Latest Issue of RabelsZ: Vol. 76, No. 2 (2012)

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:

- *Holger Fleischer*, **The Optional Instrument in European Private Law ("28th Regime"),** pp. 235-252

This paper explores the "optional instrument" as a regulatory tool in European private law. The term "optional instrument" or "28th Regime" refers to supranational corporate forms, legal titles or legal instruments which provide an alternative model for doing business throughout the European Union while leaving national laws untouched. After distinguishing different modes of optional law, the paper provides an overview of optional instruments that already exist or are proposed in European company law, intellectual property law, insurance contract law and sales law. It then identifies common features and problems of the 28th Regime, from its appropriate legal basis and the need for an optional instrument, to its scope of application, its interface with national law and its relationship to private international law. Finally, the paper addresses the under-researched question of vertical regulatory competition triggered by optional instruments in European private law

- *Jörn Axel Kämmerer*, **Responsibility for Integration: A New Theme Made in Karlsruhe,** pp. 253-275

Integrationsverantwortung is a neologism that was coined by the German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) in its 2009 judgment on the Treaty of Lisbon. The term translated as "responsibility for integration" but does in fact mean the constitutional limits that the German Basic Law (Grundgesetz – GG) imposes on the Treaty, especially compliance with democratic principles enshrined therein, and which are specified in the judgment. According to the Court, the national laws accompanying ratification of the Treaty deviated from these principles and were therefore declared void. The German legislature took account of the Court's findings in the

Responsibility for Integration Act (Integrationsverantwortungsgesetz-IntVG). Its numerous and detailed rules on participation of parliaments, responding to the extension of European Union (EU) competencies in the Lisbon Treaty, are likely to complicate future attempts to create a Union-wide (optional or mandatory) private law, especially if the legislation of other Member States is used as a catalyst. In most cases covered by the IntVG, the Bundestag must formally authorise the German member of the Council of Ministers to vote in favour of the proposal or to abstain; otherwise the German member of the Council would be obliged to reject the European legal act. The European act would then fail, as its adoption must be unanimous. Among the EU competencies that require neither this kind of empowerment nor unanimity in the Council, none provides a suitable basis for a pan-European private law. Article 81(2) of the Treaty on the Functioning of the European Union (TFEU), confined to " judicial cooperation in civil matters", does not allow for approximation of material law. While no such restriction is inherent in Art. 114 TFEU, the harmonisation of national private law that it admits must serve the functioning of the internal market, with only internal and non-commercial legal relations being excluded. Requiring the Union to act "within the framework of the policies defined in the Treaty", even Art. 352 TFEU cannot provide the basis for a comprehensive private law regime where the Treaty remains otherwise silent on the matter. Even insofar as the provision serves as a basis for (optional) rules, the Council must decide unanimously and its German member must have been previously empowered by the Bundestag (§ 8 IntVG).

In introducing the barriers, the Federal Constitutional Court underestimated the democratic achievements of the EU and adhered to nationState-based concepts of legitimacy that have been criticised as backwardlooking. Its assumption that Art. 352 TFEU would come into conflict with the interdiction of "blanket empowerments" contrasts with its former position on Art. 308 EC; involvement of national parliaments had never been considered necessary in this respect, even though the scope of its successor provision is not palpably broader. Confining § 8 IntVG to legal acts not related to the internal market may appear politically desirable but would sidestep the will of the contracting States, which was to abolish this criterion. Positive effects of the IntVG on integration should be mentioned, despite their potential to hamper standardisation of private law in Europe. Ultra vires control of Union acts by the German Constitutional Court is unlikely to be exercised where Parliament has positively assented to EU legislation whose compatibility with the principle

of conferral is disputed. If attempted, standardisation, or harmonisation, of private law in Europe might evidence the true significance of Art. 352 TFEU for European integration. In summary, the IntVG makes European law-making less predictable but might help parliaments to become involved in debates on projects such as the "28th model" that have until now largely remained in the domain of legal scholars. The likelihood of its materialisation, however, decreases with the proliferation of legal caveats, and even the European Court of Justice could be induced to applying a stricter ultra vires control.

