THEMIS COMPETITION

WRITTEN REPORT ON THE LEGAL PRACTICAL QUESTIONS

Team ROMANIA 2

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A. Legal rights of the parties

THE LEGAL RIGHTS OF BBB Events GmbH (hereinafter, "BBB"):

I. **The right to demand** from TWL Cars GmbH (hereinafter, "TWL") the rest of 30% of the price: BBB claims it has fulfilled its contractual obligations and it is entitled to full payment and it never agreed to a partial payment. The defendant could raise the exception of non-performance through a response, trying to prove that the price was not paid because BBB had not fulfilled its obligation.

a) Court having jurisdiction: Regulation no. 44/2001 is applicable, since a request for full payment by virtue of contractual stipulations falls under the notion of "civil matters", according to art. 1 par. 1. Furthermore, the nature of the litigation is not excluded from the scope of this Regulation, according to art. 1 par. 2. The German court is, on the one hand, the one who has jurisdiction over this case, according to art. 2 par. 1 and art. 60 par. 1 letter a). On the other hand, the jurisdiction of the German court is alternative to the one provided by art. 5 letter b) second indent. This article is also applicable, since the parties have concluded a contract for provision of services. According to the CJEU's case-law, the concept of service found in the second indent of Article 5(1)(b) of Regulation No. 44/2001 implies, at the least, that *the party who provides the service carries out a particular activity in return for remuneration* (Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-3327, par. 29). BBB's commitment entails a specific activity, consisting of the organization of the Berlin marathon.

In our case, this second court having jurisdiction is again the German court, since we assume that the place "where the services were provided" – that is, where the dealing with the organizational aspects of the marathon in Berlin - is Germany. Thus, the German court has jurisdiction, by virtue of both art. 2 par. 1 corroborated with art. 60 par. 1 letter a), and art. 5 letter b).

b) Applicable law: In **our opinion**, Regulation no. 593/2008 (hereinafter, "Rome 1") is the legal framework for various reasons. According to art. 1, there is a conflict of laws, since the statutory office of the two companies are in different states – Germany and Austria. Moreover, according to art. 2, the nature of the trial is not excluded from the scope of the Regulation. According to art. 4 par. 1 letter b), since art. 5 and 8 are not incident, the applicable law is the law of the country where the habitual residence of the service provider is. In accordance with art. 19 par. 1, the applicable law would be the Austrian one. However, if the contract was concluded in the course of the operations of BBB's branch office in Frankfurt, the German law will be applicable.

THE LEGAL RIGHTS OF KONTAKT DESIGN, SP Z O.O, hereinafter, "K."

I. The right to ask from BBB the value of the printings and compensation for any other damages caused by the non-payment for the printings (in the legal relationship between K. and S.) – With regard to the request to pay the value of the printings, this is an *ex contractu* claim, with chances of success: the objections raised by TWL regarding the printings were expressed when the printing process had already

started and TWL was just a third party, who had no right to refuse the materials. Only BBB could have done that and it had not.

There are two separate legal relationships: the one between BBB and K., and the one between BBB and TWL. K., since it has fulfilled its obligations, never received the corresponding value from BBB. With regard to the other damages that may result from BBB's not paying of the printings – due to this, K. can be held liable for other damages by S. – it is true that these damages are not contractual in the relationship between K. and BBB. However, in the Court's autonomous approach, the notion of "contractual" includes *all other claims that are strictly connected to the non-fulfilling of a contractual obligation*, as indirect consequences (Case C-9/87 *SPRL Arcado and SA Haviland* [1988], par. 15). Thus, this claim will also be an *ex contractu* one. Obviously, this claim can only be accepted if S. asked for damages, since, otherwise, the prejudice is not actual. As regards the position of the defendant, it could introduce TWL in the trial as a third party, as the one responsible for the payment of the printings to BBB.

a) Court having jurisdiction: Regulation no. 44/2001 is applicable, following the above-mentioned reasoning. According to art. 2 par. 1 and art. 60 par. 1 letter a), and to art. 5 letter b) second indent, the courts having alternative jurisdiction are the Austrian court, where BBB's statuary office is located, and the Polish court, where the printings were made by K.

b) Applicable law: According to art. 4 para. 1 letter b) and art. 19 (1) of Rome I (which is applicable for the above-mentioned reasons), the Polish law is applicable.

