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Angaben zur Veröffentlichung / Publication details:

Lutzi, Tobias, and Felix M. Wilke. 2023. "Germany." In *Jurisdiction over non-EU defendants: should the Brussels Ia regulation be extended?*, edited by Tobias Lutzi, Ennio Piovesani, and Dora Zgrabljic Rotar, 111–25. London: Bloomsbury.

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Germany

TOBIAS LUTZI AND FELIX M WILKE

Question 1

(a)

In German law, local (and international, see (b)) jurisdiction is governed by the Code of Civil Procedure (*Zivilprozessordnung*; ZPO).[1] The relevant section (Book 1, Section 1, Titles 2 and 3; §§ 12–40) contains a set of provisions on general jurisdiction (§§ 12–19), followed by a number of heads of special jurisdiction (§§ 20–34), some provisions on the relationship between the different heads of jurisdiction (§§ 35–37) and the rules governing the choice of court (§§ 38–40).

The provisions of the ZPO are supplemented by individual provisions contained in more specific pieces of legislation that govern specialised courts – such as the Act on Labour Courts (*Arbeitsgerichtsgesetz*; ArbGG) – or regulate specific areas of law – such as the Act on Insurance Contracts (*Versicherungsvertragsgesetz*; VVG).

(b)

Generally speaking, German law contains no specific rules on international jurisdiction. Instead, courts apply the principle of double functionality (*Doppelfunktionalität*; codified (only) for family courts)[2] to extend the rules on local jurisdiction (venue) to the question of international jurisdiction.[3] Thus, whenever a German court has local jurisdiction, it also has international jurisdiction.

Still, a small number of provisions contain rules that presuppose the existence of a transnational dispute. For instance, § 23 ZPO creates a head of jurisdiction at the

[1] Official translation provided by the Ministry of Justice, www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

[2] See § 105 Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*; FamFG).

[3] See Bundesgerichtshof (Federal Court of Justice), 2 July 1991, XI ZR 206/90, BGHZ 115, 90, sub I; 18 April 1985, VII ZR 359/83, BGHZ 94, 156, sub 2 a); see also H Linke and W Hau, *Internationales Zivilverfahrensrecht*, 8th edn (Cologne, Otto Schmidt, 2021), paras 4.2–3, 4.63.

place where the defendant holds assets that is only available if the defendant has no domicile in Germany. Similarly, § 38(2) ZPO relaxes the requirements for a choice-of-court agreement if German courts do not have general jurisdiction over at least one of the parties.

(c)

As far as the aforementioned legal framework on jurisdiction is concerned, German law has remained independent from the Brussels Ia Regulation.

In a small number of cases, however, German courts have referred to the Regulation (as interpreted by the CJEU) to support their interpretation of the parallel provisions of domestic law,[4] or even changed[5] their interpretation in order to ensure the alignment of the two systems.

Scholars have also occasionally suggested applying specific provisions from the Brussels Ia Regulation, such as its Art 8(1),[6] by analogy.

(d)

As far as the reporters can tell, the information notified by Germany is both accurate and exhaustive.

Question 2

As a matter of terminology, the ZPO distinguishes between the 'domicile' (*Wohnsitz*) of natural persons and the 'seat' of legal persons as the relevant jurisdictional connecting factors.[7]

§§ 12, 13 ZPO state that a *natural person* can generally be sued before the courts of her domicile. It has long been held that 'domicile' must be interpreted by reference to the respective provisions of substantive law – § 7 et seq of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB) – which are applied in this context for nationals, foreigners and stateless persons alike.[8] A few special provisions (§§ 15, 16 ZPO) supplement these rules.

[4] See, eg, Bundesgerichtshof, 28 February 1996, XII ZR 181/93, BGHZ 132, 105, sub I.3.b), discussed in more detail below, at n 42; Bundesgerichtshof, 8 November 2017, IV ZR 551/15, BGHZ 216, 358, discussed in more detail below, at n 96.

[5] See, eg, Bundesgerichtshof, 21 April 2016, I ZR 43/14, GRUR 2016, 1048 (*An Evening with Marlene Dietrich*), para 18, discussed in more detail below at n 60.

[6] See, eg, H Linke and W Hau, *Internationales Zivilverfahrensrecht*, para 5.65; see also below, under 5(c).

[7] This can lead to uncertainty with regard to provisions that contain only one of the two terms, see below 5(d)(3).

[8] Reichsgericht (Imperial Court), 9 December 1907, VI 276/07, RGZ 67, 191, 193; 10 October 1929, VIII 244/29, RGZ 126, 8,9; Bundesgerichtshof, 25 March 1987, IVb ARZ 6/87, (1988) *NJW-RR* 387; H Roth, '§ 13', in R Bork, H Roth, F Stein and M Jonas (eds), *Kommentar zur Zivilprozessordnung* (Mohr Siebeck, Vol 1, 2014), para 2; M Pagenstecher, 'Gerichtsbarkeit und internationale Zuständigkeit als selbständige Prozeßvoraussetzungen', (1938) 11 *RabelsZ* 337, 362 (in footnote 8a).

Pursuant to § 7(1) BGB, a person establishes her domicile where she settles permanently. This requires both a factual presence and a will to take domicile.[9] Abandoning the place with the intention to give it up means the termination of domicile at that place (§ 7(3) BGB). A person can have more than one domicile as § 7(2) BGB expressly sets forth. This translates to the jurisdictional rules so that the person can be sued at all places where she has a domicile.[10] People lacking full capacity to contract (such as minors) require the consent of their legal representative in order to take up a domicile (§ 8 BGB). Typically, a minor shares the domicile of her parents (who have the right to care for her) under § 11 BGB; if the parents separate, the minor thus has two domiciles.[11]

Germans enjoying immunity abroad as well as German public servants working abroad keep their last domicile in Germany for jurisdictional purposes pursuant to § 15(1) cl 1 ZPO. If they never had a domicile in Germany, they can be sued before the Local Court of Schöneberg (Berlin) pursuant to § 15(1) cl 2 ZPO. In the rare case that a person has no domicile at all,[12] she can be sued at the place of her current residence in Germany or, if this is not known, at the place of her last domicile (§ 16 ZPO).

