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GRAND FINAL
KRAKOW

ITALY 1

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1. ABOUT THE PROTECTIVE MEASURES SEEKED BY TWL CARS AGAINST KONTAKT DESIGN.

TWL CARS GmbH (hereinafter: TWL CARS), a company with its central office in Berlin, seises the Krakow civil court applying for a protective measures in order to freeze the property of the KONTAKT DESIGN SP Z.0.0. (hereinafter: KONTAKT), a Polish company having seat in Krakow, alleging to have suffered serious pecuniary damages as a consequence of the wrong implementation by KONTAKT of the contract signed by the latter company with BBB EVENTS Gmbh (hereinafter: BBB EVENTS), a service supplier of TWL CARS having the main seat in Wien and a branch in Frankfurt,.

On the question of **jurisdiction**, this controversy falls within the scope of Council Regulation (EC) No. 44/2001 of 22 December 2000 on the Jurisdiction and Recognition of Judgments in Civil and Commercial matters (the so-called Brussels I Regulation, hereinafter also the Regulation). This Regulation is meant to promote judicial cooperation in civil matters among EC Member States and to make possible that a judgment given in a Member State is recognised in the other Member States without any special procedure being required. The Regulation applies between all Member States of the European Union. Regulation (EC) No 44/2001 will be replaced by Regulation (EU) No 1215/2012 (Brussels I Regulation (recast)) as from 10 January 2015. The Regulation does not interfere with the choice of law rules, which remain different in the various Member States of the EU, if not subject to the uniform rules of Regulations Rome I and II (for what please see below).

The requirements set forth by the Regulation for its application are met by the concerned case:

a) the UE cross-border dispute regards a civil or commercial matter (art. 1 of the Regulation);

b) the defendant is domiciled in a Member State (art. 2 of the Regulation).

As regards the domicile of the defendant company KONTAKT, it is placed in Krakow (Poland), where the company has its seat and administration , because article 60 of the Regulation states that, *for* the purposes of the same Regulation, a company is domiciled at the place where it has its: (a) statutory seat; or (b) central administration; or (c) principal place of business.

In the context of Regulation Brussels I, considering that TWL CARS asks for protective measures, the case is covered by article 31 of the Regulation related to *provisional, including protective, measures.* According to art. 31 application may *be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.* The provision has to be interpreted in the sense that the plaintiff is generally entitled to ask for application for provisional measures to the Court of the State that has jurisdiction as to the substance of the matter pursuant to Reg. 44/2001. However, as a way of exception, because of the

urgent nature of the requested provisional measure, the application could be also filed to the court of the Member State whose competence is designated by the national law of the applicant.

In the concerned case the German company TWL CARS decided to seise the Polish court in Krakow, that is competent to deal with the protective measures to freeze the property of the company KONTAKT, because the Polish court has jurisdiction over the merit of the case, according to article 2 of the Regulation. The regulation in its article 2 consecrates, indeed, the principle known as *actor sequitur forum rei,* which is recognised in all legal systems of EU and elsewhere. Specifically article 2 states that, subject to express exceptions contained in the Convention itself, a defendant is to be sued in the court of the Member State of his or her domicile, irrespective of national law.

Once solved the issue of jurisdiction, the **question of applicable law** arises.

The problem comes from the fact that TWL CARS intends to ask for compensation of damages from KONTAKT even though the contractual agreements about supplying services were signed by TWL CARS, as customer, and BBB EVENTS, as service provider, on one side and by BBB EVENTS and KONTAKT, as subservice supplier, on the other side, being KONTAKT performance of services aimed at implementing the obligations assumed by BBB EVENTS under the first contract. The lack of a formal contract between TWL CARS and KONTAKT raises the issue whether "the relation" between TWL CARS and KONTAKT falls under the scope of contract law or tort law. Solving this matter would bring consequences for the application of conflicts of law rules, because contract law is regulated by Regulation (EC) No 593/2008 of 17 June 2008 on *the law applicable to contractual obligations* (Rome I); whilst tort law falls under the scope of Regulation (EC) 864 2007 of 11 July 2007 about *the law applicable to non-contractual obligations* (Rome II). The Regulation Rome I applies to *contractual obligations* (article 1 paragraph 1) but it does not define what contractual obligations are. The scope of Regulation Rome II covers *non-contractual obligations in civil and commercial matters* (article 1 paragraph 1), whose nature is again not defined by the Regulation.

