Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2012)

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

- ***Dorothee Einsele***: "Overriding Mandatory Provisions in Capital Market Law – Does the Rome I Regulation Need a Special Rule Regarding Harmonized European Law?"

Capital market legal provisions can often be qualified as overriding mandatory rules in the sense of art. 9 (1) Rome I Regulation. However, third country provisions regulating the capital market are rarely applicable because they are usually not captured by art. 9 (3) Rome I. The question is whether this is different as to provisions of other EU/EEA Member States that are based on harmonized European capital market law. Since the relevant European directives separate the competence to regulate the case and allocate it to the different Member States, the relevant implementing provision of the competent Member State has to be applied or to be taken into account by the other Member States. This is true irrespective of the law applicable to the rest of the case, and could be clarified in recital 40 of Rome I.

- ***Stefan Leible/Michael Müller:*** "Die Anknüpfung der Drittwirkung von Forderungsabtretungen in der Rom I-Verordnung" – the English abstract reads as follows:

The article deals with the assignment of claims according to Art. 14 of the Rome I Regulation. The focus lies with the third-party effects of an assignment. The pending revision envisioned in Art. 27 (2) of the Rome I Regulation as to the third-party effects of an assignment prompts the discussion which law should apply to an international assignment in this regard. The article mainly addresses three options: the law of the assignor's habitual residence, the law of the assigned claim or the law of the contract of assignment. The final vote of the Special Committee among the options provided for in the annex of the

article reflects a continuing diversity of opinions.

- ***Michael Grünberger:*** "Relative Autonomie und beschränkte Einheitlichkeit im Gemeinschaftsmarkenrecht" – the English abstract reads as follows:

The Community trade mark is a specific European Union intellectual property right with an unitary character and equal effect throughout the Union. In an aversion of the principle of subsidiarity, Union law depends on member state's procedural and substantive law in order to enforce the rights granted by the Community Trade Mark Union effectively. Thus, there is tension between the uniform nature of the substantive rules on the Community trade mark as well as its uniform judicial protection and the means to achieve these goals. The ECJ's decision resolves two issues: (1st) The scope of the prohibition against further infringement issued by a Community trade mark court with territorial jurisdiction over the entire Union extends to the entire area of the Union. However, if the trade mark proprietor restricts the territorial scope of its action or, if the use of the sign at issue does not affect the functions of the trade mark, the court must limit the territorial scope of its injunction. (2nd) The Community trade mark court must order coercive measures to ensure compliance with its injunction. Their territorial scope is identical to the scope of the injunction. The article also tries to answer the remaining questions regarding the jurisdiction for adopting and/or for quantifying or otherwise assessing the coercive measure pursuant to the court's lex fori and how to enforce a coercive measure adopted and assessed by a Community trade mark court in the territory of another member state.

- ***Peter Schlosser:*** "Death-blow to the so-called „Supplementary Interpretation of Contracts („ergänzende Vertragsauslegung") in the Case of Invalid Terms in Consumer Contracts?"

The focus of the ruling (C-618/10) – and its explosive force – is on the reply to the second question of the referring court. The issue – often coming up in judicial practice relating to general contract terms – is: what is the content of the remaining contract should one of its pre-drafted terms had turned out to be invalid. Mostly, indeed, the respective term is to be taken for non-existing without any adaptation of the contract other than by taking recourse to general

legal rules. However, to apply this approach slavishly without any element of a supplementary solution leads sometimes to inacceptable injustice, for example to excessive windfall benefits for hundreds of thousands of consumers. Therefore, the Spanish law vested the courts with a discretionary power (and not a mandatory one, as the translation into some of the languages of the Union, including the English language, makes us believe) to grant a modification of the incriminated term, which power is termed as "facultades moderadoras". According to the Court of the Union to grant such a power contravenes the Directive on Abusive Contract Terms.

The author is very critical with this narrow-minded approach of the European Court's ruling. This narrow-mindedness is the consequence of the total refusal to take into consideration the solutions which the legislations and courts of the Member States (particularly in Germany and Austria) had developed for the purpose of avoiding said excessive injustice. Hence, his proposition is to develop an understanding of the ruling as narrow as possible. According to him one must strictly stick to the Court's words "[…] which allows a national court […] to modify that contract […]" (in the official Spanish original: "atribuye al juez nacional […] la facultad de integrar dicho contrato modificando el contenido de la cláusula abusiva".). Therefore, even in consumer contracts the following must still remain permissible:

1. Often the national legislation implementing the Directive is stricter than the Directive itself. Hence, it is possible that under such a national legislation a contractual term is taken for inadmissible, notwithstanding the fact that its content does not amount to the shocking degree to be qualified as "abusive". In such a case the ruling of the court does not apply.

2. The very Court of the Union makes it clear that for dealing with the remaining part of the contract the national court must take recourse to "the interpretive methods recognized by domestic law", "taking the whole body of domestic law into consideration". Since in German and Austrian law dealing with a gap in a contract, even if the gap is due to the inadmissibility of a contract term, is a matter of contract interpretation rather than of a court's "modifying power" the court which is disposing of such an approach may still take recourse to it.

