Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

Moritz Brinkmann, **„Clash of Civilizations" oder effektives Rechtshilfeinstrument? Zur wachsenden Bedeutung von discovery orders nach Rule 28 U.S.C. § 1782(a)**
The author analyses two recent decisions by U.S. federal courts on Rule 28 U.S.C. § 1782(a). Under this rule a court may grant judicial assistance with respect to a foreign or international tribunal by ordering the respondent "to give his testimony or statement or to produce a document or other thing". The decision of the District Court for the Southern District of New York in In re Kreke concerns inter alia the question whether discovery under § 1782(a) is available also with respect to documents which are not located in the U.S. The CONECEL case, decided by the Court of Appeals for the Eleventh Circuit, touches upon the highly contested issue whether under § 1782(a) judicial assistance may also be obtained with respect to arbitration tribunals.

Peter Mankowski, **International Jurisdiction in Insurance Matters: Professional Lessor as Injured Party and Standardized, not Case-by-case Assessment of Need of Protection**
The injured party can sue its opponent's liability insurer at its own domicile under Art. 11 II in conjunction with Art. 9 I lit. b Brussels I Regulation/Art. 13 II in conjunction with Art. 11 I lit. b Brussels Ibis Regulation. This holds true also where the injured party is not a natural person but a legal entity. Likewise, it does not matter whether the injured party is a professional. Generally, the protective regimes of the Brussels I/Ibis Regulations including the regime governing insurance matters apply irrespective of whether any protected party deserves protection measured by a concrete yardstick. Conversely, the standard is abstract and typical in line with efficiency, legal certainty and predictability of jurisdiction.

Carl Friedrich Nordmeier, **Coordination of parallel proceedings according to**

Art. 27 Brussels I Regulation and exclusive jurisdiction – including an analysis of the scope of Art. 22 no. 1 Brussels I Regulation

Parallel proceedings are coordinated by Art. 27 Brussels I Regulation on the ground of the principle of priority according to which the court first seized examines its international jurisdiction. The present judgment breaks this principle if the court second seized bases its jurisdiction on an in rem claim (Art. 22 no. 1 Brussels I Regulation). In the first part, this article argues that Art. 22 no. 1 Brussels I Regulation covers neither proceedings for the consent to register the transfer of ownership with the German Land Register nor proceedings for a declaration that the exercise of the right of pre-emption under German Law was ineffective and invalid. The second part shows that the reason for strengthening the court second seized – which can be identified in Art. 31 no. 2 Brussels I Regulation (recast) as well – is the protection of the especially close link between the matter in dispute and the place of trial. In contrast, the reliability to predict the (non-)recognition of the judgment which the court first seized may hand down cannot serve as a justification to break the principle of priority. Other potential reasons of non-recognition than the infringement of an exclusive jurisdiction do not allow the court second seized to continue its proceedings.

Hannes Wais, **The concept of a particular legal relationship in Article 23 Brussels I Regulation and application of Article 5 No. 1 Brussels I Regulation in matters relating to a non-competition clause**

The Higher Regional Court of Bamberg had to deal with mainly two questions: Whether, pursuant to Art 23 (I) Brussels I Regulation, choice of court agreements in sales contracts had a binding effect for a dispute arising from negotiations over a distribution agreement between the same parties (1), and whether a claim, based on an alleged violation of a non-competition agreement, qualified as contractual, pursuant to Art 5 No. 1, or as tort, pursuant to Art 5 No. 3 Brussels I Regulation (2). The court answered the first question in the negative. With respect to the second question, the court held that this claim, even though it may qualify as tort under national law, had to be qualified as contractual under the Brussels I Regulation.

David-Christoph Bittmann, **The legitimacy of substantive objections against a European Enforcement Order in the state of enforcement**

In its judgment of 21/11/2014 the Oberlandesgericht Cologne had to deal with the controversial question whether it should be permitted to a debtor to contest a

European Enforcement Order in the state of enforcement by the way of substantive objections, raised in a remedy like the Vollstreckungsabwehrklage according to § 767 of the German Code of Civil Procedure (ZPO). To answer this question, the Oberlandesgericht had to deal with two issues: First, the Senate stated that the courts of the state of enforcement have jurisdiction for such remedies according to art. 22 no. 5 of Reg. (EC) 44/2001. In its argumentation the Oberlandesgericht refers to the judgment of the ECJ in the case Prism Investments BV. Second, the Senate stated, that § 1086 ZPO, which gives a debtor the possibility to raise substantive objections by the way of the Vollstreckungsabwehrklage, is not in contrast to the provisions of Reg. (EU) 805/2004. This judgment is in line with the majority of legal writers. An analysis of the wording, the systematic and the objective of Reg. (EU) 805/2004 shows however, that § 1086 ZPO violates European Law, because the regulation concentrates substantive objections at the courts of the state of origin. A comparison with the procedure of declaration of enforceability according to Reg. (EC) 44/2001 confirms this result.

