Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2012)

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

- ***Urs Peter Gruber***: "Scheidung auf Europäisch – die Rom III-Verordnung" – the English abstract reads as follows:

Regulation (EU) No. 1259/2010 („Rome III") contains uniform conflict-of-laws rules on divorce and legal separation. Compared with the previous conflict-of-laws rules of the Member States, it brings about fundamental changes. Primarily, in contrast to the majority of the pre-existing national laws, it favours party autonomy. Only absent a valid agreement on the applicable law, divorce or legal separation are governed by the law of the state where the spouses have their common habitual residence or – under certain circumstances – were last habitually resident. The common nationality of the spouses and the lex fori are only subsidiary connecting factors.

The Regulation also touches some politically intricate subjects. First of all, the Regulation is also applicable to same-sex marriages; however, pursuant to a compromise reached in article 13, those Member States which do not accept same-sex marriages are not obliged to pronounce the divorce of such a marriage. Art. 10 which deals with gender discrimination might lead to a rigid exclusion of Islamic laws.

- ***Christopher Wilhelm***: "Die Anknüpfung von Treuhandverträgen im Internationalen Privatrecht unter besonderer Berücksichtigung der Rom I-VO" – the English abstract reads as follows:

Having contractual as well as property rights elements, and because of the great variety of its possible fields of application, the German Treuhand does not only pose problems in German substantive law, but also in private international law. The present article shows how to find the law applicable to the contractual

fiduciary relationship according to the Rome I Regulation. It points out and answers certain questions arising from the material scope of the regulation, and discusses the possibility and the advantages of choice of law. The main focus is on the law applicable in the absence of choice by the parties, Article 4 Rome I, and the specific problems occurring. The article closes by summing up the key aspects and a comment of the author.

- ***Matthias Lehmann***: "Vorschlag für eine Reform der Rom II-Verordnung im Bereich der Finanzmarktdelikte" – the English abstract reads as follows:

On today's interconnected financial markets, illegal behaviour – such as false or misleading information in prospectuses, violation of disclosure and shareholder transparency rules, ill-founded credit rating, merger offers not complying with legal requirements, insider trading or market manipulation – often has repercussions in different countries. This raises the question of the law that applies to the civil liability of the tortfeasor. In the European Union, the answer has to be found in the Rome II Regulation, which provides a comprehensive set of conflict rules for non-contractual obligations. However, the regulation does not contain any specific provision on financial torts. Its general rule, Article 4 (1), points to the law of the state in which the damage occured, i.e. either the state of the investors' home or that of their bank accounts. When looking from the perspective of the tortfeasor – typically an issuer or an intermediary – this has the effect that a multitude of different laws governs, which moreover cannot be predicted in advance. In order to remedy this situation, the German Council for Private International Law, a body established by the German Ministry of Justice, suggests amending the Rome II Regulation. The proposal, an English version of which is annexed to this article, provides for new, specific connecting factors, an escape and a fallback clause, as well as special rules regarding collective redress, bilateral relationships and party autonomy.

- ***Martin Illmer***: "Anti-suit injunctions and non-exclusive jurisdiction agreements" – the English abstract reads as follows:

Due to uncertainty about the interpretation and scope of two earlier, potentially conflicting Court of Appeal decisions concerning anti-suit injunctions

enforcing non-exclusive jurisdiction agreements, the state of the law was unclear. Setting aside an anti-suit injunction granted by the High Court at first instance, the Court of Appeal made a fresh start. It distinguished the earlier case law on the matter and laid down general guidelines for the grant of anti-suit injunctions enforcing non-exclusive jurisdiction agreements. The decision itself as well as the accompanying plea on behalf of textbook writers deserve full support.

- ***David-Christoph Bittmann***: "Das Gemeinschaftsgeschmacksmuster im Europäischen Zivilprozessrecht" – the English abstract reads as follows:

The following article deals with a decision rendered by the Oberlandesgericht Munich. Subject of this decision is an application for declaration of enforceability of an injunctive relief from the Tribunal de Grande Instance of Paris. With this injunctive relief the French court prohibited further infringements of a community design committed by a French and a Belgium enterprise, which are part of one concern. The applicant was in fear of further infringements of the community design through this concern in Germany so it applied for the declaration of enforceability of the French injunctive relief at the Landgericht Munich I. The German court however declined the application on the grounds that it has no jurisdiction as far as the Belgium enterprise is concerned; furthermore an injunctive relief was not a decision that could be subject of a declaration of enforceability. The Oberlandesgericht changed the decision and released the declaration of enforceability. The following article takes a closer look to the reasoning of the senate that had to deal with questions of international jurisdiction, of remedies in cases of protection of industrial property and of the enforcement of foreign judgements according to the Regulation Brussels I.

- ***Stefan Reinhart:*** "Die Durchsetzung im Inland belegener Absonderungsrechte bei ausländischen Insolvenzverfahren oder Qualifikation, Vorfrage und Substitution im internationalen Insolvenzrecht" – the English abstract reads as follows:

In a recent case the German Federal Court had to decide on cross-border insolvency issues that – at first hand – looked straight forward, which, however,

are much more complicated at a second look. A secured creditor applied for enforcement measures in real property situated in Germany against a debtor who had been declared bankrupt in England. The Federal Court held that the application had to be dismissed since on the basis of German enforcement law the enforceable title had not been reindorsed and readressed against the English trustee and had not been served upon the trustee prior to initiating execution proceedings.

