The Much Expected Ruling on Case C-536/13

The Grand Chamber says:

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 not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.

Click here to access the decision.

Many thanks to Prof. B. Hess for the alert.

Agnieszka Frackowiak-Adamska on Time for a European 'full faith and credit clause' (article)

Dr Agnieszka Frackowiak-Adamska, Chair of International and European Law at the Faculty of Law, Administration and Economics,University of Wroclaw, Poland, has just published an article analysing the possibility of introducing one European general mutual recognition clause for judgments in civil and commercial matters, to replace the today's plurality of recognition clauses provided by at least 10 different Regulations. In the author's words, the contribution discusses briefly the

acts providing for mutual recognition of judgments in civil and commercial matters. It aims to compare them, to assess if , when and how, they may be replaced by one denominator (part I). Furthermore it explains deficiencies of the current situation, including potential breaches of fundamental rights by some of the acts abolishing the *exequatur* (part II). Finally, a reform proposal is laid down, accompanied by an explanation of potential drawbacks and methods of addressing them.

The paper is published in 2015 Common Market Law Review 52, pp. 191-218.

Professor Ron Brand on "Understanding Judgments Recognition"

The twenty-first century has seen many developments in judgments recognition law in both the United States and the European Union, while at the same time experiencing significant obstacles to further improvement of the law. This article, just posted here to SSRN, describes two problems of perception that have prevented a complete understanding of the law of judgments recognition on a global basis, particularly from a U.S. perspective. The first is a proximity of place problem that has resulted in a failure to understand that, unlike the United States, many countries allow their own courts to hear cases based on a broad set of bases of jurisdiction, while recognizing judgments from other countries only if they are based on a much narrower set of bases of jurisdiction. This gap between direct and indirect bases of jurisdiction results in a level of discrimination against foreign judgments that does not exist in the United States and some other countries, and makes a harmonized global approach to judgments recognition difficult. The second is a proximity of time problem that has resulted in a failure to remember the full context of Justice Gray's historic analysis in Hilton v. Guyot, the seminal case in U.S. judgments recognition law. This article seeks to explain the consequences of both problems, and then comments on how a clearer

understanding of these two problems of proximity may aid in making further progress in judgments recognition law.

La Ley-Unión Europea, April 2015

The latest issue of the Spanish issue *La Ley-Unión Europea* (April 2015), was released last week. Besides the usual sections dealing with case law and current developments within the EU you'll find therein the following contributions – in Spanish, abstract in English:

S. Sánchez Lorenzo, "El nuevo sistema de reconocimiento y ejecución de resoluciones en el Reglamento (UE) 1215/2012 («Bruselas I bis»)". **Abstract:** The Regulation (EU) 1215/2000 introduces significant modifications related to recognition and enforcement of foreign judgments in Spain. The most important ones deal with automatic recognition of enforceability, whose application often requires specific adaptations in domestic civil procedural law.

J. González Vega, "La «teoría del big bang» o la creciente distancia entre Luxemburgo y Estrasburgo. Comentarios al Dictamen 2/13, del Tribunal de Justicia, de 18 de diciembre de 2014 sobre la adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos" **Abstract:** In its Opinion 2/13 the European Union's Court of Justice has declared the draft accession agreement of the European Union to the European Convention on Human Rights contrary to the provisions of the Treaties and to Protocol no. 8 of the Treaty of Lisbon. The decision of the Court consistently puts into question the essential points of agreement: Firstly, it points out the specificity of the Union —as a distinctive subject— and it unambiguously states the need to preserve the autonomy of its law and the exclusive jurisdiction of the Court, threatened by the project. In its analysis, mainly laconic and formalistic, sometimes alarmist, it questions the very notion of external control and its jurisdictional monopoly threatened by the «emerging» preliminary ruling to the ECHR, conceived by the Protocol No. 16. Moreover, it rejects the regulation of the status of co-respondent and prior involvement procedure and questions strongly the jurisdictional immunity of

CFSP acts. Furthermore, its decision, albeit expected, leaves open the question on the ways to address the negative of the Court, given the imperative proviso on the accession to the ECHR established in the art. 6.2 TEU. Also, inasmuch as it can generate conflicting dynamics with other actors involved in the process of protection of fundamental rights -not only the ECHR but apex national jurisdictions-, the Opinion could have a deep impact in European multilevel system of human rights protection.

