Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2010)

Recently, the November/December issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

Here is the contents:

- ***Anne Röthel/Evelyn Woitge***: "Das Kollisionsrecht der Vorsorgevollmacht" – the English abstract reads as follows:

Various European national laws have recently implemented powers of representation granted by an adult to be exercised when he or she is not in a position to protect his or her interests. The authors show the existence and scope of these powers of representation within Europe and identify the need for conflict norms for this legal institution. Based on an analysis of the respective rules in the Hague Convention on the international protection of adults, the authors highlight the need to find a national solution that acknowledges the special interests of incapable adults. They suggest a regulation for powers of representation in autonomous international private law that adapts the concept of the Hague Convention.

- ***Stefanie Sendmeyer***: "Die Rückabwicklung nichtiger Verträge im Spannungsfeld zwischen Rom II-VO und Internationalem Vertragsrecht" – the English abstract reads as follows:

In private international law, it is highly disputed whether the law applicable to claims aiming to reverse enrichment in

case of a void contract is determined by Art. 10 (1) lit. e) Rome II Regulation or by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome I Regulation respectively. After a short analysis of the current state of discussion, it is shown that the argument emanates from the erroneous assumption that the question of restitution in such cases is a matter of unjust enrichment according to Art. 10 Rome II Regulation as well as a topic of private international law concerning contractual obligations. In fact, the question has to be solved by clearly differentiating between contractual and non-contractual obligations and, therefore, between the scope of the Rome II Regulation and the scope of the instruments of private international law dealing with contractual obligations. In consistence with European international procedural law, restitution in case of a void contract is considered a contractual obligation and, therefore, the applicable law is determined by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome II Regulation respectively.

- ***Anatol Dutta:*** "Grenzüberschreitende Forderungsdurchsetzung in Europa: Konvergenzen der Beitreibungssysteme in Zivil- und Verwaltungssachen?" (on ECJ, 14.1.2010 – C-233/08 – Milan Kyrian ./. Celní úrad Tabor) **–** the English abstract reads as follows:

The dogma that claims of the State based on its penal, revenue or other public law are not enforceable abroad – a doctrine also known as the revenue rule – is more and more displaced by European instruments obliging the Member States to collect public law claims of their fellow Member States. One example for this development is the Tax Recovery Directive 76/308/EC (later: 2008/55/EC, now: 2010/24/EU) on the mutual assistance for the recovery of claims relating to taxes, duties and other measures – an instrument, which has been gradually extended to all taxes levied by the Member States. The present article, which discusses a recent

decision of the European Court of Justice interpreting the Tax Recovery Directive, attempts to highlight some similarities between the European enforcement rules for public law claims and those for private law claims. These similarities do not only allow fertilisation across the public-private law border when applying and interpreting the different enforcement rules, but once more demonstrate that the revenue rule should be reconsidered.

- ***Sebastian Mock:*** "Internationale Streitgenossenzuständigkeit" – the English abstract reads as follows:

The international jurisdiction for claims against several defendants at the domicile of one of the defendants as today established by Art. 6 No. 1 Brussels I Regulation is unknown in several member states and consequently causes general doubts due to the existing possibilities of manipulation in this context. Although the European Court of Justice reflected these doubts by establishing the additional need of the risk of irreconcilable judgments resulting from separate proceedings in the application of Art. 6 No. 1 Brussels Convention and Art. 6 No. 1 Lugano Convention – which was later recognized by the European legislator in the drafting of Art. 6 No. 1 Brussels I Regulation – the determination of this additional requirement is still left unclear. In its recent decision the German Federal Court of Justice delivered a rather broad understanding of this requirement. The court held that the jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation does not require that all defendants have to be sued at the same time. Moreover the court held that the violation of a duty of a member of the board of directors is sufficient to establish a jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation for a claim against the member of the board of directors when the plaintiff already filed a claim against the company of the director. However, the author

doubts that this ruling can be considered as a general principle in the application of Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation and shows that the ruling has to be seen in context with a special provision of the applicable Swiss corporate law.

- ***Martin Schaper:*** "Internationale Zuständigkeit nach Art. 22 Nr. 2 EuGVVO und Schiedsfähigkeit von Beschlussmängelstreitigkeiten – Implikationen für den europäischen Wettbewerb der Gesellschaftsrechte" – the English abstract reads as follows:

Art. 22 (2) Brussels I Regulation establishes an exclusive jurisdiction of a Member State's court for proceedings which have as their object, among others, the nullity or the dissolution of companies and the validity of the decisions of their organs. This jurisdiction depends on where the company's seat is located. For determining this seat the court has to apply its rules of International Private Law (lex fori). Although Germany generally adheres to the real seat theory, the OLG Frankfurt a.M. (Higher Regional Court) decided that a private limited company's statutory seat is the relevant factor for determining the exclusive jurisdiction.

