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

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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.

Working Paper on Business and Human Rights

The Working Paper *The Private International Law Dimension of the Principles. An Introduction*, written by Veerle Van Den Eeckhout is now available on ssrn.

The abstract reads as follows: "In the reports on Business and Human Rights by John Ruggie, "access to remedies" cq "access to justice" appears to be a key element. Rules of Private International Law can be seen as key factors in achieving access to remedies cq access to justice: PIL rules act like hinges that allow doors – granting access to a specific court and to a specific legal norm – to be opened or to be kept closed; thus, as PIL deals with issues of international jurisdiction and applicable law, PIL rules are of paramount importance in determining access to a specific court and access to a specific legal norm. In his Guiding Principles, Ruggie addresses the responsibility of States for issuing suitable legislation and 'access to remedies'; it may be well argued that PIL legislation (rules on jurisdiction and applicable law) and the interpretation of this legislation should also be examined in this context. In this article the focus is on

the hypothesis that plaintiffs want to bring an action before a EU Member State court. When focusing on this hypothesis, one can observe that at least some PIL-aspects are covered by rules of PIL of European origin – the regulation of some other aspects is still left to the EU- Member States themselves. To what extent do these rules allow or deny access to remedies cq access to justice? In this article, some rules and issues of (mainly) European PIL – both jurisdiction and applicable law – that deserve attention from this perspective will be highlighted in an introductory way."

The corresponding Power Point Presentation, presented during the Conference "The Implementation of the UN Principles on Business and uman Rigths in Private International Law" at Lausanne (October 2014) is available here.

ECtHR on SAS v. France. A Comment.

Multiculturalism is one of the greatest challenges of our time. Minority but deeply rooted practices with a potential to bring social unrest to host countries – as may be, in our Western societies, the use of the full Islamic veil- raise questions to which law may answer with tolerance or reject with incomprehension and hostility. It is with the first intention in mind that Prof. Zamora and Prof. Camarero, both from the University Jaume I (Castellón) have addressed the ECtHR decision *SAS v. France*, application number 43835/2011, in a paper written in Spanish, with an English abstract that reads as follows:

"The decision of the European Court of Human Rights related to the case S.A.S. is a historic milestone as far as the treatment of the religious freedom all along its jurisprudence is concerned. Throughout a critical analysis their foundations are submitted to review. Among them we underline the requirements of the so called *vivre ensemble* and the wide way it is granted to the State a 'margin of appreciation'. Both aspects are subject to scrutiny to reach the conclusion that there exists little ultimate basis to support the severe restriction imposed upon

freedom of religion and the protection of minorities under the French law of 2010. Upon those basis, the study agrees upon that the above mentioned decision really masks the purpose of an institutional political balance looked for by the High Court in its ruling. A balance that in the present case turns out to be highly burdensome concerning the protection of Human Rights".

The full text is to be found in the *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 37 (2015).

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner, ***European conflict of laws 2014: The year of upheaval***
The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2013 until November 2014. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the ECJ as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

Anatol Dutta, ***The European Succession Regulation: Ten issues in miniature***
Since its adoption in July 2012, the European Succession Regulation has

generated a great volume of scholarly writing, although being applicable only from summer 2015 onwards. The following paper shall retrace ten selected issues which have been subject to debate during those first three years, namely (1) the delimitation between the applicable succession law and matrimonial property law, in particular regarding the German lump sum approach as to the participation of the surviving spouse in the gain obtained during marriage, (2) the role of legacies or other attributions which directly transfer ownership in certain objects of the estate from the testator to the legatee or other beneficiaries, in particular in case of a so-called legatum per vindicationem, (3) the localization of joint wills of spouses or registered partners, (4) the scope of the special jurisdictional rules in case of a choice of law, (5) the admissibility of certain types of testamentary dispositions, (6) the problem of incidental questions in the applicable succession law, (7) the binding effects of a choice of law, (8) the role of national certificates of inheritance under the Regulation, (9) the scope of the duty to accept foreign authentic instruments, and (10) the impact of previous overriding succession-related conventions of the Member States on the European Certificate of Succession.

