment of the contractual penalty could also not be characterized as remuneration. Instead, international jurisdiction should be determined in accordance with Art. 7(1)(a) Brussels Ia-Regulation. The author criticizes that the ECJ characterizes the contract to enter into a future contract detached from the future contract and generally argues in favor of an ancillary characterization and

a broad understanding of the provision of services for the purpose of Art. 7(1)(b) Brussels Ia-Regulation.

C. Rüsing: **Transfer of jurisdiction under Article 15 Brussels IIbis Regulation and Articles 12, 13 Brussels IIter Regulation in cases of child abduction**

According to Art. 15 Brussels IIbis Regulation, a court of a Member State may, under certain prerequisites, transfer its jurisdiction in custody proceedings to the court of another Member State. In TT ./. AK (C-87/22), the CJEU held that in cases of child abduction, a court with jurisdiction under Art. 10 Brussels IIbis Regulation may also transfer jurisdiction to a court of the state to which the child has been abducted. The article welcomes this, but highlights problems that both courts must take into account in doing so. It also discusses changes under the Brussels IIter Regulation now in force.

D. Looschelders: **Time-preserving effect of a waiver of the succession before the courts of the heir's habitual residence**

Whether a waiver of the succession before a court at the habitual residence of the heir competent under Article 13 of the EU Succession Regulation has time-preserving effect, even if the declaration of the heir is not forwarded to the court responsible for settling the estate within the period stipulated by the law applicable to the succession, has been controversial to date. In the present decision, the ECJ has affirmed a deadline-preserving effect. The operative part and the grounds of the judgement suggest that the ECJ regards the question of before which court the waiver of the succession is to be declared as a matter of form. The prevailing opinion in Germany, on the other hand, still categorises this question as a matter of substantive law; the jurisdiction of the courts at the habitual residence of the heirs is therefore understood as a case of substitution ordered by law. Within the scope of application of Article 13 EU Succession Regulation the divergent characterisation has no practical significance. However, different results may arise if an heir according to the law of his habitual residence does not waive the succession before a court or if he declares the waiver of the succession before a court of a third country. In these cases, only Article 28 EU

Succession Regulation is applicable, but not Article 13 EU Succession Regulation. As the ECJ has argued with the interaction between both provisions, a new referral to the ECJ may be necessary in this respect.

C. A. Kern/K. Bönold: **Blocking effect of filing an insolvency petition with courts in Member States and third countries under the EU Insolvency Regulation and InsO**

In its preliminary ruling of 24 March 2022 (Case C-723/20 – Galapagos BidCo. Sàrl ./. DE, Hauck Aufhäuser Fund Services SA, Prime Capital SA), the ECJ confirmed that the filing of an insolvency petition with a court of a Member State triggers a bar to the jurisdiction of courts of other Member States. Due to Brexit, the BGH, in its final decision of 8 December 2022 (IX ZB 72/19), had to apply German international insolvency law, which it interpreted differently from the EU Insolvency Regulation.

H.-P. Mansel: **In memory of Erik Jayme**

C. Kohler: **Guidelines on the recognition of a foreign legal relationship in private international law – Conference of the European Group for Private International Law 2023, Milan, September 2023**