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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

# International Jurisdiction at the Place of Performance of a Contract in Civil (EU) Law: A Jurisdiction Rule Stuck Between the *Common Law* Perspective and Conflict of Laws Terminology

## Kıta Avrupası (AB) Hukukunda Sözleşmenin İfa Yeri Mahkemesinin Milletlerarası Yetkisi: Common Law Bakış Açısı ile Kanunlar İhtilâfı Terminolojisi Arasında Sıkışmış Bir Yetki Kuralı

**Banu Şit Köşgeroğlu***

**Abstract**
The place of performance rule is characterized by its belonging to the European (civil law) legal system. The rule has preserved its existence as a classic rule from Roman law to the present day regarding which local courts will hear the disputes arising from the contracts. Problems related to the interpretation of the place of performance rule, which is also taken as a basis of international jurisdiction, especially in the practice of European Union (EU) law, have emerged since the 1970s; the EU Court of Justice has held that the rule should point to the most closely connected court under the effect of a common law perspective. The closest connection test, which cannot only be seen as a common law effect, also bears traces of the conflict of laws terminology. In this article, it is found that the place of performance rule does not have the function of indicating the most closely connected court, at least in the context of civil law; on the contrary, the rule should be interpreted from the perspective of legal certainty and predictability.

**Keywords**
International judicial jurisdiction, jurisdiction rule of the place of performance, the closest connection, the most appropriate court, legal certainty and predictability

**Öz**
İfa yeri yetki kuralı özellikle Kıta Avrupası hukuk sistemine aidiyeti ile karakterize olan bir kuraldır. Kural, sözleşmeden doğan uyuşmazlıkların hangi yer mahkemelerince görüleceğine ilişkin olarak Roma hukukundan bugüne klasikleşmiş bir kural olarak varlığını korumuştur. Milletlerarası yetki tesisinde de esas alınan ifa yeri kuralının, özellikle Avrupa Birliği (AB) hukukuna ait uygulamada yorumlanması ile ilgili sorunlar 1970'li yıllardan beri baş göstermiş; AB Adalet Divanı tarafından common law etkisi ile kuralın en yakın ilişkili mahkemeye işaret etmesi gerektiği yönünde değerlendirmeler yapılmıştır. Sadece common law etkisi olarak görülemeyecek olan en yakın ilişki testi, aynı zamanda kanunlar ihtilâfı terminolojisinin izlerini taşımaktadır. Bu çalışmada ifa yeri yetki kuralının en yakın ilişkili mahkemeyi gösterme işlevinin en azından Kıta Avrupası sistemi dikkate alındığında bulunmadığı; aksine kuralın hukukî kesinlik ve öngörülebilirlik perspektifinden yorumlanması gerektiği ortaya konulmaktadır.

**Anahtar Kelimeler**
Milletlerarası yetki, ifa yeri yetki kuralı, en yakın ilişki, en uygun mahkeme, hukukî kesinlik ve öngörülebilirlik

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# International Jurisdiction at the Place of Performance of a Contract in Civil (EU) Law: A Jurisdiction Rule Stuck between the Common Law Perspective and Conflict of Laws Terminology

## Introduction

There is a profound difference between the civil law (European) system's approach to the jurisdiction of the courts and the common law approach to it.[1] When the civil law – common law[2] interaction[3] – is examined regarding the place of performance rule, which is a jurisdiction rule historically belonging to civil law historically, it is seen that a common law wind is effective on this rule within the framework of the *forum (non) conveniens* doctrine. This effect is particularly noteworthy in the interpretation of the rule under the Brussels I Regulation[4] and Brussels I Recast[5] in European Union law and in the Convention of 2 July 2019 *on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*[6] (2019 Judgments Convention). In this article, the civil law - common law distinction is analyzed from the perspective of the place of performance rule and it is demonstrated that the place of performance rule should not be interpreted under the common law as 'the most appropriate court' or 'the most closely connected court' ('the closest connection') approach.

It is also clear that place of performance has also been recognized in the past as a connecting factor in the conflict of laws. The interrelation and at the same time the difference between the place of performance in the conflict of laws and the place of

1 See Ralf Michaels, 'Two Paradigms of Jurisdiction' 27 Michigan Journal of International Law 1003–1027.

2 In this study, the term *common law* is used in the context of jurisdiction, as it encompasses the traditional common law principles adopted in English and United States law. Basically, the effect of the *forum (non) conveniens* principle and the approach of determining the most appropriate court in English law on the interpretation of the place of performance rule of civil law is analyzed.

3 While discussing the impact of the *common law* jurisdictional understanding on the interpretation of the place of performance rule, which is a civil law jurisdictional rule, on the basis of the *forum (non) conveniens* doctrine, it is observed that the civil law jurisdictional principles have also had an impact on the legislative jurisdiction rules in English and US law. The assumed jurisdiction rules, called the English Civil Procedure Rules - CPR, were introduced; Practice Direction 6B Art 3.1 (6) and (7), which are applied by reference to CPR 6.36, include jurisdiction rules for contractual disputes. Of these, Practice Direction 6B Art 3.1(7), the fact that the contract has been breached in England is sufficient for the English courts to have jurisdiction. To the extent that this rule requires consideration of the place of performance, it is close to the place of performance rule in civil law. See Paul Torremans and others, *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 334ff. Adrian Briggs, *Civil Jurisdiction and Judgments* (Informa Law from Routledge) 475ff. Similarly, in US law, under long-arm statutes, the defendant's activities within the scope of the principles of transacting business or causing an effect allows for the establishment of jurisdiction, and some states have adopted more specific jurisdiction rules for contractual disputes. Eg, New York Statute Art 3 para 302 provides that if the place of delivery of the goods or the place of performance of the work is New York, the courts of New York shall have jurisdiction. See the text of New York Statute at https://www.nysenate.gov/legislation/laws/CVP/302. See also Hélène van Lith, *International Jurisdiction and Commercial Litigation* (TMC Asser Press The Hague 2009) 276–288. In this sense, an interaction can be mentioned.

4 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12 (Brussels I Regulation).

5 Council 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 (recast) [2012] OJ L 351/1 (Brussels I Recast).

6 For the full text of the Convention see < https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 > accessed 10 October 2022.

performance as a jurisdictional rule is remarkable. Recently, a return to the place of performance rule in the field of conflict of laws has been advocated.[7] Also it has been argued that the place of performance rule as a rule of jurisdiction can be considered within the framework of the considerations in the field of conflict of laws and that these two may overlap.[8] However, the place of performance as a jurisdictional rule is in fact completely independent from the conflict of laws, both historically and in terms of the purpose and function of the rule. Nevertheless, it should also be noted that the place of performance as a jurisdiction rule has followed a course of development towards the place of performance of the characteristic obligation (not the habitual residence of the performer of the characteristic obligation as in the conflict of laws field) with considerations completely different from the field of conflict of laws.

In this article, in the first part (I), firstly, the roots of the place of performance rule in the civil law system and the necessity to consider the rule in the light of the basic paradigm of the civil law (legal certainty and predictability) are identified. Then the impact of the common law approach of determining 'the most appropriate or most closely connected court' in EU law is discussed.

In the same vein, the place of performance jurisdiction filter under the 2019 Judgments Convention is examined and the common law effect on recognition and enforcement is also pointed out. In the second part (II), firstly, the historical relationship between the place of performance jurisdiction rule and the place of performance rule in the conflict of laws is determined; then the different courses of development of the two categories of rules are revealed and it is demonstrated that the place of performance criterion is evolving towards the place of performance of the characteristic obligation as a jurisdictional rule. This section explains why the place of performance as a jurisdictional rule and the place of performance as a conflict of laws rule do not coincide.

## I. PLACE OF PERFORMANCE RULE IN CIVIL (EU) LAW and COMMON LAW CLOUDS AROUND IT

### A. Roots of Place of Performance As a Ground of Jurisdiction: Its Way to International Jurisdiction

*Justinian's* Code (Code of Justinian 3.13.2) stipulates that the action must be brought to the court where the defendant resided at the time the action was filed or the contract was concluded *(actor sequitur forum rei)*.[9] This rule is based on the understanding

7 See Chukwuma Okoli, *Place of Performance: A Comparative Analysis* (Hart Publishing 2020) 120ff.

8 See Daria Levina, 'Jurisdiction at the Place of Performance of a Contract Revisited: A Case for Theory of Characteristic Performance in EU Civil Procedure' (2022) 18 280ff..

