

**Remarks on the autonomous interpretation of the Brussels Regulation,
in particular of the concept of „place of delivery“ under Art. 5(1)(b),
and the Vienna Sales Convention
(on the occasion of a recent Italian court decision)**

By:
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I. Introduction

It is common knowledge that the so-called „communitarization“¹ or „Europeanization“² of private international law and international civil procedure has led, among others³, to the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁴ (hereinafter: Brussels I Regulation), that has taken the place of the 1968 Brussels Convention⁵. The “communitarization of the Brussels

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¹ For the use of this expression, see BASEDOW, *The Communitarization of the Conflict of Laws under the Treaty of Amsterdam*, *Common Law Market Review*, 2000, p. 687 ff.; GEIMER, *Salut für die Verordnung (EG) Nr. 44/2001 (Brüssel I-VO). Einige Betrachtungen zur „Vergemeinschaftung“ des EuGVÜ*, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2002, p. 69 ff.; MOURRE, *Chronique de droit international privé appliqué aux affaires: la communautarisation de la coopération judiciaire en matière civile*, *Revue de droit des affaires internationales*, 2001, p. 770 ff.; NUYS, *La communautarisation de la convention de Bruxelles*, *Journal des tribunaux*, 2001, p. 913 ff.; POCAR, *La comunitarizzazione del diritto internazionale privato: una “European Conflict of Laws Revolution?”*, *Rivista di diritto internazionale privato e processuale*, 2000, p. 873 ff.; TAGARAS, *La révision et communautarisation de la Convention de Bruxelles par le règlement 44/2001*, *Cahiers de droit européen*, 2003, p. 399 ff.; *Vergemeinschaftung des europäischen Kollisionsrechts: Vorträge aus Anlaß des fünfzigjährigen Bestehens des Instituts für Internationales und Ausländisches Privatrecht der Universität zu Köln* (Mansel ed., Cologne/Berlin/Bonn/Munich, 2001); WEBER, *Die Vergemeinschaftung des internationalen Privatrechts* (Berlin, 2004).

² For this expression, see HEB, *Die Europäisierung des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag*, *Neue Juristische Wochenschrift*, 2000, p. 23 ff.; KREUZER, *Die Europäisierung des internationalen Privatrechts - Vorgaben des Gemeinschaftsrechts*, in *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (Müller-Graff ed., Baden-Baden, 2nd ed., 1999), p. 457 ff.; LEIBLE, *Die Europäisierung des internationalen Privat- und Prozessrechts: Kompetenzen, Stand der Rechtsvereinheitlichung und Perspektiven*, in *La cooperación judicial en materia civil y la unificación del derecho privado en Europa* (Sánchez Lorenzo/Moya Escudero ed., Madrid, 2003), p. 13 ff.; SCHNYDER, *Die Europäisierung des Internationalen Privat- und Zivilverfahrensrechts: Herausforderung auch für die Schweiz*, in *Festschrift für Erik Jayme* (Mansel ed., Munich, vol. 1, 2004), p. 823 ff.

³ See, among others, Council Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, *Official Journal* L 143, of 30 April 2004, p. 15 ff.; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation, *Official Journal* L 338, of 23 December 2003, p. 1 ff.; Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, *Official Journal* L 174, of 27 June 2001, p. 1 ff.; Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, *Official Journal* L 160, of 30 June 2000, p. 19 ff.; Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, *Official Journal* L 160, 30 June 2000, p. 1 ff.; Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, *Official Journal* L 160, of 30 June 2000, p. 37 ff.

⁴ See Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal* L 12, of 16 January 2001, p. 1 ff.; Commission Regulation (EC) No 1937/2004 of 9 November 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal* L 334, of 10 November 2004, p. 3 ff.; Commission Regulation (EC) No 2245/2004 of 27 December 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal* L 381, of 28 December 2004, p. 10 ff.

⁵ See Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *Official Journal*, 1978 L 304, p. 36 ff., as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, *Official Journal*, 1978 L 304, p. 1 ff., and (– amended version – 77 ff.), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, *Official Journal*, 1982 L 388, p. 1 ff., by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, *Official Journal*, 1989 L 285, 1 ff., and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, *Official Journal*, 1997 C 15, p. 1 ff.

Convention”⁶ is, however, only a partial one⁷, as can easily be derived from the Brussels I Regulation itself, namely from its Article 1(3)⁸ as well as from consideration n. 21⁹. Accordingly, as also pointed by the Tribunale di Padova in its decision of 10 January 2006¹⁰ to be commented on here, in Denmark the Brussels Convention will still be applicable¹¹, and this, at least partially, even after the coming into force of the Agreement between the European Community and Denmark¹² aimed at extending to Denmark the provisions of the Brussels I Regulation¹³.

The aforementioned decision is worth being commented on not as much, however, for its reference to the fact that the communitarization of the Brussels Convention is only a partial one, but rather for its exemplary interpretation of the Brussels I Regulation, in particular of the concept of “place of delivery” referred to in Article 5(1)(b) Brussels I Regulation.

The Tribunale di Padova had to decide whether it had jurisdiction over a dispute relating to a contract for the delivery of two merry-go-rounds concluded between a plaintiff with place of business in Italy, who sued for the purchase price, and a defendant with place of business in England, where the merry-go-rounds had been delivered and assembled. Since the defendant did not enter an appearance, the Italian court dealt *ex officio* with the issue of whether it had jurisdiction, as required by Article 26 Brussels I Regulation¹⁴. In doing so, sitting as a sole judge, Judge Alessandro Rizzieri, known to those focusing their research on the United Nations Convention on Contracts for the International Sale of Goods¹⁵ (hereinafter: CISG¹⁶) for having rendered some of the most famous decisions concerning this Convention¹⁷, one of which¹⁸ is considered to be “impressive” “an example of how the international character of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) can be achieved”¹⁹, grasped the occasion to extensively analyze and “autonomously” interpret some of the key concepts of the Brussels I Regulation. The most innovative parts of the decision are

⁶ BESSE, *Die Vergemeinschaftung des EuGVÜ*, Baden-Baden, 2001; MICKLITZ/ROTT, *Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001*, *Europäische Zeitschrift für Wirtschaftsrecht*, 2002, p. 15.

⁷ See CZERNICH/TIEFENTHALER, *Einleitung*, in *Kurzkommentar. Europäisches Gerichtsstand- und Vollstreckungsrecht* (Vienna, 2nd ed., 2003), p. 9.

⁸ See Article 1(3) Brussels I Regulation: “In this Regulation, the term “Member State” shall mean Member States with the exception of Denmark.”

⁹ See Consideration n. 21: “Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.”

¹⁰ See Tribunale di Padova, 10 January 2006, *Giurisprudenza italiana*, 2006, p. 1013 ff., also published on the internet at <<http://cisgw3.law.pace.edu/cases/060110i3.html>>.

¹¹ See DROZ/GAUDEMET-TALLON, *La transformation de la Convention de Bruxelles du 28 septembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, *Revue critique de droit international privé*, 2001, p. 614 f.

¹² See Proposal for a Council Decision concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and the recognitions and enforcement of judgments in civil and commercial matters, COM(2005)145 def., of 15 April 2005; Council Decision of 20 September 2005 on the signing, on behalf of the Community, of 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, *Official Journal* L 299, of 16 November 2005, p. 61 f.

¹³ V. JAYME/KOHLER, *Europäisches Kollisionsrecht 2005: Hegemonialgesten auf dem Weg zu einer Gesamtvereinheitlichung, Praxis des Internationalen Privat- und Verfahrensrechts*, 2005, p. 485 f.

¹⁴ It should be noted that the court did not expressly refer to Article 26 Brussels I Regulation; nevertheless, it is to be presumed that it is this provision which led the court to deal with the issue of jurisdiction.

¹⁵ For the text of the Convention, see *International Legal Materials*, 1980, p. 668 ff.

¹⁶ For a reference to the various abbreviations used for the United Nations Convention on Contracts for the International Sale of Goods, see FLESSNER/KADNER, *CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf*, *Zeitschrift für europäisches Privatrecht*, 1995, p. 347 ff.

¹⁷ See Tribunale di Padova, 11 January 2005, *Rivista di diritto internazionale privato e processuale*, 2005, p. 791 ff., also published on the internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText>>; Tribunale di Padova, 31 March 2004, *Giurisprudenza di merito*, 2004, p. 1065 ff., also published on the internet at <<http://www.cisg-online.ch/cisg/urteile/823.pdf>>; Tribunale di Padova, 25 febbraio 2004, *Giurisprudenza italiana*, 2004, p. 1403 ff., also published on the internet at <<http://www.cisg-online.ch/cisg/urteile/819.pdf>>.

¹⁸ See Tribunale di Vigevano, 12 July 2000, *Giurisprudenza italiana*, 2001, p. 280 ff., also published in English on the internet at <<http://www.cisg-online.ch/cisg/urteile/493.htm>>.

