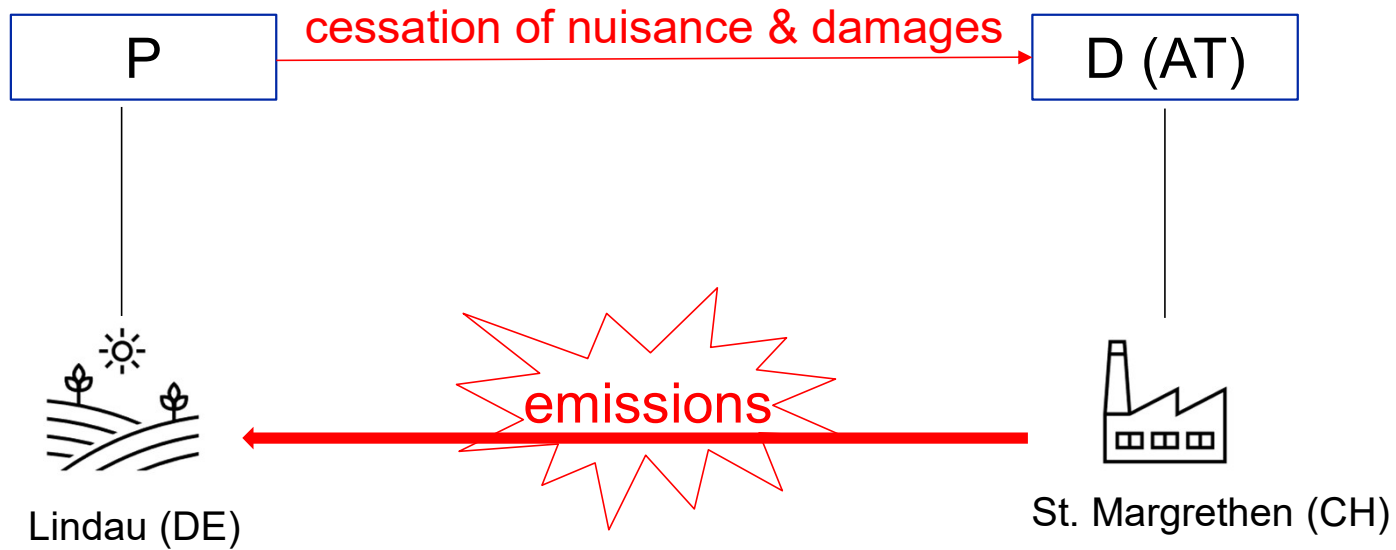




Alternative forum for tort claims – Case 1



Where can P sue D for cessation of nuisance and for damages?



Alternative forum for tort claims – Case 1

- material scope of application of LC/Brussels I *bis* Regulation (civil/commercial matter, no exclusion from scope)
- exclusive jurisdiction under Article 22?
 - ECJ *Land Oberösterreich/ČEZ*: disputes concerning cessation of nuisance do not have as their object *a right in rem* in immovable property
- no insurance/consumer/employment dispute, no exclusive jurisdiction agreement
- 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 Austrian courts: Article 4(1) Brussels I *bis* Regulation
- local jurisdiction: Austrian national law



Alternative forum for tort claims – Case 1

- alternative forum under Article 5.3 LC/Article 7.2 Brussels I *bis* Regulation
 - territorial/personal scope of application
 - defendant's domicile in a CS/MS (AT), action in another CS/MS (CH or DE)
 - material scope of application
 - not covered by Article 5.1 LC
 - establishment of liability

