RabelsZ 87 (2023): Issue 4

The latest issue of RabelsZ has just been released. It contains the following contributions:

ESSAYS

Mareike Schmidt, Kulturalität der Rechtsanwendung und internationale Rechtsvereinheitlichung – Überlegungen am Beispiel des UN-Kaufrechts, 643–671, DOI: https://doi.org/10.1628/rabelsz-2023-0077

Cultural Dimensions in the Application of Law and International Unification of Law – The Example of the CISG. – The uniform application of law, in general, and of international uniform law, in particular, is confronted with the challenges of cultural diversity. Drawing on a meaning-based understanding of culture and using the example of the United Nations Convention on Contracts for the International Sale of Goods, the article examines the extent to which cultural conceptions of normality shape the individual steps in the application of law and illustrates this influence with concrete examples. Overall, it becomes clear that the cultural nature of the application of law goes well beyond what is usually discussed. The analysis advances an understanding of the application of international uniform law as the processing of cultural difference, in the context of which – and within an entire network of actors – foreign conceptions of normality are often interpreted with the aim of integrating them into one's own system of meaning. The resulting depiction of interconnections within this network, which concludes the text, can serve as a starting point for a more detailed analysis of the processes involved.

Maarten Herbosch, Contracting with Artificial Intelligence – A Comparative Analysis of the Intent to Contract, 672–706, DOI: https://doi.org/10.1628/rabelsz-2023-0076

Computer systems based on artificial intelligence (AI) are an increasing presence in everyday legal practice. They may even be used to form contracts on behalf of their users. In such instances, it is not necessarily required that the system has been set up to take precise, pre-specified actions from an engineering perspective. As a result, the system may enter into contracts unforeseen by its user. This comes into friction with the requirements that contract formation depends on the contracting parties' intent to be bound or that a contract constitutes a meeting of the minds. It is obscure how the intent to form a specific contract or a meeting of the minds can be present if one of the parties may not even know that a particular contract is being entered into. To tackle this challenge, this article thoroughly examines the intent requirement in various legal systems. It becomes clear that the intent requirement is often loosely applied and that its role is formulated too generally, unnecessarily obstructing a straightforward application to contract formation via AI systems. Supplying nuance to the role of intent in contract formation helps clarify that the intent requirement is not in fact an obstacle to contract formation via AI systems.

SYMPOSIUM: Fundamental Rights and Private International Law

Ralf Michaels: Einleitung zum Symposium: Grundrechte und IPR im Lichte der Entscheidung des Bundesverfassungsgerichts zum Kinderehenbekämpfungsgesetz, 707–713, DOI: https://doi.org/10.1628/rabelsz-2023-0084 [Open Access: CC BY-SA 4.0]

Symposium Introduction: Fundamental Rights and Private International Law after the Federal Constitutional Court Decision on the Act to Combat Child Marriages. – This issue presents the contributions to a symposium which examined the German Federal Constitutional Court's ruling on the Act to Combat Child Marriages from the perspectives of constitutional law and the conflict of laws. This introduction summarizes the Court's ruling and situates it in the scheme of German jurisprudence; thereafter, the symposium and the presented papers are described.

Henning Radtke, Zu den Maßstäben der verfassungsrechtlichen Beurteilung von Regelungen des deutschen Internationalen Privatrechts, 714–727, DOI: https://doi.org/10.1628/rabelsz-2023-0083 [Open Access: CC BY-SA 4.0]

On the Standards of Constitutional Review of Provisions of German Private International Law. – The German Federal Constitutional Court regularly reviews the constitutionality of domestic provisions of private international law and their application by the competent courts. In doing so, it takes into account the special features of this type of legislation that result, for example, from the cross-border dimension of the situations it is supposed to address and from the necessary respect for the validity of foreign legal systems. With regard to the protection of marriage and the family, this applies in particular when determining the scope of protection and the structural principles underlying art. 6 para. 1 and other provisions under the German Basic Law. The level of scrutiny when examining constitutionality is primarily determined on the basis of the principle of proportionality.

