Out now: Latest issue of RabelsZ 2019/3

The latest issue of RabelsZ has just been released. It contains the following articles (English abstracts are available only for articles in German):

Lord Thomas of Cwmgiedd, The Common Law in Private Dispute Resolution's Shadow, pp. 487 et seq

Fleischer, Holger and *Horn, Konstantin*, Berühmte Gesellschaftsverträge unter dem Brennglas: Das Standard Oil Trust Agreement von 1882 (A Closer Look at Prominent Corporate Charters: The Standard Oil Trust Agreement of 1882), pp. 507 et seq

> *The charter shapes the life of the corporation. This crucial role notwithstanding, corporate contracts have received but scarce scholarly attention. Apart from a few exceptions, little is known about the charters of notable business entities. A new research program at the Max Planck Institute in Hamburg has set out to fill that void. The first test case, which is explored in this paper, is the Standard Oil Trust Agreement of 1882 – a seminal governance framework for corporate groups that spread quickly through different industries and became eponymous for the anti-trust legislation of the United States. The remarkable success of this agreement illustrates how innovative legal design can be just as vital to the survival and success of a company as managerial or technical innovation.*

Hille, Christian Peter, Die Legitimation des Markenschutzes aus ökonomischer und juristischer Sicht- Ein Beitrag insbesondere zur Search Cost Theory des US-Markenrechts (Justifying Trademark Protection – An Economic and Legal Approach with Special Reference to the Search Cost Theory of

US Trademark Law), pp. 544 et seq

> *Whereas trademark protection in the 19th century was justified by the theory of natural law, such concepts are generally considered to be outdated in secular law, even if the underlying values are still embedded in positive law. The law and economics approach, however, is focused solely on allocative efficiency as defined by Pareto optimality and the Coase theorem. US theory justifies trademark protection with the dual rationales of reducing consumer search costs and creating an incentive to improve the quality of products. While some authors criticize this view, they mostly do not propose a different approach, instead arguing that the search cost theory neglects certain social costs. Still, whereas the qualification of a trademark as a public good leads to completely different conclusions, it has been without significant influence on legal theory. Based on the search cost theory, the efficiency of German trademark law may be enhanced, e.g. by requiring a bona fide intention to use the trademark and by obliging the trademark owner to produce evidence of use. Requiring quality control in cases where a license is granted would also improve efficiency, and a mark should be invalidated if the sign becomes generic without this development being attributable to the owner. However, in order to evaluate the search costs as well as other social costs related to the trademark system, further research needs to be conducted with respect to the modes of action of trademarks (in particular in the context of famous trademarks and new technologies). The economic analysis of trademark law and the associated findings may be considered by judges in their interpretation of the law as long as their rulings do not serve to amend the statutory provisions establishing German trademark law (or the applicable European directives). Amendments of this nature would need to be carried out by lawmakers (see Art. 20 para. 3 of the German Constitution).*

Makowsky, Mark, Die „Minderjährigenehe“ im deutschen IPR- Ein

Beitrag zur Dogmatik des neuen Art. 13 Abs. 3 EGBGB (The “Marriage of Minors” in German Private International Law – The Legal Structure of the New Article 13 para. 3 EGBGB), pp. 577 et seq

The migration crisis has sparked a debate on how to deal with minor migrants who married in their home country or during their flight to Europe. In response to this problem, in 2017 the German legislature passed the Act Combatting Child Marriage. The paper analyses the new and highly controversial conflict-of-laws rules. Pursuant to the public policy clause of Art. 13 para. 3 EGBGB, a marriage is invalid under German law if a fiancé was under the age of 16 at the time of the marriage. If a fiancé had already turned 16 by the time of the marriage but was not yet 18, the marriage has to be annulled pursuant to German law. This strict approach allows for only few exceptions. The invalidity rule has a limited temporal scope and is not applicable when the minor fiancé had already turned 18 by the time of the law’s entry into force. Another exception to the invalidity rule exists if the marriage was “led” by the spouses up until the minor spouse’s reaching the age of majority and if no spouse had his or her habitual residence in Germany during the time between the marriage and the minor spouse’s attaining the age of majority. Due to the limited scope of these exception clauses, most child marriages are rendered void in Germany. This leads to the question whether the invalid marriage can nonetheless have some legal consequences, especially when the spouses relied on its validity. The exception clauses of the annulment rule are similarly very limited. An annulment is ruled out only if the minor spouse has turned 18 and wants to uphold the marriage or if the annulment would constitute an undue hardship for him or her. It is disputed whether this is in conformity with European law because the annulment rule also applies to marriages which were contracted and registered in another EU Member State. The paper argues that the law can be interpreted in accordance with Art. 21 TFEU.

Biemans, Jan, and *Schreurs, Sits*, Insolvent Cross-Border Estates of Deceased Persons – Concurrence of the Succession and Recast Insolvency Regulations, pp. 612 et seq

Infantino, Marta, and *Zervogianni, Eleni*, Unravelling Causation in European Tort Laws- Three Commonplaces through the Lens of Comparative Law, pp. 647 et seq