Out now: Issue 4 of RabelsZ 81 (2017)

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

Marc-Philippe Weller, *Vom Staat zum Menschen: Die Methodentrias des Internationalen Privatrechts unserer Zeit* (Referral, Recognition and Consideration: New Methodological Approaches in Private International Law):

> *This article draws attention to new methodological challenges posed by an increasingly globalized world: In modern European societies, individual interests are becoming more and more important, demanding private international law to no longer only determine the legal order closest connected to the respective case, but to consider individual interests and substantive arguments as well. To cope with these current developments, private international law must find a balance between individuals' and states' interests, while ensuring international consistency at the same time. This article aims at showing that these challenges can, however, be met if the existing system of referral was complemented by methods of recognition and consideration of local and moral data.*

Dorothee Einsele, *Kapitalmarktrecht und Internationales Privatrecht* (Capital Market Law and Private International Law)

> *Claims for damages in the case of capital market offences not only grant compensation to market participants but also play an important role in the enforcement of market regulations. Hence, the question of which law is applicable to capital market offences becomes relevant. In this regard, one must make the following differentiation: If a (pre-)contractual relationship between the injuring party and the damaged person already exists at the time of the infringement, claims for damages are covered by the Rome I Regulation. Otherwise, the applicable law is determined by the Rome II Regulation. This means that the place of injury, which usually coincides with the place of habitual residence of the injured party, is, in principle, the decisive connecting*

factor (Art. 4(1)). However, this connecting factor, by focusing on the individual injured party, does not correspond with the character of capital market law as market organisation law. With regard to competition law, another set of rules regulating the organisation of markets, Art. 6 of the Rome II Regulation provides for the application of the law of the affected market. Since Recital 23 of the Rome II Regulation qualifies Art. 6 as a mere clarification of the general rule of Art. 4(1), the place of injury may be clarified accordingly for capital market offences and be interpreted as the law of the affected market. Capital market rules of conduct, however, are mostly overriding mandatory rules. Therefore, they are not covered by the general conflict-of-law rule for torts but are governed by special provisions, especially Art. 17 of the Rome II Regulation. The rationale of Art. 17 is to protect the legitimate expectations of the injuring party that the rules of conduct he had to comply with at the time the harmful act was committed will also be relevant to whether he has to pay damages. Therefore, the rules of conduct of the country in which the harmful act was committed, while often coinciding with the law of the affected market, may be taken into account when applying the substantive law. The rationale of Art. 17 even allows for primarily the rules of the affected market to be taken into account when market participants could expect this law and not the rules of the country where the harmful act was committed to be relevant for damage claims. Ultimately, this means that the rules of conduct of the affected market will usually be relevant, albeit not automatically but rather taking into account their nature as overriding mandatory rules. The differentiation between the applicable tort law and the relevant rules of conduct is already necessary for those rules that follow the country-of-origin principle. By contrast, it would not be consistent with the principles of the Rome I and Rome II Regulations to apply the tort law of the violated rule of conduct, as this would mean that overriding mandatory rules would determine the applicable tort law.

Hannes Wais, *Einseitige Gerichtsstandvereinbarungen und die Schranken der Parteiautonomie* (Unilateral Jurisdiction Agreements and the Limits of Party Autonomy)

1. Unilateral jurisdiction agreements may seem unfair when viewed from a purely procedural perspective. However, the mere imbalance of jurisdictional options between the parties may be counterbalanced by a financial or other benefit for the (procedurally) disadvantaged party. The regulation does not

provide for a standard of review against which the implied unfairness can be measured.

2. Unilateral jurisdiction agreements may constitute an abuse of law. Such an abuse of law is generally prohibited under the Brussels I Regulation. Thus, where an abuse of law is ascertained, the unilateral jurisdiction agreement is void. An abuse of law exists where the sole purpose of the unilateral jurisdiction agreement is to render it impossible for the disadvantaged party to file a lawsuit or to appear in court.

3. Unilateral jurisdiction agreements may infringe substantive national law. Article 25(1) Brussels I Regulation provides for the application of the law of the prorogated forum for questions concerning the agreement's substantive validity. Notwithstanding the still unclear definitive scope of Art. 25(1) Brussels I Regulation, the rules of lex fori prorogatiwill, in any case, apply where their purpose is to safeguard the existence of real party autonomy.

4. With regard to German substantive law, the provisions on the admissibility of standard contract terms (Secs. 305 ff. German Civil Code (BGB)) mostly fulfil these requirements. Due to the inherent imbalance in the procedural options, unilateral jurisdiction agreements differ from the conceptual approach to jurisdiction underlying the Brussels I Regulation. For this reason, where Secs. 305 ff. BGB are applicable, unilateral jurisdiction agreements are generally presumed to be void.

5. Article 31(2) Brussels I Regulation does not apply to unilateral jurisdiction agreements. Hence, these types of agreements are not immune to so-called "torpedo claims" that are filed with the sole purpose of delaying trial in the chosen court.

Johan Meeusen, Fieke van Overbeeke, Lore Verhaert, *The Link Between Access to Justice and European Conflict of Laws after Lisbon, Much Ado About Nothing?*

Since the Treaty of Lisbon, the access to justice principle has become "serious business". Its insertion in the Treaty implies a certain gravity. The inclusion of conflict of laws within that realm provokes many questions. As has been explained in this paper, access to justice is not easy to define within the

framework of the EU Treaty and is primarily understood in a procedural sense. It is therefore rather odd that European conflict of laws harmonisation should be approached in its light, as a procedural concept of access to justice does not seem apt to impose a substantive, policy-inspired direction upon conflict of laws, apart then from promoting the benefits served by harmonisation as such. Also, one could read in the strong emphasis by Articles 67(4) and 81(1) TFEU on mutual recognition of judicial and extrajudicial decisions in civil matters another confirmation of this procedural approach towards conflict of laws in the EU, which could eventually result in its completely auxiliary position.

From a conflict of laws perspective, yet paradoxically even more so from a broader EU perspective, such limited understanding of the purpose which choice-of-law rules can serve, would be unfortunate as some specific and valuable features of conflict of laws might remain unused. Appropriate choice-of-law rules may in their way contribute to the attainment of substantive policy goals. It should be noted however that not only this ability to incorporate policy objectives in choice-of-law rules pleads for a well-balanced approach between mutual recognition and European conflict of laws as developed by the EU legislature. Harmonised choice-of-law rules in important or delicate fields tend to create more legal certainty as well as inspire more political and judicial acceptance, one must assume, than a system solely based on mutual recognition. The Rome I, II and III Regulations and those on Maintenance and Succession illustrate the advantages of an elaborated, legislative system of conflict of laws very well. The AFSJ, however broad and vague this concept still may be, can certainly serve as an appropriate framework for the elaboration of private international law within the EU with ample space for the establishment of such a well-balanced system. The prominent place of the AFSJ, enhanced by the Treaty of Lisbon and paralleled with the clear categorisation of conflict of laws in this area, can be very instrumental in both preventing an isolated approach to conflict of laws and providing a framework which would fit its proper characteristics. Possibly, the somewhat enigmatic link with access to justice, in a modern understanding which includes substantive policies, could even stimulate this process.