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Summary

Financial Crisis and the Conflict of Laws

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1. The indirect and decentralized regulation of international financial markets by way of private investors who have suffered losses and institute civil transnational litigation complements and supports supervisory mechanisms rooted in public law.

2. The most recent case law of the German Federal Court of Justice concerning the protection of investors by means of civil procedural law is marked by a tendency favouring investors. This can be shown by three developments of the court's jurisprudence:

(1) The autonomous characterization of claims rooted in domestic tort law (§ 823(2) of the German Civil Code in connection with § 32 of the German Banking Act) and in *culpa in contrahendo* as contractual within the meaning of the Brussels I/Lugano-régime;
(2) The generous affirmation of jurisdiction in tort cases which involve a plurality of tortfeasors;
(3) The affirmation of jurisdiction under Article 5(3) Brussels I if the victim has transferred sums of money from a bank account located in his or her own country of habitual residence.

With regard to a uniform interpretation of the Brussels I/Lugano rules, it is desirable that the Federal Court of Justice would resort more frequently to referring cases to the Court of Justice of the European Union (Article 267(3) TFEU).

3. The restriction of consumer protection to contractual claims under the Brussels I-Regulation (Articles 15–17) should be reconsidered in the course of the on-going revision of the Regulation. When a professional directs his or her activity to the state where the consumer is domiciled, it is appropriate to extend the court's jurisdiction to claims rooted in tort law or *culpa in contrahendo*.

4. The extension of the Brussels I-Regulation (Article 5 no. 3, Article 15) to defendants domiciled in third states (e.g. the United States) is to be welcomed. Deficits remain with regard to the European regulation of class or group actions.

5. The capital market-related exceptions from the Rome I rules on consumer protection show a potential for linguistic improvement, but they are substantially adequate and justified. They should be extended to Article 15 of the Brussels I-Regulation as well.

6. The fact that European private international law opts for the place of damage as the single decisive connecting factor for torts (Article 4(1) Rome II) does not necessarily require giving up the principle of ubiquity developed by the CJEU with regard to Article 5 no. 3 of the Brussels I-Regulation.

7. The escape clause contained in Article 4(3) Rome II allows for the development of an adequate conflicts rule for international prospectus liability and other types of market-related torts; nevertheless, a precise black-letter rule would be desirable for reasons of legal certainty. With regard to EU issuers, such a rule should be based on a

harmony between the law governing the issuer's obligation to issue a prospectus and the law governing the issuer's civil liability.

8. The most recent case law of the U.S. Supreme Court (*Morrison* v. *National Australia Bank*) curtails the extraterritorial reach of U.S. securities law and thus reduces the incentives for forum shopping, which is to be welcomed. The EU and the FRG should make their voice heard in the course of the pending U.S. legislation on this matter. The fact that Germany generally refuses to recognize U.S. class action judgments against German issuers pursuant to § 32b(1) of the Code of Civil Procedure is left untouched by the revision of the Brussels I-Regulation; yet it is no longer convincingly justifiable in light of this case law.

9. The classic multilateral approach of European private international law (general and abstract legal rules based on the principle of proximity) is, generally speaking, superior to the traditional U.S.-American unilateral approach (determination of the spatial reach of substantive laws by courts in a variety of cases). It should be the preferred method when it comes to an international unification of private international law governing securities torts, e.g. within the framework of the Hague Conference.