THEMIS FINAL

KRAKOW 2014

LEGAL PRACTICAL QUESTIONS

TEAM THE NETHERLANDS

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Part One : The contractual claims

Perspective 1: TWL Cars', claim on Kontakt Design, SP ZO.O – a triangular analysis

We will begin by discussing the claim that TWL CARS (hereafter: TWL) makes on Kontakt Design, SP ZO.O (hereafter: Kontakt). Kontakt, in TWL's view, failed to live up to their end of the agreement by not providing a suitable logo and other symbols for the marathon.

The first question that must be answered in this context is whether TWL has a legitimate claim on Kontakt. After all, TWL entered into a contract with BBB Events GmbH (hereafter: BBB), and not with Kontakt. In principle, therefore, TWL has no claim on Kontakt at all. TWL can try to recover her loss by stating that her damages are caused by a fault of Kontakt, so that Kontakt committed a tort/delict against her. But since BBB also has a claim on Kontakt this would create confusion as to who has a claim on whom. We believe that the most satisfactory solution for all three parties is if TWL entered into the positon of BBB as creditor/claimant, by means of voluntary assignment or subrogation (article 14 Rome I) or subrogation (article 15 Rome I) (*cessio legis*). Neither of these two situations is mentioned in the case, and so we must fill in the gaps in order to make this change of claimant possible.

Given the facts available in this case, TWL can enter into the position of creditor through voluntary agreement (in the sense of article 14 Rome I), if such an agreement was made with BBB. Rome I gives no definition of the word 'claim', leaving it open to interpretation. If we, in the current case, take it to mean 'rendering of a service', it is possible for BBB to transfer its' claim on Kontakt to deliver a (suitable) logo for the marathon, to TWL through voluntary agreement. Article 14(2) provides that the rights of the debtor remain intact – the creditor changes but the claim does not[1]. In this way, TWL could tread in the place of BBB and demand that a (suitable) logo be provided, and Kontakt could subsequently claim its' right to payment for its' services on TWL.

Because we can now speak of a valid claim between TWL and Kontakt, the next question is if the EU rules in civil and commercial matters are applicable. Since TWL is located in Munich and Kontakt in Krakow, there is a conflict of laws (we do not immediately know which national law is applicable). According to article 1(1) of Rome I, IPR in the form of the regulation is applicable, and none of the exemptions in article 1(2) apply.

Article 14(2) of Rome I stipulates which national law system applies in this case, namely: the law governing the claim itself. In this case this is the law governing the original claim between Kontakt and BBB (where TWL will take the place of BBB after the assignment/cession). Kontakt is

[1] Francisco Garcimartin Alferez, *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, (Sellier European law publ. : 2009), p.228

located in Krakow, and BBB has its' head-office in Vienna, but a branch office in Frankfurt. Because the parties have made no choice of law, we resort to article 4 of Rome I. In this case article 4(1) s applicable – Kontakt was selling a good to BBB. Since the law of the country where the seller has is habitual residence is to be applied, Polish law is the applicable law system.

Therefore the situation after the assignment/cession is as follows: TWL, a German company, has a claim on Kontakt, a Polish company, which is governed by Polish law. Which judge, in which jurisdiction, is the one to decide in this case? The first relevant article, is article 2 of the Brussels I regulation (Reg. No. 44/2001, of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). This implies that the country of domicile of the defendant, in this case Poland, determines which court has jurisdiction. Alternately, article 5 (1)(a) Brussels I applies, which states that the place of the performance of the obligation determines jurisdiction. In this case one could discuss whether the making of a logo is the sale of a good (article 1(b) first paragraph)or the rendering of a service (article 1(b) second paragraph), but in either case the logo should have been delivered to TWL for use in Berlin, so under article 5 the German court has jurisdiction. Therefore, both Polish and German courts have jurisdiction. It is up to parties which one they choose.

The question whether Kontakt actually did default on their part of the contract (after all, there was a logo provided, only TWL didn't like it) and the question of any eventual damages that TWL may have suffered as a consequence of this default, would have to be decided on by the German/Polish court, according to Polish law. In the event that Kontakt in turn would want to make a claim on TWL (for not paying, for instance), it could do so within the scope of the same contractual agreement (article 14(2) Rome I). Article 6(3) Brussels I states that in case of a counter-claim, the court in which the original claim is pending has jurisdiction, meaning that a counter-claim by Kontakt would have no effect on the question of jurisdiction (cf. article 10(1) Rome I). The remainder of the contract between TWL and BBB would remain untouched, making the option of assignment an effective solution for all three parties.

