Master's Thesis in Private International Law
30 ECTS

Place of performance as a ground for jurisdiction

A study of case law from the European Court of Justice regarding Article 5(1)(b) of the Brussels I Regulation

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Relevant provisions

Article 5(1) 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; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated.

Artikel 5(1) Brysselkonventionen
Talan mot den som har hemvist i en konventionsstat kan väckas i en annan konventionsstat
1. om talan avser avtal, vid domstolen i den ort där den förpliktelse som talan avser har uppfyllts eller skall uppfyllas; om talan avser anställningsavtal är denna ort den där arbetstagaren vanligtvis utför sitt arbete eller, om arbetstagaren inte vanligtvis utför sitt arbete i ett och samma land, kan talan mot arbetsgivaren även väckas vid domstolen i den ort där det affärsställe vid vilket arbetstagaren anställts är eller var beläget
Article 5(1)(b) Brussels-I Regulation

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;

Artikel 5(1)(b) Bryssel-I förordningen

Talan mot den som har hemvist i en medlemsstat kan väckas i en annan medlemsstat

1) a) om talan avser avtal, vid domstolen i uppfyllelseorten för den förpliktelse som talan avser;

   b) i denna bestämmelse, och såvida inte annat avtalats, avses med uppfyllelseorten för den förpliktelse som talan avser

   - vid försäljning av varor, den ort i en medlemsstat dit enligt avtalet varorna har eller skulle ha levererats,

   - vid utförande av tjänster, den ort i en medlemsstat där enligt avtalet tjänsterna har eller skulle ha utförts;

   c) om punkt b inte gäller, skall punkt a gälla,
Abbreviations:

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<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
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<tr>
<td>EC</td>
<td>European Community</td>
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<td>EC Treaty</td>
<td>Treaty establishing the European Community</td>
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<td>ECJ</td>
<td>Court of Justice of the European Union</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<td>EFTA</td>
<td>European Free Trade Association</td>
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<td>EU</td>
<td>European Union</td>
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<td>Lugano Convention</td>
<td>The Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters</td>
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<tr>
<td>SvJT</td>
<td>Svensk Juristtidning</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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1. Introduction

1.1 The question of jurisdiction

It might seem quite reasonable to draw the conclusion that a national court is not competent to handle all civil disputes that might occur throughout the world. For a court to have jurisdiction over a case a linking factor is normally required. Most courts have national rules and regulations to follow on how to determine jurisdiction in cases with international association. Usually there are also different rules and regulations depending on what kind of civil matter is being tried, if there is a case concerning family law, contract law or employment law and so on.¹

When it comes to contract law, transactions of goods and services between parties in different states have been taking place for centuries. With the internal market, introduced by the European Union and simplifying the movement of goods and services between Member States, these transactions have increased. With cross-border business transactions increasing so are also disputes, which arise from these transactions. Rules on which court is competent to deal with these cross-border disputes have not always been available and if so they have not always been easy to interpret or apply.

With the EU being an internal market harmonized rules on jurisdiction are vital for insuring a healthy market for international trade and business. The interpretation of how to apply the articles in union instruments is essential in order to ensure all parties within Member States a fair position within the market.

1.2 Jurisdiction and recognition of foreign verdicts in the European Union

One problem that arose with the increasing cross-border transactions was the difficulty in the recognition verdicts from one state in another state. In many areas of the world this is still an issue but since my thesis regards the Brussels I Regulation applicable between EU Member States my focus will lie within the European Union. With the creation of the European Union the states joining agreed to give up some of their supremacy to the EU. This included giving

the mandate to the EU legislator to create provisions in private international law concerning jurisdiction.

The European Union is based on the four freedoms: the free movement of goods, the free movement of services, the free movement of people and the free movement of money. Many business transactions based on contracts regarding the sale of goods and services, where my focus is in this thesis, take place within the EU between different Member States each year. Following these transactions some disputes will of course occur between the parties of the contract. To enable these cross-border business relationships and in order to fulfill the aim of free trade within the EU the then European Community decided to create a convention, the Brussels Convention (the Convention), dealing with jurisdiction and enforcement of foreign judgments in civil and commercial matters within the European Union. This convention was later replaced with the Brussels I Regulation (the Regulation).

To decide on jurisdiction in a dispute relating to a contract regarding the sale of goods or the provision of services between two parties domiciled in different EU Member States one must turn to the second section of the Brussels I Regulation. The general rule can be found in Article 2, which determines that jurisdiction may be based on the domicile of the defendant. More interesting though are the articles on special jurisdiction found in Articles 5-7 of the Regulation and in particular Article 5(1) regarding the sale of goods and the provision of services. Article 5(1) of the Regulation is an exception to the general rule found in Article 2.

1.3 Purpose and delimitation of the topic

This Masters of Law thesis strives, by analyzing the case law from the European Court of Justice (ECJ) regarding Article 5(1)(b) of the Brussels I Regulation, to identify such interpretation guidelines which could assist in the application of the Article. This thesis will also discuss whether the change of Article 5(1)(b) in the Regulation, compared to the precedent Article 5(1) in the Brussels Convention, has meant any actual improvement in the application of the Article, if it does, in fact, after the change cover more possible disputes and whether the change has meant that it has become easier for national courts to determine jurisdiction, on the basis of the Article.

This thesis will also consider the Swedish responses and comments on the Brussels I Regulation and the ECJ case law regarding Article 5(1)(b) of the Regulation. Sweden being a Member State of the EU it is examined how legal scholars have commented the rulings
regarding the issue and therefore how those rulings are expected to influence Swedish courts in matters of private international law.

Article 5(1)(b) of the Brussels I Regulation has been the topic of many discussions both in its present form as well as in the previous wording, which can be found in the Brussels Convention. Many cases have been referred to the ECJ for a preliminary ruling regarding how to interpret the wording of Article 5(1)(b) and on how to determine its applicability.

My main focus in this thesis will lie on Article 5(1)(b) of the Brussels I Regulation. Even though as mentioned earlier, there are other articles regarding jurisdiction, my focus will only lie with determining jurisdiction in contractual relationships regarding the sale of goods or the provision of services between parties in different Member States when jurisdiction is based on the place of performance and not the domicile of the defendant. I will therefore not examine any materials on other contractual obligations or any materials regarding the general rule on determining jurisdiction found in Article 2 of the Brussels I Regulation.

Article 5(1)(b) of the Brussels I Regulation targets disputes regarding jurisdiction that arises out of a contract on the sale of goods or the provisions of a service between two parties domiciled in different Member States. The Article states that if jurisdiction cannot be determined from the provisions in the contract jurisdiction may be based on the place of performance. The court with the closest link to the place of performance is then considered as the court competent to try the case. According to Article 5(1)(b), the place of performance should, in the case of the sale of goods, be considered to be where the goods were or should have been delivered and in the case of the provision of services where the services were or should have been provided. This may seem quite straightforward but as has been proven through the number of cases referred to the ECJ for preliminary ruling this is not the case.

The cases I have chosen to examine concerns interpretation of different parts of Article 5(1)(b) of the Brussels I Regulation. The questions attached included how to determine the obligation in question as a sale of goods or as a provision of services, on which criteria one should determine where the place of performance should be, if it is not clear, or if there are several places which of them can be considered the place of performance, to then determine the jurisdiction.

1.4 The complex of problems

The main problem with Article 5(1)(b) of the Brussels I Regulation is that even though it might not seem that difficult to apply to disputes, reality is often more complicated than can be easily fitted in under the wording of the Article. In many cases there are difficulties in determining if a contractual obligation to be performed by one party is a matter of a good being delivered or of a service being provided. In reality it is often also so that there is not one single place of delivery or one single place where the service is to be provided under the contract. This has made it difficult, in some cases, for national courts to be certain about how to assert the question of their potential jurisdiction according to Article 5(1)(b).

As mentioned earlier in this thesis, my aim is to find the criteria that determine if an obligation is a matter of a sale of a good or a provision of a service and, if there are several places of delivery or of provision of services both within a Member States or within different Member States, how the national court should go about identifying the relevant place of performance as stated in Article 5(1)(b) of the Regulation.

1.5 Method and Materials

For the main discussion regarding the interpretation of Article 5(1)(b) of the Brussels I Regulation this thesis primarily uses case law from the ECJ regarding the Article in question. To further examine the ruling of the ECJ this thesis also looks at material from academic scholars commenting on the rulings as well as paying special attention to references in newer rulings to former rulings regarding the same Article.

Since the Brussels I Regulation is so closely linked to the Brussels Convention and the Lugano Convention it is also necessary to look at these conventions and some of the case law provided by the ECJ regarding Article 5(1) in the Brussels Convention, which often is used as a guideline for the ECJ in determining cases concerning Article 5(1)(b) of the Regulation. To be able to present criteria on how to interpret Article 5(1)(b) the ECJ case law regarding the Article of the Regulation will be analyzed in detail regarding both the factual background as well as the reasoning of the ECJ.

In order to learn how the ECJ interprets Article 5(1)(b) of the Regulation an overview of the methods used by the ECJ in its interpretation of the Brussels Convention is also examined.
This thesis will not examine any Swedish case law regarding the Brussels I Regulation since there have been no relevant rulings regarding Article 5(1)(b) of the Regulation.

1.6 Contents

This thesis is divided into five chapters with a number of subsections under each chapter. The second chapter will present the background of the Brussels I Regulation, the Brussels Convention and the Lugano Convention in order to provide the reader with the history and the process leading up to the current wording and scope of Article 5(1)(b) of the Regulation. In the second chapter the different wordings, scope and applicability of Article 5(1)(b) in the Regulation and Article 5(1) of the Brussels Convention will be presented in detail. The second chapter also presents methods of interpretation used by the ECJ in interpreting the Brussels Convention that are still, in some aspects, used when interpreting the Brussels I Regulation. Chapter three will present the cases, ruled on by the ECJ, chosen to be analyzed in this thesis. Each case will first be presented with a background and thereafter a detailed presentation of the reasoning and judgment of the ECJ will follow. Chapter four begins with presenting an analysis of the case law presented by the author of this thesis. Focus will lie with identifying general criteria and reasoning used by the ECJ. Chapter four will also present the Swedish comments and response to Article 5(1)(b) in the Brussels I Regulation as well as comments regarding the ECJ case law and its impact on private international law. The chapter will also consider if the altering of Article 5(1)(b) in the Brussels I Regulation in comparison to its predecessor, Article 5(1) in the Brussels Convention, has meant any actual improvement or if change is needed. In the fifth chapter of this thesis the author will present some concluding remarks and reflections.