The obvious difference between claims based on a contract and claims sounding in tort, is that contracts are concluded on a voluntary basis and the parties are free to make their own deal not only as regards substance but also with respect to jurisdiction. Not so with tort.

However in the concerned case even though contracts are concluded, they are chain contracts, in which the final customer is not the formal counterpart of the subcontractors.

In order to establish whether the case should be referred to contract or to tort law, under the scope of European uniform conflicts of law rules, it should be recalled the Court of Justice case law about the concept of tort in the context of Regulation Brussels I art. 5 paragraph 3 (and previously of the

Brussels Convention on recognition and enforcement that had the same content[1]). The case law about Brussels I is relevant for the interpretation of Regulation Rome I, pursuant to its 7 *whereas*, according to which the substantive scope and the provisions of the Regulation should be consistent with Council Regulation Brussels I and Regulation Rome II on the law applicable to non contractual obligations.

As regards the concept *matters relating to tort,* the Court in *Kalfelis v. Schroeder*[2] has consistently held that an autonomous interpretation of that concept is required in the light of the principles and objectives and the general scheme of the Convention, in order to ensure that the Convention is given full effect to ensure, as far as possible, the equality and uniformity of the rights and obligations, in accordance with the principle of legal certainty[3]. The Regulation (and previously the Convention) frequently uses terms and legal concepts that are drawn from civil, commercial and procedural law, such as "civil and commercial matters"[4], "matters relating to a contract", "obligation", "consumer" or "appeal". Many of these concepts have a different meaning in the various contracting States. The question has arisen how these concepts must, within the context of the uniform European rules, be interpreted: should they be regarded as having their own independent meaning common to all contracting States, or as referring to the national law of one or the other state concerned? As becomes evident from the Court's case law, the principle of equality and uniformity of rights and obligations requires that legal concepts used in the Convention should receive an autonomous, independent interpretation rather than an interpretation that simply refers to the national law of one or the other of the States concerned[5]. The technique used by the Court in attributing the required autonomous meaning to the Convention's provisions has been described by

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[1] As it is explicitly stated in the preliminary considerations of Regulation N° 44/2001, continuity between the Brussels Convention and the Regulation should be ensured (preliminary considerations (Nos. 5 and 19). The principle of continuity also applies to the interpretation of the Conventions's provisions which has been in the hands of he Court of Justice of the European Communities. Although there are certain differences between regulation No 44/2001 and the Brussels Convention, the body of case law of the EC Court of Justice under this Convention will for a long period of time, remain of great importance for understanding the Regulation and will remain a guide for the interpretation and application of the Regulation by the national judges.

[2] Judgment of 27 September 1988 in case 189/87.

[3] In the case, *Krombach v. Bamberski,* judgment of 28 March 2000 in case C-7/98, the Court stated that *it follows form the Court's case law that ..... the principle f legal certainty in the Community legal system and the objectives f the Convention in accordance with article 220 of the EC Treaty (now article 293 EC), on which is is founded, require an uniform application in all Contracting States of the Convention rules and the relevant case-law of the court.*

[4] In the case *Bavaria v. Eurocontrol*, judgment of 14 July 1977 in case *C-9/77*, the Court affirmed the following: *The Court .. has determined the scope of the Brussels Convention ... by interpreting "civil and commercial matters" as an independent concept and not as a reference to the internal law of one or other of the states concerned. This interpretation is based on the desire to ensure .... that the Contracting States and parties concerned have equal and uniform rights and duties under the Brussels Convention. The principle of legal certainty in the Community legal system and the objectives of the Brussels Convention ... require in all Member States a uniform application o the legal concepts and legal classifications developed by the Court n the context of the Brussels Convention.*