- *Lars Klöhn*, **Supranational Legal Entities and Vertical Regulatory Competition in European Corporate Law. The Case for Market-Mimicking EU Corporate Forms,** pp. 276-315

This article states the case for market-mimicking supranational corporate forms in Europe. It argues that the form and substance of European Union (EU) incorporation options, such as the Societas Europaea or the Societas Privata Europaea, depend on the extent to which there can be regulatory competition between the European Union Member States (horizontal competition), and between the EU and its Member States (vertical competition). At present, there is some passive horizontal competition, but there can be no proactive vertical regulatory competition in Europe. However, as the Canadian experience shows us, there might be temporary passive vertical competition causing Member States to copy certain features of supranational corporate forms which are perceived as better matching the preferences of those facing a decision on where to incorporate. Therefore, when offering corporate forms, the EU should mimic a functioning European corporate law market. It should adopt those rules which would prevail under such conditions. The concept of market-mimicking corporate forms adds a third, "diagonal" dimension to regulatory competition in European company law. It confronts Member States' regulators with the result of hypothetical proactive horizontal regulatory competition. If this result better matches the preferences of entrepreneurs, mere incentives to enter into passive competition will suffice for this result to prevail in national company laws. When drafting such rules European regulators can seek guidance from over 35 years of economic analysis of corporate law. Examples of such analysis can be found in respect of Delaware's General Corporation Law.

- *Helmut Heiss,* **An Optional Instrument for European Insurance Contract Law**, pp. 316-338

In its first chapter, the article explains why a European insurance contract law in the form of an optional instrument is needed to complete the internal insurance market. Essentially, this is due to the existence of a large number of mandatory rules in conflict of laws as well as the substantive law of insurance, both of which form a serious barrier to the functioning of the internal insurance market. The "Principles of European Insurance Contract Law (PEICL)" are presented as a model optional instrument in the second chapter, where the basic features of the model law, in particular its regulatory approach, are set out. The optional character of a European instrument is discussed in the third chapter. It applies, but is not restricted to insurance contract law. In essence, an argument is advanced in favour of a "2nd regime" model. This model has since been adopted by the Commission Proposal on a Common European Sales Law (COM(2011) 635 final).

- *Reto M. Hilty*, **An Optional European Contract Law Instrument ("28th Model"): "Intellectual Property",** pp. 339-373

In the search for the "28th model", a glance at the European acquis communautaire could lead us to assume that intellectual property is in the vanguard and that the establishment of an optional instrument has proven to be a model of success. All that was actually created, however, were two supranational legal systems, namely in trade mark law and in design law. The terrain for these two regulations, from 1993 and 2002, respectively, was certainly well-cleared, for the corresponding national regimes had for the most part already been harmonised via directives in 1988 and 1998. These two EU regulations thus did not compete with the national legal systems so much in terms of content as with respect to their geographic scope. A registrant primarily chooses EU legal title when he or she intends to do business in the EU and not strictly within national boundaries. The European Patent Convention (1973), on the contrary, is not only not a legal entity of the EU, but it also is based on an independent supranational construct, the European Patent Organisation. Furthermore, the Convention's intended purpose is limited to centralising the procedures leading up to the grant of patents for the participating, currently 38, member states. Once granted, however, the so-

called bundle patents are for the most part on a par with the nationally granted patents. A true supranational patent-law title has not been achieved yet, despite decades-long efforts. The "enhanced cooperation" between 25 member states (Spain and Italy not included) that is currently being discussed will likewise not be able to stand in for an EU patent – not to mention the open question of whether business and industry would even accept such a construct. In the area of copyright, again, certain vague ideas have recently been brought into play that point towards an EU right, though without any concrete details, and such a thing as an EU copyright – assuming discussion on this topic does not soon fade away on its own – certainly lies far in the future. It is especially striking that agreements on intellectual property rights – which practically speaking are incredibly important – have never played a part in the previous initiatives for a unifi ed European contract law. It is in relation to just these types of contracts that an optional "28 th model" seems the most obvious choice for markedly increasing legal certainty in the outcome of court disputes. Indeed, more innovation and competitiveness cannot be gained through the abstract reinforcement of legal protection alone; what is further necessary is a knowledge transfer as comprehensive as possible. First and foremost, this requires an appropriate contract law that is capable of providing for the particularities of each contractual subject.

