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ity's decision to grant or refuse registration of a given trade mark.

64. As to whether it is necessary, when distinctive character is assessed under Article 3(1)(b) of the Directive, to undertake administrative investigations to determine whether and to what extent similar trade marks have been registered in other Member States, it need merely be borne in mind that the fact that a trade mark has been registered in one Member State for certain goods or services can have no bearing on the examination by the competent trade mark registration authority of another Member State of the distinctive character of a similar mark for goods or services similar to those in respect of which the first trade mark was registered.[13]

65. The answer to the third question must therefore be that the distinctive character of a trade mark within the meaning of Article 3(1)(b) of the Directive may be assessed solely on the basis of national trade usage, without any need for other administrative investigations to be undertaken in order to determine whether and to what extent identical trade marks have been registered or have been refused registration in other Member States of the European Union.

The fact that an identical trade mark has been registered in one Member State as a mark for identical goods or services may be taken into consideration by the competent authority of another Member State among all the circumstances which that authority must take into account in assessing the distinctive character of a trade mark, but it is not decisive regarding the latter's decision to grant or refuse registration of a trade mark.

On the other hand, the fact that a trade mark has been registered in one Member State for certain goods or services can have no bearing on the examination by the competent trade mark registration authority of another Member State of the distinctive character of a similar trade mark for goods or services similar to those for which the first trade mark was registered. (...)"

[13] ECJ 12 February 2004 – C-363/99 – *KPN* [2004] ECR I-0000, para. 44.

INTERNATIONAL AND EUROPEAN PROCEDURAL LAW

European Tort Jurisdiction and Pure Economic Loss
Comment on the ECJ decision of 10 June 2004, *Kronhofer/Maier et al.*[*]

Felix Blobel, LL.M.[**]

Aggrieved investors in the European law of civil procedure

The decision of the ECJ in the case of *Kronhofer/Maier et al.* concerns a scenario that is not altogether rare in the field of cross-border private investment.[1] A private investor loses monies, in part or in full, which he had placed with an asset management company, a brokerage firm etc. in another country which subsequently becomes insolvent. The investor therefore feels impelled to hold the firm's executives, employees, financial advisors etc. liable for the losses that he has suffered because of the alleged breach of fiduciary duties, excessive fees, or, as in the present case, false representations regarding the risks involved with the investment. Apart from the practical and substantive law problems that such an action for direct liability entails, the investor is also in an unfortunate position as regards the question of jurisdiction. An immediate contractual relationship exists only *vis-à-vis* the foreign – here: German – investment firm. This will often constitute a consumer contract within the meaning of Article 13(1)(3) of the Brussels Convention[2], since asset management, brokerage and related activities amount to a "supply of services".[3] *A fortiori*, such cases will henceforth be covered by Article 15(1)(c) of the Brussels I Regulation, the scope of which extends beyond that of Article 13 of the Convention, since it is no longer limited to contracts for sales of goods and services.[4] If the further requirements of Article 15 of the Brussels I Regulation are also met,[5] the investor can avail himself of the jurisdiction

[*] ECJ 10 June 2004 – C-168/02 – *Kronhofer*, reprinted in this issue at 191.

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[1] For a case with practically identical facts, see OLG Stuttgart (D) 6 July 1998, NJW-RR 1999, 138 = RIW 1998, 809; another similar case is HansOLG Bremen (D) 21 November 1997, IPRax 2000, 226.

[2] The Brussels Convention was, as of 1 March 2002, transformed into the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, at 1) (Brussels I Regulation) for all EU states except Denmark. The changes made in the course of this transition are of no relevance for the problems presently under discussion.

[3] See *Kropholler*, Europäisches Zivilprozeßrecht, 7th ed., Heidelberg (D), 2002, Article 5, para. 37; *Reithmann/Martiny-Martiny*, Internationales Vertragsrecht, 5th ed., Cologne (D), 1996, para. 720 (on the choice-of-law provision in Article 29 of the Introductory Act to the German Civil Code [*EGBGB*], which is to be given a parallel interpretation). The ECJ left a question referred to it on this point unanswered, since Article 13 was not applicable as a whole, ECJ 19 January 1993 – C-89/91 – *Shearson Lehman Hutton*, [1993] ECR I-139, at 189, para. 25. AG *Darmon* assumed that the contracts in question were within the material scope of Article 13, opinion delivered on 27 October 1992, [1993] ECR I-164, at 175, para. 79.

