

Question 1: International jurisdiction

A) Applicability of the *Brussels Ia Regulation*

The international jurisdiction is determined by the *Brussels Ia Regulation* ((EU) 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, hereinafter *Brussels Ia*), if the work supply agreement between W and C falls within the regulation's scope of application.

The *Brussels Convention* was replaced by the *Brussels I Regulation* on 1 March 2002 and will be replaced with effect from 10 January 2015 by the *Brussels Ia Regulation*. For the present case studies, the applicability of the *Brussels Ia Regulation* is assumed. That is why judgments and commentaries often refer to the predecessor provisions, but they are regularly transferable to the current version of the act. Innovations and changes installed by the *Brussels Ia Regulation* will be mentioned expressly.

I) Material scope of application

Art. 1 ss. 1 *Brussels Ia* describes the Regulation's material scope of application: it shall apply in civil and commercial matters whatever the nature of the court or tribunal is.

The wide term 'civil and commercial matters' – though not yet positively defined by the Regulation or by jurisdiction - follows an autonomous interpretation, independent of any national definitions.

Litigation between private individuals is generally covered by the Regulation. Litigation involving a public authority can fall within the Regulation's scope of application as long as the public authority does not exercise official power (Case C-29/76 *LTU Lufttransportunternehmen GmbH & Co KG v. Eurocontrol* [1976] ECR 1541 para 4).

The agreement about the manufacturing and delivery of the fountain pen between W and C is a contract between two individuals and thus a civil matter (as one can at least deduce from Art. 7 No 1 *Brussels Ia*). As it does not fall within the derogation of Art. 1 ss. 2 *Brussels Ia*, *Brussels Ia* is applicable at its material level.

II) Temporal scope of application

Art. 81 and 66 ss. 1 Brussels Ia outline the temporal scope of application, stating that the Regulation applies to legal proceedings instituted on or after 10 January 2015. One can deduce from *Art. 32 ss 1 (a) Brussels Ia* that proceedings are deemed to be instituted when the claim is lodged with the court, irrespective of the time when it is served on the defendant.² As the dispute arose at the end of December 2014 only, it is safe to assume that W's eventual claim did not reach the court before 10 January 2015. *Brussels Ia* also is applicable in temporal terms.

III) Geographical scope of application

The *Brussels Ia Regulation* is applicable in 26 EU Member States. The United Kingdom and Ireland have decided to take part in its adoption and application (*opt-in*, cf. *recital 40 Brussels Ia*).

Denmark is not directly bound by the *Brussels Ia Regulation* (cf. *recital 41 Brussels Ia*). However, Denmark made use of its possibility to adopt the amendments made by *Brussels Ia* compared with *Brussels I* pursuant to *Article 3 of the Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, *ABl. 2005, L 299/6* and notified the European Commission of its acceptance, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:079:0004:0004:EN:PDF>

Thus, *Brussels Ia* will take effect in Denmark as well.

The geographical scope of application requires an unwritten precondition, the existence of a foreign element: One can deduce from *Art. 4 ss 1 and 6 ss. 1 Brussels Ia* that in principle (with exceptions e.g. in *Art. 25 ss. 1, 18 Brussels Ia* applying regardless of the party's domicile) the defendant has to be domiciled in an EU Member State, *and* that the facts to the case must not constitute a purely domestic situation, thus must be shaped by an international (not necessarily European) aspect.

The "domicile" of a company as defined in *Art. 63 ss. 1 Brussels Ia* is *alternatively* the place where it has its statutory seat, its central administration or its principal place of business.³ C's seat is in Portugal and as the facts of the case are characterized by several foreign elements (e.g. to France, Portugal, Spain and Italy), the case falls within the spatial scope of application.

Brussels Ia thus applies to the case.

² *Kropholler/v. Hein*, *Europäisches Zivilprozessrecht* (9th edition 2011), art. 66 EuGVO note 2.

³ Please note that in order to determine the domicile of a natural person, the court cannot rely on a definition in the Regulation. According to *Art. 62 ss 1 Brussels Ia*, the court must instead apply its own domestic definition of "domicile".

As to the term 'domicile' of a natural person within the meaning of the *Brussels Ia Regulation*:

In order to determine the international jurisdiction, the *Brussels Ia Regulation*, as well as its predecessors the *Brussels I Regulation* and the *Brussels Convention*, mostly refers to the place where the defendant is domiciled, less frequently to the place of the defendant's habitual residence; a person's nationality is not of (direct) relevance at all. Normally, the European Law interprets its terms independently, however concerning the interpretation of a person's domicile, *Art. 62 Brussels Ia* uses the technique of referral to the national law of the court seized (*lex fori*). Each Member State thus applies its own domestic law that may differ from country to country.