Since the freedom of establishment, as interpreted by the Court of Justice of the European Union, promoted corporate mobility there is an increasing demand for settling disputes not in the state of incorporation, but in the country where the major business operations take place. Therefore, the article examines the possibility of arbitration proceedings on the nullity and avoidance of decisions taken by shareholders' meetings in an international context.

Finally, based on the experience with the state competition for corporate charters in the USA, the impact of a

jurisdiction's courts and the admissibility of arbitration proceedings is analysed within the context of regulatory competition in company law in Europe.

- ***Veronika Gärtner:*** "Internationale Zuständigkeit deutscher Gerichte bei isoliertem Versorgungsausgleichsverfahren" – the English abstract reads as follows:

Until recently, German law did not know an explicit rule on international jurisdiction with regard to proceedings dealing with the adjustment of pension rights between divorced spouses. The Federal Court of Justice held in several judgments that international jurisdiction with regard to the adjustment of pension rights followed – also in cases where those proceedings are initiated independently from divorce proceedings – the rules of international jurisdiction with regard to the divorce proceedings due to the strong link between both issues.

With reference to this case law, the Regional Court of Karlsruhe held in its decision of 17 August 2009 (16 UF 99/09) that German courts lacked international jurisdiction with regard to (independent) proceedings on the adjustment of domestic pension rights between two Portuguese divorced spouses habitually resident in Portugal, based on the argumentation that Art. 3 Brussels II bis Regulation had to be applied analogously with regard to the question of international jurisdiction. Due to the fact that the requirements of this provision were not met, German courts were – according to the Higher Regional Court Karlsruhe – not competent to rule on the adjustment of the (German) pension rights.

This result is undoubtedly incorrect under the present legal situation: With effect of 1 September 2009 – in the course of a general revision of the procedural rules in family law and

non-contentious cases – a new rule has been introduced stating explicitly that German courts have international jurisdiction with regard to proceedings on the adjustment of pension rights inter alia in cases concerning domestic (pension) rights (§ 102 Nr. 2 FamFG).

However, the author argues that also before the entry into force of this new rule, the Regional Court of Karlsruhe should have answered the question of international jurisdiction in the affirmative: First, it is argued that the court's reference to Art. 3 Brussels II bis Regulation was misplaced since – as Recital No. 8 of the Brussels II bis Regulation illustrates – "ancillary measures" – and therefore also proceedings on the adjustment of pension rights of divorced spouses – are not included into the scope of application of Brussels II bis.

Further, the author argues that the negation of international jurisdiction in cases concerning domestic (pension) rights leads to a denial of justice. Therefore it is argued that international jurisdiction could – and should – have been assumed on the basis of general principles of jurisdiction.

- ***Gerhard Hohloch/ Ilka Klöckner:*** "Versorgungsausgleich mit Auslandsberührung – vom alten zum neuen Recht – Korrektur eines Irrwegs" – the English abstract reads as follows:

On the 11th of February 2009, the Federal Supreme Court of Justice has had its first opportunity to decide whether or not the Dutch provisions on pension rights adjustment were to be regarded as equivalent to the German "Versorgungsausgleich" (VA) in the matter of Art. 17 III 1 EGBGB. Though until then this was generally accepted, the Court decided to deviate from the established opinion. In the course of the 2009 Reform, Art. 17 III EGBGB was revised and significantly restricted regarding its field of application.

According to this new regulation, German law must now be applicable in order for the plaintiff to successfully be able to claim an adjustment of pension rights in Germany. Starting off with a critical examination of the Supreme Court's decisions, the authors then point out the impact of the Court's adjudication on the interpretation and the application of the new Art. 17 III EGBGB.

- ***Pippa Rogerson*:** Forum Shopping and Brussels II bis (on: High Court of Justice, 19.4.2010 – [2010] EWHC 843 (Fam) – JKN v JCN)

Sometimes real life cases focus academic attention on important issues of principle. In JKN v JCN a husband and wife from New York had been living in London for 12 years and had four young children together. Then they returned to New York where they are all now residing for the foreseeable future. The marriage has broken down and a divorce, financial settlement and arrangements for the children are required. Which court should deal with these matters? The wife commenced proceedings in England under Brussels II bis and the husband in New York. The parties had both UK and US citizenship and the husband at that time was still resident in England. Both parties were pursuing proceedings in a court which provided that party with some advantages. Ideally, the parties should come to a settlement without needing the court's determination. If not, preferably a single court should adjudicate matters. This is achieved within the EU by the lis pendens rule in Brussels II bis. However, there is no similar regime operating with non-Member States. A proliferation of judgments over the same matter is wasteful of the parties' time and assets as well as of the courts' resources. It also leads to problems of enforcement of possibly irreconcilable judgments.