[4] See *Rauscher/A. Staudinger*, Europäisches Zivilprozeßrecht, Munich (D), 2004, Article 15 Brussels I Regulation, paras 7 *et seq*.

[5] In this regard all depends, of course, on the concrete circumstances of

of the courts at his domicile according to Article 16(1) for a contractual action for damages.[6] Together with the insolvent investment firm, however, this jurisdictional privilege also vanishes. There is normally no contractual connection between the investor and the private parties presumably responsible for the loss, which could provide the claimant with a domestic forum. According to the principle of *actor sequitur forum rei*, laid down in Article 2 of the Brussels Convention/Brussels I Regulation, the investor seeking compensation must therefore sue the persons he is seeking to hold liable at their respective domiciles. As the present decision by the ECJ illustrates, the *forum delicti commissi* in Article 5(3) of the Brussels Convention/Brussels I Regulation is generally not an appropriate means for founding jurisdiction at the domicile of the claimant in such cases.[7]

The *forum delicti commissi* in the jurisprudence of the ECJ

The ECJ has had to deal with the *forum delicti commissi* in Article 5(3) early on in its jurisprudence on the Brussels Convention. In the "Rhine pollution case" *Bier/Mines de Potasse* the Court held, as is well known, that in the case of so-called cross-border torts the expression "place where the harmful event occurred" refers both to the place of the event giving rise to the damage (place of acting), and the place, where the injury is sustained (place of injury), thus granting the claimant a choice of jurisdiction between the two places.[8] The determination of the *locus delicti* under Article 5(3) is therefore governed by an autonomous concept.[9] The ubiquitous jurisdiction at the place of acting and at the place of injury is based on reasons relating to the sound administration of justice and the efficacious conduct of proceedings.[10] Both places can exhibit a particularly close connection with the respective dispute which justifies a deviation from the basic principle of general jurisdiction at the domicile of the defendant (Article 2).[11] In further cases, subsequent to the decision in *Bier*, the ECJ was anxious to constrain the jurisdiction of the courts at the place of injury under Article 5(3) in order to prevent Article 2 from being undermined. Accordingly, jurisdiction at the place of injury is only available to the person directly sustaining the damage and not to someone only indirectly effected by a tortious act.[12] Neither does Article 5(3) confer jurisdiction on the courts of the place where the claimant, after having sustained the initial injury in another Contracting State, suffers further economic damage.[13] Lastly, where the victim suffers several damages in different Contracting States caused by one and the same act – namely in the case of defamations committed via the print media – jurisdiction under Article 5(3) at the various places of injury is limited to the extent of claims for compensation relating to the injury in each particular State.[14] As recognised correctly by the referring OGH,[15] the ECJ had not yet directly dealt with the situation where the claimant asserts that a tortious act committed in another Contracting State, having caused damage there, has also directly resulted in a damage to the same extent to his assets situated at his domicile, thus founding jurisdiction of the courts there under Article 5(3). The question referred, which ultimately sprang from the claimant's jurisdictional hardship described above, accordingly presented the ECJ with an opportunity to further refine its approach of determining the place of the harmful event; at the same time, it touches upon the problem of applying the *loci delicti commissi* principle to cases of pure economic loss.

The decision of the ECJ in *Kronhofer*

The remarkable brevity of the judgment illustrates that the ECJ does not have any serious doubt that the question referred to it had to be answered in the negative.[16] The ECJ characterises the case before it correctly as one where both the place of acting and the place of injury are located in one Con-

the individual case. Where an investor, as in the case presently under discussion, is induced to make an investment via telephone, the other party's commercial or professional activity can be seen as "directed" at the Member State of the consumer's domicile within the meaning of Article 15(1)(c), 2nd alternative, unless the consumer was approached with a one-off and individual offer; see *Schlosser*, EU-Zivilprozessrecht, 2nd ed., Munich (D), 2003, Article 15 Brussels I Regulation, para. 8a.

