Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2009)

Recently, the May/June issue of the German legal journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Peter Kindler***: "Internationales Gesellschaftsrecht 2009: MoMiG, Trabrennbahn, Cartesio und die Folgen" – the English abstract reads as follows:

The article summarizes, in a European as well as in a German perspective, the recent developments for corporations in private international law in 2008. In German legislation, the law aiming at the modernization of the private company limited by shares ("MoMiG") has abandoned the requirement for German companies of having a real seat in Germany, introducing at the same time stricter disclosure requirements in respect of branches of foreign companies in Germany. The German Federal Court, in a ruling of October 2008 ("Trabrennbahn"), has applied the real seat doctrine to companies incorporated outside the EU – in this case in Switzerland –, thus confirming the traditional approach of German courts since the 19th century. Finally, in a European perspective, the article addresses the judgment of the EJC in case C-210/06 ("Cartesio") referring to the extent of freedom of establishment in case of transfer of a company seat to a EU Member State other than the EU Member State of incorporation. The article concludes with the statement, inter alia, that EU Member States are free to use the real seat as a connecting factor in private international company law.

- ***Marc-Philippe Weller:*** "Die Rechtsquellendogmatik des Gesellschaftskollisionsrechts" – the English abstract reads as follows:

This article deals with the International Company Law in the aftermath of the judgments "Cartesio" from the ECJ and "Trabrennbahn" from the German Federal Court of Justice. There are three different sources of International Company Law. The sources have to be applied in the specific order of precedence stated by Art. 3 EGBGB:

(1.) The European International Company Law is based on the freedom of establishment according to Art. 43, 48 EC. The freedom of establishment contains a hidden conflict of law rule known as "Incorporation Theory" for companies that relocate their real seat in another EC-member state.

(2.) As part of Public International Company Law the "Incorporation Theory" is derived from various international treaties such as the German-US-American-Friendship-Agreement.

(3.) The German Autonomous International Company Law follows the "Real Seat Theory" when it is applied in cases with third state companies (e.g. Swiss companies). Therefore, substantive German Company Law is applicable to third state companies with an inland real seat. According to the so called "Wechselbalgtheorie" (Goette), foreign corporations are converted into domestic partnerships.

The German jurisdiction is bound to the German Autonomous International Company Law (i.e. the real seat theory) to the extent of which the European and the Public International Company Law is not applicable.

- ***Alexander Schall:*** "Die neue englische floating charge im Internationalen Privat- und Verfahrensrechts" – the English abstract reads as follows:

After Inspire Art, thousands of English letter box companies have come to Germany. But may they also bring in their domestic security, the qualified floating charge? The answer depends on the classification of the floating charge under the German conflict laws. Since German law does not acknowledge global securities on undertakings, the traditional approach was to split up the floating charge and to subject its various effects (e.g. security over assets, the right to appoint a receiver/administrator) to the respective conflict rules. That meant in

particular that property in Germany could not be covered by a floating charge (lex rei sitae). This treatment seems overly complicated and not up to the needs of an efficient internal market. The better approach is to understand the floating charge as a company law tool, a kind of universal assignment. This allows valid floating charges on the assets of UK companies based in Germany. And while the new right to appoint an administrator under the Enterprise Act 2002 is part of English insolvency law, the article shows that this does not preclude the traditional right to appoint a (contractual or – rather – administrative) receiver for an English company with a CoMI in Germany.

- ***Stefan Perner:*** "Das internationale Versicherungsvertragsrecht nach Rom I" – the English abstract reads as follows:

Unlike its predecessor – the Rome Convention –, the recently adopted Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) covers the entire insurance contract law. The following article outlines the new legal framework.

- ***Jens Rogler:*** "Die Entscheidung des BVerfG vom 24.1.2007 zur Zustellung einer US-amerikanischen Klage auf Strafschadensersatz: – Ist das Ende des transatlantischen Justizkonflikts erreicht?"
  This article deals with the service of actions for punitive damages under the Hague Service Convention. The author refers first to a decision of the Higher Regional Court Koblenz of 27.06.2005: In this case, the German defendant should be ordered to pay treble damages in a class action based on the Sherman Act. Here, the Regional Court held that the Hague Service Convention was not applicable since the case did not constitute a civil or commercial matter in terms of Art. 1 (1) Hague Service Convention. The author, however, argues in favour of an autonomous interpretation of the term "civil or commercial matter" according to which class actions directed at punitive/treble damages can be regarded as civil matters in terms of Art. 1 Hague Service Convention.Further, the author turns to Art. 13 Hague Service Convention according to which the State addressed may refuse to comply with a request for service if it deems that complicance would infringe its sovereignty or security. There have been several decisions dealing with the applicability of Art. 13

