

Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (5/2010)

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

Here is the contents:

- **Peter Mankowski:** “Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, renvoi, Parteiautonomie” – the English abstract reads as follows:

The Rome II Regulation is up for regular review in the near future. Some of its rules deserve closer consideration. This relates in particular to Art. 7 on environmental liability which does not address the paramount question to which extent permissions granted by one Member State influence liability. Insofar a detailed solution by way of recognition is proposed. Another field open for reform is party autonomy under Art. 14. Insofar a number of proposals is submitted generally attempting to bring Art. 14 better in line with other rules of Community law. A systematic restructuring of Art. 6 (3) on competition law is advocated for, too. In contrast, it does not appear to alter anything with regard to the exclusion of renvoi.

- **Beate Gsell/Felix Netzer:** “Vom grenzüberschreitenden zum potenziell grenzüberschreitenden Sachverhalt – Art. 19 EuUnterhVO als Paradigmenwechsel im Europäischen Zivilverfahrensrecht” – the English abstract reads as follows:

This article sheds light on a new development in European Civil Procedure Law caused by Article 19 Regulation (EC) No 4/2009 of 18 December 2008 on maintenance obligations. It illustrates the differences between Article 19 Regulation (EC) No 4/2009 and related Articles in the Regulations on the European enforcement order for uncontested claims, the European order for payment procedure and the European small claims procedure. The authors

demonstrate that Article 19 (EC) No 4/2009 provides the defendant with an autonomous right to apply for a review of a national court's decision in order to compensate the abolition of the exequatur. Thereby European Civil Procedure Law does not confine its scope to cross-border cases, but, on the grounds of an only potential Europe-wide recognition and enforcement of judgements, intervenes in merely national procedures as well. After discussing the consequences of this principle change in European Civil Procedure Law, the authors doubt the EU's competence under Article 65 EC or Article 81 TFEU to intervene in national procedure law as regulated in Article 19 (EC) No 4/2009.

- **Anne Röthel/Evelyn Woitge:** “Das ESÜ-Ausführungsgesetz – effiziente Kooperation im internationalen Erwachsenenschutz” – the English abstract reads as follows:

The coming into force of the Hague Convention on the International Protection of Adults on 1 January 2009 gives reason to examine the German Implementation Act. Its purpose is to include the regulations of the Convention into the internal German system for the protection of adults who are suffering from an impairment or an insufficiency in their personal facilities and therefore are not able to safeguard their own interests. In this article, the authors show the major content of the Implementation Act and discuss how the rules on jurisdiction, applicable law and international recognition and enforcement of protective measures laid down by the Convention fit into existing German law. Also, they highlight the concept of administrative co-operation between member states drawn up by the Convention and put into effect by national law.

- **Jörn Griebel:** “Einführung in den Deutschen Mustervertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen von 2009” – the English abstract reads as follows:

The article comments on the new German Model BIT (bilateral investment treaty) of 2009. After a general description of its content, some changes of the new model in comparison to its predecessors are addressed. Against the background of various models by other states, the question will be raised as to whether some necessary changes were omitted. It is also discussed to what degree different approaches to reforming model BITs are due to political reasons and/or different approaches to treaty drafting.

- **Axel Metzger:** “Zum Erfüllungsortgerichtsstand bei Kauf- und Dienstleistungsverträgen gemäß der EuGVVO” – the English abstract reads as follows:

The Car Trim decision of the ECJ puts a spotlight on two important and yet unsettled questions regarding the jurisdiction at the place of performance in sales and service contracts under Art. 5 Nr. 1 lit. b Brussels I Regulation. The author agrees with the Court’s ruling that contracts for the supply of goods to be manufactured or produced should be characterised as sales contracts as long as the purchaser has not supplied the materials. However, the ruling should not be generalised to all types of mixed contracts with service components. The Car Trim decision is also correct in localising the place of performance in case of a sale involving carriage of goods at the place where the purchaser obtained actual power of disposal over the goods at the final destination and not at the place at which the goods are handed over to the first carrier for transmission to the purchaser. Finally, the author examines some of the general questions on autonomous interpretation of Art. 5 Nr. 1 lit. b Brussels I Regulation raised by the Court.

- **Ben Steinbrück:** “Internationale Zuständigkeit deutscher Gerichte für selbstständige Beweisverfahren in Schiedssachen” – the English abstract reads as follows:

The author comments on a decision of the Higher Regional Court Düsseldorf (7 February 2008 – I-20 W 152/07), which deals with the competence of German courts to preserve evidence for use in foreign arbitration proceedings. The court ruled that parties who agree that their dispute shall be resolved by a foreign arbitral tribunal pursuant to a foreign law derogate the German courts’ international jurisdiction to make (interim) orders in independent proceedings for the taking of evidence (“selbstständiges Beweisverfahren”). This decision is not in line with German arbitration law. According to §§ 1025 Abs. 2, 1033 of the German Code of Civil Procedure German courts arbitration agreements conferring jurisdiction on a foreign arbitral tribunal do not affect the German courts’ competence to grant interim relief. It follows that these competences, including the power to preserve evidence, can only be excluded by an explicit agreement to that effect.