2. Background

2.1 The Brussels Convention and Article 5(1)

Two of the European Union’s five critical objectives are the free movement of goods and the common market for verdicts issued by courts in the Member States. Before any provisions on jurisdiction within the EU, previously the EC, were adopted, national rules within the Member States were highly limited in recognizing and enforcing judgments from other Member States in their own state. To solve this problem the Member States of the European Union negotiated with each other in an attempt to agree upon procedural rules to simplify the
recognition and enforcement of judgments made in other Member States, this according to Article 220\(^3\) of the then applicable EC Treaty. One of the objectives was to simplify for the citizens within the EU, as well as to improve the economic integration within the Union.\(^4\)

To achieve this, a committee of experts was appointed and the product of this committee was a Convention that included both rules on recognition and enforcement of other EU Member State’s verdicts and how to determine jurisdiction, the so-called Brussels Convention from 1968.\(^5\) The Convention only focused on civil and commercial matters. It was based on Article 220\(^6\) of the EC Treaty, however, it was not an EU-instrument per se, although an additional Protocol, The Luxemburg Protocol of 1971, the European Court of Justice was given mandate to interpret the Convention.\(^7\)

The original members of the Convention were the six founding members of the EEC: Belgium, France, Germany, Italy, the Netherlands and Luxembourg. Concepts such as nationality and reciprocity were abandoned and instead a community approach was adopted which viewed the Member States only as parts of one single greater unit.

Necessary technical adjustments were made to the Convention every time the EC/European Union was enlarged by a new state becoming a member of the EU, resulting in Accession Conventions in 1978, 1982, 1989 and finally in 1996 following the so-called northern enlargement of the EU when amongst others\(^8\) Sweden joined the EU.\(^9\) The Brussels I Regulation is not directly applicable in Denmark, it is, however, applicable between the EU and Denmark through the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concluded in 2006.

In 1988 the Lugano Convention was agreed upon between the Member States of the European Free Trade Association (EFTA) and the European Union. The Lugano Convention was designed as a parallel convention to the Brussels Convention with the aim of enabling the free movement of judgments between the Member States of both organizations, which together

\(^3\) Now Article 293 EC Treaty.
\(^5\) L. Pålsson (2008), pp. 21-22.
\(^6\) Now Article 293 EC Treaty.
\(^7\) M. Bogdan (2008), p. 131.
\(^8\) Also joining were Austria and Finland.
form the EEA. Other states not members of the two organizations are also allowed to join the Lugano Convention.\(^\text{10}\) In order not to over-burden the Accession Convention of 1996 it was decided to pursue the reform of the Brussels-Lugano Regime separately. There was a proposal for a fifth Accession of the Brussels Convention but after the introduction of the Treaty of Amsterdam the so-called third pillar concerning the intergovernmental cooperation of police and administration of justice, the subject became a Union matter which meant competence for the EU to create a regulation in the field. One of the areas where the Brussels I Regulation meant changes in comparison with the Lugano Convention is in regard to Article 5(1)(b).\(^\text{11}\) With the adoption of the new Lugano Convention in 2007, the provisions are again essentially the same.

Since the Brussels Convention dealt with both the recognition and enforcement of foreign judgments as well as rules on jurisdiction, in so being a “double convention”, it made it possible, in disputes among the EU Member States, to exclude such national rules that meant a specific advantage for domestic plaintiffs. This also meant that deciding on the relevant fora could be determined only on relevant, objective criteria, preventing cases from being tried in a court of a Member State without relevant connection to the case.

In being a double convention, which in general are much harder to reach international consensus on, the Brussels Convention was and is regarded as a major achievement in international cooperation, creating a single European area of jurisdiction, an “espace judiciaire européen”\(^\text{12}\).

Article 5(1) of the Brussels Convention was the predecessor to Article 5(1)(b) in the Brussels I Regulation except that Article 5(1) in the Convention has no specific applicability to the sale of goods and the provision of services as in Article 5(1)(b) of the Regulation. To determine the applicable fora according to Article 5(1) of the Brussels Convention the obligation of the contract in question was first to be identified and following that the place of performance could be determined. In connection with deciding the obligation in question the court, which had jurisdiction in the matter, was decided upon.\(^\text{13}\)

\(^{12}\) L. Pålsson (2008), pp. 33-34.
If a court needed to determine whether it had jurisdiction in accordance with Article 5(1) of the Brussels Convention a two-step procedure called the Zelger/Tessili-procedure was to be followed. This procedure meant first that the court needed to determine, in accordance with the guidance provided by the Zelger case\textsuperscript{14}, whether the parties had a written or implied agreement on where the place of performance should be. This written or implied agreement on where the place of performance was considered to be under the contract was then admissible if the agreement was considered valid and not concluded only to create jurisdiction for the courts of a certain country. If such a written or implicit stipulation in the agreement did not exist, the courts were to determine jurisdiction, in accordance with the Tessili\textsuperscript{15} judgment, by going through three steps. First, the court needed to classify the obligation on which the claim was based. Secondly, the court needed to determine the law applicable to that obligation in accordance with the court’s own rules of choice of law and finally, they needed to assert the place of performance of the obligation in accordance with the law thus determined.

The problem arising in this context was that when determining jurisdiction regarding obligations not characteristic for the agreement in question, the objective of proximity between the dispute and the court with jurisdiction was not fulfilled. For example, regarding a dispute on the sale of goods the place of performance would be decided on the basis of where the payment would have taken place if the contractual obligations had been fulfilled, even though this would have had nothing to do with the real dispute, which generally focuses on the quality or delivery of the goods. Article 5(1) of the Brussels Convention could also lead to the jurisdiction of different courts in regards to different obligations contracted by the same contract. Finally, due to the difficulty in identifying the relevant obligation of the contract different national courts came to different conclusions on how to interpret Article 5(1), which in turn resulted in low predictability in respect of how to determine the place of performance.\textsuperscript{16} As one can see there were several shortcomings in Article 5(1) of the Brussels Convention when it came to living up to the objectives and aims set out by the Convention. The decision was therefore taken to reform the Article and to introduce a new way of interpreting it.

\textsuperscript{14} Case 56/79 Zelger v. Salintiri (1980) ECR 89.
\textsuperscript{15} Case 12/76 Industrie Tessili Italiana Como v. Dunlop AG (1976) ECR 1473.
2.2 Council Regulation (EC) 44/2001, the Brussels I Regulation

On 20 December 2001 the Brussels Convention was replaced by Council Regulation (EC) 44/2001, the Brussels I Regulation, on jurisdiction and enforcement of judgments in civil and commercial matters. The Regulation is aimed at facilitating the judicial treatment of lawsuits and judgments between Member States. It also aims at creating easier and more uniform rules as well as faster and simpler procedures for civil cross-border litigation within the EU. Due to earlier difficulties in enforcing civil claims in other Member States people were discouraged to establish cross-border trade relations, which hampered the sound operation of the internal market. The Regulation was set out to remedy this and use mutual trust of the legal system between the parties and the assumption among Member States that the Regulation was followed as means of achieving this goal.

The Regulation is also purposed at basing jurisdiction and with that the defendant’s obligation to submit claims to the competent court. Jurisdiction is in the Regulation as in the Convention based on uniform and connecting factors. The Regulation abolished several national provisions basing jurisdiction, which was regarded as excessive.

One other main objective of the Regulation is asserting the principle of legal certainty in matters of jurisdiction and the recognition and enforcement of judgments. A defendant is to be able to foresee in which court in the EU he or she can be sued. It is not up to the court that has been seized to settle a dispute to decide if it should entertain a suit or not, as being bound by the Regulation. This means that the doctrine of non conveniens is not allowed under the Regulation. One must note though that even though the Regulation aims at security and certainty in cross-border litigation it also offers a wide freedom for parties to select the competent courts, as Article 23 of the Regulation expressively allows for choice of court agreements that are only limited where the Regulation provides for exclusive or protective jurisdiction.

It has been suggested by legal scholars that the grounds for alternative jurisdiction presented in amongst others Article 5(1)(b) of the Brussels I Regulation could mean producing incentive for forum shopping in the Brussels I Regulation instead of leaving no room for it. Forum

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17 L. Pålsson (2008), p. 35.
shopping would mean a problem in meeting the objectives of legal certainty set out by the Regulation.\textsuperscript{21} I will, however, not, in this thesis, examine this further.

The Brussels I Regulation is based on the Brussels Convention and the transformation meant turning the Brussels Convention into a Community Law (now Union Law) instrument. The Brussels Convention is still applicable in Member States’ territories outside the EU, stated in Article 68(1) of the Regulation.\textsuperscript{22} Although the Brussels I Regulation has kept the same main legal framework as in the Brussels Convention, many changes have been made, also in respect of Article 5(1)(b).\textsuperscript{23} In being a Union Law instrument this means that the court of a Member State can ask the ECJ to interpret the provisions of the Regulation in a preliminary ruling according to then applicable Article 234 of the EC Treaty and now applicable Article 267 of the TFEU.\textsuperscript{24}

The Brussels I Regulation is directly applicable in all Member States except Denmark, where it is, as mentioned, applicable through an agreement between the EU and Denmark. The main rule on determining jurisdiction is Article 2, which states that jurisdiction should be determined on the basis of the defendant’s domicile. The provisions on special jurisdiction, found in Articles 5 to 7, can only be used against a defendant domiciled within a Member State, bearing in mind that Article 2 should be considered first.\textsuperscript{25}

\textbf{2.2.1 Article 5(1)(b) of the Brussels I Regulation}

The changes made to Article 5(1)(b) in the Brussels I Regulation, compared to Article 5(1) of the Brussels Convention, were aimed mainly to provide a definition on what should be considered the place of performance in cases regarding the sale of goods and the provision of services. This meant that defining first the obligation in question as was required by the previous interpretation of Article 5(1) of the Convention, was no longer necessary. Instead the focus shifted to the actual sale of goods and provision of services. The first step of determining the court with jurisdiction is still the same in both instruments. If the place of performance can be determined on the basis of the contract, this automatically determines the competent fora. The Brussels I Regulation does in some cases simplify the determination of

\begin{itemize}
\item \textsuperscript{21} A. Vezyrtzi (2009), pages 83-87.
\item \textsuperscript{22} L. Pålsson (2008), p. 35.
\item \textsuperscript{23} W. Kennett (2001), p. 725.
\item \textsuperscript{24} L. Pålsson (2008), p. 44.
\item \textsuperscript{25} T. Seth (2011), pp. 30-31.
\end{itemize}
jurisdiction since the place of performance is to be interpreted as the place where the goods were or should have been delivered or the place where the services were or should have been provided.  

