SPECIAL JURISDICTION UNDER THE BRUSSELS I-BIS REGULATION

JURISDICTION UNDER ARTICLE 7 NO. 1 OF THE RECAST BRUSSELS I REGULATION: DISCONNECTING THE PROCEDURAL PLACE OF PERFORMANCE FROM ITS COUNTERPART IN SUBSTANTIVE LAW

AN ANALYSIS OF THE CASE LAW OF THE ECJ AND PROPOSALS *DE LEGE LATA* AND *DE LEGE FERENDA*

Thomas KADNER GRAZIANO*

* Professor of Law at the University of Geneva, Faculty of Law (thomas.kadner@unige.ch). Dr. iur. (Goethe-Univ. Frankfurt), habil. (Humboldt-Univ. Berlin), LL.M. (Harv.), Director of the Department of Private International Law and of the program on transnational law (available at <www.unige.ch/droit/transnational/certificat.html>). See on this issue by the same author, in German: Der Gerichtsstand des Erfüllungsortes in Art. 7 Nr. 1 der Brüssel I-VO n.F.: Zur Entkoppelung des international-zivilprozessualen vom materiell-rechtlichen Erfüllungsort, *RIW* 2015 (forthcoming).

Yearbook of Private International Law, Volume 16 (2014/2015), pp. 167-217

Printed in Germany

I. Introduction

The question of how the jurisdiction at the place of performance shall be determined in transnational contract cases has caused – and it is probably not an exaggeration to say: for decades – considerable difficulties. In legal doctrine this head of jurisdiction has been considered a "mystery" even by specialists in this field.[1] The difficulties in determining the place of performance for the purpose of

[1] See S. LEIBLE, Der Erfüllungsort iSv Art. 5 Nr. 1 lit. b Brüssel I-VO – ein Mysterium?, in *Festschrift für Ulrich Spellenberg*, München 2010, p. 451; P. MANKOWSKI, Der Erfüllungsortsbegriff unter Art. 5 Nr. 1 lit. b EuGGVO – ein immer größer werdendes Rätsel, *IHR* 2008, 46; see also J. VON HEIN, Der europäische Gerichtsstand des Erfüllungsortes (Art. 5 Nr. 1 EuGGVO) bei einem unentgeltlichen Beratungsvertrag, *IPRax* 2013, 54; W. HAU, Kaufpreisklage des Verkäufers im reformierten europäischen Vertragsgerichtsstand – ein Heimspiel?, *Juristen-Zeitung (JZ)* 2008, 974, at 979: "Der Erfüllungsort, Faszinosum der Wissenschaft und Schreckgespenst der Praxis" [The place of performance, fascination with legal science and the bogeyman of legal practice].

international jurisdiction appear so great that numerous authors have, even recently, proposed to simply abolish this head of jurisdiction.[2]

Abolishing jurisdiction at the place of performance would however be at odds with the fact that in a number of contractual disputes there is a practical need for a special forum, in addition to the (sometimes distant) forum in the State of the defendant's domicile. According to some authors, the jurisdiction at the place of performance is "for cross-border economic activities by far the most important of the special jurisdictions".[3] Abolishing this special head of jurisdiction would thus be contrary to the practical need to have a forum which is in proximity to the contractual dispute.

The causes of all the difficulties lie in the central connecting factor: the *place of performance* and its determination. The notion of the "place of performance" is used on the one hand in *substantive law*, where it responds to the

---

[2] M. MÜLLER, Objektive Anknüpfungsmomente für Schuldverhältnisse im europäischen IPR/IZVR – Die Behandlung vertraglicher Sachverhalte, in J. VON HEIN/ G. RÜHL (eds), *Kohärenz im europäischen Internationalen Privat- und Verfahrensrecht*, Tübingen 2015, p. 270, at 289 *et seq.*; he suggests to remove the curent provision and to entirely redefine the forum for contract claims; H. GAUDEMET-TALLON, La refonte du règlement Bruxelles I, in M. DOUCHY-OUDOT/ E. GUINCHARD (eds), *La justice civile européene en marche*, Dalloz 2012, p. 21, at 29; *idem*, *Compétence et exécution des jugements en Europe: règlement n° 44/2001 – Conventions de Bruxelles et de Lugano,* 4th ed., Paris 2010, p. 209 with further references; R. RODRIGUEZ, *Beklagtenwohnsitz und Erfüllungsort im europäischen IZPR*, Fribourg 2005, p. 173 *et seq.*, at 240; doubtful also E. LEIN, Modern Art – The ECJ's Latest Sketches of Art. 5 N° 1 lit. b Brussels I Regulation, *YbPIL* 2010, 571, at 586; see, from the period before the reform of 2001, J. HILL, Jurisdicion in Matters relating to a Contract under the Brussels Convention, *I.C.L.Q.* 1995, 591; G. DROZ, *Delendum est forum contractus*?, *Recueil Dalloz (D.)* 1997, Chronique, 351 with further references; A. VON OVERBECK, L'interprétation traditionnelle de l'article 5-1 des conventions de Bruxelles et de Lugano: le coup de grâce?, in *Liber amicorum G. Droz*, La Haye 1996, p. 287 *et seq*.

[3] P. MANKOWSKI, Die Brüssel I-Verordnung vor der Reform, in B. VERSCHRAGEN (ed.), *Interdisziplinäre Studien zur Komparatistik und zum Kollisionsrecht (Bd. I)*, Wien 2012, p. 31, at 72; see also J. KROPHOLLER/ J. VON HEIN*, Europäisches Zivilprozessrecht*, 9th ed., Frankfurt am Main 2011, Art. 5 EuGGVO, No. 1: "Die *praktisch wichtigste* besondere Zuständigkeit" (in practice the most important head of jurisdiction); S. LEIBLE (note 1), at 451: "[ihm kommt] in der Praxis […] unter den besonderen Gerichtsständen die größte Bedeutung zu", "letztlich unverzichtbar" (in practice the most important head of special jurisdiction, ultimately indispensable); H. SCHACK, Entscheidungszuständigkeiten in einem weltweiten Gerichtsstands- und Vollstreckungsübereinkommen, *ZEuP* 1998, 931, at 932: der Handelsverkehr ist auf ihn "dringend angewiesen" (the trade "strongly depends" on this head of jurisdiction); A. METZGER*,* Zum Erfüllungsortgerichtsstand bei Kauf- und Dienstleistungsverträgen gemäß der EuGGVO, *IPRax* 2010, 420; G.P. ROMANO*,* Le for au lieu de l'exécution dans la jurisprudence récente de la Cour de justice de l'Union européenne, in A. BONOMI/ D. TAPPY/ D. GAULIS/ E. KOHLER (eds), *Nouvelle procédure civile et espace judiciaire européen*, Genève 2012, p. 63, at 67: the large number of court decisions on jurisdiction at the place of performance also prove its practical significance; R. IGNATOVA, *Art. 5 Nr. 1 EuGVO – Chancen und Perspektiven der Reform des Gerichtsstands am Erfüllungsort*, Frankfurt am Main 2005, p. 68 *et seq*.

specific needs of substantive law.[4] On the other hand, the same notion is used in *procedural law* where it determines a special head of jurisdiction. In the past, the ECJ has not found a way to determine the procedural place of performance autonomously for the purposes of international jurisdiction. Instead, the ECJ determined the place of performance for the purpose of jurisdiction according to the substantive law which is applicable to the contract between the parties (i.e. according to the *lex causae*).[5] However, practical experience has shown that combining the procedural place of performance with the place of performance as defined by substantive law was an aberration.[6] When the Brussels I Convention was converted into the Brussels I Regulation in 2001, the European legislator thus disconnected the procedural place of performance from substantive law for the two most important types of contracts: contracts for the sale of goods and contracts for the provision of services. Instead, for these two types of contracts the legislator pragmatically determined the place of performance for the purpose of international jurisdiction autonomously, namely – and in line with some proposals in legal literature[7] – at the factual and economic place of performance of the contract.[8]

Since then, the courts have sought to implement this legislative decision in practice. Most of the ECJ's decisions on the new Art. 5 (now: Art. 7) no. 1 *lit. b* implement the disconnection of the procedural place of performance from substantive law consistently and are convincing.[9] Other ECJ rulings seem, however, to fall back into old habits and can therefore convince neither in their reasoning nor in the results.[10]

In legal practice, it is of the utmost importance to have certainty with respect to jurisdiction and available fora. Recital 15 of the Regulation 1215/2012

---

[4] See below, III. A. 2. d).

[5] See below, II.

[6] See on behalf of almost all voices in legal literature, T. RAUSCHER, Internationaler Gerichtsstand des Erfüllungsortes – Abschied von Tessili und De Bloos, *NJW* 2010, 2251, at 2254: "rechtskonstruktiver Irrweg". For details see below, III.

[7] "ein Triumph der Neuerer, der Progressiven" (a triumph of the innovators, the progressive), P. MANKOWSKI, in B. VERSCHRAGEN (note 3), at 73 with references. See in particular G. DROZ (note 2), at 356: "Il faudrait […] poser une règle simple pour les contrats qui forment la majorité du commerce juridique international et dont l'exécution se traduit par des opérations concrètes, ventes, locations, leasing, prestations de services, contrats d'entreprise, etc. Il faudrait donner compétence au tribunal du lieu où s'exécutent ces opérations concrètes, livraisons des marchandises, exécution de la prestation de service, mise à disposition du matériel, etc." For the (French) source of inspiration of the new provision see J. KROPHOLLER/ J. VON HEIN (note 3), at Art. 5 EuGGVO, No. 27. For a pragmatic, factual localisation of the place of performance at the place where the party to the contract deploys an economic activity ("wirtschaftliche Aktivitäten entfaltet"), see T. PFEIFFER, *Internationale Zuständigkeit und prozessuale Gerechtigkeit*, Frankfurt am Main 1995, p. 678 *et seq.*; T. KADNER GRAZIANO, Gerichtsstand des Erfüllungsortes im EuGVÜ, Einheitliches Kaufrecht und international-zivilprozessuale Gerechtigkeit, *Jura* 1997, 240 *et seq.*, at 247.

[8] For details, see below, IV.

[9] Below, V.

[10] Below, VI.

(the recast Brussels I Regulation), thus states that "[t]he rules on jurisdiction should be highly predictable". According to the rulings of the ECJ, legal certainty requires that the plaintiff can "identify easily the court in which he may sue" and that it is possible for the defendant "reasonably to foresee before which court he may be sued".[11] Regarding jurisdiction of the courts at the place of performance, this objective of the 2001 reform has now partially been achieved. With respect to a certain number of issues, this head of jurisdiction remains however a mystery to many scholars, courts and practitioners. Others have called it the "main construction site in the field of international jurisdiction".[12]

This article first sets out how Art. 7 no. 1 *lit. a* of the recast Brussels I Regulation operates (II.). In *lit. a* the previous interpretation of the ECJ (i.e. determining the place of performance *lege causae*) remains in force for contracts other than contracts for the sale of goods or the provision of services.[13] The article will then illustrate the weaknesses of this solution and show what the legislator wanted to avoid through adopting the new regulation and the autonomous definition in *lit. b* for contracts of sale of goods or the provision of services (III.). Looking back at the reasons for the reform paves the way for a consistent historical and teleological interpretation of Art. 7 no. 1 *lit. b* for sales and service contracts (IV.). It will then be examined how, and to what extent, the recent case law of the ECJ implements the principle of disconnection of the procedural place of performance from its counterpart in substantive law (V. and VI.). On this basis, some open questions regarding *lit. b* will be analyzed and proposals for solutions will be made (VII.). It will then be considered whether the experiences with *lit. b* also allow conclusions to be drawn for the interpretation of Art. 7 no. 1 *lit. a*, i.e. for other types of contracts, and proposals will be made for an autonomous interpretation of *lit. a* (*de lege lata*) as well (VIII). Finally, proposals for a cautious reform of Art. 7 no. 1 are made, through which the disconnection could be achieved even more consistently and legal certainty for plaintiffs and defendants in an international context could be further enhanced (IX.).

---

[11] ECJ, 03.05.2007, case C-386/05, *Color Drack GmbH v Lexx International Vertriebs GmbH*, para. 20; ECJ, 23.04.2009, case C-533/07, *Falco Privatstiftung, Thomas Rabitsch v Gisela Weller-Lindhorst*, para. 22.

[12] P. MANKOWSKI, in B. VERSCHRAGEN (note 3), at 73 *et seq*.: "Die faktische Bestimmung des Erfüllungsortes ist ein bis heute nicht vollständig durchgerechnetes Prinzip." Es herrsche "Verunsicherung und Unsicherheit". ["The factual determination of the place of performance is a principle that is still not completely thought through." "Insecurity and uncertainty reigns."], p. 74, es handele sich um die "wichtigste Baustelle im Bereich der Zuständigkeitstatbestände" [the main construction site in the field of international jurisdiction], p. 76.

[13] See explicitly ECJ, 23.04.2009, case C-533/07 (*Falco Privatstiftung*), paras 48-51.

II. Art. 7 no. 1 *lit. a* of the Recast Brussels I Regulation: Determining the Place of Performance for Contracts Other than Contracts for the Sale of Goods or the Provision of Services

Art. 5 no. 1 1st sent. of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[14] provided Member States of the European Community for the first time with an internationally uniform head of jurisdiction for contractual claims at the place of performance. The same rule is nowadays to be found in Art. 7 no. 1 *lit. a* of the recast Brussels I Regulation. It reads:

> "A person domiciled in a Member State may be sued in another Member State: (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; […]."

In the following years, the ECJ did not succeed in defining the procedural place of performance *autonomously*. Instead, starting with the decisions in the *Tessili v Dunlop* and *Shenavai v Kreischer* cases, the court determined the place of performance under Art. 5 no. 1 of the Brussels I Convention according to the substantive law which is applicable to the contract between the parties (i.e. according to the *lex causae*).[15] Following the ECJ judgment in the *De Bloos v Bouyer* case, the place of performance was not determined for the whole contract (for example at the place of performance of the characteristic obligation), but separately for each obligation in question.[16] According to the ECJ, this method of interpretation is still to be followed under Art. 7 no. 1 *lit. a* of the recast Brussels I Regulation.[17]

Consequently, for contracts falling under Art. 7 no. 1 *lit a*, when analysing whether they have jurisdiction, the courts have to incidentally determine the law that governs the contract. They then have to determine the place of performance under this law for the obligation that is in dispute. If, under the applicable substantive law, this place is located in the forum State, the court at this place then has international and local jurisdiction.[18]

---

[14] *OJ* L 299, 31.12.1972, p. 32.

[15] ECJ, 6.10.1976, case C-12/76, *Industrie Tessili v Dunlop AG*, in particular paras 13-15; ECJ, 15.01.1987, case 266/83, *Shenavai v Kreischer*.

[16] ECJ, 6.10.1976, case C-14/76, *De Bloos v Bouyer*.

[17] ECJ, 23.04.2009, case C-533/07, *Falco Privatstiftung v Gisela Weller-Lindhorst*, paras 48-51.

[18] For a detailed discussion of the complexity of this examination with a case study, see the author of this article (note 7), at 240 *et seq*.

