Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2019: Abstracts

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

R. Wagner: **Twenty Years of Judicial Cooperation in Civil Matters**

With the Treaty of Amsterdam entering into force on 1 May 1999 the European Union has obtained the legislative competence concerning the judicial cooperation in civil and commercial matters. This event’s 20th anniversary gives ample reason to pause for a moment to briefly appreciate the achievements and to look ahead. This article follows the contribution of the author in this journal in regard to the 15th anniversary of the entry into force of the Treaty of Amsterdam (IPRax 2014, 217).

E. Jayme/C.F. Nordmeier: **The Freedom to Make a Will as a European Human Right? – Critical Considerations on the West Thrace Decision of the European Court of Human Rights**

The article critically examines the decision of the ECHR of 19 December 2018, Molla Sali v. Greece, which deals with the special legal regime applicable to Muslims in West Thrace, a region in northern Greek. The Court considers Art. 14 ECHR in conjunction with Art. 1 of the Additional Protocol No. 1 to be violated if the will of a Muslim testator of this region, drawn up according to Greek state law, is measured against religious law. The authors are of the opinion that a human rights-protected election to state law is not permissible for individual areas of law or single legal questions. It opens up an arbitrary mixture of state and religious law, which can lead to inconsistent overall results. This is particularly the case when legal positions of third parties are affected. In addition, overarching political aspects of the protection of minorities, especially in Western Thrace, are not sufficiently taken into account in the decision.

J. Schulte: **A Wii bit illegal? International jurisdiction and applicable law for the infringement of a Community Design by several tortfeasors (ECJ**

C-24, 25/16 – Nintendo)

On 27 September 2017 the European Court of Justice decided on the international jurisdiction and applicable law with regards to the infringement of a unitary Community intellectual property right, when Nintendo Inc. sued a mother and a daughter company for replicating, advertising and selling Wii console accessories. The Court's judgement clarifies many important issues ranging from the member state courts' scope of competence in case of several defendants, to the difficult relationship between Rome II's conflict of law rules and the ones in the regulations on Community intellectual property rights as well as to the applicable law for infringing acts via the internet. Most notably, the ruling establishes a central act theory in case of multiple places of acts of infringements in the sense of Art. 8(2) Rome II.

P. Mankowski: **Choice of law clauses in the Standard Terms and Conditions of airlines**

Choice of law clauses in the Standard Terms and Conditions of airlines are commonplace in international air travel. Art. 5 (2) subpara. 2 Rome I Regulation "limits" freedom of choice in passenger contracts. Yet the CJEU's Amazon judgment has raised questions whether choice of law clause in Standard Terms and Conditions might also be challenged under the aegis of the Unfair Contract Terms Directive.

B. Heiderhoff: **Jurisdiction based on Art. 12 (3) Brussels IIbis and its consequences**

The Saponaro judgment concerns the judicial authorisation for a renouncement of succession by the parents of a minor heir whose habitual residence is not within the state of the succession proceedings. The Court confirmed that this issue falls within the scope of the Brussels IIbis Regulation and gave details on the prerequisites of jurisdiction under Art. 12 (3) Brussels IIbis Regulation. In particular, the ECJ needed to clarify the meaning of the requirement of having been "accepted expressly or otherwise in an unequivocal manner by all the parties". As Greek law, in order to secure the rights of the child, provides that a prosecutor is a party to the proceedings, the ECJ held that the acceptance of the prosecutor is necessary. The Court does not, however, even mention the necessity of the agreement of the child, an omission which must be criticised. This

contribution additionally raises the question of the applicable law. Here, we see a number of difficulties. Firstly, the prorogated jurisdiction under Art. 12 (3) Brussels IIbis Regulation poses problems for the synchronous operation of the Brussels IIbis Regulation and the 1996 Hague Convention. Secondly, the approval procedure is a constellation where the distinction between protective measures (under Article 15 of the 1996 Convention) and the exercise of parental responsibility (under Article 17 of the 1996 Convention) becomes necessary. Thirdly, the strong interlinkage between the substantive law of parental responsibility and the procedural measures to protect the child make it very complicated to combine the approaches that the different legal systems take. All in all, it generally seems easier to institute the judicial authorisation in the state of the child's habitual residence.

U.P. Gruber: **The habitual residence of infants and small children**

The ECJ has stressed in several decisions that for the purpose of Article 8(1) of Regulation No 2201/2003, a child's place of "habitual residence" has to be established by considering all the circumstances specific to each individual case. However, in a new case, the ECJ has opted for a more conclusive weighing of selected criteria. The ECJ based its assessment on the fact that the child was permanently resident in Belgium. Furthermore, the ECJ pointed to the fact that the mother, who – in practice – had custody of the child, and also the father, with whom the child also had regular contract, both lived in Belgium. Other circumstances were expressly deemed to be "not decisive", especially the stays of mother and child in Poland in the context of leave periods or holidays, the mother's cultural ties to Poland and her intention of settling in Poland in the future. In summary, it can be said that for a rather typical fact pattern, the ECJ has given valuable guidance as to where the habitual residence of children is located.

U.P. Gruber/L. Möller: **The admissibility of a custody order after the return of the child under the Hague Abduction Convention**

The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction seeks to provide a rapid procedure for the return of the child to the country of the child's former residence. Pursuant to Art. 16 of the Convention, a court in the state of refuge is not permitted to decide on the merits of any custody issue until it has been decided that there exists a reason for not ordering the

return of the child, or the application for the return of the child is not lodged within a reasonable time. This provision is based on the assumption that a procedure dealing with custody issues in the state of refuge might delay or otherwise impair the procedure on the return of the child in that state. The OLG Bremen had to decide whether Art. 16 of the Convention was still applicable when the conclusive order to return the child had already been carried out, i.e. the child had been given back to the holder of the right of custody and had returned to its state of residence prior to its removal. The court concluded that in this situation the prohibition in Art. 16 of the Convention had ceased and that therefore German courts could decide on the rights of custody. The decision is correct: When the status quo ante has been fully restored, the objectives of the Convention have been reached; therefore, there is no more need to protect the procedure on the return of the child against influences of parallel proceedings on custody issues. Subsequently, the court also assumed jurisdiction as, under German law, jurisdiction can be based solely on the German nationality of the child. At closer look, the case illustrates that German jurisdictional rules are not well-suited for child abduction cases and there is need for reform.