II. The right to ask from TWL for material damages resulted from its employee's unauthorized access to the printings, which has led to K. not being paid by BBB: The unlawful action of TWL's employee getting unauthorized access to provisional drafts can be the ground for this claim. As regards the defendant, it might prove that there is no unlawful deed of the company itself, but of the employee, and the conditions provided by the applicable law regarding the employer's liability for the servant's torts are not met. Furthermore, it should introduce the employee in the trial in order to ensure against trial loss.

a) Court having jurisdiction: According to art. 2 par. 1 and art. 60 par. 1 letter a) of Regulation no. 44/2001, the German court would have jurisdiction. Furthermore, there is an alternative jurisdiction in favor of the Polish court, as stated by art. 5 par. 3, for the prejudicial deed – the unauthorized access to the printings - probably occurred in Poland, at K.'s statutory office, where the printings were produced.

b) Applicable law: Regulation no. 864/2007 (hereinafter, "Rome II") is applicable, since this claim is non-contractual and is not excluded from the scope of the regulation, as stated by art.1 par. 1-3. According to art. 4 par.1, the German law is applicable, since the damage – the unauthorized access itself- occurred in Germany.

NOTE: There is, of course, also a claim in torts that can K. can make against the employee himself, for, after all, the unauthorized access is his unlawful deed. In this case, the German court will have

jurisdiction according to art. 2 par. 1 and art. 59 par. 1 from the Regulation. The alternative jurisdiction in favor of the Polish court exists, as stated by art. 5 par. 3. The German law will be applicable, as explained above.

THE LEGAL RIGHTS OF TWL:

I. The right to ask from BBB the value of the unpredicted costs generated by hiring in emergency another company to perform the activity assigned to K.: given the inappropriate quality of the work done by K., TWL decided to hire another company to perform the activity assigned to the polish enterprise. Therefore, in the legal relationship between BBB and TWL, BBB's not fulfilling its obligations has led to a damage caused to TWL, for which it can now seek indemnification. As regards the defendant, it may try to prove that the refusal of the printing materials by TWL was abusive.

a) Court having jurisdiction: Regulation no. 44/2001 is applicable, following the above-mentioned reasoning. According to art. 2 par. 1 and art. 60 par. 1 letter a), and to art. 5 letter b) second indent, the courts having alternative jurisdiction are the Austrian court, where BBB's statuary office is located, and the German court, where the event was organized.

b) Applicable law: According to art. 4 para. 1 letter b) and art. 19 (1) and (3) of Rome I, either the German law or the Austrian law may be applicable. If the contract with BBB was part of the activity of BBB's branch office, than the German law is applicable; otherwise, if the contract was concluded in the course of the central office's operations, the Austrian law would be applicable.

Note 1: A claim that TWL might file against K. asking for damages compensation under tort liability, due to the contact of K. design that eventually led to TWL negotiating a more expensive agreement would have to be rejected. We believe that, for this prejudice, TWL has a contractual claim against BBB available, since BBB is the one who has a *culpa in eligendo* – he chose K. as a contractual partner; for the prejudice resulted from K.'s unlawful deeds, BBB is the one who has to cover it for TWL. Thus, there is no unlawful action in the sense of tort liability on K.'s behalf in this case and this claim would be ill-founded,. Moreover, an action in tort against K. may also be filed for the damage in TWL's image. However, we believe that this claim would also have to be rejected, since there is no information in this case that the samples of the symbols became public. Thus, there are no grounds to sustain a possible damage in image.

a) Court having jurisdiction: According to art. 2 par. 1 and art. 59 of Regulation no. 44/2001, the Polish court would have jurisdiction. Furthermore, the Polish court's jurisdiction is also attracted by art. 5 par. 3, for the prejudicial deed – the printings claimed to be inappropriate were probably made in Poland.

b) Applicable law: Regulation no. 864/2007 (hereinafter, "Rome II") is applicable, since this claim is non-contractual and is not excluded from the scope of the regulation, as stated by art.1 par. 1-3. According to art. 4 par.1, the German law is applicable, since the organizing of the marathon takes place in Berlin. There is no information in this case to offer hints of a possible application of par. 3.