A. Scope of Application of Art. 7 no. 1 *lit. a*

Today, Art. 7 no. 1 *lit. a* of the recast Brussels I Regulation is applicable to, for example, contractual disputes regarding license agreements and other contractual disputes about intellectual property rights,[19] to contracts for the sale of land, to contractual obligations resulting from *joint ventures*, contractual claims based on letters of exchange,[20] contracts for the sale of financial instruments, contracts for the exchange of goods (barter), and possibly also to obligations under certain software contracts (insofar as these are not considered contracts for the sale of goods or for the provision of services),[21] etc.[22]

Once the applicable law has been determined, it is applied in order to find the place of performance of the obligation which is in dispute.[23] A recent case decided by the ECJ may serve to illustrate this approach:

> Case 1: *Falco.*[24] Falco Privatstiftung, a foundation established in Vienna (Austria), licenses Ms Weller-Lindhorst, domiciled in Munich (Germany) to market, against remuneration, in Austria, Germany and Switzerland, video recordings of a music concert of the famous Austrian singer Falco. Falco Privatstiftung requests before the courts of its own domicile in Austria that Weller-Lindhorst provides an account of all sales of video recordings and pays the resulting royalties. Weller-Lindhorst responds that the Austrian courts lack jurisdiction.

Since the defendant is domiciled in Germany, the German courts would have had international jurisdiction under Art. 4 para. 1 of the recast Brussels I Regulation. The courts at the domicile of the plaintiff in Austria would only have jurisdiction if the place of performance of the obligation in question was located in Austria and hence a forum under Art. 7 no. 1 of the recast Brussels I Regulation would be available.

In the *Falco* case, the ECJ argued

> "that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right for remuneration is not a contract for the provision of services"

---

[19] ECJ, 23.04.2009, case C-533/07, *Falco Privatstiftung v Gisela Weller-Lindhorst*.

[20] See ECJ, 14.03.2013, case C-419/11, *Ceska sporitelna, a.s. v Gerald Feichter*, paras 41 *et seq*.

[21] For a detailed analysis regarding software contracts, see M. REYMOND, in this *Yearbook*.

[22] For more examples see e.g. P. STONE, *EU Private International Law*, 3rd ed., Cheltenham 2014, p. 90 *et seq*.

[23] The exact obligation in dispute is to be determined, according to the ECJ, not autonomously but *lege causae*. For the resulting complications, see E.-M. BAJONS, Der Gerichtsstand des Erfüllungsortes: Rück- und Ausblick auf eine umstrittene Norm, in *Festschrift für Reinhold Geimer*, München 2002, p. 15, 20 *et seq*., 43 *et seq*.

[24] ECJ, 23.04.2009, C-533/07, *Falco Privatstiftung v Gisela Weller-Lindhorst*.

and therefore does not fall under *lit. b* (which governs service contracts) but under the general rule in Art. 7 no. 1 *lit. a*.[25] The ECJ then set out that, since the Brussels I Regulation is largely based on the Brussels I Convention, and in "the absence of any reasons for interpreting" Art. 5 (now: Art. 7) no. 1 *lit. a* in a different way than its predecessor in the Brussels I Convention,

> "consistency requires that Article 5(1)(a) of Regulation No 44/2001 be given a scope identical to that of the corresponding provision of the Brussels Convention, so as to ensure a uniform interpretation of the Brussels Convention and Regulation No 44/2001".[26]

Consequently, in order to determine jurisdiction, first the law that governs the licensing contract needs to be determined. In the absence of a choice by the parties (Art. 3 of the Rome I Regulation), the law applicable to a license contract is established pursuant to Art. 4 para. 2 of the Rome I Regulation. The contract is thus governed

> "by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence."

In the case of a licensing contract, the party granting the licence effects the characteristic performance.[27] Since the licensor in the *Falco* case was established in Austria, the licensing contract between the parties was governed by Austrian law.[28]

Once the applicable law is established, the second step is to determine where the obligation in question has to be performed according to this law. In the *Falco* case, the obligation in question was the licensee's obligation to pay royalties. § 905 para. 1 of the Austrian Civil Code, the ABGB, provides:

> "If the place of performance does not follow from the agreement between the parties or from the nature or the purpose of the transaction, the obligation is to be performed at the place where the *debtor* was domiciled when the contract was formed or, if the obligation was contracted in the course of a business of the debtor, at the place of the relevant branch. […]"[29]

---

[25] ECJ, *Falco Privatstiftung* (note 24), paras 18 *et seq*., in particular para. 44.

[26] ECJ, *Falco Privatstiftung* (note 24), paras 46 *et seq*., in particular para. 51.

[27] See e.g. P.A. DE MIGUEL ASENSIO, Applicable Law in the Absence of Choice to Contracts Relating to Intellectual or Industrial Property Rights, *YbPIL* 2008, 199, at 209; D. MARTINY, in *Münchener Kommentar BGB*, 6th ed. 2015, Art. 4 Rom I-VO, No. 265 with references.

[28] Likewise, Art. 122 para. 1 of the Swiss PIL Act expressly states that: "Agreements pertaining to intellectual property are governed by the law of the state in which the transferor or grantor of the intellectual property right has his or her habitual residence".

[29] Translation by the author of this article, emphasis added. In the original version: "Kann der Erfüllungsort weder aus der Verabredung noch aus der Natur oder dem Zwecke des Geschäftes bestimmt werden, so ist an dem Orte zu leisten, wo der Schuldner zur Zeit des Vertragsabschlusses seinen Wohnsitz hatte, oder, wenn die Verbindlichkeit im Betriebe

According to § 905 para. 2 of the ABGB, the debtor is in principle responsible, and carries the costs and the risk, for the transfer of money to the creditor's domicile or place of business; however, under Austrian law, the place of performance of his obligation – i.e. the place where he has to perform the act he is obliged to execute – is still located at his domicile or place of business.[30] Consequently, the place of performance for the payment of a royalty under a license contract is, under Austrian law, in principle located at the domicile or place of business of the *debtor* (in the *Falco* case: at the defendant debtor's domicile in Munich, Germany). Thus, according to the ECJ, the Austrian courts at the plaintiff's domicile did not have jurisdiction under Art. 7 no. 1 *lit. a*.

The same result would be achieved had the parties in the *Falco* case chosen German law to govern their licensing contract: § 269 para. 1 of the BGB provides that in principle the place of performance is located at the *debtor's* habitual residence.[31] Just as in Austrian law, the debtor carries the costs and the risk that the money be transferred to the creditor (§ 270 para. 1 of the BGB); however the place for him to perform the acts he is obliged to execute under the contract is still located at his habitual residence (§ 270 para. 4 and § 269 para. 1 of the BGB).

The situation would be different had the parties chosen Swiss law to govern their contract. Art. 74 para. 2 no. 1 of the Swiss Code of obligations (OR) provides that "[e]xcept where otherwise stipulated, […] pecuniary debts must be paid at the place where the *creditor* is resident at the time of performance".[32]

In the *Falco* case, the ECJ thus set out (and insisted) that

- the place of performance in the sense of Art. 5 (now Art. 7) no. 1 *lit. a* is to be determined according to the *lex causae*, i.e. according to the substantive law that governs the contract (as opposed to being defined autonomously);
- for the purpose of jurisdiction, the place of performance of the *obligation in dispute* is relevant (as opposed to determining a uniform place of performance for all obligations resulting from the contract);
- the place of performance under the applicable *substantive* law continues to determine jurisdiction (as opposed to disconnecting the procedural place of performance from the place of performance as defined by substantive law).

---

des gewerblichen oder geschäftlichen Unternehmens des Schuldners entstand, am Orte der Niederlassung. […]."

[30] Austrian OGH, 08.09.2009, 4 Ob 90/09b, case *Falco*, para. 3.2. with further references. Under Austrian law, the debt is regarded as a "qualifizierte Schickschuld".

[31] Emphasis added. In the original version: "§ 269 Leistungsort (1) Ist ein Ort für die Leistung weder bestimmt noch aus den Umständen, insbesondere aus der Natur des Schuldverhältnisses, zu entnehmen, so hat die Leistung an dem Ort zu erfolgen, an welchem der Schuldner zur Zeit der Entstehung des Schuldverhältnisses seinen Wohnsitz hatte."

[32] Emphasis added. In the original version: "Art. 74. [1] Der Ort der Erfüllung wird durch den ausdrücklichen oder aus den Umständen zu schliessenden Willen der Parteien bestimmt. [2] Wo nichts anderes bestimmt ist, gelten folgende Grundsätze: 1. Geldschulden sind an dem Orte zu zahlen, wo der Gläubiger zur Zeit der Erfüllung seinen Wohnsitz hat;" A monetary obligation is thus regarded as "Bringschuld".

B. A First Brief Critique of the Interpretation *lege causae*

In situations such as the one in the *Falco* case, international jurisdiction thus depends on whether the obligation to pay the licence fee is regarded by the applicable *substantive* law as a collectable debt, an obligation to be performed at the debtor's domicile or place of business (such as, in our example, under Austrian and German law), or a portable debt, i.e. a debt to be discharged at the creditor's domicile (such as, in our example, under Swiss law). These issues of substantive law have nothing to do though with considerations of procedural appropriateness regarding the adequate forum. In situations such as the one in the *Falco* case, for reasons of proximity of evidence, and thus for *procedural* reasons, it would indeed often be appropriate to open a forum in the market for which the intellectual property rights were granted. However, the ECJ's decision to continue determining the place of performance under Art. 7 no. 1 *lit. a lege causae* shut the door to this solution.

As the *Falco* case as well as the example given in the next chapter will show, determining the place of performance *lege causae* is complicated, raises numerous criticisms, is for many reasons altogether unfortunate, and may lead to arbitrary results in international civil litigation.

III. Criticism of Connecting the Procedural Place of Performance to the Place of Performance as Defined by Substantive Law. Reasons for Adopting Art. 7 no. 1 *lit. b*

In 1994, the ECJ decided the case of *Custom Made Commercial Ltd v. Stawa Metallbau GmbH*. This case made the numerous weaknesses of determining the place of performance according to the *lex causae* (i.e. according to the substantive law that is applicable to the contract) particularly obvious. It thereby contributed considerably to the reform of the jurisdiction at the place of performance under Brussels I. In 2001, the European legislator eventually introduced, in Art. 5 no. 1 *lit. b* of the new Brussels I Regulation, for contracts for the sale of goods and for contracts for the provision of services, an *autonomous definition* of the procedural place of performance for the first time.[33]

Those who nowadays undertake to interpret and apply Art. 7 no. 1 *lit. b* of the recast Brussels I Regulation need to remember the reasons that led to the reform in 2001. Only when one is aware of the solution that the legislator wanted to abolish is it possible to achieve a coherent application of the new provision that respects the intentions of the European legislator.

[33] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 012, 16/01/2001, p. 1.

The following chapter therefore briefly recalls the development around the decision in the *Custom Made* case. It thereby lays the foundations for a subsequent analysis and criticism of the current decisions of the ECJ regarding jurisdiction at the place of performance under what is now Art. 7 no. 1 of the recast Brussels I Regulation.

A. Starting point: Interpretation *lege causae* and Criticism of this Method

1. Interpretation lege causae *as Illustrated by the* Custom Made *Case*

> Case 2: *Custom Made*.[34] Custom Made Commercial Ltd., which had its seat in London, ordered windows and doors to be manufactured by Stawa Metallbau GmbH, which had its seat in Bielefeld (Germany), to be used for a building complex in London. The parties agreed that Stawa Metallbau GmbH would supply the goods to Custom Made. When Custom Made paid only part of the stipulated price, Stawa brought proceedings for recovery of the balance before the Landgericht (Regional Court) Bielefeld. Custom Made claimed that the courts in Bielefeld lacked jurisdiction.

Given that the seat of the defendant company was in England it would have been possible for Stawa Metallbau GmbH to sue Custom Made Commercial Ltd for the remaining purchase price before the English courts, pursuant to Art. 2 (now Art. 4) para. 1 of the (now: recast) Brussels I Regulation. However Stawa preferred to bring an action before the German courts at its own seat in Bielefeld. This was only possible if the special jurisdiction for contractual disputes in Art. 5 no. 1 of the Brussels I Convention was open. Art. 5 no. 1 of the Brussels I Convention provided – just as Art. 7 no. 1 *lit. a* of the recast Brussels I Regulation provides today:

> "A person domiciled in a Member State may, in another Member State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; […]."

A claim could thus be brought in a State that was not the State of the defendant's domicile if the disputed obligation was to be performed there. In the *Custom Made* case the dispute was about the buyer's obligation to pay the remaining purchase price.[35]

---

[34] ECJ, 29.06.1994, case C-288/92, *Custom Made Commercial Ltd v Stawa Metallbau GmbH*.

[35] According to the *substantive* sales laws in a certain number of European jurisdictions, the obligation to pay the purchase price is to be fulfilled *at the buyer's domicile*; the obligation is thus a collectable debt, or an obligation to be performed at the debtor's place of business (this is the case in the laws of France, Belgium, Luxemburg, Austrian and Germany). In other jurisdictions the debt to be discharged, and the place of performance located, *at the creditor's (or seller's) domicile* (this is so in the laws of England, the Netherlands, Denmark, Italy and Switzerland). Given this diversity in the substantive laws the ECJ did not manage to proceed to an autonomous interpretation of the

According to the interpretation *lege causae* – as is still applied today by the ECJ regarding Art. 7 no. 1 *lit. a* of the recast Brussels I Regulation for contracts other than contracts for the sale of goods or for the provision of services – the court when analysing whether it has jurisdiction, first has to determine incidentally the law that governs the contract. The court then has to establish the place of performance under this law for the obligation that is in dispute. If, under the applicable substantive law, this place is located in the forum State, the court at this place then has international and local jurisdiction.

In the *Custom Made* case the contract between the German seller and the English buyer was governed by the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG).[36] Art. 57 para. 1 *lit. a* of the CISG provides that the buyer has to pay the price "at the seller's place of business". Given that the seller's seat in the *Custom Made* case was in Bielefeld, Bielefeld was the place of performance for the English buyer's obligation to pay the balance of the purchase price. In sales scenarios such as the one in the *Custom Made* case, the interpretation according to the *lex causae* thus led to the result that the seller could bring a claim against the buyer at his own (the seller's) seat.

2. A critical evaluation of the interpretation lege causae

The determination of the place of performance according to the law that is applicable to the contract (i.e. the interpretation *lege causae*) raises an array of criticisms. Since the European legislator intended to respond to this criticism when enacting Art. 5 (now Art. 7) no. 1 *lit. b* of the recast Brussels I Regulation, the knowledge of these criticisms provides, as mentioned above, important insights for the interpretation of Art. 7 no. 1 *lit. b* of the recast Brussels I Regulation. It is therefore advisable to briefly recall the weaknesses of the interpretation *lege causae*.[37]

a) Complexity of Having Recourse to the Determination of the Law Applicable to the Contract

A first point of criticism concerns the considerable complexity of this solution: Determining the place of performance *lege causae* makes it necessary for the court

procedural place of performance for the purpose of international jurisdiction. Instead, the Court determined the place of performance of the obligation in dispute according to the law that governs the contract (interpretation *lege causae*). This was the method the ECJ had applied in the *Tessili* and *Shenavai* cases and this is the method the Court also applied in the *Custom Made* case.

[36] This is the case if the case is brought before German courts, since Germany is a Contracting State to the CISG. It should eventually also be the case before English courts, see the author of this article, The CISG before the Courts of Non-Contracting States? – Take foreign sales law as you find it, *YbPIL* 2011/2012, 165 *et seq*.

