Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2015: Abstracts

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

Christoph Benicke, **Die Anknüpfung der Adoption durch Lebenspartner in Art. 22 Abs. 1 S. 3 EGBGB**

In Germany, step child adoption by the partner of a same sex civil union (registered partnership) has been legal since 2004, but was restricted to the other partner's biological child. 2014, following a landmark ruling by the German Constitutional Court the German Parliament has enacted legislation that rescinded this restriction and allowed thereby partners of registered same-sex couples to legally adopt the other partner's adoptive child. Not mandated by the Constitutional Court's ruling the legislator stopped short of totally putting same sex registered partnerships on equal footing with traditional marriages. The joint adoption by both partners is still reserved to the spouses of a heterosexual marriage.

On the occasion of this new legislation, a special choice of law rule for the adoption by same sex partners has been enacted. The general choice of law rule (Art. 22 par. 1 s. 2 EGBGB) calls for the national law of the adoptive parent. In the case of the adoption by one or both spouses of a heterosexual marriage the law applicable to the general effects of the marriage (Art. 14 EGBGB) is to be applied. This holds true for the joint adoption by both spouses or for the single (step parent) adoption by only one spouse. The new rule for same sex partners (Art. 22 par. 1 s. 3 EGBGB) follows the example of the rule for married couples, in that it calls for the application of the law that governs the general effects of the registered partnership, i.e. the law of the registering state (Art. 17b par. 1 EGBGB). However, the new rule for same sex partners limits itself to the case of the adoption by only one partner, leaving unregulated the choice of law question of a joint adoption by both partners. The single and only reason for this limitation is the ban on joint adoption by same sex partners in German internal adoption law, not taking into account, that the laws of other countries allow the joint adoption by same sex partners. As there is no valid reason for this limitation in

regard to the choice of law question this same rule must be extended to cover the joint application for the adoption by both partners. The general choice of law rule would lead to a quite preposterous result as it would call for the joint application of the national laws of both partners, whereas in the case of the adoption by only one partner the law that governs the effects the same sex partnership would apply.
The new legislation also casts new light on the discussion of the ramifications of Art. 17b par. 4 EGBGB. This rule limits the effects of a same sex partnership that was registered in another country and therefore is governed by this other country's laws. The legal effects cannot exceed the effects of a registered same sex partnership under German internal law. Under the previous law the majority opinion was that Art. 17b par. 4 EGBGB bans same sex partners from adopting jointly in Germany even if the joint adoption was legal under the applicable foreign adoption law. In granting the unrestricted step child adoption German law effectively allows partners to adopt a child jointly, just in two immediately consecutive proceedings. Therefore, there are no real differences left in regard to the legal effects of a registered partnership under a foreign law that allows the simultaneous joint adoption by same sex partners in one and only proceeding.

Christoph Thole, **The differentiation between Brussels I and EIR in annex proceedings and the relation to art. 31 CMR**
On the occasion of the ECJ ruling (4.9.2014 – C-157/13), the author discusses the precedence of special conventions (CMR) according to art. 71 (1) Brussels I-reg. and the question of the criteria necessary for the application of art. 3 EIR. With respect to art. 3 EIR, the ECJ rightly concludes that an action for the payment of a debt based on the provision of carriage services taken by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings is covered not by the EIR, but is a civil matter within the Brussels I-reg. However, once again, the Court has failed to further elaborate on the criteria necessary for the classification of an action as an insolvency-related action within the meaning of art. 3 EIR and art. 1 para. 2 lit. b Brussels I-reg.
With respect to art. 71 Brussels I-reg., it is a step forward that, in contrast to earlier verdicts, the ECJ itself decided upon the compatibility of the convention with the principles of EU law, instead of referring the matter to state courts. It would have been even more conclusive to rely on the wording of Art. 71 (1) Brussels I-reg. and omit the unwritten necessity of compatibility with EU Law entirely.

