

**IX THEMIS FINAL**  
**KRAKOW 2014**

**LEGAL PRACTICAL QUESTIONS**

**TEAM FRANCE 4**

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ADDITIONAL FACTS

We consider that:

- BB EVENTS disclose confidential data of KONTAKT DESIGN to TWL
- There was a confidentiality clause in the contract between BB EVENTS and TWL
- KONTAKT DESIGN did not pay SCHWEIZGRAPH
- The German hospital is a private hospital

**QUESTION 1:**

**NB:** Throughout the following cases, once a legal concept has been explained or the relevant case law has been quoted, the developments made in the consecutive case-studies shall rely on these solutions, without making further reference to these elements.

**I) TWL MUNICH against BB EVENTS**

**Solution:** TWL would be acting on a contractual ground against BB EVENTS (breach of contract) due to extra-costs engaged by the hiring of a new German contractor. German Courts would accept jurisdiction and apply German law to this case. There is no particular difficulty relating to recognition or enforceability. Should the decision be executed in Vienna - where the head office of BB EVENTS is located - the simplified exequatur procedure of article 38 of Brussels would apply.

➤ *Applicability of Brussels I:* International element: the ECJ has ruled that the application of the rules of jurisdiction in Brussels I requires the existence of an international element (ECJ, 17 November 2011, C-327/10). An international element exists insofar these two companies have different nationalities. Ratione temporis: Brussels I entered into force on 1 March 2002 and the facts took place in 2013. Ratione loci: Pursuant to article 2 of Brussels I, the regulation is applicable if the defendant is residing in a Member State. In this first case, the defendant is BB EVENT, a company with its head office in VIENNA. The defendant's residence is located in AUSTRIA, an EU Member State and as a consequence, such a lawsuit by BB EVENT would be within the scope of this Regulation. Ratione materiae: Article 1 of Brussels I provides that the regulation is applicable in civil and commercial matters. TWL is accusing BB EVENT of breaching the contract they signed and therefore such action remains within the material scope of Brussels I.

➤ *Application of Brussels I:* Pursuant to article 2 of Brussels I, persons domiciled in a Member State shall be sued in the Courts of that Member State. In this case, the defendant is domiciled in AUSTRIA (reference is made to article 60 of Brussels I on the domicile of a company) and as a consequence, Austrian Courts would accept jurisdiction for this case. Pursuant to article 5.1. b of Brussels I and in the case of provision of services, "special jurisdiction" is given to, the Member State where, under the contract, these services were provided or should have been provided. In this case, the services were provided in GERMANY and as a consequence, German Courts would accept jurisdiction for this case. Finally, article 5.5 of Brussels I, also gives "special jurisdiction" to the Courts of the Member state where a branch is situated, as regards a dispute arising out the operation of this branch. BB Events has a branch in GERMANY (FRANKFURT)

and as a consequence, German Courts would equally accept jurisdiction on these grounds.

➤ *Applicability of Rome I*: Ratione temporis: the regulation Rome I entered into force on the 17<sup>th</sup> of December 2009 and the facts took place in 2013. Ratione loci: Rome I is applicable before all EU Courts, such as the German Courts designated for this case. Ratione materie: Rome I is applicable in contractual matters. The European Court of Justice (ECJ) defines contractual matters as situations in which there is an obligation freely assumed by one party towards another (ECJ, Jakob Handte, 17 June 1992, C 26/91). Such an obligation can be found in the context of the relationship between TWL MUNICH and BB EVENTS.

➤ *Application of Rome I*: Pursuant to article 3 of Rome I, a contract shall be governed by the law chosen by the parties. Since there is no indication as to a law chosen by TWL and BB EVENTS, this article does not apply. In the absence of choice and in accordance with article 4 b Rome I “a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence”. Furthermore, in accordance with article 19.2 of Rome I, the place where the branch of a company is located shall be treated as the place of habitual residence if the contract is concluded “in the course of the operations of a branch” which we consider was the case for BB EVENTS.

## II) TWL against KONTAK DESIGN

**Solution**: TWL would be acting on a non-contractual ground due to extra-costs implied and loss of reputation. German courts would accept jurisdiction and apply German law to this case. With respect to enforcement of the German decision against KONTAKT DESIGN in Poland, exequatur will happen in Poland according to the simplified procedure of article 38 and following of Regulation Brussels I. **N.B**: There is no contract between TWL and KONTAKT DESIGN. The ECJ has ruled that “matters relating to contract”, as referred to in article 5.1. of Brussels I, is to be understood as meaning that it does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or their unsuitability for their intended purpose. (ECJ, Jakob Handte, 17 June 1992, C 26/91 and Refcomp, 7 February 2013, C 543/10). Therefore, no contractual relationship exists between TWL against KONTAKT DESIGN.

