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.

State Attribution, Extraterritorial Torts and Sovereign Immunity: A New Case to be Heard at the U.S. Supreme Court

The United States Supreme Court just last week granted a Petition for a Writ of Certiorari in *OBB Personenverkehr AG v. Sachs*, a case that involves a key issue of state attribution under the U.S. Foreign Sovereign Immunities Act ("FSIA"). This is an issue that has not been addressed by the Supreme Court for over thirty years

The plaintiff in this case is a California resident who bought a Eurail pass from an online ticket seller based in Massachusetts. She suffered severe injuries while trying to board a train in Innsbruck, Austria. She sued OBB, an agency of the Austrian government, for her injuries in U.S. federal court. The seller and OBB have no direct contractual relationship. OBB argues that United States courts lack jurisdiction because the acts of the U.S. based ticket seller cannot be imputed to OBB.

Over a strong dissent, an *en banc* panel of the Ninth Circuit Court of Appeals held that the Massachusetts-based Internet site that sold Sachs her train ticket was OBB's agent in the U.S., and therefore the railway had conducted commercial activity in the U.S. giving rise to jurisdiction. OBB said in its petition to the Supreme Court that the appeals court ignored the FSIA's definition of "agency" of a foreign state — creating a precedent "divorced from the statutory text" — and instead improperly relied on common law principles of agency. OBB has also argued that the Ninth Circuit was mistaken when it held that Sachs' claims were based upon the sale of the rail pass in the U.S., rather than OBB's alleged mistakes on the Austrian rail platform. The Solicitor General, on behalf of the United States, had urged the Court to deny certiorari in the case.

The Court will answer the following questions: (1) Whether, for purposes of determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), the express definition of "agency" in the FSIA, the factors set forth in First National City Bank v. Banco Para el Comercio Exterior de Cuba, or common law principles of agency, control; and (2) whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.

A date for argument has not yet been set, but it will be in the 2014 Term. The briefs filed in this case can be found here.

INTEREULAWEAST – call for papers

INTEREULAWEAST, or Journal for International and European Law, Economics and Market Integrations, announced its call for papers. It is looking to publish papers in both the field of law and the field of economics, with an international focus. Topics of particular interest include:

> *1. legal and economic aspects of European Union and other market integrations, market freedoms and restrictions,*
> *2. competition and intellectual property,*
> *3. company law and corporate governance,*
> *4. international trade and*
> *5. international private and public law.*

Additional information is available at the Journal web page.

La Ley Unión Europea, Nº 22 (January 2015)

Number 22 of the Spanish periodical La Ley-Unión Europea (January 2015) has just been released. You will find therein:

Under the heading *Doctrina*

An article by Prof. Jiménez Blanco (University of Oviedo), on “social tourism”, entitled “Derecho de residencia en la Unión Europea y turismo social”.

Abstract: The judgment of the ECJ of 11 November 2014 (Case C-333/13: Elisabeta Dano, Dano and Jobcentre Florin Leipzig) restates the problem of access to social benefits of the host State by EU citizens. However, the real problem lies in the limited right of residence of European citizens when they are non-active EU citizens and manifestly lack of economic resources. In such cases, European citizenship, stated in the art. 20 TFEU, does not legitimize a residence in the host State based on «social tourism».

A paper by Dr. Muleiro Parada (University of Vigo), entitled “La cooperación reforzada en el impuesto sobre transacciones financieras”.

Abstract: Some countries of the European Union are willing to the implementation of a financial transaction tax since 2016. In order to achieve this goal, it´s necessary to use the enhanced cooperation mechanism regulated in the EU Treaties. The Commission have been formulated several proposals which will culminate in a fi nal one. It will be expected that the final proposal can be less ambitious. In this paper we analyzes these European proposals, the most problematic issues and the future of European regulation, on the basis of recent political agreements.