Burkhard Hess/Katharina Raffelsieper, **Debtor protection within Regulation 1896/2006: Current gaps in European procedural law**

Regulation 1896/2006 does not provide for effective debtor protection in cases when a European Order for Payment was not properly served on the debtor. As a result of the unilateral nature of the procedure for issuing the order, the order will be declared enforceable if the defendant does not challenge it within a period of 30 days. However, the service of the payment order shall safeguard the right to a defense. When the defendant has never been informed about the ongoing procedure, he should be able to easily contest the Order for Payment even after it has been declared enforceable. Yet, the text of the Regulation does not provide for a remedy in this situation. In a reference for a preliminary ruling, the Local Court Berlin-Wedding asked the European Court of Justice which remedy should apply. The referring court suggested an application by analogy of the review proceedings provided for in Article 20 of Regulation 1896/2006 in order to ensure an effective right to a defense. Regrettably, the CJEU did not endorse this solution. It declared national procedural law applicable in accordance with Article 26 of the Regulation. As a consequence, parties are sent to the fragmented remedies of national procedural laws. As the efficiency and uniform application of Regulation 1896/2006 is no longer guaranteed, the European lawmaker is called to remedy the insufficient situation. This article addresses the final decision of the Local Court which implemented the CJEU's judgment.

Peter Huber, **Investor Protection: Lugano Convention and questions of international insolvency law**

The article discusses a recent decision of the German Bundesgerichtshof which primarily deals with matters of international jurisdiction in tort claims under Article 5 No. 3 of the Lugano Convention. In doing so, the author also analyses to what extent the decision is in line with the more recent judgment of the ECJ in Kolassa v Barclays Bank. A second issue of the decision is how provisions of foreign insolvency law which modify a creditor's claim against a (not insolvent) co-debtor of the insolvent party should be characterised under domestic German private international law.

Christoph Thole, **Porsche versus Hedgefonds: The requirements for lis pendens under Art. 32 reg. 1215/2012 (Art. 30 reg. 44/2001)**

Porsche SE, which is currently trying to fend off several actions for damages connected to the failed takeover of Volkswagen, has reached a partial success

before the OLG Stuttgart. The OLG has ruled that the negative declaratory action against an institutional investor in Germany takes precedence over the action for performance filed in London. The proceedings clearly demonstrate how fiercely disputes concerning the place of jurisdiction in capital market law are fought. Specifically, the court needed to judge upon the necessary requirements for lodging the claim with the court under Art. 30 of the Brussels I-reg. (Art. 32 Reg. No. 1215/2012). The decision as well as most of the reasoning is convincing.

Peter Mankowski, **Lack of reciprocity for the recognition and enforcement of judgments between Liechtenstein and Germany**
Liechtenstein fashions a system of recognition and enforcement of foreign judgments with a strict and formal requirement of reciprocity in the Austrian tradition. In particular, judgments from Germany are not recognised in Liechtenstein. The retaliative price Liechtenstein has to pay is that judgments from Liechtenstein are not recognised in Germany, either, for lack of reciprocity. Methodologically, German courts are idealiter required to research whether reciprocity is guaranteed in a foreign country in relation to Germany. The popular lists in the leading German commentaries should only serve as a starting point.

Lars Klöhn/Philip Schwarz, **The residual company's applicable law**
The "theory of the residual company (Restgesellschaft)" deals with legal problems that may arise in the context of winding-up companies doing business in at least two countries. In Germany, the theory applies in particular to English private companies limited by shares ("Limited") with assets in Germany. If a Limited is dissolved in its home country, the residual company will come into existence and be considered as the owner of the company's "German" assets. The discussion in the literature as well as recent case law by Higher Regional Courts (Oberlandesgerichte) has focused on the question which law applies to the residual company. This paper analyzes the newest judgement on this issue by the Higher Regional Court of Hamm, which states that German law applies. The authors agree with this result while pointing out that this conclusion will be reached regardless of whether one follows the theory of domicile (Sitztheorie) or the theory of establishment (Gründungstheorie). Furthermore, German law applies irrespective of whether the company is still doing business or has already entered into liquidation.

