Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2014)

The latest issue (September/October) of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** contains the following articles**:**

- ***Christian Schall/Johannes Weber***: "The precautionary choice of the law applicable to divorce according to Rome III"

The Regulation (EU) No. 1259/2010 (Rome III) has put conflict of law rules in cross-border divorce cases on a new footing. By implementing a wide range of possibilities to designate the applicable law, Rome III establishes party autonomy as a key principle in international divorce law. This article focuses on contractual choices of law prior to divorce proceedings and analyses substantial and formal provisions of choice of law clauses in marriage contracts.

- ***Deniz Halil Deren***: "The effect of a Swiss insolvency on domestic proceedings"

Foreign insolvency proceedings can force a temporary stay of domestic court proceedings. In respect of insolvency proceedings in Member States of the EU, Article 15 EIR (Insolvency Regulation (EC) 1346/2000) provides for a temporary stay of domestic court proceedings; for insolvency proceedings in non-Member States, the governing provision is § 352 InsO (German Insolvency Act). This article discusses whether the requirements of § 352 InsO are met in the event of a Swiss insolvency (Konkurs) as per Article 197 et seq SchKG (Swiss Insolvency Act). This question is of current importance in light of the recent judgment by the Bundesgerichtshof (German Supreme Court) of December 2011 which rejects the view that domestic court proceedings should be stayed following a Swiss moratorium (Nachlassstundung) under Article 293 et seq SchKG (old version). The article takes into account the new Swiss provisions on moratoria, Article 293 et seq SchKG (new version, in force since 1 January 2014).

- ***Robert Arts:*** "On the applicability of Regulation (EC) No. 1346/2000 – No unwritten requirement for a connection to more than one Member State to constitute international jurisdiction pursuant to Art. 3 (1) InsReg"

After confirming the applicability of the Insolvency Regulation on actions to set transactions aside in its landmark Seagon-decision, the ECJ now answers the remaining question of whether this applicability requires the defendant to be the resident of a Member State. After examining its wording and purpose as well as considering the practical implications, the Court concludes that the application of the Regulation does not necessitate such an unwritten connection to a second Member State.

Beyond the scope of application of Regulation (EC) No. 1346/2000 itself, the decision has bearing on the underlying issue of whether or not the EU law-maker does have the competence to regulate relationships between individual Member States and third states. The Court's interpretation of Art. 85 TFEU does assume the possibility of such a competence in principle.

- ***Felix Koechel:*** "When is the jurisdiction of the court first seised deemed to be established within in the meaning of Art. 27 of the Brussels I Regulation?"

The question when the jurisdiction of the court first seised is deemed to be established is vital for the coordination of parallel proceedings under Art. 27 of the Brussels I Regulation (Brussels I). However, a full reply to the question has yet to be achieved, as recent references for a preliminary ruling to the ECJ by, respectively, the French Cour de cassation, the German Higher Regional Court of Munich and the German Federal Supreme Court demonstrate. In particular, it is unclear whether it is necessary that the court first seised has impliedly or expressly rendered a decision on the issue of jurisdiction. Answering to the question referred by the Cour de cassation, the ECJ held that jurisdiction is deemed to be established within the meaning of Art. 27 (2) Brussels I if the requirements of submission according to Art. 24 Brussels I have been met before the court first seised. In that case, the second court must not await a decision of the court fist seised before declining jurisdiction according to Art. 27 (2) Brussels I. Contrary to the ECJ's decision, the second court should be requested to await a decision of the court first seised on its jurisdiction when

applying Art. 27 Brussels I, especially when the first court might assume jurisdiction according to Art. 24 Brussels I. The main proceedings in the present case also gave rise to questions regarding the court's obligation to stay proceedings and decline jurisdiction on its own motion under Art. 27 Brussels I. Contrary to the current concept set forth in Art. 27 Brussels I, under Art. 29 of the Brussels I Recast not only the legal requirements for the existence of this obligation but also the procedure to be followed by the second may be should be established autonomously.

- ***Wolfgang Hau:*** "Is there an appeal in law based on a violation of foreign law?"

Under the traditional German rules of civil procedure it was well established that provisions of foreign law were rules of law and not questions of fact. Nevertheless, the Federal Court of Justice would not review the application of foreign law by lower courts. In 2009 the relevant provision in the Code of Civil Procedure (§ 545) was modified. This was widely perceived as good reason to recede from the traditional rule of non-review and to allow an appeal in law based on a violation of the applicable foreign law. However, the Federal Court of Justice has recently refused to draw this conclusion from the new wording of § 545. This article argues that the correctness of this decision is doubtful and that the jury (i.e. the Federal Constitutional Court) is still out.

