

THEMIS 2014

INTERNATIONAL COOPERATION IN CIVIL MATTERS

**DISCOURSE ON THE  
LEGAL PRACTICAL QUESTIONS**

**AUSTRIA 1**

TRAINER:

Barbara Prantl

TEAM MEMBERS:

Kathrin Astner

Veronika Tiefenthaler

Viktoria Tschurtschenthaler

KRAKOW, November 2014

**Regarding the claims of BBB EVENTS GmbH (hereinafter „BBB EVENTS“) against TWL CARS GmbH (hereinafter “TWL CARS”):**

Since TWL CARS never paid BBB EVENTS 30 % of the price agreed, BBB EVENTS will claim TWL CARS on the basis of fulfillment of contract.

Since there is no indication for choice of law (Art. 3 Reg. No 593/2008), Art. 4 [1] b Reg. No 593/2008 is applicable. According to this, the law applicable is determined on the basis of the country where the service provider – in our case BBB EVENTS – has its habitual residence, which is determined according to Art. 19 Reg. No 593/2008. Based on the assumption that the branch situated in Frankfurt, Germany, was responsible for the performance of the contract, the national law applicable is that of Germany (Art. 19 [2] Reg. No 593/2008).

As there are no indications for agreements conferring jurisdiction (Art. 23 Reg. No 44/2001), BBB EVENTS can always sue TWL CARS in Germany as set out in Art. 2 in conjunction with Art. 60 Reg. No 44/2001 (place of general jurisdiction). However, Art. 5 (1) Reg. No 44/2001 indicates special jurisdiction referring to the place of performance, whereby the term “place of performance” needs to be defined autonomously.<sup>1</sup> In the present case, BBB EVENTS was responsible for all organizational aspects of the event, including the logistical, the graphical and the digital. In an overall view it can be said that subject of the contract was the provision of services.<sup>2</sup> According to the second indent of Art. 5 (1) b Reg. No 44/2001 jurisdiction lies in the Member State where the services were provided or should have been provided. Even though preparatory measures may have been performed in Vienna, the promised service was or at least should have been carried out in Berlin.<sup>3</sup> Therefore, jurisdiction of the German courts is given.

**Regarding the claims of BBB EVENTS against KONTAKT DESIGN, SP. Z O.O (hereinafter “KONTAKT DESIGN”):**

In the case that the action of BBB EVENTS against TWL CARS is not successful (see above), the company could seek recourse and sue KONTAKT DESIGN on the basis of breach of contract.

The determination of law applicable and jurisdiction follows exactly the same principles as for

---

<sup>1</sup> ECJ 09.07.2009, C-204/08, Peter Rehder vs. Air Baltic Corporation; ECJ 19.12.2013, C-9/12, Corman-Collins SA vs. La Maison du Whisky SA; ECJ 11.03.2010, C-19/09, Wood Floor Solutions Andreas Domberger GmbH vs. Silva Trade SA.

<sup>2</sup> ECJ 19.12.2013, C-9/12, Corman-Collins SA vs. La Maison du Whisky SA.

<sup>3</sup> According to ECJ 11.03.2010, C-19/09, Wood Floor Solutions Andreas Domberger GmbH vs. Silva Trade SA, the “place of performance” must be understood as the place with the closest linking factor, which, as a general rule, will be at the place of the main provision of services.

the claim against TWL CARS. As the service provider, KONTAKT DESIGN, is situated in Poland, the applicable national law as stated in Art. 4 (1) b Reg. No 593/2008 would be that of Poland.

According to Art. 2 in conjunction with Art. 60 Reg. No 44/2001 general jurisdiction of the Polish courts applies. Based on the assumption that KONTAKT DESIGN creates the layouts in its office in Poland, which means that the place of the main provision of services and with that the special jurisdiction also lies in Poland (second indent of Art. 5 [1] b Reg. No 44/2001).

#### **Regarding the claims of KONTAKT DESIGN against BBB EVENTS:**

Based on the assumption that KONTAKT DESIGN did not receive any payment from BBB EVENTS, the company can sue the latter for fulfillment of contract.

Since KONTAKT DESIGN is the service provider, the applicable law is that of Poland (Art. 4 [1] b Reg. No 593/2008).

As the parent company's actual seat of administration is located in Vienna, general jurisdiction of the Austrian courts applies (Art. 2 in conjunction with Art. 60 Reg. No 44/2001). However, KONTAKT DESIGN may also file the claim in Poland, where the characteristic performance of the contract is carried out (second indent of Art. 5 [1] b Reg. No 44/2001).