- *Stefan Leible*, **Private International Law and Vertical Competition Between Legal Systems,** pp. 374-400

Over the past decades, the European Union (EU) has influenced private law in two ways: first, by the "four freedoms" enshrined in primary law which are designed to promote the Internal Market and have a bearing on private relationships, and second by enacting acts of secondary law that address relationships between individuals. Today, we are facing a plethora of national laws and court decisions that live side by side with the many regulations, directives and decisions by the EU institutions. The coexistence of these different legal sources is not very easy to manage, and suggestions how to disentangle the mess abound. While some authors plead for a full harmonization of private law, others highlight the benefits of competition between the national legal systems (horizontal dimension) and between the Member States and the EU (vertical dimension). The article stresses the advantages of a harmonization approach, but also points to unwelcome effects.

The workings of horizontal and vertical competition are juxtaposed and the importance of comparative law is underlined. The new Optional Instrument on a Common Sales Law for the European Union is studied as an example of vertical competition. Drawing on the lessons of the past, the author pleads for extending the scope of the instrument in the future.

- *Matteo Fornasier*, **"28th" versus "2nd" Regime – An Optional European Contract Law from a Choice of Law Perspective,** pp. 401-442

Ten years after placing the idea of a European contract law on the political agenda, the European Commission has finally taken legislative action. On 11 October 2011, a proposal for a Regulation on a Common European Sales Law was published. The regulation would create a set of European contract rules which would exist alongside the various national regimes and could be chosen as the applicable law by the parties to a sales contract. Such an instrument raises a number of questions with regard to private international law in general and the Rome I Regulation in particular. Should the choice of the European contract law be subject to the general rules on party choice under Rome I or does the new instrument call for special rules? Also, should the European contract law be eligible only where the relevant choice of law rules refer the contract to the law of a Member State or should the parties also be allowed to opt for the European rules where private international law designates the law of a third state as the law applicable to the contract? The paper examines which solution is the best suited to achieve the primary goal of the optional instrument, i.e. to improve the functioning of the internal market. Moreover, it seeks to shed some light on the terms of »28th regime« and »2nd regime« that are often used to identify different possible approaches of how to fit the optional instrument into the system of private international law. Moreover, the paper deals with the relationship between the optional instrument and the CISG as well as other uniform law conventions. The article concludes by addressing a number of specific issues such as the prerequisites for a valid choice of the instrument, the applicability of the pre-contractual information rules, gap-filling, and the relationship between the optional instrument and national overriding mandatory provisions (Eingriffsnormen).

ECJ Rules Again on Defendants with Unknown Domicile

On March 15th, the European Court of Justice ruled again on the defendants with unknown domicile in *G v. Cornelius de Visser*. The Court had already addressed the issue in its *Lindner* case last year.

Background

In *de Visser*, the plaintiff was a woman who had asked de Visser to take pictures of her, including one where she did not wear much cloth. De Visser later published the picture on his German website. The plaintiff argued that she had never agreed to this, and sued in Germany. But she was unable to determine where the domicile of de Visser might be.

Applicability of the Brussels I Regulation

The first issue that whether the Brussels I Regulation applied in a case where the domicile of the defendant was unknown. In *Lindner*, the court had issued a ruling with a very limited scope: consumers who had concluded long-term mortgage loan contracts, and who had agreed to inform the other party of any change of addresses. The *de Visser* court is courageaous enough to issue what seems to be a general ruling. The Brussels I Regulation applies when the domicile of the defendant is unknown provided that he is a national from a Member state, and that no "firm evidence" of a domicile outside of the EU has been adduced. In other words, EU nationals are presumed to have their domicile in the EU.

> *40 Secondly, the expression 'is not domiciled in a Member State', used in Article 4(1) of Regulation No 44/2001, must be understood as meaning that*

application of the national rules rather than the uniform rules of jurisdiction is possible only if the court seised of the case holds firm evidence to support the conclusion that the defendant, a citizen of the European Union not domiciled in the Member State of that court, is in fact domiciled outside the European Union (see, to that effect, Hypote?ní banka, paragraph 42).

41 In the absence of such firm evidence, the international jurisdiction of a court of a Member State is established, by virtue of Regulation No 44/2001, when the conditions for application of one of the rules of jurisdiction laid down by that regulation are met, including in particular that in Article 5(3) thereof, in matters relating to tort, delict or quasi-delict.

Interestingly enough, the nationality of de Visser was only "probably" that of a Member state. The Court still concludes:

1. In circumstances such as those in the main proceedings, Article 4(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it does not preclude the application of Article 5(3) of that regulation to an action for liability arising from the operation of an Internet site against a defendant who is probably a European Union citizen but whose whereabouts are unknown if the court seised of the case does not hold firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union.