K. Siehr: **International jurisdiction of German courts to take measures in order to enforce the right of access of the mother to meet her children living abroad**

A German couple had two sons. The couple divorced and the father got custody for the two children and moved with them to Beijing/China. The Magistrate Court of Bremen (Amtsgericht Bremen) awarded to the mother, still living in Germany, rights of access to the children and obliged the father to cooperate and send the children from Beijing to Germany in order to visit their mother. The father did not cooperate and did not send the children to Germany. The Magistrate Court of Bremen fixed a monetary penalty (Ordnungsgeld) of e 1000,00 in order to sanction the father’s misbehavior. The father lodged an appeal against this decision and the Court of Appeal of Bremen (Oberlandesgericht Bremen) vacated the decision of the Magistrate Court because of lack of international jurisdiction. The Federal Court for Civil and Criminal Matters (Bundesgerichtshof) corrected the Court of Appeal of Bremen and upheld the order for monetary penalty awarded by the Magistrate Court of Bremen. German courts are allowed to sanction their decision by awarding monetary penalties against a party living abroad.

P. Kindler/D. Paulus: **Entry of Italian partnerships into the German land register**

Under German law, following a judgment of the Federal Court of Justice (BGH) of 29 January 2001, even non-commercial partnerships (the „Gesellschaft bürgerlichen Rechts", GbR) under certain circumstances – and without being regarded a legal entity – have an extensive legal capacity. On 4 December 2008, in a second step, the Federal Court of Justice held that a GbR can not only acquire ownership of land or other immovable property or rights but may also be entered in the German land register (Grundbuch – „formelle Grundbuchfähigkeit"). Subsequently, as of 18 August 2009, the German legislator implemented a new § 899a to the German Civil Code (BGB) as well as a new section 2 to § 47 of the German Land Register Code (GBO), stating that if a GbR is to be registered, its partners must also be entered into the land register. In its judgment of 9 February 2017 concerning an Italian società semplice, the

German Federal Court of Justice held that also foreign non-commercial partnerships can be entered into the German land register. Prerequisite for this is not a full legal capacity but only that the respective partnership, according to its company statute, at least has a partial legal capacity with regard to the acquisition of real estate („materielle Grundbuchfähigkeit"). In order to determine this, a judge has to investigate foreign law ex officio. This includes not only the determination of the law itself but also of its concrete application in the respective foreign legal practice. To this end, the judge must make full use of the legal sources available to him. The authors share the position of the German Federal Court of Justice but point out that the applicable Italian law of business associations even provides for a full legal capacity of non-commercial partnerships.

K. Duden: **Jurisdiction in case of multiple places of performance: preparatory work vs. its implementation on site**

In the case of a contract for the provision of services, Art. 7 (1) (b) of the Brussels Ibis Regulation establishes jurisdiction at the place where the service is provided. In light of a decision of the Austrian Supreme Court on an architect's contract this paper analyses how jurisdiction at a single place of performance can be identified if the performance actually is provided in several places. In doing so, it is argued that a distinction should be drawn between services that have an internal as

opposed to an external variety of places of performance. Regarding architects' contracts the author agrees with the Austrian Supreme Court that the courts at the building site have jurisdiction as the courts at the place of the main performance. Furthermore, the paper discusses where jurisdiction generally should be located for services that consist of extended preparatory work at one place that culminates in its implementation at another place, but where those services do not necessarily have a comparatively strong link with the place of implementation. Finally, cases will be considered in which the place where the service is mainly provided cannot be determined. It is argued that amongst the approaches taken in such cases by the ECJ it is more convincing to grant the claimant a choice amongst the places which could be considered as the place of main performance, rather than give preference – amongst various potential places of main performance – to the jurisdiction at the seat of the characteristic performer.

L. Hübner: **Existential disputes as a case for Art. 24 no. 2 Brussels 1a Regulation – the doctrine of fictivité in the European law of jurisdiction**

The decision of the Cour de cassation deals with the exclusive jurisdiction for company-related disputes in Art. 24 No. 2 Brussels 1a Regulation. The Cour de cassation confirms the strict interpretation in accordance with the parameters of the ECJ. The subject-matter of the action is not a dispute regarding deficiencies in resolutions, which frequently is the subject-matter of action in connection with Art. 24 (2) Brussels 1a Regulation, but a so-called existential dispute arising from the French doctrine of fictivité.

P. Schlosser: **Prescription as Lack of jurisdiction of an arbitral tribunal**

In view of the expropriation of gold mines the claimant instituted arbitral proceedings on the basis of the Bilateral Agreement between Canada and Venezuela according to the Additional Facility Rules of the Word Bank Centre. The Canadians were successful. The Cour d'Appel de Paris, however, invalidated the calculation of the award, but not the further elements of the ruling. The reason therefor was a term in the Bilateral Investment Treaty, that the tribunal had only competence to consider events no more than three years prior to the institution of arbitral proceedings. In validating the damage of the Canadians, however, the tribunal had taken into consideration events of a prior occurrence. Normally the claimant had to institute new proceedings because in France the

case cannot be referred back to the arbitrators. But since the parties had found a settlement agreement no further proceedings were necessary.

