

INTERNATIONAL CONTRACTS IN EUROPEAN COURTS: JURISDICTION UNDER ARTICLE 5(1) OF THE BRUSSELS CONVENTION

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I. INTRODUCTION

On both sides of the Atlantic, courts are likely to see an increasing number of contract cases of an “international” character—a term which we, for present purposes, may define as including at least contracts concluded between parties whose places of business are in different countries.¹

In dealing with an international contract case, courts often need to resolve issues of jurisdiction and of choice of law before they reach the actual merits of the dispute. In the past, judges resolved such matters by turning to the domestic law rules of the forum. Today more and more, international law rules govern these matters.

The jurisdiction of a court in the European Union over defendants domiciled in the Union is determined by the Brussels Convention of 1968.² In a limited number of cases, a European court needs to follow the Brussels Convention even as regards defendants not domiciled within the European Union.³ The corresponding Lugano Convention⁴ applies to cases involving defendants domiciled in the European Union, on the one

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1. This is, for example, the definition of “internationality” of sales contracts given in art. 1(1) of the 1980 Vienna Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, 19 I.L.M. 668 [hereinafter CISG]; see HERBERT BERNSTEIN & JOSEPH M. LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE § 2-2 (forthcoming 1997).

2. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229; for the consolidated and updated version, see 1990 O.J. (C 189) 2, 29 I.L.M. 1413 (1990) [hereinafter Brussels Convention].

3. Brussels Convention art. 17.

4. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 28 I.L.M. 620 (1989). For details concerning the relationship between the Lugano and the Brussels Conventions, see JAN KROPHOLLER, EUROPÄISCHES ZIVILPROZESSRECHT [EUROPEAN CIVIL PROCEDURE], Einl. Rd.Nm. (Intro., margin nos.) 55-57, at 47-49 (5th ed. 1996). Because the differences between the two Conventions are minute (*id.* Rd.Nr. 54, at 47), the Lugano Convention will not be discussed further in this Article.

hand, and in the remaining European Free Trade Area (E.F.T.A.) States, on the other.⁵ No such convention is as yet applicable in the United States; in matters of so-called "extraterritorial" jurisdiction we still look exclusively to domestic law rules.⁶ But that may change in the future since a multilateral treaty on the recognition of judgments in civil and commercial matters with a potentially global scope of application is under consideration, and the United States not only participates in, but initiated, the negotiations.⁷

Also as regards the choice of law in a contract case, courts in the European Union are already bound by international treaty rules: Convention on the Law Applicable to Contractual Obligations of 1980 (the Rome Convention).⁸ Work on a similar Inter-American Convention was concluded in 1994, and again the United States was a participant together with Canada and seventeen Latin American countries.⁹ Thus it is possible that in the not-too-distant future judges in this hemisphere, like their European brethren, will be guided by a uniform set of rules in contract cases to determine the law applicable to the merits of the case.

It should be noted that the rule eventually governing the substance of a contract case is no longer necessarily a domestic law rule. For example, many disputes relating to international sales contracts are now subject to the rules of the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG). When international sales cases are brought in a court in the United States, the Convention is already the law of the land and has been since 1988, even though relatively few people seem to have noticed. No less than forty-five countries have ratified the CISG,¹⁰ including most of the important trading partners of the U.S., with the notable exception of the UK.

5. The remaining E.F.T.A. members include Iceland, Norway, and Switzerland. Note, however, that two of the most recent arrivals in the European Union, the former E.F.T.A. states Finland and Sweden, continue to apply the Lugano Convention until their accession to the Brussels Convention has been completed. (The other new member, Austria, did not sign the Lugano Convention.)

6. *I.e.*, both as regards the forum court's jurisdiction over defendants in sister-states and as regards jurisdiction over defendants in foreign countries.

7. See Arthur von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (Summer 1994); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1041-43 (1995).

8. June 19, 1980, 1980 O.J. (L 266) 1, 19 I.L.M. 1492 (1980).

9. For the text, see Inter-American Convention on the Law Applicable to International Contracts, March 17, 1994, OEA/Ser. K/XXI.5, CIDIP-v/doc. 34/94 rev. 3 Corr. 2, 33 I.L.M. 732 (1994).

10. See the list in BERNSTEIN & LOOKOFKY, *supra* note 1, App. I.

Thus in at least one important area of contracts, namely in sales cases, we do have internationally uniform rules of decision and concomitant rules that tell us when a case is subject to these rules.¹¹ In these cases, to the extent that we share rules of substance, we have no occasion to resolve a "conflict of laws." On the other hand, the CISG does not resolve all issues which may arise with respect to a sales contract,¹² and sales cases are not the only contracts cases. Thus the need to address conflicts of law in contract cases remains, and internationally uniform rules on jurisdiction and choice of law in such cases are still far from being a reality in this hemisphere. For now, we must often make do with our domestic law rules and approaches.

