

Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (6/2009)

Recently, the November/December 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)**:

- **Klaus Bitterich**: “Vergaberechtswidrig geschlossene Verträge und internationales Vertragsrecht” – the English abstract reads as follows:

This article is concerned with the law applicable to international (works or supplies) contracts concluded by a German public authority on the basis of an unlawful award procedure or decision. In many, but not all cases there will be an express or implied choice of law agreement in favor of German law by way of reference to the German Standard Building Contract Terms “VOB/B” or, in case of a supplies contract, the “VOL/B” respectively. In the absence of choice, a contract concluded as a result of a tender procedure governed by public procurement legislation is, as the author intends to show, according to the escape clause of article 4 para. 3 of the new Rome I-Regulation No. 593/2008 governed by the law of the country where the tender procedure took place, because such a contract is more closely connected to this place than to the place where the party who is to effect the characteristic performance has his habitual residence. Thus, where German authorities are involved German law will apply to the question whether a breach of a public procurement rule is capable of affecting the validity of the contract. The relevant German provisions of substantive law state that such breach may only be invoked by means of a specific review process according to §§ 102 et seq. of the “Gesetz gegen Wettbewerbsbeschränkungen” (GWB) and, as this remedy is no longer available after the contract has been concluded, as a principle hold errors in the procurement procedure which were not subject to such review irrelevant. The only exception is § 101b GWB (replacing the former § 13 of the “Vergabeverordnung” – public procurement regulation –) declaring void

contracts concluded without prior information of tenderers whose offers will not be accepted and, on the other hand, contracts concluded without a regular tender procedure. Whether this provision is an overriding mandatory provision within the meaning of article 9 para. 1 of the Rome I-Regulation and thus applicable irrespective of the law otherwise applicable to the contract is the second subject of the article at hand. The author argues that this is not the case due to its inability to effectively enforce the public procurement regime even on a national level after the contract has been concluded. It must be noted, though, that the Oberlandesgericht (OLG) Düsseldorf has taken the opposite view.

- **Felix Dörfelt:** “Gerichtsstand sowie Anerkennung und Vollstreckung nach dem Bunkeröl-Übereinkommen” – the English abstract reads as follows:

The International Convention on Civil Liability for Bunker Oil Pollution Damage designates international jurisdiction to the country where the damage occurred. The author discusses the various available local fori under the Brussels I-Regulation and the German ZPO, emphasizing on the forum actoris under Art. 9 para. 1 lit. b in connection with Art. 11 para. 2 Brussels I-Regulation. The gap in German local jurisdiction for damages in the exclusive economic zone can be bridged by an analogy to § 40 AtomG. Concerning the recognition and enforcement of judgments under the convention the author criticises the possibility of “recognition-tourism” due to the global effect of recognition under Art. 10 para. 1 Bunker Oil Convention. The convention allows subsequent enforcement of judgements recognized without the possibility of a public policy exception due to the specialties of the German law on recognition and enforcement. This problem can be overcome by an extensive interpretation of “formalities” in Art. 10 para. 2 Bunker Oil Convention allowing for courts to invoke the public order exception.

- **Peter Mankowski:** “Die Darlegungs- und Beweislast für die Tatbestände des Internationalen Verbraucherprozess- und Verbrauchervertragsrechts” – the English abstract reads as follows:

The burden of proof and the onus for the underlying facts in the concrete application of both conflict rules and rules on jurisdiction is one of the dark

areas. The present article examines it in the field of international consumer law. The fundamental maxim is that the party who alleges that a certain rule is applicable bears the burden of stating and proving that the facts required are fulfilled. Hence, generally it is for the consumer to show that the facts required to bring the protective regime of international consumer law in operation, are present since ordinarily the consumer will allege its applicability. He who invokes an exception is liable to present the facts supporting such contention. If a choice of law or choice of court agreement is at stake the party invoking it must show that such agreement has been concluded in accordance with the chosen law.

- **Carsten Müller:** “Die Anwendung des Art. 34 Nr. 4 EuGVVO auf Entscheidungen aus ein- und demselben Mitgliedstaat” - the English abstract reads as follows:

The Council Regulation (EC) No 44/2001 provides in Article 34 (3) and (4) that a judgment, under certain conditions, shall not be recognised if this judgment is irreconcilable with a judgment given in the Member State in which recognition is sought (Article 34 (3)) or with an earlier judgment given in another Member State or in a third State (Article 34 (4)). The following article deals with the question whether “another Member State” in the sense of Article 34 (4) is also the Member State from which the judgment to which the earlier judgment might be opposed originates. The author comes to the conclusion that Article 34 (4) also applies to two judgments originating from the same Member State other than the Member State in which recognition is sought.