Piotr Machnikowski/Martin Margonski, **Anerkennung von punitive damages- und actual damages-Urteilen in Polen**

The case note concerns the judgment of the Polish Supreme Court of October 11, 2013 on the enforceability of US-American punitive damages and judgments on actual damages in Poland. The enforceability has been rejected in case of punitive damages which, as a rule, are contrary to Polish public policy as such. Polish civil law is governed by the principles of compensation and restitution of the damage. The damage should be repaired to the condition that would have existed had the wrong not occurred. The injured party may not be enriched as a result of the damages awarded. The compensation law in Poland does recognize some exceptions to that rule which allow to grant compensation not closely based on the value of the restored damage. Such exceptions are, however, justified under the constitutional proportionality principle. Punitive damages do not meet such requirements to the extend they peruse penal objectives. They are permissible only to the extent they perform a compensatory function and are linked to the damage suffered. In case of actual damages, such conflict with the Polish public order does not occur by nature of the legal instrument. Yet, the said proportionality principle may lead to only a partial enforceability of a US-American actual damages judgment. The crucial factor here is how closely the factual setting of the case is connected to Poland. The judgment in question addresses the general problem of partial enforceability of foreign judgments, which has been found possible in case of divisible obligations. Despite some critique on detailed aspects of the findings, the case note positively appraises the judgment.

Bernhard König, **Austrian money judgments which do not finally determine the amount of payment**

Judgments given in a Member State which are enforceable in that State are enforceable in other Member States. Difficulties could arise if a money judgment was given in a Member State which does not require a final determination of the amount of the payment in the judgment itself and has to be enforced in a Member State which national law requires the final determination of the amount of payment already in the judgment. This paper offers a glimpse to the question if and to what extent other Member States will have to deal with Austrian judgments which have not finally determined the amount of the payment.

Miguel Gómez Jene/Chris Thomale, **Arbitrator liability in International Arbitration**

Recent decisions by Spanish courts raise questions upon the conditions as well as

the extent of arbitrator liability. Authors suggest a distinction between qualified adjucative and simple managerial tasks: It is only when acting as a quasi-adjudicative agent that arbitrators should be essentially exempt from personal liability. Conversely, as far as an arbitrator's conduct of an arbitration procedure is concerned, he should assume general tort liability for negligence.

Jürgen Samtleben, **The New Panamanian Code of Private International Law – A Kaleidoscope of Conflict of Laws**
Panama is known as an important banking center and as the registered office of many internationally active corporations. Therefore, international relations between private subjects need specific regulation. Up to now, the private international law of Panama found its basis in individual provisions of the Civil Code, the Family Code and some special laws. These provisions were replaced by Law 7 of 2014, which contains in 184 articles a comprehensive regulation of nearly all conflict-of-law topics. The following article gives an overview of the new Law. As a result, it must be stated that the Law contains many flaws, due to insufficient coordination between the different parts and a lack of careful editing of the individual articles. In Panama, as well, the law has been criticized and there is a call for its thorough reform.

Beaumont and Holliday on "Habitual Residence" in Child Abduction Cases

Paul Beaumont, Professor of European Union and Private International Law and Director of the Centre for Private International Law, University of Aberdeen (Scotland/UK), and *Jayne Holliday*, Research Assistant and Secretary of this Centre, have published an insightful and carefully researched new working paper on "Recent Developments on the Meaning of 'Habitual Residence' in Alleged Child Abduction Cases" in the series of the Aberdeen Centre for PIL (Working Paper No. 2015/3, the full content is available here). The highly recommended

article is based on an overview of the recent developments within European and International Family Law that was presented by Professor Beaumont at the conference on "Private International Law in the Jurisprudence of European Courts – Family at Focus" held in Osijek, Croatia, June 2014. Drawing from that presentation, the working paper focuses on the recent developments on the meaning of habitual residence in child abduction cases from the UK Supreme Court and the Court of Justice of the European Union (CJEU). In particular, the authors analyze the move by the UK Supreme Court towards a more uniform definition of habitual residence in line with the jurisprudence of the CJEU under the Brussels II*bis* Regulation.

