German Federal Labor Court refers Questions relating to Art. 9 and 28 Rome I to the CJEU

On February 25, the German Federal Labor Court referred three questions relating to the interpretation of Art. 9 and 28 Rome I Regulation to the CJEU. They relate to the temporal scope of application of the Rome I Regulation on the hand and, and the (highly) disputed issue whether and to what extent Member States courts are required to apply foreign overriding mandatory provisions in general and overriding mandatory provisions of other Member States in particular. The following is an unofficial translation based on the court's press release:

1. Does the Rome I Regulation in accordance with Art. 28 exclusively apply to (employment) contracts if the contract was concluded (for the first time) after 16 December 2009 – or does it also apply if the parties agreed after 16 December 2009 to continue a previously concluded contract (without any changes)?
2. Does Art. 9(3) Rome I Regulation (merely) exclude the direct application of overriding mandatory provisions of third states where the obligations arising out of the contract have not to be or have not been performed – or does it also exclude their indirect consideration in the law of the state whose laws govern the contract?
3. Does the principle of cooperation embedded in Art. 4(3) TEU affect the decisions of national courts to apply overriding mandatory provisions of other Member States (directly or indirectly)?

Background:

The claimant is a Greek national and employed by the Greek State at the Greek primary school in Nuremberg (Germany). From October 2010 through December 2012 the Greek State reduced his salary in accordance with the Greek Saving Laws No 3833/2010 und 3845/2010. The claimant asks for payment of the sums withheld. With its preliminary questions the German Federal Labor Courts wants to know whether and to what extent it is bound to apply the Greek Saving Laws.

The court's press release is available here (in German).

Conference: "The Economic Dimension of Cross-Border Families: Planning the Future" (Milan, 13 March 2015)

The University of Milan will host on **13 March 2015** a conference on **"The Economic Dimension of Cross-Border Families: Planning the Future"**. The sessions will be held in English and Italian. Here's the programme (available as a .pdf file):

14h00 Welcoming addresses

- *Gianluca Vago* (Rector, University of Milan)
- *Laura Ammannati* (Director of the Department of International, Legal, Historical and Political Studies)
- *Ilaria Viarengo* (Coordinator of the PhD course on International and European Law, University of Milan)

Chair: *Stefania Bariatti* (University of Milan)

14h15 Revision of Brussels IIa: Current State of Play

- Joanna Serdynska (Civil Justice Policy, DG Justice, European Commission)

14h45 Property Rights of International Couples and Registered Partnerships: The Role of Parties' Autonomy

- *Cristina González Beilfuss* (Universitat de Barcelona)
- *Ilaria Viarengo* (University of Milan)

15h30 The Coordination of the EU Legislation on Divorce, Maintenance

and Property

- *Maria Caterina Baruffi* (University of Verona)
- *Francesca Villata* (University of Milan)

16h00 Discussion

16h30 The Interaction Among Succession and Property

- Anatol Dutta (MPI Hamburg – Universität Regensburg)

16h50 Planning the Future: Practical Issues

- *Gloria Servetti* (Judge, Chair IX Sezione Tribunale Milano)
- *Franco Salerno* Cardillo (Notary, Palermo)

17h30 Discussion

18h00 Closing Remarks: *Stefania Bariatti*

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Attendance is free of charge but registration is required. Further information and the registration form are available on the conference's webpage.

(Many thanks to Prof. Ilaria Viarengo for the tip-off)

Conflict of Laws Lectureship at Cambridge

The Faculty of Law, Cambridge University, is advertising a three year lectureship in Conflict of Laws sponsored by Clifford Chance. The closing date is 13th March 2015. More detail is available here.

If anyone would like to discuss the details of this post, please contact Richard Fentiman (rgf1000@cam.ac.uk), Pippa Rogerson (pjr1000@cam.ac.uk) or Louise Merrett (lm324@cam.ac.uk) all of whom research and lecture in conflict of laws in Cambridge.

H/T: Gilles Cuniberti

Testing the Stress of the EU: EU Law After the Financial Crisis

The University of Bayreuth (Germany) and the *Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales* (Spain), with support from the DAAD, will host a joint conference under the heading "Testing the stress of the EU: EU law after the financial crisis" next 8 May 2015 (venue: Escuela Diplomática, Paseo Juan XXIII, 5. 28040 Madrid). Click here to see the program.

Registration:

Admission to the conference (including coffee breaks) is free of charge.

In order to attend, please register **by 15 April 2015** via e-mail to: **Zivilrecht1@uni-bayreuth.de.**

Please provide your full name and the number of your ID card/passport (required in order to access to the conference venue).