J. García López, "La Asociación Transatlántica para el Comercio y la Inversión: VIII Ronda de negociaciones"**. Abstract:** The eighth round of negotiations on the Transatlantic Trade and Investment Partnership between the EU and the US was held in Brussels last February, concluding with advances in Regulatory Cooperation and discrepancies in Financial Services.

L.M. Jara Rolle, "Contratos tipo de servicios jurídicos concluidos por un abogado con una persona física que actúa con un propósito ajeno a su actividad professional". **Abstract**: Unfair terms in consumer contracts extend to standard form contracts for legal services, as contracts concluded by a lawyer with a natural person acting for purposes which are outside his trade, business or profession.

R. Lafuente Sánchez, "Competencia internacional y protección del inversor en acciones por responsabilidad contractual y delictual frente al banco emisor de títulos (a propósito del asunto *Kolassa*)". **Abstract:** This paper aims at analysing the scope of application of the Brussels I Regulation in private law relationships that stem from cross-border marketing of investment services in the European Union. In the light with the recent ECJ case law, the possible attribution of international jurisdiction to the courts of the investor's domicile is examined; either under the applicable forum over consumer contracts, the forum of special jurisdiction in matters relating to a contract, or in matters relating to tort, delict or quasi-delict.

M. Otero Crespo, "Las obligaciones precontractuales de información, explicación adecuada y de comprobación de solvencia en el ámbito de los contratos de préstamo al consumo. Comentario a la STJUE, Sala Cuarta, de 18 de diciembre de 2014, asunto C- 449/13, CA Consumer Finance sa v I. Bakkaus/ Sres. Bonato). **Abstract:** On 18 December 2014, the Court of Justice of the EU delivered its judgment in the case of CA Consumer Finance v I. Bakkaus and Bonato,

concerning the pre- contractual obligations of credit providers. according to this decision, creditors must prove that they have fulfilled their pre-contractual obligations to provide information and explanations – so that the borrower can make an informed choice when subscribing a loan- and to check the creditworthiness of borrowers. Further, the Court highlights that the credit provider cannot shift the burden of proof to the consumer through a standard term.

Council's Position on the (to be) Insolvency Regulation Recast

The Position (EU) No 7/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast), Adopted by the Council on 12 March 2015 , as well as the Statement of the Council's reasons: Position (EU) No 7/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast), were made officially public in yesterdays OJ, C 141.

Johannes Schmidt on Legal Certainty in European Civil Procedure Law

Johannes Schmidt's doctoral thesis on "Legal Certainty in European Civil Procedure Law. An Analysis of ECJ Judgments Regarding the Brussels Convention and the Brussels I Regulation." (*Rechtssicherheit im europäischen Zivilverfahrensrecht – Eine Analyse der Entscheidungen des EuGH zum EuGVÜ*

und der EuGVVO; Mohr Siebeck, Tübingen, 2015) has just been published in German. The doctoral dissertation was written under the supervision of Professor Rolf Stürner and was accepted by the University of Freiburg.

When interpreting the Brussels Convention and the Brussels I Regulation, the European Court of Justice (CJEU) has regularly employed the concept of legal certainty in various contexts. Johannes Schmidt questions if and to what extent the case law of the CJEU actually contributes to legal certainty. For this purpose, he scrutinizes at first, if the methodical criteria of "adherence to the wording" and "continuity of the case law" make the decisions of the CJEU foreseeable. Secondly, the results reached by the CJEU are analysed with respect to the principle of legal certainty. This part takes the perspective of the lawyers and courts who have to apply the European civil procedure rules in their interpretation by the CJEU. It investigates the foreseeability of jurisdiction and lis pendens and it raises the question, which price is to be payed for legal certainty.

The study comes to a critical conclusion. The last part suggests changes, mainly with regard to the style of reasoning.

Thanks to Johannes Schmidt for providing the text.

