Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2025: Abstracts

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

C. Krapfl/N. V. Krahn: **Can Parties Gather Evidence for Arbitration by Utilizing Freedom of Information Laws?** [Article published in English]

This article examines the use of freedom of information laws, specifically the *German Freedom of Information Act* (“IFG”) and the *United States Freedom of Information Act* (“FOIA”), to gather evidence for arbitration. Both acts grant public access to government-held information but include exemptions. Recent German court decisions in the German car toll system case confirm that freedom of information requests can provide evidence for arbitration, emphasizing that such claims cannot be overridden by private arbitration agreements. The courts also ruled that transparency regarding documents enhances due process and does not undermine arbitral tribunals. The article concludes that freedom of information laws, including the *IFG* and *FOIA*, offer significant opportunities to gather evidence for arbitration, particularly when one party is a state or government entity, ensuring a fairer and more transparent arbitration process.

B. Schmitz: **Protection Principle instead of Preferential Law Approach: A Dutch Alternative for Interpreting Article 6 (2) Rome I Regulation**

Article 6 (2) Rome I Regulation allows parties to a consumer contract to choose the applicable law, but “such a choice may not, however, have the result of depriving the consumer of the protection afforded” under the non-derogable rules of the consumer’s habitual place of residence. This article introduces the reader to two distinctly different ways of interpreting this restriction to party autonomy: the preferential law approach, which is followed by German scholars, and the

protection principle approach, which is followed by the majority of Dutch scholars. The article argues that whilst the preferential law approach is likely to be the correct interpretation in the eyes of the CJEU, the "Dutch method" bears many advantages.

L. Hübner: **Determination of the place where the harmful event occurred in lawsuits against manufacturers in the diesel emissions' scandal**

This article examines the question of how the place where the harmful event occurred is to be determined in the context of the tort jurisdiction of the Brussels Ibis Regulation in actions brought by purchasers against the manufacturers of emissions-manipulated motor vehicles. While the ECJ had defined the place of acquisition as the place of success in the *VKI* case, the ECJ had to define the place of acquisition more precisely in *FCA Italy*. In doing so, the Court continues its questionable line of case law from the *VKI* decision. The article takes the criticism of the ECJ's case law as an opportunity to also assess the alternative solutions considered in the literature.

W. Wurmnest: **The single economic entity concept does not apply to claimants when determining international jurisdiction under Art. 7(2) Brussel Ibis Regulation**

In MOL, the CJEU rejected the application of the single economic entity doctrine to the claimant to localise "the place where the harmful event occurred" according to Art. 7(2) Brussels I bis Regulation. Consequentially, a parent company cannot bring an action for damages at its registered office to remedy the losses caused to its subsidiaries in various EU Member States through the acquisition of allegedly cartelised goods at supra-competitive prices. As the parent company is merely indirectly harmed, the damage caused to the subsidiaries is the relevant damage under Art. 7(2) Brussels I bis Regulation. The economic entity doctrine that was developed in EU competition law does not alter this finding. The CJEU's interpretation is sound from the perspective of procedural law. Making the indirect losses of the parent company the cornerstone of jurisdictional analysis based on the single economic entity doctrine would contradict the Regulation's objectives of proximity and predictability of the rules

governing jurisdiction.

M. Lehmann: **The United Kingdom as a Fourth State? Controversy About the Continued Application of the Brussels Ibis Regulation after Brexit**

Can EU consumers sue a British business in their home Member State? The answer seems obvious, but it has recently been the subject of a heated discussion between several German courts of appeal. At the heart of the debate is the Withdrawal Agreement, which was concluded between the EU and the UK in 2019. The article sheds light on its role and its relation to the Brussels Ibis Regulation.

Furthermore, the merits of the disputes underlying the actions will be addressed. They concerned a specific type of instrument under German law, the "Genussrecht" or "participation right", which confers on its holders benefits usually reserved for shareholders. Holders of an Austrian issuer of these instruments sued its successor, a British company, in Germany. The article analyses the law governing their claims from various perspectives (contract law, tort law, M&A).

G. Freise: **Brussels Ibis and CMR: Primacy of Application and Breach of Jurisdiction Agreements as Grounds for Refusal of Recognition**

The preliminary ruling procedure discussed in this article addresses two issues. Firstly, it deals with the relationship between the Brussels Ibis Regulation and the CMR, a topic that has previously been considered by the ECJ on several occasions. In this instance, the referring court raised the question of whether the priority given to the more specific CMR in Article 71 of the Brussels Ibis Regulation also applies in the case of a jurisdiction agreement. In contrast to the Brussels Ibis Regulation, the CMR does not recognise exclusive jurisdiction agreements, which is why the court considered a violation of the essential principles of the Brussels Ibis Regulation possible. Unfortunately, due to its lack of relevance to the decision, the ECJ did not comment on this intriguing question. According to the view presented here, however, the CMR should continue to take precedence even without the possibility of an exclusive jurisdiction agreement.

Secondly, the referring court raised the question of whether decisions must be recognised if a jurisdiction agreement has been disregarded. On this point, the ECJ upheld its previous case law, reaffirming the principles of mutual trust and recognition. The Court clarified that disregarding a jurisdiction agreement does not constitute grounds for refusing recognition, particularly on the basis of a breach of public policy.

R. Wagner: **Club de Fútbol Real Madrid vs. Le Monde before the ECJ: Does "the Spanish decision" violate French public policy**

"The [European] Union offers an area of freedom, security and justice …" (Art. 67 TFEU). The area of justice makes it possible to enforce civil court decisions from one EU Member State in another EU Member State. This possibility is based on the principle of mutual trust. However, trust in the judiciary of the other EU member states does not have to be completely unlimited. For example, the ECJ ruled, among other things, that a Spanish decision won by the football club Real Madrid against Le Monde does not have to be enforced in France, "… to the extent that this would result in a manifest violation of the freedom of the press, as enshrined in Article 11 of the Charter of Fundamental Rights, …". The following article explains and evaluates this decision.