#### **Regarding the claims of KONTAKT DESIGN against TWL CARS:**

Since there is no contract between KONTAKT DESIGN and TWL CARS, there is no possibility to file a claim against TWL CARS on a contractual basis.

#### **Regarding the claims of TWL CARS against BBB EVENTS:**

As TWL CARS withheld payment from BBB EVENTS on the basis of bad choice when subcontracting KONTAKT DESIGN, it can – to put it simple – wait until BBB EVENTS sues it, so it can assert set-off. In this case, TWL CARS would be limited to the amount of the initial claim (30 %). Apart from that, it can of course make a counter-claim. This will be indicated if the amount of damages claimed increases that of the initial claim. In both cases, the basis for these claims would be contractual ("liability for vicarious agents").

In the first case (set-off), the jurisdiction would already be defined (Germany) since the claim would be already pending. According to Art. 17 Reg. No 593/2008 set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted (German).

In the case of a counterclaim, TWL CARS may sue BBB EVENTS in the court in which the original claim is pending (Art. 6 [3] Reg. No 44/2001; Germany). The law applicable depends on the habitual residence of the service provider, which is in the respective case the German branch of BBB EVENTS (Art. 4 [1] b in conjunction with Art. 19 [2] Reg. No 593/2008); this also complies with the close connection to the initial claim (Art. 4 [3] Reg. No 593/2008). Thus, German law has to be applied.

The German law is also applicable in case of an independent claim of TWL CARS against BBB EVENTS. We make the assumption that the branch office of BBB Events in Frankfurt carried out at least the major operations in regard to the organization of the Berlin marathon. Thus, according to the second indent of Art. 5 (1) b Reg. No 44/2001 the claim can be filed in Germany.<sup>4</sup>

#### **Regarding the claims of TWL CARS against KONTAKT DESIGN:**

Since the symbols produced by KONTAKT DESIGN – appealing to violence and being against all principles underlying the event – were not made public, we do not see any reason how the image of TWL CARS could have been damaged. The damage lies rather in the additional costs arising from the necessity of hiring another Design company.

TWL CARS cannot base its claim on a contract with KONTAKT DESIGN. However, the question arises whether the claim may be based on a “contract with protective effort to the benefit of third parties” as it could be argued that the contract between BBB EVENTS and KONTAKT DESIGN has protective effect on TWL CARS. While the ECJ hasn’t taken a clear stand yet, the predominant opinion in legal science<sup>5</sup> is that contracts with protective effort to the benefit of third parties fall within tort liability. Law applicable is therefore to be determined according to Art. 4 (1) Reg. No 864/2007. Thus, as the damage occurred in Germany, the applicable national law is that of Germany (Art. 4 [1] Reg. No 864/2007). Place of general jurisdiction is Poland (Art. 2 in conjunction with Art. 60 Reg. No 44/2001). However, according to Art. 5 (3) Reg. No 44/2001 the claim could also be filed in Germany.

#### **Regarding the claims of SCHWEIZGRAPH GmbH (hereinafter “SCHWEIZGRAPH”):**

---

<sup>4</sup> It has to be noted that if the assumption was made that the BBB EVENTS Frankfurt branch signed the contract with TWL CARS in the name for its parent company, the claim could be filed in Germany because of Art. 5 (5) Reg. 44/2001: According to this, a person can be sued in the courts for the place in which the branch is situated, if the dispute arises out of the “operations” of this branch. See in this regard ECJ 22.11.1978, 33/78, Somafer SA vs. Saar-Ferngas AG, according to which the concept of “operations” comprises of actions relating to undertakings which have been entered into at the place of the branch in the name of the parent body and which must be performed in the contracting state where the place of business is established.

<sup>5</sup> *Karner, Zur Haftung von Rating-Agenturen, ÖBA 2010, 587.*

KONTAKT DESIGN contracted with SCHWEIZGRAPH the execution of the printing job. KONTAKT DESIGN did not pay the printing jobs performed by SCHWEIZGRAPH, inspite of the many insistences from this company. Thus, SCHWEIZGRAPH can assert claims for breach of contract.

