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gation is assigned later, all the more since this does not alter the place of performance. The place of performance remains the same since it is either linked with the factual delivery or with the original creditor, not subsequent creditors including the present plaintiff. The defendant debitor cessus is not unfairly treated since he faces jurisdiction only in a place which he could envisage from the outset. Otherwise the debitor cessus would gain an unjustified windfall profit from the assignment, and parties contemplating a transfer of the obligation from the original creditor would be advised only as to the transfer of the eventual proceeds of the obligation in advance and to order the original creditor to stay upfront and to cash in the obligation. It does not matter that the debitor cessus is not party to the assignment or subrogation and did not participate voluntarily in this process. Nor does the fact become relevant that the assignee was previously unknown to the debtor. Accordingly, assignees and subrogating persons can also sue in the court designated by (1) if only the claim assigned or subrogated has been in contract initially. It may be added that in the event of another person individually succeeding to the debt by agreement the claim retains its contractual nature and can be pursued in the forum provided by (1). For the sake of clarification, it should be asserted that the holder of a lien to a claim sort of subrogates into the claim when exercising his lien and should thus be enabled to rely on (1) if the claim is a contractual one.

2. Art. 5 (1) (b)

a) Characterisation

aa) Contracts for the sale of goods

The first category covered by (b) comprises contracts for the sale of goods. This expression should be given an autonomous meaning independent from the definition a contract for the sale of goods is given by the lex fori, the lex causae or any other (single) national law. Rightly it should be taken as a concept of EU law. The national sales laws might provide some help, but only in their entirety and as a kind of comparative background, not with defining power. Whether national law, particularly the substantive law of the lex fori, would coin the concrete contract a contract for the sale of goods or else bears no relevance.

(1) Contract for sale

The phrase “sale of goods” ought to be coined widely, i.e. at least interpreted regardless of whether a transfer of property is automatically executed or not. (1) (b) does not contain a
proper definition, though,\textsuperscript{452} and insofar its drafting might be called opaque.\textsuperscript{453} Otherwise contracts governed by a \textit{lex causae}, which – like German law or even the CISG – strictly distinguishes between contractual issues and issues of property law, would be excluded. Since only contractual issues are inside (1), property law falls completely outside and does not even have indirect influence via questions of classification.\textsuperscript{454} The basic meaning of “sale of goods” thus should read as the contractual exchange of goods against money.\textsuperscript{455} This covers all kinds of sale contracts.\textsuperscript{456}

But on the other hand the phrase “sale of goods” requires that parties contract for a transfer of property since otherwise it would be impossible to distinguish between a sale of goods and the mere hire of goods. Delivery is the physical hand-over when material and corporeal goods are concerned. Under a hire contract the goods in question are also handed over which implies that something else must serve as the distinguishing and characteristic element of a sale of goods. Hence, in solving case the first practical step is to identify the obligations which characterises the concrete contract.\textsuperscript{457} Only contracts which have the supply of goods as their characteristic obligation, qualify as contracts for the sale of goods.\textsuperscript{458} The supplier’s responsibility can also be a factor to consider: If the supplier is responsible for the quality of the goods, even if the goods are result of activities on his part, and the compliance of the goods with the contract, that responsibility will tip the balance in favour of classification as a “contract for the sale of goods”.\textsuperscript{459} On the other hand, if the supplier is responsible only for correct implementation in accordance with the recipient’s instructions, that fact indicates rather that the contract should be characterised as one for the provision of services.\textsuperscript{460} The characteristic performance is the relevant one,\textsuperscript{461} faithful to principle.\textsuperscript{462}

Seizing upon the meaning of “sales”\textsuperscript{463} in the CISG,\textsuperscript{464} the most elaborate and most widely

\begin{itemize}
\item Shine, [2011] ICCLR 20, 22.
\item See only (with lists of sub-types) Burgstaller, in: Neumayr/Burgstaller, Art. 5 note 10 (2002); Simotta, in: Fasching/Konecny, Art. 5 note 161; Leible, in: Rauscher, Art. 5 note 46.
\item Car Trim GmbH v. KeySafety Systems SrL, (Case C-381/08) [2010] ECR I-1255, I-1280 para. 32.
\item Car Trim GmbH v. KeySafety Systems SrL, (Case C-381/08) [2010] ECR I-1255, I-1280 para. 32.
\item Shine, [2011] ICCLR 20, 23 does not grasp the principle.
\item The German wording of (b) reads “bewegliche Sachen”, not “Waren” and thus employs a different terminology, but should be taken as equivalent, though; Lynker, Der besondere Gerichtsstand am Erfüllungsort in der Brüssel I-Verordnung (Art. 5 Nr. 1 EuGVVO) (2006) p. 53.
\end{itemize}
used international instrument in modern times, worlds apart from any national particularities, it does not matter whether the seller is called upon to manufacture or produce the goods or not as Art. 3 CISG demonstrates. The understanding under Art. 1 (4) Consumer Sales Directive and Art. 6 (2) UN Convention of 16 June 1974 on the Limitation Period in the International Sale of Goods amply support this. If the element of activity does not become predominant the mere result that a product is handed-over and property in this product has passed, becomes the important characteristic. The seller-producer and the mere re-seller are both covered by (a). How the seller obtains the goods and comes into a position to transfer property in them, has no relevance if not the process of producing (as opposed to its resulting outcome) as such is the topic the parties are mainly interested in. A sales contract with a subsequent agreement on modifying the goods still is a sales contract.

However, it might be an indication pointing towards activity and the production process as such being the dominant element and the contract qualifying as one for the provision of services if the purchaser supplies the materials from which the goods are manufactured.

On the hand if the contract purports at the supply of goods to be manufactured or produced, such contract is for the sale of goods even though the purchaser has specified certain instructions and requirements with regard to the provision, fabrication and delivery of the components to be produced. The place of manufacture is irrelevant when the contract is for supply of goods elsewhere, anyway. If the seller is first called upon to invest sweat of

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465 For the limited purposes of gaining interpretatory guidance it does not matter that the United Kingdom and Portugal (plus Iceland in the context of the Lugano Convention) are not Member States of the CISG; *Schlosser Art. 5 note 10a; Lynker, Der besondere Gerichtsstand am Erfüllungsor in der Brüssel I-Verordnung (Art. 5 Nr. 1 EuGVVO) (2006)* p. 53 fn. 235.

