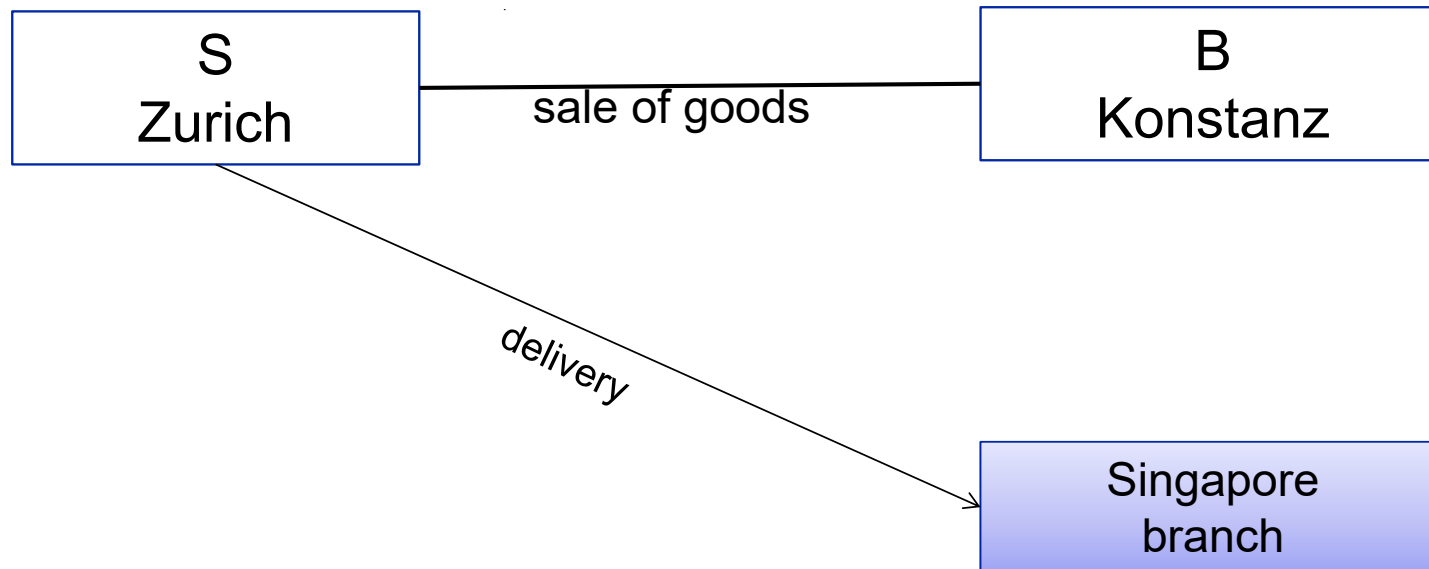




Forum at the place of performance – Case 1 (2)



As B does not pay, S wants to know where B could be sued.



Forum at the place of performance – Case 1 (2)

- no change with respect to the international/local jurisdiction of German courts (Article 4(1) Brussels I *bis* Regulation; local jurisdiction according to German national law)
- Article 5.1(b) LC or Article 7.1(b) Brussels I *bis* Regulation not applicable, as there is no place of delivery in a CS/MS
- Article 5.1(c) LC → application of Article 5.1(a) LC
 - if the autonomously determined place of performance is in a third state, the plaintiff gets “another go” at the contractual forum under Article 5.1(a) LC/Article 7.1(a) Brussels I *bis* Regulation

