German Article: Costs of Free Choice of Law from an Economic Perspective

An interesting article written by *Giesela Rühl* has recently been published in the German legal journal *Rabels Zeitschrift* (71 RabelsZ 2007, 559 et seq.):

"Die Kosten der Rechtswahlfreiheit: Zur Anwendung ausländischen Rechts durch deutsche Gerichte"

Here's the English abstract:

> *Free choice of law has been the focus of the economic analysis of law for several years. However, most of the contributions have concentrated on one aspect of choice-of-law clauses only, namely their efficiency. In contrast, few authors have taken note of other economic problems that free choice of law might pose. One of these problems is the fact that choice-of-law clauses – at least if they call for application of foreign law – incur significant costs. After all, domestic courts will have to apply a law that they do not know and whose application, therefore, is more expensive than the application of domestic law. In economic terms, these additional costs can be classified as negative external effects. They may result in inefficiencies unless the parties – when making their choice consider and, thus, internalise the additional costs associated with the applicationof foreign law. Unfortunately, under current German law no such internalisation takes place: Courts have to determine the content of foreign law ex officio. And the parties neither have to support the courts in this endeavour nor to bear all the costs involved. This article, therefore, discusses several proposals for legal reform designed to provide the parties with an incentive to consider the additional costs when making their choice of law. More specifically, it discusses the economic advantages and disadvantages of adopting a lex fori approach, of requiring the parties to plead and proof foreign law and of increasing the court fees in cases where the parties have chosen a foreign law. It comes to the conclusion that the last option complies best with economic and legal requirements and, therefore, suggests to change German law accordingly.*