➤ *Application of Brussels I*: Pursuant to article 2 of Brussels I, Polish Courts would accept jurisdiction. However, article 5.3 gives special jurisdiction to the Courts of the place where the harmful event occurred or may occur in matters relating to tort, delict or quasi-delict. Furthermore, ECJ has ruled that claimants may opt between the place of the damage and the place of the event in which that damage originates. (ECJ, 30 November 1976, *Handelskwekerij G.J. Bier BV c/ Mines de potasse d'Alsace SA*, C 21/76). The place of the damage is Germany and the place in which the

damage originates is Poland. Both countries would therefore accept jurisdiction. Given the German nationality of the claimant and that German law will apply, we favour German jurisdiction.

➤ *Applicability of Rome II: Ratione temporis*: Rome II entered into force the 11 January 2009. The facts take place in 2013 and therefore the Regulation can be applied. *Ratione materie*: according to article 1, Rome II is applicable to non-contractual obligations in civil and commercial matters. ECJ has defined non-contractual matters as an independent concept covering all actions which seek to establish the liability of the defendant and which are not related to a “contract” within the meaning of article 5.1 (ECJ, 1988 CJUE Kalféllis). *Ratione loci*: GERMANY is an EU Member State, Rome II is therefore applicable and German Courts would accept jurisdiction.

➤ *Application of Rome II*: According to article 4 of Rome II: “*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*”. The damage occurred in Germany and therefore German law is applicable.

### III) BB EVENTS against TWL

**Solution**: BB EVENTS would be acting on a contractual ground (breach of contract and wrongful interference) as it suffered economic losses resulting from the unpaid 30% of the total amount. German courts would accept jurisdiction and apply German law to this case.

➤ *Application of Brussels I*: The defendant is domiciled in GERMANY and German Courts would accept jurisdiction. (Incidentally, same jurisdiction designated by special jurisdiction of article 5.1.b)

➤ *Application of Rome I*: BB EVENTS has a branch in GERMANY and the contract is concluded in the course of the operation of a branch. German law will be applicable.

### IV) KONTAKT DESIGN against TWL

**Solution**: KONTAKT DESIGN would be acting on non-contractual grounds due to economic loss and insolvency. Polish Courts would accept jurisdiction and apply Polish law to this case.

➤ *Application of Brussels I: Article 5.3 of Brussels I is applicable*. The ECJ has ruled that claimants may opt between the place of the damage and the place of the event in which that damage originates. (ECJ, 30 November 1976, *Handelskwekerij G.J. Bier BV c/ Mines de potasse d'Alsace SA, C 21/76*). The place in which the damage originates is Germany. Yet, there is a difficulty to locate the place where the damage occurred. A first option would be to locate the ‘place where the harmful event occurred’ at the place where the debt should have been paid, as defined contractually or as defined by supplementary contract law (i.e. Germany if the debt is

payable upon summons). A second option would be to designate the place where the loss was actually suffered (i.e. Poland). The ECJ ruled in a case R. Kronhofer, 10 June 2004 (Case C-168/02) that the ‘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.’ However, in this context (and unlike in Kronhofer), the loss was actually incurred and suffered at the defendant’s domicile. As a consequence, both Germany (where the damage occurred) and Poland (where the damage was suffered) could have jurisdiction. Given the Polish nationality of the claimant and that Polish law will apply, we favour the Polish jurisdiction.

➤ *Application of Rome II*: The damage occurred in Poland and therefore Polish law is applicable.

#### V) **KONTAKT against BB EVENTS**

**Solution**: KONTAKT would be acting on a contractual ground due to economic loss and insolvency. Austrian courts shall have jurisdiction and German law shall be applicable.

➤ *Application of Brussels I*: The defendant is domiciled in AUSTRIA and therefore the Austrian judge would accept jurisdiction. We could also use special jurisdiction of article 5 of Brussels I. With that article, German judge could have jurisdiction. The German judge could apply German law. Yet, we should favour the Austrian judge because it is better to have a decision issued in Austria, in order to enforce it directly in Vienna, where the central office of BB EVENTS is situated.

