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## JURISDICTION IN CONTRACTUAL MATTERS UNDER THE BRUSSELS IA REGULATION: WHERE DO MIXED CONTRACTS STAND?

Diletta Danieli\*

SUMMARY: 1. The Brussels regime regarding jurisdiction in contractual matters and its application to mixed contracts. – 2. The interpretation provided (so far) by the Court of Justice of the European Union on Art. 5 of the Brussels I Regulation. – 3. National courts applying the Brussels regime to cases involving mixed contracts: some examples. – 4. Final remarks.

### **1. The Brussels regime regarding jurisdiction in contractual matters and its application to mixed contracts**

The Brussels Ia Regulation (No 1215/2012<sup>1</sup>, hereinafter also Recast) represents the latest frontier in European private international law, having recast the previous Brussels I Regulation (No 44/2001<sup>2</sup>) that was the cornerstone of cross-border litigation in civil and commercial matters, together with the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations, respectively<sup>3</sup>. The EU Commission

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<sup>1</sup> Regulation 1215/2012/EU of the European Parliament and of the Council, *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, of 12 December 2012, in OJ L 351, 20 December 2012, pp. 1-32. It applies since 10 January 2015, except for Arts. 75-76 that apply since 10 January 2014.

<sup>2</sup> Regulation 44/2001/EC of Council, *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, of 22 December 2000, in OJ L 12, 16 January 2001, pp. 1-23.

<sup>3</sup> Regulation 593/2008/EU of the European Parliament and of the Council, *on the law applicable to contractual obligations (Rome I)*, of 17 June 2008, in OJ L 177, 4 July 2008, pp. 6-16, and Regulation 864/2007/EC of the European Parliament and of the Council, *on the law applicable to non-contractual obligations (Rome II)*, of 11 July 2007, in OJ L 199, 31 July 2007, pp. 40-49.

proposal of December 2010<sup>4</sup> was preceded by extensive preparatory works<sup>5</sup> that showed an overall successful functioning of the Brussels I Regulation, but also a number of aspects that could be subject to amendments in order to set up an improved piece of legislation in this area of judicial cooperation policy. Indeed, in light of the outcomes of these preliminary activities, the proposal focused on four main shortcomings (recognition and enforcement procedures, disputes involving third country defendants, choice of court agreements and arbitration proceedings), while maintaining the fundamental system of rules of the previous Regulation<sup>6</sup>.

With particular regard to jurisdiction in contractual matters, which is the specific topic of this paper, the Recast did not provide any change, but rather confirmed the regime already set forth in the previous legal instrument. The relevant rule is now Art. 7 of the Recast that replicates Art. 5 of the Brussels I Regulation<sup>7</sup>. As is well known, said provision introduces a ground of jurisdiction that is alternative to the general principle of the defendant's domicile, on the basis of a "close connection between the court and the action" (Recital 16 of the Recast). In particular, such requirement is conveyed by allowing for a person domiciled in a Member State to be sued in another Member State where "the place of performance of the contractual obligation in question" is located (Art. 7(1)(a)). The substantial innovation brought about by Regulation No 44/2001, and confirmed in the Recast, compared to its predecessor (the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters) is however the special rule set out in para. (1)(b) for contracts for the sale of goods and contracts for the provision of services. Here the Regulation directly defines the place of performance of the obligation characterising the two types of contract that amounts to the connecting factor

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<sup>4</sup> Proposal for a Regulation of the European Parliament and of the Council *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)*, of 14 December 2010, COM(2010) 748 final, available at <http://eur-lex.europa.eu>.

<sup>5</sup> They included a Report from the Commission, as required by Art. 73 of Brussels I Regulation itself (21 April 2009, COM(2009) 174 final, available at <http://eur-lex.europa.eu>), a Green Paper (21 April 2009, COM(2009) 175 final, available at <http://eur-lex.europa.eu>) and two comparative studies (Report on the Application of the Regulation Brussels I in the Member States presented by Prof. B. Hess, Prof. T. Pfeiffer and Prof. T. Schlosser, final version September 2007, also known as "Heidelberg Report", and Study on Residual Jurisdiction prepared by Prof. A. Nuyts, final version 3 September 2007, both available at <http://ec.europa.eu/justice/civil>).

