Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2016: 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 laws 2015: Reappraisal**
The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2014 until November 2015. It summarizes current projects and new instruments that are presently 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 ECJ 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.

K. Kroll-Ludwigs, **Conflict between the Hague Protocol on the law applicable to maintenance obligations (2007) and the Hague Maintenance Convention (1973): lex posterior derogat legi priori?**
On 18.6.2011, the European Union set into force the Hague Protocol on the law applicable to maintenance obligations of 23 November 2007 and established common rules for the entire European Union aiming to determine unanimously the applicable law where debtor and creditor are in different countries. The Protocol replaced the Hague Convention of 2 October 1973 on the Law applicable to maintenance obligations. Due to its universal application, its rules apply even if the applicable law is the law of a non-Contracting State. However, note that non-EU-States, as Turkey, Switzerland, Japan and Albania are not bound by the Protocol. As well as Germany they are Contracting States of the Hague Maintenance Convention. From the German perspective, in relation to these States the question raises whether the rules of the Hague Maintenance

Convention still apply. Taking into account that the Protocol – unlike the Hague Maintenance Convention – enables the parties to choose the applicable law, determining the relevant legal instrument is of great practical importance.

F.M. Wilke, **The subsequent completion of German judgments to be enforced abroad**

Under certain conditions, a German court can pass a judgment without a statement of facts and even without reasons. This can lead to problems abroad if the decision is to be recognized and enforced there. This is why the implementing statute concerning recognition and enforcement (AVAG) contains provisions that cover the subsequent completion of such decisions in light of certain international conventions and, so far, the Brussels regime. After the reform of the German Code of Civil Procedure (ZPO) in light of the Brussels I Recast, however, the scope of application of the AVAG does not extend to the Brussels I Regulation anymore. At first sight, this may seem plausible because of the abolition of exequatur. Yet it might be necessary for a court of an EU member state to examine the facts of a case and/or the reasons behind a decision in order to determine if its recognition/enforcement should be refused (Articles 45, 46 Brussels I Recast). This short article analyses for which cases the legal basis for subsequent completion seems to have vanished and how to deal with them. Essentially, the solutions de lege lata are to bypass the scope of application of the AVAG or to proceed by analogy. In a potential future reform, the respective AVAG provisions simply should be integrated into the ZPO.

S. Kröll, **The law applicable to the subjective reach of the arbitration agreement**

Defining the parties to an arbitration agreement, in particular whether nonsignatories are bound by the agreement, is one of the pervasive problems in international arbitration. It generally involves a number of conflict of laws questions some of which have been addressed by the German Supreme Court in its decision of 8 May 2014. A party's reliance on the „group of companies doctrine" does not relieve the courts from a detailed analysis of the various relationships involved. In most cases, it is the law governing the arbitration agreement which also determines who are the true parties to the arbitration agreement.

M. Weller, **No effect of foreign mandatory provisions on arbitration agreements under German law according to § 1030 ZPO**

The material scope of arbitration agreements, in particular with regard to tort claims, is a constant point of controversy before state courts. The note on the judgment by the Upper Regional Court Munich identifies opposing trends in German and European case law. The judgment also decides on the (lack of) influence of foreign mandatory provisions, arbitrability according to foreign law and the foreign ordre public on arbitration agreements, subject to German law.

C. Althammer/J. Wolber, **Cross-border enforcement of coercive fine orders in Europe and limitation on enforcement**

The European Court of Justice ruled in the case of Realchemie Nederland BV./. Bayer CropScience AG that decisions ordering a coercive fine fall within the scope of the Brussels I Regulation. This ruling made the German Federal Court of Justice decide upon the effects of a limitation on the crossborder enforcement of such an order. The judgment of the German Federal Court of Justice reveals a traditional understanding of the international law of enforcement and provokes the question if this approach is still appropriate for cross-border enforcement in Europe, especially as the recast of the Brussels I Regulation abolished the exequatur proceeding. The article examines the effects of obstacles resulting from national law of enforcement on the conditions of cross-border enforceability under the Brussels I and Ia Regulation. In this way the article leads into an issue that has so far not been discussed to a sufficient extent: the relationship between the cross-border enforceability of judgments and the national laws of enforcement.

