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Brussels I Regulation (2nd ed. 2012) art. # note #
But foremost and most importantly, the obligation to pay has the same place of performance as the said obligation characterising the contract. Sellers and service providers, as money creditors, can sue the buyers and customers at the place of performance of the obligation characterising the contract. (b) might not suit them by establishing a forum actort at their respective place of business automatically. But if the place of performance can be identified at the seller’s place of business a forum actort emerges. Whenever the contract binds the buyer to take delivery at the seller’s place of business this formation arises, likewise if the service is to be rendered at the provider’s place of business. Then the seller enjoys a forum actort if he sues the buyer for payment. Sellers under fob-contracts and under cif-contracts also profit as the place of performance, equalling the place of delivery of the goods to the buyer, is in the port of loading (which will in most instances be near, and at least in the same state as, one of the seller’s places of business), not in the port of discharge. The same applies under fas (free alongside ship). On the other hand, the buyer gets a forum actort for actions for repayment or other remedies due to defective goods if the delivery of the goods happens at his place. Yet the place of delivery need not necessarily coincide with the place of either party and can lead to jurisdiction of a court in a state where none of the parties has a place of business.

4. Accordance with the contract

a) Ambit of the reference to the contract

The first clouds of doubt as to the proper interpretation of the fact-oriented concept are shed by the words “under the contract”. Primarily, this appears at first glance to refer to express provisions in the contract explicitly spelling out the place of performance. Such express stipulations however are already dealt with on a higher level in the structure of (1): (b) and (a)
alike come only into operation if the contract does not contain an express and explicit stipulation of the place of performance. Hence, the reference in (b) can not be read as to express and explicit contractual provisions. Otherwise it would amount to a redundant duplication. It would be disastrous to deprive the clause “unless otherwise agreed” of any meaningful sense, waiting for some imaginative court to breathe meaning in it, elsewise attributing to it only an incoherent interpretation, which the opposite approach would be bound to do. At stake here are only clauses not identifying directly or explicitly the place of performance. The ECJ alleges agreements to determine the place of delivery (but not the place of performance as such) to fit the bill, though. It might be difficult to draw such fine lines of distiniction. Secondly, contractual provisions from which a like inference can be gained operate without any contradiction to the fundamental decision to have no recourse to the lex causae since they are implications from the contract, not from any rule supplementing the contract. Here contractual fixations regarding the place of delivery are masters of the game. The most prominent examples are provided by cif- or fob-contracts. Fob, as such, is concerned with the delivery of the goods, albeit it is influenced by technical modalities of transport and might overemphasise the importance of the port of loading to some degree, though. Furthermore, there might be modifications attaching more importance to the documents if the seller demands the bill of lading made to be out to him so that he retains control of the goods until paid on presentation of the documents.

Generally, the use of one of the clauses from Incoterms clarifies the matter considerably. They make it easier for traders to draft contracts because, through the use of short and simple terms, they can define may aspects of their business relations. Standardisation and the level of explanation by the rules which explain the details of the respective Incoterms clauses are a major advantage. As yet another example, “cash against delivery” might establish the

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553 Cf. André Huet, Clunet 128 (2001), 1126, 1128 et seq.

554 Cf. for such an opposite approach Briggs/Rees p. 131; Klemm (fn. 340), p. 71.

555 Electrosteel Europe SA v. Edil Centro SpA, (Case C-87/10), nyr, para. 18.


557 Haas/Oliver Vogel, NZG 2011, 766, 767.

558 Kienle, IPRax 2005, 113, 115; cf. also Electrosteel Europe SA v. Edil Centro SpA, (Case C-87/10), nyr, para. 16.

559 André Huet, Clunet 128 (2001), 1126, 1129 et seq.; cf. also Electrosteel Europe SA v. Edil Centro SpA, (Case C-87/10), nyr, paras. 18 et seq.


564 Cf. only Electrosteel Europe SA v. Edil Centro SpA, (Case C-87/10), nyr, para. 21; Carrascosa González, in: Calvo Caravaca, Art. 5.1 CB note 20.