As regards *legal persons*,[13] § 17(1) ZPO sets forth that they can be sued at the place of their 'seat'. Again, this is a reference to the relevant substantive law, eg company law, and in particular to the statutory seat (not the 'real seat').[14] Although the concept of double functionality applies in this context as well,[15] the provision is of very limited practical relevance for the international jurisdiction of German courts.[16] Whenever a defendant legal person has a statutory seat, its central administration or its principal place of business in Germany, the Brussels Ia Regulation will determine international jurisdiction pursuant to Art 5(1), 63(1) Brussels Ia. This includes limited-liability companies registered in third states that German law treats as (mere) partnerships if they move their principal place of business to Germany.[17] In case of summary proceedings for a payment order (*Mahnverfahren*), however, § 17(1) ZPO is still of practical relevance because jurisdiction in this context depends on the domicile/seat of the applicant, not of the respondent (§ 689(2) ZPO).[18]

[9] Bundesgerichtshof, 14 January 2010, IX ZB 76/09, *ZEV* 2010, 528; M Beurskens, '§ 7', in: G Dannemann and R Schulze (eds), *German Civil Code – Bürgerliches Gesetzbuch (BGB)* (Beck/Nomos, Vol I, 2020), para 7.

[10] Roth, '§ 13', para 5.

[11] Bundesgerichtshof, 30 November 1983, IVb ARZ 50/83, (1984) *NJW*, 971.

[12] For an example see Bundesgerichtshof, 14 January 2010 (n 12), (2010) *ZEV* 528.

[13] With the exception of the German State itself, see §§ 18–19 ZPO.

[14] H Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht* 8th edn (Beck, 2021) 303; Roth, '§ 17', para 2.

[15] Bayerisches Oberstes Landesgericht (Highest Regional Court of Bavaria), 20 February 2003, 12 AR 160/02, RIW 2003, 387.

[16] C Kern, 'Anerkennungsrechtliches Spiegelbildprinzip und europäische Zuständigkeit' (2007) 120 *ZZP* 31–71, 34–35.

[17] See in particular the famous '*Trabrennbahn*' decision in which the *Bundesgerichtshof* treated a Swiss company by shares as a German partnership after it had moved its principal place of business to Germany: Bundesgerichtshof, 27 October 2008, II ZR 158/06, (2009) *NJW* 289. Also eg Bundesgerichtshof, 22 November 2016, II ZB 19/15, *RIW* 2017, 303, 305, concerning a company from the Bahamas.

[18] See Roth, '§ 17', para 15.

Question 3

German domestic law only contains one general head of jurisdiction, which is generally based on domicile (as defined above, under 2) and defined more specifically for different types of defendants in §§ 12–19 ZPO.

§ 23 ZPO could be seen as a subsidiary general head of jurisdiction as it renders the courts of the place in which the defendant's assets are located competent for all claims in economic matters, which includes all claims falling within the scope of the Brussels Ia Regulation, provided that the defendant has no domicile in Germany and that the case is sufficiently closely connected to Germany.[19]

Question 4

German statutory law does not contain any rules on a *forum necessitatis* in civil and commercial matters,[20] nor is there any case law on this point. The *Bundesgerichtshof* and some *Oberlandesgerichte* (Higher Regional Courts) have entertained the idea of a *forum necessitatis* on several occasions, but never actually had to rely on such a ground of jurisdiction.[21]

Scholarly opinion seems to uniformly favour some way of establishing German international jurisdiction in cases where no[22] other forum would be available.[23] The main approach lies indeed in the assumption of an unwritten *forum neccesitatis* that a judge must rely upon if its conditions are met.[24] The biggest problem[25] then becomes identifying the special nexus (connecting factor) tying a case to Germany specifically. *Neuhaus's* oft-quoted seemingly sweeping proposition that every country can exercise international jurisdiction where no country has international jurisdiction[26] is generally rejected; it was not meant to imply limitless jurisdiction, anyway, as it presupposes the claimant's need for protection in the particular forum.[27] One factor that is typically

[19] See Bundesgerichtshof, 2 July 1991, XI ZR 206/90, BGHZ 115, 90, sub II.1.b).

[20] However, as regards eg matters of parental responsibility, visitation rights, guardianship, see § 99(1) cl 2 FamFG (above 1(b)), which de facto is an instance of a *forum necessitatis*. Further examples are provided by M Kübler-Wachendorff, *Das forum necessitatis im europäischen Zuständigkeitsrecht* (Mohr Siebeck, 2021) 13.

[21] Eg Bundesgerichtshof, 21 June 2006, IX ZR 39/06, *EuZW* 2007, 582, 584; Oberlandesgericht Rostock (Higher Regional Court of Rostock), 11 November 1999, 1 U 31/98, IPRspr 1999, No 132, 312, 317.

[22] It is considered to be sufficient that no foreign forum is available whose decision could be recognised in Germany: Kübler-Wachendorff, *Das forum necessitatis im europäischen Zuständigkeitsrecht*, 39; T Pfeiffer, *Internationale Zuständigkeit und prozessuale Gerechtigkeit: Die internationale Zuständigkeit im Zivilprozess zwischen effektivem Rechtsschutz und nationaler Zuständigkeitspolitik* (Frankfurt, Klostermann, 1995) 451.

[23] In more detail Kübler-Wachendorff, *Das forum necessitatis im europäischen Zuständigkeitsrecht*, 14–39.

[24] Kübler-Wachendorff, *Das forum necessitatis im europäischen Zuständigkeitsrecht*, 44; also J Kropholler, 'Kapitel III – Internationale Zuständigkeit' in *Handbuch des Internationalen Zivilverfahrensrechts I* (Mohr Siebeck, 1982), para 187.