Expedited settlement of commercial disputes : The Commission's Response

A Legislative initiative procedure which started nearly a year ago, is coming now to the next level: The European Commission has recently stated its position on the European Parliament non-legislative resolution with recommendations to the Commission on expedited settlement of commercial disputes. The response is featured in a document titled *'Follow-up to the European Parliament non-legislative resolution with recommendations to the Commission on expedited settlement of commercial disputes'.* The main issues addressed may be summarized as follows:

Creation of a European Expedited Civil Procedure (EECP)

The Commission will take the resolution as further inspiration to analyse simplifications to cross-border litigation, but not necessarily by a specific European Expedited Civil Procedure.

Possible changes to the Rome I, the Rome II and the Brussels Ia Regulations

The Commission will, as appropriate, consider issues concerning choice of law agreements and choice of court agreements within the framework of the review of the relevant instruments (the Rome I and the Brussels Ia Regulations).

Other measures – building competence in commercial law in Member States

The Commission will continue to support training and research in commercial law

and to facilitate access to information on foreign law in the framework of non-legislative actions, including financial programmes.

Other measures – analysing establishment of the European Commercial Court

At this stage, it does not seem appropriate to engage in preparatory action concerning the establishment of a European Commercial Court. However, the Commission will consider the question of the desirability of further studies in this field.

The full text of the doc. document is available here.

Once there, scroll down to Documentation gateway, and open the European Commission box.

Applicable Law and Jurisdictional Agreement in European Union International Family and Succession Law

Dr. Marlene Brosch (Senior Research Fellow at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law) recently published a book on Choice of Law Agreements and Jurisdictional Agreements in EU International Family Law and Succession Law.

Here is a brief overview provided by the author:

Choice of Law Agreements and Choice of Court Agreements are fundamental

legal instruments in Private International Law, expressing the parties' autonomy to determine the applicable law and the competent court(s). In the field of Family Law and Succession Law, party autonomy has only recently taken root through the enactment of several EU Regulations that recognise limited party autonomy: Rome III, Brussels II-bis, Maintenance Regulation, Succession Regulation, as well as the Regulations on Matrimonial Property Regimes and Property Regimes of Registered Partnerships.

The book constitutes an in-depth comparison of the rules on party autonomy in the aforementioned legal instruments from a functional and systematic perspective. Special regard is given to the interrelations between applicable law and jurisdiction. This comparative analysis serves as the starting point for assessing inconsistencies and deficiencies, which further lead to discussing reform proposals for a more coherent normative system.

More information can be found at https://www.mohrsiebeck.com/en/book/rechtswahl-und-gerichtsstandsvereinbarung-im-internationalen-familien-und-erbrecht-der-eu-9783161562730?no_cache=1 .

The Hague Convention on the International Protection of Adults – A position paper by experts involved in the ELI Adults' Project

The European Law Institute (ELI) has launched in 2017 a project on *The Protection of Adults in International Situations*.

The adults to which the project refers are persons aged 18 or more who are not in

a position to protect their interests due to an impairment or insufficiency of their personal faculties.

The project purports to elaborate on the resolution of 1 June 2017 whereby the European Parliament, among other things, called on the European Commission to submit 'a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity'.

The Commission has made known that it does not plan to submit such a proposal in the near future. At this stage, the Commission's primary objective is rather the ratification of the Hague Convention of 13 January 2000 on the International Protection of Adults by the Member States that have not yet done so.

The ELI project builds on the idea that the Convention, which is currently in force for twelve States (ten of which are also Member States of the Union), generally provides appropriate answers to the issues raised by the protection of adults in situations with a foreign element. That said, the team of experts charged with the project has taken the view that it would be desirable for the Union to legislate on the matter, in a manner consistent with the Convention, with the aim of improving the operation of the latter among the Member States.

The ultimate goal of the project is to lay down the text of the measure(s) that the Union might take for that purpose.

While the project is still in progress, a position paper has been issued on 3 December 2018, signed by some of the members of the project team, to illustrate the main views emerged so far from the discussion.

The paper suggests that the Union should consider the adoption of measures aimed, *inter alia*, to:

(*i*) enable the adult concerned, subject to appropriate safeguards, to choose in advance, at a time when he or she is capable, the Member State whose courts should have jurisdiction over his or her protection: this should include the power to supervise guardians, persons appointed by court or by the adult (by way of a power of attorney), or having power *ex lege* to take care of the adult's affairs;

(*ii*) enlarge the scope of the adult's choice of law, so that he or she can also

choose at least the law of the present or a future habitual residence, in addition to the choices currently permitted under Article 15 of the Hague Convention of 2000;

(*iii*) outline the relationship between the rules in the Hague Convention of 2000 and the rules of private international law that apply in neighbouring areas of law (such as the law of contract, maintenance, capacity, succession, protection against violence, property law, agency);

(*iv*) specify the requirements of formal and material validity of the choice of the law applicable to a private mandate, including the creation and exercise (and supervision by the courts) of such mandates;

(*v*) address the practical implications of a private mandate being submitted (by virtue of a choice of law, as the case may be) to the law of a State whose legislation fails to include provisions on the creation or supervision on such mandates, e.g. by creating a "fall-back" rule in cases of choice of the "wrong" law, which does not cover the matters addressed (or at least applying Article 15(1) of the Hague Convention of 2000);

(*vi*) extend the protection of third parties beyond the scope of Article 17 of the Hague Convention of 2000 to the content of the applicable law, and possibly also to lack of capacity (or clarifying that the latter question is covered by Article 13(1) or the Rome I Regulation);

(*vii*) make it easier for those representing and/or assisting an adult, including under a private mandate, to provide evidence of the existence and scope of their authority in a Member State other than the Member State where such authority has been granted or confirmed, by creating a European Certificate of Powers of Representation of an Adult (taking into account the experience developed with the European Certificate of Succession);

(*viii*) clarify and make more complete the obligations and procedures under Articles 22, 23 and 25 of the Convention in order to ensure 'simple and rapid procedures' for the recognition and enforcement of foreign measures; further reflection is needed to determine whether, and subject to which safeguards, the suppression of exequatur would be useful and appropriate for measures of protection issued in a Member State;

(*ix*) facilitate and encourage the use of mediation or conciliation.

