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The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has just been released. It contains the following articles:

- *Holger Fleischer*, **The Optional Instrument in European Private Law ("28th Regime"),** pp. 235-252

This paper explores the "optional instrument" as a regulatory tool in European private law. The term "optional instrument" or "28th Regime" refers to supranational corporate forms, legal titles or legal instruments which provide an alternative model for doing business throughout the European Union while leaving national laws untouched. After distinguishing different modes of optional law, the paper provides an overview of optional instruments that already exist or are proposed in European company law, intellectual property law, insurance contract law and sales law. It then identifies common features and problems of the 28th Regime, from its appropriate legal basis and the need for an optional instrument, to its scope of application, its interface with national law and its relationship to private international law. Finally, the paper addresses the under-researched question of vertical regulatory competition triggered by optional instruments in European private law

- *Jörn Axel Kämmerer*, **Responsibility for Integration: A New Theme Made in Karlsruhe,** pp. 253-275

Integrationsverantwortung is a neologism that was coined by the German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) in its 2009 judgment on the Treaty of Lisbon. The term translated as "responsibility for integration" but does in fact mean the constitutional limits that the German Basic Law (Grundgesetz – GG) imposes on the Treaty, especially compliance with democratic principles enshrined therein, and which are specified in the judgment. According to the Court, the national laws accompanying ratification of the Treaty deviated from these principles and were therefore declared void. The German legislature took account of the Court's findings in the

Responsibility for Integration Act (Integrationsverantwortungsgesetz-IntVG). Its numerous and detailed rules on participation of parliaments, responding to the extension of European Union (EU) competencies in the Lisbon Treaty, are likely to complicate future attempts to create a Union-wide (optional or mandatory) private law, especially if the legislation of other Member States is used as a catalyst. In most cases covered by the IntVG, the Bundestag must formally authorise the German member of the Council of Ministers to vote in favour of the proposal or to abstain; otherwise the German member of the Council would be obliged to reject the European legal act. The European act would then fail, as its adoption must be unanimous. Among the EU competencies that require neither this kind of empowerment nor unanimity in the Council, none provides a suitable basis for a pan-European private law. Article 81(2) of the Treaty on the Functioning of the European Union (TFEU), confined to " judicial cooperation in civil matters", does not allow for approximation of material law. While no such restriction is inherent in Art. 114 TFEU, the harmonisation of national private law that it admits must serve the functioning of the internal market, with only internal and non-commercial legal relations being excluded. Requiring the Union to act "within the framework of the policies defined in the Treaty", even Art. 352 TFEU cannot provide the basis for a comprehensive private law regime where the Treaty remains otherwise silent on the matter. Even insofar as the provision serves as a basis for (optional) rules, the Council must decide unanimously and its German member must have been previously empowered by the Bundestag (§ 8 IntVG).

In introducing the barriers, the Federal Constitutional Court underestimated the democratic achievements of the EU and adhered to nationState-based concepts of legitimacy that have been criticised as backwardlooking. Its assumption that Art. 352 TFEU would come into conflict with the interdiction of "blanket empowerments" contrasts with its former position on Art. 308 EC; involvement of national parliaments had never been considered necessary in this respect, even though the scope of its successor provision is not palpably broader. Confining § 8 IntVG to legal acts not related to the internal market may appear politically desirable but would sidestep the will of the contracting States, which was to abolish this criterion. Positive effects of the IntVG on integration should be mentioned, despite their potential to hamper standardisation of private law in Europe. Ultra vires control of Union acts by the German Constitutional Court is unlikely to be exercised where Parliament has positively assented to EU legislation whose compatibility with the principle

of conferral is disputed. If attempted, standardisation, or harmonisation, of private law in Europe might evidence the true significance of Art. 352 TFEU for European integration. In summary, the IntVG makes European law-making less predictable but might help parliaments to become involved in debates on projects such as the "28th model" that have until now largely remained in the domain of legal scholars. The likelihood of its materialisation, however, decreases with the proliferation of legal caveats, and even the European Court of Justice could be induced to applying a stricter ultra vires control.

- *Lars Klöhn*, **Supranational Legal Entities and Vertical Regulatory Competition in European Corporate Law. The Case for Market-Mimicking EU Corporate Forms,** pp. 276-315

This article states the case for market-mimicking supranational corporate forms in Europe. It argues that the form and substance of European Union (EU) incorporation options, such as the Societas Europaea or the Societas Privata Europaea, depend on the extent to which there can be regulatory competition between the European Union Member States (horizontal competition), and between the EU and its Member States (vertical competition). At present, there is some passive horizontal competition, but there can be no proactive vertical regulatory competition in Europe. However, as the Canadian experience shows us, there might be temporary passive vertical competition causing Member States to copy certain features of supranational corporate forms which are perceived as better matching the preferences of those facing a decision on where to incorporate. Therefore, when offering corporate forms, the EU should mimic a functioning European corporate law market. It should adopt those rules which would prevail under such conditions. The concept of market-mimicking corporate forms adds a third, "diagonal" dimension to regulatory competition in European company law. It confronts Member States' regulators with the result of hypothetical proactive horizontal regulatory competition. If this result better matches the preferences of entrepreneurs, mere incentives to enter into passive competition will suffice for this result to prevail in national company laws. When drafting such rules European regulators can seek guidance from over 35 years of economic analysis of corporate law. Examples of such analysis can be found in respect of Delaware's General Corporation Law.