9 See L Wenger, *Institutes of Roman Law of Civil Procedure* (Otis H. Fisk tr, Veritas Press, 1940) 46.

that a case should be filed in a place connected with the case.[10] At that time, with the increase in migration and the expansion of trade, the parties had often separated from the place where the dispute arose, and the need to file a case in a place connected to the dispute arose.[11] Thus, the understanding of the protection of the defendant formed the basis of the jurisdiction rules that stipulate the filing of a lawsuit in a place connected with the lawsuit. Later exceptions to the rule of *actor sequitur forum rei*, namely special jurisdiction rules, were formulated in connection with the place of performance of the contract, the place of tortious act and the property situs.[12] Thus, the place of performance rule constitutes one of the most well-established jurisdictional rules in civil law with a history dating back to Roman law.

In this sense, the place of performance indicates the competent court(s) in relation to the contract. Considering the various civil law countries, the place of performance rule has appeared together with the place of conclusion of the contract in procedural laws and regulations from past to present.[13] However, in time, the place of conclusion of the contract was abandoned and only the place of performance rule was retained.[14] This rule was included in the first European procedural laws[15] as a domestic jurisdiction rule. The place of performance rule became functional as an international jurisdiction rule only after the 1900s. This is because the same (domestic/venue) jurisdiction rules were applied to all kinds of disputes, whether or not they had a foreign element, in the civil law legal systems. In this sense, no distinction was made between disputes with foreign elements and disputes without foreign elements in terms of the determination of the competent courts. However, since the mid-1900s, the establishing jurisdiction for disputes with a foreign element started to be addressed as a separate issue.

10 Friedrich Juenger, 'Judicial Jurisdiction in the United States and in the European Communities: A Comparison' (1984) 82 Michigan Law Review 1195, 1203–1204.

11 Albert A Ehrenzweig, 'The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens' (1956) 65 The Yale Law Journal 289, 297.

12 Ehrenzweig (n 11) 297.

13 Articles 41 and 52 of the Law of 25 March 1876 and Art 624 of Judicial Code in Belgian law; Italian Code of Civil Procedure 1942 (Codice di procedura civile), Art 4 and 20; French Code of Civil Procedure Art 59(3) and 420; German Code of Civil Procedure Art 29. See Report on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters (Jenard Report), [1979] OJ C 59 22-23; See also Peter Mankowski, 'Special Jurisdictions, Article 5', *Brussels I Regulation – European Commentaries on Private International Law* (European Law Publishers 2007) 77, 91.

14 In the view that the approach based on Roman law regarding the jurisdiction of the court where the contract is concluded, ie. where the obligation arises, has lost its effect over time and the place of performance has come to the forefront in determining the competent court, see FC von Savigny, *Private International Law, A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time,* (William Guthrie tr, T. & T. Clark/Stevens & Sons, 1869) 153-154.

15 See, eg, German Code of Civil Procedure 1879 (Zivilprozessordnung) Art 29; Italian Code of Civil Procedure 1942 (Codice di procedura civile), Art 4, Art 20; French Code of Civil Procedure 1806 (Code de procédure civile), Art 59(3). For historical explanations see Sereni Angelo Piero, 'Basic Features of Civil Procedure in Italy: A Comparative Study' (1952) 1 The American Journal of Comparative Law 373; Mauro Cappelletti and Joseph M Perillo, *Civil Procedure in Italy* (Springer Dordrecht 1965) 88; Christof von Dryander, 'Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure' (1982) 16 The International Lawyer 671, 684–685. See also Justin Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions* (Hart Publishing 2002) 124ff.

Indeed, the distinction between domestic and international jurisdiction has been made by German jurists since the middle of the 20th century,[16] and the *Bundesgerichtshof* emphasized the importance of this distinction in a decision rendered in 1965.[17] Today, in German law (in cases which do not fall within the scope of EU Regulations and international agreements containing jurisdictional rules) it is accepted that the jurisdiction rules in the German Civil Procedure Code incorporate both domestic and international jurisdiction. This is referred to as the 'double function of the rules of jurisdiction in terms of venue' *(Doppelfunktionalität)* in German doctrine.[18] Currently, the 'place of performance of the obligation in dispute' rule under Article 29 of the German Code of Civil Procedure is taken as basis both in domestic and international jurisdiction.

Similarly, in French law, the place of performance as a jurisdictional rule dating back to the 1600s.[19] In French law, the distinction between domestic and international jurisdiction is relatively recent. Firstly, in the 1959 *Pelassa* case, the *Cour de cassation* accepted the application of the rules of domestic jurisdiction to disputes of an international character and used the term 'extension' of the domestic jurisdiction rules to disputes of an international character.[20] Today, the place of performance rule (place of delivery of goods and place of provision of services) in Article 46(2) of the French Code of Civil Procedure is taken as basis to establish both domestic and international jurisdiction (in cases not falling within the scope of EU Regulations and international treaties containing jurisdictional rules).

In Swiss law, inter-cantonal jurisdiction rules established international jurisdiction as well.[21] Until 1989, international jurisdiction and conflict of laws issues were handled within the framework of inter-cantonal principles. However, from the 1970s, studies for a separate private international law and international procedural law started[22] and finally the Federal Code on Private International Law *(Bundesgesetz über das Internationale Privatrecht* - IPRG), which is still in force today, was passed in 1989. Thus, it is determined that the international jurisdiction in Swiss law was initially based

16 Arthur Taylor von Mehren and Eckart Gottschalk, *Adjudicatory Authority in Private International Law : A Comparative Study* (Martinus Nijhoff Publishers 2007) 124ff.

17 See BGH NJW 1965, 1665.

18 Abbo Junker, *Internationales Zivilprozessrecht* (5th edn, CH BECK 2020) 68; Eckart Brödermann and Joachim Rosengarten, *Internationales Privat- Und Zivilverfahrensrecht* (8th edn, Vahlen 2019) 187.

19 In 1673, French (commercial) law recognized the principle of the (commercial) creditor bringing an action in the court of the place of payment. Newton (n 15) 129 fn 827; J Roussel, 'Les Clauses Attributives de Compétence' (Doctoral Thesis, Universite de Lille 1933) 75–77.

20 Cass civ (1) 19 October 1959, Bull 416 no 416 344; See Dominique Bureau and Horatia Muir Watt, *Droit International Privé. 1, Partie Générale*, vol 1 (Presses universitaires de France 2007) 130–142; Paul Lagarde and Henri Batiffol, *Droit International Privé*, vol 2 (Librairie générale de droit et de jurisprudence 1983) 448–450, 456. and 456. The practice was later confirmed in the *Scheffel* case. See Cass civ (1) 30 October 1962, Bull no 449.

21 Loi fédérale du 25 juin 1891 sur les rapports de droit civil des citoyens établis ou enséjour (CH); Bundesgesetz vom 25 Juni 1891 betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter (CH). This Act of 1891 contained jurisdictional rules mainly in the field of inheritance and family law. The practice had also developed in the field of contracts and torts through court decisions.

22 Expertenkommission, Bundesgesetz über das internationale Privatrecht (IPR-Gesetz): Gesetzentwurf der Expertenkommission und Begleitbericht 1978 59.

on the principles of domestic (federal) jurisdiction, and relatively recently, international jurisdiction rules were regulated by a separate law. The place of performance rule was also adopted in Swiss law, and while the first text of the IPRG was based on the place of performance of the obligation in dispute[23] with the effect of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention)[24], the rule of the place of performance of the characteristic obligation (Art. 113) was adopted with the amendment made in 2009.[25]

In Italian law, international jurisdiction is separately regulated by the new Private International Law of 31 May 1995. Prior to the entry into force of this law, it is understood that international jurisdiction (pursuant to the place of performance rule) was established in accordance with the rules of domestic jurisdiction (Art. 4(1)(2) of the Code of Civil Procedure). International jurisdiction rules are in Articles 2 to 11 of the new Private International Law. While Article 3(1) of the law introduces a general rule of jurisdiction, Article 3(2) of the law regulates the special jurisdiction with reference to the Brussels Convention. Therefore, in accordance with Article 5(1) of the Brussels Convention, the court of the place of performance of the obligation in dispute has international jurisdiction. Also, the general jurisdiction rule establishes international jurisdiction.[26]

Based on the examples, it is determined that in the civil law system, the place of performance rule was actually adopted as a domestic jurisdiction rule. Over time, the rules of domestic jurisdiction have also functioned as rules of international jurisdiction, or separate rules of international jurisdiction have been introduced, as in Swiss law.

