Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2012)

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

- ***Burkhard Hess***: "Staatenimmunität und ius cogens im geltenden Völkerrecht: Der Internationale Gerichtshof zeigt die Grenzen auf" – the English abstract reads as follows:

This article deals with the decision of the International Court of Justice in Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), critically analysing the question of juridictional immunities of the the state in current public international law.

- ***Björn Laukemann***: "Der ordre public im europäischen Insolvenzverfahren" – the English abstract reads as follows:

The advancing integration of European civil procedure means that the criteria under which European insolvency judgments can be refused recognition on grounds of public policy are constantly modified. The European Insolvency Regulation is not excluded from such a development. Public policy is not something which is solely derived from national law. More and more, a European concept of public policy is becoming the benchmark for interpreting Art. 26. This article will focus on the analysis of the public policy clause in the light of international insolvency law principles – mainly the universal and immediate recognition of insolvency proceedings. Against this background, it will show why and to what extent the interpretation of Art. 26 of the Insolvency Regulation differs from that of Art. 34 n° 1 of the Brussels I Regulation, which is applied in the context of civil procedure. Due to the increasing harmonisation within the EU, the article will also shed light on the relation between the public policy exception and the need for a prior legal defence in the State in which the insolvency proceedings were opened.

- ***David-Christoph Bittmann***: "Der Begriff der „Zivil- und Handelssache" im internationalen Rechtshilfeverkehr" – the English abstract reads as follows:

The OLG Frankfurt/Main had to decide on a case concerning the qualification of the term of "civil and commercial matters" in the German-British Convention on the conduct of legal proceedings of 20 March 1928. On the basis of this convention the High Court Auckland (New Zealand) requested the service of a petition by way of legal aid from the Amtsgericht Frankfurt/Main. Subject of this petition was a penalty, requested from the New Zealand Commerce Commission against the applicant. The Commission accused the applicant of having infringed the Commerce Act of 1986. The applicant opposed against the service of the petition that the Convention from 1928 is not applicable on the requested penalty. The OLG Frankfurt/Main followed this argumentation and denied a civil and commercial matter. The following article analyses the problem of the qualification of "civil and commercial matters" in international civil procedure law at the example of the penalties requested by the New Zealand Commerce Commission.

- ***Oliver L. Knöfel***: "Ordnungsgeld wegen Ausbleibens im Ausland? – Aktuelle Probleme des deutsch-israelischen Rechtshilfeverkehrs" – the English abstract reads as follows:

The article reviews a decision of the Higher Social Court of North Rhine-Westphalia (3.12.2008 – L 8 R 239/07), dealing with the question whether a contempt fine (Ordnungsgeld) can be imposed on a party to a lawsuit who has been summoned to appear before a German consul posted abroad or before a German judge acting on foreign soil, but who has failed to comply with the summons. The author analyses the relevant mechanisms of the Hague Evidence Convention of 1970 as well as German procedural law.

- ***Dirk Otto***: "Präklusion und Verwirkung von Vollstreckungsversagungsgründen bei der Vollstreckung ausländischer Schiedsgerichtsentscheidungen" – the English abstract reads as follows:

The German Federal Supreme Court refused to enforce a foreign arbitration award for lack of a valid arbitration agreement and held that a defendant, who

objected against the arbitration throughout the proceedings is not estopped from invoking Art. V (1) (a) of the New York Convention (NYC) for having failed to initiate set-aside proceedings under the lex arbitri. The Supreme Court stressed that a defendant may opt not to commence court proceedings at the place where the award was rendered but may choose to resist enforcement under Article V NYC. This interpretation is in line with case law in other Convention countries. However, a defendant may be estopped from invoking grounds for non-enforcement if he participates in arbitration proceedings but fails to protest against any deficiencies. Furthermore, if a defendant does opt to seek annulment of an award at the place of origin, he has to put forward all reasons for setting aside, otherwise he may be precluded from raising them before the enforcing court.

- ***Frauke Wedemann***: "Die Regelungen des deutschen Eigenkapitalersatzrechts: Insolvenz- oder Gesellschaftsrecht?" – the English abstract reads as follows:

Under German law, shareholder loans are subordinate to the claims of all other creditors in the case of the insolvency of a company whose members are not personally liable. In its "PIN Group" decision, the German Federal Supreme Court (BGH) held that this rule also applies to companies founded in another EU Member State for which insolvency proceedings have been opened in Germany. The Court stated that the rule is to be characterised as a matter of insolvency law – not company law – and based this ruling on Art. 4(2)(g) and (i) of the European Regulation on Insolvency Proceedings. The author agrees with the decision, but critically examines and refines its reasoning. She analyses in detail whether the application of the German rule to a foreign company is compatible with the freedom of establishment (Art. 49, 54 TFEU). Furthermore she discusses the characterisation of other German rules concerning (1) the rescission of repayments of shareholder loans after the opening of insolvency proceedings or after the refusal to open such proceedings for lack of funds, (2) loans for which a shareholder has provided a security, and (3) the relinquishment of items or rights for use or exercise by a shareholder to the company. She argues that all these rules are to be characterised as matters of insolvency law.

