

Reforming Jurisdiction in Contract A Success Story or a Painful Compromise?

One of the cornerstones of EU law is the principle of autonomous interpretation. As the ECJ ruled in the *Linster* case: ‘The need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question.’¹ From this perspective, the definition of specific notions stipulated in EU legislative acts should not depend upon the understanding of the same or similar notions as entailed in the *lex fori*, the law applicable on the merits of the case or any other national law of an EU or third country. In the context of the Brussels I Regulation,² the ECJ³ upholds the validity of this approach by stressing the interest in ensuring the Regulation’s full effect, such that reference should be made principally to its general scheme and objectives.

However, it is largely known that there is always an exception to every rule. One of the most striking cases can be found in the EU rules relating to a court’s jurisdiction in matters of contract. The reason that this exception is so prominent relates to its coverage of one of the most common jurisdictional rules in the field of international trade relations. Furthermore, its very nature seems to contravene the policy objectives underpinning the enactment of the Brussels Convention, namely putting uniform rules in place as well as ensuring transparency and predictability relating to the jurisdiction of national courts. Despite these aims, the ECJ

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¹ Case C-287/98, *State of the Grand Duchy of Luxembourg v B. Linster et al.* [2000] ECR I-6917, para. 43. See also Case 327/82, *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees* [1984] ECR 107, para. 11.

² Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L12 (16.1.2001) 1.

³ Case 189/87, *Athanasios Kalfelis v Banque Schröder, Münchmeyer, Hengst & Co.* [1988] ECR 5565, para 16; Case C-295/95, *Jackie Farrell v James Long* [1997] ECR I-1683, paras 12-3; Case C-269/95, *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-3767, para 12; Case C-440/97, *GIE Groupe Concorde et al. v The Master of the vessel Suhadiwarno Panjan et al.* [1999] ECR I-6307, para 11; Case C-347/08, *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG* [2009] ECR I-8661, para 35. See also Case C-433/01, *Freistaat Bayern v Jan Blijdenstein* [2004] ECR I-981, para 24; Case C-419/11, *Česká spořitelna, a.s. v Gerald Feichter*, unrep., para 25.

recognised in its landmark ruling in *Tessili Italiana*⁴ that the words and legal concepts drawn from civil, commercial and procedural law could be regarded either as having their own independent meaning and, thus, being common to all EU Member States, or as referring to the substantive rules of the law applicable to the merits of the case. The Court concluded that neither of these two options is mutually exclusive.

The following paper discusses the main features of the reform of jurisdictional rules relating to contractual disputes and evaluates the subsequent case law of the ECJ. Starting with an analysis of the former provisions in the Brussels Convention and their shortcomings (*I*), attention is then shifted to the policy *rationale* underpinning the EU Commission's reform plans (*II*). Emphasis is given to ECJ case law on the new rule found in Article 5(1)(b) Brussels I Regulation and, in particular, to the main notions that made judicial intervention necessary (*III*). In light of these findings, the paper analyses the reasoning of the relevant jurisprudence and evaluates the effectiveness of the new regime (*IV*).

The paper does not scrutinise in-depth the *ratione materiae* scope of application of jurisdiction in contract. For the sake of completeness, it is sufficient to note that the concept of 'matters relating to contract' within the meaning of Article 5(1)(a) Brussels I Regulation is, pursuant to the Court,⁵ to be interpreted independently by reference to the Regulation's scheme and purpose, in order to ensure that it is applied uniformly in all Member States. Therefore, the notion at issue cannot be taken to refer to how the legal relationship in question is classified by the relevant national law. Furthermore, it is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.⁶ Therefore, application of the rule under which special jurisdiction is provided for matters relating to a contract presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based.⁷ In contrast, it is settled case-law that the term 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) Brussels I Regulation covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)(a).⁸

⁴ Case 12/76, *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1473, paras 10-1.

⁵ See in particular *Česká spořitelna* (n 3), para 45; Case C-548/12, *Marc Brogitter v Fabrication de Montres Normandes EUURL et al.*, unrep., para 18 and 21. See furthermore Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] ECR I-7357, paras 19-20; Case C-27/02, *Petra Engler v Janus Versand GmbH* [2005] ECR I-481, para 33; Case C-543/10, *Refcomp SpA v Axa Corporate Solutions Assurance SA et al.*, unrep., para 22.

⁶ See also J. von Hein, 'Der europäische Gerichtsstand des Erfüllungsortes (Art. 5 Nr. 1 EuGVVO) bei einem unentgeltlichen Beratungsvertrag' (2013) 33 IPRax 54, 55-6.

⁷ Case C-51/97, *Réunion européenne SA et al. v Spliethoff's Bevrachtingskantoor BV et al.* [1998] ECR I-6511, paras 17-20; *Tacconi* (n 5) paras 22-3; *Engler* (n 5) para 50-1; *Česká spořitelna* (n 5) para 46-7; C-519/12, *OTP Bank Nyilvánosan Működő Részvénytársaság v Hochtief Solution AG*, unrep., paras 23 and 25; Case C-147/12, *ÓFAB, Östergötlands Fastigheter AB v Frank Koot et al.*, unrep., para 33; Case C-375/13, *Harald Kolassa v Barclays Bank plc*, unrep., paras 39 and 41.

⁸ *Kalfelis* (n 3) paras 17-8; Case C-261/90, *Mario Reichert et al. v Dresdner Bank AG* [1992] ECR I-2149, para 16; *Réunion européenne* (n 7) paras 22-4; *Tacconi* (n 5) para 21; *OTP Bank* (n 7) para 26; *Brogitter* (n 5) para 44; *Kolassa* (n 7) para 44.