The ELI project will form the object of a short presentation in the framework of a conference on *The Cross-border Protection of Vulnerable Adults* that will take place in Brussels on 5, 6 and 7 December 2018, jointly organised by the European Commission and the Permanent Bureau of the Hague Conference on Private International Law.

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

M. Andrae: **The Scope of Application of the Regulation (EU) 2016/1103**

The Regulation (EU) 2016/1103 will be the central European legal instrument governing matters of matrimonial property regimes having cross-border implications. This includes any property relationships, between the spouses and in their relations with third parties resulting directly from the matrimonial relationship, or the dissolution thereof. From this it follows a broad objective scope of application. Excluded from the scope the Regulation (EU) 2016/1103 are inter alia: the succession to the estate of a deceased spouse and the nature of rights in rem relating to a property. This contribution discusses which typical legal relationships are covered by the regulation and which are precluded. Particular attention is given to: the responsibility of one spouse for liabilities and debts of the other spouse, the powers, rights and obligations of either or both spouses with regard to property, gratuitously allowance between spouses, undisclosed partnerships between spouses, employment contracts between spouses, the allocation of matrimonial home in case of separation, the distinctness of a matrimonial property agreement and a contract of inheritance as well as the

relationship between the legal system of marriage property and the numerus clausus of rights in rem known in the national law of the Member States. The Regulation (EU) 650/2012 should be applied in the case, if the inheritance of the surviving spouse increases by a quarter under Art. 1371 para. 1 German Civil Code (BGB).

E. Jayme: **Reform of Tort Law in Germany (2017): compensation of dependent survivors of dead persons for pain and suffering: problems of jurisdiction and conflict of laws**

The German legislator has introduced, recently, the right of the surviving dependents of a person who has been killed, e.g. in a car accident, to ask for compensation for pain and suffering. The article deals with the rules concerning jurisdiction and the applicable law in international cases such as car accidents abroad, when the survivors live in a foreign country. In addition, solutions are proposed for the question, how the personal relation are to be determined, when the person killed and his or her survivors live in a foreign country.

P. Mankowski: **Liability insurance, direct action, forum actoris: no deviating by jurisdiction clause in the insurance contract**

Liability insurance and direct claims are everyday appearances in European private international law and international procedural law. *Odenbreit* has awarded the injured party with a *forum actoris*. Now, and consequentially, *Assens Havn* supplements this with protection against derogation to the injured party's detriment: The injured party is rightly held not to be bound by a derogating urisdiction agreement in the insurance contract between the policyholder (i.e. the tortfeasor in relation to the injured party) and his insurer.

D. Coester-Waltjen: **Opportunity missed: The CJEU and private divorces**

This article comments on the decision of CJEU in the case of *Sahyouni ./. Mamisch* (C-372/16). The CJEU accepted jurisdiction because the applicability and interpretation of the Rome III-Reg. (No. 1259/2010) was at issue. However, the Court following the advice of the Advocate General decided that a private divorce does not fall within the scope of the Rome III-Reg. Consequently, the court was not concerned with the interpretation of Art. 10 Rome III-Reg. in cases where the applicable divorce law provides different rules based on gender. The Advocate General had recommended the non-application of all rules which are not gender-

neutral irrespective of the fact whether the result in the case at hand was or would be discriminatory or not. This article analyses critically the reasoning of the Court and the Advocate General, especially the lack of any differentiation between the different kinds of private divorces and the emphasis put on the applicability of the Brussels IIbis-Reg. (No. 2201/2003). The author expresses regret over the interpretation of Art. 10 by the Advocate General.

M. Andrae: **Petition for divorce of marriage before a sharia court in Lebanon and Germany**

According to s. 109 of the German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Familienverfahrensgesetz*, *FamFG*) German courts will recognize a decree of divorce of marriage given by sharia courts abroad. Therefore, a pending petition for divorce before such a court will be recognized as well. The Higher Regional Court of Hamm (*Oberlandesgericht* Hamm) had to decide in this matter. Traditionally, *lis pendens* of litigation in familiy matters in a third State is an obstacle to the decision of a German court given the following premises: The parties and the subject matter of proceedings are identical, the foreign court was seized first and the foreign court is expected to give a decision capable of recognition within reasonable time. The OLG Hamm does not comply with this established body of case law. Instead, it is guided by Art. 29 (EC) Regulation No 44/2001 and Art. 27 Lugano Convention, respectively. Drawing on the ECJ's doctrine in *Gubisch* (1987) it does not take into account whether the foreign decision is expected to be capable of recognition. The article critically analyzes this ruling.

S. Korch/M. Konstantin: **From Freedom of Establishment to Free Choice of Corporate Form – The Implications of Polbud**

The ECJ judgment in *Polbud* is a landmark decision in international corporate law. Summarizing, the ECJ no longer focuses on protecting the free establishment (of corporations) but instead embraces the idea of allowing European corporations to freely choose a corporate form from any EU Member State's legislation. This switch confronts the national legal systems with a wide range of challenges, especially with regard to the protection of creditors, transformation law, and employee co-determination. The analysis in this paper reveals that the relevant German statutes do not adequately cover these challenges.

C. Thomale: **The "Centre of Main Interests" in international corporate insolvency proceedings**

The *Landgericht* Berlin has used the *Niki* insolvency proceedings, which have been attracting wide public attention, for a deep discussion of the criterion "Centre of main interest" as contained in the European Regulation on Insolvency Proceedings. This case note carefully evaluates the decision and tries to highlight possible venues for legal reform.

