

THE PLACE OF PERFORMANCE OF THE OBLIGATION TO PAY
THE PRICE ART. 57 CISG

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INTRODUCTION

Of all articles of the Vienna Convention (CISG) relating to the buyer's obligations, Article 57 has generated most of the case law, although this provision, which determines the place of payment of the price, is simple and should, therefore, not raise particular problems of application.

This "leading role" of Article 57 in the judicial practice is due to the fact that the place of payment has an impact on the jurisdiction of State courts. In other words, litigation under this article is so abundant because the territorial jurisdiction of State courts may depend on the place of payment. As regards to Europe, three different legal instruments provide for the place of performance of the contractual obligation as a special case of jurisdiction, in addition to the general jurisdiction based on the domicile of the defendant. They are:

- The Brussels Convention of September 27, 1968;
- The Lugano Convention of September 16, 1988, which is a parallel convention to the one of Brussels and applies to the EFTA States; and
- The European Community Regulation No. 44/2001, which has replaced the Brussels Convention for EU Member States.

I. THE INTERPLAY BETWEEN ARTICLE 57 CISG AND THE BRUSSELS AND
LUGANO CONVENTIONS

1. The Brussels Convention remains applicable to all litigation having arisen prior to March 1, 2002. It also applies to litigation having arisen after

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March 1, 2002, in all cases where the defendant is domiciled in Denmark, the reason being that Denmark has remained outside the EC Regulation.¹

According to Article 5 of the Brussels Convention, “A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; . . .”

It is not necessary to present all of the courts’ hesitations and all of the controversies in legal writing which this provision has induced.

It should be enough to remind one of the solutions developed by the European Court of Justice (ECJ): the contractual obligation to which Article 5(1) refers to is the disputed obligation, not the characteristic one. That was the finding of the ECJ’s landmark *De Bloos*² ruling, and this interpretation was later confirmed by the Accession Treaty of 1978.³ Indeed, the Treaty clarifies that, from now on, Article 5(1) refers precisely to the obligation on which the legal suit is based. Thus, in the case of a legal suit for non-payment of the sales price, it is the place of payment of the price which is determinant and not the place of delivery of the goods, though this is the characteristic obligation of the sales contract.

The place of payment is found by resorting to the substantive law which applies to the contract. This results from the ECJ’s famous *Tessili* judgement.⁴ In other words, this place is not determined by the *lex fori* or by some autonomous method still to be defined. Consequently, in order to determine the place of performance of this obligation, one will have to see where the rules governing the contract locate this obligation.

1. See, as regards Denmark, Christian Kohler, *Vom EuGVÜ zur EuGVVO: Grenzen und Konsequenzen der Vergemeinschaftung*, in Festschrift Geimer 468 (2002). The Brussels Convention also continues to apply to the “territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.” As for France, these are the overseas territories (New Caledonia, Polynesia, French Southern and Antarctic Lands, Wallis and Futuna Islands) as well as Mayotte and Saint-Pierre et Miquelon. See Répertoire Dalloz de droit international, Règlement Bruxelles I, no. 4.

2. Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer, 1976 E.C.R. 1497.

3. It is the Convention of October 9, 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom to the Brussels Convention. The confirmation of the ECJ’s ruling is visible in the French text. While the Brussels Convention of 1968 referred only to the jurisdiction “*du lieu où l’obligation a été ou doit être exécutée*,” the Convention of 1978, as well as subsequent treaties, refer to “*the place of performance of the obligation in question*” (“*lieu où l’obligation qui sert de base à la demande a été ou doit être exécutée*”).

4. Case 12/76, Industrie Tessili Italiana Como v. Dunlop AG, 1976 E.C.R. 1473.

These rules of law can be of two different types, either the domestic law that applies according to the conflict of laws rules, or uniform law if the contract is submitted to a uniform law instrument. This latter solution has been expressly affirmed by the ECJ in its *Custom Made Commercial* ruling, which deals with the Hague Convention of 1964 relating to the Uniform Law on the International Sales of Goods (ULIS).⁵

What is true for its predecessor, the ULIS, is of course also true for the CISG, which has taken its place.