¹⁹ MAZZOTTA, *The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example*, *Pace International Law Review*, 2003, p. 438; see also FERRARI, *Problematiche tipiche della Convenzione di Vienna sui contratti di vendita internazionale di beni mobili risolte in una prospettiva uniforme*, *Giurisprudenza italiana*, 2004, p. 1407.

not those, however, in which the court interprets these concepts “autonomously”, since courts had already done so previously²⁰, but rather that in which Judge Rizzieri, in order to interpret the Brussels I Regulation in general and its concept of „place of deliver“ in particular, resorts to international substantive law instruments, namely the CISG, the *Unidroit Principles of International Commercial Contracts*²¹ as well as the *Principles of European Contract Law*²².

II. Temporal and substantive sphere of application of the Brussels I Regulation

It is common knowledge, and Judge Rizzieri has pointed this out, too, that the Brussels I Regulation’s temporal sphere of application is defined by Article 66 Brussels I Regulation²³. According to this provision, which is based on the principle of “non-retroactivity”²⁴, “this Regulation shall [generally] apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof”. Since the legal proceedings Judge Rizzieri had to deal with had been instituted on 9 August 2004, *i.e.* undoubtedly after the Regulation’s coming into force on 1st March 2002, it cannot surprise that Judge Rizzieri stated that “the Regulation’s temporal applicability requirements have certainly been met”²⁵. Consequently, Judge Rizzieri did not see it necessary to discuss which procedural law governs the issue of when proceedings can be considered as being instituted. In this author’s opinion, this issue is to be solved on the basis of the procedural law of the forum²⁶, not unlike under the Brussels Convention²⁷. One should not, as suggested by some commentators²⁸, resort to Article 30 Brussels I Regulation to solve the issue, as this would contrast with the wording of this provision²⁹, according to which it merely applies to provisions of Section 9 of the Brussels I Regulation, *i.e.* the provisions dealing with *lis pendens* and related actions³⁰.

While the Brussels I Regulation’s temporal sphere of application is defined by its Article 66, its substantive sphere of application is to be derived from Article 1; according to this provision, it applies, as also pointed out by Judge Rizzieri in his decision, “in civil and commercial matters whatever the

²⁰ See Tribunale di Rovereto, 28 August 2004, *International Lis*, 2005, p. 132, also published on the internet at <<http://www.cisg-online.ch/cisg/urteile/902.pdf>>.

²¹ See *Unidroit Principles of International Commercial Contracts*, published on the internet at <<http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>>.

²² See *Principles of European Contract Law*, published on the internet at <http://frontpage.cbs.dk/law/commission_on_european_contract_law/Skabelon/pecl_engelsk.htm>.

²³ See also THORN, *Gerichtsstand des Erfüllungsorts und intertemporales Zivilverfahrensrecht, Praxis des internationalen Privat- und Verfahrensrechts*, 2004, p. 354.

²⁴ See STAUDINGER, *Einleitung, in Europäisches Zivilprozessrecht. Kommentar* (Rauscher ed., Munich, 2004). p. 15; TIEFENTHALER, *Art. 66, in Kurzkomentar. Europäisches Gerichtsstand- und Vollstreckungsrecht, supra* note 7, p. 369.

²⁵ For case law that applied the Brussels Convention instead of the Brussels I Regulation due to the latter’s Article 66 requirements not being met, see BGH, 6 October 2005, *Internationales Handelsrecht*, 2005, p. 259 ff.; BGH, 28 September 2005, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 2005, p. 1593 f.; Cass. civ., 12 January 2005, *Giustizia civile Massimario*, 2005, p. 1; BGH, 7 December 2004, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 2005, p. 581 ff..

²⁶ For this opinion see also MAGNUS, *Das UN-Kaufrecht und die Erfüllungsortszuständigkeit in der neuen EuGVO, Internationales Handelsrecht*, 2002, p. 45 note 3; STAUDINGER, *Art. 66 Brüssel I-VO, in Europäisches Zivilprozessrecht. Kommentar, supra* note 24, p. 487; in case law see OLG Düsseldorf, 30 January 2004, *Internationales Handelsrecht*, 2004, p. 108 ff.

²⁷ See BGH, 28 February 1996, *Neue Juristische Wochenschrift*, 1996, p. 1411 ff.

²⁸ See SCHLOSSER, *EU-Zivilprozessrecht. Kommentar. EuGVVO, EuEheVO, EuBVO, EuZVO*, (2nd ed., Munich, 2003), p. 330; TIEFENTHALER, *Art. 66, in Kurzkomentar. Europäisches Gerichtsstand- und Vollstreckungsrecht, supra* note 7, p. 370.

²⁹ See Article 30 Brussels I Regulation: “For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.” (emphasis added by the author)

³⁰ For this conclusion, see also STAUDINGER, *Art. 66 Brüssel I-VO, in Europäisches Zivilprozessrecht. Kommentar, supra* note 24, p. 487.

nature of the court or tribunal.” “Thus, what is decisive is the qualification of the subject matter. The type of court seized, on the other hand, is completely irrelevant”³¹.

The Brussels I Regulation does not define the concept of „civil and commercial matters“³²; this, however, should not lead the interpreters to resort to domestic definitions, as also pointed out by Judge Rizzieri who, citing ECJ case law issued in application of the equivalent provision of the Brussels Convention³³ in order to ensure, where possible³⁴, “continuity between the Brussels Convention and [the Brussels I] Regulation”³⁵, stated, not unlike other Italian judges before him³⁶, that the concept of “civil and commercial matters” “should not be interpreted as a mere reference to the internal law of one or other of the States concerned. The concept referred to must therefore be regarded as an independent concept to be interpreted by reference, first, to the objectives and, secondly, to the general principles which stem from the national legal systems as a whole”³⁷.

Since in the case to be decided by the Tribunale di Padova the Italian party sued for payment of the purchase price, Judge Rizzieri correctly considered the matter a “civil and commercial” one, and, consequently, that the Brussels I Regulation’s substantive applicability requirements were met. And since the matter to be dealt with was obviously not one of those excluded from the Regulation’s substantive sphere of application by virtue of Article its 1(2)³⁸, Judge Rizzieri correctly decided to apply the Brussels I Regulation.

III. The general head of jurisdiction (Article 2(1) Brussels I Regulation)

³¹ MANKOWSKI, *Art. 1 Brüssel I-VO, Europäisches Zivilprozessrecht. Kommentar*, supra note 24, p. 47; in case law, see ECJ, 14 October 1976, case 29/76 (*LTU Luftransportunternehmen GmbH & Co. KG/Eurocontrol*), European Court Reports, 1976, 1541, sub 3.

³² For this statement see, e.g., LUPOLI, *Conflitti transnazionali di giurisdizione* (Milan, vol. 1, 2002), p. 279 f.

³³ In its decision, the Tribunale di Padova referred to the following ECJ decisions: ECJ, 22 February 1979, case 133/78 (*Henri Gourdain/Franz Nadler*), European Court Reports, 1979, 733, sub 3; ECJ, 21 April 1993, case C-172/91 (*Volker Sonntag/Hans Waidmann*), European Court Reports, 1993, I-1963, sub 18; ECJ, 15 May 2003, case C-266/01 (*Préservatrice foncière TIARD SA/Niederlande*), European Court Reports, 2003, I-4867, sub 20.

See also ECJ, 14 October 1976, case 29/76 (*LTU Luftransportunternehmen GmbH & Co. KG/Eurocontrol*), European Court Reports, 1976, 1541, sub 3; ECJ, 16 December 1980, case 814/79 (*Niederlande/Reinhold Rüffer*), European Court Reports, 1980, 3807, sub 7.

³⁴ See also STAUDINGER, *Einl Brüssel I-VO*, in *Europäisches Zivilprozessrecht. Kommentar*, supra note 24, p. 25; SILVESTRI, *L’interpretazione del “luogo di consegna” ai sensi del novellato art. 5, n. 1, lett. b) Reg. 44/2001: qualche osservazione sui limiti del criterio fattuale*, *International Lis*, 2005, p. 133.

³⁵ Consideration 19; for a reference in ECJ case law to this need for “continuity” and consistency, see ECJ, 1st October 2002, case C-167/00 (*Verein für Konsumenteninformation/Karl Heinz Henkel*), European Court Reports, 2002, 8111, sub 49: “Finally, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), while not applicable *ratione temporis* to the main proceedings, is such as to confirm the interpretation that Article 5(3) of the Brussels Convention does not presuppose the existence of damage. That regulation clarified the wording of Article 5(3) of the Brussels Convention that the new version of that provision resulting from that regulation refers to the place where the harmful event occurred or may occur. In the absence of any reason for interpreting the two provisions in question differently, consistency requires that Article 5(3) of the Brussels Convention be given a scope identical to that of the equivalent provision of Regulation No 44/2001. This is all the more necessary given that that regulation is intended to replace the Brussels Convention in relations between Member States with the exception of the Kingdom of Denmark, with that convention continuing to apply between the Kingdom of Denmark and the Member States bound by that regulation.”