Conference Report: CISG Basel Conference, 29 and 30 January 2015, University of Basel

The CISG entered into force around 35 years ago – reason enough to celebrate and discuss the state of this instrument. Under the auspices of the University of Basel, in cooperation with UNCITRAL and the Swiss Association for International Law, a large number of experts convened on 29 and 30 January 2015 in order to present current trends and problems.

Panel 1 dealt with the economic analysis of the CISG (Prof. Dr. B. Piltz, Dr. L. Spagnolo, G. Moser and Prof. P. Winship). The core question was whether and to what extent the CISG does in fact what it promises which is to reduce transaction costs. A lot of skepticism and reservations, in particular from the US-American speaker, about economic analysis were articulated but the overall impression was that it is more efficient to have the CISG than not to have it even though it is hardly possible to substantiate, let alone quantify, this impression. However, compared to alternatives, for example the selection of a national law by choice-of-law clauses including the numerous limitations to party autonomy, it appears plausible to believe that instruments like the CISG have beneficial effects. Any less favorable result would of course have been somewhat impolite on a birthday party for the CISG.

Panel 2 discussed extending the CISG beyond sales contracts in respect to distribution contracts, contracts on natural gas, on deduction and set-off and on the statute of limitations (Prof. Dr. P. Perales Viscasillas, Dr. F. Mohs, Prof. Dr. C. Fountoulakis, Dr. P. Hachem). It became clear that long-term contracts and service contracts are of growing importance and that the unification of contract law should continue working on these types of contracts. And indeed, UNIDROIT is currently working on principles for long-term contracts that may supplement the UPICC (http://www.unidroit.org/work-in-progress-studies/current-studies/long-term-contracts). On the basis of the current state of the CISG, each of the presentations demonstrated that the distinction between external and internal lacunae is far from trivial which sometimes may contribute to doubts about the economic

efficiency of unified law.

Panel 3, originally planned as the second part of the conference but postponed due to late arrivals (snow storms in New York), analysed the recent trend towards a decline of reservations to the CISG under Articles 92, 93, 95, 96 (Prof. Dr. U. Schroeter, Prof. Dr. J. Ramberg, Prof. Dr. S. Han). Reservations were described not so much as a flaw but rather as a tool for enabling uniformity, at least to the degree politically possible. It was assumed that the reservation in Article 94 for regional harmonization may play a growing role in the future, in particular in Asia.

Panel 4 again turned to the question of extending the CISG, now in respect to validity issues (Prof. Dr. S. Eiselen, Prof. L. Gama, Prof. J. Gotanda, Prof. E. Sondahl Levin), and discussed the complex relation of the CISG to the control of standard terms on fairness, to contractual limitations of liability, to the repayment of attorney's fees as damage and other issues. Contractual limitations for example could be viewed as covered by the CISG in respect to their incorporation, formal validity and interpretation whereas their validity as such, for example in light of protective or otherwise mandatory law, would have to be seen outside the scope, but it was suggested that the general standards of the CISG such as party autonomy, reasonableness or good faith should control and, if necessary, limit the impact of the applicable national law – an approach that slightly mirrors the control by the European Court of Justice of the exercise of public policy clauses by Member State courts in European instruments of private international law.

Panel 5, under the heading of "CISG, State Action and Regionalisation" discussed whether and to what extent the CISG, in particular in comparison to the CESL, would be suitable for sales contracts with consumers (Prof. Dr. Y. Atamer), how to fill gaps in Article 78 CISG relating to default interest for late payments (Prof. Dr. J. Ramberg), how to apply the CISG to government purchases, in particular in relation to mandatory requirements of public procurement law (Dr. C. Pereira) and the relation of the CISG to OHADA (Dr. J. A. Penda Matipe). It became clear that the CISG, by adequate interpretation and standard terms control, could address many of the core issues of consumer protection.

Panel 6 continued the discussion on the regionalization of the CISG by focusing on the harmonization in the EU and its impact on the CISG, for example by the Late Payment Directive (Prof. Dr. C. Witz), on the political difficulties in the past

and the currently limited, but may be not that much limited prospects of the CESL (M. Zaleski) – "replacement by modified proposal that will come to life this year", the harmonization in Asia, in particular with regard to the potential Principles (Prof. Dr. H. Sono) and Latin America (Prof. A. Garro).