State courts have respected the solution affirmed by the ECJ in the *Custom Made Commercial* judgement. There have been numerous decisions on the interplay of Article 5(1) and Article 57 or even Article 31 CISG.⁶ The Digest quotes numerous examples from case law. Since its publication, other examples can be found, especially two decisions of the Italian Supreme Court and of the German Bundesgerichtshof.⁷

2. The Lugano Convention, being the parallel to the Brussels Convention for EFTA States, features a provision which is identical to Article 5(1) of the Brussels Convention. At the same time, the drafters of the Lugano Convention have made reference to the case law of the ECJ and accepted its findings. The result is that the interplay between the Lugano Convention and the CISG is the same as the interplay between CISG and the Brussels Convention.⁸

This traditional solution, which will still apply to all cases where the defendant is domiciled in Denmark, as well as to all cases where the defendant

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

6. See UNCITRAL Digest of Case Law on the CISG, art. 57, ¶ 3, available at http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html [hereinafter DIGEST].

7. Corte Suprema di Cassazione, Italy, 20 Apr. 2004, available at <http://www.cisg-online.ch/cisg/urteile/927.pdf>; Bundesgerichtshof, Germany, 25 Feb. 2004, published in INTERNATIONALES HANDELSRECHT 124-25 (2004).

8. Since the publication of the DIGEST, see Oberster Gerichtshof, Austria, 18 Nov. 2003, published in ÖSTERREICHISCHE JURISTENZEITUNG (ÖJZ) 305-07 (2004); Handelsgericht St. Gallen, Switzerland, 11 Feb. 2003, available at <http://cisgw3.law.pace.edu/cases/030211s1.html>.

is domiciled in an EFTA State,⁹ has been particularly challenged by the EC Regulation.

II. THE EC REGULATION

Regulation No. 44/2001 still provides for a specific case of jurisdiction for contractual obligations. In view of the important amount of criticism raised by Article 5(1),¹⁰ one might have wondered whether the Regulation was to abandon the specific case of jurisdiction and stick to the general rule that the tribunal of the defendant's domicile had jurisdiction.

However, the specific case of jurisdiction for contractual matters has been maintained. Article 5(1) of the Regulation says, in the same words as Article 5(1) Brussels Convention, that the person domiciled in a Member State may, in another Member State, "be sued 1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question."¹¹ Nevertheless, in two cases, the Regulation itself defines what is to be understood by the place of performance of the obligation on which the legal suit is based, thus amending the ECJ's *De Bloos* ruling. These two cases are, on one hand, the sale of goods and, on the other hand, the provision of services.

In the case of the sale of goods, Article 5(1)(b) provides that it will be "the place in a Member State where, under the contract, the goods were delivered or should have been delivered."

This new solution has two important advantages. The first advantage is highlighted by the Commission's document on the draft Regulation: "to remedy the shortcomings of applying the rules of private international law of the State whose courts are seized, the second subparagraph of Article 5(1) gives an autonomous definition of the place for enforcement of the obligation

9. See Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters art. 54B(2)(a), 16 Sept. 1988. When the Convention of Lugano came into force, the following States were members of the EFTA: Austria, Finland, Iceland, Norway, Sweden and Switzerland. As the Lugano Convention was open to third States being neither a member to the EU nor to the EFTA, Poland joined it in 1999. Since the accession to the EU of Finland, Sweden and Austria in 1995 and Poland in 2004, the convention of Lugano is presently applicable if the defendant is domiciled in one of the following States: Iceland, Norway and Switzerland. In addition, it is also applicable in case of a clause conferring jurisdiction to one of these States (see art. 54B(2)(a) in fine) or in the case of *lis pendens* or related actions (see art. 54B(2)(b)).

