

IX THEMIS FINAL 2014: LEGAL PRACTICAL
QUESTIONS

SPAIN -1

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We are going to divide our analysis into three parts. Firstly, we will deal with the disputes related to the organization of the marathon; secondly, we will talk about claims related to the various accidents that happened during the marathon; and finally we will address issues connected to the provisional proceedings initiated in Poland. In order to explain the solution of these practical questions as clearly as possible, we are going to distribute them attending to the possible plaintiffs, that is to the different subjects claiming to have legal rights and wishing to exercise them.

I. THE ORGANIZATION OF THE MARATHON

1. PLAINTIFF: TWL CARS GmbH

1.1. TWL CARS vs. BBB EVENTS

TWL CARS and BBB events concluded a contract. TWL therefore exercises a contractual action on the basis of breach of contract and asks for compensation of damages.

Regarding jurisdiction, we have to point out that Regulation n. 1215/2012 (Brussels I bis) has already been approved and entered into force but will only become applicable on 15 January 2015. Therefore, to determine jurisdiction we will apply Regulation n. 44/2001 (Brussels I), which is applicable to actions exercised before that date, which we will assume to be the case. As this subject is not one of those listed in article 22 Brussels I (exclusive jurisdiction), and as the contract does not contain an agreement on jurisdiction (art. 23), by applying the jurisdiction rules in Brussels I, TWL CARS can choose between possibly three alternative ways of proceeding: 1. According to the general rule, at present in Article 2, action can be brought before the defendant's domicile. Art. 60 equates the domicile of a legal person with its (a) statutory seat;(b) central administration; or (c) principal place of business. According to the information provided TWL has its central office and administration in Vienna which would allow BBB to sue in Austria.

2. Alternatively, TWL may prefer to use the possibility provided for in art. 5.1 in contractual matters. This provision contains special rules that apply to contracts for the sale of goods and for the provision of services [art. 5.1 b)]and a general rule that applies to other contracts [art.5.1 a)] The first issue therefore is to determine whether the contract between TWL and BBB falls into one of the two categories referred to in art. 5.1 b). In that connection, the ECJ has stated that, in order to classify a contract in the light of that provision, the classification must be based on the obligations which characterise the contract at issue (Case C-381/08 *Car Trim* [2010] ECR I-1255, paragraph 31 and 32). According to the definition given by the Court, the concept of 'services' within the meaning

of that provision requires at 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, paragraph 29). In our case BBB EVENTS is in charge of all organizational aspects of the 40tieth Berlin Marathon; it therefore follows that the contract is a contract for the provision of services under the Regulation. These services are to be provided in Germany, as it is the country where the marathon is going to take place, and TWL may therefore sue in Germany under art. 5.1 b) Regulation 44/2001.

3. We have been told that BBB Events has a branch office in Frankfurt (Germany). Art. 5.5 would confer jurisdiction as regards a dispute arising out of the operations of a branch, agency or other establishment to the courts for the place where the branch, agency or other establishment is situated. This requires the contract to be part of the operations of the branch office. We do not have sufficient information to decide whether this is or is not the case. Art. 5.5 does however not confer any additional possibilities to the plaintiff since German courts can intervene on the basis of art. 5.1 b), as analyzed above.

As regards the applicable law, the instrument applicable to the case is Regulation n. 593/2008 (Rome I). As the parties have not made an explicit choice of applicable law, we apply Article 4 of Rome I. Art. 4 again distinguishes between different types of contracts- as our contract is a contract for the provision of services art. 4.1 b) applies. According to this Article, we will apply the law of the habitual residence of the service provider. The concept of habitual residence is provided by Article 19. If we understand that the services were provided by the central office, we would apply Austrian Law (Article 19.1 RRI); contrary, if the services were provided by the branch office, the applicable law would be German Law (Article 19.2 RRI).

Regarding to the recognition of the judgement, due to Article 33.1 RBI, the judgement would be recognised by all the Member States without the requirement of any special procedure. About the enforcement, if the judgement is rendered by the Courts of Austria, there would probably not be a problem of enforcement abroad as the central office of the defendant is in Austria and it is likely that the defendant has assets in Austria. Contrary, if the judgement is given by the German Courts, a proceeding of enforcement abroad would be more likely. It should be initiated by the plaintiff (Article 38.1 RBI). The petition of enforcement will be presented to the competent Authorities of the Member State listed in Annex 2 RBI and the proceeding is regulated in Articles 38-56 RBI.