But then the distinction between international and domestic law rules may not always be the most relevant concern in the cases being considered here. Rather, what is needed more than anything else is a better understanding of differences among nations and groups of nations in their approaches and policies respecting contracts. Of course, many "differences" between Western legal cultures may, upon closer examination, prove more apparent than real.

The professional comparatist may be thoroughly familiar with both the differences and the similarities in the Western legal tradition. But we have to remind ourselves constantly that most lawyers—including our own American judges—know little, if anything, about foreign laws and their social, economic, political or cultural environment. And to make things worse, the reader of American cases cannot escape the impression that all too frequently they do not even want to know more. In an increasingly global economy America can ill afford such deliberate ignorance.

This Article will discuss problems of jurisdiction in contract cases which have arisen in the nearly twenty-five years since the Brussels Convention went into effect in 1973. Experiences gained by the Europeans in a quarter century of international cooperation in this area of the law cannot be ignored in the current negotiations, mentioned before, aiming at the conclusion of a worldwide treaty designed to facilitate the enforcement of judgments in civil and commercial cases.

11. See CISG, *supra* note 1, arts. 1-6.

12. For details, see BERNSTEIN & LOOKOFKY, *supra* note 1, § 2-6.

II. THE EUROPEAN PRACTICE

The great significance of the Brussels Convention is due not only to the fact that it is a uniform law for more than 300 million people. Equally important is the method employed by the drafters of the Convention. The EC Treaty¹³ merely calls for “the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals.”¹⁴ Thus a multilateral treaty modeled on traditional bilateral recognition-of-judgments treaties which leave existing national rules on judicial jurisdiction intact might have sufficed to carry out this mandate.

The drafters of the Brussels Convention, however, undertook a much more ambitious task. They attempted, and surprisingly succeeded in the attempt, to devise uniform rules for the exercise of jurisdiction in all EC/EU countries.¹⁵ Acceptance by the various ratifying states required each of them to forego the exercise of one or more forms of traditional jurisdiction under their national laws which appear “exorbitant” from a broad comparative perspective, but which are ingrained in their respective traditions.¹⁶

The most important principle embraced by the Brussels Convention is that a person domiciled in an EU country shall be sued in that country.¹⁷ The courts of all other EU countries would have jurisdiction over that defendant only by virtue of the rules of the Convention.¹⁸ These rules apply regardless of the defendant’s nationality. Thus a U.S. citizen domiciled in an EU country is entitled to invoke them, as is the EU subsidiary of a U.S. corporation. The same rights, of course, attach to any defendant linked to another non-EU country by citizenship, as an individual, or by corporate affiliation, as a subsidiary with an EU domicile.¹⁹

Exceptions to this ground rule requiring the plaintiff to sue at the defendant’s domicile are very limited in number thanks to the elimination

13. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY].

14. EC TREATY art. 220.

15. It certainly helped that at the time of adoption of the original Brussels Convention only the six founding members of the EC needed to reach an agreement. Those joining later, including the UK, had to accept the results of this agreement (with minor modifications).

16. See Brussels Convention, *supra* note 2, art. 3, for a long list of these outlawed bases of jurisdiction.

17. Brussels Convention, *supra* note 2, art. 2.

18. *Id.* art. 3(1).

19. See *id.* art. 52, which refers to domestic law for the determination of a party’s domicile.

of “exorbitant” national rules on jurisdiction mentioned before. The amorphous concept of “doing business” (by a corporate defendant) is not permitted as the basis for the exercise of jurisdiction under the Brussels Convention. Moreover, something that should go without saying, but needs to be mentioned because of the retrograde ruling of the U.S. Supreme Court in the *Burnham* case,²⁰ is the fact that service of process within a given EU country never furnishes a basis for Brussels Convention jurisdiction.

On the other hand, the lawyer trained only in the Common law may be surprised to learn how contract cases fare under the Brussels Convention. In “matters relating to a contract,” Article 5(1) of the Convention provides for jurisdiction “in the courts for the *place of performance* of the obligation in question.” (emphasis added) This Convention rule, odd as it may seem from a Common law perspective,²¹ conforms to age-old Civil law traditions. This, however, does not mean that the place-of-performance rule has been understood and applied uniformly throughout the Civil law world, not even in Europe. Thus its interpretation as a Convention rule has given rise to numerous doubts and controversies.