[37] See in detail, with numerous further references, the author of this article (note 7), at 244 *et seq*.

to incidentally determine the substantive law that is applicable to the contract when analysing its jurisdiction. This may even be complex if the contract is ultimately governed by uniform sales law, especially when one of the parties is domiciled or established in a country which is not party to the CISG.[38]

b) Complexity of Determining the Place of Performance under Foreign Substantive Law

Secondly, the Court, when examining its jurisdiction, must already identify where the place of performance is to be located under the applicable substantive contract law. If the contract, as in the case of *Custom Made*, is governed by uniform sales law, this can be done quickly. If the parties have however excluded the CISG (which is possible according to Art. 6 of the CISG and is often still done due to widespread ignorance of the substantive law rules of the CISG) and if the contract is then to be assessed by a foreign substantive law, such as Finnish, Polish, Portuguese or Estonian law, it may – according to information provided by practitioners – take more than two years for a court to determine the relevant place of performance under the applicable foreign law. Many lower courts in the EU are overburdened with such a task and have determined the place of performance for the purpose of international jurisdiction simply according to their own law, i.e. *lege fori*, or purely factually, disregarding the ECJ's requirement to apply the *lex causae*.[39]

c) Different Localization of the "Place of Performance" in the EU if this Place Is Not Determined Autonomously

The interpretation *lege causae* makes a uniform understanding of the procedural place of performance for the European judicial area and the recast Brussels I Regulation impossible. Thanks to the Rome I Regulation, the relevant contract law in a specific case is now found by applying the same PIL rules in all EU Member States. The place of performance is thus uniformly determined by application of the same substantive law, regardless of where a precise case is decided. Given that the substantive laws diverge greatly in locating the place of performance for reasons other than procedural considerations,[40] this nevertheless leads, in similar situations, to different places of performance depending on the applicable substantive law.

---

[38] This can be particularly complex if the choice of law clauses are to be found in conflicting standard terms; for a detailed analysis, see the author of this article, Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution, *YbPIL* 2012/2013, 71 *et seq*.

[39] See H. GAUDEMET-TALLON (note 2), at No. 194, p. 197 with references to French case law.

[40] References *infra*, d).

d) Connecting Substantive and Procedural Law Despite Differences in the Purposes of Both Sets of Rules

If the place of performance is determined *lege causae*, the procedural place of performance ultimately depends on the place of performance of the contested contractual obligation as defined by substantive law. However, the rules on the place of performance under substantive law have entirely different objectives from those pursued by the rules on jurisdiction.

It is crucial for a party to a contractual relationship to know where it has to perform its obligation, for example where goods are to be delivered or where to provide a service and when the party has therefore fulfilled its contractual obligations. If the parties have not determined these issues in their contract, the answers to these questions are to be found in the provisions of *substantive law* on the place of performance. These provisions determine, for example, whether it is sufficient that the seller makes the sold goods available at its premises for collection by the buyer, or whether he has to send them to the buyer or even bring them to him. The definition of the relevant performance and of the type of debt in turn is crucial for the distribution of the contractual risk (i.e. the question of which party bears the risk of accidental loss of the goods). Once the debtor has done everything he was obliged to do, he has fulfilled his obligations and the risk is transferred to the creditor, who then owes the payment, even if the sold goods are accidentally lost.

The debtor's exact obligations largely depend on how the respective national legislator has delimited the respective duties and obligations of the parties and how he distributed the risk of accidental destruction or loss of the goods. In sale of goods law, many European jurisdictions apply the principle that it is enough for the seller to provide the goods for collection by the buyer.[41] This is based on the presumption that the debtor usually wants to take only the least onerous obligation.[42] Regarding the place of performance of the obligation to pay the buyer, the solutions in the European jurisdictions differ considerably. In some jurisdictions, the obligation to pay the buyer is to be fulfilled at the place of residence or at the registered office of the creditor (i.e. the seller),[43] in others at the residence or domicile of the debtor (i.e. the buyer).[44]

All these are substantive law considerations. They have nothing at all to do with the question of whether and where it is appropriate to open a special jurisdiction for contract claims alongside the general jurisdiction at the domicile of the defendant. Substantive law and international civil procedure pursue completely

---

[41] See § 269 para. 1 BGB; Art. 74 para. 2 no. 3 of the Swiss Code of Obligations; no. 2 will also frequently lead to this result; Section 29 (2) of the English Sale of Goods Act; Art. 31 lit. c) CISG; Art. 7:101(1)(b) PECL; Art. 93 no. 1 (b)(ii) CESL.

[42] See e.g. O. LANDO/ H. BEALE (eds), *Principles of European Contract Law, Parts I and II*, The Hague et al. 2000, p. 330, D.

[43] For English law: *Bank of Scotland v Seitz*, 1990 S.L.T. 584; Art. 1182 para. 3 of the Italian Codice civile; Art. 57 CISG; Art. 7:101 (1)(a) PECL; Art. 125 No. 1 CESL.

[44] See e.g. § 270 para. 4 and § 269 para. 1 BGB; Art. 1171 para. 3 of the Spanish Código civil; Art. 1247 para. 3 of the Civil codes of France, Belgium, and Luxemburg.

different goals and aims here. Combining two very different regulatory matters causes friction and produces arbitrary results regarding jurisdiction.

e) Starting Point: Jurisdiction of the Courts of the Country of the Defendant's Habitual Residence and Exceptional Character of Special Fora

The starting point for determining jurisdiction is the almost globally applied principle that the plaintiff has to in principle travel to the defendant (*actor sequitur forum rei*, codified in Art. 4 para. 1 of the recast Brussels I Regulation). It is then to be decided solely on *procedural* aspects under what conditions a special jurisdiction at the place of performance, in addition to the general jurisdiction at the defendant's domicile, is justified. These procedural aspects include a special expertise of the courts, the proximity of evidence (such as the location of a defective item), the possibility of an inspection by the court or by experts, and the availability of witnesses, etc.

The ECJ stresses regularly, and rightly so, that the jurisdiction at the place of performance pursues the goal of procedural practicality, which is an issue of procedural law, not of substantive law. In this sense, the ECJ has consistently held (and thus also in the judgment of *Custom Made*) that the jurisdiction at the place of performance is based on "a particularly close relationship between a dispute and the court which may most conveniently be called upon to take cognizance of the matter".[45] The place of performance "usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it". It is this procedural aspect which "explains why that court has jurisdiction in contractual matters".[46] If the procedural place of performance is linked with, and made dependent on, the place of performance as defined by substantive law, it is however a matter of chance whether the result corresponds with these procedural requirements. In the *Custom Made* case, in which the goods had been delivered to London in accordance with the contract, and in which the German seller claimed payment of the remaining purchase price, there was absolutely no sense from a procedural point of view to open a special forum at the seller's (and plaintiff's) domicile in Germany.

f) Disrespect for the Exceptional Nature of Special Jurisdiction, in Particular When the CISG Applies

The situation is particularly precarious in scenarios that fall within the scope of the uniform sales law, such as in the case of *Custom Made*. According to Art. 57

[45] ECJ, 29.06.1994, case C-288/92, *Custom Made Commercial Ltd v Stawa Metallbau GmbH*, para. 12; see also ECJ, 03.05.2007, case C-386/05, *Color Drack GmbH v Lexx International Vertriebs GmbH*, para. 24; ECJ, 09.07.2009, case C‑204/08, *Peter Rehder v Air Baltic Corporation*, para. 33; ECJ, 23.04.2009, case C-533/07, *Falco Privatstiftung v Gisela Weller-Lindhorst,* para. 24.

[46] ECJ, 29.06.1994, case C-288/92, *Custom Made Commercial Ltd v Stawa Metallbau GmbH*, para. 13.

para. 1 *lit. a* of the CISG, "[i]f the buyer is not bound to pay the price at any other particular place, he must pay it to the seller: (a) at the seller's place of business". Under the CISG, the money obligation is therefore a *portable debt*. If the substantive and the procedural place of performance are linked, Art. 57 para. 1 *lit. a* of the CISG has the effect that the claimant-seller systematically benefits from a forum at his own domicile, without this being justified by any procedural considerations. On the contrary, in order to protect the defendant, the European legislator has enacted the principle that the courts of the country of the defendant's domicile have general jurisdiction. Special jurisdiction needs a specific *procedural* justification. If the procedural place of performance is linked with the place of performance as defined by substantive law, this is no longer guaranteed due to the different regulatory objectives of both matters.

g) Procedural Non-Sense of Localizing the Place of Performance at the Place Where Goods or Documents Are Handed Over from One Transport Person to the Other

The non-sense of linking the procedural place of performance with the one as defined by substantive law is particularly obvious in situations in which the sold goods are, according to the contract, handed over midway from seller's carrier to the buyer's. According to Art. 57 para. 1 *lit. b* of the CISG, "[i]f the payment is to be made against the handing over of the goods or of documents," the place of performance is located "at the place where the handing over takes place". The seller is then freed from his contractual obligations and the risk of accidental loss of the goods is passed on to the buyer.

However, it is in no way justified on procedural aspects to open a special jurisdiction at the place where the goods are handed over from one transporter to the other. On the contrary, the goods are usually only for a very short moment at this location and there is therefore no link that would justify opening a special jurisdiction there. Accordingly, when Art. 57 of the CISG was adopted, the participants in the diplomatic conference did not want to prejudice in any way questions of international jurisdiction by establishing the substantive place of performance under this rule. On the contrary, it was explicitly stated in the Official Records that the rules for place of performance in the CISG are totally distinct and disconnected from issues of international jurisdictional.[47]

h) Different Fora for One Single Contract and No Comprehensive Jurisdiction for Contractual Claims

Finally, the solution which provides jurisdiction at the place of performance of the disputed contractual obligation may lead to the unfortunate consequence that, with respect to the same contract, the courts of different States have jurisdiction for

[47] United Nations Conference on Contracts for the International Sale of Goods, Official Records (O.R.) 1991, p. 79, Art. 53, no. 2; O.R., p. 122, Art. 53, no. 2, 3, 5; O.R., p. 368 *et seq.*, Art. 53, Nos 27-35.

different disputed obligations.[48] From the point of view of procedural efficiency, this too should absolutely be avoided.

B. Interim Conclusions

At least *eight strong reasons* thus oppose linking the procedural place of performance with the place of performance as defined by substantive law and making the former dependent on the latter.[49] By introducing the new *lit. b* in Art. 5 (now Art. 7) the European legislator wanted to respond to all of these criticisms and remedy the problems for contracts for the sale of goods and contracts for the provision of services. This intention of the legislator is of the utmost importance for the interpretation of the new Art. 7 no. 1 *lit. b*, and it must always be taken into account when applying the historical and teleological methods of interpretation to this rule.

IV. The 2001 Reform: Disconnecting the Procedural Place of Performance from Substantive Law – One Single Place of Performance and its Autonomous Determination for Sales and Service Contracts in Art. 7 no. 1 *lit. b*

Just like its predecessor in the Brussels I Convention, Art. 7 no. 1 *lit. a* in its current version first of all provides that:

> "A person domiciled in a Member State may, in another Member State, be sued: 1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;"

Lit. b then defines the place of performance for contracts for the sale of goods and for the provision of services as follows:

> "(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

[48] For details see E.-M. BAJONS (note 24), at 27-33.

[49] On the complexity and the weaknesses of the interpretation *lege causae*, see E.-M. BAJONS (note 24), at 15 *et seq.*; G. DROZ (note 2), in particular at 353 *et seq.*; both authors provide numerous examples taken from domestic case law that illustrate the uncertainties of the former solution; for numerous further references to criticism in legal doctrine, see T. LYNKER, *Der besondere Gerichtsstand am Erfüllungsort in der Brüssel I-Verordnung (Art. 5 Nr. 1 EuGGVO)*, Frankfurt am Main 2006, p. 45 *et seq*.

> - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
>
> - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided; […]."

The deficiencies listed above of the old version are thus corrected for these two types of contracts.

A. One Forum for All Claims Relating to a Contract for the Sale of Goods or for the Provision of Services

First, the new rule remedies the problem of opening special jurisdiction in different countries depending on the obligation in dispute (above, III.A.2.h.). For sales contracts the place of performance is located "at the place in a Member State where, under the contract, the goods were delivered or should have been delivered". For contracts for the provision of services, it is "at the place in a Member State where, under the contract, the services were provided or should have been provided". Thus, for all obligations resulting from these types of contracts, there is now only *one single place of performance*,[50] namely the place of performance of the obligation that is characteristic of the contract.[51]

B. Autonomous Definition of the Place of Performance and Abolishment of the Interpretation *lege causae*

Secondly, Art. 7 no. 1 *lit. b* abandons the interpretation *lege causae*. Instead, the place of performance in *lit. b* is defined autonomously for two categories of contracts. It is no longer necessary or permitted to have recourse to the law which is applicable to the contract or to the contested contractual obligation. The disadvantages and weaknesses of the former solution mentioned above under (III.A.2.a.-c.) are thus also fixed for these two types of contracts.

C. Disconnecting the Place of Performance in Procedural Law from Substantive Law

At the same time, the European legislator has cut the link between the procedural place of performance on the one hand and the substantive place of performance on the other. Instead, the place of performance is defined autonomously in Art. 7 no. 1

---

[50] With the consequence that "Le *forum contractus* porte enfin bien son nom", G.P. ROMANO (note 3), at 70.

[51] Compare W. HAU (note 1), at 975; F. POCAR, *OJ* 23.12. 2009, C 319, No. 50: "Sans utiliser le terme, il adopte le principe de l'obligation caractéristique"; G.P. ROMANO (note 3), at 70 *et seq*.

lit. b for the purposes of international jurisdiction and completely independently from substantive law. The weaknesses of the former solution set out above under (III.A.2.d.-g.) are thus also fixed.

In 2001, the European legislator thus introduced a factual, economic place of performance at the destination of the goods or at the place where the service is provided which allows for an approach based solely on *procedural criteria*. This *disconnection* of the procedural place of performance from substantive law allows important consequences to be drawn for numerous categories of cases (see the analysis of the current jurisprudence of the ECJ below, V. and VI., as well as the proposals for solving outstanding issues, VII. and IX.).

D. Interim Conclusions

As an interim conclusion it can thus be stated that the problems of the former solution (a.-h. above), which gave rise to the 2001 reform, are resolved by the present regime for sales contracts and service contracts. It is now important to create clear guidelines for dealing with the new solution. As experiences since 2001 show, the application of the new version raises a whole series of new issues.

Given the many serious criticisms of the old solution (above, III.) and given the clear decision by the European legislator to establish an autonomous determination of the procedural place of performance and to disconnect the procedural place of performance from substantive law in *lit. b*, the current issues of interpretation can by no means be solved by returning to an interpretation of the place of performance *lege causae*.[52]

V. Analysis of the Current Case Law of the ECJ, Part 1: Confirming the Disconnection

In the following chapter the current case law of the ECJ is examined, in particular regarding the extent to which it implements the disconnection of the procedural place of performance from substantive law (1. and 3.). It will also briefly be considered how the case that gave the final push to reform the rules on jurisdiction at the place of performance, the *Custom Made* case, would be resolved today under the new provision (2.).

[52] For authors who are in favour of having recourse to the criteria of substantive law, see e.g. S. LEIBLE, Anmerkung zu EuGH, Urt. v. 25.2.2010 – C-381/08 (*Car Trim GmbH/KeySafety Systems Srl*), *EuZW* 2010, 303, at 305; *idem* (note 1), at 463. He does *not*, however, recommend returning to an interpretation *lege causae*; P. MANKOWSKI, *IHR* 2008, 46, at 50 *et seq*.

