Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2024: Abstracts

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

Th. Klink: **Der Commercial Court nach dem Justizstandort-Stärkungsgesetz – ein Modellprojekt für grenzüberschreitende Gerichtsverfahren**

The Legal Venue Strengthening Act allows the German states to establish Commercial Courts at the higher regional courts as of 2025. The project aims to make the jurisdiction of state courts more attractive, especially for cross-border disputes, by implementing elements of arbitration. In a contract or after the dispute has arisen, the parties can agree on the jurisdiction of the Commercial Court as a special court of first instance in cases with a value of EUR 500,000.– or more, provided that a specific area of law is involved (B2B cases, M&A cases and cases of D&O liability). For the first time, the entire civil procedure from complaint to judgment can be conducted in English. Commercial Chambers may be established at the regional courts, allowing for similar specialization regardless of the amount in dispute. The article explains the background to the legislative reform and analyzes the procedural framework for jurisdiction and commencement of proceedings, with a focus on cross-border litigation.

J. F. Hoffmann: **New developments regarding the relationship between main and secondary insolvency proceedings in European insolvency law?**

The ECJ had to answer fundamental questions concerning the relationship between main and secondary proceedings under the European Insolvency Regulation. Firstly, the ECJ affirms that the lex fori concursus of the main proceedings applies to liabilities of the estate that arise between the opening of the main proceedings and that of the secondary proceedings. Reading between

the lines, it can be inferred from the decision that the secondary estate is also liable for these preferential debts of the main proceedings. However, a number of details remain vague and in the future, the individual categories of liabilities of the estate should be more clearly distinguished: The secondary estate should only have subsidiary liability for the costs of the main proceedings. Genuine privileges of the main proceedings that are not related to the administration of the estate should not be able to be invoked in the secondary proceedings, just as, conversely, the secondary proceedings should be able to recognize their own privileges in accordance with the lex fori concursus secundarii.

Secondly, the ECJ states largely undisputed that the secondary estate is only constituted at the time the secondary proceedings are opened. The main administrator may transfer assets from the state of (future) secondary proceedings to the state of main proceedings prior to the opening of secondary proceedings. Although this may constitute abuse of rights under certain circumstances, the ECJ does not specify this further. The ECJ also takes a position in favor of avoidability on the highly controversial question of whether the secondary administrator can take action against the main administrator by way of insolvency avoidance. However, no further clarification is provided. The question is ultimately left entirely to the national regulations on insolvency avoidance, which is not a convincing solution. In substance, the powers of the main administrator to deal with assets located in other Member States should be limited to what is necessary for the proper conduct of the insolvency proceedings as a whole (ordinary course of business).

B. Kasolowsky/C. Wendler: **Sanctioned Russian parties breaching the arbitration agreement: an extra-territorial declaratory relief in aid of arbitration**

In a landmark decision on 1 June 2023, the Berlin Higher Regional Court upheld the validity of an arbitration agreement under Section 1032(2) of the German Code of Civil Procedure in a novel context. The court used this provision to bind a sanctioned Russian entity to an arbitration agreement, which it had breached by initiating proceedings in Russian state courts. This decision also sheds light on how German courts deal with the practical challenges of serving court documents on Russian parties. Notably, the court ruled that Russian parties could be served

by public notice in German courts, as the Russian authorities currently refuse to accept service of documents under the Hague Service Convention.

B. Steinbrück: **Federal Court of Justice rules foreign judgments refusing to set aside an award cannot bind German courts**

Does a foreign decision upholding an arbitral award on challenge have binding effect in enforcement proceedings in the German courts? If a foreign award has already been challenged unsuccessfully at the arbitral tribunal's seat, a full re-hearing of the same grounds of challenge can seem inefficient; however, foreign decisions vary widely in their quality, so a blanket binding effect equally seems inappropriate. The Federal Court of Justice has nonetheless now ruled out any binding effect of foreign decisions rejecting challenge proceedings. The Federal Court of Justice also decided that, even if the court at the seat of the arbitration has rejected a challenge, it is open to the losing party to proactively apply to the German courts for a declaration that the foreign award cannot be enforced in Germany.

On the facts of the present case, this outcome appears justified, since the arbitral award at stake in the decision itself appears to have been obtained in highly dubious circumstances and suffered from serious irregularity. Nonetheless, it is less clear why a foreign decision rejecting the challenge to an arbitral award should not be taken into account in German enforcement proceedings if the foreign challenge proceedings are comparable to German litigation standards. As such, a more nuanced approach that is able to reflect that foreign decisions on arbitral awards vary widely would have been preferable.

