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A NOVEL INTERPRETATION OF ARTICLE 5(1)(B) OF THE BRUSSELS I REGULATION IN RESPECT OF COMPLEX CONTRACTS

by

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MINOR-DISSERTATION

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UNIVERSITY OF JOHANNESBURG

SUPERVISOR PROFESSOR JAN NEELS
**A novel interpretation of Article 5(1)(b) of the Brussels I Regulation in respect of complex contracts**

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## Abbreviations

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Rome I  

Schlosser Report  
Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court Justice
Relevant Provisions

Article 2 of the Brussels Convention:

“[P]ersons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State … [and those] who are not nationals of that State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.”

Article 5(1) of the Brussels Convention:

“A person domiciled in a Contracting State may, in another Contracting State, be sued (1) in matters relating to a contract, in courts for the place of performance of the obligation in question.”

Recital 2 of Brussels I:

“Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.”

Recital 5 of Brussels I:

“On 27 September 1968 the Member States, acting under Article 293, fourth indent of the [EEC] Treaty, concluded the Brussels Convention … as amended by Conventions on the Accession of the New Member States to that Convention … On 16 September Member and EETA states concluded the Lugano Convention … which is parallel to the 1968 Brussels Convention …”

Recital 6 of Brussels I:

“[I]n order to attain the objective of free movement of judgements, it is necessary and appropriate that the rules governing jurisdiction … to be governed by a Community legal instrument which is binding and directly applicable.”
Recital 11 of Brussels I:

“The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in few well-defined situations in which the subject matter of litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make common rules more transparent and avoid conflicts of jurisdiction.”

Article 2 of Brussels I:

(1) “[P]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

(2) Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.”

Article 5(1) of Brussels I:

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

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

(c) if subparagraph (b) does not apply then subparagraph (a) applies.”

Article 68(1) of Brussels I:

“This Regulation shall, as between the Member States, supersede the Brussels Convention, expect as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 229 of the Treaty.”
Article 293 of EEC Treaty

“Member States shall, so far as necessary, enter into negotiations with each other with the view to … [simplify the] formalities governing the reciprocal recognition and enforcement.”
1. Introduction

1.1 Background

The inception of Article 5(1)(b) of Brussels I (“Article 5(1)(b)”) has sparked robust academic debate and will be the subject of further scrutiny below. Article 5(1)(b) was introduced to remedy the shortcomings of Article 5(1) of the Brussels Convention as interpreted by the ECJ.¹ But has Article 5(1)(b) achieved its purpose or is it simply a celebration short-lived?

This thesis serves as a critical analysis of Article 5(1)(b). To answer the afore posed query, inquires will be made into the legislative history of Article 5(1)(b) – exploring it from the lens of the Brussels Convention through to its current form under Brussels I; deliberating on its deficiencies as argued by academics and determining whether these concerns are sometimes misplaced; and ascertaining whether Article 5(1)(b) can in fact be said to have successfully achieved its purpose. After a comprehensive study of Article 5(1)(b) necessary recommendations for legislative reform will also be made.

1.2 A summary of the issues

Before delving into an analysis of Article 5(1)(b), it is crucial that one is acquainted with the issues surrounding this provision. The purpose of highlighting the concerns encircling the provision at the foundational phase of this inquiry is to equip the reader with the necessary tools required to grasp the sequence of the arguments and perhaps form an opinion as to whether the aforementioned goal has been reached.

At the crux of the aforementioned issues, lays the failure by the legislature to provide actual definitions for what constitutes the “place of delivery” in contracts of sale and the “place of service” in contracts of service under Article 5(1)(b).² For purposes of clarity, it is crucial to take cognizance of the fact that Article 5(1)(b) defines where the places of delivery and service are to be determined but does not articulate what will constitute such delivery or service.³ Such a legislative omission appears alarming as it presupposes that the parties are clear on these issues without appreciating the intricate nuances in establishing the delivery or service. In addition to this, it is submitted that such an omission also fails to take into

³See Merett “Place of delivery in International Sales Contracts” 2008 (67 no. 2) The Cambridge Law Journal 244 244-246.
consideration the realities that contracting parties might not be well-versed on such determinations and the consequences that follow.\(^4\) Furthermore, a slightly weaker proposal can be made that these disputes are augmented when parties fail to even agree on a place of delivery of service. However, this argument is merely speculative and will only occur on rare occasions thus it will not be explored further.

Thereafter, the arguments surrounding “characteristic performance” for the purpose of founding jurisdiction in complex contracts will be discussed.\(^5\) Additionally, the trepidations around the limited scope of the Article 5(1)(b) application, within the veracity that it is only applicable to sales and service contracts, will also be briefly discussed. Transitory reference will also be made to the setbacks caused by the application of Article 5(1)(c) of Brussels I and the enigmatic rules provided for under \textit{Wood Floor Solutions Andreas Domberger GmbH v Silva Trade} (“Wood Floor”).\(^6\)

Although these other factors will be investigated, this essay is quintessentially dedicated to the conundrum caused when the defined characteristic performance, in complex contracts of sale or service, is not the performance in dispute.\(^7\) In such cases the jurisdiction is, arguably, misplaced. Consequently, recommendations on how to remedy this situation will be proposed.

1.3 Principles of the Brussels Regime

It is equally vital that the reader is introduced to the principles of the Brussels Regime in its entirety.\(^8\) Similarly to the introduction to the issues surrounding the provision, familiarising the reader with these principles will enable the reader, as they journey through the text, to formulate an opinion on whether the envisaged principles are upheld throughout the legislative progression and the court’s methodology in founding jurisdiction. As a

\(^{4}\) Bernstein “International contracts in European Courts: Jurisdiction under Article 5(1) of the Brussels Convention” 1994 (11) \textit{Tulane European and Civil Law forum} 33 47. In this article it is argued that the parties may not always be aware of additional risks in jurisdiction issues.

\(^{5}\) “Complex contracts are considered to be contracts involving either one obligation or a multiplicity of obligations with multiple places of performance” – Grušić “Jurisdiction in complex contracts under Brussels I Regulation” 2011 \textit{Journal of Private International Law} 1 2.

\(^{6}\) ECJ \textit{Wood Floor Solutions Andreas Domberger GmbH v Silva Trade} C-19/09 (11 March 2010) per \url{http://europa.eu}. 

\(^{7}\) Please note that the discussion in this thesis will be restricted to contracts of sale or service. Therefore, the recommendations which be provided will be limited to these contracts.

\(^{8}\) Please take note that for the purposes of this thesis the Brussels Regime refers to combined effect of the Brussels Convention, the Regulation and the Brussels I Recast.
concomitant of this, the reader will ultimately be able to conclude whether Article 5(1)(b) has
in fact achieved its purpose.

As a point of departure, it is submitted that at the heart of the Brussels Regime lay the
principles of legal certainty and predictability.9 In Owens Bank Ltd v Fulvio Bracco (“Owens
Bank”),10 the ECJ stated that “legal certainty... imbues the whole [Brussels] Convention”.11
This principle was reinforced under Brussels I by Advocate General Bot in Color Drack
GmbH v Lexx International Vertriebs GmbH (“Color Drack”).12 In his judgement, Advocate
General Bot focused the judgment acutely on the objective of promoting the principles of
certainty and predictability and close proximity.13 To further authenticate this submission,
reference can be made to Professor Lupoi who asserts that the traditional approach
throughout the Brussels Regime is that “certainty and predictability of forum are considered
absolute values”.14

Moss argues that “[o]ne of the corollaries of legal certainty is that the practice of so-called
forum shopping should be prevented”.15 An argument can be made that not only does legal
certainty prevent forum shopping but it also functions to promote predictability to the extent
that a defendant will know where he will be sued. The idea that a well-informed defendant
should know where he will be sued is arguably an underlying principle which may be derived
from the core principles of certainty and predictability. This principle was elucidated in
Groupe Concorde v The Master of the vessel Suhadiworno Panjan (“Concorde”)16 and Besix
v Wasserreinigungsbau Alfred Kretzschmar GmbH (“Besix”)17 where the ECJ guided that “a
well-informed defendant must reasonably be able to foresee before which court, other than