Under the heading *Tribuna*

A contribution by Dr. Oró Martínez (Max Planck Institute Luxembourg), entitled

“Las reclamaciones por daños derivados de una infracción del Derecho de la competencia de la UE: primeras observaciones sobre la Directiva 2014/14/UE”, analizing Directive 2014/104/EU

Abstract: This comment makes some general remarks on the recent Directive 2014/104/EU, on actions for damages arising out of infringements of EU competition law. After presenting its background and the legal context of the Directive, we examine the scope of application of the Directive, the general design of these actions for damages, as well as the relationship between the Directive and the Commission Recommendation on collective redress mechanisms. The different procedural and substantive provisions of the text are examined, together with the rules on coordination with public enforcement and consensual dispute resolution. The comment concludes with some remarks on the scarce impact of cross-border situations in the content of the Directive.

A study on the 2005 Hague Convention by Prof. Arenas García (University Autónoma, Barcelona), under the title “La aprobación por la UE del Convenio de La Haya sobre acuerdos de elección de foro: un cruce de caminos”.

Abstract: The acceptance by the EU of the Hague Convention of 2005 on Choice of Court Agreements will allow the entry into force of the Convention since Mexico has already ratifi ed it. In this work we deal with the fundamental issues of the Convention and also with the particularities linked to the participation in the Convention of the EU and its Member States.

Two comments are included under the chapter *Sentencia seleccionada*.

The first one, “Trabajadores extranjeros en situación irregular e instituciones de garantía salarial”, focus on the CJEU ruling on case C-311/13, *O. Tümer*. It’s signed by Prof. Espiniella Menéndez (University of Oviedo).

Abstract: The Court of Justice rules that a national legislation as the Dutch legislation, which denies the insolvency benefit in favor of foreign employees in irregular situation, is contrary to the EU Law. The Judgment can be analyzed from the two legal rationales under the issue: the social policy and the immigration policy. This approach permits to conclude that the ruling is right, although some arguments are unconvincing.

The second one, under the headline “Ley aplicable a los contratos internacionales en defecto de elección: la interpretación del artículo 4 del Convenio de Roma y su proyección sobre el Reglamento Roma I” corresponds to the ruling on case C-305/13. The author is Dr. Unai Belintxon Martín (Univesity of the País Vasco).

Abstract: The aim of this study is to analyze and evaluate the European Court of Justice Judgement in the Haeger & Schmidt case, on the interpretation of Article 4 of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations. In particular, the research will focus on analyzing the interpretive contribution of the Court in this new decision and its repercussion on articles 4 and 5 of the Rome I Regulation.

The current issue includes a section on case law (*Jurisprudencia*) and another one on updated EU news and events (*Actualidad de la Unión Europea*) as well.

Call for papers: Extraterritorial application of EU Law

Erasmus+ Program/Jean Monnet Project:
EU Law between Universalism and Fragmentation: Exploring the Challenge of Promoting EU Values beyond its Border

Call for papers (Young researchers)

THE EXTRATERRITORIAL APPLICATION OF EU LAW

Vigo (Spain)

The Spanish Association of Professors of International Law and International Relations (AEPDIRI) is the beneficiary of a Jean Monnet project on the pressures experienced by EU law in a globalized world that become apparent in the

conflicting trends towards universalism on the one hand and states' legal fragmentation on the other hand. Overall objective of the project is promoting research on EU policies from the viewpoint of the Association's research areas – public international law, private international law and international relations – with a view to enhancing EU values beyond its borders.

It is in the framework of this Jean Monnet project that AEPDIRI will organize an international Conference in Vigo (Spain) on **June 18/19, 2015** entitled ***The Extraterritorial Application of EU Law***. In order to draw the attention of young researchers to this field of study, the AEPDIRI is pleased to make this call for papers.

While under public international law states cannot exercise their sovereign rights in the territory of another state without the concurrence of its consent, there are some areas of law in which this principle may experience exceptions or modulations. These are areas that show the complexity of this issue both in theory and in practice. Among the possible topics of research the following can be mentioned:

1. *Law of Treaties*: Despite the general principle of treaties' being binding on the territory of each contracting party, there are cases where these instruments may have application beyond that scope for various reasons such as containing provisions concerning third States, regulating an area beyond national jurisdiction, or because it is a human rights convention.

2. *Compulsory enforcement of International law*: In this framework it could fit both claw-back clauses adopted by other countries and sanctions.

3. *Competition law and its extraterritorial effect*: Reference could be made here to tensions with other jurisdictions such as those arising from extraterritorial application of US antitrust law and the corresponding European reactions, the conduct and effects tests, and so on.