- **Axel Kunze/ Dirk Otto:** "Internationale

Zwangsvollstreckungszuständigkeit, rechtliche Grenzen und Gegenmaßnahmen" (on: New York Court of Appeals, Opinion v. 4.6.2009) – the English abstract reads as follows:

A New York Court recently ruled that courts in New York have international competence to order the cross-border attachment of rights and securities held by a foreign party with a foreign bank abroad as long as the foreign bank carries out business in the state of New York. This decision potentially exposes foreign banks operating in New York state to attachment disputes. The article describes the impact of the decision and compares it with the legal situation in Germany and other EU countries. The authors come to the conclusion that under German law, EU law as well as under the Lugano Convention a court may not order the attachment of claims located in other countries. In order to limit the risk for banks from being caught in the middle, the authors suggest contractual arrangements that would enable banks to "vouch in" customers into disputes before U.S. courts to ensure that banks are not liable if they comply with U.S. rulings. On the other hand customers could initiate legal steps in their home jurisdiction to prevent a bank from transferring assets/securities abroad; such an injunction would also be recognized by U.S. courts.

- ***Bartosz Sujecki***: "Zur Anerkennung und Vollstreckung von deutschen Kostenfestsetzungsbeschlüssen für einstweilige Verfügungen in den Niederlanden" – the English abstract reads as follows:

The Dutch Supreme Court (Hoge Raad) had to give an answer to the question whether a German decision on the amount of cost (Kostenfestsetzungsbeschluss) related to an interim injunction (einstweilige Verfügung) can be recognized and enforced in the Netherlands. Since the German interim injunction was given in an ex parte procedure and the cost

decision was not contested by the defendant, the question arose whether such an uncontested decision can be qualified as a "decision" according to article 32 of the Brussels I Regulation and can be enforced in the Netherlands. This paper discusses and analyzes the decision of the Dutch Supreme Court.

- ***Gerhard Hohloch:*** "Feststellungsentscheidungen im Eltern-Kind-Verhältnis – Zur Anwendbarkeit von MSA, KSÜ und EuEheVO" – the English abstract reads as follows:

The article discusses the Austrian Supreme Court's order issued on May 8th 2008, concerning the applicability of the 1961 Hague Convention "[…] on the protection of minors" on declaratory actions in statutory custody cases. It refers to the international jurisdiction rules (including "Regulation Brussels IIa") as well as to the conflict of law rules. As the significance of the Court's assessment extends beyond the Austrian-German border, the main emphasis is put on how the problems of the case at issue are to be treated in Germany, and furthermore on the impact the 1996 Hague Convention "[…] on the protection of Children" – which is expected to come into force soon – will have on the legal situation in Germany and in Austria.

- ***Oliver L. Knöfel:*** "Nordische Zeugnispflicht – Grenzüberschreitende Zivilrechtshilfe à la scandinave" – the English abstract reads as follows:

The article gives an overview of the mechanisms of judicial assistance in the taking of evidence abroad in civil matters as maintained by the five Nordic Countries (Denmark, Finland, Iceland, Norway, Sweden). In Central and Western Europe, it is little-known that the Nordic Countries have, since the 1970s, erected an autochthonous system of judicial assistance differing quite significantly from the long-standing habits of taking evidence abroad as established by the Hague

Conference or recently by the European Union. According to specific reciprocal legislation, Nordic residents are obliged to appear before the courts of any Nordic country, and to give evidence. Thus, there is hardly any need to have a foreign Nordic witness examined by her home court according to a letter rogatory, or to take evidence directly on foreign soil. The article aims at exploring this extraordinary mode of international judicial co-operation with special reference to Swedish procedural law. It is shown that the Nordic mechanism is a product of a very high level of convergence in the field of civil procedure, and that this is due to a common core of Nordic legal cultures.

- ***Reinhard Giesen*** on a decision of the Norwegian Supreme Court on the applicable law with regard to defamation: "Das Recht auf freie Meinungsäußerung und der Schutz der persönlichen Ehre im Kontext unterschiedlicher Kulturen" (on: Norges Høyesterett, 2.12.2009 – HR-2009-2266-A)
- ***Kurt Siehr*** on the Austrian Supreme Court's decision of 18 September 2009 dealing with the question of the applicability of Brussels II bis with regard to the return of abducted children – in particular in cases where the child is over 16 years old : "Zum persönlichen Anwendungsbereich des Haager Kindesentführungsübereinkommens von 1980 und der EuEheVO "Kind" oder "Nicht-Kind" – das ist hier die Frage!" (on: Austrian Supreme Court, 18.9.2009 – 6 Ob 181/09z)
- ***Erik Jayme*** on the inaugural lecture held by Professor Martin Gebauer in Tübingen on 16 July 2010