10. See, e.g., Georges A.L. Droz, *Delendum est forum contractus?*, RECUEIL DALLOZ, CHRONIQUE 351 (1997).

11. "... peut être attrait, dans un autre Etat membre, 1) a) en matière contractuelle, devant le tribunal du lieu où l'obligation qui sert de base à la demande a été ou doit être exécutée."

in question.” The commentary thus praises the “pragmatic determination of the place of enforcement,” relying on a purely factual criterion.¹²

The new rule’s second advantage is that the place of delivery of the goods, in other words, the place of performance of the characteristic obligation, often, but not always, fulfills the requirement of proximity between the litigation and the forum having to dispense justice to it. As a matter of fact, if the buyer does not pay and is sued by the seller, it is very often because he is not satisfied with the quality of the goods. Taking this into account, jurisdiction should go to the court of the place of delivery which verifies the conformity of the goods or has it verified. However, there are some cases where the place of delivery will not be an adequate jurisdiction,¹³ even though the seller will be able to invoke it according to Article 5(1)(b). For instance, it may be that the goods have been resold or have not been delivered at all.

Leaving aside the question whether the rationale of the new Regulation can be approved, the new provision unfortunately raises a number of difficulties.¹⁴ Opinions in legal doctrine are extremely divergent, and it is

12. The French version of the Commission’s document actually even refers to this latter point: “. . . reposant sur un critère purement factuel.”

13. Compare especially 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*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 596, 631 (2000).

14. On Article 5(1) of the new Regulation, see Danièle Alexandre & André Huet, *Répertoire Dalloz de droit international*, V° RÈGLEMENT BRUXELLES I (MATIÈRES CIVILE ET COMMERCIALE) no. 158 *et seq.*; Marie-Elodie Ancel, *La prestation caractéristique du contrat*, ECONOMICA no. 449 *et seq.* (2002); Ena-Marlis Bajons, *Der Gerichtsstand des Erfüllungsortes: Rück- und Ausblick auf eine umstrittene Norm—Zu Art. 5 Nr. 1 EuGVÜ und seiner revidierten Fassung in der Brüssel I-VO*, FESTSCHRIFT GEIMER 15 *et seq.* (2002); Jean-Paul Béraudo, *Le Règlement (CE) du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matières civile et commerciale*, JOURNAL DU DROIT INTERNATIONAL (JDI) 1033 *et seq.* (2001); Hélène Gaudemet-Tallon, *Compétence et exécution des jugements en Europe, Règlement n° 44/2001*, CONVENTIONS DE BRUXELLES ET DE LUGANO, LGDJ no. 198 *et seq.* (3d ed. 2002); REINHOLD GEIMER, EUROPÄISCHES ZIVILVERFAHRENSRECHT art. 5, no. 83 *et seq.* (Reinhold Geimer & Rolf Schütze eds., 2d ed. 2004); Beate Gsell, *Autonom bestimmter Gerichtsstand am Erfüllungsort nach der Brüssel I-Verordnung*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRax) 484 *et seq.* (2002); Ulrich Huber & Corinne Widmer, KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT art. 31 no. 93 *et seq.* (Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed. 2004); André Huet, *Convention de Vienne du 11 avril 1980 sur les contrats de vente internationale de marchandises et compétence des tribunaux en droit judiciaire européen*, in *Mélanges en l'honneur de Paul Lagarde, Le droit international privé: esprit et méthodes*, Dalloz 417, 427 *et seq.* (2005); Abbo Junker, *Vom Brüsseler Übereinkommen zur Brüsseler Verordnung—Wandlungen des Internationalen Zivilprozeßrechts*, RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 569 *et seq.* (2002); Jan Kropholler, *Europäisches Zivilprozeßrecht*, VERLAG RECHT UND WIRTSCHAFT 133 *et seq.* (7th ed. 2002); Stefan Leible in *EUROPÄISCHES ZIVILPROZEßRECHT, KOMMENTAR 80 et seq.* (Thomas Rauscher ed., 2004); Filip De Ly, *Obligations of the Buyer and Remedies for the Buyer's Breach of Contract (Articles 53-65)*, *General Observations and Some Specific Issues*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES,*

predictable that there will be equally widespread attempts from the courts to solve this problem. One must hope that the ECJ will soon have the opportunity to decide on the interpretation of these texts which, no doubt, deserve a better wording.

