Place of Performance-Jurisdiction and Plaintiff's Interests in Contempory Societies

Walter A. Stoffel*

Court practice under Article 5(1) of the Brussels/Lugano Convention is probably the most controversial part of the application of the uniform European system on jurisdiction and recognition of judgments. In this paper, I shall argue that the reason does not lie in any inherent defect of the jurisdiction based on the place of performance, but rather in an only partial realisation of the procedural fairness which Article 5(1) tried to achieve and which basically amounts to a plaintiff's jurisdiction in certain circumstances. The interpretation given by the ECJ is surely complicated, but its results often compensate the plaintiff for the disadvantages he or she faces under the defendant's jurisdiction of article 2. The new Article 5(1) of the Regulation 44/2001 is an improvement with respect to sales contracts, but not with respect to service contracts.

A. The Rule and Its Application

1. The Rule of Jurisdiction at the Place of Performance

The jurisdiction at the place of performance opens an access to courts in contractual matters at a different place than the place of residence or seat of the defendant *(defendant's jurisdiction)*. It counter-balances the defendant's jurisdiction without introducing a forum which is based on the residence or seat of the plaintiff *(plaintiff's jurisdiction)*. Together with the other special jurisdictions of Article 5, the place of performance allows to take into account, in a contractual relationship,

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* Professor of Private International Law and Law of Corporations, Faculty of Law, University of Fribourg (Switzerland), Member and Vice-President of the Council of the Swiss Institute of Comparative Law, Lausanne; Former Scientific Director of the International Association of Legal Science (I.A.L.S.). e-mail <walter.stoffel@unifr.ch>.
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particular circumstances which create a link of sufficient strength with a place other than the residence of the defendant.[1]

The scheme of special jurisdictions was, and remains, the way through which a number of legal systems *cut back* some of the *advantages* the defendant may enjoy under the defendant's residence principle, and yet avoid the drawbacks of an exorbitant jurisdiction. It was well established in Germany in the fifties, and its introduction into Article 5 constituted one of the major term contributions of this country to the Bruxelles Convention.[2] The place of performance jurisdiction fits well into the scheme. It is based upon an objective connecting factor and does not look upon the party, but upon a genuine link between the contract and a given place.

The place of performance jurisdiction under Article 5(1) is surely important, although it is far from covering *all* contractual disputes. It applies only in cases where the parties have not chosen other jurisdictions or which are not governed by protective jurisdictions on other grounds. Both voluntary exclusions and protective jurisdictions are numerous. They include:

- the jurisdictions based on prorogation (Art. 17) and acceptance (Art. 18);
- contractual disputes submitted to arbitration (Art. 1(2)(4));
- the jurisdictions in the field of consumer contracts (Art. 13–15) and in matters relating to insurance (Art. 7–12a);
- the jurisdiction for contracts over tenancy of immovable property (Art. 16(1)).

These exclusions cover a *large* number of disputes. Only a relatively modest part of the possible contractual cases are finally left to be brought before court on the jurisdictional ground of the place of performance. As will be demonstrated, each of these remaining cases shows a similar pattern.

2. *The Application*

Over the years, the principle of the defendant's jurisdiction has gained a *quasi-constitutional value* in the system of the Brussels Convention.[3] All special

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[1] *See* generally: H. Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano: compétence internationale, reconnaissance et exécution des jugements en Europe*, 2nd ed., Paris 1996; J. Kropholler, *Europäisches Zivilprozessrecht: Kommentar zum EuGVÜ und Lugano-Übereinkommen*, 6th ed., Heidelberg 1998; H. Schack, *Internationales Zivilverfahrensrecht: ein Studienbuch*, 2nd ed., Munich 1996; P.F. Schlosser, *EuGVÜ: Europäisches Gerichtsstands- und Vollstreckungsübereinkommen mit Luganer Übereinkommen und den Haager Übereinkommen über Zustellung und Beweisaufnahme*, Munich 1996; G. Walter, *Internationales Zivilprozessrecht der Schweiz: ein Lehrbuch*, 2nd ed., Bern 1998; P. Kaye, *Law of the European judgments convention*, Little London, Chichester 1999.