The revised Regulation maintained the main criterion of domicile despite opposing voices in literature that argued that the referral to a national definition of domicile would cause conflicts of jurisdiction (Rauscher/*Staudinger*, *EuZPR*, *EulPR*, *art. 59 Brüssel I-VO* note 9; *Kropholler/v. Hein*, *Europäisches Zivilprozessrecht*, *art. 59 EuGVO* note 3).

B) Exclusive jurisdiction

The provisions on exclusive jurisdiction in *Art. 24 Brussels Ia* and *Art. 25 Brussels Ia* are not applicable *ratione materiae*.

C) General jurisdiction

Pursuant to *Art. 4 ss. 1 Brussels Ia*, the general place of jurisdiction is the defendant's domicile. Since C is not domiciled in France in the sense of *Art. 63 ss. 1*, French courts cannot base their competence to adjudicate the case on *Art. 4 ss. 1 Brussels Ia*.

D) Special jurisdiction

But the international jurisdiction of French Courts could possibly be based on a special jurisdiction provision.

I Special jurisdiction over consumer contract, *Art. 17 ss. 1 Brussels Ia*

The international jurisdiction is based on *Art. 17 ss. 1 Brussels Ia*, if the contract between W and C is considered a consumer contract. This special jurisdiction allows the consumer to sue the provider of goods or services either in the courts of the Member State of the provider's domicile or, regardless of the domicile of the other party, in the courts of his own domicile, *Art. 18 ss. 1 Brussels Ia*.

The fact that the provisions for consumer contract claims apply in exception to *Art. 6 Brussels Ia* regardless of the domicile of the defendant is an innovation which is appreciated by literature (*Pohl*, IPrax 2013, 109 (111); *v. Hein*, RIW 2013, 97 (101)). Independent from the domicile of the sued party, the consumer shall be able to sue the other party at his own domicile. Thereby, the consumer's legal protection against an enterprise seated in a third country is improved.

The consumer himself, however, may only be sued in the courts of his own domicile (exclusive jurisdiction, *Art. 18 ss. 2 Brussels Ia*). Thus, if *Art. 17, 18 ss. 1 Brussels Ia* apply, the provider loses the advantages he would have when being brought before a court of his own domicile.

1) Personal scope of application

W must be a consumer within the meaning of *Art. 17 ss. 1 Brussels Ia*, i.e. must have concluded the contract for a purpose "which can be regarded as being outside his trade or profession", as *Art. 17* puts it. Since W intends to use the fountain pen only for writing (private) letters and poems that are not connected to his trade as wine merchant, he is a consumer.

If W person had concluded the contract for both, personal and professional purposes (**variation (a)**, so-called 'dual-use'), this would have led to a different result. The CJEU – in deviation from some national jurisdictions – ruled that the predominance of the private element is by itself irrelevant. The term 'consumer' has to be interpreted narrowly as *Art. 17 Brussels Ia* constitutes a deviation from the general jurisdiction, *Art. 4 Brussels Ia*. A person thus can only be defined as consumer as long as it is in need of the consumer protection rules. Only in case the business purpose of the transaction was *negligible* in the overall context of the supply, the person could be qualified as consumer (Case C-464/01 *Gruber v. BayWa AG* [2005] ECR I-439 para 56). Assuming the "business use" of the pen is *not totally negligible* in the variation (a) of our case at hand, W did not act as a consumer. *Art. 17, 18* do not apply.

Yet, the result would be not different if W did not reveal to C the use he wanted to make of the pen (**variation (b)**): The consumer is protected because he is deemed to be the (*objectively*) *weaker party* to the contract when contracting for a private purpose with a professional. It follows that it is, in principle, irrelevant whether the contracting partner had any knowledge of the use the consumer wants to make of the purchased good. Please note, however, that the **consumer who actively purports to be a professional** when concluding the contract will be treated as a professional: "In such a case, the special rules of jurisdiction for matters relating to consumer contracts ... are not applicable ..., and the individual must be regarded, in view of the impression he has given to the other party acting in good faith, as having renounced the protection afforded by those provisions" (Case C-464/01 *Gruber v. BayWa AG* [2005] ECR I-439 para 53).