The authors summarize their findings as follows:

"Over the past 30 years the concept of habitual residence of the child in the UK has developed from one which put weight on parental intention to a mixed model, which takes a more child centric and fact based approach. By following the jurisprudence of the CJEU, the UK Supreme Court has made a genuine and conscious attempt to provide a uniform interpretation of the 1980 Abduction Convention. This will hopefully have the effect of creating a more uniform approach to the definition of habitual residence amongst all Contracting States to the Hague Abduction Convention. […] If enough weight is given to parental intention of the custodial parent(s) of newborns then physical presence is not required to establish habitual residence. This is an easier solution to arrive at if the myth that habitual residence is a pure question of fact is abandoned. Whilst a mixed question of fact and law is the best way to analyse the 'habitual residence' of the young child, it is not appropriate to introduce into the equation a suggestion that somehow habitual residence cannot change when the custodial parent lawfully removes a child to another country just because that decision was still subject to appeal in that country even though the appeal did not suspend the custodial parent's right to take the child out of the country lawfully. Such an appeal should not prevent the loss of the child's habitual residence in the country where the appeal is made and should not impact on the 'stability' of the child's residence in the new jurisdiction to prevent habitual residence being established there within a few months of the residence beginning."

Conference on “European Minimum Standards for Judicial Bodies”, University of Regensburg on 12/13 November 2015

Matthias Weller is Professor for Civil Law, Civil Procedure and Private International Law at the EBS University for Economics and Law Wiesbaden and Director of the Research Center for Transnational Commercial Dispute Resolution (www.ebs.edu/tcdr) of the EBS Law School.

Mutual trust amongst the Member States of the European Union in other legal systems is a prerequisite for the expansion of the free movement of judgments and judicial titles within the European Judicial Area. To justify such mutual trust amongst the European Member States requires, inter alia, the definition of common minimum standards in the various judicial systems.

A joint project between the law faculties of the University of Regensburg (Prof. Dr. Christoph Althammer) and the EBS Law School in Wiesbaden (Prof. Dr. Matthias Weller, Mag.rer.publ.) has set itself the goal to search for and explore further such minimum standards in the judicial systems within the European Judicial Area. After the first conference in Wiesbaden in 2014 (see conference report earlier on this blog here), where the discussion has been initiated from a broader perspective, the project will be continued with the upcoming two-days-conference in Regensburg (conference language: German) that is dedicated to a central issue within this field: European minimum standards for judicial bodies.

The focus will be on three main requirements (independence, efficiency, specialization) which will be presented by experts from both academia and legal practice. These topics will be complemented by a legal comparative analysis with regard to the French, Greek and Italian legal system before the discussion will conclude with a final synthesis.

We would like to cordially invite you to join the discussion! For registration and the conference flyer see here.

Now available: New edition of Volumes 10 and 11 of the „Münchener Kommentar“ on Private International Law

It has not yet been mentioned on this blog that Volumes 10 and 11 of the Munich Commentary on the German Civil Code (Münchener Kommentar zum Bürgerlichen Gesetzbuch), are now available in their sixth edition (2015). A standard German language treatise on both German and European private international law, the new edition contains a detailed article-by-article analysis of the Rome I, II and III Regulations (by Abbo Junker, Munich; Dieter Martiny, Hamburg/Frankfurt an der Oder); Ulrich Spellenberg, Bayreuth; Peter Winkler von Mohrenfels, Rostock), the Hague Protocol on Maintenance (Kurt Siehr, Hamburg/Zurich), the European Succession Regulation (Anatol Dutta, Regensburg), and the Hague Conventions on the Protection of Children and Adults (by Kurt Siehr, Hamburg/Zurich; Volker Lipp, Göttingen).