4. *Data protection and intellectual property law*: Possible topics could be protection of intellectual property on the Internet, telecommunications and broadcasting, Internet communications and sale of private data, the role of state intelligence agencies in monitoring the activities of citizens, duties of carriers with particular reference to the agreement between the United States and the European Union on data registries on names of passengers (PNR), and so on.

5. *Environmental Law*: marine and air pollution caused by ships, protection of endangered species, illegal fishing, trading systems of emission rights, protecting the environment and tort law.

All those interested in presenting a paper on any of the items listed or other related issue should send their proposal by April 1, 2015. The proposal must contain, in addition to a title, a 5-line abstract and a 1-2 pages excerpt in word format. Proposals dealing with public international law and international relations issues should be sent to Professor Montserrat Abad Castelos (mabad@der-pu.uc3m.es) and those on private international law issues to Professor Laura Carballo Piñeiro (laura.carballo@usc.es). A CV and a letter of recommendation must be attached as well.

Presentations can be made in Spanish or English and the papers will be published in either language in a book. The publishing house will be announced in due time.

The organization will be responsible for the costs of selected candidates' participation in the Conference, always within the limits of the allocated budget.

Which Court is Competent for Prospectus Liability Cases? The CJEU Rules in Kolassa (Case C-375/13)

by *Matthias Lehmann*, University of Bonn

On 28 January 2015, the CJEU has decided for the first time on the question of jurisdiction over alleged liability for a wrong prospectus. The Kolassa judgment is of paramount importance for the future handling of investor claims. In a nutshell, the CJEU holds that the court at the place where the investor is domiciled and has its damaged bank account is competent to decide on the claim under Art 5(3)

Brussels I Regulation (now Art 7(2) Brussels Ia Regulation).

The Facts (as Easy as Possible)

The case concerned an Austrian investor who had bought a certificate from an investment firm in Austria. The certificate had been issued by Barclays UK, which had also distributed an accompanying prospectus, inter alia in Austria. After the value of the certificate had been wiped out completely, the investor brought a claim against Barclays before an Austrian court, alleging that Barclays' prospectus would not have given correct information regarding the way in which the money was to be invested. The Austrian court questioned whether it had jurisdiction to hear the case and submitted a reference for a preliminary ruling.

The Decision (in a Bit more Detail)

The CJEU first rejects to consider prospectus liability as a matter relating to a consumer contract under Art 15 Brussels I Regulation (now Art 17 Brussels Ia Regulation). The Court also rules out a characterization as a contract matter under Art 5(1) Brussels I Regulation (now Art 7(1) Brussels Ia Regulation). This is understandable as the issuer arguably has not freely assumed an obligation towards the investors, at least not with regard to the accurateness of the content of the prospectus. It is astounding, however, that the CJEU refuses a final qualification and asks the Member State tribunal to verify whether there is a contractual obligation or not. The judgment does not provide any guidance on the criteria the national tribunal should use in making such a determination. This is rather unfortunate, given that the term 'contract' must be given an EU autonomous meaning.

In principle, the Court accepts the proposition that prospectus liability is a matter relating to a tort, delict or quasi-delict in the sense of Art 5(3) Brussels I Regulation (now Art 7(2) Brussels Ia Regulation). Using its twin approach to localise the harmful event (see *Mines de potasse*, Case 21/76, aka as "*Bier*"), the Court considers the place of the event giving rise to the damage and the place where the damage occurred.

With regard to the event giving rise to the damage occurred, the CJEU denies that it took place in Austria because all relevant decisions as to the arrangement of the

investments and the content of the prospectus had been taken by Barclays in the UK. The Court also highlights that the prospectus had originally been drafted and distributed there. It follows by implication that the place of the causal event is at the seat of Barclays unless the prospectus has originally been drafted and distributed elsewhere.

The most important and interesting part of the judgment concerns the localisation of damage. The CJEU first reminds of its judgment in Kronhofer (C-168/02), where it had ruled out the domicile of the investor *as such* as the place of financial damage. It goes on to say, however, that the courts in the country of the investor's domicile have jurisdiction 'in particular when the loss occurred itself directly in the applicant's bank account held with a bank established in the area of jurisdiction of those courts' (margin no 55).