Fortunately, a procedure in force since 1975 guarantees a certain degree of uniformity in the application of all Convention rules. It allows, and in some instances requires, the resolution of interpretation issues by the European Court of Justice (ECJ) in Luxemburg.²² This procedure has resulted in a series of cases from the ECJ attempting to clarify authoritatively the meaning of crucial elements of the place-of-performance jurisdiction in contract cases.

A. *What is a Contract Case?*

Before seeking to determine the “place of performance” and the “obligation in question,” which (I might warn) is a rather complicated business, we should first consider the scope of application of this *contract*-jurisdiction rule. The ECJ has held that the concept of a “matter relating to a contract” must be interpreted as having the same meaning in all EU countries. According to the court, this meaning is to be established

20. See *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990).

21. It is not completely unknown in this country; see, for instance, the Florida statute involved in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

22. See Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, June 3, 1971, 1990 O.J. (C 289) 3, 29 I.L.M. 1439, 1440-41 (1990).

by a so-called autonomous interpretation, *i.e.*, we must determine the scope of the rule not according to a particular national law, but by giving meaning to the Convention's text "having regard to its principles and objectives and to its relationship with the EC/EU Treaty."²³

A recent case²⁴ illustrates the court's approach. In this case the plaintiff, a French company doing business under the name TMCS, had purchased a device from another French company, Handte France, which acted as the distributor for the German manufacturer of the product, Handte Deutschland. The device was designed to extract small particles in a production process and was to be attached to two machines used in the process of polishing pieces of metal in the plaintiff's factory. Claiming that it could not be so used because it did not comply with applicable occupational safety and health provisions, plaintiff brought an action in a French court against the distributor and the manufacturer.

The manufacturer, domiciled in Germany, objected to the exercise of jurisdiction by the French court on the basis of Article 5(1) of the Brussels Convention, arguing that any claim against it did not constitute a "matter relating to a contract," because it had not entered into a contract with the plaintiff. The ECJ agreed, even though under French law the end-user of a product in circumstances like these *might* have a cause of action against the manufacturer *in contract*. The court insisted that an autonomous interpretation of the crucial terms of the Convention rule was required and concluded that a "matter relating to a contract" was not present in a situation where no obligation voluntarily incurred by one party *vis-à-vis* the other was involved.²⁵

The case is particularly interesting for several reasons. First of all, let us consider the connection between substance and procedure in the light of the *Handte* case. It is easy to see that absent an agreement on choice of law the contract between the French end-user and the French seller of the product was subject to French law.²⁶ Because French law enables the end-user to hold a manufacturer liable on a contract basis, it

23. See Case 34/82, *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging* 1983 E.C.R. 987.

24. Case C 26/91 *Jakob Handte & Co. v. Traitements Mécano-chimiques des Surfaces SA*, 1992 E.C.R. I-3967.

25. Case C 26/91, 1992 E.C.R. at I-3994-95.

26. This would seem to follow simply from the fact that both parties are French companies acting in France. If necessary, one can also refer to the 1955 Hague Convention on the Law Applicable to International Sales of Goods, 510 U.N.T.S. 149, 151 (1964), which is in force in France and which provides in art. 3(1) that in default of a law chosen by the parties the law at the vendor's habitual residence applies.

could be argued that this is an effect of the contract between the end-user and its seller, the French distributor. On the facts of the *Handte* case the issue of the German manufacturer's contract liability would thus be governed by French (contract) law. Is it not appropriate then to let the French court exercise jurisdiction to adjudicate this issue?²⁷ We can safely assume that the manufacturer did release the goods into a stream of commerce which was calculated to lead to a sale to an end-user in France. In an American court, this fact would have been considered crucial under the due process requirements for the exercise of personal jurisdiction.²⁸ The ECJ did not address the fairness aspects inherent in the constitutional due process issue. It was obviously more concerned with certainty than with fairness in the concrete case: more concerned with the need for a reasonably well-defined concept of a "matter relating to a contract" (art. 5(1) of the Brussels Convention) which would help the judges in a very diverse Union of twelve nations to determine the availability of the special contracts jurisdiction under the Brussels Convention with relative ease.

The *Handte* case is also interesting for the reason that it tends to show how significant the conceptual distinction between contract and tort still is—notwithstanding all the rumors about the "Death of Contract."²⁹ The point I am trying to make will become clearer once we ask the question: What would happen in a case like *Handte* if the plaintiff were to bring a *tort* action against the foreign manufacturer of allegedly defective equipment purchased from a forum distributor? There should be no problem with the French court's jurisdiction since the effect of the defendant's act (the harm) occurred in the forum country and the ECJ has held that in *tort* cases jurisdiction lies under Article 5(3) of the Brussels Convention both in the country where the allegedly tortious act was committed and in the country where the harmful effect materialized.³⁰ So why did the plaintiff in *Handte* sue in contract and not in tort?