Le Précédent en Droit International (Conference)

The annual conference of the French Society for International Law (Société française pour le droit international), organised in 2015 by the Faculty of Law of Strasbourg University, will take place next 28, 29 and 30 May 2015.

The general subject is "The precedent in International Law"(Le précédent en droit international). The presentations will be in French but questions addressed in English during the debates are possible.

A call for paper is launched for the workshops on the following topics:

Workshop 1 : Precedent in International Law before International and Regional Courts/Tribunals

Workshop 2 : Precedent in International Law before Arbitral Tribunals

Workshop 3 : Precedent in International Law before National Tribunals

Proposals must be sent by 15 March 2015 to sfdi2015@gmail.com, indicating "Proposal for Workshop 1/2/3 and (applicant's name)" as the subject matter of the email. A CV and a list of publications shall be attached. Proposals written and to be presented in English are welcome, but the author should be able to read and understand French.

For further information (program, registration, etc), please go to www.sfdi2015.unistra.fr

---

Fourth Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The fourth issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features two articles and five comments.

Francesco Salerno, Professor at the University of Ferrara, examines fundamental rights in a private international law – and namely a public policy – perspective in "**I diritti fondamentali della persona straniera nel diritto internazionale privato: una proposta metodologica"** (Fundamental Rights of the Foreigner in

Private International Law: A Methodological Proposition; in Italian).

Namely focusing on the role of public policy, this paper examines how personality rights of foreign individuals are ensured under the Italian private international law system. While personality rights are meant to reflect the identity of an individual at a universal level, private international law is aimed at ensuring the continuity of an individual's rights and status across borders. Art. 24 of the Italian Statute on Private International Law (Law No 218/1995) underlies this concern in that it provides, as regards personality rights, for the application of the law of nationality of the individual in question. However, as a result of the fact that personality rights are closely intertwined with human rights, it becomes inevitable to explore the link between the somehow neutral technique traditionally employed by conflict-of-law provisions and the fundamental values shared within the international community, in particular those values safeguarded by international obligations regarding the protection of human rights. As this paper portrays, the tension between personality rights under an individual's national law and fundamental rights is crucial to Art. 24 of the Italian Statute, as shown, in particular, by the process with which rights are characterized as falling within the scope of the provision: where a given right is perceived as fundamental by the *lex fori*, that right should enjoy protection in the forum regardless of its status according to the law of nationality of the concerned individual (proceedings on sex reassignment provide some significant examples in this respect). This approach embodies a "positive" expression of the notion of public policy: cross-border uniformity is foregone, here, as a means to ensure the primacy of the fundamental policies of the forum. However, as the paper illustrates, the role of public policy in ensuring fundamental rights goes even further: in fact, public policy may also serve as a guide whenever the need arises to adapt the applicable foreign law, should such law fail to provide solutions that are equivalent to those enshrined in the *lex fori*.

Fabrizio Vismara, Associate Professor at the University of Insubria, discusses agreements as to successions and family pacts in **"Patti successori nel regolamento (UE) n. 650/2012 e patti di famiglia: un'interferenza possibile?"** (Agreements as to Succession in Regulation (EU) No 650/2012 and Family Pacts: A Possible Interference?; in Italian).

Law No 55 of 14 February 2006 enacted the regime on family pacts and amended Art 458 of the Italian Civil Code repealing the prohibition against agreements as

to succession. This article analyzes the relationship between family agreements and agreements as to succession with reference to the regime enacted by Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. After examining the different solutions with respect to the characterization of family agreements (donation, division, contract), this article highlights how family agreements may be referred to the application of Regulation (EU) No 650/2012 as a form of waiver agreement as to succession. In this respect, family agreements may be governed by Regulation (EU) No 650/2012 and, in particular, by the rules on the determination of the applicable law provided therein.

In addition to the foregoing, the following comments are also featured:

Michele Nino, Researcher at the University of Salerno, examines State interests in labor disputes in "**State Immunity from Civil Jurisdiction in Labor Disputes: Evolution in International and National Law and Practice"** (in English).