466 *Di Blase, Europa e dir. priv. 2011, 459, 465.*


469 *Car Trim GmbH v. KeySafety Systems Srl*, (Case C-381/08) [2010] ECR I-1255, I-1281 paras. 35, 37; Cassaz. RDIPP 2013, 169, 171; sceptical as to the methodical correctness Axel Metzger, IPRax 2010, 420, 421 et seq.


471 Rb. Rotterdam NIPR 2010 Nr. 357 p. 580; see also OLG Stuttgart IHR 2011, 236, 238 = IHR 2012, 38, 40.


the brow and to develop concepts or construction plans this might become a dominant feature, but not necessarily so.\textsuperscript{476}

94 Printing orders should be taken as constituting sales contracts.\textsuperscript{477} Even an artist selling a picture to be painted, should be regarded as a seller since the buyer is interested in the result of the artist’s efforts not in the painting process itself.\textsuperscript{478} If the seller is obliged to install the goods at the buyer’s place, that does not alter the nature of the contract as one for the sale of goods, either.\textsuperscript{479} Likewise demolishing a previous good not to be substituted with the sold one will not become characteristic.\textsuperscript{480}

95 The mere fact that after-sale services have to be provided by the seller, does not alter the nature of the contract.\textsuperscript{481} Neither such a split, nor would regarding such services as the dominant element do justice to the over-all structure of (a) in most instances. One has only to compare this case with an event in which the seller has to perform warranties due to defective goods by repairing them (regardless as to whether such warranties are generated by contract\textsuperscript{482} or \textit{ex lege}). However, the picture might change if the after-sale services are not declared as such but form the subject of a separate contract for e.g. schooling staff, monitoring, maintaining and repair in case of need.\textsuperscript{483} In this case the parties themselves have opted for a split. Different contracts can and should be treated as such: different contracts. A contract containing mixed obligations for supply, delivery, maintenance and support ought to be subjected to identifying the most important obligation, though.\textsuperscript{484} On yet another hand, contracts providing for regular or occasional up-dates should be treated as sales contracts.

96 Complex contracts, the elements of which are the sale of goods and the provision of services at a roughly equivalent level, should not be transferred to the realm to (a) but kept within the confines of (b).\textsuperscript{485} Although, the Joint Working Group which elaborated (1), might have held a different view.\textsuperscript{486} But would it really make sense to allow for two elements, which if agreed

\begin{itemize}
\item \textsuperscript{474} \textit{Car Trim GmbH v. KeySafety Systems Srl}, (Case C-381/08) [2010] ECR I-1255, I-1283 para. 43; BGH IHR 2010, 216, 217; Cass. RCDIP 100 (2011), 915, 916.
\item \textsuperscript{475} \textit{MBM Fabri-Clad Ltd. v. Eisen- und Hüttenwerke Thale AG} [2000] I.L.Pr. 505, 510 \textit{et seq.}, 512 (C.A., per Pill and Aldous L.JJ. respectively).
\item \textsuperscript{476} See for the latter and characterising the developing process as \textit{accessorium} in the concrete cases Rb. Rotterdam NIPR 2010 Nr. 357 p. 580; Rb. ’s-Hertogenbosch NIPR 2010 Nr. 483 p. 790.
\item \textsuperscript{477} \textit{Contra} Rb. Kh. Turnhout TBH 1994, 730, 733 with note Erauw.
\item \textsuperscript{478} Appraises by Axel Metzger, IPRax 2010, 420, 423.
\item \textsuperscript{479} \textit{Burgstaller/Neumayr} Art. 5 note 10 (Oct. 2002).
\item \textsuperscript{480} Hof Amsterdam NIPR 2010 Nr. 328 p. 547.
\item \textsuperscript{481} Tentatively doubting \textit{Peter Arnt Nielsen}, in: Liber Professorum College of Europe 2005, p. 245, 256. Tentatively as here Axel Metzger, IPRax 2010, 420, 423.
\item \textsuperscript{482} Rb. Rotterdam NIPR 2011 Nr. 250 p. 438.
\item \textsuperscript{486} \textit{Peter Arnt Nielsen}, in: Liber Professorum College of Europe 2005, p. 245, 256.
\end{itemize}
upon separately, would clearly fall within (b), but when being combined, drop out of (b)?

Admittedly, it must be conceded that in the next step the choice for the appropriate connecting factor is a difficult issue. But perhaps a lenient tendency towards a dépeçage could cure the illness and provide the requisite remedy. Alternatively, the search for a relative centre of the contract would be on with the single obligations to be weighed against each other. The economic value of the respective elements can be factor in this regard. Yet it should be clear that distribution agreements as such do not qualify as sale contracts whereas an actual contract for the transfer of goods under the umbrella of a master agreement does.

Since an obligation to transfer property is the decisive element leasing contracts do not feature as contracts for the sale of goods. They are effectively for the hire of goods unless either party seizes upon given options to actualise a dormant sales element contained in some leasing contracts. To effectuate such an option transforms the contract into a contract for the sale of goods, but only after the actualisation. Before the option is exercised a leasing contract is for hire and not for sale.

Barter contracts are not sales contracts, either, but for a different reason. As barter contracts establish mutual obligations to transfer property, it is impossible to identify a performance by a single party which would be characteristic for the entire contract. Consequently, it is impossible to identify any place of the delivery of the goods under (b) since the mutual main obligations are equivalent and bear the same relevance.

For yet another reason donations and gifts are not covered by (b): Whereas “contract” in general does not require consideration to be agreed upon, it is different in the case of sale contracts. Sale contracts are for remuneration and thus require consideration to be agreed upon. Yet the case can be different in the event of so-called gemischte Schenkungen (literally to be translated as “mixed donations”) where a consideration is agreed upon, but to the knowledge of both parties does not properly reflect the value of the good to be transferred. If the sales part of the transaction is the dominant one, (b) should apply, sticking to the ordinary yardstick that the preponderant part qualifies the entire transaction in the case of doubt.

