# Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2013)

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

- ***Miriam Pohl***: The Recast of Brussels I – striking the balance between trust and control

*Roughly two years after the presentation of the Commission's proposal, the recast of the Brussels I Regulation was adopted on 6 December 2012. As from 10 January 2015, the recast will replace Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The following article presents the most important changes.*

- ***Michael Coester***: The Influence of EU-Law on German Conflict Rules for Registered Partnerships

*Since the enactment of the German conflict rules on registered partnerships (Art. 17b EGBGB) in 2001 significant changes have taken place. The European Union is progressively building a system of private international law rules in family matters, and the constitutional as well as the human rights approach towards registered partnerships today focuses more on the protection of same-sex relationships against unjustified discrimination rather than on the protection of marriage. As a result, some elements of Art. 17b EGBGB are already today (or will be in the next future) governed by Community law instead of national law (alimony, inheritance, property issues), and basic principles of common private international law become visible. This article explores in detail (1) the scope of EU-regulations with regard to registered partnerships, (2) the convergence of the remaining text of Art. 17b EGBGB with emerging techniques and principles of Community law and (3) its conformity with overriding principles of constitutional, EU- or human rights law. It is suggested that the existing German rules of private international law on registered partnerships need an overall revision in order to bring it in line with existing*

*constitutional law and emerging European Community law. To this end, the author submits concrete text proposals for all areas of German Private International Law on registered partnerships which are still subject to national law.*

- ***Eric Wagner/Marius E. Mann***: The Merchant Status of Foreign Parties in Civil Proceedings

*According to section 95 Judiciary Act (Gerichtsverfassungsgesetz), the functional jurisdiction of the court seized of the matter depends on the merchant status of the parties to the proceedings. This can lead to difficulties in the case of disputes in international business dealings. For example, if a party established abroad is involved, the question arises as to what country's laws determine whether this party has merchant status. So far there is no Supreme Court case law on this question. The views taken by the lower courts and in legal literature vary. This article offers a view of the status of the discussion and explains why, when it comes to determining, within the scope of section 95 Judiciary Act, whether merchant status is present – also in the case of foreign parties – only lex fori can be decisive.*

- ***Peter-Andreas Brand***: Cross-border consumer protection within the EU – Inconsistencies and contradictions in the European System of Conflict of Law Rules and Procedural Law

*The endeavours throughout the European Union to create a harmonized European Procedural Law, in particular in the context of jurisdiction and recognition and enforcement, and also the process of harmonisation of the Conflict of Law Rules within the EU have realised the importance of cross-border consumer protection. Both the Rome I Regulation and Regulation No. 44/2001 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters contain specific provisions for the protection of consumers. It is the aim of this article to consider the practical implications of the most important provisions of the EU-Conflict of Law Rules and the Procedural Rules with respect to the applicable law, jurisdiction and the exequator proceedings. Furthermore, current inconsistencies and sometimes contradicting intentions in European legislation shall be highlighted.*

- ***Christian Heinze:*** Keine Zustellung durch Aufgabe zur Post im Anwendungsbereich der Europäischen Zustellungsverordnung – the English abstract reads as follows:

*The rules for judicial service in some EU Member States allow service of documents on parties domiciled abroad by a form of "fictitious" service within the jurisdiction. Under these rules, service is deemed to take effect at the moment when a copy of the document is lodged with a national authority, placed in the court's case file or at the time when it is sent abroad for service, irrespective of the time when the recipient actually receives the document, if the foreign party has failed to appoint a representative in the forum state who is authorised to accept service. The following case note discusses two judgments of the German Bundesgerichtshof and the Court of Justice of the European Union (Case C-325/11 – Alder) which hold that this practice is, for inner-EU cases, incompatible with the European Service Regulation (EC) No 1393/2007 (ECJ) and German domestic law (Bundesgerichtshof). The Court of Justice has rightly coined an autonomous definition of service of a judicial document between Member States for the purposes of Article 1(1) of the Service Regulation. As a consequence, the Service Regulation provides, with the exceptions of Article 1(2) and Recital 8, for an exhaustive list of the means of transmission of judicial documents. The Service Regulation therefore excludes the application of national rules on fictitious service which would deprive the rules of the Service Regulation, in particular the right of the person to be served to benefit from actual and effective receipt, of all practical effect.*

- ***Christoph Thole***: Verbrauchergerichtsstand aufgrund schlüssiger Behauptung für eine Kapitalanlegerklage gegen die Hausbank des Anlagefonds? – the English abstract reads as follows:

*In its judgment, the German Federal Supreme Court held that in a case brought by a consumer against the house bank of a Ponzi scheme in which the consumer had invested money, the courts in his home country enjoy jurisdiction under Art. 15, 16 Brussels I-Regulation. The Austrian bank was considered to have committed itself to the plaintiff to transfer the money paid in by the consumer into the bank's own account in Germany to the Austrian bank account of the Ponzi scheme. The defendant was thus held to have entered into a contractual relationship with the consumer. Christoph Thole argues the judgment to be*

*feasible, however, the ruling must not be generalized too easily. Furthermore, he emphasizes that the burden of demonstration with respect to jurisdictional issues has a Community law dimension rather than being solely based on national law.*

- ***Stefan Arnold***: On the scope of the jurisdiction over consumer contracts and on the nature of the doctrine of culpa in contrahendo and actions based on an infringements of sec. 32 German Banking Act (Kreditwesengesetz)

*According to the Federal Court of Justice (Bundesgerichtshof), sec. 13 and 14 Lugano Convention 1988 give German courts jurisdiction in proceedings brought by German consumers concerning investments in Switzerland. Actions based on an infringement of § 32 German Banking Act (Kreditwesengesetz) and on culpa in contrahendo (here: breach of precontractual duties of disclosure) must be considered as "proceedings concerning a contract" in the sense of sec. 13 Lugano Convention 1988. The jurisdiction of German courts does not depend on the consumer's material vulnerability. It is equally irrelevant whether the consumer took the initiative as regards the investment and whether the "specific invitation" addressed to the consumer did not constitute a legally binding offer but merely an invitatio ad offerendum. Thus, the Bundesgerichtshof implicitly argues for a formal analysis in matters of the jurisdiction over consumer contracts and acknowledges the crucial importance of legal certainty in International Procedural Law. The judgment is also relevant for the interpretation of sec. 15 Brussels I Regulation/Lugano Convention 2007.*

- ***Florian Eichel***: Judicial power and international jurisdiction for the enforcement of a judgment for a specific act (§§ 887 et seq. German Code of Civil Procedure) in case of a foreign place of performance

*The German Federal Court of Justice (Bundesgerichtshof – BGH) held that German courts have international jurisdiction to take measures for enforcing a judgment for a specific act even when the act has to be performed abroad. This essay agrees with the outcome of the decision, discusses questions of state sovereignty and suggests that personal jurisdiction should have been derived from the Brussels I-Regulation (EC) No. 44/2001 as an unwritten annex-competence.*

- ***Björn Laukemann***: Actions for separate satisfaction and the European jurisdictional regime

*In the case ERSTE Bank, the ECJ had to decide on the applicability ratione temporis of Article 5 of the European Insolvency Regulation (EIR) in the context of Hungary's accession to the European Union. Thereby, the Court left out the contentious issue whether international jurisdiction over actions for the determination of collateral securities on assets belonging to the debtor's estate is to be determined by the Brussels I regime or rather the EIR. Exemplified by actions for separate satisfaction, this article will focus on the jurisdictional delimitation between both Regulations which is now, concerning insolvency related actions in general, regulated by Article 3a of the EU-Commission's proposal for a recast of the EIR. The article points out that the criteria underlying the principle of vis attractiva concursus are not suitable for actions for separate satisfaction and unfolds the consequences on the dispute at issue.*

- ***Klaus Bartels***: Interim regulations on corporate headquarters in Europe

*The annotated judgment of the OLG Nürnberg deals with questions of cross-border transfer of corporate headquarters. The concrete case shows a moving-in-concept of a Société responsabilité limitée heading from Luxembourg to Germany. The immigration had been planned as a change into a German GmbH with fitting new firm and varied statute, but with affirming its outgoing law-identity. Especially the formation of a new company like in "Vale Építési" wasn't aimed. Though transfers like that are welcome in Luxembourg, the German Umwandlungsgesetz doesn't accept immigrations of that kind. In the court's opinion a request according to Article 267 (2) AEUV is not needed, for even a German duty (with European origin) to create and to offer immigration-friendly statutes wouldn't help to have the aimed transfer. The court misses the prerequisites of the national Umwandlungsgesetz as well as of the regulations of EWIV, SE and SCE.*