9See Hill “Jurisdiction in Matters Relating to a Contract under the Brussels Convention” 1995 (44 no.3) The
International and Comparative Law Quarterly 591 604-607.
10ECJ Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA C-129/92 (20 January 1994) per
11Ibid 61.
12ECJ Color Drack GmbH v Lexx International Vertriebs GmbH C-386/05 (3 May 2007) per http://euro-
lex.europa.eu.
13Ibid 30-35.
15Moss “Performance of Obligations as the Basis of Jurisdiction and Choice of Law (Lugano and Brussels
Convention Article 5(1)(b) and Rome Convention Article 4)” 1999 Nordic Journal of Private International Law
379 384.
16ECJ Groupe Concorde and Others v The Master of the vessel Suhadiworno Panjan and Others C-440/97 (27
17ECJ Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH and Co.KG (WABAG) Planungs-
und Forschungsgesellschaft Dipl.Ing. W. Kretzschmar GmbH and Co (Plafog) C-256/00 (19 February 2002) per
those of the State in which he is domiciled, he may be sued”.18 According to the Schlosser Report, “a potential defendant should be able to predict, with reasonable certainty, which courts may take jurisdiction actions against him”.19 Moreover, this report guides that “a plaintiff should [also] be able to find a court with jurisdiction without having to waste his time and money”.20 Lastly, this principle was reinvigorated in *Custom Made Commercial Ltd v Stawa Metallbau GmbH* (“Custom Made”)21 where the ECJ rejected an alternative interpretation of the place of performance because this might “jeopardize the possibility of foreseeing which court will have jurisdiction and for that reason is incompatible with the Convention”.22

Accordingly, throughout this thesis the question will always remain whether these principles of (a) certainty; (b) predictability; and (c) that the defendant is able to foresee where he will be sued are advanced. These questions are entwined with the primary query of whether Article 5(1)(b) has accomplished its purpose.

2. The Brussels Convention

2.1 The background to the Brussels Convention

When attempting to dissect the legal matrix of Article 5(1)(b), initial reference ought to be made to Article 5(1) of the Brussels Convention as the predecessor of Article 5(1)(b). In light of this, this portion of the thesis will be focused on the history of the Brussels Convention and the interpretation of Article 5(1) of the Brussels Convention when founding jurisdiction. In addition to understanding the Brussels Convention for its historical context that demanded the legislative reform, one ought to note that Article 68(1) of Brussels I instructs that the Brussels Convention remains in force to Member States outside of the EU.23 More importantly, Article 5(1)(a) of Brussels I duplicates the text of Article 5(1) of the Brussels Convention whilst Article 5(1)(c) stipulates that when Article 5(1)(b) is not applicable, Article 5(1)(a) applies.24 The scheme of these provisions arguably results in the residual application of the jurisdictional rules under the Brussels Convention. For this reason, a critical understanding of

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18*Concorde* 24; and *Besix* 24 and 5. See also Moss (n 15) 381.
20Ibid.
22Ibid 18.
23See Recital 2 of Brussels I. “The remaining EFTA members include, Iceland, Norway, and Switzerland. Note, however, that two of the most recent arrivals in the [EU], former EFTA states Finland and Sweden [and most recently Austria], continue to apply the Lugano Convention until their accession to the Brussels Convention has been completed.” See, Bernstein (n 4) 33.
24Pocar Report (n 1) 51.
the Brussels Convention procedure is key as it remains applicable under Brussels I.\textsuperscript{25} Likewise, the wording under Brussels I Recast concerning special jurisdiction remains unchanged. Subsequent to this, a conclusion can be drawn that a thorough understanding of the jurisdictional rules under the Brussels Convention is pivotal as these rules have permeated throughout the entire Brussels Regime.\textsuperscript{26}

Prior to the enactment of the Brussels Convention, the rules relating to jurisdiction were governed by the national laws of each EU Member State. The founding fathers of the EU thought this to be problematic and thus, in an attempt to simplify the procedures relating to recognition and enforcement of judgments and to improve economic integration within the EU, the EEC Treaty was developed.\textsuperscript{27} Article 293 of the EEC Treaty demanded the simplification of the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals.\textsuperscript{28} As a result of this, a “multilateral treaty modelled on traditional bilateral recognition-of-judgment treaties which leave existing national rules on the judicial jurisdiction intact”\textsuperscript{29} − the Brussels Convention, was enacted. The Brussels Convention was signed on 27 September 1968. It served as a “double treaty” because it dealt with both recognition and enforcement of commercial judgments within the EU. For reasons which will not be unpacked in our current study, certain states entered into a treaty called the Lugano Convention. The Lugano Convention was signed on 16 September 1988 and is a parallel convention to the Brussels Convention. The Lugano Convention is applicable to EETA countries and Denmark.\textsuperscript{30} It is essential to note that interplay between the conventions will not be discussed in this dissertation.\textsuperscript{31}

\textsuperscript{25}Ferrari “Remarks on the autonomous interpretation of Brussels I Regulation, in particular of the concept of ‘place of delivery’ under Article 5(1)(b), and the Vienna Sales Convention (on the occasion of the recent Italian court decision)” 2007 International Business Law Journal 83 83.

\textsuperscript{26}Bernstein (n 4) 34.

\textsuperscript{27}Although not evident under the Brussels Convention, reference ought to be made at this point to Recital 6 of Brussels I as it reinforces the need to have a Community instrument to govern jurisdiction.

\textsuperscript{28}Recital 5 of Brussels I. Please be advised that Article 293 of the EEC Treaty was previously, prior to multiple amendments, stood as Article 220. Therefore, various authors may opt to refer to Article 220 as opposed to 293.

\textsuperscript{29}Bernstein (n 4) 34.

\textsuperscript{30}See Article 3 of the Brussels Convention, as it contains these states and clarifies their individual reservations.

\textsuperscript{31}This information was derived collectively from- Article 68 of Brussels I; Recital 5 of Brussels I; Beaumont and Raulus “Update on Private Internal Law in the European Union- 2001” 2002 (96) American Society of International Law Stable 109 109-110; Bernstein (n 4) 31-32 and 34; Bogdan “The ‘Common Market’ for judgements: the extension of the EEC jurisdiction and enforcement treaty to non-Member Countries” 1990 (113 no. 9) Saint Louis University Public Law Review 113 113-116; Burke “Brussels Regulation (EC) 44/2001: Application to Financial Services under Article 5(1)(b)” 2004 Columbia Journal of European Law 1 2; Collins (ed) Dicey Morris and Collins on the Conflict of Laws 2012 (1) 2; Ferrari (n 25) 83-85; Forner “International Jurisdiction in International Contracts: New Art.5.1 Brussels I and the ECJ” 2010 International Company and Commercial Law Review 1 1-2; Gaia “The concept of place of delivery according to Article 5(1)(b) of the Regulation ‘Brussels I’ in the case of distance selling” 2006 The European Legal Forum 1-228 1-228; Gardella
The importance of the Brussels Convention was not only vested in fact that it provided for a uniform basis for the recognition and enforcement of judgements within the EU but also that “a person domiciled in an EU country shall be sued in that country ... [and that] all other courts have jurisdiction over that defendant only by virtue of the rules of the Convention”. This new rule of jurisdiction, which discarded questions of nationality, was arguably vital for the aforementioned unification within the EU and also promoted the free and expedient movement of judgements as demanded by the preamble of the Brussels Convention. This argument is supported when one appreciates that this provision allowed the courts to overlook the idiosyncrasies of each Member State when determining jurisdiction unless in exceptional cases that necessitated such reference to national laws. This logically facilitated a uniform basis for the recognition and enforcement of judgments.

Though this argument, which reflects an autonomous interpretation of the provisions is mentioned here, a comprehensive analysis of these ideals will be detailed elsewhere in this thesis. However, its relevance in this context is to highlight one of the aims of the Brussels Convention or even more acutely − the aim of the entire Brussels Regime which is to refrain from reference to national laws.

For the purposes of this thesis, the definition of Article 5(1) of the Brussels Convention will be subdivided into three parts. These include: (a) “matters relating to a contract”; (b) “place of performance”; and (c) the “obligation in question”. The issues in “matters relating to contract” have been profusely argued and there has been an abundance of case law and guidelines on this matter. It is therefore submitted that due to this abundance, these concerns have been resolved and a study of these issues for our current objectives would be redundant. Accordingly, the current discussion will be engrossed on the interpretation of “place of performance” and the “obligation in question” for purposes of founding jurisdiction.


32Bogdan (n 31) 117.

33See Recital 2 of Brussels I.

34See Magnus and Mankowski Brussels 1 Regulation on Jurisdiction and Recognition in Civil and Commercial matters “The present relevance of the Brussels Convention” (2012) 163-167. For a comprehensive analysis on the issues relation “matters relating to contract”.