[25] A second issue arises once one relies on an unwritten *forum necessitatis* to establish Germany's international jurisdiction: There is no obvious rule determining *local* jurisdiction in such a situation.

[26] P Neuhaus, 'Internationales Zivilprozessrecht und Internationales Privatrecht: Eine Skizze', (1955) 20 *RabelsZ*, 201, 265; also J Schröder, *Internationale Zuständigkeit* (Opladen, Westdeutscher Verlag, 1971), 216.

[27] P Neuhaus, 'Internationales Zivilprozessrecht und Internationales Privatrecht: Eine Skizze', 265.

considered sufficient is the expectation that a judgment could also be enforced in Germany.[28] At the same time, this explains why the issue has so far not played any role in practice: if the claimant (later) wants to seize assets of the defendant's located in Germany, German courts can usually assume international jurisdiction under the 'exorbitant' rule of § 23 ZPO (above, under 3).[29] Further links to Germany that may be considered sufficient may be derived from a person's[30] German nationality or even her mere (ie not habitual) residence in Germany as well as from a prejudicial effect of the case on another case in Germany or from the (desired)[31] applicability of German law.[32]

In the 1970s, an alternative solution was suggested that, in spite of being mentioned quite a lot, has not gained much traction since. It consists in allowing *renvoi* in the law of jurisdiction.[33] This 'jurisdictional *renvoi*' would mean to analyse whether another country that would have international jurisdiction under the *German* rules for international jurisdiction would, in applying *its own* jurisdictional rules, consider Germany to have international jurisdiction (or would consider a third country to have international jurisdiction which in turn would assume itself or Germany to have international jurisdiction).[34] Even if one accepted this approach, it would still leave claimants effectively unprotected who might have access to a foreign forum by law but could not reasonably expect any success for factual, including political, reasons.[35] Moreover, a jurisdictional *renvoi* would inevitably conflict with the need for predictable, clear grounds of jurisdiction.[36]

Question 5

At the outset, it might be worth noting that the special heads of jurisdiction in German law and under the Regulation share two important similarities. First, they each define

[28] Kübler-Wachendorff, *Das forum necessitatis im europäischen Zuständigkeitsrecht*, 41 (with further references).

[29] Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, para 503; see also Kübler-Wachendorff, *Das forum necessitatis im europäischen Zuständigkeitsrecht*, 13.

[30] The *Bundesgerichtshof* was wary of potential manipulations in the past, considering the claimant's domicile in Germany to be insufficient for the establishment of a *forum necessitatis* where the claim in question had only been assigned to the claimant. Rather, the claimant should have turned to the courts of the country of the assignor's seat in order to try to establish a *forum necessitatis*: Bundesgerichtshof, 17 January 1995, XI ZR 182/94.

[31] It may seem to be circular reasoning to derive the competence of German courts from the application of German substantive law as the applicable conflict of laws rules depend on the forum in the first place. What is meant, however, is a desired legal consequence that only German law provides, Kübler-Wachendorff, *Das forum necessitatis im europäischen Zuständigkeitsrecht*, 43–44.

[32] Kübler-Wachendorff, *Das forum necessitatis im europäischen Zuständigkeitsrecht*, 42–44 (with further references); Kropholler, 'Kapitel III – Internationale Zuständigkeit', para 192.

[33] The main proponents of the jurisdictional *renvoi* are E Milliker, *Der Negative Internationale Kompetenzkonflikt* (Bielefeld, Gieseking, 1975) 81 et seq and Schröder, *Internationale Zuständigkeit*, 789 et seq.

[34] See the concise explanation by J Kropholler, 'Kapitel III – Internationale Zuständigkeit', para 197.

[35] Kübler-Wachendorff, *Das forum necessitatis im europäischen Zuständigkeitsrecht*, 16.

[36] Pfeiffer, *Internationale Zuständigkeit und prozessuale Gerechtigkeit: Die internationale Zuständigkeit im Zivilprozess zwischen effektivem Rechtsschutz und nationaler Zuständigkeitspolitik*, 460.

the relevant categories (of contract, tort, etc) autonomously, ie without reference to the *lex causae*.[37] Second, each head of special jurisdiction is limited (as regards the international dimension)[38] to the specific types of claims that it covers; thus, a parallel claim in tort cannot be brought in the *forum contractus*, unless it is also the *forum delicti*, and vice versa.[39] In 1996, the *Bundesgerichtshof* upheld this jurisprudence, expressly referring to the need for uniformity with the CJEU's interpretation of the Brussels Convention.[40]

(a)

According to § 29(1) ZPO, '[f]or any dispute arising from a contractual relationship and disputes regarding its existence, the court of that location shall have jurisdiction at which the obligation is to be performed that is at issue'.[41]

Just like Art 7(1) Brussels Ia, the provision not only refers to the place of performance but also requires to determine it for the specific obligation in question rather than identifying a single forum for the contract as a whole.[42] Also like Art 7(1) Brussels Ia,[43] § 29(1) ZPO does not include a definition of the 'place of performance' but rather refers to the *lex contractus*.[44]

Still, there is a number of significant differences between the two heads of jurisdiction.

Maybe most importantly, § 29(1) ZPO does not emulate letter (b) of Art 7(1) Brussels Ia, which subjects two practically significant types of contracts entirely to the law of a specific place, independently of the obligation in question. Thus, while all obligations arising from a contract of sale can be adjudicated in the court of the Member State of delivery under Art 7(1)(b) Brussels Ia, German law will limit this forum to claims against the seller. The forum for claims against the buyer, on the other hand, will depend on where the buyer's obligation is supposed to be performed under the applicable contract law. This approach has been criticised for creating arbitrary results that do not depend on any consideration of jurisdiction but only on how the applicable contract law qualifies the relevant obligation.[45]

[37] See Bundesgerichtshof, 28 February 1996 (n 7), sub I.2.a); Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, para 313. As to the Regulation, see, eg, Case C-26/91 *Jakob Handte*, para 11.

