

CISG ARTICLE 31: WHEN SUBSTANTIVE LAW RULES AFFECT JURISDICTIONAL RESULTS

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I. INTRODUCTION

Judicial application of Article 31 of the U.N. Sales Convention has proved that the determination of the place of performance of the seller's obligation can have implications beyond just the substantive effect of that obligation. In fact, many of the cases dealing with this article apply its substantive rules primarily for purposes of determining jurisdictional outcome. This raises important questions of uniformity in the application of the Convention.

CISG Article 31 provides four rather specific rules for determining the place of performance of the seller's delivery obligation, each depending on party choices and the type of contract relationship involved. These rules are important for both contract formation and dispute resolution purposes. The fact that parties may structure a transaction to avoid the three default rules of Article 31 makes important a clear understanding of the import and effect of these rules.

In this paper I first provide a brief review of the substantive rules found in CISG Article 31. I then discuss the cases under the Brussels and Lugano Conventions that rely on Article 31 to help determine the existence of jurisdiction in a court other than a court in the state of the defendant's domicile. This is compared with the approach to jurisdiction in the United States that makes the Article 31 rules less likely to have significance for jurisdictional purposes. Finally, I discuss a series of hypothetical cases in order to explore these differences and to consider further aspects of the relationship between CISG rules of substantive law and rules of jurisdiction. I conclude that Article 31 is an example of a CISG provision for which the "homeward trend" will have different impact in differing legal systems, particularly in its application to jurisdictional questions.

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II. THE STRUCTURE AND EFFECT OF ARTICLE 31

CISG Article 31¹ sets up four rules for determining the place of performance of the seller's obligation to deliver goods: a party autonomy rule followed by three default rules. The party autonomy rule is found in the chapeau to the Article, noting that the default rules of subparagraphs (a), (b), and (c) apply only "[i]f the seller is not bound to deliver the goods at any other particular place."² Thus, if the contract otherwise establishes a place of performance of the seller's obligation to deliver the goods, no other reference to the provisions of Article 31 is required. While this appears to be a rather simple rule, its application is not always clear. For instance, when a contract includes a price-delivery term (*e.g.*, *f.o.b.*, *c.i.f.*, etc.), that term may or may not clearly determine the place of performance of the seller's delivery obligation.³ Rules providing the effect of price-delivery terms are not always consistent,⁴ and other provisions of the contract may alter the effect of a price-

1. United Nations Convention on Contracts for the International Sale of Goods art. 31, U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980) [hereinafter CISG], *English version reprinted in* 52 Fed. Reg. 6262 (Mar. 2, 1987), *and in* 19 I.L.M. 671 (1980):

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- (a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;
- (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;
- (c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

2. *Id.*

3. For discussion of the effect of price-delivery terms on the application of the CISG, see, for example, Johan Erauw, *Observations on Passing of Risk*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION* 292 (Franco Ferrari et al. eds., 2004); Jan Hellner, *The Vienna Convention and Standard Form Contracts*, in *INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES* 335 (Petar Sarcevic & Paul Volken eds., 1986); Burghard Piltz, *INCOTERMS and the UN Convention on Contracts for the International Sale of Goods*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1998* at 1 (Pace Int'l Law Review ed., 1998).

4. While the parties may incorporate the Incoterms of the International Chamber of Commerce to govern interpretation of price-delivery terms in a contract, it should not be assumed that all price-delivery terms are governed by the Incoterms. For example, those terms may be subject to the definitions contained in the version of Article 2 of the Uniform Commercial Code still in effect in most all U.S. states, which

delivery term.⁵ Nonetheless, Article 31 begins with a clear acknowledgment of party autonomy in determining the rules applicable to a private contract.⁶

Article 31 then goes on to provide three default rules that may be applicable if the parties did not agree on a place for performance of the seller's delivery obligation. Which of these three rules applies depends on the type of contract involved. If the contract "involves carriage of the goods," then paragraph (a) provides that the seller's obligation to deliver consists "in handing the goods over to the first carrier for transmission to the buyer."⁷ If the contract does not involve carriage of goods, and "relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place," then the seller's obligation is to place "the goods at the buyer's disposal at that place."⁸ In all other cases, the seller's obligation is to place the goods "at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."⁹

Article 31 represents a clear attempt to define place of performance in accordance with the facts of a case. To the extent it is necessary to determine a place of performance for legal purposes, the result may at times amount to a legal fiction designed simply to provide that there is *a* place for purposes of the application of other legal rules.