35See Recital 2 of Brussels I.
2.2 The methodology of determining jurisdiction

At the precipice of this analysis, it is essential to note that Article 2 of the Brussels Convention provided for the default or general provision in the determination of jurisdiction. This was grounded on the domicile of the defendant. However, in matters relating to contracts, Article 5(1) was accordingly utilised to found special jurisdiction.35

For our current study, it is submitted that there are three approaches for founding of jurisdiction under Article 5(1) of the Brussels Convention namely: (a) the obligation in question approach; (b) the characteristic performance approach; (c) and the autonomous interpretation. The obligation in question method was the basic exploited method whilst the characteristic performance and autonomous interpretation were only considered alternative methods of interpretation under the Brussels Convention.36 Correspondingly, a stern argument arises that these “alternative methods” are far more pertinent under the Brussels I methodology and will accordingly be discussed under the Brussels I discussion.

2.2.1 The obligation in question approach

Although the concepts of “place of performance” and “obligation in question” can be divided into different issues under the definition of Article 5(1) of the Brussels Convention, when adjudicating over jurisdictional matters these concepts are combined to provide a holistic interpretation of this provision. Consequently, in this context, the “obligation in question” refers to the approach employed to determine jurisdiction and should not be confused with the independent concept under the definition.

The obligation in question approach was derived from the interpretation of two landmark cases which resulted in what has been coined the “De Bloos/Tessili approach”.37 A cumulative reading of De Bloos v Société en commandite par Bouyer (“De Bloos”) and Industrie Tessili Italiana Como v Dunlop (“Tessili”) can be summarised to denote that, when founding jurisdiction under Article 5(1) of the Brussels Convention, the courts ought to have: firstly, determined the obligation which gave rise to the claim and, secondly, established the place of performance by reverting “to the conflict of rules of the court first seized or the

35See note 31.
36Hill (n 9) 593.
37This approach is derived from the ECJ De Bloos v Société en commandite par Bouyer (1976) C-12/76 per http://curia.europa.eu and ECJ Industrie Tessili Italiana Como v Dunlop AG (1976) C-12/76 per http://curia.europa.eu cases respectively. See also Bernstein (n 4) 41-42; Collins (n 31) 475; Gaia (n 31) 1-230; Giardina (n 31) 266-267; Hill (n 9) 44; and Vezyrtsi (n 2) 84.
applicable substantive law”. In a similar vein, it is also noteworthy to refer to a later case – *Zelger v Salinitri* (“Zelger”). In accordance with this case, the courts were tasked with an initial consideration of whether the parties had a written or implied agreement pertaining to what would be regarded as the “place of performance”. If there was such an agreement, the courts would simply give effect to the agreement. In the absence of such an agreement the courts would follow a procedure identical to the *De Bloos/Tessili* approach.

In summary, the “obligation in question” approach guided that the jurisdiction will be conferred upon the courts of the place of performance of the obligation in question.

### 2.2.2 Defining the obligation in question

At this juncture, the “obligation in question” refers to the definition under the Brussels Convention and not the *De Bloos/ Tessili* approach. The “obligation in question” has received various connotations which will be summarised below to allow for an all-inclusive analysis and also serve as clarity between its different forms under the definition and approach.

In *De Bloos*, Advocate General Reischl held that “[the] obligation in question is that upon which the corresponding right is based”. The ECJ further concluded that to prevent a multiplicity of fora with jurisdiction, the obligation in question is that which forms the main basis for the plaintiff’s claim. The Jenard Report states that the obligation which is referred to is the “specific obligation” on which the plaintiff’s claim is based. In another case, *Kleinwort Benson Ltd v Glasgow City Council*, the House of Lords guided that there must be an obligation to be performed under the contract and that particular obligation must be in dispute.

Therefore, it can be concluded that the obligation in question under Article 5(1) of the Brussels Convention refers to the obligation which, in layman terms, allows the plaintiff to institute proceedings.

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38Ferrari (n 25) 88.
39ECJ *Zelger v Salinitri* C-56/79 (17 January 1980) per [http://euro-lex.europa.eu](http://euro-lex.europa.eu). See also Bernstein (n 4) 42; and Forner (n 31) 3.
40See *De Bloos* 11-16.
41See *De Bloos* 60.
43*House of Lords Kleinwort Benson Ltd v Glasgow City Council* 1 AC (30 October 1997) per [http://www.publications.parliament.uk](http://www.publications.parliament.uk).
44Ibid 3.
2.2.3 “Centre of gravity” — Establishing the place of performance

Bernstein maintains that, based on “a combination of normative and factual circumstances,” the court where the actual place of performance occurred has jurisdiction to preside over the matter. Following this assertion, a claim can be made that in his argument, Bernstein elucidates the two divergent considerations for what ought to exemplify the place of performance namely – the factual and legal place of performance, which will be harmoniously observed through the case law below.

At the formative phase of this discussion, an argument can be formulated that the ECJ has on multiple occasions blurred the difference between the factual and legal places of performance. This has undeniably resulted in mass confusion on whether it is the factual or legal place of performance which ought to be considered to be the centre of gravity for purposes of founding jurisdiction.

With connotations such as the “actual power of disposal”, “physical transfer”, and “final destination”, a transparent argument would be that the factual place of performance ought to have been considered as the preliminary place of performance for purposes of founding jurisdiction as it epitomises the centre of gravity. However, under the Brussels Convention, the courts implemented a rather peculiar formula when confronted with the issue. As previously stated, in *Tessili* the ECJ held that the place of performance ought to be established in accordance with the law applicable to the contract. Juxtaposed to this, Hill affirms that the conclusion of *Tessili* is that the legal place of performance is “identified according to the factual realities, rather than according to legal niceties”.

These contradicting ideals assist in illuminating the complications in the court’s approach. This is substantiated when one considered that initially the ECJ in *Tessili* seemed to advocate for the legal place of performance whilst a different author deduces, still based on *Tessili*, that it is the factual place of performance which is applied.

The confusion within the ECJ was perpetuated further in *Custom Made*. In this case, Advocate General Lenz importantly guided that the place of performance which ought to be accounted for in a contract of sale, is in respect of delivery and not the payment. Then the

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45Hill (n 9) 597.
46Bernstein (n 4) 45.
47These phrases are referred to in ECJ *Car Trim GmbH v KeySafety Systems SrL* C-381/08 (25 February 2010) 25 per http://euro-lex.europa.eu; and Magnus and Mankowski (n 34)168-171 respectively.
48Hill (n 9) 614.
honourable advocate conceded that the legal place of performance is flawed to the extent that it has the effect of conferring jurisdiction on a court which has no connection with the dispute. Nonetheless, within the same breath, he concluded that the place of delivery which founds jurisdiction is the legal place of performance. Then, he reasoned that the legal place of performance will be when the seller actually has possession of the good, “irrespective of the centre of gravity of the dispute, thus irrespective of factual place of performance”. This line of reasoning may be perceived to be blatantly convoluted. The rationale behind this is based on the fact that in this case, the ECJ accepts that the legal place of performance as inherently defective but still concludes that it ought to be applied. Within the same line of reasoning, it goes on to conclude the actual place of performance is determined to be the “legal place of performance”.

Still on this issue, one may be perplexed by the position taken in respect of the idea the “physical possession” in this case was utilised to determine the legal place of performance when common sense dictates that the “physical” transfer is in fact indicative of the factual performance. Succeeding from this, it is submitted that when referring to the place where the contract “is to be” performed the court refers to the legal place of performance as agreed upon by the parties. Nevertheless, these contradicting ideologies are herein utilised to indicate the issues which demanded the legislative reform under the Brussels Convention. At this cusp of the inquiry, the reader is reminded that earlier an argument was made that the issues under the Brussels Convention permeate throughout the entire Brussels Regime. However, the reader ought to accept to a large extent these issues have been corrected under Brussels I as will be discussed later.

In *Shenavai v Kreischer* (“Shenavai”) ECJ stated that “the place in which the obligation is to be performed usually constitutes the closest connecting factor between the disputed claim and the court having jurisdiction over it”. Hill contends, in reference to the *Tessili* approach, that the applicable law does not always result in the place of performance being the factual place of performance or even have the closest connection to the court.

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49 Custom Made 68.
50 Ibid 80.
51 ECJ Shenavai v Kreischer C-266/85 (15 January 1987) per http://euro-lex.europa.eu.
52 Ibid 243.
53 Hill (n 9) 598.
Kohler proposes the approach adopted under the Brussels Convention to be an “offset”.54 From this background, it is patent that the courts were not always certain of whether the factual or legal place of performance compromised the requisite performance, which further authorised the need for reform.

2.2 Issues that demanded legislative reform

The chief issues besieging Article 5(1) of the Brussels Convention were three-fold. Firstly, and as previously alluded to, the failure by the legislature to define what ought to be regarded as the “place of performance” and “obligation in question” resulted in a multitude of interpretations and caused grave confusion on this matter. Secondly, the corollary of the failure by the legislature to define what comprised the “place of performance” or “obligation in question” was that the courts embraced varying interpretations in relation to this issue. Intimately linked to this failure is the palpable fact that the methodology assumed under the Brussels Convention was crippled at its core. Lastly, the aggregate effect of the above mentioned inadequacies was that the core principles of certainty and predictability were not fostered under the Brussels Convention. Although not in grave detail, these paucities will be expanded on subsequently below.