The sixth edition of Volumes 10 and 11 is the first edition that has been edited by our co-editor Jan von Hein (Freiburg/Germany) as the volume editor. Jan is the successor to Hans-Jürgen Sonnenberger (Munich) and has contributed to the commentary himself with a completely new section on the general principles of European and German private international law.

The new edition has been well received in the German literature (translations kindly provided by the volume editor):

„A battle cruiser of private international law has been set on a new course.“ (IPRax 2015, 387)

„…a truly indispensable work.“ (Ludwig Bergschneider, FamRZ 2015, 1364)

Further information is available on the publisher’s website.

M. E. Burge on Party Autonomy and Legal Culture

Mark Edwin Burge, Associate Professor of Law, Texas A&M University School of Law, has published a highly interesting article on the relationship between party autonomy and legal culture, providing new insights on the success (or failure) of legal transplants in choice of law: “Too Clever by Half: Reflections on Perception, Legitimacy, and Choice of Law Under Revised Article 1 of the Uniform Commercial Code”, 6 *William & Mary Business Law Review* 357 (2015).

The abstract reads as follows:

“The overwhelmingly successful 2001 rewrite of Article 1 of the Uniform Commercial Code was accompanied by an overwhelming failure: proposed section 1-301 on contractual choice of law. As originally sent to the states, section 1-301 would have allowed non-consumer parties to a contract to select a governing law that bore no relation to their transaction. Proponents justifiably contended that such autonomy was consistent with emerging international norms and with the nature of contracts creating voluntary private obligations. Despite such arguments, the original version of section 1-301 was resoundingly rejected, gaining zero adoptions by the states before its withdrawal in 2008. This Article contends that this political failure within the simultaneous overall success of Revised Article 1 was due in significant part to proposed section 1-301 invoking a negative visceral reaction from its American audience. This reaction occurred not because of state or national parochialism, but because the concept of unbounded choice of law violated cultural symbols and myths about the nature of law. The American social and legal culture aspires to the ideal that ‘no one is above the law’ and the related ideal of maintaining ‘a government of laws, and not of men.’ Proposed section 1-301 transgressed those ideals by taking something labeled as

‘law’ and turning on its head the expected norm of general applicability. Future proponents of law reform arising from internationalization would do well to consider the role of symbolic ideals in their targeted jurisdictions. While proposed section 1-301 made much practical sense, it failed in part because it did not—to an American audience—make sense in theory.”

The full article is available here.

Out Now: Basedow on “The Law of Open Societies – Private Ordering and Public Regulation in the Conflict of Laws”

Prof. Dr. Dr. h.c. mult. *Jürgen Basedow*, LL.M. (Harvard), Director of the Max Planck Institute for Comparative and International Private Law, Hamburg, has published a revised and updated version of the widely read and well-received lectures given by the author during the 2012 summer courses of the Hague Academy of International Law (on the first edition, see the post by *Gilles Cuniberti* here). This superbly written and well-researched book is a must-read for anyone interested in the paradigm shifts that private international law has undergone in recent decades. The abstract provided by the publisher reads as follows:

“This book endeavours to interpret the development of private international law in light of social change. Since the end of World War II the socio-economic reality of international relations has been characterised by a progressive move from closed to open societies. The dominant feature of our time is the opening of borders for individuals, goods, services, capital and data. It is reflected in the growing importance of ex ante planning – as compared with ex post adjudication – of cross-border relations between individuals and companies. What has ensued is a shift in the forces that shape international relations from states to private

actors. The book focuses on various forms of private ordering for economic and societal relations, and its increasing significance, while also analysing the role of the remaining regulatory powers of the states involved. These changes stand out more distinctly by virtue of the comparative treatment of the law and the long-term perspective employed by the author."

Further information is available on the publisher's website here.

The Trust Re-visited – The Hague Convention 30 Years After

The Society of Trust and Estate Practitioners (STEP), in cooperation with the Swiss Association of Trust Companies (commonly abbreviated as SATC, not to be confused with an American TV sitcom), is organising an international conference in Lausanne (Switzerland) on recent experience and current trends under the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1985. The event will take place on 3 November 2015; the conference language will be English.