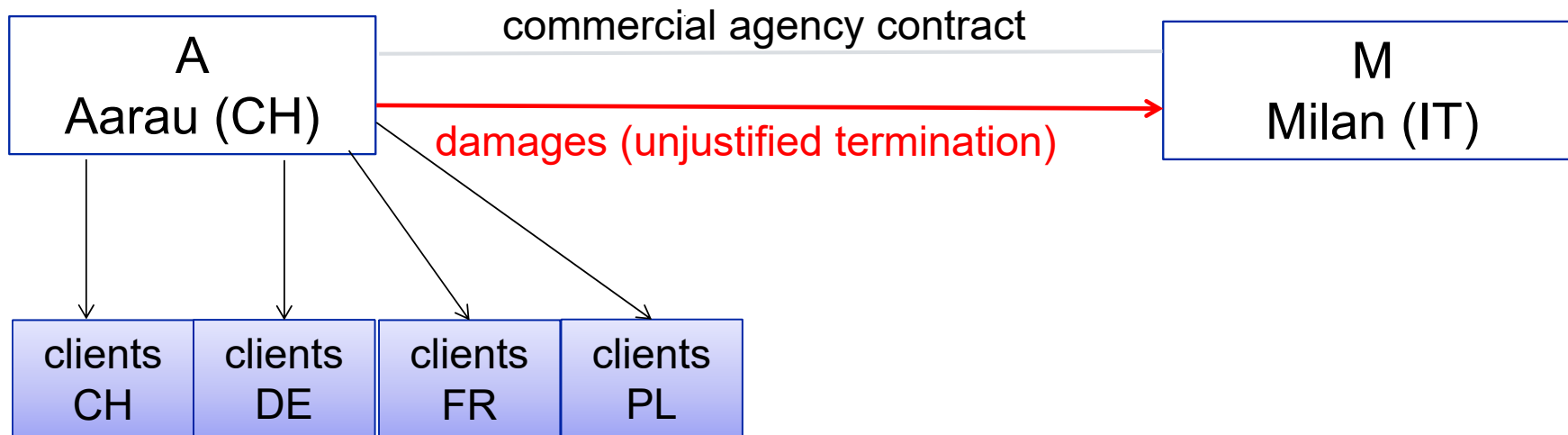


Forum at the place of performance – Case 1 (2)

- Jurisdiction of a Swiss court under Article 5.1(a) LC?
[LC and not Brussels I *bis* applies with respect to the jurisdiction of Lugano State courts against EU defendants]
- *lex causae*: CISG (Article 1(1)(a) CISG)
- obligation in question: payment of sales price
- place of performance of payment obligation: Article 57(1)(a) CISG: seller's place of business
- **Result: international and local jurisdiction in Zurich under Article 5.1(a) LC**



Forum at the place of performance – Case 2



Which courts have jurisdiction for A's claim?



Forum at the place of performance – Case 2

- material scope of application of LC/Brussels I *bis* Regulation (civil/commercial matter, no exclusion from scope)
- no exclusive jurisdiction, no exclusive jurisdiction agreement, no insurance/consumer/employment dispute
- default rule of territorial/personal scope of application: defendant domiciled in a CS
- Article 64 LC: where EU defendant is sued in EU Member State [MS], Brussels I *bis* Regulation [probably] applies
- international jurisdiction of Italian courts: Article 4(1) Brussels I *bis* Regulation
- local jurisdiction: Italian national law



Forum at the place of performance – Case 2

- Alternative forum under Article 5.1(b) LC?
 - Territorial/personal scope of application
 - defendant's domicile in CS (IT), action in another CS (CH)
- Material scope of application of the forum at the place of performance
 - matter relating to a contract (obligation freely assumed by one party towards another)
- Material scope of application of Article 5.1(b) LC
 - provision of services: carrying out a particular activity in return for remuneration (see ECJ *Falco Privatstiftung*)

