Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2014)

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

- ***Rolf Wagner:*** "The new programme in the judicial cooperation in civil matters – a turning point?"

Since the entry into force of the Amsterdam Treaty in 1999 the European Union is empowered to act in the area of cooperation in civil and commercial matters. This article describes the fourth programme in this area. It covers the period 2015–2019. The author provides an overview of the history and content of the new programme in so far as the area of civil and commercial law is concerned. Furthermore, he explains how this programme differs in conceptual terms from its predecessors.

- ***Michael Stürner/Christoph Wendelstein:*** "The law governing arbitral agreements in contractual disputes"

The article deals with the law governing arbitral agreements in contractual disputes. As such agreements are excluded from the material scope of application of Regulation Rome I, a conflict of laws approach has to be found in national law. Under German law, none of the existing black-letter private international law rules apply. Various connecting factors are conceivable (e.g. law of the seat of the arbitration, law governing the arbitration). Given the close connection between the arbitral agreement and the main contract, the article suggests that the law applicable to the latter will also determine the former. That applies, of course, only if the parties did not (explicitly or implicitly) choose the law applicable to the arbitral agreement.

- ***Katharina Hilbig-Lugani***: "Das gemeinschaftliche Testament im deutsch-französischen Rechtsverkehr – Ein Stiefkind der

Erbrechtsverordnung" – The English abstract reads as follows:

Mutual wills have troubled German doctrine before a European instrument came along and they continue to do so under the Succession Regulation 650/2012. The Regulation lacks an explicit provision. The focus of the present contribution lies on the discussion whether a mutual will is subject to the conflict of law rule on agreements as to succession (article 25 of Regulation 650/2012) or subject to the general provision on dispositions upon death (article 24 of Regulation 650/2012). The concepts of "mutual will" and "agreement as to succession" on the European level are far from being clear. Though less favorable, the more convincing arguments – including wording, systematics and legislative history – argue in favor of the application of article 24 Regulation 650/2012.

- ***Peter Kindler***: "Corporate Group Liability between Contract and Tort under the Brussels I Regulation"

The judgment of the CJEU of 17 October 2013 (C-519/12 – OTP Bank vs. Hochtief) confirms the consolidated case law on art. 5(1)(a) Brussels I Regulation regarding the contractual nature of the matter. The liability has to derive from "obligations freely assumed" by one party towards another. According to the Court there is no such freely assumed obligation when the claim is based on a provision of national law imposing a liability on the controlling shareholder of a corporation for the debts of such corporation in case of its failure to disclose the acquisition of control to the commercial register. Astonishingly, the CJEU goes beyond the question referred for the preliminary ruling by the Hungarian Kúria and also gives its views on art. 5(3) Brussels I Regulation. Under this provision, in matters relating to tort, a person domiciled in a Member State may be sued in the courts of the place where the "harmful event" occurred. In this regard, the judgment is incomplete as far as causation is concerned. It remains unclear which could be the defendant's conduct that caused the "harmful event".

- ***Christian Koller:*** "Conflicting Goals in European Insolvency Law: Reorganization vs. Territorial Liquidation"

In the Christianapol-case the ECJ had to resolve the conflict between main

insolvency proceedings, aiming at the restructuring of the debtor, and secondary proceedings, which must be winding-up proceedings under the European Insolvency Regulation. The ECJ's solution is mainly based on the interpretation of the provisions of the Insolvency Regulation dealing with the coordination of proceedings. It does not, however, take sufficient account of the effects of restructuring measures approved by the court in the main insolvency proceedings. This contribution, therefore, discusses the effects the recognition of a restructuring plan approved by the court in the main insolvency proceedings might have on the opening of secondary proceedings.

- ***Wulf-Henning Roth***: "IZPR und IPR – terra incognita" – The English abstract reads as follows:

The judgment of the Oberlandesgericht Karlsruhe, in its substance, deals with the much debated issue whether and under what conditions agreements on costs and charges that go along with the conclusion of an insurance contract may be regarded as void. Issues of private international law are given short shrift. In this regard however, the judgment of the renowned Appellate Court reveals an astonishing ignorance of the fundamentals of European private international law: Instead of applying Regulation No. 44/2001 the Court turns to the German law of jurisdiction; and, with regard to substance (claim based on contract; voidness of the contract; claim based on precontractual misinformation), neither the Rom I- nor the Rom II-Regulation is even mentioned. Instead, the Court bases its judgment on the Rome Contracts Convention of 1980 whose direct applicability has been explicitly excluded by German legislation.

- ***Christoph A. Kern***: "Jurisdiction based on the place of performance according to Art. 5(1) Brussels I 2001/Art. 7(1) Brussels I 2012 when a contract combines the sale of real estate with the seller's obligation to construct business premises and find financially strong tenants"

The Düsseldorf Court of Appeal held that a contract combining the sale of real estate with the seller's obligation to construct business premises on the land

and to find financially strong tenants is a contract on the provision of services in the sense of Art. 5(1) lit. b 2nd indent Brussels I 2001 (Art. 7(1) lit. b 2nd indent Brussels I 2012). This holding might have been driven by the court's wish not to apply the traditional rule in Art. 5(1) lit. a Brussels I 2001 (Art. 7(1) lit. a Brussels I 2012), according to which the place of performance must be determined with reference to the primary obligation in question. In the eyes of the commentator, the obligations to construct certain premises and to find solvent tenants normally do not affect the qualification of the contract as a sale of real estate, even more so if these obligations cannot be enforced directly by the buyer but their only sanctions are a condition precedent and a right of withdrawal. The commentator sees a parallel to contracts on the supply of goods to be manufactured according to requirements specified by the buyer, which have been qualified as sales contracts by the ECJ in the case C-381/08 (Car Trim).