Choice of Law

The lack of information on the domicile of de Visser also created problem from a choice of law perspective. Visser was a service provider. He thus enjoyed a European freedom to provide service outside of his Member state of establishment. Thanks to the Directive on eCommerce, this meant that he might have been entitled to avoid the application of the lex loci delicti if that law were more restrictive than the law of the place of his establishment. But it was unclear where he was established. In such a case, could he argue in favour of the law of his nationality instead of the law of his unknown domicile?

No. The Court rules that in the absence of a proven establishment in the EU, European law simply does not apply. Well, domicile in the EU is also a requirement for applying the Brussels I Regulation, isn't it? The Court does not care to explain how these two outcomes can be reconciled.

> *70 In that regard, it is clearly apparent from the judgment in eDate Advertising and Others that the establishment of the provider in another Member State constitutes both the reason for and the condition for application of the mechanism laid down in Article 3 of Directive 2000/31. That mechanism seeks to ensure the free movement of information society services between Member States by making those services subject to the legal system of the Member State in which their providers are established (eDate Advertising and Others, paragraph 66).*
>
> *71 Since application of Article 3(1) and (2) of that directive is thus subject to the identification of the Member State in whose territory the information society service provider is actually established (eDate Advertising and Others, paragraph 68), it is for the national court to ascertain whether the defendant is actually established in the territory of a Member State. In the absence of such establishment, the mechanism laid down in Article 3(2) of Directive 2000/31 does not apply.*

The judgment also addresses two additional issues:

> ***2. European Union law must be interpreted as meaning that it does not preclude the issue of judgment by default against a defendant on whom, given that it is impossible to locate him, the document instituting proceedings has been served by public notice under national law, provided that the court seised of the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.***
>
> ***3. European Union law must be interpreted as precluding certification as a European Enforcement Order, within the meaning of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, of a judgment by default issued against a defendant whose address is unknown.***

> ***4. Article 3(1) and (2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market does not apply to a situation where the place of establishment of the information society services provider is unknown, since application of that provision is subject to identification of the Member State in whose territory the service provider in question is actually established***.

Photocredit: Velove Shieffa.

Conference: "The Making of European Private Law: Why, How, What, Who" (Rome, 9-11 May 2012)

On 9-11 May 2012 the University of "Roma Tre" will host an international conference on the current issues and perspectives of European Private Law, organized by the **Jean Monnet Centre of Excellence "Altiero Spinelli"** (CEAS): **"The Making of European Private Law: Why, How, What, Who"**. Here's the programme (available for download on the registration page):

Wednesday, 9 May 2012

(Venue: "Roma Tre" University – Aula Magna Rettorato, Via Ostiense 159)

Registration (16,00-16,30)

Opening session (16,30 – 16,45)

- *Guido Fabiani*, Rector, "Roma Tre" University

- *Savino Mazzamuto*, Secretary of State, Ministry of Justice, "Roma Tre" University

The Europeanisation of private law: problems and perspectives (16,45-18,30)

Chair: *Antonio Tizzano*, European Court of Justice

Panelists:

- *Ole Lando*, Copenaghen Business School
- *Bénédicte Fauvarque-Cosson*, "Panthéon-Assas" University (Paris II)
- *Guido Alpa*, "Sapienza" University of Rome
- *Pietro Rescigno*, "Sapienza" University of Rome

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Thursday, 10 May 2012

(Venue: "Roma Tre" University – Aula Magna Rettorato, Via Ostiense 159)

The 'legal basis' of European private law in the light of the EU constitutionalisation (09,30 – 11,30)

Chair: *Luigi Moccia*, "Roma Tre" University

Panelists:

- *Mads Andenas*, University of Oslo
- *Martijn Hesselink*, University of Amsterdam
- *Hans Micklitz*, European University Institute, Florence
- *Christiane Wendehorst*, University of Vienna

The 'instruments' for implementing European private law (11,45 – 13,30)

Chair: *Angelo Davì*, "Sapienza" University of Rome

Panelists:

- *Hugh Beale*, University of Warwick
- *Fabrizio Cafaggi*, European University Institute, Florence
- *Reiner Schulze*, University of Münster

- *Verica Trstenjak*, European Court of Justice

The relationship between European private law and the international unification of private law (15,30 – 17,30)

