Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2024: Abstracts

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

S. Deuring: **Gender and International Private Law – Comments on the New Article 7a of the German Introductory Act to the Civil Code**

Although the attribution of a specific gender to a person has become less important in the German legal order, it can still be relevant. Thus, the rules of descent set out in Sections 1591 et seqq. of the Civil Code provide that a mother is a woman and a father a man. The legislature has therefore done well to address private international law issues of gender attribution in a new specific gender conflict rule, Art. 7a of the Introductory Act to the Civil Code. In doing so, it primarily opted for a nationality-based approach: According to Art. 7a para. 1, a person’s birth gender is determined by the law of the state of whom the person is a citizen. This is remarkable because, in other areas, conflict rules increasingly hold a person’s habitual residence determinative. At the same time, Art. 7a para. 2 provides that a person who habitually resides in Germany can opt for the application of German law to the change of their gender or first name later in life. The following article will outline and discuss these legislative decisions and other questions regarding the scope of Art. 7a.

P. Wittum: **No conflict of laws fit for the digital age? Law applicable to contracts for the supply of digital content and digital services**

This article shows that Directive (EU) 2019/770 on contracts for digital content and services does not harmonise perfectly with the existing EU conflict of laws. Regarding consumer contracts, Art. 6(1) of the Rome I Regulation convinces through its contract type neutrality; however, the service exception of para. 4(a)

does not fit to digital products. Correctly viewed, the Geoblocking Regulation does not affect the directing criterion of para. 1(b). If Member States made use of the option to extend the consumer concept under Directive (EU) 2019/770, conflict of laws would in most cases defeat such an implementation. On the other hand, the trader's recourse pursuant to Art. 20 of the Directive (EU) 2019/770 is defective. The chain of recourse (implementation variant 1) can be broken if the CISG or a third-country legal system apply. In comparison, the direct claim (implementation variant 2) is superior as the loss cannot be taken by someone halfway up the chain of recourse. The eCommerce Directive, which would also render the direct claim meaningless, is not applicable. If both implementation variants collide, the redress system breaks down entirely. In terms of legal policy, the trader's recourse should be abolished.

P. Vollrath: **Protection of EU Member States' Treaties with Third Countries in European Private International Law**

In a decision from 2020, the Supreme Court of the United Kingdom authorised the enforcement of an ICSID-award in the United Kingdom. This arbitral award being incompatible with primary European Union law, the Supreme Court applied Art. 351(1) TFEU to the ICSID Convention, a multilateral treaty signed by both member states and non-member states. Although all the relevant facts of the case were located inside the EU, the Supreme Court held that "rights" of non-member states were affected and therefore a derogation from primary law was permitted. The Supreme Court reached this conclusion characterising the obligations under the ICSID Convention as obligations *erga omnes partes*. Following an infringement procedure initiated by the European Commission, the CJEU rejected this reasoning in its judgment of 14 March 2024. For the first time, the CJEU affirms its authority to interpret (at least certain aspects of) member states' international agreements with non-member states also in proceedings under Art. 267 TFEU. The case note proposes criteria in order to determine whether such agreements in the field of private international law fall within the scope of Art. 351(1) TFEU and analyses the decision's consequences for the court's *TNT Express Nederland* case law.

C. Rüsing: **International jurisdiction and applicable law for holiday letting agreements**

According to Art. 24(1) of the Brussels Ibis Regulation, in proceedings which have as their object tenancies of immovable property, the courts of the Member State in which the property is situated have exclusive jurisdiction. In *Roompot Service* (C-497/22), the CJEU held that this provision does not apply in a case, in which a tourism professional lets holiday accommodation situated in a holiday park and offers other services in return for a lump sum. The court based its reasoning on a very broad understanding of the concept of "complex contracts" and on a case-by-case assessment leading to considerable legal uncertainty. The article criticises this and proposes an alternative justification that would generally exempt contracts with tourism professionals from exclusive jurisdiction.