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487 Favouring this de Franceschi, Contratto e impresa/Europa 2008, 637, 689 et seq.
488 Simotta, in: Fasching/Konecny, Art. 5 note 163.
489 Hof’s-Gravenhage NIPR 2005 Nr. 51 p. 92; Wurmnest, IHR 2005, 107, 112 et seq. With regard to its case law under the CISG the Corte di Cassazione might hold otherwise; see Cassaz. Giur. it. 2000 I col. 2333 with note Ferrari; Cassaz. IHR 2005, 115.
491 Czernich, in: Czernich/Tiefenthaler(Kodek, Art. 5 note 30; Leible, in: Rauscher Art. 5 note 46c; Geimer/Schütze Art. 5 note 88a; Hofmann/Kunz, in: Basler Kommentar, Art. 5 note 196.
492 See only Geimer/Schütze Art. 5 note 88; Rodriguez, Beklagtenwohnsitz und Erfüllungsort im europäischen IZVR (Zürich 2005) para. 664; Lynker, Der besondere Gerichtsstand am Erfüllungsort in der Brüssel I-Verordnung (Art. 5 Nr. 1 EuGVVO) (2006) p. 55; Kropholler/von Hein Art. 5 note 39.
493 See only Hofmann/Kunz, in: Basler Kommentar, Art. 5 note 185.
(2) Goods

(a) In general

Goods in the literal every-day meaning are tangibles, corporeal goods.\textsuperscript{496} A more accurate and reasonably refined approximation defines goods as physically tangible objects (other than real estate) to which tradable personal property rights attach.\textsuperscript{497} This encompasses already the majority of possible objects of a contract under which delivery shall take place and property shall be transferred. Tangibles are the evident realm of “goods”. If the contract provides for the good to be produced by the seller, the contract will nevertheless be a sales contract\textsuperscript{498} unless the buyer’s specification are so exhausting that the element of services gains prevalence and the contract should be denominated as a contract essentially for the provision of services. The borderline between those two categories of contracts reflects and mirrors the similar borderline between the fundamental freedom of movement of goods under Arts. 34 et seq. TFEU (ex-Arts. 23 et seq. EC Treaty) and the fundamental freedom for the provision of services under Arts. 56 et seq. TFEU (ex-Arts. 49 et seq. EC Treaty) on the other hand.\textsuperscript{499} Generally, the understanding of goods under (b) should follow the path cut by the respective definition in the CISG as far as possible.\textsuperscript{500} That four Member States of the Brussels Ibis Regulation (namely the United Kingdom, Ireland, Portugal and Malta) are not Contracting States of the CISG does not amount to an obstacle\textsuperscript{501} for in the present context the CISG is employed solely as persuasive authority and not applied in the strict and technical sense.\textsuperscript{502}

(b) Ships and vessels

Since no express exception can be found, even ships which are definitely tangibles in the natural sense, are covered.\textsuperscript{503} Art. 2 (e) CISG is not mirrored in (b).\textsuperscript{504} There are no (assumed) particularities of ship sales that would demand the treatment of ships as immovable

\textsuperscript{495} See Rodríguez, Beklagtenwohnsitz und Erfüllungsort im europäischen IZVR (Zürich 2005) para. 673. Contra Geimer/Schütze Art. 5 note 88. More generous Hofmann/Kunz, in: Basler Kommentar, Art. 5 note 185: Every consideration suffices, be it only more than symbolic.
\textsuperscript{500} Rb. Arnhem NIPR 2006 Nr. 51 p. 83; Trib. Padova, sez. Este RDIPP 2007, 147, 151; Kubis, ZEuP 2001, 742, 750; Krophollerivon Hein, Art. 5 note 38; Magnus, IHR 2002, 45, 47; Leible, in: Rauscher, Art. 5 note 46; Ulrich G. Schroeter, UN-Kaufrecht und Europäisches Gemeinschaftsrecht (2005) § 17 with note 33; Ignatova, Art. 5 Nr. 1 EuGVVO – Chancen und Perspektiven der Reform des Gerichtsstands am Erfüllungsort (2005) p. 185; Franzina, La giurisdizione in materia contrattuale (2006) p. 309; Mankowski, CR 2010, 137, 138; see also Fawcett, in: Fawcett/Harris/Bridge para. 3.149 (same general line but with express tendency to a wider definition).
\textsuperscript{502} Mankowski, IHR 2009, 46, 56; Leible, EuZW 2010, 301, 304; Gsell, ZEuP 2011, 669, 679.
\textsuperscript{503} Rb. Rotterdam NIPR 2010 Nr. 322 p. 529.
\textsuperscript{504} Magnus, IHR 2002, 45, 47 fn. 26.
property. That property in ships is registered in the real rights register does not affect the mere sales contract too much. The same applies to the sale of other vessels which might be registered somewhere (like aircrafts).505

(c) Money
On the other hand money, if taken as an instrument to measure and denominate value, is not covered.506 Not a single coin or Art. 5 note matters if currency swaps are entered into and executed, even more so since such deals today do not involve genuine coins or notes anymore but only numbers and figures in accounts. Things are different if Krugerrands, Golden Eagles or Maple Leafs are bought and the delivery of genuine coins is at stake. Then and only then a sales contract is at stake.

(d) Real estate (immovables)
Of the catalogue of exceptions to be found in Art. 2 CISG, which should serve as some guideline for the interpretation of “goods” under (b), real estate (immovables) and electricity remain. Unfortunately, as for the sale of immovable property the answer is not already found in Art. 24 (1) since this paragraph only deals with claims founded in rights in rem and not with contracts on acquiring such rights.507 Hence, the sale of immovables is only excluded from (b) if one could restrict the meaning of “goods” to moveables, since immovables are without the slightest doubt intangible and corporeal. Passing possession does not pose a major problem. Delivery of an immovable takes place where this immovable is located. Effects in the books (if they are necessary under, or demanded by, the applicable legal system for the transfer of property) are of no avail since delivery as such does not refer to the transfer of property but to the change in possession.

