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

- ***Rolf Wagner***: "15 years of judicial cooperation in civil matters"

With the Treaty of Amsterdam entering into force on 1 May 1999 the European Union has obtained the legislative competence concerning the judicial cooperation in civil matters. This event's 15th anniversary gives ample reason to pause for a moment to briefly appreciate the achievements and to look ahead.

- ***Marc-Philippe Weller:*** "Habitual residence as new connecting factor in International Family Law – Counterbalancing changes in the applicable law by the local and moral data approach"

In International Family Law, the traditional connecting factor of nationality is more and more substituted by habitual residence. E.g., according to Article 8 Rome III-Regulation divorce and legal separation shall be subject to the law of the State where the spouses are habitually resident at the time the court is seized. The connecting factor of habitual residence reflects the greater mobility in the 21st century's open societies. However, it affects the permanence of the law applicable in family matters and causes a change in the applicable law with every cross border-transfer of the spouses' habitual residence. This volatility of substantive family law conflicts with the principle of predictability and interferes with the cultural identity of the individual. It therefore requires counterbalance by means of substantial law. One method of counterbalancing changes in the applicable law is the local and moral data-approach, advocated by Albert A. Ehrenzweig and pursued by my great academic mentor Erik Jayme, whom this article is dedicated to. It discusses the local and moral data-approach and shows its limits of application, especially in the area of ordre public.

- ***Alfred Escher/Nina Keller-Kemmerer***: "On the way to the American Rule? The unconstitutionality of recent German Federal Court's (BGH) decisions on limiting foreign correspondence lawyers' reimbursement claims for litigation costs"

German procedural law is guided by the so called Unterliegenshaftung. According to this principle, which is nearly equal to the English Rule, the unsuccessful party is obliged to pay the costs of the proceedings and the extrajudicial costs necessarily incurred by the applicant in taking the appropriate legal action (lawyers' fees and expenses). In accordance to this guiding principle of German procedural law, the determination of the amount of fees for foreign correspondence lawyers had been based on the relevant foreign law and was not limited to the amount of German correspondence lawyers. In 2005 however, the German Federal Court (BGH) changed this lawful and prevailing jurisprudence and limited the fees for foreign correspondence lawyers to the regulations of the German Rechtsanwaltsvergütungsgesetz (Act on the Remuneration of Lawyers). This article takes the BGH's recent decision of 2012 concerning this question of law as a reason to stress especially two important aspects which only received little attention in the discussions in 2005: That the German Federal Court's decision is not only inconsistent with fundamental principles of German procedural law, but also incompatible with the Constitution.

- ***Chris Thomale***: "Brussel I and the eastern EU enlargement – defining the scope ratione temporis of Reg (EC) 44/2001"

The European Court of Justice recently held that for the Brussels I-Regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed. This decision raises general questions on the spatial and temporal scope of the Brussels I-Regulation as well as the normative relationship between its Art. 2 et seqq. and Art. 32 et seqq., which are discussed in this article.

- ***Moritz Brinkmann***: "International jurisdiction with respect to avoidance claims in the context of insolvency proceedings regarding

credit institutions”

At the centre of the case, that is an ancillary proceeding to the insolvency proceedings regarding the Lehman Brothers Bankhaus AG, are intricate issues regarding the international jurisdiction with respect to avoidance claims: The most pertinent is the question whether the doctrine developed in Deko Marty is also applicable in the context of the Directives 2001/24/EC on the reorganisation and winding up of credit institutions and 2001/17/EC on the reorganisation and winding-up of insurance undertakings. If this was answered in the affirmative, one has to ask whether national legislation that implements the directives into the law of a Member State can be interpreted in conformity with the Directive, even though the legislation does not explicitly deal with ancillary proceedings and the autonomous law of that Member State does not follow the approach taken in Deko Marty. In this sense, the case is also about the limits of the duty of the national courts to interpret national legislation in conformity with European law insofar as it implements directives.

- ***Peter Mankowski***: “Die internationale Zuständigkeit nach Art. 3 EuUnterhVO und der Regress öffentlicher Einrichtungen”

If public bodies enforce claims for maintenance subrogated by them, jurisdiction is vested in the court of the place where the original creditor is habitually resident, by virtue of Art. 3 (b) Maintenance Regulation. Art. 3 Maintenance Regulation establishes a system of general jurisdiction and does not retain the relation which was previously prevailing between Arts. 2 and 5 (2) Brussels I Regulation. Else an unwilling or defaultive debtor would indirectly benefit from the subrogation and the transfer of the claim to the public body. This would generate quite some unwelcome and counterproductive incentives. Conversely, to vest jurisdiction in the court for the place where the original creditor is habitually resident, proves to be advantageous in many regards.

- ***Christoph Thole:*** “Member States may take cross-border evidence without recourse to the methods of the Evidence Regulation”

The Council Regulation (EC) No 1206/2001 has no conclusive character. This was recently ruled by the ECJ. The decision confirms the Court’s earlier ruling

in Lippens and finally settles a long lasting dispute about the scope of the Regulation. While the ECJ's arguments, which are primarily based on teleological grounds, are convincing and the ruling to be welcomed, it is questionable though, what effect the decision will have on the factual application of the Regulation. The comment analyses the decision and its consequences.

