Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2011)

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

Here is the contents:

- ***Marc-Philippe Weller***: "Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der „klassischen" IPR-Dogmatik?" – the English abstract reads as follows:

Friedrich Carl v. Savigny has influenced modern private international law. His method is known as the "classic" private international law doctrine. Its principles are the international harmony of decisions and the neutrality of private international law, embodied in the principle of the most significant relationship.

However, in European private international law a slight paradigm change concerning the structure of the conflict of law rules can be detected from a classic point of view. The conflict of law rules of the Rome I and Rome II Regulation are prevalently oriented according to the material principles of the European Union such as the promotion of the internal market, the increase of legal security and the protection of the weaker party (e.g. consumer protection).

Nevertheless, in the event of a future codification of private international law at European level, the classic connecting principles of private international law deserve greater attention in the law making process. The Lisbon Treaty would allow such a "renaissance" of the classic private international law doctrine.

- ***Dieter Martiny***: "Die Kommissionsvorschläge für das internationale Ehegüterrecht sowie für das internationale Güterrecht eingetragener Partnerschaften" – the English abstract reads as follows:

On 16 March 2011 the European Commission proposed two separate Regulations, one for married couples on matrimonial property regimes and another on the property consequences of registered partnerships. A Communication of the Commission explains the approach of the proposals. While it is in principle to be welcomed that the Proposals are gender neutral and neutral regarding sexual orientation, the relationship between the intended overarching European rules with the (existent) divergent national rules for different types of marriages and partnerships raises some doubts. It is regrettable that, whereas spouses may themselves expressly choose the applicable law to a certain extent, the assets of registered partnerships are, as a rule, subject to the law of the country where the partnership was registered. In the absence of a choice of law by the spouses, similar to the Rome III Regulation – but following the immutability doctrine – the law of their common habitual residence applies in the first instance. The scope of the Proposals as to "matrimonial property" is not totally clear, nor is the role of overriding mandatory rules. Rules on jurisdiction and recognition are broadly in line with the Brussels II bis Regulation and the Succession Proposal. Many details of the recent Proposals need more clarification. However, despite a number of flaws the Proposals seem basically to be acceptable – at least for the civil law Member States.

- ***Andreas Engert*/Gunnar Groh**: "Internationaler Kapitalanlegerschutz vor dem Bundesgerichtshof" – the English abstract reads as follows:

In 2010, the German Federal Court handed down a number of judgments on the liability of investment service providers in an international setting. The Court faced two specific fact patterns: On the one hand, broker-dealers from the U.S. and Britain participated in a fraudulent investment scheme operated by a German asset manager through investment accounts located abroad. The question arose whether German courts had jurisdiction over the foreign defendants for aiding and abetting, and if so, which tort law governed the case. On the other hand, an investment fund from Turkey and a Swiss asset manager offered their services to investors in Germany without being licensed by the German financial services supervisor.

As regards the jurisdiction issue vis-à-vis defendants from the U.S. and Turkey, the Court concluded that foreign aiders and abettors to a tort committed in

Germany can be sued in Germany. The tortfeasor's acts were imputed to them under § 32 Zivilprozessordnung (German Code of Civil Procedure). In relation to European defendants, the Federal Court claimed jurisdiction under art. 5 no. 3 Brussels I Regulation/Lugano Convention based on the place where the damage occurred. Because investors were almost certain to lose money on the

fraudulent scheme, the damage occurred in Germany when investors transferred their funds to a foreign account. In one case, the Court relied on its jurisdiction over consumer contracts for adjudicating a torts claim, which allowed the Court to dismiss a jurisdiction clause.

With regard to the conflicts rules on tort law, the cases were still governed by German conflicts law leading to similar issues. As a result, investors were able to rely on German tort law. Under the new Rome II Regulation, future tort claims may well qualify as culpa in contrahendo. The applicable law then depends on the law applicable to the contract itself. In this case, the special conflict rule for consumer contracts (Art. 6 Rome I Regulation) ensures that retail investors can invoke their home country's tort law.

- ***Jürgen Samtleben:*** "Schiedsgerichtsbarkeit und Finanztermingeschäfte – Der Schutz der Anleger vor der Schiedsgerichtsbarkeit durch § 37h WpHG" – the English abstract reads as follows:

The present article discusses the disputed provision of § 37h of the German Securities Trading Act (WpHG), according to which non-merchants are not able to enter into a valid advance arbitration agreement as regards financial services transactions. The decision of the Federal Court of Justice (BGH) at issue addressed a damages claim brought against a US broker who had, through the use of independent German financial intermediaries, secured clients for the purchase of financially risky futures. As in other cases, the BGH found the business practice of the financial intermediaries to be contrary to public policy and concluded that the broker is subject to liability for his participation in an unlawful commercial practice. The central issue, however, was the defendant's contention that the court was bound to refer the matter to arbitration in light of an arbitration clause included in the original account agreement. Although signed only by the client, the clause arguably comported with US law, notwithstanding its failure to meet the formal requirements of Art.