As previously highlighted, the ECJ in Owens Bank boosted that one of the main objectives of the Brussels Convention is legal certainty.55 An argument can be made that the “obligation in question” theory derogated from this goal. To augment this, Herbert reveals that the “difficulties inherent in this approach [were] undeniable”.56 This argument is further authenticated when one considers the complexities the courts endured when attempting to determine which obligation was referred to and the hurdles the courts faced in determining the “place of performance”. These hurdles were amplified by the failure of the ECJ to actively determine whether it was the factual or legal place of performance which is an issue that ought to have been dispelled with in Tessili. Still on Tessili, an argument can be made that the ECJ ought to have assisted by aggressively maintaining the distinct differences between the factual or legal place of performances. Unfortunately, this issue was not reconciled by the court.

54 Kohler (n 31) 573.
55 See note 10.
56 Bernstein (n 4) 40.
When straying away from these glaring defects, a slightly weaker argument can be introduced that the reference to the *lex causae*, under *Tessili*, as a rule for founding jurisdiction was not within the spirit of the unification of laws in international law.57 This conclusion may be drawn when one considers that when referring to the *lex causae* of the Member State in question, the idea of a unified or autonomous interpretation of the methodology is intrinsically weakened as an element of the national law, which ought to have been shied away from, is included in to the equation.58 Reference to the aforementioned national laws is unquestionably against the ideals of the founding fathers of the Brussels Convention. To buffer up this argument reference can also be made to *Martin Peters v ZuidNerder*59 and *JakobHandte v TraiteMecano*60 in which the European Courts have reiterated that the Article 5(1) of the Brussels Convention should not be interpreted through national law but rather the interpretation should purport to give effect to the Brussels Convention as an independent concept. Likewise, the failures to enhance the principles of certainty and predictability trigger the failure to ensure that a well-informed defendant is able to determine where he will be sue as demanded by *Groupe Concorde* and *Besix*.

Lastly, Hill argues that the fragmentation is even more predominant in complex cases as seen in *Shenavai*.61 He reasons that situations of multiple performances, which may include various breaches that may occur in different contracting states, may not be answered under the obligation in question approach.62 To this extent Hill confesses that under the Brussels Convention, the obligation in question approach was somewhat of an elusive concept which did not answer the “*maxim accessorium sequitur principale* as the principle obligation might not be the obligation in question”.63 When discussing the issue of the obligation in question theory, Hill admits that the obligation in question approach does not adequately satisfy issues which occur in complex contracts particularly when the obligation upon which the claim is based is not the principle obligation.64 If there is anything the reader should concentrate on, it is this assertion as it forms the basis for the conundrum which forms the basis of this dissertation. The blatant misplacement of jurisdiction in complex contracts when the characteristic obligation is not the obligation in dispute remains an issue yet to be answered

57Ferrari (n 25) 89.
58Ibid 91.
61Hill (n 9) 604.
62Ibid.
63Ibid.
64Ibid 599.
even under the Brussels I Regime. If this issue is not curbed by the courts urgently, it will continue to infiltrate the rules of jurisdiction under the Brussels I Recast.

3. Background of Brussels I

Article 5(1)(b) was promulgated to confront issues surrounding aforementioned uncertainties and propel the free movement of judgments.\textsuperscript{65} Professor Takahashi avers that although Article 5(1)(b) “is far from perfect, given that it would be impossible to come up with wholly satisfactory jurisdictional rules for general contractual matters, [it therefore] should be welcomed as it has brought improvements upon Article 5(1) of the Convention”.\textsuperscript{66} On 21 December 2001, Brussels I was signed with the purpose of replacing the Brussels Convention.\textsuperscript{67}

Before delving into a discussion about Article 5(1)(b), it is crucial to remind the reader that like under the Brussels Convention, Article 2 remains the general provision for jurisdiction whilst Section 2 of Brussels I provides for special jurisdiction.\textsuperscript{68} In light of this, an argument can be made that Article 2 of Brussels I establishes the connecting factor which is premised on the defendant to a court where he is domiciled whilst the Section 2 of Brussels I acknowledges that there may be more closely connected factors between the dispute and the court chosen to hear it.\textsuperscript{69} Although Section 2 of Brussels I provides for an extensive list of various guidelines, our discussion is limited to Article 5(1)(b).

Under the advent of this provision, the courts have recognized an autonomous interpretation to founding of jurisdiction.\textsuperscript{70} Gaia avers that the consequence of this is that “it is no longer necessary neither to determine what is the obligation in question or where the obligation is to be performed according to the lex causae … [J]urisdiction is no longer to the concrete obligation forming claim.”\textsuperscript{71} Grušić illuminates that by providing an autonomous interpretation, the definition provided under Article 5(1)(b) for the place of performance applies regardless of the obligation in question.\textsuperscript{72} Beaumont contends that Article 5(1)(b)

\textsuperscript{65}See Recital 6 of Brussels I.
\textsuperscript{66}Takahashi (n 31) 530.
\textsuperscript{67}The background to Brussels I may be derived from Burkes (n 31) 528; Ferrari (n 25) 83; Gaia (n 31) 1-228; Grušić (n 5) 1; Vezyrtzi (n 2) 83; Takahashi “Jurisdiction in matters relating to contract: Article 5(1) of the Brussels Convention and Regulation” 2002 European Law Review 530 530; and Witz (n 31) 325-326.
\textsuperscript{68}Ferrari (n 25) 86.
\textsuperscript{69}Ibid.
\textsuperscript{70}Ibid.
\textsuperscript{71}Ibid.
\textsuperscript{72}Ibid.
provides a factual basis for determining the place of performance. Parallel to Beaumont’s assertion, an argument can be made that the ambiguities surrounding whether it is the factual or legal place of performance that is required are now settled. As an aside, a further argument can be made that by dispelling of these uncertainties, Article 5(1)(b) has obvious advantages. These advantages will be explored at a later stage of our inquiry.

When one studies the case law of the ECJ, a basic conclusion can be drawn that the De Bloos/Tessili approach has been discarded with by Car Trim GmbH v KeySafety Systems SrL (“Car Trim”)⁷⁴. Although this argument seems somewhat of a bare statement, it will be discussed in further detail below.

Though prima facie a better approach, the question remains whether the Article 5(1)(b) has sufficiently improved the position in relation to the rules of jurisdiction.

### 3.1 Methodology followed

The methodology under the Brussels I regime can be divided into two distinct situations namely: the method under single performance and the methods under complex issues. A joint reading of the case law can be summarised to guide that the courts ought to consider the place of delivery from the terms of the contract and then to give regard to the autonomous interpretation as demanded by Recital 11 of Brussels I.⁷⁵ As previously stressed, demanding an autonomous interpretation results in the courts having to refrain from referring to the lex causae. In the event that this is not possible, delivery ought to be concluded to be the actual place of delivery. This methodology will be reviewed with reference to the appropriate cases below.

### 4. Article 5(1)(b)

#### 4.1 Single performance

In disputes dealing with a single place of delivery, an argument can be made that the provision from a literal reading of it, is eloquent in its approach. However, the potent question remains whether the passage of risk characterises the place of delivery.⁷⁶ To dispel

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⁷³“For the determination of place of performance [Article 5(1)(b) of Brussels I] adopts a factual test”. This statement was made in reference to Car Trim on the discussion of Brussels I cases per http://www.dutchcivillaw.com/content/brusselsone033.htm. See also Beaumant (n 31) 110.


⁷⁵See Color Drack 19.

⁷⁶Ferrari (n 25) 83; Vezyrtzi (n 2) 84.
any of the previous anxieties, the ECJ in *Electrosteel Europe SA v Edil Centro SpA* ("Electrosteel")\(^{77}\) provided guidelines about such places of delivery in cases of single performance. The court guides that one ought to determine the place of delivery from the terms of the contract and if this is not possible, the place of physical transfer is deemed to be the place of delivery. This interpretation is in line with the views of Magnus and Mankowski. The authors argue that where delivery has not taken place, the place where delivery ought to have taken place is in terms of the contract is to be considered. Then, in congruence with *Electrosteel*, the authors proclaim that in matters where the factual delivery has been effected, such place is regarded as the place of delivery for the purposes of this provision.\(^{78}\)

Authors such as Ferrari, Witz and Vezyrtzi have copiously argued Article 5(1)(b) to be a patent disappointment.\(^{79}\) Although these disgruntled authors are rightfully disappointed by the lack of clarity in the drafting of this article, these emotions cannot suffice to cast away Article 5(1)(b) as a dismal failure. In *Electrosteel*, the ECJ affirmed that the final place of delivery is where it was intended to be “under the contract”. Fawcett, Harris and Bridge concluded that when the legal and factual place of performance are in conflict, the courts to must assume the factual place of performance to be the required performance.\(^{80}\) In light of this, a suggestion can be advanced that on this basis Article 5(1)(b) remains successful in furthering the principle of certainty underlying the convention.