Chair: *Joachim Bonell*, "Sapienza" University of Rome

Panelists:

- *Fernando Gomez*, "Complutense" University of Madrid
- *Morten Fogt*, Aarhus University
- *Sergio Marchisio*, "Sapienza" University of Rome
- *Renaud Sorieul*, UNCITRAL

European consumer law and its consolidation (17,45 – 19,30)

Chair: *Diego Corapi*, "Sapienza" University of Rome

Panelists:

- *Luc Grymbaum*, "René Descartes" University (Paris V)
- *Hans Schulte-Nölke*, University of Osnabruck
- *Simon Whittaker*, Oxford University
- *Vincenzo Zeno-Zencovich*, "Roma Tre" University

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Friday, 11 May 2012

(Venue: Sala "Pio X", Via Borgo S. Spirito 80)

European property law: issues and projects (09,30 – 11,30)

Chair: *Adolfo Di Majo*, "Roma Tre" University

Panelists:

- *Ulrich Drobnig*, Max Planck Institute for Private Law, Hamburg
- *Brigitta Lurger*, University of Graz
- *Sjef van Erp*, University of Maastricht
- *Francesco Paolo Traisci*, University of Molise, Campobasso

European contract law: issues and projects (11,45 – 13,30)

Chair: *Guido Alpa*, "Sapienza" University of Rome

Panelists:

- *Eric Clive*, University of Edinburgh
- *Marco Loos*, University of Amsterdam
- *Jerzy Pisulinski*, University of Warsaw
- *Anna Veneziano*, University of Teramo

Common European Sales Law: the Commission proposal and the role of stakeholders

15,30-17,00

- *Andrea Zoppini*, Secretary of State, Ministry of Justice, University "Roma Tre"
- *Luigi Berlinguer*, Member of the European Parliament
- *Mihaela Carpus-Carcea*, European Commission, DG Justice

17,15-19,00

- *Ettore Battelli*, "Roma Tre" University, Unioncamere stakeholder
- *Oreste Calliano*, University of Torino, CEDIC director
- *Antonio Longo*, Consumers' representative, EESC member

Each session will be ended by discussion. Working language will be English (French allowed): no simultaneous translation will be provided. **Conference works will be video-recorded and made available on CeAS website.**

Hague Academy of International

Law: Summer Programme

The Hague Academy of International Law has recently released the programme for this year's summer course in Private International Law:

30 July 2012: **Inaugural Conference**

Conflicts of Laws and Uniform Law In Contemporary Private International Law: Dilemma or Convergence?, *Didier OPERTTI BADÁN*, Professor at the Catholic University of Montevideo.

6 to 17 August 2012: **General Course**

The Law of the Open Society, *Jürgen BASEDOW*; Director of the Max Planck Institute for Comparative and International Private Law, Hamburg

30 July-17 August 2012: **Special Courses**

- **The Private International Law Dimension of the Security Council's Economic Sanctions** (30 July-3 August), *Nerina BOSCHIERO*; Professor at the University of Milan.
- **The New Codification of Chinese Private International Law** (30 July-3 August), *CHEN Weizuo*; Professor at Tsinghua University, Beijing.
- **Applying Foreign Public Law in Private International Law – A Comparative Approach** (30 July-3 August), *Andrey LISITSYN-SVETLANOV*, Professor at the Institute of State and Law, Russian Academy of Sciences, Moscow.
- **Party Autonomy in Private International Law: A Universal Principle between Liberalism and Statism** (6-10 August), *Christian KOHLER*; Honorary Director-General at the Court of Justice of the European Union, Luxembourg.
- **Applying the most Favourable Treaty or Domestic Rules to Facilitate Private International Law Co-operation** (6-10 August), *Maria Blanca NOODT TAQUELA*; Professor at the University of Buenos Aires.
- **Bioethics in Private International Law** (13-17 August), *Mathias AUDIT*; Professor at the University of Paris Ouest Nanterre La Défense
- **Compétence-Compétence in the Face of Illegality in Contracts and**

Arbitration Agreements (13-17 August), *Richard H. KREINDLER*; Professor at the University of Münster

More information is available on the Academy's website.

2nd Annual ICQL Lecture: Assignment of Contractual Claims under the Rome I-Regulation

On Thursday, 10 May 2012, 5 pm to 7 pm the British Institute for International and Comparative Law will host the 2nd Annual ICQL Lecture. The lecture will be given by Professor Trevor Hartley (Professor of Law Emeritus, London School of Economics) and it will focus on "Assignment of Contractual Claims under the Rome I Regulation: Choice of Law for Third-Party Rights".