3. The main argument of the Court of the Union is the proposition that the

Directive must be implemented in a manner to built up a "dissuasive effect" for the co-contracting party of the consumer. In many situations, however, a mitigating power of the court cannot possibly have any influence on the dissuasive effect to be established by the implementation of the Directive. This is particularly the case when the co-contracting party of the consumer had been loyal and has adapted its terms to the case law and where thereafter, however, the courts tighten the latter.

- ***Christian Heinze/Stefan Heinze***: "Striking off a foreign company branch from the German commercial register"

As a result of the freedom of establishment in the European Internal Market, companies are increasingly expanding beyond national borders and establish branches in other Member States. Under the Eleventh Council Directive 89/666/EEC, these branches are subject to registration and compulsory disclosure in the Member State of establishment. The following article discusses a judgment of the Oberlandesgericht Frankfurt a.M. which had to decide whether the German branch of an English private company limited by shares could be struck from the German commercial register according to the German procedural rules which provide for deletion from the register if a company does not own any assets. The article supports the negative answer given by the Frankfurt court and discusses alternative ways to clear commercial registers of "phantom branches" of inoperative foreign companies.

- ***Bettina Heiderhoff***: "Habitual Residence of Newborns – Application of German PIL in Cases of Same-sex Parents and of Surrogacy"

The two cases have different factual backgrounds. One concerns a married, same-sex couple seeking recognition of double motherhood to a girl that was born by one of the spouses. The child was born in Spain, where both women were recorded as mothers in the birth register. In the other case a child was born via a surrogate mother in India and the intended parents want to bring it to Germany.

By applying the general rules of PIL, and in particular Art. 19 EGBGB, both cases boiled down to the question of where a new-born has its habitual

residence. While this was relatively easy to determine with respect to a girl born from a German mother, with a German habitual residence, and merely a few weeks of factual residence in Spain, it was more difficult in the case of the Indian child. Habitual residence does not depend on legal parenthood, but on the real-life situation. It is important to consider where the baby lives and is cared for. As the period of time that the Indian child will spend in India is open-ended, one would probably rule for habitual residence in India. That decision, however, may have the consequence that the child might leave India immediately, as an Indian residence leads to the application of Indian law and, thereby, most probably to the parenthood of the intended German parents.

Both cases feature strong political aspects which are not, however, mirrored in the decisions. While it seems safe to say that Germany should open up to the recognition of double motherhood or fatherhood in same-sex couples, it is much more complicated to determine the correct position in respect of surrogacy. However, when a child has already been born, and surrendered, by the surrogate mother, and she shows no further interest in the infant, while the intended parents wish to obtain legal parenthood and raise the child, German ordre public must not be used to prevent them so doing or force them to leave the child behind.

- ***Götz Schulze***: "The principal habitual residence"

The decision concerns the disputed question among commentators of whether a person can have several habitual residences at the same time and if so, according to which criterion one of the habitual residences takes precedence over the other.

The wife concerned in the case was a Norwegian national. She demanded maintenance under Art. 18 para. 4, 17 para. 1 sentence 1 in conjunction with Art. 14 para. 1 EGBGB (Introductory Act to the Civil Code), her husband was German. Until their separation the couple lived together in Germany. Thereafter the woman moved out of the matrimonial home and lived with the couple's 17- and 11-year-old children in Norway. Following the separation the husband split his time between stays with his children in Norway and Germany, where he operated a nightclub with his brother. The Higher Regional Court of Oldenburg denies a change of the habitual residence to Norway and thereby a

mutual habitual residence in this country. However, the court leaves the question unanswered as to whether the application of German law is here based on a relative weighting of the habitual residences or whether Art. 5 para. 1 sentence 1 EGBGB concerning multistate nationalities is to be applied equally.

If a clear classification in favour of a country is not possible and if the grouping of contacts leads – as in this case – to an impasse, a multiple habitual residence must be assumed. The principal habitual residence is to be determined by an accordant application of Art. 5 para. 1 sentence 1 EGBGB. The decisive factors are nationality and continuity of living conditions.

- ***Dagmar Coester-Waltjen***: "Die Abänderung von Unterhaltstiteln – Intertemporale Fallen und Anknüpfungsumfang" – the English abstract reads as follows:

The decision of the Nürnberg Court of Appeal concerned the modification of a post-divorce maintenance order. The court rightly applied German family law to the maintenance obligation of the former husband towards his divorced wife. However, some tricky questions arose in determining the applicable law. This applies with regard to the transitional rules of the EU Maintenance Regulation (Art. 75), the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (Art. 22). The Maintenance Regulation applies only to proceedings initiated from 18 June 2011 on. As in this case the proceedings for modification were instituted already in December 2010, neither the EU Regulation nor the Hague Protocol 2007 applied. However, if the proceedings had been instituted as from 18 June 2011 on, then the rules of the Hague Protocol would have determined the law applicable to maintenance claimed even for periods prior to the entry into force of the protocol – despite the general rule of sec. 22 Hague Protocol 2007. This transitional rule of the „Council decision of 30 November 2009 on the Conclusion by the EU Commission of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations" (OJ L 331 16/12/2009 p.17) is easily overlooked. Other problems concerned the determination of the law applicable to the modification of maintenance orders and to the conflict between several maintenance obligations.

