Latest Issue of RabelsZ: Vol. 78 No 4 (2014)

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

McGrath, Colm Peter, and Helmut Koziol: *Is Style of Reasoning a Fundamental Difference Between the Common Law and the Civil Law?*

Renner, Moritz: *Transnationale Wirtschaftsverfassung* (Transnational Economic Constitutionalism)

Since the 1920ies, the concept of the Economic Constitution ("Wirtschaftsverfassung") has been highly influential in German and European legal thinking. The Economic Constitution refers to the mandatory legal rules which shape the relationship of economy and politics within a democratic society. In Europe, these norms have come to be defined on a supranational level. Here, the Four Freedoms and the competition rules of the EU Treaty are the cornerstones of a European Economic Constitution. On the international level, there is no equivalent to such norms. World trade and investment law enshrine free trade, whereas there is an apparent lack of even basic rules of market regulation. The practice of cross-border economic exchange can be described as "private ordering in the shadow of law". Rules from different legal sources are recombined – or even replaced – by private mechanisms of dispute-resolution and standard-setting. The article analyzes this development with a view to the rise of international commercial arbitration and the growing importance of international accounting standards. Both examples show the limited reach of domestic and supranational Economic Constitutions, as they can be employed for "opting out" of mandatory regulation in cross-border contexts. At the same time, however, the institutions of private ordering described here increasingly develop their own standards of mandatory law, both by referring to existing national, supranational and international norms and by generating new rules of a genuinely transnational character. The article argues that these rules may form the nucleus of an emerging Transnational Economic Constitution ordering the relationship between

economy, politics and law on a global level.

Donini, Valentina M.: *Protection of Weaker Parties and Economic Challenges – An Overview of Arab Countries' Consumer Protection Laws*

Lieder, Jan: *Die Aufrechnung im Internationalen Privat- und Verfahrensrecht* (Set-off in International Private and Procedural Law)

This paper analyses the functions of set-off, illustrates the differences between individual national regimes, introduces and explains Art. 17 of the Rome I Regulation (Rome I) and discusses disputes regarding further topics relating to the private international and procedural law of set-off. The primary function of set-off is the simplification of payment transactions. It facilitates the settlement of mutual claims of two parties against one another in a fast and simple way and reduces transaction costs by rendering unnecessary the execution of two separate payment transactions and by disburdening lawsuits from multiple claims. Given these – and other – functional advantages, no developed legal system can afford to abstain from providing the legal institute of set-off. Nevertheless, there are profound differences between individual legal systems, e. g. in the classification of set-off as a matter of substantive or procedural law, in whether there is a pre-condition of an offsetting statement, and whether the set-off has a retroactive effect back to the moment in which the two claims faced each other for the first time (ex tunc) or whether it just takes effect ex nunc after the issuance of an offsetting statement. European and international academic model rules (DCFR, UNIDROIT) basically follow the German-coined continental approach, with the exception of instead giving a set-off an ex nunc effect to a large extent. The regulation of the conflicts of law by the newly established Art. 17 Rome I is of fundamental importance given the differences between the legal systems. It declares as applicable the law governing the claim against which the right to set-off is asserted and abolishes former disputes about the applicable law. It aims at protecting the set-off opponent, which is justified since he is confronted with the extinction of his claim and the party who has pleaded the set-off, judicially or extra-judicially, had the choice to file a suit instead. The author argues that all known kinds of unilateral set-offs should be governed by Art. 17 Rome I, and that – irrespective of the scope of Rome I – all kinds of claims, contractual and non-contractual, should be subjected to its Art. 17 (analogously). Since Art. 17 Rome I does not regulate the law applicable

to set-off by contract, the general rules of the law of conflicts apply, especially Arts. 3 and 4 Rome I. Furthermore, Art. 17 Rome I does not apply to genuinely procedural aspects of a set-off, so that the lex fori is to be applied. Heavily disputed is the question of the international jurisdiction of a court in respect to procedural set-offs against disputed, non-connected claims. Here, the author argues against international jurisdiction as a prerequisite since the set-off opponent is not deserving of any protection.

Corneloup, Sabine: *Rechtsermittlung im internationalen Privatrecht der EU: Überlegungen aus Frankreich* (The Application of Foreign Law in European Private International Law: Reflections from a French Perspective)

On 16 January 2014, a symposium of the German Council of Private International
Law took place in honour of the 80th birthday of Hans Jürgen Sonnenberger. This article is based on a presentation given at that symposium. Its purpose is to formulate, as far as the scope of application of the Private International Law of the EU is concerned, proposals for harmonizing the application of foreign law by the national courts of the Member States. First, it provides an overview of the position in France and comes to the conclusion that the French case law is not completely satisfactory. Secondly, regarding the mandatory or facultative nature of conflict-of-law rules, it proposes that a clear distinction should be made between the judge and the parties. Conflict-of-law rules should always be applied ex officio by the judge, whereas the parties should have the possibility in the course of the proceedings to choose the lex fori. The limits of party autonomy are defined according to two different models which both might be appropriate. Regarding the ascertainment of foreign law, the article advocates for better judicial cooperation especially within the European Judicial Network.