<sup>6</sup> For a comprehensive examination of the solutions envisaged in the proposal, which fall outside the more limited scope of this work, see F. POCAR, I. VIARENGO, F.C. VILLATA (eds.), *Recasting Brussels I*, Padova, 2012 (with particular regard to the topic of jurisdiction, see in this volume the essay by B. HESS, *The Proposed Recast of the Brussels I Regulation: Rules on Jurisdiction*, pp. 91-109).

<sup>7</sup> The literature on this topic has extensively developed over the years. Just to name a few, see K. TAKAHASHI, *Jurisdiction in matters relating to contract: Article 5(1) of the Brussels Convention and Regulation*, in *European Law Review*, 2002, n. 5, pp. 530-550; P. FRANZINA, *La giurisdizione in materia contrattuale. L'art. 5 n. 1 del Regolamento n. 44/2001/CE nella prospettiva della armonia delle decisioni*, Padova, 2006; M.A. LUPOI, *Il nuovo foro per le controversie contrattuali*, in *Rivista trimestrale di diritto e procedura civile*, 2007, n. 2, pp. 495-523; P.A. NIELSEN, *European Contract Jurisdiction in Need of Reform?*, in G. VENTURINI, S. BARIATTI (a cura di), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar*, vol. 2, Milano, 2009, pp. 773-784; and more recently T.M. KADNER GRAZIANO, *Jurisdiction under Article 7 No. 1 of the Recast Brussels I Regulation: Disconnecting the procedural place of performance from its counterpart in substantive law. An analysis of the case law of the ECJ and proposals de lege lata and de lege ferenda*, in *Yearbook of Private International Law*, 2014/2015, pp. 167-217.

to establish the jurisdiction: for the former contracts, the relevant location is the place of delivery of the goods, whereas for the latter ones, it is the place of provision of the services. Para. (1)(c) complements the provision by setting up the relationship between the two rules, according to which point (a) applies whenever point (b) does not.

The starting point of the considerations here proposed comes from a rather controversial issue, which is the applicability of the above-mentioned rules to mixed contracts, *i.e.* contracts that comprise elements of a sale alongside with obligations to produce or manufacture goods, or to supply services. This kind of agreements has never been directly regulated by the Brussels jurisdictional regime, and the Recast Regulation followed its precedents by choosing not to introduce any specific provision in this regard.

Nevertheless, at the international level there have been other legal instruments that addressed the issue of jurisdiction in cases involving mixed contracts, which could have offered a legislative example to draw inspiration from. For instance, the 1999 Hague Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters provided for a contractual *forum* specifically dedicated to “matters relating both to the supply of goods and the provision of services”, according to which a plaintiff may bring action in the courts of the State where the “performance of the principal obligation took place in whole or in part” (Art. 6(c))<sup>8</sup>. Such a provision does not of course solve all the questions that could potentially arise in similar cases (the most obvious being to establish the principal obligation on a case-by-case basis), but it offers, at least, a general rule to assess the issue of mixed contracts<sup>9</sup>.

Given the current legislative framework provided for in the Recast, however, the allocation of jurisdiction still appears to be debatable in these cases. On the one hand, the types of obligations involved are those selected by the special rule of Art. 7(1)(b), but, on the other hand, their combination could theoretically justify the application of the general rule laid down in para. (1)(a), as required by para. (1)(c).

The aim of this paper is thus to examine, firstly, the interpretation of the Court of Justice of the European Union (hereinafter also CJEU) regarding the rules on jurisdiction in contractual matters provided for in the Brussels I Regulation and, secondly, their implementation by some national courts that have been called upon to rule on cases

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<sup>8</sup> The Preliminary Draft Convention was adopted by the Special Commission on 30 October 1999 and accompanied by the Report drawn up by P. Nygh and F. Pocar (see Prel. Doc. No 11, August 2000, available at [www.hcch.net](http://www.hcch.net); in the literature see F. POCAR, C. HONORATI (eds.), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments*, Padova, 2005) as part of the work carried out for the Judgments Project of the Hague Conference on Private International Law, which started in 1992. The initial project of a broad convention on both jurisdiction and recognition and enforcement rules was later scaled down to focus on choice of courts agreements and led to the Hague Convention of 30 June 2005 on Choice of Courts Agreements. More recently, the Project has been re-launched and the Special Commission is developing a draft convention on recognition and enforcement of foreign judgments. From 16 to 24 February 2017 the Special Commission met for its second meeting and adopted the February 2017 draft convention (available at [www.hcch.net](http://www.hcch.net)).