P. Mankowski, **Inhibitions against arrest of ships abroad inside or outside an insolvency context?**

Sometimes seemingly technical cases at first instance open up a plethora of questions touching upon basics and fundamentals of international procedural law. Whether a court can inhibit parties from pursuing enforcement or arresting ships abroad in- or outside an insolvency context is precisely such a case. It touches upon the permissibility of measures against enforcement abroad and upon the universality approach in modern international insolvency law. Furthermore, it is inexplicably linked with the question to which extent (registered) ships are to be treated like real estate.

D. Otto, **Internationale Zuständigkeit indischer Gerichte bei Markenverletzungen**

In its decision of 15.10.2014, the Delhi High Court had to resolve whether it had competence in the international sense for a lawsuit by a U.S.-based claimant

without a presence in India against an Indian-based defendant, who had his business in a different state. Under Indian civil procedure rules, a court has jurisdiction in the international sense against a defendant residing within the jurisdiction of the court. As per such rule, claimant would have to litigate before the Bombay High Court, not the Delhi High Court. The Claimant invoked a new legal provision that gives jurisdiction in disputes involving copy right or trademark violations in India also to a court at the place where the claimant carries on business. Claimant argued that it did "carry on business" within the jurisdiction of the Delhi court because its website could be accessed in Delhi. The court accepted that. This Article questions such decision as previous jurisprudence by Indian courts required that an "essential" part of claimant's business is carried out in India; access to a website alone was deemed insufficient.

F. Heindler, **Austrian Supreme Court on Remuneration of Heir Locators**
The Austrian Surpreme Court in Civil Matters (Oberster Gerichtshof) has changed its jurisdiction on claims by commercial heir locators. Under Austrian law, according to the Oberster Gerichtshof, commercial heir locators are still entitled to reimbursement for expenses in negotiorum gestio. However, the amount of remuneration is no longer calculated in relation to the heir's inheritance right.

Call for papers: A conference in Santiago de Compostela on Security Rights and the European Insolvency Regulation

This post has been written by Ilaria Aquironi.

On 15 April 2016 the Law Faculty of the University of Santiago del Compostela will host an international conference on *Security Rights and the European Insolvency Regulation: from Conflicts of Laws towards Harmonization*. The event

is part of the *Security Rights and the European Insolvency Regulation Project.*

Speakers include Paul Beaumont (Univ. of Aberdeen), Francisco Garcimartín Alferez (Univ. Autonoma of Madrid), Juana Pulgar Esquerra (Univ. Complutense of Madrid) and Anna Veneziano (Unidroit).

With a view to promote scientific debate on the topic, a call for papers has been issued. The organizers will consider papers addressing, in particular: (a) Security Rights, Set-Off, Transactional Avoidance and Conflict-of-Laws Issues; (b) Security Rights and Insolvency Law in National Legislation, in particular taking into account the New Approach to Business Failure and Insolvency as proposed by the 2014 European Commission Recommendation; (c) Harmonization Trends at an international level.

Submissions should be sent by 11 March 2016 either to Marta Carballo Fidalgo (*marta.carballo@usc.es*) or to Laura Carballo Piñeiro (*laura.carballo@usc.es*).

Further information about the project is available here. The call for papers can be downloaded here.

EBS Law School Lecture on "Cross border insolvency: National principles and international dimensions" on 18 February 2016 at EBS Law School in Wiesbaden

by Jonas Wäschle

Jonas Wäschle, LL.M. is a research fellow at the EBS Law School Research Center for Transnational Commercial Dispute Resolution at EBS University for Economics and Law in Wiesbaden (www.ebs.edu/tcdr).

