Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2012)

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

- ***Gerhard Hohloch:***" Die „Bereichsausnahmen" der Rom II-VO – Zum Internationalen Privatrecht in und um Art. 1 Abs. 2 Rom II-VO" – the English abstract reads as follows:

The scope of applicability of the regulation "Rome II" is governed by its art. 1. Art. 1 subpara. 1 defines this scope as the matter of "non-contractual obligations", art. 1 subpara. 2 traces the limits of this scope by a catalogue of "excepted areas" (lit. a–g). The subsequent article hereinafter has been dedicated to the research of the limits of these "excepted areas" as well as the conflict of laws rules governing these areas. The author underlines that art. 1 subpara. 2 has to be understood on the basis of "European law making"; therefore methods of classification have to follow European, not "national" ideas. The program of harmonization and unification of conflicts of laws ("Rome I"–"Rome V" and more) obliges to describe the scope of each regulation. The "excepted areas" are defined by methods of interpretation of European style, meanwhile their contents are governed by European conflict rules ("Rome I–III") or by conflict rules based on multilateral conventions or by "national rules". The author discusses their "border lines" and goes on to the residuary competences of national conflict rules and to look for the future development.

- ***Dieter Martiny:*** "Lex rei sitae as a connecting factor in EU Private International Law" – the English abstract reads as follows:

The situs rule is one of the classic connecting principles in private international law, particularly for property law. In European conflict law, which is mainly regulated by different Regulations, the lex rei sitae only plays a restricted role as a connecting factor. Property issues are generally outside the scope of the Regulations. In international civil procedure the situs functions as a basis for

exclusive jurisdiction. It is, however, difficult to separate the effects of relationships in contract law, succession and matrimonial property law from questions of property law as such. In international contract law the situs has only a reduced importance in the context of the form of the contract and overriding mandatory rules. Since there is a lack of harmonised property law, problems arise mainly in the context of non-possessory security rights when encumbered assets cross the border. The plethora of problems arising from a change of the applicable law and the recognition of foreign security rights suggest that the creation of an additional uniform security right might be more successful than a solution restricted to private international law.
The scission or dualist approach in matrimonial property law and succession law with its distinction between the law applicable to the person (and movable property) and the law applicable to immovables (the lex rei sitae applying as to the latter) is not followed by the proposed EU Regulations for succession and matrimonial property. However, it is necessary to a certain extent that the law of the place where property is located be applied or at least be taken into account. Property rights in rem, transfer of land and land registers have to be excluded from the scope of application of the EU instruments so long as there is no uniform law. For some separate issues a special connection to the place of location of property is appropriate. Precise definitions are of particular importance given the need to ensure legal certainty and satisfy the expectations of parties.

- ***Christoph Reithmann*** on foreign notarial deeds***:*** **"**Urkunden ausländischer Notare in inländischen Verfahren"
- ***Timo Nehne***: "Die Internationale Geschäftsführung ohne Auftrag nach der Rom II-Verordnung – Anknüpfungsgegenstand und Anknüpfungspunkte" – the English abstract reads as follows:

The choice of law rules of the Rome II Regulation have so far been dealt with by a remarkable number of scholarly publications in different countries and languages. Most of them, however, pay only little attention to Article 11. Its legal category and connecting factors give rise to specific questions of construction and application which the following contribution aims to address.

- ***Susanne Fucks***: "Die Zustellungsbevollmächtigung von inländischen

Schadensregulierungsbeauftragten ausländischer Kraftfahrzeughaftpflichtversicherer" – the English abstract reads as follows:

According to Art. 4 of the 4th Motor Insurance Directive all motor vehicle insurers are required to appoint a claims representative in each Member State other than that in which they have received their official authorisation. The claims representative should be authorised to collect all necessary information in relation to claims and to take appropriate action regarding the settlement of claims on behalf and for the account of the insurance undertaking in cases where the victim of a motor vehicle accident abroad makes use of his or her direct right of action against the foreign insurance company. If the claim is not settled the insurance company may be sued before the courts for the place in a Member State where the injured party is domiciled.
This article discusses the decision made by the Higher Regional Court of Saarbrücken, which concluded that the service of the writ cannot be effected to the claims representative if the representative is not explicitly authorised to receive such a statement of claim. The article attempts to give reasons why Art. 4 of the 4th Motor Insurance Directive suggests such an authorisation and a service of process abroad including the translation of the statement of claim according to the European Regulation on the service of documents is not necessary in that case.

- ***Peter Mankowski:*** "Autoritatives zum „Ausrichten" unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO" – the English abstract reads as follows:

„Directing activities" in Art. 15 (1) (c) Brussels I Regulation is the key term for the width and scope of consumer protection in Europe. Now, the ECJ has adressed and refined it with regard to the most important area, e-commerce. The Joint Declaration of Council and Commission has lost any sway. A test of criteria has been established, creating some guidelines but leaving some remaining uncertainty. Some of the criteria mentioned deserve closer inspection. Going beyond the borders of the State in which a business has its seat is the foundation for a rebutable presumption that the business directs its activities to the consumer's State. The yardsticks developed in consumer protection law can be transferred to the PIL of unfair commercial practices.

- ***Heinz-Peter Mansel*** on the decision of the Disctrict Court Neustrelitz of 18 January 2011: "Rechtsprechungsübersicht zu AG Neustrelitz, Beschluss v. 18.1.2011 – 6 F 106/09"

- ***Renata Fialho de Oliveira***: "Die Zulässigkeit ausschließlicher internationaler Gerichtsstandsvereinbarungen in Brasilien" – the English abstract reads as follows:

In the absence of an express legal rule providing for international choice of court agreements and its effects under Brazilian law, the subject has to be analysed considering the national general legal framework regarding international jurisdiction, legal writing and case law. As far as the latest is concerned, courts in Brazil have adopted in the last decades different approaches when it comes to the derogatory effects of exclusive choice of court agreements. The lack of a clear line of decision in such an important subject for international affairs is source of legal uncertainty. A recent decision of the Superior Tribunal de Justiça gives rise to a brief analysis of the subject in the following note.

