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Question 1

We will start by presenting the types of contracts which have been concluded between the parties. We consider that all the four contracts between TWL Cars, BBB Events, Kontakt Design and Schweizgraph are enterprise contracts by which one of the parties obliges to execute a service in exchange of a price. These contracts are not mandates because the main obligation is not to conclude other contracts, but to execute certain services.

We will show what complaints can be made by each person in order to exercise all their rights.

I. JURISDICTION AND APPLICABLE LAW

A. BBB Events vs. TWL Cars. BBB Events has the legal possibility to act against TWL Cars to recover the remaining 30% of the price which has not been paid. In order to decide the nature of the contract, it is necessary to take as a basis the obligation which characterizes the contracts at issue. A contract which has as its characteristic obligation the supply of a good will be classified as a 'sale of goods' within the meaning of the first indent of art. 5 par. 1 (b) of Council Regulation No. 44/2001[1]. A contract which has as its characteristic obligation the provision of services will be classified as a 'provision of services' within the meaning of the second indent of art. 5 par. 1 (b) of that regulation[2]. As a consequence, this contract is a provision of services.

According to art. 5 par. 1 b) second indent of Regulation No. 44/2001, the competent court is where, under the contract, the services were provided or should have been provided. Art. 5 par. 3 cannot be applied because this matter is one relating to a contract. Also, art. 2 par. 1 is not applicable because it establishes a general rule which is used only when other rules don't apply. Contractual obligation that determines the competence is the one which represents the basis of the judicial claim[3]. The European Court of Justice *(ECJ)* concluded that, for the purposes of determining the place of performance within the meaning of art. 5 par. 1, the obligation to be taken into account is that which correspons to the contractual right on which the plaintiff's action is based[4]. Also, ECJ has held on several occasions that the place of performance of the obligation is determined by the law governing it according to the conflict rules of the

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[1] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters, OJEU L 012, 16/01/2001, P. 0001-0023;
[2] C-381/08, *Car Trim GmbH v. KeySafety Systems Srl*, 25 February 2010;
[3] C- 266/85, *H.Shenavai v. Kreischer*, 15 January 1987;
[4] C-420/97, *Leathertex v. Bodetex*, 5 October 1999;

seized court.[5] So, in the BBB **v.** TWL case, the court which has jurisdiction is the one situated at the place where the services should have been provided, more exactly, in Germany, the place where the Berlin Marathon took place.

Regarding the law applicable, we consider that Regulation No. 593/2008[6] is applicable considering that the present matter is related to a contract. We must first emphasize that there is no consent of the parties as to the choice of the applicable law. The uniform rules set out in Title II of the Regulation No. 593/2008 enshrine the principle that priority is given to the intention of the parties, to whom art. 3 grants freedom of choice as to the law to be applied. In the absence of a choice by the parties as to the law applicable to the contract, art. 4 provides for connecting criteria on the basis of which the court must determine that law. Those criteria apply to all categories of contracts[7]. As a consequence, in accordance with art. 4 par. 1 (b), the applicable law for the contract of provisions of services provided by BBB is the law of the country where the service provider has his habitual residence. Art. 19 par. 1 of Regulation No 593/2008 states that the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. In our case, the central office of BBB is in Vienna, Austria therefore, the applicable law should be Austrian law.

Nevertheless, we must take into consideration another situation that could be plausible. If the contract has been concluded by the office branch of BBB situated in Germany and if it would have been acting in the limits of the powers attributed by the central administration, we consider that, based on provisions from art. 19 par. 2, the habitual residence could be considered the place where the office branch is situated, so the applicable law would be the German law.

B. BBB Events v. KONTAKT DESIGN. The claim should be rejected considering that BBB never paid for the services provided by Kontakt, considering that it was not their fault for not receiving the price from TWL Cars. Anyhow, BBB Events could never ask for the whole 30% of the initial price, but only for the price of Kontakt services, if these would have been paid. As regard the applicable law, according to art. 4 par. 1 (b) of Regulation No. 593/2008, to the extent that the applicable law has not been chosen by the parties, the contract shall be governed

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[5] C-12/76, *Tessili v. Dunlop*, 1976; C-288/92, *Custom Made Commercial v. Stawa Metallbau*, 1994; C-440/97, *Groupe Concorde and Others v. The Master of the Vessel Suhadiwarno Panjan and Others*,1999;
[6] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJEU 4/07/2008 L 177/6;
[7] C-133/08, *Folien Fischer and Fofitec*, 25 October 2012;

by the law of the country where the service provider, Kontakt, has its habitual residence and, considering the provisions from art. 19 par. 1, the applicable law is the Polish law.