[5] Case *Shearson v. TVB,* judgment of 19 January 1993 in case C-89/91,the Court affirmed the following. The *principle according to which the concepts used in the Convention, which may have a different content depending on the national law of the Contracting state must be interpreted independently .... In order to ensure that the Convention is uniformly applied in all the Contracting State.*

the Court in in most of its case law. The Court has consistently held that an independent concept has to be interpreted by reference, first, to the objective and scheme of the Convention and secondly, to the general principles which stem from the corpus of the national legal system. However, when attributing an autonomous meaning to the Convention's provisions, the Court nowadays[6] also refers more and more to the substance of concepts used in the European legal instruments, such as Conventions, Regulations and Directives. In Case *Kalfelis* (cited above), the Court decided that the concept *matters relating to tort,* encompasses *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 of the Convention.* Examples of claims which are clearly within tort law are those relating to personal injury or damage to property when there is no contract between the parties (please see the cases in the last paragraph of this work). In case *Réunion européenne v. Spliethoff's* (judgment of 27 October 1998 in case C-51/97), the Court went further to specify that the phrase "matter relating to a contract" is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards the other. In *Tacconi v. Hienrich Wagner Sinto Maschinenfabrik* (judgment of 17 September 2002 in case *C-334/00*), the court followed the same line and concluded that, in circumstances characterised by the absence of an obligation freely assumed by one party towards the other on the occasion of negotiations, an action arising from a possible breach of the rule requiring the parties to act in good faith, is not covered by the expression "matters relating to a contract".

Coming the to the conclusion with reference to the case study, the absence of an obligation freely assumed by KONTAKT in respect of TWL CARS, brings the case under the umbrella of non contractual obligations, construed according to an autonomous meaning. The breach of good faith claimed by TWL CARS against KONTAKT is not enough to qualify their relation as a contractual obligations, pursuant to the Court of Justice case law.

Therefore, the applicable law must be determined in the light of Regulation Rome II. Considering that the concrete case is not covered by any of the specific provisions of Rome II listed in articles from 5 to 12, the residual provision of article 4 (*general rule*) paragraph 1 shall apply, according to which the law applicable to a non-contractual obligation arising out of tort shall be the law 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.

The applicable law would then be the Polish one, because in Poland occurred the event giving rise to the damage, that is the creation of the contested layouts, the official images, icons and other symbols of the marathon. The financial damage suffered in Germany by the German company is

[6] Case *Gabriel,* judgment of 11 July 2002 in case C-96/00.

instead an indirect consequence of the event (for further consideration of this issue please see the last chapter of this work about tort) and it does not ground the application of German law.

2. PROCEDURAL ISSUES ABOUT TAKING EVIDENCE

The proceeding about protective measures raises some procedural issues for what regards the taking of evidence by the Polish court in France and Austria.

The Krakow court asks directly the French Court in Bordeaux to examine as witness trough videoconference the French former administrator of KONTAKT. Further, the Polish defendant KONTACT asks the Polish court in Krakow to find the address of an Austrian witness.

The first issue falls under the scope of the Council Regulation (EC) No 1206/2001 of 28 May 2001 (hereinafter: Regulation), on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters, because it relates to civil matter and regards a request of the court of a Member State (Poland) to the competent court of another Member State (France) to examine a witness trough videoconference (art. 1 of the Regulation).

The second case instead is internal to the Polish procedural system, because the request of taking evidence does not involve two courts of two different Member States. The issue has therefore to be solved pursuant to the Polish national law.

As regards the first case, the Regulation provides for two ways of taking of evidence between Member States: direct transmission of requests between the courts and the direct taking of evidence by the requesting court. The *whereas* 11, in order to enhance the cooperation amongst European courts, states that *to secure the effectiveness of the Regulation, the possibility of refusing to execute the request should be confined to strictly limited exceptional situations.*

The first technical error in the case is that, according to article 10 paragraph 1 of the Regulation, the French Court directly, without the involvement of the Central Authority, should have executed the request within 90 days of the receipt of the same request. In case of delay, pursuant to article 15 of the Regulation, the Court directly should have notified the Polish court explaining the grounds for the delay and giving the estimated time for the execution of the request. The French Authority was instead right, pursuant article 17 paragraph 2, first and second indent, of the Regulation in assuming that the taking of evidence should be performed on a voluntary basis, without the support of coercive measures and should be the requesting court to contact the witness and to inform him of the voluntary character of the examination.

