IX THEMIS FINAL

– KRAKOW 2014 –

LEGAL PRACTICAL QUESTIONS

FRANCE 2

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FIRST PART : THE RIGHTS INVOLVED

The proposed case covers a wide range of contractual and non-contractual obligations between four legal entities, and six natural persons that may consider their rights have been infringed. We shall then consider the questions relating to jurisdiction and applicable law for each case.

Preliminary considerations : fields regarding Brussels I Regulation.

Ratione temporis : litigations introduced after 1st March 2002. Ratione loci : the defendant must have their habitual residence in a EU Member State. Ratione materiae : civil and commercial matters. Those criteria are stated in Article 1.

In our case, all the firms except for Schweizgraph have their headquarters within a EU Member State, and all natural persons have their habitual residence within a EU Member State as well, all the events took place after 1st march 2002, and the litigation matters relate to civil and commercial matter (except for Mathias's case). So we can assume at that point that Burssels I shall be applicable to every litigation except for the two exceptions mentioned.

I. RIGHTS INVOLVED REGARDING TWL

TWL is linked to BBB by a contract, BBB subcontracted then with Kontact. Besides, TWL reckons that Kontakt's poor work caused a damage to its image : we shall thus study the various causes of action TWL has against the two other firms.

A) TWL vs KONTAKT

1) Jurisdiction

Brussels I Regulation article 2 states that " *Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*"

Plus, Article 60 states that : "*1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:*

a) statutory seat, or

b) central administration, or

c)principal place of business."

Kontakt has its headquarters in Poland, thus pursuant to Article 2 and 60 of the Brussels I Regulation, TWL can go to Polish Courts. Yet, TWL being a German firm, will probably prefer, as far as possible, to take its case to German Courts. German Courts may have jurisdiction insofar as Germany was the place where the obligation took place ; and Germany was the place where the damage took place.

Now the question that arises is to determine whether or not TWL and Kontakt had contractual or non-contractual obligations.

Rule to be applied : Article 5-1 of the Brussels I Regulation mentions "matters relating to a contract", a

notion that is to be interpreted autonomously, and not pursuant to the national law of the Member State jurisdiction. Indeed, the problem had already been raised way before the Brussels I Regulation, in the aftermath of the 1968 Brussels Convention, which inspired the Brussels I Regulation, and had already provided for a claimant to act in Court in the Member State where the contract took place.

The ECJ stated on that occasion in Case C-26/91 Jakob Handte & Co. GmbH vs. Traitements Mécano-chimiques des Surfaces SA (TMCS) that "contractual matters" is a notion that implies a direct, chosen tie, between parties. Contractual matters "*is not to be understood as covering a situation in which* ***there is no obligation freely assumed*** *by one party towards another*".

Factual consequences : the link between TWL and Kontakt is indirect, insofar as no contract had been directly celebrated between them, as Kontakt precisely reminded TWL in their e-mail correspondence.

Therefore, TWL and Kontakt have no contract whatsoever between them, so the forum option granted by article 5-1 is not allowed for TWL.

Consequently, we will have to study the use of article 5-3 in this case.

Rule to be applied : Article 5-3 states that "*A person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*".

The notion of delict, tort or quasi-delict is also to be interpreted autonomously by the ECJ.

In the case of Kalfelis (27th September 1988, n°189/87) it was stated that the notion *"covers all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5 (1)"*. It is now even clearer that TWL and Kontakt are only tied by delictual matters. Applying Article 5-3, we can state that the competent jurisdiction is where the damage took place. According to the ECJ, this place can be that of the event that **caused** the damage which took place, as well as the place where the **damage actually occured**. (*30th November 1976, Mines de Potasse d'Alsace*). Nevertheless, the Court also excluded that the claimant lead his action before a Court of his domicile if he only suffered a financial damage (*ECJ, 10th June 2004*).

