Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2010)

Recently, the May/June issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

This issue contains *inter alia* some of the papers presented at the Brussels I Conference in Heidelberg last December. The other papers were published in the previous issue.

Here is the contents:

- ***Paul Oberhammer***: "The Abolition of Exequatur"

The Commission's Report on the reform of the Brussels Regulation points out that "the abolition of the exequatur procedure in all matters covered by the Regulation" is the "main objective of the revision of the Regulation". In this context, the Green Paper raises the following two questions: "Are you of the opinion that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)? And in that case, are you of the opinion that some safeguards should be maintained in order to allow for such an abolition of exequatur? And in that case, which ones?"4 In the following discussion, I will try to answer these questions. As the problem is multifaceted, I can do so only in a very sketchy fashion.

- ***Andrew Dickinson***: "Provisional Measures in the "Brussels I" Review – Disturbing the Status Quo?"

Art. 31 of the Brussels I Regulation provides: "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter." This provision closely mirrors Art. 24 of the Brussels and Lugano Conventions. Sitting (and, perhaps, partly hidden from view) between the

provisions concerning, on the one hand, substantive jurisdiction and, on the other, the recognition and enforcement of judgments, the treatment of provisional measures attracted very little attention in the early history of those Conventions, being fleetingly considered in each of the official reports. That Art. 31 emerged intact from the process leading to the conversion of the Brussels Convention into a Community Regulation at the turn of the century is, however, surprising for the following reasons. First, as the Recitals to the Regulation emphasise, the predominant concern of the Community legislator was to adopt "highly predictable" rules of jurisdiction "founded on the principle that jurisdiction is generally based on the defendant's domicile". Art. 31 achieves neither objective. The delegation to national rules of jurisdiction (including rules of the kinds prohibited by Art. 3) creates a non-uniform landscape in which it is not possible for litigants to determine on the basis of the Regulation alone whether a particular court is competent to grant provisional measures. Secondly, the Commission itself in its 1997 Proposal for a Council Act establishing a revised Convention on jurisdiction and judgments had suggested replacing Art. 24 with a narrower provision, limiting the exorbitant power to grant provisional including protective measures (as defined) to cases of urgency in which the measure in question would be enforced within the territory of the State granting it. Thirdly, as the Commission noted in the explanatory memorandum accompanying its initial proposal for the Regulation in 1999, the Court of Justice (ECJ) had in the previous year been faced with two important references concerning Art. 24 of the Brussels Convention (Van Uden v. Firma Deco Line and Mietz v. Intership Yachting). In those decisions, the ECJ had recognised Art. 24 as an anomalous provision whose propensity to disturb the scheme established by the Brussels Convention needed to be curtailed. In response, the Court revisited Art. 24's place in the jurisdictional scheme established by the Convention and reshaped it in ways that the Court found to be implicit in its wording and objectives but which are not readily apparent from a study of the text alone. A codification of some aspects, at least, of these rulings therefore appeared desirable. The need for caution in applying Art. 31 of the Regulation and its counterpart in Art. 31 of the Lugano II Convention (the successor instrument to the Lugano Convention) is highlighted by the commentary in the Heidelberg Report on the functioning of the Brussels I Regulation, in the Commission's recent Report and Green Paper on the review of the Regulation and in the Explanatory Report on the Lugano II Convention by Professor Fausto Pocar. Although, for rather

unsatisfactory reasons, the text of Art. 31 has been left intact in the Lugano II Convention, its revision is long overdue and this should be one of the objectives of the Brussels I review. By way of background, this article considers, briefly, the ECJ's decisions in Denilauler, Van Uden and Mietz (Section II.) and the proposals advanced by the authors of the Heidelberg Report and the Commission (Sections III. and IV.) before turning to address the issues raised by Art. 31 in its present form and possible solutions (Section V.).

- ***Stephan Rammeloo***: "Chartervertrag cum annexis – Art. 4 Abs. 2, 4 und 5 EVÜ" – the English abstract reads as follows:

October 6, 2009, the ECJ gave interpretative rulings in case C-133/08 on Article 4 of the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980). The questions in preliminary proceedings centered round the applicable law to a charter-party contract cum annexis in the absence of choice by the parties ("objective proper law test"), the seperability of the contract, and the connecting criteria of Article 4, subsection 4 in relation to subsections 1, 2 and 5. The main proceedings and the essential observations of the ECJ judgment are followed by a critical analysis as well as some considerations on its potential effects on the interpretation of Article 4 (objective proper law test) and Article 5 (contract on the carriage of goods) of EC Regulation 593/2008 which on 27 December 2009 replaced the 1980 Convention.