### 2.2.1.1 Matters relating to a contract

Article 5(1)(b) of the Brussels I Regulation is applicable in matters related to a contract, limiting the scope of the Article. The interpretation of the phrase “matters relating to a contract” has not been altered with the change from the Brussels Convention. The meaning of the phrase can be derived from the general schemes and objectives of the Regulation itself. The scope extends to include close links of the same kind as what is considered a close link between parties to a contract in the strictest sense. It does not include situations where one party does not freely assume there being an obligation towards the other party.  

The ECJ has determined that the concept of a contract extends to relationships between parties that include the same close links as if there was an actual contract between them. Contractual matters within the scope of Article 5(1)(b) are for instance the obligation to pay money arising from a relationship between an association and its members. As a general conception relations between two parties, as recognized by law in some form, are considered a contractual matter within the scope of Article 5(1)(b).

The claim relating to the contractual obligation has been interpreted so that as long as a plaintiff’s claim is based on a strongly arguable assertion on there being an valid contractual obligation owed from the defendant to the plaintiff the claim is considered to be valid.

### 2.2.1.2 The obligation in question

Where Article 5(1)(b) of the Brussels I Regulation is substantially different from its predecessor in the Brussels Convention is regarding the concept of “the obligation in question” which in the Regulation is specified to be applicable to contracts for the sale of goods and contracts for the provision of services. This was not specified in Article 5(1) of the Brussels Convention.

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28 Case 34/82, 1983, ECR 987 (Peters v ZNAV).  
29 P. Stone (2010), pp. 82-83.
In regard to the sale of goods the Regulation refers to the place within a Member State where, according to the contract, the goods were or should have been delivered. This is then considered the place of performance. This provision of Article 5(1)(b) of the Regulation is aimed at displacing the approach used within the Brussels Convention, as explained above. This makes the provision quite clear since the sale of goods refers to tangible moving goods and does not include land, for example. The term sale then implies the transaction of the ownership of goods in return for payment excluding e.g. situations of hire-purchase from the scope of the Article.

In Article 5(1)(b) the second indent refers specifically to cases regarding the provision of services. The Article determines that, unless otherwise agreed between the parties, the place of performance in case of the provisions of services is the place according to the contract where the services were provided or should have been provided within a Member State. As with the provision in Article 5(1)(b) regarding the sale of goods the second indent of Article 5(1)(b) in the Regulation is designed to displace the approach used in the Brussels Convention. As will be presented later in this thesis the definition of a provision of services was given by the ECJ in the Falco judgment, the concept of services implies there being an activity carried out by the party providing the service in remuneration for money from the other party.

The second indent of Article 5(1)(b) does not apply in cases where the service provider does not carry out any activity. It does therefore not apply in cases where the service takes the form of monetary payment such as in insurance contracts, loan contracts or guarantee contracts. It may also be inferred that Article 5(1)(b) does not apply to cases where both parties have an obligation to each other to perform substantial activities other than making payments, such as franchising contracts.

2.3 Interpretation of the Brussels Convention and the Brussels I Regulation

Since many of the provisions found in the Brussels Convention have been preserved identical or almost so in the Brussels I Regulation, the Regulation is in many areas to be interpreted in the light of the substantial body of case law that has been decided by the ECJ under the

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30 P. Stone (2010), p. 84.
32 Case C-533/07.
Brussels Convention. Since many of the provisions have the same meaning in the two instruments one may look at previous case law settled by the ECJ in interpreting the different articles of the Regulation. There are several principles laid down by the ECJ as regards interpreting the Brussels Convention which are of importance and applicable also in interpreting the Brussels I Regulation. They will be stated below.

(i) The meaning of a provision is to be interpreted in the light of its actual purpose rather than being interpreted by taking its literal meaning. This has been confirmed to be applicable for the Regulation as well.

(ii) One general principle determined in interpreting the Convention is that it is should be interpreted autonomously rather than by reference to national law. The reason for this approach is that many of the Convention’s concepts have different meanings under the different Member States’ national laws and the reference to national law would inevitably lead to the lack if uniformity when interpreting the Convention. The objective of uniform application throughout the Union is therefore of significance. The scope of the Convention and the uniform application of particular provisions also apply to the Regulation as the Regulation and its provisions too should be given an autonomous meaning. Under the Convention in exceptional cases references to national law to some extent were allowed. This has, however, almost entirely disappeared with the Regulation, which introduced several important changes including replacing provisions which required or was interpreted as requiring reference to national law.

(iii) As regards deciding what the Union Law meaning should be there is another general principle to be considered. When asserting concepts that were used in the Brussels Convention the ECJ considered two factors. First it looked at the objectives and schemes of the Convention, this is also to be applied in interpreting the Brussels I Regulation since the Regulation shares the same objectives as the Convention. Second, the ECJ also looked at the objectives of the specific provision in question and then decided how it related to other provisions of the Convention.

(iv) When the Convention was replaced by a Regulation and thereby became integrated into the Union legal order in a more systematic and direct manner

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regard should be made to the meaning of cognate concepts that can be found in the EC Treaties or in secondary legislation. This was also necessary under the Convention approach, but is of more importance as regards the legal nature of the Regulation.

(v) As regards some particular provisions, the ECJ has laid down policy considerations to be taken into account, especially if a provision is to be interpreted narrowly or widely.\(^{35}\)

One major difference between the interpretation of the Convention and the interpretation of the Brussels I Regulation is the sources that one can turn to for help in understanding the meaning of the different provisions. Regarding the Regulation, it was only accompanied by a brief Explanatory Memorandum from the European Commission on its proposal for the Regulation to replace the Convention. There was no official report accompanying the Regulation itself. In contrast with this is the Brussels Convention, which was accompanied by the so-called Jenard Report\(^ {36}\), which is a commentary on the Convention, prepared by the rapporteur of the committee of experts who drew up the Convention. The first three Accession Conventions to the Brussels Conventions were also accompanied by reports. All this has of course been very useful for the ECJ in interpreting the Convention. Even though these reports can still be used in interpreting the Regulation what is missing is an explanatory report on the changes introduced with the Brussels I Regulation.\(^ {37}\)

### 2.4 The Lugano Convention

When discussing the Brussels Convention and the Brussels I Regulation one must remember to mention the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. The 1988 Lugano Convention was so similar to the Brussels Convention that the two together went by the name the Brussels-Lugano regime. Like the Brussels Convention the 1988 Lugano Convention was considered a major achievement in uniting different legal systems, especially achieving harmonized rules between states with the

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\(^{36}\) OJ 1979 C 59.

common law system used by the United Kingdom and Ireland and states using the civil law tradition which is most of the remaining EU and EFTA states.\textsuperscript{38}

The 1988 Lugano Convention meant an expansion of regime of the Brussels Convention to non-EU Member States. It was ratified by all then fifteen EU Member States and later on Poland who was not a member of the EU at the time. It was also ratified by the EFTA Member States Iceland, Norway and Switzerland\textsuperscript{39}. The 1988 Lugano Convention was modeled after the Brussels Convention as a parallel and close to identical convention. It differed from the Brussels I Regulation in some matters, in the same way as the Brussels Convention differs from the Regulation.\textsuperscript{40}

In 2007 a new Lugano Convention entered into force replacing the 1988 Convention. Article 5(1) of the 2007 Lugano Convention corresponds to Article 5(1)(b) of the Regulation. All in all the 2007 Lugano Convention strives to follow the legal framework of the EC and with that the legal framework of the Brussels I Regulation.\textsuperscript{41}

In substance the 2007 Lugano Convention has the same scope of application as the Brussels I Regulation. Where the instruments differ is in regard to the temporal and territorial scope of application. It applies to all proceedings, which have been instituted on or after the day the Lugano Convention entered into force in the relevant state.\textsuperscript{42}

Regarding the interpretation of the Lugano Convention the general rules on interpretation of international instruments are applicable. It should also be interpreted in the same way as the Brussels I Regulation in order to ensure their parallel character, bearing in mind, however, that the application of the Lugano Convention is not limited to EU Member States. Protocol Number 2 to the Lugano Convention is intended to safeguard that the courts of the non-EU Lugano contracting States also take into account and more or less follow the decisions made by the ECJ even though these decisions cannot be directly binding on them.\textsuperscript{43}

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\textsuperscript{39} No other state has since ratified the Lugano Convention.
\textsuperscript{40} U. Magnus, P. Mankowski (2007), Introduction 29.
\textsuperscript{41} http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16029_en.htm
\textsuperscript{42} See Article 54 Lugano Convention.
\textsuperscript{43} U. Magnus, P. Mankowski (2007), Introduction 30-34.
\end{flushright}
3. ECJ Case law

3.1 Case C-386/05 Color Drack GmbH v Lexx International Vertriebs GmbH

This case is one of the most important cases regarding the interpretation of Article 5(1)(b) of the Brussels I Regulation. Many cases, following this case, refer to the reasoning of the ECJ in its judgment in Color Drack. The preliminary ruling in Color Drack focused on the interpretation of the first indent of Article 5(1)(b) and how to determine jurisdiction when there are several places of deliver within one Member State.