Note 2: There may even be a direct action of TWL against K., should the applicable German law provide such a possibility. In this case, the jurisdiction of the Polish court will be established by virtue of art. 2 par. 1 of Regulation no. 44/2001. Furthermore, the jurisdiction of the Polish court is also attracted by art. 5 par. 3: direct actions are regarded in the ECJ jurisprudence as non-contractual, since there is no agreement between K. and TWL (Case C-265/02 *Frahuil SA and Assitalia Spa* [2004] ECR I-01543, par. 22-24).

II. The right to ask for protective measures against K.: TWL has the interest to protect the debtor's patrimony, since there are suspicions of K. going through financial difficulties. As regards the defendant, however, he could try to prove that there is no urgency and that no main litigation exists, so the provisional measure has only an abusive aim - to gain control over its assets.

a) Court having jurisdiction: According to art. 31 of Regulation no. 44/2001, the Polish court would have jurisdiction, under the assumption that, under the Polish law, jurisdiction exists.

b) Applicable law: The Polish law would be applicable, since this is a procedural law, which is always *lex fori*, as a principle of private international law. Moreover, art. 3 par. 2 of Rome II clearly states that it does not apply to procedure.

THE LEGAL RIGHTS OF S. GMBH, hereinafter, "S.":

I. The right to ask from K. the payment of the printing costs: S. has executed the printings, but it had not receieved its payment, due to the fact that K. has not paid. Whereas it is true that K. has not received the money from BBB, this is of no importance in the contractual relationship between K. and S. Thus, S. can ask for the payment of the printing costs from K. As regards the defendant, it should introduce BBB in the trial, as the indirect person responsible for the payment of the printings. Of course, should *lex fori* allow, BBB is to further introduce TWL in the trial, as the one who was the main responsible for the payments.

a) Court having jurisdiction: The legal framework is comprised of Regulation no. 44/2001 and the 2007 Lugano Convention. This situation is two-folded, the claimant has the right to choose between:

a1) **suing K. before a Swiss court**, whose jurisdiction can be attracted by art. 3 par. 1 corroborated with art. 60 par. 1 letter a) and art. 1 par. 3 of the Lugano Convention. Since K.'s statutory office is in the EU and the EU is a state bound the Lugano Convention, these articles are applicable. The 2007 Lugano Convention is applicable as legal framework, since demanding the price of the printings falls under the notion of "*civil matters*", according to art. 1 par. 1 and the nature of the litigation is not excluded from its scope, as stated in par. 2. Furthermore, the EU is also bound by this Convention, according to art. 1 par. 3 – thus, even if K.'s statutory office is in the EU, the Convention is applicable. The Swiss court has jurisdiction also according to art. 5 par. 1 letter b) second indent, because the place where the printings were made was, most probably, Switzerland.

a2) **suing K. before a Polish court** – according to art. 2 par. 1 and art. 60 par. 1 letter a) of Regulation no. 44/2001, since K.'s statutory office is in Krakow. This regulation is also applicable, since this claim is a civil matter not expressly excluded from its scope and, according to art. 64 par. 1 of the Lugano Convention, it shall not prejudice the application by the Member States of the EU of the Regulation no. 44/2001. Art. 5 par. 1 letter b) from the Regulation is not applicable, since the place where the services were provided is most probably Switzerland, a non-EU member state, and the jurisdiction of the Swiss court is established according to the Lugano Convention.