<sup>9</sup> In the absence of an express provision in the Brussels I Regulation, it was indeed suggested to take as a reference the mentioned Art. 6(c) of the Draft Hague Convention: see K. TAKAHASHI, *Jurisdiction in matters relating to contract*, cit., p. 533.

involving mixed contracts. In light of the above, the final considerations will attempt to provide an interpretative solution to this open (and relatively unaddressed) issue.

## **2. The interpretation provided (so far) by the Court of Justice of the European Union on Art. 5 of the Brussels I Regulation**

The CJEU has actually ruled in various occasions on the interpretation of Art. 5(1)(b) of the Brussels I Regulation, and these precedents are surely applicable to Art. 7(1)(b) of the Recast as well, given the substantially unchanged wording and scope of the two provisions. The EU court, however, has not directly dealt with cases involving mixed contracts, still it provided valuable guidance that can prove useful when applying the existing rules to such instances.

For the purposes of this paper, therefore, the case law analysis focuses on those CJEU decisions that have dealt with the definition of the concepts of “sale of goods” and “provision of services” in the context of the Regulation and the criteria to distinguish between them, also when they have to be applied to specific types of contract.

With regard to the first aspect, the *Falco* case<sup>10</sup> took into account a contract under which the owner of an intellectual property right had granted its contractual partner the use thereof in return for remuneration. When establishing whether such contract could fall within the meaning of Art. 5(1)(b), second indent, of the Brussels I Regulation, the CJEU observed that the qualification did not need to comply with the approach developed for the purposes of the freedom to provide services under Art. 50 of the EC Treaty (now Art. 57 TFEU), nor with the concept of services provided by EU secondary legislation on VAT. In fact, the possibility to apply the Regulation also by means of other heads of jurisdiction justified a narrower interpretation according to which the notion of provision of services required, “at the least, that the party who [had provided] the service carri[e]d out a particular activity in return for remuneration”<sup>11</sup>. Moreover, such activity was to be understood as a performance of positive acts, with the consequence that the contract at hand fell outside the scope of Art. 5(1)(b), second indent, since “the owner of an intellectual property right [had] not perform[ed] any service in granting a right to use that property”<sup>12</sup>. Nevertheless, the Brussels I Regulation was applicable pursuant to para. (1)(a) of the same provision.

Similarly, in another instance (*Corman-Collins* case<sup>13</sup>) the CJEU had to establish whether Art. 5(1)(b), second indent, could be applied to an exclusive distribution agreement. Building upon the interpretation given in *Falco*, the Court acknowledged both

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<sup>10</sup> Court of Justice, judgment of 23 April 2009, *Falco Privatstiftung, Thomas Rabitsch v. Gisela Weller-Lindhorst*, case C-533/07, ECLI:EU:C:2009:257. All CJEU judgments cited in this paper are available at <http://curia.europa.eu>.

<sup>11</sup> Court of Justice, *Falco*, cit., para. 29.

<sup>12</sup> Court of Justice, *Falco*, cit., paras. 30-31.

<sup>13</sup> Court of Justice, judgment of 19 December 2013, *Corman-Collins SA v. La Maison du Whisky SA*, case C-9/12, ECLI:EU:C:2013:860.

the performance of “positive acts” by the distributor (namely, the distribution of the grantor’s products) and the remuneration paid as consideration for such activity, which should not be understood strictly “as the payment of a sum of money”, but more generally as an advantage conferred to the exclusive distributor over other sellers<sup>14</sup>. Therefore, the characteristic obligations of the contract in question were classified as provisions of services under Brussels I Regulation.

As far as the distinction between the two types of contract provided for in Art. 5(1)(b) is concerned, the CJEU in *Car Trim*<sup>15</sup> examined a contract for the supply of goods to be produced or manufactured, where the customer had specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced. In this case, which could not be directly classified into one of the two indents of the mentioned provision, the Court reminded that it was necessary “to take as a basis the obligation (...) characteris[ing] the contract at issue”<sup>16</sup>. Then, it took into consideration several factual elements that could be referred to as an indication to determine the characteristic obligation of the agreement in question. First, the requirements specified by the purchaser regarding the provision, fabrication and delivery of the goods did not, by themselves, alter a possible qualification as sales contract, in accordance with the rules provided for in other legal instruments at both EU and international level<sup>17</sup>. Second, where the purchaser had supplied the raw materials used to produce the goods, the contract would be classified as a sale rather than a provision of services. Third, the supplier’s responsibility played a significant role as well: where the seller was responsible for the quality of goods or only for the correct implementation of the contract, the contract would be qualified as a sale of goods or a provision of services, respectively. Applying these criteria to the case at hand, the supply contract was thus classified as a sale of goods within the meaning of Art. 5(1)(b), first indent, of Brussels I Regulation.