I Jurisdiction in Contract under the Brussels Convention – The Shortcomings of the Tessili Jurisprudence

Before analysing the new rule on jurisdiction in contract introduced by the Brussels I Regulation, a short analysis of the jurisprudence relating to the former provision seems necessary. The concept of ‘obligation’ entailed therein refers to an obligation which arises under a contract and the non-performance of which is the basis of the action.⁹ The same test applies where the plaintiff has asserted the right to be paid damages or has sought dissolution of the contract on the ground of the wrongful conduct of the other party.¹⁰ If several claims are raised by the same action, such that various obligations are at issue, the principal obligation should be decisive.¹¹ Ancillary obligations are held as inappropriate to determine jurisdiction of the Member State courts pursuant to the maxim *accessorium sequitur principale*.¹² However, this approach does not apply with regard to an obligation consisting of an undertaking not to do something (such as an obligation of exclusivity and non-competition), provided that it is not subject to any geographical limit and is therefore characterised by a multiplicity of places for its performance. For such factual situations, the Court ruled that Article 5(1) Brussels I Regulation is not applicable since the place of performance cannot be determined.¹³ Therefore, jurisdiction is to be established only by application of the general rule of the defendant’s domicile.

Furthermore, the place of performance of the afore-mentioned principal obligation is to be found in accordance with the law governing this obligation, pursuant to the conflict rules of the court before which the proceedings have been brought.¹⁴ As to this aspect, the ECJ¹⁵ recognises that the place of performance depends on the contractual context of the obligations in question and that the contract laws of the Member States have very divergent views as to the place of performance. However, the Court¹⁶ underlines that there is no risk that the law applicable to the determination of the place of performance will vary depending on the court seised, since the conflict rules enabling determination of the law applicable to the contract have been

⁹ Case 14/76, *A. De Bloos SPRL v Société en commandite par actions Bouyer* [1976] ECR 1497, paras 11-5; Case 266/85, *H. Shenavai v K. Kreischer* [1987] ECR 239, para 9; Case C-288/92, *Custom Made Commercial Ltd v Stawa Metallbau GmbH* [1994] ECR I-2913, paras 23-4; Case C-256/00, *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG)* [2002] ECR I-1699, para 44; *Česká spořitelna* (n 3) para 54. Cf. also Case C-533/07, *Falco Privatstiftung et al. v Gisela Weller-Lindhorst* [2009] ECR I-3327, paras 47 *et seq.*

¹⁰ See *De Bloos* (n 9) para 14; *Shenavai* (n 9) para 9; Case C-420/97, *Leathertex Divisione Sintetici SpA v Bodeltex BVBA* [1999] ECR I-6747, para 31.

¹¹ *Shenavai* (n 9) para 19.

¹² See also the case law of the Hellenic civil courts as reported by E. Vassilakakis, ‘Die Anwendung des EuGVÜ und der EuGVO in der griechischen Rechtsprechung’ (2005) 25 IPRax 279, 280.

¹³ *Besix* (n 9) paras 45 *et seq.*

¹⁴ Case 12/76, *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1473, paras 13 and 15; *Custom Made Commercial* (n 9) para 26; *GIE Groupe Concorde* (n 3) paras 19, 29 and 32; *Leathertex* (n 10) para 33; *Besix* (n 9) paras 33 and 36; *Česká spořitelna* (n 3) para 54. Cf. also *Falco Privatstiftung* (n 9) paras 47 *et seq.*; OLG Saarbrücken, Decision of 16.2.2011, (2013) 33 IPRax 74, 78. As to the case law of the Hellenic civil courts see E. Vassilakakis (n 12) pp. 279-280.

¹⁵ *GIE Groupe Concorde* (n 3) para 17.

¹⁶ *GIE Groupe Concorde* (n 3) para 30.

standardised by the Convention of 19 June 1980 on the Law applicable to Contractual Obligations (*Rome I Convention*)¹⁷. According to this instrument, a national court is precluded from hearing the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the applicable conflict rules, one of those obligations is to be performed in the *forum* State and the other in another Member State.¹⁸ However, in the event that the relevant contractual obligation has been, or is to be, performed in a number of places, jurisdiction to hear and determine the case cannot be conferred on a court where any one of those places of performance happens to be located.¹⁹ Accordingly, in a case characterised by a multiplicity of places of performance of the contractual obligation at issue, a single place of performance has to be identified. In principle, this will be the place presenting the closest connection between the dispute and the court having jurisdiction.²⁰

This approach did not preclude an exercise of private autonomy by the parties to the extent that a designation of the place of performance was allowed under the provisions of the applicable national law. Therefore, if the parties to the contract are permitted by the applicable law to specify the place of performance of an obligation, that agreement is sufficient to establish jurisdiction in that place.²¹ However, the ECJ repeatedly underlined that whilst the parties are free to agree on a place of performance for contractual obligations, they are nevertheless not entitled to designate – with the sole aim of specifying the courts having jurisdiction – a place of performance having no real connection with the reality of the contractual relationship at issue.²²

II The Policy Rationale Underpinning the New Rule of Article 5(1) Brussels I Regulation

The reasoning of the court and its persistence in adhering to the *Tessili Italiana* jurisprudence was widely criticised²³ particularly due to the fact that it constituted a *petitio principii*. Furthermore, the Court's reasoning could not ensure the aspired predictability or the implementation of uniform solutions within the EU, since jurisdiction would always remain dependent upon the character of the claim raised as an 'obligation of dispatch'. Therefore, the EU Commission invoked the policy *rationale* underpinning facultative jurisdiction in contract and sought to introduce an alternative connecting factor, based on the model of French law (Article 46 ncp).