Concerning the ‘person who pursues commercial or professional activities’ within the meaning of *Art. 17 ss. 1 c) Brussels Ia*: The CJEU recently decided that the ‘other person’ does not have to be domiciled in a Member State other than the consumer’s one: The applicability of the Regulation indeed requires a foreign element – not necessarily to another Member State -, however this requirement can also be met if both contractual partners are domiciled in the same Member State. In this case, the CJEU followed a broad interpretation of the foreign element, considering as sufficient the inseparable connection of the consumer contract to another contract concluded by the consumer and a (foreign) third person (Case C-478/12 *Armin Maletic Marianne Maletic v. lastminute.com GmbH and TUI Österreich GmbH* judgment of 14 November 2013 (not vet reported)).

2) Situational scope of application: Directing commercial or professional activities to the Member States, Art. 17 ss. 1 c) Brussels Ia

As the agreement between W and C is neither a contract on instalment credit terms (*Art. 17 ss. 1 a) Brussels Ia*) nor a contract for any other form of credit (*Art. 17 ss. 1 b) Brussels Ia*), it is decisive whether C pursues commercial or professional activities in the Member State of W’s domicile or, by any means, *directs* such activities to that Member State or to several States including that Member State, and whether the contract falls within the scope of such activities, *Art. 17 ss. 1 c) Brussels Ia*.

The company C sells fountain pens, which it manufactures and delivers to the buyer. It thus pursues commercial and professional activities. As C does not pursue these activities in France, the Member State where W is domiciled, it is decisive whether C directs its activities to that Member State.

The broad wording ‘*directs such activities in the Member State*’ aims at taking into account the increasing relevance of contracting via e-commerce.⁴ The crucial question is whether the commercial or professional activity can be regarded as being directed to the Member State where the consumer is domiciled. The trader therefore must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer’s domicile, before the contract is concluded.⁵ This is determined on the basis of several criteria such as ‘*the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader’s site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States.*’⁶

⁴ COM (1999) 348, 17 available at: <http://www.statewatch.org/semidoc/assets/files/commission/COM-1999-348.pdf>.

⁵ Case C-585/08 and 144/09 *Pammer and Hotel Alpenhof* [2010] ECR I-12527 para 75.

⁶ Case C-585/08 and 144/09 *Pammer and Hotel Alpenhof* [2010] ECR I-12527 para 93; please note: this jurisdiction is contrary to *recital 24 of the Rome I Regulation*: According to this recital, the parallel provisions of Brussels I and Rome I should be interpreted harmoniously and it should be

C's website provides a phone number including an international prefix. This alone is not a decisive factor as it might indicate that C's business in general is international and directed to Member States other than the one C is domiciled in. Nevertheless, it does not lead to the conclusion that C directs its commercial or professional activities also to W's Member State, France, as required by the wording of *Art. 17 ss. 1 c) Brussels Ia*. However, the website is available in different languages, i.a. in French. C also provides directions to reach its company site from France. These criteria support the hypothesis that C directs its activities to France as required by *Art. 17 ss. 1 c) Brussels Ia*.

The fact that the website itself does not provide any possibility to directly conclude the contract, but rather asks the customer to contact C by means of email or phone to negotiate, cannot have any impact on this evaluation: It is undisputed that an entrepreneur directs its activities to the consumer's State if it sends a catalogue to the consumer in the consumer's language;⁷ in this case it is irrelevant whether the catalogue itself provides the possibility to directly conclude the contract. Therefore, the same should apply for electronic advertising⁸ Also, the CJEU held that the former '*distinction drawn by certain governments and certain parties [...] between websites enabling the trader to be contacted electronically, indeed even the contract to be concluded on line by means of an 'interactive' site, and websites not offering that possibility, a distinction according to which only the former are to be included in the category of sites that enable pursuit of an activity 'directed to' other Member States, is not decisive*'.⁹

Also, the CJEU held that the provision does not necessarily require the contract itself to be concluded at a distance. Neither does the wording contain such a requirement, nor would this restriction be in conformity with the provision's original scope – the consumers' protection. This is underlined by the fact that the EU changed the wording of the preceding paragraph of the *Brussels Convention* which required, firstly, the trader to have addressed a specific invitation to the consumer or to have advertised in the State of the consumer's domicile and, secondly, the consumer to have taken in that State the steps necessary for the conclusion of the contract with conditions applicable to the trader alone. The *Brussels I*-provision that is congruent with the revised *Brussels Ia*-provision has a less restrictive wording and thus does not require the contract to be concluded at a distance (Case C-190/11 *Daniela Mühlleitner v. Ahmad Yusufi and Wadat Yusufi* judgement of 6 September 2012 (not yet reported) para 35 ff.).

born in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that 'the language or currency which a website uses does not constitute a relevant factor.'