- ***Björn Laukemann***: "Public policy control in European insolvency proceedings in the light of fraudulent recourse to the court's competence and subreption of discharging residual debts: a creditors' perspective"

Bankruptcy tourism within the European internal market is legion. Especially uninformed and involuntary creditors suffer from cross-border COMIshifts of the insolvent debtor undertaken with fraudulent intention. In this context, it is hardly surprising – as demonstrated by a new decision of the Local court of Göttingen – that the public policy exception comes into play. The article will shed light on the question if the interpretation of Art. 26 of the European Insolvency Regulation has to distinguish between objections concerning the international jurisdiction of the insolvency court (Art. 3 EIR) and alleged violations of the creditors' right to participate effectively in foreign proceedings. The author will point out that infringements against the latter may, under specific conditions, trigger the application of Art. 26 EIR. In this regard, the adequate balance between the creditors' need for a prior legal defence, on the one hand, and their obligation to (constantly) inform about the insolvency of their debtor, on the other, is of peculiar importance. The outcome of the current reform of the Insolvency Regulation will show to what extent it will meet the necessity to strengthen the procedural position of foreign creditors – beyond Art. 26 EIR.

- ***Bettina Heiderhoff***: "The "mirror principle" and the violation of international public policy in German recognition procedures"

For the recognition of divorce decrees from non EU member states, the German courts must determine whether the decision was within the jurisdiction of the foreign court (§ 109 para. 2, nr. 1 FamFG). In order to do so, the German rules on jurisdiction are applied to the foreign case in a "mirrored" fashion (the

socalled "mirror principle"). In some special cases, it is debatable, but also decisive, as to whether the German judge must mirror § 98 FamFG or Art 3 et seq Brussels IIbis regulation. This counts, in particular, where one or both of the divorcees may have given up their former nationality of the State of origin. The article indicates that the German court must always mirror § 98 FamFG. The Brussels IIbis regulation can only justify additional competences. In particular, the exclusive competence of art. 6 Brussels IIbis is not applicable in this context. Furthermore, the article points out that each party can refer to a violation of the international public policy during the recognition procedure, even if he hasn't made use of a possible appeal before the foreign court. It is a question for the individual case if the right to appeal before the court of origin has to be considered by the German court.

- ***Jens Adolphsen/Johannes Bachmann***: "The Certification of orders to perform concurrently ("Zug-um-Zug") as European Enforcement Orders"

The reviewed judgment of the Regional High Court of Karlsruhe, Germany is dealing with the certification of an order to perform concurrently ("Zug-um-Zug") as a European Enforcement Order. In contrast to the court, a majority in German literature and jurisprudence denies the possibility of certification in such cases. But "Zug-um-Zug" claims can still be issued as European Enforcement Orders. The following article describes the academic discussion and names the necessary requirements for certification.

- ***Rolf A. Schütze***: "Zur cautio iudicatum solvi juristischer Personen"

German law practices the principle of residence in determining the obligation of cautio iudicatum solvi. It is contested whether legal entities have their usual residence at the place of incorporation or at the place of administration. Contrary to the prevailing opinion in case law and legal writing the OLG Schleswig – in the commented decision – sees the usual residence at the place of incorporation. The author contests that and favours the place of administration as decisive in application of sect. 110 German Code of Civil Procedure.

- ***Stefan Pürner:*** "The reciprocity (concerning the recognition of civil

judgments) in the relation between Bosnia and Herzegovina and Germany"

The article describes the development of the German court practice related to the reciprocity concerning the recognition of civil judgments in the relation between Bosnia and Herzegovina and Germany. There are contra dictionary judgments in Germany related to this question. In the midst of the 90s the Higher regional Court Cologne ruled that, due to the war situation in Bosnia and Herzegovina, there would be no reciprocity. The author holds that this judgment was wrong already in the time it was brought. In any case it is overtaken by the legal development in the meantime which convinced also the newer German court practice to affirm the existence of the reciprocity in the said relation. However, even in the present German legal literature authors deny that the reciprocity exists in mentioned relation. From this, the author draws the conclusion that in cases with foreign elements country- specific knowledge is essential. In addition to that, past former findings of courts should not be just carried forward. Moreover he emphasizes that, in particular in relation to states with a very agile legal development (e.g. the transformation states) the legal situation concerning questions like the reciprocity may be answered only on the basis of laws, judgments and legal literature of the respective states (or by legal opinions of experts or institutions which are specialized in the law of the respective country) as primary source whilst judgments of German (and all other foreign courts) are only secondary sources of information.

- ***Tobias Lutzi***: "France's New Conflict-of-Laws Rule Regarding Same-Sex Marriage and the French ordre public international"

In a lawsuit that attracted huge media attention, the French Cour d'appel de Chambéry has confirmed France's first lower court decision concerning the relation between the new Art. 202-1 § 2 of the Code civil (which provides that same-sex marriage is allowed if only the law of the nationality or the law of the residence of one of the spouses allows it) and bilateral treaties that provide exclusively for the application of the law of the nationality of each spouse. Although the court recognized the superiority of these treaties to the provisions of the Code civil under Art. 55 of the French Constitution, it ruled that the Franco-Moroccan Agreement of 10 August 1981 does not apply to the marriage

of a Franco-Moroccan same-sex couple as the prohibition of same-sex marriages contradicts French international public policy.