Susanne Lilian Gössl, Grundrechte und IPR – Von beidseitigem Desinteresse zu höflicher Aufmerksamkeit – und zu angeregtem Austausch?, 728–747, DOI: https://doi.org/10.1628/rabelsz-2023-0075 [Open Access: CC BY-SA 4.0]

Fundamental Rights and Private International Law: From Mutual Disinterest to Respectful Attention – and on to Animated Exchange? – The relationship between German constitutional law and the field of conflict of laws has been discussed for decades, especially when decisions of the Constitutional Court (BVerfG) addressing private international law issues have been pending or published. The most recent occasion to reflect on this relationship is the decision of the BVerfG on the Act to Combat Child Marriages. Initially, German scholars had assumed that conflict of laws, as a value-neutral and merely technical body of law, was constitutionally irrelevant. Fundamental rights could – according to a first Constitutional Court decision – at most become relevant through the ordre public clause. Foreign law was subsequently upgraded by the widow's pension decision, with the result that foreign rules can expand the scope of German fundamental rights. Ultimately, the BVerfG has affirmed that – like private law generally – private international law is bound to the German

Constitution as part of the collective legal order and, furthermore, that it shapes the expression of constitutional guarantees in the German legal order. Nevertheless, many theoretically intriguing questions remain open, such as the character of foreign law in the jurisprudence of the Constitutional Court. These questions invite further inquiry and academic exchange.

Lars Viellechner, Die Anwendbarkeit der Grundrechte im Internationalen Privatrecht: Zur Methodik der Entscheidung des Bundesverfassungsgerichts über die Kinderehe, 748–765, DOI: https://doi.org/10.1628/rabelsz-2023-0078 [Open Access: CC BY-SA 4.0]

The Applicability of Fundamental Rights in Private International Law: On the Methodology of the Federal Constitutional Court's Decision Regarding Child Marriage. – In its decision on the Act to Combat Child Marriages, the Federal Constitutional Court of Germany does not explicitly address the applicability of fundamental rights in private international law. It only considers some cross-border effects of the statute in the context of the proportionality test. According to its own earlier case law, however, it should have taken a position on this question. It could also have taken the opportunity to further develop a constitutional notion of conflict of laws, which equally shines through its decisions on the relationship between the Basic Law and both international law as well as European Union law. With resort to such a method, not only could it have clarified a question of principal significance regarding the relationship between fundamental rights and private international law, it might also have reached a different result in the present case.

Dagmar Coester-Waltjen, Die »Kinderehen«-Entscheidung des Bundesverfassungsgerichts: Welche Schlussfolgerungen ergeben sich für das internationale Eheschließungsrecht?, 766–785, DOI: https://doi.org/10.1628/rabelsz-2023-0069 [Open Access: CC BY-SA 4.0]

The Early Marriage Decision of the Federal Constitutional Court: What Does It Mean for International Marriage Law? – The decision of the Federal

Constitutional Court on art. 13 para. 3 no. 1 of the Introductory Act to the Civil Code raises many questions of private international law. Although the court ultimately held the provision unconstitutional, a welcome outcome, the decision also weakens the protection of legal statuses acquired under foreign law and allows the specifications and classifications of German internal law to apply as the standard even for marriages validly entered into under foreign law. The court roughly indicates a few possible ways to remedy the disproportionality of the provision, but it would seem difficult to implement these remedies in a way that both systematically conforms with the principles of private international law and does not create serious practical issues. As an alternative, the legislator should instead consider declaring all underage marriages, including the »earliest of the early«, to be voidable, because although the court's ruling accepts their classification as non-marriages, it does not necessarily require such a harsh categorization. The article concludes by examining the potential of a fundamental reform of art. 13 of the Introductory Act to the Civil Code.

BOOK REVIEWS

As always, this issue also contains several reviews of literature in the fields of private international law, international civil procedure, transnational law, and comparative law (pp. 786–853).