It should be mentioned that, in addition to the domestic jurisdiction rules being the basis for establishing international jurisdiction, cross-border jurisdiction rules were formulated in the 1960s under the umbrella of the European Economic Communities (EEC). In the Brussels Convention, which today has been transformed into Brussels I Recast,[27] uniform rules of jurisdiction were introduced in order to facilitate the recognition and enforcement of court judgments between EEC countries (in order to prevent the establishment of excessive jurisdiction). Among these, Art. 5 (1) includes the rule of 'place of performance of the obligation in dispute'. It is accepted that this rule is based on Art. 29 of the German Code of Civil Procedure, which entered into force in 1879.[28]

23 See 'Switzerland: Statute On Private International Law' (1990) 29 Cambridge University Press 1274.

24 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299, 31/12/1972 0032-0042.

25 See <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en> accessed 22 October 2022.

26 See Legge 31 Maggio 1995 no 218 Riforma del sistema Italiano di diritto internazionale (IT). For the text in English see Andrea Giardina, 'Italy: Law Reforming The Italian System Of Private International Law' 35 International Legal Materials 760, 760–782. As Brussels Convention was replaced by regulations, Brussels I Recast Art 7 is the current provision referred by Italian law.

27 Brussels I Regulation entered into force in 2001 before Brussels I Recast which entered into force in 2015. See fn 4.

28 Newton (n 15) 124-125. See also Jenard Report (n 13) 22.

As can be seen, the place of performance rule, which is a rule of international jurisdiction in national legal systems and is now a rule of cross border jurisdiction in EU law, is based on the place of performance as a domestic jurisdiction rule. It should be noted at this point that the scope of application of the place of performance rule as a rule of international jurisdiction for EU Member States has been narrowed due to the Brussels I Recast. This is because only in cases that are not covered by the Brussels I Recast, the rules of international jurisdiction in their national legal systems are applicable. As for Switzerland, since Switzerland is a party to the Lugano Convention,[29] the Swiss Federal Code on Private International Law Art. 113 will be applicable for cases falling outside the scope of the Lugano Convention.

As a result, it is clear that the place of performance rule has been adopted in the civil law since Roman law. In addition, it is observed that the concept of international jurisdiction is a relatively new concept for civil law; until the 19th century, national laws did not make a distinction in terms of jurisdiction regarding disputes that have a foreign element; each national law determined the jurisdiction of its courts with criteria such as the place of residence of the defendant or place of performance.[30]

## B. Place of Performance Rule: Its Versions in Civil Law and Problems Associated with the Place of Performance Rule in EU Law

Although the place of performance rule is recognized in various national laws, it has actually been subject to different regulations. In this respect, the rule is an evolving rule on which no consensus has been reached.

### 1. Different Versions of the Rule in Civil Law

As pointed out above, although the place of performance rule has a long history, there are different regulations in terms of the obligation to be performed. To summarize briefly,

- German Code of Civil Procedure Art. 29 and Brussels (Lugano) Convention Art. 5(1) - 'place of performance of the obligation in dispute';
- Brussels I Regulation Art. 5(1)(a) and Brussels I Recast Art. 7(1)(a) - 'place of performance of the obligation in dispute'

29 Twenty years after the Brussels Convention, the Lugano Convention, which contains the same provisions as the Brussels Convention, was signed in 1988 between 12 member states of the European Economic Communities (EEC) and 6 member states of the European Free Trade Area (EFTA) (Austria, Finland, Iceland, Norway, Sweden and Switzerland) and entered into force on January 1, 1992. See Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention) [1988] OJ L319/9.

Following the adoption of the Brussels I Regulation in 2001, the Lugano Convention was re-signed in 2007 between the European Communities and three EFTA member states (Iceland, Norway and Switzerland) in line with the provisions of the Regulation and entered into force on January 1, 2010, repealing the 1988 Lugano Convention as of May 1, 2011. See Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [2009] OJ L52/5 (Lugano Convention). The relationship between the Brussels I Recast and the 2007 Lugano Convention is set out in Article 73(1) of the Regulation.

30 eg see Cappelletti and Perillo (n 15) 85ff.

- French Code of Civil Procedure Art. 46(2) - 'place of delivery of goods in contracts of sale and place of provision of service in service contracts';
- Swiss IPRG Art. 113 - 'place of performance of the characteristic obligation';[31]
- Brussels I Regulation Art. 5(1)(b) - 'place of delivery of goods in contracts of sale and place of provision of service in service contracts';
- Brussels I Recast Art. 7(1)(b) - 'place of delivery of goods in contracts of sale and place of provision of service in service contracts'

can be singled out.

As can be seen, basically, a classification can be made considering the obligation in dispute and characteristic obligation with respect to the place of performance rule in jurisdiction law. In Swiss law, the rule of the place of performance of the characteristic obligation is adopted without making a distinction on the basis of contracts.

On the other hand, in French law and in the Brussels I Regulation, the place of performance of the characteristic obligation is autonomously determined for sale and service contracts. In these contracts, the performance based on the place of performance is the characteristic performance. Thus, it is noteworthy that the tendency of taking the characteristic obligation as the basis of jurisdiction has been gaining strength. However, the rule of the place of performance of the obligation in dispute, which originates from German law, has led to intense debates both in German law and in the Brussels regime. In addition, the place of delivery of the goods and place of provision of service rules adopted by the Brussels I Regulation in the Brussels regime also have controversial aspects. In the following sections, these problems, which have become more visible in the Brussels regime, will be pointed out and it will be analyzed how the common law effect is embodied in the place of performance rule.

## 2. Problems Associated with the Place of Performance Rules in EU Law

### a. *Lex Causae* Formula and *Forum Actoris* Problem

The rule of the place of performance of the obligation in dispute in German law has also affected the EU regime;[32] the Brussels and Lugano Conventions are based on the place of performance of the obligation in dispute. This adaptation has been subjected

31 Article 31 of the Swiss Federal Code of Civil Procedure includes the rule of place of performance of the characteristic obligation as a domestic jurisdiction rule.

32 Problems regarding Article 5(1) of the Brussels Convention had previously manifested themselves as a result of the German courts' interpretation of Article 29 of the German Code of Civil Procedure. See Newton (n 15) 126. It is also noted that German court decisions referring to the 'obligation in dispute' date back to the early 1900s and that the distinction between 'independent' and 'secondary' obligations in relation to contractual obligations was also made by the ECJ years later in Case C-14/76 *A. De Bloos, SPRL v Société en commandite par actions Bouyer* [1976] ECR 1497.

to intense criticism. Starting from the 1970s, the main criticism is that the place of performance is determined subject to different *lex causae* and has the potential to designate the court of the plaintiff's own domicile *(forum actoris)*.[33] The ECJ set forth the *lex causae* formula in the *Tessili*[34] decision.[35] Since the place of performance of monetary obligations in various national laws is the place of domicile of the creditor, filing a case in the court of the plaintiff's own domicile *(forum actoris)* has emerged as a problem of international jurisdiction.[36] The *forum actoris* criticism points to the need to prevent exorbitant jurisdiction decisions, which are contrary to the purpose of the Brussels Convention.[37]

The determination of the place of performance of the obligation in dispute according to the *lex causae* is not the only problem caused by the place of performance rule. Some other problems formulated in connection with the determination of the place of performance based on the *lex causae* have been expressed especially from a common law perspective.