P. Huber/M. Boussihmad: **Recognition of a Member State decision to establish a liability limitation fund under maritime law and its effects on obligation claims**

In this case, the Bundesgerichtshof dealt with the procedural effects of a Member State decision to establish a maritime liability limitation fund. In the past, the CJEU had already classified such decisions as recognisable under the Brussels?I Regulation. The Bundesgerichtshof now drew the consequences and strictly adhered to the extension of the effect to other Member States in accordance with Art. 36(1) Brussels I Regulation. In addition, the Bundesgerichtshof commented on disputed questions of private international law concerning the limitation of liability under maritime law.

J. O. Flindt: **Lugano Convention VS national procedural law: How to classify a cause of action between a spouse and a third party**

The international jurisdiction of courts is being increasingly harmonised within the European Union and also among the EFTA states. However, the relevant provisions are scattered across various legal acts. Thus, delimitation problems arise. To delineate the scope of the application of the various regulations, a precise qualification of the legal dispute is required. The Higher Regional Court of

Karlsruhe had to decide on a claim for restitution under property law, which a spouse asserted against a third party by exercising a special right of asserting the ineffectiveness of the other spouses' disposition (Section 1368 of the German Civil Code). The question arose as to whether this was a general civil matter subject to the Lugano Convention or whether it was a matrimonial property law matter for which there was an exception under Art. 1 para. 2 lit. a) var. 5 Lugano Convention. The Higher Regional Court of Karlsruhe makes a distinction according to whether the matrimonial property regime aspect is the main issue of the dispute or merely a preliminary issue. The court concludes that it is only a preliminary issue. The legal dispute should therefore be categorised under property law, which means that the Lugano Convention applies. The author retraces this decision and shows that the question of delimitation is also relevant to the Brussels I Regulation and the EU Regulation on Matrimonial Property. He comes to another solution and argues in favour of a differentiated approach.

F. Berner: **Restitution of Wrongs in the Conflict of Laws – a critical evaluation of OLG München, 23.3.2023 – 29 U 3365/17**

The classification of restitutionary claims within the Conflict of Laws remains difficult. In particular, the classification of the German "Eingriffskondiktion" is unclear. The Higher Regional Court in Munich *(Oberlandesgericht München)* held that under both the European and the national jurisdictional regimes, "Eingriffskondiktion" were to be understood as tort claims. Under the Rome II Regulation, however, the court classified such claims not as tort claims but as claims falling under Art. 10 ("unjust enrichment"). The case note argues that the court was correct in its classification under European Conflict of Laws but wrong in its classification regarding the German rules of jurisdiction. Furthermore, the case note challenges the court's assumption that German national law governs the question of whether one of the defendants had sufficiently contested the court's jurisdiction.

G. Cuniberti: **French Supreme Court Excludes Insolvency Proceedings from Scope of Nationality Based Jurisdiction (Art. 14, C. civ.)**

In a judgement of 12 June 2024, the French Supreme Court limited the material

scope of nationality-based jurisdiction (Article 14 of the Civil Code) by excluding from its scope insolvency proceedings. The judgment is remarkable as it is the first time in years that the court limits the operation of this exorbitant rule of jurisdiction. The reasons given by the court, however, are substance specific, which makes it unlikely that the judgment announces a more far reaching reconsideration of the rule, in particular on the ground of fairness to foreigners.

M. Klein: **Spanish default interest between insurance law and procedure**

In Spanish insurance law, there is a provision (Art. 20 para. 4 subpara. 1 LCS) that mandates courts to sentence insurance company defendants to pay default interest without petition by the claimant. The Spanish law is intended to penalise insurance companies for their default. As the provision relates to procedural as well as to substantive law, the question of characterisation arises. This paper argues to characterise it as substantive (insurance) law. Furthermore, it discusses criteria that the CJEU has recently used to differentiate between procedural and substantive law. Finally, this paper suggests liberal construction of the Rome Regulations with respect to Art. 20 para. 4 subpara. 1 LCS and similar provisions that relate to both procedural and substantive law.