3.1.1 Circumstances surrounding the case

The conflict in question arose between the Austrian company Color Drack GmbH (“Color Drack”) and Lexx International Vertriebs GmbH (“Lexx”), a company established in Germany, regarding the performance of a contract for the sales of goods. Lexx had undertaken to deliver goods to various of Color Drack’s retailers in Austria and Color Drack undertook to pay the price of those goods. In specific, the case concerned the non-performance of the obligation to which Lexx was obliged under the contract, namely to take back unsold goods and reimburse Color Drack the price.

Due to that non-performance, Color Drack brought an action for payment against Lexx before the Bezirkgericht St Johann im Pongau in Austria, where Color Drack had its registered office. The first court accepted jurisdiction on the basis of the first indent of Article 5(1)(b). Lexx, however, appealed this decision arguing that this court did not have jurisdiction. The appeal court concluded that since there were several places of delivery, there was no single linking place. Color Drack thereafter appealed the decision of the appeal court, the Landesgericht Salzburg, to the Austrian Supreme Court, Oberster Gerichtshof, which considered an interpretation of the first indent of Article 5(1)(b) necessary to settle the case. The question referred to the ECJ reads: “Is Article 5(1)(b) of Regulation No 44/2001 to be interpreted as meaning that a seller of goods domiciled in one Member State who, as agreed, has delivered the goods to the purchaser, domiciled in another Member State, at various places within that Member State, can be sued by the purchaser regarding a claim under the contract relating to all the (part) deliveries – if need be, at the plaintiff’s choice – before the court of one of those places (of performance)?”
3.1.2 The judgment of the ECJ

The ECJ had to answer first if the first indent of Article 5(1)(b) applies to cases of sale of goods involving several places of delivery, and secondly, if the claim relates to all the deliveries, whether the plaintiff may sue the defendant in the court for the place of delivery of its choice.

ECJ started off by referring to recital 2 and recital 11 in the Brussels I Regulation establishing that the Regulation seeks to unify the rules of conflicts of jurisdiction in civil and commercial matters by making these rules highly predictable and in that manner strengthening the legal protection of persons established in the Community.

The ECJ continued; the reason for Article 5(1)(b) and “the place of performance”-criterion as a complement to the general rule of jurisdiction of the defendant’s domicile is the objective of proximity between the contract and the court called upon to determine the case.

Regarding the first question referred for a preliminary ruling, the ECJ answered that when providing for a single court to have jurisdiction and providing for the criterion of one single linking factor, the Community did not mean to exclude cases where a number of courts may have jurisdiction or those cases where the existence of a single connecting factor can be established in different places. Accordingly, the ECJ answered, the applicability of Article 5(1)(b) where there are several places of delivery within a Member State still falls within the objective of predictability and proximity of the Regulation, especially since in any event the courts of that Member State will exercise jurisdiction over the case. The answer to the first question was therefore affirmative, the first indent of Article 5(1)(b) is applicable when there are several places of delivery within one Member State.

As regards the second question referred to the ECJ, concerning the plaintiff’s right to choose where to sue the defendant in cases where there are several places of delivery within a single Member State, the Court began by referring to the origins of the provision. The ECJ broke with earlier solutions determining the place of performance for each obligation in question. It brought on a new approach by designating autonomously “the place of performance” to be the place where the obligation which characterizes the contract is performed. The ECJ wanted to centralize the place of performance and determine jurisdiction over all the contractual obligations to one place and by doing that link jurisdiction in all claims arising from the contract in question to that place. The ECJ determined, with regard to an efficient handling of
the proceedings, that in cases with several places of delivery of the goods, the “place of performance” must be understood as the place with the closest connecting factor between the court to hear the case and the contract in question. To determine the closest linking factor the ECJ reasoned that as general rule this should be the place of the principal delivery, based on economic criteria. Therefore, it is up to the national court to determine jurisdiction based upon the evidence submitted to it.

In case it is not possible to determine the principal place of delivery, but on condition that each of the places of delivery has a adequate link of proximity to the material elements of the conflict and a significant link of jurisdiction, the ECJ determined that the plaintiff may sue the defendant at the court of its choice and that this is in agreement with the first indent of Article 5(1)(b).

3.2 Case C-533/07 Falco Privatstiftung, Thomas Rabitsch v Gisela Weller-Lindhorst

In this case the ECJ was asked to decide upon the interpretation of Article 5(1)(a) and the second indent of Article 5(1)(b) of the Brussels I Regulation and if a license agreement falls under the wording “provision of services”. Since I will only examine Article 5(1)(b) of the Regulation in my thesis I will disregard the parts of the judgment concerning the interpretation of Article 5(1)(a).

3.2.1 Circumstances surrounding the case

The proceedings referred to the ECJ were between Falco Privatstiftung and Mr. Rabitsch (Falco), domiciled in Vienna, Austria, and Ms. Weller-Lindhorst who was domiciled in Munich, Germany. The dispute concerned the marketing of audio and video recordings of a concert with and without contractual basis. The claim regarded royalties in connection with the previously mentioned concert on the basis of contract or a copyright infringement.

The first instance, the commercial court of Vienna, claimed jurisdiction on the basis of Article 5(3) of the Brussels I Regulation, however, the higher regional court of Vienna, the Oberlandesgericht Wien, disagreed and the case was brought before the Supreme Court, the Oberster Gerichtshof, which referred three questions to the ECJ. Only two of these questions were directly answered by the ECJ. One concerned Article 5(1)(b) so I will only cover the part of the judgment concerning that question.
The question referred to the ECJ regarding Article 5(1)(b) was the following. Is a contract under which the owner of an intellectual property right grants the other contracting party the right to use that right (a license agreement) a contract regarding “the provision of services” within the meaning of Article 5(1)(b)?

3.2.2 The judgment of the ECJ

The ECJ began by stating that an answer to the question cannot be found in the actual wording of the second indent of Article 5(1)(b). The ECJ went on referring to the objectives of the Regulation, as well as previous cases, and stated that it must be determined whether a contract, under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration, is a contract for the provision of services within the meaning of Article 5(1)(b). The ECJ stated that the Regulation’s aim of high legal certainty was of the essence in determining this question, this legal certainty aiming at strengthening the legal protection of persons established in the European Community by providing a level of predictability in foreseeing which court they may be sued in. These rules of jurisdiction have their general basis in Article 2 of the Brussels I Regulation, that is, jurisdiction based on the defendant’s domicile.

Article 5(1)(b) is a complement to this rule reflecting the desire for proximity, between the contract and the court. As regards Article 5(1)(b), the ECJ continued, for sales of goods an autonomous link is required. The ECJ stated that it is under the light of those considerations that one is to determine whether a contract falls under the scope of Article 5(1)(b), as here, where the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration.

The Governments of Germany, Italy and United Kingdom had submitted written observations to the ECJ in which they argued that the concept of services implies that the party who provides the service at least carries out a particular activity in return for remuneration. The ECJ drew the conclusion that whether a service was provided or not could not be inferred from such a contract as in this case where such an activity is involved. As was also stated by the General Attorney in this case, the owner of an intellectual property right does not perform any service when granting a right to use that property.

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44 Point 58 in her Opinion.
The ECJ argued that the broad logic and scheme of the rules governing jurisdiction in Regulation 44/2001 require a narrow interpretation when it comes to the rules on special jurisdiction, such as Article 5(1)(b). The ECJ stated that extending the scope of application of Article 5(1)(b) would amount to circumventing the intention of the Community Legislator in the respect that the article is mainly focused on contracts for the sales of goods and contracts for the provision of services and have a negative impact on the effectiveness of Article 5(1)(a) and Article 5(1)(c) of the Brussels I Regulation.

The ECJ therefore came to the conclusion that the concerned contract is not a contract for the provision of services within the meaning of Article 5(1)(b) of the Regulation.

3.3 Case C-204/08 Peter Rehder v Air Baltic Cooperation

This case, which was settled by the ECJ in 2008, was brought before the ECJ for a preliminary ruling by the Supreme Court, Bundesgerichtshof, of Germany concerning the interpretation of the second indent of Article 5(1)(b) of the Regulation. The ruling concerns more specifically how to determine place of performance when there are several places of where the provision of services takes place within different Member States.

3.3.1 Circumstances surrounding the case

The case was brought before the German courts by Mr. Peter Rehder, domiciled in Munich, who sued Air Baltic who had its registered office in Riga, Latvia, after the cancellation of a flight, which he had booked with the company, to take him from Munich airport in Germany to Vilnius in Lithuania. Mr. Rehder sued Air Baltic at the regional court, Amsgericht Erding, which had territorial jurisdiction over Munich airport, for the amount of EURO 250 as compensation based on EU legislation\(^45\). The regional court held that air transport services are provided at the aircraft’s place of departure, implying that this is the place of performance of the contractual obligation as referred to in the second indent of Article 5(1)(b). On these grounds the regional court claimed jurisdiction. After appeal by Air Baltic, the Oberlandesgericht München took the view that the place of jurisdiction should be where the company operating the flight has its head office. Mr. Rehder went on to appeal this decision to the German Supreme Court, Bundesgerichtshof, which focused on the question on

\(^{45}\) Article 5(1)(c) and 7(1)(a) of Regulation No 261/2004.
determining whether Amtsgericht Erding’s jurisdiction was dependent on the interpretation of
the second indent of Article 5(1)(b).

The German Supreme Court considered what would be the closest link, as established in
Color Drack, and in case it was not possible to establish one place of principal delivery
according to economic criteria, if it should be up to the plaintiff to decide where to sue. The
two questions referred to the ECJ were, first, if the second indent of Article 5(1)(b) is to be
interpreted as meaning that in the case also of journeys by air from one Member State to
another Member State, the single place of performance for all contractual obligations must be
taken to be the place of the main provision of services, determining according to economic
criteria? Secondly, where a single place of performance is to be determined. What criteria are
relevant for its determination? Is the single place of performance to be determined, in
particular, by the place of departure or the place of arrival of the aircraft?