- ***Heinrich Dörner***: "Der Zugriff des Staates auf erbenlose Nachlässe – Fiskuserbrecht oder hoheitliche Aneignung?" – the English abstract reads as follows:

The state's right to succeed to heirless estates may be construed either as a succession under private law or as an act of occupation under public law. In the present judgement the "Kammergericht" deals with the legal nature of the state's right of succession under the Civil Code of the former Russian Soviet Federative Socialist Republic and correctly characterises it as private intestate succession. According to the former Russian law of succession a cousin of the decedent was not entitled to a statutory portion. This regulation does not constitute an infringement of the German public order.

- ***Dirk Looschelders***: "Der Anspruch auf Rückzahlung des Brautgelds nach yezidischem Brauchtum" – the English abstract reads as follows:

In the discussed case the groom's family agreed to pay nuptial money to the father of the bride in compliance with the requirements for marriage in the Yazidi tradition. According to this tradition and the parties' agreement this money had to be repaid, because the marriage was dissolved after the wife had suffered under severe abuse by her husband.

The agreement on nuptial money has not to be qualified contractually but as a question of engagement. The determination of the statute of engagement is controversial, in the present case, however, German law is decisive according to all opinions. Pursuant to § 138 BGB the agreement on nuptial money is void as it violates public policy. A claim for repayment on grounds of unjustified enrichment fails due to § 817 sent. 2 BGB, because the violation of public policy is not only caused by the money receiving party but also the paying claimant.

- ***Martin Illmer***: "West Tankers reloaded – Vollstreckung eines feststellenden Schiedsspruchs zur Abwehr der Vollstreckung einer zukünftigen ausländischen Gerichtsentscheidung" – the English abstract reads as follows:

After the European Court of Justice's decision in West Tankers and the Court of Appeal's conclusions in National Navigation, anti-suit injunctions as well as

declaratory decisions by the state courts at the seat of the arbitration regarding the existence and validity of the arbitration agreement are either not available or not effective in preventing torpedo actions frustrating the arbitration agreement. In light of this unsatisfactory status quo, after having succeeded in the arbitration proceedings in London (declaring West Tankers' non-liability for the damage under dispute), West Tankers sought to enforce the arbitral award in England so as to prevent recognition and enforcement of a future Italian judgment on the merits. Whether an arbitral award constitutes a ground for refusing a declaration of enforceability of a foreign decision under Art. 34, 45 Brussels I Regulation is, however, disputed. The High Court as well as the Court of Appeal held that the issue was not decisive for the outcome of the case while it clearly was. This is at last proven by the fact that the High Court implicitly determined the issue by upholding the declaration of enforceability of the arbitral award. This article scrutinises the High Court's decision and the Court of Appeal's dismissal of the appeal in light of the interface of the Brussels I Regulation and arbitration. Furthermore, it discusses the crucial question whether an arbitral award may constitute a ground for refusing a declaration of enforceability under the Brussels I Regulation and whether such a ground would be compatible with the ECJ's decision in West Tankers.

- ***Weidi LONG***: "The First Choice-of-Law Act of China's Mainland: An Overview" – the abstract reads as follows:

On 28 October 2010, China promulgated the Act of the People's Republic of China on Application of Law in Civil Relations with Foreign Contacts, which came into force in China's Mainland on 1 April 2011. The Act is remarkable for its brevity and lack of concrete solutions. The legislators have opted for generality, while leaving specific issues to the courts and in particular, to the Supreme People's Court. Thus, the legislature has merely set the stage for the judiciary by providing a preliminary framework for future Chinese private international law. Pending interpretive instruments by the Supreme People's Court, this Note stays with an overview of the Act. It first introduces the legal background to Chinese private international law, followed by a brief retrospect of the legislative history of the Act. It then discusses the general features of the Act, viz., the residual role of the closest connection rule, the liberal attitude towards party autonomy, the free-spirited approach to forum mandatory rules, enhanced (possibilities of) content-orientation, and adoption of the habitual-

residence principle. Finally, it concludes by observing that Chinese private international law is moving towards a regime with greater flexibility, and that this move is inspired by the demands for substantial justice and the wish to promote national interests.

- **Duygu Damar**:"Deutsch-türkisches Nachlassabkommen: zivilprozess- und kollisionsrechtliche Aspekte" – the English abstract reads as follows:

The German-Turkish Agreement on Succession of 1929 is of substantial importance for more than one and a half million Turkish nationals with habitual residence in Germany. The Agreement on Succession does not only regulate the applicable law regarding movable and immovable estate as well as the international competence of German and Turkish courts, but also grants important powers, in line with given tasks, to German and Turkish consuls. These powers generally cause doubts in German practice, whether the certificate of inheritance should be issued by the Turkish consul in case of death of a Turkish national in Germany. The
article gives an overview on the conflict of laws rules set in the Agreement on Succession and clarifies the questions of civil procedure with regard to the issuance of certificates of inheritance and their consideration in Turkish law of civil procedure.

- ***Erik Jayme/Carl Friedrich Nordmeier*** on the conference of the German-Lusitanian Association in Cologne: "Anwendung und Rezeption lusophoner Rechte: Tagung der Deutsch-Lusitanischen Juristenvereinigung in Köln"
- ***Erik Jayme*** on art trade and PIL: "Kunsthandel und Internationales Privatrecht – Zugleich Rezension zu Michael Anton, Rechtshandbuch – Kulturgüterschutz und Kunstrestitutionsrecht"
- ***Marc-Philippe Weller*** on the PIL Session 2011 of the Hague Academy of International Law: "Les conflits de lois n'existent pas! Hague Academy of International Law – Ein Bericht über die IPR-Session 2011"

Kein Abstract