Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2009)

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

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

- ***Christoph Althammer***: "Verfahren mit Auslandsbezug nach dem neuen FamFG" – the English abstract reads as follows:

The new "Law on procedure in matters of familiy courts and non-litigious matters" (FamFG) contains a chapter that deals with international proceedings. The author welcomes this innovation for German law in non-litigious matters as there is an increase of cross-border disputes in this subject matter. He especially welcomes that the rules on international procedure are no longer fragmented but are part of one comprehensively codified regulation. The author then highlights these rules on international procedures. Subsection 97 establishes the supremacy of international law. The following subsections (98 to 106) regulate the international jurisdiction of German courts in international procedures. Finally, subsections 107 to 110 detail principles for the recognition and enforcement of a foreign judgement.

- ***Florian Eichel:*** "Die Revisibilität ausländischen Rechts nach der Neufassung von § 545 Abs. 1 ZPO" – the English abstract reads as follows:

So far, s. 545 (1) German Code of Civil Procedure (Zivilprozessordnung – ZPO) prevented foreign law from being the subject of Appeal to the German Federal Court of Justice (Bundesgerichtshof – BGH); s. 545 (1) ZPO stipulated that exclusively Federal Law and State Law of supra-regional importance can be subject of an appeal to the BGH. The BGH could review foreign law only indirectly, namely by examining whether the lower courts had determined the foreign law properly – as provided for in s. 293 ZPO. The new wording of

s. 545 (1) allows the BGH to examine foreign law: now every violation of the law can be subject of an appeal. However, this change in law was motivated by completely different reasons. Parliament did not even mention the foreign law dimension in its legislative documents although this would be a response to the old German legal scholars' call for enabling the BGH to review the application of foreign law. The essay methodically interprets the amendment and comes to the conclusion that the new s. 545 (1) ZPO indeed does allow the appeal to the BGH on aspects of foreign law.

- ***Stephan Harbarth/Carl Friedrich Nordmeier:*** "GmbH-Geschäftsführerverträge im Internationalen Privatrecht – Bestimmung des anwendbaren Rechts bei objektiver Anknüpfung nach EGBGB und Rom I-VO" – the English abstract reads as follows:

According to German substantive law, a contract for management services (Anstellungsvertrag) concluded between a German private limited company (Gesellschaft mit beschränkter Haftung) and its director (Geschäftsführer) is only partially subject to labour law. The ambiguous character of the contract is reflected on the level of private international law. The present contribution deals with the determination of the law applicable to such service contracts in the absence of a choice of law, i.e. under art. 28 EGBGB and art. 4 Rome I-Regulation. As the director normally does not establish a principal place of business, the closest connection principle of art. 28 sec. 1 EGBGB applies. Art. 4 sec. 1 lit. b Rome I-Regulation contains an explicit conflict of law rule regarding contracts for the provision of services. If the director's habitual residence is not situated in the country of the central administration of the company, the exemption clause, art. 4 sec. 3 Rome I-Regulation, may apply. Compared to the determination of the applicable law to individual employment contracts, art. 30 EGBGB and art. 8 Rome I-Regulation, there is no difference regarding the applicable law in the absence of a choice of law provision.

- ***Michael Slonina***: "Aufrechnung nur bei internationaler Zuständigkeit oder Liquidität?" – the English abstract reads as follows:

In 1995 the European Court of Justice stated that Article 6 No. 3 is not applicable to pure defences like set-off. Nevertheless, some German courts and authors still keep on postulating an unwritten prerequisite of jurisdiction for

set-off under German law which shall be fulfilled if the court would have jurisdiction for the defendant's claim under the Brussels Regulation or national law of international jurisdiction. The following article shows that there is neither room nor need for such a prerequisite of jurisdiction. To protect the claimant against delay in deciding on his claim because of "illiquidity" of the defendant's claim, German courts can only render a conditional judgment (Vorbehaltsurteil, §§ 145, 302 ZPO) on the claimants claim, and decide on the defendants claims and the set-off afterwards. As there is no prerequisite of liquidity under German substantial law, German courts can not simply decide on the claimant's claim (dismissing the defendants set-off because of lack of liquidity) and they can also not refer the defendant to other courts, competent for claims according to Art. 2 et seqq. Brussels Regulation.

- ***Sebastian Krebber***: "Einheitlicher Gerichtsstand für die Klage eines Arbeitnehmers gegen mehrere Arbeitgeber bei Beschäftigung in einem grenzüberschreitenden Konzern" – the English abstract reads as follows:

Case C-462/06 deals with the applicability of Art. 6 (1) Regulation (EC) No 44/2001 in disputes about individual employment contracts. The plaintiff in the main proceeding was first employed by Laboratoires Beecham Sévigné (now Laboratoires Glaxosmithkline), seated in France, and subsequently by another company of the group, Beecham Research UK (now Glaxosmithkline), registered in the United Kingdom. After his dismissal in 2001, the plaintiff brought an action in France against both employers. Art. 6 (1) would give French Courts jurisdiction also over the company registered in the United Kingdom. In Regulation (EC) No 44/2001 however, jurisdiction over individual employment contracts is regulated in a specific section (Art. 18–21), and this section does not refer to Art. 6 (1). GA Poiares Maduro nonetheless held Art. 6 (1) applicable in disputes concerning individual employment contracts. The European Court of Justice, relying upon a literal and strict interpretation of the Regulation as well as the necessity of legal certainty, took the opposite stand. The case note argues that, in the course of an employment within a group of companies, it is common for an employee to have employment relationships with more than one company belonging to the group. At the end of such an employment, the employee may have accumulated rights against more than one of his former employers, and it can be difficult to assess which one of the

former employers is liable. Thus, Art. 6 (1) should be applicable in disputes concerning individual employment contracts.

