Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2013)

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

- ***Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner***: "European conflict of laws: Progressing process of codification– patchwork of uniform law"

The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters from November 2011 until November 2012. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted on a national level in Germany which are a consequence of the new European instruments. Furthermore, the article shows areas of law where the EU has made use of its external competence. The article discusses both important decisions and pending cases before the ECJ touching the subject matter of the article. In addition, the present article turns to the current projects of the Hague Conference as well.

- ***Stefan Leible/Doris Leitner***: "Conflict of laws in the European Directive 2008/122/EG"

The following essay is about the conflict of laws in the European Directive 2008/122/EG on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, being effective since 2/23/2008 and being transformed into German law since 1/17/2011, and its relevance for German law. After giving information about the regulation's history, scope and content, the authors make a detailed analysis on the directive's conflict of laws rule art. 12 par. 2 as well as its national transformation rule art. 46b EGBGB and demonstrate the differences to the former legal norms.

- ***Christoph Benicke***: "Haager Kinderschutzübereinkommen" – the

English abstract reads as follows:

The 1996 Hague Protection of Children Convention provides a modern legal instrument in the field of international child protection and overcomes the shortcomings of the 1961 Hague Protection of Minors Convention. International jurisdiction is primarily assigned to the authorities of the State of habitual residence of the child. In addition, a flexible consideration of the particularities of the case is made possible by the fact that the jurisdiction may be transferred to the authorities of a State with which the child has a close relationship e.g. based on nationality. The principle that the court applies its own law promotes rapid and effective procedures. Since the general jurisdiction lies with the authorities in the State of the habitual residence of the child, the law of the habitual residence of the child will be applied in most proceedings. This is consistent with the choice of law rule in Article 16, which establishes the applicable law outside the realm of protective measures. The Convention also includes a modern system for the recognition and enforcement of decisions from other Contracting States. The international jurisdiction of the authority which issued the decision can still be checked, but the recognizing State is bound in respect to the factual findings in the decision to be recognized. Once recognition and enforceability are certified, the foreign decision will be enforced under the same conditions as a national one. Difficult questions arise about the relationship between the Hague Child Protection Convention and the Brussels II regulation. Among Member States the Brussels II regulation displaces the Protection of Children Convention for the jurisdictional issues in most cases. The same is true for the recognition and enforcement of decisions from other Member States of the Brussels II regulation. On the other hand, the choice of law rules of the Protection of Children Convention apply in all procedures, even when the jurisdiction is based on the Brussels II regulation.

- ***Jan von Hein***: "Jurisdiction at the place of performance according to Art. 5 no. 1 Brussels I Regulation in the case of a gratuitous consultancy agreement"

The annotated judgment of the OLG Saarbrücken deals with the question whether a gratuitous consultancy agreement falls within the scope of Art. 5 no. 1 Brussels I Regulation. After establishing that the present decision concerns a contract and not a mere act of courtesy, it is discussed whether Art. 5 no. 1(b)

or Art. 5 no. 1(a) Brussels I Regulation is applicable to a gratuitous consultancy agreement. Subsequently, the reasons why the non-remuneration is the decisive factor for ruling out the application of Art. 5 no. 1(b) Brussels I Regulation are elaborated followed by some remarks concerning the determination of the place of performance of the obligation in question under Art. 5 no. 1(a) Brussels I Regulation. The possibility of establishing a concurring competence – a forum attractivitatis – of the court having special jurisdiction in contract for related tort claims e.g. resulting from product liability is analysed. The annotation concludes with final remarks on the revision of the Brussels I Regulation and the proposed changes concerning the jurisdiction at the place of performance.

- ***Markus Würdinger***: "Language and translation barriers in European service law – the tension between the granting of justice and the protection of defendants in the European area of justice"

The problem of languages implicates considerable obstacles in international legal relations. Regulation No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (European Regulation on the service of documents) provides in Article 8, in which cases the addressee may refuse to accept the document to be served. This right exists if the document is not written in, or accompanied by a translation into a language which the addressee understands (1. lit. a) or the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected (1. lit. b). The article analyses this statute on the basis of a judgment of the LG Bonn (District Court Bonn), formulates principles of interpretation and arrives at the conclusion that the language of correspondence has by right a great importance in commercial legal relations. Whoever engages here in a certain language and is able to communicate adequately in it, has in case of doubt not the right provided by Article 8 of the Regulation to refuse the acceptance of the document to be served.