E. Jayme/C.F. Nordmeier: **Greek Muslims in Thrace: dépeçage and new opt-in-requirement in family and inheritance**

In the northern Greek region of Thrace, Greek citizens enjoy a special status in family and inheritance law. The Greek law 1920/1991 of 24 December 1990 regulates the jurisdiction of the Mufti and thus the application of Islamic law in the execution of international treaties after the end of the Greek-Turkish war. The provisions of Law 1920/1991 have been significantly amended by Law 4511/2018 of 15 January 2018. The focus is on the need to agree on the mufti's jurisdiction in family matters. In the absence of an agreement, the state courts have sole competency. In matters of succession, the testator must have opted for the application of Islamic law. The present article presents the new rules in greater detail and examines their effects in European international private and procedural law. In addition, the question of what impact they have on the practice of German family and probate courts is examined.

F. Heindler: **The right of direct action in international road accidents**

The annotated judgement focuses on the scope of application of Art. 9 Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents. The Austrian Surpreme Court in Civil and Criminal Matters *(Oberster Gerichtshof)* has ruled that the law applicable under Art. 9 does not oust the law applicable to the insurance contract in relation to the extent of the insurer's liability. In contrast, Art. 9 merely determines whether a claim can be brought directly against the insurer. By way of obiter dictum, the *Oberster Gerichtshof* suggested that it would adopt the same position when applying Art. 18 Rome II which was not applicable in the current case since the Convention has priority in accordance with Art. 28 s. 1 Rome II and the EU Member States' international law obligations.

M. Komuczky: **Dogmatic Assessment of Surrogacies undertaken abroad in Austria**

The article discusses the family law consequences of surrogacy conducted abroad from an Austrian perspective. This question is discussed in the light of the ECtHR's jurisprudence. If a court order was rendered in the state where surrogacy was performed, this decision may be capable of being recognized in Austria, provided that the child obtained the citizenship of the other state. In all other cases, a conflict of law analysis according to the principle of the strongest connection is necessary, as §§ 21, 21 autIPRG only apply to naturally conceived children. It is of pivotal importance that the child maintains effective family relationships. Only in exceptional cases, Austrian public policy may be invoked.

D.B. Adler: **Post Daimler: Foreign companies still run the risk to be subject to U.S. general jurisdiction throughout the US.**

In *Daimler AG* v. *Bauman*, the U.S. Supreme Court overturned nearly seventy years of law on general jurisdiction. According to Daimler, the general jurisdiction inquiry is no longer whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic, but rather whether that corporation's affiliation with the forum is so continuous and systematic as to render it essentially at home in the forum. Except in rare situations, general jurisdiction henceforth should be proper over a corporation only in the corporation's state of incorporation or principal place of business. This article proceeds in three main sections. Part one provides a brief analysis of the *Daimler* decision, including a critique on both its shortcomings and the court's rationale. Part two focuses on the post-*Daimler* developments highlighting three points. First, the article evaluates how lower courts throughout the US have adapted to the newly developed "at home" standard. Second, it shows how litigants are more often than not successful at circumventing Daimler's "at home" test by reviving century-old cases in order to establish general jurisdiction on a "consent-by-registration" theory. According to this theory, foreign corporations consent to general jurisdiction when they register to do business in states outside their place of incorporation or principal place of business. The author critically assesses this theory and its effects on foreign companies and banks in the context of *Daimler's* rationale and questions its validity as a basis for general jurisdiction. He then evaluates a recent New York State legislative initiative, which attempts to further "clarify" *Daimler* and to strengthen the validity and foundation of the "consent-by-

registration" theory. Part three summarizes the findings.

A. Anthimos: **The application of the Rome I Regulation in Greece**

The present article serves as an inventory of published and unpublished case law in regards to the application of Rome I Regulation in Greece. It focuses solely on provisions, which were examined and interpreted by domestic courts. The author's purpose is to provide a concise report of the existing trends in the application of the EU Regulation.

Z. Csehi: **New Hungarian Legislation on conflict of laws, jurisdiction and procedure in private international law matters**

In Hungary, Private International Law has been changed fundamentally by Act No XXVIII, which entered into force on 1 January 2018. These legislative changes are related to the recent reform of Hungarian civil law, which made modifications in the area of Private International Law necessary. From now on, rules regarding the conflict of laws, the international procedural law as well as the recognition and enforcement of foreign judgments are codified in a single legal act. The aim of this new codification of Private International Law was also to bring Hungarian legislation in line with the relevant European regulations, which was not entirely the case with the previous provisions. The present contribution describes the legal modifications in Hungarian Private International Law and the key changes of the reform.

Private Divorces – Lecrture on the Consequences of the CJEU decision Sahyouni

The IACPIL (Interdisciplinary Association of Private International and Comparative Law) and the University of Vienna invite to a lecture by Prof. Budzikiewicz (in German).

Whereas private divorces were mostly executed outside Europe, nowadays Italian, French as well as Spanish law allow a contractual divorce. The lecture addresses to what extent private divorces can be valid outside the enforcing state. The recognition can be relevant in different cases, e.g. another marriage is aspired or legal questions concerning the right of maintenance, tax law as well as law of succession arise.

The CJEU recently ruled that the Rome III regulation is not applicable to a marriage divorced by a spiritual court in a third country. In this respect the lecture focuses on how private divorces are to be treated with regard to private international law and international procedural law.

The flyer can be found here

Where: University of Vienna, Juridicum, Schottenbastei 10-16, 1010 Vienna, SEM 20
When: 17 May 2018, 6 p.m.
The event is free but registration is required (office@igkk.org).

ERA Summer Courses: Cross-Border Insolvency Proceedings and Cross-Border Civil Litigation

ERA Summer course on cross-border insolvency proceedings

Trier, 11-13 June 2018

This intensive course on insolvency law will introduce lawyers to practical aspects of cross-border insolvency proceedings: different national insolvency laws, EU legislation and major CJEU case law will be presented.

The course will focus on the recast EU Regulation No 2015/848 on insolvency proceedings, including the following key topics:

- Centre of main interest (COMI) and forum shopping
- Coordination of proceedings
- Insolvency, cross-border security and rights in rem

Following an introduction to different insolvency law systems within the EU, participants will discuss the recent proposal for a Directive on insolvency and post-Brexit implications for insolvency and restructuring. Participants will be able to deepen their knowledge through case studies and workshops.