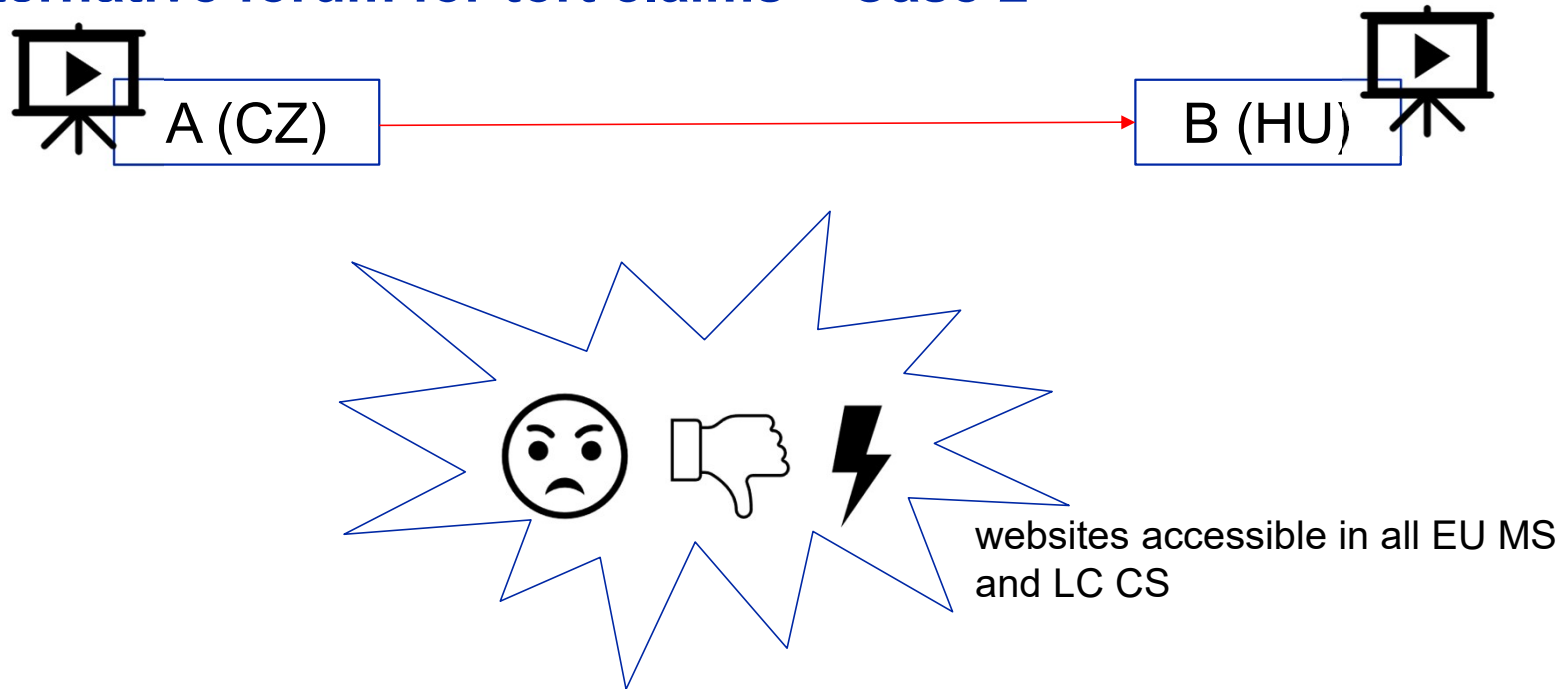


Alternative forum for tort claims – Case 1

- alternative forum under Article 5.3 LC/Article 7.2 Brussels I *bis* Regulation (cont.)
 - place where the harmful event occurred
 - place of the event giving rise to the damage: St. Margrethen (CH)
 - P can sue both for cessation of nuisance and for damages
 - place where the (initial) damage occurred: Lindau (DE)
 - as the only place of the damage is located in Germany, P can [probably] sue both for all the damage, but also for cessation of nuisance
 - Consequences:
 - the courts for Rheintal [the court district where St. Margrethen is located] have international and local jurisdiction under Article 5.3 LC
 - the courts for Lindau have international and local jurisdiction under Article 7.2 Brussels I *bis* Regulation



Alternative forum for tort claims – Case 2



Where can A sue B (1) for damages; (2) for rectification and removal?



Alternative forum for tort claims – Case 2

- material scope of application of LC/Brussels I *bis* Regulation (civil/commercial matter, no exclusion from scope)
- no exclusive jurisdiction, no insurance/consumer/employment dispute, no exclusive jurisdiction agreement
- 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 Hungarian courts: Article 4(1) Brussels I *bis* Regulation
- local jurisdiction: Hungarian national law
- A can sue both with respect to all the damage and for rectification and removal in Hungary



Alternative forum for tort claims – Case 2

- alternative forum under Article 5.3 LC/Article 7.2 Brussels I *bis* Regulation
 - territorial/personal scope of application
 - defendant's domicile in a CS/MS (AT), action in another CS/MS (CH or DE)
 - material scope of application
 - not covered by Article 5.1 LC
 - establishment of liability



Alternative forum for tort claims – Case 2

- alternative forum under Article 5.3 LC/Article 7.2 Brussels I *bis* Regulation (cont.)
 - place where the harmful event occurred
 - place of the event giving rise to the damage: Budapest (HU)
 - as the defendant is domiciled in Hungary, Article 5.3 LC/Article 7.2 Brussels I *bis* Regulation does not apply (but A can sue in Hungary based on Article 4(1) Brussels I *bis* Regulation)
 - place where the (initial) damage occurred: every place where the content was accessible
 - centre of A's interests (Prague): A can sue with respect to all the damage & for rectification and removal
 - at each other place where the content was accessible, A can sue with respect to the damage that occurred in that state



Alternative fora based on connexity between claims

- purpose/rationale
 - procedural economy
 - avoiding the risk of irreconcilable judgments
- territorial/personal scope of application
 - defendant domiciled in a Contracting State
 - action in *another* (?) Contracting State

