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Performance of Characteristic Obligation in Multiple Places under Brussels I Recast Article 7(1)(b): Legal Certainty and Predictability over "a Close Connection"

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Abstract

This article offers a critique of the teleological interpretation of the provision of Art. 7(1)(b) of the Brussels I Regulation Recast, adopted by the Court of Justice of the European Union, in relation to the cases where there are several places of performance. First, the nature of the jurisdiction rules in civil law is discussed and the main purpose of the special jurisdiction rules is identified. In this context, it is emphasized that legal certainty and predictability are the main objectives of the jurisdiction rules, while proximity is an instrument to achieve these main objectives. Secondly, the "principal place of performance" approach of the Court of Justice of the European Union regarding the provision of Art. 7(1)(b), in cases where there are several places of performance, is discussed. It is demonstrated that the Court of Justice of the European Union's quest for the "closest link" is not in accordance with the spirit of the Recast. Aside from the difficulty of determining the principal place of performance; the search for the closest link being the basis of the determination of the principal place of performance is criticized. Additionally, this approach is remarkable as to how it is close to the application of *"forum (non) conveniens"* in *common law*. As a result, it is proposed to abandon the "principal place of performance" approach in cases where the place of performance is located in several Member States; and it is argued that it is necessary to recognize that the courts of several places of performance are competent.

Keywords

Private International Law, International Procedural Law, International Jurisdiction, Place of Performance, Brussels I Regulation Recast, Article 7(1).

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Introduction

The main purpose of the special jurisdiction rules in the Brussels I Regulation Recast (Recast)[1] is to build a system of jurisdiction which ensures legal certainty and predictability. It is assumed that the requirement of close connection is met by criteria used in these rules such as place of performance or *forum delicti*. In this direction, teleological interpretation requires that the competent court is predictable in terms of Art. 7(1), just as other jurisdiction rules in the Recast. Art. 7(1)(b) is developed with Art. 5(1)(b) of the Brussels I Regulation[2] as a result of the problems caused by the provision of Art. 5(1) of the Brussels Convention[3], and the criticisms leveled at this provision point to two fundamental developments: Firstly, the obligation in dispute is narrowed down to the characteristic obligation for certain types of contracts and thus, the issue of fragmentation based on several obligations that are the subject of the dispute is solved. Secondly, in determining the place of performance of the obligation, the method of applying the law applicable to the contract has been abandoned, and instead, determining the place of performance based on facts in an autonomous manner is adopted. However, it is seen that, especially in cases where there are places of performance in several Member States for a characteristic obligation, the approach of the Court of Justice of the European Union (CJEU) in relation to the rule of the place of performance in Art. 7(1)(b) contradicts the teleological interpretation and tends toward an evaluation of *forum conveniens*. In the decisions of the CJEU, the approach that if there are several places of performance for a characteristic obligation, one of these places should be identified under the name "principal or main place of performance", is put forth. In *Color Drack GmbH v. Lexx International Vertriebs GmbH,*[4] regarding a dispute related to a sales contract, the phrase "principal place of performance"; then, in a dispute related to a service contract, the search for "main place of performance", were expressed. Thus, in cases where the performance of the characteristic obligation is dispersed in several Member States, for each specific dispute, the court(s) to which the case is filed, should determine where the place of the predominant performance for the characteristic obligation is located. This approach needs to be examined from various angles.

First of all, the rule of the place of performance of the characteristic obligation is designed to point to a single place and contributes to predictability with this feature.

In addition, the jurisdiction rules in the civil law system in general and in the Recast are the rules that are already assumed to indicate the court of proximity. As a

1 Council Regulation (EU) 1215/2012 on jurisdiction and the recognition of judgments in civil and commercial matters [2012] OJ L351/1.

2 Council Regulation (EC) 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters [2001] OJ L012/1.

3 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32.

4 Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-03699.

matter of fact, when the Preamble of the Recast is analyzed in paragraphs 15 and 16, the presence of a close relationship between the dispute and the court is expressed as the element that will ensure legal certainty and predictability. Therefore, further investigation of the close relationship in each individual case contradicts the reason for the existence of the jurisdiction rules.

Moreover, the function of the jurisdiction rules in the Brussels regime in the framework of recognition and enforcement should be considered. In the Brussels regime, there is no indirect jurisdiction review by the court of recognition and enforcement. The underlying reason for this is that the jurisdiction rules in the Recast point at a real and substantial relationship between the dispute and the court. The lack of a real relationship between the dispute and the deciding court, which is among the obstacles to recognition and enforcement in national legal systems, is not included in the Recast because it is accepted that the jurisdiction rules in the Recast are based on such a real and substantial relationship. The important point is that decisions rendered by the courts of Member States are easily recognized and enforced within the European Union (EU); in ensuring this, it was sought that the court of the Member State that rendered the decision is competent on a solid basis. In other words, the jurisdiction rules in the Recast are the rules that constitute a presumption of a real and substantial relationship, taking into account functionality in terms of recognition.

In this sense, the jurisdiction rule based on the place of performance is built upon the assumption that the court of the place of performance is the court having a close connection. In this case, the rule essentially has the function of pointing to a single place. In other words, the concept of the place of performance has acquired a function as a criterion of jurisdiction to bear legal effect in the field of civil procedure law. This function is based on the presumption that the place of performance points to a single place. However, in the sense of substantial law, the performance of an obligation in several places is possible.

In this study, firstly, the main purpose and nature of jurisdiction rules in light of the civil law paradigm are discussed. It is determined that a specific jurisdiction criterion is required to make a specific court competent. Then, the role of the "close relationship" is evaluated within the framework of the function of the jurisdiction rules in the Brussels regime. In particular, it seems that legal certainty and predictability characterize both the civil law system and the Brussels regime. Finally, it is examined how the rule of the place of performance should be interpreted in cases where there are several places of performance for the characteristic obligation.

I. Civil Law Paradigm on Jurisdiction

A. General Aspects of Jurisdiction Systems

The most effective way to present the civil law paradigm is to compare it with the United States (U.S.) paradigm.[5] This paradigm difference put forth by *Michaels* sheds light on the evaluation of the place of performance rule in the civil law jurisdiction system. However, first of all, the differences between these two legal systems regarding jurisdiction should be cited.

In terms of how states regulate the domestic and international jurisdiction, two basic approaches that differ from a technical standpoint, between the U.S. law[6] and the civil law (European) systems can be mentioned. In U.S. law, the courts have considerable flexibility and discretion in determining their own jurisdiction. In addition, there is no separate system of international jurisdiction in U.S. law.[7] In contrast, in the civil law system, the jurisdiction rules are set by the legislator and the courts have little discretion.[8]

In addition to the methodical difference in question, there are practices regarding jurisdiction in both legal systems which differ, chiefly the *forum non conveniens* doctrine[9] adopted in U.S. law.[10] As will be mentioned below, the basic approach of the two legal systems to jurisdiction is different, and therefore there are differences in methodical and practical aspects.[11]

5 Ralph Michaels, 'Two Paradigms of Jurisprudence' (2006) 27 Mich. J. Int'l L. 1013.

6 In the text, the phrase "U.S. law" is used to refer to the law of the United States of America (USA). While, as an object of comparison with the civil law system, either *common law* or Anglo-American law is taken as a basis, it became necessary to depart from this method in relation to the issue of "jurisdiction", which is a subject of law of civil procedure. This is mainly, as will be seen below, because the way the issue of jurisdiction is handled in the civil law system and the way the issue of jurisdiction is handled in U.S. law differ from each other. English law has long been part of the EU system of jurisdiction. Therefore, the concepts of Anglo-American law, including English law, or *common law* are not used; and English law is excluded from this comparison.

7 Trevor C Hartley, 'Basic Principles of Jurisdiction in Private International Law: The European Union, The United States and England' (2021) ICLQ 2. For how in U.S. law the principles of jurisdiction are formulated in terms of disputes involving the law of several states, which can be called interstate; and how these rules are then also applied in terms of disputes of an international character, see Hartley, 13.

8 Helene Van Lith, *International Jurisdiction and Commercial Litigation* (T.M.C. Asser Press 2009) 4; Pietro Franzina and Ralph Michaels, 'Jurisdiction, Foundations' (2017) Encyclopedia of Private International Law 1044-1045; Simona Grossi, *The U.S. Supreme Court and the Modern Common Law Approach* (Cambridge University Press 2015) 136 ff.

9 *Forum non conveniens* is developed by the Scottish courts and adopted by the English courts in order to mitigate the impact of the lack of international jurisdiction rules. See William Tetley, 'Mixed Jurisdictions: common law vs civil law (codified and uncodified)' (Part II) (1999-4) Rev. dr. unif. 879-880. It can be said that it is a doctrine that has also influenced American law and that it is one of the elements of the flexible appearance of the American system of powers.

10 Grossi (n 7) 149.

11 As a result, it is stated by various authors that these differences have been instrumental in the failure to realize the project for uniformity in jurisdiction under the umbrella of the Hague Conference which is sought after and worked upon. See Michaels (n 10) 1009. However, there have also been some assessments in the doctrine that differences between the two systems do not prevent the uniformization of the rules of jurisdiction. See Grossi (n 7) 104 ff. It was aimed to prepare a convention on the jurisdiction on civil and commercial matters and recognition and enforcement of foreign judgments under the umbrella of the Hague Conference; however, negotiations were not concluded and, finally, the part of the project on the "jurisdiction" issue was postponed and was opened for signature with the *Convention of 30 June 2005 on Choice of Courts* in 2005 and with *the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* in 2019. For an explanation regarding this, see https://www.hcch.net/en/publications-and-studies/details4/?pid=6843&dtid=61.

Basically, in both systems, the jurisdiction of the courts is shaped by the connection with the parties and/or the subject of the case. In the U.S. system, the courts consider themselves competent or not based on the principle of minimum contacts instead of specific rules within the framework of their discretion. In the European system, on the other hand, hard and fast rules have been accepted by legal systems, relying on a long history. It is clear today that both systems approach the issue from a perspective close to each other, in terms of theoretical framework, and it can be said that theories of fairness[12] serve as a common ground. Indeed, both the U.S. system and the civil law system are united on the need to ensure that the jurisdiction of the courts is fair. Thus, in these two systems, the tools used to consider the courts competent are different from each other, but the common point is that the jurisdiction of courts complies with the requirements of justice.

In other words, it is understood that the basis of the jurisdiction of the courts lies in the need to determine the court that is appropriate, convenient and fair in terms of jurisdiction.[13] In this context, the rules or assessments related to the jurisdiction of the courts in the two systems in question may differ from each other. In the civil law system, while the jurisdiction of courts is determined by hard and fast rules, in U.S. law, jurisdiction is determined by courts on a case-by-case basis with principles such as the minimum contacts test based on the principle of *due process* (as in the U.S. Constitution).[14] However, there is a difference in paradigm at a deeper level than differences in legal technique between these two systems.[15]

B. Different Paradigms of Jurisdiction

1. The U.S. System

The U.S. jurisdiction system pays attention to the (vertical) relationship between the court and the parties; it is important whether it is fair to consider the court in a particular place as having jurisdiction over the defendant. In this sense, the relationship of the claimant with the court is not decisive; it is sufficient that the defendant is in a relationship with the court with the minimum points of contact, even if the claimant has no relationship with the court.[16] The notion that the defendants will be subject to the jurisdiction of the state only if sufficient connections exist is presented as the protection of defendants at the constitutional level by the principle of *due process*. It should be emphasized that in this aspect, in fact, the right to a trial and the jurisdiction

12 Arthur Taylor von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983-1984) 6 Tel Aviv U. Stud. L. 54 ff.

13 ibid [118].

14 Michaels (n 10) 1006-1022.

15 Michaels (n 10) 1027 ff. See also Christof Von Dryander, *'Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure'* (1982) 16 No 4 Int'l Lawyer 672 ff.

16 Michaels (n 10) 1031.

of the courts in terms of location are not distinguished in the U.S. system.[17] Although this point of view creates the perception that it is a defendant-friendly system, it is actually envisaged that the American system is claimant-friendly and if the approach that a person can be sued at a place only if there is sufficient connection based on the principle of *due process* is not adopted, there would be an imbalance.[18]

It cannot be said that the briefly mentioned features above depict the U.S. system in its entirety. It should be noted that not only the vertical relationship between the court and the parties and the dispute is taken into consideration, but also the jurisdiction of other state courts, as required by the federal structure, thanks to the principle of *due process*.[19] Regarding the consideration of the jurisdiction of the courts of another state in respect of disputes of an international character, in fact, interstate practice is taken as the basis. But it is noted that some mechanisms, such as the *forum non conveniens* doctrine, soften the one-sidedness of the jurisdiction system in terms of disputes of an international character.[20]

2. The Civil Law System

The rules regarding the jurisdiction of the courts in legal systems adopting the civil law system are pre-defined within the scope of various laws and regulations. International jurisdiction is also determined by the rules of internal jurisdiction in the majority of legal systems.