- ***Christian Tietje***: "Investitionsschiedsgerichtsbarkeit im EU-Binnenmarkt" – the English abstract reads as follows:

More than 170 Bilateral Investment Treaties (BITs) exist between the EU Member States. In the last years several investment arbitrations were initiated by investors from EU Member States against other Member States. This has led to an intense legal and political discussion on intra-EU BITs with regard to their validity and enforceability as well as the effects of public international law on European Union Law in general. In this context, the EU Commission calls on the EU Member States to denounce the existing intra-EU BITs because of an alleged incompatibility with Union law. This contribution discusses and illustrates relevant legal issues of this debate based on a recent Decision of the Regional High Court of Frankfurt, Germany. The Court in its decision of 10 May 2012 intensively discussed the question of whether intra-EU-BITs are in violation of EU law and thus not applicable as a base for jurisdiction of an international tribunal. The Court convincingly rejects all arguments in this regard and declares intra-EU-BITs in full conformity with EU law.

- ***Johannes Weber***: "Actions against Company Directors from the Perspective of European Rules on Jurisdiction"

The interaction of European and International Company Law has until now been primarily viewed in the context of conflict of laws. The practice of national and European courts, however, indicates that issues of international jurisdiction are getting more and more important. Focusing on the Brussels I Regulation, this paper deals with jurisdiction on actions against company directors for breach of their duties. It argues that these actions fall within the scope of Art. 5 (1)(b) BR and that the courts both in the state of the company's statutory and administrative seat may claim competence.

- ***Bernd Reinmüller/Alexander Bücken:*** "The scope of an arbitration clause in the event of a "brutal termination of an existing business relationship" under French Law"

The contribution deals with a decision by the Cour de Cassation (1ère civ. of 8 July 2010 – Case no. 09-67.013) on the scope of an arbitration clause in respect of damage claims on grounds of a "brutal breach" of a trade relation- ship.

Art. L 442-6 I 5 of the French Commercial Code stipulates that persons engaged in a trade or business who "brutally" breach an established trade relationship

are obliged to compensate the ensuing damages. This provision serves for the upholding of law and order (ordre public) and as part of the French law of torts it is not subject to the disposition of the parties.

The Cour de cassation held that an action based on this legal norm can be covered by a contractual arbitration clause regardless of its tortious nature and its coercive character, because it has a sufficient contractual reference. This presupposes a sufficiently broad formulation of the arbitration clause.

- ***Wilfried Meyer-Laucke***: "Zur Frage der Anerkennung russischer Urteile auf dem Gebiet des Wirtschaftsrechts" – the English abstract reads as follows:

Up to now no Russian judgments have been admitted in the Republic of Germany and declared enforceable due to the rule that this can only be done in case reciprocity is ensured. The same rule is applied in the Russian Federation. It let into a dead end.

However, things have changed. Since 2006 Russian arbitrage-courts handling commercial matters have admitted foreign judgments to be enforced in Russia despite the lack of international agreements. Following this line the arbitrage-court of St. Petersburg has applied this practice to an order of the local court of Frankfurt a.M. by which a bankruptcy procedure has been opened, and has based its grounds on general rules in particular on Art. 244 of the Arbitrage Procedure Rules. These grounds are given in accordance with the jurisdiction of the High Arbitrage Court of Russia. Thus, it can be taken as granted for the German jurisdiction that reciprocity is ensured from now on as far as judgments of arbitrage-courts are concerned.

- ***Francis Limbach***: "About the End of the "Witholding Right" in French International Law of Succession"

The "withholding right" ("droit de prélèvement") has been a singular instrument in French international private law for nearly 200 years. In succession cases where foreign (i.e. non-French) law of succession applied and a French citizen was to inherit as a legal heir, the withholding right aimed to protect the latter from disadvantages related to applicable foreign provisions.

Thus, if it occurred that his share determined by foreign law was less than what he would have received under French law, his withholding right entitled him to seek adequate compensation by "withholding" assets of the estate located on French territory. Criticized for decades in scholarly literature as a "nationalist rule", the provision pertaining to the withholding right has eventually been declared unconstitutional by the French Constitutional Council on August 5th, 2011 on the grounds of un- equal treatment of French and foreign nationals. The present article aims to determine the impact of this decision on French international law of succession, especially on French-German cross-border cases.

- ***Erik Jayme/Carl Zimmer*** on the question whether there is a need for a Rome Regulation on the general part of the European PIL:"Brauchen wir eine Rom 0-Verordnung? – Überlegungen zu einem Allgemeinen Teil des Europäischen IPR"
- ***Erik Jayme*** on methodical questions of European PIL: "Systemfragen des Europäischen Kollisionsrechts"
- ***Jan Jakob Bornheim*** on the conference on the European law on the sale of goods held in Tübingen on 15./16.6.2012: "GPR-Tagung zum Gemeinsamen Europäischen Kaufrecht und Kollisionsrecht in Tübingen, 15./16.6.2012"