¹⁷ OJ L266 (9.10.1980) 1.

¹⁸ *Leathertex* (n 10) para 40.

¹⁹ *Besix* (n 9) para 28.

²⁰ *Besix* (n 9) para 32.

²¹ Case 56/79, *Siegfried Zelger v Sebastiano Salinitri* [1980] ECR 89, para 5; Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] ECR I-911, para 30; *GIE Groupe Concorde* (n 3) para 28; *Česká spořitelna* (n 3) para 55.

²² *MSG* (n 21) paras 31 *et seq.*; *GIE Groupe Concorde* (n 3) para 28; *Česká spořitelna* (n 3) para 56.

²³ See J. Kropholler, *Europäisches Zivilprozessrecht* (8th edn, Verlag Recht und Wirtschaft 2005), Art. 5, paras 23-6; S. Leible, 'Art 5 Brüssel I-VO' in T. Rauscher, *Europäisches Zivilprozessrecht vol. I*, (2nd edn, Sellier 2006), p. 173-4.

In particular, Recital 6 of the Brussels I Regulation explicitly refers to the objective of free movement of judgments in civil and commercial matters, which makes it necessary and appropriate to enact common and uniform rules governing jurisdiction by means of an EU legal instrument that is binding and directly applicable.²⁴ Furthermore, Recital 11 underlines the exceptional character of the provisions establishing special and facultative jurisdiction and, thus, stipulates the need for highly predictable rules. For that reason, only a few exceptions from the principle that jurisdiction is generally based on the defendant's domicile and must always be available on this ground should be allowed. This is only the case in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different connecting factor.²⁵ The latter is based on the recognition of a close link between the court and the action, as well as on the aspiration to facilitate the sound administration of justice. Additionally, it has to be borne in mind that the Brussels I Regulation seeks to strengthen the legal protection of persons established in the EU, by, on the one hand, enabling the plaintiff to identify easily the court in which they may sue and, on the other hand, allowing a generally well-informed defendant to make a reasonable assumption of the court before which they may be sued.²⁶

In light of these acknowledgments, the reform of the rules governing jurisdiction in contract should be based on the *rationale* of enacting rules providing, at least, a higher degree of transparency than that of the previous regime. As the ECJ²⁷ notes, the reason for establishing facultative jurisdiction for contract-related litigation is the objective of proximity, which is substantiated by the existence of a close link between the contract and the court called upon to hear and determine the case. Therefore, the national courts for the place of performance of the obligation in question are presumed to have a close link to the contract.²⁸ In this context, the Commission Proposal²⁹ invokes the policy reason of obviating the need for reference to the private international law rules of the State whose courts are seised. Specific reference is made to the afore-mentioned ECJ ruling in *Tessili*, which is regarded as a shortcoming that has to be remedied. To that end, the place of performance of the obligation underlying the claim raised is to be given an autonomous definition in two specific categories of contracts: the sale of goods and the provision of services.³⁰

²⁴ See also Case C-9/12, *Corman-Collins SA v La Maison du Whisky SA*, unrep., paras 18-19.

²⁵ See also Case C-469/12, *Krejci Lager & Umschlagbetriebs GmbH v Olbrich Transport und Logistik GmbH*, unrep., para 20.

²⁶ See Case C-103/05, *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* [2006] ECR I-6827, paras 24-5; Case C-386/05, *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699, para 20; *Falco Privatstiftung* (n 9) para 22.

²⁷ *Color Drack* (n 26) paras 22-23; Case C-204/08, *Peter Rehder v Air Baltic Corporation* [2009] ECR I-6073, para 32; Case C-19/09, *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] ECR I-2121, para 22; *Falco Privatstiftung* (n 9) para 24; *ÖFAB* (n 7) para 41; *Corman-Collins* (n 24) para 31.

²⁸ See furthermore *Custom Made Commercial* (n 9) paras 14 *et seq.*

²⁹ Proposal of 7.9.1999 for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(1999) 348 final. See, furthermore, Case C-381/08, *Car Trim GmbH v KeySafety Systems Srl* [2010] ECR I-1255, paras 52-53; P. Mankowski, 'Mehrere Lieferorte beim Erfüllungsortgerichtsstand unter Art. 5 Nr. 1 lit. b EuGVVO' (2007) 27 IPRax 404, 405.

³⁰ *Refcomp* (n 5) para 20.