⁷ Case C-96/00 *Rudolf Gabriel* [2002] ECR I-6373 para 44; *Magnus/Mankowski/Nielsen*, *Brussels I Regulation* (2nd revised edition 2012), art. 15 note 33.

⁸ *Leible*, JZ 2010, 272 (276); *Rauscher/Staudinger*, *EuZPR*, *EuIPR* (editing 2011), art. 15 *Brüssel I-VO* note 14.

⁹ Case C-585/08 and 144/09 *Pammer and Hotel Alpenhof* [2010] ECR I-12527 para 79; again: *recital 24 of the Rome I regulation* points out that according to the joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001, 'a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means.'

However, when concluding the contract, W did not even take notice of C's website, but contacted C independently. The question thus arises whether the precondition of '*directing one's activities to the consumer's Member State*' requires the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile and the conclusion of the contract with that consumer.

The wording '*direct one's activities*' (first precondition of *Art. 17 ss. 1 c) Brussels Ia*) is indifferent as to the requirement of a causal link. However, the wording that '*the contract falls within the scope of such activities*' (second precondition of *Art. 17 ss. 1 c) Brussels Ia*) is said to require a causal link.¹⁰ Others want to set an unwritten requirement.¹¹ These opinions are based i.a. on *recital 25 of the Rome I Regulation* which for the parallel provision *Art. 6 Rome I Regulation* requests that the consumer contract must have been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. This suggests that the same must be valid for *Art. 17 ss. 1 c) Brussels Ia*.¹² Further, *Art. 17 ss. 1 Brussels Ia* provides for a special jurisdiction deviating from the general jurisdiction and as such must be interpreted narrowly.¹³

However, pursuant to a recent CJEU judgment, the requirement of a causal link would go against the intended consumers' protection:¹⁴ Requesting a causal link between the provider's activity and the consumer's order would give rise to difficulties of proof, especially in case the consumer finally did not conclude the contract at a distance. At the same time, the consumer might refrain from bringing his claim to the courts of his domicile.¹⁵ According to the CJEU, it therefore is sufficient that the provider's commercial or professional activities are directed to the consumer's Member State without the need for the consumer to take notice of it.¹⁶ Nevertheless, the existence of such a causal link might furnish strong evidence when determining whether the provider indeed directs its activities to the consumer's Member State.¹⁷

This is convincing: If a causal link was an inherent requirement of *Art. 17 ss. 1 c) Brussels Ia*, this would give rise to great risks of abuse. The trader could argue that the consumer didn't contact the trader as consequence of its advertisement. Applying the general rule that every person has to proof those preconditions on which it bases its claim, the consumer would be in a weak position. Hence, the causal link is not a decisive factor.

Thus, even if W did not take notice of C's activities that were directed to his Member State, the contract between W and C providing for the manufacturing and the delivery of the fountain pen, is covered by *Art. 17 Brussels Ia*.

According to *Art. 18 ss. 1 Brussels Ia*, W can choose to bring proceedings against C either before the Portuguese courts (as courts of the Member State where C is domiciled) or before the courts at the place where W is domiciled. In the latter case, *Art. 18 ss. 1 Brussels Ia* also determines the local jurisdiction, thus the jurisdiction automatically lies with the courts of Bordeaux.

¹⁰ *Leible/Müller*, EuZW 2008, 26 (28).

¹¹ BGH, court order of 17 September 2008, Az. III ZR 71/08= NJW 2009, 298; *Leible/Müller*, NJW 2011, 495 (497).

¹² Cf. *recital 7 of the Rome I regulation*; *Leible/Müller*, NJW 2011, 495 (497); *Leible/Müller*, EuZW 2008, 26 (29).

¹³ BGH, court order of 17 September 2008, Az. III ZR 71/08= NJW 2009, 298 (298); *Rauscher/Staudinger*, EuZPR, EuIPR, art. 15 Brüssel I-VO note 18.

¹⁴ Case C-218/12 *Emrek* judgment of 17 October 2013 (not yet reported) para 24.

¹⁵ Case C-218/12 *Emrek* judgment of 17 October 2013 (not yet reported) para 25.

¹⁶ Case C-218/12 *Emrek* judgment of 17 October 2013 (not yet reported) para 26.