For a detailed analysis of the interpretation of the Brussels I Regulation in light of the Brussels Convention, see BONADUCE, *L’interpretazione della Convenzione di Bruxelles del 1968 alla luce del regolamento n. 44/2001 nelle pronunce della Corte di giustizia*, *Rivista di diritto internazionale*, 2003, p. 746 ff.

³⁶ See Tribunale di Brescia, 28 December 2004, *International Lis*, 2005, 132; Tribunale di Rovereto, 28 August 2004, supra note 20, p. 131 and 132.

³⁷ ECJ, 14 November 2002, case C-271/00 (*Gemeente Steenberg/Luc Baten*), European Court Reports, 2002, I-10489, sub 28.

³⁸ See Article 1(2) Brussels Regulation: „The Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration“.

Not unlike the Brussels Convention, the Brussels I Regulation provides for a „very detailed and thought through system of heads of jurisdiction“³⁹; thus, under the Brussels I Regulation as well, the general head of jurisdiction provided for in Article 2(1) has to compete with special heads of jurisdiction; on the other hand, just like the special heads of jurisdiction, the general one has to give way to the exclusive heads of jurisdiction⁴⁰; thus, for instance, a person domiciled in a Member State cannot be sued in the courts of that Member State if the parties have, in compliance with Article 23⁴¹, agreed upon a different court where to start the proceedings. Since, however, the plaintiff had not relied upon any such agreement, Judge Rizzieri stated that in the case at hand the only heads of jurisdiction that could establish his jurisdiction were either the general one (of Article 2(1)) or a special one.

In respect of the general possibility to sue a party in the courts of the Contracting State in which it is domiciled provided for in Article 2(1)⁴², which is, as often pointed out both in legal writing⁴³ and in case law⁴⁴, based upon the principle „actor sequitur forum rei“ which supposedly “makes it easier, in principle, for a defendant to defend himself”⁴⁵, Judge Rizzieri stated that it could not serve as a basis for jurisdiction in the case at hand. Judge Rizzieri justified his conclusion by stating that this head of jurisdiction required the defendant to be domiciled in Italy (at the time the law suit was brought⁴⁶), but that this was not the case, since none of the three connecting factors alternatively⁴⁷ listed in Article 60 Brussels I Regulation (namely the statutory seat, the central administration and the principal place of business) “to make the common rules more transparent and avoid conflicts of

³⁹ MANKOWSKI, *Vorbem Art 2 Brüssel I-VO*, in *Europäisches Zivilprozessrecht. Kommentar*, supra note 24, p. 61.

⁴⁰ For a case summarizing the Brussels I Regulation’s system of heads of jurisdiction, see BGH, 1st June 2005, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 2005, p. 1518.

⁴¹ See FERRARI, *L’interpretazione autonoma del Regolamento CE 44/2001 e, in particolare, del concetto di „luogo di adempimento dell’obbligazione“ di cui all’art. 5, n. 1, lett. b, Giurisprudenza italiana*, 2006, p. 1019.

⁴² It has often been stated that the jurisdiction of the courts of the Contracting State in which the defendant is domiciled constitutes a general principle; in ECJ case law (rendered in application of the Brussels Convention), see, e.g., ECJ, 1st March 2005, case C-281/02 (*Andrew Owusu/N. B. Jackson*), European Court Reports, 2005, I-1383, sub 24; ECJ, 20 January 2005, case C-27/02 (*Petra Engler/Janus Versand GmbH.*), European Court Reports, 2005, I- 481, sub 42; ECJ, Corte di Giustizia, case C-464/01 (*Johann Gruber/BayWa AG*), European Court Reports, 2005, I-439, sub 32; ECJ, 10 June 2004, case C-168/02 (*Rudolf Kronhofer/Marianne Maier*), European Court Reports, 2004, I-6009, sub 12 f.; ECJ, 5 February 2004, case C-265/02 (*Frauil SA/Assitalia SpA.*), European Court Reports, 2004, I-1543, sub 23; ECJ, 13 July 2000, case C-412/98 (*Group Josi Reinsurance Company SA/Universal General Insurance Company (UGIC)*), European Court Reports, 2000, I-5925, sub 35; ECJ, 7 October 1999, case C-420/97 (*Leathertex Divisione Sintetici SpA/Bodetex BVBA*), European Court Reports, 1999, I-6747, sub 17; ECJ, 17 November 1998, case C-391/95 (*Van Uden Maritime BV/Kommanditgesellschaft in Firma Deco-Line u.a.*), European Court Reports, 1998, I-7091, sub 4; ECJ, 27 October 1998, case C-51/95 (*Réunion européenne SA/Spliethoff’s Bevrachtungskantoor BV*), European Court Reports, 1998, I-6511, sub 16; ECJ, 17 June 1992, case C-26/91 (*Jakob Handte & Co. GmbH/Traitements mécano-chimiques des surfaces SA.*), European Court Reports, 1992, I-3967, sub 14; ECJ, 15 February 1989, case 32/88 (*Six Constructions Ltd/Paul Humbert*), European Court Reports, 1989, 341, sub 18; ECJ, 8 March 1988, case 9/87 (*SPRL Arcado/SA Haviland*), European Court Reports, 1988, 1539, sub 9; ECJ, 22 March 1983, case 34/82 (*Martin Peters Bauunternehmung GmbH/Zuid Nederlandse Aannemers Vereniging*), European Court Reports, 1983, 987, sub 7.

⁴³ See CZERNICH, Art. 2, in *Kurzkommentar. Europäisches Gerichtsstand- und Vollstreckungsrecht*, supra note 7, p. 49; DE CRISTOFARO, *Convenzione di Bruxelles sulla giurisdizione e l’esecuzione delle sentenze in materia civile e commerciale (1968). Regolamento CE n. 44/2001 sulla giurisdizione e l’esecuzione delle sentenze in materia civile e commerciale*, in *Le convenzioni di diritto del commercio internazionale. Codice essenziale con regolamenti comunitari e note introduttive* (Ferrari ed., 2nd ed., Milan, 2002), p. 243; SIANI, *Il regolamento CE n. 44/2001 sulla competenza giurisdizionale e sull’esecuzione delle sentenze. Parte prima. La cooperazione giudiziaria in materia civile e commerciale: dalla Convenzione di Bruxelles al regolamento (CE) n. 44/2001, Diritto comunitario e degli scambi internazionali*, 2003, p. 469.

⁴⁴ See ECJ, 19 February 2002, case C-256/00 (*Besix SA/Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG)*), European Court Reports, 2002, I-1699, sub 52; ECJ, 13 July 2000, case C-412/98 (*Group Josi Reinsurance Company SA/Universal General Insurance Company (UGIC)*), European Court Reports, 2000, I-5925, sub 35

⁴⁵ ECJ, 17 June 1992, case C-26/91 (*Jakob Handte & Co. GmbH/Traitements mécano-chimiques des surfaces SA.*), European Court Reports, 1992, I-3967, sub 14.

⁴⁶ See CZERNICH, Art. 2, in *Kurzkommentar. Europäisches Gerichtsstand- und Vollstreckungsrecht*, supra note 7, p. 49; MANKOWSKI, *Art 2 Brüssel I-VO*, in *Europäisches Zivilprozessrecht. Kommentar*, supra note 24, p. 73 f.; contra SCHLOSSER, *EU-Zivilprozessrecht*, supra note 28, p. 52.

⁴⁷ For this qualification of the connecting factors listed in Article 60 Brussels I Regulation, see BERTOLI, *La disciplina della giurisdizione civile nel regolamento comunitario n. 44/2001*, *Rivista di diritto internazionale privato e processuale*, 2002, p. 633; DE CRISTOFARO, supra note 43, p. 249; HAUSMANN, *The Revision of the Brussels Convention of 1968. Part I: International Jurisdiction*, *European Legal Forum*, 2000/2001, p. 43; MICKLITZ/ROTT, *Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001*, supra note 6, p. 327; STAUDINGER, *Art 60 Brüssel I-VO*, in *Europäisches Zivilprozessrecht. Kommentar*, supra note 24, p. 476; SCHLOSSER, *EU-Zivilprozessrecht*, supra note 28, p. 322.

jurisdiction”⁴⁸ and to promote an autonomous interpretation⁴⁹ of the concept of place of business of a legal person⁵⁰ allowed him to consider the defendant a legal person with place of business in Italy. It is for this reason that Judge Rizzieri rightly concluded that jurisdiction could not be based on the defendant's domicile, but had to be based, if at all, on a special head of jurisdiction.

