Incoterms and Jurisdiction in Sales: Some Observations on the Brussels I (Recast) Regulation

Professor Björn Sandvik – Åbo Akademi University, Finland

Under the Brussels I (Recast) Regulation, in contracts for the sale of goods, special jurisdiction is linked to the agreed place of delivery understood as an autonomous concept distinct from its substantive meaning under lex causae. At the same time, according to the Court of Justice of the European Union, the parties' substantive choice of delivery term under Incoterms must also be taken into account for the purposes of establishing special jurisdiction.

This article analyses the tension between the autonomous procedural interpretation of the Brussels I (Recast) Regulation and Incoterms as a set of purely substantive rules. It further proposes an alternative interpretation that preserves the autonomous approach under the Regulation while respecting the exclusively substantive purpose of Incoterms.

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1. Navigating the Intersection between Procedural Law and Substantive Commercial Law

At first glance, it might appear that there is no point of contact between Incoterms and the Brussels I (Recast) Regulation of 2012.[1] Incoterms were drafted by the International Chamber of Commerce and constitute a set of rules for the interpretation of delivery terms frequently used in international sales. The parties' choice of delivery term governs the seller's contractual duty to deliver the goods to the buyer, the passing of risk from the seller to the buyer, the allocation of costs between the parties, and a range of other *substantive* aspects of importance in international (and domestic) sales. By contrast, the Brussels I (Recast) Regulation governs

[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters. The purpose of the Regulation is to lay down uniform *procedural* rules on which court has jurisdiction to determine a dispute involving parties from different Member States, and to facilitate the mutual recognition of civil judgments between Member States.

Despite the different subject matter of Incoterms and the Brussels I (Recast) Regulation, there is nonetheless a difficult point of intersection in the Regulation's rules on special jurisdiction. In the case of the sale of goods, Art. 7(1)(b) first indent of the Regulation confers jurisdiction on the courts of the place of delivery as the designated place of performance of the sale. The question that arises is, first, what is meant by "place of delivery" and, secondly, whether the parties' agreement on an Incoterms delivery term is also determinative for jurisdiction under the Regulation. As will be shown, the approach has not been uniform over time, either as regards the legislative framework itself or its interpretation. The Court of Justice of the European Union (CJEU) has ruled on the interpretation, including in relation to Incoterms. The question remains, however, how the court's interpretation is properly to be understood, and whether a fully uniform interpretation of the Regulation has been achieved or can be expected.

2. Place of Delivery as the Place of Performance of the Sale

2.1 From Substantive to Autonomous Interpretation

2.1.1 The Substantive Approach

The basic starting point under the Brussels I (Recast) Regulation is that a person domiciled (or having its seat) in a Member State shall be sued in the courts of that Member State (Art. 4(1)). Under the Regulation, this forum has *general jurisdiction*. A person domiciled in a Member State may be sued in the courts of another Member State only pursuant to the Regulation's *special jurisdiction* provisions (Art. 5(1)).

The provisions on special jurisdiction are supplementary. According to the recitals of the Regulation, in addition to the defendant's domicile, "there should be alternative grounds of jurisdiction based on a *close connection* between the court and the action or in order to *facilitate the sound administration of justice*".[2] If proceedings are brought in a Member State other than that in which the defendant is domiciled, and the defendant does not enter an appearance to contest jurisdiction, the court must, under Art. 28(1) of the Brussels I (Recast) Regulation, of its own motion declare whether it has jurisdiction under the Regulation. It is stated that the rule "is intended to protect the defendant from having to respond before a court in a foreign State without having consented to it or without there being grounds for it under the Regulation".[3]

In the case of the sale of goods, special jurisdiction is governed by Art. 7(1)(b) first indent of the Brussels I (Recast) Regulation. This provision must be read in the light of its predecessor, namely the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil

[2] Recital 16 of the Brussels I (Recast) Regulation (author's italics). See further, *e.g.*, Geert van Calster, European Private International Law, second edition, Hart Publishing 2016, pp. 135–136.

[3] See the Swedish Supreme Court decision Nytt Juridiskt Arkiv (NJA) 2018 p. 957, para. 14 (author's translation from Swedish). In the case, the court was called upon to determine whether the original Brussels I Regulation (EC) No. 44/2001 allows a provision of the Swedish Code of Judicial Procedure, which constitutes supplementary law, to be applied even if this results in a court having jurisdiction to hear the dispute despite not being competent under the Brussels I Regulation. The Supreme Court held that the Regulation does not permit this. Since the Regulation refers to a specific court, it governs both international and local jurisdiction.

and commercial matters. Under Art. 5(1) of the Brussels Convention, a person domiciled in a Contracting State may be sued:

"*in matters relating to a contract, in the courts for the place of performance of the obligation in question*, […]"