III. PLACE OF PERFORMANCE AND JURISDICTION IN EUROPE

One of the most commonly-litigated issues under Article 31 has been whether a given court has jurisdiction to adjudicate a contract action governed by the CISG based on jurisdictional rules that allow a plaintiff to bring a case

includes definitions not always consistent with those found in the Incoterms. *See, e.g.*, U.C.C. §§ 2-319 to -322 (without 2002-03 amendments).

5. *See, e.g.*, *Comptoir D'Achat et de Vente du Boerenbond Belge S/A v. Luis De Ridder, Ltda. (The Julia)*, [1949] A.C. 293 (H.L.) (c.i.f. allocation of transfer of risk and of title to goods altered by use of delivery order rather than bill of lading).

6. This is at least in part a reiteration of the Article 6 CISG rule that "[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." CISG art. 6.

7. CISG art. 31(a).

8. CISG art. 31(b).

9. CISG art. 31(c). For a more complete discussion of the case law applying each of the provisions of Article 31, see UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS art. 31, at http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited Sept. 25, 2005) [hereinafter UNCITRAL Digest].

at the place of performance of a contract obligation. This normally involves the application of Article 5(1) of either the Brussels Convention¹⁰ or the Lugano Convention.¹¹ While the Brussels Convention has been replaced by the Brussels I Regulation,¹² the cases interpreting it remain instructive.

In each of the Brussels and Lugano Conventions, the “general” rule of jurisdiction is found in Article 2, allowing suit to be brought in the courts of the state of the defendant’s domicile.¹³ Other rules then provide for limited, “special” jurisdictional options allowing suit in a court other than in the state of the defendant’s domicile. Article 5(1) of both the Brussels and Lugano Conventions provides the special jurisdiction rule for contract cases, and reads as follows: “A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; . . .” Thus, Article 5(1) provides the plaintiff an option, and allows a certain amount of forum shopping.¹⁴ It is most often used to bring an action in the plaintiff’s home forum.

10. European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1998 O.J. (C 27) 1 (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1996 accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden) [hereinafter Brussels Convention].

11. European Communities—European Free Trade Association: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9 [hereinafter Lugano Convention].

12. Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 012) 1 [hereinafter Brussels I Regulation]. The Brussels Convention remains in force for relations between Denmark and the other Member States.

13. Article 2(1) of the Brussels I Regulation, *supra* note 12, reads as follows: “1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”

14. *See, e.g.*, Case 189/87, *Kalfelis v. Bankhaus Schröder, Munchmeyer, Hengst & Co.*, 1988 E.C.R. 5565.

Pursuant to Article 2 of the Convention, persons domiciled in a Contracting State are, subject to the provisions of the Convention, “whatever their nationality, to be sued in the courts of that State”. Section 2 of Title II of the Convention, however, provides for “special jurisdictions”, by virtue of which a defendant domiciled in a Contracting State may be sued in another Contracting State. . . .

The principle laid down in the Convention is that jurisdiction is vested in the courts of the State of the defendant’s domicile and that the jurisdiction provided for in [the “special jurisdiction” articles are] exception[s] to that principle.

Id. at 5583, ¶¶ 7-8. “[T]he ‘special jurisdictions’ enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively.” *Id.* at 5585, ¶ 19.

Article 5(1) obviously makes important the determination of the place of performance of “the obligation in question.” In *Tessili v. Dunlop*,¹⁵ the European Court of Justice rejected the argument that place of performance for purposes of Article 5(1) had its own independent meaning common to all Member States of the European Community, and opted instead for the rule that “‘place of performance of the obligation in question’ within the meaning of Article 5(1) . . . is to be determined in accordance with the law which governs the obligations in question according to the rules of conflict of laws of the court before which the matter is brought.”¹⁶

The Sales Convention has two rules dealing with the place of performance of contractual obligations. In addition to the Article 31 provisions determining the place of performance of the seller’s delivery obligation, Article 57 provides the rule on place of the buyer’s obligation to pay the purchase price.¹⁷ Each of these articles has been applied to determine

15. Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, 1976 E.C.R. 1473.

16. *Id.* at 1485. See also Franco Ferrari, “Forum Shopping” Despite International Uniform Contract Law Conventions, 51 INT’L & COMP. L.Q. 689, 691-92 (2002):

While the concept of ‘matters relating to a contract’ is interpreted both by the European Court of Justice and national courts autonomously, i.e., without recourse to domestic law, the concept of ‘place of performance’ is not interpreted autonomously, but rather on the basis of the law applicable to the obligation in dispute, as held by not only the European Court of Justice, but also by national courts. This can be either the law applicable by virtue of the rules of private international law of the forum or substantive uniform law.