The purpose of the civil law jurisdiction system is to grant jurisdiction to the most appropriate local court with jurisdiction rules. With the allocation of jurisdiction to the court of the domicile of the defendant, and with special jurisdiction rules introduced in addition to that, it is preferred to allocate jurisdiction to the court of a specific place (Member State) based on a close connection *(relevant factor)*.[21] For instance, in the rule of jurisdiction for contractual disputes, the place where the contract

17 For an explanation regarding that in the civil law system, unlike the U.S. system, "jurisdiction" is understood as jurisdiction in terms of venue, see Peter F Schlosser, 'Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems' (1996) 45 U. Kan. L. Rev., 19 ff.

18 Michaels (n 10) 1053. About the advantageous aspects of the American system for the claimant, see Hartley (n 6) 15. Accordingly, the first advantage of the American system is that the *contingency fee* is paid depending on whether the case is won. Secondly, in American law, the approach toward *pre-trial discovery* is also more advantageous compared to the civil law system. Thirdly, the possibility of jury evaluation, especially in cases for compensation, makes it possible for large sums to be decided on. For these reasons, claimants may prefer American courts in international disputes.

19 Michaels (n 10) 1033-1034.

20 Michaels (n 10) 1036-1037.

21 Michaels (n 10) 1043. It may be accepted that the defendant may have several domiciles by the relevant legal system(s). From the point of view of this possibility, it becomes clear the rule of jurisdiction based on the domicile of the defendant may not correspond to a single location in all cases. As a matter of fact, in the Jenard Report on the Brussels Convention, it is set forth that, the defendant's domicile is mentioned as a rule to give jurisdiction to a single local court; exceptionally, if the defendant has a domicile in several countries, in accordance with the law of several Member States, this issue can be solved in accordance with the principle of *lis pendens* and provisions on related cases. See *Council Report on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters* [1979] (Jenard Report), OJC 59, 16-17.

was concluded and/or the place of performance of the contract is considered to be connected with an understanding based on Roman law.[22] From the point of view of U.S. law, both local courts may consider themselves competent if there is a sufficient degree of connection.[23] However, in the civil law system, jurisdiction is established based on a connecting factor for each legal category. In the Brussels Convention, the Brussels I Regulation and the Recast, this place was laid down as the court of the place of performance for contracts.[24]

The approach in the European system and, accordingly, in the Brussels regime, exhibits a horizontal appearance. One or several certain forum(s) is (are) pointed towards and it is determined which of the relevant forums have jurisdiction. Thus, the horizontal relationship between forums comes to the fore. From this point of view, in the civil law system, it can be said that the search for determining which court out of those in multiple places – countries is the most appropriate court in terms of litigation predominates.[25]

Indeed, the main purpose of the Recast is expressed as the uniformization of jurisdiction rules in civil and commercial matters and thereby the recognition and enforcement of decisions rendered by the courts of Member States in a quick and simple manner.[26] For this purpose, a distinction has been made between disputes related to several EU Member States and disputes related to non-EU countries in the Recast, and the jurisdiction of the courts of Member States was determined mainly in terms of disputes related to several EU Member States.[27]

The fundamental principle in determining the competent court is searching for the most appropriate place among relevant countries, that is, the most closely connected

22 In German, French and Italian law, the jurisdiction of the courts of the place where the contract was concluded and/or the place of performance of the contract had been recognized. See Von Dryander (n 15) 684-685.

23 In U.S. law, the place where the contract was concluded or the place of performance, although not considered insignificant, is also not considered a sufficient connection for jurisdiction alone. See Von Dryander (n 15) 685.

24 Michaels (n 10) 1043. It can be seen that there is an exception to the perspective that a single connecting factor should be taken as the basis for each legal category for torts and that the court of the place where the harmful event occurred and the court of the place where the damage occurred are conferred jurisdiction; on how these two places actually point at alternative connecting factors regarding the interpretation of "the place where the harmful event occurred", see Michaels (n 10) 1043-1044. In addition, in the Jenard Report, it is stated that the purpose of the Brussels Convention is to ensure the highest possible degree of legal certainty with the rules of jurisdiction; with the wording of the Convention *"To this end, the rules of jurisprudence codified in Title II determine which State's courts are most appropriate to assume jurisprudence, taking into account all relevant matters;..."* See Jenard Report (n 21) 15.

25 Michaels (n 10) 1045. See also Jenard Report (n 21) 15.

26 Preamble of Recast, para. 4.

27 Michaels (n 10) 1044. In the jurisdiction system, for which the first step was taken by the Brussels Convention, it was ensured that the courts of other Member States, along with the court of the domicile of the defendant, were granted jurisdiction with special jurisdiction rules. Thus, if the court of general jurisdiction is in one Member State, a case can be filed in another Member State if there is a competent court there in accordance with the rules of special jurisdiction. In other words, the aim here is to find alternative competent courts in cases where the defendant's domicile is within the EU, just as in national legal systems. From another point of view, if it is taken into account that, as a rule, the defendant's domicile can only be located in one Member State, it is ensured that the courts of other Member States to which the dispute is connected are also competent. In addition, it is prevented that cases against defendants who are located in another Member State are filed in courts of Member States that are competent in accordance with their internal jurisdiction rules. See Jenard Report (n 21) 17.

forum for each legal category. Of course, several courts may be competent at the same time under different jurisdiction rules. However, it is provided that a certain forum will be competent in accordance with each jurisdiction criterion such as "place of performance".[28] Accordingly, in contractual disputes, it is obvious that a case can be filed at the court of the place of performance along with the court of the defendant's domicile. However, the issue is that the criterion of the place of performance points to one place, and, as mentioned below, there has been a debate about whether the place of performance should point to one place due to the nature of this criterion in particular.

European thinking about jurisdiction is considered "international" as well.[29] What is meant by this is the assumption that it is possible to grant jurisdiction to courts of several relevant countries due to the nature of the jurisdiction, and that the one that is closely related among them is determined by the jurisdiction rules.

Considering the paradigm difference between the U.S. system and the civil law system, the main goal of both systems is to ensure fairness in identifying the competent court. But these two systems proceed in different ways for the realization of fairness. Since, in the U.S. system, the relationship between the defendant and the court is taken as the basis, the need for the court's consideration of itself as competent over the defendant to produce fair results brings the purpose of fairness to the fore; in the European system, determining which of the courts of relevant countries are closely connected contains the purpose of fairness.[30] In this system, the defendant is protected not against the state, but against the claimant, who can choose the forum among several forums.[31] The fact that the special jurisdiction rules are based on the close connection between the dispute and the court ensures that the defendant will not be sued in an inappropriate court.

C. General Evaluation of Paradigm Difference

The right of access to court being provided at the constitutional level in the civil law system serves to protect claimants.[32] Hence, it can be said that, in the U.S. system, the principle of *due process* plays an important role in terms of protecting defendants from being sued unfairly; in the civil law system, the right of access to court protects the right to sue. The approaches of these systems to the issue of jurisdiction at the constitutional level are demonstrated in this way: The U.S. jurisdiction system prevails protecting defendants against unfair claims in a claimant-friendly[33] structure; in the civil law system, the right of claimants to access to court is guaranteed at a

28 Michaels (n 10) 1046.

29 Michaels (n 10) 1047.

30 Michaels (n 10) 1048-1049.

31 Michaels (n 10) 1049.

32 Michaels (n 10) 1053.

33 Schlosser (n 17) 37.

constitutional level, against defendants where a case can be filed against them is predictable under "hard and fast rules".[34]

From this point of view, the difference of paradigm between the two systems reveals the following issue: the provision of jurisdiction rules in an abstract manner and in advance, in the civil law system, is focused on ensuring predictability from the point of view of the defendant, and in this sense, the system protects the defendant. Therefore, the evaluation[35] of which party is advantageous in terms of each jurisdiction rule or the investigation of, in terms of the jurisdiction criteria that symbolize the connection with the subject of the dispute, such as the place of performance, which one offers more favorable opportunities for the parties, has no decisive importance in terms of the paradigm underlying the jurisdiction rules.

D. Civil Law Paradigm and the Place of Performance Rule

When evaluating the characteristics of the paradigm of the civil law system in terms of the place of performance rule, the approach of determining the *closely connected* court as the court of *a certain place* must be discussed.

In the civil law system, the rules of jurisdiction hypothetically refer, through abstraction, to the closely connected court. The criterion of the place of performance reveals the hypothetical nature of this approach. As mentioned above, when the contractual relationship is evaluated as a whole, it is assumed that the place of performance in the field of contracts, like the place of commission in torts, is the criterion pointing to the closely connected court. This assumption can be attributed to the fact that the place of performance has historically been considered[36] a place closely connected with the contract.[37]

34 Michaels (n 10) 1053-1054.

35 In the civil law system, the paradigm of jurisdiction provides predictability with the jurisdiction rules, for the defendant, and in this sense, the notion that the defendant is being protected, also applies to the jurisdiction rules in which the concern for the protection of the weak side is taken into consideration. Indeed, as a result of the application of these jurisdiction rules, the fact that the claimant has the opportunity to file a case at his own domicile and the defendant is relieved of the burden of filing a case at his domicile does not change the paradigm underlying these rules.

36 The jurisdiction rules in the civil law system date back to Roman law. In the Roman and early medieval periods, it was accepted that the jurisdiction of courts is based on the consent of the parties because of the principles of *submission*. As a result of migration and increasing commercial relations and the parties leaving the place where the dispute arose, the approach of protecting the defendant by setting forth the requirement that cases be filed *somewhere connected with the case* emerged. The acceptance of cases being filed at the place where the defendant resided *(actor sequitur forum rei)* as of the date of the filing the case or the execution of the contract in the Code of *Justinian*, represents this approach. The later exceptions to this general rule, namely the special jurisdiction rules, are also formulated *as connected to* the place of performance of the contract, the place of commitment of the tort and the location of the goods. See Friedrich Juenger, 'Judicial Jurisdiction in the United States and in the European Communities: A Comparison' (1984) 82 Mich. L. Rev. 1203-1204; Albert A Ehrenzweig, 'The Transient Rule of Personal Jurisdiction: The "Power" Myth and *Forum Conveniens'* (1956) 65 Yale L. J. 297.

37 It should also be examined, in the field of conflict of laws, whether the factors that lead to the abandonment of the place of performance in favor of the domicile or place of the business of the obligor of the characteristic obligation, with the assumption that it points to the closely connected law, will affect the use of this concept as a jurisdiction criterion. In particular, the evolution of the characteristic obligation to the place of performance, under the jurisdiction rule based on the place of performance with Art. 5(1)(b) of the Brussels I Regulation, brings into question whether a similar trend will occur in the long run.

In the civil law system, the need to determine a closely connected court, which is one of the main features of the paradigm of jurisdiction, should be taken as the basis in the interpretation of the place of performance, and thus the place of performance should be interpreted coherently with the characteristics of the system as a whole. More clearly, if the place of performance must point to a single place for a particular contractual relationship, then the need for its identification as a specific place, such as "the place of performance of a characteristic obligation", would come into question, and, as will be seen below, this approach was accepted by the Brussels I Regulation to some extent.[38]

Thus, the fact that the place of performance points to a single place is in accordance with the general approach of the civil law system. Accordingly, it should be recognized that the most suitable place for special jurisdiction in terms of the whole contractual relationship is the place of performance. This is evident from the Brussels regime. Indeed, the Brussels I Regulation transformed the place of performance rule in the Brussels Convention Art. 5(1), to the place of characteristic performance for certain categories of contracts. Thus, the place of characteristic performance is narrowed down to a single place. This proves that the place of performance rule is both intended for the entire contract and should point to a single place. As discussed below, with the provision of Art. 5(1) of the Brussels Convention, which is the basis of the Brussels regime, the place of performance of the obligation in dispute has determined the jurisdiction; however, as a result of the problems created by this rule and the criticisms directed to the rule,[39] the place of performance of the characteristic obligation became preponderant. The same trend has been maintained with the Recast, which came into force in 2015.

In the Swiss Civil Procedure Code, the place of performance of the characteristic obligation is taken as the basis for the determination of the competent court without going for an obligation-based distinction (Art.31). In the same direction, in Art. 113 of the Swiss Federal Act on Private International Law, it has been adopted that, in case the place of performance of the characteristic obligation is in Switzerland, the court of that place is competent.