More recently, in the *Granarolo* case<sup>18</sup> the CJEU was again called upon to rule on the distinguishing features of the two contracts provided for in Art. 5(1)(b). The preliminary ruling regarded a long-standing business relationship between two companies that had to be classified as either a sale of goods or a provision of services. To this end, the Court referred to its previous case law and confirmed that the characteristic obligation of a sale of goods had to be the “supply of goods”<sup>19</sup>, whereas the concept of provision of services required the performance of “a particular activity in return for remuneration”<sup>20</sup>.

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<sup>14</sup> Court of Justice, *Corman-Collins*, cit., par. 38-40.

<sup>15</sup> Court of Justice, judgment of 25 February 2010, *Car Trim GmbH v. Keysafety Systems Srl*, case C-381/08, ECLI:EU:C:2010:90.

<sup>16</sup> Court of Justice, *Car Trim*, cit., par. 32.

<sup>17</sup> Namely, Directive 1999/44/EC of the European Parliament and of the Council, *on certain aspects of the sale of consumer goods and associated guarantees*, of 25 May 1999, in OJ L 171, 7 July 1999, pp. 12-16, and the 1980 United Nations Convention *on contracts for the international sale of goods* (CISG).

<sup>18</sup> Court of Justice, judgment of 14 July 2014, *Granarolo SpA v. Ambrosi Emmi France SA*, case C-196/15, EU:C:2016:559.

<sup>19</sup> Court of Justice, *Granarolo*, cit., par. 34.

<sup>20</sup> Court of Justice, *Granarolo*, cit., par. 37.



In light of the indications offered by the EU court, where a contract includes elements of a sale of goods and a provision of services it seems reasonable to establish, first and foremost, its characteristic obligation, in accordance with the fundamental principle governing the functioning of the heads of jurisdiction in contractual matters set forth by the Brussels regime. In this regard, the interpretation of the concepts of sale of goods and provision of services, as well as the factual elements distinguishing the two types of contract provided for in para. (1)(b) shall direct the assessment, which needs to be carried out on the basis of the circumstances of each case and to ultimately comply with the objectives of proximity and predictability underlying the whole Regulation.

### **3. National courts applying the Brussels regime to cases involving mixed contracts: some examples**

After analysing the relevant CJEU judgments, the inquiry turns to some cases arisen in national case law in order to verify the consistency of the related decisions with the guidelines provided by the EU court when dealing with cases that do not fall directly under any of the special heads of jurisdiction for a sale of goods or a provision of services. Also these decisions actually involve Art. 5 of the previous Brussels I Regulation, but their reach can be extended to the corresponding Art. 7 of the Recast, as already mentioned when examining the EU case law.

A significant precedent comes from a decision rendered by the Higher Regional Court of Cologne (*Oberlandesgericht Köln*) in 2005<sup>21</sup> that ruled on the international jurisdiction of the lower court (*Landgericht Köln*) pursuant to Art. 5(1)(b) of the Brussels I Regulation in a case regarding a supply of prototypes designed by a company based in Italy for a new model of electric windows produced by a company based in Spain. These items had been delivered in Cologne to a satellite company of the Spanish party.

The Italian company brought action against its counterparty before the *Landgericht Köln* claiming the payment for the supply. The Regional Court of Cologne denied its jurisdiction in the dispute at hand on the basis of a clause provided for in the general terms and conditions drafted by the Spanish party according to which the Tribunal of Valencia was the competent court to hear cases arising between the parties. In particular, such clause was considered as a valid choice of court agreement under the meaning of Art. 23 of the Brussels I Regulation.

The Italian company appealed the first instance judgment before the *Oberlandesgericht Köln*, claiming that the international jurisdiction of the German court should have been based on Art. 5(1)(b) of Brussels I Regulation since said choice of court

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<sup>21</sup> Higher Regional Court of Cologne, judgment of 14 March 2005, Az. 16 U 89/04, available at <http://openjur.de>.

clause did not comply with any of the substantial and formal requirements listed in Art. 23 of the same Regulation<sup>22</sup>.