An answer to this question will usually emerge from a comparison of the relative advantages to a plaintiff of contract and tort actions. For example, generally speaking German law imposes less

27. Note that the argument developed in the text is completely independent from the fact that *Handte Deutschland* appears to control *Handte France* and uses it as a distributor of its products.

28. See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987); see also Herbert Bernstein, *Verfassungsschranken der Personal Jurisdiction in den USA: Eine Studie aus Anlass des Asahi-Falls*, in GEDÄCHTNISSCHRIFT FÜR WOLFGANG MARTENS 751 (1987).

29. GRANT GILMORE, *DEATH OF CONTRACT* (1974).

30. See Case 21/76, *Bier v. Mines de Potasse d'Alsace*, 1976 E.C.R. 1735.

stringent requirements on contract plaintiffs than on tort plaintiffs with respect to the kind of injury, defendant's liability for the acts of others, burden of proof concerning fault and the statute of limitations.³¹ The French law does not.³² On the contrary, in at least one respect a tort plaintiff is better off than someone bringing a contract action: the measure of damages is not limited by a foreseeability test, such as the one Article 1150 of the French Civil Code establishes for nonintentional breach of contract. So once again, why not bring an action in tort in a case like *Handte*?

The difficulty that plaintiff's lawyer saw with such an action was probably this: Under French law a party to a contract cannot recover in a tort action against the other party to the contract for any losses resulting from a breach of contract. Rather, to this extent contractual liability is exclusive due to the principle of so-called *non-cumul*.³³ In order to escape this principle, plaintiff would have to argue that, because of the international nature of the contract between the manufacturer and the distributor, German rather than French law applied to that contract.³⁴ If French law could be thus by-passed, that might have opened the gate to a tort action.

To the plaintiff's disappointment though, German tort law would not have offered any real chance of recovery. We have to remember that according to the plaintiff the product manufactured by the German company was defective in that it did not meet French occupational and health standards and for this reason could not be used for the intended purpose, thus leading to the production losses suffered by the plaintiff. But no property damage or personal injury had resulted from the alleged condition of the goods, and under Section 823(1) of the German Civil Code mere economic loss, even if caused by tortious conduct, does not establish tort liability.³⁵

31. ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [DECISIONS OF THE GERMAN CIVIL COURT] [BGHZ] 41,127.

32. C.Civ. art. 1382.

33. See HENRI MAZEAUD & FRANÇOIS CHABAS, *LÉCONS DE DROIT CIVIL, OBLIGATIONS, THÉORIE GÉNÉRALE* No. 404, at 384-85 (8th ed. 1991).

34. A French court might hold German law applicable to the manufacturer's contract with the distributor by virtue of art. 3 of the 1955 Hague Convention, *supra* note 26, provided it would classify this transaction as a sales contract. If not, art. 4 of the Rome Convention, *supra* note 8, would probably yield the same result.

35. Under German law such loss can be recovered in a tort action if the defendant has caused the loss intentionally and *contra bonos mores* or by an act which contravenes a German law designed to protect people situated like the plaintiff. See BGB [German Civil Code] §§ 826, 823(2).

Consequently, only French tort law held some promise for the plaintiff. But can one argue, on the one hand, that *non-cumul* should be disregarded in view of the international nature of the manufacturer's relationship with the distributor and then, on the other hand, invoke the protection of French tort law vis-à-vis the foreign-based manufacturer? An American lawyer might have no problem with this double-edged argument. But to the French mind, more concerned with logical consistency, it may seem odd.³⁶

According to one commentator, the Brussels Convention law in this area has been "thrown into confusion" by the *Handte* case.³⁷ In any event, *Handte* and similar cases teach us that in borderline situations lawyers are serving their clients poorly if they try to get the case into a forum whose jurisdiction is questionable at best. This is true in particular when the expense and inconvenience of taking the case to the defendant's forum are not all that great and there is a good chance that the foreign court will adjudicate the action by applying the law the plaintiff prefers, in this case French law. These conditions were indeed present in the *Handte* case.³⁸

B. *Where is a Contractual Place of Performance?*

Defining the concept of a "matter relating to a contract" as an autonomous Convention concept to be applied uniformly throughout the EU was one of the things the ECJ set out to do, as we have seen. It also had to decide whether the "place of performance (of the obligation in question)," as this term is used in Article 5(1), required a similarly "autonomous" interpretation. In the very first case in which the ECJ was called upon to interpret the Brussels Convention, in *Tessili v. Dunlop*,³⁹ the court answered in the negative and held that the law which governs the obligation in question determines the place of performance of that

36. The plaintiff's difficulties would be compounded by the French practice of treating the manufacturer's product liability as an aspect of contracts even where the end-user has no direct contractual relationship with the manufacturer.