38 Additionally, the evolution of the place of performance, especially in the field of conflict of laws, has also led to the conclusion that the place of characteristic performance is taken as the basis for a long time. Although this evolutionary process has given rise to an approach that puts the obligor of the characteristic obligation at the center in the field of conflict of laws, recently, opinions have been expressed that, in the field of conflict of laws, the connecting factor of the place of performance of the characteristic obligation should be returned to. See Chukwuma Samuel Adesina Okoli, *Place of Performance: A Comparative Analysis* (Hart Publishing 2020) 120 ff.

39 Jenard Report (n 21) 23. In addition, the provision of Art. 5(1) of the Brussels Convention determines jurisdiction in terms of contracts of any type and nature by accepting the place of performance as the criterion of jurisdiction and taking a single element of the contractual relationship as the basis. Although legal certainty or predictability is ensured in this way, this jurisdiction rule has been subjected to intense criticism due to problems such as the fact that some other connecting factors that may be as important as the place of performance have not been taken into account or the place of performance cannot be localized when it comes to negative obligations. Georges A L Droz, 'Delendum est forum contractus' (1997) Recueil Dalloz, Chronique 351-356; Lennart Pålsson, 'The Unruly Horse of the Brussels and Lugano Conventions: The Forum Solutionis' Festkrif für Ole Lando (Copenhagen 1997) 259 ff.; Vincent Heuzé, 'De quelques infirmités congénitales du droit uniforme: l'exemple de l'article 5-1 de la Convention de Bruxelles du 27 septembre 1968' (2000) Revue critique de droit international privé 595 ff.

The place of performance rule should also be evaluated in terms of its connection with the notion that the defendant is to be protected against the claimant in the civil law system. As mentioned above, in addition to the fact that the court of the defendant's domicile has general jurisdiction, the system's approach regarding the protection of the defendant is evident, mainly, on the rules of jurisdiction pointing to a specific place *a priori*, therefore, by ensuring predictability. It is understood that the special jurisdiction rules and the place of performance in this context are functional for the defendant in terms of predictability. The principle of the narrow interpretation of the special jurisdiction rules in the Recast should also be taken into account. Accordingly, the general rule is that if the defendant's domicile is in a Member State, the case is filed in that place.[40] In the same direction, the place of performance should also not refer to several obligations or places. This point of view is reflected by the Brussels I Regulation as predominance accorded to the court of the place of characteristic performance. Therefore, as will be discussed below, the possibility that the characteristic obligation will be performed in several places was actually probably not foreseen by those who drew up the rule.

II. Fragmentation Problem under Brussels Convention Art. 5(1)

The rule of place of performance "of the obligation in dispute" that is contained in Art. 5(1) of the Brussels Convention and kept, to a limited extent, by the Brussels I Regulation and the Recast, is criticized from various aspects, such as being determined according to *lex causae* and leading to *forum actoris*.[41] One of the points of criticism has been that the rule has led to a fragmentation of jurisdiction. The courts of several places of performance being competent, for a particular contractual relationship, depending on whether several obligations are in dispute, is presented as an undesirable outcome. In other words, the fragmentation of jurisdiction in the case of different obligations has been a focus of criticism.

As a matter of fact, in *Ets. A. De Bloos v. Bouyer*, it was stated that the purposes of the Brussels Convention were aimed at not allowing, as much as possible, the possibilities that would lead to several courts being competent in relation to a single contract, and therefore the provision of Art 5(1) should be interpreted as referring to the obligation in dispute.[42] However, it is understood that, in practice, the disputes arising from a contractual relationship can be brought before the courts of different Member States.[43] Thus, it can be seen that the parties to a contractual relationship

40 Michaels (n 10) 1049-1050.

41 See Justin Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions* (Hart Publishing 2002) 160 ff; Droz (n 45) 355; Jonathan Hill, 'Jurisdiction in Matters Relating to a Contract under Brussels Convention' (1995) 44 ICLQ 593 ff; Thomas Kadner Graziano, 'Jurisdiction under article 7 no. 1 of the recast Brussels I regulation: disconnecting the procedural place of performance from its counterpart in substantive law. An analysis of the case law of the ECJ and proposals de lege lata and de lege ferenda' (2015) 16 Yearbook of Private International Law 178 ff.

42 Case C-14/76 *Ets. A. De Bloos v Bouyer,* [1976] ECR 1498 [9-11].

43 Hill (n 41) 603-604.

may conclude that the place of performance of each obligation on which they base their claims may lead to courts in different countries being competent. For instance, in terms of claims arising from a service contract between A and B, each party may file a case in the court of the place of performance of the counterparty's obligation.[44]

The problem of fragmentation arising from the interpretation of Art. 5(1) by the CJEU is more clearly seen, especially in complex relationships involving multiple obligations. The general rule formulated in *Ets. A. De Bloos v. Bouyer* is that if it is alleged that the defendant has violated two obligations that have a place of performance in two separate countries, the provision of Art. 5(1) leads to the fragmentation of jurisdiction among these two Member States.

The problem of fragmentation due to the place of performance of multiple obligations has been discussed in the case *Shenavai v. Kreischer*[45]*,* but a total solution has not been brought. In the decision, it was concluded that the theory of the obligation in dispute cannot provide a solution in terms of disputes related to several obligations arising from a contract and being the basis of the claimant's claims; in the case of several obligations, the principal obligation *(accessorium sequitur principale)* may serve as a guiding light in terms of the jurisdiction.[46] In other words, the principle of the principal obligation being determined and the secondary obligations following the principal obligation has been emphasized. However, this principle does not truly solve the fragmentation problem, since it is understood that the principal obligation that the CJEU mentions is the defendant's principal obligation, not the principal obligation arising from the contract.[47]

In addition, the problem of determining the principal obligation may raise various possibilities. In the case *Leathertex Divisione Synthetici SpA v. Bodetex BVBA*[48], the CJEU has accepted that the court of each place of performance is competent if the principal obligation cannot be determined. It has been determined that two main problems arise from this approach:

Firstly, the principal obligation is not easy to determine for the court without resorting to the law applicable to the contract.[49] This uncertainty also jeopardizes

44 Hill (n 41) 604.

45 Case C-266/85 *Shenavai v Kreischer* [1987] ECR 251.

46 See *Shenavai v Kreischer,* (n 45) [19]. Here, the rule of *accessorium sequitur principale* was used, in determining the competent court, in the sense that the secondary obligation follows the principal obligation and is based on the place of performance of the principal obligation.

47 Hill (n 41) 604.

48 Case C-420/97 *Leathertex Divisione Sintetici SpA v Bodetex BVBA* [1999] ECR I-6779.

49 The rule of *accessorium sequitur principale*, namely the *principal* obligation being taken as the basis, can also lead to uncertainty because there may be doubts about which obligation of the defendant constitutes the principal (fundamental) obligation, and *Union Transport Plc v. Continental Lines S.A.* is presented as an example of this. In this case, the defendant's two obligations in relation to the cargo transportation transaction are to determine the means of transportation and to allocate it for the transportation. The claimant filed a case in an English court on the grounds that the place of performance of the obligation to determine the means of transport is the United Kingdom; the defendant objected, arguing

the purpose of the competent court to be predictable. Secondly, the fragmentation of jurisdiction is not an ideal solution. The fragmentation may be identified in two cases: (i) if the two separate obligations that are breached are of equal weight; (ii) if *the same obligation* is to be performed in different countries according to the contract. In the first case, two separate courts will probably be found to be competent for two separate breaches according to the law applicable to the contract. In fact, there are several obligations, none of which can be considered a principal obligation. In this case, the determination of the competent court on the basis of the rule of obligation that is in the dispute does not seem to be possible. According to Briggs, the logic of the rule is based on the close connection between the dispute and the court, and if there is no principal obligation, there should also not be a court whose jurisdiction will be established based on its connection with the dispute.[50]

In the second case, the claimant can file a case at each place of performance where the breach occurred.[51] Although the CJEU does not want the court to be competent in terms of only part of the dispute from a procedural point of view, in the case *Leathertex*, it glossed over this problem and stated that the claimant can file a case in the court of the domicile of the defendant if he prefers.[52]

III. Fragmentation Problem under Brussels I Regulation Art. 5(1)(b) and Recast Art. 7(1)(b)

With the provisions of Art. 5(1)(b) of the Brussels I Regulation and Art. 7(1)(b) of the Recast, it has been accepted that there is a single place of performance for the entire contract in sales and service contracts. In other words, the place of performance is the same place in terms of all obligations arising from the contract.[53] Thus, there will be no fragmentation in terms of different obligations, and the consideration of claims that are not related to the performance of the obligation within the framework of this rule is seen as an appropriate solution.[54] The main purpose here is that, if the general jurisdiction rule is to be set aside, special jurisdiction is allocated to a single forum. In this way, the characteristic obligation is used to determine a single place of performance for the entire contract. Although this term has not been explicitly used

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that the principal obligation is the obligation to allocate the means of transport, and the obligation to determine the means of transport is not decisive from the point of view of jurisdiction. However, the English court has declared itself competent, on the grounds that the obligation to determine the means of transportation is the principal obligation, and the place of performance of this obligation is the United Kingdom. Although the decision is well-founded, it is clear that the issue of jurisdiction carries uncertainty from the defendant's point of view. See *Union Transport Plc v. Continental Lines S.A. Tu* [1992] Lloyd's LR 1, 229). See also Hill (n 41) 607.

50 Adrian Briggs, *Civil Jurisdiction and Judgments*, 6th ed. (Informa law from Routledge 2015) 227-228.

51 Arthur Poon, 'Determining the Place of Performance under Article 7(1) of the Brussels I Recast' (2021) 70 ICLQ 648.

52 *Leathertex v Bodetex* (n 48) [41].

53 Peter Mankowski, *Special Jurisdictions, Article 5, Brussels I Regulation,* (European Law Publishers 2007) 136; Andrew Dickinson and Eva Lein, *The Brussels I Regulation Recast* (Oxford University Press 2015) 153; Graziano (n 41) 184 ff.

54 Mankowski (n 53) 136; Graziano (n 41) 184 ff.

as in the Rome I Regulation, it is accepted that paragraph (b) reflects the principle of characteristic obligation in an absolute manner and refers to the place of delivery of the goods or the place of provision of services in this context.[55]

As a result of taking the characteristic obligation as a basis, the court of the place of performance of the characteristic obligation has been rendered competent in terms of claims arising from secondary obligations, including compensation claims. Thus, with regard to Art. 5(1) of the Brussels Convention, the problem of fragmentation of jurisdiction based on different obligations has been solved. However, in fact, the problem of fragmentation has not been fully solved because there still exists a possibility that the obligation in dispute, that is, the place of performance of the characteristic obligation, may be located in several Member States.

As a matter of fact, the probability that the goods will be delivered by the seller at several points is discussed in the case *Color Drack GmbH v Lexx International Vertriebs GmbH*[56]. The CJEU, in this case, has provided that, the "principal place of delivery" be accepted as the place of performance under the *center of gravity* approach and the principal place of delivery be determined according to "economic criteria" as a general rule. Thus, in fact, it seems that the CJEU has introduced a new jurisdiction rule, but has not determined which economic criteria will be decisive.[57] It is not clear whether the value of the goods or their prices will be taken as the basis. Pursuant to the decision, if it is not possible to determine the actual place of delivery, it is possible for the claimant to choose one of the multiple places of delivery and file a case at this place.[58]

In the case *Color Drack*, several places of delivery were located in the same Member State, and the decision of the CJEU was formed accordingly. In terms of cases where several places of delivery are split among Member States, it seems that the CJEU does not want the *Color Drack* decision to be taken as the basis in such a way as to give the claimant the opportunity to choose the court. However, it has been stated that the same principle should also apply if several places of delivery are located in different Member States; this has been confirmed by the CJEU, especially in terms of service contracts, as discussed below.[59] Thus, the limitation proposed by the CJEU has actually become ineffective, at least in terms of service contracts.

As a result, in cases where several places of delivery are located in different Member States, if the principal place of delivery can be determined, the jurisdiction of

55 Mankowski (n 53) 136; Dickinson and Lein (n 53) 153.

56 *Color Drack* (n 4).

57 Dickinson and Lein (n 53) 153-154.

58 *Color Drack* (n 4) [42].

59 See Dickinson and Lein (n 53) 154.

this court is confirmed, while if the principal place of delivery cannot be determined, it is controversial if the claimant can file a case at any of the places of delivery in different Member States regarding the entirety of the obligation.[60]

First, the ambiguity of the "economic criteria" stands out. For instance, if the amount of sale, the market value of the goods, or net profit is taken as the basis, it may be possible to identify different places of performance. Since the close relationship between the dispute and the court depends more on the facts, determining the correct criteria and assessing their weight requires fine-tuning.[61] If it is a long-term sales contract, the problem arises as to which period the criteria will be taken as the basis. Determination of the place of performance based on the facts may require the examination of the provisions of the contract and, accordingly, referring again to the law applicable to the contract as in the *Tessili* formula. Thus, in fact, a result that was tried to be prevented by the provision of Art. 7(1)(b) may occur again.