IV. The “autonomous” concept of “matters relating to a contract” referred to in Article 5(1)(a) Brussels I Regulation

Judge Rizzieri correctly stated that he had jurisdiction only if it could be based on Article 5(1) Brussels I Regulation, *i.e.* the provision that allowed, „in matters relating to a contract”⁵¹, to sue a person domiciled in a Member State in another Member State “in the courts of the place of performance of the obligation in question”⁵². Judge Rizzieri justified his conclusion by stating that the matter was one „relating to a contract”, which is undeniable. The claim for the purchase price certainly qualifies as a “matter relating to a contract”, a concept which, not unlike its Brussels Convention equivalent⁵³, it to be interpreted autonomously⁵⁴, as expressly pointed out also by Judge Rizzieri. Citing ECJ case law relating to the Brussels Convention’s concept of „matter relating to a contract”⁵⁵, which in light of the aforementioned need to ensure “continuity between the Brussels Convention and this Regulation” remains relevant insofar as it relates to provisions and concepts that the Brussels I Regulation has adopted without change⁵⁶, Judge Rizzieri stated that a matter “for sure” relates to a contract when there is a “legal obligation freely consented to by one person towards another and on which the claimant’s action is based”.

The fact that Judge Rizzieri expressly stated that a matter “for sure” related to a contract where the aforementioned requirements were met, allows one to assume that Judge Rizzieri was aware of the fact that the Brussels I Regulation’s concept of „matter relating to a contract”, not unlike that of the Brussels Convention, is much wider⁵⁷. In light of the abovementioned need to ensure “continuity

⁴⁸ Consideration 11.

⁴⁹ See BERTOLI, *La disciplina della giurisdizione civile nel regolamento comunitario n. 44/2001*, *supra* note 47, p. 633; CARBONE, *Giurisdizione ed efficacia delle decisioni in materia civile e commerciale nello spazio giudiziario europeo: dalla Convenzione di Bruxelles al Regolamento (CE) N. 44/2001, Diritto processuale civile e commerciale comunitario* (Carbone/Frigo/Fumagalli, Milan, 2004), p. 15; MERLIN, *Novità sui criteri di giurisdizione nel Regolamento CE «Bruxelles I», International Lis*, 2003, p. 40; POGGIO, *Vendita internazionale di beni e foro speciale contrattuale ai sensi del Regolamento (CE) 44/2001 del Consiglio dell’Unione Europea*, in *Giurisprudenza italiana*, 2005, p. 1008 note 3; STAUDINGER, *Art 60 Brüssel I-VO*, in *Europäisches Zivilprozessrecht. Kommentar*, *supra* note 24, p. 475.

⁵⁰ For the definition of the place of business of natural persons recourse is to be had to Article 59 Brussels I Regulation, which, unlike Article 60, does not provide an autonomous definition, but rather requires resort to a private international law approach; see DE CRISTOFARO, *supra* note 43, p. 243; STADLER, *From the Brussels Convention to Regulation 44/2001: Cornerstones of a European law of civil procedure*, *Common Market Law Review*, 2005, p. 1645.

⁵¹ Article 5(1)(a) Brussels I Regulation.

⁵² *Id.*

⁵³ For the autonomous interpretation of the concept of “matter relating to a contract” under the Brussels Convention, see in ECJ case law ECJ, 5 February 2004, case C-265/02 (*Frahuil SA/Assitalia SpA*), European Court Reports, 2004, I-1543, *sub* 22; ECJ, 27 October 1998, case C-51/97 (*Réunion européenne SA/Spliethoff’s Bevrachtungskantoor BV*), European Court Reports, 1998, I-6511, *sub* 15; ECJ, 17 June 1992, case C-26/91 (*Jakob Handte & Co. GmbH/Traitements mécano-chimiques des surfaces SA.*), European Court Reports, 1992, I-3967, *sub* 10; ECJ, 8 March 1988, case 9/87 (*SPRL Arcado/SA Haviland*), European Court Reports, 1988, 1539, *sub* 11; ECJ, 22 March 1983, case 34/82 (*Martin Peters Bauunternehmung GmbH/Zuid Nederlandse Aannemers Vereniging*), European Court Reports, 1983, 987, *sub* 1 and 10.

⁵⁴ See CARBONE, *Giurisdizione ed efficacia delle decisioni in materia civile e commerciale nello spazio giudiziario europeo*, *supra* note 49, p. 18; CZERNICH, *Art. 5*, in *Kurzkommentar. Europäisches Gerichtsstand- und Vollstreckungsrecht*, *supra* note 7, p. 64; LEIBLE, *Art 5 Brüssel I-VO*, in *Europäisches Zivilprozessrecht. Kommentar*, *supra* note 24, p. 93; SCHLOSSER, *EU-Zivilprozessrecht*, *supra* note 28, p. 64 f.

⁵⁵ In his decision, Judge Rizzieri cited the following ECJ decisions: ECJ, 20 January 2005, case C-27/02 (*Petra Engler/Janus Versand GmbH.*), European Court Reports, 2005, I- 481, *sub* 51; ECJ, 5 February 2004, case C-265/02 (*Frahuil SA/Assitalia SpA*), European Court Reports, 2004, I-1543, *sub* 24; ECJ, 17 June 1992, case C-26/91 (*Jakob Handte & Co. GmbH/Traitements mécano-chimiques des surfaces SA.*), European Court Reports, 1992, I-3967, *sub* 15.

⁵⁶ For this statement, see also Tribunale di Rovereto, *supra* note 20, p. 131.

⁵⁷ For a very thorough analysis of the “wide” concept of “matter relating to a contract”, see MANKOWSKI, *Die Qualifikation der culpa in contrahendo – Nagelprobe für den Vertragsbegriff des europäischen IZPR und IPR, Praxis des internationalen Privat- und Verfahrensrechts*, 2003, p. 129 ff.

between the Brussels Convention and this Regulation” the obligations which are based on the affiliation between an association and its members must be regarded as contractual for the purpose of the Brussels I Regulation as well, “on the ground that the membership of a private law association creates between the members close links of the same kind as those which are created between the parties to a contract”⁵⁸. Moreover, since the setting up of a company is the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective who, in order to achieve that objective, are assigned, as regards other shareholders and the organs of the company, rights and obligations set out in the company’s statutes, under the Brussels I Regulation as well⁵⁹ the company’s statutes must be regarded as a contract covering both the relations between the shareholders and also the relations between them and the company they set up.

It should also be mentioned that under the Brussels I Regulation, too, the contract does not have to be valid in order for Article 5(1) to be applicable. In effect, not unlike under the Brussels Convention, “that provision is therefore applicable even when the existence of the contract on which the claim is based is in dispute between the parties”⁶⁰; “if that were not the case, Article 5(1) [. . .] would be in danger of being deprived of its legal effect, since it would be accepted that, in order to defeat the rule contained in that provision, it is sufficient for one of the parties to claim that the contract does not exist.”⁶¹

V. New Article 5(1)(b) and its limited sphere of application

Even though, as mentioned, the Brussels I Regulation’s concept of „matter relating to a contract“ compares to that of the Brussels Convention, the application of Article 5(1) Brussels I Regulation does not necessarily lead to the same results as the application of Article 5(1) Brussels Convention. This is due to the introduction of Article 5(1)(b) which, within its limited sphere of application, has done away with the two-step-approach required under the Brussels Convention, which obliged the courts to first determine the obligation which *in concreto* forms the basis of the claim⁶², and to then identify the place of the performance of the obligation in question by resorting either to the conflict rules of the court seized⁶³ or to the applicable uniform substantive law rules (such as those of the CISG)⁶⁴. Under new Article 5(1)(b) Brussels I Regulation, only one place of performance is relevant, namely that of the characteristic contractual obligation⁶⁵. That place of performance is relevant for all claims arising in connection with a contract⁶⁶, provided that the contract is the type to

⁵⁸ ECJ, 20 January 2005, case C-27/02 (*Petra Engler/Janus Versand GmbH*), European Court Reports, 2005, I- 481, sub 47 (in relation to the Brussels Convention); see also ECJ, 22 March 1983, case 34/82 (*Martin Peters Bauunternehmung GmbH/Zuid Nederlandse Aannemers Vereniging*), European Court Reports, 1983, 987, sub 13 and 15.

⁵⁹ For a similar statement in respect of the Brussels Convention, see ECJ, 10 March 1992, case C-214/89 (*Powell Duffryn/Petereit*), European Court Reports, 1992, I-1769, sub 16.

⁶⁰ ECJ, 20 January 2005, case C-27/02 (*Petra Engler/Janus Versand GmbH*), European Court Reports, 2005, I- 481, sub 46.

⁶¹ ECJ, 4 March 1983, case 38/81 (*Effer SpA/Hans-Joachim Kantner*), European Court Reports, 1983, 825, sub 7.

⁶² See ECJ, 6 October 1976, case 14/76 (*A. De Bloos, SPRL/Société en commandite par actions Bouyer*), European Court Reports, 1976, 1497, sub 9/12 ff.; ECJ, 15 January 1987, case 266/85 (*Shenavai/Kreischer*), European Court Reports, 1987, 251, sub 20; ECJ, 29 June 1994, case C-288/92 (*Custom Made Commercial Ltd/Stawa Metallbau GmbH*), European Court Reports, 1994, I-2913, sub 23; ECJ, 5 October 1999, case C- 420/97 (*Leathertex Divisione Sintetici SpA/Bodetex BVBA*), European Court Reports, 1999, I-6747, sub 31; ECJ, 19 February 2002, case C-256/00 (*Besix SA/Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG)*), European Court Reports, 2002, I-1699, sub 44.