### 4.2 “Moving towards characteristic performance”\(^{81}\)

“Complex contracts continue to cause practical problems.”\(^{82}\) From this statement, it can be deduced that even under the Brussels I Regime there remains multiple disagreements surrounding the rules of founding jurisdiction in complex cases. The clashes here pertain to the question of what actually suffices as the place of delivery or service. These concerns are expressed within the reality that although the legislature has defined where the place of delivery is to be considered, thus disposing of the issues regarding the factual or legal place of delivery or service, the question remains what compromises such service or delivery. As earlier accentuated, the question regarding whether the passage of risk confirms the finality of

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\(^{78}\)Magnus and Monkowki (n 34) 171-172.

\(^{79}\)See Ferrari (n 25) 93; Witz (n 31) 332 and Vezyrtzi (n 2) 83.

\(^{80}\)Fawcett and Bridge argue that in the event that the place of delivery cannot adequately be extracted reference ought to be made to the rules under the Incoterms as guidance on this matter. See Fawcett, Harris and Bridge *International Sale of Goods in the Conflict of Laws* (2005) 3.179.

\(^{81}\)Moss (n 15) 390.

\(^{82}\)Grušić (n 5) 5.
the place of delivery or service also remains unanswered. These questions will be discussed through the case law systematically below. Also, it is vital to remember that these issues are customary within complex contracts and have largely been resolved in single performance cases as previously concluded under Electrosteel with the exception of the questions on the passing of risk.

The first case to consider the interpretation of Article 5(1)(b) is Color Drack. The facts of this case are as follows: Color Drack GmbH ("Color Drack") was an Austrian company which purchased goods from Lexx International Vertriebs ("Lexx"), a German company. According to their contract, Lexx was to deliver the goods to Color Drack customers in different places within Austria. Color Drack paid the full price as per agreement. However, Lexx failed to deliver all of the goods. This case is therefore concerning the non-performance of an obligation by Lexx. Consequently, Color Drack brought a payment action against Lexx in the court where Lexx had its registered office to be reimbursed for the unsold goods. The District Court ruled in favour of Color Drack on the question of jurisdiction. Lexx appealed on the basis that the District Court lacked territorial jurisdiction to adjudicate over the matter. Nevertheless, for our purpose, the relevant legal question was: in complex cases, which of the "performances" ought to be regarded as the place of performance for the purpose of Article 5(1)(b)?

The ECJ held that in cases where multiple performances occur in the same Member State, a single court ought to adjudicate over the entire matter.83 To determine which court has such jurisdiction, the court is required to implement the characteristic performance test to confer jurisdiction upon a single Member State court. The test of characteristic performance is to be determined on the basis of economic criteria.84 Such economic criterion is to be tested on the delivery and not payment. Thus, the delivery which has the most monetary value is to be regarded as the characteristic. As a result, the court within which such performance occurred has jurisdiction over the matter. Notwithstanding this, the ECJ also guided that in an event that the characteristic performance cannot be determined from the facts, for example if

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83 Color Drack 38.
84 Please be alerted to the fact that although the ECJ has customarily used the characteristic performance to determine the law applicable under Rome I, in this context this test was adopted for purposes of founding jurisdiction. See Hill (n 9) 509.
performances are of the same economic standing, the plaintiff has the option to elect either court to hear the matter.\textsuperscript{85}

It is equally imperative to refer to the \textit{obiter dictum} in \textit{Color Drack} that Article 5(1)(b) is applicable regardless of whether the matter is concerning a single or complex contract.\textsuperscript{86} As well, to uphold the autonomous interpretation, the ECJ held that no reference ought to be made to the laws of the forum court in relation to jurisdiction as Article 5(1)(b) is independently capable of ascertaining such jurisdiction. Supplementary guidelines to be considered also include: (a) the emphasis by the ECJ that even in complex cases, one court ought to adjudicate over a case involving the same course of action and parties; (b) the question of close proximity and the existence of a close link between the course of action and the court with jurisdiction is imperative and should always be enforced; (c) and the principles of certainty and predictability should always be encouraged.\textsuperscript{87}

While \textit{Color Drack} signifies monumental growth in complex cases, the guidelines required an improvement as they were restricted to complex cases where delivery ensued from a single Member State. Succeeding this, the ECJ was confronted with the issue of complex cases in which performance occurs in different Member States. \textit{Peter Rehder v Air Baltic Corporation} (“\textit{Rehder}”)\textsuperscript{88} relates specifically to this issue. Mr Rehder was an individual domiciled in Germany and Air Baltic was a Latvian airline. Mr Rehder had booked a flight from Munich to Vilnius in Lithuania but the flight was cancelled. Subsequent to this, he instituted proceedings against Air Baltic for compensation. Even though the case had different facets of concern such as the question of whether the case fell within the ambit of Article 5(1)(b) and consumer protections, our discussion will be restrained to the imparted guidelines relating to complex contracts under the auspice of Article 5(1)(b). Hence, the principle that can be extracted from \textit{Rehder} is that in complex contracts within different Member States the rules regarding characteristic performance as determined in \textit{Color Drack} are applicable. Moreover, in the event that the characteristic performance cannot be determined, the plaintiff has the option to litigate in the court of his choice bearing in mind the requirement of close proximity. Consistently, the ECJ also pronounced that the place of the main provision of

\begin{flushleft}
\textsuperscript{85}\textit{Color Drack} 30-40.
\textsuperscript{86}Ibid 38- 39.
\textsuperscript{87}Ibid 30- 35.
\textsuperscript{88}ECJ \textit{Peter Rehder v Air Baltic Corporation} C-204/08 (9 July 2009) per \url{http://curia.europa.eu}.
\end{flushleft}
services under a commercial agency contract was “the place where the agent was to carry out his work on behalf of the principal”. 89

The most recent in the series of cases discussing Article 5(1)(b) is *Wood Floor*. The facts of this case are the following: Wood Floor Solution Andreas Domberger GmbH (“Wood Floor”), a company which was seated in Austria, entered into a contract for the provision of services with Silva Trade, a company which was seated in Luxembourg. The companies entered into a commercial agency contract which was subsequently terminated. 90 As a result of this, Wood Floor instituted action against Silva Trade in Austria. For our purpose, the relevant question was whether the performance in Austria could be said to be characteristic in light of *Color Drack* and *Rehder*. 91 The ECJ held that the characteristic service is to be determined by “the place where the agent was to carry out his work on behalf of the principal, consisting in particular in preparing, negotiating, and where appropriate, concluding transactions for which he has authority”. 92 In addition to this, the ECJ guided that if it was not possible to determine such a characteristic place of service, then place where the agent “has in fact for the most part carried out his activities in the performance of the contract”, 93 should be regarded as the performance in question. The courts also guided that the close proximity test should always be upheld and that the main provision of service suffices to meet this test. 94

Contrasted with *Color Drack* and *Rehder*, the ECJ went on to conclude that in the event that the characteristic performance cannot be determined the court with jurisdiction is that where the agent was domiciled. This shocking approach is antagonistic to the pattern derived from *Color Drack* and *Rehder* to the extent that in the absence of a characteristic performance, the ECJ had previously held that the plaintiff had a choice between courts which ought to be guided by the underlying principle of close proximity. This case is even more uncharacteristic because it did not consider the factual place of performance where it “actually occurred” as one would have anticipated or even the domicile of defendant in as demanded by Article 2 of Brussels I.

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89Ibid 34.
90Ibid 10.
91Ibid 31.
92Lupoi (n 14) 5.
93Ibid 6.
94Wood floor 33.
The final noteworthy case is *Car Trim*. In this case, Advocate Mazák was tasked with the determination of whether a contracts for components, which are supplied for the purpose of manufacturing goods, can to be classified as contracts of goods or service under Article 5(1)(b) and what comprised the place of performance in such contracts. Although this case dealt largely with the issue of the classification of such a contract to determine whether it fell under the realm of Article 5(1)(b), for the purposes of our current discussion this case is utilised to further regurgitate that the characteristic performance signifies the place of delivery or service and should be determined by the test of closest proximity. Also in *Car Trim*, the ECJ held that in matters dealing with agency, the agent who performed the obligation which characterises the obligation constitutes the place of performance for purposes of Article 5(1)(b). As an aside, a weak submission can be made that *Car Trim* is also illuminative of the trend towards favouring the factual place of performance under the current Brussels I Regime.