565 Electrosteel Europe SA v. Edil Centro SpA, (Case C-87/10), nyr, para. 21.
place of performance for the buyer’s obligation to pay at the place of delivery contractually.\footnote{LG Nürnberg-Fürth IHR 2004, 20.} If the parties inserted “free house”, “frei Haus”, “frei Baustelle” or alike in their contract, it is nevertheless doubtful whether this constitutes an agreement influencing the place of delivery or whether this only bears relevance for the passing of the risk and the allocation of costs between the parties.\footnote{Cf. BGH CLOT 268; OGH SZ 71/145; OLG Karlsruhe CLOT 317; Simotta, in: Fasching/Konecny Art. 5 note 94. In preference of the latter, narrower scope OGH JBl 1999, 333; OGH RdW 1999, 210; OLG Köln IHR 2002, 66; OLG Koblenz IHR 2003, 66; KantonSG Zug IHR 2005, 119, 121 et seq.; Fountoulakis, IHR 2005, 122, 123.} The clause does not have an unequivocal content.\footnote{Cf. only OLG Köln IHR 2002, 66.} It depends on the circumstances in which the two alternating meanings should prevail under the concrete contract.\footnote{Magnus, IHR 2002, 45, 48.} If, for instance, the seller has undertaken to install the goods or to instruct the buyer’s personnel the place of delivery is influenced;\footnote{Cf. in a slightly different context in the near vicinity OLG Köln IHR 2006, 86, 87.} the same applies if the seller issued a warranty or has undertaken to provide repair services for a certain period.\footnote{Cassaz. Giur it. 1995 I/1 col. 1480, 1484; Cassaz. Foro it. 2000 I col. 2226, 2231; Bajons, in: FS Reinhold Geimer (2002), p. 15, 51 et seq. Unclear Fawcett, in: Fawcett/Harris/Bridge para. 3.157.} It is not necessary that the relevant clauses are genuine Incoterms clauses; stipulations borrowing some elements from Incoterms clauses can be qualitatively helpful.\footnote{Electrosteel Europe SA v. Edil Centro SpA, (Case C-87/10), nyr, para. 20.} It is not necessary that the relevant clauses are genuine Incoterms clauses; stipulations borrowing some elements from Incoterms clauses can be qualitatively helpful.\footnote{Cf. Electrosteel Europe SA v. Edil Centro SpA, (Case C-87/10), nyr, para. 19.} Art. 23 (1) (c) Brussels I Regulation is a cornerstone for the general contention that trade usages and established commercial practices bear major relevance.\footnote{Cf. Electrosteel Europe SA v. Edil Centro SpA, (Case C-87/10), nyr, para. 23; Notdurfter/Petruzzino, Contratto e impresa/Europa 2011, 223, 239.} A most decisive feature is to distinguish between clauses which are to identify the place of delivery on the one hand and clauses which merely lay down conditions relating to the allocation of the risks connected to the carriage of the goods or the division of costs between the contracting parties.\footnote{OLG Hamm IHR 2006, 84, 85; OLG München IHR 2009, 201 with note Großkopf: Rauscher, in: FS Andreas Heldrich (2005), p. 933, 942; Pilz, IHR 2006, 53, 57. But cf. also Rb. Leeuwarden NIPR 2010 Nr. 485 p. 793. Outside the Incoterms “Resa: Franco Partenza” was believed to be a clause solely on costs; BGH NJW 2010, 3452, 3453; OLG München IPRax 2009, 69. Contra Trib. Arezzo Dir. scambi int. 2006, 343, 344 for “franco destinazione sodagamato”.} Clauses dealing with costs or insurance exclusively (e.g. CPT “carriage paid to” or CIP “carriage and insurance paid”) have no impact on the place of performance.\footnote{LG Siegen 7 March 2007 – Case 8 O 250/06: Rauscher, in: FS Andreas Heldrich (2005), p. 933, 943; Fawcett, in: Fawcett/Harris/Bridge para. 3.188 et seq.; Hau, JZ 2008, 974, 978; Leible, in: Rauscher Art. 5 note 103} Particular observance must be paid to D-clauses (like DES “delivered ex ship” or DEQ “ex quay” or DDU “delivered duty unpaid” or DDP “delivered duty paid” under Incoterms 2000 and DAT “delivered at terminal”, DAP “delivered at place” or DDP “delivered duty paid” under Incoterms 2010).\footnote{Peter Mankowski © sellier european law publishers www.sellier.de} Enthalten in Incoterm clauses is the restriction that such clauses will not directly influence the place of payment as they only deal with modalities...
of the delivery of the goods.\textsuperscript{577} On the other hand, it would be rash to state that Incoterms never influence jurisdiction.\textsuperscript{578} For instance, “free on truck” clearly indicates that delivery at the truck is agreed upon\textsuperscript{579} whereas “ex works”, “ex factory” or “ab Werk” point towards the seller’s production facilities as the place of delivery,\textsuperscript{580} likewise do “ex warehouse” or “ex store” point to the places respectively named\textsuperscript{581} whereas “ex ship” and “ex quay” designate the port of discharge.\textsuperscript{582} If the seller has also to install the goods (in particular machinery) at the buyer’s premises the place of delivery should be located at the buyer’s premises.\textsuperscript{583}