M. Andrae: **On the Delimitation of the Provisions on Jurisdiction of the Brussels IIb Regulation and the 1996 Hague Child Protection Convention (CPC)**

The decision of the ECJ in case C-572/21 provides an opportunity to define the territorial scope of application of the individual provisions of the Brussels IIb Regulation, the 1996 Hague Child Protection Convention (CPC), and the German Act on Proceedings in Family Matters *(FamFG)* regarding the international jurisdiction of courts in matters of parental responsibility. With the entry into force of the Brussels IIb Regulation, this issue has not lost its practical significance. A considerable part of the discussion focuses on Article 10 of the Brussels IIb Regulation, which regulates the court's jurisdiction based on a choice-of-court agreement. It is argued that such an agreement loses its effect if, after its conclusion but before the proceedings are concluded, the child lawfully

relocates and establishes habitual residence in a Contracting State that is not bound by the Regulation. In this case, jurisdiction is determined by the CPC, and the principle of *perpetuatio fori* does not apply. The jurisdiction of the agreed court can only arise from ancillary jurisdiction under Article 10 of the CPC in such circumstances.

F. Berner: **Settlement of estates in cases with a foreign element**

Complex estate settlements can become even more difficult when potential heirs live abroad. The Higher Regional Court in Düsseldorf *(Oberlandesgericht Düsseldorf)* had to decide how a fraction of heirs could be registered in the German land register *(Grundbuch)* if another part of their community of heirs did not participate in the German proceedings and could not be reached by the land registry office.

C. v. Bary: **The public law of names in cross-border situations taking into account the reform of the private law of names of 1 May 2025**

The German law of names is divided between private and public law. In cross-border cases, this has been leading to questions of characterisation (in private international law) and scope of application (in public law) already in the past, with the decision of the Berlin Administrative Court concerning the latter. The answers to these questions are now reconsidered in light of the 2025 reform of the law of names because the scope of application of the private and public law of names now differ from each other. Therefore, a need for reform remains, which should ideally be resolved by abolishing the distinction between private and public law in the law of names altogether.

B. Hess: **Shallows and abysses of the contractual jurisdiction, Art. 7 No. 1 b) and a) of the Regulation Brussels Ibis – the Higher Regional Court of Dresden in the interfaces between the German and the European laws of civil procedure**

The contractual jurisdiction of Article 7 No. 1 of the Brussels I-bis Regulation still

causes difficulties for the courts of the EU member states. This demonstrates a judgment rendered by the Dresden Higher Regional Court dated 29 November 2024, that, unfortunately, misunderstood the meaning and the function of European procedural law.

L. D. Loacker/G. A. Capaul: **Enforceability of foreign arbitration settlements or: Unequal treatment due to gradual differences?**

The enforceability of arbitral settlements under German procedural law is subject to considerable restrictions. Based on a recent decision of the Bavarian Higher Regional Court *(BayObLG)*, the *authors* discuss the extent to which the widespread refusal to enforce foreign arbitral settlements appears justified. Overall, they advocate a more enforcement-friendly approach. Such an approach can be achieved by understanding the scope of application of the UN Arbitration Convention in a way that is more closely aligned with the party-autonomous nature of arbitral dispute resolution. In particular, the reference to the UN Arbitration Convention contained in section 1061 of the German Code of Civil Procedure *(ZPO)* does not have to preclude the enforcement of arbitral settlements. In all cases, however, it is important not to fall short of sufficient requirements for the enforceability of arbitral settlements. This is due to the fact that not all forms of arbitral settlements are suitable for a cross-border extension of their effect with regard to enforcement.

A. S. Zimmermann: **Accelerated Enforcement Proceedings for Cross-Border Child Abductions: European Parameters for Domestic Procedural Law**

Child abduction cases are among the most sensitive matters in international family law. The 1980 Hague Convention on Child Abduction, which today connects more than 100 contracting parties, has led to great progress in this area. Its guiding principle is the child’s best interest, which generally requires an abducted child to be returned immediately. The Brussels II, II bis and II ter Regulations incorporated this guiding principle into EU law. Nevertheless, there is no agreement among the Member States as to how much procedural acceleration the child’s best interest requires. In the decision discussed here, the ECJ clarified how much (or rather: how little) the enforceability of return orders

may be postponed by national law.

S. C. Symeonides: **The Public Policy Exception in Choice of Law: The American Version** [Article published in English]

To the surprise of many foreign readers, the American version of the public policy reservation *(ordre public)* is phrased exclusively in terms of jurisdiction and access to courts rather than as an exception to choice of law. At least in its "official" iteration in the First and Second Restatements, the exception allows courts to refuse to entertain a foreign cause of action that offends the forum's public policy rather than to refuse to apply an offensive foreign law provision while adjudicating a (foreign or domestic) cause of action. This essay discusses the historical origins of this narrow and rather unique formulation, the problems it creates, its tacit rejection by most American courts, and the new flexible formulation of the exception in the proposed Third Conflicts Restatement.

A. Hermann: **Applicability of the Hague Convention in British-European Legal Relations to Contracts Concluded before Brexit Confirmed**

The Belgian *Cour de Cassation* has ruled that the Hague Convention on Choice of Court Agreements became effective in the United Kingdom and, from the perspective of the EU Member States, in relation to the United Kingdom on 1 October 2015 and has been in force continuously since then. With this decision, the Cour de Cassation helps to eliminate uncertainty for future British-European legal relations.