### b. Proximity: An Interpretation under Common Law Perspective

In some decisions of the ECJ and in the doctrine, 'the close connection' has been considered to be the specific purpose of the special jurisdiction rules; in this regard, determination of the close, most closely connected[38] or the most appropriate place is considered to be the purpose of the place of performance rule.[39] Accordingly, in the Brussels regime, the claim that the rule of the place of performance of the obligation in dispute in the Brussels regime does not, in all cases, select the court that is close

33 Georges AL Droz, *Compétence Judiciaire et Effets Des Jugements Dans Le Marché Commun (Étude de La Convention de Bruxelles Du 27 Septembre 1968)* (Dalloz 1972) 56ff; Newton (n 15) 125–129.

34 Case C-12/76 *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1491, Opinion of AG Mayras.

35 There have also been subsequent judgments in the same direction. See Case C-288/92 *Custom Made Commercial Ltd v Stawa Metallbau GmbH* [1994] ECR I-2913 (Custom Made Commercial).

36 It is clear that the court designated pursuant to Art 5(1) in respect of monetary obligations will generally be the court of the domicile (place of business) of the claimant or the defendant. In fact, Brussels Convention Art 5(1) is meaningless when coupled with the court of the defendant's domicile; on the other hand, when it gives rise to *forum actoris*, it clearly loses its legitimacy due to excessive jurisdiction. See Newton (n 15) 160; Georges AL Droz, 'Delendum Est Forum Contractus? : (Vingt Ans Après Les Arrêts "De Bloos " et "Tessili" Interprétant l'article 5.1 de La Convention de Bruxelles Du 27 Septembre 1968)' [1997] Recueil Dalloz 351–355.

37 Jonathan Hill, 'Jurisdiction in Matters Relating to a Contract under the Brussels Convention' (1995) 44 The International and Comparative Law Quarterly 591, 595–596.

38 In the *Besix* decision, the ECJ emphasised that the place of performance rule should point at the court which has the closest connection with the case: *'...it appears that Article 5(1) of the Brussels Convention is not apt to apply in a case such as that in the main proceedings, where it is not possible to determine the court having the closest connection with the case...'.* See Case C-256/00 *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG), Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzchmar GmbH & Co. KG (Plafog)* [2002] ECR I-01699 para 48 *(Besix)*.

39 In the ECJ's decisions on the subject, the close connection has been considered to be the specific purpose of the special jurisdiction rules and the determination of the close or most closely connected place has been considered to be the purpose of the place of performance rule. See Case C-266/85 *Hassan Shenavai v Klaus Kreischer* [1987] ECR 251 paras 6-18; *Besix* (n 38) paras 31-32; Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-03699 para 40 *(Color Drack)*; Case C-19/09 *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] ECR I-2161. See also Hill (n 37) 594ff; Arthur Poon, 'Determining the Place of Performance under Article 7(1) of the Brussels I Recast' 70 International & Comparative Law Quarterly 635, 661–662.

or most closely connected to the dispute has been the basis for criticism.[40] However, when the Brussels Convention (and the superseding Regulations) are examined from a purposive point of view, it seems difficult to conclude that the special jurisdiction rules (in this context, the place of performance rule in particular) select the court most closely connected to the dispute.

Indeed, the Report on the Brussels Convention states that *'[a]doption of the special rules of jurisdiction is also justified by the fact that there must be a close connection factor between the dispute and the court with jurisdiction to resolve it'*.[41] Likewise, in the Preamble of the Brussels I Recast (para. 12), it was expressed that '*[i]n addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice'*. 'A close link' is again included as the basis for the special jurisdiction rules; the purpose of the special jurisdiction rules to designate the court with the closest connection is not mentioned. On the contrary, as is clear from the Jenard Report, the rules of special jurisdiction hypothetically indicate the court with a close connection.[42] The main function of the Brussels regime and civil law jurisdiction rules in general, as will be discussed below, is to ensure that the courts with jurisdiction are foreseeable for the parties, especially for defendants. Therefore, special jurisdiction rules, such as the place of performance rule, are not rules to be interpreted on a case-by-case basis. In other words, it is contrary to the nature of the jurisdiction rules in civil law to make an assessment in each case by taking into account whether the place of performance is indeed closely connected to the dispute.

As a matter of fact, the assessments that the place of performance of the obligation in dispute is not closely connected to the dispute in all cases are mostly put forward under the *forum conveniens* doctrine of the common law. The common law perspective has been reflected in the ECJ judgements, especially in the reports submitted by the United Kingdom, formerly one of the member state governments. Accordingly, the ECJ pointed out the need for a close connection or the closest connection in interpreting the place of performance rule.[43] In *Shenavai v Kreischer,* the United Kingdom argued that the purpose of Brussels Convention Art. 5(1) is to give jurisdiction to the court most closely connected with the contract;[44] also referring to the considerations regarding the applicable law under the Rome Convention,[45] *'...it is to be presumed that the contract is most closely connected with the country where the party who is to perform*

40 Hill (n 37) 594ff; Poon (n 39) 639; Briggs (n 3) 32.

41 See Jenard Report (n 13) 22.

42 In *Color Drack* (n 39), the ECJ stated that court is presumed to have a close link to the contract. See *Color Drack* (n 39) para 23.

43 However, it can be said that the ECJ does not have a consistent approach on this issue. In some other decisions, the ECJ has favoured legal certainty and predictability over proximity. See *Custom Made Commercial* (n 35) para 13.

44 Report for the Hearing delivered in Case 266/85 243.

45 1980 Rome Convention on the Applicable Law to Contractual Obligations [1980] OJ C 27 26.1.1998 34-53.

*the obligation which is characteristic of the contract'*.[46] In the same vein, the ECJ in *Shenavai v Kreischer* stated that *'[t]he place in which that obligation is to be performed usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it'*.

Also, the *Besix* decision states that *'...[t]he court of the place where the contractual obligation giving rise to the action is to be performed will normally be the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence'*.

The *common law* influence on ECJ judgements has led to the search for the most closely connected or the most appropriate court. This is because the common law concept of jurisdiction is based on the need to identify the most appropriate court. As will be discussed below, there is a fundamental difference between the civil law and the common law in this respect. In civil law, the competent court is predetermined in accordance with the jurisdiction rules introduced by the legislature. However, the jurisdiction in common law is based on the determination of the most appropriate court on a case-by-case basis. Indeed, in English law, Graveson put forward the proper court theory with the analogy of proper law of the contract.[47] Another common law writer, Hill, referred to Graveson as *'Graveson had argued that English private international law was based on the principles of 'justice' and 'convenience'. In connection with the notion of the proper court, Graveson repeated that the relevant jurisdiction principles 'must be found in the philosophical foundations of private international law, the framework of justice, necessity and convenience'*.[48] It is seen that the search for a proper court and the search for the most appropriate court overlap in common law in the framework of justice, necessity and convenience. The *Spiliada Maritime Corporation v Cansulex Ltd.*[49] decision, which is the basis of the *forum (non) conveniens* doctrine, points out the need to determine the most appropriate court. Accordingly, the *forum (non) conveniens* doctrine enables the appropriate court for the trial to be identified, that is to say *'that with which the action [has] the most real and substantial connection'*.[50] In other words, according to Hill the *'...overriding goal of the forum non conveniens doctrine is to direct litigation to the appropriate forum rather than to an appropriate forum'*.[51] The appropriate court in this sense is the forum

46 Report for the Hearing delivered in Case 266/85 244.

47 Ronald H. Graveson, Comparative Aspects of the General Principles of Private International Law (Volume 109) (Collected Courses of the Hague Academy of International Law 1963) 1.

48 Jonathan Hill, 'The Exercise of Jurisdiction in Private International Law', *Asserting Jurisdiction International and European Legal Perspectives* (Hart Publishing 2003) 41–42.

49 *Spiliada Maritime Corporation v Cansulex Ltd,* [1987] AC 460.

50 Jonathan Hill, 'Jurisdiction in Civil and Commercial Matters: Is There a Third Way?' (2001) 54 Current Legal Problems 439–445.