More information is available on the Institute's homepage.

Conference Announcement: European Class Action – Status and Perspectives

On 7 and 8 May 2012 the Humboldt-Viadrina School of Governance will host a conference on EU Class Action in Berlin. The programme reads as follows:

Monday, 7 May

- 10:00 **Welcome**, *Prof. Dr. Christoph Brömmelmeyer*, European University Viadrina Frankfurt (Oder)
- 10:15 **Opening Statement**, *Herr Lothar Jünemann*, German Judges Association, Berlin

I. Kollektiver Rechtsschutz – Rechtspolitische Fragen

- 10:45 **Aktuelle Pläne und Perspektiven einer EU-Rahmenregelung für kollektive Rechtsschutzinstrumente,** *Frau Salla Saastamoinen*, Directorate-General for Justice, Brussels
- 11:15 **Bemerkungen zu den Brüsseler Gesetzgebungsplänen aus Sicht des Bundesverbandes der Deutschen Industrie (BDI),** *Herr Dr. Heiko Willems*, Federation of German Industry
- 11:30 **Coffee break**
- 12:00 **Bemerkungen zu den Brüsseler Gesetzgebungsplänen aus Sicht der Verbraucherzentralen,** *Herr Gerd Billen*, Federation of German Consumer Organisations, Berlin
- 12:15 **Bemerkungen zu den Brüsseler Gesetzgebungsplänen aus Sicht der Anwaltschaft,** *Dr. Christian Duve*, Attorney-at-law, Frankfurt am Main
- 12:30 **Der Meinungsstand im Europäischen Parlament zu den Gesetzgebungsplänen in der Kommission,** *Dr. Andreas Schwab*, European Parliament, Brussels
- 12:45 **Discussion**, Chair: *Prof. Dr. Thomas Lübbig*, Attorney-at-law, Berlin
- 13:15 **Lunch**

II. Kollektiver Rechtsschutz: Effektivität und Erforderlichkeit in ausgewählten Rechtsgebieten

- 14:45 **Effektivität kollektiver Rechtsschutzinstrumente,** *Prof. Dr. Caroline Meller-Hannich*, Martin-Luther-University Halle-Wittenberg
- 15:15 **Kollektiver Rechtsschutz im Kartellrecht,** *Prof. Dr. Christoph Brömmelmeyer,* European University Viadrina Frankfurt (Oder)
- 15:45 **Coffee break**
- 16:15 **Kollektiver Rechtsschutz im Verbraucherrecht,** *Prof. Dr. Eva Kocher*, European University Viadrina Frankfurt (Oder)
- 16:45 **Discussion,** Chair: *Prof. Dr. Hans-Peter Schwintowski*, Humboldt-

University Berlin

- 17:15 **End of the first day**

Tuesday, 8 May

III. Kollektiver Rechtsschutz in den U.S.A. und den Mitgliedstaaten der EU

- 10:00 **Class Actions in den U.S.A. als Vorbild für Europa?,** *Prof. Dr. Astrid Stadler*, University of Konstanz
- 10:30 **The Status and Practice of Collective Redress in France,** *Jacqueline Riffault-Silk*, Cour de Cassation, Paris
- 11:00 **Coffee break**
- 11:15 **Grenzüberschreitender kollektiver Rechtsschutz,** *Prof. Dr. Michael Stürner*, European University Viadrina Frankfurt (Oder)
- 11:45 **Discussion,** Chair: *Prof. (em.) Dr. Dieter Martiny*, European University Viadrina Frankfurt (Oder) / Hamburg
- 12:15 **Lunch**

IV. Kollektiver Rechtsschutz im Bereich der Finanzdienstleistungen

- 13:45 **Kollektiver Rechtsschutz im Kapitalmarktrecht**, *Prof. Dr. Jan von Hein*, University of Trier
- 14:15 **Kollektiver Rechtsschutz im Versicherungsrecht,** *Dr. Theo Langheid*, Attorney-at-law, Cologne
- 14:45 **Discussion: Ist das KapMug ein Erfolgsmodell und sollte es auf andere Bereiche des Ersatzes von Streu- und Massenschäden ausgedehnt werden?**, *Prof. Dr. Jan von Hein*, University of Trier; *Dr. Theo Langheid, Ministerialrat Dr. Christian Meyer-Seitz*, Federal Ministry of Justice, Berlin, *Dr. Wolfgang Schirp*, Attorney-at-law, Berlin; Chair: *Prof. Dr. Axel Halfmeier*, Frankfurt School of Finance, Frankfurt am Main
- 15:30 **End of Conference**