[2] R. Geimer, 'The Brussels Convention – Successful Model and Old-timer' in (2002) 4 (1) *Eur J L Ref* at pp. 19–35., the title in German was: Das Brüsseller Übereinkommen – Esfolgsmodell und oldtimer augleich. L.W. Valloni, *Der Gerichtsstand des Erfüllungsortes nach Lugano- und Brüsseler-Übereinkommen*, Zurich 1998.

[3] Cf. especially case C-26/91, *Handte v. Traitements Mécano-chimiques des Surfaces*, [17.6.1992] 1992 ECR I-3967.

jurisdictions are derogations from it, and necessarily limit the application of the principle. They are seen by the Court as infringements on the defendant's jurisdiction and must therefore be construed narrowly. This is why a case-law of extraordinary complexity grew out of the simple phrase of Article 5(1) which states:

> 'A person domiciled in a Member State may, in another Member State, be sued (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question [...]'

The phrase is a compromise and an attempt at creating a (partial) equilibrium between the plaintiff's and the defendant's jurisdictions. The compromise is based on proximity and forseeability: proximity, because the courts of the place of performance are close to the evidence and therefore in a strong position to decide the case; forseeability, because the parties should know where they must perform their obligations; indeed, the contract may even govern the issue. The notion must be understood in an objective and autonomous ("procedural") sense, which does not differ according to the law applicable to the contract. In this way, the place of performance jurisdiction can achieve the 'equilibrium of jurisdictions' ('Zuständigkeitsgleichgewicht') sought to counterbalance the pure principle of a defendant's jurisdiction.[4]

The practice did not quite live up to these expectations. The Court chose an interpretation of Article 5(1) which complicated both issues. The parties cannot always easily *forsee* the place of performance, especially if the obligation is to pay money, because this place depends on the substantive law applied to the contract, which in turn depends on the conflict rule in force at the place of the court seized (which may not be the one which ultimately has jurisdiction). The *proximity* is not guaranteed either since the Court strictly limited the jurisdiction to the obligation in dispute and refused to subordinate money claims to the main obligation of the contract.

Are these complications worth the advantages of a jurisdiction based on the place of performance? Or do they simply hide the fact that the place of performance is a useful connecting factor only in cases where this place is at the *domicile of the plaintiff*? In fact, all cases on Article 5(1) decided by the European Court of Justice concerned suits brought before the courts of the domicile of the plaintiff.

- The first case, *Industrie Tessili Como v. Dunlop AG*, decided by the European Court of Justice (ECJ) was typical for all cases that followed. Dunlop AG, Hanau (Germany), bought goods from an Italian manufacturer, Industrie Tessili Como, Como (Italy). Considering that the goods were defective,

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[4] H. Schack, *Der Erfüllungsort im deutschen, ausländischen und internationalen Privat- und Zivilverfahrensrecht*, Frankfurt 1985, p. 136–150, p. 239–245: 'Der Erfüllungsort soll unter Wahrung des Zuständigkeitsgleichgewichts jedem Vetragspartner einen möglichst einheitlichen, vorhersehbaren und leicht feststellbaren besonderen Gerichtsstand eröffnen.' (nr. 344 p. 239).

Dunlop brought an action in its local court in Hanau against Tessili. The ECJ held the place of performance must be determined in accordance with the law which governs the obligations in question according to the rules of conflict of laws of the court before which the matter is brought.[5]