According to the flyer, the conference "will consider how in thirty years since the conclusion of the Hague Trust Convention the trust has become more widely accepted and trust service providers have greater opportunities, in many countries, including Switzerland. The speakers will demonstrate how the trust is playing a full and positive role in the world of wealth management and fiduciary services in Switzerland, as well as cover recent international trust law developments and jurisprudence. The ambitious program features distinguished speakers from the judiciary, academia, the Swiss government, regulatory and the financial services world and promises to be an extraordinary conference."

The full programme and details on registration are available here.

Request for preliminary ruling on Art. 5 No. 1 Brussels I Regulation

On 18 August 2015, the German Federal Supreme Court referred the following questions relating to the interpretation of Article 5 No. 1 of the Brussels I Regulation to the CJEU (my translation):

> *1. Must Art. 5 No. 1 lit. a) of the Brussels I Regulation be interpreted as covering a claim for compensation under Art. 7 of the EU Air Passenger Regulation against an airline that is not the contracting partner of the passenger but operates the flight by way of a codeshare agreement with the passenger's contracting partner?*
>
> *2. If Art. 5 No. 1 Brussels I Regulation applies: In case of a flight connection consisting of several flights without any meaningful stay at the connecting airports, is the place of departure of the first flight the place of performance within the meaning of Art. 5 No. 1 lit. b) Brussels I Regulation, if the flights are operated by different airlines by way of a codeshare agreement and if the claim for compensation is directed against the airline that operates the – severely delayed – second flight?*

The facts of the underlying case are straightforward: The claimant booked a flight with Air France from Stuttgart to Helsinki via Paris. The flight from Paris to Helsinki was operated by Finnair by way of a codeshare agreement with Air France. The flight from Paris to Helsinki was delayed by three hours and twenty minutes. Therefore, the claimant sought compensation from Finnair under the EU Air Passenger Rights Regulation – and brought an action against Finnair in Stuttgart. The Court of First Instance (Amtsgericht) and the Regional Court (Landgericht) both rejected the claim for lack of jurisdiction. The Federal Supreme Court (Bundesgerichtshof), in contrast, wasn't so sure, and, therefore, referred the above questions to the CJEU.

The press release of the Federal Supreme Court is available here (in German).

European Succession Regulation in Force

On 17 August 2015 the European Succession Regulation has entered into force. It provides for uniform rules on the applicable law as well as recognition and enforcement of decisions in matters of succession. It also creates a European Certificate of Succession that enables person to prove his or her status and rights as heir or his or her powers as administrator of the estate or executor of the will without further formalities.

More information is available on the European Commission's website.

Book on International Protection of Adults

A volumious book on the **International Protection of Adults**, edited by Richard Frimston, Alexander Ruck Keene, Claire van Overdijk and Adrian Ward, has just been published (Oxford University Press, 2015).

The blurb reads:

> *Increasing numbers of people have connections with one country, but live and work in another, frequently owning property or investments in several countries. People with lifelong or subsequently developed impairments of capacity move cross-border or have property or family interests or connections spread across different jurisdictions. This new work fills a gap in a specialist market for a detailed work advising lawyers on all the considerations in these situations.*

The book provides a clear, comprehensive, and unique overview of all relevant capacity and private international law issues, and the existing solutions in common law and civil law jurisdictions and under Hague Convention XXXV. It sets out the existing law of various important jurisdictions, including detailed chapters on the constituent parts of the UK, Ireland, Jersey, the Isle of Man and the Hague 35 states; and shorter chapters on 26 Non-Hague states and those within federal states, including coverage of the United States, several Australian and Canadian states, and a number of other Commonwealth jurisdictions. Containing a number of helpful case studies and flowcharts, the book draws upon the expertise of the editors in their respective fields, together with detailed contributions from expert practitioners and academics from each relevant jurisdiction.

Furhter information is available here.