Perspective 2: TWL's claim on BBB, and BBB's subsequent claim on Kontakt – a linear analysis

Implicit throughout the case is the contractual relationship between the three parties. If the situation described above in Issue One didn't take place – i.e. TWL did not take BBB's place in the claim on Kontakt through assignment – a linear relationship of accountability would occur. TWL has closed a contract with BBB, and would therefore have to hold BBB responsible for not delivering (a satisfactory) logo on time. BBB, in turn, would by means of indemnity hold Kontakt responsible for not meeting their end of the bargain. In order to find an adequate solution to this conflict, it would be

necessary to deal with the claims of all three parties in one court, according to one national legal system. The question is how to realize this.

The first part of this linear relationship is the contract between TWL and BBB. Which legal system is applicable, and which court has jurisdiction? BBB has a valid claim on TWL because despite any dissatisfaction TWL has, unless it chooses to dissolve part of the contractual agreement, it is required to fulfil its' part of that agreement. The first question we have to ask ourselves is, is there a conflict of laws in this situation? If TWL in Munich closed the contract directly with BBB's branch office in Frankfurt, there would be no conflict of laws as both parties are situated in Germany.

If the contract was closed between TWL and BBB's headquarters in Vienna, however, this would not be the case. As already discussed, BBB has it's habitual residence in Germany, therefore, German law is applicable (in accordance with article 4(1)(b) Rome I, assuming that BBB is primarily delivering a service to TWL). According to article 5(1)(a), the German courts would also have jurisdiction. It is interesting to note, therefore, that irrespective of whether there is a conflict of laws or not, German law is applicable and the German court has jurisdiction.

The second part is the contractual relationship between BBB and Kontakt. BBB is situated in Vienna and in Frankfurt, and Kontakt is situated in Krakow. In this case there is little question that there is conflict of laws. Kontakt had agreed to deliver a certain good to BBB (layout, symbols, printed materials). Therefore, article 4(1)(a) is relevant, stating that Polish law is applicable. Article 2 of the Brussels I regulation indicates that in principle, Kontakt should be sued in their country of domicile – Poland. Article 5(1)(a) and (b), however, indicate that the German courts have jurisdiction, as that is where the good should have been delivered.

This creates a tricky situation, where the EU regulations dictate that the conflict that we wanted to treat as a whole, should be treated according to two different legal systems (albeit possibly in the same court). One possible solution to this situation is to apply the 'escape clause' of article 4(3) of Rome I. The EU Court of Justice has made it clear in for instance the *Intercontainer Interfrigo SC (ICF) v. Balkenende Osthuizen BV, MIC Operations BV*(C-133/08) case that a strict interpretation of this clause is prescribed. The Court states that it has to be 'clear from the circumstances as a whole that the contract is more closely connected with a country other than that identified on the basis of the presumptions'.

We would argue that in the current situation this criterion is met. The 'main' or original contract was created between two German parties (in the case of BBB, effectively so). The result of the contract was to be manifested in Germany, during the Berlin marathon. The German courts have jurisdiction in both contracts. All in all, it seems that the circumstances as a whole clearly indicate

that also the contract between BBB and Kontakt should be treated according to German law. This would allow the whole conflict, involving two contracts, to be treated consecutively, allowing an effective solution for all parties.

Schweizgraph's claim on Kontakt

We have now considered the contractual relationship between the three parties TWL, BBB and Kontakt from two different perspectives that both offer potential solutions. The only party for which no solution has yet been provided, is Schweizgraph, whom Kontakt enlisted for the execution of the printing activities. Regardless of which of the two above approaches one takes to the underlying contracts, Kontakt will be liable to fulfil its' contractual obligations to Schweizgraph.

As to the question of which law is applicable, that would in this case be Swiss law, in accordance with article 4(1)(b) of Rome I– in this case it is clear that Schweizgraph (the seller) is delivering a good to Kontakt. The court that has jurisdiction is either the Polish judge – as set out by article 2 of Brussels I – or the Swiss, in accordance with article 5(1)(a) and (b). The parties are free to choose, but seeing as Swiss law is applicable it may make sense to have the case presented before a Swiss judge, provided that Kontakt has effective access to the Swiss court.