Regarding the applicable law: In accordance with Art. 1 of the UN Sales Convention 1980 (hereinafter „CISG“), SCHWEIZGRAPH and KONTAKT DESIGN have their companies in different states. The critical question is whether the printing activity is considered as a sale of goods. We anticipate that SCHWEIZGRAPH used its own materials for the printing activity; this means according to Art. 3 (1) CISG that its supply is to be considered a sale. However, even if SCHWEIZGRAPH got the materials from KONTAKT DESIGN, Art. 3 (2) extends the applicability of CISG to contracts in which the seller’s obligation include a duty to provide labor or other services, as long as the supply of labor does not constitute the „predominant“ part of the seller’s obligation. When providing prints, the predominant part is not constituted by the manufacturing of the prints itself. Thus, the CISG applies.<sup>6</sup>

In our case, the Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (hereinafter „Lugano Convention“) is applicable as Switzerland and Polen are parties of it. First, based on the given facts it is assumed that the parties did not make an agreement of the place of jurisdiction (Art. 23 Lugano Convention). The international jurisdiction is regulated in its Title II, according to which SCHWEIZGRAPH may file the action against KONTAKT DESIGN in Poland, the state of its domicile (Art. 2). In accordance with the special jurisdiction regulated in Art. 5 (1) a, SCHWEIZGRAPH may also file its action against KONTAKT DESIGN in Switzerland, as the printing job was carried out in Geneva.

#### **Regarding the protective measures against KONTAKT DESIGN:**

TWL CARS applied for protective measures against KONTAKT DESIGN at a Krakow civil court in order to seize its property with a view to grant its future credit for damages compensation. International jurisdiction of Poland is given in accordance with Art. 31 Reg. No 44/2001 (regardless of whether TWL CARS has sued KONTAKT DESIGN in another state deciding on the substance of the matter).

---

<sup>6</sup> UNICITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods, see [www.uncitral.org](http://www.uncitral.org), 04 November 2014.

For the request to take evidence through videoconference of the Polish court to a French court, the „Council Regulation No 1206/2001 on the cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters“ (hereinafter “Reg. No 1206/2001”) according to its Art. 1 a has to be applied. The request itself is in accordance with Art. 10 (4) Reg. No 1206/2001.

In regard to the French authority’s arguments to refuse the taking of evidence under Art. 17 (5) Reg. No 1206/2001:

- a) The fact that the French court only had a videoconference system installed for criminal cases, does not constitute a „reason of major practical difficulties“ under Art. 10 (4) para. 2. Reg. No 1206/2001: There are no grounds that would indicate that the operation of the videoconference system installed for criminal cases is different from the ones of civil cases.
- b) It is a fundamental principle of Reg. No 1206/2001 that the taking of evidence can only be performed on a voluntary basis, without the support of coercive measures (Art. 17 [2]); however, this principle does not constitute any grounds for the French court to refuse the Polish court’s request as there are no indications given that the examination of the witness would be performed on a non-voluntary basis.
- c) The argument of the central French authority that it should be the Polish court to contact the witness and to inform him of the voluntary character of the examination, is not valid: In our case the Polish court made a request to the competent French court; now it would have been for the French court to inform the Polish court of the receipt of the request (Art. 7). Assumed that there would have been no reasons for refusing to execute the request, the Polish court could have informed the French witness about the examination via videoconference.<sup>7</sup> Agreeing with the central French authority, the Polish court has to inform the French witness that the performance takes place on a voluntary basis (Art. 17 [5]). However, the Polish court may do so when the French witness is summoned to be interviewed at a videoconference.
- d) The function of the central body is limited to supplying information to courts and to seek solutions when difficulties arise. According to Art. 2 Reg. No 1206/2001, requests have to be transmitted directly to the competent court of the other Member State. Thus, there are no grounds for the French authority’s argument that the request needed to be redirected to it within twenty days.

---

<sup>7</sup> See Practice Guide for the Application of the Regulation on the Taking of evidence, see [http://ec.europa.eu/civiljustice/evidence/evidence\\_cc\\_guide\\_en.pdf](http://ec.europa.eu/civiljustice/evidence/evidence_cc_guide_en.pdf), 04 November 2015.

e) According to Art. 17 (6) Reg. No 1206/2001, the requesting court shall execute the request in accordance with its own law. Thus, in contrary to the argument of the French authority, it is in line with this provision that the Polish court requested the French court that the examination is performed by a French judge (in accordance with its national law).<sup>8</sup>