Peter Mankowski, ***The Deceased's Habitual Residence in Art. 21 (1) Succession Regulation***

Art. 21 (1) Succession Regulation hails the deceased's habitual residence as the dominant connecting factor for objectively determining the applicable law. The European legislator intends to nurture integration and personal mobility within the Internal Market. Habitual residence as connecting factor raises quite some questions, though. Recitals (23) and (24) are only helpful up to a certain extent in this regard. To place particular reliance on the deceased's intentions would be misconceived. To rely on such intentions would generate a bevy of consequential issues, for instance concerning the deceased's mental sanity or other persons' influence. Moving cross-border ordinarily is a deep cut in everybody's personal life and should be a clear warning of possibly ensuing consequences. To assume an alternating habitual residence provides a solution for the tricky cases that someone is living in different places consecutively each year. With regard to cross-border commuters the place where they habitually carry out their work is only relevant for employment purposes but does not determine their habitual residence.

Burkhard Hess/Katharina Raffelsieper, ***The European Account Preservation***

Order: A long-overdue reform to carry out cross-border enforcement in the European Area of Justice

This article describes the key elements of Regulation (EC) 655/2014 establishing a European Account Preservation Order adopted in May 2014 and explains its practical implications. This new instrument will facilitate direct cross-border enforcement of monetary claims by allowing creditors to block bank accounts in other EU Member States (with the exception of the UK and Denmark). The Regulation shall be available as an additional alternative to existing national provisional relief. However, it implements the so-called surprise effect in cross-border cases: the blocking effect takes place without any prior notification to the debtor.

At the same time, appropriate safeguards to protect the debtor's rights are in place, such as the obligation of the creditor to compensate the damage caused to the debtor by the seizure if the order is subsequently set aside. The debtor's right to be heard will be safeguarded by a hearing in the Member State of enforcement taking place after the blocking of the account. Finally the livelihood of the debtor is assured by the application of the respective national laws of the Member State of enforcement governing non-attachable amounts. All in all, the European Account Preservation Order can be qualified a major achievement which will considerably improve cross-border enforcement in the EU. It fills the gap in creditor protection left open by the Brussels I Recast which has unnecessarily abolished the surprise effect of provisional measures in the cross-border context.

Christian Kohler, ***A Farewell to the Autonomous Interpretation of the Concept of 'Civil and Commercial Matters' in Article 1 of Regulation Brussels I?***

In Case C-49/12, Sunico, the ECJ held that the concept of "civil and commercial matters" within the meaning of Article 1 of Regulation Brussels I covers an action whereby a public authority of one Member State claims, as against persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit value added tax fraud in the first Member State. The author argues that the judgment is not in line with the ECJ's earlier caselaw on the autonomous interpretation of that concept. As the defendants in Sunico were the real beneficiaries of the sums obtained by means of tax evasion and the damages claimed corresponded to the amount of the VAT not paid, the action was brought in the exercise of the authority's powers and concerned a "revenue matter" within the meaning of Article 1(1) of the Regulation. The author observes a tendency in

the ECJ's recent case-law to give too much weight to the law of the Member State of the proceedings when interpreting the concept of "civil and commercial matters". However, a shift towards a "national" rather than an autonomous interpretation of that concept would be detrimental to the uniform application of the Regulation. Although a wide interpretation of the concept is to be approved, the rationale behind the exclusion of matters of public law from the scope of the Regulation remains valid.