The new rule entailed in Article 5(1)(b) Brussels I Regulation provides, with regard to the sale of goods, for the jurisdiction of the Member State courts where, under the contract, the goods were delivered or should have been delivered. For the provision of services, the courts of the Member State where, under the contract, the services were provided or should have been provided are identified as being competent. In both cases, the rule may be displaced by an explicit agreement on the place of performance.³¹

III The ECJ Case Law on the New Rule

The afore-mentioned policy reasons underpinning the introduction of the rule entailed in Article 5(1)(b) militate in favour of the autonomous interpretation of the notions entailed therein.³² In this context, the ECJ³³ invokes the need to reinforce the primary objective of unifying jurisdictional rules whilst ensuring their predictability. However, this task is combined with a significant amount of uncertainty relating to two specific issues, namely the specification of the scope of the new provision and the interpretation of the enacted connecting factor. Although the first issue constitutes an unavoidable consequence of Article 5(1)(b)'s very nature as *lex specialis*,³⁴ the second set of problems seem to directly contravene the aspirations of the EU Commission. In particular, the principle of party autonomy combined with the rapidly changing modern business environment creates significant problems impeding the achievement of the main aims pursued by the Brussels I Regulation, namely transparency and predictability. Not coincidentally, in the thirteen years following the entry into force of the new rule, the ECJ has not infrequently – in roughly ten cases – has been called on to clarify the new rule and provide guidance for the national courts.³⁵ In this regard, the Court has stressed at least four times³⁶ the fact that the enacted Brussels I Regulation did not include any specific provision as to the issue raised and that, therefore, specific clarifications and guidance for the national courts were required. One could argue, of course, that ten cases are not many, especially when considering the common character of the contracts at issue. However, it has to be borne in mind that well-advised parties include jurisdiction and choice-of-law clauses in their contractual

³¹ See M. Lehmann, A. Duczek, 'Zuständigkeit nach Art. 5 Nr. 1 lit. b EuGVVO – besondere Herausforderungen bei Dienstleistungsverträgen' (2011) 31 IPRax 41, 48-9.

³² See A. Metzger, 'Zum Erfüllungsortgerichtsstand bei Kauf- und Dienstleistungsverträgen gemäß der EuGVVO', (2010) 30 IPRax 420, 421; R. Wagner, 'Die Entscheidung des EuGH zum Gerichtsstand des Erfüllungsorts nach der EuGVVO – unter Berücksichtigung der Rechtssache Rehder' (2010) 30 IPRax 143, 144.

³³ *Color Drack* (n 26) para 24; *Air Baltic Corporation* (n 27) para 33; *Car Trim* (n 29) para 49; *Corman-Collins* (n 24) para 32; *Krejci Lager* (n 25) para 22. Cf. also *Wood Floor* (n 27) para 23; *Falco Privatstiftung* (n 9) para 26.

³⁴ See *Corman-Collins* (n 24) para 42; *Brogstetter* (n 5) para 28; OLG Saarbrücken, Decision of 16.2.2011, (2013) 33 IPRax 74, 77.

³⁵ See, in particular, the cases *Color Drack* (n 26); *Falco Privatstiftung* (n 9); *Air Baltic Corporation* (n 27); *Car Trim* (n 29); *Wood Floor* (n 27); Case C-87/10, *Electrosteel Europe SA v Edil Centro SpA* [2011] ECR I-4987; *Krejci Lager* (n 25); *Corman-Collins* (n 24); Case C-47/14, *Holterman Ferho Exploitatie BV et al. v Friedrich Leopold Freiherr Spies von Bülllesheim*, unrep., paras 55 *et seq.* Cf. also *Brogstetter* (n 5) para 28.

³⁶ See, for instance, the cases *Color Drack* (n 26) para 17; *Falco Privatstiftung* (n 9) para 19; *Car Trim* (n 29) paras 30 and 51.

relations. As such, the room for applying Article 5(1)(b) Brussels I Regulation is limited to the very few cases where the parties have abstained or neglected to insert such clauses.

1 Notion of a ‘Contract for the Sale of Goods’

At the outset, it has to be noted that a contract for sale is not defined in the Brussels I Regulation. This absence creates a significant amount of ambiguity, since it remains debatable whether the parties’ will to transfer the property over goods should be decisive or, instead, the mere exchange or even the mere handing-over of goods for money.³⁷ The ECJ gives consideration to the obligation which characterises the contract under scrutiny.³⁸ Under this approach, the fact that the mere supply of a good has been agreed upon is decisive. Such classification may viably be applied to a long-term commercial relationship between two economic operators, provided that it is limited to successive agreements, each having the object of the delivery and collection of goods. This conclusion is, however, outweighed in the case of a typical distribution agreement, the precise aim of which is to regulate the future supply and provision of goods between two economic operators. In such a contract, specific contractual provisions can be found that relate to the distribution of the goods sold by the grantor.³⁹

Of particular note is the determination of specific criteria in order to distinguish between a sale of goods and the provision of services. In *Car Trim*,⁴⁰ the ECJ had to address hybrid contractual relations involving the supply of goods in situations where the customer has specified certain requirements with regard to the provision, fabrication and delivery of components to be manufactured or produced. Right from the start, the Court notes that the new rule is silent as regards both the definition and the distinguishing features of those two types of contract in the context of a sale of goods simultaneously involving a provision of services. The specificity of the case relied on the fact that the seller was obliged under the contract to manufacture or produce the goods in compliance with certain requirements specified by the buyer, regard being had to the fact that such manufacture or production, or a part thereof, could also be classified as a ‘service’. In this context, the Court gave specific consideration to three specific factors (paras. 35 *et seq.*): (i) the scope of specific EU (such as Directive 1999/44/EC⁴¹ and Directive 2004/18/EC⁴²) or international legislative acts (such as the United Nations Convention on Contracts for the International Sale of Goods, largely known as the ‘CISG’, and the United Nations Convention on the Limitation Period in the International

³⁷ OLG Saarbrücken, Decision of 16.2.2011, (2013) 33 IPRAx 74, 78.

³⁸ *Car Trim* (n 29) para 32; *Corman-Collins* (n 24) para 35.

³⁹ *Corman-Collins* (n 24) para 36.