1.2. TWL CARS vs. KONTAKT DESIGN

As there is not a written contract between the plaintiff and the defendant, the existence of a contractual relationship between the parties is disputed. Considering that the existence of the contract will be decided later by the competent judge by applying the substantive law, we are in favour of

applying art. 5.1 RBI. The possible contract between TWL and KONTAKT comprises different obligations since KONTAKT has to create all the layouts of that marathon edition and also to supply all the printed materials. The issue is whether this contract is a contract for the provision of services or for the sale of goods or falls under 5.1 a). In our opinion we must try to determine the characteristic obligation- which would be more of the nature of a service, since the goods that must be supplied are a result of the previous creation of symbols, icons etc.

Therefore, in this case the general rule of Article 2 applies and Article 5.1.b2) related to the jurisdiction in cases about provision of services (as the layouts are made in Poland, we consider that the service is provided in Poland). So we reach the same solution with both Articles: the Courts of Poland will be competent.

Regarding to the applicable law, according to Article 4.1b) and 19.1 Rome I Regulation, we will apply the law of the habitual residence of the service provider: Polish Law.

The judgment could be recognized and enforced in other Member States by applying RBI (see above).

2. PLAINTIFF: BBB EVENTS GmbH

2.1. BBB EVENTS vs. TWL CARS

Due to the limited space of this paper, we will sum up the next explanations of the cases.

A) Action: BBB EVENTS exercises a contractual action on the basis of breach of contract because of lack of payment.

B) Jurisdiction: Article 2 and Article 5.1 RBI apply. The Courts of Germany are competent due to both Articles.

C) Applicable Law: Article 4.1.b) RRI applies. The applicable Law is German Law.

D) Recognition and enforcement of the judgement: the rules of Regulation 44/2001 apply.

2.2. BBB EVENTS vs. KONTAKT

A) Action: BBB EVENTS exercises a contractual action on the basis of breach of contract because of an inadequate performance of the obligation.

B) Jurisdiction: Article 2 and Article 5.1.b) RBI sapply. The Courts of Poland are competent due to both Articles.

C) Applicable Law: Article 4.1. b) RRI applies. The applicable Law is Polish Law.

D) Recognition and enforcement of the judgement: the rules of Regulation 44/2001 apply.

3. PLAINTIFF: KONTAKT DESIGN, SP. Z O.O

3.1. KONTAKT DESIGN vs. BBB EVENTS

A) Action: KONTAKT DESIGN exercises a contractual action on the basis of breach of contract because of lack of payment.

B) Jurisdiction: Article 2, Article 5.1.b) and Article 5.5 RBI apply. According to Articles 2 and 5.1.b) the Courts of Austria are competent in this case. Moreover, the plaintiff can also sue in Germany because BBB EVENTS has a branch office in Frankfurt (Article 5.5 RBI), if the dispute arose out of the operations of the branch, which might be the case.

C) Applicable Law: Article 4.1b) Rome I. According to this Article, we will apply the law of the habitual residence of the service provider. The concept of the habitual residence is provided by Article 19. If we understand that the services were provided by the central office, we would apply Austrian Law (Article 19.1 RRI); contrary, if the services were provided by the branch office, the applicable law would be the German Law (Article 19.2 RRI).

D) Recognition and enforcement of the judgement: if the German Courts (where the branch office of the defendant is placed) ruled the judgement, the plaintiff might be interested in initiating the enforcement proceeding in Austria because the central office of BBB is placed in Vienna (it is supposed that the most important part of its heritage is located there). RBI applies in this case.

3.2. KONTAKT DESIGN vs. TWL CARS (non contractual)

A) Action: According to the text, KONTAKT DESIGN considers that no contract was signed with TWL. Therefore, the plaintiff will only exercise a non-contractual action for unfair competition.

B) Jurisdiction: Article 2 and Article 5.3 RBI apply. According to Article 2, the Courts of Germany are competent. According to Article 5.3, in matters related to tort the Court for the place where the harmful event occurred or may occur has jurisdiction. The harmful event took place where the plaintiff develops its commercial activity; that is, in Poland. Therefore, the competent Courts would be the Polish Courts.

