Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2008)

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

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Rolf Wagner***: "Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung) – Ein Bericht über die Entstehungsgeschichte und den Inhalt der Artikel 3 und 4 Rom I-Verordnung" – the English abstract reads as follows:

In the second half of 2007 the Portuguese EU-Presidency has achieved a political agreement in the negotiations on the regulation of the European Parliament and the Council on the law applicable to contractual obligations. The work on this so-called Rome I Regulation was then finalized under the Slovenian EU-Presidency in the first half of 2008. It will become applicable in the EU member states (without Denmark) as from 17 December 2009. The following remarks provide an overview on the history and content of two key provisions of the Regulation. These are, more specifically, the provision on choice of law (Article 3 Rome I Regulation) and the general provision on the law applicable in absence of a choice of law (Article 4 Rome I Regulation).

- ***Alexander H. Stopp***: "Die Nichtübertragbarkeit der Lizenz beim Unternehmenskauf: Anwendbares Recht bei fremdem Lizenzstatut im Lichte des § 34 UrhG – Zur Sonderanknüpfung des § 34 Abs. 5 S. 2 UrhG" – the English abstract reads as follows:

The author deals with the application of the German Copyright Act in cases of mergers and acquisitions with regard to international software licensing contracts. The German Copyright Act provides for automatic transfer of the usage rights to the buyer in a merger situation. Contractual non-transferability

clauses in international licensing contracts will step in to stop automatic transfer to the buyer. Under German domestic law, non-transfer provisions are, however, in principle admitted by the consent exception in the German Copyright Act (Section 34 Subsection 5 of the German Copyright Act). German rules on standard terms will often void such provisions in licensing terms for being overly broad or unspecific, if they are not specifically designed to address the merger situation. As a general rule, the law of the country in which legal protection is sought for the transfer should apply to the transfer as opposed to the country of the author's citizenship or the law chosen in the licensing agreement. However, the author suggests that the consent provision of the German Copyright Act (Section 34 Subsection 5 of the German Copyright Act) allows for the application of the law of the contract, which will in the cases discussed often be foreign law.

- ***Dorothee M. Kaulen***: "Zur Bestimmung des Anknüpfungsmoments unter der Gründungstheorie – Unter besonderer Berücksichtigung des deutsch-US-amerikanischen Freundschaftsvertrags" – the English abstract reads as follows:

According to the prevailing opinion, article XXV para. 5, s. 2 of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany from 1954 represents a rule of conflict of laws. Applying this interpretation, in German-US-American corporate conflict of laws the law of legal persons is determined by the incorporation principle . Furthermore, it can be expected that the German corporate conflict of laws will soon give up the idea of the seat principle and adopt the incorporation principle completely. However, under the incorporation principle, the question of how the place of incorporation should be determined remains. Different ideas have been discussed like the place of the process of incorporation, the place of the registered office, the place of registration by the secretary of state, the place free chosen, the place of the law under which the corporation is organised, or the place where the law gave the corporation legal personality. This paper investigates all these possible concretizations of the incorporation principle and concludes that under the incorporation principle a corporation is determined by the law of the place of its registration, or failing that, by the law of the place where it is organised, or failing that, by the law of the place that has the closest connection to the corporation.

- ***Alice Halsdorfer***: "Der Beitritt Deutschlands zum UNESCO-Kulturgutübereinkommen und die kollisionsrechtlichen Auswirkungen des neuen KultGüRückG" – the English abstract reads as follows:

In connection with Germany's ratification of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, a new version of the Law on the Return of Cultural Objects (KultGüRückG) entered into force. The most fundamental improvements are return claims for cultural objects which have been unlawfully removed from the territory of contracting states according to s 6 (2) KultGüRückG and import restrictions for cultural objects listed in the List of Important Cultural Property of the Contracting States according to s 14 (1) KultGüRückG. Regarding the conflict of laws, the traditional lex rei sitae will be replaced after the return of a cultural object by the lex originis of the contracting state from which the object has been unlawfully removed according to ss 5 (1), 9 KultGüRückG. As a result, the lex originis functions as a control mechanism which might correct the validity of intermediary acquisitions of property with retroactive effect. In addition, the new import restrictions have to be considered German mandatory rules which may affect the validity of contractual obligations irrespective of the applicable law according to art. 34 EGBGB. However, certain gaps remain due to the fact that the lex originis has not been fully and unconditionally embodied and that the import restrictions as mandatory rules do not refer to the foreign laws on cultural objects themselves. Despite of these gaps, the ratification of the convention and the new legislation are important steps towards a better protection of cultural property under German law.