⁴⁰ Case C-381/08, *Car Trim GmbH v KeySafety Systems Srl* [2010] ECR I-1255.

⁴¹ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L171 (7.7.1999) 12.

⁴² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L134 (30.4.2004) 114. See now Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L94 (28.3.2014) 65.

Sale of Goods) and, in particular, their stance as to contracts for the supply of consumer goods to be manufactured or produced;⁴³ (ii) the origin of the raw materials used for the production of the goods at issue and, specifically, the circumstance whether the purchaser supplied the manufacturer with these materials; and finally (iii) the supplier's liability regime and, in particular, the issue whether they could be held responsible for the quality of the goods and their compliance with the contract.⁴⁴

2 Notion of a 'Contract for the Provision of Services'

Since the Brussels I Regulation does not define the concept of a contract for the provision of services,⁴⁵ the ECJ gives consideration to the obligation which characterises the contract at issue.⁴⁶ Of importance is the fact that the characteristic obligation of the contract at issue consists of the provision of services. Therefore, the Court endorses an understanding of the concept implying, at the least, that the party who provides the service carries out a particular activity in return for remuneration.⁴⁷ The first criterion was elaborated in *Corman-Collins*⁴⁸ as requiring the performance of positive acts, rather than mere omissions. As to the second criterion, namely the remuneration paid as consideration for an activity, the Court underlined that this is not to be understood strictly as the payment of a sum of money. In fact, any kind of commercial advantage could be considered as remuneration provided that it represents an economic value.⁴⁹

In the case of a licence agreement, namely a contract under which the owner of an intellectual property right grants its contractual partner permission to use the right in return for remuneration, the Court explicitly declined to interpret 'services' under the meaning of either Article 50 EC (now Article 57 TFEU) or any secondary EU legislation (such as the EU Directives on value added tax – VAT), other than the Brussels I Regulation.⁵⁰ Based on this reasoning, the Court highlighted the narrow interpretation of the rules on jurisdiction in contract. Of further note was the lack of any activity on the part of the owner of an intellectual property right which could qualify as a service, since they merely undertake to permit the licensee to exploit that right freely. In light of these findings, the ECJ reached the conclusion that a licence agreement

⁴³ See A. Metzger (n 32) pp. 421-2; G. Mongiò Erdelbrock, 'The concept of place of delivery according to Article 5(1)(b) of the Brussels I Regulation in the case of distance selling', (2006) 5/6 EuLF I-228-9.

⁴⁴ A. Metzger (n 32) p. 422.

⁴⁵ See *Falco Privatstiftung* (n 9) para 19. As to the diverging approaches of Member State laws see M.C. Pitton, 'L'article 5, 1, b dans la jurisprudence franco-britannique, ou le droit comparé au secours des compétences spéciales du règlement (CEE) n° 44/2001' (2009) 136 *Clunet* 853, 855-7.

⁴⁶ *Car Trim* (n 40) para 32; *Corman-Collins* (n 24) para 34.

⁴⁷ *Falco Privatstiftung* (n 9) paras 29-32; *Krejci Lager* (n 25) para 26; *Corman-Collins* (n 24) para 37; *Holterman*, (n 35) para 57. See also OLG Saarbrücken, Decision of 16.2.2011 (2013) 33 IPRax 74, 78.

⁴⁸ Case C-9/12, *Corman-Collins SA v La Maison du Whisky SA*, para 38.

⁴⁹ *Corman-Collins* (n 48) para 39-40. See furthermore J. von Hein (n 6) pp. 56-9.

⁵⁰ *Falco Privatstiftung* (n 9) paras 33 *et seq.* See also M. Brinkmann, 'Der Vertragsgerichtsstand bei Klagen aus Lizenzverträgen unter der EuGVVO' (2009) 29 IPRax 487, 489-490; A. Metzger (n 32) p. 420.

does not constitute a contract for the provision of services and, hence, falls under the general rule of Article 5(1)(a) Brussels I Regulation.⁵¹

The Court reached the opposite conclusion with regard to exclusive distribution agreements which have been conceived as framework agreements, that lay down the general rules applicable to future relations between a grantor and a distributor as to their obligations of supply or provision and that prepare subsequent sale agreements.⁵² The activity test was deemed to have been fulfilled, since the characteristic service provided by the distributor is involved in increasing the distribution of the grantor's products. Furthermore, as a result of both the supply guarantee it enjoys under the exclusive distribution agreement and its involvement in the grantor's commercial planning, in particular with respect to marketing operations, the distributor is able to offer clients services and benefits that a mere reseller cannot.⁵³ The remuneration criterion was also filled through the grantor's selection of the distributor. That selection, which is a characteristic element of this type of agreement, confers a competitive advantage on the distributor in that they have the sole right to sell the grantor's products in a particular territory or, at the very least, in that a limited number of distributors enjoy this right. Moreover, the distribution agreement often provides assistance to the distributor in the form of access to advertising, the communication of knowhow by means of training or even payment facilities.⁵⁴

The same has been deemed to apply to contracts concerning the management of a company⁵⁵ or the storage of goods.⁵⁶ In the latter case, the ECJ has held that a predominant element of such contracts is the warehouse keeper's undertaking to store the goods concerned on behalf of the counterparty. Accordingly, such commitment entails a specific activity consisting of, at the least, the reception of goods, their storage in a safe place and their return to the other party in an appropriate state.⁵⁷

3 Place of Delivery of the Goods

As far as the definition of the concepts of 'delivery' and 'place of delivery' is concerned, the ECJ accurately notes that the Brussels I Regulation is silent.⁵⁸ Indeed, a 'pragmatic determination of the place of enforcement' pursuant to the EU Commission aspiration stipulated in its Proposal of 7 September 1999 is deemed to be based on purely factual criteria. For that reason, the Court⁵⁹ elaborates a hierarchy as to the circumstances that have to be deemed decisive in order to identify the place of delivery. Claiming highest importance are the provisions of the contract which have to be understood without reference to the substantive law applicable to

⁵¹ Cf. however P. Mankowski, (2009) 64 JZ 959-960.