Panel 7 dealt with the issue of the fairness of the CISG as contract law, partly with a focus on (compliance requirements for) supply and distribution chains. Prof. Dr. H. W. Micklitz posed the general question what kind of standards of fairness should apply to b2b sales relations, Prof. Dr. P. Butler addressed the relation between the "CISG and human rights – an Oxymoron?", Prof. Dr. P. Nalin discussed ethical standards in connection with international sales contracts, and Prof. Dr. A. Veneziano presented UNIDROIT's project on agricultural production contracts and explained the particularities – e.g. risk and value chain management but also imbalances of bargaining powers – and legal tools used by the parties up to now in this intriguing type of complex and relational contracts (http://www.unidroit.org/work-in-progress-studies/current-studies/contract-farming).

Last not least there was a round table discussion on the general issue of the future of unification of contract law (Prof. Dr. Ingeborg Schwenzer, Prof. Dr. Dr. h.c. M. Jametti Greiner, Dr. B. Czerwenka, Dr. L. Castellani, J. A. Estrella Faria) that revolved, amongst other themes, around the growing importance of relational contracts of all kinds (e.g. service contracts, long-term contracts etc.) – an excellent round-up for a truly excellent conference!

Spanish Yearbook of International Law , vol. 18

The last issue of the *Spanish Yearbook of International Law* (*SYbIL*), has just been released. The whole content can be accessed either here or here.

Note: This time the volume is mostly devoted to Public International Law problems; nonetheless some PIL papers are also included, in English.

International Seminar on Private International Law (Program)

The program of the new edition of the International Seminar on Private International Law organized by Prof. Fernández Rozas and Prof. de Miguel Asensio, to be held in Madrid on 21-22 May 2015, is final and downloadable in its entirety here.

Venue:

Salón de Grados de la Facultad de Derecho de la Universidad Complutense, Avda. Complutense, Ciudad Universitaria, Madrid.

Main speakers:

The distinction between admissibility and jurisdiction in international arbitration- **Friedrich Rosenfeld**, Hamburg.

La dimensión procesal internacional en la Ley de navegación marítima – **Juan José Álvarez Rubio**, País Vasco University.

La aplicación de la regulación de la Ley de Navegación Marítima sobre los contratos de utilización del buque y de los contratos auxiliares de la navegación en los supuestos internacionales – **Rafael Arenas García**, University Autónoma – Barcelona.

The influence of the ECtHR case law on European Private International Law – **Burkhard Hess,** Max Planck Institute Luxemburg

Claves de la coherencia del DIP europeo: la jurisprudencia del TJUE– **Marta Requejo Isidro**, Max Planck Institute Luxemburg

La Orden europea de retención de cuentas (Reglamento 655/2014) – **P. Jiménez Blanco**, Oviedo University.

La reconnaissance des jugements après la refonte du règlement Bruxelles I –

Louis d'Avout, París 2- Panthéon-Assas University.

Nuevas reglas internacionales sobre las cláusulas de elección de foro en contratos internacionales: el convenio de La Haya y el reglamento Bruselas Ibis – **Marta Pertegás Sender**, Hague Conference of Private International Law

Multiplicity of objective connecting factors and their relationship to each other: Comments on Art. 4 Rome I Regulation- **Franco Ferrari**, New York University

Cross-border protection measures in the European Union – **Anatol Dutta**, Regensburg University

Further information: patricia-orejudo@ucm.es

Registration: by email to seminariodiprucm@gmail.com

Transnational Law and Social Justice (Call for Papers, London School of Economics)

By Ugljesa Grusic, assistant professor at the University of Nottingham.

The Transnational Law & Social Justice project seeks to study how transnational law shapes, facilitates and challenges economic, political and cultural exclusion in a fragmented legal and political landscape. Our aim is to bring together lawyers and non-lawyers, early career scholars and PhD researchers whose work examines pervasive inequalities in the transnational context. Our first event, hosted by the **London School of Economics on June 26/27 2015,** will feature roundtable discussions and thematic panels exploring the methodological

challenges raised by the study of transnational law and its distributional effects. The event will focus more specifically on the normative dimensions of family, marketplace and workplace regulations. In choosing these three themes our aim is to examine the effects of transnational law on individuals' everyday life while also analyzing themes that are often neglected in the global or transnational governance debates because labelled as 'private'.

Speakers include Graínne de Búrca (NYU School of Law), Priya S. Gupta (Southwestern Law School), Ralf Michaels (Duke Law School), Aukje van Hoek (Amsterdam Law School) and Peer Zumbansen (KCL). You can find more information on the event including the call for papers here.

Publication of the Rules and Commentaries of the Draft Text of the OHADAC Principles on International Commercial Contracts

Prof. Sixto Sánchez Lorenzo (University of Granada) has kindly provide the following information.