[38] The Bundesgerichtshof changed its position with regard to local jurisdiction, however. A court with local jurisdiction over tort claims (§ 32 ZPO) can also rule on a parallel claim under contract law, Bundesgerichtshof, 10 December 2002, X ARZ 208/02, (2003) NJW 828. The respective scopes of international and local jurisdiction diverge in such a situation, sub III.3.d.

[39] See Bundesgerichtshof, 8 January 1971, V ZR 125/67, (1971) *NJW* 564, sub II.1; 6 November 1973, IV ZR 199/71, (1974) NJW 410, 411, sub B.II.1.; Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, para 426. As to the Regulation, see Case 189/87 *Kalfelis*, para 19.

[40] Bundesgerichtshof, 28 February 1996 (n7), sub I.3.b).

[41] In the official translation of the Ministry of Justice (n 2).

[42] See Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, para 317.

[43] See Case C-12/76 *Industrie Tessili Italiana Como v Dunlop AG*; but see also F Wilke, 'Is Tessili still good law?' (conflictoflaws.net, 9 March 2021); F Wilke, 'Autonome Auslegung und kein Ende?', *GPR* 2021, 57, 59 et seq.

[44] See Bundesgerichtshof, 7 November 2011, VIII ZR 108/12, BGHZ 195, 243, para 15; 18 January 2011, X ZR 71/10, BGHZ 188, 85, para 29; H Linke and W Hau, *Internationales Zivilverfahrensrecht*, para 5.33.

[45] See Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, paras 321–24.

Finally, it should be noted that Art 7(1) Brussels Ia and the jurisprudence of the CJEU do not seem to have had any noticeable influence on the interpretation of § 29(1) ZPO by the German courts so far.

(b)

According to § 32 ZPO, '[f]or complaints arising from tort, the court in the jurisdiction of which the tortious act was committed shall have jurisdiction'.[46]

As far as the wording is concerned, § 32 ZPO differs more noticeably from its corollary in Art 7(2) Brussels Ia than § 29 ZPO differs from Art 7(1) Brussels Ia. Yet, both the place in which 'the tortious act was committed' in § 32 ZPO and the place of the 'harmful event' in Art 7(2) Brussels Ia are understood by the *Bundesgerichtshof* and the CJEU, respectively, as referring to both the place of the causal event (*Handlungsort*) and the place of the direct damage (*Erfolgsort*)[47] but not the place of any incidental or indirect damage.[48]

Whether, and if so, to what degree, German case law on § 32 ZPO differs from the CJEU's interpretation of Art 7(2) Brussels Ia in specific situations is not always easy to tell, as the different courts have not necessarily had opportunities to decide similar cases. The CJEU, for instance, has rendered multiple decisions on how to locate purely economic loss, allowing claimants to bring a claim for prospectus liability at the seat of the bank holding the relevant bank account.[49] There is no analogous German decision, although German courts seem similarly inclined to consider the place of a bank account a sufficient basis for jurisdiction in cases of fraud (where the special rule of § 32b ZPO does not apply).[50]

A particularly insightful example can arguably be found in the area of online torts. Long before the internet, both the German courts and the CJEU held that torts committed by publishing infringing material must be understood as taking place 'in any place in which the material has been published'.[51] Yet, while the German courts have always considered this fact to provide a basis for territorially unlimited jurisdiction,[52] the CJEU adopted the so-called mosaic approach, according to which the courts of each Member State will only have jurisdiction for the damage caused by publication in that State.[53] When confronted with the first cases of online defamation, the two lines of case law

[46] See also § 14(2) cl 2 Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*; UWG).

[47] See Bundesgerichtshof, 25 November 1993, IX ZR 32/93, (1994) *NJW*, 1413, sub III.4.a) (and already Reichsgericht, 18 October 1909, Rep II 96/08, RGZ 72, 41, 42–44) for § 32 ZPO and Case C-21/76 *Bier*, para 19, for Art 7(2) Brussels Ia.

[48] See Bundesgerichtshof, 3 May 1977, VI ZR 24/75, (1977) *NJW* 1590, sub II.1.b) for § 32 ZPO and Case C-364/93 *Antonio Marinari v Lloyds Bank plc und Zubaidi Trading Company*, paras 14–15, for Art 7(2) Brussels Ia.

[49] Case C-304/17 *Löber*, para 28; Case C-375/13 *Kolassa*, para 55.

[50] See Bundesgerichtshof, 25 November 1993, IX ZR 32/93, (1994) *NJW*, 1413, 1415; Bundesgerichtshof, 6 February 1990, XI ZR 184/88, (1990) *NJW-RR*, 604, 605.

[51] Bundesgerichtshof, 3 May 1977 (n 51), sub II.1.a). See also Case C-68/93 *Fiona Shevill*, para 29.

[52] See already Reichsgericht, 18 October 1909 (n 50), 44–46; see also Lutzi, 'Private International Law Online' (2020) *OUP*, para 4.102.

[53] Case C-68/93 *Fiona Shevill*, para 30; recently confirmed in Case C-251/20 *Gtflix Tv*, para 30.

diverged even further. The *Bundesgerichtshof* restricted the international jurisdiction of the German courts to publications that are objectively connected to Germany,[54] whereas the CJEU effectively created an additional *de facto forum actoris* by allowing the claimant to sue at her centre of interests.[55] Interestingly, the German courts used to also be more restrictive with regard to other online torts, requiring that a website be directed at Germany for the German courts to have international jurisdiction for infringements of IP rights;[56] the requirement was dropped, though, with explicit reference to the jurisprudence of the CJEU that considered mere accessibility a sufficient basis for jurisdiction.[57]

(c)

German law does not contain a general provision like Art 8 No 1 Brussels Ia, which allows the establishment of international jurisdiction over one defendant merely on the basis of their connection to another.[58] In civil and commercial matters, rules of this kind only exist for very specific scenarios, such as § 603(2) ZPO, which allows the suing of all defendants allegedly liable under a bill of exchange in each court (and thus state) that has general jurisdiction over at least one of them, and § 56(2) cl 2 of the Air Traffic Act (*Luftverkehrsgesetz*; LuftVG), which allows the suing of the other party to a contract for carriage of cargo by air jointly with their subcontractor in the same forum.