Secondly, in cases where the principal place of delivery cannot be determined, the claimant is granted an unlimited right to choose. Although the wording of Art. 7 (1)(b) does not allow it, it is not appropriate to expand the scope of the article in this way. In fact, this interpretation contradicts the CJEU's approach of narrow interpretation of the jurisdiction rules. In fact, since the different delivery locations in the case *Color Drack* remain within the borders of a single Member State, it is concluded that this interpretation does not have a serious impact on predictability. There is no doubt that it is more difficult for a defendant to defend himself before a foreign court than to defend himself before a court of another place in the country where he resides. The CJEU has also applied the "economic criteria" in terms of obligations performed in different Member States, especially in the case of service contracts, and has taken its approach in *Color Drack* as the basis. It is clear that this approach undermines legal certainty and predictability in the jurisdiction regarding contractual disputes.[62]

The definition of the place of performance in service contracts in Art. 7(1)(b) of the Recast has the same purpose as the provision on the place of performance in sales contracts. Accordingly, in terms of service contracts, also a single court to be determined in accordance with the *autonomous* approach should be competent. The place where the service is provided or will be provided points to the place of performance for jurisdictional purposes in relation to disputes arising from such contracts. In sales contracts, compared to the place of delivery of the goods, it is more difficult to identify the place where the service is provided because the abstract nature of the services and the variety of services that are provided make it difficult to

60 Briggs (n 50) 234.

61 Poon (n 51) 649.

62 Poon (n 51) 651.

connect them to a particular place, and to determine whether they have been provided or will be provided in a particular place.[63]

Some decisions of the CJEU contain comments on the determination of the place of performance in service contracts and evaluate the problems that have arisen. *Peter Rehder v. Air Baltic Corporation*[64] stands out as one of the significant decisions in terms of the place of performance in service contracts. In this decision, in determining the competent court regarding the dispute arising from the contract of carriage by air, both the place of departure and the place of destination of the aircraft have been accepted as the place of performance.[65] The claimant has been given the right to choose one of these two places. Thus, it became possible for passengers to file a case in their own domicile, which is usually the place of departure of the aircraft. In fact, there are no two performance places here; the characteristic obligation is the obligation of the airway. CJEU made an interpretation regarding where the service was provided and it has been accepted that it will be deemed to have been provided in both places. *Rehder* has been criticized in particular for not giving due attention to the concept of predictability. Accordingly, it is not sufficient if the defendant can only foresee the number of places in which they might be sued, no matter how large that number potentially could be[66] because, in terms of predictability, the significant point is that it should be clear where the case will actually be filed. Therefore, when the claimant has a free-standing choice close to *forum shopping,* predictability is undermined.[67]

Similarly, in *Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade TU*[68], it was discussed how to determine the place of provision of services if the commercial agent makes transactions in several countries. The CJEU pointed out the need to designate a single place for the entirety of the contract and it stated that it was necessary firstly to look at the contract between the parties. Accordingly, if there is no clarity in the contract between the parties regarding the place of provision of services, the place of provision of services is in most cases the place where the commercial agent conducts the activities for the performance of the contract. In other words, in parallel with *Color Drack* related to sales contracts, the place of the main provision of services has been adopted. The CJEU also stated that the provision of services in this place should not contradict the contract. In the event that the place of the main provision of services cannot be determined, the case can be filed at the domicile of the commercial agent pursuant to the decision. As a justification for this

63 Dickinson and Lein (n 53) 154.

64 Case C-204/98 *Rehder v Air Baltic Corporation* [2009] ECR I-6073.

65 ibid [43].

66 Poon (n 51) 652.

67 Poon (n 51) 652.

68 Case C-19/09 *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] ECR I-2161.

opinion, it has been stated that the commercial agent's obligation is the characteristic obligation and that the commercial agent is the one who provides the services in terms of jurisdiction.[69] However, this solution is criticized as it deviates from the secondary approach adopted in *Color Drack.* Also, its potential to lead to *forum actoris* is considered a drawback.[70]

As can be seen, in determining the place of performance in service contracts, multiple places of performance has also emerged as a problem, and *Wood Floor* has gained an important place in this sense. According to the decision, if possible, it is necessary to determine a single place as the place where the services are provided. The Recast Preamble (para. 15)[71] requires that in line with the purpose of predictability, the place where the services are provided or will be provided should be determined under the contract. This place is the place where, within the framework of the commercial agency contract, the commercial agent prepares, negotiates, and concludes legal actions on behalf of the principal. According to the contract between the parties, the place where the services are mainly provided also meets the need for proximity, since this place is connected with the dispute due to the nature of the services. If from the provisions of the contract, it is not clear where the services are mainly provided because there are several places of performance, or because there is no clarity in the contract, but if the commercial agent has already provided the services, if appropriate, alternatively, the actual place where the agent most often conducts its activities for the performance of the contract should be taken as the basis. However, the fact that the services have been provided in this place should not contradict the will of the parties as far as it is understood from the contract. For this purpose, it may be necessary to take into account the facts related to the case, such as the time spent in these places and the importance of the activities carried out. The national court where the case is filed must decide whether it is competent in the light of the evidence presented. Finally, if the place of the main provision of the services is not understood from the provisions of the contract or from the place where it is actually provided, it should be determined by another tool that meets the criterion of predictability and proximity. For the said purposes of Art. 7(1)(b) of the Recast, the domicile of the commercial agent should be taken as the basis for the place of main provision of services. This location is always obvious when considering certainty and predictability. In addition, it is closely related to the dispute, since the commercial agent will probably provide a significant part of the services in this place.[72]

69 ibid [34].

70 Dickinson and Lein (n 53) 155; Poon (51) 653.

71 The decision was made during the period of the Brussels I Regulation. In the text of the decision, a reference was made to para. 11 of the Preamble of the Brussels I Regulation and the equivalent of this reference in the Recast is shown in the text above.

72 *Wood Floor* (n 68) [41]-[42].

Thus, with *Wood Floor*, important points have been made. First, it is envisaged that, if possible, a single place shall be identified as the place where the services are provided. Secondly, the domicile of the agent being taken as the basis depends on the fact that this place is really connected with the dispute, as a result of the assessment of the facts, and usually, the commercial agent performs a significant part of its activities in this place.[73] In *Wood Floor*, in case the place of the main provision of services cannot be determined, it is stated that, the opportunity to file a case at the commercial agent's domicile sets the ground for *forum actoris*, and this result is incompatible with the purpose of the special jurisdiction rules.[74] Therefore, the fact that the commercial agent files a case at his domicile, in fact, does not meet the close connection requirement. When the court at the commercial agent's domicile is deemed competent, this gives rise to the assumption that one of the places where the services are provided is this place.[75] The CJEU also stated that the commercial agent will probably provide a significant part of the services at this place. In other words, it was sought to legitimize the jurisdiction of the court at the commercial agent's domicile on the grounds that, in fact, this place meets the proximity need in terms of connection with the dispute.

In fact, it should be considered that the claimant will not be the commercial agent at all events, that is, the performer of the characteristic obligation; the client may also be the claimant, and in such a case, the court at the domicile of the defendant under the general rule, and the court at the domicile of the agent will overlap. Therefore, the domicile of the commercial agent, is actually not always a legitimate ground, if proximity is kept in the foreground. However, it is functional in terms of ensuring legal certainty and predictability.

IV. Proposal for a Return to the General Jurisdiction Rule

Within the scope of both Art. 7(1)(a) and Art. 7(1)(b), regarding cases where there are multiple places of performance, it was not possible to find a substantial solution by interpreting the obligation in dispute or the place of performance. Taking *Besix S.A. v. WABAG* as the basis in particular, not applying Art. 7(1) in the case of several places of performance at all and instead, taking the general jurisdiction rule set forth in Art. 4 as the basis is proposed.[76]

In *Besix*, it was stated by the CJEU that "a single place" should be determined in interpreting the "place of performance" of the obligation in dispute in Recast

73 *Wood Floor* (n 68) [42].

74 Poon (n 51) 653.

75 The CJEU has consistently accepted, since *Care GmbH v KeySafety Systems Srl*, that the place of performance should be determined on the basis of facts; that is, the place where the services are actually provided should be taken as the basis. See Case C-386/05 *Car Trim GmbH v KeySafety Systems Srl* [2010] ECR I-1255.

76 Poon (n 51) 654.

Art. 7(1)(a).[77] Indeed, as stated by AG Alber, in this case,[78] the court of the place of performance refers to a single place, not to several places.[79]

The opinion given by AG Bot in *Color Drack*[80] also stands out as it supports the return to the general jurisdiction rule. It was stated by AG Bot, in this case, that, in cases where there are several places of performance, the *Besix* decision may be taken as basis; that the rule set forth in Art. 5(1)(b) (currently, in Art. 7(1)(b)) may not be applied, as according to this rule, the courts of several Member States may potentially be competent and therefore the purpose of predictability cannot be realized. In the same direction, considering the purpose of predictability and the difficulties brought by the provision of Art. 5(1)(a), it is assumed that Art. 5(1)(a) also cannot be applied; and if several places of performance are split among several Member States, the competent court must be determined in accordance with the general jurisdiction rule.

In *Wood Floor*, AG Trstenjak has evaluated the *Besix* decision; however, she concluded that this decision cannot be taken as the basis in *Wood Floor*. The main grounds put forward by AG Trstenjak can be summarized as follows:

- Application of the general jurisdiction rule in cases where there are several places of performance of the characteristic obligation, contradicts the purpose of Art. 7(1)(b) because Art. 7(1)(b) requires the determination of the place of performance in sales and services contracts autonomously. Since the Recast provides for the place of performance as a special jurisdiction rule, it would be more appropriate for the purpose of the Regulation to try to ensure the implementation of the provision of Art. 7(1) before returning to the general jurisdiction rule.[81]

- Although the economic criteria bring uncertainty, if it is possible to determine the principal place of performance, the court of this place should be competent. If this place cannot be determined, the domicile of the obligor of the characteristic obligation should be considered the place where the services are provided.

Poon is of the opinion that these grounds (and others) put forward by AG Trstenjak do not constitute an obstacle to taking *Besix* as the basis in cases where there are several places of performance, and defended the application of the general jurisdiction rule:

According to Poon, firstly, even though *Besix* is about the place of performance of the obligation in dispute which is currently set forth in Art. 7(1)(a) [Brussels

77 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 [29].

78 ibid, Opinion of AG Siegbert Alber, para. 61.

79 ibid.

80 *Color Drack* (n 4), Opinion of AG Bot, para. 115, fn.30.

81 *Wood Floor* (n 68), Opinion of AG Trstenjak, para. 88.

Convention Art. 5(1)], there is no reason to interpret the concepts set forth in the provision of Art. 7(1)(b) differently.[82] Also, the manner in which the provision of Art. 7(1)(b) will be applied in cases where there are several places of performance has not been satisfactorily demonstrated in the decisions of the CJEU. The inadequacy of the approach of determining the principal place of performance in accordance with the economic criteria was also noted by AG Trstenjak;[83] the difficulties related to determining the principal place of performance are also pointed at in the doctrine.[84] Even so, in the process from *Color Drack* to *Wood Floor*, the determination of the principal place of performance in accordance with the economic criteria came to the fore. Thus, it has been accepted that the principal place of performance refers to the closely connected court.

Nonetheless, as noted by Poon, the teleological interpretation of Art. 7(1)(b) is not in all cases supportive of the determination of the competent court according to economic criteria because the principal place of performance does not always indicate the most closely connected place.[85] In particular, where there are several places of performance in a sales contract, i.e., delivery is to be made in several Member States, none of the places of delivery may be much more closely connected than others. For instance, in an example where defective goods were delivered in several Member States, if goods have been delivered at rates close to each other in each Member State, the court of the country in which the products have been delivered at a certain slightly higher rate will be considered competent as the court of the principal place of performance. However, this court will not actually be the court of the place most closely connected to the dispute.[86] Hence, interpreting the provision of Art. 7(1)(b) to cover disputes involving several places of performance is actually neither in accordance with the wording of the provision nor with its purpose as a special jurisdiction rule.[87] The economic criteria approach may not create a disadvantage in terms of the predictability of the competent court in simple cases. Especially in the case of obligations to be fulfilled in two Member States, if 90% of the goods are delivered in one of these countries, it can be predicted that the economic criteria will point to this country as the principal place of performance.[88] However, in complex commercial relations, when deliveries are made to multiple Member States at rates close to each other, it would be necessary to use trial-and-error by applying to the court to determine which place of performance carries weight, and the competent

82 Poon (n 51) 654.

83 *Wood Floor* (n 68), Opinion of AG Trstenjak, para. 78-79.