37. See Trevor C. Hartley, *Unnecessary Europeanisation under the Brussels Jurisdiction and Judgments Convention: the Case of the Dissatisfied Sub-Purchaser*, 18 EUR. L. REV. 506, 516 (1993). In my opinion, the statement quoted from this article is an exaggeration. I also do not agree with the author's view that the court should not have "Europeanised" the concept of "matters relating to a contract." *Id.* On the contrary, there needs to be more "Europeanisation," as explained in the following discussion of the "place of performance."

38. There is, of course, a reluctance of lawyers to turn a case over to a colleague in another jurisdiction, if only (why deny it?) for pecuniary reasons.

39. See Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, 1976 E.C.R. 1473, 1 C.M.L.R. 26 (1977).

obligation. It is pointed out in the court's opinion that great differences obtain between the national laws of contracts and that unification of those laws is not in sight so that, according to the court, it is impossible "to give any substantial guide . . . to the place of performance of contractual obligations."⁴⁰

Tessili was the first case ever of interpretation of the Brussels Convention by the ECJ. This fact probably explains the court's restraint. In subsequent cases it has always preferred the so-called autonomous approach, thus promoting a uniform application of the Convention. The difficulties inherent in this approach are undeniable, but they would seem to be no greater when the issue is the concept of the "place of performance (of the obligation in question)" than when the interpretation of a "matter relating to a contract," as discussed previously, is involved.

On the other hand, leaving the determination of the place of performance for purposes of Article 5(1) of the Brussels Convention to the law applicable to the obligation in question has serious disadvantages. The full impact of the *Tessili* method will be understood better when we take note of the fact that commercial transactions create obligations for both parties and that, consequently, there are, as a rule, several places of performance with respect to a single contract. Inevitably, the question arises whether the special contracts jurisdiction of Article 5(1) of the Brussels Convention can be exercised in only one of these places for the whole contract, or in each of the various places of performance.

In a companion case to *Tessili*, which was decided on the same day, the ECJ multiplied the contract fora by holding that the crucial obligation under Article 5(1) is the obligation forming the main basis of the plaintiff's claim.⁴¹ Consequently, if a buyer brings a damage action alleging delivery of defective goods, the place where the seller was obligated to make delivery determines the forum for *this* action. If, however, the seller of the same goods under the same contract brings an action for the price, the place where the buyer was obligated to make payment determines the forum for *this* action; and this court may have to decide an issue involving the defective nature of the goods raised as a defense by the buyer. Had the court followed suggestions made by the Advocate General in *Tessili* and by the UK government in *Shenarai v. Kreisler*, only the place where the "essential" (or "characteristic")

40. *Id.* at 1485, 1 C.M.L.R. at 52.

41. See Case 14/76, *Ets. A. de Bloos, S.P.R.L. v. Société en commandite par actions Bouyer*, 1976 E.C.R. 1497, 1 C.M.L.R. 60 (1977).

performance has to be rendered would serve as the single contract forum for the whole contract under Article 5(1).⁴² Fragmentation of the special contract jurisdiction would have been avoided.

The combined effect of *Tessili* and *De Bloos* is fragmentation of fora and uncertainty about the location of the Article 5(1) forum. To illustrate the uncertainty let us assume these facts: At various points in time, a German company makes contracts with an Austrian, a French and a Swiss manufacturer for the delivery, installation and maintenance of machines at the German company's place of business; each of the contracts is subject to the manufacturer's law.⁴³ If each of the three suppliers, having not received what each considers full payment, decides to sue the German company for the price of their goods and services, we have to tell the Austrian as well as the French plaintiff that they will have no choice but to bring their action in Germany, whereas we will advise the Swiss party that an action can be brought in Switzerland. Why? Because Austrian and French law make the debtor's place of business the place of performance for the obligation to pay, while Swiss law provides for a place of performance for this obligation at the creditor's place of business.⁴⁴ A court needs to ascertain both which law applies and also what the applicable rules say, in order to know whether Convention jurisdiction lies. This is not only burdensome; it is also hard to accept such striking differences in the application of an international Convention designed to unify the law.