Factual consequences : The damage suffered by TWL was caused by Kontakt, its cause of origin is therefore in Poland. Thus, if TWL wants to make a claim before a German judge, it will have to demonstrate that **the consequences** of the harmful behaviour **took place in Germany**.

Therefore, it is possible for TWL to go to German Courts but it will probably spark a judicial debate over the actual pertinence of that choice.

In that case, we think that it is easier to act directly before Polish Courts on the ground of Article 2 of the Brussels I Regulation : TWL made the right decision.

2) Applicable Law

As we said, following the interpretation made by the ECJ in the Jakob Handte case law, the link between TWL and Kontakt cannot be considered a contractual one. Therefore, following the same reasoning and

extending it to the question of the conflict of law, we have to check whether or not that situation is covered by the Rome II Regulation. Pursuant to its Article 1, the Court has jurisdiction if the damage occurred after 11th January 2009 (*ratione temporis*), if the requested Court is in a Member State (*ratione loci*) and if the obligation is a non-contractual one regarding civil and commercial matters (*ratione materiae*). As mentioned before, all those aspects are to be found in this case, thus Rome II is applicable. Now, pursuant to article 4.1 in that Regulation, we should consider that the applicable law is that of the country where the damage occurred. The exception is mentioned in article 4.2 where, if both parties dwelled in the same country when the damage occurred, that country's law is to be used ; and in article 4.3, if the situation is obviously closely linked to another country, that country's law is to be used.

Factual consequences : In our case, the damage took place in Germany, Kontakt and TWL do not have their usual place of abode in the same country and nothing allows us to think there is a closer link to another country ; thus the requested judge shall use German law to decide on TWL's demands against Kontakt.

B) TWL vs BBB

TWL could sue its contractor BBB, considering that BBB's subcontractor did not execute its obligations properly, thus causing TWL a damage.

1) Jurisdiction

Then again, TWL being in Germany, and BBB having a branch in Germany, we have to look at Brussels I Regulation to determine whether or not German Courts have jurisdiction over that case.

There are two possibilities here : TWL can lead its action against the German branch of BBB, grounded on Article 2, or TWL can lead its action against the Austrian Headquarters of BBB, grounded on Article 5-1 (b).

First option : BBB has its central administration located in Vienna, Austria, therefore pursuant to article 2 and article 60 b) and c) , TWL should lead its action before Austrian Courts. Yet, TWL could sue BBB before German Courts if, pursuant to Article 60 - (c) the German branch of BBB is its principal place of business.

Second option : TWL can also go to a German Court with another rationale. Indeed, article 5-1 (b) states that, when it comes to services contracts, the Court that has jurisdiction is the one where the services were rendered or should have been so.

According to ECJ case law *Tessili* (*6th October 1976*), confirmed 28th September 1999, *GIE Groupe Concorde*, to determine the place where the contract was to be executed the judge has to look into the national law statements applicable in the case, but that approach has been constantly criticized by Member State judges who would rather consider the factual circumstances that are the basis of the contract, a reasoning **we shall follow here.**

Indeed, in our case, BBB has a branch in Germany and has to organize the Berlin marathon. The circumstances clearly demonstrate that the place where the contract is to be executed is Germany.

Therefore, TWL can take its action against BBB to the German Courts.

2) Applicable Law

There is a contract between TWL and BBB, it was signed after 17th December 2009 and the requested judge is German, therefore pursuant to Article 1 in Rome I Regulation the *ratione materiae, temporis* and *loci* are fulfilled : the litigation shall be ruled by Rome I. Now, pursuant to art.3 the law that shall rule the parties' obligations is to be determined in the contract, or deduced from its stipulations or from the situation's circumstances. Here, we have none of the above. So we rely upon Article 4-1 (b) which provides for services contracts, and pursuant to article 19-1 of the Rome I regulation we determine BBB's domicile as Austria (where its headquarters are). Therefore, the judge requested by TWL shall use Austrian law.