⁵² *Corman-Collins* (n 48) para 28.

⁵³ *Corman-Collins* (n 48) para 38.

⁵⁴ *Corman-Collins* (n 48) para 40.

⁵⁵ *Holterman* (n 35) paras 57-8.

⁵⁶ *Krejci Lager* (n 25) paras 24 *et seq.*

⁵⁷ *Krejci Lager* (n 25) para 27.

⁵⁸ *Car Trim* (n 40) para 32.

⁵⁹ *Car Trim* (n 40) paras 54 *et seq.*; *Electrosteel* (n 35) para 16.

the contract. However, this approach does not preclude recourse to usages which – especially if they are collected, explained and published by recognised professional organisations and are widely followed in practice by traders – play an important role in the non-governmental regulation of international trade or commerce. For that reason, national courts must take into account all the relevant terms and clauses in the contract at issue, including, as the case may be, the terms and clauses generally recognised and applied in international commercial usage, such as the Incoterms, in so far as they enable the place of delivery to be clearly identified.⁶⁰ Nevertheless, it has to be ascertained whether the place mentioned in the contract 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.⁶¹ In the absence of such clauses, the ECJ holds, as most consistent with the origins, objectives and scheme of the Brussels I Regulation, the place where the goods were physically transferred or should have been physically transferred to the purchaser at their final destination. This criterion meets both the objective of proximity and the principle aim of a contract for the sale of goods, namely the transfer of those goods from the seller to the purchaser.

However, the most striking and lively debated issue relates to sale of goods contracts providing for several places of delivery.⁶² In its first ruling in *Color Drack*,⁶³ which dealt with several places of delivery located within a single Member State,⁶⁴ the ECJ explicitly argued that the new rule by itself does not enable the referred question to be answered. Although the Court affirmed the applicability of the relevant provisions in such a case, it expressed considerable reservations as to the question whether concurrent jurisdiction could be conferred in favour of all domestic courts for any place where goods were or should have been delivered (para 37). Consequently, the Court did not regard the place where any of the several deliveries has occurred as pivotal, but only the place with the closest connecting factor between the contract and the court having jurisdiction. This closest connecting factor will, as a general rule, be at the place of principal delivery, which must be determined on the basis of economic criteria (para 40).⁶⁵ As the Court⁶⁶ recognised in a later case, the main argument in favour of the economic criteria approach is dependent on distinct and quantifiable economic operations that can be traced to the deliveries of goods to different locations. In case of doubt, each of the places of delivery has a sufficiently close link to the material elements of the dispute and, accordingly, a significant link as regards jurisdiction. In any other case, the plaintiff is entitled to sue the defendant in the court of the place of delivery of their choice (para 42).⁶⁷

⁶⁰ *Electrosteel* (n 35) paras 21-2.

⁶¹ *Electrosteel* (n 35) paras 23-5.

⁶² As to the differentiation between several contracts and several places of delivery under a single contract see P. Mankowski (n 29) p. 405.

⁶³ Case C-386/05, *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699.

⁶⁴ As to the application of the jurisprudence in case of several places of delivery located in several Member States, see P. Mankowski (n 29) pp. 411-2.

⁶⁵ See also *Wood Floor* (n 27) para 31. Cf. also BGH, Decision of 2.3.2006 (2006) 59 NJW 1806-8.

⁶⁶ *Air Baltic Corporation* (n 27) para 42.

⁶⁷ See also *Air Baltic Corporation* (n 27) paras 34-5.

4 Place Where a Service is Rendered

The reasoning of the Court in the afore-mentioned *Color Drack* ruling could be deemed to apply *mutatis mutandis* at least where services are rendered in several places located within a single Member State. Indeed, in *Air Baltic Corporation*⁶⁸ the ECJ ruled that the factors at issue are also valid with regard to contracts for the provision of services, including where such provision is not effected in one single Member State. Therefore, where services are provided at several places in different Member States, a differentiated approach cannot be applied since the determination of exclusive jurisdiction for all claims arising out of such contracts cannot satisfy the objectives of proximity and predictability, which are indeed pursued by the centralisation of jurisdiction in the place of the provision of services.⁶⁹ Therefore, the closest connecting factor between the contract in question and the court having jurisdiction is ascertained as being in the place where, pursuant to the contract under scrutiny, the main provision of services is to be carried out (para 38). This approach necessitates an in-depth analysis of the services whose provision corresponds to the performance of obligations arising from a contract to transport passengers by air. These are the checking-in and boarding of passengers, the on-board reception of those passengers at the place of take-off agreed in the transport contract in question, the departure of the aircraft at the scheduled time, the transport of the passengers and their luggage from the place of departure to the place of arrival, the care of passengers during the flight, and, finally, the disembarkation of the passengers in safe conditions at the place of landing and at the time scheduled in that contract. From that point of view, places where the aircraft may stop over do not have a sufficient link to the essential nature of the services resulting from that contract. Accordingly, the ECJ reached the conclusion that the places of departure and arrival of the aircraft should be decisive, since the words ‘places of departure and arrival’ must be understood as being agreed in the contract of carriage entered into with the sole airline which is the operating carrier (paras 40-1).⁷⁰

