Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2013)

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

- ***Bernhard Pfister***: "Kollisionsrechtliche Probleme bei der Vermarktung von Persönlichkeitsrechten" – the English abstract reads as follows:

> *Internationally famous celebrities often commercialize their personality rights in different countries. The following article tries to solve the problem, what national law is applicable in regard to the protection of these rights; the relevant sources of law for a German court are Arts. 42, 40 and 41 EGBGB. In this context, German courts and literature mostly deal with defamation by the press. In those cases, the personality of the defamed is offended and the law of the state, where the injured person lives (Erfolgsort) or where the newspaper is published (Handlungsort), is applicable. The issue of protection of commercially used property rights, however, is a different matter: The personality of the celebrity is not harmed, but the property right gained by her/his achievement. It is situated in the country, where the she/he is known.*
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> *Only the law of the state, where the advertisement was placed, has to be applied. This is the place, where the action occurred (Handlungsort) and where the damage was caused (Erfolgsort). Neither the law of the country, where the advertising documents had been written, nor the law of the country of the habitual residence are applicable.*

- ***Kurt Lechner:*** "The interplay between the law applicable to the succession and national property law (lex rei sitae) in the EU regulation on successions"

The line the European regulation on successions draws between the law applicable to the succession on the one hand, and property law on the other hand, raises specific questions in legal practice. The way a legatum vindicationis is to be treated by German law is a good example. Only a thorough analysis of the provisions in the regulation and their historic evolution in the law-making process can illustrate the functioning of the regulatory system. The stipulations of Article 1 (2) lit. l together with recital 18 of the regulation are the result of a carefully considered compromise between the institutions involved in the legislative process. Besides leaving the national register proceedings as such unaffected, the final wording expressly states that it is the national law that determines "the effects of recording or failing to record such rights in a register". Moreover, as far as immovable property is concerned, recital 18 confirms the lex rei sitae principle. The European legislator hence gives precedence to the national property law, the accuracy of registers and the protection of bona fide rights over a more comprehensive application of the law applicable to the succession. As a result, and as far as real estate located in Germany is concerned, neither can rights in rem be created nor ownership be transferred without registration in the German land register. Accordingly, the protection of the integrity of the German land register and the protection of bona fide rights require a formal agreement (Auflassung) between the parties involved in the transfer of ownership.

- ***Matthias Weller***: "Keine Drittwirkung von Gerichtsstandsvereinbarungen bei Vertragsketten" – the English abstract reads as follows:

In Refcomp the ECJ rejected any binding effect of a choice of forum clause on following buyers in the distribution chain raising an "action directe" under French law against the first seller. The judgment is unconvincing both in its reasoning and its result. It appears preferable to characterise as contractual the direct claim against the first seller if and to the extent the claim aims at compensating the contractual interests in full performance. The characterisation as delictual results in unforeseeable places of jurisdiction at the domicile of the respective buyer in the distribution chain. If the applicable law grants a direct claim to a third party, thereby transgressing the relativity of the contract, it appears justified to bind the privileged third party to what the contractual parties agreed for each other in respect to claims compensating the contractual interest.

- ***Jan von Hein***: "The applicability of Art. 5 No. 3 Brussels I-Regulation to damages caused by multiple tortfeasors"

In Melzer v. MF Global UK Ltd, the CJEU refused the application of article 5 no. 3 of the Brussels I Regulation in a case in which the plaintiff who claimed to have been harmed by multiple tortfeasors had sued only the alleged accomplice, a London broker, at the place where the main perpetrator, a German company, had committed the relevant acts, i.e. defrauded the claimant. The German courts had so far applied a principle of "reciprocal attribution of the place where the event occurred" amongst multiple tortfeasors in such cases. The CJEU argued, however, that there is no equivalent autonomous concept in the Regulation, that art. 5 no. 3 must be interpreted restrictively and that the plaintiff could instead have sued under art. 5 no. 1 or art. 6 no. 1 of the Regulation. In his critical note, Jan von Hein argues that, given the substantial convergence of Member States' laws on joint and several liability of multiple