➤ *Application of Rome I*: BB EVENTS has a branch in GERMANY and, we consider that the contract is concluded in the course of the operation of this branch, German law will therefore be applicable.

#### VI) **SCHWEIZGRAPH against KONTAKT DESIGN**

**Solution**: SCHWEIZGRAPH would be acting on contractual grounds due to economic loss. Polish courts shall have jurisdiction and Swiss law shall be applicable (no exequatur issues).

➤ *Applicability of the Convention of Lugano* : Ratione temporis : the Lugano convention entered into force the 1<sup>st</sup> January of 2011. Ratione loci: Poland and Switzerland have signed the Convention (decision 2007-712-CE). Ratione materie : according to article 1 of the Convention, the Lugano Convention is applicable to commercial and civil matters.

- *Application of the Lugano Convention (rules of Brussels I mutatis mutandis)* : Under article 5.b of the Lugano Convention: special jurisdiction is given, in the case of sales of goods, to the Courts of the place where, under the contract, the goods were delivered or should have been delivered. We consider that the goods would have been delivered to GERMANY and therefore that German Courts would accept jurisdiction. We choose to favour the Polish Courts given that the decision will need to be enforced in Poland, even if this choice favours the defendant.
- *Application of Rome I*: The goods provider is SCHWEITZGRAPH and has its habitual residence in SWITZERLAND. Therefore Swiss law will be applied.

## VII) SCHWEIZGRAPH against BB EVENTS and against TWL

**Solution:** SCHWEIZGRAPH would be acting on non-contractual grounds (aforementioned ECJ case law “Jakob Handte” applies, according to article 1 of protocol n° 2 to the Lugano convention on the uniform interpretation of the Convention) due to economic loss. The Polish Courts will accept jurisdiction and the polish law will be applicable.

- *Application of Lugano*: Pursuant to article 6.1 of the Lugano Convention, SCHWEIZGRAPH could sue BB EVENTS and TWL before the Polish Courts, before which the claim against KONTAKT DESIGN would be brought (the three claims of SCHWEIZGRAPH against TWL, BB EVENTS and KONTAKT DESIGN are connected, because they aim at recovering the same economic loss).
- *Application of Rome II*: The damage occurred in Poland and the Polish law is applicable.

## VIII) JUAN PABLO against TWL

**Solution:** JUAN PABLO acted on a non-contractual ground, because he suffered physical and moral injuries due to the fight with supporters. **Therefore**, German Courts have jurisdiction and German law shall be applicable. Since the decision shall be enforced in Germany against a German company, there will be no issues of exequatur.

Brussels I is applicable, since the domicile of the defendant is in Germany. Applying article 2, since the defendant is domiciled in GERMANY, the German judge would accept jurisdiction. Moreover, Article 5 3) of Brussels I on special jurisdiction would lead to the same solution.

Rome II is applicable, since German Courts have jurisdiction. Applying article 4 of Rome II and since the damage occurred in Germany, the German law is applicable.

**IX) JUAN PABLO against the FOUR FRENCH SUPPORTERS**

**Solution:** JUAN PABLO acted on a non-contractual ground, because he suffered physical and moral injuries due to the fight with supporters. **Therefore**, German Courts shall have jurisdiction and German law shall be applicable. Since the German decision shall be enforced in France, a simplified exequatur shall happen according to the article 38 and following of Brussels I.

Brussels I is applicable, since the domicile of the defendant is in France. Applying article 2 of Brussels I, and given that the defendants are domiciled in FRANCE, French Courts would accept jurisdiction. However, the application of article 5 3) of Brussels I on special jurisdiction would lead to designating German Courts (which we deem more appropriate), since the damage occurred in Germany.

Rome II is applicable, since German Courts have jurisdiction. Applying article 4 of Rome II and since the damage occurred in Germany, German law is applicable.

**X) JUAN PABLO against the GERMAN PRIVATE HOSPITAL**

**Solution:** JUAN PABLO acted on a contractual ground, because he suffered physical and moral injuries due to the contamination with hepatitis. German Courts shall have jurisdiction and shall apply German law. Since the German decision will be enforced against a German hospital, there will be no issue of exequatur.