6 The consumer jurisdiction is not available for actions sounding in tort; see *Rauscher/A. Staudinger* (*supra* note 4), Vorbem Article 15-17 Brussels I Regulation, para. 4 with further references. The decision of the ECJ of 17 September 2002 – C-334/00 – *Tacconi*, ECR 2002 I-7357 does not stand in the way of a contractual classification of claims based on pre-contractual liability, at least when a contract was ultimately concluded, see *Rauscher/Leible* (*supra* note 4), Article 5 Brussels I Regulation, para. 27.

7 The claimant's assertions based on Article 5(3) were unsuccessful in the two lower courts preceding the reference to the ECJ by the Austrian Supreme Court (*Oberster Gerichtshof, OGH*). The *Landesgericht* Feldkirch as the court of first instance seised with the matter, did not even find Article 5(3) to be applicable, since it classified the claims as contractual and not delictual in nature; see AG *Léger*, para. 11 of the opinion delivered on 15 January 2004 in *Kronhofer*.

8 ECJ 30 November 1976 – 21/76 – *Bier*, [1976] ECR 1976, 1735; confirmed recently in ECJ 5 February 2004 – C-18/02 – *DFDS Torline* = [2004] EuLF 2004 (E) 37, at 40, para. 40.

9 In autonomous German law, however, tort jurisdiction under § 32 of the Code of Civil Procedure (*Zivilprozessordnung, ZPO*) is handled accordingly; see *Kropholler*, in: Handbuch des Internationalen Zivilverfahrensrechts, vol. I, Tübingen (D), 1982, Ch. III, para. 376.

10 ECJ 27 October 1998 – C-51/97 – *Réunion européenne*, [1998] ECR I-6511, at 6544, para. 27 with further references.

11 On the *ratio legis* of the *forum delicti commissi* see also *Geimer*, Internationales Zivilprozeßrecht, 4th ed., Cologne (D), 2001, para. 1497.

12 ECJ 11 January 1990 – C-220/88 – *Dumez France*, [1990] ECR I-49, at 80, paras 20 *et seq*.

13 ECJ 19 September 1995 – C-364/93 – *Marinari*, [1995] ECR I-2719, at 2739, para. 14. For national caselaw, see, *e.g.*, BGH (D) 3 May 1977, NJW 1977, 1590 (on § 32 ZPO); Hoge Raad (NL) 7 December 2001, Nederlands juristenblad 2002, 37; OGH (A) 24 February 1998, JBl. 1998, 517. Also, following *Marinari*, the Italian Court of Cassation has abandoned its earlier extensive handling of tort jurisdiction, see *Davì*, IPRax 1999, 484, at 485 *et seq*.

14 ECJ 7 March 1995 – C-68/93 – *Shevill*, [1995] ECR I-415, at 462, paras 30 *et seq*. Compensation for the entire damage can only be claimed at the place of acting, which, however, usually coincides with the seat or domicile of the tortfeasor. On the transferability of this concept to other so-called multi-state torts, see *Kropholler* (*supra* note 3), Article 5, para. 76; *Rauscher/Leible* (*supra* note 4), Article 5 Brussels I Regulation, paras 91 *et seq*.

15 Reference for a preliminary ruling of 9 April 2002, EWS 2002, 448 = JBl. 2002, 664 = ZfRV 2002, 232 (LS no. 2002/56) = International Litigation Procedure (I. L. Pr.) 2003, 242.

16 The practice of the ECJ, "to give only very curt answers, tailored to particular segments of the concrete case" is criticised by *Geimer*, JZ 1995, 1108.

tracting State (Germany). This statement rests on the implied assumption that only the claimant's assets in Germany can be relevant for the determination of the place of the immediate damage. Under these circumstances, the ECJ asserts, it is not required to confer jurisdiction under Article 5(3) to the courts of the place where the claimant's total assets are concentrated. This would run counter to the postulate of legal certainty and foreseeability, since jurisdiction would depend on uncertain factors, such as the concentration of the claimant's assets. It may be doubted, however, whether the determination of the centre of the claimant's estate really entails such great difficulties and uncertainties, since this place usually coincides with the domicile or habitual residence of the claimant. This also appears to be the view of the ECJ, for it goes on to state that affording jurisdictional relevance to the place where the claimant's assets are concentrated would in most cases found jurisdiction at the claimant's domicile, to which the Brussels Convention – the same holds true for the Brussels I Regulation – is generally hostile.[17]