This approach not only satisfies both the criterion of proximity and the requirement of predictability, but it is also in line with the hierarchy of factual circumstances that the Court elaborated in the context of identifying the place of delivery of the goods sold. Therefore, the predominance of the contractual terms – including the terms and clauses generally recognised and applied in international commercial usage, such as the Incoterms – is valid with regard to contracts for the provision of services as well. However, the ECJ⁷¹ explicitly recognises the peculiarities of the latter category of contracts and acknowledges that air transport consists, by its very nature, of services provided in an indivisible and identical manner extending from the place of departure to the place of the aircraft’s arrival. For that reason, a part of the service

⁶⁸ *Air Baltic Corporation* (n 27) para 36. See also *Wood Floor* (n 27) para 25.

⁶⁹ See also *Wood Floor* (n 27) para 27.

⁷⁰ See also A. Staudinger, ‘Streitfragen zum Erfüllungsortgerichtsstand im Luftverkehr’ (2010) 30 IPRax 140, 141; R. Wagner (n 32) pp. 146-7.

⁷¹ *Air Baltic Corporation* (n 27) para 42. See furthermore A. Staudinger (n 70) p. 141; R. Wagner (n 32) p. 146.

separate from the principal service that has to be provided in a specific place cannot be distinguished in such types of contract on the basis of economic criteria.

In its subsequent ruling in *Wood Floor*, the Court upheld this reasoning and elaborated on this analysis with reference to the specifics of commercial agency contracts related to the territories of several Member States. The ECJ explicitly acknowledged that the approach followed in its judgment in *Color Drack* should also be applicable *mutatis mutandis* to the present dispute (paras 31-2). Accordingly, the ‘place of performance’ must be understood as the place with the closest connecting factor, which, as a general rule, will be the place of the main provision of services (para 33). In order to reach this conclusion the Court gives particular consideration to the definition of commercial agency embodied in Article 1(2) Directive 86/653/EEC⁷² and emphasises the fact that it is the commercial agent who performs the obligation which characterises that contract and who provides the services for the purposes of Article 5(1)(b) Brussels I Regulation. However, in order to determine the place of the main provision of these services, the ECJ does not invoke the economic criteria entailed in *Color Drack*, instead shifting attention to the provisions of the contract itself.⁷³ Of note is a series of factual circumstances, namely the place where the agent was – pursuant to the terms of the contract – to carry out their work on behalf of the principal, consisting in particular of preparing, negotiating and, where appropriate, concluding the transactions for which they have authority (para 38).

In the absence of such terms or if the contract provides for several places where the services at issue are to be rendered, the Court considers the place where the commercial agent has in fact primarily carried out his activities in the performance of the contract as prevailing, provided that the provision of services in that place is not contrary to the parties’ intentions as described in the contract.⁷⁴ For that purpose, the factual aspects of the case may be taken into consideration, in particular the time spent in those places and the importance of the activities carried out there (para 40).⁷⁵ If the place of the main provision of services cannot be determined on the basis of the provisions of the contract itself nor on its actual performance, the ECJ holds as decisive the commercial agent’s domicile, since that place can always be identified with certainty and is therefore predictable. Noteworthy also is the close link this place has with the dispute, since the agent will in all likelihood provide a substantial part of their services from there (para 42).⁷⁶ Whether this approach is to be deemed valid for other types of contracts for the provision of services remains open.⁷⁷

⁷² Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L382 (31.12.1986) 17.

⁷³ See also *Holterman* (n 35) para 60.

⁷⁴ See, however, the criticism expressed M. Lehmann and A. Duczek (n 31) p. 46.

⁷⁵ Cf. also *Holterman* (n 35) paras 63-5.

⁷⁶ See also P. Mankowski (n 29) p. 409.

⁷⁷ M. Lehmann and A. Duczek (n 31) pp. 44-5.

IV Assessment of the Jurisprudence Considering the New Rule

The aforementioned findings make it clear that the EU legislature has indeed achieved its aim of providing an autonomous definition of the place of enforcement of ‘the obligation in question’ in at least the two most common types of contract. In this context, it has to be emphasised that the pragmatic determination of the place of enforcement applies regardless of the obligation in question, even where this obligation is dependent on the payment of the financial consideration for the contract.⁷⁸ A further advantage of the new rule relates to its wide scope of application, which covers all kind of contractual obligations arising out of the sale of goods or the provision of services, regardless of their very nature as primary or ancillary obligations. Negative obligations, consisting of an undertaking not to do something (such as an obligation of exclusivity and non-competition), are also encompassed by the new rule. In fact, the rule of Article 5(1)(b) Brussels I Regulation and, consequently, the autonomous connecting factor embraces all claims founded on one and the same contract. The same applies where several obligations are raised in a single action. As the ECJ accurately notes: ‘By designating autonomously as ‘the place of performance’ the place where the obligation which characterises the contract is to be performed, the Community legislature sought to centralise at its place of performance jurisdiction over disputes concerning all the contractual obligations and to determine sole jurisdiction for all claims arising out of the contract.’⁷⁹

However, this achievement is also inextricably linked to significant drawbacks that could be deemed to contravene the primary policy motivations of transparency and predictability.⁸⁰ Primarily, two sets of problems can be identified: on the one hand, there exist some inconsistencies as to the reasoning underpinning the definition of the afore-mentioned terms and, on the other hand, a significant amount of ambiguity is present in respect of the specification of the criteria used by the ECJ.