This aspect of the *Tessili* decision has been followed in subsequent cases. See Case C-288/92, *Custom Made Commercial v. Stawa Metallbau*, 1994 E.C.R. I-2913; Case C-440/97, *GIE Groupe Concorde v. The Master of the vessel “Suhadiwarno Panjan,”* 1999 E.C.R. I-6307; and Case C-420/97, *Leathertex v. Bodeltex*, 1999 E.C.R. I-6747.

17. CISG art. 57:

Article 57

- (1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
 - (a) at the seller’s place of business; or
 - (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.
- (2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

the existence of jurisdiction under Article 5(1) of the Brussels Convention,¹⁸ and Article 5(1) of the Lugano Convention.¹⁹

18. For cases applying Article 31 to determine jurisdiction for purposes of Article 5(1), see, for example, the following cases listed in the UNCITRAL Digest: CLOUT Case No. 268 [Bundesgerichtshof, Germany, 11 Dec. 1996], *available at* <http://cisgw3.law.pace.edu/cases/961211g1.html>; Hoge Raad, the Netherlands, 26 Sept. 1997, *available at* <http://cisgw3.law.pace.edu/cases/970926n1.html>; CLOUT Case No. 207 [Cour de Cassation, France, 2 Dec. 1997], *available at* <http://cisgw3.law.pace.edu/cases/971202f1.html>; CLOUT Case No. 242 [Cour de Cassation, France, 16 July 1998], *available at* <http://cisgw3.law.pace.edu/cases/980716f1.html>; Oberster Gerichtshof, Austria, 10 Sept. 1998, *available at* <http://cisgw3.law.pace.edu/cases/980910a4.html>.

For cases applying Article 57 to determine jurisdiction for purposes of Article 5(1), see, for example, the following cases listed in the UNCITRAL Digest: Bundesgerichtshof, Germany, 30 Apr. 2003, *available at* <http://cisgw3.law.pace.edu/cases/030430g1.html>; Rechtbank van Koophandel Veurne, Belgium, 19 Mar. 2003, *available at* <http://cisgw3.law.pace.edu/cases/030319b1.html>; Bundesgerichtshof, Germany, 2 Oct. 2002, *available at* <http://cisgw3.law.pace.edu/cases/021001g1.html>; Hof van Beroep Gent, Belgium, 15 May 2002, *available at* <http://cisgw3.law.pace.edu/cases/020515b1.html>; Hof van Beroep Gent, Belgium, 31 Jan. 2002, *available at* <http://cisgw3.law.pace.edu/cases/020131b1.html>; Bundesgerichtshof, Germany, 7 Nov. 2001, *available at* <http://cisgw3.law.pace.edu/cases/011107g1.html>; Cour de Cassation, France, 26 June 2001, *available at* <http://cisgw3.law.pace.edu/cases/010626f1.html>; Landgericht Flensburg, Germany, 19 Jan. 2001, *available at* <http://cisgw3.law.pace.edu/cases/010119g1.html>; CLOUT Case No. 379 [Corte di Cassazione S.U., Italy, 14 Dec. 1999], *available at* <http://cisgw3.law.pace.edu/cases/991214i3.html>; CLOUT Case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000], *available at* <http://cisgw3.law.pace.edu/cases/000509g1.html> (see full text of the decision); Landgericht Trier, Germany, 7 Dec. 2000, *available at* <http://cisgw3.law.pace.edu/cases/001207g1.html>; CLOUT Case No. 320 [Audencia Provincial de Barcelona, Spain, 7 June 1999], *available at* <http://cisgw3.law.pace.edu/cases/990607s4.html> (see full text of the decision); CLOUT Case No. 274 [Oberlandesgericht Celle, Germany, 11 Nov. 1998], *available at* <http://cisgw3.law.pace.edu/cases/981111g1.html>; CLOUT Case No. 223 [Cour d'appel Paris, France, 15 Oct. 1997], *available at* <http://cisgw3.law.pace.edu/cases/971015f1.html> (see full text of the decision); CLOUT Case No. 287 [Oberlandesgericht München, Germany, 9 July 1997], *available at* <http://cisgw3.law.pace.edu/cases/970709s2.html>; CLOUT Case No. 284 [Oberlandesgericht Köln, Germany, 21 Aug. 1997], *available at* <http://cisgw3.law.pace.edu/cases/970821g1.html> (see full text of the decision); CLOUT Case No. 162 [Østre Landsret, Denmark, 22 Jan. 1996], *available at* <http://cisgw3.law.pace.edu/cases/960122d1.html>; CLOUT Case No. 205 [Cour d'appel Grenoble, France, 23 Oct. 1996], *available at* <http://cisgw3.law.pace.edu/cases/961023f1.html>; Landgericht Siegen, Germany, 5 Dec. 1995, *available at* <http://cisgw3.law.pace.edu/cases/951205g1.html>; Gerechtshof 's-Hertogenbosch, the Netherlands, 9 Oct. 1995, *available at* <http://cisgw3.law.pace.edu/cases/951009n1.html>; Oberlandesgericht München, Germany, 28 June 1995, *available at* <http://cisgw3.law.pace.edu/cases/950628g1.html>; CLOUT Case No. 153 [Cour d'appel Grenoble, France, 29 Mar. 1995], *available at* <http://cisgw3.law.pace.edu/cases/950329f1.html> (see full text of the decision); Rechtbank Middelburg, the Netherlands, 25 Jan. 1995, *available at* <http://cisgw3.law.pace.edu/cases/950125n1.html>; Hof 's-Hertogenbosch, the Netherlands, 26 Oct. 1994, *available at* <http://cisgw3.law.pace.edu/cases/941026n1.html>; CLOUT Case No. 156 [Cour d'appel Paris, France, 10 Nov. 1993], *available at* <http://cisgw3.law.pace.edu/cases/931110f1.html> (see full text of the decision); CLOUT Case No. 25 [Cour d'appel Grenoble, France, 16 June 1993], *available at* <http://cisgw3.law.pace.edu/cases/930616f1.html>.

