Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2014)

The latest issue (July/August) of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** contains the following articles:

- ***Maximilian Hocke***: "Characterizing the culpa in contrahendo under Art. 12 Rom II-Regulation" – The English abstract reads as follows:

This article explores the scope of Art. 12 Rome II Regulation. According to Recital (30) Rome II Regulation, personal injuries shall not be covered by Art. 12, but rather disclosure duties as well as negotiation breakdowns. The article argues that the recent construction – Art. 12 addresses specific transactional duties and Art. 4 general duties – is too vague. Instead, a precise characterization of the culpa in contrahendo will be established by referring to comparative law. This characterization focuses on expectation as a condition for respective claims.

- ***Sebastian Mock***: "Verschuldete und unverschuldete Fristversäumnis im Europäischen Mahnverfahren"
- ***Felix Koechel***: "Section 23 of the German Code of Civil Procedure: For Domestic Claimants only?" – The English abstract reads as follows:

Seemingly in line with former case law, the Third Civil Panel of the German Federal Court of Justice (BGH) held that Section 23 of the German Code of Civil Procedure (ZPO) – providing for an exorbitant ground of jurisdiction based on the location of property of the defendant – is to be interpreted restrictively. According to case law, this provision requires (beyond its wording) a "sufficient connection of the dispute" with the State of forum. However, the Third Civil Panel virtually turned Section 23 ZPO into a claimant's forum when it held that the plaintiff's domicile in Germany already establishes such a connection. What started in 1991 as a quest of the Eleventh Civil Panel of the BGH to diminish the exorbitant character of Section 23 ZPO has thus been exploited to openly

privilege domestic claimants. This article gives an overview on the development of the case law, and illustrates the inconsistency of the decision of the Third Civil Panel.

- ***Carl Friedrich Nordmeier:*** "French proceedings for the determination of paternity and German proceedings for a right to a compulsory portion: scission of the estate and coordination of proceedings according to § 148 German Code of Civil Procedure" – The English abstract reads as follows:

Under French and German law, the right to a compulsory portion of the estate depends on the number of descendants the deceased left. The present article analyses a succession with connections to France and Germany, in which the ancestry of one of the persons involved is doubtful. In case of scission of the estate, the calculation of a right to a compulsory portion in one part of the estate has to take into account the designation as an heir in another part of the estate if the rational of this right demands so. From a procedural point of view, the coordination of French proceedings for the determination of paternity and German proceedings for a right to a compulsory portion is discussed. Pursuant to § 148 (1) German Code of Civil Procedure, German proceedings can be stayed as a result of assessing the individual circumstances of the case in the light of the purposes of this provision. Results of foreign procedures for the safeguarding of means of proof can be used in German proceedings according to § 493 (1) German Code of Civil Procedure if the foreign proceedings are substitutable for a German independent procedure of taking evidence.

- ***Heinrich Dörner***: "The qualification of § 1371 Sect. 1 Civil Code – a missed opportunity" – The English abstract reads as follows:

It is still discussed controversially whether § 1371 Sect. 1 Civil Code can be applied when succession after the deceased spouse is controlled by foreign law. The Federal Court of High Justice did not comment on this question in its judgment of 9th September 2012. This article will summarize current jurisprudence and outline the legal situation after the European Regulation on jurisdiction and applicable law in matters of succession will have come into force.

- ***Marianne Andrae:*** "Post-marital maintenance concerning a failed marriage between a German and a Swiss spouse" – The English abstract reads as follows:

The key aspect of the decision, which is discussed, lies on the law applicable to maintenance obligations. The issues to be resolved concern, in particular, the delimitation between the Hague Convention on the law applicable to maintenance obligations (HU 1973) and the Hague Protocol of 2007 for the determination of the law applicable to maintenance obligations (HUP) and the requirements for the use of the escape clause for the conjugal maintenance (Art. 5 HUP). Another aspect covers the assignation of the appropriate maintenance in accordance with § 1578 b BGB, if the dependent spouse has moved in consequence of the marriage from abroad to Germany and as consequence of the marriage is not gainfully employed. The last issue concerns the qualification of a contractual provision on the right to a monetary payment, which is drawn from Art. 164 Swiss Civil Code (ZGB).