Hague Service Convention with regard to class actions aiming at punitive/treble damages. Those decisions discussed in particular whether Art. 13 corresponds to public policy. In this respect, most courts held that Art. 13 has to be interpreted more narrowly than the public policy clause. In this context, the author refers in particular to a decision of the German Federal Constitutional Court of 24 January 2007 (2 BvR 1133/04): In this decision, the Constitutional Court has held that the mere possibility of an imposition of punitive damages does not violate indispensable constitutional principles. According to the court, the service may be irreconcilable with fundamental principles of a constitutional state in case of punitive damages threatening the economic existence of the defendant or in case of class actions *if* – i.e. only then – those claims deem to be a manifest abuse of right. Thus, as the author shows, the Constitutional Court agrees with a restrictive interpretation of Art. 13 Hague Service Convention.

- ***Christian Heinze*:** "Der europäische Deliktsgerichtsstand bei Lauterkeitsverstößen"
  The article examines the impact of the new choice of law rule on unfair competition and acts restricting free competition (Art. 6 Rome II Regulation) on Art. 5 No. 3 Brussels I Regulation: The author argues that it should be adhered to the principle of ubiquity according to which the claimant has a choice between the courts at the place where the damage occurred and the courts of the place of the event giving rise to it. In view of Art. 6 Rome II Regulation he suggests, however, to locate the place where the damage occurred with regard to Art. 5 No. 3 Brussels I Regulation in case of obligations arising out of an act of unfair competition at the place where the competitive relations are impaired or where the collective interests of consumers are affected – if the respective measure had intended effects there. In case an act of unfair competition affects exclusively the interests of a specific competitor, the place should be determined where the damaging effects occur, which is usually the place where the affected establishment has its seat. With regard to the determination of the place of the event giving rise to the damage, the author suggests to apply a centralised concept according to which the place of the event giving rise to the damage is, as a rule, the place where the infringing party has its seat.

- ***Peter Mankowski:*** "Neues zum 'Ausrichten' unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO" – the English abstract reads as follows:

"Targeted activity" in Art. 15 (1) lit. c Brussels I Regulation and in Art. 6 (1) lit. b Rome I Regulation aims at extending consumer protection. Accordingly, it at least comprises the ground which was already covered by "advertising" under Arts. 13 (1) pt. 3 lit. a Brussels Convention; 5 (2) 1st indent Rome Convention. "Targeted activity" is a technologically neutral criterion. Any distinction between active of passive websites has to be opposed for the purposes of international consumer protection since it would fit ill with the paramount importance of the commercial goal pursued by the marketer's activities. Any kind of more or less unreflected import of concepts from the United States should be denied in particular. Any switch in the mode of communication does not play a significant role, either.

Activities by other persons ought to be deemed to be the marketer's activities insofar as he has ordered or enticed such activities. In principle, registration in lists for mere communication purposes do not fall within this category. If only part of the overall programme of an enterprise is advertised "targeted activity" does not exclude contracts for other parts of that programme if and insofar as such advertising has prompted the consumer to get into contact with the professional.

- ***Dirk Looschelders:*** "Begrenzung des ordre public durch den Willen des Erblassers" – the English abstract reads as follows:

When applying the Islamic law of succession, in many cases conflicts occur with the fundamental principles of German law, especially with the German fundamental rights. In particular problems arise in view of the Islamic rule that the right of succession is excluded when the potential heir and the deceased belong to different religions. The Higher Regional Court of Berlin ascertains that such a rule is basically inconsistent with the German "ordre public", regulated in Article 6 EGBGB. In this particular case, however, the court refused the recourse to Article 6 EGBGB, because the consequence of the application of the Egypt law and the will of the deceased – the exclusion of the illegitimate son of Christian faith from the succession – comply with each other. In the present case, this

conclusion is strengthened by the fact that the deceased has manifested his will in a holographic will, which is effective under German law. Nevertheless, with regard to the testamentary freedom (Art. 14 Abs. 1 S. 1 GG), the same conclusion would be necessary, if a corresponding will of the deceased could be discovered in any other way. Insofar, the "ordre public" is limited by the will of the deceased.

- ***Boris Kasolowsky/Magdalene Steup:*** "Ordre-public-Widrigkeit kartellrechtlicher Schiedssprüche – der flagrante, effective et concrète -Test der französischen Cour de cassation" – the English abstract reads as follows:

The Cour de Cassation decision in SNF v. Cytec is the first case in which a final appeal court of an EU Member State dealt with the enforcement of an arbitration award allegedly in breach of EC competition law. On the basis of the breach of EC competition law, one of the parties argued that the enforcement of the award would – pursuant to Eco Swiss – be contrary to public policy within the meaning of Article V. 2 (b) of the New York Convention.