- In the second case, *A. de Bloos, Sprl, v. Société en commandite par actions Bouyer*, decided on the same day, the question was whether or not the Belgian courts had jurisdiction to hear a case brought before them by A. de Bloos, Sprl, Leuze (Belgium), against Bouyer, Tomblaine (France), on the basis of an alleged breach of a distributorship contract. The ECJ held that an action for damages or for dissolution of the contract is still one which arises under a contract and under the (non-) performance of certain obligations.[6]
- In *Siegfried Zelger v. Sebastiano Salinitri*, Siegfried Zelger, Munich, sued in Munich against Sebastiano Salinitri, Mascali (Italy) on the basis of an oral agreement that the payments should be made in Munich. The ECJ held that a specification of the place of performance made validly according to the national law applicable to the case constitutes the connecting factor for jurisdiction under Article 5(1), irrespective of the formal conditions forseen under Article 17 for a prorogation.[7]
- The same ruling was made by the Court in *Effer Spa v. Hans-Joachim Kanter (Kanter)*. In this case, the court held that the jurisdiction of the place of performance can be invoked even when the existence of the contract on which the claim is based is in dispute between the parties. The facts were that Hans-Joachim Kanter, a patent agent practicing in Darmstadt (Germany), brought action in Germany against *Effer Spa*, Bologna (Italy), on the basis of a contract which he claimed had been concluded for Effer by Hykra, the German distributor of cranes manufactured by Effer.[8]
- In the case *Hassan Shevanai v. Klaus Kreischer* the question to decide was whether the action for the payment of the fees of an architect for plans for a house were to be commenced at the place where the money payment had to be made or at the place where the houses had to be built. Shevenai, architect in Rockenhausen (Germany), was commissioned to draw up the plans by Kreischer, a resident at Geleen (Netherlands). He brought the action before the court in Rockenhausen, but the ECJ upheld the interpretation according to which the payment of the money claim was the relevant performance that determined the place of performance in accordance with the Convention.[9]

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[5] Case 12/76 *Industrie Tessili Como v. Dunlop AG* [6.10.1976] 1976 ECR 1473.

[6] Case 14/76 *A. de Bloos, Sprl, v. Société en commandite par actions Bouyer* [6.10.1976] 1976 ECR 1497.

[7] Case 56/79 *Siegfried Zelger v. Sebastiano Salinitri* [17.1.1980] 1980 ECR 89.

[8] Case 38/81 *Effer Spa v. Hans-Joachim Kantner* [4.3.1982] 1982 ECR 825.

[9] Case 266/85 *Hassan Shevanai v. Klaus Kreischer* [15.1.1987] 1987 ECR 239.

- In *Custom Made Commercial Ltd. v. Stawa Metallbau GmbH (Custom Made v. Stawa)*, the Court had to consider a allegedly defective execution of a contract involving the supply of windows and doors by Stawa and for which Custom Made refused to pay the whole price. Stawa, Bielefeld (Germany), brought action for payment of the price against Custom Made, London, before the Courts in Bielefeld. The Court held that the place of performance for the money claim at the domicile of the seller forms the ground for jurisdiction under Article 5(1), even if the London-based buyer retained the money for alleged defects of the windows and doors delivered to it in London.[10]
- The case *Mainschifffahrts-Genossenschaft eG (MSG) v. Gravières Rhénanes Sàrl* involved an agreement on an artificial place of performance. Gravières Rhénanes Sàrl, France, chartered a vessel from MSG Mainschifffahrts-Genossenschaft, Würzburg (Germany), for use on the Rhine for transports between locations in France. The ship was damaged, and MSG sued in Würzburg for compensation, on the basis of a clause, concluded orally and confirmed in writing by MSG, which forsaw Würzburg as the place of performance. The Court held that a clause not designed to determine the place where the party actually has to perform its obligations (as it was in Zelger/ Salinitri), but solely to establish a jurisdiction, must satisfy the form requirements for a prorogation under article 17. If it does not, it consitutes an abstract place of performance, not governed by Article 5(1).[11]
- The case *GIE Groupe Concorde and Others v. The Master of the vessel Suhadiwarno Panjan and Others (GIE Groupe Concorde)* arose from a contract under which *Pro Line Ltd.*, Hamburg, transported vine on the vessel *Suhadiwarno Panjan* from Le Havre to Santos, Brazil, where the goods arrived only in part and damaged. The insurance company *GIE Groupe Concorde*, Paris, paid compensation to the buyer and sued *Pro Line* and the Master of the vessel before the courts of Le Havre. This was not the domicile of the plaintiff, but it was still a French court close to the insurer. The French courts declined jurisdiction on the ground that Le Havre was not the place where the contract of carriage was to be performed, but without first investigating which law governed the contract. The Cour de cassation asked the ECJ if it should be obliged to make such investigations first rather than determining the place of performance in autonomously. The ECJ refused again to follow this path.[12]
- In *Leathertex Divisione Sintici SpA (Leathertex) v. Bodetex BVBA*, the ECJ had to intervene in a dispute between Bodetex BVBA, Rekkem-Menen

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[10] Case C-288/92 *Custom Made Commercial Ltd. v. Stawa Metallbau GmbH* [29.6.1994] 1994 ECR I–2913.