In domestic cases, this lacuna can usually be overcome by application of § 36(1) No 3 ZPO, which allows a superior court to designate one of the fora with general jurisdiction for one of several joint defendants to hear a claim against all of them if no common forum exists. The provision also applies to international cases – where courts even use some additional flexibility[59] – but requires that the German courts have international jurisdiction for every single defendant.[60]

The lack of a provision similar to Art 8 No 1 Brussels Ia has led some scholars to call for its analogous application to cases involving defendants not domiciled in a member state,[61] and/or for the introduction of a similar provision into German domestic law.[62]

[54] Bundesgerichtshof, 2 March 2010, VI ZR 23/09, BGHZ 184, 313 (*New York Times*), para 20.

[55] Joined Cases C-509/09 and C-161/10 *eDate Advertising*, para 48; later refined in Cases C-194/16 *Bolagsupplysningen* and C-800/19 *Mittelbayerischer Verlag*.

[56] Bundesgerichtshof, 29 April 2010, I ZR 69/08, BGHZ 185, 291, para 14.

[57] See Bundesgerichtshof, 21 April 2016 (*An Evening with Marlene Dietrich*) (n 8), para 18, referring to Case C-170/12 *Pinckney*.

[58] See also Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, para 439; H Linke and W Hau, *Internationales Zivilverfahrensrecht*, para 5.66.

[59] See Bayerisches Oberstes Landesgericht, 22 March 1988, AR 1 Z 12/88, (1988) *NJW*, 2184, applying the provision although another (foreign) forum had been available.

[60] See Bundesgerichtshof, 6 November 1970, I ARZ 228/70, (1971) *NJW*, 196; Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, para 440.

[61] See, eg, H Linke and W Hau, *Internationales Zivilverfahrensrecht*, para 5.65; Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, para 443.

[62] See Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, para 443; P Mankowski, (2017) *EWiR*, 415, para 3.3; F Rieländer, 'Die verkappte Streitgenossenszuständigkeit am Verbrauchergerichtsstand des Art 18 Abs. 1 EuGVVO' (2021) *IPRax*, 512, 521.

(d)

Consumers

German law does not contain a general ground of consumer jurisdiction.[63] Legal scholars have occasionally called for the introduction of such a provision,[64] but the German legislator has not paid heed to this proposal thus far. There are some special grounds of jurisdiction that *also* benefit consumers among the rules to be expounded below. Still, only § 29c ZPO, which governs actions arising out of off-premises contracts, has a specific focus on consumers.

Under § 29c(1) ZPO, the court in whose district the consumer has her domicile (above, under 2) at the time the court is seised has jurisdiction over an off-premises contract. Because of the idea of double functionality (above, under 1(b)), this translates to German courts having international jurisdiction in these cases if the consumer has her domicile in Germany. If the consumer has no domicile at all,[65] the consumer's habitual residence in Germany suffices (§ 29c(1) cl 1 2nd alternative). Where the consumer is the defendant, this ground of jurisdiction is exclusive (§ 29c(1) cl 2 ZPO);[66] conversely, where the consumer brings the action, § 29c(1) ZPO only serves as an additional ground of jurisdiction.

Since 2018, § 29c(2) ZPO contains a definition of 'consumer' that is independent from substantive law. The only relevant point is whether the natural person did not predominantly act in the context of her trade or profession when acquiring the respective right,[67] whereas, unlike in the context of § 13 BGB, the purpose of the transaction does not matter. Somewhat paradoxically, however, this definition does not have any effect on the application of § 29c ZPO itself[68] because the provision requires an off-premises contract as defined under substantive law, including the respective definition of the term 'consumer'.[69]

§ 29c(4) ZPO allows for choice-of-court agreements designating a court different from the one determined by § 29c(1) ZPO in cross-border cases specifically. They may

[63] The respective statement by the Oberlandesgericht Karlsruhe (Higher Regional Court of Karlsruhe) from more than two decades ago is still correct: OLG Karlsruhe, 22 September 1999, 19 AR 14/99, (2000) *NJW-RR* 353.

[64] In particular with further references G Vollkommer and M Vollkommer, 'Empfiehlt sich ein (ggf. subsidiärer) allgemeiner oder besonderer Verbrauchergerichtsstand in der ZPO?' in Schütze (ed), *Einheit und Vielfalt des Rechts* (Beck, 2002) 1367, 1367; against this position eg Roth, '§ 29c', para 2.

[65] Not only not in Germany, see Roth, '§ 29c' para 10.

[66] Since Art 18(2) Brussels Ia applies to actions against consumers domiciled in an EU Member State, § 29c(1) cl 2 ZPO has a very limited scope of application.

[67] See R Koch and LM Friebel, 'Inhalt, Reichweite und Auswirkungen des prozessrechtlichen Verbraucherbegriffs (§ 29c Abs. 2 ZPO)' (2019) *GPR* 280, 282–83.

[68] R Koch and LM Friebel, 'Inhalt, Reichweite und Auswirkungen des prozessrechtlichen Verbraucherbegriffs (§ 29c Abs. 2 ZPO)', 284.

[69] It appears that the legislator created § 29c(2) ZPO with a view to model declaratory actions (*Musterfeststellungsklagen*) in §§ 606 (!) et seq ZPO and only chose this location in the ZPO because the Code makes mention of 'consumers' for the first time here. Indeed, the change to § 29c ZPO was part of the Act Introducing a Civil Model Declaratory Action of 12 July 2018, Federal Gazette 2018 I No 26, 1151.

only be concluded in order to take precautions against the consumer taking up a new domicile or habitual residence outside Germany after conclusion of the off-premises contract (or that the consumer's domicile/habitual residence is not known at the time the court is seised). The reverse case of the trader relocating to another country requires no special rule. For one, choice-of-court agreements for this situation are allowed anyway (§ 38(3) No 2 ZPO)[70] – for another, the consumer could and most likely would still rely on § 29c(1) ZPO.