51 Hill (n 50) 462.

which has the closest connection with the dispute.[52] It has even been proposed to take into account the center of gravity of the dispute in determining the closest connection under Brussels Convention Art.5(1).[53]

On the other hand, Hill pointed out that courts exercise jurisdiction in civil law if they are a connected forum though not necessarily the most closely connected forum.[54] The Brussels regime, in this sense, does not aim to allocate jurisdiction to the most closely connected court.[55] This interpretation is in line with the civil law paradigm. In civil law and in the Brussels regime, it is not the most appropriate or the most closely connected court that is important when establishing the jurisdiction of the courts. On the contrary, what is important is the predetermination of the courts of the place that are presumed to be closely connected under the rules of jurisdiction.

Thus, it is seen that the aim of determining the most convenient or the most closely connected court, which is taken into account in the ECJ decisions, is not an aim to be referred to in the civil law system or the Brussels regime. As a matter of fact, it has been historically established that the doctrine of *forum (non) conveniens* is not suitable for the Brussels regime. This point was emphasized in a report on the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention. According to the report, predictability should be understood as the plaintiff's certainty of the court in which to bring the action and the defendant's predictability of the court in which to follow the case. The plaintiff's time and money should not be wasted because a court considers itself less competent than another one, and the plaintiff's right to determine the court should not be undermined by the *forum (non) conveniens* doctrine.[56]

Despite these findings, as seen above, the ECJ, in its various decisions, has sought to identify the court that is closely connected or the most closely connected court. As will be seen below, determining the most closely connected court has also found its expression in the framework of the fragmentation of jurisdiction under the place of performance rule.

### c. Fragmentation Problem and Common Law Clouds Around Its Solution

Another problem with Brussels Convention Art. 5(1) is related to the problem of multiple obligations in dispute. Although it has been accepted in ECJ decisions[57] that

52 Hill (n 50) 446.

53 Hill (n 50) 598.

54 Hill (n 48) 58.

55 Hill (n 50) 444.

56 Peter Schlosser, 'Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on Its Interpretation by the Court of Justice' (1979) OJ 1979 C 59 97 para 78.

57 See *Shenavai v Kreischer* (n 39) para 19; Case C-420/97 *Leathertex Divisione Sintetici SpA v Bodetex BVBA* [1999] ECR I-6779.

the place of performance of the principal obligation should be used as the basis for jurisdiction in the event of more than one obligation being the subject of dispute, it has been seen that this is not a complete solution. This is because it is possible that the two different obligations breached are of equal weight, or the same obligation may be performed in different countries. In both cases, it is not possible to determine the principal obligation.[58] In this sense, it has been seen that taking the principal obligation as a basis cannot prevent the fragmentation of jurisdiction, and the Brussels I Regulation aims to solve this problem by introducing a different jurisdiction rule at least for sale and service contracts.[59] Regulations laid down state that the obligation in dispute for sale and service contracts is the characteristic obligation.[60] However, as mentioned below, it was observed that the fragmentation problem could not be solved in cases where the place of performance of the characteristic obligation (i.e., places of delivery in sales contracts and places of provision of service in service contracts) is located in more than one country, and this time, the concept of 'principal place of performance'[61] was introduced. This tendency is based on 'the closest connection' approach as seen in the ECJ decisions. Thus, the place of performance rule is once again confronted with the common law perspective.

### aa. Brussels I Regulation Art. 5(1)(b) and Brussels I Recast Art. 7(1)(b)

As seen above, pursuant to Brussels Convention Art. 5(1) of the Brussels Convention, firstly, the *forum actoris* problem was discussed because of the issue of determining the place of performance of the obligation in dispute pursuant to the *lex causae*, and afterwards a solution was sought for the fragmentation problem. The final solution to these problems was brought by the Brussels I Regulation, and the obligation in dispute was designated as the performance of the seller and the performance of the contractor, especially for contracts of sale and service (Brussels Regulation Art. 5(1)(b)).[62]

In addition, the place of performance of the seller and the contractor is also designated autonomously, in order to eliminate the need for a reference to the *lex causae*. Under Brussels I Regulation Art. 5(1)(b), the place of performance of the seller is determined as the place of delivery of the goods and the place of performance of the contractor is determined as the place of provision of service. In this way, the need to refer to the *lex causae* for determination of the place of performance has been

58 In fact, according to Briggs, also a *common law* writer, the logic of the place of performance rule is based on the close connection between the dispute and the court, and if there is no principal obligation, there should be no court to establish jurisdiction over its connection with the dispute. See Briggs (n 3) 227–228.

59 The rule on the place of performance of the obligation in dispute is retained in Brussels I Regulation Art 5(1)(a) for contracts other than contracts of sale and service. Brussels I Recast Art 7(1)(a) retains the same provision.

60 Mankowski (n 13) 136; Andrew Dickinson and Eva Lein, *The Brussels I Regulation Recast* (Oxford University Press 2015) 153.

61 The ECJ has held that the place of performance in a dispute where there is more than one place of delivery of the goods is the place of actual delivery. See *Color Drack* (n 39) paras 40-45.

62 Mankowski (n 13); Dickinson and Lein (n 60) 153.

eliminated. In the same vein, the possibility of multiple obligations being the subject of dispute has been excluded for sale and service contracts. This provision has been retained in Brussels I Recast Art. 7(1)(b). This provision, due to its characterization of the obligation in dispute as the characteristic obligation in contracts of sale and service and its autonomous determination of the place of performance, has remedied to a great extent the problems that arose from Article 5(1) of the Brussels Convention to a great extent. However, this time, the fragmentation problem arises due to the fact that the place of delivery or the place of provision of service is spread over more than one country. In cases where there is more than one place of delivery or place of provision of service, the search for the principal place of performance by determining the predominant place of performance in each dispute evokes exactly the search for *forum conveniens,* which is the prevailing common law approach.

### bb. The 'Principal Place of Performance' and *Forum (Non) Conveniens*

In *Color Drack,*[63] the ECJ determined the 'principal place of delivery' in cases where the place of delivery of the goods is more than one; similarly, in *Wood Floor,*[64] the ECJ determined the 'principal place of performance' in cases where the work is performed in more than one country. It has been stated that the principal place of performance indicates the court most closely connected to the contract, and the most closely connected court is to be determined through a rating between the places of performance.[65] Indeed, the *Color Drack* decision states that *'place of performance must be understood as the place with the closest linking factor between the contract and the court having jurisdiction'*.[66] In the *Wood Floor* decision, it is stated that *'... concerning the provision of services, when there are several places of delivery of the goods the 'place of performance' must be understood as the place with the closest linking factor, which, as a general rule, will be at the place of the main provision of services'*.[67] This statement demonstrates that the place of performance is considered to be the place most closely connected to the contract. Thus, the dominance of the common law understanding of jurisdiction is also felt here.

The principal place of performance is determined on the basis of economic criteria.[68] However, it is not clear which economic criteria will be decisive,[69] and it is accepted that the court will determine whether it is competent or not in the light of the evidence

63 See *Color Drack* (n 39) [40].

64 See *Wood Floor* (n 39) [33].

65 *Color Drack* (n 39) [40].

66 *Wood Floor* (n 39) para 31.

67 *Wood Floor* (n 39) para 33.

68 *Color Drack* (n 39) paras 40-41; *Wood Floor* (n 39) para 31.