Brussels I is applicable, since the domicile of the defendant is in Germany. The contract between JUAN PABLO and the GERMAN PRIVATE HOSPITAL is a consumer contract. The special regulation of article 16 BI applies. It provides that either the Court of the defendant's or the claimant's domicile can have jurisdiction. Since the defendant is domiciled in Germany and the claimant in Spain, both German and Spanish Court shall accept jurisdiction. However, since the other actions of JUAN PABLO are located in Germany we favour German Courts. Since German law is applicable, it is also less problematic for a German judge to apply German law, than for a Spanish judge to apply German law.

Rome I is applicable since the legal ground for the action is contractual. Since there is no indication of a chosen law by the parties, we shall apply article 4.b of Rome I. Since the service provider has its habitual residence in Germany, German law will be applicable.



**XI) Legal rights of FRANCISCO**

For the actions of FRANCISCO against TWL and the FOUR FRENCH SUPPORTERS, the solutions will be the same as for the actions of JUAN PABLO. Even if a part of the damage of FRANCISCO happened in Spain, which could change the jurisdiction of Court, it is better to group all the actions in front of German courts.

**XII) GODA and EDUARDO against TWL**

**Solution:** GODA acts on a contractual ground since she paid the fees for running the Marathon. She suffered physical, economical and moral damages. Therefore, Lithuanian Courts will have jurisdiction for GODA and Portuguese Courts will have jurisdiction for EDUARDO and German law will be applicable.

Brussels I is applicable, since the domicile of the defendant is in Germany. The contract between GODA and TWL is a consumer contract. The special regulation of article 16 BI applies. The defendant is domiciled in Germany and the claimant in Lithuania, either German and Lithuanian Courts may accept jurisdiction. Regarding proximity issues, knowledge of the procedures and costs, it is more appropriate for GODA to go before a Lithuanian judge. The same reasoning will lead to the jurisdiction of the Portuguese Courts for EDUARDO.

Rome I is applicable since the legal ground for the action is contractual. There is no indication as to a law chosen by the parties, article 4.b of Rome I applies. The service provider has its habitual residence in Germany; therefore German law will apply to the law suits of GODA and EDUARDO.

**XIII) GODA and EDUARDO against the INSSURANCE COMPANY**

Brussels I is applicable and article 9b is applicable to insurance contracts. According to this article the Courts that have jurisdiction are the Courts of the Member State where the beneficiary of the assurance has its residence. GODA has its domicile in Lithuania, therefore a Lithuanian judge has jurisdiction. The same reasoning will lead to the jurisdiction of Portuguese Courts for EDUARDO.

The Regulation of Rome I is applicable, since German Courts have jurisdiction and since the legal ground for action is contractual. Article 7.3 of Rome I is applicable to the insurance contract. In the absence of choice, the State that has jurisdiction is the one where the risk occurs. Given that the marathon takes place in Berlin, the risk occurs in Germany, therefore German law will apply.

**XIV) FRANCISCO's FATHER against TWL**

Brussels I is applicable since the defendant is domiciled in Germany. Applying article 5.3 of Brussels I, the damage occurred in Spain, therefore Spanish Courts have jurisdiction.

Rome II is applicable since the Spanish Court has jurisdiction and since the ground of action is non-contractual. Article 4 of Rome II applies because the damage occurred in Spain, therefore, Spanish law applies.

**XV) FRANCISCO's FATHER against the 4 FRENCH:** the same reasoning as above will lead to the jurisdiction of Spanish Courts and the application of Spanish law.

**We could also have brought the actions of JUAN POLO, FRANCISCO, EDUARDO, GODA and MIGUEL, in front of the German penal judge (see article 5.4 Brussels I).**

**XVI) MATHIAS against THE STATE OF GERMANY**

The action of MATHIAS against the German state has an international element. However, it is not within the scope of international private law given that it directed against a public entity. Any such lawsuit would be governed by German law.

**QUESTION 2:**

**Council regulation (EC) No 1206 / 2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters** applies to all Member States, with the exception of Denmark (article 1.3), in civil or commercial matters when a Member State decides to ask the competent court of another Member State to take evidence or to take evidence directly in another Member State. It entered into force on 1 January 2004, except for articles 19, 21 and 22, which have applied since 1 July 2001 (article 24). Moreover, to fall under the scope of this regulation, the evidence must be obtained for use in commenced or contemplated judicial proceedings (article 1.1 and 1.2).