Leonhard Hübner, **Cross-border change of legal form – implementation of ECJ's Vale judgment into German law**

The following article discusses the national implementation of the cross-border change of legal form by means of transfer of the statutory seat against the background of the Vale judgment of the ECJ. First, it treats the issues arising in case of a cross-border change of legal form to Germany. These include the missing legal foundation, the treatment of the de-registration of the company from the foreign register, and the protection of the stakeholders. It then examines the reverse situation – the cross-border change of legal form to a foreign country.

Thomas Rauscher, **Unbilligkeit bei Versorgungsausgleich mit Auslandsbezug**

Both decisions in comment apply the hardship clause in article 17 (3) (2) introductory law to the civil code (EGBGB). The article explains intertemporal and substantial consequences of the coming into force of the Rome III-Regulation on the law applicable to divorce as far as the distribution of pension rights (Versorgungsausgleich) is concerned. As to the boundaries between the international hardship clause under article 17 (3) 2, the material hardship clause (para 27 Law on the Distribution of Pension Rights, VersAusglG) and forfeiture of rights the author favors a narrow interpretation of the scope of application of the

international clause.

Kurt Siehr, **Habitual Residence of Abducted Children before and after Their Return**

Two children, born in 2002 and 2003, had been abducted by their mother from La Palma (Spanish Canary Islands) to Germany. Both parents had custody rights (patria potestad) according to Spanish law. In Germany the parents agreed on 13 February 2013 that the children had to be returned to La Palma. In March 2013 the children were brought back by their mother. In La Palma the Spanish court declined jurisdiction because, according to Spanish law, the mother is entitled to take the children to Germany. She returned with them to Germany and here the father applied for enforcement of the agreement of 13 February 2013 and for an order to return the children to La Palma. The mother argued that she had already performed her obligation by returning the children to La Palma in March 2013. The father, however, objected and was of the opinion, supported by a decision of the Court of Appeal of Karlsruhe of 14 August 2008, that a child is only returned if it had established habitual residence in the state of origin. But this was not the case in the present situation because the children, after a short visit in La Palma in March/April 2013, returned to Germany. The Court of Appeal for the German State of Schleswig-Holstein (Oberlandesgericht in Schleswig), seized of this matter, finally decided that the duty of the mother to return the children had been performed in March 2013. The establishment of a new habitual residence in the state of origin is not necessary for the performance of the duty to return. Therefore no new return order is given by the court. – Discussed is the habitual residence of an abducted child before and after return to the country of origin from which the child has been abducted. Mentioned is also the English case O v. O (Abduction: Return to Third Country), [2013] EWHC 2970 (Fam), in which the "return" of a child was ordered to a country (USA) from which the child had not been abducted and in which the child was not habitually resident immediately before being abducted. The child had to be "returned" to the state in which the parents agreed to establish their new habitual residence after having given up their former habitual residence in Australia.

Alexandra Hansmeyer, **Legal effects of a third party notice (Streitverkündung) filed in German court proceedings on court and arbitration proceedings in China**

As the world's second largest economy and its largest exporter, China's

manufacturers occupy an increasing number of positions across the supply chains of a wide range of industries. With Chinese manufactured or processed products being sold globally, many international product liability cases require bringing claims up the supply chain against Chinese manufacturers. Third party notices ("Streitverkündung") provide a mechanism for courts to recognize specific aspects regarding such claims made in a preceding court proceeding. The article examines the legal impact of third party notices filed in German court proceedings against a Chinese party on subsequent proceedings in Chinese civil courts or by the China International Economic and Trade Arbitration Committee ("CIETAC"). The article concludes that according to the current Chinese law and state of jurisprudence, third party notices have no legally binding effect on subsequent proceedings in China, neither with regard to ordinary courts, nor with regard to CIETAC arbitrations. Further, even if a Chinese party accedes to German court proceedings, such action, according to Chinese contract law, cannot be deemed as an implicit waiver of an arbitration clause in an underlying Chinese law contract.

Marc-Philippe Weller/Alix Schulz, **Maintenance obligations and Legal kidnapping – Jurisdiction at the illegally established habitual residence?**
The following article discusses "habitual residence" as a ground for jurisdiction in maintenance claims according to Art. 5 Nr. 2 Brussels-I-Regulation as well as pursuant to Art. 3 of the Regulation n° 4/2009 on maintenance obligations. In cases of legal kidnapping by one of the parents, it may be worth discussing whether habitual residence can be established in the destination state, even if the change of the child's living environment itself has been illegal.

Carl Zimmer, **The change in the habitual residence under the 2007 Hague Maintenance Protocol**
The Austrian Supreme Court's case gave rise to two crucial questions concerning the application of the Hague Maintenance Protocol from 2007: First, whether a change of habitual residence may already occur as from the moment of relocation to another State and secondly, whether Art. 4 para 3 or Art. 3 para 1 Hague Maintenance Protocol applies when, at the moment of commencement of proceedings, the maintenance creditor and the maintenance debtor have their habitual residence in the same state. While the second instance court addressed both questions, the Austrian Supreme Court did not: the father's appeal was dismissed because of a lack of motivation. The author supports the solution of the

second instance court to grant the claimant a choice of procedure with regard to Art. 4 para 3 Hague Maintenance Protocol. The court’s concept of habitual residence based on a fixed time-criterion, however, seems questionable.