C) THE POSSIBILITY OF A JOINT ACTION AGAINST BBB AND KONTAKT

We can also think about another possibility of jurisdiction : Article 6-1 of the Brussels I Regulation states : "*A person domiciled in a Member State may also be sued: where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.* "

The ECJ suggested that this "connexion" implies that the actions against the various defendants have identical legal bases (*ECJ, 27th October, 1998, C51/97*) . This is not the case here. But ever since, it revised its stand in case law (*Freeport, 11th October 2007, C98/06* and *Painer C145/10, 12 April 2011*) where the Court implied that the defendants only had to share a common factual situation. Moreover, as we previously demonstrated TWL has a cause of action to go to German Courts on the ground of Article 2 and 60 – c) in Brussels I Regulation.

Consequences here : BBB and Kontakt share a common factual situation, as we said previously, besides the contract is to be executed in Germany, thus TWL can lead an action against both BBB and Kontakt before German Courts, which in turn shall use German and Austrian law depending on the demands.

II. RIGHTS INVOLVED REGARDING KONTAKT : KONTAKT vs BBB

Kontakt and BBB share a contractual obligation. Kontakt was subject to certain expenses when fulfilling its contractual obligations but was never paid. The firm might want to sue BBB on the legal basis of contractual liability.

1) Jurisdiction

Pursuant to Article 2 in the Brussels I Regulation and Article 60, Kontakt can lead an action against BBB in Austria. Nevertheless, bearing in mind that it is a small Polish firm, it might be easier for it to go to Polish Courts and try to invoke Article 5-1 as mentioned before. But in our case, Kontakt was just a subcontractor of BBB, bound to fulfil only parts of BBB's obligations. As we said, the circumstances of

the case do not allow us to consider that the place where the contract is mainly to be fulfilled is Poland : on the contrary, we said it is Germany. Therefore, Kontakt shall have to go to Austrian (art 2) or German (art 5-1) Courts.

2) Applicable Law

Following the rationale already presented above, the contract between Kontakt and BBB falls under Rome I provisions. As well as the action led by TWL against BBB, the action led by Kontakt against BBB shall be grounded on article 4-1 (b). So long as Kontakt is a Polish firm, the law applicable shall be Polish pursuant to article 19.

III. RIGHTS INVOLVED REGARDING BBB

BBB shares contractual obligations with TWL, which did not pay the agreed price. BBB is also contractually linked to Kontakt and was damaged by Kontakt's failure to fulfil its obligations.

A) BBB vs TWL

1) Jurisdiction

Considering Articles 2 and 60, or article 5-1 (a), as we mentioned before in Brussels I Regulation, and considering the fact that TWL is a German firm on the one hand, and the fact that on the other hand the main place to fulfil the contractual obligations is also Germany, we have to conclude that BBB shall go to German court.

2) Applicable Law

The reasoning is the same as in TWL vs BBB mentioned above, thus the applicable law shall be Austrian.

B) BBB vs KONTAKT

1) Jurisdiction

Same reasoning following articles 2 and 60 of the Brussels I Regulation : we consider that Kontakt is a Polish firm, so the first two articles lead to jurisdiction for the Polish Courts in this case, but it is rather unsatisfactory for BBB. We can therefore consider article 5-1 (a), and reckon that the circumstances of the case do not allow us to determine whether or not the main contractual obligation is to be fulfilled in Germany insofar as the litigious obligation is essentially an intellectual one, and is going to be fulfilled in Poland by a Polish firm : therefore, there is no other option for BBB but to sue Kontakt before Polish Courts.

2) Applicable Law : same reasoning as in Kontakt vs BBB : the Polish law is applicable.

IV. RIGHTS INVOLVED REGARDING SCHWEIZGRAPH

Schweizgraph is contractually linked to Kontakt and fulfilled its obligations. But the firm was never paid. It could thus sue Kontakt before Polish Courts pursuant to article 2 in the Brussels I Regulation. But could it go to Swiss Courts ?