- ***Martin Gebauer***: "Forum non Conveniens, Foreign Plaintiffs and

International Forum Selection Agreements”

One of the most important normative objections against the forum non conveniens doctrine lies in the concern that it attributes a stronger presumption of convenience to the forum chosen by a domestic plaintiff, whereas the suit of a foreign plaintiff is significantly more often dismissed on the basis of forum non conveniens. On the other hand, many courts do not attach importance to the (domestic) defendant's domicile in the forum state when dismissing a suit on the basis of forum non conveniens. This kind of different treatment is confirmed in Cessna Aircraft where the Court of Appeals for the 11th Circuit seems to presume that a foreign plaintiff does not choose to litigate in the United States for convenience.

In Wong v. Party Gaming, the Court of Appeals for the 6th Circuit decided that federal and non state law applies to the enforceability of forum selection agreements in diversity cases. The question had raised unsettled issues under the Erie doctrine. The reasoning of the Court also demonstrates the impact of a forum selection clause on the forum non conveniens analysis.

- ***Dieter Martiny:*** “Beachtung ausländischer kulturgüterrechtlicher Normen im internationalen Schuldvertragsrecht” – the English abstract reads as follows:

The case note analyses a judgment of the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH) in a case concerning the sale of a Chinese cultural object in Austria which was alleged to have been illegally imported from China via Hong Kong. While it is undisputed that China's Regulations of cultural objects are internationally mandatory rules in the sense of Article 7 para. 1 of the 1980 Rome Convention on the law applicable to contractual obligations, it is difficult to determine whether the other prerequisites are met which would allow the rules under the Convention to be taken into account. Particularly, the „close connection“ is hard to define. However, under the circumstances of the case the Court's correctly reasoned that there was no close connection. The second possible path for the protection of foreign cultural objects, a determination that the contract is immoral under Austrian substantive law, was also rejected and the contract was upheld. Under the new Article 9 para. 3 Rome I Regulation on the law applicable to contractual obligations foreign

overriding mandatory rules may also be given effect under certain conditions which are not easy to define in cases of illegal exports. The case note discusses the continuing legitimacy of taking foreign mandatory laws into account under national substantive law as a factor for immorality such that the nullity of the contract may result.

- ***Sabine Corneloup***: "Zur Unterscheidung zwischen Bestimmungen, von denen nicht durch Vereinbarung abgewichen werden darf, und dem ordre public-Vorbehalt bei internationalen Arbeitsverträgen" – the English abstract reads as follows:

Pursuant to Art. 6 n 1 of the Rome Convention, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable in the absence of choice. In the decision of the French Cour de cassation the issue was the mandatory character of French prescription rules. The parties had chosen Spanish law under which the claim of the employee was subject to a limitation period of 20 days whereas the time limit set by French law was of 30 years. The Cour de cassation holds Spanish law to be applicable since the employee has not been deprived of the right of access to the court. This motivation is to be criticized.

- ***Christa Jessel-Holst***: "Approximation of the Macedonian Law with the Rome II-Regulation"

The present contribution discusses the amendment of 2010 to the Macedonian Private International Law Act of 2007. The purpose of this amendment consists in the introduction of the concept of habitual residence as a connecting factor and in the harmonization of Macedonian PIL with the Rome II-Regulation. The Macedonian legal definition of habitual residence is analyzed in comparison with existing models in Belgium, Bulgaria and Romania and contrasted to countries that have decided against a legal definition, like Germany, Turkey or Poland. Before the background of the case Mercredi ./. Chaffe, the introduction of a time-based delimination (Art. 12a MacePILAct: six months period) for establishing habitual residence is criticized. The implementation of the Rome II-Regulation has for the most part been effected verbatim. However, some inconsistencies remain (e.g. renvoi, infringement of intellectual property). The

Rome I-Regulation has so far not been integrated in Macedonia. The contribution also addresses ongoing reforms of PIL in other countries of the region.

- ***Burkhard Hess*** on the conference on the revision of the Brussels I Regulation: "Mailänder Tagung zur Revision der Verordnung Brüssel I, 25./26.11.2011"
- ***Nicolas Nord/Gustavo Cerqueira*** on the conference at the University of Tsinghua on international contracts under the new Chinese PIL: "Internationale Verträge nach dem neuen chinesischen IPR-Gesetz: ein rechtsvergleichender Blick aus Europa – Tagung an der Universität Tsinghua am 28./29.3.2011"
- ***Elsabe Schoeman:*** "New Zealand Conflict of Laws Electronic Database"