¹⁷ Case C-218/12 *Emrek* judgment of 17 October 2013 (not yet reported) para 26.

Please note:

The German Bundesgerichtshof submitted another question for a preliminary ruling to the CJEU, asking whether the consumer may sue the seller in the courts of his domicile, if the seller directs its commercial or professional activity to the consumer's Member State within the meaning of *Art. 17 I c) Brussels Ia*, but if the contract on which the claim is based does not directly fall within the scope of the seller's activities, but is economically associated with a (former and already fulfilled) contract that indisputably fell within the scope of the seller's activities (BGH, court order of 15 May 2014, Az. III ZR 255, 12).

II Special jurisdiction in contract, *Art. 7 No 1 Brussels Ia*

The special jurisdiction concerning contractual obligations (*Art. 7 No 1 Brussels Ia*) is superseded by the special jurisdiction over consumer contracts, *Art. 17 Brussels Ia*. In the variation (a), where *Art. 17* is not applicable, however, *Art. 7 No 1 (b)* could be applied. Since W took delivery of the pen in C's shop in Milano, the place of performance for *all obligations* arising out of the contract is in Italy. Therefore, *Art. 7 No 1 (b)* does not provide a forum for the claim in France.

E) Result

Concluding, W can proceed against C before French courts (more exactly before the courts of Bordeaux) only if he purchased the pen for a (nearly) entirely private use.

According to *Art. 6 ss. 1 (b) Rome I Regulation*, in the absence of a choice of law clause in the contract between C and W, the court will have to apply French substantial law to W's claim (within the limits of *Art. 12 Rome I Regulation*), because W acted as a consumer and C directed its activities (also) to that country. In variation (a), where W did not act as a consumer, *Art. 4 No 1 (a)* and *Art. 19 ss. 2* would lead to Italian law.

Question 2: Submission

W filed a suit against C in Berlin. C sends its statement of defence to the Amtsgericht in Berlin without objecting to the court's jurisdiction. As noted above, French or Portuguese courts have international jurisdiction. The German courts instead do not have jurisdiction, irrespective of whether C directs its activities in the same way to Germany as it does to France.

However, according to *Art. 26 ss. 1 Brussels Ia Regulation*, a court gains jurisdiction if the defendant enters an appearance before that court. By doing so, the defendant itself establishes the court's international jurisdiction.

If someone 'enters an appearance' this must be determined autonomously to make sure that the definition is the same in all Member States. Since the submission is an implicit agreement between the two parties to a process on the fact that a specific court should have jurisdiction,¹⁸ the term 'to enter an appearance' is defined as the legal presence of the defendant in the process which authorizes the defendant to act as a party in that civil trial.¹⁹ Excluded from this are actions, which precede actual defence and which do not aim at a rejection of the claim.²⁰ It follows that the defendant's challenge to jurisdiction must be made preliminary to any defence as to the substance of the case.²¹ It must not be made after the making of submissions which under national procedural law are considered to be the first defence addressed to the court seized.²²

In German law, the statement of defence generally is the first action of defence (§ 277 Code of Civil Procedure (ZPO)). C send its statement of defence to the Amtsgericht Berlin, arguing on the merits of the case but leaving out any objection to the international jurisdiction of the German local court. Engaging itself in the claim, C established the German courts' jurisdiction within the meaning of *Art. 26 ss. 1 Brussels Ia*.²³

Information: Within the previous Regulation it was debatable, whether even in case of special jurisdiction such as the jurisdiction for consumer contracts, a submission could take place at the expense of the sued consumer. This was widely accepted, since – though politically doubtful – the wording of *ex Art. 24 Brussels I* would be unequivocal in so far (Case C-111/09 *CPP, Vienna Insurance Group v. Bilas* [2010] ECR I-4545 para 30; Musielak/*Stadler*, ZPO, art 24 EuGVO note 4; *Kropholler/v. Hein*, Europäisches Zivilprozessrecht, art. 24 EuGVO note 16).

In this regard, *Brussels Ia* also contains a readjustment: Following *Art. 26 ss. 2 Brussels Ia* the court has a duty to inform the consumer about the consequences of its appearance or nonappearance in the proceeding. The EU legislator hereby clarified that in general *Art. 26 Brussels Ia* is applicable in case of consumer contracts as well.

Since in the case at hand W, as consumer, is not the respondent but the claimant, this provision has no effect.