This article examines the evolution of the international rule on State immunity from civil jurisdiction in labor disputes. After having shed light on the notion and content of the international rule at issue, this article examines the relevant international legal instruments (such as the 1972 European Convention on State Immunity and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property), the national practice of civil law and common law States, as well as the case law of the European Court of Human Rights and of the European Court of Justice. In light of this analysis, this papers illustrates that, although an important trend aimed at promoting in labor disputes stable criteria of jurisdiction of the State of the forum (such as the nationality or the residence of the worker and the place of the execution of the employment relationship), the criterion based on the distinction between *acta jure imperii* and *acta jure gestionis* continues to be applied rather permanently in such disputes. As a result, in the conclusions, solutions are put forth so that the application of such criterion be subject to revision, at national and international levels, and that, as a consequence, an effective protection of workers be guaranteed in labor disputes against the need to safeguard State interests.

Giulia Vallar, Fellow at the University of Milan, addresses the topic of intra-EU investment arbitration in "**L'arbitrabilità delle controversie tra un investitore di uno Stato membro ed un altro Stato membro. Alcune considerazioni a margine del caso *Eureko/Achmea v. The Slovak Republic*"** (Arbitrability of Disputes between an Investor from a Member State and another Member State. Some Remarks on *Eureko/Achmea v. The Slovak Republic*; in Italian).

The present paper deals with one of the issues that has recently been considered within the *Eureko/Achmea v. The Slovak Republic* case, namely the arbitrability of the so called intra-EU BITs disputes. In essence, it focuses on whether the investor of an EU member state can rely on the compromissory clause contained in a BIT that its country of origin had signed with another country that, in turn, at a later time, became an EU member State. To such a question arbitral tribunals have answered in the positive, while the EU in the negative, without however adopting a normative act in this sense. Throughout the paper, an analysis is conducted of those aspects of international law and of EU law that come into play in relation to the matter at hand. It is submitted that, in the absence of a definite/hard law solution, the way out should consist, for the time being, in applying soft law principles and, in particular, that of comity; nevertheless, the EUCJ and the arbitral tribunals do not appear to be very much keen to act in this sense. EU member states, on their part, are more and more frequently opting for the termination of the relevant BITs, allegedly on the basis of a law and economics analysis. This attitude, however, might produce negative effects on the economy of these states, since investors, seeking the protection of a BIT, could be encouraged to move their seats in third countries.

Giovanna Adinolfi, Associate Professor at the University of Milan, tackles the issue of financial instruments and State immunity from adjudication in **"Sovereign Wealth Funds and State Immunity: Overcoming the Contradiction"** (in English).

The increasing number of sovereign wealth funds (SWFs) and the growth in the value of their assets are among the main current trends in the global financial markets. The governments of recipient States have voiced their concerns, contending that SWFs are financial vehicles used by States to pursue general public aims but acting like private economic agents. The question this contribution tackles is whether SWFs, as "sovereign" investment vehicles, come within the scope of international and national rules on sovereign immunity. This

topic will be analyzed from three perspectives. As a starting point, the definition of "foreign State" given by immunity legal regimes will be investigated in order to define in which circumstances SWFs meet it. Next, the issue of SWSs' immunity from adjudication will be ascertained. In this regard, the main point is whether SWFs investments are to be understood as actions engaged in within the exercise of sovereign authority, or as mere commercial activities, over which immunity from judgment on the merits is removed. As it may not be excluded that courts render judgments against SWFs, the rules on immunity from pre-judgement and post-judgement measures of constraint are to be considered, so as to identify the property against which jurisdictional rulings may be enforced for the full satisfaction of the legitimate expectations of judgment creditors. The enquiry mainly focuses on the rules established under the UN and the Council of Europe conventions; the content and practice under national regimes is also considered, mainly the US Foreign Sovereign Immunities Act and the UK State Immunity Act. The main result is that there is no univocal answer to the question whether rules on sovereign immunity are helpful in overcoming the contradiction between the different but complementary public and private natures of SWFs. The form through which funds have been established and the content of the specific legal regime on the basis of which courts have to judge in their regard are the fundamental variables, and their combination in each case may lead to different results in terms of immunity from both the adjudicative process and enforcement measures.