Wal-Mart and the Foreign Corrupt Practices Act

Here in the United States, news outlets (and investors) are abuzz in reponse to a blockbuster article this weekend in the New York Times regarding allegations of bribery in Mexico by a foreign subsidiary of Wal-Mart Stores, Inc. If the allegations are true, Wal-Mart officials may have violated the Foreign Corrupt Practices Act, a U.S. statute that makes it unlawful for U.S. persons and foreign issuers, as well as foreign firms whose actions have an impact in the United States, to, among other things, bribe foreign government officials to assist in obtaining or retaining business. FCPA investigations are exploding and corporations are thus being required to spend significant resources on in-house counsel and outside law firms to ensure compliance.

For the purposes of this blog's subject, one issue that should not be missed is the fact that in this case U.S. law will ostensibly be applied to conduct occurring in whole or in part in a foreign country. Regardless of whether or not the alleged conduct violates Mexican law, we see a real potential here for regulatory conflict–a species of the conflict of laws–between U.S. interests and foreign interests and arguably no doctrinal way to negotiate such a conflict, except the discretion of U.S. government officials to exercise their authority in ways that are senstive to international relations and foreign regulatory authority. As such, this case brings to the forefront yet again the question of the extraterritorial application of U.S. law that has recently become a steady diet of recent Supreme Court caselaw, as illustrated by the recent Morrison and Kiobel cases.

As the Wal-Mart investigation develops, it will be interesting to see how forcefully the U.S. pushes to regulate such conduct and whether foreign governments will resist that regulation or basically defer to the United States. It will also be interesting to see what reactions Wal-Mart and other U.S. corporations, and their lawyer-advisors, take in response to these allegations. And, of course, how will Mexico react?

New edition standard textbook on modern Roman-Dutch private international law

The fifth edition of Christopher Forsyth's Private International Law. The Modern Roman-Dutch Law, including the Jurisdiction of the High Courts (2012) appeared recently. The author is professor of public law and private international law at the University of Cambridge. This work is the standard textbook on the private international law applicable in South Africa and most of its neighbouring countries (Botswana, Lesotho, Namibia, Swaziland and Zimbabwe), as well as in Sri Lanka. Of interest to the foreign reader may be especially the sections on classification (76-90; the decision Society of Lloyd's v Price; Society of Lloyd's v Lee 2006 5 SA 393 (SCA) is regarded by the author as "the leading decision on characterization in the common-law world" (v)) and on the influence of constitutional values on private international law (19-20), including in the context of arrest to found or confirm jurisdiction (196), polygamous marriages (289-291), same-sex marriages (300-301), the proprietary consequences of marriages (302-303) and the enforcement of foreign judgements (468). More information can be found on the website of the publisher: www.juta.co.za.

Sciences Po Seeks to Recruit Professor of Private International Law

The law school of the Paris Institute of Political Science (*Sciences Po*) is seeking to recruit a professor of private international law.

Sciences Po Law School is advertising an open position for a professor of private international law (with public employee status). The expected starting date is September 1st, 2012.

Profile of Researcher and Teacher

Sciences Po Law School is looking for a professor of economic international law. The chosen candidate will be granted a teaching position at the Law School and within the University College of Sciences Po. He or she will conduct research with the faculty at the Law School, specifically in the field of international economic law, international arbitration, and international private law.

The chosen candidate must provide proof of research at an internationally recognized level at the forefront of these academic fields. The chosen candidate will be open to multidisciplinary research and will have to demonstrate an aptitude for collaborating with researchers outside of the field of law. The chosen candidate will also contribute to the creation of agreements with partners outside of Sciences Po.

The chosen candidate will have solid teaching experience and will have had demonstrated a capacity for innovation that matches the teaching model implemented by Sciences Po Law School.