Michael Grünberger, ***The Place of an Alleged Infringement of Copyright under the Brussels I-Regulation***

The CJEU held in Pinckney v KDG Mediatech AG that a court has international jurisdiction for a copyright infringement claim according to Art. 5 No. 3 Brussels I regulation, if the member state in which that court is situated protects the copyrights relied on by the plaintiff and the harmful event alleged may occur within the jurisdiction of the court seised. First, the court reaffirmed that jurisdiction in intellectual property rights claims can be allotted based on both, the place where the damage occurred and the place of the event giving rise to it. Second, the CJEU developed a specific approach for non-registered IP rights, merging the classical Shevill doctrine with its solution to IP rights in Wintersteiger. Third, the CJEU rebuffed any attempt to apply any further localization criteria to limit a national court's international jurisdiction in multistate infringements. Fourth, the approach enables the plaintiff to sue one of several supposed perpetrators of the damage in the place where the final damage has occurred even though he or she did not act within the jurisdiction of the court seised.

Christoph Thole, ***Jurisdiction for injuncture relief and contractual penalties***

The judgment in question was linked to two significant problems within the law of international jurisdiction. It concerned a legal action taken by an association and the question of jurisdiction for injuncture relief in cases without adherence to a specific locality. Although the court reaches – in spite of overlooking several aspects – the correct result, the judgment still reveals yet unresolved questions of how to treat agreements on contractual penalties and negative covenants with respect to the place of performance under art. 5 no. 1 Brussels I-Reg. (= art. 7 no. 1 Reg. 1215/2012).

Marta Requejo Isidro, ***On Exequatur and the ECHR: Brussels I Regulation before the ECtHR***

Concerns about the relationship between Article 6 ECHR and the international procedural law instruments of European (Community) source has long been a recurring topic in the legal literature. The issue has been reviewed recently by the ECtHR: concrete aspects of the European system of recognition and exequatur of judgments among EU Member States have been assessed by the Court in light of the so called Bosphorus test and the presumption of equivalence in Povse v. Austria, of 18.6.2013, in the domain of family law; and in the decision we comment on here, Avoti?š v. Latvia, rendered on 25.2.2014, where Regulation Brussels I was applied. Avoti?š v. Latvia is remarkable and must be approved for the tolerance shown by the ECtHR towards existing EU law and its application by the Member States at a very sensitive stage of the relations EU/Strasbourg. However, disappointment cannot be hidden as regards its grounds used by the ECtHR: technically the decision is based on unclear, disputable reasoning, as well as on a rather superficial assessment of the Bosphorus test. It is therefore not surprising that the judgment was adopted by a narrow majority of just four votes against three.

Friedrich Niggemann, ***Foreign precautionary measures to take evidence under the Brussels I-Regulation: New attempts, but still no convincing solution***

The decision of the OLG München of 14.2.2014 is part of the quite heterogeneous case law of the German courts under Art. 31 Regulation 44/2001. Following an expert procedure in France the German party to this procedure started a second procedure with the same object in Munich, which was the agreed place of jurisdiction. The German court refused jurisdiction on the basis of Art. 27 par. 2 Regulation 44/2001. Whereas the result is in line with the decisions of the ECJ, the decision remains nevertheless unconvincing. It considers that the French procedure is not a provisional one under Art. 31, but an ordinary one, which in the court's opinion is apparently necessary to justify the refusal of jurisdiction. However this is contrary to the ECJ's definition of a provisional decision. Moreover the ECJ attributes the consequence of Art. 27 para. 2 Regulation 44/2001 not only to ordinary but as well to provisional decisions.

Sarah Nietner, ***Fragmentation of the law applicable to succession by way of party autonomy: What will be the impact of the Succession Regulation?***

The present case deals with a succession having cross-border implications. The deceased was a Swedish citizen who had her habitual residence in Germany at

the time of her death. In her disposition of property upon death, the deceased had chosen German law to govern her succession with regards to her immovable property located in Germany. The deceased had disinherited her niece, who contests the validity of the will due to lack of testamentary capacity. The Higher Regional Court of Hamm found that the question, whether the deceased had been capable of drawing up her will, is governed by German law with respect to the immovable property located in Germany, whereas Swedish law decides on the question of capacity regarding the other assets. The fragmentation of succession results from the possibility to choose the law governing the succession, which is granted by Art. 25 (2) of the Introductory Act to the German Civil Code. This contribution outlines the decision of the court and examines how the situation will change under the European Regulation on Succession and Wills, which aims to avoid contradictory results due to a fragmentation of succession.