The Convention provides no further guidance as to the meaning of "place of performance". In a series of cases, the CJEU consistently interpreted Art. 5(1) of the Brussels Convention in accordance with the *substantive* meaning of the concept under the national law applicable to the contract, that is, *lex causae*.[4] It has been observed in the literature that this was in fact one of the few areas in which the CJEU did not insist on introducing an autonomous "European" interpretation or definition of private international law concepts.[5] At the same time, the court's substantive approach attracted criticism. It has been argued, *inter alia*, that determining the place of performance under the applicable substantive law is often complicated and may give rise to problems in relation to the proximity of evidence and to results that appear both unforeseeable and arbitrary.[6]

The criticism of a substantive interpretation based on *lex causae* has been illustrated, among other things, by the interpretation of the CJEU in *Custom Made*,[7] which concerned an international sale. In that case, a seller in Bielefeld, Germany, had sold windows to an English buyer in London. The United Nations Convention on Contracts for the International Sale of Goods (CISG) was applicable to the sale.[8] As the buyer paid only part of the purchase price, the seller brought proceedings for the unpaid balance before the court in Bielefeld. The buyer objected that the court lacked jurisdiction and that proceedings should have been brought in London. The court found that, under Art. 57(1)(a) CISG, the buyer was obliged to pay the price "at the seller's place of business", and that the court in Bielefeld therefore had jurisdiction under Art. 5(1) of the Brussels Convention. It has been argued in the criticism that special jurisdiction should be based on *procedural considerations* justifying jurisdiction, and that there was no procedurally justified reason to locate the proceedings at the court for the place where the seller had its place of business.[9]

It may be added, however, that there is extensive case law in which Art. 57(1)(a) CISG — as a definition of the place of performance in respect of the buyer's obligation to pay — has been

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[4] See, *e.g.*, the following cases: C-12/76, *Industrie Tessili v Dunlop AG*; C-14/76, *De Bloos v Bouyer*; C-533/07, *Falco Privatstiftung v Gisela Weller-Lindhorst*.

[5] See, *e.g.*, van Calster, *supra* fn. 2, p. 140.

[6] See in more detail, *e.g.*, the comprehensive analysis by Thomas 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, pp. 177–214, in Andrea Bonomi and Gian Paolo Romano (eds), Yearbook of Private International Law 2014/2015, pp. 167–217, Verlag Dr. Otto Schmidt, 2016. It may, however, be debated whether much of this criticism may not equally be transposed to the subsequent autonomous interpretation of the CJEU.

[7] Case C-288/92, *Custom Made Commercial Ltd v Stawa Metallbau GmbH*.

[8] Although the United Kingdom has not, unlike Germany, ratified the CISG, German law was applicable to the contract of sale. Pursuant to Art. 1(1)(b) CISG, the Convention therefore applied even in the absence of a choice of the CISG by the parties.

[9] See, *e.g.*, Kadner Graziano, *supra* fn. 6, in particular pp. 178–179 and 182–183, who also notes that the interpretation by the CJEU becomes particularly difficult to justify in the case of sales of goods under transport and payment against documents representing the goods (Art. 57(a)(b) CISG). Referring to certain statements made during the Diplomatic Conference that adopted the CISG in 1980, it is further observed that the explicit purpose of the Convention's provisions on the performance of the parties' obligations was to ensure that these provisions would not affect international jurisdiction.

decisive for jurisdiction under Art. 5(1) of the Brussels Convention.[10] In Finland, the Supreme Court decision Korkein oikeus (KKO) 2005:114 (the so-called log house case) is notable; it remains the only Finnish Supreme Court decision concerning the CISG. In that case, a Finnish seller had sold a log house package to a buyer in Germany. The CISG was applicable.[11] The buyer failed to pay the full purchase price. The seller brought proceedings before the district court at the seller's domicile, that is, the District Court of Heinola. The buyer argued that proceedings should have been brought in Germany before the court at the buyer's domicile. The Supreme Court, referring to Art. 57(1)(a) CISG on the place of payment of the purchase price, held that the District Court of Heinola had jurisdiction under the Brussels Convention.[12]

2.1.2 The Autonomous Approach

With the Brussels I Regulation (44/2001) of 2001, a definition of the place of performance for both sales and services was introduced in Art. 5(1). In the current Brussels I (Recast) Regulation, that definition is reproduced unchanged in Art. 7(1).[13] Pursuant to Art. 7(1), a person domiciled in a Member State may be sued in the courts of another Member State:

"(*a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;*

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered;

– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply then point (a) applies;"

Services and the more precise distinction between sales and services will not be addressed here.[14] As regards sales and the solution in Art. 7(1)(b) first indent — which applies "unless

[10] Reference can be made here to the account of case law in Jan Ramberg and Johnny Herre, Internationella köplagen (CISG): En kommentar, fjärde upplagan [International Sales Law (CISG): A Commentary, fourth edition], Wolters Kluwer, 2016, pp. 378–379. See also, *e.g.*, Petra Butler and Arjun Harindranath, Article 57, pp. 795–96, in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), UN Convention on Contracts for the International Sale of Goods, second edition, CH. Beck 2018.