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You will learn:

- …which court is competent to hear your case
- …how to serve a judicial document
- …how to take evidence abroad
- …to advice on how to enforce a judgment abroad
- …to apply the recent CJEU case law in the field
- …which way to choose to recover money owed to your client
- …to provide guidance on how to efficiently freeze monies in foreign bank accounts
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Court of Appeal of Ljubljana and implied consent to application of Slovenian law by not- contesting the application of Slovenian law in first and in appellate instance

Written by Dr. Jorg Sladic, Attorney in Ljubljana and Assistant Professor in Maribor (Slovenia)

In judgment of 25 October 2017 in case I Cpg 1084/2016 (ECLI:SI:VSLJ:2017:I.CPG.1084.2016) published on 31 January 2018 the Slovenian Appellate Court ruled on a question of implied consent to application of Slovenian law.

Unfortunately the underlying facts are not described with the necessary precision. It would appear that there was a three-person contractual chain between an Austrian, an Italian and a Slovenian commercial company. Apparently the Italian company was the seller, the roles of both the Austrian and Slovenian company are not very clearly described. The underlying transaction that led to the dispute was a contract for the sale of goods concluded under the CISG. The ruling does not state where the seller had the habitual residence, yet the condemnation to perform the payment can only be construed in such a way that the Italian plaintiff was the seller.

The court of first instance condemned the defendant (a Slovenian commercial company) to payment of the sum of 52.497,28 EUR to the Italian claimant (Italian commercial company) and dismissed the Slovenian defendant's defense of set-off (exceptio compensationis) in the sum of 50.000,00 EUR.

The condemnation was based upon a sales contract for goods concluded under the application of the CISG. The Slovenian defendant contended that the Italian claimant did not sign the double order / mandate addressed to the Austrian third person (named the client or the orderer) who had been instructed to perform the payment to the Italian company. The Austrian client later withheld the performance of payment due to a non signed double order / mandate (double order/mandate is a figure where a principal gives the first mandate to the agent to perform an obligation to a third person (recipient) and the second mandate to the third person (recipient) to accept the performance of such an obligation, see Art. 1035 Slovenian Code of Obligations: Through an instruction one person, the principal, authorizes a second person, the agent, to perform an obligation for the latter's account to a certain third person, the recipient (the beneficiary), and authorizes the third person to accept performance in the third person's name. The Slovenian legislative provision corresponds to § 1400 Austrian ABGB, § 784 German BGB and Art. 468 Swiss Code of Obligations). The defendant claimed in his defense of set-off that there was an extra-contractual obligation (a delict) due to lack of performance of the Austrian agent that was caused by the Italian company.

One of the pleas in appeal was that Italian and in the alternative the Austrian substantive law should be applied for assessing the existence of the obligation to be set-off. The Court of Appeal dismissed such a plea. The Slovenian defendant alleged an allegedly mature and liquid non-contractual obligation to be set-off. The assessment of facts narrated by the Slovenian company i.e. the damages set-off due to non signature of an order given to the Austrian company shows that there is in essence a defense of breach of the claimant's obligation in accepting the performance based on the same facts as the claimant's claim to payment. The Appellate Court expressly avoided the characterization of the said breached obligation as contractual or as non-contractual. There was only a precisions that the facts underlying both the contractual obligation to perform a payment and the allegedly breached obligation are identical.

According to the Appellate Court in Ljubljana the court of first instance found that

there was an implied consent to apply the Slovenian law, neither party contested the application of Slovenian law in the first and also in the appellate instance. The law applicable to the obligation that was claimed in set – off is therefore Slovenian law. Even if such an obligation were non – contractual, Slovenian law would have to be applied under Art. 4(1) and (3) in connection with Art. 15 Regulation (EC) No 864/2007 (Rome II).

The ruling does not contain any explicit connecting factor. The issue is not Art. 17 Rome I Regulation (Regulation (EC) No 593/2008). One can assume that under Art. 1(1) CISG the applicable law is the CISG as Austria, Italy and Slovenia are contracting parties to the said UN convention. However, the interesting part is the reference to the implied consent to the application Slovenian substantive law. Under Art. 4(1)(a) Rome I Regulation (Regulation (EC) No 593/2008) "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence". This should prima facie be the Italian law, as the Italian company applied for payment after having performed the specific performance under the sales contract. However, not contesting the application of Slovenian substantive law in judicial proceedings in first and also in the appellate instance was then construed as "implied consent" to Slovenian substantive law (Art. 3(2) Regulation Rome I). Seen in pragmatic perspective, in order to avoid a uneasy modus vivendi or fine tuning of Art. 3 and 15 of the Regulation Rome II with Art. 17 Regulation Rome I the Slovenian Appellate Court preferred to refer to Slovenian law even if under conditions that do not easily fit in Art. 3(2) and 10 Rome I Regulation.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2018: Abstracts

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

B. Heiderhoff: **The new EU Regulations on Matrimonial Property Regimes and on the Property Consequences of Registered Partnerships**

The two new EU Regulations on matrimonial property regimes (2016/1103) and on property consequences of registered partnerships (2016/1104) will come into force on 29th January 2019. This contribution provides an introduction to the new acts and analyses their central provisions. Firstly, the material and personal scope of the Regulations are clarified. The author then considers the conflict of laws rules. Here, the Regulation is consistent with Rome III and the 2007 Hague Protocol in allowing a limited choice of law. It is highlighted that the habitual residence at the time of the marriage is of central importance, but that several issues will need further clarification. In particular, the exact time at which the habitual residence of the couple must be established under Article 26 para 1 needs to be fixed. Furthermore, the escape clause in Article 26 para 3 is described as being too narrow. It is then shown that the formal requirements for marriage contracts in Article 25 refer to the *lex causae* which may cause difficulty. Finally, the rules on jurisdiction are briefly described. The author ends with an overall positive assessment.