Jurisdiction : As the Brussels I Regulation is not applicable to Switzerland, we have to use the Lugano

Convention that states in Article 5 (a) that the Court that has jurisdiction is that of the place where the obligation was to be fulfilled : in our case, the printing was to be performed in the Schweizgraph facility in Switzerland, thus the firm can take action before the Swiss Courts.

Applicable law : Switzerland did not join the Rome Convention of 19th June 1980 nor does it apply the Rome I regulation, therefore the applicable law shall be determined by Swiss rules on conflict of law.

V. RIGHTS INVOLVED REGARDING THE NATURAL PERSONS

The athletes had a contractual obligation with BBB, organizer of the event, or with TLW if we consider that this firm is the one to be liable as it owns the event. The contract is clear from the fact that Goda and Eduardo both paid to participate in the competition. They were covered by BBB's insurance. We'll examine whom they might turn to to ask for compensation.

If we deny such contractual links for the Spanish students, we end up on tort, delict and quasi-delict fields. In our case, the victims and the authors were all citizens of EU Member States, the event giving rise to the damage and the damage itself took place in a EU Member State, after the 11th january 2009, therefore the Rome II Regulation to non-contractual obligations is to be applied as its *ratione materiae, loci* and *temporis* are fulfilled.

A) JUAN PABLO

If we proceed one by one we can say that : Juan Pablo is Spanish, he got injured in Germany, the aggressor was French. It is not mentioned whether or not the Spanish victim and the French aggressor had their habitual residence in Germany. We can assume that it is not the case, and therefore stick to the general provisions made by article 4-1 of the Rome II Regulation which states : "*the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*" Therefore German law shall be applied.

Determining the competent jurisdiction leads to rely on the grounds of Article 5-3 of the Brussels I Regulation stating that "*A person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.*" So, Germany has jurisdiction, which is easier since Juan Pablo has another action in that state.

Now, concerning the hepatitis, the damage took place through the contractual link that tied the German Hospital to Juan Pablo, so the Rome I Regulation shall be applied, and German law shall be applied pursuant to article 4-1 b .

The service took place in Germany, so pursuant to article 5-1 in Brussels I Regulation Juan Pablo shall go to German courts.

B) FRANCISCO

Francisco got beaten in Germany so part of his damage actually happened in that country. Yet, another part of his damage was later on revealed as he came back to Spain and could no longer work properly due to the injuries he had endured. Pursuant to article 5-3 of the Brussels I Regulation and according to the afore mentioned ECJ case law "*Mines de Potasse d'Alsace*", Francisco can choose between German or Spanish jurisdiction : but if he picks the Spanish one, the Spanish judge will only compensate the damage he suffered in Spain. Whereas German Courts shall be allowed to compensate for all of his damages as they are in the State where the event that caused the damages occurred. Thus he had better go to German courts. Now, pursuant to article 4-1 in Rome II, the law that shall be applied is the law of the country in which the event that caused the damage occurred, here : German law.

C) FRANCISCO'S FATHER

Considering Francisco's father, he was in Spain when his damage occurred, so his best option is to rely on article 5-3 in Brussels I Regulation which gives jurisdiction to Spanish courts (better than article 2 that could lead him to Germany or France). Considering the applicable law, Francisco's father was in no contract with any party whatsoever so Rome II Regulation is to be applied, article 4-1 states that the event that caused the damage determines the applicable law depending on the country where it occurred. Here : the event took place in Germany so German law shall rule the case. Unless we consider there might be closer ties with Spain pursuant to article 4-3 in Rome II.