Thus, German law differs from Art 17 et seq Brussels Ia in many respects, mainly because the two regimes have diverging approaches to consumer jurisdiction. § 29c ZPO only encompasses one kind of situation in which consumer contracts are *concluded* (namely: off premises). By contrast, Art 17(1)(c) Brussels Ia is limited to certain *commercial settings*: the trader must have pursued the commercial or professional activities in the Member State of the consumer's domicile or have directed them at that Member State, and the contract has to fall within the scope of such activities. Additionally, Art 17(1)(a), (b) Brussels Ia covers two *types* of contracts (independently from the setting or circumstances of their conclusion): contracts for the sale of goods on instalment credit terms and loan contracts if made to finance the sale of goods.

As regards choice-of-court agreements in the consumer context, the similarities are more pronounced, but far from ubiquitous. Art 19(3) Brussels Ia renders permissible (subject to the law of the respective Member State) choice-of-court agreements where consumer and trader are at the time of the conclusion of the contract domiciled or habitually resident in the same Member State and jurisdiction is conferred on the courts of that Member State. This provision has the same effect as § 29c(4) and § 38(3) No 2 ZPO. Choice-of-court agreements entered into after the dispute has arisen are accepted in principle both by Art 19(1) Brussels Ia and (the general rule of) § 38(3) No 1 ZPO. Under German law, however, this does not apply for proceedings against the consumer because choice-of-court-agreements may not derogate from grounds of exclusive jurisdiction, § 40(2) No 2 ZPO. Finally, unlike Art 19(2) Brussels Ia, German law does not allow choice-of-court agreements prior to the dispute arising even if they increase the consumer's options.

Employment Matters

In addition to the rule for international jurisdiction in § 15 of the German Posting of Workers Act (*Arbeitnehmerentsendegesetz*: ArbEntG),[71] § 48(1a) ArbGG[72] provides for special rules of local jurisdiction for labour courts in certain employment matters. It has long been accepted that, on principle, the concept of double functionality (above, under 1(b)) applies in labour matters as well,[73] so that one must read 'district' as

[70] Roth, '§ 29c', para 13.

[71] As this rule is based on Art 6 Directive No 96/71/EC, Brussels Ia does not prejudice its application pursuant to Art 67 Brussels Ia.

[72] Above 1(a).

[73] Bundesarbeitsgericht (Federal Labour Court), 19 March 1996, AZR 656/94, (1997) *NZA* 334, 335; also Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, para 347.

'Germany' for this purpose. Pursuant to § 48(1a) cl 1 ArbGG, the labour court *in* whose district the employee habitually carries out her work, or most recently habitually carried out her work, has jurisdiction. If this one habitual place of work cannot be determined (because no place is truly 'central'), the labour court *from* whose district the employee habitually carries out her work or most recently habitually carried out her work has jurisdiction under § 48(1a) cl 2 ArbGG. The wording ('also') clearly indicates that § 48(1a) ArbGG does not supersede other grounds of jurisdiction. In particular and among others, jurisdiction at the place of performance (§ 29 ZPO; above, under 5(a)) or jurisdiction in tort matters (§ 32 ZPO; above, under 5(b)) can be relevant in employment disputes.[74]

By its reference to certain parts of § 2(1) ArbGG, § 48(1a) ArbGG only covers individual employment disputes, not least those concerning claims arising out of an employment contract (§ 2(1) No 3(a) ArbGG) and those concerning the (non-)existence of an employment contract (§ 2(1) No 3(b) ArbGG). The personal dimension of the provision extends to employees and employers. Pursuant to § 5(1) ArbGG, employees for the purposes of jurisdiction are workers (*Arbeiter*) and employees in the narrow sense (*Angestellte*) including outworkers as well as people employed for the purpose of their vocational training.

It will have become apparent that the connecting factors of § 48(1a) ArbGG are very similar to the ones used in Art 21(1)(b)(i) Brussels Ia. The similarity is even more striking with regard to the German version of Brussels Ia. This is no accident. The proposal for § 48(1a) ArbGG expressly referred to Art 19 Brussels I.[75] By contrast, unlike Art 21(1)(b)(ii) Brussels Ia, § 48(1a) ArbGG does not use the place of the business that engaged the employee as a connecting factor. Similar results can be reached under German law by applying § 21 ZPO (special jurisdiction at a place of business),[76] however. This ground of jurisdiction differs from its counterpart in Brussels Ia in that it exists in addition to jurisdiction at the habitual workplace, not only as a subordinate option. Conversely, German law does not contain a ground of exclusive jurisdiction like Art 22(1) Brussels Ia for actions against an employee.

The personal dimension of the jurisdictional rules is quite similar, but, due to slightly different definitions, not perfectly congruent. § 5(1) ArbGG is based on the general understanding of 'employees' in substantive German law as codified in § 611a BGB since 2017.[77] Thus, an employee is a person under an obligation to provide labour in the service of another in personal dependency (subordination). The employee is subject to the other person's directives that can extend to the type of work, the manner in which it is to be carried out, its time and its place. According to § 5(1) cl 3 ArbGG, however, persons who by law, by charter or by the articles of association[78] have the authority to represent

[74] B Reinhard and S Böggemann, 'Gesetz zur Änderung des Sozialgerichtsgesetzes und des Arbeitsgerichtsgesetzes – Änderungen des ArbGG', (2008) *NJW* 1263–64.

[75] See BR-Drs. 820/07, 31. The 'from where' alternative now found in Art 21(1)(b)(i) Brussels Ia was added in the Recast, creating a parallel to Art 8(2) Rome I.