A. The Case of *Car Trim GmbH v KeySaftey Systems Srl*: Fundamental Clarifications

The ruling of the ECJ that is so far the most important for understanding the new provision was issued in February 2010 in the case of *Car Trim GmbH v KeySafety Systems Srl*. The decision was based on the following facts:

> Case 3: *Car Trim*.[53] The German company Car Trim GmbH, established in Chemnitz (Germany), produced components for the manufacturing of airbag systems. Car Trim supplied KeySafety Systems Srl., established in Italy, with these components, in accordance with five supply contracts. Under the contracts, Car Trim was obliged to manufacture components for airbags of a certain shape so as to be able to supply them to order, according to the needs of KeySafety's production process and in conformity with a large number of requirements relating to the organization of the work, quality control, packaging, labelling, delivery orders and invoices. KeySafety in turn used the components for the manufacture of airbags systems and then supplied Italian car manufacturers with these airbag systems.
>
> KeySafety declared termination of the contracts with effect from the end of 2003. Based on the view that those contracts should have continued, in part, until 2007, Car Trim claimed that the terminations were in breach of contract and brought an action for damages before the Landgericht Chemnitz (Regional Court, Chemnitz), within whose jurisdiction its own (the claimant's) registered office was located.

The German supplier could have sued their Italian purchaser before the Italian courts on the basis of (the current) Art. 4 para. 1, 63 para. 1 of the recast Brussels I Regulation. It preferred, however, to bring an action before the courts in Chemnitz. Jurisdiction of the German courts could only follow from Art. 5 (now Art. 7) no. 1 *lit. b* of the (now: recast) Brussels I Regulation.

1. The Decision of the ECJ

a) Qualification of the Contract

The ECJ first ruled that the contract at issue must be classified as a contract for sale, relying among others on Art. 1 no. 4 of the Consumer Sales Directive and Art. 3 para. 1 of the CISG.[54] According to both sets of rules, contracts for the supply of goods to be manufactured also qualify in principle as sales contracts (as opposed to service or work contracts).

[53] ECJ, 25.02.2010, case C-381/08, *Car Trim GmbH v Key Safety Systems Srl*.

[54] ECJ, *Car Trim* (note 53), paras 27-43.

b) Determination of the Place of Performance

For the question of how the place of performance is to be determined for the purpose of Article 5 (now Art. 7) no. 1 *lit. b*, the ECJ first underlined the crucial importance of "the origins, objectives and scheme" of the Brussels I regulation for the interpretation of Article 5 (now: Art. 7) no. 1.[55] The Court then set out that the rule on special jurisdiction at the place of performance "complements the rule that jurisdiction is generally based on the domicile of the defendant" (now Art. 4 para. 1 of the recast Brussels I Regulation) and creates a single special forum "to apply to all claims founded on one and the same contract for the sale of goods".[56] This place of performance of the contract is to be determined autonomously.[57] The "autonomy of the linking factors provided for in Article 5 [now 7] (1)(b) […] precludes application of the rules of private international law of the Member State with jurisdiction and the substantive law which would be applicable thereunder."[58] The rule of special jurisdiction in matters relating to a contract "reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine the case".[59]

Under Article 5 (now Art. 7) no. 1 *lit. b* the place of performance of the contract for the sale of goods is "the place in a Member State where, under the contract, the goods were delivered or should have been delivered". The ECJ dedicates the central passages of the judgment to the question of how the terms "delivery" and "place of delivery", which are not defined in the Regulation, are to be interpreted.[60] The Court sets out that "at the time of drafting that provision […] the Commission stated that it was intended «to remedy the shortcomings of applying the rules of private international law of the State whose courts are seized» and that that «pragmatic determination of the place of enforcement» [in the new *lit. b*] was based on a purely factual criterion."[61] In those circumstances, it is for the referring court "to determine […] whether the place of delivery is apparent from the provisions of the contract."[62] "Where it is possible to identify the place of delivery in that way, without reference to the substantive law applicable to the contract, it is that place which is to be regarded as the place where, under the contract, the goods were delivered or should have been delivered".[63] If "the

[55] ECJ, *Car Trim* (note 53), at para. 47; see the decision in ECJ, *Color Drack* (note 45), at para. 18.

[56] ECJ, *Car Trim* (note 53), at paras 48, 50; see ECJ, *Color Drack* (note 45), at paras 26, 39.

[57] ECJ, *Car Trim* (note 53), at paras 49, 52; ECJ, *Color Drack* (note 45), at paras 24, 39.

[58] ECJ, *Car Trim* (note 53), at para. 53; ECJ, *Color Drack* (note 45), at paras 30, 39.

[59] ECJ, *Car Trim* (note 53), at para. 48; ECJ, *Color Drack* (note 45), at para. 40.

[60] ECJ, *Car Trim* (note 53), at paras 51-61.

[61] ECJ, *Car Trim* (note 53), at para. 52; also see the decision ECJ, *Color Drack* (note 45), at paras 39, 40.

[62] ECJ, *Car Trim* (note 53), at para. 54.

[63] ECJ, *Car Trim* (note 53), at para. 55; see on this issue in detail below, VI.

contract would not contain any provisions indicating, without reference to the applicable substantive law, the parties' intentions concerning the place of delivery of the goods" this place is to be determined autonomously in a manner "which is consistent with the origins, objectives and scheme of that regulation."[64]

The referring court had suggested "two places which could serve as the place of delivery for the purposes of fixing an autonomous criterion": "The first is the place of the physical transfer of the goods to the purchaser and the second is the place at which the goods are handed over to the first carrier for transmission to the purchaser."[65] The Court held that of these two places "the *place of the physical transfer of the goods to the purchaser*" would be preferable and "most consistent with the origins, objectives and scheme" of the Brussels I Regulation.[66] This criterion is "highly predictable" and "also meets the objective of proximity, in so far as it ensures the existence of a close link between the contract and the court called upon to hear and determine the case." Finally the Court stated: "It should be pointed out, in particular, that the goods which are the subject-matter of the contract must, in principle, be in that place after performance of the contract."[67]

2. Comments

a) Qualification of the Contract as a Sales Contract

With regard to the question of whether the contract should be qualified as a service or sales contract, the reasoning of the Court provides a perfect example of an autonomous, comparative, and international qualification which takes inspiration from EU law and international conventions. A result other than the qualification of the contract between the parties as a contract of sale was hardly defendable.[68]

b) Determination of the Place of Performance: Key Points

In the localisation of the place of performance, the ECJ fixes in the *Car Trim* case, as previously in the case of *Color Drack* (see below, C.), the key points and vertices for the interpretation of the new *lit. b*, as they arise in response to the criticisms of the former legal situation (represented above, III.). They comprise: general jurisdiction of the courts of the country where the defendant is domiciled as the basic rule, special jurisdiction at the place of performance as an exception justified by procedural considerations; requirement of proximity and a close link between the specific contract and the court called upon to hear and decide the case; the goal of ensuring uniformity and predictability of jurisdiction; a uniform place

[64] ECJ, *Car Trim* (note 53), at paras 56, 57.

[65] ECJ, *Car Trim* (note 53), at para. 58.

[66] Emphasis added. ECJ, *Car Trim* (note 53), at paras 58-60.

[67] ECJ, *Car Trim* (note 53), at para. 61.

[68] See in legal doctrine e.g. G.P. ROMANO (note 3), at 72: "La conclusion s'est – en l'espèce – imposée".

of performance for the entire contract; its autonomous determination without recourse to Private International Law; no more linking the procedural place of performance to the place of performance under substantive law, instead: independence and *disconnection* of the procedural place of performance from the place of performance as defined by substantive law.

All these key points follow either from the wording of Article 5 (now: Art. 7) no. 1 *lit. b*, or the scheme of jurisdictions in the recast Brussels I Regulation, or they may be deduced in any case from the history of the provision and the purpose of the new regulation in *lit. b* (as set out above).[69]

In *Car Trim* the question was then which consequences were to be drawn from these key points for the determination of the place of performance in the specific case.

c) Place Where Goods or Documents Are Handed Over from One Transport Person to the Other: an Irrelevant Factor

In the *Car Trim* case, the contract itself contained no express provision regarding the place of performance.[70] The place of performance was then to be determined in light of the contract. The referring German Federal Court had suggested two possible options: the place at which the goods were handed over to the first carrier for transfer to the purchaser or, alternatively, the place of the physical transfer of the goods to the purchaser. The ECJ decided that the place at which the goods were handed over to the first carrier was to be excluded,[71] and rightly so. In fact, the place where the goods are transferred to an intermediary person such as a carrier is, as a rule, very volatile and there are hardly any procedural arguments for opening a special forum there. At this place, the required proximity and close link between the specific contract and the court called upon to hear and decide the case is usually lacking.

d) Importance of the Final Destination of Goods

The Court decided instead to situate the place of performance for the purposes of Article 5 (now: Art. 7) no. 1 *lit. b* at the "final destination" of the goods[72] (in the *Car Trim* case this pointed to a place in Italy). This decision is to be most welcomed since it the only one which is appropriate in terms of the ratio of this head of jurisdiction. Proximity and a close link between the specific contract and the court called upon to decide the case is given solely at the final destination of the goods, whether this is the headquarters of the buyer, a construction site, or a production site.

---

[69] Above, III. and IV.

[70] See however below, VI. B. For situations in which the parties concluded an agreement on a "place of performance", see below, VI.

[71] ECJ, *Car Trim* (note 53), at paras 58-60.

[72] ECJ, *Car Trim* (note 53), at para. 60.

e) Presence of the Goods at the Place of Destination Required?

Towards the end of the central passages of the *Car Trim* decision the Court states: "It should be pointed out, in particular, that the goods which are the subject-matter of the contract must, in principle, be in that place after performance of the contract."[73] This requirement, not further explained by the ECJ, may seem surprising at first glance. However, with respect to the purpose of this special jurisdiction, it makes sense. We will have to come back to this (below, VII. A.).

f) Résumé

The decision of the ECJ in the *Car Trim* case has brought most welcome clarity in many ways. The decision confirmed a number of key benchmarks for the interpretation of Article 5 (now: Art. 7) no. 1 *lit. b*. It also brings important clarifications to the interpretation of the terms "delivery" and "place of delivery", which are absolutely consistent with the *ratio* and purpose of the new Art. 5 (now: 7) no. 1 *lit. b*. Last but not least, the central passages of the judgment of the ECJ show the benefit that can be derived through an autonomous, historical, and teleological (or purposive) interpretation of the new provision.

B. Solution of the *Custom Made* Case under the New Provision

In the *Custom Made*[74] case, which gave an important push toward reform, the parties had formed a contract for the sale of windows and doors which were intended for a building complex in London. London was the contractually agreed destination of the goods and hence the procedural place of performance of the contract and of all obligations resulting from it. In the case of *Custom Made* the courts in England already had jurisdiction under Art. 2 (now: Art. 4) para. 1 of the recast Brussels I Regulation. In this situation, there is no room for an application of Art. 7 no. 1, because Art. 7 presupposes that the place of performance is in a Member State *other* than that of the defendant's domicile.

Art. 7 no. 1 *lit. b* would however apply if the destination of the goods were in a country other than the one in which the buyer is domiciled or established. One may think for example of building projects in third countries. For example, if an English and a German company are involved in a construction project in Spain, and if the German company supplies goods to Spain because of a purchase contract with the English company, the courts at the place of the *destination* of the goods in Spain would have jurisdiction pursuant to Art. 7 no. 1 *lit. b* for a contractual claim of the German or the English company against each other. The reason for the jurisdiction of the Spanish courts is that they are in the best position to take evidence in the case that one party invokes a violation of the contract by the other. It is then for the respective applicants to decide whether they prefer a lawsuit at the domicile of

[73] ECJ, *Car Trim* (note 53), at para. 61.

[74] Facts and reference above, III. A. 1.).

the defendant (in the example in Germany or England) or at the Spanish place of performance.

C. The Cases of *Color Drack*, *Rehder*, *Wood Floor*, *Krejci*, and *Corman-Collins*

In the cases of *Color Drack*, *Rehder*, *Wood Floor*, *Krejci*, and *Corman-Collins*, the Court confirmed the key points for the autonomous determination of the place of performance pursuant to Art. 5 (now: Art. 7) no. 1 *lit. b* and added further clarifications for a number of specific issues.

> Case 4: *Color Drack*.[75] Lexx International Vertriebs GmbH ("Lexx"), a company established in Nuremberg (Germany), and Color Drack GmbH ("Color Drack"), a company established in Schwarzach (Austria), formed a contract under which Lexx undertook to deliver goods to various retailers of Color Drack in Austria, inter alia in the area of the registered office of Color Drack, who undertook to pay the price of those goods. The Austrian company argued that the German seller had violated its obligation under the contract to take back unsold goods and to reimburse the price to Color Drack and brought an action for payment before the Austrian court within whose jurisdiction its own (the claimant's) registered office was located.

Color Drack was the ECJ's first case on the new Art. 7 no.1 *lit. b.* The ECJ made it clear that Art. 5 (now Art. 7) no. 1 *lit. b* first indent also applies when several places of delivery are situated in one single Member State. The Court decided that, "where there are several places of delivery within a single Member State" the action can be brought before the court

> "having jurisdiction […] for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice."

Other judgments concern the application of *lit. b* second indent to service contracts.

> Case 5: *Rehder*.[76] Mr Rehder, who resided in Munich, booked a flight from Munich to Vilnius with Air Baltic, the registered office of which was in Riga (Latvia). Shortly before departure, the flight was cancelled. Mr Rehder's booking was changed by Air Baltic and he arrived in Vilnius after a six hour delay. He brought an action for compensation before the courts in Munich (Germany).

[75] ECJ, 03.05.2007, case C-386/05, *Color Drack GmbH v Lexx International Vertriebs GmbH*.

[76] ECJ, 09.07.2009, case C-204/08, *Peter Rehder v Air Baltic Corporation*.

In the *Falco* case, the ECJ had already made it clear that a service in the sense of Art. 5 (now Art. 7) No.1 *lit. b* is to be regarded as "a particular activity in return for remuneration."[77] The *Rehder* case provided the ECJ, for the first time, with the opportunity to clarify "the place in a Member State where, under the contract, the services were provided or should have been provided." The Court decided that "in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier", the procedural place of performance is both at the place of departure (where the checking-in and boarding of passengers and their luggage, their on-board reception, and the departure of the aircraft at the scheduled time shall take place) and at the place of arrival of the aircraft. The claimant has the choice to bring his claim at either of these places. On the other hand, places where the aircraft may stop over are irrelevant for the purpose of jurisdiction (just as for contracts for the sale of goods, the volatile place where the goods are handed over midway from the seller's to the buyer's carrier is irrelevant[78]).

In the case of *Wood Floor*[79] a claim was brought for damages following the termination of a commercial agency contract. The commercial agent had acted in several EU Member States. The ECJ decided that for the purpose of jurisdiction at the place of performance under Art. 5 (now: Art. 7) no. 1 *lit. b* second indent, when services are provided in several Member States, where the services of the commercial agent were *mainly* to be provided, as it appears from the provisions of the contract, is relevant. In the absence of such provisions, the actual performance of that contract or, as a last resort, the place where the agent is domiciled are relevant.

In the case of *Krejci Lager & Umschlagsberiebe GmbH*[80] the ECJ decided that a contract relating to the storage of goods constitutes a contract for the "provision of services" in the sense of Art. 5 (now Art. 7) para. 1 *lit. b* second indent. Consequently, special contract jurisdiction is available at the place of storage for claims arising from a storage contract.