[11] The log house was intended to be used not only as the buyer's and his family's home but also as a model house in connection with the buyer becoming an agent for the seller. The negotiations for both the sale and the agency contracts were conducted simultaneously, and the contracts were concluded concurrently. The Supreme Court found that, since the house had been purchased not only for personal use but also partly for the professional use of the buyer as an agent, in accordance with Art. 2(a) CISG, the Convention applied to the case. See further Björn Sandvik, The Battle for the Consumer: On the Relation between the UN Convention on Contracts for the International Sale of Goods and the EU Directives on Consumer Sales, European Review of Private Law 2012, pp. 1097–1118.

[12] See also Björn Sandvik and Lena Sisula-Tulokas, Internationella köplagen – CISG, andra upplagan [International Sales Law – the CISG, second edition], Kauppakamari 2024, pp. 44, 98–99.

[13] See also Art. 5(1) of the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Convention is applicable, *inter alia*, in Denmark, Iceland, and Norway.

[14] See for a detailed discussion on this subject, *e.g.*, Jonatan Echebarría Fernández, Jurisdiction and Applicable Law to Contracts for the Sale of Goods and the Provisions of Services Including the Carriage of Goods by Sea

otherwise agreed" — it may be noted that there are certain nuances between the different language versions. For example, the Finnish and Swedish versions refer to the place "*to which*" the goods were delivered (Fi: "*minne*", Sw: "*dit*") whereas the English, German and French texts may *also* be understood as referring to the place *at which* ("where") the goods were delivered.[15] It is possible to discern substantive differences between these expressions (see further below). On 25 February 2010, however, in *Car Trim*[16] — concerning the interpretation of the identical Art. 5(1)(b) of the earlier Brussels I Regulation — the CJEU held in any event that the concept of *place of delivery* must be interpreted *autonomously and independently of the substantive law applicable to the contract*.

The case concerned a dispute arising from several contracts for the supply of components for car airbag systems. The contracts had been concluded between an Italian buyer (KeySafety) and a German seller (Car Trim). The CISG was applicable. The seller brought proceedings in Germany. The lower courts declined jurisdiction on the ground that the German courts lacked international jurisdiction. The Bundesgerichtshof (Federal Court of Justice), as the referring court, asked the CJEU, *inter alia*, the following question:[17]

"[…] *in the case of sales contracts involving carriage of goods, is the place where under the contract the goods sold were delivered or should have been delivered to be determined according to the place of physical transfer to the purchaser, or according to the place at which the goods were handed over to the first carrier for transmission to the purchaser?"*

The latter alternative reflects the default rule on delivery under, for example, Art. 31(a) CISG.[18] The Bundesgerichtshof itself appears to have favoured interpreting Art. 5(1)(b) of the Brussels I Regulation in line with the substantive solution in Art. 31(a) CISG.[19] For example, the German wording of Art. 5(1)(b) could be regarded as *also* supporting that interpretation, whereas the Finnish and Swedish wording would rather be seen as pointing towards the final destination "to which" the goods are to be delivered.

The CJEU held that the special jurisdiction rule in Art. 5(1)(b) of the Regulation is justified by a close link between the contract and the court called upon to hear the dispute. The purpose of the concept of *place of delivery* in the first indent was considered to be an *autonomous connecting factor* applicable to *all claims* arising from one and the same contract of sale, and

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and Other Means of Transport in the European Union*,* Cuadernos de Derecho Transnacional, October 2019, vol. 11, no. 2, pp. 58–84. See also, more generally, *e.g.*, Vesna Lazić and Peter Mankowski, The Brussels I (Recast) Regulation: Interpretation and Implementation, Edward Elgar 2023, pp. 102–104. Regarding manufacturing agreements, see also, *e.g.*, case C-381/08, *Car Trim GmbH v KeySafety Systems Srl*.

[15] In English: "the place in a Member State *where*, under the contract, the goods were delivered or should have been delivered". In German: "der Ort in einem Mitgliedstaat, *an dem* sie nach dem Vertrag geliefert worden sind oder hätten geliefert werden müssen". In French: "pour la vente de marchandises, le lieu d'un État membre *où*, en vertu du contrat, les marchandises ont été ou auraient dû être livrées".

[16] Case C-381/08, *Car Trim GmbH v KeySafety Systems Srl*.

[17] *Car Trim*, para. 26.

[18] See also the solution in Sec. 7(2) of the harmonised Sale of Goods Acts in the Nordic countries for cases where the seller does not itself carry out the transport (which the seller seldom does in international sales). See also, e.g., the English Sale of Goods Act 1979, Sec. 29(2) and further on this provision M.G. Bridge, The Sale of Goods, third edition, Oxford University Press 2014, pp. 270–271.