One can concur, however, in the outcome of the ECJ's decision. The acceptance of a general jurisdiction at the place where the claimant's assets are concentrated would let the *forum delicti commissi* get out of hand and constitute a violation of the system of the Brussels Convention/Brussels I Regulation. The ECJ has rightly made an effort to not unduly expand those jurisdictional bases that favour certain groups of litigants deemed to require special protection (*e.g.* consumers and maintenance creditors) to the detriment of the general jurisdiction at the domicile of the defendant (Article 2).[18] In the context of Article 5(3), an interpretation is all the more to be avoided that would not be in line with the underlying rationale of the provision and that would inevitably lead to a claimant's forum. The *forum delicti commissi* does not aim at affording specific privileges to particular groups of claimants.[19] Rather, on the assumption that tort jurisdiction at the place of the harmful event – understood alternatively as the place of acting and the place of injury – is at least in part justified by the proximity of the court as to facts and evidence in relation to the allegedly tortious acts in question,[20] nothing militates in favour of granting jurisdiction to the place where the whole assets of the claimant are located in a case like the one presently under discussion.[21] The misrepresentations alleged by the claimant all occurred in Germany, or, respectively, were transmitted from Germany via telephone, the investment account was kept in Germany and the monies were ultimately lost there. The courts at the claimant's Austrian domicile, on the other hand, are in no way particularly closely connected to the events underlying the dispute.

Greater significance than on the factual proximity of the court seised with the action is, at least in cases of cross-border torts,[22] usually placed on the aspect of exceptionally granting a jurisdictional privilege to the victimised claimant.[23] This consideration, however, does not call for a domestic forum for the claimant's action, either. From the perspective of granting protection to the victim, jurisdiction at the place of injury can be justified because the injured party ought to have a right to bring his claim where he exposes his assets to the potentially detrimental influence of others.[24] Where the victim voluntarily transfers parts of his assets abroad, as in the case of *Kronhofer*, he can reasonably expect to be able to bring suit at the place where those assets are located should they be wrongfully interfered with. He cannot expect, however, to also be able to bring his case in the courts at his domicile or any other place where his remaining assets or their "centre" is situated. In this respect, the line of reasoning put forward by the claimant, that the loss of part of his assets abroad had, in a sense, immediately and to an identical extent effected the entirety of his assets at his domicile, does not seem sustainable. In this way, a direct damage at the place where the claimant's assets are concentrated could be constructed in every case, *i.e.* whenever damage occurs to some particular asset abroad. It might well be said that when a corporeal object located abroad is damaged, the total assets of the claimant are at the same instant diminished by the value of the thing. This, however, would lead straight into a claimants' forum that Article 5(3) was not intended to create.[25]

These lines of reasoning appear to be behind the decision of the ECJ, yet they are not expressed with the desirable clarity. To justify the result of its legal analysis, the ECJ rather refers to the decision in *Marinari*[26] as evidence for the proposition that jurisdiction under Article 5(3) does not cover "any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere."[27] Thereby, however, the ECJ disregards the distinction between the two categories of cases, which was established carefully by the OGH in its reference for a preliminary ruling.[28] In *Marinari*, the Italian domiciled claimant had initially suffered an injury

17 *Kronhofer*, reprinted in this issue at 191, paras 18, 20.

18 See ECJ 15 January 2004 – C-433/-1 – *Blijdenstein* = [2004] EuLF (E) 42, 43 *et seq*. paras 25 *et seq*; *Shearson Lehman Hutton* (*supra* note 3), paras 14 *et seq*.

19 See AG *Léger*, para. 34 of the opinion delivered on 15 January 2004 in *Kronhofer*. To this extent, the situation is the same as regards Article 5(1), on this see *Mankowski*, EWiR 2004, 379, at 380.

20 See *Kropholler* (*supra* note 9), para. 376; *Kiethe*, NJW 1994, 222, 224. The legal proximity of the court seised, on the other hand, is of no particular relevance, since Article 5(3) does not operate on the assumption of a synchronism (*Gleichlauf*) between the forum and the applicable law; see *Geimer* (*supra* note 11), para. 1498.