69 Dickinson and Lein (n 60) 153–154.

presented in each case.[70] In other words, if the court, within the framework of its discretionary power, reaches the conclusion that another place of performance carries weight, it may decide that it is not competent on the grounds that the principal place of performance is that place. This approach is undoubtedly close to the *forum (non) conveniens* doctrine. This is because, pursuant to the *forum (non) conveniens* doctrine, the court where the case is filed may decide that it does not have jurisdiction on the grounds that another forum more closely connected to the dispute is competent.[71]

## 3. Common Law Influence on the Place of Performance Rule and its Incompatibility with Civil Law

In the civil law system, jurisdiction is established based on predetermined rules. In this respect, the civil law prioritizes the predictability of the competent courts for the parties and thus aims to ensure legal certainty.[72] The most typical examples of hard and fast rules adopted from Roman law are *actor sequitur forum rei*, the general jurisdiction rule, and *forum contractus,* a special jurisdiction rule. These jurisdiction rules are based on the connection with the parties or the dispute. Hard and fast rules refer *ex ante* to the courts of the place closely connected to the parties or the subject matter of the dispute.[73] The court does not investigate whether these local courts are the most closely connected or the most appropriate local court in each dispute. In other words, the court has no discretionary power with respect to the jurisdiction rules.[74] In some of its judgments, the ECJ has also clearly stated that there is no room for discretion in establishing jurisdiction.[75]

In the civil law system, the plaintiff's right to sue is protected at the constitutional level and a balance is maintained by the predictability of the competent courts for the defendant category.[76] Namely, predictability and legal certainty are preserved for the defendant against the guarantee of the plaintiff's right of access to the court.[77] The defendant is in a position to know in advance in which local courts a case can be filed against him. Proximity, in this balance, is an inherent feature of the rules of jurisdiction. It is not the main or specific purpose of the jurisdiction rules. The main purpose is to ensure predictability and legal certainty by designating the rules

70 *Color Drack* (n 39) para 41; *Wood Floor* (n 39) para 40. See also Poon (n 39) 649.

71 *Spiliada Maritime Corporation v Cansulex Ltd* (n 49) 477-478 para (d).

72 Ulrich Magnus, 'Introduction', *Brussels I Regulation* (European Law Publishers 2007) 8; Peter F Schlosser, 'Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems' (1996) 45 Kansas Law Review 9, 19; Michaels (n 1) 1008.

73 Michaels (n 1) 1039; Pietro Franzina, 'Jurisdiction, Contracts and Torts', *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 1032; van Lith (n 3) 317.

74 Magnus (n 72) 8; Brussels Regulation (n 4) para 14; van Lith (n 3) 332; Ralf Michaels and Pietro Franzina, 'Jurisdiction Foundation', *Encyclopedia of Private International Law* (Edward Elgar Publishing) 1045.

75 *Shenavai v Kreischer* (n 39) para 19.

76 Michaels (n 1) 1053–1054.

77 van Lith (n 3) 318–320.

of jurisdiction based on proximity. In other words, a jurisdiction rule is presumed to point to a closely connected court, i.e., jurisdiction rules hypothetically point to closely connected courts.[78] The common law, on the contrary, recognizes the close connection to be tested by the court in each dispute.[79] The rules of jurisdiction, which are presumed to indicate the closely connected court, are not established in advance as a rule.

As a matter of fact, both the civil law and the common law recognize that the appropriate or the most appropriate court should be competent and that the jurisdiction should be established through the close or closest connection.[80] However, what the two legal systems understand from the concept of 'most appropriate court' is essentially different. The civil law envisages that the most appropriate court among the courts of various countries is determined in advance by jurisdiction rules.[81] Since the most appropriate court is predetermined by the legislature, there is no need for the courts to exercise discretion on a case-by-case basis. On the other hand, the common law requires the determination of the most appropriate court in each case, especially considering the defendant.[82] Therefore, it should be taken into consideration that the concepts of close connection and the most appropriate court do not actually mean the same thing in these two systems and that these issues are examined at different levels.[83]

The incompatibility of the common law influence on the place of performance rule of the civil law system should also be considered in the light of these differences. Especially under the Brussels regime, the common law winds affecting the place of performance rule resulted in the interpretation of the place of performance of the obligation in dispute to determine the 'most closely connected court' or the 'most appropriate court'. Moreover, in the Brussels regime, the search for the principal place of performance, in cases where there is more than one place of performance of the characteristic obligation, can be seen as an importation of the doctrine of *forum (non) conveniens,* which does not belong to civil law.

However, as seen above, the purpose of hard and fast jurisdiction rules in civil law is not to determine the most closely connected court, but to indicate the courts of the place that are considered to be closely connected and thus to ensure legal certainty and predictability by determining the competent courts in advance. It is the duty of the legislators to determine the closely connected court, and the rules of jurisdiction in the relevant regulations, based on criteria such as place of performance, indicate the competent courts. In this sense, civil law jurisdiction rules do not give much discretion

78 van Lith (n 3) 325; See also Jenard Report (n 13) 15.

79 Michaels and Franzina (n 74) 1049; van Lith (n 3) 315ff.

80 Jenard Report (n 13) 15; van Lith (n 3) 316.

81 Michaels (n 1) 1043.

82 Michaels (n 1) 1029; Hill (n 48) 57.

83 van Lith (n 3) 311ff; Michaels (n 1) 1027ff.

to the judge. In common law, on the other hand, the close connection underlying the establishment of jurisdiction is examined by the courts and the court determines whether it has jurisdiction in each case under traditional common law standards such as presence or jurisdiction rules designated in related regulations such as English Civil Procedure Rules or American long-arm statutes.[84]

## 4. The Hague Conference on Private International Law and Place of Performance Rule

The differences between the civil law and common law systems are deemed to be responsible for the failure of uniformization of jurisdiction rules to date.[85] However, within the framework of the Hague Conference Jurisdiction Project, the principles of indirect jurisdiction limited to recognition and enforcement are included. *The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (2019 Judgments Convention) should be considered especially as it introduces a jurisdiction filter referring to the place of performance rule. The 2019 Judgments Convention includes the place of performance rule within the scope of the indirect jurisdiction rules; however, it subjects recognition and enforcement to the minimum contact test of United States law. As such, a specific filter has been introduced for judgments relating to contractual obligations, combining the civil law system and the Anglo-American system's approach to specific jurisdiction.

Pursuant to 2019 Judgments Convention Art. 5(1)(g), judgments rendered by the court 'at the place of performance of the obligation in dispute' may be recognized and enforced. This part of the rule reflects the perspective of the civil law system. Nevertheless, the last sentence of this provision demonstrates that the Anglo-American approach is also harmonized. Accordingly, a judgment rendered by the court of the place of performance of the obligation in dispute cannot be recognized and enforced unless the defendant's contractual activities do not constitute a conscious and substantial connection with the country of performance.[86] This gives effect to the US approach that jurisdiction can only be established if there is a meaningful relationship ('minimum contact') between the defendant and the court.[87] Thus, it is stated that a balance has been achieved between the European and the US jurisdiction system.[88]

84 See fn 3.

85 Michaels (n 1) 1009.

86 Article 5(1)(g) of the 2019 Judgments Convention contains the following statement:

*'the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with*

*(i) the agreement of the parties, or*

*(ii) the law applicable to the contract, in the absence of an agreed place of performance,*

*unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;'.*

87 Michiel Poesen, 'Is Specific Jurisdiction Dead and Did We Murder It? An Appraisal of the Brussels Ia Regulation in the Globalizing Context of the HCCH 2019 Judgments Convention' (2021) 26 Uniform Law Review 1, 10.

88 Poesen (n 87) 11.

In addition to the 2019 Judgments Convention, a working group was established in 2021 in the framework of the Hague Conference Jurisdiction Project. This Working Group conducts a study for an international instrument containing jurisdictional rules for parallel and related cases. In the report prepared in February 2022, a parallel provision to the 2019 Judgments Convention was proposed for contractual disputes.[89] Indeed, Article 9(1)(d), within the scope of the draft jurisdiction rules included in the February 2022 Report of the Working Group, aims to harmonize the jurisdiction between the civil law and the Anglo-American system by taking the place of performance rule in the 2019 Judgments Convention for contractual obligations. This draft is open to criticism: First of all, the place of performance rule is reduced to the place of performance of the obligation in dispute and, e.g., the place of performance of the characteristic obligation, which is widely accepted today, is not included. In addition, the fact that the place of performance rule is laid down in such a way that only the court of the place of performance of the obligation in dispute has jurisdiction is actually a result of the predominance of Anglo-American influence in the scope of this work (and in the 2019 Judgments Convention). This is because, in the draft text, before the place of performance rule, jurisdiction rules are introduced, which stipulate that the activities of the defendant leading to the dispute must be directed to the place where the court is located. Accordingly, disputes arising out of a contractual relationship and not related to the performance of an obligation may be brought to court at the place of business, provided that dispute arises out of the activities of the defendant in that place. Thus, it can be said that the tendency to limit the place of performance rule to the place of performance of the obligation in dispute is a concrete indicator of the approach to the Anglo-American system within the Hague Conference.