[19] *Car Trim*, para. 25: "The Bundesgerichtshof considers that, even in the case of sales contracts involving carriage of goods, that place of performance refers to the place where, under the contracts, the purchaser obtained, or should have obtained, actual power of disposal over the delivered goods." In its response to the question for a preliminary ruling, however, the CJEU appears to treat the physical delivery of the goods to the buyer as synonymous with the buyer's power of disposal over the goods. The court's ruling is, nevertheless, clear.

not only to claims based on the delivery obligation.[20] In cases where the parties' intention regarding the place of delivery cannot be inferred from the contract — *without reverting to the applicable substantive law* — the place of delivery is to be regarded as the goods' final destination, where the goods were physically handed over or should have been handed over to the buyer. Under an autonomous interpretation, that place was considered to have the closest connection to the performance of the obligations under the contract of sale. Moreover, that interpretation was regarded as best corresponding to the origin, objectives and scheme of the Regulation.

By autonomously linking the place of performance for all claims to the goods' final destination as the place of delivery, a clear procedural advantage is achieved. A single dispute may often comprise several claims — for example, defects in the goods on the one hand and non-payment on the other — which may then be dealt with in one and the same forum. This result is achieved regardless of whether the court's jurisdiction is based on general or special jurisdiction. In that respect, the interpretation thus contributes to internal consistency between the jurisdictional grounds.

The interpretation in *Car Trim* has, however, also been criticised, it being argued that the solution in Art. 31(a) CISG should have governed the interpretation of the place of delivery under Art. 5(1)(b) of the Brussels I Regulation.[21] A general interpretation of the place of delivery under the Regulation as the place of dispatch where the goods were handed over to the first carrier for transmission to the buyer, as under Art. 31(a) CISG, would of course have entailed the same internal consistency as the Court's interpretation in *Car Trim*. Such an interpretation would moreover have had the further advantage, regardless of the CISG,[22] that the default solutions for both applicable law under the Rome I Regulation and special jurisdiction under the Brussels I (Recast) Regulation would have pointed to one and the same State, namely the seller's country.[23] This observation is significant because, ideally, applicable law and jurisdiction should not be assigned to different States as a default solution.

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[20] *Car Trim*, para. 52 referring to the Commission in its proposal COM(1999) 348 Final, Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, p. 14. There it is stated that the provision aims to avoid the disadvantages arising from referring to the private international law rules of the Member State in which the action is brought.

[21] See Echebarría Fernández, *supra* fn. 14, p. 71, with further references. Fernández does not himself endorse the criticisms of the interpretation in *Car Trim*.

[22] The CISG does not provide a comprehensive legal framework of international sales, and in practice its application is often excluded by the parties to the contract. See Sandvik and Sisula-Tulokas, *supra* fn. 12, pp. 56, 65–69.

[23] The foregoing applies in full under Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation)**.** Under the default rule in Art. 4(1)(a), contracts for the sale of goods are governed by the law of the seller's country. However, Art. 25(1) provides that the 1964 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods prevails over the Rome I Regulation. The Hague Convention applies in, *inter alia*, both Finland and Sweden. In Finland, the Convention has been implemented through the Act on the Law Applicable to Contracts for the International Sale of Goods (387/1964). Here, too, the default rule is that the law of the seller's country applies (Sec. 4) subject to certain exceptions. For example, unless otherwise agreed, matters relating to the examination of the delivered goods and any claims or notices of defects are governed by the law of the buyer's country (Sec. 5). In Finnish legal literature, it has been suggested that Finland should denounce the Hague Convention, in which case the choice of law would also be governed by the Rome I Regulation in Finland. See Sandvik and Sisula-Tulokas**,** *supra* fn. 12, p. 38 and Ulla Liukkunen, Sopimussuhteita koskeva lainvalinta [Choice of Law in Contractual Relations], Talentum 2012, p. 117.

The choice between these alternative interpretations of the place of delivery under Art. 5(1)(b) of the Brussels I Regulation in *Car Trim* will not, however, be discussed further here. In any event, the CJEU's autonomous interpretation applies under the Brussels I (Recast) Regulation as well. The question that arises below is what relevance should be accorded to Incoterms, given that Art. 7(1)(b) first indent of the Regulation refers to the place of delivery "under the contract" and, in any event, applies only "unless otherwise agreed". As established in *Car Trim*, these aspects too must be given an autonomous meaning, detached from the substantive law of *lex causae*.

2.2 The Relevance of Incoterms

2.2.1 Different Interpretations

In practice, most international sales are concluded on the basis of a delivery term, usually by reference to an appropriate Incoterm. The current version of Incoterms is the 2020 edition. Incoterms are widely regarded as an indispensable tool in international sales contracting. At times, Incoterms have been considered to have the status of international trade usage, but this perception may vary between countries and with respect to different terms.[24] Furthermore, the possibility of regarding Incoterms as international trade usage has been considered diminished by the fact that Incoterms were registered as a trademark in connection with the 2010 edition of the terms.[25] However, as will be shown below, the CJEU in *Electrosteel* appears to have treated Incoterms as reflecting international trade usage.[26] In any event, there can be no doubt that Incoterms are firmly established in international commercial practice.