For the purposes of the ruling on the jurisdictional issue, the Higher Regional Court firstly assessed the contents of the agreement between the parties. Given the combination of elements of a sale of goods (namely, the duty to supply and to transfer the ownership of the finished products) and of a provision of services (that were the development and creation of the prototypes)<sup>23</sup>, it was qualified as a mixed contract (“*gemischter Vertrag*”). Consequently, the Court had to establish which obligation could be deemed as “characteristic” (“*vertragscharakteristisch*”), *i.e.* the main obligation performed under the contract that served as the jurisdictionally relevant obligation within the meaning of par. (1)(b). The activities undertaken by the Italian company of developing and creating the prototypes outweighed the subsequent delivery and acquisition of title of the items, therefore the contractual aspects of a provision of services prevailed over the ones of a sale of goods<sup>24</sup>. The Court thus held that Cologne could not be considered as the place of performance of the disputed contract pursuant to Art. 5(1)(b) of the Brussels I Regulation and, for this reason, the *Landgericht* was not competent to hear the case.

Another relevant example is a judgment given in 2013 by an Italian Court of first instance (*Tribunale di Tolmezzo*)<sup>25</sup>. The factual background of the case refers to a subcontracting agreement between a company based in Italy and a company based in Austria, whereby the former had to manufacture steel rings, to be used in the construction of funicular railways, according to the technical requirements provided by the latter. The Italian party applied for an order of payment for said supply, which was issued by the

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<sup>22</sup> It is worth briefly recalling that for an agreement conferring jurisdiction to courts of a Member State to be valid, Art. 23 of Brussels I Regulation prescribed at least one of the parties to be domiciled in a Member State, as well as certain formal conditions to be met. Namely, the agreement shall be either: “(a) in writing or evidenced in writing, or (b) in a form which accords with practices which the parties have established between themselves, or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned” (para. 1). The CJEU has further specified these requirements in several judgments, particularly as to choice of court clauses included in general terms and conditions (see for example judgment of 21 May 2015, *Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH*, case C-322/14, EU:C:2015:334), and to the concept of usage regularly observed in international trade or commerce (already with regard to the corresponding provision of the 1968 Brussels Convention see judgment of 20 February 1997, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, case C-106/95, EU:C:1997:70; judgment of 16 March 1999, *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, case C-159/97, EU:C:1999:142). The Recast has actually amended certain provisions in the new Art. 25 on prorogation of jurisdiction, the most relevant of which extends its applicability also to choice of court agreements concluded between parties not domiciled within the EU.

<sup>23</sup> Higher Regional Court of Cologne, judgment of 14 March 2005, Az. 16 U 89/04, cit., par. 30: “sowohl Elemente eines Kaufvertrages – Pflicht zur Lieferung und Übereignung der Waren – als auch Elemente eines Dienstleistungs- und Werkvertrages, soweit es um die Entwicklung und Herstellung der Fensterheber geht”.

<sup>24</sup> Higher Regional Court of Cologne, judgment of 14 March 2005, Az. 16 U 89/04, cit., par. 30: “überwiegt die Entwicklung und Herstellung der Produkte als Dienstleistungsanteil und lässt die Lieferung der Waren und die Eigentumsverschaffung hieran in den Hintergrund treten”.

<sup>25</sup> Court of first instance of Tolmezzo, civil division, judgment of 3 September 2013, No 200, available at [www.avvocati.ud.it/vendita-o-prestazione-di-servizi/](http://www.avvocati.ud.it/vendita-o-prestazione-di-servizi/).

Tribunal and later opposed by the Austrian counterparty on the ground of the lack of jurisdiction of the Italian court, besides other objections on the merits of the case.

In order to rule on the jurisdictional issue under Art. 5(1) of Brussels I Regulation, the Court of first instance of Tolmezzo was preliminarily required to classify the contract concluded between the parties. In this regard, it supported the reasoning of the Italian manufacturer, according to which the agreement was not a sale of goods, but rather a works contract where the supplier had to acquire the raw materials and to carry out a specific process to create the finished products. The characteristic obligation of said contract was thus the work performed by the manufacturer, whereas the subsequent delivery of the items in Austria was deemed to be a secondary commitment pertaining to the final stage of the contractual relations<sup>26</sup>. Consequently, the Italian Court retained its jurisdiction pursuant to Art. 5(1)(b), second indent, given that Italy was the Member State where the services had been provided under the contract at issue.