- ***Angelika Fuchs****:* "Direct claim and assignment after cross-border traffic accident"

Following the respective judgment of the CJEU (C-347/08), a German court decided that a federal state in Germany, acting as the statutory assignee of the rights of the directly injured party in an international motor accident, may not bring an action directly in the courts of its Member State against the insurer of the person allegedly responsible for the accident, when that insurer is established in another Member State. The court argues that – other than the injured party itself – the federal state cannot be considered to be a weaker party and can therefore not rely on the combined provisions of Articles 9(1)(b) and 11(2) of the Brussels I Regulation. The following article explains what impact the assignment of rights has on the interpretation of different rules of jurisdiction.

- ***Martin Gebauer:*** "The Autocomplete Features of „Google" and the Infringement of Personality Right – Jurisdiction to Adjudicate and Choice of Law"

In its recent "Google"-decision, the German Federal Supreme Court (FSC) ruled that German courts have jurisdiction to adjudicate under Section 32 of the German Code of Civil Procedure in an action brought against Google Inc., a

company seated in California, USA, for the infringement of personality rights by means of the autocomplete feature offered by "Google.de". The FSC also held that German law applied. For the first time after the "eDate Advertising" ruling of the European Court of Justice (ECJ), the FSC had the opportunity to synchronize the approach of its own case law, in terms of the German autonomous rules of jurisdiction, with the approach developed by the ECJ. Without picking it out as a central theme, the FSC approach differs from the approach of the ECJ. Whereas the ECJ is looking for the place where the alleged victim has its centre of interests, the FSC requires that the forum state be the place where the diverging interests of both parties collide. This test is applied both to the question of jurisdiction to adjudicate and to the question of choice of law (under autonomous German conflict rules). Mainly for three reasons, the FSC in the long run should bring its case law more in line with the "eDate-doctrine" of the ECJ: First, the centre of interests of a person is more predictable as a ground of jurisdiction than the place of colliding interests. Second, jurisdiction to adjudicate and choice of law fit together in the sense that a court having jurisdiction under the Brussels Regulation for the alleged infringement of personality rights should preferably be empowered to apply the law of the forum. Third, the coordination of parallel proceedings within the EU is closely linked to the scope of the jurisdictional rules in the member states. Coordination works better when these rules resemble each other even in cases where the defendant is domiciled in a third state.

- ***Andreas Engel:*** "Conflict of Laws in Property Law: Statutory Limitation and Changes in the Applicable Law"

In a lawsuit for the recovery of a classic car which was originally sold in Germany and then went missing after the Second World War, only to later reappear in the U.S. where it was sold at an auction in California and then re-transferred to Germany for an exhibition, the Oberlandesgericht Hamburg had to grapple with diverging national laws. Under Californian law, but not under German law, the pertinent period of limitation is not deemed to accrue until the discovery of the whereabouts of the article, and there is no tacking of previous possessors.

According to German conflict-of-law rules regarding property, German law was applicable for the recovery claim and its limitation. However, even the special

provision of art. 43 para. 3 EGBGB does not allow for a retroactive modification of final legal determinations arrived at pursuant to a law formerly applicable. A final legal determination of facts in that sense can also be of a negative nature. In the given case, this meant that German property law had to respect and uphold the Californian decision as to when the period of limitation began to accrue.

- ***Bettina Heiderhoff:*** "Return of the child in case of child's objection under the Hague Child Abduction Convention"

The decisions mainly concern issues of Art. 13(2) Hague Child Abduction Convention. In both cases, the children were relatively old (between 11 and 16 years) and objected to the return.

In the ECHR case, the court order to return the children to their mother in England was not enforced by the French authorities following an unsuccessful mediation meeting between the mother and the children. The ECHR held that France should have tried harder to influence the position of the children (para. 94). The OGH found that even at the age of 15 it was necessary for the courts to assess the individual maturity of the child.

In fact, Art. 13(2) Child Abduction Convention must be interpreted in a narrow way. Only where a child possesses the necessary maturity, and is objecting in a determined and distinct manner, may the return be refused by the authorities. While it must be deplored that Art. 13(2) is so imprecise, courts should still try to establish a clear line. For children below a certain age (one might consider the age of 10, for instance) the necessary maturity should, generally, be denied. Correspondingly, there might also be an age above which maturity is assumed without further investigation (this might be appropriate for children of 13 years and older).

Only where a child has been unduly influenced by the abducting parent is there reason for an attempt to change the child's opinion.

- ***Hans Jürgen Sonnenberger:*** "Transkription einer von zwei Italienern in den USA – New York – geschlossenen gleichgeschlechtlichen Ehe in das italienische Personenstandsregister" – The English abstract reads as

follows:

For the first time in Italy the Tribunale of Grosseto ordered the transcription of an Italian same-sex couple's marriage, who was wedded abroad. This note analyzes the decision, demonstrates the development of Italian and European case law and evaluates it in the light of the reasoning of the Tribunale.

- ***Christa Jessel-Holst:*** "Recodification of the Private International Law of Montenegro"

The contribution analyses the new Montenegrin Act on Private International Law of 23 December, 2013, as the first comprehensive PIL-reform in a Yugoslav successor state. The Act regulates conflict of laws as well as procedural international law in 169 articles. EU-harmonization is a main objective of the reform. Habitual residence is introduced as a connecting factor, for which a legal definition is provided. The scope of party autonomy is considerably expanded. Novelties include inter alia a general escape clause and a provision on overriding mandatory rules. Issues like maintenance, personal name, agency or intellectual property are regulated for the first time, others have been totally reformed. The reciprocity requirement for the recognition of foreign judgments has been abolished. For the recognition of foreign arbitral awards it is referred to the New York UN-Convention of 1958. For Montenegro, the new Act replaces the Yugoslav codification of 1982.