[76] See Bundesarbeitsgericht, 19 March 1996, 9 AZR 656/94, (1997) *IPRax*, 335, 336, for an example.

[77] Bundesarbeitsgericht, 9 April 2019, 9 AZB 2/19, (2020) *NZA* 67, 68.

[78] Power of representation conferred on a person by way of a legal transaction does not suffice. Such a representative would not be exlcuded by § 5(1) cl 3 ArbGG.

a company will not be considered employees for the purposes of the ArbGG – even if the contractual relationship between the company and the respective person indeed is an employment contract under substantive law.[79] Commercial agents can be considered employees for the purposes of the ArbGG, but only under the narrow conditions of § 5(3) ArbGG, including the one that they do not earn more than 1,000 EUR per month on average.

Both issues just mentioned could be resolved differently under Brussels Ia. The CJEU has defined an employment relationship for the purposes of the Lugano II Convention as implying 'the existence of a hierarchical relationship between the worker and his employer', to be assessed on the basis of all circumstances of the relationship between the parties.[80] The court has also identified several characteristics of employment contracts: that 'they create a lasting bond which brings the worker to some extent within the organisational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements'.[81] Moreover, 'the essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he receives remuneration'.[82] Hence, the director and manager of a corporation could be considered an employee for the purposes of Brussels Ia.[83] Depending on the individual circumstances, commercial agents can also meet the requirements set forth by the CJEU.[84]

Insurance Matters

§ 215 VVG[85] contains a special rule concerning local jurisdiction that, in line with the concept of double functionality (above, under 1(b)), also applies to international jurisdiction.[86] Following the model of § 29c(1) ZPO[87] (above, under 5(d)(2)), § 215(1) cl 2 VVG provides for exclusive jurisdiction for actions arising out of an insurance contract or relating to insurance agents/brokers (see § 59 et seq VVG) against the insured at the place of her domicile or, if she has no domicile, habitual residence. For actions against

[79] Bundesarbeitsgericht, 3 December 2014, 10 AZB 98/14, (2015) *NZA* 180, para 15.

[80] Case C-603/17 *Bosworth*, para 26.

[81] Case C-47/14 *Holterman*, para 39.

[82] Case C-47/14 *Holterman*, para 41.

[83] Case C-47/14 *Holterman*, paras 33–47. Indeed, the director of a German company with limited liability ('GmbH') will always have to be considered an employee if she is not a shareholder – and even if she is, she still might be treated as an employee under Brussels Ia; see J Lüttringhaus, 'Die Haftung von Gesellschaftsorganen im internationalen Privat- und Prozessrecht' (2015) *EuZW* 904, 906; P Mankowski, 'Organpersonen und Internationales Arbeitsrecht' (2004) *RIW* 167, 169 et seq.

[84] The CJEU, however, in Case C-19/09 *Wood Floor*, apparently did not spare any thought on whether the commercial agency agreement at issue could be characterised as an employment contract. German cases on the Brussels regime seem to have been concerned thus far only with commercial agents too independent from their contractual partner to consider them employees, eg Bundesarbeitsgericht, 20 October 2015, 9 AZR 525/14, (2016) *NZA* 254, para 20 et seq; Oberlandesgericht Hamburg (Higher Regional Court of Hamburg), 14 April 2004, 13 U 76/03, (2004) *NJW*, 3126, 3127 et seq.

[85] Supra 1(a).

[86] Bundesgerichtshof, 1 June 2016, IV ZR 80/15, (2016) *NJW*, 3369, 3370.

[87] Indeed, the German legislator had § 29c ZPO in mind when creating § 215 VVG: BT-Drs. 16/3945, 117.

the insurer, § 215(1) cl 1 VVG sets forth an additional forum at this place. Whether insured/beneficiaries can also rely on this provision, either in direct or analogous application, is subject to debate among courts and scholars.[88] There seems to be unanimity, however, that the first clause of § 215(1) VVG cannot be used against an insured/beneficiary.[89] The insurer can also be sued, inter alia, at its domicile pursuant to §§ 12, 17 ZPO (under 2). Choice-of-court agreements designating a court different from the one determined by § 215(1) VVG are only allowed to a limited extent under § 215(3) VVG. This provision corresponds to § 29c(4) ZPO (above, under 5(d)(2)).

§ 215 VVG applies to insurance contracts, ie agreements by which one party (the insurer), in return for payment, assumes a duty to perform certain services when an uncertain event occurs, with the risk being spread over a large number of people who face the same danger.[90] It does not apply to reinsurance and marine insurance contracts (§ 209 VVG). As the wording of § 215 VVG is somewhat ambiguous,[91] there was some academic debate over whether this provision only applied if the insured party was a natural person or even only a consumer. The *Bundesgerichtshof*, however, has held that it extends to legal persons, as well. The court mainly relied on the legislative history and the purpose of the rule, noting that the provision is more concerned with the respective court's access to evidence and its local vicinity to the relevant factual situation than with a (perceived) need for protection of the insured party.[92] Moreover, it stated that it could not be assumed that the German legislator wanted to offer less protection to legal persons than under Art 9 Brussels I Regulation.[93]

It can be assumed that Section 3 of Brussels Ia likewise applies to legal persons as policyholders (and as insured[94]/beneficiaries). It appears from Recital (18) Brussels Ia that policyholders, insured and beneficiaries must be considered weaker parties regardless of their legal nature (or indeed economic power). As regards the substantive scope of application, however, the CJEU has held that the jurisdictional rules for insurance contracts, even without an express indication to this effect, do not cover disputes between a reinsurer and a reinsured in connection with a reinsurance contract.[95] In this respect, German law and EU law are aligned. As far as we can tell, the court has not yet provided a definition of 'matters relating to insurance'. It certainly must be independent from concepts of national law. Moreover, it extends to co-insurance contracts, liability insurance, insurance of immovable property as well as marine – excluded from the scope of § 215 VVG, see § 209 VVG – and aviation insurance because Art 11(1)(c), Art 12 and Art 16 No 1 Brussels Ia expressly mention them.[96] The connecting factors of

[88] See only D Looschelders, '§ 215', in T Langheid and M Wandt (eds), *Münchener Kommentar zum VVG*, 2nd edn (Beck, 2017) para 16.

