Investor Claims:
Issues of Jurisdiction and Applicable Law

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A. Financial Regulation and Private Relationships

- impact of financial regulation on investor claims:
  1. may shape content of contractual duties
  2. violation may constitute a tort
  3. may provide a direct claim
- law & economics theory: regulatory policies are enforced through private litigation
- obstacles in international cases:
  - jurisdiction and applicable law are not the same for public and private enforcement
B. Conflicts Rules for Public Enforcement

General rules:
- financial authority applies lex fori
  = parallel between jurisdiction and applicable law
- unilateral approach
- mandatory nature

B. Conflicts Rules for Public Enforcement

- main conflicts principle: territoriality
- connecting factors:
  1. securities, e.g. place of offering or admission to trading
  2. issuer, e.g. registered seat or seat of administration
  3. investor, e.g. domicile or habitual residence
C. Private Enforcement: Derogation by Party Autonomy

EU
application of general rules of private international law
• possibility to choose the competent court (Art. 23 Brussels I Regulation)
→ two cases in point:
  1. UBS AG & Anor v HSH Nordbank AG, [2009] 1 C.L.C. 934
  2. ECJ, Berliner Verkehrsbetriebe v JPMorgan Chase, case C-144/10, 12 May 2011
• possibility to choose arbitration (no restriction of arbitrability)

C. Private Enforcement: Derogation by Party Autonomy

EU
• possibility to choose the applicable law
• but:
  – limitation in case of consumer contracts
  – restriction by public policy rules (“overriding mandatory provisions”)
→ financial regulation is overriding and mandatory
C. Private Enforcement: Derogation by Party Autonomy

a closer look to the applicability of overriding mandatory provisions in EU:

- provisions of the forum (Art. 9(2) Rome I, Art. 16 Rome II)
- provisions of third country only under certain conditions (Art. 9(3) Rome I):
  1. country where the contract has to be performed
  2. render the performance of the contract unlawful
     → doubtful from a regulatory perspective

US

- applies to arbitration agreement and choice of foreign court
- but: if US courts have jurisdiction, no possibility of choice of law (mandatory application of US securities laws)
D. Private Enforcement in the Absence of Parties’ Choice

### EU

<table>
<thead>
<tr>
<th>Jurisdiction (Brussels I)</th>
<th>Applicable Law (Rome I/II)</th>
</tr>
</thead>
<tbody>
<tr>
<td>place of domicile of defendant</td>
<td>habitual residence of seller/service provider</td>
</tr>
<tr>
<td>place of delivery/performance</td>
<td>habitual residence of consumer</td>
</tr>
<tr>
<td>place of loss</td>
<td>place of loss</td>
</tr>
<tr>
<td>habitual residence of consumer</td>
<td></td>
</tr>
</tbody>
</table>

→ these rules have little or no relation to the policies of financial regulation!

### US

- Jurisdiction is determined by reach of securities laws
  - Securities Exchange Act applies only if
    - securities concerned are registered in the US or
    - transaction took place in the US
D. Private Enforcement in the Absence of Parties‘ Choice

- *Morrison* has led to a number of dismissals of suits by foreign investors:
  - *In re Alstom SA Sec. Litig.*, No. 03 Civ. 6595 (VM) (S.D.N.Y. (Sept. 13, 2010)
- is currently under review by SEC

⇒ **these rules strictly follow the policies of securities regulation**

E. Conclusion

**EU**
- division between jurisdiction and applicable law
- parties have right to choose the governing law
- mandatory and default conflict rules do not take regulatory policy into account

**US**
- jurisdiction and applicable law run in parallel
- mandatory application of securities laws
- conflict rules follow regulatory policy closely
E. Conclusion

Which system is to be preferred?

• EU rules may frustrate purpose of financial regulation
• US approach turns a blind eye on private needs
• best would be combination of both worlds:
  – open courts to foreign investors
  – allow choice of law (e.g. for standard of liability)
  – but enforce regulatory policies of the most affected state
  ➔ change of Art. 9(3) Rome I
  ➔ addition to Art. 16 Rome II