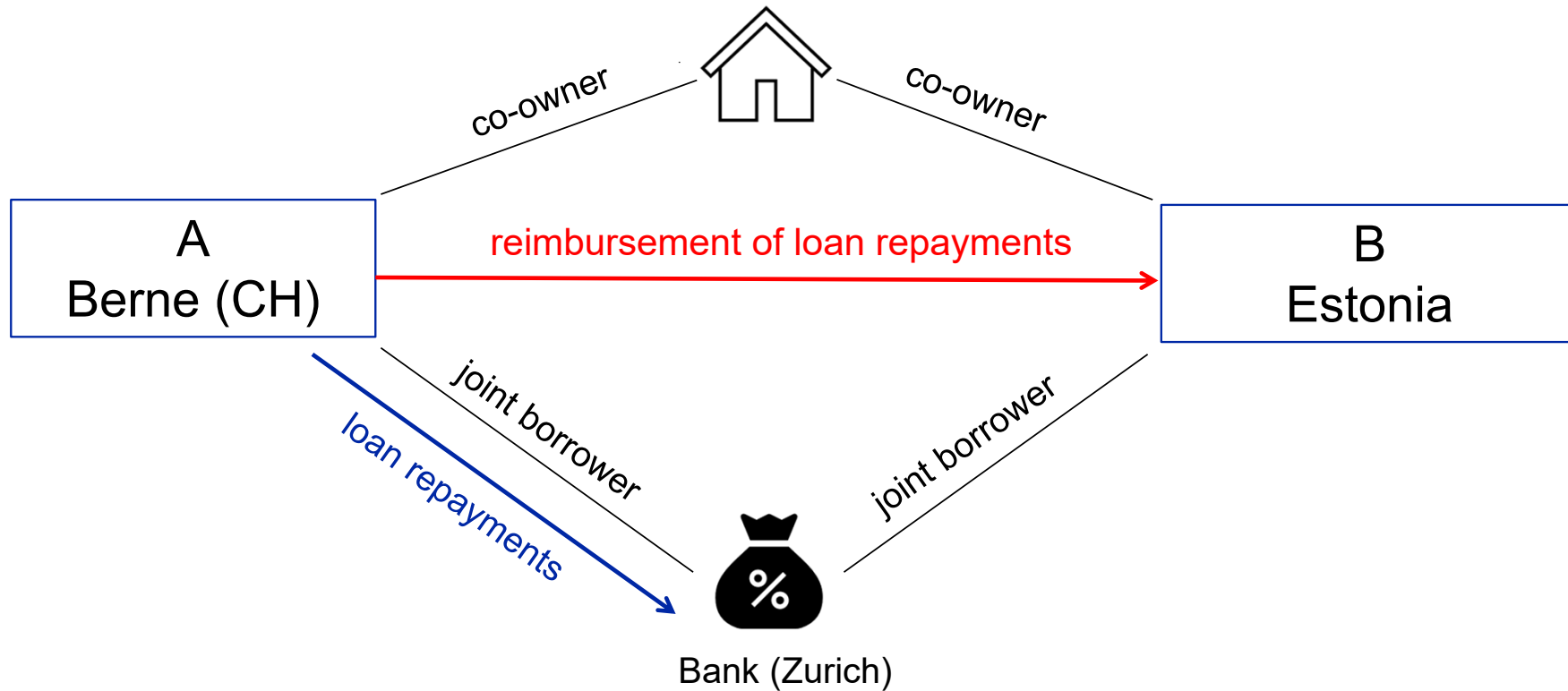


Forum at the place of performance – Case 2

- Alternative forum under Article 5.1(b) LC? (cont.)
 - determination of the place of performance: main place of performance (ECJ *Wood Floor Solutions*)
 - place of the **main provision of services for agency contracts**
 - place of the main provision of services by the agent, as it appears from the **provisions of the contract** (if the place designated in the contract is the place where the activities are really meant to be carried out)
 - in the absence of such provisions, the **actual performance** of that contract
 - where it cannot be established on that basis, the **place where the agent is domiciled**
 - **As a place of the main provision of services cannot be established in the present case, the agent's domicile is deemed to be that place**
- **Result: international and local jurisdiction of the Aarau courts under Article 5.1(b) LC for A's claim**



Forum at the place of performance – Case 3



Where can A sue B for reimbursement?



Forum at the place of performance – Case 3

- material scope of application of LC/Brussels I *bis* Regulation (civil/commercial matter, no exclusion from scope)
- no exclusive jurisdiction, no exclusive jurisdiction agreement, no insurance/consumer/employment dispute
- default rule of territorial/personal scope of application: defendant domiciled in a CS
- Article 64 LC: where EU defendant is sued in EU MS, Brussels I *bis* Regulation [probably] applies
- international jurisdiction of Estonian (EE) courts: Article 4(1) Brussels I *bis* Regulation
- local jurisdiction: EE national law



Forum at the place of performance – Case 3

- Alternative forum in Switzerland under Article 5.1 LC?
 - Territorial/personal scope of application
 - defendant's domicile in CS (EE), action in another CS (CH)
- Material scope of application of the forum at the place of performance
 - matter relating to a contract (obligation freely assumed by one party towards another)

ECJ *Kareda/Benkö*:

“given that the purpose of the action in the main proceedings is itself linked to the existence of that contract, it would be **artificial [...] to separate those legal relationships from the contract** which gave rise to them and on which they are based” (para. 21); therefore “**a recourse claim between jointly and severally liable debtors under a credit agreement constitutes a ‘matter relating to a contract’**” (para. 22)