D) GODA AND EDUARDO

The insurance might under-estimate their damage, so they might have to resort to Court to claim for better compensation (by asking for an expert report for example). Indeed, the athletes were covered by an insurance policy that was negotiated between BBB and Sportsure LLC, based in London. Then, this company might turn to the French supporters to claim for their liability. Though there is no direct contractual link between the two athletes and the insurance company we can still apply Brussels I article 9-1 b because they are beneficiaries of the contract passed between BBB and Sportsure, which provides that an insurance company can be judged in a Member State other than its own (here, the United Kingdom) "*in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled*". In our case, the insured is BBB but the beneficiaries are the two athletes who can thus go to their national Courts thanks to this provision in Brussels I.

Concerning the applicable law : as there is an insurance contract between BBB and Sportsure, Rome I is thus to be applied. In its Article 7, it provides that if no law was chosen by the parties, the law applicable shall be that of the State where the risk is located when the contract was signed. In our case, that risk is located in Germany, where the marathon took place. It is to be noted that article 10 in Brussels I provides that the insurance company could have been sued in Germany, with German law, so that the athletes could share their expenses in a joint action.

Jurisdiction : Pursuant to article 6-2 in Brussels I, the insurance company can claim for the French supporters' liability : "*as a third party in an action on a warranty or guarantee or in any other third party*

proceedings, in the court seized of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case." The conditions required to base an action on this ground are : that the third party lives in a Member State (here, France), that there is no fraud or forum shopping. Here, the litigation takes place in Germany, there is no forum shopping, so the insurance company can sue the French.

Applicable law: the insurance has no contractual links with the French authors, in case of tort, delict, quasi-delict, Rome II is applicable and its article 19 provides for the law applicable between the insurance and the author shall be the same as between the victim and the author (here : article 4 in Rome II determines German law).

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THE ISSUE OF RECOGNITION AND ENFORCEMENT

All the decisions (except for Schweizgraph) were made on the ground of the Brussels I Regulation, which provides as well for recognition and enforcement procedures. Concerning the recognition, article 33-1 provides that "*A judgement given in a Member State shall be recognised in the other Member States without any special procedure being required.*"

All parties (except for Schweizgraph, which we shall focus on hereafter) live in EU Member States and are subject to article 38 in Brussels I which provides that the decision shall be enforced when a party asks for it in another State. Concerning the Schweigraph case, though Brussels I is not applicable in Switzerland, Switzerland is a member of the Lugano convention (30th October 2007) which provides for mutual recognition and enforcement in civil and commercial matters between the EU and the countries that signed it. Grounded on article 33-1 and 38-1 Switzerland shall have its decision recognized and enforced in Poland after a party asked for it in the requested country.

VI. CONCERNING MATHIAS'S ISSUE

Mathias claims he suffered a damage because of his unjustified detention and would like to claim for compensation. Though it is quite tempting to resort to Brussels I Regulation, it should be reminded that its Article 1 provides that it does not cover States' liability for the actions or omissions that caused damages in the course of an *acta jure imperii*. In our case, Mathias's damage was caused by such an *acta jure imperii* (the police arrest, and his consequent detention). So, Brussels I is not applicable and to know more about the State's liability we have to come back to the principle of territoriality, which implies that the German authorities are the only one that have jurisdiction in this issue and that German law is applicable (here, the compensation shall be determined by applying the law of the 8th March 1971 "Strafverfolgungsentschädigungsgesetz".)

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SECOND PART : THE PROVISIONAL PROCEDURE

A) Applicability of Regulation (CE) n° 1206/2001

The Polish court sent a direct request to the French court in the taking of evidence relating to the litigation opposing TWL and Kontakt ; moreover, Poland, Germany and France all signed Regulation (CE) n° 1206/2001 (28th may 2001) on civil and commercial cooperation in matters relating to taking of evidence, so pursuant to its Article 1, that Regulation is applicable to our case.

B) Application of this Regulation in our case

1) Direct transmission between Courts

Article 10 and following : allows the judge dealing primarily with the case to ask directly for a measure to be carried out by a requested judge. When it comes to auditioning a witness, the requesting judge can ask to be present during questioning.

