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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:

- *Reinhard Zimmermann*, **Testamentsformen: »Willkür« oder Ausdruck einer Rechtskultur? (Testamentary Form Requirements: Arbitrary or Expression of Legal Culture?),** pp. 471-508

In the history of European private law the law of succession used to play a central role. This is different today. In most modern legal systems, comparatively little scholarly attention is devoted to it; in some of them it is not even a mandatory subject of legal training in the universities. Widely, the law of succession is regarded as static and somewhat boring. In addition, it is taken to be deeply rooted in fundamental cultural values of a society and, therefore, not suitable for comparative study or even legal harmonization. The present article challenges these views, as far as the law of testamentary formalities is concerned. It traces the comparative history of the three main types of form requirements: writing in the testator's own hand, reliance on witnesses, and involvement of a court of law or notary. It is argued that the differences between the legal systems found today do not reflect cultural differences and can, indeed, often be regarded as rather accidental; that the comparative study of a large variety of issues concerning testamentary formalities can indeed be meaningful and enlightening; that in a number of legal systems the law relating to testamentary formalities has been changed more often than many parts of the supposedly much more dynamic law of obligations; that the international will constitutes an unhappy compromise between the will-types found in the various national legal systems and that it is, therefore, not surprising that the Washington Convention has been so remarkably unsuccessful. Attention is also drawn to the purposes served by the form requirements for wills and to the fact that, in the modern world, the holograph will (traditionally regarded as the simplest and most convenient way to make a will) is rapidly acquiring a much more solemn character. This paper is based on the Savigny lecture, delivered in Marburg on 24 October 2011, to mark the 150th anniversary of Savigny's

death. It therefore concludes by asking why Savigny does not appear to have devoted much attention to the law of succession, what Savigny thought of testamentary formalities, and whether that may have any significance for us today.This paper explores the "optional instrument" as a regulatory tool inEuropean private law.

- *Dethloff, Nina,* **Der deutsch-französische Wahlgüterstand – Wegbereiter für eine Angleichung des Familienrechts? (The Franco-German Optional Matrimonial Property Regime – A Trailblazer for the Alignment of Family Law?)** pp. 509-539

The Franco-German Convention signed on the 4th of February 2010 creates a new optional matrimonial property regime that can be elected by spouses and that is subject to the same provisions in both countries. With regard to its content, the property regime is not a fundamentally new concept, instead joining elements of the German default property regime and the French optional property regime of a community of accrued gains in a quite successful manner. The implementation of elements of the French legal system, which generally places a stronger emphasis on rights in rem, improves the just participation of the spouses compared to the German regime that is rather focused on practicability and legal certainty. On the other hand, the new optional property regime seems more suitable for application in practice than the French property regime, which – due to its lumbering regulation – has not to date been commonly used. The level of protection that is attributed to the family home by the new optional community of accrued gains is not only consistent with the European common core, but from a German point of view it also establishes a clear advantage that cannot be reached by a contractual agreement.

The major significance of the new common matrimonial property regime, however, lies in the fact that for the first time ever, identical substantive family law will be applied in two European countries. Nonetheless, the potential benefits of this uniform law will only be realised to full extent if beyond the mere unification of the law, a consistent interpretation of the provisions can be reached in the member states. Whether the new property regime unveils a ground-breaking impact will primarily depend on its future development from a bilateral convention to a uniform optional European property regime. Analysing

the model from a comparative point of view and in due consideration of the therein contained option for other countries to join the Convention, the stipulations seem at least generally suitable for affiliation. However, if in a second step the community of property, which is also very common in many European countries, were to be established as a further optional matrimonial property regime – be it at a binational, multinational or even European level – this should be based on the sound foundation of a detailed comparative law inquiry, taking into account in particular the evolving Principles of Matrimonial Property Law of the Commission of European Family Law. Moreover the Franco-German community of accrued gains could function as the initial spark for the creation of further uniform law. The choice of a uniform property regime facilitates the asset planning that is usually extremely complex in crossborder situations. Nevertheless, due to the diverging stipulations of maintenance law in the participating countries as well as the varying compensation mechanisms and the different scope of judicial review or authorisation schemes, the economic consequences of a divorce can vary considerably. This could be countered by an optional uniform legal framework encompassing all aspects of marriage law. Spouses could choose this legal regime upon contracting marriage. Thus, the new Franco-German property regime could lead the way to a uniform European optional property regime and ultimately to a European marriage.