Nevertheless, these constructive steps are only of secondary importance. The first and logically paramount question that needs to be answered is whether the sale of land can be qualified as a sale of goods or whether the notion of “goods” implicitly requires that the object of the sale can be transported and moved. The German and Dutch versions univocally demand so for they refer to “bewegliche Sachen” or “roerende zaken” respectively thereby excluding “unbewegliche Sachen” or “onroerende zaken” by the way of argumentum e contrario.508 This gains strong support from some quarters of EU law since Art. 1 (2) (b) Consumer Sales Directive expressly restricts “consumer goods” to tangible movable items. The interpretation of (1) (b) should not be uninfluenced by other instruments of EU law which refer to the sale of goods or the provision of services in comparable circumstances.509 Some coordination with the understanding of “sale” under Art. 15 (1) (a) also is desirable.510

507 See only Mankowski, in: Rauscher, Art. 24 notes 8 et seq.; Christoph A. Kern, IPRax 2014, 503, 504.
509 Layton/Mercer para. 15.047; see also Trib. Padova, sez. Este RDIPP 2007, 147, 152.
510 Hofmann/Kunz, in: Basler Kommentar, Art. 5 note 182.
Distinguishing between goods and immovables gives rise to consequential questions. Firstly, according to which law the characterisation issue as to whether the tangible is deemed a movable or an immovable (the *lex fori*\(^{511}\) or the *lex rei sitae*\(^{512}\) or in autonomous interpretation\(^{513}\)) and, secondly, how to deal with the nitty-gritty of movable tangibles which form part of land or are *accessoire* to land pursuant to the applicable national law. If under Art. 24 (1) a characterisation pursuant to the *lex rei sitae* ought to be preferred\(^{514}\) there is a strong case for proceeding down the same avenue here. Yet the search for consistency might not stop with Art. 24, but also indicate a look at other attempts in EU law to deal with the problem. Art. 1 (2) (b) Consumer Sales Directive provides an example for an autonomous try.

But the parallel could be taken one step further and land could be treated as a “good”, subjecting the German version to a teleological reduction. Insofar (1) could complement Art. 24 (1) and help filling the gaps of the latter. At least the courts at the place where the immovable is located would have jurisdiction but for the difference between exclusive jurisdiction under Art. 24 (1) and special jurisdiction here. At least treating land as a “good” would avoid any difficulties in distinguishing and would solve the case of *Zubehör* by simply not allowing it to arise. On the other hand, the price would be considerably high by deviating from the internationally common circumscription of goods in Art. 2 CISG which expressly excludes immovables, and from Art. 1 (2) (b) Consumer Sales Directive. Between Scylla and Charybdis the dice should eventually be cast in favour of the traditional approach to regard real estate to be excluded from the realm of “goods”. The areas of doubt connected with it are rather minor and do eventually not amount to convincing counterarguments.

**Electricity and other sources for energy**

Electricity is a virtual quantity. It is not tangible in the natural sense that one could touch it, nor has it ever been transported or produced in a tangible form. In terms of physics energy might be a function of mass \(e = mc^2\), but in terms of physics only. Thus, although electricity is not expressly excluded from the circle of goods it should fall outside this circle.\(^{515}\) That one can speak of a delivery of electricity at the customer’s place does not turn the tide. Oil is a tangible and does not pose any major problems. Gas as another source for energy might not be corporeal in a strict sense but could materialise if transferred into another stage physically. Accordingly, it should be regarded as a “good”.\(^{516}\)

**Software and other digitised products**

Modern times have raised the question of whether software or information be can be regarded as “goods” for the purposes of (b). Perhaps surprisingly the better arguments can be raised in favour of an affirmative answer at least for standard software.\(^{517}\) Despite

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511 Czernich, in: Czernich/Tiefenthaler/Kodek, Art. 5 note 32.
512 Hüßtlege, in: Thomas/Putzo, Art. 5 note 6.
513 Kropholler, Art. 5 note 34; Leible, in: Rauscher, Art. 5 note 48.
516 Concurring OLG Brandenburg IPRspr. 2011 Nr. 212 p. 552.
the naturalistic impression at first glance that both software and information are intangibles, the notion of “goods” ought not to be restricted to tangibles. For software there is a line of argument relating back to the interpretation of the CISG. Under the CISG the almost general opinion subjects standard software (i.e. software not specifically designed to meet the customer’s individual orders and requirements) to the notion of “goods” for it should not make a fundamental difference whether the software is delivered on a hard disk or on-line. The mere wrapping of the hard disk does not matter, it is the content inside. The wrapping cannot determine the nature of the entity itself. Historically anything started with the hard disk and software thus was believed to be covered by the CISG. Alterations based upon technological progress have been rejected. A justification to treat someone who buys standard software on a hard disk or CD more preferential insofar as an additional ground for jurisdiction is opened in his favour, compared to someone who buys the software in digitised mode can hardly be found. Furthermore, parallels to the notion of sale of a copy of a program under Art. 4 (2) Directive 2009/24/EC could advance helpful guidelines and arguments. Arts. 5 (b); 2 (j) Proposal CESL might add valuable insights for demarcating the line in the area of digitised products.

Other digitised products could possibly follow an analogy to the standard/individual software divide. Mostly, matters of licensing and transferring usage rights under intellectual property law could be the most imminent cause and purpose for contracting. Perhaps this

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(g) Rights and securities

Rights, e.g. to claims, patents, trademarks, etc. do not start amongst the goods since they are not corporeal tangibles; the sale of shares of a company (or of units of a unit trust) also falls outside the scope of application of (b).\footnote{See only Trib. Matova RDIPP 2007, 393, 398; Czernich, WBL 2002, 337, 340; Magnus, IHR 2002, 45, 47; Burgstaller/Neumayr Art. 5 note 10 (Oct. 2002); Leible, in: Rauscher, Art. 5 note 47; Fawcett, in: Fawcett/Harris/Brige para. 3.147; Ignatova, Art. 5 Nr. 1 EuGVVO – Chancen und Perspektiven der Reform des Gerichtsstands am Erfüllungsort (2005) p. 186; Lysner, Der besondere Gerichtsstand am Erfüllungsort in der Brüssel I-Verordnung (Art. 5 Nr. 1 EuGVVO) (2006) pp. 56 et seq.; Franzina, La giurisdizione in materia contrattuale (2006) p. 319; von Hein, BerDGflR 2011, 369, 386–387 and (with regard to the parallel question under Art. 13 (1) Brussels Convention) Waverley Asset Management Ltd. v. Saha 1989 SLT (Sh Ct) 87, 88 (Sheriff Court of Lothian and Borders at Edinburgh, Sheriff Shiach).} Although the latter might be deemed as incorporated in some kind of corporealisation (the old idea of a share in paper), the important issue behind the sale of shares is the transfer of the right, not the transfer of some piece of paper (if such paper in the age of electronic account holding still exists). The same should apply to other securities.\footnote{Contra Gehri, Wirtschaftsrechtliche Zuständigkeiten im internationalen Zivilprozessrecht der Schweiz (2002) p. 199.} Though substantive law might treat them differently in some respect, what matters with regard to them is the right and title, not the paper (if some substitute for paper can still be construed). In modern times securities are kept electronically, and it would fit ill if securities in printed form were treated differently. The German distinction between Wertpapiere and Wertrechte should not matter, either.\footnote{Contra Basedow, in: FS Erik Jayme (2004), p. 3, 9.}