A problem arises, however, as to the national protection clause of § 504 ZPO: According to this provision, the German local court (Amtsgericht) should, if it lacks jurisdiction, this being local jurisdiction or competence *ratione materiae*, indicate this fact to the defendant prior to holding the hearing on the merits of the case, and shall likewise draw the defendant's attention to the consequences of entering an appearance on the merits of the case without filing a corresponding objection. This provision applies regardless of whether the defendant is a consumer or an

¹⁸ Magnus/Mankowski/*Calvo Caravaca/Carrascosa González*, *Brussels I Regulation*, art. 24 note 1.

¹⁹ Magnus/Mankowski/*Calvo Caravaca/Carrascosa González*, *Brussels I Regulation*, art. 24 note 10.

²⁰ *Kropholler/v. Hein*, *Europäisches Zivilprozessrecht*, art. 24 EuGVO note 7.

²¹ Case C-150/80 *Elefanten Schuh GmbH v. Pierre Jacqmain* [1981] ECR 1671 para 16.

²² Case C-150/80 *Elefanten Schuh GmbH v. Pierre Jacqmain* [1981] ECR 1671 para 16.

²³ Cf. OLG Frankfurt, judgment of 9 September 1999, Az. 4 U 13/99 para 8 f.; *Kropholler/v. Hein*, *Europäisches Zivilprozessrecht*, art. 24 EuGVO note 15; Musielak/*Stadler*, ZPO (11th edition 2014), Art. 24 EuGVO note 4; of another opinion BGH, judgement of 21 November 1996, Az. IX ZR 264/95= NJW 1997, 397 (398).

entrepreneur and regardless of whether the defendant is represented by a lawyer. Even if the wording only addresses the local or material competence, it is suggested that the provision should also be applicable *mutatis mutandis* for lack of international jurisdiction, even in case *Brussels Ia* is applicable.²⁴ Thus, in case, no such indication is made, the court's competence would not be established (see § 39 2 ZPO).

However, this approach is to be rejected for methodical reasons: *Art. 26 ss. 1 sentence 1 and 2 Brussels Ia* itself sets exhaustively the limits to its own applicability by stating that no submission takes place e. g. where another court has exclusive international jurisdiction in the sense of *Art. 24 Brussels Ia*.²⁵ As *Art. 288 TFEU* points out the EU Regulation takes priority over national law. Thus, no such indication is necessary.

Since C entered an appearance before the German courts, they now have international jurisdiction.

Question 3: International jurisdiction for the claims of the cleaning costs

W asks before which courts he can proceed against C for claiming his cleaning costs.

Again, the *Brussels Ia Regulation* is applicable in material, personal and spatial regard, *Art. 1 Brussels Ia* (see above).

A) General jurisdiction

Pursuant to *Art. 4 ss. 1, 63 ss. 1 a) Brussels Ia*, W may sue C in the Portuguese courts, irrespective of whether W bases his claim on a contractual or a tort basis. However, W would like to avoid bringing his claim before Portuguese courts as he is afraid C could benefit from some kind of 'home advantage'.

B) Special jurisdiction

I Special jurisdiction over consumer contracts, Art. 17 ss. 1 Brussels Ia

W claims damages that result from a breach of contract (supply of faulty goods), so-called consequential damages. W can institute claim against C before French Courts as above, *Art. 18 ss. 1 Brussels Ia*.

II Special jurisdiction in tort, Art. 7 No 2 Brussels Ia

According to *Art. 7 No 2 Brussels Ia*, if the subject of the proceeding is a matter relating to tort, a delict, or a quasi-delict, or a claim arising out of such acts, a person may be sued in the court of the place where the harmful event occurred or may occur. The special place of jurisdiction of the harmful event ensures a reasonable balance between the interests of both claimant and defendant regarding the jurisdiction.²⁶ The injured party can file a suit at the place where the harmful event or the damage occurred and does not have to fall back on the defendant's general

²⁴ Stein/Jonas/Bork, ZPO (22nd edition 2011), § 39 note 15; MüKo/Deubner, ZPO (4th edition 2013), § 504 note 4.

²⁵ Rauscher/Staudinger, EuZPR, EulPR, art. 24 EuGVO note 15, 16.

²⁶ Rauscher/Leible, EuZPR, EulPR, art. 5 Brüssel I-VO note 74.

jurisdiction at its domicile, which is potentially unpredictable for the injured party. The same applies to the defendant, for whom the jurisdiction of the court at the place of the harmful event is likewise rather predictable as the place of the claimant's domicile.