The rules and commentaries of the draft text of the OHADAC Principles on International Commercial Contracts have been published in Spanish and can be downloaded from the OHADAC website.

The draft text of the OHADAC Principles on International Commercial Contracts is an optional regulation of international contracts, a convergence of legal cultures in the Caribbean. It seeks to promote legal security of international trade in the Caribbean region. The rules and commentaries to the draft have been elaborated under the scientific coordination of Prof. Dr.h.c. **Sixto Sánchez**

Lorenzo (Chair), Professor of private international law at the University of Granada, Member of the International Academy of Comparative Law, international arbitrator and Member of IHLADI. This scientific coordination was carried out as part of a partnership initiated by the association ACP Legal in collaboration with the association Henri Capitant. The law faculties of the Universities of Granada and Madrid (Complutense) are also heavily involved in the process, in conjunction with Caribbean lawyers.

The draft is being translated and will also be published in English and French in the coming weeks. The mission of translation is led by CERIJE (Centre for Interdisciplinary Research in Juritraductologie) under the coordination of Mrs. **Sylvie Monjean Decaudin**.

Note that other draft OHADAC texts available on the www.ohadac.com website are:

- The draft OHADAC Model Law Relating to private international law in its original version, drafted under the scientific coordination of Prof. Dr.h.c. **José Carlos Fernandez Rozas**: Director of the Department of public and private international law at the Complutense University of Madrid, Associated of the Institute of International Law, international arbitrator and Member of the IHLADI.
- The draft OHADAC Model Law on Commercial Companies is available in the three languages of the OHADAC project, namely French, English and Spanish. It has been drafted under the scientific coordination of Prof. Dr. **Rodolfo Dávalos Fernández**: Chair (Professor) of private international law and business law at the University of Havana, President of the Arbitration Court of Cuba, international arbitrator and Member of the IHLADI.

Coming soon:

- The draft OHADAC Arbitration and Conciliation Rules: drafted under the scientific coordination of Prof. Dr. **Rodolfo Dávalos Fernández**.

Thoughts, suggestions and/or comments on the draft OHADAC model law publications are welcome and will be taken into consideration so that they contribute to the success of the OHADAC reform, which will lay the foundations for the genuine regional integration of countries in the Caribbean zone.

For further information, please contact:

Dr. **Jean Alain Penda** Email: japenda@ohadac.com

ACP LEGAL / OHADAC.com

Investor Protection and Issuer Confidence after Kolassa

By Matteo Gargantini, Senior Research Fellow MPI Luxembourg

The decision rendered by the ECJ in *Kolassa* (Case C-375/13) offers a good opportunity to assess the European rules on jurisdiction from the point of view of investor protection and issuer confidence. A first comment on *Kolassa* has already been published on this Blog by Professor Matthias Lehmann. In his post, Professor Lehmann mainly focuses on the application of Art. 5(3) Brussels I Regulation to prospectus liability and on the evidence a court needs to consider when the disputed facts are relevant both for establishing jurisdiction and for deciding on the merit (these topics are addressed respectively in the third and the fourth questions referred to the ECJ). Full reference can therefore be made to Professor Lehmann's accurate analysis both for such points and for the description of the relevant facts. This post will instead sketch some general remarks from the perspective of financial markets law (for a more detailed analysis based on the Opinion of the Advocate General in *Kolassa* see Gargantini, Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General's Opinion in Kolassa V. Barclays, Rivista di diritto internazionale privato e processuale (2014), 1095).

To better understand the issues raised by *Kolassa*, it is worth considering in more detail the first two questions referred by the Austrian court, namely whether for the purpose of Art. 15 Brussels I Regulation Barclays, the issuing company, and Mr Kolassa, the final investor, are part of a contract, or whether for the purpose of Art. 5(1) Brussels I Regulation the relationship between them can at least be

considered contractual. As opposed to the claim considered by the third question – which only refers to prospectus liability and to "breach of obligations to protect and advise" – the claims dealt with by the first two questions were also based on "the bonds terms and conditions". Hence, it appears that Mr Kolassa was relying not only on prospectus liability, but also on a direct violation of the bond terms, that being the missing payments. Therefore, the clarifications provided by the ECJ on prospectus liability are not the full story. First, nothing prevents investors from filing claims exclusively – or, as Mr Kolassa did, also – on the basis of violation of the bond terms and conditions. Second, it might well be the case that a security offering is carried out with no prospectus being published at all, for example because one of the exemptions set forth by Art. 4 Directive 2003/71/EC (on the prospectus to be published when securities are offered to the public or admitted to trading) applies.