bb) Contracts for the provision of services

(1) General considerations

The second category covered by (b) comprises contracts for services. The notion of “services”\footnote{For a comparative approach see Merchiers, in: Études offertes au Philippe Malivaud (2007), p. 431.} bears an autonomous meaning independent from any respective notions contained in the national legal orders of the Member States.\footnote{BGH NJW 2006, 1806; OLG Düsseldorf IHR 2004, 108, 110 with further references; OLG Köln RIW 198 September 2015} Insofar the TFEU provides the most...
conditions and what the content of these conditions is.\textsuperscript{311} If he then consents it is his own risk that the contract contains an unfavourable jurisdiction clause. Otherwise no valid jurisdiction agreement is concluded. Partly, it has been advocated that merchants in international trade must always understand English irrespective of whether English was the language of the main contract.\textsuperscript{312} This goes too far; only if the offeree in fact understands English does this language suffice.

d) Factual impediments like illegibility etc.

Also factual impediments like, e.g., the illegibility of a jurisdiction clause in very small print, may affect the validity of the jurisdiction agreement. Again, the question must be answered whether Art. 25 provides an autonomous solution or whether the applicable law designated by the conflicts rules should decide. It is suggested here that an autonomous solution should be sought.\textsuperscript{313} As a factual question the court seised should be allowed to decide without further redress to national law whether or not a jurisdiction clause could have been read or was illegible and for this reason invalid.\textsuperscript{314} If the clause was illegible again the necessary consensus is lacking. However, Art. 25 does not require that the clause must be specifically highlighted (in red ink or the like).\textsuperscript{315}

4. Form

It is common ground that Art. 25 (1) covers the form requirements for jurisdiction agreements and excludes insofar any redress to national law.\textsuperscript{316} In particular with a view to the form requirements the ECJ has stated that the wording of [the former Art. 17 Brussels Convention] must be construed strictly because of the serious consequences a valid jurisdiction agreement may have for a defendant who may lose the access to the courts which normally would be competent for his disputes.\textsuperscript{317} Furthermore, the Article’s provisions on

\textsuperscript{311} OGH RdW 1999, 723; OGH IHR 2009, 126 (127: contract terms in Italian are invalid if addressee does not understand Italian and contract negotiations were led in German); Kohler, IPRax 1991, 299, 301; Tiefenthaler, in: Czernich/Kodek/Tiefenthaler Art. 23 note 33. Spellenberg, IPRax 2010, 469 requests that the jurisdiction clause itself must be in a language understood by the other party.

\textsuperscript{312} See Auer, in: Bülow/Böckstiegel/Geimer/Schütze Art. 23 note 212; contra, e.g., Spellenberg, IPRax 2007, 102.

\textsuperscript{313} In the same sense Mankowski, in: Rauscher Art. 23 note 39; also without redress to the applicable law Schack para. 472; evidently also Spellenberg, IPRax 2010, 465.


form have to be interpreted in an autonomous way without redress to any national law or concept.\footnote{See Auer, in: Bülow/Böckstiegel/Geimer/Schütze Art. 23 note 84, 86; Geimer/Schütze Art. 23 note 97; Kropholler/von Hein Art. 23 note 30.}

If the ECJ judgments\footnote{See in particular Estasis Salotti di Colzani Aimo and Gianmario Colzani v. RÜWA Polstereimaschinen GmbH, (Case 24/76) (1976) ECR 1831; Galeries Segoura SPRL v. Société Rahim Bonakdarian, (Case 25/76) (1976) ECR 1851; Partenreederei ms “Tilly Russ” and Ernst Russ v. NV Haven- en Vervoerbedrijf Nova and NV Goeminne Hout, (Case 71/83) (1984) ECR 2417; Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trampy SpA, (Case C-159/97), (1999) ECR I 1597; Coreck Maritime GmbH v. Handelsveem BV, (Case C-387/98) (2000) ECR I-9337.} on the form of jurisdiction clauses and in particular on their incorporation into a binding agreement between the parties are taken as a whole it is rather evident that they do not only formulate formal but also material rules of formation of a contract.\footnote{See also Kropholler/von Hein Art. 23 note 27; Layton/Mercer para. 20.083 et seq.; Herbert Roth, ZZP 93 (1980), 156, 162.} Indeed, these rules could easily be generalised as model for the formation of a contract and the incorporation of general conditions into a contract. It has been suggested that contrary to the ECJ decisions the incorporation problem should be better left to the applicable national law.\footnote{See thereto supra Art. 25 note 82.} In support of this view it has been argued that an autonomous solution would raise difficulties. It would, for instance, disregard, where English law would be the proper law of contract, a lack of consideration that could invalidate a jurisdiction clause which under the ‘form requirements’ of Art. 25 would be valid. This would, it is said, be contrary to the aim of Art. 25 “to impose tighter requirements on jurisdiction clauses than on other clauses.”\footnote{Layton/Mercer para. 20.084.} However, Art. 25 aims as well at a unification of the standards according to which jurisdiction clauses are to be adjudicated in the Member States; and this aim militates rather in favour of, than against, a wider scope of Art. 25. Moreover, the argument neglects the fact that the validity of the jurisdiction agreement and validity of the main contract are separate subjects and independent of each other as Art. 25 (5) now expressly states.\footnote{Estasis Salotti di Colzani Aimo and Gianmario Colzani v. RÜWA Polstereimaschinen GmbH, (Case 24/76) (1976) ECR 1831 (1st sentence of the summary of the decision); Galeries Segoura SPRL v. Société Rahim Bonakdarian, (Case 25/76) (1976) ECR 1851, 1860 para. 6.}

The purpose also of the form requirements is “to ensure that the consensus between the parties is in fact established.”\footnote{OGH IHR 2009, 126 et seq.} The form serves to evidence that a true consensus was reached but does not substitute the agreement.\footnote{See thereto supra Art. 25 note 82.} Where an agreement is lacking the form alone does not suffice.