Part Two : The Tort claims

We will consider each of the individuals' tort claims in chronological order. The question we have to answer is if Juan Pablo can recover his loss, namely the fact that he got hepatitis for life, as damages in a lawsuit from Adrianne, Barthelemy, Charles and Damien or from the German hospital. The regulation applicable is the 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 (hereafter: Rome II), according to article 1 of this Regulation. The damage is a consequence of the blood transfusion, the tort/delict, Juan received in a German Hospital.

According to article 2 the damages shall cover any consequence rising out of the tort/delict. So Juan can recover his loss from the German hospital. According to article 4 of Rome II the law applicable to an obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective 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 damages meant in article 4 (1) are about the direct consequences of the tort/delict as follows out of point 17 of the preamble. Point 17 states that in cases of personal injury the country in which the damage occurs is the country where the injury was sustained. In this case the personal injury was

sustained in Germany, so that the German law is applicable. The ground rule according to Brussels I is that the court of the place of residence of the defendant has jurisdiction. In this case that would be France. Article 5(3) states that in matters relating to tort/delict, the defendant can also be sued in the court for the place where the harmful event occurred.[2] So in this case that is the German court.

The question we have to answer concerning Francisco is whether he can recover his damages, namely the fact that he left the hospital with strong limitation of movements in the left upper side of his body and difficulties of concentration that prevented him to continue to perform his activity of truck driver. The damage is a consequence of the tort/delict, namely the quarrel of the four French supporters; Adrianne, Barthelemy, Charles and Damien, so Francisco can try to recover his loss as damages in a lawsuit from them. As mentioned above: out of article 4 and point 17 of the preamble to Rome II follows that in a case of personal injury the country in which the damage occurs should be the country where the injury was sustained, so that the German law is also applicable in this case. According to point 17 of the preamble this is also the case for the indirect damages as the damages he has from not being able to work as a truck driver anymore.
Regarding the jurisdiction the following: the ground rule according to Brussels I is that the court of the place of residence of the defendant has jurisdiction. Because the defendants all have their place of residence in France, this means the French court has jurisdiction. Article 5(3) of Brussels 1 states that in matters relating to tort/delict, the defendant can also be sued in the court for the place where the harmful event occurred. So for Francisco this means he can sue Adrianne, Barthelemy, Charles and Damien in both the French and in the German court.

Francisco's father had an immediate heart attack. As far as he had any actual damages and he states that the beating of his son by Adrianne, Barthelemy, Charles and Damien caused these damages he can try to recover his loss as damages arising out of tort/delict in a lawsuit. As mentioned above: Article 4 and point 17 of the preamble to Rome II stipulate that in a case of personal injury the country in which the damage occurs is the country where the injury was sustained. In this case the injury was sustained in Spain, so that the Spanish law is applicable. Regarding the jurisdiction; the ground rule according to Brussels I is, as already mentioned above, that the court of the place of residence of the defendant has jurisdiction. Because the defendants all have their place of residence in France, this means the French court has jurisdiction. Article 5(3) of Brussels 1 is, however, also applicable meaning that the defendant can also be sued in the court for

[2] Also see the HvJ EU 19 september 1995, 364/94, Marinari/ Lloyds Bank,http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993J0364:EN:HTML. These cases are about Article 5(3) of the Treaty but also see on Article 5(3) of the regulation.

the place where the harmful event occurred, in this case Spain. So for Francisco's father this means he can sue Adrianne, Barthelemy, Charles and Damien in both the French and Spanish court. Whether Francisco's father could actually legitimately claim damages, depending on whether there was a causal connection between the injury sustained and the quarrel he witnessed on the television, is a decision that would need to be taken by the chosen court.

The two athletes Goda and Eduardo/Andre were also injured. Goda from Lithuania was hit and broke a leg. Eduardo/Andre from Portugal broke a rib. They both also had to abandon the race that they prepared and paid using their own financial recourses. These damages were a consequence of the quarrel of Adrianne, Barthelemy, Charles and Damien, the four French supporters. Goda and Eduardo/Andre were both covered by an insurance policy; Sportsure LLC, with head office in London. Since both injuries were sustained during the marathon due to an accident, we assume the insurance company paid for the damages of Goda and Eduardo/Andre. This means the insurance company Sportsure LLC can seek reimbursement from the four French supporters for the damages that are a consequence arising out of tort/delict, the quarrel. In other words, Sportsure will pursue subrogation.