[11] Case C-106/95, *Mainschifffahrts-Genossenschaft eG (MSG) v. Gravières Rhénanes Sàrl*, [20.2.1997] 1997 ECR I–911.

[12] Case C-440/97 *GIE Groupe Concorde and Others v. The Master of the vessel Suhadiwarno Panjan and Others* [28.9.1999] 1999 ECR I–6307.

(Belgium) and Leathertex Divisione Sintici SpA, Montemurlo (Italy). *Bodetex* was the sole representative of *Leathertex* for the Netherlands and Belgium. Bodetex sued against Leathertex in Belgium for unpaid royalties and for a penalty due according to Belgian law for breach of contract. The place of performance for the royalties was in Italy, but for the penalty it was in Belgium. The ECJ refused to accept a uniform place of performance jurisdiction even in a circumstance in which both claims were of the same importance and none of them accessory to the other.[13]

3. Result

This overview reveals two things:

- Each case was based on a situation in which the place of performance jurisdiction allowed the plaintiff to bring the action before the courts of his or her *own domicile*. The ground for jurisdiction of Article 5(1) seems therefore to be useful only where it coincides with a plaintiff's jurisdiction, but not for the purpose of proximity of evidence.
- It is often invoked by the party which was probably the weaker one: the agent, the distributor, the buyer of defective goods and so on. The facts were not always sufficient to assert that this party was indeed always the weaker one, but the cases involved were typically situations in which this was is usually true.

This suggests that the place of performance jurisdiction is more a device which *limits* possible plaintiff's jurisdictions rather than a means for opening a additional forum in cases where this seems appropriate for reasons of proximity or forseeability.

B. Trends

1. Harsh Criticisms

The majority of the legal writers do not favour the interpretation given by the Court to Article 5(1),[14] even if some of them think that the complications are unavoidable.[15] Most writers feel that the application given by the ECJ is too complicated and too cumbersome. They favour a smoother and easier reading of the

[13] Case C-420/97, *Leathertex Divisione Sintici SpA v. Bodetex BVBA* [5.10.1999] 1999 ECR I-6747.

[14] Gaudemet-Tallon (cf. *supra* note 1), nr. 164–166 p. 117–122 and nr. 172–173 p. 129; Kropholler (cf. *supra* note 1), Art. 5 nr. 2 p. 94; Schack, (cf. *supra* note 1) nr. 51 p. 18, nr. 92 p. 37, nr. 267 p. 105, nr. 271 p. 107–108 and nr. 286 p. 112–113; Schlosser (cf. *supra* note 1), nr. 3 p. 45–46 and nr. 8 p. 48; Walter (cf. *supra* note 1), p. 145 and p. 178–179.

[15] Bischoff, in 2000 Clunet 547 ff., with respect to *GIE Groupe Concorde*.

provision, mainly by applying an autonomous concept of the notion of the place of performance, rather than an interpretation according to the national law applicable on the basis of the rules of conflict of laws.[16] The most vocal critics propose that the *forum contractus* be abandoned altogether.[17]

The critical attitude bagan to find a powerful expression in the *Advocates General.* In the cases decided in the nineties, the Advocates General regularly suggested a development of the law which would eventually end up in a modification of the practice in which the Court seemed to have locked itself up. Gaudemet-Tallon speaks of a 'conspiracy' of the Advocates General (*'fronde des avocats généraux'*).[18] Indeed, the criticism has been quite outspoken:

- Advocate General Lenz proposed in *Custom Made* (1994) to modify the practice whenever the traditional interpretation leads to the jurisdiction of a court which is obviously far away from the dispute, as it was the case for the allegedly defective window frames in London over which the German courts had to decide. He suggested to go in such cases for an interpretation which favors the court of proximity.[19]
- Advocate General Ruiz-Jarabo Colomer took a similiar position in *GIE Groupe Concorde.* The place of performance must follow from the circumstances of each individual case and from the nature of claim. But it should be presumed, he suggested, that this place is the place where performance which is characteristic of the whole contract has to be made.[20]
- Finally, Advocate General Léger in *Leathertex* (1999), proposed to favour the effective place of performance in contracts on distributionship. Claims for the payment of sums of money should be considered to have to be performed where the obligations in kind must be delivered, upon which the money claims are based. This should be so particularly for claims which form a unity. Thus, the claim for indemnity for breach of contract as well as for unpaid commissions are closely connected with the place where the distribution contract would have to be fulfilled.[21]

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[16] In particular after *Leathertex:* H. Gaudemet-Tallon in 2000 Rev. crit. 84: 'Tessili poussé jusqu'à l'absurde'; F. Leclerc, in 2000 Clunet 540–547; K. Otte, ZZPint 2000 272–279; Advocate General Léger, 1999 ECR I-6749–6778 (cf. *infra* note 21).

[17] G.A. Droz, 'Delendum est forum contractus?' Receuil Dalloz 1997 351; V. Heuzé, 'De quelques infirmités congénitales du droit uniforme: l'exemple de l'article 5.1 de la Convention de Bruxelles du 27 septembre 1968', Rev. crit. 2000 595.

[18] Gaudemet-Tallon, Rev. crit. 2000 86 f.

[19] Advocate General Lenz in case C-228/92, *Custom Made Commercial Ltd. v. Stawa Metallbau GmbH Commercial Ltd. v. Stawa Metallbau GmbH* [29.6.1994] ECR 1994 I 2913, p. 2915–2948.

[20] Advocate General Ruiz-Jarabo Colomer in case C-440/97, *GIE Groupe Concorde and Others v. The Master of the vessel Suhadiwarno Panjan and Others* [28.9.1999] 1999 ECR I-6307, p. 6309–6341.

[21] Advocate General Léger in case C-420/97, *Leathertex Divisione Sintici SpA v. Bodetex BVBA* [5.10.1999] 1999 ECR I-6747, p. 6749–6778.

2. *The Response to the Criticisms*

The ECJ has not yielded to these repeated criticisms. Two main arguments seem to have been decisive in its judgments:

- The *infringement* argument. Article 5 is an exception to the general principle of the defendant's jurisdiction. The plaintiff does not have to make any compromises if he or she brings a suit at the domicile of the defendant. Dividing a case into its different claims is therefore not a disadvantage, quite to the contrary. The Conventions favours the defendant's jurisdiction, and this is one means to that end.[22]
- The argument of *forseeability* and *security*. The determination of the substantive law according to the rules of conflicts of laws may be complicated, but it leads to forseeable results. This is particularly true since the Rome Convention on the law applicable on contractual obligations from 1980 has gained a more widespread acceptance. The ECJ favours forseeability over technical difficulties as long as the difficulties are surmountable. A 'reasonably informed defendant' can know before which courts she or he may be sued, contrary to what would be the case under an autonomous interpretation where the result would be quite unpredictable.[23]

The lines of case-law are clearly drawn. The practice of the Court is settled. The *Tessili*-standard is *bound to stay.*

3. *The Revised Text of Art. 5(1) in the Regulation 44/2001*

The principle of Article 5(1) has not been changed by Regulation 44/2001. But the place of performance is now defined for two groups of contracts in two additional paragraphs which are added to the principle. The new text reads as follows:

> '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,*
> *– [...]'*

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[22] *Handte* (cf. *supra* note 3), nr. 18, 1994 ECR I-2956; *GIE Groupe Concorde* (cf. *supra* note 12), nr. 24, ECR 1999 I 6350.

[23] *Kantner* (cf. *supra* note 8), nr. 6, 1982 ECR 834; *Shenavaï* (cf. *supra* note 9), nr. 17, 1987 ECR 256; *Custom Made* (cf. *supra* note 10), nr. 15 and 18, 1992 ECR I-3995; cf. also: *Handte* (cf. *supra* note 3), nr. 18, 1994 ECR I-2956; *GIE Groupe Concorde* (cf. *supra* note 12), nr. 24, 1999 ECR I-6350.