- **Rolf A. Schütze** on the principle of reciprocity in relation to South Africa: “Zur Verbürgung der Gegenseitigkeit im Verhältnis zu Südafrika”
- **Peter Kindler**: “Zum Kollisionsrecht der Zahlungsverbote in der Gesellschaftsinsolvenz” – the English abstract reads as follows:

Under German law, the managing director of a company is obliged to reimburse the company any payment that has been made to a third party – e.g. a creditor or a shareholder – after the company’s insolvency or over-indebtedness (see, e.g. sec. 64 of the law pertaining to private companies ltd. by shares – GmbHG).¹ The Berlin Kammergericht holds that this rule of law also applies to a managing director of a company registered abroad – in this case a British Ltd. – with its centre of main interests in Germany (sec. 3 of the EC Regulation 1346/2000 on cross border insolvency). The author welcomes this decision.

- **Fabian Wall**: “Enthält Art. 21 Abs. 1 AEUV eine „versteckte“ Kollisionsnorm?” – the English abstract reads as follows:

According to the judgment of the European Court of Justice in the case “Grunkin and Paul”, Article 21 TFEU (ex Article 18 TEC) awards the right to every citizen of the Union that each Member State has to recognise a surname which has been formerly determined and lawfully registrated in a civil register of another Member State. Until now, it is uncertain how the demand of the Court of Justice can be implemented in german practice. This is demonstrated by a case decided recently by the Higher Regional Court of Munich. The legal question is whether Article 21 TFEU should be interpreted as a target which leaves the national authorities the choice of form and methods of implementation or whether Article 21 TFEU should be interpreted as a “hidden” conflict of laws rule which is directly applicable in all Member States.

- **Martin Illmer**: “La vie après Gasser, Turner et West Tankers – Die Anerkennung drittstaatlicher anti-suit injunctions in Frankreich” – the English abstract reads as follows:

The strong winds from Luxembourg blowing in the face of anti-suit injunctions have extinguished the remedy within the territorial and substantive scope of the Brussels I Regulation. Yet, anti-suit injunctions are not dead even within the European Union. Rather, the focus shifts to the remaining areas of operation.

One of these areas concerns anti-suit injunctions issued by non-member state courts against parties initiating proceedings before member state courts. Since the Brussels I Regulation does not cover extra-territorial scenarios, the rationale of the ECJ's judgments in Gasser, Turner and West Tankers does not apply. Faced with such an anti-suit injunction, it is entirely up to the national law of the respective Member State whether or not to recognize it. While the Belgian and German courts had refrained to do so in the past, the French Cour de Cassation in a recent straight forward judgment has had no difficulty in recognizing and enforcing an anti-suit injunction of a US state court (Georgia).

- **Ulrich Spellenberg** on Art. 23 Brussels I Regulation: “Der Konsens in Art. 23 EuGVVO – Der kassierte Kater”
- **Carl Friedrich Nordmeier**: “Portugal: Änderungen im internationalen Zuständigkeitsrecht” – the English abstract reads as follows:

By art. 160 of law n. 52/2008 of 28 of August 2008, Portugal reformed its autonomous rules on jurisdiction, art. 65 and 65-A of the Civil Procedure Code. This contribution gives a short overview of the new rules, focussing especially on the applicability in time.

- **Christoph Benicke**: “Die Neuregelung des internationalen Adoptionsrechts in Spanien” – the English abstract reads as follows:

With the law 54/2007 of 28 December 2007 the Spanish legislator has enacted a special law on international adoption which encompasses rules on jurisdiction, applicable law and the recognition of foreign adoption decisions in Spain. The new law has the advantage that it summarizes the scattered arrangements into one piece of legislation. It also represents a step forward in that the transformation of a weak foreign adoption in a strong adoption is now possible. But the reform remains half hearted as it restricts the recognition of a weak foreign adoption to cases where none of the parties has the Spanish nationality. In addition, both the conflict of laws rule and the rules on the recognition of foreign adoption decisions are substantively implausible. Most schemes have been taken over from the existing legal situation which had in great part been formed by decisions of the General Directorate of public registries and of the notary system (Dirección General de los Registros y del Notariado) without of systematic guideline. Significantly, there are many

technical shortcomings in the legislation. Overall, the new law fails to create a modern, autonomous international adoption law. This is all the more striking since the motives express the aim to reach the standard of the Hague Adoption Convention of 1993.

- **Viviane Reding** on the European Civil Code and PIL: “Zum Europäischen Zivilgesetzbuch und IPR”
- **Rolf Wagner**: “Die zivil(verfahrens-)rechtlichen Komponenten des Aktionsplans zum Stockholmer Programm” – the English abstract reads as follows:

The “Stockholm Programme – An open and secure Europe serving and protecting the citizens” covering the period 2010-2014 defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice. Recently the European Commission finalized an action plan. The action plan entails lists of measures with time limits implementing the Stockholm Programme. The article provides an overview on this action plan.