Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2011)

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

Here is the contents:

- ***Jürgen Basedow***: "Das Staatsangehörigkeitsprinzip in der Europäischen Union" – the English abstract reads as follows:

In continental countries, citizenship has traditionally played an important role as a connecting factor in the private international law relating to personal status. The article outlines the gradual emergence of this connecting factor throughout the 150 years of rising nationalism up to World War II and explores its remaining significance in the framework of European integration, with a par- ticular view to the prohibition of discrimination on grounds of nationality under article 18 TFEU. Against the background of the historical purpose of that provi- sion, the author advocates an anti-protectionist reading of that article which does not categorically prohibit the use of citizenship as a connecting factor, but only a discrimination of foreigners on the sole ground of their foreign citizenship. This interpretation is underpinned by a detailed inquiry into the case law of the Euro- pean Court of Justice on article 18 and into the secondary law of the European Union. This approach leads to detailed conclusions with regard to the use of nationality in the areas of jurisdiction, choice of law rules and recognition.

- ***Ivo Bach****:* "Zurück in die Zukunft – die dogmatische Einordnung der Rechtsscheinvollmacht im gemeineuropäischen IPR" – the English abstract reads as follows:

Under most legal systems, a principal may be bound by a contract that his agent has concluded even if the agent lacked the actual authority to do so. As long as the principal's conduct creates the reasonable impression that he

authorized his agent to conduct the transaction, the law protects the third party. Under German law, such a "reasonable impression" is presumed in particular when (a) the principal has knowledge of the agent's behavior yet does not intervene ("Duldungs- vollmacht"), or when (b) the principal could (and should) have knowledge that would allow him to intervene ("Anscheinsvollmacht").

European conflict-of-laws rules raise the question of whether the prin- cipal's liability under the agent's apparent authority should be classified as a contractual or a non-contractual obligation – i.e. whether Rome I or Rome II determines the applicable law. In light of the ECJ's criteria for dis- tinguishing contractual from non-contractual obligations, this paper concludes that both of the above-mentioned apparent authority scenarios of German law must be classified as non-contractual obligations, thus placing them within the scope of Rome II.

This result generates a difficult follow-up question: is apparent authority a case of culpa in contrahendo (Art. 12 Rome II) or should it be governed by Rome II's general rule on torts/delicts (Art. 4)? This paper tends towards an application of Art. 12 Rome II.

- ***Marianne Micha:*** "Der Klägergerichtsstand des Geschädigten bei versicherungsrechtlichen Direktklagen in der Revision der EuGVVO" – the English abstract reads as follows:

The Commission of the EC presented a Report together with a Green Paper on the review of Regulation 44/2001 on jurisdiction in civil and commercial matters. The present article examines the needs for review with a view to a recent decision of the ECJ (FTBO ./. Jack Odenbreit), in which it granted the person injured in a car accident a forum in the Member State of his domicile, although the accident took place in another Member State where the insured tortfeasor was domiciled and had taken out motor liability insurance for his car. On the whole, the present legal situation is satisfying. Concerning third State situations, the injured person should be granted a forum at his domicile, if the accident took place within the EU although the insurer is not domiciled in a Member State. Choice of court agreements do not bind the injured person if they are to his detriment.

- ***Burkhard Hess****:* "Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts" – the English abstract reads as follows:

On December 14, 2010, the European Commission presented its highly anticipated proposal for the reform of the Brussels I Regulation. KOM (2010) 748 endg. vom 14.12.2010, der Text ist verfügbar unter: http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf. Im folgenden Beitrag werden die Vorschläge als EuGVVO-E bezeichnet. This proposal marks the beginning of the formal law-making process to recast the Regulation. Intense, legal and political debate concerning the function and the reform of this central legal instrument of the European Judicial Area can be expected in the next months. This debate should not be limited to the legal instrument itself, but it should address the future of European Procedural Law as a whole. In particular, procedural law academics should continue to engage actively in – and thereby influence – European judicial policy. The following contribution deals with the cornerstones of the reform proposals and contrasts them to the current stage of European Civil Procedural Law. It also contains a first evaluation of the reform proposals.

- ***Andreas Spickhoff*** on the ECJ's decision in C-278/09 (Olivier Martinez, Robert Martinez ./. MGN Ltd) as well as decisions of the German Federal Supreme Court (2.3.2010 – VI ZR 23/09); Regional Court Cologne (26.8.2009 – 28 O 478/08) and the Austrian Supreme Court (8.9.2009 – 4 Ob 138/09m) dealing with the questions of jurisdiction and applicable law with regard to the infringement of personal rights on the internet: "Persönlichkeitsverletzungen im Internet: Internationale Zuständigkeit und Kollisionsrecht"
- ***Anatol Dutta.*** "Ein besonderer Gerichtsstand für die Geschäftsführung ohne Auftrag in Europa?(Higher Regional Court Cologne – 13.5.2009 – 6 U 217/08, Regional Court Aachen, 31.10.2008 – 12 O 40/089" – the English abstract reads as follows:

Localising negotiorum gestio on the map of the law of obligations is a difficult task, especially when applying autonomous criteria such as those developed by the European Court of Justice for the terms "contract" and "tort" in Article 5 (1) and (3) of the Brussels I Regulation. In a recent decision, the Regional Court of Appeal in Cologne held that obligations flowing from negotiorum gestio are, for

purposes of the European jurisdictional rules, neither contractual nor tortuous. That view appears to be sound not only in theory but also in practice (infra III.): Article 5 (1) and (3) of the Brussels I Regulation – if applied to negotiorum gestio – would not lead to the proper forum for disputes on negotiorum gestio, namely the courts at the place where the negotiorum gestio was performed (infra II). Hence, the article suggests that a new special head of jurisdiction for negotiorum gestio should be introduced (infra IV.).

- ***Hannes Wais:*** "Internationale Zuständigkeit bei gesellschaftsrechtlichen Ansprüchen aus Geschäftsführerhaftung gemäß § 64 Abs. 2 Satz 1 GmbHG a.F./§ 64 Satz 1 GmbHG n.F.(Higher Regional Court Düsseldorf, 18.12.2009 – I-17 U 152/08, Higher Regional Court Karlsruhe, 22.12.2009 – 13 U 102/09)" **–** the English abstract reads as follows:

Must international jurisdiction for liability claims based on § 64 GmbHG against a foreign director of a German company with restricted liability (Gesellschaft mit beschränkter Haftung) be determined according to the European Insolvency Regulation or according to the Brussels I Regulation? Furthermore, if one applies the Brussels I Regulation, has the claim to be qualified as a matter relating to a contract pursuant to Art. 5 (1), or to a tort pursuant to Art. 5 (3) Brussels I Regulation? Both the OLG Düsseldorf (Higher Regional Court) and the OLG Karlsruhe had to consider these questions in recent cases. In accordance with earlier decisions of German courts the OLG Düsseldorf regarded Art. 5 (1) Brussels I Regulation applicable.

- ***Moritz Brinkmann****:* "Die Auswirkungen der Eröffnung eines Verfahrens nach Chapter 11 U.S. Bankruptcy Code auf im Inland anhängige Prozesse(Federal Supreme Court, 13.10.2009 – X ZR 79/06)" – the English abstract reads as follows:

The article discusses the effects of the commencement of insolvency proceedings on a lawsuit pending between the debtor and another party. When the lawsuit is taking place in another jurisdiction than the insolvency proceedings, three questions have to be answered: 1.) Does the lex fori processus recognize the foreign insolvency proceedings? 2.) If yes, does the commencement of the foreign insolvency proceedings lead to a stay of the litigation? 3.) If yes, who, or rather which side has the right to resume the

lawsuit? Against the backdrop of a decision by the Bundesgerichtshof dealing with the effects of a U.S.-chapter 11 filing on a lawsuit before German courts, Brinkmann shows the differences between the solutions under the European Insolvency Regulation (EC) No 1346/2000 and under § 352 German Insolvency Code (InsO) which is applicable when the insolvency proceedings are in a non-EU member state: While Art. 15 of the European Insolvency Regulation is a conflict rule under which the lex fori processus is applicable to answer questions 2.) and 3.), § 352 I 1 German Insolvency Code is a substantive rule that directly stays the domestic lawsuit. On the question, who has the right to resume the litigation, the Bundesgerichtshof applies the lex fori concursus. Brinkmann argues that this issue should be decided by the lex fori processus notwithstanding § 352 I 2 InsO.

- ***Jörg Pirrung*:** "Teilaussetzung des Verfahrens zur Vollstreckbarerklärung einer griechischen „konservativen Beschlagnahme" von Vermögen(Higher Regional Court Cologne, 15.9.2008 – 16 W 6/08) " – the English abstract reads as follows:

Where the defendant has requested a revocation of a provisional measure according to art. 697 of the Greek law on civil procedure, this is equivalent to an ordinary appeal in the sense of art. 46 of the Brussels I regulation.

- ***Marc-Philippe Weller**:* "Windscheids Anspruchsbegriff im Strudel der Insolvenzrechtsarbitrage (Higher Regional Court Celle, 7.1.2010 – 6 U 60/09)" – the English abstract reads as follows:

The doctrine of actionability of a creditor's claim can be traced back to Windscheid. From the perspective of the German lex fori the actionablity has to be qualified not as a procedural but as a substantive element of the claim. As a consequence an action has to be dismissed not as (procedurally) inadmissible but as unfounded, when the creditor's claim is non-actionable. According to French insolvency law, the creditor's claim loses its element of actionability when an insolvency proceeding is opened. The claim even remains non-actionable when the insolvency proceeding comes to an end due to lack of assets. According to Art. 17 EuInsVO, these consequences of the French insolvency law has to be recognized in all other EU member states. The differences in the insolvency laws of the EU member states lead to arbitrary

behaviour of debtors in International Insolvency Law.