84 Dickinson and Lein (n 53) 153-154; Poon (n 51) 649.

85 The focus of the teleological interpretation is the detection of the closely connected court. See Poon (n 57) 656.

86 See Poon (n 51) 656.

87 Poon (n 51) 656.

88 Poon (n 51) 656-657. However, in such an example, if 10% of the goods delivered in another Member State are defective, the initiation of a case in the court of the place where 90% of the goods were delivered, which is determined as the principal place of performance, would contradict the need for a close connection between the dispute and the court.

court being able to be determined beforehand and thus, ensuring predictability, for the defendant, would not be possible.[89]

According to Poon, it is important to establish, in a proper way, the relation between the general jurisdiction rule set forth in Art. 4 and the provision of Art. 7(1). Under one opinion, it is claimed that the provision of Art. 7(1) gives the claimant an advantage and that, with Art. 7(1), the opportunity to choose granted to the claimant is secured in principle;[90] it is also suggested that Art. 7 should not be interpreted narrowly.[91] However, the notion that the provision should not be interpreted narrowly contradicts the established practice of the CJEU, and the Preamble of the Recast (para. 15) clearly states that the jurisdiction should be based mainly on the defendant's domicile, with a few exceptions with definite limits. Actually, it is true that the provision of Art. 7(1) provides the claimant with an alternative court, but this should not mean that the CJEU may extend the provision of Art. 7(1) and that the claimant may make a choice between Art. 4 and Art. 7(1) in cases where there is no close connection between the dispute and the court.[92]

As it can be seen, it seems reasonable from various points of view to return to the general jurisdiction rule in cases where there are several places of performance. Mainly, problems related to the determination of the principal place of performance within the scope of Art. 7(1)(b) have been pointed out. At the heart of the interpretation of the principal place of performance lies the desire to determine the court that is closely (most closely) connected to the dispute (contract). In contrast, while it is suggested that the general jurisdiction rule should be applied, the points put forward are that the principal place of performance may not point to the closely connected court in every case, and legal certainty and predictability should be preferred.

Thus, the problem of identifying the competent court in cases where there are multiple places of performance was actually considered as a priority problem in the Brussels regime among the purposes of the special jurisdiction rules.[93] In other words, in disputes where the legal certainty and predictability, which is the general purpose of the system, and the need for a close connection, which is its "specific" purpose, confront each other, the question as to which of them has priority in terms of Art. 7(1) is identified as a question and it is stated that legal certainty and predictability should be the priority. [94] According to Poon, legal certainty and predictability considerations in cases where there are several places of performance justify the application of the

89 Poon (n 51) 657.

90 Ulrich Magnus and Peter Mankowski, *Brussels I Bis Regulation: Commentary* (Otto Schmidt 2016) 177, 186.

91 ibid 114; Dickinson and Lein (n 53) 140.

92 Poon (n 51) 656.

93 Poon (n 51) 661-662.

94 Poon (n 51) 661-662.

general rule set forth in Art. 4, by abandoning the provision of Art. 7(1).[95] Although the abandoning of the provision of Art. 7(1) is not accepted in the doctrine, it can also be seen that there are no clear results from the decisions of the CJEU aimed at determining the close connection between the court and the dispute.[96] Indeed, it is stated that it is not easy to reach a conclusion where the close connection is ensured and legal certainty and predictability are not sacrificed.[97]

V. The Main Aim of the Rules of Jurisdiction: Legal Certainty and Predictability

A. Legal Certainty and Predictability through Proximity

As can be seen from the analysis of the paradigm of the civil law system above, the most basic function of the jurisdiction rules in the civil law system is to protect the defendant against the claimant's secured right of access to courts by ensuring predictability. The logic of the fact that the special jurisdiction rules can perform this basic function is based on the fact that there is a real connection between the dispute and the court. Thus, it is assumed that, in fact, the special jurisdiction rules indicate the court of the place that is closely connected to the dispute. Therefore, connecting factors such as the place of performance and the place of commission of tort are taken as a basis. The need that there should be a close connection between the dispute and the court is a tool for the realization of legal certainty and predictability.

In other words, the main purpose of the jurisdiction rules is to determine the competent court in such a way as to ensure legal certainty and predictability. In particular, special jurisdiction rules are rules that are assumed to refer to a closely connected court by nature and use connecting factors such as place of performance, and place of commission of tort as an indicator of close connection. From a teleological point of view, on the other hand, the main purpose of these rules is to point at the competent court in a way that is certain and predictable in advance. As a matter of fact, while examining the Preamble of the Recast, in para. 15 and 16, the presence of a close connection between the dispute and the court is expressed as the element that will realize legal certainty and predictability. Thus, it turns out that the purpose that should be taken as the basis for the interpretation of the jurisdiction rules from an objective point of view is legal certainty and predictability.

Indeed, proximity ("a close connection") can only be seen as an attribute of special jurisdiction rules. As explained in the Jenard Report on the Brussels Convention,

95 Poon (n 51) 662.

96 Poon (n 51) 662.

97 Poon (n 51) 662.

"Adoption of the 'special' rules of jurisdiction is also justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it. Thus, to take the example of the *forum delicti commissi*, a person domiciled in a Contracting State other than the Netherlands who has caused an accident in The Hague may, under the Convention, be sued in a court in The Hague. This accident cannot give other Netherlands court jurisdiction over the defendant. On this point, there is thus a distinct difference between Article 2 and Articles 5 and 6 due to the fact that in Article 2 domicile is the connecting factor".

As can be seen, it has been stated that, in comparison with the determination of the court with general jurisdiction depending on the defendant, the special jurisdiction rules refer to the court of the place that is connected with the dispute. This explanation also shows that the competent court is closely connected to the dispute due to the nature of the special jurisdiction rules; the connecting factors that are assumed to be closely related to the dispute are used as the jurisdiction criterion. Otherwise, the purpose of the rules of special jurisdiction is not the investigation of the closely or most closely connected place in each concrete dispute.

The jurisdiction rule of the place of performance of the characteristic obligation is also formulated on the assumption that the place of performance is a place that is already closely connected to the dispute. Therefore, the consideration that should be taken into account when determining the place of performance that has been previously provided for to indicate a certain place for a contractual relationship should be legal certainty and predictability. In fact, it is doubtful that the proximity criterion serves as a guide in terms of determining the place of performance, as will be seen below. This point of view has introduced the search for the principal place of performance in cases where there are several places of performance. It is obvious that the evaluations for the principal place of performance remain very weak in terms of legal certainty and predictability. Because the defendant cannot predict in which place the case can be filed, the court of which place will consider itself competent as a closely connected court cannot be certain.

Below, it is demonstrated that the provision introduced by Art. 5(1)(b) of the Brussels I Regulation and kept by Art. 7(1)(b) of the Recast, is, in fact, beyond preventing the division of the obligation in dispute, drafted to point at a single place of performance for all disputes arising from the contract, and in this direction, it is explained that in cases where there are several places of performance, the rule should be interpreted in line with legal certainty and predictability. In other words, it is clear that the rule does not give the court the task of determining the closely connected court in terms of each concrete dispute.

B. Characteristic Obligation and a Single Place of Performance

1. Specific Obligation is the Characteristic Obligation

As mentioned above, with the Brussels I Regulation, the rule of the place of performance of the obligation in dispute as set forth in Art. 5(1) of the Brussels Convention has been revised in such a way as to grant jurisdiction to the court of the place of performance of the characteristic obligation in terms of sales and service contracts.[98] Thus, the problem of fragmentation of jurisdiction in terms of the possibility that several obligations may be the subject of dispute has been solved.[99] In other words, in the event that several obligations are the subject of a dispute, the need to determine the principal obligation has disappeared in accordance with the decisions of the CJEU because it has been accepted that the obligation in dispute is the characteristic obligation. That is to say, the jurisdiction for contractual disputes is attached to the characteristic obligation.[100] This approach proves that the EU legislator did not prioritize the proximity criterion between the dispute and the court while drafting the provision of Art. 5(1)(b) and Art. 7(1)(b) because it is also likely that contractual disputes are not related to the performance of the characteristic obligation. In determining the place of performance of the characteristic obligation, by taking as the basis the place of delivery for sales contracts and the place of provision of services for service contracts, certainty is ensured,[101] and it is no more necessary to apply *lex causae* to determine the place of performance. In particular, it is important that the place of performance is defined independently of legal systems, subject to a purely factual criterion with reference to the provisions of the contract or the place of physical delivery of the goods.

The most fundamental characteristic of the provision of Art. 7(1)(b) of the Recast, which determines the place of performance in sales contracts as the place of delivery of the goods is that, as mentioned above, the place of performance is determined, as based on facts, *independently* of the law applicable to the contract. In the Commission Proposal on the Brussels I Regulation, it was stated that this approach aims to determine the place of performance in a pragmatic way based only on a factual criterion.[102]

In terms of service contracts, the special definition regarding the place of performance set forth in the provision of Art. 7(1)(b) of the Recast, has the same

98 About the process of transformation of the rule of the place of performance of the obligation in dispute into the performance rule of the characteristic obligation in terms of sales and employment contracts, see Okoli (n 38) 187-192.

99 Mankowski (n 53) 136.

100 Mankowski (n 53) 136.

101 Mankowski (n 53) 136; Dickinson and Lein (n 53) 153.

102 *Commission Proposal for the 2001 Regulation*, COM (1999) 348 final [14 July 1999] Explanatory Memorandum 14.

purpose as the provision regarding the place of performance regarding sales contracts. In accordance with the decisions of the CJEU, in terms of service contracts, the court of a certain place to be determined under an autonomous approach should be competent.[103] The place where the service is provided or will be provided points to the place of performance to establish jurisdiction in relation to disputes arising from such contracts. In sales contracts, compared to the place of delivery of the goods, it is more difficult to identify the place where the service is provided because the abstract nature of the services and the variety of services that are provided - to be provided make it difficult to connect them to a particular place, to determine whether they have been provided or will be provided in a particular place.[104] As mentioned above, this difficulty manifests itself, especially when the services are provided in several countries.

Consequentially, with Art. 7(1)(b), the characteristic obligation is shown, concretely, as the obligation of the seller and the provider of services and the arguments regarding that the characteristic obligation may be indefinite have been set aside,[105] and the way in which the place of performance of the characteristic obligation is to be determined is also identified. The fact that, with *Car Trim,*[106] the place of delivery or provision of services is embodied as the place where the goods are actually delivered to the purchaser or the place where the services are provided, shows once again that the rule serves legal certainty and predictability.

2. A Single Place of Performance for all Contractual Matters

The allocation of jurisdiction to the court of the place of performance for sales contracts and service contracts with Art. 5(1)(b) of the Brussels I Regulation, is important, not only because it provides for the place of performance of which obligation will be taken as the basis, but because it allocates jurisdiction to the court of the place of performance of the characteristic obligation for all disputes arising from a contract *("in matters relating to a contract"*). It is ensured that the dispute is subject to the same jurisdiction rule in cases where it is not related to the performance of the obligation. Thus, it can be seen that the jurisdiction rule for the place of performance of the characteristic obligation is a jurisdiction rule that applies to the entire contractual relationship. In fact, the adoption of this approach demonstrates that the jurisdiction rules indicate the connected court on the basis of the relationship or legal category from which the dispute arises. That is, the

103 Briggs (n 50) 232.

104 Dickinson and Lein (n 53) 154.

105 See Hill (n 41) 611-612.

106 In *Car Trim*, the CJEU stated that the place where the goods are physically delivered or supposed to be physically delivered to the purchaser at the final destination is the place that is the most compatible with the purposes and the general structure of the Regulation. It is also emphasized that this criterion is largely predictable and that it also meets the need for proximity as long as it ensures a close connection between the contract and the court. *Car Trim* (n 75) [60]-[62].

court that the "contract" is closely related to or the "tort" is closely related to is indicated.[107]

It is clear that the jurisdiction rule of the place of performance should also be understood in this sense because the jurisdiction rule of the place of performance of the characteristic obligation indicates the competent court not only in cases where the characteristic obligation is in dispute, but also in relation to the entire contract.[108] Accordingly, the provision introduced by the Brussels I Regulation clarifies that the jurisdiction rules are not actually focused on the connection between the specific subject of dispute and the court. Therefore, even if pointing to a closely related court will be considered a secondary purpose and will be taken as the basis for the interpretation of the jurisdiction rules, it becomes evident that the teleological interpretation does not actually require examination of the relationship between the "specific subject of dispute" and the court in each case. The important point is that there is a close connection between the "contract" and the court, so that the court of the place of performance of the characteristic obligation, as a specific criterion to ensure this, has been granted jurisdiction. Otherwise, it is already impossible to establish a close connection in terms of each dispute arising from the contract. For instance, from the point of view of invalidity claims, it is obvious that the court of the place of performance of the characteristic obligation is not closely connected.