⁶³ See ECJ, 6 October 1976, case 12/76 (*Industrie Tessili Italiana Como/Dunlop AG*), European Court Reports, 1976, 1473, sub 15; ECJ, 29 June 1994, case C-288/92 (*Custom Made Commercial Ltd/Stawa Metallbau GmbH*), European Court Reports, 1994, I-2913, sub 26; ECJ, 28 September 1999, case C-440/97 (*GIE Groupe Concorde/Kapitän des Schiffes "Suhadiwarno Panjan"*), European Court Reports, 1999, I-6307, sub 13; ECJ, 5 October 1999, case C- 420/97 (*Leathertex Divisione Sintetici SpA/Bodetex BVBA*), European Court Reports, 1999, I-6747, sub 33; ECJ, 19 February 2002, case C-256/00 (*Besix SA/Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG)*), European Court Reports, 2002, I-1699, sub 33.

⁶⁴ See ECJ, 29 June 1994, case C-288/92 (*Custom Made Commercial Ltd/Stawa Metallbau GmbH*), European Court Reports, 1994, I-2913, sub 27 ff.

⁶⁵ See MAGNUS, *Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO*, supra note 26, p. 47.

⁶⁶ For this conclusion see CAMPEIS/DE PAULI, *Luogo di adempimento del contratto di compravendita come titolo di giurisdizione europea tra Convenzione di Bruxelles del 1968 e Regolamento UE n. 44/2001*, *Nuova Giurisprudenza civile commentata*, 2003, p. 238; ELTZSCHIG, *Art 5 Nr lit b EuGVO: Ende oder Fortführung von forum actoris und Erfüllungsortbestimmung*

which the new rule of article 5(1)(b) applies; ultimately, within the limited sphere of application of new Article 5(1)(b) Brussels I Regulation this means that there is no need to determine the obligation which *in concreto* forms the basis of the claim⁶⁷.

The goal behind the introduction of new Article 5(1)(b) Brussels I Regulation was, however, not only to do away with the need to identify the obligation which *in concreto* forms the basis of the claim, but also to avoid to have to determine the law applicable for the purpose of identifying the place of performance of that obligation⁶⁸. This is why, as regards the two types of contract that, from a commercial point of view, are the most important ones⁶⁹, namely the contract for the sale of goods and that for the provision of services, Article 5(1)(b) Brussels I Regulation defines the place of performance in an “autonomous”⁷⁰ way, *i.e.* independently from the *lex causae*⁷¹. This should not come as a surprise, since the new Article 5(1)(b) Brussels I Regulation has been specifically drafted⁷² to „unify the concept of place of performance for the purposes of the European law on jurisdiction and to avoid the difficulties created, and the unreasonable results reached, by the case law initiated by the *Tessili*-decision”⁷³.

In light of the fact that this new rule merely applies in a very limited line of cases (*i.e.*, where contracts for the sale of goods or contracts for the provision of services are concerned) and only where

lege causae, *Praxis des internationalen Privat- und Verfahrensrechts*, 2002, p. 492; FRANZINA, *Obbligazioni di non fare e obbligazioni eseguibili in più luoghi nella Convenzione di Bruxelles del 1968 e le regolamento (CE) n. 44/2001*, *Rivista di diritto internazionale privato e processuale*, 2002, p. 404; HAGER/BENTELE, *Der Lieferort als Gerichtsstand – Zur Auslegung des Art. 5 Nr. 1 lit. b. EuGVO*, *Praxis des internationalen Privat- und Verfahrensrechts*, 2004, p. 73; JAYME/KOHLER, *Europäisches Kollisionsrecht 1999 – Die Abendstunde der Staatsverträge*, *Praxis des internationalen Privat- und Verfahrensrechts*, 1999, p. 405; MERLIN, *Novità sui criteri di giurisdizione nel Regolamento CE «Bruxelles I»*, *supra* note 49, p. 41; MICKLITZ/ROTT, *Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001*, *supra* note 6, p. 328; SCHLOSSER, *EU-Zivilprozessrecht*, *supra* note 28, p. 72.

⁶⁷ For this conclusion, see FERRARI, *supra* note 41, p. 1021.

⁶⁸ See FRANZINA, *Obbligazioni di non fare e obbligazioni eseguibili in più luoghi nella Convenzione di Bruxelles del 1968 e le regolamento (CE) n. 44/2001*, *supra* note 66, p. 403; GSELL, *Autonom bestimmter Gerichtsstand am Erfüllungsort nach der Brüsseler I-Verordnung*, *Praxis des internationalen Privat- und Verfahrensrechts*, 2002, p. 485.

⁶⁹ For similar statements, see CAMPEIS/DE PAULI, *Luogo di adempimento del contratto di compravendita come titolo di giurisdizione europea tra Convenzione di Bruxelles del 1968 e Regolamento UE n. 44/2001*, *supra* note 66, p. 237 f.; SILVESTRI, *L'interpretazione del “luogo di consegna” ai sensi del novellato art. 5, n. 1, lett. b) Reg. 44/2001*, *supra* note 34, p. 133.

⁷⁰ BERTOLI, *La disciplina della giurisdizione civile nel regolamento comunitario n. 44/2001*, *supra* note 47, p. 637; CARBONE, *Giurisdizione ed efficacia delle decisioni in materia civile e commerciale nello spazio giudiziario europeo*, *supra* note 49, p. 20; DE CRISTOFARO, *supra* note 43, p. 251; FRANZINA, *Obbligazioni di non fare e obbligazioni eseguibili in più luoghi nella Convenzione di Bruxelles del 1968 e le regolamento (CE) n. 44/2001*, *supra* note 66, p. 403; HAGER/BENTELE, *Der Lieferort als Gerichtsstand – Zur Auslegung des Art. 5 Nr. 1 lit. b. EuGVO*, *supra* note 66, p. 73; HAU, *Der Vertragsgerichtstand zwischen juristischer Konsolidierung und legislativer Neukonzeption*, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2000, p. 359; HEB, *Die Europäisierung des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag*, *Neue Juristische Wochenschrift*, 2000, p. 27; *Der Vertragsgerichtstand zwischen juristischer Konsolidierung und legislativer Neukonzeption*, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2002, p. 377; JAYME/KOHLER, *Europäisches Kollisionsrecht 1999 – Die Abendstunde der Staatsverträge*, *supra* note 66, p. 405; KOFLER, *Il forum destinatae solutionis nelle azioni di accertamento negativo del credito e di nullità del contratto*, *Corriere giuridico*, 2004, p. 217; KUBIS, *Gerichtsstand am Erfüllungsort*, *Zeitschrift für europäisches Privatrecht*, 2001, p. 749 f.; LORENZ/UNBERATH, *Gewinnmitteilungen und keine Ende? - Neues zur internationalen Zuständigkeit*, *Praxis des internationalen Privat- und Verfahrensrechts*, 2005, p. 222; MERLIN, *Novità sui criteri di giurisdizione nel Regolamento CE «Bruxelles I»*, *supra* note 49, p. 42; MICKLITZ/ROTT, *Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001*, *supra* note 6, p. 328; SIANI, *Il regolamento CE n. 44/2001 sulla competenza giurisdizionale e sull'esecuzione delle sentenze. Parte prima*, *supra* note 43, p. 472 and 474; THORN, *Gerichtsstand des Erfüllungsorts und intertemporales Zivilverfahrensrecht*, *supra* note 23, p. 356.

In case law see Tribunale di Rovereto, 28 agosto 2004, *supra* note 20, p. 132.

⁷¹ DE CRISTOFARO, *supra* note 43, p. 252; DROZ/GAUDEMET-TALLON, *La transformation de la Convention de Bruxelles du 28 septembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, *supra* note 11, p. 634; ELTZSCHIG, *Art 5 Nr lit b EuGVO: Ende oder Fortführung von forum actoris und Erfüllungsortbestimmung lege causae*, *supra* note 66, p. 493; FRANZINA, *Obbligazioni di non fare e obbligazioni eseguibili in più luoghi nella Convenzione di Bruxelles del 1968 e le regolamento (CE) n. 44/2001*, *supra* note 66, p. 403 f.; GSELL, *Autonom bestimmter Gerichtsstand am Erfüllungsort nach der Brüsseler I-Verordnung*, *supra* note 68, p. 486 f.; KOFLER, *Il forum destinatae solutionis nelle azioni di accertamento negativo del credito e di nullità del contratto*, *supra* note 70, p. 217.