The approach taken in both the German and the Italian decisions appears to be in line with the above-mentioned CJEU case law. Indeed, the two national courts identified the characteristic obligation of a mixed contract on the basis of its prevailing features that were, in both instances, those of a provision of services since the parties providing the service had carried out an activity in return for remuneration, as the EU Court held in *Falco*, *Corman-Collins* and, more recently, in *Granarolo*<sup>27</sup>. This factual evaluation of the contractual agreement then led to determine which head of jurisdiction referred to in Art. 5(1)(b) had to be applied in the case at hand. In particular, this is consistent with the judgments in *Car Trim* and *Corman-Collins*<sup>28</sup>, in which the EU Court stressed the relevance of the characteristic obligation serving as the connecting factor for the purposes of the classification of a contract under Art. 5(1)(b) of the Brussels I Regulation.

This interpretative operation, moreover, is well adjusted with other EU legal instruments of private international law. More precisely, Recital 19 of Rome I Regulation expressly refers to the notion of the “centre of gravity” to determine the characteristic performance in cases where the “contract consist[s] of a bundle of rights and obligations capable of falling within more than one of the specified types of contract”. Even though the provision does not clarify how to intend such concept, it seems safe to say that the solution envisaged by these national courts is coherent with the legislative aim of the

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<sup>26</sup> Court of first instance of Tolmezzo, civil division, judgment of 3 September 2013, No 200, cit.: “(...) ai fini dell’adempimento di una siffatta commessa, dove[vano] essere effettuate tutta una serie di operazioni volte alla realizzazione di detta merce (anelli così come indicati), previa acquisizione del necessario materiale grezzo, mentre invece la successiva consegna del materiale risultato dalla lavorazione (...) ne veniva a rappresentare, trattandosi appunto di appalto e non di mera vendita, soltanto la fase finale, senza che alla stessa, proprio per le caratteristiche di un tal tipo di rapporto contrattuale (appalto), avente come sua nota distintiva la prevalenza del lavoro, potesse riconoscersi in alcun modo carattere principale”.

<sup>27</sup> Respectively, Court of Justice, *Falco*, cit., par. 29; *Corman-Collins*, cit., par. 37, and *Granarolo*, cit., par. 37.

<sup>28</sup> Respectively, Court of Justice, *Car Trim*, cit., par. 31, and *Corman-Collins*, cit., par. 34.

provision of pursuing predictability<sup>29</sup>, also with regard to the law applicable to the contract<sup>30</sup>.

Furthermore, the reasoning of both these decisions can be applied to a similar recent case between a company based in Italy and a company based in Germany. The object of the contract was the prototype of a pipe welding machinery, which had to be designed and manufactured by the Italian party and subsequently installed on an already existing plant located in the facility of the German party in Bochum (Germany). The Italian company sued its counterparty before the Court of first instance of Pavia (*Tribunale di Pavia*) seeking for the payment of the supply in question, but the defendant lodged an application before the Italian Supreme Court (*Corte di cassazione*) asking for a ruling on the international jurisdiction of the court seised, pursuant to Art. 41 of the Italian civil procedural code (*regolamento di giurisdizione*). The Supreme Court was thus called upon to take a final and binding decision on this preliminary jurisdictional issue.

It should go without saying that such agreement qualifies as a mixed contract, featuring both elements of a sale of goods (the supply of the final product) and of a provision of services (the design and actual creation of the prototype performed according to the technical requirements provided by the client). Following the above-mentioned approach grounded on the contract's "centre of gravity", the prevailing performance in the case at hand appears to be the highly specialised provision of services carried out by the Italian company in its facility, which further qualifies the agreement as a works contract. The subsequent installation in the plant of the German party, instead, should be downgraded to an ancillary obligation, albeit necessary to the fulfilment of the objective of the agreement. The Supreme Court should thus take the view that the Court of first instance of Pavia shall retain its jurisdiction over the dispute pursuant to Art. 5(1)(b), second indent, of Brussels I Regulation (still applicable *ratione temporis*), since the provision of services serving as characteristic performance of the contract had been performed in Italy.

Nonetheless, the first court documents, namely the opinion of the attorney general of the Supreme Court (*Procuratore generale*)<sup>31</sup>, seem to support a different position. In fact, the agreement in question has been reasonably classified as a works contract, whose objective was however deemed to be the mere installation of the pipe welding machinery in the facility of the German company. On this ground, Art. 5(1)(a) of Brussels I Regulation was referred to as the relevant provision according to which the German judicial authorities shall have jurisdiction to rule on the case.