The Research Center for Transnational Commercial Dispute Resolution at EBS Law School will host a lecture on cross border insolvency. Hon. Elizabeth Stong, judge since 2003 at the U.S. Bankruptcy Court, Eastern District of New York, Professor Dr Heinz Vallender, University of Cologne, former judge at the Insolvency Court of Cologne, and Jennifer Marshall, Partner in Allen & Overy London and General Editor of the Sweet & Maxwell loose-leaf on European cross-border insolvency, will talk to us on cross-border insolvencies.

The focus will be on the techniques to reconcile national principles with the challenges from international cases. Starting with a key note lecture by Stong on her experiences from a US perspective, her European counterparts will pick up the ball and present and compare European practice. The speakers will look at recent US and European cases and refer to guiding principles. This input will be measured against the principles of the UNCITRAL Model Law on Cross-Border Insolvency with its 2014 Guide to Enactment and Interpretation and the European Insolvency Regulation Recast of 2015. All attendees are invited to join the discussion chaired by Dr Oliver Waldburg, Partner in Allen & Overy.

The Lecture will be held on 18 February 2016 at 6.30 p.m. in Lecture Room “Sydney”. The program will be as follows:

Welcome and Introduction

Prof. Dr. Matthias Weller, Mag.rer.publ., EBS Law School, Wiesbaden

Keynote Lecture

Hon. Elizabeth Stong, U.S. Bankruptcy Court, E.D.N.Y.

Panel discussion

Chair: Dr. Oliver Waldburg, Allen & Overy Frankfurt

Hon. Elizabeth Stong, U.S. Bankruptcy Court, E.D.N.Y.

Prof. Dr. Heinz Vallender, University of Cologne

Jennifer Marshall, Allen & Overy London

Get-together at the Lounge of the EBS Law School

The lecture will be held in co-operation with:

Allen & Overy | Harvard Law School Association of Germany e.V. | Deutsch-Amerikanische Juristen-Vereinigung e.V.

We would like to cordially invite you to join the lecture! Further questions and registrations may be addressed to claudia.mueller@ebs.edu.

US Supreme Court Enforces No-Class-Action Arbitration (Again): DIRECTV, Inc. v. Imburgia

By Verity Winship (University of Illinois College of Law).

In *DIRECTV, Inc. v. Imburgia* – decided on December 14, 2015 – the US Supreme Court enforced a no-class-action arbitration clause, shutting down a consumer class action.

The consumer contract at issue provided that "if the law of your state" did not allow waiver of class arbitration, the agreement to arbitrate as a whole was invalid. At the time DIRECTV drafted the contract, California law made class-arbitration waivers unenforceable. But the US Supreme Court later undid this in *AT&T Mobility LLC v. Concepcion*, which required California to enforce these waivers under US federal law – the Federal Arbitration Act (FAA).

Against this backdrop, the *DIRECTV* majority opinion navigates choice of law and the interplay between US state and federal law in a few discrete steps.

First, the parties could elect invalid California law as their choice of governing law. "In principle," Justice Breyer indicates, writing for the majority, parties "might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California … irrespective of that rule's invalidation in *Concepcion*".

Second, the state court held that the parties had elected invalid California law. The state court has the final word on the interpretation of state law, and contract law is at the heart of this subnational prerogative. So the Supreme Court must live with the California state court's holding that the contractual selection of "law of your state" included now-invalid California law (the last on Justice Breyer's list above).

But, *third*, the state court's interpretation singled out arbitration contracts, so was pre-empted by the Federal Arbitration Act.

The Supreme Court reasoned that the California state court decision must not conflict with the FAA. In particular, it must put arbitration contracts on "equal footing" with all other contracts. According to the Supreme Court, the California court singled out arbitration when interpreting the phrase "law of your state". Federal law accordingly pre-empted its decision and the arbitration agreement must be enforced.

The two dissenting opinions make very different points.

Justice Thomas would restrict the reach of the FAA so that it does not reach state courts.

A separate dissent by Justices Ginsburg and Sotomayor highlighted the underlying dynamics that have made this area of the law so controversial in the US and that perhaps have pushed the Supreme Court to revisit these questions repeatedly in recent years. In particular, the dissent decried the majority's reading of the FAA to "deprive consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts." The dissent would not "disarm consumers, leaving them without effective access to justice".

Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey

Prof. Symeonides' Survey of American Choice-of-Law Cases, now in its 29th year, you can download it from SSRN by clicking on this link. It is also forthcoming in the American Journal of Comparative Law, Vol. 64, No. 1, 2016. The following are some of the cases discussed in this year's Survey:

*Three Supreme Court decisions, the first declaring unconstitutional all state laws against same-sex marriages, the second interpreting the commercial activity exception of the Foreign Sovereign Immunity Act, and the third further constricting the range of state law in matters relating to arbitration;

* A Second Circuit decision resuscitating for now that court's theory that corporations are not accountable for international law violations under the Alien Tort Statute (ATS), and two decisions holding that the violations at issue did not "touch and concern the territory of the United States . . . with sufficient force";

* Two cases refusing to allow a Bivens action for an extraterritorial violation of the Fourth Amendment and an intra-territorial violation of the Fifth Amendment, respectively, and several cases upholding the extraterritorial application of criminal statutes;

*Several cases refusing (and some not refusing) to enforce choice-of-law and forum-selection or arbitration clauses operating in tandem to deprive employees or consumers of their otherwise unwaivable rights;

* A New York Court of Appeals case explaining why a New York choice-of-law clause in a retirement plan did not include a conflicts rule contained in New York's substantive successions statute;

* Several cases involving the "chicken or the egg" question of which law governs forum-selection clauses;

* A New Jersey decision ruling on actions for "wrongful birth" and "wrongful life," and several other cases arising from medical malpractice, legal malpractice,

deceptive trade practices, alienation of affections, and, of course, traffic accidents, along with products liability cases involving breast implants and pharmaceuticals;

* The first case granting divorce to a spouse married under a “covenant” marriage in another state, and a Texas case recognizing a Pakistani talaq;

* An Alabama Supreme Court decision refusing to recognize a Georgia adoption by a same-sex spouse on the ground that the Georgia court misapplied its own law regarding subject matter jurisdiction;

* A Delaware case holding that the Full Faith and Credit clause mandates recognition of a sister-state judgment that has recognized a foreign judgment, and does not allow examination of the underlying foreign judgment; and

* A case recognizing a foreign judgment challenged on the ground that the foreign country did not provide impartial tribunals or procedures compatible with due process.

Regulation (EU) 2015/2421, OJ L 341, 24.12.2015

Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure was published on December, 24. Click here to access the Official Journal.

Commission report European Order for Payment

In October 2015, the long awaited Commission Report on the application of Regulation No 1896/2006 creating a European Order for Payment Procedure (that was due December 2013) was published. It generally and optimistically concludes that:

> *Overall, the objective of the Regulation to simplify, speed up and reduce the costs of litigation in cases concerning uncontested claims and to permit the free circulation of European payment orders in the EU without exequatur was broadly achieved, though in most Member States the procedure was only applied in a relatively small number of cases.*
> *From the studies and consultation carried out, it appears that there have been no major legal or practical problems in the use of the procedure orin the fact that exequatur is abolished for therecognition and enforcement of the judgments resulting from the procedure.*

On the basis of a limited and somewhat outdated set of data the following observations are made. Annually, approximately 12.000 to 13.000 applications for the procedure are received. Most orders are issued in Germany and Austria (approx. 4.000). In seven other Member States, the number of applications is between 300-700, while in the remaining Member States the use of the procedure is very limited.

The time lapse between the application and issuing the order (that should normally not be more than 30 days according to Art. 12 of the EOP Regulation) varies considerably per Member State. Some Member States are able to issue the order within one or several weeks, while the majority of the Member States take several months and up to nine months. Only six Member States have an average length of the procedure lower than 30 days, according to available data upon which the report is based. Another important element for assessing the effectiveness of the procedure is the number of oppositions against the European order for payment; if opposition is lodged the case should proceed according to domestic procedural rules (Art. 16 and 17 EOP Regulation). This percentage varies largely, from approx. 4% (in Austria) to over 50% (in Greece). Looking at the numbers, the general trend is that in Member States where the procedure is

used often the opposition rate is low, whereas in Member States where the procedure is rarely used the opposition rate is high. It would be interesting to know what causes what – the chicken and egg dilemma.The costs of the procedure vary considerably per Member State as well, and when translation of documents is required (which is the case in most countries, as the majority only accepts documents in the domestic language), the costs of the procedure are high. Furthermore, Member States have varying methods to calculate court fees.