⁷² See Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (1999), 348 def., p. 14: “The Brussels Convention rule regarding contractual obligations is maintained. But to remedy the shortcomings of applying the rules of private international law of the State whose courts are seised, the second subparagraph of Article 5(1) gives an autonomous definition of the place for enforcement of “the obligation in question”.

⁷³ MAGNUS, *Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO*, *supra* note 26, p. 46

certain requirements are met, it must be doubted, however, whether the new rule really has simplified things⁷⁴.

As regards the aforementioned requirements, it must be pointed out that the rule only applies where the place of performance identified in Article 5(1)(b) Brussels I Regulation in relation to the two types of contracts referred to is located in a Member State as defined by Article 1(3) Brussels I Regulation. Where this requirement is not met or where the contract in connection of which the claim arises is neither one for the sale of goods nor one for the provision of services, courts have, as pointed out by Judge Rizzieri, to resort to the aforementioned two-step-approach and apply the rules laid down by the *De Bloos*-decision as well as the *Tessili*-decision⁷⁵.

VI. The “autonomous” concept of “contract for the sale of goods” (Article 5(1)(b) Brussels I Regulation)

As mentioned, the new rule contained in Article 5(1)(b) applies provided that the claim arises in connection with either a contract for the sale of goods or one for the provision of services. As regards the former, which is the only one to be dealt with here, the Brussels I Regulation does not define it⁷⁶. In order not to endanger the uniformity aimed at by introducing the new rule, this should not lead one to resort to domestic definitions⁷⁷; rather, one should interpret this concept as well “autonomously”⁷⁸. In this author’s opinion, this “autonomous” interpretation can be achieved by resorting to the (“autonomous”) definition of contract for the sale of goods elaborated in respect of the CISG⁷⁹, and this despite the fact that the CISG has not yet entered into force in all Member States.

In recent Italian case, this approach, based upon what in academic circles is being labelled as “inter-conventional interpretation”⁸⁰, has been criticized, on the grounds that an international procedural law instrument of European origin, such as the Brussels I Regulation, cannot be interpreted in the light of a substantive law instrument of “extra-European” origin such as the CISG⁸¹.

In this author’s opinion⁸², this criticism has to be rejected, among others, because, as also pointed out by Judge Rizzieri, the concept at hand (contract for the sale of goods) constitutes a substantive law concept, and not a procedural one; therefore, it has to be defined on the basis of substantive law rules; moreover, if one considers the need for an “autonomous” interpretation of the

⁷⁴ Doubts have been expressed also by DROZ/GAUDEMET-TALLON, *La transformation de la Convention de Bruxelles du 28 septembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, *supra* note 11, p. 634; GSELL, *Autonom bestimmter Gerichtsstand am Erfüllungsort nach der Brüsseler I-Verordnung*, *supra* note 68, p. 486; MAGNUS, *Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO*, *supra* note 26, p. 46.

⁷⁵ For this conclusion, *see also* BERTOLI, *La disciplina della giurisdizione civile nel regolamento comunitario n. 44/2001*, *supra* note 47, p. 637 and 639; DROZ/GAUDEMET-TALLON, *La transformation de la Convention de Bruxelles du 28 septembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, *supra* note 11, p. 634; LORENZ/UNBERATH, *Gewinnmitteilungen und keine Ende? - Neues zur internationalen Zuständigkeit*, *supra* note 70, p. 223; SCHLOSSER, *EU-Zivilprozessrecht*, *supra* note 28, p. 74; *contra* MICKLITZ/ROTT, *Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001*, *supra* note 6, p. 329.

⁷⁶ *See* FERRARI, *supra* note 41, p. 1022; MAGNUS, *Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO*, *supra* note 26, p. 47.

⁷⁷ For this statement, *see also* CZERNICH, *Art. 5*, in *Kurzkommentar. Europäisches Gerichtsstand- und Vollstreckungsrecht*, *supra* note 7, p. 71.

⁷⁸ For this conclusion, *see* FERRARI, *supra* note 41, p. 1022; *see, however*, FRANZINA, *Obbligazioni di non fare e obbligazioni eseguibili in più luoghi nella Convenzione di Bruxelles del 1968 e le regolamento (CE) n. 44/2001*, *supra* note 66, p. 404, where the author expresses some doubts.

⁷⁹ For this suggestion *see also* MAGNUS, *Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO*, *supra* note 26, p. 47; SCHLOSSER, *EU-Zivilprozessrecht*, *supra* note 28, p. 73

⁸⁰ *See* BASEDOW, *Konventionen und ihre Auslegung*, in *50 Jahre Bundesgerichtshof – Festgabe aus der Wissenschaft* (Tübingen, vol. 2, 2000), p. 786 f.; FERRARI, *I rapporti tra le convenzioni di diritto materiale uniforme in materia contrattuale e la necessità di un'interpretazione interconvenzionale*, in *Rivista di diritto internazionale privato e processuale*, 2000, p. 669 ff.; MAGNUS, *Konventionsübergreifende Interpretation internationaler Staatsverträge privatrechtlichen Inhalts*, in *Festschrift 75 Jahre Max-Planck-Institut für Privatrecht* (Tübingen, 2001), p. 571 ff..

⁸¹ *See* Tribunale di Rovereto, 28 August 2004, *supra* note 20, p. 132.

⁸² *See* FERRARI, *supra* note 41, p. 1022.

concept at hand, there is no reason not to have recourse to the CISG to define the concept *de quo*, as the CISG constitutes a substantive law convention⁸³ that has to be interpreted “autonomously”, too⁸⁴.

In this author’s opinion, the CISG’s non-European origin does not preclude recourse to the CISG either. Although it is true that the CISG does not formally constitute an “European” instrument and that there are Member States, namely England and Portugal, that have not yet entered it into force⁸⁵, it is important on a European level, even in those Member States that have not entered it into force, as (implicitly) acknowledged by the European legislator itself, when it used the CISG as a model for the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees⁸⁶.

Thus, it is correct to define, as did Judge Rizzieri, the sales contract referred to in Article 5(1)(b) Brussels I Regulation in light of the definition of sales contract elaborated by commentators⁸⁷ and courts⁸⁸ under the CISG; consequently, under the Brussels I Regulation as well, it can be defined as the

⁸³ In case law, the CISG has often been qualified as a substantive law convention; *see, e.g., McDowell Valley Vineyards, Inc. v. Sabaté USA Inc. et al.*, U.S. District Court, Northern District of California, 2 November 2005, published on the internet at <<http://cisgw3.law.pace.edu/cases/051102u1.html#iii>>; Cass. civ., 20 April 2004, published on the internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=975&step=FullText>>; Tribunale di Padova, 25 February 2004, *Giurisprudenza italiana*, 2004, p. 1403; HG Zürich, 26 April 1995, published on the internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=166&step=FullText>>; Tribunal de Commerce de Bruxelles, 5 October 1994, published on the internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=176&step=FullText>>.

⁸⁴ For references to the need to interpret the CISG autonomously, *see, e.g.,* ACHILLES, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* (Berlin, 2000), p. 28; AUDIT, *La vente internationale de marchandises* (Paris, 1991), p. 47; BONELL, *La nouvelle Convention des Nations-Unies sur les contrats de vente internationale de marchandises, Droit et pratique du commerce international*, 1981, p. 14; BONELL, *Art. 7, Nuove leggi civili commentate*, 1989, p. 21; DIEDRICH, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, *Pace International Law Review*, 1996, p. 303; FELEMEGAS, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, *Review of the United Nations Convention on Contracts for the International Sale of Goods*, (CISG), 2000/2001, p. 235; FERRARI, *Interpretation uniforme de la Convention de Vienne de 1980 sur la vente internationale*, *Revue internationale de droit comparé*, 1996, p. 827; FERRARI, *Vendita internazionale di beni mobili. Art. 1-13. Ambito di applicazione. Disposizioni generali* (Bologna, 1994), p. 130; HACKNEY, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, *Louisiana Law Review*, 2001, p. 475; JAMETTI GREINER, *Der Vertragsabschluss*, in *Das Einheitliche Wiener Kaufrecht* (Hoyer/Posch ed., Vienna, 1992), p. 57; KAROLLUS, *UN-Kaufrecht. Eine systematische Darstellung für Studium und Praxis* (Vienna/New York, 1991), p. 11; LIGUORI, *La convenzione di Vienna sulla vendita internazionale di beni mobili nella pratica: un'analisi critica delle prime cento decisioni*, *Foro italiano*, 1996, IV, c. 148; MAGNUS, *Wiener UN-Kaufrecht – CISG* (Berlin, 2005), p. 171; NAJORK, *Treu und Glauben im CISG* (Bonn, 2000), p. 53; SCHLECHTRIEM, *Internationales UN-Kaufrecht* (Tübingen, 2nd ed., 2003), p. 39; SCHMITT, *"Intangible Goods" in Online-Kaufverträgen und der Anwendungsberich des CISG*, *Computer und Recht*, 2001, p. 147; VAZQUEZ LEPINETTE, *The interpretation of the 1980 Vienna Convention on International Sales*, *Diritto del commercio internazionale*, 1995, p. 387.