For what regards the execution of the request of taking evidence trough videoconference by the requested French court, the spirit of the Regulation should have prevented the French Authorities to refuse this possibility, because, ad said above, the refusal is admissible only in exceptional cases; because, even though the videoconference equipment was in principle available for criminal cases

only, according to article 10 paragraph 3 of the Regulation the French court was obliged to comply with the Polish court's request to use the device for a civil case, being this not incompatible with the French law. Furthermore, according to paragraph 4 of the article 10, the use of videoconference is a privileged mean of taking evidence pursuant to the Regulation, because it facilitates the communication amongst distant Member States courts. An alternative, not exploited in the case, would have been the direct taking of evidence by the Polish judge according to article 17 of the Regulation.

3. ABOUT THE CLAIMS BROUGHT BY BBB EVENTS AND SCHWEIZGRAPH GMBH FOR THE PAYMENT OF CONTRACTUAL FEES.

BBB EVENTS claims the payment of 30 % of unpaid contractual fees from TWL CARS in relation to the main contract of service supply, entered by the two companies (first case).

At the same time the SCHWEIZGRAPH GmbH (hereinafter: SCHWEIZGRAPH), a Swiss company, claims the fees owed by KONTAKT with reference to the supply subcontract signed by the two companies (second case)

As regards **jurisdiction** the first case falls under the scope of Brussels I, because it relates to civil and commercial EU cross border litigation and the defendant is domiciled in a Member State (Austria). The second case, having the plaintiff its seat in a Country –Switzerland- that is not an EU member would fall instead under the application of the Convention of Lugano on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, that was signed on 30 October 2007 by the European Community, along with Denmark, Iceland, Norway and Switzerland (hereinafter: Convention), replacing the Lugano Convention of 16 September 1988. The Convention follows the present legal framework of Brussels I.

Considering that the two claims (first and second case) are similar and that the provision of the Regulation Brussels I and the Convention about contractual obligations are the same (art. 5 of the Regulation and art. 5 of the Convention) , a similar solution, with different results depending on the facts of the cases, can be proposed for both case studies.

According to the general rule of jurisdiction (article 2 of the Regulation and the Convention), that is the domicile of the defendant, the competence should belong to the German judge in the first case and to the Polish judge in the second case. However, pursuant to the provisions contained in the Title II of the Regulation and the Convention, a defendant may, under a rule of special jurisdiction be sued before a court of another Member or Contracting State. According to the Court of Justice case-law *the rules of jurisdiction codified in title II determine which State's courts are most appropriate to assume jurisdiction, taking into account all relevant matters* (*Duijnstee v. Goderbauer*, judgment of 15 November 1983 in case C-288/82).

In light of this requirement, Article 5 paragraph 1 of the Regulation and the Convention attributes jurisdiction, in matters relating to a contract, *to the court of the place of performance of the obligation in question.* In *Besix v. Ktretzschmar* (judgement of 19 February 2002 in case *C-256/00)* the Court stated that *the reason for the adoption of the jurisdictional rule in Article 5 (1) of the Brussels Convention was concern for sound administration of justice and efficacious conduct of proceedings. The court of the place where the contractual obligation giving rise to the action is to be performed will normally be the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence.*

As regards, specifically, the case of *provision of services,* lett. b) second indent of paragraph 1 of article 5 states that for the purposes of the Regulation (and Convention) the place of performance of the obligation in question shall be the place in a Member State where, under the contract, the services were provided or should have been provided.

In the second case, the services were, under the contract, clearly provided in Switzerland, where images, icons and symbols were printed. In this case, it is likely to be that the plaintiff will bring the claim in front of a Swiss court, taking into account the disadvantage that plaintiff –as every plaintiff in general- would encounter in bringing an action in a foreign country, according to a foreign language and in compliance with foreign procedures and practices .