Another questionable effect of the *Tessili* doctrine is the opportunity for manipulation it creates. The facts of the *Tessili* case should have given the court pause: A German company ordered 310 women's ski suits from an Italian manufacturer. Included in its purchase order were its "Conditions of Purchase," among which a forum-selection clause provided for "jurisdiction to deal with disputes arising from this contract" to be exercised by the court at the buyer's place of business in

42. See Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, 1976 E.C.R. 1473, 149; see also Case 266/85, *Shenavai v. Kreischer*, 1987 E.C.R. 239, 246.

43. On the assumption that labor and maintenance services are the preponderant part of these contracts CISG would not apply, see CISG art. 3(2) discussed in BERNSTEIN & LOOKOFSKY, *supra* note 1, § 2-5.

44. See § 905 Abs 1 ABGB [Austrian Civil Code]; C. civ. art. 1247 [French Civil Code]; and Art. 74(2) O.R. (Swiss Obligationenrecht [Swiss Law of Obligations]). It should be mentioned that Switzerland has made a reservation to the Lugano Convention enabling it to refuse recognition of decisions by other Contracting States based on art. 5; this, however, does not mean that Swiss courts cannot exercise art. 5 jurisdiction—subject possibly to a right of the other states to refuse recognition on the principle of reciprocity. See KROPHOLLER, *supra* note 4, art. 28 Rd.Nrn. (margin nos.) 20-22, at 316-17.

Germany.⁴⁵ After the goods had been delivered, the German buyer found them to be defective, rescinded the contract and brought an action against the Italian seller in the German court at its own place of business.

To be sure, the Brussels Convention permits forum-selection agreements in Article 17. Such agreements must be in writing or, if oral, must be evidenced in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce which are or should be known to the parties. The *Tessili* doctrine has the potential for undermining the effect of the safeguards built into Article 17. Note that the Convention rule requires a genuine agreement and, in principle, a writing.

But in view of *Tessili* it appears possible that a party to an international contract can accomplish by the use of a place-of-performance clause what could not be done by a forum-selection clause. Because by virtue of the *Tessili* doctrine, the law governing the obligation in question determines the place of performance, this law would also seem to determine the requirements for a valid place-of-performance clause. If such requirements of the *lex contractus* are more lenient than those in Article 17, the purpose of Article 17 will be thwarted. For instance, suppose in a case like *Tessili* the buyer uses a simple place-of-performance clause making the location of its headquarters the place of performance for all contractual obligations. It may turn out that the *lex contractus* upholds a one-sided imposition of terms in a standard form mailed to the other party without an actual agreement being reached on these terms. In other words, the law governing the obligation in question may be much more lenient respecting the validity of a place-of-performance clause than Article 17 is with regard to forum-selection clauses.

The ECJ had to deal with this situation in *Zelger v. Salinitri*.⁴⁶ The German plaintiff domiciled in Munich had loaned money to the Italian defendant, a merchant in Sicily. Because, according to the plaintiff, the defendant had failed to transmit certain amounts due for repayment in 1975 and 1976, an action was commenced by the lender in Munich. Again according to the plaintiff, jurisdiction did lie because of

45. After manufacturing the goods, the Italian seller shipped them and simultaneously sent an invoice to the buyer which included a forum-selection clause in favor of an Italian court. See 1976 E.C.R. at 1481. Thus a "battle of forms" had taken place whose result was hard to predict, and the buyer obviously felt it would maximize its chances by invoking art. 5(1) along with art. 17 (permitting forum selection by the parties). See the following text.

46. See Case 56/79, *Zelger v. Salinitri*, 1980 E.C.R. 89, 2 C.M.L.R. 635 (1980).

an alleged oral agreement providing that payment of the defendant's debt would be made in Munich. The German courts refused to exercise jurisdiction in these circumstances in view of the form requirements of Article 17 for forum-selection clauses that they held applicable to the agreement alleged by the plaintiff.

Both the Advocate General at the ECJ and the court itself saw a significant difference between agreements falling under Article 17 and an agreement specifying the place of performance for a contractual obligation. While agreements conferring jurisdiction give exclusive power to the court so specified, the agreed place of performance is merely the basis of a special jurisdiction which exists concurrently with the general jurisdiction at the defendant's domicile and possibly other special jurisdictions. In addition, it is argued that a forum selected in accordance with Article 17 may lack any factual connection with the legal relationship in dispute, while jurisdiction based on the chosen place of performance is warranted because an important aspect of the contract links the case with the forum.