Furthermore, the French court violated Art. 10 (1) Reg. No 1206/2001 according to which it should have executed the request without delay, however, at least within 90 days of its receipt. While the Reg. No 1206/2001 does not provide for a sanction if the time limit is not complied with, TWL CARS may make a claim arising from the liability of France (according to the national law of Poland)<sup>9</sup> or Poland may launch an infringement proceeding against France in accordance with Art. 259 TFEU. The Polish court could also make a request to the EJC contact point in this matter.<sup>10</sup>

#### **Regarding the rejection of the Polish court to find the address of an Austrian witness:**

The Polish court's legal view that there is no European Regulation that could be applied in order to find the address of an Austrian witness in another Member State in a civil proceeding is correct. However, one approach would be that the Polish court makes use of the mutual legal assistance granted for by the EJC contact points as it might be the case that the Austrian contact point – in accordance with Austrian law – is in the position to make a query of the register of residents („Zentrales Melderegister“).

#### **Regarding the claims of JUAN, FRANCISCO and FRANCISCO'S father against the four French supporters:**

Based on the assumption that JUAN and FRANCISCO were severely injured by the four French supporters ADRIANNE, BARTHELEMY, CHARLES and DAMIEN, they can make a claim against them on the basis of tortious liability. Also FRANCISCO'S father can claim them for damages.

<sup>8</sup> See para. 55 of the Practice Guide for the Application of the Regulation on the Taking of evidence, see [http://ec.europa.eu/civiljustice/evidence/evidence\\_ec\\_guide\\_en.pdf](http://ec.europa.eu/civiljustice/evidence/evidence_ec_guide_en.pdf), 04 November 2015.

<sup>9</sup> See *Schlosser*, EU-ZPR Art 10 EuBVO Rz 1.

<sup>10</sup> See [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/133129\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133129_en.htm) (04 November 2014).

The law applicable to non-contractual obligations is determined by the Reg. No 864/2007. According to its Art 4 (1) the law applicable to non-contractual obligation arising out of a tort/delict shall be the law of the **state in which the damage occurs**.

Since the damage that JUAN and FRANCISCO sustained occurred in Germany, the law applicable is German law. Regarding FRANCISCO'S FATHER, his damage occurred in Spain. This means that Spanish law applies.

Generally a person domiciled in a Member State shall be sued in the courts of that Member State (Art 2 of Reg. No 44/2001). However, in matters relating to tort, delict or quasi-delict, the person may also be sued in the courts for the **place where the harmful event occurred** or may occur (Art 5 [3] Reg. No 44/2001). A civil claim for damages which is based on an act giving rise to criminal proceedings, may also be filed against the offender in the court seised of those criminal proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings (Art 5 [4] Reg. No 44/2001).

The place where the harmful event occurred is Germany, thus, JUAN, FRANCISCO and also his father can claim the French supporters liable for their damage in Germany. However, they can also file the claim in France, since this is the state where the persons claimed to be liable are domiciled.

#### **Regarding the claims of JUAN against the GERMAN hospital:**

JUAN was treated by the German hospital on the basis of a treatment contract. JUAN can assert claims for a breach of contract against the German hospital.

The treatment contract between JUAN and the GERMAN hospital generally falls within the scope of Reg. No 593/2008. Since there is no indication that the parties have chosen a law, the law governing the contract is determined by Art 4 of Reg. No 593/2008. The medical treatment contract is a contract for the provision of services that shall be governed by the law of the country **where the service provider has his habitual residence** (Art 4 [b] and Art 19 [1] of Reg. No 593/2008).

Art 6 of the Reg. No 593/2008 does not apply in this case: The treatment contract is not a consumer contract as laid down in Art 6 (1) of the Reg. cit., because there are no indications that the GERMAN hospital directs its commercial or professional activities to Spain, and that the contract between JUAN and the GERMAN hospital falls within the scope of such activities.

Since the place of central administration of the Berlin hospital is Germany, German law applies.



According to Art 2 of Reg. No 44/2001 persons domiciled in a Member State shall be sued in the court of that Member State. However, in matters relating to a contract, they can also be sued in the courts of another Member for the **place of performance of the obligation** in question (Art 5 [1] of Reg. No 44/2001). In the case of the provision of services, the place of performance of obligation in question shall be the place in a Member State where, under the contract, the services were provided.

Art 15 of the Reg. No 44/2001 does not apply in this case: The treatment contract is not a consumer contract as laid down in Art 15 (1) of the Reg. No 44/2001 because there are no indications that the GERMAN hospital pursues commercial or professional activities in Spain or, by any means, directs such activities to Spain and that the contract falls within the scope of such activities.