Does this formulation *change the picture*? It does indeed, but it does so by drawing a distinction which puts into question many of the advantages of the place of performance jurisdiction for service contracts, while enhancing the very same advantages for sales contracts.

- First, and *generally*, the standard definition of the new Article 5(1)(b) *facilitates* the application of the clause because its meaning was made immediately clear in many cases. It also helps the application of the substantive law, because it avoids dividing the case into its different claims.
- Secondly, and more *importantly*, the new formulation will often create a genuine plaintiff's jurisdiction for *sales contracts*. The place where the goods are to be delivered is often the domicile of the buyer, who will then be able to bring action before his or her home courts, even for the money claims for damages or restitution of the price already paid.
- Thirdly and contrary to what is true for sales contracts, the new formulation makes the place of performance jurisdiction inoperative for most *service contracts*, because the place where the services are to be provided is generally the same as the domicile of service provider. This makes the particular ground for jurisdiction less attractive for service contracts in general.

In sum, the place of performance jurisdiction will become more attractive in sales contracts, but generally meaningless in service contracts, whereas the situation remains unchanged for all other contractual relationships, amongst them distribution contracts. Where applicable, the new formulation is simpler and leads to improved forseeability, but the new distinctions will also bring up new difficulties, mainly the ones related to the qualification of the contracts: it will matter what kind of contract a party is engaged in!

C. Evaluation

The Law of international civil procedure is the area of the law which takes into account the particularities of international relationships. As such, it essentially serves the same *purposes* as civil procedure in general; namely, it allows private parties to enforce their rights against other private parties who do not recognize or do not execute their obligations. The 'rights' themselves are based on substantive law. This is why we generally agree that civil procedure serves substantive law.

The general criteria of a well-functioning procedural system should therefore be used if the performance of international civil procedure is to be determined. Three values are particularly useful in this respect: *accuracy*, *fairness*, and *efficiency*.[24] The

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[24] See, from a comparative point of view, G.A. Bermann, 'Trends and Recent Developments in Civil Procedure', in Int'l Ass'n of Legal Sci (ed.), *Report of the 1995 Colloquium (Buenos*

following is an attempt to measure the results described above according to these apects.

1. Accuracy

Accuracy contains an element of forseeability and security on the one hand, and of proximity of the court to the case on the other.

a) Forseeability and Security

Forseeability and security are surely important values in law and procedure. But they are important mainly with respect to the security and stability of decisions once these decisions are taken. It is less certain that security is of the same importance when it comes to the forseeability of the court which will probably decide a possible contractual conflict. The question is, in other words, whether forseeability is to the advantage of the plaintiff or of the defendant, and – if it favours one rather than the other – whether it favours the one who deserves it the most.

Forseeability is generally considered to be to the advantage of the plaintiff, because he or she can plan his or her process. A closer look suggests, however, that it is often the *lack* of forseeability which is to the advantage of the *plaintiff*:[25]

- Uncertainty traditionally creates tactical advantages for the plaintiff: He or she decides where and when to open judicial proceedings. This is still the case, although the advantages have been reduced by the ECJ's admission that an action for declaratory judgment bars a later-introduced action for enforcement.[26]
- Uncertainty disadvantages those who have to consider future developments when determining their course of action. This is the case for 'repeat players'. Defendants are more often repeat players than plaintiffs.
- Modern plaintiffs often use uncertainty as a 'weapon' in their proceedings. Mass claims are good examples of this use. Uncertainty is particularly capable of damaging the image of publicly-held corporations who feel the need to protect their reputation as 'corporate citizens'.

On the whole, it seems unclear which of the parties is really favoured by uncertainty, but it is more likely the plaintiff.

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Aires), 'Converging Trends in a Shrinking World', Buenos Aires 1999 (including contributions by A. Garay, K. Sono, E. O'Farrell, T. Weir, A. Kemelmajer de Carlucci, D. Goddard, D. Castro Viera, J. Ziegel, J. C. Rivera, G.A. Bermann, E. Hendler, G. Bossert, P.F. Silva-Ruiz, G. Garcia Cantero).

[25] F. Dasser, 'Der Kampf ums Gericht', in 2000/U9 *ZSR/RDS* I-253–272.