Conditions for Recruitment

Because the position is a public employment position, all candidates must apply using the "Galaxie" portal through the French Ministry of Higher Education. All applications must be received within a month starting from the date of the position's publication, which is expected to April 5, 2012

In addition to the required materials mentioned on the "Galaxie" portal, all applications must include:

– cover letter addressed to Professor Horatia Muir Watt, Head of the admissions committee
– comprehensive curriculum vitae that includes the list of all past research
– a short-form resume
– Three research samples that demonstrate the candidate's aptitude for

multidisciplinary legal research (maximum of 5 articles and/or books).

Candidates must send these documents to the address below:

Sciences Po – DRH Pôle académique
27 rue Saint Guillaume
75007 Paris

All applications will be carefully examined by an admissions committee as per the requirements laid out by the law 2007-1199 of August 10, 2007 concerning the public employment of teachers. An initial selection round will take place mid June. Those candidates whose applications are retained will be invited to an interview before the members of the admissions committee and the academic community of Sciences Po first weeks of July; the candidate will freely choose the subject of his presentation among his most recent research. He will then be interviewed by the admissions committee on his project both in research and teaching at Sciences Po.

Following the interviews, Sciences Po will make a final offer to the selected candidate.

New Canadian Framework for Assumption of Jurisdiction

After 13 months the Supreme Court of Canada has finally released its decisions in four appeals on the issue of the taking and exercising of jurisdiction. The main decision is in *Club Resorts Ltd v Van Breda* (available here) which deals with two of the appeals. The other two decisions are *Breeden v Black* (here) and *Editions Ecosociete Inc v Banro Corp* (here).

The result is perhaps reasonably straightforward: in all four cases the court upholds the decisions of both the motions judges and the Court of Appeal for Ontario. All courts throughout held that Ontario had jurisdiction in these cases

and that Ontario was not a *forum non conveniens*.

The reasoning is more challenging, and it will take some time for academics, lawyers and lower courts to work out the full impact of these decisions. The court's reasoning differs in several respects from that of the courts below.

The court notes that a clear distinction needs to be drawn between the constitutional and private international law dimensions of the real and substantial connection test. This is an interesting observation, particularly in light of the fact that the court's own decision is not as clear on this distinction as it could be. I expect that going forward there will be different interpretations of what the court is truly saying on this issue.

The court is reasonably clear that the real and substantial connection test should not be used as a conflicts rule in itself. It is not a rule of direct application. Rather, it is a principle that informs more specific private international law rules governing the taking of jurisdiction. This is a change from the approach used by provincial appellate courts, especially the Court of Appeal for Ontario, which arguably had been using the real and substantial connection test as its rule, at least in part, for establishing jurisdiction in service *ex juris* cases.

The court states that it is establishing the framework for the analysis of jurisdiction. Going forward, a real and substantial connection must be found through a "presumptive connecting factor" which is a factor that triggers a presumption of such a connection. The presumption can be rebutted. If the plaintiff cannot establish such a presumption, the court cannot take jurisdiction. This last point is perhaps the largest change made to the law. On the law as it stood, the plaintiff could establish jurisdiction through a variety of non-presumptive factual connections that collectively amounted to a real and substantial connection to the forum. That approach is rejected by the Supreme Court of Canada.

The court does not purport to set out a complete list of presumptive connections. It confines itself to identifying some such connections that could apply in tort cases, namely that (a) the defendant is domiciled or resident in the forum, (b) the defendant carries on business in the forum, (c) the tort was committed in the forum, and (d) a contract connected with the dispute was made in the forum. It is quite open, on the language in the decisions, as to what other presumptive

connections lower courts will need to be finding in other cases. One possible solution is that lower courts will largely continue to follow the recent approach of the Court of Appeal for Ontario that the enumerated bases for service *ex juris*, subject to some exceptions, amount to such presumptive connections.

The decisions also address the test for the doctrine of *forum non conveniens*. Three points can be made about that analysis. First, the language suggests the burden is always on the defendant/moving party. Second, emphasis is placed on "clearly" in "clearly more appropriate", suggesting that it will be harder to displace the plaintiff's choice of forum. Third, the court cautions against giving too much weight to juridical advantage factors. Judges should avoid invidious comparisons across forums and refrain from "leaning too instinctively" in favour of the judge's own forum.

The decisions are not a radical break with the earlier cases but they do change the law on taking jurisdiction in several respects. In addition, the court makes several points along the way, as asides, that will impact other aspects of the conflict of laws. For example, the court confirms the propriety of taking jurisdiction based on the defendant's presence in the forum.