II of the New York Convention. As it was not clear whether the claimant could be labeled a merchant, the BGH could not make a final determination on the applicability of § 37h WpHG. Equally left open was the question whether the claimant had engaged in the financial activities in question for private purposes and thus as a consumer; in such a case the account agreement would fail to satisfy the formal requirements of § 1031(5) of the German Code of Civil Procedure (ZPO). The article makes clear that the formal requirements of § 1031(5) ZPO can be overridden by a written arbitration agreement that otherwise satisfies the New York Convention. In contrast, § 37h WpHG constitutes a matter of (missing) subjective arbitrability which, according to the Convention, is to be determined under national law. Whereas § 37h WpHG in its current version only protects non-merchants, this limitation is overly narrow and should be abandoned so that all investors acting in a private capacity are protected from the application of an arbitration clause.

- ***Astrid Stadler***: "Prozesskostensicherheit bei Widerklage und Vermögenslosigkeit" – the English abstract reads as follows:

The key issue in the proceedings before the Court of Appeal in Munich was the question whether an insolvent US corporation – with its center of main interest being located in Great Britain – was exempt from its obligation to provide security for legal expenses of a counterclaim after the principal cause of action had been dismissed. The author agrees with the court's judgment, stating that the counterclaimant legally was exempt but disagrees with the reasons given by the court. In her opinion, an exemption would have been possible according to Sec. 110 para. 1 German Code of Civil Procedure, which imposes the obligation to provide security only upon claimants domiciled outside the EU. With the (counter-)claimants insolvency estate being located in Great Britain, the companies statutory head office in the US (Delaware) was irrelevant. The article furthermore raises the question whether an exemption to the obligation of providing security for legal expenses should be granted whenever the foreign (counter-)claimant is penniless. The article objects to such a rule considering the ratio legis of Sec. 110 German Code of Civil Procedure, which simply tries to compensate the difficulties being linked to an execution outside the EU or the EEA. The defendants risk of being sued by an insolvent plaintiff not being able to reimburse the defendant's legal costs in case of a dismissal of his action

exists as well with respect to plaintiffs domiciled in the forum state. Thus a general rule applicable to all insolvent plaintiffs would be necessary, which however runs contrary to a tendency in European countries of generally abolishing the obligation of foreign plaintiffs to provide security for legal expenses in order to make their court more attractive.

- ***Thomas Rauscher:*** "Ehegüterrechtlicher Vertrag und Verbraucherausnahme? – Zum Anwendungsbereich der EuVTVO" – the English abstract reads as follows:

The contribution discusses several decisions rendered by the Berlin Court of Appeal (Kammergericht) concerning the qualification of a right in property as arising out of a matrimonial relationship in the sense of Art 2 (a) of the EC-Enforcement-Order-Regulation (Regulation (EC) No 805/2004) as well as the application of the EC-Enforcement-Order-Regulation towards consumer cases. The meaning of matrimonial property rights under the EC-Enforcement-Order-Regulation should be interpreted with regard to the ECJ's DeCavel-decisions given under the Brussels Convention. The primary claim will be decisive for the interpretation of this exemption from the Regulation's scope of application; secondary claims are exempted from the scope of application as well. The protection of consumers under Art 6 (1)(d) EC-Enforcement-Order-Regulation should not only apply in B2C-cases as under Art 15 Brussels I-Regulation but also in C2C-cases; the consumer being the defendant needs protection against certification of a title as European Enforcement Order without regard to the plaintiff's qualification as a consumer or professional. Finally it is questionable that the court did not ask the ECJ to render a preliminary decision concerning those remarkable questions.

- ***Martin Illmer***: "Englische anti-suit injunctions in Drittstaatensachverhalten: zum kombinierten Effekt der Entscheidungen des EuGH in Owusu, Turner und West Tankers" – the English abstract reads as follows:

Due to the territorial limits of the ECJ's judgments in Turner and West Tankers, English courts are still granting anti-suit injunctions in relation to non-EU Member States. However, even this practice may be contrary to EU law due to the combined effect of the ECJ's judgments in Turner, West Tankers and

Owusu. This line of argument which was lurking in the dark for some time now came only recently before the English High Court. Based on the assumption that forum non conveniens (which was the critical issue in Owusu) and anti-suit injunctions (which were the critical issue in Turner and West Tankers) are two related issues with overlapping preconditions, anti-suit injunctions might have been buried altogether. The High Court, however, rejected such an assumption without further discussion of the issue and granted the anti-suit injunction.

- ***Ghada Qaisi Audi***: DIFC Courts-ratified Arbitral Award Approved for Execution by Dubai Courts; First DIFC-LCIA Award pursuant to Dubai Courts-DIFC Courts Protocol of Enforcement

The enforcement of arbitral awards made by the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA) can only be achieved by a ratification Order of the Dubai International Financial Centre Courts (DIFC Courts). The first DIFC Courts-ratified arbitral award was recently approved for execution by the Dubai Courts under the 2009 Protocol of Enforcement that sets out the procedures for mutual enforcement of court judgments, orders and arbitral awards without a review on the merits, thus providing further uniformity and certainty in this arena.

- ***Christel Mindach***: Russland: Novellierter Arbitrageprozesskodex führt Sammelklagen ein
- ***Carl Friedrich Nordmeier***: Beschleunigung durch Vertrauen: Vereinfachung der grenzüberschreitenden Forderungsbeitreibung im Europäischen Rechtsraum – Tagung am 23./24.9.2010 in Maribor
- ***Mathäus Mogendorf***.: 16. Würzburger Europarechtstage am 29./30.10.2010