As a matter of fact, one of the issues discussed during the period of the Brussels Convention was that the rule of the place of performance of the obligation in

107 Special jurisdiction rules use connecting factors of the place of commission of tort and the place of performance, similar to each other, for categories of tort and contracts. As mentioned above, these rules have a history stretching back to Roman law. However, it can be seen today that the relationship between the contract and the place of performance is different from the relationship between the tort and the place of commission. A dispute arising from a tort is singular and consists of a claim for compensation. Therefore, it does not give rise to a debate about whether there is a close connection between the dispute arising from a tort and the place of commission (place of damage).
In turn, disputes of different types and natures arise from the contractual relationship. See Hill (n 41) 615. It can be seen that, if the requirement that the jurisdiction rules establish a close connection between the "dispute" and the court is sought, it is impossible for any type of dispute to be closely connected to the place of performance. As will be discussed below, this also applies to the place of performance of the characteristic obligation. Therefore, in terms of the rule of the place of performance, a close connection is actually a relationship that is assumed to be established, as a general category, between the contract and the court with the connecting factor of the place of performance. Therefore, to seek the requirement that the place of performance should be closely connected to each specific dispute, would contradict the assumption that the jurisdiction rules demonstrate *a priori* the closely connected court. The uncertainty about whether the contract or the dispute will be taken as the basis for the determination of a close connection is actually reflected in the decisions of the CJEU. It has been stated in the Jenard Report on the Brussels Convention that the special jurisdiction rules are based on a legitimate basis due to the close connection between the dispute and the court (Jenard Report (n 21) 22); in *Besix*, which is the example taken as the basis for this, it was stated that the close connection between the dispute and court is important in terms of special jurisdiction rules (*Besix* (n 77) [30]). In contrast, in *Color Drack*, it is stated that the special jurisdiction rule set forth in Art. 5(1) of the Brussels I Regulation is based on the close connection between the "contract" and the court (*Color Drack* (n 4) [22], [23], [40]). Also, in the Preamble of the Brussels I Regulation (para. 11-12), the terms "subject-matter of the litigation" and "action" were used directly, instead of the word "dispute", thus it was stated that there should be a close connection between the subject of the case and the court. There is no doubt that the subject of the case is the "contract" in a broad sense. Therefore, by the literal interpretation of the relevant texts, it is understood that, the place of performance is a jurisdiction rule that is preferred, not because it points at the relationship between the dispute at hand and the court, but because it points at the relationship between the contract and the court.

108 The CJEU held that the rule of special jurisdiction in matters relating to a contract establishes the place of delivery as the autonomous linking factor to apply to all claims founded on one and the same contract for the sale of goods rather than merely to the claims founded on the obligation of delivery itself. See *Color Drack* (n 4) [26].

dispute did not in any case point to the court of a place that is closely connected to the dispute. Where the specific dispute was not related to the performance of the obligation, due to the lack of a close connection between the dispute and the place of performance, the rule of the place of performance of the obligation in dispute was considered insufficient in terms of the criterion of close connection.[109] The same inadequacy, as can be seen, also applies to the place of performance of the characteristic obligation.[110] Because the fact that the place of performance of the characteristic obligation is determinative can in some cases ensure that the court of the place to which the dispute is actually connected is granted jurisdiction, but it is not possible to establish this connection in terms of all types of disputes. Therefore, from the point of view of the criterion of close connection, there is in fact not a very big difference between the theory of specific obligation and the theory of characteristic obligation. However, the rule of the place of performance of the characteristic obligation may be preferred since it does not lead to a problem of fragmentation on the basis of obligation, in contrast, the rule of the place of performance of the obligation is in dispute because the place of performance of the characteristic obligation is determined as a certain place.[111] However, if the place of performance of the characteristic obligation is in several countries, it is again inevitable that the courts of several countries will be competent.

As a result, the place of performance of the characteristic obligation does not have the function, in all cases, of indicating the court that is closely connected to the "dispute". This place has been recognized as a closely connected place, to which the category of contracts, in general, is connected. Thus, it is ensured that the competent court may be determined in advance, in accordance with the purpose of legal certainty and predictability. Therefore, it seems that the jurisdiction rule of the place of performance does not have the purpose of determining the court that is closely connected to the "subject of the specific dispute"; the main purpose of the rule is to ensure predictability by granting jurisdiction to the court of the place of performance of the characteristic obligation that is assumed to be closely connected for the whole contractual relationship. However, since the specific purpose of the special jurisdiction rules in practice is considered to establish a close connection, the purpose of determining the closely connected court serves as the guide in the interpretation of these rules.

109 Hill (n 41) 598-601.

110 Hill (n 41) 618; Poon (n 51) 641.

111 Hill (n 41) 611; Mankowski (n 53) 136; Dickinson and Lein (n 53) 153.

C. Objective of Proximity and *Forum Conveniens*

1. The closest connection

In the decisions of the CJEU, close connection was considered as the specific purpose of the special jurisdiction rules, and the determination of the closely or most closely connected place was construed as the purpose of the place of performance rule.[112] In fact, in the *Besix* decision, by stating that *"... 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..."*, it was pointed out that the most closely connected court should be determined in order to apply the place of performance rule.[113]

The influence of this point of view is seen in *Color Drack*. It has been noted that, since several places of performance are located in the same Member State in this case, predictability is not actually compromised, and it has been accepted that, since the courts of the same Member State have been granted jurisdiction, the requirement for close connection is also met. It was stated that the place of principal performance refers to the court most closely connected to the contract, and in order to determine the most closely connected court, a ranking was made among the places of performance.[114] Thus, in cases where there are several places of performance, the search for the determination of the "most closely connected" court has been undertaken, with an interpretation that actually goes beyond the purpose of the rule.[115]

While the determination of the place of principal performance has been accepted in this way in cases where there are several delivery places in sales contracts, the same approach has been adopted, in terms of service contracts, in principle, with *Wood Floor*. But before *Wood Floor*, in *Rehder*, it was stated, by referring to the evaluations in *Color Drack*, that the place most closely connected to the contract, that is, the place of the principal provision of services, should be determined in order

112 See *Shenavai v Kreischer* (n 45) [6]; *Besix* (77) [31]-[32]. See also *Wood Floor* (n 68), Opinion of AG Trstenjak, para. 71.

113 See *Besix* (n 77) [48]; *Color Drack* (n 4) [22]. It should be noted here that in some other decisions of the CJEU, ensuring predictability from the point of view of the defendant in determining the place of performance of the obligation in dispute was considered superior to the need for close connection. See Case C-288-92 *Custom Made Commercial Ltd v Stawa Metallbau GmbH*, [1994] ECR I-2913.

114 *Color Drack* (n 4) [40].

115 As mentioned above, in the Jenard Report, the function of the special jurisdiction rules to indicate the "most closely" connected court was not mentioned, as it was stated that *"Adoption of the special rules of jurisdiction is also justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it"*. See Jenard Report (n 21) 22. Similarly, in the Preamble of the Brussels I Regulation (para. 12), providing that, "In 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", again "a close connection" was put forth as the basis of special jurisdiction rules; meanwhile, the purpose of special jurisdiction rules to determine the most closely connected court is not mentioned.

to grant jurisdiction to the court of a single place of performance.[116] In *Rehder*, due to the nature of the services provided, it was not possible to identify a single place that was most closely connected; on the contrary, the interpretation that the services were provided in two separate places was adopted by the CJEU. Therefore, in fact, in *Rehder*, it was out of the question that the services were provided in several places. However, as a result of the fact that the place of performance cannot be determined as a single place in terms of jurisdiction in the contract of carriage in question, the CJEU has accepted that a case can be filed in two separate places, taking into account the nature of the services provided.

In *Wood Floor*, the statement in *Color Drack* that the "place of performance must be understood as the place with the closest linking factor between the contract and the court having jurisdiction" was cited.[117] Following that, it was noted that "... concerning the provision of services, when there are multiple 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";[118] thus, on the grounds that the principal place of performance is the place most closely connected to the contract, it was accepted that it was the place of performance mentioned in Art. 7(1)(b). It was also set forth that the principal place of performance should be determined in accordance with economic criteria. Additionally, it was stated that determining the place of the main provision of services in accordance with the provisions of the contract will realize the purpose of close connection, since this place is naturally connected with the dispute.[119]

As can be seen, in cases where the performance takes place in several Member States, the "place of performance" referred to in Art. 7(1)(b) is adopted as the "principal place of delivery" and the "place of the main provision of services" *within the framework of the closest linking factor*. In other words, the decisive element in the interpretation of the concept of the place of performance has been the criterion of close connection. However, the most closely connected place has not been identified as a predetermined and predictable place. On the contrary, the task of determining the principal place of performance is left to the courts for consideration on a case-by-case basis of which the guiding criteria is the economic criteria.

116 *Rehder* (n 64) [38]. In this decision, it was noted that *"the factors on which the Court based itself in order to arrive at the interpretation set out in Color Drack are also valid with regard to contracts for the provision of services, including the cases where such provision is not effected in one single Member State"* (Rehder (n 64) [36]-[37]), demonstrating that in the case *Color Drack*, the presence of several places of performance in one Member State was not a determining factor.

117 *Wood Floor* (n 68) [31].

118 *Wood Floor* (n 68) [33].

119 *Wood Floor* (n 68) [39]: *"The determination of the place of the main provision of services according to the contractual choice of the parties meets the objective of proximity, since that place has, by its very nature, a link with the substance of the dispute"*.

2. Autonomous interpretation of place of delivery and place of provision of services

Art. 5(1)(b) of the Brussels I Regulation and Art. 7(1)(b) of the Recast requires that the place of performance is to be determined, not in accordance with *lex causae*, but as a specific place in accordance with the contract and concrete facts. The fundamental assumption regarding this rule is the assumption that the goods are delivered (will be delivered) in a certain place or the services are provided (will be provided) in a certain place. Allocating jurisdiction on this place is based on the fact that this place is predetermined or determinable. It is accepted that, if this place is not determined under the contract, it should be determined according to the facts.[120] The rule allows the determination of the "specific place" where the characteristic obligation will be performed (the place of delivery or the place of provision of services) in the light of facts. Thus, there would be no need to determine the place of performance based on substantial rules of *lex causae*.

The principle of autonomous interpretation should be evaluated separately for cases where there are several places of performance because here, it goes beyond determining the place of delivery of goods or the place of provision of services (or where they are to be provided) as a specific place, based on the contract and concrete facts.

Firstly, the need to determine the factual place of performance, should not include determining the place of principal performance. It is clear that the purpose of the Recast is not to determine, in cases where the performance of the contract is split among several Member States, the weight of these places of performance on the basis of facts.

In cases where there are several places of performance, here, an interpretation that is different from the one in designating the place of performance in the light of facts under Art. 7(1)(b) is made. The place of performance is apparent, but it is spread over several Member States. In this case, should one of these places of performance be selected for the purpose of jurisdiction? Since in the decisions of the CJEU, the determination of the most closely connected court is considered the purpose of the jurisdiction rule, the concept of the principal place of performance has been put forward and it has been accepted that this place should be taken as the basis for jurisdiction. However, this place is not determined in a predictable way (such as the domicile of the obligor of the characteristic obligation).

The search for the place of principal performance in each dispute goes beyond the purpose of identifying the place of performance of the characteristic obligation on a factual basis under an autonomous approach because, in a contractual relationship,

120 *Commission Proposal* (n 102) 14. See also *Car Trim* (n 75) [57]-[62].

the place of delivery or the place where the services are provided (will be provided) can be understood, as a specific place, from the provisions of the contract or specific conditions. The autonomous interpretation is functional in this sense and does not prevent the predictability. In addition, the principle of autonomous interpretation is limited to the activity of determining a specific place of delivery or place of provision of services. However, making an interpretation on which of the multiple places of delivery or places of provision of services will be selected as the principal place of performance in accordance with economic criteria is contrary to the limited function of the autonomous approach. Therefore, in cases where there are several places of performance, the determination of the place of principal performance based on facts is not appropriate for the procedural function of the place of performance for jurisdiction.