- ***Florian Eichel***: "Inhaltskontrolle von AGB-Schiedsklauseln im internationalen Handelsverkehr" – the English abstract reads as follows:

This essay discusses a recent decision of a German Oberlandesgericht (Court of Appeal) which denied enforcement of a US arbitral award on the ground of Art. V (1)(a) New York Convention (NYC). The court deemed a B2B-arbitration clause invalid for substantive unconscionability (s. 307 German Civil Code – BGB). The clause was contained in a Dutch-German franchise form and determined New York as place of arbitration. The essay argues that substantive unconscionability may not simply be based on the remoteness of the place of arbitration from the weaker party's domicile. Rather, in considering the validity of the clause a court should follow a twofold examination: First, it has to consider the formal unconscionability by means of s. 305c (1) BGB. According to this provision, a clause is invalid if it is of a surprising character, i.e. in no

way connected to the negotiations or the execution of the contract. The reference to s. 305c (1) BGB is permissible even under the regime of the NYC as the latter only provides formal requirements for the arbitration agreement itself, but not for the procedural agreement in question designating the place of arbitration and the lex arbitri. If the party fails to prove the surprising character, one can in a second step deem the clause unconscionable pursuant to s. 307 BGB. However, this verdict requires a thorough examination as to whether the arbitral procedure in a whole, and not just the place of arbitration, deprived the defendant of his day in court.

- ***Reinhold Geimer*** on the judgment of the ECJ of 11 June 2009 (C-564/07) as well as the decisions of the German Federal Court of Justice of 5 March 2009 (IX ZB 192/07) and of 20 January 2009 (VIII ZB 47/08): "Einige Facetten des internationalen Zustellungsrechts und anderes mehr im Rückspiegel der neueren Rechtsprechung"
- ***Nina Trunk:*** "Anwendbarkeit der Wanderarbeitnehmerverordnung auf die Haftungsbefreiung bei Arbeitsunfällen" – the English abstract reads as follows:

In its ruling VI ZR 105/07 of 15th July 2008 the German Federal Court of Justice had to decide on a case, where an employee of a dutch employer has been injured in a car accident caused by his driving German colleague on a weekend visit to Germany. The crucial question is, if in this case the German regulations, which determine that the civil liability of the employer and/or its employees is excluded in cases of work accidents, applies or if Dutch law, which does not know a corresponding exclusion of liability, is applicable. This recension deals with the mandatory Character of the provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and their applicability. In accordance with the decision of the German Federal Court of Justice it comes to the conclusion that concerning the question of exclusion of liability, Dutch law applies and explains why this result is compatible with the freedom of services provided in Art. 49 EU Treaty.

- ***Peter Behrens***: "Anwendung des deutschen Eigenkapitalersatzrechts auf Scheinauslandsgesellschaften" – the English abstract reads as follows:

This is the first decision of a German insolvency court applying the new German legal rules on shareholder loans in case of insolvency of a pseudo-foreign company (i.e. an English private company limited by shares doing business exclusively in Germany). The court based its jurisdiction correctly on Article 3(1)(1) of the European Insolvency Regulation (EIR), because the debtor company's centre of main interests was clearly situated in Germany. The reasoning on the private international law issues was less convincing however. The court simply applied German law and held the insolvent company's shareholder liable towards the insolvent company for repayment of a sum which the shareholder had received from the company as redemption of a loan granted by the shareholder to the company. The redemption had occurred in 2007 at a time when the company was already insolvent. Until October 2008, the shareholder-creditor's liability towards the company resulted from relevant provisions in the GmbHG (Limited Liability Companies Act). Since November 2008, these provisions are, however, transferred to the Insolvency Act and they now establish the voidability of the redemption of a shareholder-creditor's loan which occurred within one year before the petition for insolvency proceedings was filed. This change of the law may have had an impact upon the highly disputed characterisation of a shareholder-creditor's liability towards an insolvent company. Before November 2008, it could have been characterised as a matter of company law which should be subject to the "proper law" of the company (in this case: English law). Since November 2008, there may be better reasons for a characterisation as a matter of insolvency law. The court preferred the latter characterization for both, the old and the new law, without justifying its position by adequate reasoning and, what is more, without taking any notice of European Union law. According to Article 4(2)(m) EIR, voidability of a transaction is clearly a question of insolvency law, but Article 13 EIR limits the application of Article 4(2)(m) EIR under certain circumstances which may or may not have been present in this case. The court's decision therefore suffers from insufficient reasoning.

