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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:

Holger Fleischer, *Kautelarpraxis und Privatrecht: Grundfragen und gesellschaftsrechtliche Illustrationen* (Contractual Practice and Private Law: Basic Questions and Illustrations Taken from Company Law)

> *This paper highlights the importance of contractual practice for the development of modern private law. It outlines the trajectories of such practice from its early origins in Roman law to our time. Special attention is given to practitioners' achievements and legal innovations in company law, ranging from shareholder agreements and enterprise agreements to the single-member company. Finally, the diffusion process of these innovations is analysed more closely, followed by observations on the relationship between leading practitioners on the one hand and judges, legislators and professors on the other.*

Jochen Vetter, *Kautelarpraxis und M&A-Verträge* (Contractual Practice and M&A Transactions)

> *The article describes the role of M&A lawyers in, and the limited influence of national legislators, judges and professors on, private M&A transactions. The practical work of M&A lawyers entails far more than simply drafting the relevant M&A contracts; they provide the legal framework for the whole sale process. Neither the applicable law nor the legislator is of particular importance for M&A contracts or for the process of structuring a deal. This is primarily due to the variety of market participants and the breadth of M&A practice, which make efforts of a national legislator to provide a suitable legal framework seem futile. The creation of legal certainty, legal harmonization and the development of legislative interpretation by judges has no practical relevance in M&A. Besides the general benefits of arbitral jurisdiction (professional expertise, confidentiality, timing), another advantage is seen in*

minimizing any risk that the results of the negotiations will subsequently be subject to judicial review on account of mandatory law. Academic research yields only limited input as to legal questions regarding details. Contractual drafting, deal structure and, in particular, techniques to overcome conflicts of interest are subject to legal research only in exceptional cases. The law applied to M&A contracts is therefore not developed by the legislator, state courts or academic research, but by those working on M&A in practice. M&A lawyers play an important role in contributing to that development. As engineers of party autonomy, it is their duty to set out the results of negotiations in a legal, reliable and practical way so as to ensure that their client's key points are regulated by the contract and, furthermore, to support the parties in finding creative solutions to any conflicts of interest. In doing this, M&A lawyers use reference works providing templates or legal explanations as tools far less than they utilize their experience from a great number of different transactions, knowledge of international deals and active collaboration with colleagues and consultants, in particular investment bankers and M&A advisers. In return, M&A practice has almost no influence on legislation or the development of the law by the judiciary.

Manfred Wenckstern, *Kautelarpraxis und Erbrecht* (Designing Last Wills and Inheritance Contracts)

The article describes in its first part the work of a German lawyer in the field of last wills and inheritance contracts. The practitioner's work starts with a detailed determination of the legal, economic and social situation of the client as the point of departure. The second step consists in determining the aims of the client. Does he want to deviate from the rules of intestate succession? If yes, the lawyer has the task of translating these aims into legal concepts, i.e. legal clauses and terms of the last will. For guidance and help, a huge mass of German legal literature is available. Afterwards, the lawyer has, among other obligations, the task of explaining the chosen legal terms to the client using colloquial language.

In the second part the article deals with the creation of legal clauses and terms in four cases: The first case concerns the limitation of the binding effects of spouses' interdependent joint wills. The second case treats the compulsory portion of children in the context of spouses' joint wills: How can it be avoided

that a child asks for his compulsory portion after the death of his first parent? The third case concerns the structure of a last will of parents whose child is physically and / or mentally disabled and therefore dependent on social welfare. These parents often have the aim of furthering their child on beyond the existing social welfare schemes. The social welfare authorities long tried to secure the estate as a compensation for their expenditures. However, the Federal Supreme Court (Bundesgerichtshof) has in three judgments ruled that a carefully drafted and quite complicated last will in favour of a disabled child is not against public policy and therefore is to be accepted by the public authorities. The fourth case concerns the European Regulation on Inheritance Law. As early as two years before its entry into force, German authors published proposals suggesting new legal clauses.

Caroline S. Rupp, *Gestaltungsspielraum für die Kautelarpraxis im Sachenrecht? – Beispiele aus dem Wohnungseigentumsrecht* (Contractual Practice in Property Law –Examples from Condominium Law)

Property law is not an area of law commonly associated with party autonomy but rather with strict legal categorizations. Nevertheless, in some fields there is explicit permission or even a demand for the parties to determine and shape the property law aspects of their relationship. An example of this is condominium law: as a part of land law, it is ruled by the core property law principles – but the large diversity of practical needs and relationships within the community demand a high degree of individual contract design. After an overview of the basic concepts and structures of condominium law, this article explores the possibilities and limits of party autonomy regarding the basic property law notions of "ownership" and "things" in condominium law. The analysis of the various use rights shows that the options originally offered by positive law have been creatively developed and supplemented by contractual practice. Comparing the approaches of German and Swiss law, the legal treatment of parking spaces – a notorious issue in condominium law – is used to illustrate the points raised.

Wolfgang Wurmnest, *Kautelarpraxis und Allgemeine Geschäftsbedingungen* (Contractual Practice and Standard Contract Terms)

The article examines how standard contract terms as used in

contractual practice have influenced the development of the law. It is structured in two parts. The first part summarises the function of general contract terms in today's world and highlights the role of contract lawyers for the advancement of private and commercial law. The second part analyses in comparative perspective the interplay between contractual practice and the traditional forces shaping the law (legislators, courts and professors). It is demonstrated that, on the one hand, the legislature embraced some of the standards established by contractual practice, as for example newly developed types of contracts were later codified. On the other hand, the legislature had to react to eliminate unfair contract terms. It therefore first enacted isolated mandatory rules before establishing a set of general rules for identifying and prohibiting unfair contract terms. Within Europe, there are still significant differences as to the scope of these general rules, mainly with regard to the mechanism for the control of unfair terms in contracts between businesses. Once a full-fledged general set of rules is enacted by the legislature, the legal framework remains rather stable, as it is based to a large part on general clauses. These clauses must be applied and interpreted by the courts. Shaping the law of unfair contract terms by interpreting general clauses is the main task of judges today. Historically, however, it fell to the judges to advance the law of unfair contract terms as a reaction to standard clauses developed by contract lawyers. Many rules today enshrined in statutory form were developed by private law adjudication. Finally, the relationship of contractual practice and the academic world is discussed. Scholars mainly focus on the case law addressing unfair contractual terms. They advance the law by shaping the (European) foundations of unfair contract terms law, by systemising the case law and by diagnosing reforms to be effected by the courts or by the legislature.