3. Place of principal performance and forum (non) conveniens

The parties may have agreed on multiple places of performance in a contractual relationship. The evaluation of the close connection as a purpose in taking one of these places as the principal place of performance is also open to criticism, since the main purpose of the special jurisdiction rules is not the establishment of a close connection. In other words, acting with the purpose of determining the most closely connected court actually compromises legal certainty and predictability because in order to determine the most closely connected court in each dispute, the principal place of performance must also be determined. It is explained by Trstenjak herself, in *Wood Floor*, that, due to the uncertainty of economic criteria, it is not easy to determine the principal place of provision of services.[121]

However, at this stage, the evaluation of proximity as a purpose of the jurisdiction rules and search for the principal place of performance (to indicate the most closely connected court) would lead to the *de facto* application of *forum (non) conveniens*.[122] Indeed, as can be seen from the CJEU decisions, the purpose of determining the court most closely connected to the dispute plays a role in determining the principal place of performance.

In accordance with the *forum (non) conveniens* doctrine*,* originating from *common law,* in case the court determines, for a specific dispute, that the court of another place would be more proper in terms of jurisdiction, it would then grant a stay on the ground of *forum non conveniens*. According to *Spiliada Maritime Corporation v.*

121 *Wood Floor* (n 68), Opinion of AG Trstenjak, para. 78-79.

122 The *forum non conveniens* doctrine is compatible with the jurisdiction paradigm of *common law*; it is part of it. In fact, in the Brussels regime, it is possible to dismiss or suspend subsequent cases if a case is filed in the courts of several Member States, thanks to *lis pendens* and measures related to connected cases. However, while applying *lis pendens* and provisions related to connected cases, aimed at coordinating the jurisdiction of courts and preventing the conflicting decisions, the court of which place is more appropriate in terms of jurisdiction is not examined.

Cansulex Ltd.[123]*,* which is a cornerstone for the *forum non conveniens* doctrine, *"...it is not, for the court seised, a simple question of practical or personal "convenience", associated in particular with the burdening of the court, but rather a question concerning the objective appropriateness of the forum for trial of the dispute."*[124]

In accordance with the forum non conveniens, the court to which the case is filed must establish that another forum is clearly more appropriate in terms of jurisdiction. This 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"*.[125]

In particular, the approach of determining the principal place of performance, in cases where there are several places of performance, means that the court to which the case is filed determines whether it is competent by the empirical method within the framework of the circumstances of each dispute. In other words, the determination of the most closely connected court has been adopted as the purpose[126] and further, the investigation of the specific conditions of the dispute in accordance with economic criteria, in the determination of such a place, has been proposed. Therefore, in cases where there are several places of performance, the court examines whether it is the most closely connected court, i.e., whether it is the *forum conveniens*. If the court of the place of performance where the case was filed is not the court of the principal place of performance, the case must be dismissed due to lack of jurisdiction. However, in this way, it is also shown, albeit indirectly, that in fact, another forum (the court of the principal place of performance) is the court most closely connected to the dispute.

This practice, which comes close to the doctrine of *forum non convenies*, is both against the purpose of the jurisdiction rules in the civil law system to serve legal certainty and predictability and makes difficult the application of the place of performance rule in cases where there are several places of performance. In addition, the difficulty of determining the principal place of performance should not be overlooked.

D. The Possibility that the Principal Place of Performance Cannot be Determined

The solutions proposed in the *Color Drack* and *Wood Floor* decisions of the CJEU in relation to the case in which the principal place of performance cannot be determined are different. While in *Color Drack*, the claimant was granted the

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

124 ibid 474.

125 ibid 477-478, para. (e).

126 In the decisions of the CJEU, determining the closest or closely connected court was adopted as the purpose of the special jurisdiction rules and in cases where there are several places of performance this approach led to the emergence of a concept (as the principal place of performance) which eliminates predictability in terms of jurisdiction.

opportunity to choose one of multiple places of performance[127], in *Wood Floor*, it was set forth that the case may be filed at the domicile of the agent.[128]

In *Color Drack*, granting the claimant the right to choose does not, in fact, create a serious unpredictability of the outcome, since the places of performance are located in the same Member State. However, granting the claimant the right to choose in cases where multiple places of performance are split among different Member States, has been criticized for leading to *forum shopping*.[129] In fact, the CJEU has confined the right to choose to the cases where the places of delivery are in the same Member State.[130] Therefore, in cases where multiple places of performance are located in different Member States, the claimant should not be given the opportunity to choose one of these places.

In *Wood Floor*, a different step was taken and it was accepted that the court where the agent is domiciled has jurisdiction.[131] As a justification, it was stated that, *"that place can always be identified with certainty and is therefore predictable. Moreover, it has a link of proximity with the dispute since the agent will in all likelihood provide a substantial part of his service there"*.[132] As seen, in *Wood Floor*, it was determined that the domicile of the agent ensures legal certainty and predictability; however, with the assumption that the agent would provide a substantial part of his service there, the close connection to the dispute was emphasized. In other words, once again, the search for a close connection has come to the fore in the preference of this solution. In connection with this point of view, the criticism that the commercial agent's domicile may not always be the place closely connected to the dispute has been put forward. It has been stated that, especially if the services are not provided in this place, for example, if only preparatory work is carried out in this place[133] and the services themselves are provided in another place, the domicile of the commercial agent may not be the place closely connected to the dispute.[134]

It can be seen that since in the decisions of the CJEU it was sought to determine the most closely connected place, the criticisms have the same basis. In other words, it

127 *Color Drack* (n 4) [42].

128 *Wood Floor* (n 68) [42].

129 Poon (n 51) 652.

130 *Color Drack* (n 4) [44].

131 *Wood Floor* (n 68) [42].

132 *Wood Floor* (n 68) [42].

133 For the opinion that preparatory activities can be considered as the provision of services within the scope of Art. 7(1)(b), see Magnus and Mankowski (n 90) 189.

134 Poon (n 51) 654. It was also criticized that if the court where the agent is domiciled has jurisdiction, then the claimant can sue in their own domicile which means a potential of *forum actoris*. See Poon (n 51) 653. However, it is seen that the claimant may also not be the commercial agent, that is, the obligor of the characteristic obligation, in each case; that the client may be the claimant and that in accordance with the general jurisdiction rule, the court of the domicile of the defendant and the court of the domicile of the obligor of the characteristic obligation may overlap. Therefore, the criticism regarding *forum actoris* may be considered as a weak criticism, as, for instance, in the case of deficient performance of service, the possibility that the client may be the claimant would be higher.

has been tried to demonstrate that a close connection with the dispute cannot actually be established.

VI. Search for Solutions within the Scope of Art. 7(1)(b) of the Brussels I Recast

A. Opinion that the General Jurisdiction Rule Should be Returned to and Search for Another Competent Court with Reference to the Characteristic Obligation

As can be seen above, the jurisdiction rule of the place of performance has been introduced to point to a single place in order to ensure legal certainty and predictability. It should be noted that the place of performance of the characteristic obligation, especially in sales and service contracts, is specifically designated, with the Brussels I Regulation, as to grant jurisdiction to the court of a specific place. This jurisdiction rule is based on the presumption that the place of performance is a place that is already closely connected to the contract. The fact that the place of performance is specified for sales and service contracts guarantees predictability from the point of view of the defendant. However, in cases where there are multiple places of performance, determining the most closely connected place, not predictability, has been the point of departure for the jurisdiction.

In fact, the CJEU introduced a new jurisdiction rule with the principle of *"principal place of delivery"*, in *Color Drack*. However, it did not determine which economic criteria will be taken as the basis for this place. Thus, it has been accepted that the principal place of performance will mean the place of performance of the characteristic obligation in cases where there are multiple places of performance. In response to this approach, the opinion that the provision of Art. 7(1) should not be applied and the general jurisdiction rule should be returned to if there are multiple places of performance, noting especially the difficulties in the determination of the principal place of performance and that, even if it is determined, it would not indicate the court closely connected with the dispute, in any case.

However, returning to the general jurisdiction rule should be considered as a last resort, which should be treated with caution because the special jurisdiction rules not only provide an alternative forum to the claimant. At the same time and more importantly, it is also in the defendant's interest to be sued before the court to which the case is connected. In cases where there are multiple places of performance within a country, it might be reasonable to return to the general jurisdiction rule due to a single place of performance not being determinable. In other words, if the defendant's domicile is in Paris; if the places of performance are in Lyon, Grenoble,

and Marseille, filing the case in Paris would not create a serious disadvantage and would be predictable for the defendant. However, the Brussels regime is a system of jurisdiction in which several Member States are involved. Considering the court of the defendant's domicile as competent in a dispute where the places of performance are split among other Member States while the defendant's domicile is in Germany, would mean, even though it is predictable, that there will be only one competent court in the EU. However, in such a case related to several Member States, the main point is that the court(s) connected with the dispute should be indicated in a predictable manner, besides the general jurisdiction rule. Namely, a return to the general jurisdiction rule means a denial of the purpose and function of the existence of special jurisdiction rules.

In *Wood Floor*, AG Trstenjak prioritized the implementation of the special jurisdiction rule before the general jurisdiction rule. Although this approach is well-grounded, a permanent and predictable solution can be provided for the problem of multiple places of performance, by granting jurisdiction to the court of a specific place, instead of formulating a jurisdiction rule that is hard to apply, such as the principal place of performance. Hence, if a solution is to be sought within the scope of Art. 7(1)(b), making the characteristic obligation decisive can be considered because Art. 7(1)(b) has, in the allocation of jurisdiction, acted starting from the characteristic obligation. Taking the domicile of the performer of the characteristic obligation as the basis, due to the fact that the place of performance of the characteristic obligation cannot be determined, seems particularly satisfactory from the point of view of predictability. There is no doubt that this place is connected with the contractual relationship by characteristic obligation. As can be seen from the foregoing, it is not the determination of the court most closely connected to each dispute that is important, but the determination of the court of a place that is connected with the contract. However, setting forth that this place is the domicile of the performer of the characteristic obligation carries the danger of *forum actoris*; in addition, if it is taken into consideration that in most cases, the claimant will be the purchaser or the client, in fact, the domicile of the performer of the characteristic obligation overlaps with the domicile of the defendant determined under the general jurisdiction rule. Thus, the rule of the domicile of the performer of the characteristic obligation either leads to *forum actoris*, or overlaps with the rule of the domicile of the defendant; that is, it does not imply an alternative court. In this case, it does not seem possible to formulate another jurisdiction rule in which the characteristic obligation will be the point of departure.

B. Acknowledging that the Courts of Several Places of Performance are Competent Depending on Several Places of Performance

As discussed above, in cases where there are several places of performance of the characteristic obligation, the main problem is the concept of "principal place of performance". It is clear that this concept is used to identify the "most closely connected" court. But again, as considered above, the jurisdiction rules are not actually aimed at indicating the most closely connected court.[135] In particular, the purpose of the special jurisdiction rules is to grant jurisdiction to the court of a place that is connected to the relationship or incident that is the subject of the dispute, to ensure predictability. It is aimed that this place is a specific place. For this purpose, the rule of the place of performance of the obligation in dispute set forth in Art. 5(1) of the Brussels Convention is turned into the rule of the place of performance of the characteristic obligation, at least for certain types of contracts, with the Brussels I Regulation.

Although it seems that the place of performance of the characteristic obligation solves the problem of fragmentation based on obligation, the problem of fragmentation based on the place of performance could not be eliminated. At this point, it should be taken into account that the Brussels jurisdiction rules do not actually prevent the courts of several places from being competent in the same dispute; that these rules coordinate the competent courts within the EU and indicate the competent courts allocating the jurisdiction. *Lis pendens* and the provisions for related cases are functional in terms of preventing the pending or related cases and the issuance of conflicting decisions.

Since at the basis of the special jurisdiction rules lies the allocation of jurisdiction to the connected court, it should be accepted that the court of each place of performance is in fact connected to the contract in cases where there are several places of performance. As the purpose of the jurisdiction rules is not to identify the most closely connected court, a ranking of proximity should not be made for these places of performance. The fact that the places of performance are split among several Member States indicates that the courts of these places are sufficiently connected with the contract because it is clear that the court of the principal place of performance of the characteristic obligation also does not have an adequate connection with the dispute if the non-performance of a monetary obligation or the validity of the contract is the subject of the dispute. Therefore, the determining factor here should not be the connection with the specific dispute. Especially the determination of the most closely

135 This terminology belongs to the conflict of laws methodology. The determination of the most closely connected law is the main purpose of the conflict of laws rules. Conflict of laws rules use connecting factors, which are assumed to indicate the most closely related law. In addition, it is imperative that the conflict of laws rules indicate a particular law as the most closely connected law, since the court cannot apply the law of several states to a particular dispute at the same time. A law must be determined and applied. However, it is not the determination of the most closely connected court that is important when establishing the jurisdiction of the courts. The courts of several states may be closely connected to a contractual relationship. The existence of *lis pendens* and rules regarding related actions in the civil law system demonstrates that it is usual for the courts of several places to be competent.

connected place of performance is an ambitious approach that exceeds the purpose of the jurisdiction rule of the place of performance.