[26] Art. 21 of the Convention: case 144/86, *Gubisch Maschinenfabrik KG v. Giulo Palumbo*, [8.12.1987] 1987 ECR 4861.

b) Proximity of the Court

The place of performance often facilitates taking evidence. Witnesses are more readily available and inspections more easily undertaken. Better access to proofs is obviously favorable to the accuracy of the decision.

Yet, this advantage has *lost some of its bearing*. Witnesses and inspections are often less important than expert opinions. Opinions do not depend in the same way on the proximity to the proofs than other means of evidence. In addition, modern communication means further diminish the importance of proximity.

The proximity argument has therefore lost much of its importance. The parties generally choose the forum on the ground of its proximity to the *party* rather than to the *proofs*. In fact, the argument was raised quite strongly by the Advocates General, but it did not play a major role in the cases decided by ECJ.

The proximity to the party brings the discussion to the aspect of procedural fairness.

2. Procedural Fairness

Procedural fairness can be analysed within the context of the intrinsic justification of the defendant's and the plaintiff's jurisdictions as well as again within the context of security and forseeability.

a) Intrinsic Justification of Defendant's and Plaintiff's Jurisdictions

The Convention is based on the intrinsic worthiness of a jurisdiction at the domicile of the defendant.[27]

The intrinsic worthiness of the defendant's jurisdiction in contractual matters must find its justification in the *better performance* that it achieves with respect to the enforcement of the substantive law. It is questionable whether such an argument can be made today. The principled procedural privilege of the defendant's jurisdiction is only justified if it can be said that the defendants normally have the 'law' on their side. This may be true in the field of family law and in relationships between parents and child. But it is not true in contracts:

- The substantive law is *indifferent* towards the parties. Contracts are to be fulfilled basically through (simultaneous) giving and taking. The law provides rules of evidence, statutes of limitation and other time limits after execution of a contract,[28] but it does not consider that one of the parties is generally more in need of protection than the other – with the notable exceptions of consumer and worker contracts.
- The *position of the defendant* is therefore not the result of the substantive law,

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[27] Above p. 188.
[28] Cf. Advocate General Lenz in *Custom Made*, nr. 21 (cf. *supra* note 19).

> but of the *factual* position in which the contractual parties were at the time of the conclusion of the contract. The future plaintiff is the party which does not possess, as opposed to the party who 'possesses' and can wait. The '*beati possidentes*' in Roman law were not the rich, but the ones who did not have to sue. The non-possessing party is the party who had to perform first: the seller or service provider who delivers without being covered by pre-payment, guarantee, letter of credit or the like, the buyer who receives a product with a hidden defect, and so on. It is normally the party with the better bargaining position which can get the other to deliver first.

This means that the defendant is generally in a better *factual position* than the plaintiff. The defendant may often also be the economically stronger party. But it cannot be said that the substantive law position of the defendant is normally the better one. There is no reason to believe that the position of the defendant is worthier than that of the plaintiff. A generally favourable procedural position towards the defendant can therefore not be justified on this ground.

b) Security and Forseeability

Jurisdiction rules should be simple in order to avoid an additional conflict over the forum. The simpler the rule the better the forseeability. The dilemma lies in the fact that the simple rule is also the one which differentiates the least and which is therefore likely to disregard procedural fairness. A trade-off is unavoidable.

The plaintiff's jurisdiction is surely a simple rule, as is the defendant's jurisdiction principle. At the same time, both jurisdictional standards do not differentiate and may therefore disregard procedural fairness in some cases. *None of the standards* has an advantage over the other in this respect. A certain control in circumstances in which a plaintiff's jurisdiction in contractual matters may disregard procedural fairness, can be achieved easily by limiting it to the domicile of the plaintiff at the time of the conclusion of the contract. But over all, security and forseeability is served by both the plaintiff's and the defendant's jurisdictions alike.