- ***Hans Jürgen Sonnenberger:*** "Die internationalprivatrechtliche Behandlung der Zession einer Kaufpreisforderung aus einem der CISG unterliegenden Kaufvertrag und der anschließenden Legalzession im grenzüberschreitenden Verhältnis Käufer-Verkäufer-Factor-Warenkreditversicherung"

The judgment of the Higher Regional Court (Oberlandesgericht) Oldenburg concerns the law applicable to a debtor – assignee (by operation of law) relationship in the case of successive cessions in the period prior to application of the Rome I Regulation. The cessions relate to claims originating from a sales contract subject to the CISG and arose as a result of factoring between seller and factor and performance between factor and insurance carrier due to trade credit insurance. The focus of the Higher Regional Court's statements is put on private international law issues concerning the applicable law, to which the

following comments will be limited. Moreover, the Higher Regional Court had to consider a set-off by the purchaser, the private international law aspects of which will also be addressed briefly.

- ***Dirk Looschelders:*** "The Legal Situation of Commercial Heir Locators in German-Austrian Legal Relations"

The legal situation of commercial heir locators differs in Germany and Austria. The BGH rejects a right of the heir locator to reimbursement for expenses in negotiorum gestio, whereas the OGH has repeatedly recognized such a claim. Therefore, the heir locator's rights decisively depend on the applicable law pursuant to Art. 11 of the Rome II Regulation. In its decision the LG München I has referred to the place of the heir locator's initial activities. A preferable point of contact is however the location of the estate. In the present case both approaches lead to the application of Austrian law. The Austrian courts allow the heir locator a reimbursement amounting to 30% of the heir's proportional inheritance right. Though this conflict with the principle of the parties' negative freedom of contract and the constitutional guarantee of the right of succession, it does not quite rank as a violation of the ordre public.

- ***Carl Friedrich Nordmeier:*** "Interspousal Gifts in Private International Law: German-Portuguese Cases according to the Introductory Act to the German Civil Code, the Rome I-Regulation and the Proposal for a Regulation in matters of Matrimonial Property"

Interspousal gifts in cross-border cases cause particular problems if they – as in Portuguese law – have to comply with particular rules regarding form or are freely revocable. This contribution analyses the validation of contracts invalid as to form that is provided for in § 311b (1) (2) German Civil Code if the immovable property is located abroad. Then, the validation of a gift according to § 518 (2) German Civil Code is discussed if effected by a bank transfer to a joint bank account to which foreign law applies. In such a case, there is no disposition related to the transfer of property in terms of art. 11 (4) of the Introductory Act to the German Civil Code. With regard to the Proposal for a EU-Regulation in matters of Matrimonial Property, rules which prohibit interspousal gifts should be classified as being rules of matrimonial property. Regarding procedural law, this contribution discusses under which

circumstances the question of the applicable law can be left open for the purpose of an appeal to the German Federal Court of Justice.

- ***Carl Friedrich Nordmeier**:* "The french instituion contractuelle in Private International Law: Questions of conflict of laws and material law from a German and European perspective"

The French institution contractuelle concluded between spouses during the marriage is considered a disposition of property upon death for the purpose of art. 26 (5) (1) of the Introductory Law of the German Civil Code. The present contribution analyses the determination of the law of succession hypothetically applicable at the moment the institution contractuelle is concluded, with special regard to the fixation of the renvoi. In this context, the validation of a disposition of property upon death by the law effectively applicable to the succession is rejected. In a second step, the integration of the institution contractuelle into German material law is discussed. The nomination of a spouse as beneficiary to the greatest possible extent can be interpreted as a donation of the entire succession in accordance with § 2301 German Civil Code. A third step focuses on the new European Private International Law of Successions (Regulation (EU) No. 650/2012). An institution contractuelle is considered an agreement as to succession, meeting the definition in art. 3 (1) (b) of the Regulation. For an implicit choice of law, a distinction should be made between the intention to elect a certain law and to plan the estate in a certain way according to the material law applicable.

- ***Apostolos Anthimos:*** "On the application of Art. 14 Insolvency Regulation in Greece"

On the occasion of an opening of insolvency proceedings in Bitburg, Germany, the Thessaloniki CoA issued last year a highly interesting judgment on the application of Art. 14 Insolvency Regulation. This is the first decision applying the rule in Greece.

- ***Bea Verschraegen/Florian Heindler***: "Änderungen im russischen Internationalen Privatrecht"

This contribution deals with the amendments of the conflict rules in Chapter VI

of the Russian Civil Code that entered into force on 1 November 2013. Special attention is dedicated to the changes regarding the rules on contracts, in particular to consumer contracts and agency, as well as to the increased role of choice of law. The strengthening of party autonomy reveals to be a special feature of the law reform and becomes visible in various areas, such as the conflict rules for the form and torts. In the context of torts the changes regarding the objective attachment as well as the new rule on direct action against the insurer of the person liable, the rule on culpa in contrahendo, and the conflict rules on restriction of free competition are dealt with. Further amendments were made regarding the rules on property and related rights and also regarding the lex societatis. Furthermore, the amendments concerning the public policy-clause and the overriding mandatory rules are discussed by highlighting their different scope and consequences. Finally, the article focuses on the importance of the reform and the impact it has on the development of Russian conflict of law-rules.

- ***Erik Jayme/Sebastian Seeger:*** "Internationales Kunstrecht – Tagung in Basel"