T. Koops: **Res judicata under the Brussels I Recast – Can the ruling in Gothaer Allgemeine Versicherung ./. Samskip GmbH be reconciled with the Brussels I Recast Regulation?**

In *Gothaer Allgemeine Versicherung ./. Samskip GmbH* the CJEU developed a European concept of res judicata, encompassing not only the operative part of the judgment, but also its *ratio decidendi*, based on the Brussels I Regulation. This article argues contrary to the CJEU, that today's European law of Civil Procedure cannot cope with a European concept of res judicata. Far from being a fully-fledged system of law it cannot furnish "its" concept of *res judicata* with a corresponding system of legal protection. An autonomous concept would sever the connection between the legal effect of a decision and the legal protection of the parties under national laws. Therefore, the effect of a decision, when recognized in another member state, should in principle be determined by the law of the state in which it was rendered. On the other hand, some of the provisions of what is now the Brussels I Recast do indeed require a uniform European concept of res judicata, albeit with a narrow scope. This leaves us with a European law of Civil Procedure under which the concept of res judicata should, but cannot be entirely based on national law.

P.F. Schlosser: **Agents acting on behalf of a corporate entity or debtors jointly and severally liable together with it personally bound by jurisdiction agreements in the contract?**

The opinion of the Court of Justice in its decision of June 26, 2017, case C-436/16, is correct and cannot be subject to any doubt. A jurisdiction agreement cannot by itself bind persons acting for the respective contract partner in the capacity of a managing director or holder of a power of attorney. The solution is corresponding to what is correct in the framework of arbitration. Persons acting on behalf of the respective contracting party may only be bound by an agreement relating to them specifically and meeting the form requirements of Art. II New York Convention of 1958 or Art. 25 Brussels Ibis Regulation, respectively.

R. Magnus: **The jurisdiction at the place of performance for the repayment of a loan**

This article comments on a recent decision of the Higher Regional Court in Hamm (Germany), in which the court ruled that for the repayment of a loan Art. 5 Nr. 1 lit. b Brussel I-Regulation conferred jurisdiction upon the courts at the seat of the lender or likewise the seat of the transferring credit institution. The Court decided that the decisive element that constitutes the place of performance in accordance with Art. 5 Nr. 1 lit. b Brussel I-Regulation is the location, where the lender initiated the transfer of the money to the borrower's bank account. This article discusses the implications of this decision, criticizes its reasoning and considers alternative foundations for the jurisdiction in the case at hand.

G. Schulze: **Attributability of a declaration of intent in cases of doubtful agency – triple relevance of the same fact (dreifach relevante Tatsache)**

The matter in question was whether a business woman's declaration of intent should be attributed to herself or to a Spanish joint-stock company (S.L.) which she was an agent of. This question was decisive for jurisdiction (jurisdiction clause, Art. 23, and special jurisdiction, Art. 5 Regulation (EC) No 44/2001) as well as the decision on the merits (payment of remuneration for work). Therefore, the ECJ's ruling in *Kolassa* applied (28.1.2015 C-375/13, IPRax 2016, 143) which allows accordingly to the *lex fori* different requirements for fact adjudication in "good arguable cases". Given the unional concept of res judicata in *Gothaer Versicherungs AG* (15.11.2012 C-456/11, IPRax 2014, 163) the ratio of this ruling

seems to be outdated, at least in cases within the Single Market.
In private international law the issue at stake is: Which law governs the consequences of a declaration of intent in cases of doubtful agency? Therefore, the German law applicable to contracts and the Spanish law applicable to companies should be considered. Multiple and indirect representation are both questions of substantive law of agency. Nevertheless, the issue should be characterized as a question of contract law: The heart of the problem is who should be a party to the contract. The recently enacted provision on the conflict of laws of agency does not contain any ruling on this problem (Art. 8 Introductory Act to the Civil Code). The Higher Regional Court held rightly that German contract law is applicable to the defendant's capacity to be sued and, *in casu*, this capacity was denied.

D. Martiny: **Jurisdiction and habitual residence in respect of a deceased cross-border commuter**

The case concerns a conflict of local jurisdiction between the Local Court of Pankow/Weißensee, where the succession-waiving daughter of the deceased had her domicile, and the Local Court of Wedding, in whose district the deceased had lived prior to relocating to Poland. The Berlin Court of Appeal (Kammergericht) rules that the deceased still had his habitual residence in Germany despite the fact that he lived in a flat in a rented storage depot in Poland. The court identifies the criteria relevant to the determination, particularly his activities as a "cross-border commuter" in and out of Germany and his not having integrated in Poland. The international competence and local jurisdiction of the Local Court of Pankow/Weißensee for the declaration of a waiver of succession is based on Art. 13 European Succession Regulation in conjunction with § 31 International Succession Proceedings Act (Internationales Erbrechtsverfahrensgesetz; IntErbRVG), independent of Art. 4 European Succession Regulation. Local jurisdiction of the Local Court of Wedding for protective measures can be based on the former habitual residence of the deceased in this district (§ 343 para. 2 Family Proceedings Act – *Familienverfahrensgesetz*; FamFG).

B. Haidmayer: **Parallel divorce proceedings in Germany and Switzerland**

The judgment deals with the issue of *lis alibi pendens* of parallel crossborder divorce proceedings. Under European Union law and domestic law, the first-in-time rule determines the precedence of a proceeding. The moment defining *lis*

alibi pendens is decisive for the priority rule; however, in this regard the two coordination systems of the supranational and the domestic jurisdiction diverge. This contribution analyses the approach taken by the court and particularly examines whether the Brussels IIbis Regulation contains any requirements for parallel divorce proceedings in non-member states.