It has long, however, been unclear whether the parties' choice of a delivery term under Incoterms should also be given private international law significance regarding the place of performance of contractual obligations, which forms the basis for international jurisdiction. The case law across jurisdictions presents a heterogeneous picture.[27]

In this context, two contrasting approaches may be illustrated by a decision of the Italian Corte Suprema di Cassazione and a judgment from the Belgian Hof van Beroep, Antwerp. Both cases pre-date *Car Trim*, in which the CJEU rejected a substantive interpretation of "place of delivery" under Art. 5(1)(b) of the Brussels I Regulation. In the Italian case, it was held that the Italian court lacked international jurisdiction in a dispute between a French seller and an Italian buyer on the ground that the delivery of the goods was made "CIF Incoterms", that is,

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[24] See, in overview, Björn Sandvik, Biförpliktelser vid köp – dolda vänner i nordisk och internationell köprätt [Ancillary Duties in Contracts of Sale – Hidden Friends in Nordic and International Sales Law], pp. 296–297, with extensive references, in Tidskrift utgiven av Juridiska Föreningen i Finland 2020, pp. 285–312. Compare further that the Swedish Supreme Court has held that the General Conditions of the Nordic Association of Freight Forwarders possesses the status of a trade usage; see the court's ruling in NJA 2022 p. 574. That interpretation has, however, also been subject to criticism. See Jacob Heidbrink, Standardavtal och handelsbruk – same, same, but different? [General Conditions and Trade Usage – Same, Same but Different?], Svensk Juristtidning 2023, pp. 138–148. As regards Finland, it has been concluded that the approach adopted by the Swedish Supreme Court in NJA 2022 p. 574 ought not to be followed in Finnish law. See Mia Hoffrén, Yleiset sopimusehdot, kauppatapa ja huolitsijan vakuusoikeus [General Conditions, Trade Usage and the Freight Forwarder's Right of Lien], Defensor Legis 2023, pp. 430–448.

[25] See Jan Ramberg, Incoterms® 2010, Penn State International Law Review 2011, pp. 415–424.

[26] Case C-87/10, *Electrosteel Europe SA v Edil Centro SpA*, para 19–22; see also *infra* at fn. 32.

[27] See also Sandvik and Sisula-Tulokas, *supra* fn. 12, pp. 114–115.

when the goods had been loaded onto the ship in France for carriage to the buyer.[28] In the Belgian case, a French seller and a Belgian buyer had agreed on "EXW Incoterms"; an ex works contract where delivery likewise occurred in France. The court, however, held that the French court lacked international jurisdiction, essentially on the ground that Incoterms are not intended to determine jurisdiction.[29]

2.2.2 The Electrosteel Case

Shortly after *Car Trim*, the CJEU in *Electrosteel* had reason to revisit the autonomous interpretation of Art. 5(1)(b) of the Brussels I Regulation with regard to Incoterms. The judgment was delivered on 9 June 2011. An Italian seller (Edil Centro) and a French buyer (Electrosteel) had entered into a sales contract. After a disagreement arose over performance of the contract, the buyer failed to pay the purchase price. The seller brought an action before an Italian court. The buyer argued that a French court was competent because the buyer was domiciled in France. The seller, by contrast, invoked the contractual term "Resa: Franco nostra sede" ("free our premises") and contended that the Italian court was therefore competent to hear the dispute. The seller further argued that the cited term corresponds to the Incoterm for an ex works contract, that is, the EXW term. The referring court (Tribunale ordinario di Vicenza) asked the CJEU:[30]

"*Must Article 5(1)(b) of [the] Regulation […] – and, in any event, Community law – which lays down that, in the case of the sale of goods, the place of performance of an obligation is the place where, under the contract, the goods were delivered or should have been delivered, be interpreted as meaning that the place of delivery, relevant for the purposes of determining the court having jurisdiction, is the place of final destination of the goods covered by the contract or the place in which the seller is discharged of his obligation to deliver, in accordance with the substantive rules applicable to the individual case, or is that rule open to a different interpretation*?"

The CJEU stated that its earlier interpretation of Art. 5(1)(b) in *Car Trim* "can be transposed to the case before the Tribunale ordinario di Vicenza and it provides an almost complete answer to the question referred by that court".[31] However, it was necessary to clarify how the expression "under the contract" in the first indent of Art. 5(1)(b) should be interpreted regarding the place of delivery. The CJEU linked this interpretation to an analogy with prorogation clauses under Art. 23 of the Regulation, corresponding to Art. 25 of the Brussels I (Recast) Regulation.

The CJEU found that under Art. 23 of the Brussels I Regulation, the parties may agree on the competent court not only in writing or orally, but also, *inter alia*, "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" (Art. 23(1)(c)). There was no reason to assume that the EU legislature intended to exclude such trade usage from consideration when interpreting the first indent of Art. 5(1)(b). Therefore, when interpreting this provision, the national court "must take into account all the relevant terms and clauses in that contract,

[28] Corte Suprema di Cassazione, 27 September 2006, CISG-online 1393.
[29] Hof van Beroep Antwerpen, 22 January 2007, CISG-online 1586.
[30] *Electrosteel*, para. 15.
[31] *Electrosteel*, para. 17.

including, as the case may be, the terms and clauses generally recognised and applied in international commercial usage, such as the Incoterms, in so far as they enable that place to be clearly identified".[32] With respect to the EXW Incoterm, the court noted that this term regulates not only the transfer of risk and allocation of costs between the parties but also explicitly the place of delivery.[33] – Of course, this observation by the court is equally true for all terms of Incoterms.