- *Helmut Koziol, Grabriele Koziol*, **Ansprüche des geschädigten Retters bei Selbstgefährdung eines Bergsteigers – Lösungsansätze im österreichischen, deutschen und japanischen Recht (Self-endangerment of an Alpinist – Claims of the Damaged Rescuer: Approaches under Austrian, German and Japanese Law)**, pp. 540-561

If an alpinist places himself in an emergency situation due to his own lack of care or boldness and another person in trying to rescue him suffers damage, the question arises on which basis and to which extent the rescuer is entitled to claim damages from the rescued alpinist. The present article surveys possible solutions under the doctrine of negotiorum gestio in case of necessity and tort law under Austrian, German and Japanese law. While all three legal systems provide for the compensation of expenses incurred by the negotiorum gestor, none of them has an explicit provision on the compensation of damage suffered

by thenegotiorum gestor. For Austrian law, an analogous application on the liability of the principal in case of contractual agency which is based on the idea of assumption of risks is proposed. German and Japanese law, however, seek to solve the problem through a broad interpretation of the term "expenses". Japanese law offers still a further solution with statutory compensation schemes for rescuers in certain emergency situations. As for claims based on tort law, the problem arises that it cannot easily be argued that it is wrongful to put oneself at risk by going on a dangerous mountain hike. Thus, a careful balancing of the i

- *Kuipers, Jan-Jaap,* **Bridging the Gap – The Impact of the EU on the Law Applicable to Contractual Obligations**, pp. 562-596

Despite the increasing activity of the European Union (EU) in private law, differences between the legal systems of the Member States are likely to remain. If differences in private law are liable to hinder the smooth functioning of the internal market, one would expect the European Union to have a major interest in Private International Law (PIL). However, for a long time, the opposite has proven to be true.1

Although EU law and PIL in essence both aim to resolve a conflict of laws, they underlie a different rationale. Mutual recognition combined with a country of origin principle does not do more than settle a claim of application between the laws of the host Member State and home Member State in favour of the latter. However, EU law revolves around the creation of an internal market, whereby it is perceived to be an obstacle to the functioning of the internal market when a producer would be subject to the laws of both the host and home Member State. European PIL tries to serve international trade and transnational relationships by bringing back a legal relation to its natural seat. It does not matter which law is found to be applicable. Although PIL is unfamiliar with the political nature that colours EU law, its ambitions are wider, in the sense that it tries to serve international trade as a whole and not just the needs of the internal market. The international harmony of decisions, where the outcome of a dispute is similar regardless before which court the proceedings are brought, is a goal in itself. For that purpose, a contract should be governed by the same law, regardless in which country proceedings are brought. Hence, EU law is concerned with whether the imposition of a rule constitutes a restriction to the

internal market whereas PIL, in the European tradition, does not seek to neutralise the disadvantages that result from discrepancies of national laws but instead tries to locate the geographical centre of the legal relationship.

In the past decade, the European Union has become increasingly active in the area of PIL. It will first be demonstrated that the Rome I Regulation2 does not have any specific orientation towards the objectives of the internal market. On the contrary, in particular with regard to consumer contracts, conflict of laws rules may sometimes even undermine the confidence of the consumer in the internal market. Despite the positive harmonisation, the precise relation between EU law and PIL has yet to be fully crystallised. Two major questions remain unresolved. The first addresses the role of Rome I in the international arena. Should the international scope of application of secondary law be determined autonomously, on the basis of its aim and purpose, or should one fall back upon Rome I? The second question concerns the role of Rome I in the internal market. To what extent can the determination of the applicable law be left to the conflict of laws norm? Do fundamental freedoms, be it in the form of a favor offerentis or a country of origin principle, impact upon the applicable law? Finally, the article will conclude with some suggestions on how to enhance the coordination between EU law and PIL

- *Ulrich, Ernst,* **Das polnische IPR-Gesetz von 2011 – Mitgliedstaatliche Rekodifikation in Zeiten supranationaler Kompetenzwahrnehmung (The Polish Private International Law Act of 2011 – National Recodification in Times of Exercise of Supranational Competences**), pp. 597-638

The Private International Law Act of 2011 is the third instance of Polish legislation in this area, being preceded by regulations from 1926, when the country regained its independence, and 1965, after the introduction of the national Civil Code. The initiative for a reform had been formulated in 1998, even before the EU accession, stating that the country should enact provisions of the Rome Convention and that the statute from 1965 was not detailed enough. Opponents of the draft considered it an advantage that the Act from 1965 was both short and complete. They did not find it necessary to replace tried provisions given that the introduction of EU regulations seemed to be a matter of time. They also uttered doubts about the quality of the proposed

innovations and underlined that no one had established the extent to which the new rules would answer problems courts faced under the old law.

The new statute is twice as long as its predecessor (even though essential issues are no longer ruled by internal law) but generally keeps its structure and style. On many detailed questions one finds special conflict rules. As new areas of regulation, consumer contracts, intellectual property and negotiable instruments have appeared. The new law also offers the possibility of a choice of law in matrimonial and succession matters. Another innovation is the introduction of habitual residence, used not only in the EU-unified legal areas, but also in the autonomous rules on family and succession law. Where it broadens the possibility of choice of law, it represents progress, but where it is to be taken into account only subsidiarily next to traditional elements such as citizenship and residence, its impact is doubtful. Several changes might make the application of PIL easier, yet others will rather provoke doubts.

The new Act demonstrates that there is still a large amount of room for national regulation. Some space has been left for general provisions, too, but they lose their function of providing a general overview with every new piece of EU regulation. The introduction of an entirely new PIL cannot be seen as an answer to EU requirements, nor was it required on account of practical needs. Rather, it is the realisation of a vision of completing the shorter act previously in force.