- ***Tobias Helms***: "Implied choice of law applicable to divorce under Article 5 (1) of the Rome III Regulation?" – The English abstract reads as follows:

Contrary to the opinion of the OLG Hamm, it is highly doubtful whether Article 5 (1) of the Rome III Regulation permits an implied choice of law applicable to divorce. The fact that Iranian spouses agree in their marriage contract on offering the wife under certain, strict conditions the possibility to divorce does definitely not constitute such an implied choice of law. The finding made by the OLG Hamm on the point that Article 10 of the Rome III Regulation does not necessarily preclude the choice of Iranian law, is, however, correct.

- ***Marc-Philippe Weller/Alix Schulz***: "The application of § 64 GmbHG to foreign companies" – The English abstract reads as follows:

The following article discusses the classification of § 64 GmbHG, pursuant to which directors are obligated to compensate payments effectuated to single creditors of the company despite of its insolvency. We are going to demonstrate that § 64 GmbHG is part of the lex concursus and thus falls into the scope of Art. 4 European Insolvency Regulation. The liability rule of § 64 GmbHG would

then be applicable to managing directors of foreign companies having their centre of main interest in Germany. In a second step it is, however, to be determined whether the application of § 64 GmbHG violates the freedom of establishment (Art. 49, 54 TFEU) of EU-foreign companies with their centre of main interest in Germany.

- ***Thomas Pfeiffer:*** "Again: The Market as a Connecting Factor and the Country of Origin Principle in the Area of E-Commerce" – The English abstract reads as follows:

The decision of the Austrian Supreme Court of November 28th, 2012 demonstrates the difficulties of the interplay between the E-Commerce Directive and the Rome II-Regulation; it needs to be analyzed not only against the background of the ECJ's eDate Advertising decision but also with regard to other sources of EU conflicts law: Whereas the Directive's Country of Origin-Principle does not exclude Member State choice of law rules, such rules may be applied only insofar as they are in line with inter alia the Rome II-Regulation. The Austrian § 20 Electronic Commerce Act, if construed as a conflict of laws rule, is not acceptable under this standard. Therefore the applicable choice of law rule for commercial practices in the area of E-Commerce is to be found in Art. 6(1) Rome II-Reg. With regard to advertisements, this provision has to be construed as referring to the laws of the state where the advertisement affects its addresses, not the state where the services are rendered or the goods delivered. In case an advertisement has effects in more than one state, there is a need for some limits as to an application of laws of a state where the effect is only minimal; it is, however, doubtful whether Art. 6 Rome II-Reg. is open for this interpretation. Additionally, the courts of the country of origin have to make sure that standards of their own laws are met (Art. 3(1) E-Commerce-Directive); this requirement only applies if the target country is an EU Member State. The latter statement, however, is not an acte clair.

- ***Martin Metz***: "Narrowing personal jurisdiction: Recent US Supreme Court jurisprudence" – The English abstract reads as follows:

After remaining silent on the topic for 25 years, the US Supreme Court recently reentered the contentious field of personal jurisdiction. With four decisions issued in the short period from 2011 to 2014, the Court reshaped and confined

the concepts of personal jurisdiction and minimum contacts. In Goodyear and Daimler the Court narrowed the concept of general jurisdiction. In order to assert general jurisdiction over a corporate defendant, corporate affiliations with the forum state must be so continuous and systematic as to render the corporation "essentially at home" in the forum state. The McIntyre decision restricted specific jurisdiction in product liabilities cases, whereas theWalden decision limited specific jurisdiction in tort cases. In both instances, personal jurisdiction cannot be based solely on the fact that the conduct or the injury occurred in the forum state. Rather, it is crucial that the defendant purposefully created contacts with the forum state. Taking into account all four decisions with regard to personal jurisdiction, the Court is currently re-emphasizing considerations of territoriality over considerations of litigational fairness.

- ***Hilmar Krüger/Wagih Saad***: "Private International Law in the Sultanate of Oman" – The English abstract reads as follows:

The Sultanate of Oman is – with only the state of Bahrain still missing – the penultimate state among the small countries of the Arab Peninsula to codify its rules of conflict of laws. The Omani rules of private international law are contained in the Introductory Chapter of the Civil Code (act no. 29 of 2013). The Omani Civil Code entered into force August 12, 2013. The act is based on the models of Egypt, Jordan, and the UAE. Deviations are rare.