Article 19 of Rome II states that where a person (the creditor, in this case Goda and Andre/Eduardo) has a non-contractual claim upon another (the debtor, the French supporters), and a third person (in this case Sportsure) has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship. In this case the law, which governs the third persons duty to satisfy the creditor, is, according to Article 7(3)(b) of Rome I the law of the country where the policyholder has his habitual residence. BBB events negotiated the insurance policy with Sportsure, so that BBB is the policyholder of the insurance. Since BBB's habitual residence is in Germany (the branch office is in Frankfurt, as discussed earlier), German law is applicable in the claim of BBB against the four French supporters.

The ground rule according to Brussels I is, as already mentioned above, that the court of the place of residence of the defendant has jurisdiction. Because the defendants all have their place of residence in France, this means the French court has jurisdiction. Article 5(3) of Brussels 1 states that in matters relating to tort/delict, the defendant can also be sued in the court for the place where the harmful event occurred. Because the harmful event, for both Goda and Andre/Eduardo, occurred in Germany, this means Sportsure can sue Goda and Andre/Eduardo in both the French and in the German court. Mathias, a Belgian citizen, was arrested by the German police due to a misunderstanding. According to article 1 of Rome II, Rome II is not applicable to the liability of the

State for acts and omissions in the exercise of State authority (*acta iure imperii).* This means that Mathias has no legal rights to which European Union rules can be applied.

Regarding the rules on recognition and enforcement of the judgements pronounced on all the above-mentioned rights, we would like to point out the following. According to article 33 of Brussels I a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required. According to article 38 a judgment given in a Member State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there. This means that all the judgments that would be pronounced in the above mentioned situations – both in the contractual conflict and in the various tort claims – would be automatically recognized by the other member states. In the situation that the case was treated by a court outside the member state where the victim has his habitual residence, the victim can also apply to have the judgment enforced in his own member state. For instance – should the case of Juan Pablo be treated in Germany, Juan Pablo can apply to have the judgment enforced in Spain. When the recast of Brussels I (EU regulation 1215/2012) is applied as of January 2015, there will no longer be a need to apply for the enforcement of the judgment - the new article 39 Brussels I states that no declaration of enforcement will be necessary.

Part Three : The Provisional Procedure and Obtaining of Evidence

The Polish request to the French court

The Polish court requested to have the former administrator of Kontakt a French citizen, examined as a witness through videoconference in Bordeaux, France. To this end, they sent a request directly to 'the French court' for legal assistance. It is not made clear in the case to which 'French Court' the request was sent, nor whether the relevant Frenchman was living in Bordeaux - therefore it is unclear why the request was sent to the court in Bordeaux and not to another French judicial authority. For the sake of argument and the case we will assume that the witness was residing in Bordeaux. At this moment we are not familiar with the relevant regulation in the French Civil Procedural Code, but we assume that the competent French court for the interrogation of a witness is the Court within whose jurisdiction the witness is living. Our point of departure, therefore, is the situation of a witness residing in Bordeaux and a request sent to the "Tribunal de Grande Instance" in Bordeaux. The first question that arises is whether there is a problem with the fact that the request is concerning the examination of a witness in a provisional procedure regarding protective measures in order to seize property with a view to grant future credit for damages compensation. The applicable regulation is

Council Regulation (EC) No 1206/2001 of 28 may 2001 on co-operation between the courts of the member states in the taking of evidence in civil or commercial matters (hereafter: the Regulation). In our opinion this Regulation doesn't exclude the use of its instruments regarding taking evidence in another Member state in provisional procedures. These provisional measures however must be connected to civil or commercial cases.

The secondquestion we have to address is whether the request concerns the seeking of direct evidence in the requested Member State or not. Taking 'direct evidence' means that a judge, or court or other competent judicial authority obtains the evidence themselves (directly) in the requested member state. The alternative is that the court in the requested member state obtains the evidence on behalf of the requesting state. The fact that the Krakow court requests a videoconference does not per se mean that they make a choice for the option of seeking direct evidence. Therefore it is not clear if the Court of Krakow is asking for the opportunity to take direct evidence in France or not.