C. KONTAKT DESIGN vs. BBB Events. KONTAKT DESIGN could consider that it fulfilled its obligations to BBB Events but it has never received the price. Kontakt could ask for the printing price only if the claim forwarded against it by SCHWEIZGRAPH would be accepted, else way there would not be a prejudice to recover. As regards the jurisdiction of the court, being a matter relating to a contract, according to art. 5 par. 1 (b) of Regulation No. 44/2001, the court that has jurisdiction is the one located at the place where the services were provided or should have been provided. The services should have been provided by Kontakt, situated in Krakow, so the Polish court will be competent.

As regard the applicable law, according to art. 4 par. 1 (b) of Regulation No. 593/2008, to the extent that the applicable law has not been chosen by the parties, the contract shall be governed by the law of the country where the service provider, Kontakt, has his habitual residence. Thus, the applicable law will be the Polish law.

D. TWL vs. KONTAKT DESIGN. This trial would be possible only if, according to the applicable national law, there is a direct action between TWL and Kontakt Design, because the two parties do not have direct contractual relations but they both contracted with BBB Events in the execution of the undertaking agreement.

This legal action would be anyhow based on torts. According to ECJ case-law, the concept of "matters relating to a contract" from art. 5 par. 1 Regulation No. 44/2001 is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another[8]. So, considering that there is no direct obligation between these two parties, this matter is not related to a contract. According to art. 5 par. 3, matters relating to torts, delict or quasi-delict, are judged in the courts for the place where the harmful event occurred or may occur. ECJ stated that this provision must be interpreted as meaning that, in the context of a dispute, the words 'place where the harmful event occurred' designate the place where the initial damage occurred[9]. In our case, the place where the harmful event occurred is Germany, so German courts will have jurisdiction in this case.

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[8] Case C-265/02, *Frahuil SA v. Assitalia SpA*, 05 February 2014;
[9] C-189/08, *Zuid Chimie BV v. Philippo's Mineralenfabriek NV/SA*, 16 July 2009;

As regards to the applicable law, provisions from Regulation No. 864/2007[10] are applicable because this is not a matter related to a contract. According to art. 4 par. 1, the applicable law to the non-contractual obligation arising out of a delict is the law of the country in which the damage occurred, irrespective of the country in which the event giving rise to the damage occurred or of the country in which the indirect consequences of that event occurred. The applicable law in this claim is the German law.

E. TWL vs. BBB Events. TWL could only ask for damages, for the amount of money used to print the materials, using another third company. Taking into consideration the fact that between the two parties there are contractual binding obligations, the court that has jurisdiction to hear the case is established by art. 5 par. 1 (b) of Regulation No. 44/2001, being the place where the contractual obligation should have been provided or were provided, more exactly in Germany.

The applicable law is determined according to art. 4 par. 1 (b) and art. 19 par. 2 of Regulation No. 593/2008. Therefore, the applicable law to the contract between TWL and BBB should be the German law, taking into consideration that BBB has an office branch in Germany. Nevertheless, if the contract was concluded by the central administration of BBB, according to art. 1 (b) and art. 19 par. 1, the applicable law will be the Austrian law.

F. SCHWEIZGRAPH GmbH vs. KONTAKT DESIGN. The Swiss company can ask Kontakt for payment of the price. So, it has an *ex contractu* action against. Switzerland is not member of the European Union,

1. If the plaintiff will take the action to the Swiss court, provisions from international private law are to be applied: Lugano Convention[11]. At article 5 par. 1 (b) second intend, it is stated that the competent court is the one where, under the contract, the services were provided or should have been provided. The place where the service of printing should have been provided is in Geneva, so the court that has jurisdiction to hear the case is Swiss law.

Concerning the applicable law, we consider that Regulation No. 593/2008 does not apply to Switzerland. As a consequence, the applicable law will be determined using the international private law regulations from the Swiss national law.