3.3.2 The judgment of the ECJ

The ECJ stated that in the case of a provision of services such as those at issue in the main
proceedings, the same interpretation should be given to those as that which the ECJ gave to
the first indent of Article 5(1)(b) in Color Drack. This meant that the same criteria should be
observed when there were several places of delivery in different EU Member States as in
cases where there are several places of delivery within one Member State as the case was in
Color Drack.

The ECJ held that, after referring to the ECJ’s considerations in Color Drack, that in case
there are several places in different Member States at which services are provided, it is
necessary also to identify the place with the closest connecting factor between the courts
having jurisdiction and the contract in question. In particular the place where, pursuant to that
contract, the main provisions of the contract is to be carried out should be identified. The ECJ
carried on by determining that the place of Air Baltic’s registered office, or its principal place
of establishment, does not provide a sufficient close link to the contract since the activities
taking place there are preparatory and logistical and not services directly linked to the relevant
provisions of the contract. The same goes also for the place where the contract is concluded,
any stop over and where the ticket is issued.

The ECJ held that the services that correspond to the performance of obligations arising from
a contract to transport passengers by air were the checking-in, boarding, the on-board
reception of passengers and the place of take-off, agreed in the transport contract. This lead, as follows of the argumentation of the ECJ, that the only places with a direct link to these services are the place of departure and the place of arrival of the aircraft.

Since both those places had, according to the ECJ, a sufficient link of proximity to the material elements of the dispute the choice of where to sue is given to the plaintiff. This approach, held by the ECJ, also satisfied the element of predictability, since it makes it easy to identify in advance which courts the proceedings may be brought. It was also considered to be consistent with the objective of legal certainty of the Brussels I Regulation since the plaintiff’s choice is limited to two possible judicial fora within the framework of the second indent of Article 5(1)(b).

In summary, the ECJ gave the answer that the second indent of Article 5(1)(b) must be interpreted in the case of air transport of passengers from one Member State to another Member State carried out on the basis of only one airline, that if a dispute arises regarding the service of transporting the passenger from one Member State to the other Member State the court having jurisdiction to settle a dispute founded on that transport contract, is the court, which has territorial jurisdiction over the place of departure or arrival of the aircraft, as those places are agreed in that contract. It is thereafter up to the passenger to decide whether the place of departure or the place of arrival is the place then determining jurisdiction.

3.4 Case C- 381/08 Car Trim GmbH v KeySafety Systems Srl

This case was brought before the European Court of Justice by the German Bundesgerichtshof regarding the interpretation of Article 5(1)(b). There were two specific questions to be answered by ECJ. The first question was where the difference lies between contracts regarding the “sale of goods” and contracts regarding “provision of services”. The second question was how to determine the place of performance in the case of contracts involving carriage of goods.

3.4.1 Circumstances surrounding the case

The dispute in the main proceedings was between Key Safety Systems Srl, an Italian based company that supplied Italian car manufacturers with airbag systems, and Car Trim GmbH, established in Germany, a company that sold components used in the manufacture of those systems.
KeySafety bought from Car Trim components between July 2001 and December 2003 in accordance with five supply contracts. KeySafety terminated the supply contracts with effect from the end of 2003. Car Trim was of the opinion that these supply contracts should have run, in part, until the summer of 2007 and claimed that the termination was in breach of the contract and brought an action for damages before the regional court, Landgericht, in Chemnitz, Germany. The Chemnitz regional court considered itself to have jurisdiction over the region where the components were manufactured but held that it had no jurisdiction to rule on the claim based on that German courts have no international jurisdiction.

The higher regional court, the Oberlandsgericht, dismissed the appeal brought by Car Trim. It noted that, according to the supply contracts, Car Trim had the obligation of manufacturing airbags of a certain shape. Car Trim performed this obligation by using products purchased from agreed suppliers, in order to supply them in accordance with the needs of KeySafety’s production process and in conformity with a large number of requirements related to the organization of the work; i.e. packaging, labeling, quality control, delivery orders and invoices.

After the higher regional court dismissed Car Trim’s appeal Car Trim brought an appeal on the point of law before the German Supreme Court, the Bundesgerichtshof, The Bundesgerichtshof stated that the success of Car Trim’s action depended on whether the regional court was wrong in denying it having jurisdiction, which had to be determined on the basis of the Brussels I Regulation. The answer to the question of jurisdiction depended on the interpretation of Article 5(1)(b), since KeySafety had its business domicile in Italy, which could determine jurisdiction according to Article 2 of the aforementioned Regulation.

Accordingly, it is possible that German courts had jurisdiction to judge the action for damages, if the place of production was to be considered as the place of performance of the obligation in question, within the meaning of Article 5(1)(b) of the Regulation. The Bundesgerichtshof considered that jurisdiction should lie with the court that has the closest geographical connection to the place of performance. It was therefore necessary to identify the preponderant contractual obligation, which in the absence of any other applicable solution, was to be determined on the basis of economic criteria. If the place of performance determining jurisdiction in this case was the place identified in the first indent of Article 5(1)(b) of Regulation 44/2001, then it would be necessary to determine the place where the
sold goods would have been delivered, or should have been delivered, according to the contract.

The Bundesgerichtshof could not decide whether or not the actual performance was to be regarded as a sale of goods, according to the first indent of article 5(1)(b), or as a provision of a service, following under the second indent of Article 5(1)(b), and what were the decisive criteria for determining this. The question referred to the ECJ was whether Article 5(1)(b) of the Brussels I Regulation was to be interpreted as meaning that contracts for the supply of goods to be produced or manufactured and fabrication and delivery of the components to be produced, including a guarantee of the quality of production, reliability of delivery and easy administrative handling of the order, are to be classified as a sale of goods contract according to the first indent of Article 5(1)(b)?

The Bundesgerichtshof also wanted to know whether, if assumed that there was a sale of goods, in cases regarding sales contracts involving carriage of goods, the place where under the contract the goods sold were to be delivered or should have been delivered should be determined according to the place of physical transfer to the purchaser, or according to the place at which the goods were handed over to the carrier to transport the good to the purchaser?

### 3.4.2 The judgment of the ECJ

In the first question referred to the ECJ the main issue was how contracts regarding sales of goods are distinguished from contracts regarding provision of sales within the meaning of Article 5(1)(b) of the Regulation, in the case of contracts for the supply of goods to be produced or manufactured and the customer has specific requirements with regard to the provision, fabrication and delivery of the components to be produced.

First the ECJ noted that the question had been raised in proceedings between two manufacturers in the automobile sector which is an industrial sector characterized by a high level of cooperation between manufacturers. As a rule the customer identifies its requirements with precision and provides detailed instructions regarding the manufacture, to be respected by the supplier. The ECJ went on stating that manufacturing processes can entail the provision of services, which, together with the subsequent supply of the actual product, contribute to fulfilling the fundamental aim of the contract in question.
The ECJ stated that Article 5(1)(b) of the Regulation is silent both in regard of defining the two types of contracts and in distinguishing features of those types of contracts regarding sales of goods that also involve the provision of services. Specifically the first indent of Article 5(1)(b) does not give any answer in respect of the applicability of the provision in cases where the seller must manufacture or produce goods in compliance with specific requirements from the customer, as that manufacturing could be classified as a service within the meaning of the second indent of Article 5(1)(b).

The ECJ thereafter noted that in reference to Case C-533/07 (Falco Privatstiftung and Rabitsch), mentioned above, one needed to identify the obligation that characterizes the contract in question. The conclusion by the court was that a contract, which has as its characteristic obligation the supply of a good, is to be classified within the meaning of the first indent of Article 5(1)(b). To determine the characteristics of the obligation the following factors should be taken into consideration. First, the classification of a contract that has the aim of being a contract of sales of goods manufactured or produced by the seller is governed by certain provisions of European Union Law and International Treaty Law, which can affect the interpretation to be given the concepts of “sales of goods” and “provision of service”. As an example under Article 1(4) of Directive 1999/44, contracts for the supply of consumer goods to be manufactured or produced are also deemed contracts of sale. Also, Article 3(1) of CISG states that contracts for the supply of goods to be manufactured or produced are to be considered sales contracts unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such production. The abovementioned provisions give an indication that in thus specific cases the contract in question may be considered as a sale of goods contract.

Secondly, the ECJ provided a second criterion for classifying the contract in question as regarding a “sale of goods” or “provision of service”. The origin of the raw materials and whether or not the purchaser supplied these may also imply what classification of contract is at hand. Were all the materials from which the goods are manufactured, or a substantial part of them, supplied by the purchaser, then that fact could indicate that the contract should be classified as a “provision of services”.

46 See section 3.1.2
The ECJ came to answer the first question referred by the Bundesgerichtshof that, where the purpose of the contracts is the supply of goods to be manufactured or produced and, even though the purchaser has detailed requirements regarding the provision, fabrication and delivery of the components to be produced, if the purchaser has not supplied the materials then the supplier is responsible for the quality of the goods and their compliance with the contract. Therefore those contracts must be classified as a “sale of goods” within the meaning of Article 5(1)(b) of the Brussels I Regulation.

Regarding the second question referred to the ECJ, whether in the case of a sales contract involving carriage of goods, the place where, according to the contract, the goods sold were delivered or should have been delivered should be determined by reference to the place of physical transfer to the purchaser the ECJ stated that under Article 5(1)(b) the parties enjoy a certain freedom in defining the place of delivery. The words “unless otherwise agreed” in Article 5(1)(b) show that the parties can come to a mutual agreement on where the place of performance should be. The words “under the contract” under the same provision means, in principle, that the place of delivery is to be agreed by the parties in the contract. In its answer the ECJ referred to the objectives and schemes of the Regulation, and stated that it is settled case law, see cases above, that the rule of special jurisdiction in matters relating to a contract, as set out in Article 5(1)(b) which complements the rule that jurisdiction should be determined on the defendant’s domicile reflects an objective of proximity and the reason for that rule is the basis of existence of a close link between the contract and the court called upon to settle the dispute.