In the case of *Corman-Collins*[81] the claimant brought a claim following the termination of a distribution agreement. The ECJ decided that an exclusive distribution agreement is to be regarded as a service contract and thus falls within the scope of the current Art. 7 no. 1 *lit. b* second indent, if it contains specific terms concerning the distribution of goods sold by the grantor to the distributor.

In all these cases the ECJ confirmed the key points regarding the procedural place of performance, as set out above, and further specified these principles for a number of typical case scenarios. This case law is coherent, it follows the ratio of

---

[77] ECJ, 23.04.2009, case C-533/07, *Falco Privatstiftung v Gisela Weller-Lindhorst*, para. 29.

[78] ECJ, 25.02.2010, case C-381/08, *Car Trim GmbH v KeySafety Systems Srl*, paras 58-60, and above, V. A. 1. b) and 2. c).

[79] ECJ, 11.03.2010, case C-19/09, *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA*.

[80] ECJ, 14.11.2013, case C-469/12, *Krejci Lager & Umschlagbetriebs GmbH v Olbrich Transport und Logistik GmbH*.

[81] ECJ, 19.12.2013, case C-9/12, *Corman-Collins SA v La Maison du Whisky SA*.

Art. 5 (now Art. 7) no. 1 *lit. b* and emphasizes the independence of the procedural place of performance from the place of performance as defined by substantive law. These decisions thus implement the principle of disconnection consistently and they represent an important contribution to legal certainty regarding international jurisdiction in contract cases (for some points that are still in need of clarification, see below VII.).[82]

VI. Analysis of the Current Case Law of the ECJ, Part 2: Frictions and Aberrations

A. The Problematic Case: *Electrosteel* – Agreements on the Place of Performance

The assessment is very different when it comes to the ECJ's rulings on agreements by the parties with respect to the place of performance. For contracts for the sale of goods and for the provision of services, Art. 7 no. 1 *lit. b* refers in two places, respectively, to agreements between the parties. According to *lit. b* "the place of performance of the obligation in question shall be: in the case of the sale of goods, the place in a Member State where, *under the contract*, the goods were delivered or should have been delivered" and "in the case of the provision of services, the place in a Member State where, *under the contract*, the services were provided or should have been provided". This applies "*unless otherwise agreed*". (Emphasis added).

The ECJ's current rulings on agreements on the place of performance in the context of Art. 7 no. 1 *lit. b* second indent cannot convince yet.[83] If not reconsidered, the current position of the ECJ will lead to friction with the rationale of Art. 7 no. 1 *lit. b* and risks undermining the purpose of the new rule. This becomes clear in the *Electrosteel* case.

---

[82] For an overall positive evaluation of the case law of the ECJ, see e.g. T. RAUSCHER (note 6), at 2252 *et seq*.; R. WAGNER, Die Entscheidungen des ECJ zum Gerichtsstand des Erfüllungsortes nach der EuGGVO – unter besonderer Berücksichtigung der Rechtssache Rehder, *IPRax* 2010, 143, 148; A. METZGER (note 3), 420; A. STAUDINGER, Streitfragen zum Erfüllungsortgerichtsstand im Luftverkehr, *IPRax* 2010, 140; U. GRUSIC, Jurisdiction in complex contracts under the Brussels I Regulation, *Journal of Private International Law* 2011, 321; P. SHINE, The Problem of Place of Performance in Contract under the Brussels I Regulation: Can One Size Fit All?, 1 *International Company and Commercial Law Review* 2011, 20. – For a critical view, see J. HARRIS, Sale of goods and the relentless march of the Brussels I regulation, *Law Quarterly Review* 2007, 522 *et seq*.; B. PILTZ, Anmerkung zu EuGH, Urt. v. 25.2.2010 – C-381/08 (*Car Trim GmbH/KeySafety Systems Srl*), *NJW* 2010, 1061, at 1062; S. LEIBLE (note 1), e.g. at 458 *et seq*.; for a highly critical view of the new *lit. b*, see P. MANKOWSKI, in B. VERSCHRAGEN (note 3), at 74.

[83] See also the critical appreciation by B. GSELL, Erfüllungsort beim Versendungskauf und Abgrenzung von Kauf- und Dienstleistungen nach Art. 5 Nr. 1 lit. b) EuGVVO, *ZEuP* 2011, 673.

Case 6: *Electrosteel*.[84] Edil Centro, a seller established in Vicenza, Italy, and the buyer Electrosteel, established in Paris, formed a contract for the sale of goods. The agreement contained, inter alia, the following clause: "Resa: Franco ns. [nostra] sede" *(Delivered free ex our business premises).* The seller referred to the fact that the contract clause "Resa: Franco nostra sede" corresponds to the Incoterm clause *EXW* (*Ex Works*), – drawn up by the International Chamber of Commerce, headquartered in Paris – in relation to which rules A4 and B4 designate the place of delivery of the goods. Rules A4 and B4 for use of the Incoterm "Ex Works" are worded as follows:

"A4 Delivery

The seller must place the goods at the disposal of the buyer at the named place of delivery, not loaded on any collecting vehicle, […] If no specific point has been agreed within the named place, and if there are several points available, the seller may select the point at the place of delivery which best suits his purpose."

"B4 Taking delivery

The buyer must take delivery of the goods when they have been delivered in accordance with A4 […]."

The goods were delivered to the purchaser by a carrier which took charge of them in Italy, at the seller's premises, and delivered them to the buyer's headquarters in France. The Italian seller Edil Centro applied to the Tribunale ordinario di Vicenza (Vicenza District Court) for an order directing Electrosteel to pay for the goods purchased. The French company Electrosteel pleaded that, under the Regulation, the Italian court lacked jurisdiction. Electrosteel argued that, since it had its seat in France, it should have been sued before the French courts.

B. The Decision of the ECJ

The starting point for the decision in the *Electrosteel* case was the legal considerations of the ECJ in the *Car Trim* case:[85] Under Article 5 (now Art. 7) no. 1 *lit. b* the place of performance of the contract for the sale of goods is the place in a Member State where, *under the contract*, the goods were delivered or should have been delivered. If the contract remains silent regarding the place of delivery, the relevant place is the place where the goods are physically transferred to the purchaser (not to a carrier).[86]

[84] ECJ, 09.06.2011, case C‑87/10, *Electrosteel Europe SA v Edil Centro SpA*.

[85] See above, V. A.

[86] ECJ, *Car Trim* (note 53), paras 58-60, see above, V. A.

In *Car Trim*, the contract between the parties had, inter alia, contained a clause according to which the supply should be done "as agreed, at call free works Colleferro". In *Car Trim*, the ECJ completely disregarded this clause when determining the procedural place of performance – and rightly so, as the following considerations will show.

In the *Electrosteel* case the ECJ explicitly addressed the question of "how the words «under the contract», used in the first indent of Article 5(1)(b) of the Regulation, are to be interpreted and, in particular, to what extent it is possible to take into consideration terms and clauses in the contract which do not identify directly and explicitly the place of delivery".[87]

The Court first stated that it should be kept in mind that according to Art. 23 (now Art. 25) of the (now recast) Brussels I Regulation

> "a jurisdiction clause may be agreed not only in writing – or evidenced in writing – but also in a form which accords with practices which the parties have established between themselves or, in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."[88]

The ECJ then held that in this respect, Incoterms, developed by the International Chamber of Commerce, which enjoyed a particularly high level of recognition and were widely used in practice, played an important role. In determining the place of performance, the national court must, according to the ECJ, take into account all clauses of the contract, and should the situation arise, also Incoterms

> "in so far as they enable that place [i.e. the place of performance] to be clearly identified."[89]

The ECJ noticed that with these considerations it came into dangerous proximity to substantive law which – as we have seen – is to be disregarded when the procedural place of performance is determined.[90] The Court therefore stressed that for the national court, when analysing its jurisdiction, "it may be necessary to examine" whether the respective contract clauses or Incoterms

> "merely lay down the conditions relating to the allocation of the risks connected to the carriage of the goods or the division of costs between the contracting parties or whether they also identify the place of delivery of the goods."[91]

---

[87] ECJ, *Electrosteel* (note 84), at para. 18.

[88] ECJ, *Electrosteel* (note 84), at para. 19.

[89] ECJ, *Electrosteel* (note 84), at para. 22.

[90] ECJ, *Electrosteel* (note 84), at para. 25, and above, IV. and V.

[91] ECJ, *Electrosteel* (note 84), at para. 23.

The Court then recalled that the Advocate General had already pointed out

> "that that clause [used by the Italian seller] entails not only the application of Rules A5 and B5, entitled «Transfer of risks», and Rules A6 and B6, entitled «Division of costs», but also – and separately – the application of Rules A4 and B4, entitled «Delivery» and «Taking delivery»".[92]

Regarding goods in transit, the ECJ held that

> "[o]n the other hand, where the goods covered by the contract are merely in transit, passing through the territory of a Member State which is a third party, in terms both of the domicile of the parties and of the place of departure or destination of the goods, it must be ascertained, in particular, whether the place mentioned in the contract, situated in such a Member State, is used only to spread the costs and risks relating to the carriage of the goods or whether it is also the place of delivery of the goods."[93]

C. Critique and a Proposal for Interpretation

The reasoning in the *Electrosteel* case risks violating the spirit, purpose, and rationale of the rule in Art. 5 (now: Art. 7) no. 1 *lit. b* second indent. It should therefore be reconsidered.

1. Confusion between Agreements on the Place of Performance on the One Hand and Court Agreements on the Other

The judgment in the *Electrosteel* case mingles choice of court agreements on one hand and agreements on the place of performance on the other, even though both determine jurisdiction independently and very differently from each other.[94] In fact, both have very different aims, requirements and legal consequences: Jurisdiction at the place of performance is based on the idea of a close link between the contract and the court called upon to decide the case. Such considerations do not play any role at all for choice of court agreements which leave it entirely up to the needs and assessment of the parties to determine the court of their choice. Jurisdiction at the place of performance is an alternative jurisdiction available to the claimant in addition to the option of bringing his claim before the courts of the country of the defendant's domicile. In the case of a choice of court agreement on the other hand, the chosen court has in principle exclusive jurisdiction (Art. 25 para. 1 2nd sent. of the recast Brussels I Regulation).

---

[92] ECJ, *Electrosteel* (note 84), at para. 23.

[93] ECJ, *Electrosteel* (note 84), at para. 24.

[94] G.P. ROMANO (note 3), at 80, called this reference to the rules on choice of court agreements "quelque peu énigmatique" [somewhat puzzling].

It should thus be excluded to draw any conclusions from the rules on choice of court agreements for jurisdiction at the place of performance. If the parties wish to conclude an agreement conferring jurisdiction, they should be referred to the requirements applicable to choice of court agreements. Last but not least, leaving it to the parties to determine jurisdiction through an agreement on the place of performance would ultimately amount to (at least partially) circumventing the requirements for choice of court agreements.[95]

2. Jeopardizing the Purpose of the New Rule in lit. b *if Agreements Designating a Place Other than the Destination of the Goods Are Taken into Consideration*

The reasoning of the ECJ in the *Electrosteel* case entails a significant risk that, in a variety of cases in which the parties use standard clauses defining a "place of performance", recourse is ultimately made to criteria of substantive law, such as the character of a debt as a collective or a portable debt, and that, as a result, frequently outcomes are reached that are diametrically opposed to the purpose of the new Art. 7 no. 1 *lit. b*.[96]

When parties conclude an agreement on the place of performance, they thereby define their mutual obligations under the contract and make clear when the seller or service provider has fulfilled its contractual obligations, who carries the risk of accidental loss of the goods sold, and, *last but not least*, who carries the costs for transport of the goods sold from the seller to the buyer.[97] All these are aspects of substantive law. However, as we have seen, the 2001 reform intended to entirely disconnect the procedural place of performance in *lit. b* from substantive law. The ECJ has heard that message and emphasizes the disconnection in all its previous decisions on *lit. b*. In these other judgments, the Court has recourse to the contract between the parties exclusively in order to determine the *destination* of the goods sold or the place where the services are to be performed, and rightly so.[98]

Agreements on the contractual place of performance are thus, first and foremost, to be classified as substantive law agreements. For procedural reasons on

[95] See e.g. P. STONE (note 22), at 86.

[96] This tendency (and danger) of having recourse to criteria of substantive law again can also be observed in legal doctrine, see (among many) M. GEBAUER, Anmerkung zu EuGH 09.06.2011, C-87/10 (Electrosteel Europe SA/Edil Centro SpA), *LMK* 2011, 32284 (however hesitant, and rightly so); S. LEIBLE, Anmerkung zu EuGH, Urt. v. 09.06.2011 – C-87/10 (Electrosteel Europe SA/Edil Centro SpA), *EuZW* 2011, 603; C. ZARTH, Incoterms maßgeblich für Gerichtsstand, *GWR* 2011, 307; P. STONE (note 22), at 85 *et seq*. – M. MÜLLER (note 2), at 289: Bei "Koppelung des Erfüllungsorts an eine Erfüllungsortvereinbarung besteht die Gefahr, dass einer Seite faktisch ein Klägergerichtsstand untergeschoben wird" [taking agreements on a "place of performance" into consideration when it comes to determining the procedural place of performance creates, last not least, a considerable danger that one of the parties is confronted with a forum of the claimant without having been aware of it].

[97] See in detail above, III. A. 2. d).

[98] Above, V. A. and C.

the other hand, the *destination* of the goods, or the place where services are provided, is absolutely crucial for determining a forum that is in close proximity to the contract. Both aspects taken together should have the consequence that parties' agreements on a "place of performance" that designate a place other than the destination of the goods or the place where services are in fact performed should be disregarded when it comes to determining the procedural place of performance.[99] The same should apply to contractual clauses that are inspired by Incoterms (as in the *Electrosteel* case), that refer explicitly to Incoterms, or that incorporate Incoterms into the contract.[100]

Certain paragraphs of the ECJ's judgment in the *Electrosteel* case clearly illustrate that the suggested interpretation is urgently needed: In *Car Trim*, the ECJ had held that "the place at which the goods are handed over to the first carrier for transmission to the purchaser" is to be disregarded when determining the procedural place of performance." Instead, the relevant place is, according to the *Car Trim* judgment, "the place of the physical transfer of the goods to the purchaser".[101] With respect to the purpose of jurisdiction at the place of performance one cannot agree more with this statement of the Court. A forum at the volatile place where the goods are handed over from a transport company designated by the seller to one designated by the buyer is absolutely inappropriate from a procedural point of view.

However, in para. 24 of its judgment in the *Electrosteel* case, the ECJ states that if the parties had designated in their contract as "place of performance" a place "where the goods […] are merely in transit, passing through the territory of a Member State which is a third party, in terms both of the domicile of the parties and of the place of departure or destination of the goods, it must be ascertained, in particular, whether the place mentioned in the contract, situated in such a Member State, is used only to spread the costs and risks relating to the carriage of the goods or whether it is also the place of delivery of the goods." According to this statement, international jurisdiction on the volatile place of transfer of the goods from one transporting company to the other shall apparently come into consideration if the parties have designated this place in their contractual agreement as the contract's place of performance.

However, such an agreement of the parties does not change the fact that it is devoid of any procedural sense to locate the procedural place of performance for the purpose of international jurisdiction at the volatile place where the goods are

---

[99] For a view that is entirely against the admission of agreements on the procedural place of performance: H. SCHACK, *Der Erfüllungsort im deutschen, ausländischen internationalen Privat- und Zivilprozessrecht*, Frankfurt 1985, p. 144 *et seq.*; *idem* (note 3), at 939 with excellent reasons; W. HAU, Der Vertragsgerichtsstand zwischen judizieller Konsolidierung und legislativer Neukonzeption, *IPRax* 2000, 354, at 360; D. LEIPOLD, Internationale Zuständigkeit am Erfüllungsort – das Neueste aus Luxemburg und Brüssel, in *Gedächtnisschrift für Alexander Lüderitz*, München 2000, p. 431, at 449; M. MÜLLER (note 2), at 289; T. LYNKER (note 49), at 158.