As a result, it can be said that the place of performance rule has been under the influence of the Anglo-American perspective within the Hague Conference. As it is known, the Hague Conference is a structure open to the participation of various states. The Conference contains elements of civil law and common law together. Within the scope of the Jurisdiction Project, the place of performance rule alone was not deemed sufficient both in terms of recognition - enforcement and as a direct jurisdiction rule. Accordingly, the requirement that the defendant must have directed the relevant activities to the place of performance was added to this rule. Such a provision may be deemed appropriate for common law countries to become parties to the 2019 Judgments Convention. However, limiting the function of the place of performance rule only to disputes regarding contractual obligations in an international instrument that is planned to introduce direct jurisdiction rules is not in accordance with the history and function of the rule in civil law. In this way, the introduction of an additional criterion

89 'Report of the Working Group on Jurisdiction' (Hague Conference on Private International Law) Prel Doc No 7 of February 2022.Annex I 5 para 13 <https://assets.hcch.net/docs/d05583b3-ec71-4a5b-829c-103a834173bf.pdf> accessed 30 October 2022.

that brings the place of performance rule closer to the Anglo-American system and the jurisdiction of the courts of the defendant's place of business for disputes that are not related to the performance of an obligation may lead to undesirable consequences such as the fragmentation of jurisdiction for contractual disputes. Civil law principles of jurisdiction and common law or Anglo-American principles of jurisdiction are consistent in themselves; however, combining the elements of these two systems in the place of performance rule may lead to the emergence of new problems that cannot be foreseen today.

## II. PLACE OF PERFORMANCE RULE and CONFLICT OF LAWS TERMINOLOGY

### A. Place of Performance: Jurisdictional Foundations of the Seat Theory in Conflict of Laws

As seen above, jurisdiction rule of the place of performance dates back to Roman law, and the jurisdiction of courts has been considered to be a matter of domestic law for centuries. A historical point of view reveals that the issue of jurisdiction was not subject to serious discussions in Roman law. The main argument was the issue of which of the laws of different city-states, i.e., statutes, should be applied in cross-border disputes, and the solution to this was largely based on the nature of the statutes at that time.[90] In fact, some of the classical principles that have survived until today were put forward during the period of the statutist theory. For instance, the principles that the form is subject to *lex loci actus*; *lex fori* governs the conduct of the proceedings; the law of the place where the contract was concluded for disputes arising at the time of the conclusion of the contract, and the law of the place of performance for problems arising later, such as non-performance or delay in performance, were formulated in this period.[91] In the same period, within the scope of the *lex fori* principle, the courts dealt with the disputes falling within their jurisdiction according to their own law; in this sense, jurisdiction was not a matter of dispute. Namely, local courts were considered competent for disputes that were somehow related to their territorial jurisdiction.[92] It is also observed that foreigners may come within the jurisdiction of the courts by transferring their residence to the place where the court is located or paying taxes in this place.[93] However, it is understood that the establishment of jurisdiction was

90 Alberto-Horst Neidhart, 'The Transformation of European Private International Law, A Genealogy of the Family Anomaly' (Unpublished Doctoral Thesis, European University Institute 2018) 83. <https://cadmus.eui.eu/bitstream/handle/1814/60158/Neidhardt_2018-_LAW.pdf> accessed 30 October 2022. See also Hessel E Yntema, 'The Historic Bases of Private International Law' 2 The American Journal of Comparative Law 297, 303–304.

91 Similarly, lex rei sitae for the questions arising out of things, lex loci delicti for tortious acts or personal law for matters relating to personal status, belong to this period. Yntema (n 90) 304.

92 See Neidhart (n 90) 84 fn 128.

93 In fact, it is seen that in this way, individuals became the subjects of that city-state and therefore courts became competent. See Neidhardt (n 90) 84 fn 129 cited in: Breve del Consiglio di Genova 1143, Statuto di Nizza 1162. See Giuseppe Saggio, *Saggio Sulla Storia Del Diritto Internazionale Privato* (G Pellas 1873) 80.

largely arbitrary. In other words, in this period, the main issue discussed in cross-border disputes was how these disputes would be resolved, rather than which courts would hear these disputes, and the statutist theory tried to solve this problem based on the nature of the statutes.

In the 19th century, the classical period started with Savigny who, with a different theoretical approach, tried to determine the most appropriate law based on the nature of legal relations and for this purpose, he introduced the concept of seat - the place where legal relations are localized. Savigny himself stated that it is difficult to determine the place of localization of contractual relations due to the abstract character of obligations, the fact that contractual obligations involve at least two persons and generally show reciprocity.[94] However, Savigny concluded that the obligations are localized at the place of performance taking some factors into consideration. He attributed a special importance to the fact that the place of performance has determined the court for contracts since Roman law[95] and stated that the competent court that coincides with the place of performance of the obligation reflects the will of the parties (voluntary submission). According to Savigny, the considerations that justify the competence of the court of the place of performance with an understanding dating back to Roman law are also valid for the application of the place of performance law.[96]

As can be seen, the place of performance has served as a criterion determining the competent court; and with the development of the conflict of laws methodology, it has been used in the field of conflict of laws to determine the place where the obligation is localized. In this sense, the place of performance connecting factor in conflict of laws has become independent from the place of performance, which is the criterion of jurisdiction, and has developed as a connecting factor indicating the place where the obligations are localized.[97] In German law, in line with Savigny's opinion, it is accepted that every obligation to be performed in different countries is subject to the law of the country where it is to be performed.[98] Similarly, in English law, the place of performance is one of the factors taken into consideration in determining the most closely connected law, if the parties have not made a choice of law.[99]

94 Savigny (n 14) 149-150.

95 Savigny (n 14) 150. It should be noted that before Savigny, Story considered the place of performance in determining the law applicable to the contract. However, Story stated that the contract is primarily governed by the law of the place of its formation; if this place is different from the place of performance, the law of the place of performance may be taken into account as an element indicating the will of the parties. Savigny, on the other hand, stated that the application of the law of the place of performance is in accordance with the expectations of the parties in cases where the parties have not made a choice of law. See Okoli (n 7) 22-23.

96 Savigny (n 14) 175-176.

97 At this point, Savigny argues that the jurisdiction of the court of the place of performance as the court of special jurisdiction continues as well as the jurisdiction of the court of the defendant's domicile as the court of general jurisdiction; the plaintiff has a choice to file a case in one of these two courts; however, he cannot make such a choice regarding the applicable law and the law of the place of performance should be applied in any case. See Savigny (n 14) 176.

98 See Okoli (n 7) 24-25.

99 See Okoli (n 7) 23-24.

The place of performance has also been a problematic connecting factor in conflict of laws as it requires to designate the place of performance under substantive rules. In order to find a solution, first the place of performance of the characteristic obligation, and then the connecting factors such as the place of business and habitual residence of the debtor of the characteristic obligation were used as a basis. In this sense, it can be said that place of performance in the field of conflict of laws has evolved towards the contacts based on the characteristic obligation and the performer of the characteristic obligation.[100] The place of performance in establishing the jurisdiction, on the other hand, has maintained its existence in national procedural laws, apart from the considerations regarding the determination of the applicable law.

Thus, it is seen from a historical point of view that the use of the place of performance in determining both the competent court and the applicable law does not arise from a necessary connection.[101] As a matter of fact, conflict of laws rules and international jurisdiction rules do not necessarily interact, and the functions of these two fields are quite different. However, it is clear that the place of performance was fundamentally determinant in establishing jurisdiction long before the development of the conflict of laws methodology and was taken as a basis by Savigny in designating the place where the obligations are localized.