Laura Carpaneto, Researcher at the University of Genoa, examines the interface of the Brussels II-*bis* Regulation and the European Convention of Human Rights in **"In-Depth Consideration of Family Life v. Immediate Return of the Child in Abduction Proceedings within the EU"** (in English).

The paper focuses on the EU regime on child abduction provided by Regulation No 2201/2003 and, in particular, on its Art. 11(8) expressly providing for the replacement of a Hague non return order by a subsequent judgment (the so called "trumping order") imposing the return of the child made by the courts of the State where the child was habitually resident prior to the wrongful removal or retention. Starting from the analysis of some recent decisions of the European Court of Human Rights, stating that some return orders held by domestic courts in applying the 1980 Hague Convention (*Neulinger and Shuruk v. Switzerland and X v. Latvia*) as well as the Brussels II-*bis* Regulation (*Sneersone and*

Kampanella v. Italy) were not in compliance with Art. 8 of ECHR, the paper is aimed at demonstrating the that a too strict "Art. 8 ECHR's test" is capable of undermining the functioning of the Brussels II-*bis* trumping order and that a specific human rights' test for intra-EU child abduction should be carried out. In this light, the paper firstly highlights the added value of the Brussels II-*bis* regime on child abduction compared to the 1980 Hague Convention; it goes on to critically analyze the recent decisions of the European Court of Human Rights on the return orders in child abduction cases, and it finally proposes a possible human rights test capable of protecting the "effet utile" of the EU regime on child abduction.

Matteo Gargantini, Senior Research Fellow at the Max Planck Institute Luxembourg, examines and shares some considerations on the AG's Opinion in *Kolassa* in "**Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General's Opinion in *Kolassa v. Barclays*"** (in English).

This article addresses the Advocate General's Opinion in *Kolassa v. Barclays* (released on September 3, 2014, in the case C-375/13) from the perspective of financial markets law. The case raises some issues on the establishment of jurisdiction in disputes concerning securities offerings. The article suggests that a restrictive interpretation should be given of the Opinion (as well as of the CJEU decision on the case, which substantially follows the Opinion). On the one hand, the interpretation affirmed by the Advocate general may in fact, if read extensively, rule out the possibility that investors enjoy the protective regime of Brussels I Regulation *vis-à-vis* the issuer if they purchase securities on the secondary market, as it denies the possibility of establishing jurisdiction on the basis of Articles 15 and 16 of the Brussels I Regulation where a consumer has purchased a security not from the issuer but from a third party that has in turn obtained it from the issuer. On the other hand, the Opinion may expose offering companies to the risk of being sued by professional investors in multiple jurisdictions on the basis of tortious liability, even in cases where a prospectus was not published and, therefore, such companies did not intend to conduct any activity in other countries, on the basis that no contractual relationship can be identified in *Kolassa* between the issuer of the certificate and the final investor. Tortious liability, which is admitted by the Opinion, may therefore sometimes be an imperfect substitute for contractual liability. Hence, the article proposes that

the Advocate General's (and the CJEU's) reasoning should be narrowly interpreted so as to confine its purview to the issues raised by the holding of certificates through trusts and other similar devices. On the contrary, further reflections are needed before a conclusive position is taken on the effects of circulation of securities under the Brussels I Regulation.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

German Federal Labour Court on Foreign Mandatory Rules and the Principle of Cooperation among EU Member States

by Dr. Lisa Günther

Dr. Lisa Günther, a lawyer at TaylorWessing, has kindly provided us with the following note on the recent reference for a preliminary ruling made by the German Federal Labour Court (see Giesela Rühl's earlier post on the Court's press release here). Günther is the author of a doctoral dissertation on the applicability of foreign mandatory rules under Rome I and II that was accepted by the University of Trier (Die Anwendbarkeit ausländischer Eingriffsnormen im Lichte der Rom I- und Rom II-Verordnungen, Verlag Alma Mater, Saarbrücken 2011; more details are available here).

On February 25, 2015, the German Federal Labour Court referred three questions relating to the interpretation of Art. 9 and Art. 28 Rome I Regulation to the CJEU. In the context of a wage claim made by a Greek national who is employed by the Greek State at a Greek primary school in Germany, the German Federal Labour Court faced the problem whether to apply the Greek Saving Laws

No 3833/2010 and 3845/2010 Laws as overriding mandatory provisions although the employment contract is governed by German law.