⁸⁵ For an updated list of Contracting States of the CISG; *see* <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

⁸⁶ For papers discussing the relationship between the CISG and the directive referred to in the text, *see, e.g.,* GRUNDMANN, *Verbraucherrecht, Unternehmensrecht, Privatrecht - warum sind sich UN- Kaufrecht und EU-Kaufrechts-Richtlinie so ähnlich?*, *Archiv für die civilistische Praxis*, 2002, p. 40 ff.; JANSSEN, *Das Rückgriffsrecht des Letztverkäufers gemäß der Verbrauchgüterrichtlinie und das schwierige Verhältnis zum UN-Kaufrecht*, *European Legal Forum*, 2003, p. 181 ff.; MITTMANN, *Einheitliches UN-Kaufrecht und europäische Verbrauchsgüterkauf-Richtlinie: Konkurrenz und Auslegungsprobleme* (Frankfurt, 2004); NIETZER/STEIN, *Richtlinie zum Verbrauchsgüterkauf - Auswirkungen in Deutschland und Frankreich - Vergleich zum UN-Kaufrecht*, *Zeitschrift für vergleichende Rechtswissenschaft*, 2000, p. 41 ff.; SCHROETER, *UN-Kaufrecht (CISG) und Verbrauchsgüterkauf-Richtlinie*, *Gemeineuropäisches Privatrecht*, 2005, p. 173 ff.

⁸⁷ *See* CHIOMENTI, *Does the choice of a-national rules entail an implicit exclusion of the CISG?*, *European Legal Forum*, 2005, p. 143; ENDLER/DAUB, *Internationale Softwareüberlassung und UN-Kaufrecht*, *Computer und Recht*, 1993, 601; HERBER/CZERWENKA, *Internationales Kaufrecht. Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11 April 1980 über Verträge über den internationalen Warenkauf* (Munich, 1991), p. 16; LANCIOTTI, *Norme uniformi di conflitto e materiali nella disciplina convenzionale della compravendita* (Naples, 1992), p. 120; MAGNUS, *Wiener UN-Kaufrecht - CISG*, *supra* note 84, p. 66-67; PILTZ, *Internationales Kaufrecht. Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung* (Munich, 1993), p. 23; THIELE, *Das UN-Kaufrecht vor US-amerikanischen Gerichten*, *Internationales Handelsrecht*, 2002, p. 10.

⁸⁸ *See, e.g.,* Juzgado de primera instancia e instrucción no. 3 de Tudela, 29 March 2005, published on the internet at <<http://www.uc3m.es/cisg/sespan45.htm>>; Tribunal Cantonal du Jura, 3 November 2004, published on the internet at <<http://www.cisg-online.ch/cisg/urteile/965.pdf>>; Tribunal Cantonal du Valais, 19 August 2003, published on the internet at <<http://www.cisg-online.ch/cisg/urteile/895.pdf>>; Tribunal Cantonal de Vaud, 11 April 2002, published on the internet at <<http://www.cisg-online.ch/cisg/urteile/899.pdf>>; Kantonsgericht Schaffhausen, 25 February 2002, published on the internet at <<http://www.cisg-online.ch/cisg/urteile/723.htm>>; Cor d'Appel de Colmar, 12 June 2001, published on the internet at <<http://witz.jura.uni-sb.de/CISG/decisions/120601v.htm>>; Cour d'Appel de Paris, 12 October 2000, published on the internet at <<http://witz.jura.uni-sb.de/CISG/decisions/121000v.htm>>; Audiencia Provincial de Navarra, 27 March 2000, published on the internet at <<http://www.uc3m.es/cisg/sespan11.htm>>; Tribunal Cantonal de Vaud, 11 March 1996, published on the internet at <<http://www.cisg-online.ch/cisg/urteile/333.pdf>>.

contract “pursuant to which one party - the seller - is bound to deliver the goods and transfer the property in the goods sold and the other party - the buyer - is obliged to pay the price and accept the goods”⁸⁹. As correctly stated by Judge Rizzieri when dealing with the obligation of the seller to assemble the merry-go-rounds in England, the circumstance that a contract also obliges the seller to supply labour or services does not exclude that it can be qualified as a sales contract⁹⁰, unless “the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services”⁹¹.

In this author’s opinion, the concept of “goods” referred to in Article 5(1)(b) Brussels I Regulation also has to be defined in light of the definition of the CISG’s equivalent concept⁹², which is why, not unlike under the CISG, under the Brussels I Regulation, too, only moveable and tangible goods are considered “goods”⁹³. Under the Brussels I Regulation, however, the exclusions from the CISG’s substantive sphere of application listed in to Article 2 CISG are irrelevant for the purpose of determining what constitutes a “contract for the sale of goods”⁹⁴; consequently, the Article 5(1)(b) rule also applies where the claim relates, for instance, to the sale of ships, hovercrafts or airplanes, the sales excluded from the CISG’s sphere of application by virtue of its Article 2(e).

VII. The “autonomous” determination of the place of performance of the delivery obligation arising from a contract for the sale of goods under Article 5(1)(b) Brussels I Regulation

According to Article 5(1)(b) Brussels I Regulation, “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”. It has already been mentioned that by introducing this new rule, the European legislator wanted to create an “autonomous” rule, independent of the *lex causae*; but where does this new rule lead to *in concreto*?⁹⁵

It is this question that Judge Rizzieri has tried to answer, in part by using very innovative arguments. The starting point of Judge Rizzieri’s analysis was the consideration that the answer differs according to whether the delivery has actually taken place. Where it has, the place of performance relevant for the purposes of establishing jurisdiction under Article 5(1)(b) Brussels I Regulation is that where the delivery has physically occurred⁹⁶. Generally, this place of delivery corresponds to that agreed upon by the parties⁹⁷, albeit not necessarily so. Where the buyer accepts delivery of the goods with the intention to free the seller from its obligation to deliver the goods at a place different than the one agreed upon, it is this place of delivery that will be relevant for the purposes of establishing jurisdiction

⁸⁹ Oberster Gerichtshof, 10 November 1994, published on the Internet at <<http://www.cisg-online.ch/cisg/urteile/117.htm>>; for this exact same definition, see also Tribunale di Padova, 11 January 2005, *Rivista di diritto internazionale privato e processuale*, 2005, p. 791 ff.; Tribunale di Padova, 25 February 2004, *Giurisprudenza italiana*, 2004, p. 1404; Tribunale di Rimini, 26 November 2002, published on the internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=823&step=FullText>>.

⁹⁰ For this conclusion see also CZERNICH, *Art. 5*, in *Kurzkomentar. Europäisches Gerichtsstand- und Vollstreckungsrecht*, *supra* note 7, p. 72.

⁹¹ Article 3(2) CISG.

⁹² For this suggestion see also SCHLOSSER, *EU-Zivilprozessrecht*, *supra* note 28, p. 73.

⁹³ In CISG case law, see, e.g., Tribunale di Padova, 25 February 2004, *Giurisprudenza italiana*, 2004, p. 1404; Tribunale di Rimini, 26 November 2002, *Giurisprudenza italiana*, 2003, p. 903; KG Zürich, 21 October 1999, *Internationales Handelsrecht*, 2001, p. 45; Tribunale di Pavia, 29 December 1999, *Corriere giuridico*, 2000, 932 f.; OLG Köln, 21 May 1996, published on the internet at <<http://www.cisg-online.ch/cisg/urteile/254.htm>>; Oberster Gerichtshof, 10 November 1994, *Zeitschrift für Rechtsvergleichung*, 1995, p. 79 ff.; OLG Köln, 26 August 1994, published on the internet at <<http://www.cisg-online.ch/cisg/urteile/132.htm>>.

⁹⁴ For a similar statement see MAGNUS, *Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO*, *supra* note 26, p. 47.

⁹⁵ GSELL, *Autonom bestimmter Gerichtsstand am Erfüllungsort nach der Brüsseler I-Verordnung*, *supra* note 68, p. 486.

⁹⁶ LEIBLE, *Art 5 Brüssel I-VO*, in *Europäisches Zivilprozessrecht. Kommentar*, *supra* note 24, p. 111.

⁹⁷ MAGNUS, *Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO*, *supra* note 26, p. 47.

under Article 5(1)(b) Brussels I Regulation⁹⁸; Judge Rizzieri has justified this on the grounds that there is a new agreement on where delivery has to occur.