- **Moritz Brinkmann:** “Der Vertragsgerichtsstand bei Klagen aus Lizenzverträgen unter der EuGVVO” - the English abstract reads as follows:

In Falco Privatstiftung and Rabitsch the ECJ has excluded license agreements from the application of Article 5 (1) (b) Brussels I Regulation. The author argues that the Court’s narrow understanding of the term “contract for the provision of services” is persuasive particularly in light of Article 4 (1) (b) Rome I Regulation. Regarding Article 5 (1) (a) Brussels I Regulation, the ECJ has held, that the principles which the Court previously developed in Tessili and De Bloos with respect to Article 5 (1) of the Brussels Convention are still

pertinent with respect to the construction of Article 5 (1) (a) of the Brussels I Regulation. This position is not surprising as the legislative history of Article 5 (1) gives clear indications that for contracts falling under (a) the legislator wanted to retain the Tessili and De Bloos approach. In the author's view, however, the case gives evidence for the proposition that the solution in Article 5 (1) of the Brussels I Regulation is an unsatisfying compromise as it requires for contracts other than contracts for the sale of goods or for the provision of services a determination of the applicable law. Hence, the ascertainment of jurisdiction is burdened with the potentially difficult determination of the lex causae. The author postulates that the European legislator should de lege ferenda extend the approach taken in Article 5 (1) (b) to other kinds of contracts where the place of performance of the characteristic obligation can be autonomously ascertained. With respect to license agreements this could be the jurisdiction for which the right to use the intellectual property right is granted.

- **Markus Fehrenbach:** "Die Zuständigkeit für insolvenzrechtliche Annexverfahren" – the English abstract reads as follows:

Even though the EC Regulation No 1346/2000 on Insolvency Proceedings contains provisions about recognition and enforcement of judgments deriving directly from insolvency proceedings and which are closely linked with them it lacks explicit rules about international jurisdiction for these types of actions. On 12 February 2009 the ECJ ruled on the international jurisdiction on an action to set aside which was brought by the liquidator of a German main insolvency proceeding. The ECJ declared the international jurisdiction to open a main proceeding covered these actions as well. While the ECJ established an international jurisdiction for German courts, German law does not contain explicit rules about local jurisdiction. In its judgment of 19 May 2009 the German Federal Court of Justice decided that local jurisdiction is determined by the seat of the Court of Insolvency. The author analyses both judgments and agrees with the ECJ insofar as international jurisdiction for actions deriving directly from insolvency proceedings and which are closely linked with them, belong to the courts of the member state where the main proceeding was opened. He disagrees insofar as a German action to set aside is regarded as such an action. Once the international jurisdiction of the German courts is established there has to be a local jurisdiction, too. In contrast to the judgment

of the German Federal Court of Justice, the local jurisdiction follows by analogy with article 102 sec. 1 para. 3 of the German Act Introducing the Insolvency Code.

- **Diego P. Fernández Arroyo/Jan Peter Schmidt:** “Das Spiegelbildprinzip und der internationale Gerichtsstand des Erfüllungsortes” - the English abstract reads as follows:

The article comments on a decision by the Oberlandesgericht Düsseldorf on the recognition and enforcement of an Argentine judgment. The Argentine claimant had obtained an award for payment of a broker's commission against a company domiciled in Germany. Recognition and enforcement of the judgment was denied because, according to the German rules of international jurisdiction, the Argentinean court had not been competent to decide the matter. The case perfectly illustrates Argentine courts' tendency to claim a much wider scope of jurisdiction than their German counterparts in litigation arising out of contractual relations. The authors draw the conclusion that while the decision by the Oberlandesgericht Düsseldorf not to grant recognition and enforcement is fully in accordance with German law, it also highlights the defects of the so called “mirror principle”, i. e. the mechanism of reviewing the jurisdiction of foreign courts strictly according to the German rules. In times of ever increasing international legal traffic, more flexible and liberal approaches, which can be found in other legal systems, are clearly preferable.

- **Rolf A. Schütze:** “No hay materia más confusa ...” - In this article, the author discusses a decision of the German Federal Court of Justice dealing with the question which standard has to be applied with regard to the (in)consistency of national arbitral awards with public policy (BGH, 30.10.2008 – III ZB 17/08).
- **Dirk Looschelders:** “Anwendbarkeit des § 1371 Abs. 1 BGB nach Korrektur einer ausländischen Erbquote wegen Unvereinbarkeit mit dem ordre public” - the English abstract reads as follows:

Under the German statutory marital property regime a person who outlives his or her spouse and becomes legal heir is generally granted an additional quarter of the inheritance pursuant to § 1371 para. 1 BGB. Scholars disagree whether

this provision also applies in cases where the legal succession to the deceased is governed by foreign law. The present case involved an unusual situation: the applicable Iranian law of succession discriminates against the surviving wife and therefore violates the German ordre public. The Higher Regional Court of Düsseldorf refused the application of § 1371 para. 1 BGB, since the wife's inheritance pursuant to the Iranian law of succession had already been increased to avoid the ordre public violation. This argument, however, does not convince: There needs to be a clear distinction between the correction of the Iranian law of succession to conform to the German ordre public and the question of whether the provisions of § 1371 para. 1 BGB apply.