tortfeasors, the Court should have contributed to the development of an autonomous rule on attribution. The doctrine of restrictive application of art. 5 no. 3 is not absolute, but must be balanced against the principle of effet utile. The alternatives suggested by the CJEU – generously re-characterizing claims sounding in tort as contractual or suing all alleged tortfeasors at the same time – are, in a large number of cases, either not available or lead to unsatisfactory consequences. Particularly in the given case, a suit against the main perpetrator would not have been admissible because of its insolvency. The note concludes with an outlook on pending cases concerning infringements of intellectual property rights.

- ***Wulf-Henning Roth:*** "Choice-of-law clauses in consumer contracts – a difficult matter?"

The judgment of the Bundesgerichtshof (BGH) deals with the use of a choice-of-law clause in the standard terms of a consumer contract. Applying German law to the relevant clause the Court holds that a choice-of-law clause may not be misleading and has to stand up to the standard of transparency. The implications of this approach need to be discussed further on. The Court classified the action for injunctive relief brought by a trade organisation as delictual, applying German private international law of torts, thereby disregarding the Rome II-Regulation. Moreover, the Court hold that the question whether the relevant choice-of-law clause stands up to the standard of transparency shall be determined by the applicable law of torts, instead of classifying this issue as a contractual one. It is suggested that this classification should be reconsidered.

- ***Stefan Arnold***: "Claims for Damages by Private Investors in Foreign Funds – Some Aspects Concerning International Private and Procedural Law"

The Federal Court of Justice (Bundesgerichtshof) reaffirms its jurispru- dence concerning the jurisdiction of German courts in consumer matters under sec. 13 and 14 Lugano Convention 1988. These provisions give German courts jurisdiction in proceedings brought to by German consumers concerning investments in Switzerland. Actions based on an infringement of § 32 German Banking Act (Kreditwesengesetz), on culpa in contrahendo (here: breach of precontractual duties of disclosure) and on prospectus liability according to sec. 127 German Investment Act (Investmentgesetz) are considered as „proceedings concerning a contract" in the sense of sec. 13 Lugano Convention 1988. This wide interpretation is not mirrored at the Conflict of Laws level however. Here, it is argued, the law applicable to damage claims based on an infringement of § 32 German Banking Act and on sec. 127 German Investment Act does not follow the law applicable to the contracts. It must rather be determined according to the Conflict of Law rules as it regards non-contractual obligations.

- ***Marc-Philippe Weller/Bettina Rentsch***: "The Combination Theory (Kombinationslehre) and cross-border Company Conversion: Incentives from EU Law"

The ECJ VALE Case (ECJ, 12.7.2012 – C-378/10 – VALE Építési kft) concerns an Italian Company's conversion into a Hungarian legal form, but being refused to register according to Hungarian corporate law. The Court, with reference to its well-known Cartesio Judgement, considers the refusal, firstly, to fall under the scope of Art. 49, 54 TFEU, and, secondly, to interfere with the EU freedom of establishment. The article examines the consequences of this reasoning for Private International Law. Especially, it adapts the requirements of the so-called Combination Theory, developed by Beitzke, to the requirements of the Freedom of Establishment.

- ***Dieter Martiny***: "Deutscher Kündigungsschutz für das Personal ausländischer Botschaften?" – the English abstract reads as follows:

The case note analyses a judgment of the Federal Supreme Labour Court (Bundesarbeitsgericht; BAG) as well as a related judgment of the European Court of Justice in a case concerning the dismissal of a member of the local staff of the Algerian Embassy in Berlin. The case first required determining whether sovereign immunity of the Algerian State barred German jurisdiction. The Federal Supreme Labour Court expressed some sympathy for the argument of the Algerian State that the employed driver also performed other duties, such as translation services, which could justify immunity. The Federal Court reversed the judgment of the Appellate Labour Court of Berlin-Brandenburg for insufficient findings of fact and remanded the matter back to the Appellate Court. In respect of the law applicable to the employment contract, there was an implied contractual choice of Algerian law, and therefore the so-called "principle of favourability" under Article 6 of the Rome Convention of 1980 had to be applied. Subsequently, after it again rejected immunity, the Appellate Labour Court of Berlin- Brandenburg referred the case to the European Court of Justice for clarification on whether an embassy constitutes a branch, agency or other establishment within the meaning of Article 18(2) of Regulation No. 44/2001. The Court of Justice ruled that Article 18(2) must be interpreted as meaning that an embassy of a third State situated in a Member State is an "establishment" within the meaning of that provision in a dispute concerning a contract of employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers (an act iure gestionis). It is for the national court seized to determine the precise nature of the functions carried out by the employee. There is no uniform European approach for the interpretation of international law criteria, and the

European Court of Justice has insofar no competence to render such a decision. However, the European Court of Justice affirmed the rejection of immunity as concerns the preliminary reference procedure. According to the European Court of Justice, an embassy may be equated with a centre of operations which has the appearance of permanency and contributes to the identification and representation of the State from which it emanates. A dispute in the field of employment relations has a sufficient link with the functioning of the embassy in question with respect to the management of its staff.

The agreement on jurisdiction in favour of the Algerian courts did not preclude the jurisdiction of German labour courts. Article 21(2) of Regulation No. 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision in so far as it gives the employee the possibility of bringing proceedings not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside the European Union. However, a jurisdiction clause depriving the employee of a possibility to sue would have no effect.

The case note discusses the concept of immunity in cases of employment of embassy personnel. It argues that performance of additional duties like translation services cannot justify an exclusion of jurisdiction. The application of the provisions on jurisdiction in labour cases by the European Court of Justice is correct. The applicable law on the employment contract is discussed not only under the Rome Convention of 1980 but also under Article 8 of the Rome I Regulation on contractual obligations of 2008. It is argued that unfair dismissal provisions protecting a single employee are not overriding mandatory provisions under the Convention of 1980 and also not under the Rome I Regulation. However, since the

employee habitually carried out his work in Germany and there was no closer connection to Algeria, the standard of protection is German law in any event.

- ***Ulrich Spellenberg***: "Form und Zugang" – the English abstract reads as follows:

The sole director of a German private limited company (GmbH) wants to resign and sends his notice to the sole shareholder of the company, a Californian Incorporated Company. The reception of the notice is confirmed by a fax sent by a person whose position or function in the Incorporated Company remains unclear. The Commercial Register in Hamburg and the lower German courts who dealt with the case refuse to enter the termination of the director's function in the commercial register because he didn't establish that his notice reached a competent person or organ of the American Incorporated Company. The federal Court (BGH) allows the appeal by applying the German rules to decide when a notice is deemed to have reached its addressee since it was sent from Germany. The outcome in this case is correct but the reasoning is not. In contradiction to its former ruling and to the general opinion the Court falsely classifies "reception" as matter of form of legal acts in the sense of Article 11 EGBGB which alternatively applies the law of the place of sending and the law of the contract. However, reception is not a matter of "form" and the Court would at least have needed to support its new classification with reasons.

- ***Csongor István Nagy***: "Cross-border company conversions in a legal vacuum: the Hungarian Supreme Court's follow-on judgment in VALE"

After the CJEU's judgment in VALE, the EU right to cross-border conversions remains a largely unregulated right. When national law contains no special rules concerning international conversions, the judge has to apply, by

analogy, the rules of domestic conversions to cross-border conversions. The Hungarian Supreme Court’s judgment in the principal proceeding is a good example for what kind of troubles emerge, if as to cross-border conversions the companies and their founders, instead of concrete requirements, have to fulfill conditions that are interpreted and applied mutatis mutandis. The moral of the Hungarian Supreme Court’s judgment is that conversions raise complex issues, which are to be addressed not in the court room but through careful legislation. Cross-border company conversions in a legal vacuum: the Hungarian Supreme Court’s follow-on judgment in VALE