III. EUROPEAN FAILURES

To develop a broader perspective as the basis for a critical assessment of jurisdiction in contract cases against the background of both *Tessili* and *Zelger*, we need to reflect on the contemporary utility of a special jurisdiction for contracts at the place of performance. Its single most meaningful function could be said to be the following: it can make available a forum at a place where significant acts of performance of the obligation in question have actually occurred. Consequently, the adjudication of factual disputes concerning these acts will probably be facilitated by the local proximity of the factfinder to all or some of the most relevant facts.⁴⁷

Thus, if delivery of goods or another act of performance has actually occurred and a dispute over its conformity with the terms of the contract needs to be decided, it makes sense to adjudicate this kind of a contract case in the place where the act occurred. In these circumstances, it appears to be irrelevant whether the plaintiff seeks damages for an allegedly defective performance or whether, in an action to recover the

47. Some commentators deny that evidentiary considerations underlie the special jurisdiction at the place of performance; see, e.g., Reinhold Geimer, *Annotation*, 5 JURISTENZEITUNG (JURIDICAL JOURNAL) 245, 246 (1995). But what else (other than historical reasons) can justify a rule like art. 5(1) in today's commercial environment?

price, the defendant relying on an alleged defect refuses to pay the full price or refuses to pay anything. In both instances, the exercise of Article 5 jurisdiction would seem to be based on a meaningful contact of the case with the forum which makes it likely that relevant evidence will be found in the forum.⁴⁸

The case for a special jurisdiction based on the place of performance is considerably weaker where acts of performance should have, but did not occur in a certain locality, in other words, in cases of nonperformance. Evidence respecting the *consequences* of nonperformance is not more likely to be available in that location than anywhere else in the world because the loss the injured party has suffered will be determined by general market conditions and the special conditions existing in the injured party's business. And the same is true of evidence respecting the *causes* of nonperformance which may or may not amount to an excuse for nonperformance; again, general conditions in the breaching party's market and the special circumstances prevailing in the business of that party are of potential relevance, but the place of performance is unlikely to be the location of relevant evidence.

Completely without merit is the case for jurisdiction based on a "boilerplate" clause in an international standard form contract, which makes a particular place, typically one party's place of business, the place of performance for all contractual obligations, as in the above hypothetical varying the facts in *Tessili*.⁴⁹ Such clauses divorce the concept of the place of performance from the actual acts of performance and thus from the reality of the transaction involved.⁵⁰ In an international business setting it is most unlikely that the clause is intended to serve substantive contract purposes because in such setting the various acts of performance of the two (or more) parties will typically have to be done at several different places. Usually, the purpose of the clause in question consists of no more than a desire to allocate risks in favor of the party imposing the clause and, in addition, to provide that party with all the advantages of a home game in case litigation should result from the deal.⁵¹

48. The Advocate General appears to have taken the same position in *Tessili*, see 1976 E.C.R. at 1489.

49. See *supra* text before note 45.

50. See *infra* discussion of the *Custom Made* case.

51. *Accord* HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT (INTERNATIONAL CIVIL PROCEDURE) Rd.Nm. (margin nos.) 276, 277, at 105, 106 (1991).

In sum then, under Article 5(1) of the Brussels Convention courts at the place of an actual act of performance, which has occurred in accordance with the terms of the contract, should be allowed to exercise jurisdiction. Whether the contract expressly identifies this locality as a place of performance or not matters little. What counts is that the contract did in fact call for, or at least permit, performance to occur in that spot and that it did take place there. This combination of normative and factual circumstances appears to furnish a fairly solid basis for adjudication in a nearby court of any contract action whose outcome turns on alleged defects of the performance.

As stated before, it is less clear what justifies an exception from the principle of Article 2 (general jurisdiction at the defendant's domicile) in cases of *nonperformance*, *i.e.*, in a situation where performance should have, but in fact has not, occurred in a place away from defendant's domicile. The English text of Article 5(1) does not indicate that a court at a place of nonperformance shall have jurisdiction. Texts in other authentic languages, however, do point in this direction.⁵² The ECJ could go either way, but should in my opinion deny jurisdiction in these cases. In all other cases, especially where the place of performance is stated to be one and the same place for all obligations in a form contract, there is no reason at all to deviate from the rule of Article 2.⁵³ In today's world of relatively easy communication and transportation, litigating in the defendant's forum does not ordinarily impose undue burdens on a plaintiff. Special rules for employees, consumers and similarly situated plaintiffs help to avoid possible hardships.⁵⁴

Regrettably, however, the ECJ has recently affirmed the *Tessili* doctrine even though the referring court, the German BGH, wondered about its soundness while a steadily increasing number of commentators and, most significantly, the Advocate General in the case, urged the court to overrule the unfortunate precedent.⁵⁵ The German plaintiff in this case had sold goods to an English buyer who had done no business with the seller before. Included with the seller's letter of confirmation in English were the seller's general business terms in German which identified the court at the seller's place of business as the exclusive forum for all

52. See, *e.g.*, the French, German and Italian texts of the Brussels Convention.

53. Accord KROPHOLLER, *supra* note 4, art. 5 Rd.Nr. (margin no.) 23, at 106; SCHACK, *supra* note 51, Rd.Nr. (margin no.) 277, at 106.

