RabelsZ: New issue alert

Issue 1/2022 of RabelsZ is out. It contains the following articles (including three open-access articles focusing on “Decolonial Comparative Law”):

Johannes Ungerer: Nudging in Private International Law. The Design of Connecting Factors in Light of Behavioural Economics, Volume 86 (2022) / Issue 1, pp. 1–31, DOI: 10.1628/rabelsz-2022-0002.

> *Amending the traditional economic analysis of law and its assumption of rationality, this paper suggests that behavioural economics can inform a more realistic understanding of private international law, which has been missing to date. Acknowledging the psychological biases which private parties are facing when dealing with complex cross-border cases, the paper introduces a new perspective on the design of connecting factors in EU private international law which are to be conceived as nudges that steer the applicable law and international jurisdiction to counteract bounded rationality. Objective connecting factors can be perceived as default rules, whereas the framework for exercising party autonomy can be construed as choice architecture of subjective connecting factors. Revealing the underlying libertarian paternalism of connecting factors requires addressing existing concerns about nudging, which is insightful for establishing the requirements of a transparent and choice-preserving design. Behavioural economics prove to be particularly suitable for explaining the restriction of choice and other connecting factor*

modifications for consumer protection in private international law.

Johanna Croon-Gestefeld: Der Einfluss der Unionsbürgerschaft auf das Internationale Familienrecht, Volume 86 (2022) / Issue 1, pp. 32–64, DOI: 10.1628/rabelsz-2022-0003

The Influence of EU Citizenship on International Family Law. – European Union citizenship is a multifaceted concept. It vests a formal status in the citizens of member states and grants them individual rights. In addition, it symbolically affirms the ideal of integration. The different facets of EU citizenship are mirrored in the various ways in which the concept influences international family law. First, the rights connected to the status of EU citizenship shape the outcome of international family law cases. Second, art. 21 para. 2 TFEU bestows a competence on EU legislators to harmonize international family law. Third, EU citizenship is invoked to support the ideal of mobile citizens roaming freely within the EU, an ideal which for its part legitimizes habitual residence as a central connecting factor in EU international family law regulations.

Jochen Hoffmann, Simon Horn: Die Neuordnung des internationalen Personengesellschaftsrechts, Volume 86 (2022) / Issue 1, pp. 65–90, DOI: 10.1628/rabelsz-2022-0004

Reshaping Germany's Private International Law on Partnerships. – The recent German act on the modernization of partnership law (MoPeG) reforms not only the substantive law but also the determination of connecting factors for conflict-of-law purposes. A newly created provision introducing a "registered seat" in § 706 of the German Civil Code (BGB) is relevant to conflict-of-law considerations as it abandons the "real seat" as a connecting factor for registered partnerships. Since the law applicable to a partnership now depends on the partnership's place of registration, substantive provisions such as the prohibition of voluntary deregistration (§ 707a BGB para. 4) will now have a considerable impact on questions of private international law. Conversely, those interpreting the substantive law must take conflict-of-law issues into account, especially to avoid unintentionally changing the law to which an entity will be subject. Moreover, the eligibility of the registered partnership (eGbR) for domestic conversions, mergers, and divisions considerably expands the range of possibilities for cross-border transactions of that kind.

Francesco Giglio: Roman dominium and the Common-Law Concept of Ownership, Volume 86 (2022) / Issue 1, pp. 91–118, DOI: 10.1628/rabelsz-2022-0005

On the basis of a comparison between common law and Roman law, it is argued in this paper that, despite the common-law focus on title, the common-law and civil-law concepts of ownership are not as far apart as often thought. Title and ownership right are not logically incompatible, and the common law has room for both: ownership is a substantive right; title is an operative, procedural tool that supplies the essential dynamism to the static right of ownership. Nor are relative and absolute ownership systemically incompatible in the civil law, as evidenced by Roman law. A study of the works of Blackstone, Austin and Honoré – three influential authors with expertise in Roman law – suggests that Roman law provides helpful elements for a comparison with the common law, but only if it is used to understand the common law, as opposed to forcing inadequate structures upon it. Austin's and Honoré's attempts to read common-law ownership through the lenses of Roman law offer two instances of the risks linked to such an approach.