21 See also *Davì*, IPRax 1999, 484, at 487.

22 Strictly speaking, of course, the present case does not, in the view of the ECJ, concern a cross-border tort, since both the place of acting and the place of injury are located in Germany and only the domicile of the claimant – which as such is irrelevant in the context of Article 5(3) – is in another Contracting State.

23 *Weller*, IPRax 2000, 202, at 207; *Geimer* (*supra* note 11), para. 1497, *Ahrens*, IPRax 1990, 128, at 131.

24 See the often quoted dictum by *Schröder*, Internationale Zuständigkeit, Opladen (D), 1971, at 269: "Where a wrong has been done, redress may be sought."

25 See *Schack*, Internationales Zivilverfahrensrecht, 3rd ed., Munich (D), 2002, para. 304. *Zöller/Geimer*, ZPO, 23rd ed., Cologne (D), 2002, § 32, para. 27, points out that jurisdiction under Article 5(3) was not based on a "'money pocket rule' (damage was suffered in my pocket)".

26 *Marinari* (*supra* note 13).

27 *Kronhofer*, reprinted in this issue at 191, para. 19.

28 OGH (A) 9 April 2002, I. L. Pr. 2003, 242, at 247 *et seq*. The distinction was also made by AG *Léger*, paras 38 *et seq*. of the opinion delivered on 15 January 2004 in *Kronhofer*.

when promissory notes in his possession were seised and he was temporarily arrested in London. Both the acts relevant for determining the *loci delicti commissi* (the seizure of the notes and the arrest) and the resulting injury (temporary imprisonment and loss of the notes) were therefore located in England. To this extent, there is concurrence with the present case, since also in *Kronhofer* the acts and the relevant place of injury (loss of the investment) were geographically coincident. The claimant in *Mariniari*, however, also tried – unsuccessfully – to avail himself of a further forum under Article 5(3) in Italy by arguing that, as a consequence of the events in England and the damage done to his reputation, various contracts had been terminated which had resulted in – further – economic losses there.[29] Such an extension of the tort jurisdiction is clearly not covered by the ratio of Article 5(3).[30] *Kronhofer*, however, does not concern this distinct problem of primary and consequential damage. Were this the case, the question referred would, strictly speaking, in light of the decision in *Marinari*, present an *acte clair*. Yet the particularity of the present case was that the claimant asserted automatic and simultaneous damage to the entirety of his assets in Austria caused by the partial loss of his investment, which was undisputedly located abroad. This line of argument can be refuted more convincingly than by a mere reference to the distinction between primary and consequential damage, as established in *Marinari*,[31] by a consistent application of the rationales behind the *loci delicti commissi* and the proposition that also in cases of pure economic loss, the determining factor under Article 5(3) is the location of those assets that are concretely effected.

Consequences for the determination of the place of injury in cases of pure economic loss

The decision by the ECJ does not answer in principle the wider question of the determination and, indeed, the relevance of the place of injury in cases of pure economic loss caused by a tortious act. This question arises when tort claims are at stake which do not depend on the violation of an absolute right, but rather aim to protect the claimant's assets as a whole. In German law, *e.g.*, this concerns claims arising under § 826 BGB or § 823 BGB in conjunction with a protective law (*Schutzgesetz*). Here, unlike in the case of mere indirect damage, the place of injury and the place of damage coincide; there is no intermediate "primary" violation of an absolute right of the victim preceding and distinct from the economic loss.[32] The determination of the place of injury, at which the claimant's assets are initially and directly effected, is faced with the difficulty that the location of the entirety of one's assets is, at times, less clear and unequivocal than is the case with other rights – for example, tangible property of the victim.[33] The claimant's assets might be spread out or deliberately dispersed over various countries, thereby increasing incentives for *forum shopping*, which the European law of civil procedure is seeking to avoid whenever possible. Some demand therefore to do without a forum at the place of injury in cases of pure economic loss and limit jurisdiction under Article 5(3) to the place of acting.[34] The prevailing view, on the other hand, transfers the principle of ubiquity under Article 5(3) of the Brussels Convention/Brussels I Regulation, as crafted by the ECJ in *Bier*, also to cases of pure economic loss and grants jurisdiction to the place of the damaged estate.[35] The decision of the ECJ in *Kronhofer* does not appear to rule out this approach.[36] The way in which the Court phrased its answer to the questions referred, stating that Article 5(3) would not confer jurisdiction on the courts at the claimant's domicile "by reason only of the fact" that the claimant has suffered financial damage there resulting from a partial loss of his assets in another Contracting State, does not preclude the location of assets from having jurisdictional relevance in the context of Article 5(3). The only generalisation that can be deduced from the ECJ's finding that monies invested abroad cannot found jurisdiction at the domicile of the claimant,[37] is that whenever a clearly-defined portion of the claimant's assets at a place other than his domicile is effected by the allegedly tortious acts, the place of injury can only be located where those particular assets are, to the exclusion of a general recourse to the place where the total assets of the claimant are concentrated.[38]