This reference to the place of the establishment of the bank that manages the damaged account is remarkable. It coincides with what has been said earlier about the location of economic loss (see Lehmann, (2011) 7 Journal of Private International Law 527). One may wonder, though, why the CJEU also refers to the domicile of the investor. Does the Court want to suggest that it plays a role in determining the place of damage? This would be rather surprising. Perhaps the explanation lies in the way the submitting tribunal had framed the preliminary question, which focused entirely on the question whether the investor's domicile can be a basis of jurisdiction. The best way to read the Court's answer is probably that the damage arises at the domicile *only* under the condition that the investor's bank account is located there. Regrettably, the judgment still leaves room for speculation which court would be competent if the bank account from which the investor paid for the securities were located outside his domicile.

Particularly noteworthy are the criteria that the judgment does not mention. The Advocate General had suggested to consider the place of publication of the prospectus as an 'indicator' for where the harmful event occurred (see Conclusions by GA Szpunar of 3 September 2014, para 64 et seq). Similarly, many authors have proposed to look at the market on which the securities have been offered. The CJEU does not even discuss these views. One must understand its silence as rejection.

Furthermore, the judgment may have far reaching implications for conflict of laws. As is well known, Art 4(1) Rome II Regulation uses the same criterion of the

‘place where the damage occurred’ that is the second prong of the tort jurisdiction under Art 5(3) Brussels I Regulation (now Art 7(2) Brussels Ia Regulation) in order to determine the applicable tort law. If parallel interpretation still is a goal and Recital 7 of the Rome II Regulation should not be devoid of all meaning, then it seems that the Kolassa ruling must be followed in the area of conflict of laws as well. Yet this would cause a complete dispersal of the law applicable to prospectus liability. An issuer would potentially be liable under the laws of all countries of the world in which investors are domiciled and have bank accounts. Whether and to what extent this result can be avoided by using the escape clause in Art 4(3) Rome II Regulation is doubtful. The better way seems to introduce a special conflicts rule for financial torts (on this issue, see Lehmann, *Revue critique de droit international privé* 2011, 485).

For Those Not Interested in Financial Law

The Court also rules on a point that is of general interest outside the special area of prospectus liability: To which extent does a court have to take evidence in order to determine its jurisdiction? The answer given by the CJEU is somewhat sibylline. On the one hand, it rules that the tribunal seised does not have to enter into a comprehensive taking of evidence at this early stage of the procedure and may ‘regard as established … the applicant’s assertions’ (paras 62 and 63). At the same time, it requires the national tribunal to examine its international jurisdiction ‘in the light of all the information available to it, including, where appropriate, the defendant’s allegations’ (para 64). Can somebody make sense of this, please?

Cross-border Insolvency Proceedings (ERA/INSOL

Conference)

The conference, taking place in Trier in March, 19-20, intends to provide an in-depth analysis of the renewed EU Insolvency Regulation 2015 which will replace the former Insolvency Regulation No 1346/2000.

Key topics

• Scope of the Regulation and definition of “insolvency”

• Concept of COMI

• Relationship between main and territorial proceedings

• Coordination and communication

• Related actions and interplay with Brussels I

• Cross-border security and rights in rem

• Insolvency of groups of enterprises

Who should attend?

Lawyers practising in the field of insolvency law, judges, insolvency administrators, ministry officials, policy-makers, academics.

Speakers

Professor Avv Stefania Bariatti, University of Milan; Of Counsel, Chiomenti Studio Legale,Milan

Professor Gerald Mäsch, University of Münster

Dr Rimvydas Norkus, Judge at the Supreme Court of Lithuania; Lecturer at Mykolas Romeris University, Vilnius

Professor Christoph Paulus, Research Center Institute for Interdisciplinary Restructuring, Humboldt University, Berlin

Dr Bernard Santen, Senior Researcher, Leiden Law School

Pál Szirányi, Legal Officer, Civil Justice Policy, DG Justice, European Commission, Brussels

Jean-Luc Vallens, Judge, Associate Professor, University of Strasbourg

Robert van Galen, Partner, Chairman of the Restructuring & Insolvency Team, NautaDutilh, Amsterdam