54. See Brussels Convention, *supra* note 2, arts. 5(1), 7-15.

55. See Case C 288/92 Custom Made Commercial Ltd. v. Stawa Metallbau GmbH, 1994 E.C.R. I-2913.

disputes arising from the contract. Because the buyer did not pay the price in full, seller brought an action for the balance in that court.

The ECJ answered in the affirmative the German court's question whether Article 5(1) supports the exercise of jurisdiction if a seller brings an action for the price at its place of business invoking a rule in an international convention fixing the place of the buyer's payment.⁵⁶

The facts of the case highlight again the dubious practice of sneaking place-of-performance clauses into contracts by springing one-sided standard form conditions on the other party, preferably *after* conclusion of the contract, as was done in this case. The English buyer was probably quite unsuspecting and not at all put on notice by the German seller. The negotiations had been conducted in London in English and had led to an oral contract. What reason should the buyer have to try and find out about the meaning of the German-language attachment to the letter of confirmation? If the seller would have had no jurisdictional basis other than its standard form clause, one wonders whether its less than honest practice would have succeeded.

Luckily for the seller, however, there was the rule of international sales law that provides for payment of the purchase price at the seller's place of business (in the absence of an agreement on this issue).⁵⁷ In recent years this rule has been used by many international sellers to gain access to the courts at their own place of business in an action for the price.⁵⁸ Buyers need to be aware of the procedural risk involved in a sales law rule which is obviously primarily designed to deal with the risks of transmitting payments in international business. Ordinarily, a buyer and even the buyer's lawyer will probably not expect to run the additional risk of being subjected to jurisdiction at the seller's place in an action for the price.⁵⁹ This risk can be averted by a clause in the sales contract varying the rule of international sales law according to which the buyer must ordinarily pay at the seller's place of business.

Whether or not this rule makes sense regarding the risk of transmitting international payments is not the issue here. (It probably does.) It is the jurisdictional impact of the rule which must be considered. In this respect, it is hard to see why the courts at the seller's place of

56. The rule applicable in the *Custom Made* case was art. 59(1) of the 1964 Hague Uniform Law of International Sales [U.L.I.S.]; to the same effect is CISG art. 57(1)(a).

57. CISG, *supra* note 1, art. 57(1)(a).

58. See BERNSTEIN & LOOKOFKY, *supra* note 1, § 1-4.

59. For criticism of the prevailing practice under U.L.I.S. and CISG, see SCHACK, *supra* note 51, Rd.Nr. (margin no.) 272.

business are likely to be better equipped for an adjudication of the issues typically involved in the price action than the courts at the buyer's place. It is rare that the mode of payment or the exact time of payment are in dispute.

In most cases of nonpayment or payment of less than the full price, the debtor believes the creditor's performance to be wanting in one or the other respect. In other instances the parties are in disagreement on how much has in fact been paid and/or how much was owed to begin with. In still other cases, the dispute of the parties involves the very fact of an effective contract formation. It is fair to say that neither of these points in dispute can be clarified better in the courts of one or the other party. Therefore, the principle should prevail that the plaintiff seeking payment must ordinarily pursue his rights in the defendant's courts: *actor sequitur forum rei*. The Brussels Convention embodies this fundamental principle of jurisdiction in Article 2. Alternatively, the place of actual performance by the creditor may establish a suitable forum under Article 5(1) for the adjudication of either party's claims.

And so I conclude that the special jurisdiction for contracts under Article 5(1) of the Brussels Convention calls for an autonomous interpretation of the concept of the place of performance. This interpretation should restrict the exercise of special contract jurisdiction to cases where, in accordance with the terms of the contract, one or more acts of performance in fact occurred in the forum state and the action is related to that performance. It is in these circumstances only that the place of performance is likely to represent an appropriate forum justifying an exception from Article 2.

The ECJ should overrule *Tessili* and its progeny in favor of an approach which, as outlined before, fosters both greater uniformity of the law and more pragmatic results in its application. Moreover, the negotiators presently at work on a universal convention concerning the enforcement of foreign judgments will have to consider carefully the European experience involving jurisdiction in international cases, its successes and its failures. The chapter on international contracts in European courts is no success story.