Ch. Reibetanz: **The 'purely domestic case' under Art. 3 (3) Rome I Regulation**

In its first decision concerning Article 3 (3) Rome I Regulation, the German Federal Court of Justice has set out guidelines as to when "all other elements relevant to the situation […] are located in a country other than the country whose law has been chosen". The provision constitutes a relevant restriction of the principle of party autonomy in international contract law. The case concerns a

choice-of-law clause in a tenancy agreement to which the Bulgarian embassy was a party. The Federal Court decided that the case is "purely domestic". The author argues that the decision is highly questionable from a dogmatic point of view. Instead of applying Article 3 (3) Rom I Regulation, the Court should have at least referred the question to the ECJ. The protection of the tenant could have been equally safeguarded by means of Article 11 (5) Rome I Regulation.

J. P. Schmidt: **The European rules on the service of documents and national time limits for appeals – the translation regime must not be hollowed out**

The European rules on the service of documents allow for the service without translation. However, the addressee may refuse to accept the document to be served if it is not written in either a language which the addressee understands or the official language of the Member State addressed. In order to safeguard this protection, but also to promote the efficiency and speed of cross-border judicial proceedings, the CJEU ruled that the period for Coding an Appeal under national law may not start to run at the same time as the period for refusing acceptance (Judgement of 7.7.2022 – Rs. C-7/21, LKW Walter). The CJEU's decision deserves support, even though it raises a number of follow-up questions and highlights the practical downsides of the flexible translation regime.

F. Heindler: **Wirksame Eheschließung zweier afghanischer Staatsbürger als Vorfrage bei Behandlung eines Antrags auf einvernehmliche Scheidung durch österreichische Gerichte**

The Rome III Regulation on the law applicable to divorce and legal separation excludes the existence, validity or recognition of a marriage from its scope ("preliminary question"). Austrian courts dealing with divorce applications from spouses in a cross-border situation apply national Private International Law provisions to determine if the marriage validly exists. This annotation comments on a decision concerning two Afghan citizens who married in Afghanistan in 1996. According to section 16(2) of the Austrian Private International Law Act, the form of a marriage celebration abroad is subject to the personal status law of each of the betrothed, sufficient is, however, compliance with the provisions on form of the place of celebration. According to section 17(1) of the Austrian Private

International Law Act, the prerequisites for entry into marriage are subject to the personal status law of each of the betrothed. In both cases, a subsequent change in the prerequisites determinative for the reference to a particular legal order has no effects upon already completed facts (section 7 of the Austrian Private International Law Act). Personal status law in the case at hand was determined according to the Afghan citizenship. The question decided by the Austrian Supreme Court was a matter of form of marriage celebration, i.e. whether in 1996 Afghanistan (the exact locus is not reported in the decition) the marriage had to be registered. The Austrian Supreme Court stated that a registration requirement postulated in the Afghan Civil Code of 1977, but widely ignored in practice in 1996, could not render a marriage celebration ineffective. The Supreme Court recalled that foreign law shall be applied as it would be in its original jurisdiction (section 3 of the Austrian Private International Law Act).

G. Zou/Z. Wang: **The Refinement of Rules on the Ascertainment of Foreign Laws in China**

The ascertainment of foreign law has always been a major challenge that has long constrained the quality and effectiveness of foreign-related civil or commercial trials by Chinese people's courts. The judicial interpretation (II) concerning the application of Chinese PIL-Act newly promulgated in November 2023 by the Supreme People's Court of China greatly refines many aspects in ascertaining foreign laws including the responsibility, means, relevant procedures, criteria, the burden of the expenses, etc. It is expected but remains to be seen whether the people's courts as well as Chinese and foreign parties could benefit from such refinement.

D. Sprick: **Building a "Foreign-Related Rule of Law": China's State Immunity Law**

With its new Law on Foreign State Immunity, the People's Republic of China abandons its long-standing notion of absolute state immunity and introduces a paradigmatic shift towards the internationally dominant restrictive approach of state immunity. Furthermore, this law needs to be understood as a building block of China's ambitions for a stronger impact of its legal system around the globe

within the agenda of a “foreign-related rule of law”. This paper will therefore discuss this new avenue for the resolution of commercial disputes between private parties and states before Chinese courts, which is certainly also aimed at providing enhanced protection for Chinese businesses considering their legal risks stemming out of China’s going global strategy and especially its Belt and Road Initiative (BRI). Furthermore, China’s new Law on Foreign State Immunity will be analysed within the specific setting of China’s approach toward the rule of law and its limited legal certainty as well as its political functionality understanding of Chinese courts.

G. Zou/Z. Wang: **The Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of the Act of the People’s Republic of China on the Law Applicable to Civil Relations with Foreign Elements (II)**

E. Jayme †: **On the dual applicability of German law of succession and Cuban matrimonial property law**