The report rightfully concludes that Art. 20 of the EOP Regulation requires clarification as has been proposed for the European Small Claims Procedure (see our earlier post). From national case law and a number of cases that have reached the Court of Justice, notably *eco cosmetics and Raiffeisenbank St. Georgen* (joined cases C-119 and C-120) it is clear that not all situation where a remedy should be available due to defect service are covered by the Regulation. The Court of Justice ruled that national law should provide such remedy. This is clearly a shortcoming of the Regulation also considering that remedies in the Member State of enforcement are limited if not absent, and it (further) undermines the uniform application. On a positive note, the report concludes that generally no problems were reported in the enforcement of EOPs, except for the general lack of transparency of debtors' assets for enforcement purposes in a cross-border context. This optimistic conclusion may, however, also be due to the lack of information on the actual enforcement track, which can generally be troublesome in many Member States. Regarding the *Banco Español* case (C-618/10) addressing the issue of order for payment and unfair contract terms (it concerned a clause on interest), the Report concludes that Art. 8 of the EOP Regulation requiring the court to examine whether the claim appears to be founded on the basis of the information available to it, the courts have sufficient room to take account of the principle of effectiveness. They can, for instance, on the basis of Art. 10 issue only a partial order. In addition, a full appreciation takes place after opposition. One might still question whether this satisfactorily resolves the issue, especially how this relates to the encouraged full automatization and digitalization of the procedure and how it shifts the burden to the consumer.

The report urges to raise awareness of the procedure, and suggests that the electronic processing should be maintained and improved; most Member States do not provide electronic submission possibilities for (all) parties yet. Concentration of jurisdiction, as some Member States have done, is advised, as

this contributes to a swift resolution of the procedure. Swiftness in general is a problem; the report once again stresses the fact that late payments are a key cause of insolvencies in small and medium-sized enterprises. If then the EOP procedure takes 6 months, the beneficiary effect of the procedure is annihilated.

Happy holidays!

Essay Contest: Nappert Prize in International Arbitration

Thanks to the generosity of Sophie Nappert (BCL'86, LLB'86), the Nappert Prize in International Arbitration will be awarded for the second time in 2016 after an enormously successful inaugural competition in 2014. The Nappert Competition is open to all students, junior scholars and junior practitioners from around the world. To be eligible for the prize, authors must be either currently enrolled in a B.C.L, LL.B., J.D., LL.M., D.C.L., or Ph.D. program (or their local equivalents). Those who are no longer in school must have taken their most recent degree within the last three years, or have been admitted to the bar (or the local equivalent) for no more than three years (whichever is later).

Prizes: First place: Can $4,000; Second place: Can. $2,000; Third place: Can $1,000. Winning one of the awards will also carry with it the presentation of the paper at a symposium to be held at McGill in autumn 2016 (the expenses of the winners for attending the symposium will be covered). The precise date of the symposium will be fixed in the coming months. The best oralist will receive an award of Can. $1,000.

Deadline: April 30, 2016.

The essay:
• must relate to commercial or investment arbitration;

• must be unpublished (not yet submitted for publication) as of April 30;
• must be a maximum of 15, 000 words (including footnotes);
• can be written in English or in French;
• should use OSCOLA or some other well-established legal citation guide (e.g. McGill Red Book; Bluebook);
• must be in MS Word format.