- **Andreas Spickhoff:** “Die Zufügung von „Trauerschmerz“ als Borddelikt”
 - The article analyses a decision of the Austrian Supreme Court of Justice (OGH, 09.09.2008 - 10 Ob 81/08x). The decision concerns - at a PIL-level
 - the question of the applicable law with regard to a claim for grief compensation in a case of a deadly accident aboard a yacht. At the level of substantive law, the case illustrates the differences between German and Austrian law: While under German law, the compensation of relatives of accident victims requires an impairment of health exceeding the “normal” reaction caused by the death of a close relative, Austrian courts award grief compensation also in cases where the relatives themselves have not suffered an impairment of health - as long as there exists a strong emotional bond which is presumed in case of close relatives living in a joint household.
- **Santiago Álvarez González:** “The Spanish Tribunal Supremo Grants Damages for Breach of a Choice-of-Court Agreement”- the introduction reads as follows:

On January 12th 2009, the Spanish Tribunal Supremo (TS henceforth) granted compensation for damages caused by the breach of a choice-of-court agreement favoring Spanish jurisdiction. This is the first, or at least one of the first judgments in Europe (leaving aside the UK), which has dealt with the issue at the highest level of the courts of justice. The TS revoked the two prior rulings (those of the courts of first instance and appeal), in which the claim of the plaintiff had been rejected alleging that, due to the essentially procedural nature of the choice-of-court agreement, its violation could not lead to

compensation. For both courts of justice, the natural consequence of the breach of a choice-of-court agreement was the rejection of the claim and (depending on the case) an order for costs. It is not the first time that the Spanish TS decides about a claim for damages due to the breach of a choice-of-court – but it is, indeed, the first time it shows its awareness of the specific problems present in this type of lawsuit. Good proof is that, in an unusual move, the judgment reproduces in extenso the legal arguments advanced by the parties both in first instance and in appeal. It also reproduces the arguments of the first and second instance courts of justice in detail. Nevertheless, the resolution is simple, convincing, and does not take into account (and in my opinion this is correct) the great number of useless details the parties added to their otherwise quite clear pretensions. In this commentary, I will pay attention just to the contents of the judgment in the light of the elements and issues that are usually relevant in this kind of process, attending to the singularity of the current case – where the non-contractual court is placed on the US, this is, out of the scope of action of Brussels I; it must be noted that Spain has no agreement on enforcement of judgments in civil and commercial matters with the US. After going through the general idea of the case, I will study the rulings of both first and second instance, as well as some non-discussed issues. I will analyze the solution of the TS, and I will finish by giving my own view on the decision and its relevance for the future. The legal discussion was heterogeneous and messy; most of the topics, except that of the procedural or substantive nature of non-fulfillment and its consequences, were not given the importance they indeed have and, at some points, they were not articulated at the right procedural moment through the proper, procedural mechanisms envisaged by the *lex fori*. This paper tries to reorganize and synthesize this heterogeneity, even at the price of losing some nuances.

- **Viktória Harsági/Miklós Kengyel:** “Anwendungsprobleme des Europäischen Zivilverfahrensrechts in Mittel- und Osteuropa” – the English abstract reads as follows:

The study is the summary of an international conference organized at the Andrásy Gyula German Speaking University. It deals with the effect of the community law on the legal systems of eight new Central and Eastern European Member States, (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovenia) on the field of civil procedure. Apart from this, former

member states like Austria and potential member states like Croatia and Turkey are also analyzed. The article examines the specific problems of applying the law in cross-border litigation, such as questions of jurisdiction, recognition, enforcement, service of documents and taking of evidence.

- **Hilmar Krüger** presents selected PIL decisions of the Jordanian Court of Cassation: “Jordanische Rechtsprechung zum Kollisionsrecht”
- **Carl Friedrich Nordmeier**: “Timor-Leste (Osttimor): Neues Internationales Zivilprozessrecht” – the English abstract reads as follows:

The Democratic Republic of Timor-Leste (East Timor) enacted a new Civil Procedure Code (Código de Processo Civil) by decree-law n. 1/2006 of 21st of December, 2006. This article reports on the new rules of international jurisdiction and enforcement of foreign judgments in Timor-Leste. The wording of the new provisions is very similar to the corresponding rules of the Portuguese Civil Procedure Code.