Additionally, the ECJ attempted to circumscribe what actually compromises as the performance in question. The ECJ achieved this by resolving that in the event that the place of performance is impossible to establish without reference to the *lex causae*, the place of performance it to be regarded as “the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination”. Pursuant to this case, an argument can be made that the issues around the factual or legal place of performance in complex cases have been resolved and might now be considered obsolete.

5. Support for Article 5(1)(b)

Burkes argues that Article 5(1)(b) “kills two birds with one stone … as it determines simultaneously the forum and the law in circumstances where the default rule of Rome I applies”. The epitome of the achievement under Article 5(1)(b) is vested in the fact that the legislature actively took progressive steps by defining where the places of delivery or services are to be considered. Cogently linked to this achievement is the requirement that such places of

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95 *Car Trim* 26.
96 Burkes (n 31) 9-10.
97 This is extracted from the text of Article 5(1)(b). It is crucial to note that this advantage is subject to criticism for reasons that will be dissected elsewhere in essay. However, for current purposes it is accepted as an advantage.
performance or service are to be given an autonomous interpretation. Fawcett, Harris and Bridge tender that the underlying autonomous interpretation demanded by Recital 11 of Brussels I results in no reference to the *lex causae*. The progression from these two new legislative steps is advantageous because the courts do not have to embark on a frivolous and confusing task to determine what constitutes the place of performance – is it the factual or legal performance that ought to be accounted for – or even more tedious, what does the *lex causae* provides about which performance is to be considered. This process has arguably been simplified as the courts are merely required to consider the place of performance “under the contract” as directed by Article 5(1)(b) and afford the contract an autonomous interpretation of such a place. In the event that this may be impossible to obtain, the courts may decide that the place where the goods were actually delivered is conclusive as seen in the case law previously discussed.

From the abovementioned legislative growth, a submission can be made that the underlying values of certainty and predictability for the purposes of jurisdiction are enhanced. This argument is supported when reference is made to the fact that in providing the guidelines on where the place of performance is to be assumed, the plaintiff will be readily able to determine in which court to institute litigation. Consequent to this, a well-informed defendant will also be able to determine where litigation will ensue. Intertwined to this, the principles of certainty and predictability are also advanced.

In addition to this, Magnus and Mankowski argue that the flagrant advantage of demanding an autonomous interpretation is that there is now a unified system of the cases relating to jurisdiction. In light of this, an argument can be presented that this also filters into the prevention of forum shopping because if there is unity throughout the different jurisdictions, the litigants do not have the incentive to forum shop.

“There should be … a close link between the court and the action.” Witz argues that the place of performance under Article 5(1)(b) will often satisfy the yardstick of close proximity. Emanating from this, an obvious argument can be made that Article 5(1)(b) may be perceived as a success to the extent that it promotes the requirement of close

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98 See Fawcett, Harris and Bridge (n 80) 3.177; Wood Floor 5 and 38; Car Trim 5; and Color Drack 3.
99 Wood Floor 1.
100 Magnus and Mankowski (n 34) 100.
101 See note 15.
102 Recital 12 of Brussels 1.
103 Witz (n 31) 329.
proximity as required by the underlying values of the Brussels Regime. Additionally, it is submitted that through the advancement of the close proximity requirement the values of certainty and predictability are again also perpetuated. This may be examined within the veracity that when the characteristic performance which is presumed to have the closest connection is regarded as the performance to be considered, a well-informed defendant and plaintiff are able to determine where litigation will ensue and consequently the requirements of certainty and predictability are encouraged.

According to Grušić, “Brussels I … has considerably affected the allocation of jurisdiction in complex contracts”. The learned author centres his conclusion on the fact that by disposing of the De Bloos/ Tessili approach which was an approach riddled with uncertainty and adopting the new regime, the promulgation of Article 5(1)(b) is indicative of a step in the right direction. It is essential to note that Grušić does, however, confess that Article 5(1)(b) is not perfect but its imperfections may be perfected through the future interpretation by the courts. This position embodies the ideals adopted in this thesis and will be studied further when the recommendations are made. However, for current purposes a conclusion can be drawn that to the extent that it has been argued above, Article 5(1)(b) is regarded as a success.

Magnus and Mankowski submit that provision for the characteristic performance results in “no split between the different obligations that occur”. This statement highlights the Color Drack rule that one court shall preside over the entire matter. From this, a submission may be made that the characteristic performance test under Article 5(1)(b) is advantageous to the extent that it promotes expedient dispute resolution and fosters the principles of certainty and predictability by ensuring that the case is only entirely adjudicated over in one court. This standpoint is taken within the authenticity that it will be easier to determine jurisdiction if the litigants are able to foresee that only one court will adjudicate over their case. Intimately linked to this, it is echoed that in so doing the incentives to forum shop are also reduced.

In conclusion, reference may be made to the text of Article 5(1)(b) which allows that this provision will be applied unless “otherwise agreed”. The reader is enticed to deduce that in the absence of the parties exercising their autonomy, by failing to agree on which court has jurisdiction over their matter in terms of their contract, Article 5(1)(b) bridges the gap of

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104 Grušić (n 5) 7.
105 Ibid 17.
106 Magnus and Mankowski (n 34) 162.
determining the requisite jurisdiction easily and effectively. As a result of this, an argument can be made that the approach under Article 5(1)(b) bolsters the values of certainty, free movement of judgements and a speedy legal system. Therefore, Article 5(1)(b) may respectively be perceived as a milestone in jurisdictional rules.

6. A celebration short-lived?

As previously insinuated, Ferrari, Witz and Vezyrtzi overtly argue Article 5(1)(b) to be a disappointment. Ferrari doubts that the provision has actually simplified the jurisdictional rules while Witz poignantly states that the Article 5(1)(b) is “deeply regrettable”. Although disappointed to a lesser degree, Vezyrtzi argues that Article 5(1)(b) has only partially remedied the issues encapsulated in the jurisdictional rules. In *Concorde*, Advocate General Colomer referred to Article 5(1)(b) as solving the Brussels Convention regime by “circumvention”. At the same time, Gardella and Brozolo argue that the rules under Brussels I are “rigid … and the rigidity of the system … is in line with civil law but rather alien to the common law approach”. However, with respect, proposals will be submitted that these concerns are slightly misplaced as they have been thoroughly and successfully dealt with by the ECJ as will be assessed below. For this reason, the issues surrounding Article 5(1)(b) will be independently stated and attempted to be systematically resolved below.

In the first place, it is fundamental to note that the main issues surrounding Article 5(1)(b) have been broadly echoed throughout this thesis to include: (a) the failure by the legislature to provide actual definitions for what constitutes “place of delivery” in contracts of sale and the “place of service” in contracts of service; (b) the limited application of the provision; (c) the residual reference to the *lex causae*; (d) and the fact that the provision does not provide guidelines on how issues relating to non-performance are to be considered.

6.1 Failure to provide a definition

The failure to provide what actually constitutes the aforementioned places of delivery or service is a concern which is two-fold. In the first place, one is reminded that although the place of performance is accounted for, what actually operates as such a delivery remains unanswered. On the other side of this spectrum lays the idea that when the courts are unable

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107 See note 79.
108 See *Concorde* 1-6307. See also Burkes (n 31) 15.
109 Gardella and Brozolo (n 31) 614.
to determine the place of performance, the residual effect of such failure is reference to the
*lex causae* in terms of Article 5(1)(c).\(^\text{110}\)

Vezyrtzi argues that Article 5(1)(b), by failing to provide for a definition, does not simplify
the rules of jurisdiction under Brussels I.\(^\text{111}\) Gaia submits that by failing to define “delivery”,
Brussels I has unduly burdened the courts with the determination of such a place of
delivery.\(^\text{112}\) When discussing the first aspect of the aforementioned dispute, it may be
suggested that by failing to lucidly stipulate whether the factual or physical delivery is to be
considered as the actual performance which is to be considered, the legislature did in fact tilt
the scales of certainty and predictably on these issues. However, a stronger argument can be
made that this failure has been resolved by the courts who have interpreted this provision in
relation to cases with a single performance such as the ECJ in *Electrosteel*. This tranquillity
was initially achieved in the cases of *Color Drack* and *Rehder* in relation to complex
contracts but was later quivered in *Wood Floor* where the ECJ diverted from the guidelines
that were declared by the courts in previous cases.\(^\text{113}\)

Compatibly, although *Wood Floor* is admittedly peculiar, the view taken under this case may
be utilised as evidence of the effects of leaving this place of performance to be interpreted by
the courts. As previously stated, *Wood Floor* is additionally unusual as it applies the domicile
of the claimant as opposed to the generally accepted domicile of the defendant. However,
this perspective has been seen to be unique to *Wood Floor*. A complete understanding of
these issues allows one to conclude that the omission on the part of the legislature to provide
for adequate guidelines on this matter is a disappointment but it does not permit one to
completely write off Article 5(1)(b) as failure.