C) Applicable Law: here Regulation n. 864/2007 (Rome II) related to applicable law to non-contractual obligations is applicable. Article 6.1 RR II related to unfair competition contains various rules which applications depend on the situation. In this case, where only the interests of a specific competitor are affected the general rule of Article 4 applies: the *lex loci delicti commissi*, that is, Polish law.

D) Recognition and enforcement of the judgement: the judgement is ruled by the Polish Courts and the central office of the defendant is placed in Munich. Therefore, the plaintiff may wish to start a proceeding of execution in Germany (Articles 38-56 RBI).

4. PLAINTIFF: SCHWEIZGRAPH GmbH

4.1. SCHWEIZGRAPH vs. KONTAKT DESIGN

A) Action: SCHWEIZGRAPH exercises a contractual action on the basis of breach of contract because of lack of payment.

B) Jurisdiction: The central office of SCHWEIZGRAPH is in Geneva (Switzerland). Switzerland does not form part of Brussels I Regulation. This country signed the Lugano Convention of 30 October 2007. In this case, the defendant has its central office in Poland, which is Part of the RBI. Therefore, the RBI is applicable to the case (art. 64 Lugano Convention). Article 2 and Article 5.1 RBI applies. According to both Articles, the Courts of Poland are competent.

C) Applicable Law: Article 4.1. b) RRI is applicable. The applicable Law is Polish Law.

D) Recognition and enforcement of the judgement: If the Polish judgment were to be recognized and enforced in Switzerland (which is not very likely), the Lugano Convention would apply.

II. THE ACCIDENTS THAT HAPPENED DURING THE MARATHON

1. PLAINTIFFS: JUAN PABLO AND FRANCISCO.

1.1. JUAN PABLO AND FRANCISCO vs. ADRIANNE, BARTHELEMY, CHARLES AND DAMIEN.

A) Jurisdiction: Article 2 and Article 5.3 RBI apply. Focussing on the general rule of Article 2, we have to take into account that in this proceeding there might be a plurality of defendants. Therefore, Article 6.1 RBI may also be relevant. According to this Article, the Courts of the domicile of any of the defendants will be competent. In this case, all the defendants are domiciled in France, so the Courts of France are competent. According to Article 5.3, in matters related to tort the Court for the place where the harmful event occurred or may occur will be competent. The harmful event took place in Berlin, so the Courts of Germany are also competent.

B) Applicable Law: here Regulation Rome II it is applicable. We apply the general rule of Article 4: the *lex loci delicti commissi*. German law is applicable.

C) Recognition and enforcement of the judgement: as the judgement may be ruled by the German Courts and the defendants have their domicile in France, the plaintiffs may initiate the proceeding of execution of Articles 38-56 RBI in France.

1.2. JUAN PABLO AND FRANCISCO vs. TWL CARS

Juan Pablo and Francisco can action against TWL as the company that organises the marathon. In this kind of public events, the companies usually hire an insurance policy in order to cover the possible damages that may occur during the performance. We do not know if TWL hired an insurance policy. If so, Juan Pablo and Francisco may also have a direct action against the Insurance Company. We will not deal with this issue here because it is examined under 3.2.

A) Jurisdiction: Article 2 and Article 5.3 RBI apply. In this case, according to both Articles, the Courts of Germany are competent.

B) Applicable Law: here Regulation Rome II applies. We apply the general rule of Article 4: the *lex loci delicti commissi*. German law is applicable.

C) Recognition and enforcement of the judgement: No problem of extraterritorial enforcement is likely as the judgement is ruled by the German Courts and TWL CARS has its domicile in Munich. If the German judgment is to be recognized and enforced abroad RBI applies.

1.3. JUAN PABLO vs. GERMAN HOSPITAL

A) Action: if Juan Pablo wants to claim for getting hepatitis, he only may sue the German Hospital and not TWL CARS or the French citizens. That is because, although the reason of the treatment in the hospital was the quarrel, there is no causal link between the quarrel and the illness.

B) Jurisdiction: Article 2 and Article 5.1.b) RBI apply. According to both Articles the Courts of Germany are competent, as the Hospital is placed in Germany and the medical treatment was developed in Germany.

C) Applicable Law: Article 4.1b) Rome I. According to this Article, we will apply the law of the habitual residence of the service provider. The concept of the habitual residence is provided by Article 19. German Law is applicable.