This is of significant importance because the Regulation hereafter gives two more or less separate arrangements for the two different types of requested assistance. Articles 10-12 of the Regulation are the general provisions on the execution of requests. According to article 2(1) of the Regulation general requests are directly sent to the competent court in the other Member state. Article 17 of the Regulation regards the direct taking of evidence. In case of seeking direct evidence the request has to be send to the Central Body; article 17(1) Regulation

This means that if the request of the Krakau court was a general request, the court in Bordeaux (TGI) unlawfully refused to execute the request by sending it to the Central Authority in Paris. That also means that the conditions and demands stated by the Central Body, as mentioned a-f in the case, weren't right. The court in Bordeaux should have investigated the nature of the request by asking the court in Krakow if the request was regarding the seeking of evidence by the court, or taking evidence directly.

If the request of the court of Krakow was made regarding a request for taking direct evidence in examining the witness, however, article 17 of the Regulation is applicable. Then the Krakow court should have sent the request to the Central Body in Paris (article 17(1) jo article 3(3) of the Regulation).

With respect to the period of 5 months that took place before any reaction came from the French (in a provisional procedure), one can say that this isn't within the time limits of the Regulation. Article 10 (1) stipulates that the requested court shall execute the request within 90 days of receipt of the request, and article 17 (4) (both of the Regulation) stipulates that within 30 days the central body of the requested Member state shall inform the requesting Member state if the request is

accepted and, if necessary, under what conditions to the law of its Member state such performance is to be carried out. So the French authorities were clearly rather *lentement* in processing the request.

Under point 'a' stipulated in the text of the case, the Central Authority in Paris stated that the requested court only had video equipment installed for criminal cases. It is interesting to note that since the Central Authority considers the request substantially, it doesn't reject the request - which to us suggests that it considers the court of Bordeaux competent to deal with the request. Its' rejection of the request on grounds that the videoconference material is only to be used in criminal cases, however, in unfounded.

Article 10(4) of the Regulation stipulates that the requested court shall comply with a requirement such as videoconference, unless this is incompatible with the law of the Member state of the requested state or by reason of major practical difficulties. According to the practical guide on using videoconferencing set out in the 'European Judicial Atlas in Civil Matters', there are no restrictions in French procedural civil law for the use of videoconferencing. The fact that the videoconferencing equipment is meant for criminal procedures cannot be regarded as a 'major practical difficulty' in the sense of article 10(4) of the Regulation.

As for point 'b' in the text – which suggests that the taking of evidence should only be performed on a voluntary basis – article 17(2) of the Regulation indeed indicates a voluntary basis without the need for coercive matters. The same paragraph is applicable to the conditions set out under 'c'. The condition under 'd' - that the request needed to be redirected to the French Central Authority - is dreadful case of *Legalismus*. Article 3(1)(b) of the Regulation states that the central authority should seek solutions to any difficulties which may arise in respect of a request, not to create more formal barriers.

In the case under 'e' another condition was made by the French. The requesting court should find a place and videoconferencing system in the French territory to perform the collection of evidence. Article 17(4) of the Regulation stipulates that the central authority in the requested MS may assign a court the requested performance. According to their own answers, as aforementioned, the central authority elects to give a court the task of participating in the taking of evidence. The only conclusion that can be drawn from this is that the French conditions are not in line with the spirit of the Regulation and the underlying principles of cooperation in legal matters within the European Union. Under 'f' the French Central Authority set as a condition that the examination should be performed by a French Judge. This condition is according to art. 17(3) of the Regulation.

The Polish request to the Austrian court

The second topic addressed in the case is the rejection of the Polish court of the request to find the address of an Austrian witness in order to subsequently ask his examination by videoconference.

A solution for this problem can be found in article 4(4) of the Regulation where it is stipulated that; where appropriate, any other information that the requesting court deems necessary falls within the request. The same paragraph points out that the requesting state shall provide the requested state with the name(s) and address(es) of the person(s) to be examined, and so it seems logical and reasonable that the requested state can also only provide the name of the concerned witness, without per se or immediately facilitating the hearing of that witness. Therefore the rejection by the Polish court seems unfounded, as indirectly the request for the address is covered by article 4 of the Regulation. Moreover, in the spirit of co-operation and finding solutions for the concerned parties, anything less that accepting the request would be unreasonable.