- ***Urs Peter Gruber*** on the ECJ's judgment in case C-195/08 PPU (Inga Rinau): "Effektive Antworten des EuGH auf Fragen zur Kindesentführung" – the English abstract reads as follows:

According to the Brussels IIa Regulation, the court of the Member State in which the child was habitually resident immediately before the unlawful removal or retention of a child (Member State of origin) may take a decision entailing the return of the child. Such a decision can also be issued if a court of another Member State has previously refused to order the return of the child on the basis of Art. 13 of the 1980 Hague Convention. Furthermore in this case, the decision of the Member State of origin is directly recognized and enforceable in the other Member States if the court of origin delivers the certificate mentioned in Art. 42 of the Brussels IIa Regulation. In a preliminary ruling, the ECJ has clarified that such a certificate may also be issued if the initial decision of non-return based on Art. 13 of the 1980 Hague Convention has not become res judicata or has been suspended, reversed or replaced by a decision of return. The ECJ has also made clear that the decision of return by the courts of the Member State of origin can by no means be opposed in the other Member States. The decision of the ECJ is in line with the underlying goal of the Brussels IIa Regulation. It leads to a prompt return of the child to his or her Member State of origin.

- ***Peter Schlosser***: "EuGVVO und einstweiliger Rechtsschutz betreffend schiedsbefangene Ansprüche".
  The author comments on a decision of the Federal Court of Justice (5 February 2009 – IX ZB 89/06) dealing with the exclusion of arbitration provided in Art. 1 (2) No. 4 Brussels Convention (now Art. 1 (2) lit. d Brussels I Regulation). The case concerns the declaration of enforceability of a Dutch decision on a claim which had been subject to arbitration proceedings before. The lower court had argued that the Brussels Convention was not applicable according to its Art. 1 (2) No.4 since the decision of the Dutch national court included the arbitral award. The Federal Court of Justice, however, held – taking into consideration that

the arbitration exclusion rule is in principle to be interpreted broadly and includes therefore also proceedings supporting arbitration – that the Brussels Convention is applicable in the present case since the provisional measures in question are aiming at the protection of the claim itself – not, however, at the implementation of arbitration proceedings. Thus, the exclusion rule does not apply with regard to provisional measures of national courts granting interim protection for a claim on civil matters even though this claim has been subject to an arbitral award before.

- ***Kurt Siehr*** on a decision of the Swiss Federal Tribunal (18 April 2007 – 4C.386/2006) dealing with PIL aspects of money laundering: "Geldwäsche im IPR – Ein Anknüpfungssystem für Vermögensdelikte nach der Rom II-VO"

- ***Brigitta Jud/Gabriel Kogler***: "Verjährungsunterbrechung durch Klage vor einem unzuständigen Gericht im Ausland" – the English abstract reads as follows:

It is in dispute whether an action that has been dismissed because of international non-competence causes interruption of the running of the period of limitation under § 1497 ABGB. So far this question was explicitly negated by the Austrian Supreme Court. In the decision at hand the court argues that the first dismissed action causes interruption of the running of the period of limitation if the first foreign court has not been "obviously non-competent" and the second action was taken immediately.

- ***Friedrich Niggemann*** on recent decisions of the French Cour de cassation on the French law on subcontracting of 31 December 1975 (Loi n. 75-1334 du 31 décembre 1975 – Loi relative à la sous-traitance version consolidée au 27 juillet 2005) in view of the Rome I Regulation: "Eingriffsnormen auf dem Vormarsch"

- ***Nadjma Yassari***: "Das Internationale Vertragsrecht des Irans" – the English abstract reads as follows:

Contrary to most regulations in Arab countries, Iranian international contract law does not recognise the principle of party autonomy in contractual obligations as a rule, but as an exception to the general rule of the applicability

of the lex loci contractus (Art. 968 Iranian Civil Code of 1935). Additionally, the parties of a contract concluded in Iran may only choose the applicable law if they are both foreigners. Whenever one of the parties is Iranian, the applicable law cannot be determined by choice, unless the contract is concluded outside Iran. However, in a globalised world with modern communication technologies, the determination of the place of the conclusion of the contract has become more and more difficult and the Iranian rule causes uncertainty as to the applicable law. Although these problems are seen in the Iranian doctrine and jurisprudence, the rule has not yet been challenged seriously. A way out of the impasse could be the Iranian Act on International Arbitration of Sept. 19, 1997. Art. 27 Sec. I of the Arbitration Act allows the parties to freely choose the applicable law of contractual obligations, without any restriction. However, the question whether and how Art. 968 CC restricts the scope of application of Art. 27 Arbitration Act has not been clarified and it remains to be seen how cases will be handled by Iranian courts in the future.

Futher, this issue contains the following information:

- ***Erik Jayme*** on the conference of the German Society of International Law which has taken place in Munich from 15 – 18 April: "Moderne Konfliktsformen: Humanitäres Völkerrecht und privatrechtliche Folgen – Tagung der Deutschen Gesellschaft für Völkerrecht in München"
- ***Marc-Philippe Weller*** on a conference on the Rome I Regulation taken place in Verona: "The Rome I-Regulation – Internationale Tagung in Verona"