- ***Burkhard Hess*** on the ECJ's judgment in case C-14/07 (*Weiss und Partner*): "Übersetzungserfordernisse im europäischen Zivilverfahrensrecht"
- ***Stephan Gregor*** on a decision of the Local Court Berlin-Lichtenberg dealing with the question of the determination of the place of performance with regard to contracts on air transport: "Der Gerichtsstand des Erfüllungsorts beim Luftbeförderungsvertrag"
- ***Astrid Stadler*** on a decision of the Federal Constitutional Court dealing with the question of whether a state is allowed to refuse the fulfilment of private individuals' payment claims in case of a national state of

emergency caused by a financial crisis: “Pacta sunt servanda – auch im Falle argentinischer Staatsanleihen”

- ***Boris Schinkels*** on a decision of the Higher Regional Court Stuttgart dealing inter alia with the question of international jurisdiction for actions against the controlling and the controlled stock corporation of a European cross-border de facto group regarding injunctions prohibiting measures to the detriment of the controlled corporation: “Ansprüche auf Unterlassung nachteiliger Maßnahmen gegen beherrschende und beherrschte Aktiengesellschaft im europäisch-grenzüberschreitenden faktischen AG-Konzern”
- ***Harald Koch*** on a judgment of the Higher Regional Court dealing with a creditor’s action to set aside in case of the donation of property allocated abroad: “Gläubigeranfechtung der Schenkung eines ausländischen Grundstücks”
- ***David Bittmann***: “Die Voraussetzungen der Zwangsvollstreckung eines Europäischen Vollstreckungstitels” – the English abstract reads as follows:

The decision of the Austrian Supreme Court (OGH) is one of the first published decisions concerning Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims, which is in force since October 2005. The OGH had to deal with two main problems regarding the enforcement of a European Enforcement Order (EEO) in the state of execution (here Austria): The first question was, whether the service of the debtor with the EEO is a condition for the enforcement of the foreign decision. Here the OGH stated that this is not the case. The second question was, whether and when the EEO has to be translated. As to this point, the OGH held that a translation was only necessary in case that the certification of the judgment as an EEO, which is made by using a standard form, contains written additions which go beyond the mere ticking of the respective points of the standard form. This article outlines the conditions for the enforcement of an EEO in the state of execution by critically considering the decision of the OGH. Thus the focus will be first on the question whether the debtor has to be served with the EEO before examining possible consequences if this is not the case. Finally the article goes into the matter under which circumstances the EEO has to be translated.

- ***Ben Steinbrück***: “US-amerikanische Beweisrechtshilfe für ausländische

private Schiedsverfahren" – the English abstract reads as follwos:

For many years U.S. courts have ruled out state-court support in the taking of evidence for foreign private arbitration according to 28 U.S.C. § 1782. In 2004, however, the U.S. Supreme Court ruled that section 1782 applies to all foreign and international tribunals if they act as adjudicatory bodies. In the wake of this decision district courts have started to grant discovery orders in aid of foreign arbitration proceedings. Despite some occasional concerns in the United States that the application of section 1782 to foreign private arbitration would lead to procedural disadvantages to US-parties, these decisions may turn the tide in favour of a more arbitration-friendly case law. A flexible and well-balanced application of section 1782 to private international arbitration is not only perfectly in line with the U.S. Supreme Court's interpretation of this provision. Also strong policy considerations militate in favour of granting parties to foreign private arbitrations access to evidence located in the United States.

- ***Dominique Jakob/Danielle Gauthey Ladner:*** "Die Implementierung des Haager Trust-Übereinkommens in der Schweiz" – the English abstract reads as follows:

On 1st July 2007 the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985 (HTC) entered into force in Switzerland. The authors present the new implementing Chapter 9a of the Swiss Private International Law Statute (PILS; art. 149a-149e) as well as two new articles of the Swiss Insolvency Law Statute (ILS; art. 284a, 284b). The new provisions facilitate the recognition of trusts in Switzerland and aim to avoid contradictions between the PILS and the HTC. Swiss substantive law has not been modified. Chapter 9a PILS expressly refers to the HTC regarding the definition of a trust and the applicable law (art. 149a and c). Yet it is broader, since it contains provisions on jurisdiction (art. 149b) as well as provisions on the recognition and enforcement of decisions in matters concerning trust law (art. 149e). The new chapter further applies to trusts which are not evidenced in writing (art. 149a). Of particular interest is the fact that the Swiss legislator expressly recognises internal trusts (art. 149c § 2 and art. 13 HTC), thus arousing anew the question of the compatibility of family trusts with Swiss public policy, since entailed estates (fideicommiss) are prohibited under Swiss

Law (art. 335 of the Swiss Civil Code). For the authors family trusts do not contravene against Swiss public policy as long as their duration is limited in time. The two new articles in the ILS stipulate the segregation of the trust assets in insolvency proceedings concerning the trustee or the trust itself, thus resolving this question once and for all.

- ***Arkadiusz Wowerka*** on the law applicable to factoring according to Polish choice of law rules: "Das auf das Factoring anwendbare Recht nach polnischem Kollisionsrecht"

As well as the following **information**:

- ***Frank Beckstein*** on the international conference "Intellectual Property and Private International Law": "Tagungsbericht zur Internationalen Konferenz 'Intellectual Property and Private International Law'"
- ***Martin Winkler*** on a conference on patent law which has taken place in Düsseldorf: "Internationalverfahrensrechtliche Probleme der Patentstreitigkeiten – Düsseldorfer Patentrechtstage 2008"
- ***Wolfram Prusko*** on the conference "The Future of of Secured Credit in Europe": "'The Future of Secured Credit in Europe' – Ein Konferenzbericht"