One thing is certain, the common scenario that the seller, who was not paid and hurries to sue the buyer before the court of his own place of business according to Article 57, should become rare. Thus, the Regulation limits the *forum actoris*. Recent case law confirms this statement.¹⁵

Nevertheless, the *forum actoris* will subsist in two kinds of situations. First, it applies, of course, if the place of delivery lies in the State of the seller's place of business. Secondly, there are cases where, within the scope of Article 5(1) of the Regulation, Article 57 CISG will continue to play a role: according to Article 5(1)(c), "if subparagraph (b) does not apply then subparagraph (a) applies." In other words, it is again the court of the place of performance of the obligation in question, i.e. the place of payment or the place of delivery of the goods, which will be competent. This will happen in particular in three types of cases.

- Article 57 comes into play when the place of delivery is outside the European Union. It seems that, rightly or not, the drafters of the Regulation wanted to keep the *forum actoris* in benefit of the seller.
- The rule according to which the court of the place of delivery of the goods has jurisdiction can be put aside by the parties. The text expressly lays down this rule "unless otherwise agreed." Consequently, the parties can agree that the obligation which will determine the court having jurisdiction will be the obligation in question and not the place of delivery. One may be inclined to think

ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 468, 471 (Franco Ferrari et al eds., 2004); Ulrich Magnus, *Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO*, IHR 49 et seq. (2002); Marie-Laure Niboyet, *La révision de la Convention de Bruxelles du 27 septembre 1968 par le Règlement du 22 décembre 2000*, GAZETTE DU PALAIS I, DOCTRINE 943 et seq., 945 (2001); A. Nuyts, *La communautarisation de la Convention de Bruxelles*, JOURNAL DES TRIBUNAUX (Belge) 913 et seq. (2001); Burghard Piltz, *Vom EuGVÜ zur Brüssel-I-Verordnung*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 789 et seq. (2002).

15. See, e.g., Rechtbank van Koophandel Hasselt, Belgium, 25 Feb. 2004, available at <http://cisgw3.law.pace.edu/cases/040225b1.html>; Oberlandesgericht Düsseldorf, Germany, 30 Jan. 2004, published in INTERNATIONALES HANDELSRECHT 108, 117 (2004) (commented on by Rolf Herber); Landgericht Trier, Germany, 8 Jan. 2004, published in INTERNATIONALES HANDELSRECHT 115 et seq. (2004) (commented on by Rolf Herber); Oberster Gerichtshof, Austria, 2 Sept. 2003, IPRax 349 et seq. (2004); Landgericht Nürnberg-Fürth, Germany, 27 Feb. 2003, available at <http://www.cisg-online.ch/cisg/urteile/818.pdf>. One other court wrongly applies Article 5(1)(a): Landgericht Gießen, Germany, 17 Dec. 2002, published in INTERNATIONALES HANDELSRECHT 276 (2003).

that such agreements will be rare.¹⁶ But I am not so sure of this. Well informed sellers could be tempted to put such clauses in their general conditions in order to restore the *forum actoris*. This would also bring back the interplay between Article 5(1) of Brussels Convention and Article 57 CISG!

- The third case is a complex one. The complexity arises from the wording of Article 5(1)(b), which refers expressly to the place of delivery as it is “under the contract.”