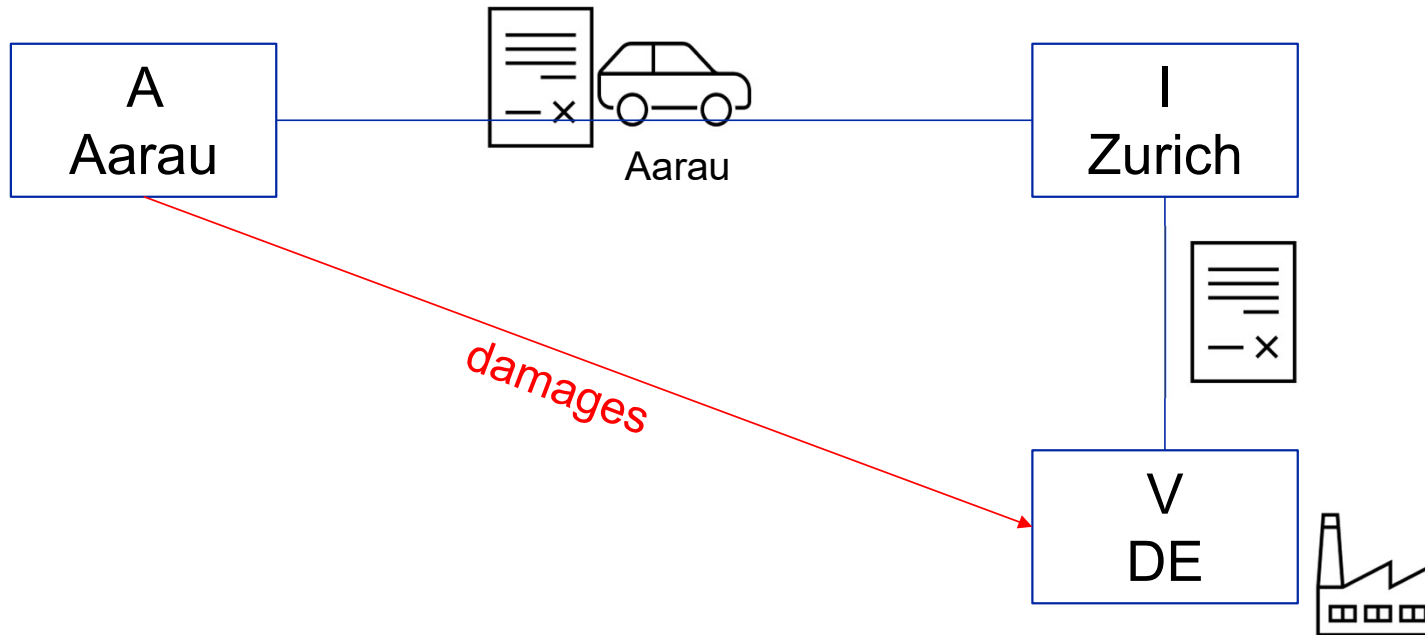


Alternative fora based on connexity between claims

- Connexity between claims
 - different (autonomous) criteria for each jurisdictional basis
 - no “general” forum based on connexity



Alternative fora based on connexity between claims – Case 1





Alternative fora based on connexity between claims – Case 1

- material scope of application of LC/Brussels I *bis* Regulation (civil/commercial matter, no exclusion from scope)
- no exclusive jurisdiction, no insurance/consumer/employment dispute, no exclusive jurisdiction agreement
- Forum for an action against V in Zurich based on Article 6.1 LC (if V and I are sued together)?
 - defendant domiciled in a CS (DE)
 - if the co-defendant is domiciled in a third state, joinder jurisdiction is governed by the national law of the forum
 - action in another CS (CH)
 - if the co-defendant is domiciled in the same CS, joinder jurisdiction is (probably) governed by the national law of the forum
- potential anchor defendant (I) domiciled in the district of the court where the action is brought
 - applicability of Article 6.1 LC (probably) does not require that the dispute between the plaintiff and the anchor defendant is “international”



Alternative fora based on connexity between claims – Case 1

- Forum for an action against V in Zurich based on Article 6.1 LC (if V and I are sued together)? (cont.)
 - connexity between the claims
 - Article 6.1 LC: claims have to be “so closely connected that it is expedient to hear and determine them together to **avoid the risk of irreconcilable judgments** resulting from separate proceedings”
 - the potential divergence in the outcome of the dispute must arise in the context of the **same situation of law and fact** (ECJ *Roche/Primus and Goldenberg*)
 - but the fact that the claims have **different legal bases** does not necessarily stand in the way of applying Article 6.1 LC (ECJ *Freeport/Arnoldsson; Painer*)
 - connexity between contractual claims and tort claims not *per se* excluded
 - in the present case: claim against I and claim against V (probably) not sufficiently closely connected to establish the required connexity under Article 6.1 LC, as divergent outcomes would not be irreconcilable
- **Consequence: (probably) no jurisdiction based on Article 6.1 LC in Zurich**