It may seem more convenient for a Swiss company to sue another company in Switzerland, but, were it to sue it in Poland, the execution of the judgment will be less cumbersome.

b) Applicable law: b1) In the first situation, the Swiss court will resort to its international private law regulation - namely, the Swiss Private International Law Act, to find the applicable law, since Switzerland is not bound by the Rome 1 regulation.

b2) In the second case, the Polish Court will establish the applicable law according to art. 4 para. 1 letter b) and art. 19 (1) and (3) of Rome I. Thus, the Swiss law is applicable and it is of no importance that Switzerland is not a member of the EU, according to art. 2 of the Regulation, the law of a non-EU state can be applicable.

THE LEGAL RIGHTS OF JUAN PABLO

I. Juan Pablo has the **legal right** to obtain pecuniary damages for the injuries he suffered during the altercation, as well as for the hepatitis infection, in virtue of the general rules regarding tort liability. Moreover, he is entitled to moral damages for the prejudice caused by the hepatitis infection.

a) *Court having jurisdiction:* The authors of the 10 days lesions against Juan Pablo are Adrianne, Barthelemy, Charles and Damien (hereinafter 'the aggressors'). In accordance with art. 2 par.1 and art. 59 of the 44/2001 Regulation, the action in tort against them can be filed before the courts where they have their domicile. Therefore, the French Courts would have authority to judge the claim. Furthermore, in virtue of art. 5 par. 1 point 3 of the same Regulation, the Courts in the State where the illicit act was committed are also competent to trial the case. For Juan Pablo this means that he can also file his claim in Germany, which is the State in which the illicit act has taken place.

b) Regarding the hepatitis infection, in virtue of art. 5 par. 1 point 3 of the 44/2001 Regulation, the German Courts are competent to hear the case, since the prejudicial act, which was the blood transfusion, occurred in a hospital in Berlin. According to art. 2 par. 1 and art. 60 par. 1, the Hospital's *legal domicile* is in Germany, which is another criteria by which German Courts have jurisdiction.

c) *Applicable law:* The aforementioned Courts will try the case according to the German law when it comes to the 10 days physical injury, in virtue of art. 4 par. 1 of Rome II, since the damage occurred in Berlin. For the hepatitis infection, the applicable law will be the German one, in virtue of art. 4 par. 1 of the

Rome II Regulation. The prejudice here is contacting of an incurable disease, and this prejudice is created as soon as the person becomes infected.

THE LEGAL RIGHTS OF FRANCISCO

I. **Francisco has the right** to obtain pecuniary damages for the physical prejudice suffered, as well as for the economical prejudice caused by not being able to work anymore.

a) *Court having jurisdiction:* The authors of the illicit act creating the prejudice were the aggressors. In virtue of art. 2 par.1 and art. 59 of the 44/2001 Regulation, the Courts from their domicile State are competent try the action in tort against them, which means that the French Courts have jurisdiction. The criteria set in art. 5 par. 1 point 3 makes German courts competent to hear the case too, alternatively with French Courts, since the illicit act was committed in Berlin.

b) *Applicable law:* These aforementioned Courts will apply the German law on the merits of the case, since this is the State where the damage occurred, according to art. 4 par. 1 of the Rome II Regulation.

FRANCISCO'S FATHER'S LEGAL RIGHTS: He had a heart attack when he saw his son being brutally beaten on TV. I. **He has the right** to file an action in tort against those responsible for the illicit act, who are the aggressors (defendants).

a) Court having jurisdiction: The lawsuit can be brought before the defendants' domicile Courts, in virtue of art. 2 par.1 and art. 59 of the 44/2001 Regulation, which means that the French Courts have jurisdiction. In virtue of art. 5 par. 1 point 3, German Courts are alternatively competent to try the case, since this is the place where the illicit act was committed. Interpreting this legal provision in light of the CJEU Decision C18-02/05.02.2004 *Danmarks Rederiforening(...)* par. 40, Spanish Courts would also be competent, alternatively, since Spain is the place where the damage occurred.

b) *Applicable law:* On the merits of the case the Courts wil use the Spanish law, since this is the place where the damage occurred, in accordance with art. 4 par. 1 of the Rome II.