On the issue of the residual reference to the *lex causae*, as a result of the application of
Article 5(1)(c), a stronger argument can be made that to this extent Article 5(1) is a
disappointment. This argument is grounded on the fact that Brussels I was promulgated with
the aim of promoting uniformity within the EU and the undertaking towards somewhat of
supranational guidelines on jurisdiction.\(^\text{114}\) Consistently, Article 5(1)(b) was enacted with the
goal of disposing the tedious and vague nature of the Brussels Convention process. Thus, the

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\(^{110}\) Ferrari (n 25) 88.
\(^{111}\) Vezyrtzi (n 2) 83.
\(^{112}\) Gaia (n 31) 1- 229.
\(^{113}\) See argument under “Movement to characteristic performance”.
\(^{114}\) See Recital 2 of Brussels I.
residual reference, in the event that the matter falls outside the scope of Article 5(1)(b), seems confusing as it arguably prolongs the judicial process and intrinsically defers from this goal envisaged under the Brussels I regime. Therefore, when confronted with the issue of residual reference to the Brussels Convention, one cannot help but agree with the aforementioned concern that Article 5(1) causes grave disappointment. Practical reference of this rather peculiar situation can be traced in *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst (“Falco”)*. In this case, this deficiency was corroborated when the ECJ held that in the event the contract does not fit the parameters of Article 5(1)(b), and is not a defined contract under Article 5(2), such a contract will be governed by the rules of the Brussels Convention in terms of Article 5(1)(c) of Brussels I. Article 5(1)(c) instructs that the matter to be governed by Article 5(1)(a). As earlier explained, Article 5(1)(a) is identical to Article 5(1) of the Brussels Convention. Therefore, because this perpetuates the application of the methodology under the Brussels Convention, reference to the *lex causae* can be concluded to be foundationally flawed as it does not comply with the autonomous interpretation as boosted by Recital 11 of Brussels I.

On the converse of this argument, a weak submission may be introduced that that because Brussels I operates parallel to the Brussels Convention in non-EU states perhaps residual reference to the methodology employed under the Brussels Convention is not completely startling. To support this argument reference may be made to Article 68(1) of Brussels I which requires a level of synergy between Brussels I and the Brussels Convention. Therefore, such residual reference may be argued to be within the spirit of continuance between the two treaties. Nevertheless, this argument is largely speculative and may be subject to further scrutiny. So, for our current purpose, the predominant opinion remains that such as it currently stands the provision is a failure in this regard.

Even in *Scottish & Newcastle International Ltd v Othon Ghalanos*, the Supreme Court of Judicature Court of Appeal held that “when the places of delivery differs factually from the contract, it ought to be interpreted to mean that the intended place of delivery rather than good’s destination as the … [place of delivery]”. Although a weak argument, this case remains indicative of the fact that there might still be dispute surrounding whether it is the

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116 Ibid 3.
117 See Magnus and Monkowi (n 34) 27-28. See also *Falco* 3.
118 Supreme Court of Judicature Court of Appeal *Scottish & Newcastle International Ltd v Othon Ghalanos* (20 December 2006) per [http://www.publications.parliament.uk](http://www.publications.parliament.uk).
factual or legal place of delivery which is considered. Before proceeding to the next phase of this inquiry, it is vital to note that based on the aforementioned grounds alone, it would be unfair to conclude that Article 5(1)(b) is a complete failure. To bolster this argument, reference ought to be made to the multiplicity of cases such as Electrosteel, Color Drack and Rehder discussed above where the courts have made a conscious attempt to encourage the desired values of certainty and predictability when providing the guidelines. Therefore, again, a well-informed defendant can arguably ascertain where he may be sued and uniformity within the rules of jurisdiction is ensured.

Lupoi submits that Car Trim is at risk of being the subject of future scrutiny as it leaves open the questions of the meaning of “otherwise agreed” in terms of Article 5(1)(b) and whether the physical transfer of the good demands that all the goods as agreed upon ought to have been transferred or does partial delivery suffice. With respect, this argument does not suffice to entice one to conclude that the Car Trim judgement did not enhance the interpretation of Article 5(1)(b) nor does it permit any licence to cast Article 5(1)(b) as a complete disappointment. In light of this conclusion, Lupoi’s submission will not be further explored.

The issue of prime importance which may be derived here is the knowledge of the issues caused by the application of Article 5(1)(c). This provision is incongruous as it encourages reference to substantive laws which derogates from the unification of international law and recommendations on this provision will be provided for below.

Hence, with the exception of the application of Article 5(1)(c), Article 5(1) with the inclusion of Article 5(1)(b) can once again be concluded to be a progressive step in this sphere of law.

6.2 Limited scope of application

Professor Takahashi avers that “the merit of the subparagraph (b) will not be thwarted unless the parties are clearly conscious of it. When “Article 5(1)(b) … is not applicable, by virtue of Article 5(1)(c), this leads one to apply subparagraph (a) with the consequence that one will resort to rules applicable under the Brussels Convention.” These two averments not only reintroduce the defect caused by the residual application of the lex causae under Article

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119 Lupoi (n 14) 6.
120 Vezyrtzi (n 2) 87 and Ferrari (n 25) 538.
121 Takahashi (n 67) 538.
122 Ferrari (n 25) 84.
5(1)(c) but also illustrate the two main disputes surrounding the limited scope of application of Articles 5(1)(b).

The limited application of Article 5(1)(b) has further been highlighted as a concern under the Pocar Report as it is only applicable to the particular issues as highlighted by the provision and leaves a lacuna of confusion to matters that do not fall within the parameters of the provision.123 Again, as extricated from Falco, the principle that if the contract is not within these defined parameters it will be governed by the Brussels Convention. This alone is tantamount to further derogation from the unification of the laws in relation to jurisdiction.124 Witz further questions whether Brussels I should “abandon the specific cases of jurisdiction and stick to the general rule that the tribunal [or court] of the defendant’s domicile [should have] jurisdiction”.125 On these issues, it is submitted that there are various defined matters which fall within the protection of Section 2 of Brussels I. For the remaining cases they are governed by the default rule founded on the domicile of the defendant in terms of Article 2. Pursuant to this, an argument can be made that the aforementioned issues of limited application can be remedied through interpretation and the issues are arguably, as presented here, simple to reconcile.

Finally, Hill also proposes that to the extent that Article 5(1)(b) is seemingly focused on issues surrounding the performance actually occurring and the question remains whether in cases of non-performance what avenues the plaintiff has on this issue, it is a failure.126 With respect, this argument is somewhat overstated and unreasonable. This outlook is premised on the fact that one cannot reasonably have expected the legislature to cover this expressly within the text of the provision. Progressing from this declaration, it is submitted that to the extent that Article 5(1)(b) assigns jurisdiction to courts where it “should have been delivered”, it does in fact embrace cases of non-performance. This proposal is authenticated when one simply acknowledges that by providing for the place where delivery should have occurred under the contract, in cases of non-performance jurisdiction will be conferred to the court where the delivery ought to have occurred under the contract.

123 Pocar (n 1) 51.
124 Grušić (n 5) 8.
125 Witz (n 31) 328.
126 Hill (n 9) 615.
7. The conundrum

Let us consider the following scenario. Company A and B contract in London for a number of chandeliers to be delivered: ten to Budapest (Hungary), five to Marcali (Hungary) and two to Novo Mesto (Slovenia). In accordance with the contract, B delivers the chandeliers but the chandeliers delivered in Marcali and Novo Mesto are defective. Under the current regime, through Color Drack, the courts in Budapest will have jurisdiction to hear this matter as it is the characteristic performance based on the economic weighting test. This seems disturbingly anomalous because from the onset Budapest has no apparent connection to the dispute. These “conundrum cases” form the bedrock of this dissertation and will thus be further explored below.

The aforementioned scenario is disturbing because the goods delivered in Budapest are not in dispute. In light of this acknowledgement, the core issue in these “conundrum cases” is the misplacement of jurisdiction under the current regime. As previously echoed, the ripple effect of such misplacement is that the underlying values of certainty and predictability are not advanced. An argument can be made that in this regard, there is a desperate need for reform. Before querying this further, it is essential to note that the recommendations that will be discussed are largely speculative and are open to further scrutiny. The approach to be effected can be perceived as somewhat of a reformed “obligation in question” approach to the extent that the inquiry will be limited to the particular claims in disputes. Also, to the degree provided for above throughout this dissertation, Article 5(1) of Brussels I may be concluded to be wide enough to cover a wide spectrum of issues and for this reason the recommendations will be limited to the abovementioned conundrum.