- ***Hans Hoyer*** on the judgment of the Higher Regional Court Munich of 5 December 2008 (33 Wx 266/08): "Nachlassverwaltung durch Betreuer im deutsch-österreichischen Rechtsverkehr""
- ***Philipp Sticherling***: "Türkisches Erbrecht und deutscher Erbschein" – the English abstract reads as follows:

The author discusses a decision of the Braunschweig district court (Landgericht) in a proceeding concerning the grant of an inheritance certificate. The bequeather has been an Turkish citizen with movable estate in Germany. The District Court has decided that German courts also have jurisdiction for the grant of the inheritance certificate. According to the decision of the District Court, the estate agreement in the consular agreement of 28 May 1929 between the German Empire and Turkey does not command the exclusive jurisdiction of Turkish courts for proceedings concerning the grant of inheritance certificates. The decision has been taken under the provisions of the Act on Voluntary Jurisdiction (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit – FGG) that was in effect until 31 August 2009. With the Act on the Reform of the Act on Voluntary Jurisdiction, as from 1 September 2009 the Act on Proceedings in Family Matters and in Matters of Voluntary Jurisdiction (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG) has replaced the Act on Voluntary Jurisdiction. The question of international jurisdiction remains relevant under the new legislation. The author shows the differences between the new procedural rules under the reformed act and the old Act on Voluntary Jurisdiction.

- ***Zeynep Derya Tarman***: "Das neue Staatsangehörigkeitsgesetz in der Türkei" – the English abstract reads as follows:

The article will firstly give an overview of the new Turkish Nationality Act from 29.5.2009, with an emphasis on the reasons for the need of this new Act. Secondly, it will analyze the provisions of the new Turkish Nationality Act pertaining to the acquisition and loss of nationality, and thirdly it will give an insight to the multiple nationality under the new code.

- ***Hakan Albas/Serdar Nart*** on the acquisition of real estate by non-residents in Turkey: "Neues zum Erwerb von Grundstücken durch Ausländer in der Türkei"
- ***Christel Mindach***: "Weiterentwicklung des Zivilrechts und Internationalen Privatrechts in Russland" – the English abstract reads as follows:

The "Web portal of Private International Law of Russia" published a range of

documents for further development of civil legislation including private international law of Russian Federation. The initiative goes back to two Decrees of the Russian President No. 1108 and No. 1105, dated July 18th, 2008. These Presidential Decrees obliged the "Council for Codification and Improvement of Civil Legislation" jointly with the "Research Centre for Private Law" both attached the President, to prepare a draft for development of civil legislation up to June 1, 2009. This article gives first information especially about this part of draft, dealing with amendment of some provisions of private international law.

- ***Sergej Kopylov/Marcus A. Hofmann***: "Das Verfahren vor dem Wirtschaftsgericht (Arbitragegericht) der Russischen Föderation" – the English abstract reads as follows:

This paper deals with a presentation of the proceedings before the national economic court (arbitration court) of the Russian Federation (RF) in the first instance. Frequently, a Russian and a foreign business partner contract under Russian law and agree on a venue in Russia. Especially in times of financial crisis, the contractors are trying – whether because of liquidity or economic reasons – to turn away from the long-term contracts that have often been entered into before the crisis, which is usually only possible by judicial decision. As a result, the European companies that are active in the Russian Federation are commonly sued by their Russian partners. The emphasis of this paper is based on a view from the perspective of the German defendants, describing the process and details of the procedure and explaining a useful approach in cases where a defendant finds himself before the arbitrage court.

- ***Peter Kindler*** on the monograph by Günther H. Roth, Vorgaben der Niederlassungsfreiheit für das Kapitalgesellschaftsrecht. Exigences de la liberté d'établissement pour le droit des sociétés de capitaux, 2010 (including a French translation): "'Cadbury-Schweppes': Eine Nachlese zum internationalen Gesellschaftsrecht"
- ***Heinz-Peter Mansel*** on the 80th birthday of Richard M. Buxbaum: "Richard M. Buxbaum zum 80. Geburtstag"
- ***Erik Jayme/Carl Friedrich Nordmeier*** on the 2009 meeting of the German-Lusitanian lawyers' association in Brasília: "Grenzüberschreitende Dimensionen des Privatrechts – Tagung der

Deutsch-Lusitanischen Juristenvereinigung in Brasília”

- ***Zou Guoyong:*** obituary in honour of Han Depei