19. For cases applying Article 31 to determine jurisdiction for purposes of Article 5(1) of the Lugano Convention, see, for example, the following cases listed in the UNCITRAL Digest: Tribunal di Reggio Emilia, Italy, 3 July 2000, *available at* <http://cisgw3.law.pace.edu/cases/000703i3.html>; Oberster Gerichtshof, Austria, 10 Sept. 1998, *supra* note 18.

For cases applying Article 57 to determine jurisdiction for purposes of Article 5(1) of the Lugano

The metamorphosis of the Brussels Convention into the Brussels I Regulation, which became effective on March 1, 2002,²⁰ brought with it concern about problems with Article 5(1) in determining the place of performance of the “obligation in question.”²¹ Thus, in the Regulation this provision was changed to read as follows:

- A person domiciled in a Member State may, in another Member State, be sued:
1. (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 subparagraph (b) does not apply then subparagraph (a) applies;

While CISG Article 57 generated a significant number of cases dealing with jurisdiction under Article 5(1) of each of the Brussels and Lugano Conventions,²² the new language of Article 5(1)(b) of the Brussels I Regulation means that the place of performance of the buyer’s payment obligation has little or no relevance for determining jurisdiction within the

Convention, see, for example, the following cases listed in the UNCITRAL Digest: Handelsgericht Aargau, Switzerland, 5 Nov. 2002, *available at* <http://cisgw3.law.pace.edu/cases/021105s1.html>; Landgericht Freiburg, Germany, 26 Apr. 2002, *available at* <http://cisgw3.law.pace.edu/cases/020426g1.html>; CLOUT Case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 Dec. 1997], *available at* <http://cisgw3.law.pace.edu/cases/971203s2.html>; CLOUT Case No. 194 [Bundesgericht, Switzerland, 18 Jan. 1996], *available at* <http://cisgw3.law.pace.edu/cases/960118s1.html>.

20. Brussels I Regulation, *supra* note 12.

21. See, e.g., CHESHIRE & NORTH’S PRIVATE INTERNATIONAL LAW 204-08 (Peter North & J.J. Fawcett eds., 13th ed. 1999); Joaquim-J Forner, *Special Jurisdiction in Commercial Contracts: From the 1968 Brussels Convention to “Brussels-One Regulation,”* 13 INT’L COMPANY & COM. L. REV. 131, 134 (2002):

To rely on the law applicable to the contract after the conflict of laws rule in order to establish judicial jurisdiction is quite a complicated solution, but no other alternative seemed to clearly improve the ECJ system. The amendments brought to the original BC68 by the four Treaties of Adhesion in more than 20 years had not dared to deviate from the ECJ doctrine and the ECJ itself has not found a good reason to do so. Moreover, the differences among the conflict of laws rules on contracts of Member States have dramatically been reduced by virtue of the Rome Convention on the law applicable to contractual obligations of June 19, 1980. Therefore, the place of performance has to be found by the European national courts according to the same conflict of laws rules.

See also *id.* at 134 nn. 32-33 and accompanying text.