8. Recommendations

The recommendations which will be provided below can be divided into three segments namely: (a) a simplistic approach to the conundrum; (b) refraining from Wood Floor; (c) and repealing Article 5(1)(c).

8.1 “A novel interpretation of Article 5(1)(b) – the conundrum”

A simplistic approach to this analogy would be to find the characteristic approach still premised on economic standards but in relation to the disputed claims. This simplistic

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127 This argument based on the scenario provided for in the International Commercial Law Exam (June 2012; University of Johannesburg).
approach will henceforth be referred to as the “novel interpretation”. Continuing from the aforementioned example for the “conundrum cases”, in terms of this novel interpretation, it is submitted that the courts in Marcali would have jurisdiction as it has the most economic weighting between the disputed claims being Marcali and Novo Mesto.

Authority for this approach can be found in the Moss article that referred to the historic position, under the Brussels Convention, which asserted that the obligation in question was the “obligation upon which the plaintiff’s claim is based”. Following this line of reasoning, an argument can be made that in our current scenario the obligations which would give rise to the plaintiff’s claim would be those in Marcali and Novo Mesto. Thereafter, when the aforementioned “novel interpretation” is applied, the characteristic performance between the two obligations, still based on economic criteria, is that in Marcali. Therefore, the court in Marcali would have jurisdiction over this matter.

As previously stated, Hill vigorously argued that in the case were the factual centre of gravity is not necessarily the characteristic performance then jurisdiction is misplaced. To eradicate Hill’s discomfort, the current proposal will arguably ensure that the disputed claims in fact signify the centre of gravity and thus jurisdiction will not be misplaced. Support for this argument may be further enhanced when reference is made to Professor Takahashi’s article which explains that under the Brussels Convention, the determination of the “obligation in question”, in respect of delivery of defective goods, was characterised by the location the witness and of evidence involved in the case. In light of this, it is submitted that because the witnesses and evidence would be located in Marcali, the centre of gravity will be in Marcali. Ensuing from this, the test of close proximity will also be satisfied as the factual occurrence of the dispute is closely connected to Marcali.

The dominant advantage of this approach is that it promotes certainty and predictability to the extent that the parties involved will easily be able to determine jurisdiction. This is due to the fact that it would be anomalous to found jurisdiction to the courts in Budapest as they are not directly linked to the dispute and the parties, who might have limited knowledge on issues of jurisdiction, could not reasonably be required to anticipate having to litigate in Budapest. Moreover, it is submitted that requiring such jurisdiction will not be cost effective as it

128 Moss (n 15) 381. See also Custom Made 14.
129 Takahashi (n 67) 544.
requires travel from the parties and might give rise to the courts arguing issues of *forum non conveniens* thus *inter alia* promoting forum shopping.\(^{130}\)

While on the issue of factual connection to the dispute, an argument can be made that in cases such as *Electrosteel*, where the ECJ ruled that when there is a disparity between the factual and legal places of performances, the courts should hold that the factual place of performance is the performance in question. Though *Electrosteel* dealt with single performance, there is no reason to stray away from this line of reason in complex cases. Opting for the factual places of performance is also advantageous because it meets the close proximity test and the centre of gravity. Succeeding these advantages, it is submitted that by preferring the factual place of performance, the methodology presented to resolve the conundrum is innately advantageous.

It is noteworthy to consider that, within this context reference to the Brussels Convention, by utilising somewhat of an “obligation in question” like approach, cannot be seen as a regression in this matter considering that its application is limited to the factually disputed claims referred to. Besides, the reference to the economic criteria in these issues is within the spirit of the current regime. This recommendation is supported by the fact that this approach is in line with the autonomous approach demanded by Brussels I as the courts would be giving a simplistic approach without reference to the *lex causae*.

Importantly, the aforementioned approach should only be applied abnormal “conundrum” cases. The need for this legislative reform should take the form of guidelines for interpretation rather than changes to the wording of the provision. The rationale for this is founded in the fact that wording of this provision remains the same under the Brussels I Recast, thus it would be futile to recommend that the wording be converted. Providing guidelines is seemingly the most effective manner to remedy the current issues. On the other hand, the legislature may also expressly provide a definition for what ought to be regarded as the place of performance or expressly state that in cases where the factual and legal places of performance are in dispute, the factual places of performance are to be considered as the disputes at issue. However, it is submitted that this seems somewhat tedious and may be adopted in the form of interpretive guidelines rather than amendments to the text.

\(^{130}\)Magnus and Monkowi (n 34) 542-549.
8.2 Refraining from *Wood Floor*

First, when adjudicating over the issues pertaining to the limited scope of Article 5(1)(b), it is submitted that the courts must interpret contracts that seem to fall outside the scope of Article 5(1)(b) in accordance with the *Color Drack* and *Rehder* guidelines. Practically, this would provide that the tests for characteristic performance or the choice of court in conjunction with the close proximity requirement being adopted in the event that the case seemingly does not fall within the scope of Article 5(1)(b). Also, in cases of single performance, the courts should simply follow the guidelines as articulated in *Electrosteel*. This recommendation is founded on the idea that, if such a system is followed, the overarching principles of certainty and predictability will be sustained.

In the same way, it is submitted that the courts should refrain from the dictum in *Wood Floor* with regards to favouring the domicile of the plaintiff in the event that the characteristic performance is impossible to determine.\(^{131}\) The reason for this caution is based on the fact that such a rule violates the basic rule to jurisdiction as accounted for under Article 2 of Brussels I and it is strange and leads to considerable uncertainties on this matter. Therefore, the courts are cautioned to return to the guidelines provided for under *Color Drack* and *Rehder*. Besides, the courts should simply refer to a default provision that the defendant’s domicile ought to be given jurisdiction in this matter when the disputes cannot be resolved under the *Color Drack* and *Rehder* approach.

Support for this argument is founded on the fact that the above-mentioned recommendation reinforces the principle of certainty. Similarly, this approach will coagulate the defendant being certain about the fora he may be sued in. In light of this, the courts ought to completely refrain from the *Wood Floor* approach to the aforementioned extent as this is indicative of regress in international trade.

8.3 Repealing Article 5(1)(c)

When investigating this further, the reader might be wondering that if the interpretation of Article 5(1)(b) cures the issues through the above provided alterations to the interpretation, should Article 5(1)(c) be removed under the Brussels I Recast? This is due to the confusion, resulting from the residual reference to the *lex causae*. It is suggested that to alleviate this confusion, Article 5(1)(c) should be repealed. Although this is an intrusive suggestion, it is

\(^{131}\) Cf Bernstein (n 4) 46 who advocates for jurisdiction on the domicile of the plaintiff.
submitted that the current Article 5(1)(b) interpretation is sufficient to encompass all the above mentioned concerns without the need to refer to the *lex causae*. If one inspected the wording of Article 5(1)(c) the question that may arise would be: if Article 5(1)(b) was introduced to fortify the rules of jurisdiction under the Brussels Convention, and Article 5(1)(b) provides for a definition of terms under Article 5(1)(a), why would the legislature allow for these provisions to be read separately? From this an argument can be advanced that a separate reading of the provisions could not reasonably have been the intention of the legislature. To this degree, it is submitted that Article 5(1)(a) and (b) ought to be read conjunctively. This quite simply would result in Article 5(1)(a) has never been read as a self-standing provision because, if it were to be regarded as such, one would observe the exact wording of Article 5(1) under the Brussels Convention. This would inherently mean that the rules under the Brussels Convention would remain and all the legislative growth would be rendered inoperable.

Therefore, by eliminating Article 5(1)(c), the legislature would be resolving the residual reference to the Brussels Convention at its core. This will integrally bolster the principles of uniformity, certainty and predictability as forcefully argued throughout this dissertation.

9. **Concluding Remarks**

The novelty of the proposed approach is founded on the deviation from the current characteristic performance test. This is attained by limiting the test, based on economic criteria, to deliveries or services which are factually in dispute, thus eliminating deliveries or services which have been performed in accordance with the contract. It should be borne in mind that this approach ought to be utilised in situations where there is a disconnection between the characteristic performance and the factual centre of gravity as illustrated through the “conundrum”. Moreover, because it is at its rudimentary phase and has not been confirmed against other contracts, the application of this approach is limited to complex contracts of sale or service as governed by Article 5(1)(b).
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