H. Roth: **Vollstreckungsbefehle kroatischer Notare und der Begriff „Gericht" in der EuGVVO und der EuVTVO**

The two important decisions of the ECJ deserve approval. A Croatian notary, acting on the foundation of a "credible deed" by issuing a writ of execution is not a "court" within the meaning of the Brussels Ia Reg. Furthermore, a proceeding concerned with the enforcement of a judgment falls as a "civil matter" within the scope of Art. 1 (1) Brussels Ia Reg., even if a parking fee is charged for a public parking lot, which belongs to the property of the municipality.

K. Siehr: **Greek Reduction of Salaries and Employment Contracts Governed by German Law**

In some German cities there are Greek schools in which teachers teach the Modern Greek language. These teachers are employed by the Greek government which pays the teachers in Germany, accepts German law as the law governing the labour contracts and agrees to German jurisdiction. In 2009, Greece started to reduce the salaries of teachers and applied this legislation also to teachers in Germany. Some of these teachers sued the Greek Republic in Germany and asked for full payment without the reduction provided in recent legislation. The Federal Labour Court asked the European Court of Justice for a preliminary ruling on Art. 9 Rome I Regulation. The ECJ decided in the case of *Greece v. Nikiforidis* on 18/10/2016 that foreign overriding mandatory rules, except those of the country of performance (Art. 9 no. 3 Rome I Regulation), cannot be applied directly but may be indirectly taken into account by the substantive law governing the contract. The German Federal Labour Court on 26/4/2017 decided the payment claim of *Grigorios Nikiforidis* in his favour and declined to recognize Greek legislation of reduction of salaries directly and also decided that under German law no employee is obliged to accept a reduction of his salary without a new contract stipulated between the parties.

J. von Hein/B. Brunk: **Shall we let her go? Legal conditions for the cross-**

border movement of companies

The ECJ cases *Cartesio* (C-210/06) and *Vale* (C-378/10) established guidelines for cross-border changes of legal form within the EU. Subsequently, the German Higher Regional Courts Nuremberg and Berlin were confronted with the issue of cross-border movement of companies from other Member States to Germany. Conversely, the OLG Frankfurt judgment concerns the outward migration of a German company for the first time. The company's decision to transfer its statutory seat to Italy was refused to be registered by the German authorities for reasons of noncompliance with German transformation laws. The OLG Frankfurt allowed the company's appeal against this refusal arguing that it violated the company's freedom of establishment (Art. 49, 54 TFEU). The following article discusses the OLG Frankfurt judgment against the background of the ECJ Cases *Cartesio* and *Vale* while examining the premises posed by private international law and substantive law.

F. Heindler: **International Jurisdiction over Claims of Shareholders relating to the Dieselgate-Scandal**

The annotated judgement focuses on the international jurisdiction of Austrian courts for damage claims brought against *Volkswagen* in the aftermath of the Dieselgate scandal. *Volkswagen*, by cheating pollution emissions tests, allegedly was in breach of applicable ad-hoc announcement requirements and caused damages to shareholders situated in Austria. The Austrian Surpreme Court in Civil and Criminal Matters (*Oberster Gerichtshof*), however, referring inter alia to the place where the harmful event occurred, rejected jurisdiction of Austrian courts under the Brussels Ibis Regulation.

F. Koechel/B. Woldkiewicz: **Submission by appearance in European Procedural Law and lex fori**

Jurisdiction under Art. 26 of the Brussels Ibis Regulation is based on the defendant's entering of appearance – a procedural act under domestic law. Art. 26 of the Brussels Ibis Regulation and the *lex fori* are therefore closely interlinked. In a recent judgment, the Polish Supreme Court (*Sa¸d Najwyz?szy*, 3.2017 – II CSK 254/16) ruled on the interplay of Art. 26 of the Brussels Ibis Regulation and the national rules governing the status of a party and the legal capacity of a defendant. One can only enter an appearance within the meaning of

Art. 26 of the Brussels Ibis Regulation, if they are considered as the defendant under domestic law. The question arises, whether the defendant enters an appearance according to Art. 26 of the Brussels Ibis Regulation by submitting factual or legal allegations in writing with regard to his status as a party and his legal capacity. Contrary to the European Court of Justice's caselaw, the notion of the entering of an appearance should be interpreted autonomously, without unnecessary recourse to the law of the forum State. Generally, written submissions by the defendant on his status as a party to the proceedings and his legal capacity are to be considered as an entering of an appearance within the meaning of Art. 26 of the Brussels Ibis Regulation. Nevertheless, the determination of whether the defendant, in making such submissions implicitly contests the court's jurisdiction is one that needs to be examined carefully in each single case. The defendant is deemed to implicitly contest jurisdiction according to Art. 26 of the Brussels Ibis Regulation if, from the defendant's allegations it is objectively apparent for the court and the claimant that the defendant invokes the lack of jurisdiction.

Now Available in the 7th Edition: The „Münchener Kommentar" on European and German Private International Law

It has not yet been mentioned on this blog that the Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vols. 11 and 12, is now available in its seventh edition (2018). This work is a standard treatise not only on German private international law, but on European PIL as well.

The new edition contains detailed commentaries on the Rome I, II and III

Regulations (by Abbo Junker, Munich; Dieter Martiny, Hamburg/Frankfurt [Oder], Ulrich Spellenberg, Bayreuth, Peter Winkler von Mohrenfels, Rostock), the Hague Protocol on Maintenance (Ansgar Staudinger, Bielefeld) and the European Succession Regulation (Anatol Dutta, Munich). It also contains an introduction to the new EU Regulations on Matrimonial Property and Registered Partnerships (by Dirk Looschelders, Düsseldorf). The relevant Hague Conventions on the Protection of Children and Adults are commented on as well (by Bettina Heiderhoff, Münster, Ansgar Staudinger, Bielefeld and Volker Lipp, Göttingen). The seventh edition is the second one prepared by Jan von Hein (Freiburg/Germany) as volume editor, who has updated the commentary on the general principles of European and German PIL.

From reviews of the 6th edition (2015):

„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 here.