The ECJ emphasized the objective of predictability as stated under the Brussels I Regulation. The autonomy, the ECJ continued in its reasoning, of the connecting factors provided for in Article 5(1)(b) precludes application of the rules of private international law of the Member State with jurisdiction and the substantive law which would be applicable thereunder. It is therefore up to the referring court to determine, first, whether the place of delivery is apparent from the provisions in the contract. When the place of delivery is possible to identify in this matter, without referring to substantive law applicable to the contract, the ECJ stated that it is that place that is to be regarded as the place in the contract where the goods were delivered or should have been delivered for the purposes of the first indent of Article 5(1)(b). If there, on the other hand, are circumstances in which the contract does not contain any provisions indicating the parties’ intentions concerning the place of delivery, it is necessary to determine that place in accordance with the origins, schemes and objectives of the Regulation.
The Bundesgerichtshof considered two places of delivery; first the place of the physical transfer of the goods to the purchaser and the second, the place at which the goods are handed over to the first carrier for transmission. According to the ECJ the place where the goods were physically transferred or should have been transferred to the purchaser at their final destination was the most consistent with the origins, schemes and objectives of Regulation 44/2001 as the “place of delivery” for the purposes of the first indent of Article 5(1)(b) of the Regulation. That criterion was considered highly predictable meeting the objective of proximity in that it ensures the existence of a close link between the contract and the court called upon to settle the dispute. Also, the ECJ stated, the principal aim of a contract of a sale of goods is the transfer of those goods from the seller to the purchaser, an operation, which is not fully completed until the arrival of those goods to the purchaser.

In the ECJ’s opinion the first indent of Article 5(1)(b) must be interpreted as meaning that, in the case of a sale that involves the carriage of goods, the place where, under the contract, the sold goods were delivered or should have been delivered must on the one hand be determined on the basis of the provisions in that contract. If this cannot be determined through the provisions of the contract, then that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power over those goods at the final destination of the sales contract.

3.5 Case C-19/09 Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA

This case was ruled upon by the ECJ in 2010. The case concerned the interpretation of the second indent of Article 5(1)(b) of the Brussels I Regulation and was referred to the ECJ by the Higher Regional Court of Austria, the Oberlandesgericht Wien. The ruling regarded the applicability of Article 5(1)(b) when there were several places in different Member States where the services were provided and on which criteria, if the Article was considered applicable, the place of performance should be decided on.

3.5.1 Circumstances surrounding the case

In 2007 Wood Floor Solutions Andreas Domberger GmbH (“Wood Floor”), established in Austria, sued Silva Trade SA (“Silva Trade”), established in Luxembourg, seeking damages for termination of a commercial agent contract. Wood Floor relied on Article 5(1)(b) of Regulation 44/2001 for the jurisdiction, claiming that it carried out business exclusively from its seat at Amstetten, thus the work of signing up and acquiring clients taking place in Austria.
Silva Trade challenged the jurisdiction and claimed that more than three quarters of Wood Floor’s turnover was generated in other countries than Austria and that Article 5(1)(b) does not explicitly provide for such a case. Silva Trade argued that jurisdiction should instead be decided upon the provisions of Article 2 of the Regulation. This was rejected by the regional court, Landesgericht Sankt Pölten, which took the view that commercial contracts fall within the meaning of “provision of services” as in the second indent of Article 5(1)(b).

Silva Trade then brought the case before the Austrian Higher Regional Court, the Oberlandesgericht Wien. The Oberlandesgericht Wien held that, based on the criteria laid down in Color Drack, Article 5(1)(b) is applicable in cases where there are several places where services are provided and the place of main provision needs to be established to determine the place of performance, the court noted, however, that in this case, the commercial agent carried out business for the most part from Amstetten although, in contrary to what was established in ECJ’s judgment in Color Drack, this case regards several places of delivery within several Member States.

Next, the referring court asked how to establish the place where services are provided and, if one single place providing services cannot be established, whether the claimant may choose to bring the whole of his claim before the court of his choice, having jurisdiction of place where services have been provided.

3.5.2 The judgment of ECJ

The first question, whether the second indent of Article 5(1)(b) is applicable where services are provided in several Member States, was answered by the ECJ in the affirmative.

The ECJ noted, as held in Color Drack regarding the first indent of Article 5(1)(b) on sale of goods, that the objective of proximity of the Brussels I Regulation and the criterion of a autonomous link to fulfill the objective of predictability provides for the place of delivery to be applicable to all claims founded on the same contract within a single Member State. After this approached was confirmed in Color Drack the ECJ held in the Rehder case that the same approach applies regarding the second indent of Article 5(1)(b). This meant, held the ECJ, that when services are provided at different places within several Member States, a differentiated approach cannot be applied to the objectives of proximity and predictability. The ECJ could also not identify anything in support of that such an approach would run
counter to the purpose of Regulation 44/2001. Therefore, the second indent of Article 5(1)(b) is applicable in the case where services are provided in several Member States.

The second question concerned the basis of the criteria upon which the place of the characteristic performance of the obligation of the contract should be established. What court has jurisdiction to hear and determine all the claims arising out of the contract in case where services have been provided in several Member States, in accordance with the second indent of Article 5(1)(b)? On the basis of what criteria should the place to be determined in the case of a commercial agency contract? The ECJ answered the question by identifying four considerations of relevance.

First, the ECJ began by referring to Color Drack saying that the place of performance must be understood as the place with the closest linking factor, in general the place of main provision of services, when there are several places of delivery.

Second the ECJ stated that in commercial agency contracts it is the commercial agent who performs the obligation that characterizes that contract and who provides the service, as stated in the second indent of Article 5(1)(b). This would then mean that in the situation where there are several places where services are provided the main place where the agent is providing services must in principle be considered to be the place of performance.

As a third consideration the ECJ decided where the main provision of service is when those services are provided within different member states. To determine this the ECJ stated that one must look at the objectives of the Regulation, in particular the objective of predictability and also the actual wording of the second indent of Article 5(1)(b) according to which the place of performance is the place in a member state that as far as possible can be deducted from the provisions of the contract itself. If one is not able to determine the place of the main provision of services on such a basis and the agent has already provided such services the ECJ stated that it is appropriate, in the alternative, to take into account the place where the agent actually has been carrying out most of his work in accordance with the contract as long as this is not contrary to the intentions of the parties as far as these can be interpreted from the provisions of the contract. In particular, one should then take into consideration the agent’s time spent and the importance of the activities carried out at that place.

Fourth, the ECJ stated that in case the place of the main provision of services cannot be established on the basis of the provision of the contract itself or its actual performance, the
place must be determined by looking at the objectives of predictability and proximity. In this case one should consider the agent’s domicile, since this place can always be identified and is therefore predictable. This also meets the objective of proximity since the agent most likely will have performed a great deal of his services there.

On the basis of these four considerations the ECJ answered the second question so that the second indent of Article 5(1)(b) must be interpreted as meaning that where services are provided in several member states, the court with jurisdiction is the court within whose jurisdiction the place of the main provision of services takes place. In a commercial agency contract this is the place of the main provisions of services by the agent as it appears from the provisions of the contract or, in absence of such provisions, the actual performance of the contract or, if it cannot be determined on that basis either, the place where the agent is domiciled.

3.6 Case C-87/10 Electrosteel Europe SA v Edil Centro SpA

In this case the ECJ tackled the question of how to interpret the words “under the contract” used in the first indent of Article 5(1)(b) of the Brussels I Regulation.

3.6.1 Circumstances surrounding the case

Edil Centro SpA (“Edil”), the seller, and ElectroSteel Europe SA (“ElectroSteel”), the buyer, concluded an agreement regarding the sale of goods. After a dispute of performance Edil applied to the Vicenza District Court, Tribunale ordinario de Vicenza, the court that had jurisdiction over the seat of Edil, for an order directing ElectroSteel to pay for goods purchased. ElectroSteel opposed the court’s jurisdiction since ElectroSteel had its seat in France where they argued that the dispute should be settled.

In the contract, Edil argued, there was a contractual clause saying that the delivery of the goods should be considered to be Italy, “Delivery free ex our business premises”, making the Italian courts the courts with jurisdiction.

The main question referred to the ECJ was if, as stated in Article 5(1)(b), the place of performance should be interpreted as the place of delivery being the place of final destination of the goods or the place where the seller is discharged of his obligation to deliver according to the contract or if this was open for a different interpretation. Since the ruling in the case of Car Trim had been given by the ECJ after the reference of this question, the ECJ referred to
that case in deciding where the place of delivery is to be established, that is according to the provisions of contract or in absence of such where the physical transfer of the goods took place. The ECJ then decided to focus on clarifying the issue of how the words “under the contract” in the first indent of Article 5(1)(b) should be interpreted and to what extent it is possible to take into consideration terms and clauses used in a contract which do not identify explicitly the place of delivery, which would then determine which court had jurisdiction.

3.6.2 The judgment of the ECJ

The ECJ began by noting that under Article 23 of the Regulation, a jurisdiction clause may not only be agreed in writing, it may also be determined in a form which accords with practices that the parties have established between themselves or in international trade and commerce in a form that accords with a usage that the parties are or should have been aware of and that such usage is widely known and regularly observed in that particular trade or commerce. The ECJ then stated that there is nothing claiming that the European Union legislature would not wish to take into consideration such usage for the purposes of interpreting other provisions of the same regulation.

According to the ECJ this meant that in order to determine, while examining a contract, the place of delivery for the purposes of determining the place of performance as stated in Article 5(1)(b) the referring court must take into consideration, when examining the relevant terms and clauses of the contract, the terms and clauses generally recognized and applied in international trade or commerce in so far as they can be identified in the contract.

When the contract contains such terms and clauses it may be appropriate to examine whether there are stipulations that merely lay down the conditions regarding the allocation of risks in the carrying of the goods or the division of the costs between the parties, or if they also identify the place of delivery.

