Tort jurisdiction and pure economic loss – Request preliminary ruling

Written by Laura van Bochove, Erasmus University Rotterdam

In January, the Dutch Court of Cassation referred several questions on Article 5(3) Brussels I Regulation to the CJEU for a preliminary ruling (Case C-12/15), including the questions how a court should establish 1) whether an economic loss is an 'initial loss' or a 'consequential loss' and 2) in which country economic losses occur.

Briefly stated, the facts of the case are as follows. In 1998, Universal Music International Ltd (part of the Universal Music Group) and Czech record company B&M agreed upon the purchase of 70 per cent of the shares of B&M by companies within the Universal Music Group. In addition, parties agreed that in 2003, Universal would buy the remaining 30 per cent. In the draft version of the Letter of Intent, the intended purchase price of all shares equalled five times the annual profit of B&M. For the drafting of the definitive share option agreement regarding the 30 per cent of the shares, the Universal Music Group turned to Czech law firm A. On 5 November 1998, a share option agreement was concluded by Universal Music International Holding B.V. (hereafter: Universal Music), seated in the Netherlands, B&M and its shareholders. However, due to an alleged mistake of A.'s employee in the drafting of the agreement, the price Universal had to pay for the shares was increased radically. In 2003 Universal Music bought, as agreed, the remaining 30 per cent of the shares. It calculated, on the basis of the intended purchase price, that it should pay about 313,000 euros. B&M's shareholders, however, calculated the price of the shares on the basis of the formula in the final agreement, resulting in an amount of more than 30 million euros. Parties went to arbitration and in 2005 Universal Music and B&M's shareholders settled their dispute for 2.6 million euros.

Universal Music then commenced legal proceedings before the court of Utrecht (the Netherlands) against the law firm and its employee for the amount of 2.7 million euros, being the difference between the intended price of the shares and

the settlement plus the costs for the arbitration proceedings and the settlement. The defendants argued that the Utrecht court did not have jurisdiction. In first instance, the court denied jurisdiction, on the basis that none of the facts giving rise to the damage occurred in the Netherlands and that the connection with the Netherlands was too weak to accept jurisdiction. The Court of Appeal followed this decision and held that the court of the place where pure economic loss was suffered cannot accept jurisdiction on the basis of Article 5(3) Brussels I Regulation. Universal Music then filed an appeal in cassation.
The Court of Appeal's ruling is in line with the majority opinion long held in Dutch scholarship that the place of (initial) pure economic loss cannot be considered the place where the damage occurred or the 'Erfolgsort'. Although one could argue that the CJEU already in its 2004 decision in Kronhofer (C-168/02) suggested otherwise, the Dutch Court of Cassation deemed it necessary to ask for a preliminary ruling on this topic. However, taking into consideration the recent CJEU decision in Harald Kolassa v. Barclays Bank plc (C-375/13), which was published after the Court of Cassation referred its questions to the CJEU, it is likely that the matter will be viewed as an 'acte éclairé', since the CJEU rules that the court of the place where pure economic loss occurred as a direct consequence of misleading information in a prospectus, can establish jurisdiction on the basis of Article 5(3) Brussels I Regulation. The Kolassa judgment also provides an affirmative answer to one of the other questions of the Court of Cassation, namely whether the court in deciding on its jurisdiction should also take into account the defendant's arguments regarding jurisdiction.

However, the two remaining questions referred to the CJEU for a preliminary ruling have not yet been answered. The Court of Cassation informs how a national court should establish whether the damage should be considered initial economic loss or consequential economic loss, and how a national court should establish whether the economic damage has occurred in its territory. In the case at hand, the question is whether the difference between the intended share price and the settlement eventually paid and the costs related to arbitration and settlement should be regarded as initial economic loss, and if so, if the Netherlands should be considered the place where the damage occurred, since these costs were paid at the expense of Universal Music's assets (bank account) located in the Netherlands.

Since the boundaries between initial and consequential economic loss can be hard

to delineate and the localisation of pure economic loss often raises problems, it would be useful if the CJEU would provide courts with more guidance. It will be interesting to see whether the CJEU is willing to extent its ruling in Kolassa to all pure economic loss cases and adopt as a general rule that in cases of pure economic loss the Erfolgsort is the place where the victim suffers the loss to its assets, in this case the bank account from which the amount was transferred. Yet, the CJEU could also rule that the Kolassa judgment should be interpreted restrictively and that it only applies to private investors suffering economic damage on their investments due to misinformation.

To be continued…

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

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