In particular, in *Car Trim* the Court defined the term ‘contract for the sale of goods’ with reference to secondary EU legislation (such as the Directive on the sale of consumer goods and the Directive on public procurement) or international legislative acts (such as the CISG). In contrast, recourse to primary or secondary EU law (respectively, former Article 50 EC, now Article 57 TFEU,⁸¹ and the Directives on VAT) has been rejected in *Falco Privatstiftung*. Although it can be argued that EU legislation on taxation is too specific and, thus, inadequate to allow for conclusions on the allocation of jurisdiction between the Member State courts, it needs to be observed that the Court denied recourse to primary EU law with the argument: ‘The broad logic and scheme of the rules governing jurisdiction laid down by Regulation No 44/2001 require, on the contrary, a narrow interpretation of the rules on special jurisdiction, including the rule contained, in matters relating to a contract, in Article 5(1) of that Regulation,

⁷⁸ G. Mongiò Erdelbrock (n 43) p. I-228. See however the opposite approach for the instance of a provision of services in several places as proposed by M. Lehmann and A. Duczek (n 31) p. 48.

⁷⁹ *Color Drack* (n 63) para. 39. See furthermore *Wood Floor* (n 27) paras 23-4.

⁸⁰ R. Wagner (n 32) p. 144.

⁸¹ J. von Hein (n 6) pp. 56-8.

which derogate from the general principle that jurisdiction is based on the defendant's domicile.⁸² However, the arguments claiming a need to interpret Article 5(1) Brussels I Regulation narrowly contradict the Court's reasoning in *Engler*,⁸³ where it was explicitly held that 'It follows from the foregoing that [...] the concept of "matters relating to contract" referred to in Article 5(1) of the Brussels Convention is not interpreted narrowly by the Court'. In light of these findings, it does not seem convincing to exclude any recourse to notions encompassed in primary EU law when interpreting Article 5(1) Brussels I Regulation.

A further doctrinal inconsistency can be traced in disputes dealing with several places of performance. In this context, the Court has followed the pattern adopted in *Color Drack* and invokes the same hierarchy as to the factual circumstances that have to be taken into account, namely (i) the contractual terms,⁸⁴ and (ii) the place where the goods at issue were physically delivered to the purchaser at their final destination or the place where the services were rendered. In case of doubt, the Court holds economic criteria to be of greatest significance in the sale of goods whereas, with regard to contracts for the provision of services in the form of commercial agency, emphasis is given to the commercial agent's domicile. This differentiating approach⁸⁵ seems peculiar since in both cases the policy reasoning behind the adoption of the stated criterion is apparent, namely the performance of distinct and quantifiable economic operations that can be traced to the deliveries of goods or the provision of services to different locations.

Nonetheless, the Court's reluctance can be justified by the significant amount of ambiguity relating to the specification of economic criteria,⁸⁶ especially when the dispute deals with complex contracts or when recourse to the subjective or objective will of the parties leads to diverging conclusions. These findings could possibly explain the ECJ's caution in avoiding any interpretation extending the scope of the special rule entailed in Article 5(1)(b) and, thus, having an adverse impact on the effectiveness of Article 5(1)(c) and (a) Brussels I Regulation.⁸⁷ Still, the inconsistency emanating from the different treatment of the aforementioned types of contract remains of note, an inconsistency whereby the plaintiff is on one occasion granted an option to choose the competent court and on the other occasion is not.

V Concluding Remarks

In light of these observations, it seems that the aspiration to concentrate all claims emanating from a contract before a single Member State court has yielded a significant amount of ambiguity. Although autonomous interpretation may unquestionably be desirable, it may sometimes result in more complicated problems than the ones that have to be resolved. In fact,

⁸² *Falco Privatstiftung* (n 9) para 37. See also B. Sujecki, (2009) 20 EWS 467.

⁸³ *Engler* (n 5) para 48. Cf. also Case C-180/06, *Renate Ilsinger v Martin Dreschers* [2009] ECR I-3961, para 57; P. Mankowski (n 29) p. 413; A. Metzger (n 32) p. 421.

⁸⁴ Cf. however M. Lehmann and A. Duczek (n 31) p. 43.

⁸⁵ See also M. Lehmann and A. Duczek (n 31) pp. 43-4.

⁸⁶ See P. Mankowski (n 29) 27 IPRax (2007), pp. 409-410; B. Piltz, (2007) 60 NJW1802; B. Sujecki, (2007) 18 EWS 402.

⁸⁷ *Falco Privatstiftung* (n 9) para 43. Cf. however J. von Hein (n 6) p. 58.

the aforementioned concerns are remedied only by the reality that in most cases the contracting parties will include a clause providing for the jurisdiction or, at least, the performance of the characteristic obligation (namely the delivery of the goods or the provision of services). Nonetheless, Article 5(1)(b) has withstood all the criticism⁸⁸ provoked by the frequent uncertainties in its application and has thus remained unaltered in the very recent revision of the Brussels I Regulation.⁸⁹ Therefore, it could be argued that compromises reached at EU level are usually able to stand the test of time even where intervention on the part of lawmakers appears very much needed in order to ensure transparency and legal certainty.

⁸⁸ See M. Lehmann and A. Duczek (n 31) p. 41.

⁸⁹ See Article 7(1) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L351 (20.12.2012) 1.