Forum at the place of performance – Case 3

- Alternative forum under Article 5.1 LC? (cont.)
 - Material scope of application of Article 5.1(b) LC
 - provision of services: carrying out a particular activity in return for remuneration (see ECJ *Falco Privatstiftung*)

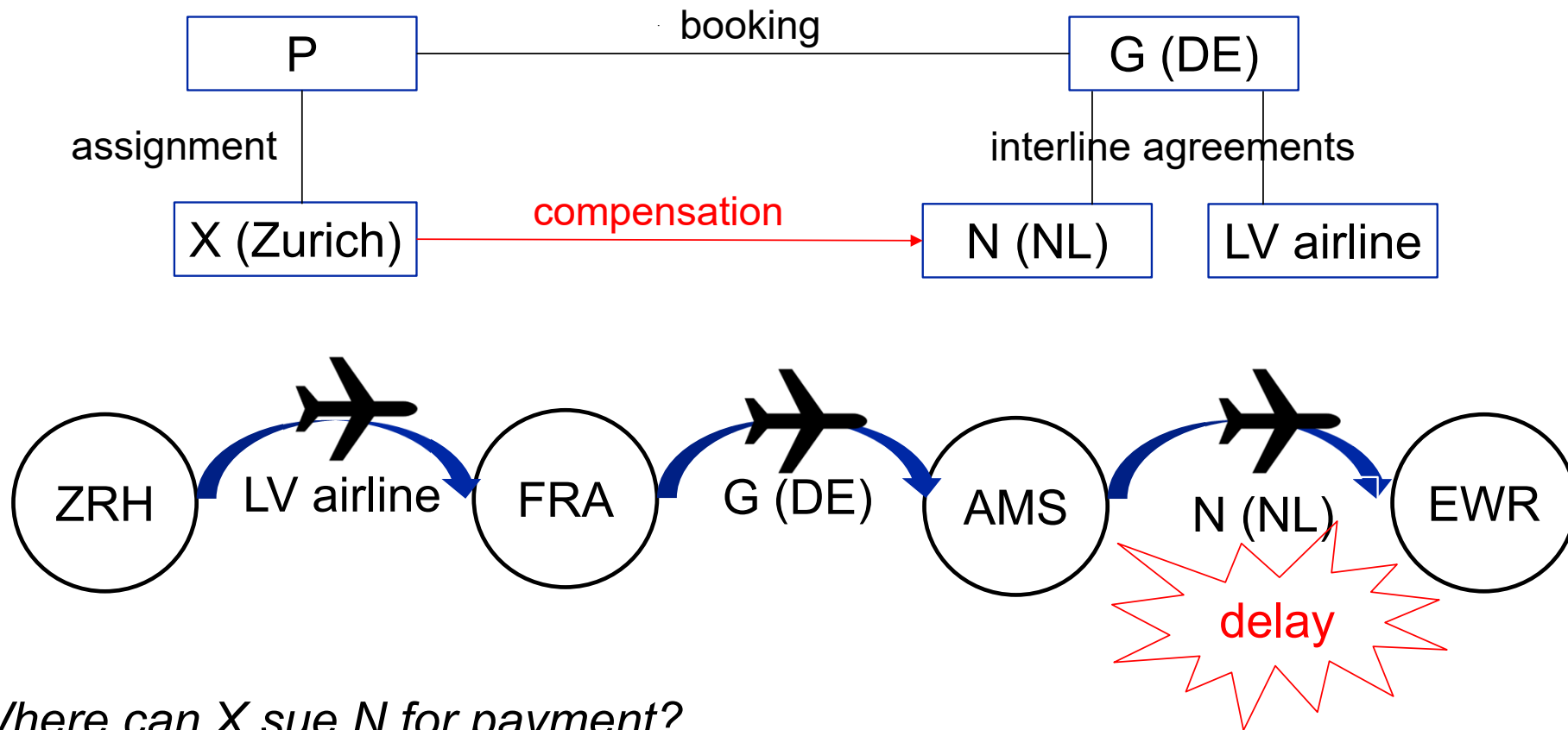
ECJ *Kareda/Benkö*:

“the supply of services lies in the transfer of a sum of money by the credit institution to the borrower, in return for fees paid by the borrower, in principle, in the form of interest” (para. 36)

- Place of performance under Article 5.1(b) LC
 - Characteristic obligation of credit agreement: actual granting of the sum loaned
 - Unless agreed otherwise, the place of performance for that obligation is the credit institution’s registered office
- Consequence: A can sue B in Zurich under Article 5.1(b) LC



Forum at the place of performance – Case 4



Where can X sue N for payment?