It was for the referring national court to determine whether the term "Resa: Franco nostra sede" corresponds to the EXW Incoterm, another term, or another international trade practice indicating the place of delivery. According to the CJEU, this assessment must be made without reference to the substantive law applicable to the contract. If it is not possible to determine the place of delivery autonomously in this way, the place of delivery shall be deemed to be the final destination where the physical handover of the goods to the buyer takes place.

2.2.3 Further Observations on Interpretation

In Finnish literature, *Electrosteel* has been regarded as a welcome clarification that Incoterms also govern jurisdiction under Art. 7(1)(b) first indent of the Brussels I (Recast) Regulation.[34] However, elsewhere the literature has emphasised that the case does not automatically mean that Incoterms govern jurisdiction under the Regulation.[35] This refers to the fact that *Electrosteel* requires a holistic assessment of all contractual terms. It must be specifically examined whether a particular term determines not only the allocation of costs and risk but also the place of delivery. Nonetheless, it is clear that all Incoterms determine the place of delivery. As demonstrated below, however, the interpretation can still be problematised and pushed to its limits in relation to the Regulation.[36] More critical voices have argued, *inter alia*, that the case shows that the phrase "unless otherwise agreed" should be removed from Art. 7(1)(b) of the Regulation.[37] Yet the expression "under the contract" would still remain in the first indent. Some scholars have also called for further clarification from the CJEU.[38]

One may certainly have reservations about the reasoning in *Electrosteel.* As noted above, a primary purpose of Art. 7(1)(b) of the Brussels I (Recast) Regulation was to reject a substantive interpretation of the concept of "place of performance" under the Brussels Convention. This purpose was confirmed by the CJEU in *Car Trim*, where the court applied an autonomous interpretation of the term "place of delivery" as the defined place of performance in the sale of goods. At the same time, *Electrosteel* demonstrates that, in practice, it may be difficult to

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[32] *Electrosteel*, para. 22.
[33] *Electrosteel*, para. 23. See, however, *infra* at fn. 48–52 on Italian case law.
[34] See Lauri Railas, Incoterms® 2020, Käyttäjän käsikirja, Kauppakamari 2020, pp. 120–122. It should be noted that this detailed handbook on Incoterms has also been published in an English edition; Lauri Railas, Incoterms® 2020 Handbook, Effecting Deliveries in Challenging Times, Kluwer Law International 2023. Sandvik and Sisula-Tulokas*, supra* fn. 12, p. 115, however, express themselves more cautiously regarding the relevance of Incoterms in this context.
[35] See, *e.g.*, van Calster, *supra* fn. 2, p. 141 and Widmer Lüchinger, Article 31 CISG, Place of Delivery, p. 737, in Ingeborg Schwenzer and Ulrich Schroeter (eds.), Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods, fifth edition, Oxford University Press 2022.
[36] See *infra* at fn. 48–52 on Italian case law.
[37] See, *e.g.*, Kadner Graziano, *supra* fn. 6, pp. 197–201, 207–208, who argues that the expression in question was simply an oversight by the EU legislator considering the overall purpose of Art. 7(1)(b).
[38] See the discussion in Vesna Lazić and Peter Mankowski, *supra* fn. 14, pp. 109–113.

maintain a clear distinction between an autonomous and a substantive interpretation of the first indent of Art. 7(1)(b).

In *Electrosteel*, Incoterms are seemingly characterised as international trade usage under what is now Art. 25(1)(c) of the Brussels I (Recast) Regulation. To the extent the Incoterms have been regarded as established international trade usage, this has exclusively been linked to their *substantive* significance.[39] As noted, the purpose of Incoterms is not to affect jurisdiction as a purely *procedural* matter.[40]

Furthermore, it should be noted in this context that the CJEU has previously held that it is for the national court to determine whether trade usage exists. Reference can be made to the MSG case,[41] concerning an oral agreement on the time charter of a river vessel and the applicable jurisdiction under the Brussels Convention. The question was whether the parties' conduct "may be deemed to constitute consent to the jurisdiction clause in issue, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice" (Art. 17(1)(c) of the Brussels Convention, corresponding to Art. 25(1)(c) of the Brussels I (Recast) Regulation). The CJEU held that it was for the referring national court to determine whether trade usage or custom exists in this respect.[42] In MSG, the issue was thus not the significance of international trade usages in a substantive sense, but rather their existence and relevance in a procedural context (a presumed jurisdiction clause).