Jurors for the 2016 competition will be:
• Sébastien Besson, Partner, Lévy Kaufmann-Kohler, Geneva
• Chester Brown, Professor of International Law and International Arbitration, The University of Sydney Faculty of Law
• José Feris, Deputy Secretary-General, ICC International Court of Arbitration, Paris
• Henry Gao, Associate Professor, Singapore Management University
• Meg Kinnear, Secretary-General, International Centre for Settlement of Investment Disputes, Washington, DC
• Cesar Pereira, Partner, Justen, Pereira, Oliveira, and Talamini, São Paolo
• Abby Cohen Smutny, Partner, White & Case LLP, Washington, DC

Submissions are to be emailed to Camille Marceau, Camille.Marceau@mail.mcgill.ca, as an attached file before April 30, 2016. Submissions should be accompanied by a statement affirming the author's eligibility for the competition, confirmation that the work is original to the author, and confirmation of the unpublished status of the paper. Review of the papers will start after April 30. For more information, kindly email Mlle. Marceau, Camille.Marceau@mail.mcgill.ca, or Professor Andrea K. Bjorklund, andrea.bjorklund@mcgill.ca, Faculty of Law, McGill University.

Romano on questions of family

status in European PIL

Professor *Gian Paolo Romano* (University of Geneva) has just published a highly insightful paper entitled "Conflicts and Coordination of Family Statuses: Towards their Recognition within the EU?" The briefing note was prepared on request of the European Parliament as a contribution to a workshop on "Adoption: Cross-border legal issues" for JURI and PETI Committees, which took place on 1 December 2015. The paper focusses on, in the author's words, "intra-EU conflicts of family statuses" that are bound to arise under the current legislative situation: Over the years, the European Union has adopted a wide set of Regulations that cover international jurisdiction, applicable law and recognition with regard to the legal effects flowing from a family status, while the creation or termination of family statuses are predominantly excluded from the Regulations' scope. Thus, the question whether and on which grounds a family status awarded by one Member State is to be recognized in other Member States is still widely left to domestic PIL, often resulting in conflicts of inconsistent family statuses between Member States, which, at this stage, cannot be resolved in legal proceedings. After reflecting upon those conflicts being contrary to human rights as well as to the objectives and fundamental freedoms of the European Union and demonstrating their potential to frustrate the aims of European PIL instruments, the author discusses four possible legislative strategies for preventing conflicts of family statuses across the European Union or alleviating their adverse effects.

The compilation of briefing notes is available here (please see page 17 *et seqq*. for Professor *Romano's* contribution).

Save the Date: 3rd Yale-Humboldt Consumer Law Lecture on 6 June

2016

On 6 June 2016, the 3rd Yale-Humboldt Consumer Law Lecture will take place at Humboldt-University Berlin. This year's speaker will be Professor Richard Brooks (Yale Law School/Columbia Law School), Professor Henry Hansmann (Yale Law School) and Professor Roberta Romano (Yale Law School).

The program reads as follows:

- 2.00 p.m. Welcome by *Professor Susanne Augenhofer* and the Vice President for Research of Humboldt University, *Professor Dr. Peter A. Frensch*
- 2.15 p.m. *Professor Richard Brooks*, Columbia Law School
- 3.15 p.m. Coffee break
- 3.45 p.m. *Professor Henry B. Hansmann*, Yale Law School
- 4.45 p.m. Break
- 5.00 p.m. *Professor Roberta Romano*, Yale Law School
- 6.00 p.m. Panel Discussion
- 7.00 p.m. Reception

Further information regarding the event is available here. Participation is free of charge but registration is required. Please register online before 27 May 2016.

The annual Yale-Humboldt Consumer Law Lecture brings faculty members from Yale Law School and other leading US law Schools to Berlin where they spend time at Humboldt Law School. During their stay, and as part of a variety of activities, the three visitors will interact with colleagues as well as with doctoral candidates and students. Highlight of their stay is the Yale-Humboldt Consumer Law Lecture, which is open to all interested lawyers. The speakers' remarks will be followed by discussion.

The Yale-Humboldt Consumer Law Lecture aims at encouraging an exchange between American and European lawyers in the field of consumer law, understood as an interdisciplinary field that affects many branches of law. Special emphasis will therefore be placed on aspects and questions which have as of yet received little or no attention in the European discourse.