Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2011)

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

Here is the contents:

- ***Hans J. Sonnenberger:*** "Grenzen der Verweisung durch europäisches internationales Privatrecht" – the English abstract reads as follows:

The designation of the applicable law by European private international law rules is limited by four factors: limits of competence, limits of conflict of laws, limits of substantive law and limits of procedural law. The present article analyses these limits. The exercise of legislative competence by the European Union according to art. 81 (2) lit. c), (3) TFEU is governed by the principles of conferral, subsidiarity and proportionality. Furthermore, the constitutional law of the member state influences the genesis of European private international law rules. Limits of conflict of laws are imposed on the designation of the applicable law by European primary law, public international law and by the domestic law of the member states. The restrictions imposed by substantive law are mainly based on the public policy exemption. International civil procedure law demands for coordination with private international law. Both the procedural treatment of conflict-of-law rules as well as the rules on the proof of foreign law impact how and to what extent the applicable law is actually applied in court. As regards the creation of a European area of justice, the author underlines that the mere harmonization of conflict of law rules will not be enough to realise this goal. He goes on to discuss the establishment of a special court for civil and private international law matters based on art. 257 TFEU.

- ***Heinz-Peter Mansel/Dagmar Coester-Waltjen/Dieter Henrich/Christian Kohler:*** "Stellungnahme im Auftrag des Deutschen Rats für Internationales Privatrecht zum Grünbuch der Europäischen

Kommission – Weniger Verwaltungsaufwand für EU-Bürger: Den freien Verkehr öffentlicher Urkunden und die Anerkennung der Rechtswirkungen von Personenstandsurkunden erleichtern – KOM (2010) 747 endg." – the English abstract reads as follows:

The German Council of Private International Law contributes to the ,,European Commission Green Paper: Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records – (COM [2010] 747 final)". The Council is an autonomous academic institution, which reports to the German Ministry of Justice. A ,,mutual recognition" of the content of administrative documents, notarial acts, civil status records within civil status matters involves complicated legal issues. The advantage of the unification of the rules on the law applicable to civil status situations, when compared with the so-called principle of ,,automatic recognition", is that a unification would uniformly determine the applicable law in all EU Member States and thereby guarantee identical determination of the civil status of a person throughout the Union. The underlying cause of the divergent approaches taken by EU Member States would be eliminated. This would not be the case with a simple ,,automatic recognition". There is also the risk that an uncoordinated ,,automatic recognition" would encroach on the sovereignty of Member States over their citizens in the field of nationality. Therefore uniform rules on conflict of laws are considered to be an essential prerequisite for the movement of public documents and the application of a principle of mutual recognition in relation to civil status matters.

- ***Heinz-Peter Mansel**: "* Kritisches zur „Urkundsinhaltsanerkennung""
- ***Christoph Althammer***: "Die prozessuale Wirkung materiellrechtlicher Leistungsortsvereinbarungen (§ 29 Abs. 1, 2 ZPO)" – – the English abstract reads as follows:

In the herein discussed decision, the OLG München dealt with the question of the appointment of jurisdiction in Section 36 Nr. 3 of the German civil procedure code (ZPO). The claimant sued the three defendants in the claimant's local court, with the justification the jurisdiction of that court was agreed in the loan contract.

One critical issue was that the parties had agreed the place of performance of

the loan contract, however, which the court did not recognise due to Section 29 subsection 2 of the ZPO. The court stated it was only due to the procedural noneffectiveness of the agreement on place of performance, that non-merchants could avoid the application of a valid agreement on place of jurisdiction (Section 38 of the ZPO). The following annotation discusses whether the decision of the OLG München was based on the right grounds.

- ***Stefan Arnold***: "Beklagtenwechsel im Produkthaftungsprozess nach Verjährung" – the English abstract reads as follows:

The ECJ has effectively overruled its own decision from 2006 concerning the very same proceedings. The court now held that national procedural rules as regards substitution of defendants must not be applied in a way which permits a producer to be sued after the ten-year period of Art. 11 of the Product Liability Directive. This holding is the corollary of interpreting the directive as aiming at full harmonization. Legal certainty is severely undermined, however, by the ECJ postulating an inconsistent and unprincipled exception as regards closely controlled suppliers of the producer.

- ***Jörg Pirrung:*** "Grundsatzurteil des EuGH zur Durchsetzung einstweiliger Maßnahmen in Sorgerechtssachen in anderen Mitgliedstaaten nach der EuEheVO" – the English abstract reads as follows:

The preliminary procedure in case Purrucker I, conducted by the ECJ in a very convincing way, has lead to clarifications as to fundamental questions concerning the enforcement of provisional measures in parental responsibility cases in other EU Member States. Where a court of a Member State, which has (expressly) founded its jurisdiction on one of Articles 8–14 of Council Regulation (EC) No 2201/2003, adopts a provisional measure concerning custody, recognition and enforcement of this measure in all other Member States is governed by Article 21 et seq. of the Regulation. In contrast, where a court of a Member State, which has not based its jurisdiction as to the subject matter on Article 8 et seq., adopts a provisional measure under the conditions of Article 20, Article 21 et seq. of the Regulation are not applicable.

To distinguish provisional measures of a court with jurisdiction as to the

substance matter from measures eventually based on Article 20 of the Regulation the courts of the State of execution have to establish whether the court of origin has based its jurisdiction on Article 8 et seq. of the Regulation or not; Article 24 does not hinder such an examination. The Regulation is based on the assumption that the courts of the Member States respect their obligations according to the Regulation to give convincing reasons for accepting their jurisdiction, even in cases where there is an urgent need for measures of protection for the children concerned. If an order for a provisional measure does not contain an unmistakable reasoning concerning its jurisdiction as to the substance matter referring to one of the bases for jurisdiction in Article 8 et seq. of the Regulation and if the jurisdiction for the substance matter does not otherwise emerge manifestly from the decision adopted, it is to be assumed that the decision has not been adopted according to the jurisdiction rules of the Regulation.