D) Recognition and enforcement of the judgement: RB I applies.

2. PLAINTIFF: FRANCISCO'S FATHER vs. SPANISH TV.

A) Action: Francisco's father had a heart attack by watching the race on TV. We think that he may sue the SPANISH TV (even though probably he will not be successful).

B) Jurisdiction: Article 2 and 5.3 RBI apply. In this case, according to both Articles, the Courts of Spain are competent, as the Spanish TV has its domicile in Spain and as the harmful event occurred in Alicante.

C) Applicable Law: here Regulation Rome II applies . We apply the general rule of Article 4: the *lex loci delicti commissi*. The Spanish law is applicable.

D) Recognition and enforcement of the judgement: no problem arises.

3. PLAINTIFFS: GODA AND EDUARDO/ANDRÉ

3.1. GODA AND EDUARDO/ANDRÉ vs. TWL CARS (and its insurance company)

A) Action: both athletes were damaged because of the quarrel between the French and Spanish citizens. Therefore, they can sue the participants of the fight, TWL as the organiser of the event and its Insurance Company. Goda and Eduardo will probably prefer to go against the companies that

have enough solvency to cover the damages. We will therefore not examine the claim against the French citizens (see for a solution 1.1)

B) Jurisdiction: Article 2 and Article 5.3 RBI apply. In this case, according to both Articles, the Courts of Germany are competent.

C) Applicable Law: here it is applicable Regulation Rome II related to applicable law to non-contractual obligations. We apply the general rule of Article 4: the *lex loci delicti commissi*. German law is applicable.

D) Recognition and enforcement of the judgement: RBI applies.

3.2. GODA AND EDUARDO/ANDRÉ vs. SPORTSURE LLC (and eventually vs. BBB EVENTS).

A) Action: both athletes were covered by an Insurance Policy negotiated by BBB EVENTS with SPORTSURE LLC. Thus, Goda and Eduardo can claim for contractual responsibility against the Insurance Company.

B) Jurisdiction: it is applicable Article 9.1 and 10 RBI. According to these Articles, Sportsure LLC can be sued:

- In the Courts of the Member State where it is domiciled; that is United Kingdom.
- In the Courts of the Member State where the plaintiff has his domicile; that is Lithuania and Portugal.
- In the Courts for the place where harmful event occurred: it can also be sued in Germany.

C) Applicable Law: in order to determine if the athletes have a direct action against the Insurance Company, we have to look for Article 18 Rome II: this Article rules that there will be direct action if it is recognised by the law applicable to the non-contractual obligation or the law applicable to the insurance contract. In this case, the law applicable to then non-contractual obligation is the German Law (Article 4.1.b)). The applicable law to the insurance contract is determined by Article 7 Rome I: the applicable law will be the law of the place where the risk is situated. In this case, the risk consists on any kind of damaged that may occur during the marathon. As the marathon took place in Berlin, the applicable law will be also the German Law.

D) Recognition and enforcement of the judgement: The plaintiffs may initiate execution proceedings in the UK according to Articles 38-56 RBI.

4. PLAINTIFF: MATHIAS

4.1. MATHIAS vs. GERMAN STATE

In this case, Mathias, a Belgian citizen, exercises a civil claim for damages based on an act giving rise to a criminal proceeding, which might fall under the Regulations. As the defendant is however the German State which exercises public prerogatives when it guarantees the security of the marathon, the matter is no longer “civil or commercial”. Private International Law instruments are not applicable to this action.

III. PROVISIONAL PROCEDURE

1. JURISDICTION

TWL requests a protective measure in order to seize the property of KONTAKT DESIGN to a Krakow civil court. The first issue that must be examined is whether this court has jurisdiction under RBI. This instrument grants jurisdiction for provisional measures on two grounds. First, the courts with jurisdiction as regards the substance of the matter may take such measures. As analyzed under I. 1.2 Polish courts have jurisdiction under articles 2 and 5.1.b2), since the defendant is domiciled in Poland and the services were provided in that country. Art. 31 RBI also deals with jurisdiction in connection to provisional measures and allows a court that does not have jurisdiction on the substance to take provisional measures, but in our case it is not necessary to apply this provision.