In the event that the courts of several places of performance have jurisdiction, fragmentation should be considered as a complication of the rule. As noted, within the framework of *lis pendens* and the rules on related cases, the defendant is prevented from having to defend himself before the courts of several places. The important point here is that it is a fact that can be foreseen by the defendant that the courts of several places of performance would be competent. There is no doubt that these places are connected by a contractual relation, even if to different degrees. It should be clearly accepted that it is not necessary to determine the most closely connected place of performance (the principal place of performance), as well as that the court of each place of performance is competent. The fact that the dispute is not related to performance or the part of the characteristic obligation that is performed at a specific place of performance also does not prevent the jurisdiction rule from allocating jurisdiction. As can be seen from the foregoing, the purpose is not the determination of the court most closely connected to the specific dispute in each specific case.

Thus, recognizing that the courts of each place of performance are competent in fact leads to the consequence that any court to which the case is filed would consider itself competent depending on whether it finds that the place of performance is within its jurisdiction. Therefore, a court of a Member State would not consider itself incompetent on the grounds that the principal place of performance is located in another Member State. Another important point here is that from the point of view of the defendant, the principal place of performance is unpredictable until a decision regarding jurisdiction is rendered. However, if the courts of each place of performance are considered competent in cases where there are several places of performance, it is clear that this will ensure predictability for the defendant.

VII. Several Places of Performance from the point of Relationship Between Jurisdiction and Recognition and Enforcement

A. Structure of the Brussels Regime and Allocation of Jurisdiction to Several Courts Under Jurisdiction Rules

The system established by the Brussels Convention is a system restricted to the legal systems of Member States, containing provisions on *lis pendens* and related cases, and ultimately aimed at facilitating the recognition and enforcement of court decisions issued in other Member States.[136] It is also necessary to determine whether this feature of the system will have an impact on the interpretation of the jurisdiction rules.

136 See Jenard Report (n 21) 7-8.

It should be taken into consideration that, as the special jurisdiction rules actually allow, in case where the domicile of the defendant is located in a Member State, and the courts of other Member States are competent, the Brussels regime allows the courts of other Member States to be competent; for instance, it provides that, if the same case is initiated both at the domicile of the defendant and the place of performance of the obligation, the second case should be dismissed on the ground of *lis pendens*; in case of related cases, it enables the suspension of the case initiated later.

Accordingly, if the defendant's domicile is within the EU, the court of another Member State may also be competent under the special jurisdiction rules.[137] Thus, in the Brussels regime, as in a system of jurisdiction belonging to a single country, it was made possible to file a case both at the defendant's domicile and at the court of another place that is competent under the special jurisdiction rules. The provisions on *lis pendens* and related cases are drawn up to prevent abuse of this mechanism and the issuance of conflicting decisions. Thus, it should be taken into account that the Brussels regime is built similar to a jurisdiction system of a single country[138] and it should be established that it allows the initiation of cases at the courts of several Member States. It is also possible that there may be several competent courts in accordance with different jurisdiction rules, as well as several competent courts in accordance with the same jurisdiction rule. In fact, the existence of several places of performance of the characteristic obligation is not the sole example. It may be seen that the defendant may have several domiciles by the relevant legal system(s). From the point of view of this possibility, it becomes clear that the jurisdiction rule of the defendant's domicile may also not correspond to a single place in all cases.[139]

B. Indirect Jurisdiction in Recognition and Enforcement

The main purpose of the Brussels Convention, which is the first instrument of regulation of the Brussels regime, was determined as to facilitate the recognition and enforcement of judgments within the Community. In order to achieve this goal, the Convention has introduced provisions to reduce the likelihood of the issuance of conflicting decisions by the courts of Member States.

The requirement that is among the conditions for recognition and enforcement in national legal systems is that the jurisdiction of the court that rendered the decision is not excessive and has a real connection with the dispute. Considering that the Brussels regime is mainly sought to facilitate recognition and enforcement within the

137 However, if the defendant's domicile is not in a Member State, then the jurisdiction rules in the law of the relevant state apply, and not the special jurisdiction rules in the Brussels regime.

138 See Jenard Report (n 21) 13.

139 See fn. 21.

EU borders, the introduced jurisdiction rules are based on the presumption that there is a real and substantive connection between the court and the dispute or the parties. In other words, a decision made by a court that considers itself competent in accordance with the jurisdiction rules set forth in the Brussels regulations is considered to have been made by the court of another Member State that is appropriate in terms of jurisdiction; the jurisdiction of the court that rendered the decision, as a rule, is not examined. Therefore, the main point is to recognize that first of all the jurisdiction rules in the Brussels regime are based on the assumption that there is a real connection between the court and the dispute. Accordingly, the place of performance rule constitutes the presumption of a substantive and real connection between the dispute and the court. For instance, when the decision of the Hamburg court, as the court of the place of performance, is to be enforced in Milan, it is not examined whether the jurisdiction of the Hamburg court is based on a real connection. The reason for not carrying out this examination is that the Hamburg court has deemed itself competent in accordance with the jurisdiction rules contained in the Brussels regulations that facilitate recognition and enforcement. If the courts of several places of performance are competent, it should be taken into consideration that, by virtue of both *lis pendens* and the measures regarding connected cases, the issuance of conflicting decisions can be prevented. Therefore, from the point of view of recognition and enforcement, the degree to which the activity of performance, which is the basis of the jurisdiction of the court that renders the decision, should not be investigated at the recognition and enforcement stage, which is already the reason for the existence of the jurisdiction rules in the Brussels regime.

In other words, the real and substantial connection is already the basis of the rules, it is not possible and logical to examine it in each individual case. If it is to be examined whether the court is really the court of the place of performance in each case, the question arises as to why hard and fast jurisdiction rules exist. Therefore, the method of testing the proximity, such as determining the principal place of performance in each dispute, should be abandoned. In fact, if the performance of a single obligation is physically split among different Member States, it should be recognized that each place of performance has the potential to establish jurisdiction in a predictable way from the point of view of the defendant, instead of using the proximity test to choose one of these places.

The logic of not examining indirect jurisdiction in recognition and enforcement also requires this. If the court hearing the case considered itself competent, by examining whether the place of performance is the principal place of performance in the case at hand, the recognition and enforcement court also has to examine indirect jurisdiction, which is exactly what the Brussels regime is trying to avoid. That is, the recognition and enforcement court does not examine indirect jurisdiction on the

assumption that the jurisdiction of the court rendering the decision is based on a real and substantive connection. Thus, if, in cases where there are several places of performance, a sub-variation of the rule of the place of performance as "the principal place of performance" is developed and determined in accordance with economic criteria in each dispute, then, the non-examination of indirect jurisdiction by the recognition and enforcement court would be devoid of legitimacy.

In other words, when the place of delivery or the place where the services are provided is multiple, it should be seen as a fact that the place of performance may point to multiple places in terms of a particular obligation. Even though the Brussels I Regulation, has reduced the obligation to the characteristic performance in order to eliminate the problems created by Art. 5(1) of the Brussels Convention and thus partially eliminated the problem of fragmentation based on several obligations, the possibility of multiple places of performance of the same obligation has either not been evaluated as a problem or has not been anticipated. This issue, which is discussed by the decisions of the CJEU, should not make the rule of the place of performance unenforceable. As a solution, it should be preferred to accept as a principle that the courts of multiple places of performance are competent, rather than developing sub-rules regarding the place of performance.

Conclusion

The search for a solution for cases where the place of performance is located in multiple Member States is based on the requirement that the jurisdiction rules, with an understanding from the past, point to the court of the most closely connected place. In this context, it has been accepted that the main purpose of the special jurisdiction rules is legal certainty and predictability; and that their specific purpose is to allocate jurisdiction to the most closely connected court. Thus, the search for a closely connected court was decisive in the teleological interpretation of the special jurisdiction rules.

The approach of determining the principal place of performance in cases where multiple places of performance are split among Member States is the result of the search for the most closely connected court. The uncertainty of the economic criteria, taken as the basis for the principal place of performance, and therefore the difficulty of determining the principal place of performance, has already been inarguably demonstrated. However, the view that the general jurisdiction rule should be returned to in the face of the difficulty of determining the principal place of performance (and the fact that the principal place of performance, as suggested in the doctrine, does not point to a closely connected court in all events) ignores the important function of the special jurisdiction rules in the Brussels regime. On the other hand, the determination

of the closely connected court under the name of the principal place of performance in each specific case, turns into a search for the *forum conveniens*. It is obvious that this approach is incompatible with the basic structure of the civil law system. In addition to undermining predictability, the principal place of performance approach contradicts the basic structure of the system.

In this study, it is emphasized that

- the rule of performance of the characteristic obligation set forth in Art. 7(1)(b) should be interpreted in light of the paradigm of the civil law system for the purpose of predictability.
- Thus, it should be considered normal for multiple places of performance to grant jurisdiction to courts in multiple Member States.
- Since the return to the general jurisdiction rule leads to the result that only one local court within the EU is competent, this would not be in accordance with the multilateral and broad geographical structure of EU integration.
- Allocation of jurisdiction to multiple courts is usual in the Brussels regime; *lis pendens* and the provisions on related cases complement this mechanism.

Therefore, it should be accepted that the courts of multiple places of performance are competent, and the approach of choosing one of these places based on some unclear criteria should be abandoned. Ensuring predictability from the point of view of the defendant would be possible in this way.

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Bibliography

Briggs, A, *Civil Jurisdiction and Judgments*, 6th ed. (Informa law from Routledge 2015).

Dickinson A and Lein, E, *The Brussels I Regulation Recast* (Oxford University Press 2015).

Droz, G A L, 'Delendum est forum contractus' (1997) Recueil Dalloz, Chronique 351-356.

Ehrenzweig, A A, 'The Transient Rule of Personal Jurisdiction: The "Power" Myth and *Forum Conveniens'* (1956) 65 Yale L. J. 289-314.

Franzina, P and Michaels, R, 'Jurisdiction, Foundations' (2017) Encyclopedia of Private International Law 1042-1051.

Graziano, T K, 'Jurisdiction under article 7 no. 1 of the recast Brussels I regulation: disconnecting the procedural place of performance from its counterpart in substantive law. An analysis of the case law of the ECJ and proposals de lege lata and de lege ferenda' (2015) 16 Yearbook of Private International Law 169-217.

Grossi, S, *The U.S. Supreme Court and the Modern Common Law Approach* (Cambridge University Press 2015).

Hartley, T C, 'Basic Principles of Jurisdiction in Private International Law: The European Union, The United States and England' (2021) ICLQ 1-16.

Heuzé, V, 'De quelques infirmités congénitales du droit uniforme: l'exemple de l'article 5-1 de la Convention de Bruxelles du 27 septembre 1968' (2000) Revue critique de droit international privé 595-639.

Hill, J, 'Jurisdiction in Matters Relating to a Contract under Brussels Convention' (1995) 44 ICLQ 591-619.

Juenger, F, 'Judicial Jurisdiction in the United States and in the European Communities: A Comparison' (1984) 82 Mich. L. Rev. 1195-1212.

Magnus, U and Mankowski, P, *Brussels I Bis Regulation: Commentary* (Otto Schmidt 2016).

Mankowski, P, *Special Jurisdictions, Article 5, Brussels I Regulation,* (European Law Publishers 2007) 78-235.

Michaels, R, 'Two Paradigms of Jurisprudence' (2006) 27 Mich. J. Int'l L. 1004-1069.

Newton, J, *The Uniform Interpretation of the Brussels and Lugano Conventions* (Hart Publishing 2002).

Okoli, C S A, *Place of Performance: A Comparative Analysis* (Hart Publishing 2020).

Pålsson, L, 'The Unruly Horse of the Brussels and Lugano Conventions: The Forum Solutionis' Festkrif für Ole Lando (Copenhagen 1997) 259-282.

Schlosser, P F, 'Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems' (1996) 45 U. Kan. L. Rev. 9-48.

Poon, A, 'Determining the Place of Performance under Article 7(1) of the Brussels I Recast' (2021) 70 ICLQ 635-663.

Tetley, W, 'Mixed Jurisdictions: common law vs civil law (codified and uncodified)' (Part II) (1999-4) Rev. dr. unif. 678-738.

Van Lith, H, *International Jurisdiction and Commercial Litigation* (T.M.C. Asser Press 2009).

Von Dryander, C, *'Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure'* (1982) 16 No 4 Int'l Lawyer 671-692.

Von Mehren, A T, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983-1984) 6 Tel Aviv U. Stud. L. 50-121.