In respect of sales contract that involve carriage of the goods, as well, recourse is to be had to the place where delivery actually occurred. One has to wonder, however, whether this is always the place of final destination of the goods, as suggested by an Italian court⁹⁹ as well as by some commentators¹⁰⁰, or whether the relevant place is that where the goods are handed over to the first independent carrier. Since the Brussels I Regulation itself does not allow one to infer an answer from either its legislative history or its wording, and since recourse to the *lex causae* is to be avoided in favour of an “autonomous” interpretation, Judge Rizzieri (rightly)¹⁰¹ resorted once again to the CISG¹⁰², and this independently from its applicability in the case at hand; rather, Judge Rizzieri justified his recourse to the CISG by referring to its “autonomous” character as well as the importance attributed to it by the European legislator. Consequently, where the contract of sale involves carriage of the goods, by virtue of Article 31(a) CISG the place of delivery relevant for the purposes of establishing jurisdiction is that where “the goods [are handed] over to the first carrier for transmission to the buyer”¹⁰³. This solution also corresponds to the one to be found in both the *Unidroit Principles of International Commercial Contracts* (Article 6.1.6(1) and the Principles of European Contract Law (Article 7:101(1)), as also¹⁰⁴ pointed out by Judge Rizzieri who referred to these two non-binding “autonomous” instruments to corroborate his conclusion based on the CISG.

Where, however, delivery has not occurred at all or where it has occurred at a place different from the one agreed upon (and the buyer has not accepted delivery with the intention to free the seller from its obligation to hand over the goods), the relevant place of performance for establishing jurisdiction under Article 5(1)(b) Brussels I Regulation is that agreed upon by the parties¹⁰⁵ (for instance, by referring to Incoterms¹⁰⁶), provided that they have not agreed upon, “with the sole aim of specifying the courts having jurisdiction, a place of performance having no real connection with the reality of the contract at which the obligations arising under the contract could not be performed in accordance with the terms of the contract”¹⁰⁷.

Where no actual delivery occurred and no agreement exists on the place of performance, Article 5(1)(b) Brussels I Regulation is not applicable; by virtue of Article 5(1)(c), this leads one to apply subpara. (a) with the consequence that one has to resort to the rules applicable under the Brussels

⁹⁸ See FERRARI, *supra* note 41, p. 1023; LEIBLE, *Art 5 Brüssel I-VO*, in *Europäisches Zivilprozessrecht. Kommentar*, *supra* note 24, p. 111.

⁹⁹ See Tribunale di Brescia, 28 December 2004, *International Lis*, 2005, p. 132.

¹⁰⁰ See DE CRISTOFARO, *supra* note 43, p. 252; KOFLER, *Il forum destinatae solutionis nelle azioni di accertamento negativo del credito e di nullità del contratto*, *supra* note 70, p. 217; MERLIN, *Novità sui criteri di giurisdizione nel Regolamento CE «Bruxelles I»*, *supra* note 49, p. 42.

¹⁰¹ For favorable comments see FERRARI, *supra* note 41, p. 1024 f.; RAGNO, *Forum destinatae solutionis e regolamento (CE) n. 44 del 2001: alcuni spunti innovativi dalla giurisprudenza di merito*, *Giurisprudenza di merito*, 2006, p. 1430 f.

¹⁰² For statements excluding the possibility to resort to the CISG in the line of cases referred to in the text, see HAGER/BENTELE, *Der Lieferort als Gerichtsstand – Zur Auslegung des Art. 5 Nr. 1 lit. b. EuGVO*, *supra* note 66, p. 76.

¹⁰³ For this conclusion, see also CZERNICH, *Art. 5*, in *Kurzkommentar. Europäisches Gerichtsstand- und Vollstreckungsrecht*, *supra* note 7, p. 72 f.

¹⁰⁴ For this approach, see also GSELL, *Autonom bestimmter Gerichtsstand am Erfüllungsort nach der Brüsseler I-Verordnung*, *supra* note 68, *cit.*, p. 491.

¹⁰⁵ CAMPEIS/DE PAULI, *Luogo di adempimento del contratto di compravendita come titolo di giurisdizione europea tra Convenzione di Bruxelles del 1968 e Regolamento UE n. 44/2001*, *supra* note 66, p. 238; CZERNICH, *Art. 5*, in *Kurzkommentar. Europäisches Gerichtsstand- und Vollstreckungsrecht*, *supra* note 7, p. 74; KIENLE, *Eine ökonomische Momentaufnahme zu Art. 5 Nr. 1 lit. b) EuGVVO, Praxis des internationalen Privat- und Verfahrensrechts*, 2005, p. 114; THORN, *Gerichtsstand des Erfüllungsorts und intertemporales Zivilverfahrensrecht*, *supra* note 23, p. 356.

¹⁰⁶ See CZERNICH, *Art. 5*, in *Kurzkommentar. Europäisches Gerichtsstand- und Vollstreckungsrecht*, *supra* note 7, p. 73; MAGNUS, *Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO*, *supra* note 26, p. 48 and 52; *contra* POGGIO, *Vendita internazionale di beni e foro speciale contrattuale ai sensi del Regolamento (CE) 44/2001 del Consiglio dell'Unione Europea*, *supra* note 49, p. 1008, stating that a reference to Incoterms is insufficient.

¹⁰⁷ ECJ, 20 February 1997, case C-106/95 (*Mainschiffahrts-Genossenschaft eG (MSG)/Les Gravières Rhénanes SARL*), *European Court Reports*, 1997, I- 911, *sub* 31.

For similar statements in legal writing see BERTOLI, *La disciplina della giurisdizione civile nel regolamento comunitario n. 44/2001*, *supra* note 47, p. 639; MERLIN, *Novità sui criteri di giurisdizione nel Regolamento CE «Bruxelles I»*, *supra* note 49, p. 43.

Convention, *i.e.*, the rules laid down by the ECJ in the *De Bloos*-decision and the *Tessili*-decision¹⁰⁸. Consequently, even after the entry into force of the Brussels I Regulation, it may be necessary to first determine the obligation which *in concreto* forms the basis of the claim and to then identify the place of the performance of the obligation in question by resorting either to the *lex causae* or to the applicable uniform substantive law rules.

From the above, one can easily derive that the simplification aimed at by drafting new Article 5(1) Brussels I Regulation has not been achieved¹⁰⁹. The new rule is only applicable in relation to two types of contract and only where the place of performance is located in Member State. Consequently, there are instances to which the old rules are still applicable; this leads to inconsistency¹¹⁰ and to a multiplication of the applicable rules¹¹¹. In this author's opinion, this is to be deplored at least as much as the old regime that led the European legislator to Article 5(1)(b) Brussels I Regulation.

¹⁰⁸ For this conclusion, see CAMPEIS/DE PAULI, *Luogo di adempimento del contratto di compravendita come titolo di giurisdizione europea tra Convenzione di Bruxelles del 1968 e Regolamento UE n. 44/2001*, supra note 66, p. 238; DROZ/GAUDEMET-TALLON, *La transformation de la Convention de Bruxelles du 28 septembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, supra note 11, p. 636; ELTZSCHIG, *Art 5 Nr lit b EuGVO: Ende oder Fortführung von forum actoris und Erfüllungsortbestimmung lege causae*, supra note 66, p. 492; LORENZ/UNBERATH, *Gewinnmitteilungen und keine Ende? - Neues zur internationalen Zuständigkeit*, supra note 70, p. 223; PILTZ, *Vom EuGVÜ zur Brüssel-I-Verordnung*, *Neue Juristische Wochenschrift*, 2002, p. 793; POGGIO, *Vendita internazionale di beni e foro speciale contrattuale ai sensi del Regolamento (CE) 44/2001 del Consiglio dell'Unione Europea*, supra note 49, p. 1009; SCHLOSSER, *EU-Zivilprozessrecht*, supra note 28, p. 74; contra CZERNICH, *Art. 5*, in *Kurzkommentar. Europäisches Gerichtsstand- und Vollstreckungsrecht*, supra note 7, p. 74; HAGER/BENTELE, *Der Lieferort als Gerichtsstand – Zur Auslegung des Art. 5 Nr. 1 lit. b. EuGVO*, supra note 66, p. 76 f.; JUNKER, *Vom Brüsseler Übereinkommen zur Brüsseler Verordnung - Wandlungen des Internationalen Zivilprozessrechts, Recht der Internationalen Wirtschaft*, 2002, p. 572; LEIBLE, *Art 5 Brüssel I-VO*, in *Europäisches Zivilprozessrecht. Kommentar*, supra note 24, 111 f.; THORN, *Gerichtsstand des Erfüllungsorts und intertemporales Zivilverfahrensrecht*, supra note 23, p. 357.

¹⁰⁹ See also CZERNICH, *Art. 5*, in *Kurzkommentar. Europäisches Gerichtsstand- und Vollstreckungsrecht*, supra note 7, p. 63; DE CRISTOFARO, supra note 43, p. 251.

¹¹⁰ For this criticism, see LEIPOLD, *Zuständigkeit am Erfüllungsort – das Neueste aus Luxemburg und Brüssel*, in *Gedächtnisschrift für Alexander Lüderitz* (Schack ed., Munich, 2000), p. 451.

¹¹¹ See MAGNUS, *Das UN-Kaufrecht und die Erfüllungsortzuständigkeit in der neuen EuGVO*, supra note 26, p. 52.