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Is the Shevill Doctrine Still Up to Date? Some Further Thoughts on CJEU's Judgment in Hejduk (C-441/13)

By Kristina Sirakova. Kristina is currently a research fellow at the MPI Luxembourg. In this post she takes up again the CJEU's Hejduk *case and provides her (to my mind, quite interesting) insights into the outcome.*

After Jonas Steinle commented on the judgment from a wider perspective, the CJEU's *Hejduk* case is to be addressed with regard to its ambiguous outcome. On the one hand, the CJEU blindly follows its controversial decision in *Pinckney* (C-170/12) missing the opportunity to relativize it. On the other hand, the fact that the Court does not adopt a restrictive interpretation of Article 5 (3) of the Brussels I Regulation as proposed by AG Cruz Villalón is to be welcomed.

In his Opinion of 11 September 2014, AG Cruz Villalón very precisely elaborated

the core question that arises in the case at hand: How does *Hejduk* fit into the scheme of *eDate Advertising & Martinez* (C-509/09 and C-161/10), *Wintersteiger* (C-523/10) and *Pinckney* (para. 21 of the Opinion)? According to the AG, none of the three criteria – the center of the alleged victim's interests, the direction of the website to a specific Member State and the principle of territoriality – should be applied. Therefore, he rather proposed to restrict the scope of Article 5 (3) of the Brussels I Regulation to the place where the tort was committed.

This would be very often the place where the infringer/defendant is established. Therefore, whether jurisdiction is based on Article 5 (3) or Article 2 (1) of the Brussels I Regulation would most likely be irrelevant. This result contradicts the ratio of Article 5 (3) which aims at guaranteeing a jurisdictional balance. The restrictive approach effectively creates a risk that the provision could be deprived of its substance in those cases as the claimant would be entitled to bring his action only before the court at the place of the infringer's seat irrespective of where the damage occurred.

Fortunately, the Court decided not to follow the restrictive approach. Instead, it applied the principle of territoriality which has already been the key criterion in *Wintersteiger* with regard to a national trade mark and in *Pinckney* concerning copyrights. It should be noted, however, that the principle of territoriality also bears some risks (see Opinion of AG Cruz Villalón in *Hejduk*, paras. 33-40; Opinion of AG Jääskinen in *Coty Germany* (C-360/12), para. 68; *Husovec*, IIC 2014, 370). Especially when the mere access to the website is sufficient to establish jurisdiction this opens up the floodgate for forum shopping. The only limitation set by the CJEU – as Jonas Steinle correctly points out in his post – is the mosaic principle created in *Shevill* (C-98/93).

The mosaic principle has been developed twenty years ago for an offline infringement of personality rights where the harm caused in each Member State could be easily quantified. However, this is not the case with infringements of rights committed via the internet. Here, the application of the mosaic principle causes more practical problems than it solves, therefore it might be worth reconsidering it.

There is thus a need for a criterion limiting the EU-wide jurisdiction which the CJEU created in *Pinckney* and now in *Hejduk*. The answer might be *eDate Advertising & Martinez* (as suggested by Professor Burkhard Hess in his speech

‘The CJEU’s Decision in eDate Advertising and Its Implementation by National Courts’ at the Conference on ‘The Protection of Privacy in the Aftermath of the Recent Judgments of the CJEU – eDate Advertising, Digital Rights Ireland and Google Spain’ hosted at the Max Planck Institute Luxembourg on 29 September 2014, the proceedings of which will be published shortly).

Admittedly, the center of the alleged victim’s interests has also been developed for an infringement of personality rights which, however, occurred in a case of an online infringement. Furthermore, it has to be stressed that personality rights and copyrights share many similarities. They are both ubiquitous rights, the nature of which is inextricably linked to the person itself and are protected in every Member State without the need for registration.

The main advantage of that approach would be, besides creating a balance between a too restrictive and a too extensive interpretation of Article 5 (3) of the Brussels I Regulation/ Article 7 (2) of the Recast, that the claimant would be able to claim the whole damage at one place and would not be forced to initiate various proceedings in order to receive compensation for the same infringement which is almost impossible to be quantified.