[100] See in this sense also German Federal Supreme Court, 23.06.2010, VIII ZR 135/08 (OLG München), case note D. LOOSCHELDERS, *JA* 2011, 63 *et seq.*

[101] ECJ, 25.02.2010, case C-381/08, *Car Trim GmbH v KeySafety Systems Srl*, paras 50-60.

handed over from one transport person to the other. Such an agreement on the place of performance (or on the place of delivery) should thus be regarded exclusively as a substantive law agreement. The contract should then be carefully examined in order to determine which *destination* it provides in fact for the goods. Only the *destination* under the contract is relevant for determining jurisdiction at the place of performance.

The suggested outcome can be reached by way of a narrow and consistently *historical* and *teleological* interpretation of Art. 7 no. 1 *lit. b*. It would be perfectly compatible with the *wording* "under the contract" in Art. 7 no. 1 *lit. b*, given that, under the suggested interpretation, the contract between the parties is the essential source for determining the *destination* of the goods and is therefore decisive for determining the factual, economic and hence the procedural place of performance.

The suggested result follows also from a *systematic* interpretation of the rules on jurisdiction in the (recast) Brussels I Regulation. In this respect the ECJ consistently emphasizes that the "broad logic and scheme of the rules governing jurisdiction laid down by [the Brussels I] Regulation […] require […] a narrow interpretation of the rules on special jurisdiction, including the rule contained, in matters relating to a contract, in Article 5(1) [now: Art. 7] of that Regulation, which derogate from the general principle that jurisdiction is based on the defendant's domicile."[102]

In the *Electrosteel* case the destination of the goods under the contract was Paris. Paris was the factual, economic and hence the procedural place of performance of the contract, where the goods were physically handed over to the buyer and where he received actual possession of the goods. Insofar as the quality of the goods was contested, the courts in Paris were near the evidence; it was in Paris where the required proximity between the contract and the court was given. Regarding the Italian courts at the seat of the seller, none of these requirements were fulfilled. Consequently, in the *Electrosteel* case it should have been excluded from the outset to open a forum at the seller's seat under Art. 7 no. 1 for an action brought by the Italian seller against the French buyer, regardless of what the clause "Resa: Franco ns. [nostra] sede" *(Delivered free ex our business premises)* provided with respect to a "place of performance".

In the case of *Electrosteel*, allowing the Italian seller to bring an action at his own seat against the French buyer would, from a procedural point of view, have been just as inappropriate as, in the case of *Custom Made*, the action brought by the *Stawa Metallbau GmbH* at its own seat in Bielefeld against the English buyer. In *Custom Made*, and before the introduction of *lit. b*, the ECJ had admitted such an action[103], and one of the main purposes of the 2001 reform was to avoid allowing such a claimant's forum, except if justified by procedural reasons. Given that Incoterms enjoy great popularity in practice, it is important to make sure that, in cases where reference to Incoterms is made, a result that would undermine the rationale of the jurisdiction at the place of performance is avoided. The suggested

[102] ECJ, 23.04.2009, case C-533/07, *Falco Privatstiftung v Gisela Weller-Lindhorst*, para. 37.

[103] See above, III. A.

interpretation would achieve this aim and respect the rationale of the new regulation.

There is a further, and final, aspect that supports disregarding contractual clauses that locate the place of performance at a place that is different from the destination of the goods (or from the place where services are in fact performed): The contractual forum at the place of performance is based on the idea that contractual disputes often have to do with the (contested) quality of goods sold or services provided. The forum is available in order to guarantee an efficient procedure and to provide easy access to evidence for the court or experts etc.

Proximity between the contract and the court is in fact an *objective criterion*.[104] The parties' contractual agreements should therefore be taken into consideration only insofar as they help locate the factual and economic *destination* of the goods or the place where a service is in fact provided. The suggested restrictive interpretation would achieve this aim. The ECJ's reasoning in the *Electrosteel* case is drafted so carefully that it should be easy for the Court to reconsider it.

D. Determining the Place of Performance "Under the Contract" – an Analysis of Exemplary Contract Clauses

Based on these findings, some contract clauses shall now be examined regarding the question of whether and to what extent they should be taken into consideration when determining the procedural place of performance in Art. 7 no. 1 *lit. b*. Such clauses may read, for example:

1. Any risk shall pass to the customer upon the handing over of the goods to the carrier entrusted with the transport.
2. The transportation costs shall be borne by the customer.
3. The seller undertakes to transport the goods at his own expense to X where they are to be passed, against remittance of (clearly identified delivery documents), to a transporter nominated by the buyer which performs the further transport (to Y) at the expense and risk of the buyer.

   Or alternatively: Delivery of the goods is to be effected in accordance with FCA "Free Carrier" (named place) (Incoterms 2000). [Under this term, the seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place where the risk then passes to the buyer.]
4. The place of performance for all obligations arising out of the contract is [...] (a precisely designated place, or the seat of one of the parties).
5. The place of performance for delivery and payment is […].
6. Prices are in Euros and include free delivery to the place of delivery specified by us.

[104] See already E. LEIN (note 2), at 574.

7. The seller must make the goods available to the purchaser or to any other person designated by the purchaser at (named place of delivery in [...]), without loading.

   Or alternatively: The goods are to be placed at buyer's disposal at seller's premises at (address, city, country). The seller bears the risk that the goods are accidentally damaged or lost until the buyer takes over the goods or breaches the contract by failing to take delivery.

8. The sold goods shall be delivered by (naming a transport company) to Milan. The place of performance of this contract is Munich.

9. The courts in [...] (alternatively: the courts of our place of business in […]) shall have (exclusive) jurisdiction over any dispute arising from this contractual relationship.

   Or alternatively: Any dispute arising out of or in relation with the present contract shall be submitted to the courts of […].

All of these clauses (except the last ones) define a contractual "place of performance". As set out above, when the parties have agreed on a "place of performance" it needs to be carefully distinguished whether their agreement relates to the procedural place of performance or rather to the place of performance for the purpose of substantive law.[105] The provisions in the above clauses are in fact all related to the place of performance under *substantive* law. This is obvious for clauses that expressly address the risk of accidental loss or the attribution of the costs of transport (such as the first three of the abovementioned clauses). They address issues of substantive law and should thus, in principle, be disregarded for the determination of the procedural place of performance under Art. 7 no. 1 *lit. b*. The same applies in principle to clauses that determine a place of performance without explicitly addressing the risk of loss or the distribution of costs (the fourth and fifth of the above clauses). They have the same consequences under substantive law as those clauses which address risk and cost allocation explicitly.

As demonstrated above, the *destination* of the goods and the *place where services are actually provided* are the key criteria for determining the procedural place of performance of the contract. Contractual agreements on a "place of performance" should therefore only be taken into consideration for the purpose of determining jurisdiction under Art. 7 no. 1 *lit. b* if, and insofar as, they allow to determine the destination of the goods or the actual place where services are in fact to be provided.[106] This is the case of the third of the above clauses (according to which the goods are ultimately to be carried to Y) and of the eighth clause (following which the goods are to be delivered to Milan).

The disparity between the place of performance under substantive law on the one hand and the procedural place of performance on the other is particularly evident in the eighth and penultimate of the above clauses: The place of performance for the purpose of substantive law (relevant for the distribution of the risk and of the transport costs) may, according to the wording of that clause, be

[105] Above, VI. C. 2.

[106] VI. C.2., D.

Munich,[107] whereas the procedural place of performance, relevant for the purpose of Art. 7 no. 1, is to be located at the destination of the goods in Milan.[108]

The ninth and last of the above clauses is a pure jurisdiction clause within the meaning of Art. 25 para. 1 of the recast Brussels I Regulation. It has nothing to do with the determination of the procedural place of performance under Art. 7 no. 1 *lit. b.*

VII. Open Questions

A. Proximity of Proof: Requirement that the Goods Be Present at the Place of Performance When the Action Is Brought?

At the end of its reasoning in the *Car Trim* case, the ECJ stated in para. 61: "It should be pointed out, in particular, that the goods which are the subject-matter of the contract must, in principle, be in that place [i.e. the place of performance at the destination of the goods] after performance of the contract."[109] This raises the question of whether this special jurisdiction is to be opened only when evidence is

---

[107] The example is inspired by the case LG München II, 23.03.2004, *IPRax* 2005, 143: according to the contract the delivery was to be performed "frei Bau, Bauvorhaben Olginate" [i.e. the goods should be delivered to Olginate in Italy]; at the same time, the contract contained a clause "Erfüllungsort ist Emmering" [i.e. the place of performance is Emmering in Germany]. In such a case, the clause on the place of performance should not even be reinterpreted as containing a hidden choice of court clause under Art. 25 sect. 1 of the recast Brussel I Regulation. See also the references in the following note.

[108] In the case of *Sigfried Zelger v Sebastiano Salinitri*, 17.01.1980, case 56/79, paras 5, 6, the ECJ had held that "if the parties to the contract are permitted by the law applicable to the contract […] to specify the place of performance of an obligation without satisfying any special condition of form, an agreement on the place of performance of the obligation is sufficient to found jurisdiction in that place within the meaning of Article 5 (1) of the Convention." This applied "irrespective of whether the formal conditions provided for under Article 17 [today: Art. 25] have been observed." – However, the Court held in *Mainschifffahrtsgenossenschaft (MSG) v Les Gravières Rhenans,* 20.02.1997, case C-106/95, in particular para. 31-35, "that an oral agreement on the place of performance which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is not governed by Article 5(1) of the Convention, but by Article 17 [today: Art. 25], and is valid only if the requirements set out therein are complied with". In this decision, the ECJ had, for the first time, recourse to the factual place of performance of a contract and hereby distinguished between agreements on the place of performance on the one hand (where a link to the factual place of performance is required) and choice of court agreements on the other (where no such link is necessary). See also E.-M. BAJONS (note 24), at 40 *et seq.*; P. HUBER, *ZZPInt* 1997, 180 *et seq.*; S. KUBIS, Gerichtspflicht durch Schweigen? – Prorogation, Erfüllungsortvereinbarung und internationale Handelsbräuche, *IPRax* 1999, 13.

[109] ECJ, 25.02.2010, case C-381/08, *Car Trim GmbH v KeySafety Systems Srl*, para. 61; see above, V. B. 2. e).

actually available at the place of performance when the action is brought, or whether it should be sufficient that the courts at the destination are *in principle*, i.e. in the abstract, in a better position regarding proof.

1. Requirement of Actual Availability of Proof When the Claim Is Brought

For contacts for the sale of goods, the considerations of the ECJ in para. 61 of the *Car Trim* judgment seem to support the first position, i.e. the requirement of *actual availability* of proof when the claim is brought. According to the ECJ, Art. 7 no. 1 *lit. b* "reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine the case". Requiring actual availability of proof would in fact guarantee that this forum is opened only when this is in line with its rationale. The consequences of such a requirement can be illustrated with variants of a practical case study:

> Case 7: Variation 1 of the *Custom Made* case. A Polish company sells windows and doors to an English buyer and delivers them, in accordance with the contract, to a construction site in Berlin. The windows and doors are installed in a building in Berlin. The buyer claims that they are not in conformity with the contract.

The destination of the goods (and hence the procedural place of performance) under the contract is Berlin (regardless of who carried the risk and costs of transporting them there). In this situation, jurisdiction of the courts in Berlin for actions arising from the contract would be fully in line with the rationale of Art. 7 para. 1 *lit. b*.[110]

> Variation 2 of the *Custom Made* case. A Polish company sells windows and doors to an English retailer and delivers them, as per the contract, to London. The English retailer sells and delivers them then to a final customer in Dublin, Ireland. The final destination of the goods was unknown to the Polish seller when the contract was formed. When they are installed on a construction site in Dublin, problems arise. The English retailer claims that the windows and doors are not in conformity with the contract and sues the Polish seller before the courts in London.

In variation 2, the windows and doors were sold to a retailer, who resold and delivered them to a party established in a third place (Dublin) where they were used at a construction site. Upon completion of the sales contract between the (Polish) seller and the (English) retailer, the further destination in Ireland was unknown to the (Polish) seller. The *destination* of the goods under the contract between the parties was therefore London. However, from a procedural point of view, jurisdiction of the courts in London makes sense only if the windows and

[110] However, it is noteworthy that, according to an analysis of 100 decisions on the jurisdiction of the place of performance, only one case concerned a situation in which the place of performance was neither at the purchaser's seat nor that of the seller, see the analysis and findings by G. DROZ (note 2), at 355.

doors are still there, so that the courts in London are in fact in proximity to potential evidence.[111] If the defect is only observable at the construction site in Ireland, there is no procedural reason to open *special* jurisdiction at the courts in London. If *actual availability of evidence* was required under Art. 7 no. 1 *lit. b* when the action is brought, the courts at the initial destination of these goods would have to be denied jurisdiction under Art. 7 no. 1.

Had the parties however provided in their sales contract a *final destination* of the goods in Ireland, where the evidence is present, this could in turn be instrumental for determining the procedural place of performance, regardless of who organises the transport to this place. Last but not least, this would provide an incentive for the parties to create transparency regarding the further use of the goods. If a seller, to whom such a final destination is known, wishes to exclude jurisdiction at the (in this example: Irish) final destination of the goods, the parties could conclude a choice of court agreement under Article 25 of the recast Brussels I Regulation.

National codes of civil procedure show that it is quite feasible to make jurisdiction depend on *the actual availability* of proof: Under the German Code of Civil Procedure, for example, it is possible to bring an independent action at the place where evidence is available in order to safeguard this evidence (*selbständiges Beweisverfahren*). Under §§ 485 ff. of the German ZPO, a specific procedure may be opened "provided that there is concern that evidence might be lost, or that it risks becoming difficult to access" (§ 485 para. 1 of the ZPO). The petition can be filed by one of the parties with the court that would have jurisdiction for the main action (§ 486 para. 2 of the ZPO). If a main action is not yet pending, "in cases of imminent danger […] the petition may also be filed with the court that has jurisdiction in the judicial district in which the person who is to be questioned or examined is present or in which the object that is to be inspected on site, or regarding which a report is to be prepared, is present (§ 486 para. 3 of the ZPO)." The jurisdiction of this court thus depends on the actual presence of proof.[112] Similar rules may exist in other jurisdictions.

Actual evidence could systematically be required through a consistently teleological interpretation of Art. 7 no. 1 *lit. b*, or by a teleological reduction of the scope of application of this head of jurisdiction. The jurisdiction at the place of performance would thereafter only be opened if this actually corresponds to the rationale of this head of jurisdiction, i.e. if evidence is actually available when the action is brought. Such a narrow interpretation could also follow from a systematic interpretation of the heads of jurisdiction in the Brussels I Regulation, given that jurisdiction is in general based on the defendant's domicile (Art. 4 para. 1 of the recast Brussels I Regulation and rationales 13 and 15 of the recast Brussels I Regulation) whereas special jurisdiction is only open when justified by procedural

[111] On the point that, in the case that the goods are resold, the requirement of proximity in fact is no longer fulfilled at the initial destination of the goods, see E.-M. BAJONS (note 24), at 43, fn. 84.