Rolf A. Schütze, ***On providing security for costs of proceedings under Austrian law***

Under Austrian Law a foreign plaintiff in civil litigation is obliged to provide security for costs. The foreign plaintiff is released from such obligation if – inter alia – there is a provision in an international treaty on security for cost or if an Austrian decision on costs can be recognized and enforced in the country of the habitual residence of the plaintiff. According to the ruling of the Austrian Supreme Court, however, the release from the cautio iudicatum solvi on the ground of the possibility to execute cost decisions under national law does not apply if there is an international treaty, even if such treaty – as in the instant case – does not release the plaintiff from the obligation to provide security for costs. Therefore the Court did not examine the issue of enforceability of an Austrian cost decision under the laws of the British Virgin Islands.

Claudia Pechstein and SV

Wilhelmshaven: Two German Higher Regional Courts Challenge the Court of Arbitration for Sport

By Professor *Burkhard Hess* (Director) and *Franz Kaps* (Research Fellow), *Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law*

In a decision of January 15, 2015, the Munich Court of Appeal (OLG) addressed dispute resolution practices common to sports law. The case concerns the well-known German speed skater Claudia Pechstein. In February 2009, Ms. Pechstein was imposed a two year ban by the International Skating Union (ISU) for blood doping. As she had signed an arbitration clause, she challenged the ban before the Court of Arbitration for Sport (CAS). However, an arbitral tribunal of the CAS confirmed the ISU suspension in November 2009. Ms Pechstein challenged the award before the Swiss Federal Tribunal (case no. 4A 612/2009 and 4A 144/2010), but without success. On December 31, 2012, Ms. Pechstein started litigation before the German courts contesting the lawfulness of the ban. She has always asserted that the doping results are due to an illness she has inherited from her father. According to recent (innovative) expert testimonies her allegation is correct.

In its judgment of 15 January, the OLG Munich addressed the validity of the CAS arbitration agreement and the recognition of the arbitral award. Relying on German cartel law the Court concluded that the arbitration agreement was void (a) and the arbitral award could not be recognized (b).

(a) First, the Court held that no valid arbitration agreement had been concluded between Ms. Pechstein and the ISU, as Ms. Pechstein had no choice but to agree to the arbitration clause in favor of the CAS in order to participate to the "World Speed Skating Championship" organized by the ISU. According to the Munich court, the organization of professional sports by international sports federations like the ISU corresponds to a dominant position in the (sports) market, and the ISU had abused this dominant position by imposing the arbitration clause on the athlete. In addition, the Court held that the CAS appeal dispute resolution

procedures do not correspond to the required minimum standards of a fair trial as the parties are not treated equally. In this respect the court relies on two arguments: First, parties to the CAS arbitration proceedings must select the arbitrators from a closed list; but only the sports federations (i.e., not the athletes) participate in its drawing up. Furthermore, the Court criticizes the nomination of the president of the arbitration tribunal, made by the CAS and not by the party-appointed arbitrators. Again, the Court denounces the influence of the sports' federation on the process, which entails an unequal treatment of the parties. In light of these arguments it is clear that the judgment is much more about the independence of sports arbitration than about German cartel law. Hence it may prove to be much further-reaching than appears at first sight.

(b) With regard to the recognition of the CAS arbitral award confirming the validity of the ban for doping, the Munich Court applied Art. V (2) (b) NY Convention to hold that the CAS award violated German cartel law pertaining to the German "public policy", and refused to grant recognition. In this respect, the court referred again to the lacking independence of the CAS from the international sports federations.