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[10] Regulation (EC) No. 864/2007 of The European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJEU 31/7/2007 L 199/40;

[11] Lugano Convention 2007, Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, 30 October 2007;

2. In case the plaintiff takes the trial to the Polish court, Regulation No. 44/2001 is applicable. But here we cannot apply art. 5 par. 1 (b) because it would send the case to a court outside the Regulation's jurisdiction, to the Swiss court. The general rule from art. 2 is applicable, so the competent court is the one from the defendant's domicile, the Polish court. As for the applicable law, the plaintiff who chooses the court, automatically accepts its applicable laws, so here, Regulation No. 593/2008 is incident. According to art. 4 par. 1 (b) and art. 19 par. 1, to the extent that the applicable law has not been chosen by the parties, the contract shall be governed by the law of the country where the service provider, Schweizgraph, has his habitual residence, so the applicable law will be the Swiss law.

G. Spanish students vs. French supporters. The two students Juan Pablo and Francisco can sue the French supporters based on tort for moral and material damages. In addition, Juan Pablo could ask for special damages representing the harm caused by being infected with hepatitis, even if this is an indirect prejudice related to the supporters actions. If they forward an action, according to the art. 5 par. 3 of Regulation No. 44/2001, the court that has jurisdiction is the one located at the place or the harmful event occurred. In our case, the harmful event took place in Berlin, so the court that has jurisdiction is a German one.

The applicable law for this claim is, according to art. 4 par. 1 of Regulation No. 864/2007, the German law because here is where the Spanish students have been harmed.

H. Juan Pablo vs. Berlin Hospital. Juan Pablo contracted hepatitis in the Berlin Hospital, this is where the harmful event took place, therefore the court that has jurisdiction to hear the case is a German one. ECJ stated that the phrase 'place where the harmful event occurred' designates the place where the initial damage occurred as a result of the harmful event[12], so even though Juan Pablo discovered the illness in Spain, the harmful event took place in Germany. As a consequence, according to the art. 5 par. 3 of Regulation No. 44/2001, the German court has jurisdiction. The Spanish court could not have competence of jurisdiction even if the illness was discovered there because, as ECJ stated, the place where the damage occurred cannot be considered any place where the adverse consequences can be felt of an event which has already caused damage, actually arising elsewhere. We do not find any new damages that occurred in Spain which could have determined the Spanish courts' jurisdiction, but only the discovery of an already existing illness.

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[12] C-189/08, *Zuid Chimie BV v. Philippo's Mineralenfabriek NV/SA*, 16 July 2009;

According to art. 5 par. 4 of Regulation No. 44/2001, it is stated that, as regards a civil claim related to a criminal offence will be judged by the court seized of those criminal proceedings. So, if there is any criminal proceeding, the civil claims, the court that has jurisdiction to hear the case will be the one competent to solve the criminal trial.

The applicable law for this claim is, according to art. 4 par. 1 of Regulation No. 864/2007, the German law because here is where Juan Pablo has been harmed.

I. **Francisco's father vs. French supporters.** Francisco's father can forward a claim based on tort against the French supporters who harmed his son. They can be held responsible since in torts law, even the unforeseeable prejudice can be repaired. The court competent to hear this case is determined by the provision stated in art. 5 par. 3 of Regulation No. 44/2001, thus being the court located at the place where the harmful event took place. In our case, this harmful event happened in Spain, where he suffered the heart attack, so the Spanish court has jurisdiction to hear the case.

The applicable law for this claim is, according to art. 4 par. 1 of Regulation No. 864/2007, the Spanish law.

J. **Goda and Andre vs. Sportsure**. The two athletes were both covered by a insurance policy from SPORTSURE LLC. According to art. 9 par. 1 (b) of Regulation No. 44/2001, an insurer domiciled in a Member State may be sued in other Member State in the case of actions brought by the beneficiary, in the courts for the place where the plaintiff is domiciled. Goda is from Lithuania, thus the competent court being a Lithuanian one and Eduardo is from Portugal, so the court that has the jurisdiction to hear his case is a Portuguese one.

