Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2009)

Recently, the March/April 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)**:

- ***Robert Freitag***: "Die kollisionsrechtliche Behandlung ausländischer Eingriffsnormen nach Art.9 Abs. 3 Rom I-VO" – the English abstract reads as follows:

The article examines the conditions under which foreign mandatory rules "may be given effect" under article 9 par. 3 of the Rome I-Regulation. Freitag argues that the application of foreign mandatory rules is in theory itself mandatory but that the national judge has a discretion as to the evaluation of the compatibility of the relevant foreign law with domestic values. Another strong emphasis is put on the definition of "the country in which the contract is to be performed". The author favors an interpretation of art. 9 par. 3 Rome I-Regulation according to which the place of performance is to be determined by the proper law of the contract, resulting in the possibility of a plurality of relevant foreign mandatory rules. Furthermore, Freitag considers the rule to be of a strict and limiting nature so that the national judge may not give effect (in the meaning of the Regulation) to the mandatory provisions of foreign laws other than the one(s) determined pursuant to art. 9 par. 3 Rome I-Regulation. The article concludes with a criticism of the inapt formulation and adverse effects of art. 9 par. 3 of the Regulation.

- ***Karsten Kühnle/Dirk Otto****:* "'Neues' zur kollisionsrechtlichen Qualifikation Gläubiger schützender Materien in der Insolvenz der Scheinauslandsgesellschaft – Drei Fragen, ein Gesetz, ein Referentenentwurf und ein höchstrichterliches Urteil" – the English abstract reads as follows:

Is a director of a pseudo-foreign company (e.g. a British private company limited by shares) having its centre of main interest in Germany obliged to file a petition for insolvency pursuant to German laws? Which law governs shareholder loans granted to such a company becoming insolvent? Are shareholders of such a company subject to the rules on

piercing of the corporate veil developed by German courts if they cause the company's insolvency by unlawful actions? These three questions have dominated legal discussions in the past five years not only for their practical importance but also for the complexity of issues involved in a pseudo-foreign company's insolvency, e.g. determination of the company's COMI and avoidance of forum shopping, qualification of issues which are a matter of company law (lex fori societas) rather than a matter of insolvency law (lex fori concursus) against the background of Article 4 of the European Insolvency Regulation and the impact of the ECJ's judicature on freedom of establishment. From today's perspective, it appears that three events have clarified the legal position: (i) The German Reform Act to the Limited Liability Company Act (MoMiG), which came into force on 1st November 2008, explicitly addresses the question whether a pseudo-foreign company's director's duty to file for insolvency is governed by the lex fori concursus rather than the lex fori societas. (ii) In January 2008, the German Federal Ministry of Justice has produced a bill on Rules on Conflict of Laws pertaining to Companies, which deals with shareholder loans and their legal classification from a conflict of laws perspective. (iii) The German Supreme Court has reshaped the legal fundament of piercing of the corporate veil in 2007 in the "Trihotel"-case. This case law needs to be considered when deciding whether shareholders of a pseudo-foreign company can be held personally liable for the company's insolvency.

- ***Jochen Glöckner***: "Keine klare Sache: der zeitliche Anwendungsbereich der Rom II-Verordnung" – the English abstract reads as follows:

Pursuant to its Art. 31 the Rome II-Regulation shall apply to events giving rise to damage which occur after its entry into force, while Art. 32 Rome II-Reg. determines that the regulation shall apply from 11 January 2009, except for Art. 29, which shall apply from 11 July 2008. Mostly, both provisions are simply paraphrased in a sense that the Regulation has to be applied by the courts from 11 January 2009 to events that occurred after its entry into force. Some scholars, however, tend to equate the entry into force referred to in Art. 31 with the date of application as determined in Art. 32 Rome II-Reg. requiring courts to apply the regulation only to events occurring after 11 January 2009. The wording of the various language versions of the Regulation, the drafting technique of the European legislator as exemplified in Art. 24 Reg. No. 1206/2001 (Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001 No L 174/1), Art. 29 Reg. No. 861/2007 (Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ 2007 No L 199/1), Art. 26 Reg. No. 1393/2007 (Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ 2007 No L 324/79) or Art. 29 Reg. No. 593/2008 (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 No L 177/6) as well as the legislative history and the purpose of both provisions however indicate, quite to the contrary, that entry into force must not be confused with applicability. That is why the provision in Art. 32 Rome II-Reg. does not amount to a specification of the date of entry into force under Art. 254 para. 1 EC and the Rome II-Regulation

consequently entered into force on the twentieth day following the day of its publication. So, from 11 January 2009 on Member States Courts are under a duty to apply the Rome II-Regulation not only to all events giving rise to damage, which occur after the same day, but to all events which occur or have occurred since 20 August 2007.