*Nevertheless, concrete process history and the decision itself introduce to extensive problems of European cross-border transfer of corporate headquarters as they occur at the present and (up to now) without adjusting help of the European Union. This article tries to demonstrate the interim rules and their method intricacies, caused by the conflict of national corporate law on*

*the one hand and the European legal principles on the other. It furthermore offers support by introducing basic rules of intertemporal law.*

- ***Bernd Reinmüller/Alexander Bücken***: Provokation eines inländischen Deliktsgerichtsstandes im Urheberrecht – the English abstract reads as follows:

*This contribution deals with a decision by the French Cour de cassation (1ére civ. 25.3.2009 – ref. no. 08.14.119) on the admissibility of the provocation of domestic tort jurisdiction under copyright law at the application of Article 5.3 of the European Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. In conformity with German case law, the Cour de cassation distinguishes between an admissible test order through which domestic jurisdiction can be established and a manipulative subreption of jurisdiction which does not have the effect of establishing jurisdiction in accordance with the principles of good faith. Furthermore, the "mosaic theory" developed by the ECJ for press law offences is transferred to copyright law. Consequently, the tort jurisdiction established by an admissible provocation of jurisdiction is always restricted to the damage caused in the forum state.*

- ***Herbert Roth***: Zur verbleibenden Bedeutung des deutsch-österreichischen Anerkennungs- und Vollstreckungsvertrags 1959 – the English abstract reads as follows:

*The decision of the OGH addresses problems of foreign lis pendens and their impacts to domestic disputes. Subject matter of the judgment is a proceeding for the division of assets in accordance with Art. 81 et seqq. of the Austrian Marriage Act brought to Austrian Courts prior to the German counterpart. The OGH qualifies the Austrian proceeding for the division of assets as part of the matrimonial property regime and therefore lawfully applies the German-Austrian Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed on 6 June 1959. Pursuant to Art. 17 of this Convention the sole recourse to the Court shall not be sufficient to prevent proceedings abroad. Instead, the barrier effect depends on the pendency of the suit, which according to the Austrian and German Law requires the formal service of the complaint. In the present case the OGH therefore correctly refers not to the prior recourse to the Austrian Courts, but the formal*

*service of the claim, which was effected by the German authorities earlier than the Austrian delivery. Therefore the Austrian Courts lawfully had to decline their international jurisdiction in favor of the German Courts.*

- ***Patrizia Levante***: Der materielle ordre public bei der Anerkennung von ausländischen Scheidungsurteilen in der Schweiz – Blick auf die Rechtsprechung – the English abstract reads as follows:

*In Switzerland, the question of recognition of foreign divorce judgments arises more and more often. In many international marriages, the divorce is filed and granted abroad. In these cases, the only task that remains to the Swiss courts is to examine whether the foreign divorce judgment can be recognized in Switzerland. This article discusses questions of Swiss substantive public policy (ordre public) in connection with the recognition of foreign divorce judgments. The first section of the article presents the relevant legal provisions. The second section gives an overview of the current jurisdiction of Swiss courts. With regard to the dissolution of marriage, the article highlights in particular, under which circumstances foreign extrajudicial divorces and repudiations can be recognized in Switzerland. Considering the recognition of the financial consequences of the divorce (spousal maintenance, matrimonial property, occupational pension fund), the article shows that the Swiss authorities have to look at the rationale behind a certain order (or lacking order) in the foreign judgment, and to examine whether an adequate financial compensation has been ordered. Regarding children, it is required that the competent authorities act ex officio and settle children's issues (custody, visiting rights, child maintenance) in a coherent and united manner. In the process of recognizing a foreign judgment, the best interest of the child must be considered.*

- ***Gerhard Hohloch***: Hans Stoll † (4.8.1926–8.11.2012)
- ***Konrad Duden***: „Leihmutterschaften" – Abschlussveranstaltung der Jahresfachtagung des Bundesverbandes der Deutschen Standesbeamtinnen und Standesbeamten
- ***Céline Camara***: Cross-border successions within the EU – Report on a conference by the ERA
- ***Christel Mindach:*** Staatlicher Schadensersatz bei Verschleppung von

Gerichtsverfahren und der Vollstreckung von Gerichtsentscheidungen

- ***Heinz-Peter Mansel***: Beschlüsse der Sitzung der Ersten Kommission des Deutschen Rates für Internationales Privatrecht zur Reform des Ehe- und Lebenspartnerschaftsrechts am 9./10.11.2012 in Würzburg