- *Helmut Heiss,* **An Optional Instrument for European Insurance Contract Law**, pp. 316-338

In its first chapter, the article explains why a European insurance contract law in the form of an optional instrument is needed to complete the internal insurance market. Essentially, this is due to the existence of a large number of mandatory rules in conflict of laws as well as the substantive law of insurance, both of which form a serious barrier to the functioning of the internal insurance market. The "Principles of European Insurance Contract Law (PEICL)" are presented as a model optional instrument in the second chapter, where the basic features of the model law, in particular its regulatory approach, are set out. The optional character of a European instrument is discussed in the third chapter. It applies, but is not restricted to insurance contract law. In essence, an argument is advanced in favour of a "2nd regime" model. This model has since been adopted by the Commission Proposal on a Common European Sales Law (COM(2011) 635 final).

- *Reto M. Hilty*, **An Optional European Contract Law Instrument ("28th Model"): "Intellectual Property",** pp. 339-373

In the search for the "28th model", a glance at the European acquis communautaire could lead us to assume that intellectual property is in the vanguard and that the establishment of an optional instrument has proven to be a model of success. All that was actually created, however, were two supranational legal systems, namely in trade mark law and in design law. The terrain for these two regulations, from 1993 and 2002, respectively, was certainly well-cleared, for the corresponding national regimes had for the most part already been harmonised via directives in 1988 and 1998. These two EU regulations thus did not compete with the national legal systems so much in terms of content as with respect to their geographic scope. A registrant primarily chooses EU legal title when he or she intends to do business in the EU and not strictly within national boundaries. The European Patent Convention (1973), on the contrary, is not only not a legal entity of the EU, but it also is based on an independent supranational construct, the European Patent Organisation. Furthermore, the Convention's intended purpose is limited to centralising the procedures leading up to the grant of patents for the participating, currently 38, member states. Once granted, however, the so-

called bundle patents are for the most part on a par with the nationally granted patents. A true supranational patent-law title has not been achieved yet, despite decades-long efforts. The "enhanced cooperation" between 25 member states (Spain and Italy not included) that is currently being discussed will likewise not be able to stand in for an EU patent – not to mention the open question of whether business and industry would even accept such a construct. In the area of copyright, again, certain vague ideas have recently been brought into play that point towards an EU right, though without any concrete details, and such a thing as an EU copyright – assuming discussion on this topic does not soon fade away on its own – certainly lies far in the future. It is especially striking that agreements on intellectual property rights – which practically speaking are incredibly important – have never played a part in the previous initiatives for a unifi ed European contract law. It is in relation to just these types of contracts that an optional "28 th model" seems the most obvious choice for markedly increasing legal certainty in the outcome of court disputes. Indeed, more innovation and competitiveness cannot be gained through the abstract reinforcement of legal protection alone; what is further necessary is a knowledge transfer as comprehensive as possible. First and foremost, this requires an appropriate contract law that is capable of providing for the particularities of each contractual subject.

- *Stefan Leible*, **Private International Law and Vertical Competition Between Legal Systems,** pp. 374-400

Over the past decades, the European Union (EU) has influenced private law in two ways: first, by the "four freedoms" enshrined in primary law which are designed to promote the Internal Market and have a bearing on private relationships, and second by enacting acts of secondary law that address relationships between individuals. Today, we are facing a plethora of national laws and court decisions that live side by side with the many regulations, directives and decisions by the EU institutions. The coexistence of these different legal sources is not very easy to manage, and suggestions how to disentangle the mess abound. While some authors plead for a full harmonization of private law, others highlight the benefits of competition between the national legal systems (horizontal dimension) and between the Member States and the EU (vertical dimension). The article stresses the advantages of a harmonization approach, but also points to unwelcome effects.

The workings of horizontal and vertical competition are juxtaposed and the importance of comparative law is underlined. The new Optional Instrument on a Common Sales Law for the European Union is studied as an example of vertical competition. Drawing on the lessons of the past, the author pleads for extending the scope of the instrument in the future.

- *Matteo Fornasier*, **"28th" versus "2nd" Regime – An Optional European Contract Law from a Choice of Law Perspective,** pp. 401-442

Ten years after placing the idea of a European contract law on the political agenda, the European Commission has finally taken legislative action. On 11 October 2011, a proposal for a Regulation on a Common European Sales Law was published. The regulation would create a set of European contract rules which would exist alongside the various national regimes and could be chosen as the applicable law by the parties to a sales contract. Such an instrument raises a number of questions with regard to private international law in general and the Rome I Regulation in particular. Should the choice of the European contract law be subject to the general rules on party choice under Rome I or does the new instrument call for special rules? Also, should the European contract law be eligible only where the relevant choice of law rules refer the contract to the law of a Member State or should the parties also be allowed to opt for the European rules where private international law designates the law of a third state as the law applicable to the contract? The paper examines which solution is the best suited to achieve the primary goal of the optional instrument, i.e. to improve the functioning of the internal market. Moreover, it seeks to shed some light on the terms of »28th regime« and »2nd regime« that are often used to identify different possible approaches of how to fit the optional instrument into the system of private international law. Moreover, the paper deals with the relationship between the optional instrument and the CISG as well as other uniform law conventions. The article concludes by addressing a number of specific issues such as the prerequisites for a valid choice of the instrument, the applicability of the pre-contractual information rules, gap-filling, and the relationship between the optional instrument and national overriding mandatory provisions (Eingriffsnormen).