THE LEGAL RIGHTS OF GODA AND EDUARDO (ANDRE)

Goda broke a leg and **Eduardo** a rib, respectively, due to the altercation. They were both covered by an insurance by Sportsure LLC. I. Since they are the beneficiaries of the insurance **they have the right to file an action** on contractual grounds against the insurer, or an action in tort against the aggressors (II) or the organizers (III). In this last case, TWL can introduce BBB into the trial as the party responsible for the organizing of the event. Goda and Eduardo can also request material damages for not being able to participate in the competition; for the loss of chance, proportional with their chance of winning, aiming to cover their possible gains from the race, as well as the previous individually-paid training.

a) Court having jurisdiction:

I. In virtue of art. 9 par. 1 letter a) and art. 60 of the 44/2001 Regulation a claim against Sportsure LLC can be filed before English Courts, since it is the domicile State of Sportsure. The Courts in the

domicile State of the plaintiffs are also competent in virtue of letter b) of the same article, since the action is filed by the insured person. Therefore, the Courts from Lithuania and Portugal, respectively, are competent to hear the case.

II. If Goda and Eduardo file an action in tort against their aggressors, in virtue of art. 2 par.1 and art. 59 of the 44/2001 Regulation, French Courts will be competent to hear the case. German Courts can also hear the case in virtue of art. 5 par. 1 point 3, since the illicit act was committed in Germany.

III. If Goda and Eduardo file an action in tort against TWL by holding them responsible as organizers, German Courts will be competent on the criteria set by art. 2 par.1 and art. 60 and art. 5 par. 1 point 3 of the 44/2001 Regulation.

b) Applicable law

I. The merits of the insurance claim will be tried under either the German law or the law of the usual residence of Goda and Eduardo, in accordance with art. 7 par. 3 letter a) and b) of the Rome I. Since they were insured, the EU regulations regarding contractual matters are applicable. However, should Goda or Eduardo bring the case before the English Courts *(letter a) point 1 above)*, the applicable law will be decided using the English private international law, since the U.K. is not part to Rome I.

II. If they file an action in tort against the aggressors, the applicable law is the German law, since that is the place where the damage occurred, in accordance with art. 4 par. 1 of the Roma II Regulation.

III. Should Goda and Eduardo file a complaint against TWL to hold them liable as organizers, the applicable law will be the German law, in virtue of art. 4 par. 1 of the Rome II Regulation.

THE LEGAL RIGHTS OF MATHIAS

He has been wrongfully arrested by the German police for 7 days, which caused him depression, sadness and an economical loss by virtue of absence from his workplace.

I. For the damages suffered by virtue of his arrest, **Mathias can file an action in tort against the German State**, if it was clearly established that the arrest was wrongful. He can ask for both pecuniary and moral damages for the prejudice described above.

a) *Court having jurisdiction:* The competent Court will be determined by the application of the international private law of the State in which the trial is carried out. As established in the Case 29/76 *Lufttransportunternehmen GmbH & Co. KG against Eurocontrol* [1976], a judgment against a public authority, should that authority act *acta iure imperii,* will not be subjected to the 44/2001 Regulation.

b) Applicable law: The law applicable to the merits of the case cannot be determined by using the Rome II Regulation, because art. 1 par. 1 states that it cannot be applied in matters regarding the liability of the State for acts in the exercise of State authority (*acta iure imperii*). In this case, the applicable law will be determined by using the provisions regarding the international civil lawsuit in the competent Court's State.

THE LEGAL RIGHTS OF SPORTSURE LLC

I. It has an **action against the aggressors on delictual grounds.** After Sportsure LLC has repaired the prejudice suffered by the insured persons, it can file a lawsuit against the authors of the illicit act.

II. It can also file a claim against TWL for faulty organization of the event. In this case, TWL can introduce BBB into the lawsuit as the party responsible for the organization.

a) Court having jurisdiction: I. The competent Courts to try the case against the aggressors would be those from the domicile State of the defendants, in virtue of art. art. 2 par.1 and art. 59 of the 44/2001 Regulation, which is France, since the aggressors have their legal domicile in France. The German Courts are also competent to hear the case in virtue of art. 5 par. 1 point 3 of the same Regulation.