In the first case, the unpaid services were provided in Poland by KONTAKT. For this case BBB EVENTS could bring the case either before an German court, where the domicile of TWL CARS is located, or in Poland, that is the place of performance .

For what concerns the **applicable law**, in the first case, pursuant to Regulation Rome I article 4, the contract shall be governed by the Austrian law, that is *the law of the country where the service provider has his habitual residence.* This is because, according to the contract signed between TWL CARS and BBB EVENTS, the latter should be the service provider.

In the second case, the applicable law shall be determined in accordance with the Swiss conflicts of law rules.

4. **CASES ABOUT TORT LAW.**

- The Spanish student JUAN PABLO claims for compensation for non-pecuniary permanent damages -that is hepatitis for life - suffered because of blood transfusion in the German Hospital. The permanent non pecuniary damage is detected in Spain.
- The Spanish student FRANCISCO claims for permanent non pecuniary damages related to personal injuries (strong limitation of movements in the left upper side of his body) and for financial damages for having lost the capacity to perform his activity of truck driver, as a consequence of the injuries inflicted to him by French supporters during the marathon.

- Francisco's father claims for compensation of non pecuniary damages suffered in Spain for an heart attack because of watching via TV the aggression to his son happened in Germany.
- The athletes GODA, from Lithuania, and EDUARDO, from Portugal, claim non pecuniary damages related to personal injuries, and for financial losses suffered as consequence of accidents happened during the race. They intend to ask compensation to the English seated Sportsure LLC insurance company that negotiated the insurance with BBB EVENTS.
- Finally MATHIAS, a Belgian citizen, seeks compensation of damages for unlawful detention in Germany.

All cases above share the common feature that plaintiffs, who are persons domiciled in a EU Member State, claim for compensation of non pecuniary damages or financial losses as a consequence of facts -for the most personal injuries- happened in a Member State – that is Germany in the case- - different from that of their domicile. In all cases the consequences (pain and suffering and financial losses) of the injuries or of the unlawful event are suffered in the Country of the plaintiffs' domicile. All cases relate then to tort law.

Two cases offer particular features.

In the cases of GODA and EDUARDO an insurance company appears. The issue here is whether, beyond tort law, plaintiffs could also invoke contractual obligations of the company, domiciled in UK, to compensate the damages.

In the last case, regarding MATHIAS, the defendant would be the German State. The issue that arises here is whether the State can be considered a legal "person" domiciled in a Member State in the light of Brussels I and whether the case is subject to regulation Rome II about the applicable law.

As regards **jurisdiction,** all cases fall under the scope of Regulation Brussels I, because they relate to civil issues (art. 1) and because the defendants are domiciled in a Member State.

The general rule of competence set in article 2 of Brussels I would bring the cases to various jurisdictions according to the different defendants' domicile: to German courts, the Member State where the German hospital is located, in the JUAN PABLO case; to Austrian Courts, where the seat of the organiser of the marathon –the Austrian Company BBB EVENTS- is placed in case of GODA and EDUARDO or UK courts if they seek for compensation from the insurance company; to French courts, according to place of domicile of French aggressors in the cases of FRANCISCO and FRANCISCO's father.

However the plaintiffs, who would prefer to avoid to bring the action in a foreign country, to use foreign language and to comply with foreign procedures and court's practices, could seek to exploit the Regulation's rule about special jurisdictions, that is, as for contractual obligations, set in article

5. According to paragraph 3 of article 5 of Brussels I, in matters relating to *tort, delict or quasi-delict*, a person domiciled in a Member State may be sued in another Member State, in the courts for the place *where the harmful event occurred or may occur*. The Courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on grounds of proximity and ease of taking evidence

However, with reference to the cases of GODA and EDUARDO, it should be taken into account that the special jurisdictional rules contained in Article 5 are set aside by the Convention's protective rules for insurance policyholders (art. 9 of the Regulation), according to which the policyholder may sue the insurance in the court of the place where the plaintiff is domiciled.