Other cases are, however, conceivable, where the entire assets of the claimant are effected from the outset, *e.g.*, if a claim is brought into being against him through a fraudulent act committed abroad. It does not follow from the present decision of the ECJ that in such cases, jurisdiction under Article 5(3) should not be conferred on the courts at the domicile or, respectively, the place where the claimant's assets are concentrated as the place of injury. Such an interpretation also appears to be in compliance with the governing principle of the ECJ's jurisprudence, *i.e.* to limit the place of injury to those places where the direct and primary damage is sustained by

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29 *Marinari* (*supra* note 13), para. 4.

30 See *Hartley*, [1996] ELR 164, at 165.

31 In an empirical study, *Dederichs*, EuR 2004, 345, at 347 *et seq*., identifies "references to earlier decisions" as the most frequently used form of argument in the jurisprudence of the ECJ.

32 See *Kiethe*, NJW 1994, 222, at 225.

33 See *Schönberger*, Das Tatortprinzip und seine Auflockerung im deutschen internationalen Deliktsrecht, Munich (D), 1990, at 53; *Koch*, IPRax 2000, 186, at 187.

34 To this effect see *Schack* (*supra* note 25), para. 305.

35 See *Stein/Jonas/H. Roth*, ZPO, 22nd ed., Tübingen (D), 2003, § 32 ZPO, para. 30; *Ahrens*, IPRax 1990, 128, at 132; *Kropholler* (*supra* note 3), Article 5, para. 66; *Kiethe*, NJW 1994, 222, at 223, 225 *et seq*.; *Bülow/Böckstiegel/Auer*, Internationaler Rechtsverkehr in Zivil- und Handelssachen, vol. II, Munich (D), loose-leaf (as of January 2003), Article 5 Brussels Convention, para. 113; *Rauscher/Leible* (*supra* note 4), Article 5 Brussels I Regulation, para. 86 with further references; LG Baden-Baden (D) 29 November 1991, FamRZ 1992, 557; BGH (D) 28 February 1996, BGHZ 132, 105, at 111; also, for the determination of the applicable law, BGH (D) 28 February 1989, WM 1989, 1047, at 1049; for a categorically different view see *Zöller/Geimer* (*supra* note 25), Article 5 Brussels I Regulation, para. 26.

36 Neither does the decision in *Dumez*, which, as *Kiethe*, NJW 1994, 222, at 225, note 54, points out correctly, merely restricted the jurisdiction at the place of injury to the immediately injured party, without entirely eliminating cases of pure economic loss from the scope of Article 5(3).

37 Already to this effect OLG Stuttgart (D) 6 July 1998 (*supra* note 1); approved by *Rauscher/Leible* (*supra* note 4), Article 5 Brussels I Regulation, para. 86.

38 *Schlosser* (*supra* note 5), Article 5 Brussels I Regulation, para. 19a, also tends towards this view.

the immediately injured party, because an injury thus qualified can, it is submitted, also concern one's assets in their entirety.[39] Moreover, the danger of inappropriate *forum shopping* is not greater *per se* in cases of pure economic loss than the degree already inherent in the ubiquitous concept of the place of wrong under Article 5(3). Determining the place of injury in accordance with the *lex causae* has already been disapproved of by the ECJ in *Marinari*.[40] The risk of making excessive use of the tort jurisdiction based on particular notions of national tort law, therefore, seems to be banished.[41] Further incentives for *forum shopping* by making use of the differences in national choice of law rules for torts[42] will be eliminated if and when the projected "Rome II"-Regulation on the law applicable to non-contractual obligations[43] enters into force.[44]