In this case the ECJ determined that it was up to the referring court to determine whether the aforementioned phrase “delivered free ex our business premises” corresponds to international trade and commerce usage and provisions. Ergo, to determine place of delivery the court must at first look at the provisions of the contract and if it is not possible to determine through the stipulations of the contract the place of delivery is to be considered as the place where the physical transfer of the goods took place, where the purchaser obtained or should have obtained possession of the goods at the final destination of the sales transaction.
4. Analysis of the ECJ case law

As is clearly shown by the case law presented above in Chapter 3 there is not always one single, easy way of determining where the place of performance should be considered to be. The business transaction between two parties may not always be as straightforward as might have been presumed by the drafters of the Brussels I Regulation.

4.1 How to determine place of performance

In *Color Drack* the question arose regarding how to determine the place of performance when the place of delivery was in several different places within one Member State. The criteria the ECJ laid down on how to determine the place of performance can prove to be useful in coming cases where this is not clear. As the ECJ did, the national courts must put emphasis on the objectives of the Regulation and look at proximity and predictability, it should be predictable for the defendant in which court he or she may be sued in and the court with jurisdiction should have a close linking factor with the contract in question. Even though there might be several places of delivery it is important to remember that the ECJ determined that this does not mean that Article 5(1)(b) of the Regulation is not applicable and the objectives should therefore be considered in such cases.

As the ECJ stated the place of performance should be determined on the basis of economic criteria; the place then decided on should be considered the principle place of delivery. If such a place could not be determined because all of the places of delivery were all equally linked to the conflict in question, it was up to the plaintiff to choose the court with the closest linking factor to one of the places of delivery to sue the defendant there.

*Color Drack* became a significant case, which was referred to in later judgments by the ECJ. In *Peter Rehder* the ECJ stated that the decision should be based on the same criteria as in *Color Drack*. The circumstances surrounding *Peter Rehder* were in many ways similar to the circumstances presented in *Color Drack*. The difference in *Peter Rehder* was that the possible places of performance were located in different Member States and that the place of performance was the provision of services and not the delivery of goods.

The ECJ determined in *Rehder* that, as in *Color Drack*, the main place of performance should be determined to be the same as where the main provision of the services were carried out, based on economic criteria and with the closest linking factor to the obligation in question.
based on the provisions of the contract. This was in *Peter Rehder* determined to be the place of arrival and departure of the aircraft. Since both the place of arrival and the place of departure were considered to be the main place of the provision of the services, the ECJ stated in *Peter Rehder*, as it did in *Color Drack*, that it was up to the plaintiff to decide on where of these two places he wanted to sue and that this was in line with the Regulation’s objectives of proximity and predictability.

The conclusion that could be drawn from *Color Drack* and later on from *Peter Rehder* is that both the first and second indent of Article 5(1)(b) of the Brussels I Regulation are applicable in cases where services are provided in different locations and where there are several places of delivery. The main place of delivery or provision of services should be established on the basis of economic criteria. If one place of performance cannot be established, the plaintiff can sue at either of the relevant places. One should also always bear in mind the objective of predictability and proximity found in the Brussels I Regulation.

The criteria set out in *Color Drack* were also referred to by the ECJ in the case *Wood Floor Solutions*. The ECJ stated, as the circumstances were similar to the previously mentioned cases, that the same approach should be used in *Wood Floor Solutions*, there one of the questions was the applicability of the second indent of Article 5(1)(b) of the Regulation in circumstances where there were several places of providing services within different Member States.

In *Wood Floor Solutions* a new question regarding a specific kind of contract was brought to the attention of the ECJ. The contract at hand was a commercial agency contract and the question was how the place of performance is to be established with such a specific contract when there were several places within different Member States where the services were provided. In the ECJ’s opinion, when it comes to a commercial agency contract the place of performance is the place where the main provisions of services by the agent is carried out, as it appears from the provisions of the contract or, in absence of such provisions, the actual performance of the contract. In cases where this cannot be determined on that basis either, the place where the agent is domiciled. This judgment may not be as useful for future references since it is regarding such a specific kind of contract. It may, however, be used as a guideline when it comes to similar business contracts.
When it comes to determining the place of delivery one should also take note of the second question referred to the ECJ in the case of Car Trim. There the ECJ determined that if the place of delivery could not be found in the provisions of the contract or in the intent of the parties the place of delivery should be considered to be the place where the purchaser obtained actual power over those goods sold to him by the seller. In this case as in the previous mentioned cases the ECJ emphasized the importance of predictability and proximity regarding jurisdiction, i.e. the objectives of Regulation 44/2001.

Another question of determining the place of delivery arose in the case ElectroSteel. The wording “under the contract” can be found in the first and second indent of Article 5(1)(b). It aims at identifying the place of performance through the provisions of the contract. In ElectroSteel the question referred to the ECJ was the interpretation of the phrase in the first indent. In this case the ECJ stated that one should look at other provisions of the Brussels I Regulation for guidance in interpreting Article 5(1)(b). The conclusion that may be drawn from this case is that one should also look at other provisions of the Brussels I Regulation when interpreting Article 5(1)(b). This is also in accordance with the guidelines set out by the ECJ in interpreting the Brussels Convention.

4.2 The scope of Article 5(1)(b) of the Brussels I Regulation

A different question regarding the applicability and interpretation of Article 5(1)(b) arose in the case Falco. The question referred to ECJ was if a license agreement, and the obligation contained therein, is to be considered a provision of services as stated in the second indent of Article 5(1)(b). The crucial issue in the ECJ’s judgment, which can be drawn from the case, is that it is important to always take into consideration the objectives of the Brussels I Regulation. In the Falco case this meant strengthening the rights of legal persons within the Union by access to a high level of predictability regarding where one might be sued. Most important was the ECJ’s statement, after concluding that a license agreement is not such a contract regarding the provision of services that falls within the scope of the second indent of Article 5(1)(b), that Article 5(1)(b) is a secondary provision to Article 2 and that it should be narrowly interpreted as such.
4.3 The sale of goods or the provision of services

The question of how to determine whether a contract is to be considered a contract regarding the sales of goods or a contract regarding the provision of services as stated in Article 5(1)(b) was settled by the ECJ in 2008 in the case of Car Trim.

The ECJ judgment in Car Trim gave some guidance on how to define contracts where the obligation in question is not that clearly identified as being one of the two. The ECJ gave guidance in referring to the Falco case that one must first clearly identify the main obligation that characterizes the contract. The ECJ stated that in identifying the characteristic obligation one should look at EU law and international treaty law specifying a sale of a good to see if the obligation might be identified in any such legislation. One should also look at the origin of the raw materials. If the purchaser has supplied all or most of the raw material then the obligation could be indicated as being a provision of a service.

The conclusion to be drawn from this case is that if there is uncertainty on the characteristics of an obligation one might look at other EU legislation and international treaty law in order to find guidance. Even if not stated so this might also be true in other matters relating to the interpretation of Article 5(1)(b) of the Brussels I Regulation, especially the aim of making decisions that are in conformity with the objectives of the European Union. This would also be in accordance with the interpretation guidelines used by the ECJ in interpreting the Brussels Convention as mentioned in section 2.3 above.

4.4 Swedish comments on Article 5(1)(b) of the Brussels I Regulation

Sweden became a Member State of the EU in 1995. With the expanding competence of the Union Sweden is directly affected by the legislation issued by the EU. When the Brussels I Regulation came into force this meant that the Regulation became directly applicable in Sweden, which resulted in changes in some Swedish laws and regulations.

The Swedish government proposed a new law to ensure the Swedish legal system’s compliance to the Brussels I Regulation, the Brussels Convention and the Lugano Convention. The aim was to create a legal framework, which is neutral as regards which international instruments are applicable, concerning jurisdiction and the recognition and enforcement of foreign judgments within civil and commercial matters, as so in line with the
Brussels- and Lugano Conventions as well as the Brussels I Regulation. The law would then be applicable to future international instruments regarding the same matter.\textsuperscript{47}

This approach of creating a neutral law not specifying the international instruments at hand was heavily criticized by scholars at both Lund and Uppsala University claiming it would make the scope of the law too wide and difficult to identify which instruments would fall under the scope of it. It was suggested that the new law should be configured so that it only contained supplementary provisions. Changes to existing laws should be made only by altering the headings of the laws so they referred to the current international instruments applicable in Sweden in order for there to be no confusing to the law dealing with the supplementary provisions.\textsuperscript{48}

Specific reference to Article 5(1)(b) of the Regulation was very scarce in the governmental Bill, it was only mentioned that the new version of the Article in the Regulation, compared to the Convention, was drafted in order to simplify the interpretation after criticism of it being too complicated and difficult to comprehend and interpret.

\textbf{4.4.1 Swedish comments on the ECJ case law}

Many of the cases presented in this thesis have been commented on by Professor Michael Bogdan in the Swedish legal journal \textit{Svensk Juristtidning} and some of the cases have been commented on by Professor Michael Hellner in the Karnov Law Commentary. I will present their comments below.

The first case commented on is the \textit{Falco} case. Bogdan emphasizes that the ECJ has stated that the interpretation of Article 5(1)(b) should always be autonomous with the objectives of the Regulation and that one should not take into account any considerations regarding national conceptualization.\textsuperscript{49} This has been pointed out to be a reoccurring statement of the ECJ also in other judgments regarding Article 5(1)(b). Hellner points out that the \textit{Falco} case shows that the concept “provision of services” is not given as wide a meaning as in Article 57

\begin{flushright}
\textsuperscript{47} Prop. 2001/02:146, pp. 33-34. \\
\textsuperscript{48} Prop. 2001/02:146, pp. 35-36. \\
\textsuperscript{49} M. Bogdan (2011), p. 899. 
\end{flushright}
TFEU since it excludes license agreements being considered a contract regarding the provision of services.\textsuperscript{50}

Bogdan also commented on the Rehder case stating that even though the ECJ judgment is limited to transport conducted by a single air traffic carrier, the case may still have some significance in cases where the passenger has entered into contract with someone else than the actual air traffic carrier.\textsuperscript{51} This might be an especially important observation since nowadays so many bookings of air travel takes place through a travel agency or a website which provides booking service.