The Cour de Cassation considered in particular the intensity of the courts' review when dealing with a party resisting enforcement of an award for being contrary to competition law and public policy. In its decision it reconfirmed the view of the Cour d'appel that the review out to be rather limited.

The article suggests by reference to the Cour de Cassation in SNF v Cytec, but also to the decisions rendered in other jurisdictions, that (i) a rather limited standard level of review of arbitration awards for breach of EC competition law giving rise to a breach of public policy is being developed and (ii) only the most obvious breaches may result in a challenge succeeding or enforcement being refused. Consequently, there should (increasingly) be a level playing field within Europe. Further, given the rather limited review – which is now becoming accepted – there should in most cases also be no significant additional risks in enforcing arbitration awards in EU Member State jurisdictions rather than in non-EU Member State jurisdictions.

- ***Sebastian Mock:*** "Spruchverfahren im europäischen Zivilverfahrensrecht" – the English abstract reads as follows:

Austrian and German corporate law provide a special proceeding for minority shareholders to review the appraisal granted by the majority shareholder on certain occasions (Spruchverfahren). This proceeding stands separate from

other proceedings regarding the squeeze out of the minority shareholders and does not legally affect the validity of the decision. In contrast to Austrian and German civil procedure law the application of the Brussels regulation does not generally lead to jurisdiction of the court of the state where the seat of the company is located. Neither the rule on exclusive jurisdiction of Art. 22 no. 2 Brussels regulation nor the rules on special jurisdiction of Art. 5 no. 5 Brussels regulation apply for the Spruchverfahren. As the consequence the international jurisdiction under the Brussels regulation is only determined by the domicile respectively the seat of the defendant in the procedure (Art. 2 Brussels regulation). However, a corporation can ensure the concentration of all proceedings in the Member state of their seat by implementing a prorogation of jurisdiction according to Art. 23 Brussels regulation in their corporate charter.

- ***Arno Wohlgemuth**:* "Internationales Erbrecht Turkmenistans" – the English abstract reads as follows:

The law governing intestate and testamentary succession in Turkmenistan is dispersed in different bodies of law such as the Turkmenistan Civil Code of 1998, the rules surviving as ratio scripta of the abrogated Civil Code of the Turkmen SSR of 1963, the Law on Public Notary of 1999, and the Minsk CIS Convention on legal assistance and legal relations in civil, family and criminal matters of 1993, as amended. Whereas in principle movables are distributed as provided by the law in force at the place where the decedent was domiciled at the time of his death, immovable property will pass in accordance with the law prevailing at the place where it is located.

- ***Christian Kohler*** on the meeting of the European Group for Private International Law (EGPIL) in Bergen on 19-21 September 2008: "Erstreckung der europäischen Zuständigkeitsordnung auf drittstaatsverknüpfte Streitigkeiten – Tagung der Europäischen Gruppe für Internationales Privatrecht in Bergen"

  The consultation's focus was on the proposed amendments of Regulation 44/2001 in order to apply it to external situations. The introduction of this proposal – which can be found (besides in this issue of the IPRax) also at the EGPIL's website – reads as follows:

At its meeting in Bergen, on 19-21 September 2008, the European Group for Private International Law, giving effect to the conclusions of its meeting in

Hamburg in 2007, which took into account the growth of the external powers of the Union in civil and commercial matters, considered the question of enlarging the scope of Regulation 44/2001 ("Brussels I") to cover cases having links to third countries, cases to which the common rules on jurisdiction do not apply. On this basis, it proposes, as its initial suggestion, and as one possibility among others, the amendment of the Regulation for the purpose of applying its rules of jurisdiction to all external situations. These proposals are without prejudice to the examination of other possible solutions – in particular, conventions adopted by the Hague Conference on Private International Law – or a similar analysis of other instruments, such as Regulation 2201/2003 ("Brussels II bis") or the new Lugano Convention of 30 October 2007. Other questions still remain to be considered – in particular the adaptation of Article 6 of Brussels I and the extension of Brussels I to cover the recognition and enforcement of judgments given in a third country.

- ***Erik Jayme/Michael Nehmer*** on a symposium hosted by the Law Faculty of the University of Salerno on the international aspects of intellectual property: "Urheberrecht und Kulturgüterschutz im Internationalen Privat- und Verfahrensrecht – Studientag an der Universität Salerno"