The Article permits five different forms: an agreement either in writing or evidenced in writing or shown by practices among the parties or by international trade usage or communicated by electronic means. The listed requirements are alternative conditions of which
only one must be satisfied. If however none of them is satisfied the jurisdiction agreement is invalid and does not confer jurisdiction onto the chosen court. 

The decisive point in time when a choice of court clause must meet the form requirements listed in Art. 25 (1) and (2) is the commencement of proceedings. At least then the form must be fulfilled.

Since their first formulation in Art. 17 Brussels Convention of 1968 the form requirements underwent considerable modifications until they were given their present form in Art. 25 (1) and (2). In particular the form in accordance with practices of the parties or with international trade usages was later added in reaction to preceding decisions of the ECJ. Para. (2) was only added by the Regulation in 2002.

It is now only of historical interest that certain stricter form requirements applied until 2008 with respect to transactions whose final place of destination was Luxembourg.

a) In writing, (par. 1) (a) 1st alt.

aa) Meaning of ‘writing’

A jurisdiction agreement satisfies the form of ‘writing’ as required by Art. 25 (1) (a) if both (and if more, all) parties have expressed their consent to a specific jurisdiction clause in written and authorised form. Authorisation requires, generally, the signature of the person making the declaration. However, a signature is unnecessary where the kind of the writing (telegram, telefax etc.) does not allow a handwritten signature. Then, it is sufficient if the author of the document is identifiable. Art. 25 (2) has now eased the signature requirement also for electronic communication like email. Too, signing with the initials will do if the person signing can be identified. A single written document containing the jurisdiction clause and signed by all parties generally suffices as do also separate documents containing, or expressly referring to, the same jurisdiction clause and signed each by the respective party alone. Even the mere exchange of letters, faxes, telegrams from both sides

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327 See thereto OGH IHR 2007, 243 (248) and supra Art. 25 note 59.

328 The original text of 1968 mentioned only “writing and evidenced in writing” as form requirement.

329 The form which accords with international trade usages was introduced in 1978 after the ECJ in Galeries Segoura SPRL v. Société Rahim Bonakdarian, (Case 25/76) (1976) ECR 1851 had decided that a jurisdiction clause in general contract terms annexed to a confirmation letter needed a further written confirmation of the other party in order to become binding on this party. The form which accords with practices between the parties was introduced in 1989 after the ECJ also in Galeries Segoura SPRL v. Société Rahim Bonakdarian, (Case 25/76) (1976) ECR 1851, 1861 para. 11 had already decided in a similar way.

330 See infra Art. 25 note 139 (Magnus).


333 See thereto in detail infra Art. 25 note 129 (Magnus).

334 OGH ZfRV 2007, 38.

335 See BGH NJW 1994, 2700; OGH JBl 2001, 117, 119; 7E Communications Ltd. v. Vertex Antennentechnik
constitutes “writing.”336 Electronic communications like e-mails which allow a durable record are now a full equivalent to “writing” (Art. 25 (2)). However, the form of ‘writing’ is not complied with where only one of the parties has signed the document even if the document is a standard form document of the other party.337 The same is true where the contract obliges only the party who alone has signed it, for instance, a contract of suretyship; the signature of the surety alone does not suffice.338 Also where a jurisdiction agreement was contained in a draft contract which remained unsigned though was later on referred to by the parties as “the contract” the form of writing is lacking.339 The same solution applies where the jurisdiction clause was contained in a draft which was deleted before the draft became the contract.340 Where the parties orally prolong a written contract, which contained a formally valid jurisdiction clause and which expired, the form requirement is complied with.341

An agreement in writing is also lacking where the offeror signs the offer – even electronically by email or click on an active website of the offeree and even accepting the offeree’s standard terms with a jurisdiction clause – and the offeree merely confirms the receipt of the offer. It is not rare that the offeree (the manufacturer, seller etc.) wants to remain free from any contractual obligation until delivery when s/he can be sure that not too many offers have been received and delivery or other performance is possible. The form of writing is then only met when the offeree sends a signed or otherwise authorised communication that confirms the contract.

bb) ‘Writing’ and standard contract terms

A most important and frequent practical problem concerns the question of when a jurisdiction clause, which is contained in general contract terms, is validly incorporated into a contract which the parties have concluded in writing. Again, the question has to be decided autonomously according to Art. 25 without any redress to national law.342 The ECJ has developed a body of specific rules for the incorporation which in essence are based on the following principle: jurisdiction clauses are validly incorporated into a written contract and hence validly agreed upon only if the party using them has clearly indicated that the contract terms – with the jurisdiction clause – should apply and if the other party had the reasonable

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337 See BGH NJW 2001, 1731 (signature of the surety on the stamped contract form of the bank (with a jurisdiction clause), but no signature of the bank: no ‘writing’); Cassaz. IHR 2009, 74; OLG Celle IHR 2010, 81; LG Aachen IHR 2011, 82; see also BGH RIW 2004, 938 (to Art. 17 Lugano Convention 1988).

338 See BGH (preceding fn.); also Kroführer/von Hein Art. 23 note 33; but contra Auer, in: Bülow/Böckstiegel/Geimer/Schütze Art. 23 note 33; Mankowski, in: Rauscher Art. 23 note 15.


342 See Layton/Mercer para. 20.071; Mankowski, in: Rauscher Art. 23 note 16; Schack para. 472.
chance to check the terms and the clause. Qualifications to this principle with less strict form requirements are provided for in Art. 25 (1) (b) and (c).