The term 'harmful event' must again be determined autonomously and includes any liability for damages, which are not based on a contract in the sense of *Art. 7 No 1 Brussels Ia*.²⁷ Since *W* might argue that the delivery of a faulty pen does not only violate *C*'s contractual duties as the seller, but also its duty of care as a distributor of the pen, he also claims non-contractual damages. Also the term 'place where the harmful event occurred' (principle of ubiquity),²⁸ must be determined independently, including the place where the damage occurred (*Erfolgsort*), as well as the place where the harmful event giving rise to the damage occurred (*Handlungsort*).²⁹ The claimant may make a choice in so far. The wording of the provision reveals that again not only the international, but also the local jurisdiction is regulated.

The place where the damage occurred is Madrid, as this is the place where *W* used his fountain pen. The place where the harmful event giving rise to the damage occurred is the place where *C* contributed in a causal way to the damage occurred. As *C* did not manufacture the pen itself, this can only be the place where it put the fountain pen on the market, thus in Milan.³⁰

Consequently, Spanish or Italian courts would have international jurisdiction, but not those in France, where *W* can enforce his contractual claims, due to his or the manufacturer's domicile.

²⁷ Case C-189/87 *Kalfelis* [1988] ECR I-5565 para 16; Case C-189/08 *Zuid Chemie v. Philippo's Mineralenfabriek NV/SA* [2009] ECR I-6917 para 12.

²⁸ For further details see below, case 3 question 1 D III.

²⁹ Case C-21/76 *Handelskwekerij Bier v. Mines de Potasse d'Alsace* [1976] ECR I-1735 para 15.

³⁰ Cf. *Rauscher/Leible*, EuZPR, EulPR, art. 5 Brüssel I-VO note 88.

If W had intended to proceed against X as the manufacturer of the fountain pen, there would have been a case of product liability: As to product liability, the CJEU specified the place where the harmful event occurred: It held that the place where the harmful event giving rise to the damage occurred (*Handlungsort*) is the place where the product was manufactured (Case C-189/08 *Zuid-Chemie v. Philippo's Mineralenfabriek NV/SA* [2009] ECR I-6917 para 13).

According to the same ruling, the place where the damage occurred (*Erfolgsort*) is where the initial damage occurred as a result of the normal use of the purpose for which it was intended, thus where the buyer (as the last link in a chain) intends to use the product (Case C-189/08 *Zuid-Chemie v. Philippo's Mineralenfabriek NV/SA* [2009] ECR I-6917 para 32). However, this ruling has been criticized: Literature agrees that the place of the intended use is hard to define and that the ruling only solves the simple cases (Magnus/Mankowski/*Mankowski*, Brussels I Regulation, art. 5 note 257c; Rauscher/*Leible*, EuZPR, EuIPR, art. 5 Brüssel I-VO note 86f). Further, the buyer might use the goods without or even against the manufacturer's intention which causes problems as to the jurisdiction's predictability (Magnus/Mankowski/*Mankowski*, Brussels I Regulation, art. 5 note 257e). Therefore, it has been proposed to draw a parallel to *Art. 5 of the Rome II Regulation* (Rauscher/*Leible*, EuZPR, EuIPR, art. 5 Brüssel I-VO note 86f; Magnus/Mankowski/*Mankowski*, Brussels I Regulation, art. 5 note 257e). Others argue that in most cases the application of *Art. 5 No. 1 a) Rome II Regulation* (referring to the buyer's habitual residence) would lead to the undesirable establishment of a plaintiff's jurisdiction (*Kropholler/v. Hein*, Europäisches Zivilprozessrecht, art. 5 EuGVO note 83e). All in all, the judgment therefore can only be regarded as 'starting point' in this discussion (Magnus/Mankowski/*Mankowski*, Brussels I Regulation, art. 5 note 257e).

III Solution via the so-called 'annex jurisdiction'?

The question arises, whether, in case of concurring claims, it is possible that the courts that have, in principle, special jurisdiction either for contractual claims or for the tort claims only, can decide on both issues.

1) 'Annex jurisdiction' for the jurisdiction in tort

One could argue that the court that has jurisdiction under *Art. 7 No 2 Brussels Ia* might at the same time adjudicate on the contractual claim via a so-called 'annex jurisdiction'. The advantage of this approach would be that the claimant would not have to split his claim but could rather address the same court - which has jurisdiction according to *Art. 7 No 2 Brussels Ia* - with all its claims even though based on different legal basis. This would enhance the proceedings' economy.