Jing Zhang: Functional Reform of the Chinese Law of Secured Transactions in Movables from a Comparative Perspective, Volume 86 (2022) / Issue 1, pp. 119–165, DOI: 10.1628/rabelsz-2022-0006

The Chinese law of secured transactions concerning movables was reformed through a partial implementation of a functional approach. But by mixing formalism and functionalism, this functional reform, carried out first by the legislature through a codification and then by the Supreme People's Court through a judicial interpretation, leads to a modular system with links between the various modules. Different modules are linked in the sense that the rules concerning property rights of security are extended to title-based security devices through the making of several "connection points". After introducing the old law, this article focuses on issues of publicity, priority and enforcement under the new law. The functional reform establishes a unified notice-filing register for movables, which is accompanied by several specialist registers. Moreover, it provides a set of predictable priority rules that dispense with the factor of good faith in most circumstances. It also provides a flexible but complicated and somewhat uncertain system of enforcement and remedies for

reservations of ownership and financial leases. In general, the new law is more modern and internationally oriented than the old law, but it still lacks systematic completeness and coherence and needs to be improved.

Focus: Decolonial Comparative Law

Lena Salaymeh, Ralf Michaels: Decolonial Comparative Law: A Conceptual Beginning, Volume 86 (2022) / Issue 1, pp. 166–188, DOI: 10.1628/rabelsz-2022-0007

This article introduces the intellectual motivations behind the establishment of the Decolonial Comparative Law research project. Beginning with an overview of the discipline of comparative law, we identify several methodological impasses that have not been resolved by previous critical approaches. We then introduce decolonial theory, generally, and decolonial legal studies, specifically, and argue for a decolonial approach to comparative law. We explain that decoloniality's emphasis on delinking from coloniality and on recognizing pluriversality can improve on some problematic and embedded assumptions in mainstream comparative law. We also provide an outline of a conceptual beginning for decolonial approaches to comparative law.

Emile Zitzke: Decolonial Comparative Law: Thoughts from South Africa, Volume 86 (2022) / Issue 1, pp. 189–225, DOI: 10.1628/rabelsz-2022-0008

In this article, I problematise a popular approach to comparative law in South Africa that invariably seeks answers to legal problems in European law. This approach could potentially have neo-colonial effects. I propose that one version of a decolonial approach to comparative law could involve comparing South Africa's European legal tradition (today called the South African common law) and its African legal tradition (today called the South African customary law). Utilising postcolonial, decolonial, and legal-pluralism theory, coupled with recent developments in the South African law of delict (torts), I suggest that the common/customary law interface ought to involve acts of both resistance and activism. There ought to be a resistance to the paradigms of "separatism", "mimicry", and "universality". Simultaneously, there ought to be an embrace of

"actively subversive hybridity", "pluri-versality" and "delinking". I contend that it is in this matrix of resistance and activism where at least one version of decolonial comparative law might be found.

Roger Merino: Constitution-Making in the Andes – A Decolonial Approach to Comparative Constitutional Change, Volume 86 (2022) / Issue 1, pp. 226–253, DOI: 10.1628/rabelsz-2022-0009

How might the field of comparative constitutional change account for constitution- making processes and outcomes forged by historically subordinated and racialized social movements? Inspired by critical comparative approaches to constitutional change and engaging decolonial theory, this article explores how in the Andes of South America the "colonial question" shaped constitution-making struggles and was the rationale behind the enactment of the new plurinational constitutions of Bolivia (2009) and Ecuador (2008). This study focuses on the political aspirations of subaltern actors that have promoted constitutional changes in these settings and localizes their struggles and the historical and social context of continuous colonial grievances. Thus, the article provides a deeper understanding of the process of constitution-making in the Andes and reveals the colonial patterns that persist in current frameworks, such as the constitutional provisions that legitimate and perpetuate extractivism.