\textbf{104} But doubts arise in the remaining instances where the contract itself neither contains an express provision nor allows for an inference. Does “under the contract” then open the back-door and put the construction of the contract as to the legal rules applicable, particularly the respective \textit{ius dispositivum} of the \textit{lex causae} or e.g. Art. 31 CISG, centerstage,\textsuperscript{584} be it only as part of some \textit{économie générale du contrat}?\textsuperscript{585} At least this could be maintained due to one of the main rationales behind \textit{ius dispositivum}: The very purpose of \textit{ius dispositivum} is to fill gaps and \textit{lacunae} in the contract. So, if the contract contains a gap it would be most natural for \textit{ius dispositivum} to step in. Or, even worse, should (a) step in by virtue of (c)?\textsuperscript{586} However, a stark contrast with the general, factual approach behind (b) would result.\textsuperscript{587} PIL and substantive law would creep in again\textsuperscript{588} through the backdoor to the detriment of uniform solu-
tions independent from the forum seized and the substantive law applicable. Thus, the contention to have recourse to the *ius dispositivum* quasi automatically is unsustainable in the light of the genesis of (b).\(^{589}\) Overeagerness to withdraw matters would partially lead to the approach pursued by (a) with its inherent drawbacks and rather defeat the purpose of (b).\(^{590}\) Furthermore, the further aim of concentrating the contractual lawsuits in a single *forum* as pursued by (b) would be jeopardized, too.\(^{591}\) Caution suggests that “according to the contract” should be read as nothing more than a decent hint that the characteristics of the contract should be taken into account.\(^{592}\)

At least one should not hold direct recourse to either the European or the UNIDROIT Principles on Contract Law. They do not form part of EU law, nor have they ever been recognised in any way by the Community legislator. They do not have a binding force of law anywhere, and it would be way too progressive to introduce them into practice in the interpretation of the most important head of special jurisdiction. As a further hindrance it can be identified that they were not developed with an eye on procedural issues.\(^{593}\) They do not constitute some kind of generally applicable rules or yardsticks in instances involving international trade, either. They call for contractual implementation and do not form part of any kind of *lex mercatoria* (if such notion was ever believed to exist at all). If parties want to introduce them into their contract they can do so. If they have not done so one should be very cautious to refer to them directly. Matters are different if they are taken into account *argumentandi causa* in a more general argument.\(^{594}\) As to substance, both sets of principles would produce the rather result of a *forum actoris* favouring the seller insofar as they both\(^{595}\) establish the seller’s place of business as the place of performance for the obligation to pay.\(^{596}\) Since the Principles have not been accepted in practice, where they are widely unknown and not even their mere existence forms part of general knowledge, it would be very impractical to let them form part of the *contractual* regime.

**b) Conflict between inference from the contract and later facts**

Another issue might arise if the place of delivery or performance expressly or impliedly provided for in the contract does not coincide with, and conform with, the factual place of delivery or performance. Should the latter prevail, or should one stick with the inference from the contract,\(^{597}\) or should both places gain equal weight,\(^{598}\) or should delivery at the “wrong” place be disregarded as not being “under the contract” with switching over to (1) (a)?\(^{599}\) The

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590 Fawcett, in: Fawcett/Harris/Bridge para. 3.193.
592 Cf. Audit, Rec. des Cours 305 (2003), 9, 437.
593 Magnus, IHR 2002, 45, 48.
594 Cf. Art. 5 note 112a (Mankowski).
595 Art. 7:101 European Principles; Art. 6.1.6 UNIDROIT Principles.
596 Magnus, IHR 2002, 45, 48.
597 Favoured by Tribi. Padova EuLF 2006, II-16, 18; Fawcett, in: Fawcett/Harris/Bridge paras. 3.201 et seq.
598 Tentatively favoured by Gaudemet-Tallon para. 199.