2) Direct taking of evidence

Article 17 and following : the requesting judge proceeds with the measure himself, using communication technology if necessary. Because this violates the principle of territoriality, the requesting judge has to ask permission from the central authority of the requested Member State.

3) In our case

The Polish judge asks the French judge directly and receives an answer 5 months later.

Was the Polish request valid ? The French administration claimed that the Polish court had to contact the witness it wished to examine directly. But pursuant to article 4 of the Regulation, the requesting Court must only mention : the names and address of the person to be examined, the questions to be put or the statement of the facts they are going to be asked about, any requirement that the examination is to be carried out under oath or any special form, where appropriate a reference to a right to refuse to testify under the law of the requesting Member State and any information that the requesting court deems necessary. So the Polish didn't have to contact the witness directly, furthermore, the requesting court had to mention the voluntary nature of the examination only if this is compulsory in the requesting state, not the requested one (as in our case). So the French administration was wrong here.

The French administration stated that "the taking of evidence could only be performed on a voluntary basis without the support of coercive measures". The French administration seems to be relying on Article 17.2 of the Regulation when, in our case, the Polish court was obviously using the direct transmission system which provides, in Article 13, that coercive measures can be taken only if the requested states allow them. This is not the case here. Moreover, this argument is not pertinent considering that the Polish court did not ask for coercion.

Did the cooperation mechanisms work ? The Regulation has provisions for the time frame of the procedure. In our case, the French administration answered after 5 months. But article 7.1 states that the

requested court had to notify reception of the request within 7 days. Article 8 also states that if the requested court reckons some information mentioned in article 4 is missing, it should inform the requesting court within 30 days. None of the compulsory information was missing, the Polish court had sent a request to the competent authority in France, and yet the French administration refused the request after 5 months, thus violating articles 7.1, 8 and 10.1 of the Regulation (which provides the answer has to be given within 90 days in case of refusal ; except for special circumstances as provided for in article 15). Should the request have been redirected to the French Central Authority as Place Vendôme states ? No : the direct-transmission-between-the-courts procedure states that there is no use for the requesting court to route its request through the central authority of the requested country (except special circumstances as mentioned in article 3-1 c, which is not the case here) : so the French judge should have referred to the Polish judge directly.

As for the possibility for the Polish judge to impose a videoconference : article 10-4 of the Regulation provides for that possibility, thus the Polish court could ask for it in our case. The article also provides that in case of practical difficulty, the requested court can refuse to comply with that request. In our case though, the French administration refuses because the videoconference is for "criminal matters only" (which is not true since law n°2007-1787, 20th December 2007, was passed) so there is no legal impossibility. Moreover there is no "major practical difficulty" in the sense of the Article 10-4 of the Regulation insofar as the device seems to work thus the French administration violated article 10-4.

Solutions to be offered for these issues : it seems there was a misunderstanding or insufficient knowledge of the Regulation from the French authorities who confused taking of evidence and direct transmission between the courts. The solution may be to send a request to the French courts again, by expressly mentioning article 10 of the regulation and that no coercion shall be used.

C) The issue relating to the Austrian Witness

Concerning the issue relating to the address of the Austrian witness, the Polish judge rejected Kontakt's demand because of : internal legal reasons, incompatibility with the urgency, and no EU Regulation applicable in the case. These reasons have to be examined successively : **concerning the "internal legal reasons",** it is a general principle of international private law that the applicable law to court procedure is the law of the state having jurisdiction. Here : the Polish procedural law. The Polish judge can thus invoke its national rules to reject a demand incompatible with its procedural order, for example if it is considered incompatible with the urgency. **Concerning the lack of EU Regulation** : Regulation (CE) n° 1206/2001 about the taking of evidence stated in its Article 1 that any judiciary act relating to taking of evidence was covered by its rules. In our case, the address of a citizen can be asked to national administration files in a Member State and constitutes therefore a judiciary act relating to a "taking of evidence" thus covered by the Regulation. In conclusion, the Polish judge could not invoke the lack of Regulation.