As a result, JUAN has to sue the GERMAN hospital in Germany, since it is not only the place where the hospital is domiciled but also the place of performance of the obligation in question.

#### **Regarding the claims of GODA and EDUARDO against BBB EVENTS:**

Both athletes, GODA and EDUARDO, had to abandon the race that they prepared and paid using their own financial resources. Since SPORTSURE LLC already granted compensation for the accident suffered during the race, they now can claim BBB Events for additional losses caused by the BBB EVENTS' infringement of the contract of participation in the marathon, since BBB EVENTS did not sufficiently ensure security during the marathon.

The contract of participation is also a contract for the provision of services that shall be governed by the law of the country **where the service provider has his habitual residence** (Art 4 [b] and Art. 19 [2] Reg. No 593/2008). As we assume that the BBB EVENTS branch office in Germany is responsible for the performance of the contract, German law applies.

As already mentioned above, persons domiciled in a Member State shall be sued in the court of that Member State (Art. 2 of Reg. No 44/2001). However, BBB EVENTS can also be sued in another Member State in matters relating to a contract, in the courts for the **place of performance of the obligation** in question (Art. 5 [1] of Reg. No 44/2001).

BBB EVENTS is domiciled in Austria. Thus, Austrian and German courts have got jurisdiction.

#### **Regarding the claims of SPORTSURE LLC against the persons who caused the damage of GODA and EDUARDO:**

Assuming that SPORTSURE LLC as insurer already granted compensation to GODA und EDUARDO, SPORTSURE LLC is going to claim for recourse against the four French aggressors.

According to Art 19 of Reg. No 864/2007 the law which governs the duty of the insurer to satisfy the person covered by the insurance **shall determine whether**, and the extend to which, the insurer is entitled to exercise against the persons liable for the damage the rights which GODA and EDUARDO had against them under the law governing their relationship.

If this law determines, that SPORTSURE LLC as insurer is entitled to exercise against the four French aggressors, the law applicable will be German law since this is the law that governs the relationship between GODA/EDUARDO and the French aggressors (Art 4 [1] Reg. No 864/2007).

SPORTSURE LLC can file a claim against the four aggressors in France or – since this is the place where the harmful event occurred – in Germany (Art 2 and Art 5 [3] Reg. No 44/2001).

#### **Regarding the claims of MATHIAS against the GERMAN state:**

The German police arrested Mathias, a Belgian citizen, by mistake. He can now file a damage claim against the German state because of the unlawful conduct of the police.

The Reg. No 864/2007 shall – according to its Art 1 – not apply to „acta iure imperii“. Thus, no European Union rule can be applied. The law applicable is subject to the national law.

The Reg. No 44/2001 only applies to civil and commercial matters (Art. 1): It shall not extend, in particular, to revenue, customs or administrative matters. This means that the Regulation cannot be applied. The proceedings in this case also do not fall within Art. 1 to 14 of the European Convention on State Immunity (ETS no. 074). As a result jurisdiction is subject to national law.

#### **Regarding the recognition and enforcement of the judgements:**

In order to avoid any repetition, we summarize these two elements as follows: According to Art. 33 Reg. No 44/2001 and to Art. 33 of the Lugano Convention 2007, a judgement given in a Member State bound by these regulations shall be recognised in the other Member States without any special procedure being required. Recognition can only be denied if there are grounds for non-recognition (Art. 34 Reg. No 44/2001 and Art. 33 of the Lugano Convention 2007).<sup>11</sup>

<sup>11</sup> In regard to the claims of SCHWEIZGRAPH against KONTAKT POINT.

According to Art. 38 Reg. No 44/2001 and to Art. 38 of the Lugano Convention, a judgement given in a Member State shall be enforced in other Member state when it has been declared enforceable there. According to Art. 39 Reg. No 44/2001 and Art. 39 of the Lugano Convention the application shall be submitted to the court listed in the respective Annex II;<sup>12</sup> the local jurisdiction is determined by national law.<sup>13</sup>

---

<sup>12</sup> In regard to the enforcement of the judgement SCHWEIZGRAPH vs. KONTAKT POINT: Based on the assumption that KONTAKT POINT has its company assets in Poland, SCHWEIZGRAPH may enforce the judgement by making an application to the competent court in Poland (Art. 39 Lugano Convention); it is for the Polish court then to declare the judgement enforceable (Art. 38 Lugano Convention).

<sup>13</sup> Respectively Art. 39 Subsec. 2 of the Reg. 44/2001 and the Lugano Convention.