The applicable law will be determined based on art. 7 par. 3 final thesis of Regulation No. 593/2008, which states that , in the absence of a consent between parties, the governing law will be the one from the state where the risk is situated at the time of conclusion of contract. Even if the Regulation is not applicable to the United Kingdom, we consider that because the claim will be judged by a Lithuanian or Portuguese court, the Regulation is applicable here. Considering that the contract covered the risks that could appear at the Berlin Marathon, the applicable is the German law.

K. **Goda and Andre v. TWL Cars.** They could also sue TWL Cars for damages exceeding the coverage of the insurance policy. According to art. 5 par. 3 of Regulation No.

44/2001, the competent court is the one located at the place where the harmful event took place. The two athletes were injured in Berlin, so the German court has jurisdiction.

The applicable law for this claim is, according to art. 4 par. 1 of Regulation No. 864/2007, the German law.

L. Mathias vs. German police. Mathias can sue the German state for damages for the harm he suffered. The policemen acted as representatives of state authority, thus being an *acta iure imperii,* therefore Regulation no. 44/2001 is not applicable. This claim exceeds its competence, stated in art 1, the regulation being applicable only in civil and commercial matters. The Regulation determines the legal relation between particulars, not between an individual and the state. The Court has thus held that, although certain actions between a public authority and a person governed by private law may come within the scope of Regulation No 44/2001, it is otherwise where the public authority is acting in the exercise of its public powers[13]. In this direction, the arrest is an act of authority which cannot be considered civil. The competent court will be determined by using the international private law regulations.

Par. 9 of the Preamble of the Regulation No.864/2007 states that these claim which are against officials who act on behalf of the state or against authority acts should be excluded from the scope of the regulation. As a consequence, the applicable law will be determined by using the international private law regulations.

II. RECOGNITION AND ENFORCEMENT OF JUDGEMENTS

Art. 33 and 34 of Regulation No. 44/2001 states that the foreign judgment should be recognized in the other member states. In order to enforce them, the plaintiff should follow the exequatur procedure in front of the courts from the state of enforcement, following then their national enforcement laws.

In some of the cases, the plaintiff could use procedures that would not then need the exequatur procedure in order to make the judgments enforceable in other member states. For example, depending on the value of the claim, BBB EVENTS has another way to recover its remaining 30 % of the agreed price. Firstly, it could use the European small claims procedure, regulated by Regulation No. 861/2007[14]. At art. 2 , it is stated that this Regulation shall apply, in cross-border cases, to civil and commercial matters, where the value of a claim does not exceed

[13] C-406/09, *Realchemie Nederland*, 2011;
[14] Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJEU 31.07.2007, L 199/1;

EUR 2000, excluding all interest, expenses and disbursements. The advantage would be that if the claim is admitted, according to art. 15 of Regulation No. 861/2007, the judgment shall be enforceable notwithstanding any possible appeal.

The other possibility that BBB could use is the procedure established by Regulation No. 1896/2006[15]. According to art. 2, the Regulation applies to civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal. Between BBB Events and TWL Cars there were contractual obligation of providing services for the payment of a price, therefore the Regulation 1896/2006 is applicable. If the European order for payment procedure is admitted, it will be enforced directly if the other condition of article 18 are fulfilled, meaning that if within the time limit laid down by art. 16 par. 2, taking into account an appropriate period of time to allow a statement to arrive, no statement of opposition has been lodged with the court of origin, the court of origin shall declare the European order for payment enforceable.

On 10 January 2015, the Regulation No. 1215/1212[16] will come into force. If any of the parties involved forwards an action under Regulation No. 2015/2012, the judgment that will be rendered will be enforceable without passing the exequatur procedure, according to art. 39 which states that a judgments given in a Member State which is enforceable in that State shall be enforceable is the other Member States without any declaration of enforceability being required.

Question 2

The application of TWL Cars in front of the Krakow court can be described as a claim for a protective measure, as defined by the ECJ, because it refers to measures which, in matters within the scope of the Regulation No. 44/2001, are intended to preserve a factual or legal situation so as to safeguard the creditor's rights[17]. So, according to art. 31 of Regulation No. 44/2001, applications for protective measures may be made even if, under this Regulation, the courts of another Member State have jurisdiction as to the merits of the case. Anyhow, the assets that could be seized must be in the jurisdiction of the Krakow Court. More particularly, as regards interim measures, the Court considers that their inclusion in the scope of the Regulation

[15] Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for Payment Procedure, OJEU 30.12.2006, L 399/1;
[16] Regulation (EC) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJEU 20.12.2012, L 351/1;
[17] C-104/03, *St. Paul Diary Industries NV v. Unibel Exser BVBA*, 28 April 2005;

No. 44/2001 is determined not by their own nature but by the nature of the rights that they serve to protect[18].