Forum at the place of performance – Case 4

- material scope of application of LC/Brussels I *bis* Regulation (civil/commercial matter, no exclusion from scope)
- no exclusive jurisdiction, no exclusive jurisdiction agreement, no insurance/consumer/employment dispute [see, in particular, Article 15(3) LC!]
- default rule of territorial/personal scope of application: defendant domiciled in a CS
- Article 64 LC: where EU defendant is sued in EU MS, Brussels I *bis* Regulation [probably] applies
- international jurisdiction of Dutch courts: Article 4(1) Brussels I *bis* Regulation
- local jurisdiction: Dutch national law



Forum at the place of performance – Case 4

- Alternative forum under Article 5.1 LC?
 - territorial/personal scope of application
 - defendant's domicile in CS (NL), action in another CS (CH)
- Material scope of application of the forum at the place of performance
 - matter relating to a contract (obligation freely assumed by one party towards another)
 - **assignment** does not change the character of the claim for the purposes of Article 5 LC
 - **problem**: no contractual relations between the passengers and the operating carrier



Forum at the place of performance – Case 4

- Alternative forum under Article 5.1 LC? (cont.)

Extract from ECJ *flightright/Air Nostrum*

- 61 It follows, as the Advocate General stated in point 54 of his Opinion, that the rule of special jurisdiction in matters relating to a contract provided for in Article 5(1)(a) of Regulation No 44/2001 and in Article 7(1)(a) of Regulation No 1215/2012 is based on the cause of action, not the identity of the parties (see, to that effect, judgment of 15 June 2017, Kareda, [C-249/16](#), [EU:C:2017:472](#), paragraphs 31 and 33).
- 62 In that regard, the second sentence of Article 3(5) of Regulation No 261/2004 states that, where an operating air carrier which has no contract with the passenger performs obligations under this regulation, it is to be regarded as doing so on behalf of the person having a contract with that passenger.
- 63 Therefore, that carrier must be regarded as fulfilling the freely consented obligations vis-à-vis the contracting partner of the passengers concerned. Those obligations arise under the contract for carriage by air.
- 64 Consequently, in circumstances such as those at issue in the cases in the main proceedings, an application for compensation for the long delay of a flight carried out by an operating air carrier such as Air Nostrum, with which the passengers concerned do not have contractual relations, must be considered to have been introduced in respect of contracts for carriage by air concluded between those passengers and Air Berlin and Iberia respectively.



Forum at the place of performance – Case 4

- Alternative forum under Article 5.1 LC? (cont.)
 - Material scope of application of Article 5.1(b) LC
 - provision of services: carrying out a particular activity in return for remuneration
(see ECJ *Falco Privatstiftung*)
 - ECJ *Rehder/Air Baltic*: in the case of air transport of passengers, the courts for the **place of departure** and those for the **place of arrival** have jurisdiction under Article 5.1(b) LC
 - ECJ *flightright/Air Nostrum*: in the case of **connecting flights** under a single booking, the air carrier operating the first leg can be sued in the courts for the place of the final destination
 - In the present case, the final destination is in a third state (US)
 - But combining the reasoning of *Rehder* and *flightright/Air Nostrum*, N can be sued at the place of departure
 - **Consequence: the courts for Bülach [the court district where the Zurich Airport is located] have international and local jurisdiction under Article 5.1(b) LC**



Alternative forum for tort claims (Article 5.3 LC)

- “matters relating to a tort, *delict* or *quasi-delict*”
 - autonomous interpretation
 - all actions
 - which are **not related to a “contract”** within the meaning of Article 5.1 LC
 - and
 - which seek to establish the **liability** of a defendant
 - broad concept, includes declaratory and injunctive relief



Alternative forum for tort claims (Article 5.3 LC)

- “place where the harmful event occurred or may occur”: **ubiquity principle**; choice between
 - place of the event giving rise to the damage
 - place where the (initial) damage occurred
- **“mosaic approach”** for scattered damages
 - the courts for the place where the damage occurred have jurisdiction only with respect to the harm suffered in the CS of the court seised
 - modification for online personality rights infringements
 - additional forum for actions concerning all damages & rectification/removal at the centre of the victim’s interests