It must be noted that the "Pechstein-story" has not yet come to an end. A second appeal was filed with the German Federal Supreme Civil Court; a decision is expected in the next months. Moreover, this spring the European Court of Human Rights (pending case 67474/10, *Claudia Pechstein ./. la Suisse*) will decided on a complaint brought by Ms. Pechstein against Switzerland for an allegedly unsufficient review of the CAS by the Federal Tribunal.

In addition, a recent decision of the Court of Appeal Bremen of 30 December 2014 is also worth mentioning here. In the case under consideration a local football club, SV Wilhelmshaven, challenged a ban of the Regional Football Association, imposed on the local football club for the non-payment of a so-called "training compensation". This compensation corresponds to a payment due to a football club by another upon the transfer of an athlete; in the case at hand SV Wilhelmshaven had recruited an Italian football player from Argentina. The FIFA ordered the German club to pay to the Argentinian club the amount of 157.000 € "training compensation". The order was contested by the addressee but confirmed by an arbitral tribunal of the CAS. When the German club failed to pay the sum, the FIFA decreed the German club's relegation to a lower league. Once again, the club challenged this decision before the CAS, once again to no avail.

Finally, the German Regional Football Association, being under the statutory obligation to enforce the FIFA decision, implemented the sanction. The SV Wilhelmshaven challenged the relegation before the Bremen Court of Appeal relying on the *Bosman* decision of the CJEU (Case C-415/93) and arguing the incompatibility of the "training compensation" with article 45 TFEU. The Bremen court held that the relegation was indeed incompatible with European Union law, hence it was void. Again, an arbitral award of the CAS was not recognized, this time for non-compliance with mandatory European Union law.

The *SV Wilhelmshaven* litigation may still be appealed before the German Federal Supreme Court. As with the *Pechstein* case it remains to be seen whether the Supreme Court will uphold the decision of the lower court. At any rate, the two controversies clearly demonstrate that arbitration in sports law must, like all arbitration proceedings, abide by minimum standards of procedural fairness (*Pechstein*) and apply mandatory law (*SV Wilhelmshaven*). Otherwise, the awards will be successfully challenged in state courts, and the *de facto* immunity of sports law from state court interference (which is based on arbitration) will find its limits.

Cross-border activities in the EU – Making life easier for citizens

Meeting at the European Parliament (Room ASP 5 G 3) on 26 February 2015 on Cross-border activities in the EU – Making life easier for citizens.

See Programme.

The meeting is primarily aimed at European and national Parliamentarians. Other participant observers who need an access badge must register by filling in the registration form (attached: European_Parliament_Registration_form_20150226) by **16 February**. Seats are limited.

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Funded PhD Positions/Call for Applications

The **International Max Planck Research School for Successful Dispute Resolution in International Law (IMPRS-SDR)** is a doctoral school located in Heidelberg (Germany) and Luxembourg. Founded in 2009, the Research School's aim is to examine and analyse different mechanisms for solving international disputes. The participating institutions are the **Max Planck Institute Luxembourg** for International, European and Regulatory Procedural Law, **Heidelberg University**, the **University of Luxembourg**, the **Max Planck Foundation** for International Peace and the Rule of Law, and the **Max Planck Institute** for Comparative Public Law and International Law (both in Heidelberg). In cooperation with the **Permanent Court of Arbitration** in The Hague, the IMPRS-SDR runs an internship program in international arbitration for its doctoral students.

Ten PhD positions are available from June 1, 2015. An additional five positions will become available in January 2016. Applicants who are admitted to the IMPRS-SDR will pursue their research within the framework of the Research School. The IMPRS-SDR will offer funding in the form of scholarships and research contracts to its new members.

The deadline for applications is **April 1, 2015.**

To view the complete call for applications, please visit www.mpi.lu/imprs-sdr/. To view the official poster click here.