The Greek Saving Laws are the result of the implementation of agreements between Greece and the institutions formerly known as the "Troika" (EU, ECB, IMF) regarding the granting of credits in the context of Greece's financial difficulties. The Saving Laws are supposed to ensure that Greece meets the obligations contained in Art. 119 ff. TFEU, particularly in Art. 126 TFEU. These obligations have been specified by Council Decision 2010/320/EU of 10 May 2010. The Greek Saving Laws result in payment cuts in the public sector. The Greek claimant demands payment of the difference between his original salary and the sum that has been reduced in accordance with the Greek Saving Laws.

As the employment contract was concluded in 1996, amended in writing in 2008 and lasted at least until December 2012, the German Federal Labour Court first raises the question as to whether the application of the Greek Saving Laws is subject to Art. 9 of the Rome I Regulation as far as the the temporal scope of the Regulation is concerned. If Art. 9 Rome I Regulation is applicable in this sense, the German Federal Labour Court raises the further question as to whether Art. 9 (3) Rome I Regulation implicitly prohibits the application of the Greek Saving Laws because Art. 9 (3) Rome I Regulation only covers overriding mandatory provisions of the place of performance and – according to the German Federal Labour Court – Germany is the relevant place of performance in this case.

Thus, the temporal scope of application of the Rome I Regulation must be the starting point of legal analysis. According to Art. 28 of the Rome I Regulation, the Regulation applies to contracts concluded as from 17 December 2009 (cf. the corrigendum published in OJ 2009, No. L 309, p. 87). As the employment contract was – initially – concluded in 1996, the answer in the negative seems quite clear. The previous instance, the Regional Labour Court of Nürnberg, thus decided that the Rome I Regulation is in fact not applicable. The German Federal Labour Court, however, argues that an autonomous interpretation of the term "concluded" is necessary because the Member States have different understandings of when an employment contract is actually "concluded". Particularly, the German Federal Labour Court points out that such an autonomous interpretation must take into account the fact that employment contracts are continuous obligations. Also, the Court emphasizes that it may be necessary not only to include the very first conclusion of an employment contract

into the scope of Art. 28 Rome I Regulation, but to interpret the term "concluded" in a way that amendments or changes (i.e. alteration of the gross salary or legislative measures such as the measures of the Greek legislature in question) to an existing employment contract also lead to the application of the Rome I Regulation.

Nevertheless, the wording of Art. 28 Rome I Regulation is rather inflexible in referring to contracts *concluded* as from 17 December 2009 but not to contracts merely *continuing* after 17 December 2009. Also, the legislative procedure shows that the drafters decided consciously against a retroactive effect of the Rome I Regulation (cf. *von Hein*, in: Thomas Rauscher [ed.], EuZPR/EuIPR, Munich 2011, Art. 8 Rome I para.16). While Art. 24 (3) of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, provided for a limted retroactive effect, this transitional provision was deleted and did not become a part of the final Rome I Regulation. The interpretation that it is sufficient for the applicability of the Rome I Regulation to simply continue a contract after 17 December 2009, however, would result in precisely such a retroactive effect. Against this background, a conscious choice of the contracting parties to substantially modify and/or actually renew their contract should be the minimum requirement for the intertemporal application of the Rome I Regulation.

Should the CJEU affirm the intertemporal application of the Rome I Regulation, the second question referred to the CJEU will become decisive. The characterization of the Greek Saving Laws as overriding mandatory provisions as such does not seem to pose any difficulties. Both the requirements of German case law as well as the definition now contained in Art. 9 (1) Rome I Regulation ("*provisions the respect for which is regarded as crucial by a country for safeguarding its public interest, such as its political, social or economic organisation, to such an extent that they are applicable to any situation within their scope, irrespective of the law otherwise applicable to the contract*") – which provides guidance regardless of whether the Rome I Regulation is applicable or not – are met if taking into consideration genesis, wording as well as the policy of the Greek Saving Laws.