[112] See e.g. F. PUKALL, in I. SAENGER, *Zivilprozessordnung*, 6th ed. 2015, § 486, No. 7; M. HUBER, in H.-J. MUSIELAK/ W. VOIT, *ZPO*, 12th ed. 2015, § 486, No. 5.

reasons, i.e. when there is "a close connection between the court and the action or in order to facilitate the sound administration of justice" (rationale 16).

2. No Such Requirement Needed

According to the opposite view, it is sufficient that the courts at the destination of the goods are *in principle*, i.e. in the abstract, in a better position regarding proof.[113] According to this line of argument, requiring actual availability of proof would in fact create uncertainty and would thus hamper the predictability of the contractual forum. High predictability of the forum is however one of the key requirements of the Brussels I Regulation (rationale 15). Furthermore, the evidence that is actually needed for deciding the case might depend on the development of the facts, case, and procedure. Also, an intermediary who has sold the goods on to a subsequent purchaser may have to take them back from his subsequent customer, so that proximity of proof (e.g. regarding defects) might be re-established at their first destination at any time. According to this view, in variation 2, the courts in London thus have jurisdiction under Art. 7 no. 1 *lit. b*.

3. Résumé

Although it may be surprising at first glance that the ECJ, in para. 61 of its judgment in the *Car Trim* case, arguably seems to require the presence of the goods at the place of performance to open this special jurisdiction, from a procedural point of view, and despite considerable counter-arguments, there are good reasons for such a requirement. Currently, it seems however very hard to find support in legal doctrine for such a requirement.

B. Determining the Place of Performance in the Absence of Relevant Contractual Clauses

In some cases the contract may remain silent with respect to the factual destination of the goods, or with respect to the place where the service shall in fact be provided. The question of how to proceed in these cases was answered by the ECJ in the cases of *Rehder* and *Wood Floor* (for service contracts) and in *Car Trim* (for sales).

In *Wood Floor* the court held that "[f]or a commercial agency contract, that place is the place of the main provision of services by the agent, as it appears from

[113] Against any condition of proximity in the *actual* case in order to open the contract forum, e.g. H. SCHACK (note 3), at 936; S. LEIBLE (note 52), at 305; *idem* (note 1), p. 451, 463; W. HAU (note 1), at 978; for a particularly strong view A. MARKUS, *Tendenzen beim materiellrechtlichen Vertragserfüllungsort im internationalen Zivilverfahrensrecht*, Basel 2009, p. 174 *et seq.*, even though this condition would be fully in line with the requirement of proximity between the contract and the court (diese Voraussetzung "dem Kriterium der Sach- und Beweisnähe optimal gerecht [wird]").

the provisions of the contract or, in the absence of such provisions, the actual performance of that contract or, where it cannot be established on that basis, the place where the agent is domiciled." This should however presuppose that services relevant for the contract were actually provided at the domicile of the travel agent.[114] In *Rehder*, for certain travel contracts, the registered office or the principal place of establishment of the service provider was, on the contrary, held to be irrelevant as a subsidiary connecting factor. The operations and activities undertaken from that place were regarded by the ECJ as mere preparatory acts, irrelevant for the purpose of international jurisdiction.[115]

For sales contracts, according to the judgment in *Car Trim*, "the place where the goods were physically transferred […] to the purchaser at their final destination" is the relevant place of performance.[116] As exposed above, this solution is fully in line with the rationale of this special head of jurisdiction.

However, it may be questioned if this solution also applies in the case that the final destination of the goods is unknown to the seller when the contract is concluded. In this case it may be assumed that the final destination is at the seat of the buyer. But what if this assumption is rebutted? Let us imagine the case that the contract is silent with respect to the destination of the goods, the buyer or his carrier collects them at the seller's place of business and then carries them to a third place, unknown to the seller. From a procedural point of view, it would not make much sense to locate the place of performance in such a situation at the place where the goods are handed over to the purchaser or his carrier; this would systematically lead to a forum at the seller's place of business even though the goods are not present there anymore and potential evidence and proximity between the contract and the court are therefore lacking there. Since the factual destination of the goods is unknown to the seller, a forum there would be unforeseeable for the seller and must therefore also be ruled out.[117] In cases in which the destination of the goods differs from the buyer's seat and is unknown and unforeseeable to the seller, a forum at the place of performance should therefore be ruled out altogether.

C. "Unless Otherwise Agreed": *delendum est*

All that has been said so far applies only "unless otherwise agreed" by the parties. This passage in the text of Art. 7 no. 1 *lit. b* is indeed mysterious. The proposal for

[114] See already G.P. ROMANO (note 3), at 89.

[115] ECJ, 09.07.2009, case C‑204/08, *Peter Rehder v Air Baltic Corporation*, para. 39. One reason for this difference in treatment could possibly be that sales representatives often only operate small businesses and are considered in EU law as worthy of protection, while in the case of travel contracts, it is usually the traveller who is considered being worthy of protection, G.P. ROMANO (note 3), at 86. Also, since the place of departure and of arrival are usually fixed in a travel contract, there will hardly ever be a need for a further, subsidiary connecting factor.

[116] ECJ, *Car Trim* (note 53), at para. 60.

[117] See for the requirement that special heads of jurisdiction shall be foreseeable, recitals 15 and 16 of the recast Brussels I Regulation.

the recast Brussels I Regulation states in this respect that this wording offers the parties an option to explicitly derogate from the pragmatic, factual and economic place of performance in favour of another place.[118]

As we have seen, the parties' contractual arrangements are in the first place relevant for determining the *destination* of the goods sold or the place where the services are in fact provided, i.e. for localizing the factual, economic and hence procedural place of performance. It is true that the wording "unless otherwise agreed" could be understood as opening an option for a contractual agreement between the parties that defines a place of performance that is different from the contractual destination of the goods. If for example, under the contract the destination of the goods, and therefore the procedural place of performance, is Paris, they could "otherwise agree" that the place of performance shall be Milan.[119] – As outlined above,[120] in terms of the rationale of the jurisdiction at the place of performance, it would however be very questionable to rely on such agreements for the purpose of determining the procedural place of performance. Rather, contractual agreements of this kind should be regarded as defining the place of performance under substantive law only. As mentioned above, there would otherwise be a considerable risk of undermining the purpose of the 2001 reform and thwarting the merits of *lit. b*, which consist in opening a forum in proximity to the contract.[121]

A last attempt to give meaning to the phrase "unless otherwise agreed" could be to perceive it as a reference to the possibility for the parties to conclude a choice of jurisdiction agreement under Art. 25 of the recast Brussels I Regulation. This would, however, be trivial and go without saying.[122]

The term "mystery" is thus indeed apt when it comes to understanding the terms "unless otherwise agreed" in Art. 7 no. 1 *Iit. b*. It seems reasonable to suppose that the European legislator simply had the intention to install another safety valve here – given the complexity of this special jurisdiction – without realizing that this runs diametrically against the purpose and the rationale of this head of jurisdiction. *De lege ferenda* the phrase "unless otherwise agreed" should simply be removed[123] (see the proposal below, IX. C.).

---

[118] Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 14.07.1999, COM(1999) 348 final, *OJ* of 28/12/1999 C 376 E , p. 1-17, justification for Art. 5, p. 14.

[119] The ECJ considered such clauses, as seen above, in the context of "under the contract", VI. 2.

[120] VI. C. 2.

[121] VI. C. 2.

[122] P. STONE (note 22), at 85 *et seq.;* S. LEIBLE (note 52), at 305; *idem* (note 1), at 455 *et seq*.; see however T. LYNKER (note 49), at 137, according to him such an interpretation would not be in line with the wording of the provision.

[123] See already S. LEIBLE (note 52), at 305, because of the danger of being misleading; *idem* (note 1), at 456; R. IGNATOVA (note 3), at 307, 318; T. LYNKER (note 49), at 158; firmly and convincingly already D. LEIPOLD (note 99), at 449.

D. Art. 7 Nr. 1 *lit. c*: *delendum est*

As seen above, Art. 7 no. 1 *lit. a* contains a rule determining the place of performance for all types of contracts that do not qualify as sales or service contracts, while *lit. b* defines the place of performance autonomously for sales and for service contracts. *Lit. b* is thus a specific rule taking precedence over *lit. a* for these two types of contracts.[124] This follows already from the general principles of statutory interpretation. It appears therefore as a legislative oddity that *lit. c* once again expressly states that when *lit. b* is not relevant, *lit. a* shall apply.

It was suggested (notably in the Commission's explanatory memorandum to the Brussels I Regulation) to use *lit. c* in situations in which the place of performance of a sales or service contract is located in a third country so that *lit. b* is ultimately inapplicable. *Lit. c* would then allow recourse to the scheme in *lit. a* in order to determine a place of performance in an EU Member State.[125] Some scholars have however argued, most convincingly, that the purpose of Art. 7 no. 1 is not to create an additional jurisdiction, but to make available a forum that is in close proximity to the contractual dispute.[126] This is not achieved if the destination of the goods under the contract is indeed in a third country, but through *lit. a*, a place of performance for the contested contractual obligation is nevertheless localised in a Member State and a forum is made available there, despite lack of evidence and proximity there (i.e. contrary to idea on which *lit. b* is based). Since Art. 7 is only applicable if the defendant is domiciled or established in an EU Member State, the courts of that Member State have international jurisdiction according to Art. 4 para. 1. It is difficult to see why, with a destination outside the EU, a second jurisdiction within the EU should be opened through *lit. a*.[127] *De lege lata*, Art. 7 no. 1 *lit. b* should therefore be read as applying in all cases where the contract is for the sale of goods or the provision of services even if it does not open a forum because the procedural place of performance is not within a Member State. Recourse to *lit. c* would then be excluded.[128]

De lege ferenda lit. c should be removed (see below, IX. C.).[129] Much confusion could hereby be avoided and a legislative oddity be eliminated.

---

[124] Compare the ECJ's judgment of 19.12.2013, case C-9/12, *Corman-Collins SA v La Maison du Whisky SA*, para. 42.

[125] Reasoning in the European Commission's proposal (note 118), justification for Art. 5, p. 14.

[126] T. RAUSCHER (note 6), at 2254, wonach es "nicht darum geht, generell einen zusätzlichen Gerichtsstand zu schaffen, sondern Gewinn an Sachnähe [ist] oberstes Ziel"; P. STONE (note 22), at 86; K. TAKAHASHI, Jurisdiction in matters Relating to contract: Article 5(1) of the Brussels Convention/Regulation, *European Law Review (E.L.Rev.)* 2002, 530, at 540; J. KROPHOLLER/ J. VON HEIN (note 3), at Art. 5 EuGGVO, No. 53.

[127] Or, in the words of P. STONE (note 22), at 86: "it is difficult to see any substantial justification for giving the plaintiff «a second bite at the cherry» in this way."

[128] P. STONE (note 22), at 86.

[129] See also e.g. S. LEIBLE (note 1), at 455 *et seq*. with numerous further references in fn. 39 to authors who also recommend removing *lit. c*.

E. Limiting Jurisdiction at the Place of Performance to Situations Where the Contract Was at Least Partially Performed?

In legal doctrine it has repeatedly been criticized that neither the wording of the former Art. 5 no. 1 nor the present version of Art. 7 no. 1 ultimately ensure that, in a specific case, proof or evidence is available nearby and that proximity between the contract and the court is actually guaranteed. Even under the new Art. 7 no. 1 *lit. b*, jurisdiction would often be opened despite a lack of nearby proof or evidence and contrary to the rationale of this special head of jurisdiction.[130] Some even doubt what the rationale of this head of jurisdiction is at all.

Since the contractual forum and the case law of the ECJ implementing Art. 7 no. 1 are largely based on, and derive their rationale from, a close link between the contract and the court which is called upon to decide the case, and in particular from the proximity of evidence, it is unfortunate and it weighs heavily if this proximity is in fact lacking in many cases. This might be a significant cause, if not the main reason, for much of the discomfort with this special head of jurisdiction.

It should therefore be considered to open jurisdiction at the place of performance only if the party that has to provide the characteristic performance has started fulfilling its obligations, i.e. if the contract was at least partially executed.[131] Only if performance, or its quality, is at issue when a claim is brought can proximity between the contract and the court, and the availability of nearby evidence, be relevant. Following this proposal, the forum at the place of performance would thus not be available if the parties argue about the existence of the contract, its content, or the right of a party to terminate the contract, *before* they have started executing the contract.[132]

---

[130] See e.g. J. HARRIS (note 82), at 522: "One of the weaknesses of Art. 5(1)(b) is that it is capable of regularly pointing to a forum of no significant connection to the claim in question"; S. LEIBLE (note 1), at 458 *et seq.*: the provision in *lit. b* could ultimately not guarantee proximity of proof either; B. GSELL, *IPRax* 2002, 484, 488 *et seq*.; E. LEIN (note 2), at 580 *et seq*.; M. LEHMANN/ A. DUCZEK, Zuständigkeit nach Art. 5 Nr. 1 lit. b EuGGVO – besondere Herausforderungen bei Dienstleistungsverträgen, *IPRax* 2011, 41, at 46 *et seq*.; see already H. SCHACK (note 99), at 335 *et seq*.; *idem* (note 3), at 935 *et seq.*; R. GEIMER, in R. GEIMER/ R. SCHÜTZE, *Europäisches Zivilverfahrensrecht*, München 2010, Art. 5 A.1., No. 6 *et seq*.; L.W. VALLONI, *Der Gerichtsstand des Erfüllungsortes nach Lugano und Brüsseler Übereinkommen*, Zürich 1997, p. 159; R. IGNATOVA (note 3), at 83 *et seq*., 310; G.P. ROMANO (note 3), at 66; M. MÜLLER (note 2), at 289 *et seq*.: in practice, proximity of proof cannot, as a rule, be achieved ("Praktisch ist Sach- und Beweisnähe jedoch im Regelfall bei Vertragsstreitigkeiten nicht zu erreichen"). For the opposite view, see e.g. J. KROPHOLLER/J. VON HEIN (note 3), at Art. 5 EuGGVO, Nos 1, 46.

[131] T. LYNKER (note 49), at 142 *et seq*., 154 *et seq*.; H. SCHACK (note 3), at 940; see also A. BONOMI, in A. BUCHER (ed.), *Commentaire Romand: Loi sur le droit international privé – Convention de Lugano*, Bâle 2011, Art. 5 CL, No. 12 – Critical of such a restriction A. MARKUS (note 113), at 183.

[132] For the view that jurisdiction at the place of performance actually makes no sense in these cases, e.g. G.P. ROMANO (note 3), at 66; M. MÜLLER (note 2), at 290. – In the case of *Effer v Kantner*, 04.03.1982, case 38/81, para. 7, the ECJ held that jurisdiction at the place of performance is also open "to consider the existence of the constituent parts of the

This solution would limit this special head of jurisdiction to cases in which proximity of proof can indeed play a role, and exclude it for situations in which this is typically not the case. It would also avoid difficulties which are associated with determining the place of performance before the parties started to execute the contract, in particular when the contract remains silent with respect to the destination of goods or the place where services shall be provided. In situations in which the parties have started to execute the characteristic performance, on the other hand, and where the performance was accepted at the place where it was executed, the place of performance of the contract is clear and determined, either because the parties have already determined it when concluding the contract, or because this place has been implicitly agreed upon when performance was accepted there.[133] If the parties argue for example about the right of one of the parties to terminate the contract, or about the effectiveness of a contract termination, once they have started executing the contract, nearby proof can actually play a role in the proceedings. The rationale for opening this forum would thus not be the actual but the *potential availability of evidence* at the place of performance.