The first two questions referred to the ECJ raise difficult problems because, in *Kolassa*, not only are the securities bought on the secondary market, with no direct contact between issuer and investor, but they are also held by Mr Kolassa's bank (*direktanlage*) rather than by Mr Kolassa himself. In such a scheme, Mr Kolassa only has a claim against his bank and cannot be regarded as the holder of the securities. The distinction between the problems raised by security circulation, on the one hand, and security holding, on the other, is clearly drawn in the questions referred by the Austrian courts. Both the Opinion of the Advocate General and the ECJ decision deny that Art. 5(1) and Art. 15 apply, but they are unfortunately not as clear as the referring court in discerning the two aspects. Para. 26 of the decision seemingly links the absence of a contract to the fact that Mr Kolassa is not the bearer of the bond. Hence, it could be inferred that the "chain of contracts through which certain rights and obligations of the professional […] are transferred to the consumer" (para. 30) refers to the contracts that compose the holding chain of the securities. However, para. 35 is more elliptical and might also include security circulation when it refers to "an applicant who, as a consumer, has acquired a bearer bond from a third party professional, without a contract having been concluded between that consumer and the issuer of the bond". Likewise, the applicability of Art. 5(1) is excluded on the basis that "a legal obligation freely consented to by Barclays Bank with respect to Mr Kolassa is lacking", it being unclear whether this is linked to the fact that the bonds were purchased on the secondary market or to the fact that *direktanlage*, rather than Mr Kolassa, should be regarded as the bearer of the

certificate (para. 40).

Whether the inapplicability of Arts. 5(1) and 15 Brussels I derives from the fact that the bonds are bought from previous purchasers rather than underwritten directly from the issuer or, instead, from the fact that Mr Kolassa is not the holder of the securities is however key to understanding the implications of the decision. If the first explanation prevailed, the consumer protection regime of Art. 15 would not easily apply in securities offerings whenever – as is often the case – a bank syndicate first underwrote the securities and then resold them to investors at large (so-called "firm commitment syndicate"). At the same time, ruling out a contractual obligation pursuant to Art. 5(1) on similar grounds would imply that issuers might be held liable for violation of the bonds' terms and conditions in any jurisdiction where their investors suffered economic loss according to Art. 5(3). Such a system would exclude retail investor protection with no economic rationale and would paradoxically expose the offering companies to the risk of being sued by professional investors in jurisdictions where they published no prospectus and, consequently, addressed no investor.

Therefore, although the distinction between circulation and holding of securities may not be decisive in *Kolassa*, its implications remain whenever the investor/accountholder is the bearer of the relevant securities. Since *Kolassa* does not provide a conclusive answer to these questions, it might be appropriate to give a narrow reading to the decision, hence considering the intermediated and indirect holding of the securities through *direktanlage* as the reason why Arts. 5(1) and 15 do not apply.

To be sure, even a restrictive reading of *Kolassa*, although preferable, is no panacea. First, it would leave open the question whether the circulation of the securities might still prevent the identification of a contract or even a contractual obligation between issuers and investors pursuant to Arts. 15 and 5 respectively. This would seem to be the case for Art. 15, because ECJ case law usually requires a direct contact between the two parties (see Von Hein, Verstärkung des Kapitalanlegerschutzes: Das Europäische Zivilprozessrecht auf dem Prüfstand, in Eur. Zeitschrift für Wirtschaftsrecht, 2011, 370). A different result may perhaps be reached for Art. 5(1), considering that it might apply in the absence of a direct contact and that the ECJ has stated that conditions incorporated in a security may be transferred along with the security when this is handed over (see e.g. *Coreck*, Case C-387/98), which is exactly the purpose of incorporating a restitution

obligation into a bond. Second, linking the applicability of Arts. 5(1) and 15 to the formal qualification of the investor as security holder might easily create a differential treatment of investors that are regarded as mere beneficial owners in countries such as the United Kingdom, where security holding is mainly based on trusts. In this context, the strict interpretation of Art. 15 and the *raison d'être* of the autonomous interpretation of jurisdictional rules come into conflict.

To what extent a different reading of the applicable rules could ensure a better regulatory framework remains to be seen. The Brussels I Regulation does not always seem to leave room for different interpretations, at least in the light of consolidated case law. Art. 15 and its traditional understanding is a clear example. What is sure, from the point of view of securities law, is that the drawbacks of the current system reduce both issuer confidence and investor protection.