In the interest of ensuring a permanent success of the Regulation the clear criticism by the ECJ of the Spanish court's reasoning with regard to its own jurisdiction mentioning irrelevant circumstances and in casu inapplicable legal bases should remind courts all over the EU of their duties in this context.

- ***Marc Bungenberg***: "Vollstreckungsimmunität für ausländische Staatsunternehmen?"
- ***David-Christoph Bittmann:*** **"**Die Bestätigung deutscher Kostenfestsetzungsbeschlüsse als Europäische Vollstreckungstitel" – the English abstract reads as follows:

Since the coming into force of Regulation (EC) 805/2004 creating a European Enforcement Order for uncontested claims it has been highly discussed in German literature and jurisprudence, under which circumstances a decision on the costs of litigation can be issued as European Enforcement Order. The problem arises from the fact that according to German law the decision on the costs is rendered in a two-step-procedure. In the first step the court which decides on the merits of the case only determines which of the parties has to bear the costs of litigation, so called Kostengrundentscheidung. In a second step, in a separate procedure according to § 104 ZPO, the court determines the amount of the costs the debtor has to pay, so called

Kostenfestsetzungsbeschluss. Whether the Kostenfestsetzungsbeschluss can be issued as European Enforcement Order was the subject of a case, the OLG Nürnberg had to adjudicate on.

Another question the court had to deal with was, which possibilities of appealing a decision according to Art. 10 of Regulation (EC) 805/2004 the German law provides.

This article critically looks at the answers to these questions given by the OLG Nürnberg.

- ***Götz Schulze***: "Übertragung deutscher GmbH-Anteile in Zürich und Basel" – the English abstract reads as follows:

The District Court of Frankfurt Main negates the possibility of a foreign notarisation both under the aspect of substitution of German law and by application of Swiss law which was the proper legal form at the place where the instrument is made (Ortsform). Thus the in 2008 newly implemented notary's duty to write a list of shareholders and to transmit it to the company register according to § 40 II GmbHG (Limited Liability Companies Act) can not be substituted by a Swiss notary. Furthermore, the in 2008 likewise implemented requirement of a simple written form for the assignation of equity shares according to Art. 785 I OR (Swiss Code of Obligations) can not substitute the notarization under the terms of § 15 III, IV GmbHG, which is required by the German company law. To that effect the district court negates the applicability of the "locus regit actum forum-rule" in Art. 11 I Alt. 2 EGBGB (Introductory Act to the German Civil Code) for assignations of shares under the GmbHG. The one-sided national perspective of the district court is to be refused.

- ***Matthias Kilian:*** "Beschränkung von Untersuchungsbefugnissen der Kommission in Kartellverfahren bei Beteiligung von Unternehmensjuristen mit Anwaltszulassung"
- ***Ulrike Janzen/Veronika Gärtner:*** "Rückführungsverweigerung bei vorläufiger Zustimmung und internationale Zuständigkeit im Falle von Kindesentführungen" – the English abstract reads as follows:

The case note analyses two decisions given by the Austrian Supreme Court of

Justice (Oberster Gerichtshof, OGH) in a case concerning the abduction of four children by their mother. The case raised in particular questions on the interpretation of Art. 10 Brussels II bis Regulation as well as Art. 13 Convention on the Civil Aspects of International Child Abduction: The OGH clarified that "consent" in terms of Art. 13 a Child Abduction Convention can only be assumed if the approval to the removal/retention is declared unconditionally. Thus, the approval to a temporary stay of the children with the abducting parent – as it ad been declared in the present case – cannot be regarded as "consent" in terms of Art. 13 a Child Abduction Convention. The same interpretation has to be applied with regard to Art. 10 lit. a Brussels II bis Regulation. Thus, the courts of the Member State where the child was habitually resident immediately before the wrongful removal/retention retain their jurisdiction until the child has acquired a habitual residence in another Member State and each person having rights of custody has acquiesced unconditionally in the permanent stay of the child with the abducting parent.

- ***Jason Dinse/Hannes Rösler:"*** Libel Tourism in U.S. Conflict of Laws – Recognition and Enforcement of Foreign Defamation Judgments" – the abstract reads as follows:

The libel tourism phenomenon has ignited an international debate over recognition of foreign defamation judgments. Legislatures in the United States have now reacted to this problem with a response at both the state and federal level. The most important piece of legislation in this respect is the federal SPEECH Act. It most likely preempts the state acts, with the result that the state libel tourism laws will be rendered largely insignificant in practice. Under the SPEECH Act, a foreign defamation judgment will be presumed unenforceable in U.S. federal and state courts, unless the party seeking enforcement proves that the law underlying the foreign adjudication protected the defamation defendant's free speech expectations in accordance with U.S. federal and state constitutional standards. This article analyzes the new libel tourism legislation on the state and federal level and describes their implications.

- ***Prof. Dr. Christian Kohler:"*** Musterhaus oder Luftschloss? Zur Architektur einer Kodifikation des Europäischen Kollisionsrechts –

Tagung in Toulouse am 17./18.3.2011″

- ***Maximilian Seibl***: “Grundfragen des internationalen Privatrechts“: Symposium zum 80. Geburtstag von Dieter Henrich vom 26.–27.11.2010 in Regensburg”