In order to establish the competent court according to the special criterion of jurisdiction set by art. 5 paragraph 3 of the Regulation, it should be clarified the legal concept of *the place where the harmful event occurred.* The wording is indeed unequivocal only when the tort can be located to a single place. As regards damages suffered at distance, as in our cases, the wording leaves open the question of whether reference should be made to the place where the tortfeasor acted or where the injured person suffered damage. In the leading case *Bier v. Mines de potasse d'Alsace*[7] (judgment of 30 November 1976 in case *21/76*) the Court stated that article 5 is based on the existence of a particularly close connecting factor between the dispute and the courts other than those of the State of the defendant's domicile, which justifies the attribution of jurisdiction for reasons relating to the sound administration of justice and the efficacious conduct of proceedings. The court opted for a liberal and expansive approach to allow the plaintiff to sue *either* in the place of the event giving rise to the damage or the place where the damage occurred It spoke generally of cases where the place "of the event which may give raise to liability in tort" and the place "where the event results in damage" did not coincide, and it ruled that in those cases the "place where the harmful event occurred" included both the place where the damage occurred and the place of the event giving rise to the damage. The Courts' decision in *Bier v. Mines de potasse* clearly implies a multiplication of the heads of jurisdiction of Article 5. However, in the following case *Dumez France v. Hessische Landesbank* (judgment of 11 January 1990 in case C-220/88) the Court clarified that Article 5 should be interpreted restrictively in order to avoid a (further) multiplication of courts. It held that despite the fact that the expression *place where the harmful event occurred* may refer to *place where the damage event occurred,* the latter cannot be understood other than as indicating the place where the event giving rise to the damage, and entailing tortuous liability, directly produced its

[7] In *Bier,* a French Company had discharged slats into the Rhine River. In the Netherlands the slats cause damage to the produce of a gardening company. The Gardening company brought an action in the Netherlands against the French company, asking for a declaration that the discharge was unlawful and that the defendant was liable for the damage caused and for any future damage.

harmful effects upon the person who is the immediate victim of that event. The term *place where the harmful event occurred is not to include the place where the direct victims of the damage ascertained the repercussions on their own assets.* The latter interpretation was finally confirmed in case *Marinari v. Lloyds Bank* (Judgment of 19 September 1995 in case C-*364/93),* in which the the Court decided that the term *place where the harmful event occurred* also does not refer to the place where the *direct* victim claims to have suffered financial damage which followed on from initial damage and which was suffered by him in another Contracting State.

The interpretation of the concept of the *place where the harmful event occurred* could finally be supported, in our cases, by the 17 *whereas* of the Regulation Rome II, because, as said above, the interpretation of uniform rules contained in regulations about jurisdiction and about applicable law should comply. The whereas 17, illustrating the general rule of Regulation Rome II contained in article 4, states that the *Law applicable should be determined on the basis where the damage occurs regardless of the country or countries in which the indirect consequences could occur. Accordingly in case of personal injury , the country in which the damage occur should be the country where the injury was sustained.* Pursuant to the negative definition of the place of damage stated by the Court in to *Dumez* and *Marinari* judgments, according to which it does not include the place where injured persons ascertained the damage and the place where the injured person suffered financial losses consequential on initial damage suffered, all the cases above are located in Germany, where the injuries were sustained. Pain and suffering and financial losses suffered in the country of the plaintiffs' domicile are to be regarded as *indirect consequences* of the initial damage and cannot be a ground for jurisdiction in that Country. As regards the **applicable law,** it would be accordingly the German law pursuant to the general rule contained in article 4 of the Regulation Rome II.

As regards GODA and EDUARDO they cannot claim the jurisdiction of the courts of their domicile against the insurance company, because they are not the policyholders in the sense of article 9 of the Regulation Brussels I and they did not enter in a contractual relation with this company (please see above about the concept of contractual obligations). The insurance was instead stipulated by BBB EVENTS.

Finally MATHIAS could sue the German State in Germany according to Regulation Brussels I, because the State has to be regarded as a legal person in the light of the Regulation but he will have to rely on the German conflicts of law rules, because Regulation Rome II, according to its article 1, does not apply to the liability of the State for acts and omissions in the exercise of State authority.