If Art. 9 Rome I Regulation is not applicable *ratione temporae*, the German Federal Labour Court considers taking the Greek Saving Laws into account as a matter of fact within the scope of the German lex causae. This approach complies

with how German courts used to consider third country overriding mandatory provisions before the Rome I Regulation entered into force. As Art. 7(1) of the Rome Convention on the law applicable to contractual obligations from 19 June 1980 was never adopted in Germany, the German courts had to rely on blanket clauses in the lex causae allowing such consideration within the framework of substantive law rather than applying them pursuant to conflict of laws rules. The German Federal Labour Court, however, raises the question as to whether Art. 9 Rome I Regulation now excludes taking Greek Saving Laws into account. This question is a result of the unfortunate restrictions of Art. 9 Rome I Regulation. Whereas Art. 9(2) Rome I Regulation concerns the application of overriding mandatory provisions of the law of the forum – in this case German law –, Art. 9(3) Rome I Regulation limits the application of overriding mandatory provisions to the provisions of the place of performance, stating that "*[e]ffect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding provisions render the performance of the contract unlawful. […].*" While the Rome I Regulation does not provide a definition of the "place of performance", therefore not answering the question whether the relevant place of performance is the place of performance of the characteristic performance of the contract only or whether each performance has to be considered separately, the German Federal Labour Court seems to have determined that Germany must be regarded as the place of performance for the payments of the Greek state within the meaning of Art. 9(3) Rome I Regulation. Therefore, the question as to whether Art. 9(3) Rome I Regulation actually prohibits the application of overriding mandatory provisions which are neither overriding mandatory provisions of the lex fori nor of the place of performance becomes crucial.

Both the wording as well as the genesis of Art. 9(3) Rome I Regulation suggest that the direct application of overriding mandatory provisions which are not part of the law of the place of performance on a conflict of laws level is – unfortunately – not possible. The Member States could not agree on a provision comparable to Art. 7(1) of the Convention on the law applicable to contractual obligations from 19 June 1980 which provided for the application of third country overriding mandatory provisions with which the situation has a close connection (cf. Art. 8(3) of the proposal COM(2005) 650 final) but deliberately restricted the scope of Art. 9 (3) to overriding mandatory provisions of the place of performance.Still, Art. 9

(3) Rome I Regulation should not prohibit indirectly considering the content of third country overriding mandatory provisions as a matter of fact within the scope of blanket clauses of the substantive lex causae:

First, the indirect consideration of third country overriding mandatory provisions as a matter of fact should not be equated with a direct application on a conflict of laws level. Therefore, the conflict of law provisions of the Rome I Regulation cannot prohibit the consideration of third country overriding mandatory provisions on the substantive law level. Thus, even if the CJEU approves of the application of the Rome I Regulation *ratione temporae*, the German Federal Labour Court will not be prevented from considering the Greek Saving Laws within blanket clauses of the German lex causae – which is exactly how German courts considered third country overriding mandatory provisions before the Rome I Regulation entered into force.

Secondly, the German Federal Labour Court raises the question whether it is actually obliged to apply the Greek Saving Laws pursuant to the principle of sincere cooperation between Member States. This principle provides for the Member States to assist each other in full mutual respect in carrying out tasks flowing from the Treaties, Art. 4 (3) TEU. It is questionable whether Art. 4 (3) TEU as part of the primary law actually obligates the Member States to apply any overriding mandatory provision of other Member States simply due to the fact that another Member State’s s legislature enacted them without any further statutory basis providing for such an application. However, as the Greek Saving Laws in question have their origins in obligations arising from the TFEU as well as a council decision, the situation might be regarded differently in the given case, especially because the situation affects the entire European Union. In this case, both Art. 4 (3) TEU as well as reasons of legal policy might actually oblige the German Federal Labour Court to apply the Greek Saving Laws to the claim for payment in question. Now it is up to the CJEU to decide.

Private International Law and Migration Law

Some earlier publications of Veerle Van Den Eeckhout on Private International Law and Migration Law are currently being made publicly available on SSRN. One of the core publications is the article "De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21e eeuw" (written in Dutch. English title: "The Socialization of Private International Law. Developments at the beginning of the 21th Century"). This article provides an exploratory analysis of the interaction between Private International Law and Migration Law.