2. PROBLEMS THAT CAME UP IN THE TAKING OF EVIDENCE

2.1. THE CENTRAL AUTHORITY IS NOT COMPETENT TO PROCESS THE PETITION

KONTAKT sent a petition for the taking of evidence in France directly to the French Court. However, it was the Central authority from France that denied the petition. According to Article 10.1 of Regulation n. 1206/2001 on cooperation between the Courts of the Member States in the taking of evidence in civil or commercial matters, the requested Court is the one that has to execute the petition sent by the requesting Court. Under Article 2.2 of this Regulation each Member State shall draw up a list of the Courts competent for the performance of taking of evidences. According to the French list, the competent Court to process the petition is the Tribunal de Grande Instance de Bourdeaux (see the Judicial Atlas on civil or commercial matters). Moreover, Article 3 rules the functions of the Central Body; the function of answering the petitions sent by the requesting Court is not amongst its functions.

2.2. THE FRENCH REQUESTED AUTHORITY DID NOT ANSWER ON TIME

The French requested authorities did not accomplish with the deadlines ruled in Articles 7.1 and 10.1 of the Regulation, as it answered in 5 months. Under Article 7.1, the requested court shall send an acknowledgement receipt to the requesting Court within 7 days of receipt of the request. Moreover, Article 10.1 rules that the requested Court shall execute the request without delay and at the latest within 90 days of receipt of the request.

2.3. PROBLEMS RELATED TO THE VIDEOCONFERENCE

Regulation 1206/2001 which is applicable to civil and commercial cases establishes that the requesting court may ask the requested court to use communication technologies, such as videoconference (Articles 10.4 and 17.4). According to the Practical Guide of using videoconferencing to obtain evidence in civil and commercial matters developed by the European Judicial Network, the Regulation provides two main channels for providing the necessary evidence. The first, under Article 10, is where the court in one Member State requests the court in another Member State to obtain the evidence. The second, under Article 17, allows a court in one Member State, with the permission of the requested Member State, to obtain the evidence directly in that Member State.

In this case, as the Polish court sends the request directly to the French court, it seems that the court is using the proceeding ruled under Articles 10-12. The French court should have executed the request within 90 days of receipt but in this case the answer came from the central authority after 5 months. Moreover, none of the statements to refuse the request are applicable to the proceeding ruled in Articles 10-12.

The French Authorities seem to treat the request under the proceeding ruled in Article 17. That is why the Member State's central body is the one who denies the request and does it on several bases that can only be alleged under the proceeding of Article 17. According to the Practical Guide of using the videoconference, in deciding whether to allow a request under this Article, the central body of the requested Member State may specify the conditions under which the evidence can be obtained. If the request is accepted, the requesting court should be the one that designates and provides the person to obtain the evidence. The taking of evidence can only be performed on a voluntary basis and coercive measures cannot be used and, moreover, the requesting court is responsible to inform the witness of his rights.

1.4. THE NECESSITY OF OBTAINING THE ADDRESS OF A EUROPEAN CITIZEN

KONTAKT presents an application to the Polish court to find the address of an Austrian witness and the Court rejected the petition saying that there is no European Regulation applicable to this request. This answer is not correct as this subject is understood to be included in the Regulation 1206/2001. According to the Practice Guide for the application of the regulation on the taking of evidence, this instrument does not define the concept of “evidence”. However, the requests ruled in this Regulation can be used to obtain any evidence, which is intended for use in judicial proceedings. In this case the prior inquiry of the domicile is fundamental in order to be able to perform the hearing of the witness, which is an evidence specifically included in the Regulation. For example, in the Spanish legislation this inquiry of the domicile is a kind of evidence regulated in the Civil Procedural Act.

2. POSSIBLE SOLUTIONS

When a Judge of a Member States has to deal with a request for the taking of evidence abroad he can look for help in several instruments adopted by the European Union and he can also request for help to some people. Focusing on the instruments, we think the most useful ones are the Practice Guide for the application of the Evidence Regulation, the Practice Guide of using videoconferencing to obtain evidence in civil and commercial matters and the European Judicial Atlas, where we can find the details of the competent courts in each Member State and the requirements of each jurisdiction. This information is available on the e-justice portal.

Regarding to the people that can be asked for help, we find the national contact point of the European Judicial Network in civil and commercial matters; and in Spain we find also the members of the Spanish Network of Specialists in Civil and Criminal Cooperation (REJUE).