- ***Michael Stürner:*** "Internationale Zuständigkeit für provisorische Rechtsöffnung nach LugÜ" – the English abstract reads as follows:

Pursuant to Article 22 No. 5 Brussels I Regulation/Lugano Convention 2007, in proceedings concerned with the enforcement of judgments, the courts of the State in which the judgment has been or is to be enforced shall have exclusive jurisdiction. The jurisdictional concept of Brussels I/Lugano Convention is based on the assumption that proceedings can either qualify as being part of the enforcement stage or of the adjudication itself, the basis for such qualification being an autonomous interpretation. Given the multitude of different enforcement proceedings and recourses under national law it is not always clear if a particular type of proceeding falls within the scope of Article 22 No. 5 Brussels I/Lugano Convention. The decision of the Swiss Bundesgericht (Federal Supreme Court) of 7 October 2010 discussed here deals with the so-called provisorische Rechtsöffnung, which is a preliminary proceedings taking place before the actual enforcement proceedings. The Bundesgericht holds Article 22 No. 5 Brussels I/Lugano to be applicable, a decision, it is submitted here, which is to be criticised.

- ***Boris Kasolowsky/Magdalene Steup***: "Dallah v Pakistan – Umfang und Grenzen der Kompetenz-Kompetenz von Schiedsgerichten" – the English abstract reads as follows:

The UK Supreme Court and the Paris Cour d'appel have recently confirmed, in connection with the ICC arbitration involving Dallah and Pakistan, that the national state courts are not bound by any determinations made by an arbitration tribunal with regard to the existence of a valid arbitration agreement between the parties. The arbitration tribunal's Kompetenz-Kompetenz therefore remains subject to full review by the state courts at the recognition and enforcement stage. English and French courts have thus clarified that the principle of Kompetenz-Kompetenz is effectively just a rule of priority: the arbitration tribunal has the authority to rule on its own jurisdiction first and before any review by the national courts.

- ***David Diehl:*** "Keine Anwendbarkeit des US-amerikanischen Foreign Sovereign Immunities Act auf amtlich handelnde Individuen – Das Urteil des US Supreme Court in Samantar v. Yousuf" – the English abstract reads as follows:

The Foreign Sovereign Immunities Act (FSIA) and the Alien Tort Statute (ATS) are the two main pillars of the Human Rights Litigation in the United States. While the former constitutes the sole basis for suits against foreign states, the latter is frequently invoked by courts to establish jurisdiction over foreign government officials. However, in Amerada Hess Shipping v. Argentina, the US Supreme Court decided that plaintiffs may only rely on the ATS if the FSIA does not apply to the given case. As the FSIA does not explicitly mention individuals, courts were faced with the question of whether they may be subsumed under the notion of the "state" directly (28 U.S.C. § 1603 (a)) or can be regarded as an "agency or instrumentality of a foreign state" (28 U.S.C. § 1603 (b)) when acting in official capacity. Since the decision of the Court of Appeals in Chuidian v. Philippine National Bank, courts have regularly followed the latter interpretation. This interpretation however, has been challenged by other courts in recent years, leading to the decision of the Supreme Court in Samantar v. Yousuf. In this ATS case against the former prime minister of Somalia for torture and arbitrary killings, the highest US Court finally decided that the FSIA may not be read to include individuals at all. Instead, according to

the Court, all immunity of foreign individuals is solely governed by the (federal) common law, possibly forcing the courts to determine the scope of individual immunity according to international law in future cases. This may have severe impacts on the Human Rights Litigation in the United States which this article sets out to explore.

- ***Fritz Sturm***: "Schweizer Familiengut in Liechtensteiner Stiftungshut" – the English abstract reads as follows:

The assets of a family foundation regularly incorporated in Vaduz (Liechtenstein) have been spoiled by one of the managers of a credit institution in Geneva, where it had opened an account. The bank, however, refused to indemnify the foundation for its loss asserting that infringing the prohibition to create new family foundations (art. 335 sec. 2 Swiss Civil Code) the foundation as plaintiff could not be a subject of legal rights and duties. Following the Genevan instances, the Federal Court of Lausanne in a ruling dated 17/11/2009 rejected this argumentation. It stated that art. 18 Swiss Code of Private International Law can not be applied, the prohibition invoked not being intended to protect guiding principles of the Swiss social, political and economic policy.

- ***Hilmar Krüger***: "Zum auf Schiffspfandrechte anzuwendenden Recht in der Türkei"
- ***Carl-Johan Malmqvist***: "Die Qualifikation der Brautgabe im schwedischen IPR" – the English abstract reads as follows:

Sweden and Germany have become two multicultural countries with large Muslim minorities. This situation reflects on the court system and raises questions about some Muslim traditions and legal elements and their legal status within Swedish and German law. One example is the Mahr, the amount to be paid by the man to the woman at the time of marriage. This article is about the classification of Mahr according to German and Swedish law, but with main focus on the latter legal system. As part of this description, two basic Swedish cases regarding Mahr will be presented and analyzed and hopefully contribute to a clearer view on the Swedish standpoint on Mahr within the private international law.

- ***Karl Peter Puszkajler*** on the conference of the University of Belgrade: Current questions on international arbitration: “Aktuelle Fragen der Internationalen Schiedsgerichtsbarkeit – Tagung der Rechtsfakultät der Universität Belgrad”