Unfortunately, the Federal Court entirely missed to clarify why such rules of German enforcement law would govern the effect of the commencement of an insolvency proceeding abroad. Had the German court adressed the issue, it would have become evident that such issue is explicitly addressed by Art. 4 sub. 2 lit. f of the European Insolvency Regulation (EIR) which, however, declares the lex fori concursus applicable. On the other hand, the situation is comparable to the conflict rule in Art. 15 EIR which refers to the lex fori of the trial pending. The issue can only be solved by a new construction of the meaning of those two provisions. The author argues that the German legal requirement to transcribe the title and to serve the title on the foreign trustee does not fall under the scope of Art. 4 EIR, but concedes that such solution requires a new approach regarding the relation of Art. 15 and 4 EIR.

- ***Roland Abele***: "Ausländisches Arbeitsvertragsstatut und Wartezeit nach § 1 Abs. 1 KSchG" – the English abstract reads as follows:

A recent judgment by the German Federal Labour Court ("BAG") may be relevant to foreign employers who, after having contracted employees under home law, transfer them to Germany where they continue to perform services for their employer. In the case, heard by the BAG, the plaintiff, a Latvian citizen, who had an employment contract with a Latvian bank under Latvian law, moved to Germany to become director of one of the bank's subsidiaries located in Germany. Shortly afterwards, there was a change in the contract, this time under German law. Finally, the plaintiff was dismissed and he sued for unfair dismissal in Germany. The German statute granting protection against unfair dismissal ("KSchG") provides for a probationary period of six months ("Wartezeit", § 1 para. 1 KSchG). At the time the plaintiff was dismissed, he had not yet served six months under his (altered) contract as per German law. Nonetheless, the BAG sustained the suit, holding that the probationary period

could be completed by two consecutive contracts with the same employer. The court also recognized that it is legally irrelevant if parts of the probationary period have been completed under foreign law, provided that German law was applicable to the contract at the time when the employee received notice.

- ***Dominique Jakob/Matthias Uhl***: "Die liechtensteinische Familienstiftung im Blick ausländischer Rechtsprechung" – the English abstract reads as follows:

Several problems concerning Liechtenstein Foundations were repeatedly subject to judgments of Higher Regional Courts in Germany. These judgments were criticised in literature. Meanwhile also the Supreme Court of Austria (OGH) had to deal with a problem located at the crossroads of the principle of separation in foundation law and the legal concept of piercing the corporate veil. Similar to the jurisdiction in Germany the judgment of the OGH from 26.5.2010 seems to put the Liechtenstein Foundation under a general suspicion to present a vehicle for shifting capital in an abusive way. This allegation requires a critical analysis.

On 1.4.2009 a total revision of foundation law in Liechtenstein came into force. Its aim is to preserve the traditional features of the legal instrument while at the same time introducing modern control mechanisms. Indeed it is the Principality and its market participants who are primarily demanded to realise their wish for an improved reputation of the Liechtenstein Foundation. However, the (foreign) courts should accommodate the process by applying established dogmatic principles as well as by treating the Liechtenstein Foundation in line with other foreign legal entities.

- ***Arno Wohlgemuth***: "Anerkennung deutscher Scheidungsurteile in Russland" – the English abstract reads as follows:

Recognition of foreign divorce decrees in Russia is regulated by Chapter 45 (Art. 413–415) of the Russian Code of Civil Procedure, 2002, and Art. 160 of the Russian Family Code, 1995. In 2005 the Supreme Court of Russia dismissed the objections by the wife against a German divorce decree pronounced in 2001, when the Russian couple lived in Germany. Apart from default of the time-limit for filing objections, the Russian Supreme Court did not find any grounds for

non-recognition enshrined in Art. 412 CCP. Neither international treaties signed by Russia nor formal procedures are prerequisites for recognition in Russia. Predecessors to the rules on recognition of foreign judgements including those on personal status may be discovered in the Ukase of the Presidium of the Supreme Soviet of the USSR of 1988 on Recognition and Enforcement in the USSR of Foreign Court Decisions and of Foreign Arbitral Awards.

- ***Philipp Habegger/Anna Masser***: "Die revidierte Schweizerische Schiedsgerichtsordnung (Swiss Rules)" – the English abstract reads as follows:

The revised version of the Swiss Rules of International Arbitration (Swiss Rules) entered into force on 1 June 2012. This article addresses the main changes and innovations. After taking into consideration various provisions which aim at further enhancing the efficiency of arbitral proceedings, special emphasis is put on the revised provision on consolidation and joinder and on the new emergency relief proceedings allowing for interim relief prior to the constitution of an arbitral tribunal. The authors conclude that the revision brings to be welcomed amendments that will lead to even more time and cost efficient proceedings.

- ***Carl Friedrich Nordmeier***: "Cape Verde: New Rules on International Civil Procedure" (in English)

Since 1.1.2011, a new Code of Civil Procedure is in force in Cape Verde. It is similar to the Portuguese codification of civil procedure law and contains rules on international civil procedure. The present article analyses these new rules on international jurisdiction, on procedures with connection to a foreign country and on recognition and enforcement of foreign judgments. Under the new regime, reciprocity is granted in accordance with § 328 (1) 5 of the German Code of Civil Procedure.

- ***Erik Jayme/Carl Zimmer*** on the conference in Potsdam on cultural relativism: "Kulturelle Relativität – Völkerrecht und Internationales Privatrecht" – Tagung in Potsdam