- ***Alexander Bücken***: "Intertemporaler Anwendungsbereich der Rom II-VO" – the English abstract reads as follows:

According to its Article 32 the essential provisions of the Rome II-Regulation apply from 11 January 2009. Article 31 provides that the Regulation applies to events giving rise to damage which occur after its entry into force. There is uncertainty about the date of the entry into force, because there is no provision concerning it in the Regulation. The prevailing opinion states that the Regulation enters into force as from 11 January 2009. The following observations examine, why this opinion is right and which negative effects it would have if the Rome II-Regulation would enter into force as from an earlier date as the date of its application.

- ***Andreas Spickhoff*** on recent decisions of the Federal Court of Justice, the Court of Appeal Koblenz and the Court of Appeal Stuttgart concerning the concurrence of contractual claims and claims based on tort on the level of international jurisdiction and choice of law: "Anspruchskonkurrenzen, Internationale Zuständigkeit und Internationales Privatrecht"
- ***Stefan Huber***: "Ausländische Broker vor deutschen Gerichten – Zur Frage der Handlungszurechnung im internationalen Zuständigkeits- und Kollisionsrecht" – the English abstract which has been kindly provided by the author reads as follows:

The author analyses a judgment of the Court of Appeal of Düsseldorf which granted a claim for damages brought by German investors against a broker situated in New York. Dealing with the questions of jurisdiction and conflict of laws, he agrees with the outcome of the decision but criticises the reasoning of the appellate court. The court assumed jurisdiction because the securities transactions in question had been arranged by a German financial service provider. In the author's view such a reasoning would lead to an exorbitant jurisdiction of German courts under certain circumstances. He proposes a different line of reasoning based on the place where the damage occured.

- ***Gregor Bachmann***: "Internationale Zuständigkeit bei Konzernsachverhalten" – the English abstract reads as follows:

The number of foreign investors in German stock corporations is rising. If they use their influence for the detriment of the company, the question arises where those investors can be sued. In a case to be decided by the Landgericht Kiel (Trial Court), a German shareholder sued a large French company (France Telecom S.A.) who supposedly had deprived the company of a valuable corporate opportunity and thus diminished the value of the shares. The claim was brought at the seat of the claimant. In applying the rules of the Brussels I Regulation, the court found that it was competent to decide the case. It based its decision on Art. 5 Nr. 3 of this regulation, according to which in matters relating to tort, delict or quasi-delict the defendant may be sued at the place "where the harmful event occurred". While the court was right to interpret „tort" or „delict" in a broad sense encompassing detrimental shareholder influence, it cannot be followed in its result. Although the European Court of Justice does not give clear guidance as to where the place of occurrence must be located, it clearly holds that it cannot be generally identified with the place where the claimant resides. Therefore, in cases such as the one at hand the place of occurrence must be either the seat of the company or the place where the shares are stored. Since the latter is just a matter of chance, it must be rejected. The proper place to sue foreign shareholders rather is the place where the company's seat is located. This is in accordance with the general aim of the Brussels Regulation to avoid a splitting-up of jurisdictions and not to unduly favour the claimant.

- ***Stefan Kröll*** on a decision of the German Federal Court of Justice dealing with the principle of venire contra factum proprium in the context of the declaration of enforceability of foreign arbitral awards: "Treu und Glauben bei der Vollstreckbarerklärung ausländischer Schiedssprüche"
- ***Jan von Hein*** on a decision of the Austrian Supreme Court of Justice dealing with the ordering of protective measures with regard to German adults: "Zur Anordnung von Maßnahmen zum Schutz deutscher Erwachsener durch österreichische Gerichte"
- ***Peter Mankowski*** on the final decision of the Dutch Hoge Raad in the "Leffler-case": Übersetzungserfordernisse und Zurückweisungsrecht des Empfängers im europäischen Zustellungsrecht – Zugleich ein Lehrstück zur Formulierung von Vorlagefragen"