Everyone agrees on the fact that the intention of the parties relating to the place of delivery shall prevail. It is the next step where the debate begins. Indeed, according to a minority opinion, the words “under the contract” are to be construed literally: it is necessary for the contract to contain an express provision about the location of the place of delivery. If not, Article 5(1) (b) does not apply.¹⁷ This approach seems to be too formalistic.¹⁸ According to the prevailing opinion, it should be sufficient that the place of delivery has been implicitly agreed to by the parties. In particular, this condition will be met when the goods have been delivered, which should be the normal case. Indeed, if the buyer takes possession of the goods without expressing any reservation on the place where the goods have been delivered, this place will have to be seen as the agreed-to place of delivery.

But in the rare cases when the intention of the parties cannot be ascertained, the solution remains to be found. One opinion falls back on the general rule of subparagraph (a), which may lead to the interplay of Article 5(1)(a) and Article 57 CISG.¹⁹ According to a second stream in legal doctrine, Article 5(1)(b) remains applicable, in spite of a lack of an express or implied agreement on the place of delivery. But the opinions diverge on how this place should be determined. One opinion holds that the place of delivery has to be found by way of an autonomous method, inspired by the Principles of European Contract Law and the UNIDROIT rules.²⁰ But this, in my eyes, would lead to further uncertainties. Another opinion resorts to the law

16. Huet, *supra* note 14, at 429.

17. Heuzé, *supra* note 13, at no. 34-37; PIERRE MAYER & VINCENT HEUZÉ, *DROIT INTERNATIONAL PRIVÉ*, MONTCHRESTIEN no. 339 *in fine* (8th ed. 2004).

18. For more criticism on this point of view, see Huet, *supra* note 14, at 428.

19. Kropholler, *supra* note 14, at 141, no. 41. However, some authors even suggest that under Article 5(1)(a), the place of performance be determined autonomously. It should be the place of the characteristic performance: Ancel, *supra* note 14, at no. 452 *et seq.*; Junker, *supra* note 14, at 572. This approach seems unconvincing because of the clear distinction between subparagraphs (a) and (b) which would disappear if subparagraph (a) was interpreted in light of subparagraph (b).

20. Gsell, *supra* note 14, at 491; Leible, *supra* note 14, at 112, no. 52.

governing the contract, which may be domestic law or the CISG, Article 31 in particular.²¹ I prefer this last solution because it respects the spirit and purpose of non-mandatory rules and the parties' legitimate expectation that these non-mandatory rules will apply in the absence of an express or implied specification of the place of delivery.

The discussion of the interplay between Article 5(1) of the Regulation and Article 57 CISG has shown most of the problems raised by the new text. Other difficulties are related to the determination of the place of delivery. They do not directly concern Article 57 CISG, which is why they shall not be discussed here.²²

CONCLUSION

It is deeply regrettable that Article 5(1) of the Regulation leads to so many uncertainties, while the interplay between Article 5(1) Brussels Convention and CISG functioned rather smoothly, at least at the legal level. The future version of the Lugano Convention which is currently being drafted²³ probably will be rewritten in light of Article 5(1) and thereby imbued with the same uncertainties. Much to my regret, I have to end on this rather pessimistic note.

21. Gaudemet-Tallon, *supra* note 14, at no. 202; Huet, *supra* note 14, at 429; Piltz, *supra* note 14, at 793.

22. On the numerous questions raised by the determination of the place of delivery, see Gaudemet-Tallon, *supra* note 14, at no. 198 *et seq.* Among the recent case law, see especially the very well motivated decision of the Tribunale di Rovereto, Italy, 28 Aug. 2004, *available at* <http://cisgw3.law.pace.edu/cases/040828i1.html>.

23. Since 1998, a project of revision of the Lugano Convention is under way. The text will probably be drafted in line with the existing Regulation. Gaudemet-Tallon, *supra* note 14, at no. 495. *See also* Recital no. 5 of the Regulation.

APPENDIX

Text of Art. 5(1) of the Brussels Convention (1968) and the Lugano Convention (1988)**Article 5**

A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; (. . .)

Text of art. 5(1) of the Regulation (EC) 44/2001**Article 5**

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

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

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

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

- (c) if subparagraph (b) does not apply then subparagraph (a) applies;