In practice, most sales concluded by reference to Incoterms provide that delivery of the goods takes place in the seller's country. This applies to all terms in the E, F and C groups of Incoterms. Many standard agreements used in international sales specify such a term as a default solution — often the FCA term, corresponding to Art. 31(a) of the CISG[43] — which is rarely considered in detail by the parties. Taken together with the widespread use of Incoterms in international sales contracts, this may be said to undermine the EU legislature's original intention underlying Art. 7(1)(b), first indent of the Brussels I (Recast) Regulation. This argument rests on the idea that Art. 7(1)(b) first indent was intended to prioritise the buyer in choosing between placing jurisdiction in the buyer's or the seller's country. This rationale is reflected in *Car Trim*, where the CJEU held that the place of final destination of the goods in the buyer's country was more closely connected to the sale than the place in the seller's country where the goods were handed over to the first carrier for onward delivery to the buyer.

Both *Car Trim* and *Electrosteel* assume that the connection to the place of delivery "under the contract" in Art. 7(1)(b) first indent of the Brussels I (Recast) Regulation must be interpreted autonomously without reference to the substantive law of *lex causae*.[44] However, if the interpretation of what follows "under the contract" is based on the parties' agreement on the substantive solutions in the Incoterms as incorporated into *lex causae*, one inevitably departs

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[39] See also *supra* at fn. 24–25 with further references.

[40] See also Section II of the introduction to the English-language version of Incoterms 2020: "Neither do the Incoterms® rules provide the law applicable to the contract".

[41] Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhènanes SARL*.

[42] See *MSG*, para. 20.

[43] FCA: Free Carrier. See, *e.g.*, the Nordic General Conditions NL 17, para. 12, and the corresponding European Orgalime S 2022, para. 11. See also, for example, ICC Model Contract, International Sale of Goods (Manufactured Goods), B. General Conditions, art. 8.

[44] See *Car Trim*, para. 55 and *Electrosteel*, para. 16 and 26.

from an autonomous interpretation. And what methods of contract interpretation are truly "autonomous"?

Electrosteel has also been criticised for conflating prorogation clauses under Art. 25 of the Regulation with what "under the contract" may be deemed the place of delivery under Art. 7(1)(b) first indent.[45] This criticism emphasises that the provisions have entirely different purposes: Art. 7(1)(b) is based on a "close connection" between contractual performance and the court as the basis for jurisdiction, whereas Art. 25 is based on the principle that the parties should, in principle, be free to agree on an exclusive competent court without regard to any "close connection".[46]

The question also arises as to how *Electrosteel* should or could be understood. In this context, it should be emphasised that the case has not led to a fully uniform interpretation of Art. 7(1)(b) first indent of the Brussels I (Recast) Regulation in subsequent case law of the Member States. There are examples of Incoterms being given significance for jurisdiction with reference to *Electrosteel*, even where the parties were unaware that the choice of delivery term had such procedural effect.[47] But there are also clear examples in the opposite direction. In particular, the Italian Corte Suprema di Cassazione has chosen to interpret Art. 7(1)(b) first indent and *Electrosteel* in a manner that appears to substantially diminish the significance of Incoterms in establishing the place of delivery as a basis for jurisdiction.

In a 2019 case concerning a contract of sale between an Italian seller and a French buyer, the Corte Suprema di Cassazione held that the FCA Incoterm did not confer international jurisdiction on the Italian courts under Art. 7(1)(b) first indent of the Brussels I (Recast) Regulation. After considering *Car Trim* and *Electrosteel*, the court found that the agreement on the FCA term did not constitute a deviation from the place of delivery under Art. 7(1)(b) first indent.[48] The parties' intention in using the term was not to deviate from the final destination in the buyer's country. The court appears to have treated the term, when interpreted autonomously, as reflecting merely the allocation of costs and risks between the parties.[49]

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[45] See Kadner Graziano, *supra* fn. 6, pp. 197–198.

[46] In this context, it may be added that asymmetric prorogation clauses have long been a preferred option in certain transactions. Such clauses require one party to a contract to refer disputes to a designated, exclusive court, while providing the other party the choice to bring proceedings in any competent court. In its judgment of 27 February 2025 in case C–537/23, *Società Italiana Lastre SpA (SIL) v Agora SARL*, the CJEU held that an asymmetric jurisdiction clause in favour of EU courts may be valid despite conferring a broader choice of forum on one party.

[47] There are also examples outside the scope of the Brussels I (Recast) Regulation. Reference can be made to the German BGH judgment of 7 November 2012, CISG-online 2374. The case concerned jurisdiction under the German *Zivilprozessordnung* (Sec. 29) in a sale between a German buyer and a seller in South Korea. The BGH found, with reference, inter alia, to *Electrosteel* (BGH reasoning, para. 22), that the Incoterm "DDP Cologne" conferred jurisdiction on the German court, that is, the court at the place to which the goods were to be delivered under the term. It was irrelevant that the parties were unaware that the choice of delivery clause had this procedural effect. Under Art. 7(1)(b) first indent of the Brussels I (Recast) Regulation, however, the German court would have been competent regardless of the delivery clause in question.

[48] Corte Suprema di Cassazione, 28 June 2019, CISG-online 5758.