According to Hellner after the ruling Car Trim, one should avoid looking at any national provisions. This means that some of the case law presented by the ECJ regarding Article 5(1) of the Brussels Convention is now superfluous when it comes to interpreting the Regulation.\textsuperscript{52}

Regarding Car Trim, Bogdan states in his commentary of the ECJ case law that he found it interesting that the ECJ looked for guidance in other international instruments such as CISG when identifying the obligation in question. He states that this way of reaching a conclusion by the ECJ may impact the interpretation of other instruments in private international law. He also commented on the fact that the ECJ in the Car Trim case looked at the place of destination as the place of performance. That means that Article 5(1)(b) does not only include the actual place of delivery but also the intended place of delivery. This, according to Bogdan, could be problematic in cases when the business transaction includes transport of the goods and where the seller according to applicable law has performed his obligations and has no further responsibility for damages to the goods or late delivery of the goods when it has been handed over to an independent transporter. If for instance the actual delivery then fails, how does one, without turning to dispositive rules of any legal system, deal with cases where the parties have not decided on where the actual transfer of goods should have taken place, where the buyer would have acquired physical control of the goods and the place of performance should have been? In these cases one might still have to look at dispositive rules of any national legal order.\textsuperscript{53} This even though the ECJ in earlier judgments consistently states that one should not look into national provisions.

\textsuperscript{50} See M. Hellner, Council Regulation 44/2001, commentary note 28, (26 september 2012), Karnov Online.
\textsuperscript{52} See M. Hellner, Council Regulation 44/2001, commentary note 26, (26 september 2012), Karnov Online.
\textsuperscript{53} M. Bogdan (2011), pp. 901-902.
Bogdan goes on by saying that some guidance in how to deal with such aforementioned cases was given in the *Wood Floor* case, which dealt with mainly the same issue of connection. In *Wood Floor* the place of performance should in cases where one cannot find a place of performance from the provisions of the contract, be the place where most of the business have taken place, and if this cannot be determined, then the place where the provider of services is domiciled. According to Bogdan the reason that the parties have not determined a place of performance in the contract might be due to them relying on dispositive provisions of the, for them, known applicable law. He finds it peculiar that the place of performance when applying Article 5(1)(b) is dependent on the method determined by the parties. He says that it might be a possibility that in cases of the sale of goods perhaps the domicile of the seller or the buyer might be considered as the place of performance where there is no guidance found in the provisions of the contract or in any already performed delivery. He finds it interesting that the ECJ does not mention the possibility of making each court competent to try the case in cases of multiple possible places of performance of equal importance.  

### 4.4.2 Has Article 5(1)(b) of the Brussels I Regulation meant an improvement?

Article 5(1)(b) of the Brussels Convention was often criticized for being difficult to interpret and too complicated, so the aim of the legislator was for Article 5(1)(b) of the Brussels I Regulation to be easier to apply as well as interpret.  

When determining jurisdiction based on the Brussels Convention’s Article 5(1) the obligation in question had to be determined before one could proceed to determine the place of performance. This obligation in question became the basis of the claim. This lead to some problems as regards fulfilling the objective of proximity, since the obligation classified as the basis of the claim was not always characteristic for the contract. In Swedish legal literature Leffler points out some issues that arose with this method. Besides the objective of proximity not being met by applying Article 5(1) of the Convention, there was also then considered acceptable that the jurisdiction could be split up between different courts. Due to the fact that different national courts often interpreted the Article in different ways there was no predictability in where one might be sued.

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The change in the wording with Article 5(1)(b) in the Regulation has meant an improvement since it is no longer necessary to identify the obligation in question. It is already defined as the place of delivery or the place where the services where or should have been provided. The only issue as regard the obligation in question, which was not resolved with the Regulation, is in cases where the contract covers both sale of goods and provision of services. Leffler suggests that in these cases one should look at which obligation is the main one and base jurisdiction on that obligation\(^{56}\). This seems reasonable in relation to how the ECJ has dealt with determining the place of performance in cases of several such places by deciding that the main place of performance should be used to determine jurisdiction. All in all, the change has meant a great improvement and the problems when determining the obligation in question, such as the dividing of jurisdiction and the lack of predictability, has disappeared. Article 5(1)(b) of the Regulation is as a result less complicated to apply than its predecessor in the Convention.

When applying Article 5(1) of the Convention the Tessili-procedure was used to determine the place of performance\(^{57}\) and the main issue with this procedure is its connection to national law. That procedure is very complicated and, altogether, the Tessili-procedure presents problems through the lack of simplicity and predictability, due to its connection to national law. The fact that if the first court does not find itself competent to try the case, the next court has to re-do the whole procedure is also a downside with the Article in the Convention.\(^{58}\)

In Article 5(1)(b) of the Regulation there is no connection to national law and an autonomous definition of place of performance has been adopted. This does seem like a major improvement. Leffler, however, claims that the actual changes have not meant more than a minor improvement from the former wording of Article 5(1)(b). If a place of performance can be found in the provisions of the contract this determines the court with jurisdiction according to Article 5(1)(b) of both the Regulation and Article 5(1) of the Convention. The autonomous definition of the place of performance in the Regulation, claims Leffler, is so apparent that it does not mean an actual improvement itself since this way of determining place of performance would be used in accustomed legal interpretation of contracts.

\(^{56}\) H. Leffler (2002), pp. 817-819.

\(^{57}\) See section 2.1.1.

He also claims that if a place of performance cannot be implied from the provisions of the contract then Article 5(1)(b) of the Regulation should not be applicable, but instead Article 5(1)(a) of the Regulation which does not differ from Article 5(1) of the Convention. Leffler says that the reformation of the Article removed the first step of the Zelger/Tessili-procedure but left part two, where there is no agreement on the place of performance between the parties, untouched. Leffler claims that it was part two of the Zelger/Tessili-procedure which needed reformation and suggests that if the legislator would have chosen to add the words “[… according to the contract or otherwise […]” an autonomous definition of place of performance would have been achieved, a definition which would be of importance when the place of performance had not been determined by the parties of the contract.  

Leffler states in his journal article written in 2002 that the reformation of Article 5(1)(b) mostly dealt with the difficulties of determining the obligation in question, which in many cases should not be so difficult to determine since Article 5(1)(b) only is applicable regarding contracts of the sale of goods or the provision of services. Leffler claims that it would have been better if more complex types of contracts had been regulated in the new version of Article 5(1)(b) or cases where the place of performance is not that obvious. 

Worth to mention here is that the ECJ has since this journal article was written settled several cases with complex contracts and uncertain places of performance, which has in some ways settled the difficulties. One might add, though, that Leffler does have a point, since if this had been better regulated fewer cases would have been referred to the ECJ in the first place.

4.5 Can we expect a new version of Article 5(1)(b) in the near future?

The Heidelberg Report (the Report) was published in September 2007, evaluating the Brussels I Regulation. In the Report the authors found that the new wording of Article 5(1)(b), compared to the previous wording of Article 5(1) in the Convention, had meant a significant improvement in answering the questions of determining obligations and creating a forum closer to the parties of the dispute. Some unclarities were still found according to the Report. The Article was still considered to be quite complex and the authors of the Report

59 Freely translated from "[…] enligt kontraktet eller i övrigt[...]" by the author of this thesis.
especially emphasized the problem with carriage of goods where there is no legal consistency in when the good is supposed to be considered to be delivered.  

The Heidelberg Report came to the conclusion, regarding the sale of goods under the first indent of Article 5(1)(b), that the balancing of procedural and judicial interests of the parties presented in the Article deserves further testing and that any change in the Article would be premature. Regarding the second indent of Article 5(1)(b), i.e. the provision of services, the Report found that although there had been issues in determining the place of performance in cases where there had been several places where the services were provided the case law presented by the ECJ was satisfactory in determining how to deal with such situations.  

The Report reached the conclusion that the present wording of Article 5(1)(b) of the Regulation had not been sufficiently tested and that before any change in the Article would be at hand the Article must be used and tried and before that any suggestions in alteration of it would be premature.  

5. Concluding remarks

In this thesis a number of preliminary rulings by the ECJ on Article 5(1)(b) of the Brussels I Regulation have been presented covering most areas of the Article. In my opinion, through these preliminary rulings, most of the more complex expressions of Article 5(1)(b) have been cleared up and there is now a consistent ECJ case law for national courts to rely on when determining jurisdiction under the Article.  

This body of case law regarding Article 5(1)(b) of the Regulation can be expected to be useful for national courts in the interpretation of the Regulation. The presented case law gives at hand also that one can still use many of the interpretation methods that were applicable for the Brussels Convention and Article 5(1) of the Convention. The two objectives mainly stressed by the ECJ as regards jurisdiction are proximity and predictability in order to create legal certainty for parties entering into cross-border contracts with each other. The wording of

Article 5(1)(b) of the Regulation is often seen in the light of the actual purpose of the Regulation, for instance in Color Drack.

The guidelines developed by the ECJ in interpreting the Convention also means that provisions can be interpreted in the light of other provisions of the same instrument. As regards the interpretation of the Regulation this position was confirmed in Electrosteel and in Rehder.

An aim behind the Brussels Convention was that it should be interpreted autonomously and without regard to national law. This is essential when interpreting Article 5(1)(b) of the Regulation since there is no allowance for references to national law. Not only does this mean that legal certainty is promoted, but it also makes it easier for national courts to determine where a case should be settled as it can look at other courts’ case law as well as the ECJ case law. This means a difference compared to the Convention since the defendant as well as the plaintiff have an increased predictability regarding where the case might be determined.

The change of Article 5(1)(b) of the Regulation, compared to the previous Article 5(1) in the Brussels Convention, was mainly motivated by the need to clarify the content of the place of performance, as a ground for jurisdiction. This being considerably improved through the ECJ case law there are still some questions left for the ECJ to answer. As pointed out in the Heidelberg Report, the Brussels I Regulation has not been in force for more than ten years and to alter the wording of Article 5(1)(b) would under the circumstances be premature. In any case the interpretation and application of Article 5(1)(b) should be given more time, not least by the ECJ, before any additional changes should be introduced, especially since there does not seem to be any uniform opinion on these alterations. So at the time being the national courts must rely on the case law presented by the ECJ when facing difficulties in interpreting Article 5(1)(b) of the Regulation.
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