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<sup>29</sup> F. SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, Padova, 2015, p. 150, observes how the rule of the centre of gravity seems fitting to the legislative system relying on the concept of characteristic obligations. On the complex qualification of contractual relationships that do not immediately fall within the notion of either a sale of goods or a provision of services see also S.M. CARBONE, C.E. TUO, *Il nuovo spazio europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, Torino, 2016, p. 106.

<sup>30</sup> For further observations with regard to the law applicable, see also par. 4.

<sup>31</sup> More precisely, the opinion of the attorney general of the Supreme Court preceding the final decision was delivered on 20 June 2016.

Although the classification as a works contract is in line with the factual elements of the agreement, the conclusion reached appears rather unpersuasive as to its consistency with the provisions of the Regulation. Indeed, a works contract hardly falls outside the scope of application of a provision of services under para. (1)(b), second indent, which should have been applied as the relevant head of jurisdiction in the case at issue. The reference to para. (1)(a) thus seems questionable as to its coherence with the whole legislative framework provided in contractual matters. As it was pointed out before, the Brussels I Regulation introduced the new wording in para. (1)(b) in order to expressly identify the characteristic obligation in contracts of sale of goods and of provision of services, which amounts to the relevant head of jurisdiction in these specific instances. It follows that the application of point (a) should be limited to cases where the mentioned contracts are not involved at all, while where an agreement comprises elements of both a sale and a provision of services, the assessment should rely on the “centre of gravity” to determine which performance is the characteristic obligation of the given contract under one of the two indents of point (b).

On 17 January 2017 the Supreme Court rendered its final decision on the case<sup>32</sup>. Preliminarily, it stated that both parties, as well as the attorney general in its opinion, have qualified the contractual relationship as a provision of services, more precisely as an international works contract. The relevant provision to rule on the jurisdictional issue was thus correctly identified in Art. 5(1)(b) of Brussels I Regulation. Then, the Court carried out the factual assessment in order to determine where the services were provided or should have been provided under the contract at issue. In this regard, it held that the contractual place of performance, to be understood as the place where the characteristic obligation was performed, was the German party’s facility located in Bochum. Several elements were recalled to support this view, among which the specific clauses provided in the contract, the payment split into various instalments (even after the completion of the work and its testing), the materials used to manufacture the machinery that were supplied by the German party and the management of the work at the contractor’s risk. In the Court’s reasoning, the assembly of the machinery, which was performed by the contractor in its facility located in Italy, was regarded as merely ancillary to the subsequent installation in Germany (*i.e.* the place of performance)<sup>33</sup>. Consequently, the Supreme Court held that the Court of first instance of Pavia lacked jurisdiction to rule on the merits of the case, as such competence rather laid with the German courts.

Quite surprisingly, no relevance has been given in the final decision to the specialised provision of services undertaken in Italy, insofar as the Italian manufacturer had relied on his know-how and patented technologies to carry out a highly qualified performance and produce a one-of-a-kind prototype. Indeed, the Italian Supreme Court expressly rejected

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<sup>32</sup> Italian Court of Cassation, united divisions, judgment of 17 January 2017, No 965, available at [www.italgiure.giustizia.it](http://www.italgiure.giustizia.it).

<sup>33</sup> Italian Court of Cassation, united divisions, judgment of 17 January 2017, No 965, cit.: “il luogo di adempimento della prestazione [era] necessariamente quello in cui doveva fornirsi ed installarsi l’impianto essendo stato effettuato l’assemblaggio di quest’ultimo presso la controricorrente al mero fine della successiva installazione presso la società tedesca costituente il luogo di adempimento”.

the view proposed by the Italian party according to which the qualifying performance in the contractual agreement was the design and manufacture of the machinery undertaken in its facility. As already mentioned, however, this conclusion seems questionable for the purposes of determining the “centre of gravity” of the contract at issue. It was rather the obligation performed in Italy that should have been considered in this regard, and not the subsequent final activities taking place in Germany, to the extent that this specialised provision of services appears to confer the distinctive character to the broader contractual relationship.