It is therefore, in general, not essential that the jurisdiction clause is in fact part of the text of the contract. A mere reference to standard contract terms, which is contained in a contract signed by both parties, can suffice. However, the reference must be clear and precise: “(A) clause conferring jurisdiction … printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not of itself satisfy the requirements of Article 17 [Brussels Convention], since no guarantee is thereby given that the other party has really consented to the clause waiving the normal jurisdiction.” The signed contract itself – or, as the case may be, the offer to which in turn the contract explicitly refers – must contain an express reference to the general conditions containing the jurisdiction clause. The ECJ established the further qualification that the general conditions with the jurisdiction clause had to be communicated to the other party together with the offer to which reference is made so that the reference – and the general conditions – “can be checked by a party exercising reasonable care.” On the other hand, “the requirement of a writing in Article 17 [Brussels Convention] would not be fulfilled in the case of indirect or implied references to earlier correspondence, since that would not yield any certainty that the clause conferring jurisdiction was in fact part of the subject matter of the contract properly so-called.” The rules stated by the Court intend to ensure that the jurisdiction clause could not slip a reasonable party’s attention. Only if this is ensured then can it be safely inferred from the whole process of concluding the contract as evidenced by the form that the jurisdiction clause became part of a true agreement of the parties on the choice of one or more particular courts.

In consequence of the statements of the ECJ national courts have decided that in cases where no further practices of the parties nor international trade usages play a role it is an insufficient form if:

– a jurisdiction clause is printed on the back of invoices. An invoice – with whatever conditions – sent after the contract had already been concluded can as such not incorporate a jurisdiction clause into the contract since the contents of the contract

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343 See the references in the following notes.
350 The solution may be otherwise where a party has always accepted invoices with general conditions in a long-standing business relationship; see thereto infra Art. 25 note 111 (Magnus).
stands as fixed at the time of its conclusion unless changed later on by the consent of both parties;  
- the general conditions with the jurisdiction clause are only handed over or attached without any express reference to the fact that they should become part of the contract;  
- the contract is concluded by telexes which do not mention general conditions and one party sends afterwards its general conditions;  
- a party accepts in writing the written offer of the other party but attaches the own standard contract terms with a jurisdiction clause. Again, the consent “in writing” of the offeror to the standard contract terms is then lacking (unless the offeror now again consents in writing to the terms with their jurisdiction clause);  
- a special reference to a jurisdiction clause was given and the required form was observed but in fact the contract contained an arbitration clause;  
- the offeror refers in its offer to its general conditions which contain a jurisdiction clause and the parties perform the contract;  
- a party sends an unsigned draft contract containing general conditions with a jurisdiction clause and the other party remits a signed declaration that it was aware of the jurisdiction clause. Again, it has been held that this practice does not satisfy the requirement of “writing”. It was argued that the practice was not reconcilable with the strict interpretation of the provision. If such a practice would be allowed under the provision a one-sided declaration of the offeree alone would satisfy the form; moreover, whether the form requirement was fulfilled would then depend on the uncertain fact whether the offeree’s declaration reached the offeror;  
- the parties conclude a contract via faxes; the fax confirming the contract refers to standard terms including a jurisdiction clause. An acceptance with reference to the own jurisdiction clause does not suffice. A further reason stated here was that the standard terms were not attached but were available only on the internet and in the business office of this party;  
- the standard contract terms which contained a jurisdiction clause were neither attached to the offer nor accessible in a reproducible form.

351 Hof’s-Hertogenbosch NIPR 2000 Nr. 138; OLG Oldenburg IHR 2008, 112 (even if the other party asked for the – later – sending of the standard terms).
352 See OLG Hamm IPRspr 1977 Nr. 118; Kropholler/von Hein Art. 23 note 35; Mankowski, in: Rauscher Art. 23 note 16.
355 Hof Leeuwarden NJ 2003 Nr. 289.
357 BGH EuLF 2004, 230 et seq. (with respect to Art. 17 Lugano Convention).
361 OLG Celle RIW 2010, 164 (the decision is not based on this argument).
On the other hand the form requirement of “writing” has been held to have been complied with for instance in the following situations:

- where the jurisdiction clause appears on the frontpage of the contract form which both parties have signed or is affixed on the frontpage of such contract by a particular sticker containing the jurisdiction clause;

- where a party signs specifically (“read and accepted”) the general contract terms of the other party who has signed its offer or the contract;

- where a clear reference on the frontpage refers to attached general contract terms or to terms on the back; it is not necessary that the reference mentions the jurisdiction clause specifically nor that the general conditions themselves emphasize the jurisdiction clause in a particular print or any other way;

- where parties agree on a written contract which contains a clear reference to general conditions but those conditions refer to other general conditions which contain the jurisdiction clause and which are not attached; however, this decision has been disapproved of by legal doctrine;

- where parties conclude a contract which on the frontpage, although below the signatures of both parties, contains a clear reference to general conditions on the back of this page the form of “writing” is complied with;

- where both parties acting through agents express their agreement to a contract in writing referring to a prior document which in turn refers to the general conditions containing a jurisdiction clause while both parties or their agents know that one party – a P & I Club (an insurer) to which the other party wanted to become an insured member – concludes contracts exclusively on the basis of its general conditions which contain as also is widely known a jurisdiction clause (English jurisdiction) though in fact the general conditions had not been attached nor shown at the time when the contract was concluded.

Special attention deserves the case when both parties tried to incorporate their general conditions but that the conditions contained contradicting jurisdiction clauses. It has been rightly suggested that then the necessary consensus – the ‘agreement’ of the parties – on the choice of a certain court is lacking (unless later on one party has clearly accepted the general conditions of the other party including the jurisdiction of the court which the other party proposed).

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363 OLG Düsseldorf NJW–RR 1989, 1330.
364 OLG München RIW 1989, 901, 902.
366 See OLG Düsseldorf RIW 2001, 63, 64; OLG Karlsruhe RIW 2001, 621, 622; BayObLG BB 2001, 1498.
367 BGH RIW 1987, 998.
369 LG Hamburg RIW 1977, 424 with note Magnus.
370 Standard Steamship Owners’ Protection and Indemnity Association (Bermuda) Ltd. v. GIE Vision Bail and others (2005) 1 All ER (Comm.) 618 (Q.B.D.), Cooke J. held that "the agreement to the jurisdiction clause was made in writing or at least evidenced in writing" (at p. 631).
371 See Mankowski, in: Rauscher Art. 23 note 19.
372 See BGH NJW 2001, 1731; Hof’s-Hertogenbosch NIPR 2003 no. 43; see also Kropholler/von Hein Art. 23 note 42; Mankowski, in: Rauscher Art. 23 note 22.
The consensus is also lacking where the text of the jurisdiction clause in general conditions is illegible or where it is formulated in a language which the addressee does not, and is not obliged to, understand and which is as well not the contract language.

b) Evidenced in writing, (par. 1) (a) 2nd alt.