**Solution:** We have to apply this regulation for the request for taking of evidence sent to the French Court and also concerning the obtaining of the address of an Austrian witness. Indeed, Austria and Poland are Member States and the address is a piece of evidence which is necessary to contact an Austrian witness and examine him by videoconference in judicial proceedings. Therefore, **the European regulation is applicable and should have been used by the Polish Court instead of rejecting the application made by KONTAKT DESIGN.**

We should recall that the regulation establishes two different procedures in the taking of evidence : On the one hand, articles 10 to 12, by asking the requested court to take evidence. It is up to a judge to judge procedure, in which the requested court is going to apply its law (article 10.2) and can use coercive measures (article 13). On the other hand, article 17, allowing the requesting court to take evidence directly after submitting a request to the Central Authority. The requesting court is going to apply its own law (article 17.3). However, coercive measures cannot be used (article 17.2).

➤ The problems raised by the French Central Authority

The Polish Court asked the French Court directly to take evidence. Therefore, we are within the scope of articles 10 to 12. Thus, the French Court has to apply its own laws regarding the rules of evidence. **N.B:** A first technical error can be identified since the answer comes from the Central Authority instead of the French Court which is supposed to be the main contact for the requesting court.

a) « *The requested court only had a videoconference system installed for criminal cases* »: Such a decision is implied by article 10.4 since the requested court has to apply its own law regarding the rules of evidence. Thus, if French law only allows videoconference in criminal cases, it cannot be extended to civil matters. **Solution:** The possible solution, according to article 10.3, would be for the Polish Court to ask for the use of a special procedure provided by Polish law. However, the French Court cannot comply with this requirement if it is incompatible with its laws. This solution does not allow for the overcoming of the prohibition within French law. That is why the preferred solution is for the Polish judge to use article 17 that will allow for the application of Polish law and overcome the prohibition within French law. Therefore, if Polish law allows the use of videoconference systems in civil cases, the witness can be examined through videoconference in Bordeaux (art. 17.3).

b) « *the taking of evidence could only be performed on a voluntary basis, without the support of coercive measures* »: Within the scope of articles 10 to 12, the requested court has to apply its own law (French law) and is allowed to use coercive measures regarding article 13. **Solution:** The requested state can use coercive measures, unless it is prohibited by its national law (article 13). On the contrary, if the Polish Court used article 17, the taking of evidence could only be performed on a voluntary basis.

c) « *it should be the requesting court to contact the witness and to inform him of the voluntary character of the examination* »: According to article 4, the Polish Court should have used Form A

for its request. Article 4 (e) indicates that where the request is for the examination of a person, the requesting state has to include a reference to a right to refuse to testify under the law of the Member State of the requesting court. **Solution:** The French Court will contact and interview the witness regarding French laws and, where appropriate, inform him of the voluntary nature of the examination regarding its own laws. Moreover the person shall refuse to testify if the examination is voluntary regarding the laws of the requested or requesting state (article 14.1). On the contrary, in the procedure of article 17, it is for the requesting court to inform the witness that the examination shall take place on a voluntary basis (article 17.2).

d) « *the request needed to be redirected to the French central authority in twenty days* » : There is no need to redirect the request to the French Central authority when we use the procedure of articles 10 to 12. However, according to article 3. 1. b) the Central authority could be seized by the requested Court in case of difficulty. **Solution:** Within the scope of articles 10 to 12, the Requested Court needs to : acknowledge the reception of the request by using Form B within seven days of receipt (article 7.1) and execute the request without delay and, at the latest, within 90 days of receipt of the request (article 10.1)

e) « *it should be the requesting court to find a place and a videoconference system in the French territory to perform the collection of evidence* »: According to article 10.4 the requested court has to comply with the requirement of the requesting court unless there is a major practical difficulty, for example no videoconference device within the Court. **Solution:** A short-term solution can be found in article 10.4, since both courts may make such devices available by mutual agreement. A long-term solution is also provided in the regulation by the creation of the JUDICIAL ATLAS website in which each member state has to establish a list of Courts that have sufficient technical devices to use videoconference.

f) « *the cooperation to be given was submitted to the condition of the examination having to be performed by a French judge* »: According to article 10.4 the examination of the witness will be performed by the requested judge. However, if it is provided and compatible with the law of the requesting court, the parties, their representatives and representatives of the requesting court have the right to be present in the performance of the taking of evidence (article 11 and 12). **Solution:** The possible solution would be for the Polish judge to use article 17 and perform the questioning of the witness himself. The preferred solution would be for the representatives of the requesting court to join taking of evidence carried out by the requested court. Indeed, it would enhance cooperation between judges and enlighten the requesting court that is supposed to end the conflict.