Savigny's methodology is based on the determination of the law applicable to each legal relationship based on the seat of that legal relationship. The place where legal relations are localized has been subject to different classifications by various authors over time and the need to determine the law with which the legal relationship is most closely connected has been emphasized by terms such as the most closely connected law, the most appropriate law, the center of gravity, etc. For instance, Westlake used the term 'closest and most real connection' under the influence of Savigny, while Dicey used the term 'proper law'.[102]

### B. Conflict of Laws Perspective: The Closest Connection

As seen above, especially in ECJ decisions, determining the most appropriate court or the most closely connected court is considered to be the specific purpose of the special jurisdiction rules. It is clear that notions of 'most appropriate' or 'most closely connected' reflect the common law understanding of jurisdiction.

It should also be noted that these notions are mainly used in the conflict of laws methodology. Indeed, Savigny's concept of 'seat' has given rise to the 'closest connection' approach and the 'proper law' doctrine or the 'center of gravity' approach

100 Okoli (n 7) 25-27.

101 See von Mehren (n 16) 127-129.

102 See Okoli (n 7) 23 fn 7: John Westlake, *A Treatise on Private International Law* (6th edn, Sweet and Maxwell 1922) 227–231; Okoli (n 7) 23 fn 9: AV Dicey, *Conflict of Laws* (2nd edn, Sweet and Maxwell 1908) Rule 146 529–556.

have been developed in determining the most closely connected law.[103] In the field of conflict of laws, the aim is to determine the most closely connected or most appropriate law by taking into account the characteristics of legal relations. However, the function of the closest connection in conflict of laws and the function of the closest connection in jurisdiction law are completely different. Conflict of laws aims to designate the law[104] of the most closely connected (country) and the closest connection refers to the closest connection with the legal relationship. In the field of jurisdiction on the other hand, determining the court most closely connected to the legal relationship is not a direct objective. It is possible to establish jurisdiction for the courts that are closely connected to the parties or to the subject matter of the dispute, as in special jurisdiction rules.

Moreover, since the most closely connected law in conflict of laws should be determined to be a specific national law, the meaning of 'the most closely connected' notion is compatible with its purpose. On the other hand, 'the closest connection' in the law of jurisdiction is incompatible with the meaning of this concept because it is possible that there may be more than one closely connected court and accordingly more than one competent court. This result demonstrates that the concept that should be taken as a basis in jurisdiction law is not 'the closest connection', but the concept of 'a close connection'.

Thus, it should be taken into account that the jurisdiction rules and conflict of laws rules have different objectives; although it is sometimes argued that these two may overlap, it should be taken into consideration that jurisdiction rules may establish jurisdiction for more than one court; in this respect, they indicate closely connected courts; whereas the conflict of laws rules indicate the most closely connected law, i.e., the law of a particular country, to be applied.

The transformation of the place of performance rule in the field of conflict of laws over the last century supports this conclusion. In determining the applicable law, especially in civil law, the place of performance rule first evolved into the place of performance of the characteristic obligation and then into the habitual residence - place of business of the characteristic performer.[105] In other words, the conflict of laws rules, which claim to determine the most closely connected law, have departed from the place of performance rule over time and followed a course based on the characteristic performer.[106] On the other hand, the place of performance rule in jurisdiction law has

103 Volker Triebel, 'The Choice of Law in Commercial Relations: A German Perspective' (1988) 37 The International and Comparative Law Quarterly 935, 942ff; Peter Hay, 'Reflections on Conflict-of-Laws Methodology' (1981) 32 Hastings Law Journal 1644, 1669–1670; Okoli (n 7) 24–31. For a detailed analysis of close connection approach in contractual obligations in conflict of laws see Gülin Güngör, *Temel Milletlerarası Özel Hukuk Metinlerinin Sözleşmeden Doğan Borç İlişkilerine Uygulanacak Hukuk Konusunda Yakınlık Yaklaşımı* (Yetkin Hukuk Yayınları 2004).

104 For the distinction between the law of the most closely connected country or the most closely connected law, see Güngör (n 103) 98-99.

105 Okoli (n 7) 26ff; Güngör (n 103) 83ff.

106 Okoli (n 7) 26ff; Güngör (n 103) 83ff.

remained both as domestic and international or cross-border jurisdiction rules. Even in jurisdiction law, due to the fragmentation problems arising on the basis of performance, the place of performance of the characteristic obligation has gained weight; however, the court of the habitual residence or place of business of the characteristic performer has not been adopted.

## III. Conclusion

In the interpretation of the place of performance jurisdiction rule, the doctrine of *forum (non) conveniens* and the understanding that the court most closely connected to the dispute is competent is particularly noteworthy in the Brussels regime. The common law understanding of jurisdiction has given rise to criticisms that the place of performance of the obligation in dispute (and even the place of performance of the characteristic obligation) is not in all cases closely connected to the dispute, and it has been argued that the place of performance rule should establish jurisdiction on the basis of closest connection. With this understanding, again in the Brussels regime, the tendency has emerged to determine the court of the place of performance as the most closely connected court in cases where the place of performance of the characteristic obligation is spread over more than one country in contracts of sale and service. When this approach is taken as a whole, it is found contrary to the understanding of jurisdiction in the civil law system. This is because the civil law understanding of jurisdiction is based on the *a priori* determination of closely connected courts with hard and fast rules within the framework of legal certainty and predictability. In this system, the courts do not establish jurisdiction by exercising discretionary power as in the common law system. Therefore, it is not compatible with the basic structure of the civil law system to investigate whether the place of performance rule points to the most closely connected court through interpretation. As a matter of fact, in a recent decision of the Swiss Federal Court, in cases where there is more than one place of performance of the characteristic obligation, the jurisdiction of each place of performance court is established; in other words, the Swiss Federal Court did not investigate the principal place of performance of the characteristic obligation in order to determine the most closely connected court.[107] In this decision, the Swiss Federal Court expressly stated that the test of the closest connection, which is taken as a basis in determining the applicable law, cannot be applied in the field of jurisdiction. Based on this, subjecting the place of performance rule of civil law to the closest connection test should also be questioned in relation to the 'closest connection' test of the conflict of laws. This is because the closest connection test, which serves the purpose of determining the

107 Swiss Federal Supreme Court 13 March 2019, 4A_444/2018. For an evaluation on the decision see Valentina Hirsiger-Meierand Lukas Innerebner 'Swiss Federal Court: A contract with several characteristic performances can be enforced at each place of characteristic performance' (Global Litigation News by Baker Mckenzie 3 June 2019) <https://globallitigationnews.bakermckenzie.com/2019/06/03/swiss-federal-court-a-contract-with-several-characteristic-performances-can-be-enforced-at-each-place-of-characteristic-performance/> accessed 1 Novem-ber 2022.

most closely connected law in conflict of laws, is *de facto* imported to the field of jurisdiction in the Brussels regime. However, the development, origin, purpose and function of the conflict of laws and jurisdiction law are different. Therefore, it does not seem possible to address the place of performance in a way that overlaps in the fields of conflict of laws and procedural law, nor is it appropriate to take the concept of the closest connection as a basis for the interpretation of the place of performance jurisdiction rule.

In terms of the place of performance jurisdiction rule, the rule should be interpreted in a way to serve legal certainty and predictability. The rule of the place of performance of the obligation in dispute or the place of performance of the characteristic obligation should not be interpreted for the purpose of determining the court most closely connected to the dispute. What is important is that the competent courts should be foreseeable, especially for the defendant. Otherwise, it is unrealistic to expect the courts to determine in each and every dispute whether they are indeed the court of the most closely connected place. As a matter of fact, in the Brussels regime, the rule of place of performance of the characteristic obligation for sale and service contracts was introduced in order to find a solution to the problem of fragmentation based on performance. Thus, the EU legislature recognizes that the place of performance of the characteristic obligation determines the competent court for any dispute arising out of the contract. In other words, the EU legislator has, in fact, regulated in line with legal certainty and predictability in solving the problems related to the place of performance rule. It is confirmed that it is not necessary for the place of performance rule to point to the closely connected court for each dispute. This is because contractual disputes may not always be related to the performance of obligations; e.g., the court of the place of performance of the characteristic obligation is also competent for a case regarding the invalidity of the contract. Therefore, it should be accepted that the place of performance jurisdiction rule hypothetically points to closely connected courts; the rule should not be attributed the function of indicating the most closely connected court.

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