The alternative requirement of “evidenced in writing” in Art. 25 (1) (a) slightly eases the rather strict form of “writing”. But nonetheless a mere oral agreement on the jurisdiction of one or more certain courts does not suffice. Certain writing is still necessary. The English version “evidenced in writing” is less clear in this respect than the French, German or Spanish versions. Each of the latter versions expresses that an oral (jurisdiction) agreement with a subsequent written confirmation by the other party is required. Therefore if there is written consent only by one of the parties this satisfies the necessary form if it confirms a preceding oral agreement. This form of ‘half writing’ thus presupposes two elements: an oral agreement and a subsequent confirmation.

aa) Oral agreement

The oral agreement of the parties must include a consensus specifically concerning the jurisdiction of the chosen court. This consent need not be express; implicit consent is sufficient. Consent can be inferred for instance from the fact that the parties shortly before or after concluded further contracts with an identical jurisdiction clause in formal writing (signed by both parties). Likewise consent is given where the oral contract is concluded on the basis of general conditions which were produced or handed over prior to the conclusion of the contract and which contain a jurisdiction clause. Then it is ensured that a party could, by the exercise of reasonable care, have checked the clause. Where the oral agreement refers to general conditions which both parties know and also know that a certain jurisdiction clause is contained in the conditions this suffices as well.

By contrast, the necessary oral agreement on the jurisdiction clause is not satisfied if at the oral conclusion of the contract a party states that it wishes to rely on its general conditions (with the jurisdiction clause) but annexes the general conditions only to a later letter of

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373 See already supra Art. 25 note 87 (Magnus).
374 See thereto supra Art. 25 note 86 (Magnus).
375 “verbalement avec confirmation écrite”.
376 “mündlich mit schriftlicher Bestätigung”.
377 “verbalmente con confirmación escrita”.
382 See Standard Steamship Owners’ Protection and Indemnity Association (Bermuda) Ltd. v. GIE Vision Bail and others (2005) 1 All ER (Comm.) 618, 631 (Q.B.D., Cooke J.).
confirmation. Subsequent notification of general conditions containing such a [jurisdiction] clause is not capable of altering the terms agreed between the parties, except if those conditions are expressly accepted in writing by the purchaser [the other party].

The outcome may be otherwise where practices between the parties or international trade usages exist which provide that oral consent or mere silence suffices. But without any such practices or usages it cannot be deemed as consent if a buyer remains silent on the confirmation letter sent by the vendor, which refers for the first time to the vendor’s general conditions. … it cannot be presumed that one of the parties waives the advantage of the provisions of the [Brussels] Convention conferring jurisdiction.

Absent particular circumstances like a continuing business relationship the addressee of the confirmation letter is not even bound to object to the incorporation of the general conditions and the jurisdiction clause. Where a party declares nothing more than its intention to conclude the contract under terms containing a jurisdiction clause this is no (oral) agreement at all. In any event, standard terms which contain the jurisdiction clause must be made available – handed over, produced, downloadable – for the other party at the time of the oral agreement. Their attachment to a later confirmation letter does not suffice.

bb) Confirmation in writing

An oral agreement on a choice of court which alone is ineffective in cases not falling under Art. 25 (1) (b) or (c) becomes effective if one of the parties confirms the agreement in writing. However, there must exist a prior agreement; if no agreement had been reached there is nothing to confirm. The confirmation must further comply fully with the prior agreement; if the confirmation introduces new conditions they are validly incorporated only if they were in turn accepted by the other party again in written form. Also where the parties have only agreed on single parts of a contract but not on the whole and in particular not on the incorporation of general conditions which contain a jurisdiction clause then the subsequent confirmation of the single parts cannot result in the incorporation of the jurisdiction clause since an agreement on it is lacking. A mere invoice or notice on other issues even designated as ‘confirmation’ does not constitute a valid confirmation if and because it


385 See thereto infra Art. 25 notes 124–128 (Magnus).


388 This is the clear outcome of Galeries Segoura SPRL v. Société Rahim Bonakdarian, (Case 25/76) (1976) ECR 1851; see also OLG Frankfurt NJW 1977, 506.

389 Also Hausmann, in: Staudinger Art. 23 note 273; see also BGH NJW 2001, 1731 (mere contract negotiations).

390 See, e.g., OLG Düsseldorf WM 2000, 2192 (2193); OLG Oldenburg IHR 2008, 112 (117).

391 BGH NJW 1994, 2699 (2700); LG Aachen IHR 2011, 82 (83); HK-ZPO/Dörner Art. 23 note 37.

392 See BGH NJW 1994, 2699.


394 See BGH IHR 2004, 221 et seq.
does not pretend to confirm a prior oral agreement. The frequent confirmation merely of the offeror’s offer (not of the contract) does also not constitute a confirmation as required by Art. 25 (1) (a) 2nd alt.

The confirmation can be made by either party. It is not necessary that it is made by the party disfavoured by the jurisdiction clause. It has been suggested that the confirmation must be made within a reasonable time after the conclusion of the oral agreement. The confirmation is valid if received, and not objected to, by the other party. This party may raise objections but can do so only within a reasonable time after the reception of the confirmation. The ECJ stated that “(i)t would be a breach of good faith for a party who did not raise any objection subsequently to contest the application of the oral agreement.” The Court did, however, not decide which objections could be raised. Moreover, the effect of an objection is still unclear. It is probably an indication that the required agreement is lacking but does not necessarily, and in any event, lead to the invalidity of the jurisdiction clause.

The confirmation may take any form of writing including fax or telex but now also electronic mails. Such signature or authorisation as is usual for the respective forms of communication appears to be necessary.

The party who claims that a prior oral agreement has been concluded must prove it.

c) Practices between the parties, (par. 1) (b)
This alternative allows the inference from practices between the parties that the parties...