However, the *Brussels Ia Regulation* is to be interpreted autonomously and distinguishes clearly between tort and contractual jurisdiction. Further, the particular provisions on jurisdiction under *Art. 7 Brussels Ia* present an exception to the general rule that under *Art. 4 ss. 1 Brussels Ia* the defendant has to be sued in the courts of the Member State where it is domiciled. Exceptional provisions ought to be interpreted restrictively.³¹ Also *Art. 30 Brussels Ia* cannot be considered to provide an argument for the admissibility of an annex jurisdiction: *Art. 30 Brussels Ia* rather requires that the courts already have jurisdiction, but does not confer jurisdiction.³²

An annex jurisdiction of tort jurisdiction for contractual claims should therefore be rejected.³³

2) 'Annex jurisdiction' for the jurisdiction in contract

The converse case may lead to a different result: W could also intend to bring his tort claims before the courts having international jurisdiction for contractual claims. This debate up till now mainly focused on *Art. 7 No 1 Brussels Ia*, but the spirit of this debate might as well be transferred on *Art. 17 Brussels Ia*, the jurisdiction for consumer contracts.

In contrast to the previously presented constellation, this approach is assessed less unequivocally. Especially the CJEU did not yet take position in this constellation: One may assume that the CJEU would not accept an annex jurisdiction for the jurisdiction in contract. However, the CJEU in general favours the place of jurisdiction in contract.³⁴ Furthermore, if a breach of contract results in damages which can be claimed on a contractual basis and additionally on the basis of tort law, the contractual relationship appears to be formative.³⁵ Therefore, a combined dealing of contractual claims and tort actions seems to be appropriate.³⁶ Additionally, such a competence would create a desirable consistency of the private international law and the international civil procedural law.³⁷ Furthermore, reasons like legal certainty and proceedings' economy submit the idea of an annex jurisdiction.³⁸

If one were to reject an annex jurisdiction for the jurisdiction in contract for tort claims, this would also involve some distortions in the jurisdiction over consumer contracts and thereby the consumer protection would partially be emptied.³⁹

Finally, one must assume an annex jurisdiction under *Art. 17 ss. 1 Brussels Ia* for tort actions.

³¹ Case C-189/87 *Kalfelis* [1988] ECR I-5565, 5585 para 19.

³² Case C-150/80 *Elefanten Schuh GmbH v. Pierre Jacqmain* [1981] ECR 1671 para 19; Rauscher/Leible, EuZPR, EuIPR, art. 5 Brüssel I-VO note 82.

³³ Cf. also Case C-189/87 *Kalfelis* [1988] ECR I-5565 para 19.

³⁴ Rauscher/Leible, EuZPR, EuIPR, art. 5 Brüssel I-VO note 59a.

³⁵ Rauscher/Leible, EuZPR, EuIPR, art. 5 Brüssel I-VO note 59a.

³⁶ *Kropholler/v. Hein*, Europäisches Zivilprozessrecht, art. 5 EuGVO note 79; *Wied*, Zivilprozessuale Qualifikationsprobleme im Spannungsfeld von Vertrag und Delikt (2010), p. 109 ff.

³⁷ Rauscher/Leible, EuZPR, EuIPR, art. 5 Brüssel I-VO note 59a.

³⁸ Cf. Rauscher/Leible, EuZPR, EuIPR, art. 5 Brüssel I-VO note 59a.

³⁹ Musielak/Stadler, ZPO, art. 5 EuGVVO note 5.

Please note: the pending Case C-375/13 *Harald Kolassa v. Barclays Bank PLC* (not yet reported): The Commercial Court Vienna submitted the question for a preliminary ruling to the CJEU asking whether a court having jurisdiction pursuant to *Art. 15 Brussels I (Art. 17 Brussels Ia)* does also have (annex) jurisdiction to decide the related tort matters.

3) Result

Instead of splitting his claims, W could claim for compensation under contract and tort law before the French courts. Alongside exists the opportunity for W to bring all his actions against C at its general jurisdiction in Portugal, *Artt. 4 ss. 1, 63 ss. 1 a) Brussels Ia*.

According to *Art. 6 ss. 1 (b)* or *Art. 4 No 1 (a)* with *Art. 19 ss. 2 Rome I Regulation*, French or Italian law would apply to W's contractual damage claims, depending on him acting as a consumer, see above. Under *Art. 5 ss. 2 Rome II Regulation*, the same goes for the tort claims.