- ***Bettina Heiderhoff:*** **"**Wann ist ein „Clean Break" unterhaltsrechtlich zu qualifizieren?(Federal Supreme Court, 12.8.2009 – XII ZB 12/05) – the English abstract reads as follows:

It seemed scandalous to some when the 12th chamber of the German Supreme Court (BGH) decided, in 2009, that an English divorce judgement was only partly enforceable. However, the BGH only held that the Brussels I Regulation was not applicable as the 2004 order of the High Court concerned matrimonial property (excluded from the scope of the regulation under Article 1 sec 2 lit a) rather than maintenance (to which the regulation is applicable). It is internationally acknowledged that maintenance may be paid in a lump sum. In order to decide whether a payment serves as maintenance or as a division of matrimonial property, one must inquire about the reasons behind the payment: i.e., where the payment serves to secure the future standard of living it functions as maintenance; however, where economic disparity sustained by one partner during the marriage is to be compensated, matrimonial property law is concerned. From an EU perspective, the main question should be whether the national courts may determine the quality of the lump sum payment or whether there should be a purely autonomous determination by the ECJ. It would certainly be frustrating if the mere use of the word "maintenance" in the national court order was held to be decisive. Objective and secure criteria for a distinction between matrimonial property and maintenance may be found, although none seem obvious at first glance. They must consider the fact that different countries have different economic realities, especially as far as housing is concerned. These questions should, however, be answered by the ECJ and the BGH should have requested a preliminary ruling.

- ***Ulrike Janzen/ Veronika Gärtner*****:** "Kindschaftsrechtliche Spannungsverhältnisse im Rahmen der EuEheVO – die Entscheidung des EuGH in Sachen Deticek (ECJ, 23.12.2009 – Rs. C-403/09 PPU – Jasna Deticek ./. Maurizio Sgueglia)" – the English abstract reads as follows:

On 23 December 2009 the ECJ delivered its judgment in Re Deti?ek which has been dealt with under the urgent procedure pursuant to Art. 104b of the ECJ's Rules of Procedure. The case concerned basically the question whether courts

of the Member State where the child is present, can take protective measures on the basis of Art. 20 Brussels II bis Regulation even if a court of another Member State having jurisdiction as to the substance has already taken a protective measure declared enforceable in the first Member State. The ECJ answered this question in the negative, based primarily on teleological and systematic arguments. While the authors agree with the ECJ with regard to the case in question, the approach taken by the ECJ might be challenged in several respects: First, it can be questioned whether the ECJ put too much emphasis on systematic and technical arguments such as facilitating the enforcement of decisions of another Member State as well as the deterrence from wrongful removals, while neglecting the principal aim of the Regulation's provisions on parental responsibility – safeguarding the child's best interest. In the authors' opinion, Art. 20 (1) Brussels II bis does, in principle, not allow provisional measures in situations where the court having jurisdiction as to the substance has already taken a protective measure declared enforceable in the Member State in question, which is illustrated by the rule Art. 20 (2) Brussels II bis. However, the authors argue that – taking into account the Regulation's paramount objective – there might be a need to allow provisional measures also in these cases under certain (strict) conditions – namely if the factual situation has changed significantly subsequent to this first decision and if the new circumstances lead to the assumption of an urgent case in terms of Art. 20 (1) Brussels II bis. Secondly, the authors raise the question whether the ECJ proceeded in a methodologically correct way by examining whether the requirements for provisional measures according to Art. 20 Brussels II bis – urgency, presence of the relevant person(s) in the Member State in question, provisional nature of the measure – are met in the present case, or whether this was rather for the national court to decide. Further, in this context it is submitted that – in derogation from the position adopted by the ECJ in the present decision – it is decisive for the question whether measures can be taken under Art. 20 Brussels II bis whether the child is present in the respective Member State – and not where the parents are located.

- ***Sergej Kopylov****:* "Zur Verbürgung der Gegenseitigkeit zwischen der Russischen Föderation und Deutschland (Oberstes Wirtschaftsgericht der Russischen Föderation, 7.12.2009 – VAS 13688/09)" – the English abstract reads as follows:

In German-Russian legal relations, there is a considerable need for certainty relating to the enforcement (exequatur) of Russian decisions in Germany and vice versa. On this issue, the supreme Russian commercial court (arbitration court) adopted a position in a ruling dated 07/12/2009 and declared a Dutch judgement enforceable. The decision is a further step towards establishing a practice of recognition and enforcement of European decisions in Russia and thus towards guaranteeing reciprocity also with Germany. In the commercial courts' now also recognising British and Dutch court rulings – in addition to the already existing treaties under international law concluded with numerous EU Member States on the recognition and enforcement of court decision – they have created a mutual legal platform, also facilitating "in the triangle" recognition. In the interim, the French courts have issued exequatur for Russian decisions in civil matters.

- ***Erik Jayme*** on the conference of the German-Lusitanian Lawyers' Association in Osnabrück: "Internationales Erbrecht und lusophone Rechte"