[49] Se Corte Suprema di Cassazione, 28 June 2019, reasoning, para. 29: "Ed infatti, come già osservato dalla Corte capitolina, il richiamo alla clausola Incoterm FCA – Free Carrier ... named place (`Franco vettore´ ... luogo convenuto), non palesa la chiara ed univoca volontà delle parti di stabilire il luogo di consegna della merce, in deroga al criterio fattuale del recapito finale, essendo la clausola intesa essenzialmente a regolamentare il profilo del passaggio dei rischi e dei costi del trasporto successivo al compratore."["And indeed, as already noted by the Capitoline Court, the reference to the Incoterm FCA – Free Carrier … named place (`Franco vettore´ … luogo convenuto) does not reveal a clear and unequivocal intention of the parties to establish the place of delivery of the

Under this interpretation, it is difficult to see how Incoterms could be attributed any independent relevance under Art. 7(1)(b) first indent.

Reference can also be made to a more recent 2022 judgment of the Corte Suprema di Cassazione.[50] That case concerned the sale of wine bottles between an Italian seller and a Polish buyer. The EXW Incoterm was held not to confer jurisdiction on the Italian courts. A decisive factor was apparently that the term was incorporated into the commercial conditions for determining the purchase price.[51]

It is noteworthy that the Corte Suprema di Cassazione had previously given Incoterms significance for jurisdiction under the Brussels I Regulation, prior to the CJEU's statements in *Car Trim* and *Electrosteel* that "place of delivery" and "under the contract" must be interpreted autonomously rather than by reference to the substantive meaning in the *lex causae*.[52]

2.2.4 An Alternative Interpretation

In my view, the CJEU in *Electrosteel* could have interpreted Art. 7(1)(b) first indent of the Regulation more consistently with the provision's overarching purpose and that of Incoterms.

An alternative interpretation could have examined whether the parties' substantive choice of delivery term also, *under the contract*, constitutes an *agreement* on the place of delivery as an autonomous concept linked to international jurisdiction. According to the principle established already in *Car Trim*, this interpretative question must be assessed autonomously, without reference to the substantive law of *lex causae*. Given the purely substantive purpose of Incoterms as an incorporated part of *lex causae*, it could be argued that the *presumption* should be that the parties' agreement on a delivery term alone *cannot* simultaneously be interpreted as an agreement deviating from the final destination as the place of delivery under Art. 7(1)(b) first indent.

Such an interpretation would thus preserve the autonomous approach to special jurisdiction in sales under the Brussels I (Recast) Regulation while respecting the exclusively substantive purpose of Incoterms.

3. Concluding Remarks

Much of what has been presented could be further developed in greater depth and breadth. The above, however, already illustrates how challenging the intersection between substantive and procedural law can be.

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goods in derogation from the factual criterion of the final destination, since the clause is essentially intended to regulate the transfer of risks and the costs of the transport subsequent to the buyer."]

[50] Corte Suprema di Cassazione, 10 November 2022, CISG-online 6113.

[51] See Corte Suprema di Cassazione, 10 November 2002, *i.a.*, para. 32: "La clausola in argomento, riportata nel controricorso, attiene alle `condizioni commerciali´ ed è testualmente riferita in funzione della determinazione del prezzo: `il prezzo del prodotto si intende come EXW 51035 Lamporecchio (Incoterms 2000) con banderoul e pellets´." ["The clause in question, reproduced in the counterclaim response, concerns the `commercial conditions´ and is expressly referred to for the purpose of determining the price: `the price of the product is understood as EXW 51035 Lamporecchio (Incoterms 2000) with banderol and pellets´."]

[52] See *supra* sections 2.1.2 and 2.2.2.

In particular, the discussion shows that maintaining an autonomous interpretation of Art. 7(1)(b) first indent of the Brussels I (Recast) Regulation, separate from substantive law, may be more difficult than one might assume. The usefulness of an autonomous meaning of the place of delivery as the place of performance for sales could also be debated,[53] but such a discussion would exceed the scope of this study. The concept of "place of performance" as a basis for international jurisdiction has sometimes been described in private international law discussions as elusive, or even "mysterious" even for experts.[54] With regard to sales concluded under Incoterms and the Brussels I (Recast) Regulation, the final word has probably yet to be said on dispelling this mystery.

In any event, parties to an international sale should be aware that the choice of an Incoterm may also determine jurisdiction under the Brussels I (Recast) Regulation. However, they should also be aware that the Regulation might not be interpreted in this way in all Member States or in every situation. Unsurprisingly, then, there is essentially only one practical recommendation that can provide clarity once and for all: include an explicit, clear and unambiguous prorogation clause in the contract in accordance with Art. 25 of the Regulation.

[53] In this context, it should be noted that the autonomous interpretation of the concept of "place of performance" applies only to sales of goods and to services under Art. 7(1)(b). Under Art. 7(1)(a), the substantive approach of the applicable national law is still considered relevant for the interpretation of this concept in other types of contracts. See also, *e.g.*, van Calster, *supra* fn. 2, p. 141 and Vesna Lazić and Peter Mankowski, *supra* fn. 14, p. 100.

[54] See Kadner Graziano, *supra* fn. 6, pp. 169.