3. Efficiency

Efficiency considerations bring us to the *costs* of judicial proceedings. Cost-related risks are amongst the most important impediments in the field of civil procedure. This is particularly true in Europe where the possibilities offered by class action devices and contingency fee schemes are not used.[29]

The *European context* quite clearly places plaintiffs at a disadvantage through the risk of having to bear not only their own costs, but also the costs of the other party if

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[29] W. Stoffel, 'L'image du plaideur : du demandeur individuel aux intérêts de groupe', in *L'image de l'homme en droit, Mélanges publiés par la Faculté de droit à l'occasion du Centenaire de l'Université de Fribourg*, Fribourg 1990, p. 497–516.

they lose before the court. The economic analysis of civil procedure demonstrated that plaintiffs must be roughly convinced twice as much of their prospects to win the process than defendants. The obligation to pay the cost of the winner doubles the risk to the plaintiff, but not for the defendant. This is so because the cost cuts much more into the possible gains for the plaintiff than it adds to the risk of losing for the defendant, except in the rare situation of a one hundred per cent expectation of winning.[30] Since higher costs increase the disadvantage, the European system makes the situation of the plaintiff more difficult than it would be without the no fault obligation to compensate the winner.

Jurisdiction clauses cannot change this situation, but moderately enlarged possibilities for *forum shopping* provided by plaintiff's jurisdictions constitutes an advantage to the plaintiff which may counter-balance the risk faced in some circumstances.[31]

4. Result

Over all, an openly declared plaintiff's jurisdiction in contractual matters would have no more disadvantages than the present situation, in which the defendant enjoys a largely unreflected privilege, limited only by the complicated counter-vailing effect of the place of performance jurisdiction. All things considered, it may even do better.

The *ECJ interpretation* of Article 5(1) appears therefore to be fairer and more accurate, albeit complicated, than the new formula of *Regulation 44/2001* for *service* contracts, which is clearer but does away with most of the advantages of a place of performance jurisdiction for the plaintiff. The new rule for *sales* contracts, by contrast, achieves a high score under all criteria, but it will create difficulties for qualification.

Conclusion: A Market-Oriented Interpretation as Guiding Principle

Stepping back after these considerations, it will be noted that the different grounds for jurisdiction in contractual matters can be said to resemble a kind of a 'market jurisdiction'. The place of performance jurisdiction together with the protective jurisdictions provides in many instances a forum at a place where the economic activities are carried out.

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30 Cf. already M. Adams, 'Eine wohlfahrtstheoretische Analyse des Zivilprozesses und der Rechtsschutzversicherungen' in 1983/102 *ZSR/RDS* I 186–207; W. Stoffel, 'Diskussionsvotum am Schweizerischen Juristentag 1988 zum Thema '*Probleme des Rechtsschutzes*' in 1988/107 *ZSR/RDS* II 358–362.

31 Dasser (cf. *supra* note 25).

But under the Brussels/Lugano Convention the place of performance jurisdiction often does so at the price of the *dividing the case* into its different claims. Under Regulation 44/2001, the result is fully achieved for sales contracts, not at all for service contracts, and at the same price of splitting for all other contracts. In neither situation is there an essentially desirable result at low cost. A straightforward plaintiff's jurisdiction would prove more constructive at lower cost.

There are therefore three questions remaining:

- Are the advantages of differentiation of Article 5(1) worth the frequency and complicated nature of litigations and the division of many cases under the Brussels/Lugano Convention?
- Are they worth the sacrifice of the service contracts and the continued division of all other contracts except the sales contracts under Regulation 44/2001?
- And finally, are they worth the ongoing transatlantic dispute over 'doing business' as a ground for jurisdiction, at least if limited to claims related to the business?[32]

It is doubtful that the answer is affirmative, and it can be argued that the system deserves *thorough questioning*.

Yet at present, the law is fixed under the Brussels/Lugano Convention and under Regulation 44/2001, despite the often unsatisfactory outcome. The forgoing considerations may mean, however, that the most appropriate interpretation of the texts is the one which *acknowledges* the *plaintiff-favoring potential* of the jurisdictional grounds of Article 5(1) and makes of this potential its *guiding principle* in the application process.

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[32] A.T. von Mehren, 'La rédaction d'une convention universellement acceptable sur la compétence judiciaire internationale et les effets des jugements étrangers: le projet de la Conférence de La Haye peut-il aboutir?' 2001 Rev. crit. 85.