Last but not least, this solution would be in line with Art. 6 of the Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of August 2000.[134] Art. 6 (Contracts) of the Hague Draft Convention states: "A plaintiff may bring an action in contract in the courts of a State in which – a) in matters relating to the supply of goods, *the goods were supplied in whole or in part*; b) in matters relating to the provision of services, *the services were provided in whole or in part*; […]".[135] The Report of the Special Commission at The Hague accordingly states that "[i]t is therefore necessary, in order for the court seized to have jurisdiction, for a principal obligation *to have been performed*."[136]

To implement this solution, the terms "or should have been delivered" (for contracts of sales) and "or should have been provided" (for contracts for the provision of services) would have to be removed in Art. 7 no. 1 *lit. b* (see the proposal below, IX. C.).

---

contract itself […] If that were not the case, [this head of jurisdiction] would be in danger of being deprived of its legal effect, since it would be accepted that, in order to defeat the rule contained in that provision it is sufficient for one of the parties to claim that the contract does not exist." This danger, however, does not exist if this forum is excluded only for cases in which performance has not even started.

[133] See e.g. G.P. ROMANO (note 3), at 84.

[134] Available at <www.hcch.net/upload/wop/jdgmpd11.pdf>.

[135] Emphasis added.

[136] Report of the Special Commission, drawn up by P. NYGH and F. POCAR, p. 50: "The plaintiff can bring suit before the courts of the State in which the goods were supplied, in whole or in part. It is therefore necessary, in order for the court seized to have jurisdiction, for a principal obligation to have been performed. If that is the case, any action relating to the contract will be admissible, even if it does not bear upon the supply itself, but instead, for instance, on the validity of the contract. The term «in whole or in part» refers both to cases in which the goods were supplied entirely within one country, and cases in which only part was supplied in one country or in different countries."

F. Jurisdiction at the Procedural Place of Performance: A Forum for the Plaintiff?

If the procedural place of performance for all obligations under the contract is located at the destination of the goods or at the place where services are provided, this may lead to a forum of the plaintiff in a number of cases. Some scholars have criticized this outcome as contrary to the principle according to which the applicant has to in principle travel to the defendant (*actor sequitur forum rei*, Art. 4 para. 1 of the recast Brussels I Regulation).[137]

No problem appears in cases where the destination of the goods or the place where services are provided is located in a third country.[138] In theory, these are the cases in which jurisdiction at the place of performance may play its most important role. In practice however, the vast majority of published cases relates to situations in which the parties relied on the forum at the place of performance in order to bring an action at their own seat.[139] In such cases, the starting point is in fact that the claimant has to travel to the defendant, and that a special jurisdiction represents an exception to this principle in need of a *procedural* justification.[140] This supports, first of all, a consistent historical, teleological, and overall a restrictive, interpretation of Art. 7 no. 1. Secondly, this jurisdiction should only be opened in situations in which the necessity of nearby evidence can, at least potentially, be relevant. For this reason it has been suggested above to limit the jurisdiction to cases where the characteristic obligation has been at least partially fulfilled.[141] If the contract has at least partially been executed, there may indeed, at least potentially, be a need for the court for nearby evidence.

If the scope of jurisdiction is limited to such situations, and if cases are ruled out where, typically, no need for nearby evidence exists, then the relationship of rule and exception between the general jurisdiction (Art. 4 para. 1) and the special jurisdiction (Art. 5 no. 1) is maintained.

VIII. Conclusions for the Interpretation of Art. 7 no. 1 *lit. a*: Prospects for an Autonomous Interpretation?

It follows from the above analysis that an autonomous determination of the procedural place of performance in Art. 7 no. 1 is proving increasingly feasible and

[137] See e.g. E. LEIN (note 2), at 581, 584 *et seq*. – See, on the contrary, W. HAU (note 1), at 975, who argues that a *forum actoris* is not to be avoided at any cost and that it is, on the contrary, entirely acceptable insofar as it aims at opening a forum that is in proximity with the dispute between the parties.

[138] See the examples above, VII. A. (variations of the *Custom Made* case).

[139] See the results of the analysis by G. DROZ (note 2), at 355.

[140] See recital 15 of the recast Brussels I Regulation.

[141] Above, E.

that the fog around this head of jurisdiction is gradually clearing. Last but not least it shall be asked whether these findings can also bear fruit in the context of Art. 7 no. 1 *lit. a*.

As illustrated above, for the purpose of *lit. a*, the ECJ still defines the place of performance *lege causae*. In the past, the ECJ used this interpretation not because it was particularly convincing but, given its complexity and the numerous criticisms of this method,[142] purely for lack of a convincing alternative, i.e. because the Court did not see how it could convincingly determine the place of performance autonomously. The interpretation *lege causae* has however never been mandatory for the ECJ and it is not required under the current version of Art. 7 no. 1 either.[143] It is true that, when Art. 7 no. 1 was reformed, the European legislator expected the ECJ to continue applying this method in the context of *lit. a*, but again only because the courts had so far not succeeded in interpreting this provision autonomously. This does not have to remain so.

Should an autonomous interpretation turn out to be practicable for other types of contracts, it may very well be an interesting alternative also in the context of Art. 7 no. 1 *lit. a*.[144] This can be illustrated by the example of contracts on the transfer or the assignment of intellectual property rights: As set out above, in the *Falco* case, the ECJ used art. 7 no. 1 *lit. a* for the purpose of determining the place of performance for a licensing contract.[145] As we have seen above, the obligation to pay the licence fee is regarded, by the *substantive* law of many countries, as an obligation to be performed at the *debtor's* domicile or place of business.[146] However, the courts of the country of the defendant's domicile already have jurisdiction under the general rule in Art. 4 para. 1 of the recast Brussels I Regulation, and no special jurisdiction under Art. 7 no. 1 *lit. a* is then opened for a claim regarding a licensing contract.

If on the other hand, *lit. a* was interpreted autonomously (and benefits be drawn from the current level of understanding and knowledge regarding the autonomous determination of the procedural the place of performance), the outcome would certainly be different. The task would then be to determine a *factual, economic place of performance* of the contract regarding intellectual property rights, which is predictable for the parties and guarantees proximity between the

---

[142] Above, eight reasons for criticism were identified, III. A. 2. a.-h.

[143] ECJ, 23.04.2009, case C-533/07, *Falco Privatstiftung v Gisela Weller-Lindhorst*, para. 51, and above, II. B.

[144] Also in favour of drawing conclusions and benefitting from the experiences with *lit. b* in the context of *lit. a*, e.g. E.-M. BAJONS (note 24), at 64 *et seq*.; H.-W. MICKLITZ/ P. ROTT, Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001, *EuZW* 2001, 325, 329; J. KROPHOLLER/ M. VON HINDEN, *GS Lüderitz*, p. 401, at 409; for an autonomous interpretation of the place of performance well beyond the categories mentioned in *lit. b* also J. VON HEIN (note 1), at 60; J. KROPHOLLER/ J. VON HEIN (note 3), at Art. 5 EuGGVO, No. 31; T. RAUSCHER (note 6), at 2254; contra e.g. M.-R. MCGUIRE, Jurisdiction in cases related to a licence contract under Art. 5 (1) Brussels regulation, *YbPIL* 2009, 453, at 459, 465, 467.

[145] II. A.

[146] References above, II. A.

contract and the court which is called upon to decide the case. Regarding intellectual property rights, licensing contracts etc., this should be the place for which the intellectual property rights or the license have been granted, where they may be registered, and where they are used according to the contract (see below, IX. A.). If the user exceeds his contractual rights, does not pay the agreed royalties, does not provide proper accounts, or violates his contractual obligations in any other way, the courts of that State are best positioned to clarify the facts and to give a judgment.

Should the ECJ switch from an interpretation *lege causae* to an autonomous determination of the procedural place of performance also in the context of Art 7 no. 1 *lit. a*, this could (*de lege lata* already) thus have a considerable effect of the outcome in a given case.

IX. Prospects for the Future

A. Extension of the List in *lit. b*

Should this proposal for an autonomous interpretation of *lit. a* (above, VIII.) be regarded as too daring or far reaching, then it could be considered *de lege ferenda* to add further categories of contracts to the list in *lit. b*, such as contracts for the sale of immovable property, franchise contracts, distribution agreements, and licensing contracts or other contracts regarding intellectual property rights.[147] For the latter, inspiration could be drawn from a proposal made in 2011 by the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP). The CLIP Group suggests in Art. 2:201(2) 1st sent. of its "Principles on Conflict of Laws in Intellectual Property (CLIP-Principles)" the following rule:[148]

> "Section 2: Special jurisdiction
>
> Article 2:201: Matters relating to a contract
>
> […] (2) In disputes concerned with contracts having as their main object the transfer or licence of an intellectual property right, the State where the obligation in question is to be performed shall be […] the State for which the licence is granted or the right is transferred."

This proposal could already be realized under the current text of Art. 7 no. 1 if the ECJ switched from an interpretation *lege causae* to an autonomous interpretation

[147] In favour of adding further categories in *lit. b* e.g. S. LEIBLE (note 1), at 460; U. GRUSIC (note 82), at 340.

[148] European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), *Conflict of Laws in Intellectual Property; the CLIP Principles and Commentary*, Oxford University Press, Oxford 2013, C. HEINZE, Section 2: Special jurisdiction, Article 2:201: Matters relating to a contract, No. 2:201.C01 *et seq*. (p. 61-68). Also available at <www.clip.eu/_www/files/pdf2/Final_Text_1_December_2011.pdf>.

of *lit. a* (see above VIII.). Otherwise, Art. 7 no. 1 *lit. b* of the Brussels I Regulation could be amended accordingly on the occasion of its next revision. The same could be considered for other types of contracts (see the proposal below, IX.).

B. Alternative: Abolition of *lit. a* and Creation of a List of Examples for the Autonomous Determination of the Place of Performance

As set out above in detail, the interpretation of the procedural place of performance *lege causae* raises numerous criticisms and often leads, regarding international jurisdiction, to fortuitous results. The best solution would therefore be to completely abandon the interpretation *lex causae*, to delete the current version of *lit. a)*,[149] to turn the two cases for an autonomous determination of the procedural place of performance in *lit. b* into examples that are used as guidance for further types of contracts, and to add further types of contracts to Art. 7 no. 1, going well beyond contracts for for the sale of goods and for the provision of services.

C. Proposed Rules *de lege ferenda*

Art. 7 no. 1 of the recast Brussels I Regulation could, if reformed along the lines set out above, state, for example:

Article 7
A person domiciled in a Member State may be sued in another Member State:

(1) in matters relating to a contract, in the courts for the place where the party which has to perform the characteristic obligation has performed, under the contract, its contractual obligations fully or in part. The place of performance of the contract is in particular

(a) in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered;

(b) in the case of the provision of services, the place in a Member State where, under the contract, the services were provided;

(c) in the case of a contract of sale having as its subject matter an immovable property, the place in a Member State where the property is situated;

(d) for licensing contracts, the transfer of intellectual property rights or other contracts regarding these rights, the places in a Member State for which the licence or other intellectual property rights were granted or transferred;

[149] Also in favour of deleting *lit. a*: T. RAUSCHER (note 6), at 2254; P.A. NIELSEN, European Contract Jurisdiction in Need of Reform?, in *Liber Fausto Pocar*, 2009, p. 773, at 783 *et seq*.; T. LYNKER (note 49), at 139 *et seq*., 140, 154 *et seq*.; for an entirely autonomous determination of the procedural place of performance *de lege ferenda* also S. LEIBLE (note 52), at 305; *idem* (note 1), at 453 *et seq*., 465.

(e) for a franchise contract, the place in a Member State where the franchisee has his habitual residence and for which the rights were granted;
(f) for distribution agreements, the place in a Member State for which the rights for distribution were granted;
(g) *[add further categories of contracts]*.

X. Résumé

From the above analysis, the following conclusions can be drawn:

1. Special jurisdictions, and in particular the jurisdiction at the place of performance under Art. 7 no. 1 of the recast Brussels I Regulation, are an exception to the general rule according to which the claimant has to bring his action before the courts of the country of the defendant's domicile (Art. 4 para. 1). They need a *procedural* justification, such as the proximity between the contract and the court which is called upon to decide the case, in particular with respect to nearby evidence.

2. The procedural place of performance and the place of performance under substantive law have entirely different rationales. This procedural place of performance under Art. 7 no. 1 therefore should be entirely disconnected from the place of performance as defined by substantive law.

3. In the context of Art. 7 no. 1 *lit. b*, the fog around the jurisdiction at the procedural place of performance is gradually clearing. An autonomous interpretation of the procedural place of performance seems increasingly feasible.

4. For contracts for the sale of goods or the provision of services, the determination of the procedural place of performance under Art. 7 no. 1 *lit. b* is entirely independent from the place of performance as defined by substantive law. The place of performance is determined autonomously and uniformly for the entire contract and for all obligations resulting from the same contract. The procedural place of performance is located at the final destination of the goods "under the contract" (for sales contracts) or the place where services are provided "under the contract" (for service contracts). Where the ECJ implements the disconnection of the procedural place of performance from substantive law consistently, its decisions are convincing (*Car Trim*, *Color Drack, Rehder, Wood Floor*, *Krejci, Corman-Collins*).

5. In situations where the parties have defined a "place of performance" in their contract, the disconnection has not yet been achieved convincingly by the ECJ (such as in the *Electrosteel* case). In these situations, in order to not undermine the rationale of *lit. b*, a significantly more consistent disconnection of the procedural from the substantive place of performance is required. Contractual terms that define a "place of performance" in deviation from the *destination* of

the goods, or from the place where services are in fact provided, shall, in principle, be qualified as relevant only for the purpose of substantive law, and be disregarded for determining the procedural place of performance. Any other solution would seriously impair the rationale of this head of jurisdiction and the purpose of the 2001 reform.

6. In the context of Art. 7 no. 1 *lit. a* of the recast Brussels Regulation, the ECJ still defines the place of performance *lege causae* for contracts other than sales and service contracts. The interpretation *lege causae* however raises numerous criticisms. For the purpose of Art. 7 no. 1 *lit. a*, the procedural place of performance could also be defined autonomously (even *de lege lata*). Here inspiration could be drawn from the principles that are applied in the context of *lit. b.*

7. At least *de lege ferenda* (if not *de lege lata*), the procedural place of performance should be localized for all contractual relationships autonomously at the factual and economic place of performance of the contract. For this purpose, a list of examples could be introduced into Art. 7 no. 1 which go far beyond sales and service contracts (following the example set by Art. 4 of the Rome I Regulation; see the proposal above, IX.).

8. In order to ensure that the jurisdiction at the place of performance is in line with the rationale of this head of jurisdiction, and that this jurisdiction in open only where proximity between the case and the court matters at least potentially, this jurisdiction should *de lege ferenda* be limited to cases in which the characteristic obligation has already, at least partially, been performed.

9. The considerations in the present article are based on the firm conviction that all open questions regarding the interpretation of Art. 7 no. 1 of the recast Brussels I Regulation can adequately (and only) be solved by an autonomous interpretation that consistently takes into consideration the *historical development* of this head of jurisdiction as well as its *purpose and rationale*. When Art. 7 no. 1 is interpreted and applied, the history of this head of jurisdiction and the reasons for the 2001 reform should always be kept in mind.

10. In situations in which a place of performance can, after all, not be determined, the *forum contractus* should remain closed and the claimant be referred to the general jurisdiction under Art. 4 para. 1.