Conclusion and Outlook

With its decision in *Kronhofer*, the ECJ has added yet another building block to its jurisprudence on constraining tort jurisdiction under Article 5(3) of the Brussels Convention/Brussels I Regulation. The judgment is consistent with the Court's previous efforts directed at eliminating all places other than those where the immediate and initial damage occurs. The ECJ also remains true to the tendency displayed in relation to the other bases of special jurisdiction in Articles 5 *et seq*., to keep the duty of the defendant to appear in courts outside his country of domicile within reasonable and foreseeable limits, in order not to devalue the principle of *favor defensoris* as expressed in Article 2.[45] The solution which the ECJ found for the concrete case before it deserves approval. For the problem of a proper determination of the place of injury in cases of pure economic loss, however, the reasoning by the Court is of little value. In order to clarify the scope of application of Article 5(3) as regards damages for pure economic loss, further references by national courts to Luxembourg and respective statements by the ECJ must be waited for.

39 See *Kiethe*, NJW 1994, 222, 226 *et seq*.; *Schlosser* (*supra* note 5), Article 5 Brussels I Regulation, para. 19a.

40 *Marinari* (*supra* note 13), at 2740 *et seq*., paras 16 *et seq*. Persuasive in this respect also OLG Stuttgart (D) 6 July 1998 (*supra* note 1), 810.

41 See *Kropholler* (*supra* note 3), Article 5, para. 76.

42 See on the previous practice of the Italian courts *Davì*, IPRax 1999, 484, at 488.

43 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II"), COM (2003) 427 final.

44 According to Article 3, para. 1 of the Commission's Proposal (previous note), the country in which "indirect consequences" of the event giving rise to the damage arise is irrelevant for the determination of the applicable law; see the Commission's explanatory memorandum, which refers to the ECJ's decision in *Marinari*; *ibid*., at 12. For an extensive discussion of the choice-of-law analysis in the various categories of cases of pure economic loss see *von Hein*, Das Günstigkeitsprinzip im Internationalen Deliktsrecht, Tübingen (D), 1999, at 343 *et seq*.

45 See the references *supra* at note 18.

ECJ 10 June 2004 – C-168/02 – Rudolf Kronhofer v Marianne Maier, Christian Möller, Wirich Hofius and Zeki Karan

Brussels Convention[1] Article 5(3) – Jurisdiction in matters relating to tort, delict or quasi-delict – Place where the harmful event occurred – Financial loss arising from capital investments in another Contracting State

Article 5(3) of the Brussels Convention must be interpreted as meaning that the expression "place where the harmful event occurred" does not refer to the place where the claimant is domiciled or where "his assets are concentrated" by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

Facts: *Mr Kronhofer brought proceedings against the defendants in the main proceedings before the Landesgericht Feldkirch (Feldkirch Regional Court) (A), seeking to recover damages for financial loss which he claims to have suffered as a result of their wrongful conduct. The defendants in the main proceedings persuaded him, by telephone, to enter into a call option contract relating to shares. However, they failed to warn him of the risks involved in the transaction. As a result, Mr Kronhofer transferred a total amount of USD 82.500 in November and December 1997 to an investment account with Protectas in Germany which was then used to subscribe for highly speculative call options on the London Stock Exchange. The transaction in question resulted in the loss of part of the sum transferred and Mr Kronhofer was repaid only part of the capital invested by him. The jurisdiction of the Landesgericht Feldkirch was founded on Article 5(3) of the Convention as the court for the place where the harmful event occurred, in this case Mr Kronhofer's domicile.*

When that action was dismissed, Mr Kronhofer appealed to the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court) (A), which declined jurisdiction on the ground that the court of domicile was not "the place where the harmful event occurred", as neither the place where the event which resulted in damage occurred nor the place where the resulting damage was sustained was in Austria. An application for review on a point of law was brought before the Oberster Gerichtshof (A), which took the view that the Court of Justice had not yet ruled on the question whether the expression "the place where the harmful event occurred" is to be so widely interpreted that, in cases of purely financial damage affecting part of the victim's assets invested in another Member

1 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972, L 299, at 32), as amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (OJ, L 304, at 1), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ, L 388, at 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Republic of Portugal (OJ, L 285, at 1), and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ, 1997, C 15, at 1).