Alternative fora based on connexity between claims – Case 1

- Forum for an action against V based on Article 5.3 LC?
 - territorial/personal scope of application
 - defendant's domicile in a CS/MS (AT), action in another CS/MS (CH or DE)
 - material scope of application
 - not covered by Article 5.1 LC
 - establishment of liability

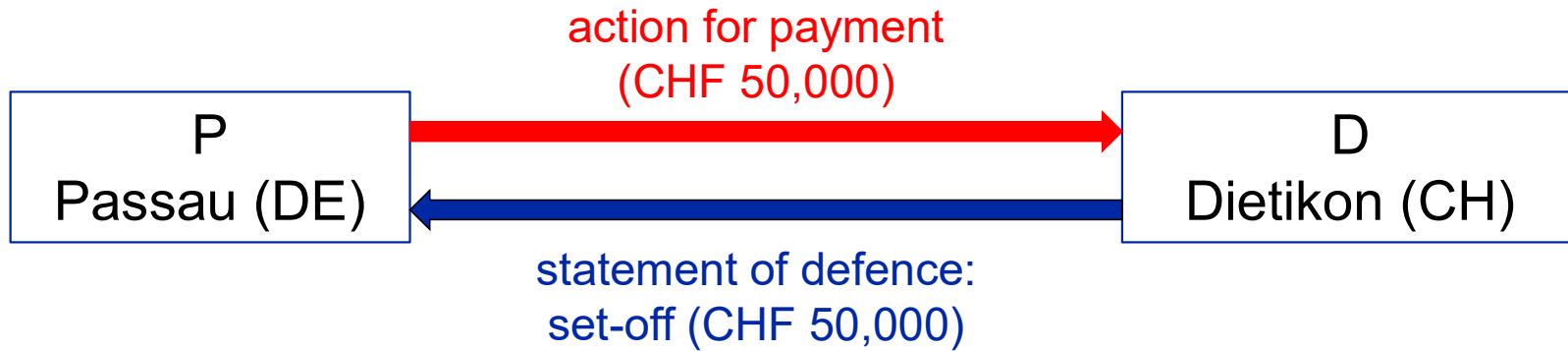


Alternative fora based on connexity between claims – Case 1

- Forum for an action against V based on Article 5.3 LC? (cont.)
 - place where the harmful event occurred
 - [place of the event giving rise to the damage: place where the cars were manufactured, i.e. in Germany]
 - place where the (initial) damage occurred:
 - “where a manufacturer in a Member State has unlawfully equipped its vehicles with software that manipulates data relating to exhaust gas emissions before those vehicles are purchased from a third party in another Member State, the place where the damage occurs is in that latter Member State” (ECJ Verein für Konsumenteninformation/Volkswagen)
 - localisation of the damage within the state where the defective goods were purchased: place of purchase (?)
 - but see ECJ *Zuid-Chemie*: in product liability cases, the place of the initial damage is not the place of purchase but the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended
- Consequence: A can (probably) sue V in Aarau (but not in Zurich) based on Article 5.3 LC



Alternative fora based on connexity between claims – Case 2



Set-off defence inadmissible for lack of jurisdiction for the set-off claim?



Alternative fora based on connexity between claims – Case 2

- material scope of application of LC/Brussels I *bis* Regulation (civil/commercial matter, no exclusion from scope)
- territorial/personal scope of application of LC: defendant domiciled in CS
- admissibility of set-off defence
 - regardless of jurisdiction for set-off claim
- or
- analogous application of Article 6.3 LC?



Alternative fora based on connexity between claims – Case 2

- analogous application of Article 6.3 LC?
 - if yes: where the court does not have jurisdiction for the set-off claim, set-off only permissible in case of connexity
 - connexity requirement of Article 6.3 LC: “counter-claim arising from the same contract or facts on which the original claim was based”
- similarities and differences between counterclaim and set-off defence
 - counterclaim: separate claim, can exceed the main claim, and can proceed even if the main claim falls
 - set-off defence: substantive law defence, but the ruling on it becomes res judicata (even in systems with a narrow concept of res judicata)



Alternative fora based on connexity between claims – Case 2

- analogous application of Article 6.3 LC? (cont.)
 - ECJ *Danværn/Otterbeck*: comparative analysis of Contracting States' laws – distinction between counterclaim and set-off defence; Article 6.3 only applies to situations where the defendant seeks a separate judgment/decre
- Consequences:
 - set-off defence admissible regardless of jurisdiction for the set-off claim
 - defences that can be raised and the conditions under which they can be raised are subject to national law