[89] See only Looschelders, '§ 215', para 17.

[90] See only Bundesgerichtshof, 29 September 1994, I ZR 172/92, (1995) *NJW*, 324, 325.

[91] As mentioned before, § 215 VVG refers to the 'domicile' (*Wohnsitz*) of a person. Usually, this term would not be applied to legal persons (above, under 2).

[92] Bundesgerichtshof, 8 November 2017, IV ZR 551/15, (2018) *NJW* 232, 233 et seq (with many references for the different views).

[93] Bundesgerichtshof, 8 November 2017 (n 96), (2018) *NJW* 232, 234.

[94] The CJEU seems to have implicitly based its decision upon this assumption in Case C-112/03 *Société financière et industrielle du Peloux*.

[95] Case C-412/98 *Group Josi*, para 76.

[96] See Case C-412/98 *Group Josi*, para 62.

Brussels Ia are quite similar to German law. The supposedly weaker parties can sue the insurer both at its own and at the insurer's domicile (Art 11(1)(a) and (b) Brussels Ia) whereas the insurer, in principle, must sue before the courts of the defendant's domicile (Art 14(1) Brussels Ia).

Other (Arguably) Protected Categories

German law contains a plethora of further grounds of jurisdiction both in the ZPO and in more specialised legislation, some of which arguably aim to protect certain structurally disadvantaged parties.

§ 30(2) ZPO contains a special ground of jurisdiction for contracts of carriage of passengers and their luggage on a ship. Here, the place of departure or the destination, as provided for in the contract of carriage, serves as the connecting factor for the exercise of (international)[97] jurisdiction. As regards contracts for carriage of passengers by aircraft, § 56(2) cl 1 LuftVG[98] contains an additional ground of jurisdiction for damage claims regarding personal injury, delay, and damaged luggage. Here, (only) the place of destination is the relevant connecting factor. § 56(3) LuftVG clarifies that certain conventions, namely the Montreal Convention, take precedence over this rule.

The German rules of international jurisdiction do not clearly favour tenants of residential property. § 29a ZPO does contain a rule for exclusive local jurisdiction over tenancies concerning 'rooms' (ie not just living space). Theoretically, as always (above, under 1(b)), this would imply German international jurisdiction for rooms situated in Germany.[99] But this does not actually mean much in practice, as even in relation to defendants in third states, Art 24(1) Brussels Ia takes precedence.

§ 32b ZPO concerns exclusive jurisdiction in cases of wrong, misleading or missing public capital market information. It only applies to certain parties with a seat in Germany – and thus has no relevance for the determination of Germany's international jurisdiction, as a seat in Germany would lead to the application of Brussels Ia (see above, under 2). It is disputed, however, whether it follows from § 32b ZPO that a respective judgment from a third state cannot be recognised in Germany (§ 328(1) No 1 ZPO).[100]

Pursuant to § 319(2) cl 1 of the Capital Investment Code (*Kapitalanlagegesetzbuch*; KAGB), the domicile or seat of the representative of an EU alternative investment fund or a foreign alternative investment fund is an additional relevant connecting factor for actions against the fund itself, its management or distributing company. This only applies to actions that have a relation to the marketing of shares to private customers. Derogation by a choice-of-court agreement is not allowed (§ 319(2) cl 2 KAGB).

For disputes arising out of a distance learning contract or concerning the existence of such a contract, § 26(1) of the Act on the Protection of Participants in Distance

[97] Expressly Roth, '§ 30', para 3.
[98] Above, 5(c).
[99] Roth, '§ 29a', para 4.
[100] For this proposition eg J von Hein, 'Der ausschließliche Gerichtsstand für Kapitalanleger-Musterverfahren – eine Lex Anti-Americana?' (2004) RIW 602, 608; against eg Roth, '§ 32b', para 5.

Learning (*Fernunterrichtsschutzgesetz*; FernUSG) sets forth the exclusive jurisdiction of the court in whose district the participant can generally be sued, ie in which she has her domicile or seat (above, under 2). Clearly, this provision considers the 'participant' to be worthy of special protection. Interestingly, there are no further personal requirements, ie no limitation to consumers or even to natural persons.[101]

For copyright actions brought against a natural person using protected material outside her profession, the courts in whose district that person has her domicile (or, failing that, her habitual residence) have exclusive jurisdiction (§ 104a(1) of the Copyright Act (*Urheberrechtsgesetz*; UrhG)). The German legislator introduced this provision in 2013 in order to protect consumers against forum shopping by claimants on the basis of § 32 ZPO (above, under 5(b)) in cases of (alleged) copyright violations on the internet.[102] If the defendant has neither her domicile nor her habitual residence in Germany, the German court in whose district the act was committed has jurisdiction pursuant to § 104(1) cl 2 UrhG.[103]

§ 22 of the Regulation on the Basic Supply of Electricity (*Stromgrundversorgungsverordnung*: StromGVV) and § 22 of the Regulation on the Basic Supply of Natural Gas (*Gasgrundversorgungsverordnung*; GasGVV), applicable to the relationship between electricity/gas providers and households, state that local jurisdiction over the mutual duties arising out of a contract about the basic supply of electricity/natural gas lies with the courts at the place where the customer receives the electricity/gas.

[101] G Vollkommer and M Vollkommer, 'Empfiehlt sich ein (ggf. subsidiärer) allgemeiner oder besonderer Verbrauchergerichtsstand in der ZPO?', 1377.

[102] BT-Drs 17/13429, 9.

[103] As to which see also above, under 5(b).