#### 4. Final remarks

The chosen examples show the complex evaluation, on both factual and juridical levels, that is required to apply the (apparently plain) rules of jurisdiction in contractual matters under (now) Brussels Ia Regulation. The difficulties become all the more evident in cases involving mixed contracts, which are not directly regulated by EU law and thus entail an interpretative adaptation of the rules provided for in Art. 7(1) of the Regulation. In this regard, it appears preferable to share the view of the Higher Regional Court of Cologne and the Court of first instance of Tolmezzo, for the reasons already analysed, as opposed to the solution envisaged in the last mentioned case decided by the Italian Supreme Court.

One last consideration is worth adding as to the different but related aspect of the law applicable to such cases. Following the reasoning grounded on the “centre of gravity” of a mixed contract, and thus identifying the agreement either as a sale of goods or a provision of services for the purposes of Art. 7(1)(b) of Brussels Ia Regulation, the subsequent application of Art. 4 of Rome I Regulation (provided that no choice of law has been made by the parties) may actually lead to opposite outcomes. In fact, para. 1 of said Article identifies two different connecting factors for the contracts of sale of goods and of provision of services: for the former, it is the habitual residence of the seller, whereas for the latter it is the habitual residence of the service provider. As a result, should a mixed contract be classified as a sale of goods on the basis of its prevailing characteristic performance, the courts having jurisdiction shall be those of the country where the goods have been delivered (basically, the buyer’s *forum*), but the law applicable shall be that of the country of habitual residence of the seller (*i.e.* the seller’s law)<sup>34</sup>. This disconnection between jurisdiction and applicable law is however not found in the case of a mixed contract that is classified as a provision of services, such as those mentioned above when

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<sup>34</sup> This peculiar effect is underlined, among others, by E.B. CRAWFORD, J.M. CARRUTHERS, *Connection and coherence between and among European instruments in the private international law of obligations*, in *International and Comparative Law Quarterly*, 2014, pp. 1-29, at p. 9, where the Authors define it as “harlequin-style”. Similarly, F. POCAR, *Relationship between Rome I and Brussels I Regulation*, in F. FERRARI, S. LEIBLE (eds.), *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, Munich, 2009, pp. 343-348, at p. 346, stresses the inequitable “distribution of advantages” between the positions of the seller and the buyer in cases concerning a sale of goods.

examining national case law, given that both the competent court and the applicable law are determined on the basis of the service provider's performance.

Such distinction furthermore confirms how EU private international law instruments do pursue, in general, a coherence of their respective bodies of rules, but such objective is not to be understood narrowly<sup>35</sup>. In this regard, as it has been underlined, the harmonization system appears to have opted, in some cases, “for a solution based on uniform conflict of laws rules, while preserving a plurality of competent fora for the same legal situation”<sup>36</sup>.

**ABSTRACT:** This paper addresses how the rules regarding jurisdiction in contractual matters provided for in the Brussels Ia Regulation (having the same scope of the previous Brussels I) may be applied to cases involving mixed contracts, which encompass elements of a sale of goods, as well as of a provision of services, and are not, as such, directly regulated by that legal instrument. On these grounds, the inquiry takes into account the case law of both the Court of Justice of the European Union and national courts that have been called upon to rule on similar instances. In light of the above, an interpretative solution will be envisaged, also taking into account the objective of predictability and proximity underlying the broader EU legislative framework of cross-border litigation.

**KEYWORDS:** Regulation No 1215/2012 (Brussels Ia) – Jurisdiction in contractual matters – Mixed contracts – CJEU case law – National case law.

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<sup>35</sup> This aspect is thoroughly investigated by R. CAFARI PANICO, *La prestazione caratteristica tra legge applicabile e giurisdizione*, in E. TRIGGIANI, F. CHERUBINI, I. INGRAVALLO, E. NALIN, R. VIRZO (a cura di), *Dialoghi con Ugo Villani*, Bari, 2017, p. 1093 ff. On the same issue, more in general, see also J. BASEDOW, *Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union: Eine einleitende Orientierung*, in J. VON HEIN, G. RÜHL (Hrsgs.), *Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union*, Tübingen, 2016, pp. 2-23, especially at pp. 15-19.

<sup>36</sup> F. POCAR, *Relationship between Rome I and Brussels I Regulation*, cit., p. 344. For further considerations regarding the principles underlying the rules on jurisdiction under the Brussels Ia regime see P. FRANZINA, *Armonia decisoria e competenza giurisdizionale nel regolamento “Bruxelles I-bis”*, in G. BIAGIONI (a cura di), *Il principio dell'armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, Torino, 2015, pp. 99-122.