II. The competent Courts to try the case against TWL are the German Courts, in virtue of art. 2 par.1 and art. 60 and art. 5 par. 1 point 3 of the 44/2001 Regulation.

b) Applicable law: I. The law applicable to the merits of the case against the aggressors is the German Law, since the damage occurred in Germany, in virtue of art. 4 par. 1 of the Rome II Regulation. This Regulation is applicable because Sportsure LLC files the action on delictual grounds.

II. The law applicable to the case against TWL is the German law, since this is where the damage occurred, according to art. 4 par. 1 of the Rome II Regulation.

B. RECOGNITION AND EXECUTION OF JUDGEMENTS

Regarding both contractual and non-contractual obligations, the applicable law in matters of recognition and enforcement of judgments is Regulation no. 44/2001 (Brussels I), as stated by art. 22 par. 5. This procedure is applicable to all the judgements in our case, except from the one in the case of Mathias, who doesn't fall within the jurisdiction of the Regulation. In his case, the Hague Convention from 1980 would be applicable.

Moreover, analyzing other relevant EU provisions, we came to the following conclusions: The Regulation no. 1896/2006 cannot be applicable in matters of non-contractual obligations (art. 2 par.2) – neither of our cases falls under the exceptions stated by art. 2 par. 2 letters i) and ii). As for the contractual obligations, since they fall within the scope of application of the Regulation, as stated by art. 2, the parties could file an application in order to obtain a European order for payment which would be automatically recognised and enforced in a Member State - art. 19. The Regulation (EC) no. 861/2007 of 11 July 2007 establishing a European Small Claim Procedure could be applicable if the value of prejudice is smaller or equals 2000 euro, since, according to art. 2 par.1, all other conditions are met. Only in the case of Mathias, this Regulation is not applicable, since the arrest takes place *iure et imperii*, in accordance with art. 2 par. 1.

In the case of the physical agressions of the two Spanish students and the two athletes, if there was a criminal proceeding and the victims were not be able to claim for compensation in that proceeding,

Directive 2004/80/CE could also be applicable. According to art. 1, the victims could file the application for compensation at the competent authority in the country of their habitual residence.

C. PROVISIONAL PROCEEDING ON SEIZURE OF PROPERTY

1. **Applicable European Union legal instruments:** The **Regulation** (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments In Civil and Commercial Matters and the **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 – *art. 17.* **In our opinion**, the request in the present case is submitted under article 17 and article 1 par. 1 b) i.e. to take evidence directly in another Member State.

2. **Technical errors:** The Polish Court sent a request of taking of evidence directly to the French Court. **In our opinion**, this request was wrongly directed to the French Court, because, according to article 17 par. 1 of the Council Regulation no. 1206/2001, the Polish Court should have submitted the request to the central body in France. Only after five months the central authority from Place Vendôme, Paris responded. **In our opinion,** the late answer from the central authority is contrary to the aim of this regulation stated in points 2, 8, 9 of the Preamble which is ensuring a fast and speedy procedure.

a) The videoconference system of the requested court was installed only for criminal cases. **In our view,** this reason cannot be accepted because article 17 par. 5 allows for the refusal of such a demand in a limited number of situations. According to point 11 of the Preamble, the possibility of refusing to execute the request should be confined to strictly limited situations. Moreover, as art. 17 par. 4 states, the requested court shall not comply when such a requirement is incompatible with the law of its Member State or by reason of major practical difficulties. In our case, neither was the request incompatible with the fundamental principles of the French law, nor did the French authority provide a reason describing a major difficulty. Obviously, having to use a system already existing in the court for criminal cases should be an easy task. This is why we believe the refusal was entirely discretionary.

b) The taking of evidence could only be performed on a voluntary basis, without the use of coercive measures. **In our opinion,** the applicable law is art. 17 par. 2 of the Regulation no. 1206/2001, according to which *direct taking of evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures.* However, the practical case does not offer any information related to a possible refusal of the witness to be heard. Therefore the answer of the French authority is irrelevant.