For the request of taking evidence sent by the Polish court, we consider the Regulation No. 1206/2001[19] is fully applicable. Even if this procedure is a short one does not cover the merits of the case, it can be described as a commercial matter and this is the only condition to apply the Regulation. The request for examining the French citizen through videoconference is based on art. 1 par. 1 (b), because the Polish Court requests to take evidence directly in France. So, considering art. 17 par. 1, the request should have been sent to the central authority in France, not directly to the Court. Even so, the French authorities have also made errors. First of all, art. 7 par. 2 could be applicable here, even if it is not a conflict of jurisdiction between two courts, but between a court and the central authority. As a consequence, the French Court should have sent the request to the central authority and inform the Polish court about this. Anyhow, the French central authority, based on art. 8 par. 1, should have informed the Polish court in maximum 30 days that the request cannot be executed, not after 5 months.

Regarding the reasons brought by the French central authority:

a) the Regulation No. 1206/2001, which regards only civil or commercial matters, not criminal cases, clearly states that the central body or the competent authority shall encourage the use of communications technology, such as videoconferences and teleconferences, so the lack of technological means cannot be a reason for refusal of the request;

b) according to art. 17 par. 2, at this point, the French authority reasoning is correct. Anyhow, we do not have information that the French citizen refused to come in front of the court voluntarily, so this cannot be a valid reason of refusal;

c) at this point the French authority reasoning is correct because the Polish court should have informed the witness. Nevertheless, based on provisions from art. 8 par 1 and art. 18 par. 4, the French authorities should have informed the Polish court, in maximum 30 days, that the request is not regularly introduced. For the notification of the witness, the Polish Court should have used the provisions from Regulation no. 1393/2007[20];

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[18] C-143/78 *de Cavel*, 1979; C-391/95, *Van Uden*, 1998;

[19] 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 matter, OJEU 27.06.2001 L 174 P. 1-24;

[20] Regulation (EC) no. 1393/2007 of The European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) No. 1348/2008, OJEU 10.12.2007, L 324/79;

d) at this point, the French authority makes an error, because it considers the Polish request void, like it has never existed, which is not correct and the French court should have sent the request to the French central authority and inform the Polish court about this and then, if they discovered irregularities, inform the Polish court again about this in 30 days;

e) based on art. 18 par. 4 and related to art. 10 par. 4, the French authorities have the obligation to ensure the logistical needs of the procedure and, as it is said, if there are extraordinary costs, ask for a reimbursement – one of the main goals of the regulation is to reduce costs be using the already existing equipments available al around the EU in order to take the necessary evidence;

f) the French authority makes another error at this reason of refusal because, according to art. 18 par. 3 and 4, the examination will be held according to Polish law, by someone, possibly the judge, designated by the Polish court. The French authorities have only the possibility to assist at the examination in order to make sure that the conditions set are respected.

Regarding the situation of the Austrian witness, we must emphasize that the Polish court did not take into account that the Council Regulation no. 1206/2001 can also be used for this kind of request, as they are meant to make the examination of the witness possible. Taking into account that this procedure must be short in order to prevent prejudices to the creditor, the use of international civil cooperation for finding the address of a witness that could then be examined is legal but it would surely add several months to the proceedings, situation incompatible with the urgency demanded. So, if the evidence is not essential for the judgment, we consider that the Polish court acted correctly and rendered the decision fast, based on the already existing evidence. But, if the evidence is essential to the case, we consider that the court must solve the citizens' problems as fast as possible. For this, the Polish court could use the European Judicial Network and, by the Polish contact point, ask the Austrian one to request information from their authorities in order to find the address of the witness, based on Decision no 568/2009/EC. We believe that, even if Regulation no. 1206/2001 is applicable, the EJN would be a faster mean by which this simple information could be obtained.