c) The requesting court should have contacted and informed the witness of the voluntary character of the examination. The applicable law is art. 17 par. 2 final thesis. Taking into account the initial stage of the proceedings, it is not for the French authority to take any measure related to the obligation to inform the witness. **In our view**, this obligation will be fulfilled by the Polish Court before the taking of evidence,

using the procedure provided for by 1393/2007 Regulation (courier or through the offices of the central authority). As a consequence, this answer is premature and does not constitute a ground for the refusal.

d) Request needed to be redirected to the French central authority in twenty days. The answer of the French authority asking to have the request redirected is wrongful. The irregularity of it being sent to the court instead of the Central Authority was covered, since it obtained the request. Secondly, the French authority may have wrongfully considered that the problem described at point c) above falls under art. 4 par. 1 letter g) (information needed to apply the provisions of art. 3 and 4). Thirdly, the 20 days deadline imposed by the French authority has no legal basis in the Regulation. If the French authority considered the request as incomplete, it should have used the 30-days deadline provided in art. 8 par. 2 by way of analogy.

e) The requesting court should have found a place and a videoconference system in the French territory to perform the collection of evidence. Art. 18 par. 2 indent 2 analyzed in the view of point 16 of the Preamble states that the French authority was responsible for finding an appropriate location. Afterwards, the Polish Court would have had the obligation to pay for the reimbursement of the costs occasioned by this action. As a consequence, the reason presented by the French authority is not valid.

f) The examination should have been performed by a French judge. According to art. 17 par. 3, *the taking of evidence shall be performed by a member of the judicial personnel (...) who will be designated, in accordance with the law of the Member State of the requesting court.* Therefore, the direct taking of evidence could only be made by the Polish judge, whereas the French judge could assist in the cases described by art. 17 par. 4 first thesis. The French Authority's reply is thus will-founded.

3. Solutions to the difficulties

1. For the procedure with France: Since the answer of the French Authority was wrong, a solution to this blockage can come from the Polish Court. It can contact its Central Authority, who is responsible for finding remedies to the difficulties that can come up in judicial cooperation, in virtue of art. 3 par. 1 letter b) of Regulation 1206/2001. The Polish Central Authority can further contact the French Central Authority and ask it to find a practical way to proceed with the examination of the witness. After all, the centrepiece of the dispute is the individual, whose claim has to be settled. *If there is a will, there is a way.*

2. For the procedure related to the Austrian witness in Poland: The argument regarding the lack of a specific European regulation for obtaining the address of a witness is true. However, there is a practical solution to overcome this situation: the Polish court should resort to its national contact point from the European Judicial Network in Civil and Commercial Matters, according to Decision no. 2001/470/CE. It should ask the Contact Point to address the Austrian Contact Point, in order to find the domicile of the witness. The Austrian contact point could find this information with the help of their administrative authorities. Thus, the request can speedily be solved and is no longer incompatible with the urgency of the provisional procedure.

COMMON ASUMPTIONS

We decided to agree upon some common assumptions, that arise from the practical case, but that are not self-evident.

1. The parties have not chosen an applicable law according to art. 14 of the Rome II Regulation.

2. Adrianne, Barthelemy, Charles and Damien have their legal domicile, established in accordance with art. 59 of the 44/2001 Regulation, in France. Goda and Eduardo have their domiciles in Lithuania and Portugal, respectively.

3. No agreement conferring jurisdiction has been concluded between the parties, according to art. 23 of Regulation no. 44/2001.

4. The parties have not chosen an applicable law, according to art. 3 para. 1 of Regulation no. 593/2008.

5. BBB was paid by TWL only 70% of the owed amount; the rest of 30% was never paid.

6. According to the contract between TWL and BBB, the last one was entitled to subcontract the services to be provided, since a large number of problems were to be dealt with. 7

7. The domicile of the parties, in the sense of art. 59 par. 1 of Regulation no. 44/2001, is in that state of citizenship.