22. See *supra* notes 18-19.

Brussels system. Even if the case is brought on the payment obligation, the jurisdictional inquiry will focus on the seller's obligation to deliver the goods. This does not, however, eliminate the relevance of Article 31 for jurisdictional purposes. If the contract specifically provides a place of performance of the seller's obligation, that will determine the locus of jurisdiction under Brussels I Regulation Article 5(1)(b), consistent with the chapeau of CISG Article 31. If the contract does not provide for the place of delivery and the CISG is the applicable substantive law, then Article 31(a), (b), and (c) will provide the relevant rules for determining place of performance, even when the claim is based on the buyer's payment obligation. Thus the Brussels I Regulation amends the result in *Tessili*,²³ moving a step closer to an independent rule for determining place of performance of the obligation in question. It does so, however, through a singular focus on the seller's obligation to deliver the goods in a sales transaction, thereby retaining need for reference to Article 31 when the Convention is the applicable substantive law.

Several cases have faced the question of whether Article 31 continues to serve as an aid in determining the place of performance for purposes of Article 5(1) of the Brussels I Regulation. One such case is *Aquafili Textile Yarns s.p.a. v. Updeals Ltd.* in the Tribunale di Rovereto, Italy.²⁴ According to the UNILEX abstract of the case:

[T]he Court did [not] follow the seller's contention that the notion of "delivery" set out in Art. 5(1)(b) of the European Regulation should have been interpreted in accordance with CISG—to be considered as applicable to the merits of the dispute—and in particular with its Art. 31(a). It is true that under Art. 31(a) CISG, if the contract involves carriage of goods and there is no contrary agreement of the parties, the place for delivery is the place where the goods have been handed over to the first carrier for transmission to the buyer (in the case at hand, Italy). Since, however, by virtue of its own nature the EU Regulation prevails over both domestic and international law, CISG cannot be used as a means for interpreting it and therefore, the concept of "delivery" contained in the EU Regulation has to be interpreted autonomously.²⁵

This is consistent with the language of the abstract of the same case found on the Pace University Law School website:

23. See *supra* note 15 and accompanying text.

24. *Aquafili Textile Yarns s.p.a. v. Updeals Ltd.*, Tribunale di Rovereto, Italy, 28 Aug. 2004, available at <http://cisgw3.law.pace.edu/cases/040828i3.html>.

25. Unilex Abstract of *id.*, available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsid=13353&x=1>.

Given that a question of interpretation could not be submitted to the European Court of Justice by a trial court, it was the present court, therefore, that had to decide whether the Regulation intended to use the term “delivery” as it is ordinarily used or whether the meaning of the term should be determined pursuant to domestic law or the CISG. Noting that (1) a substantive law convention may not be used to interpret a procedural law convention, (2) there is not a substantive definition for the term “delivery of goods in a sale of goods”, and (3) premise number 11 to the Regulation expressly provides for the domicile of a legal person to be defined autonomously so “as to make the common rules more transparent and avoid conflicts of jurisdiction”, the court held that the term delivery, for the purpose of determining whether it was jurisdictionally competent, is the place where the goods become available to the buyer, which usually is the place where the defendant has its domicile. Finally, noting that the place of delivery for purposes of the Regulation may differ from the place of delivery for purposes of substantive law, the court nonetheless refused to pass judgment on it as it considered the matter committed to the European Legislator and not subject to judicial review.²⁶

This result seems inconsistent with the language of the new Article 5(1)(b) of the Brussels I Regulation. That provision continues to require reference to “the place in a Member State where, under the contract, the goods were delivered or should have been delivered.” If the contract explicitly provides for a place of delivery, that of course will govern both CISG Article 31 and Brussels Article 5(1). But the *Aquafili* conclusion that provisions of a substantive law convention may not be used to interpret a procedural law convention flies in the face of every decision that has used the rules of Articles 31 and 57 to interpret Article 5(1) of the Brussels and Lugano Conventions,²⁷ and runs contrary to the European Court of Justice decision in the *Tessili* case.²⁸ A change of language from “the place of performance of the obligation in question” in the Brussels Convention, to “the place in a Member State where, under the contract, the goods were delivered or should have been delivered” in the Brussels I Regulation, does not so easily implicate a change from reliance on rules of applicable law to an independent rule on place of performance. Thus, the *Aquafili* case seems clearly out of line with the rather vast body of authority on the matter. It also is inconsistent with two other recent cases applying Article 31 in light of the Brussels I Regulation,²⁹ although a recent decision of the Austrian Supreme Court seems to agree with the *Aquafili* analysis.³⁰

26. Francesco Mazzotta, *Abstract of Aquafili*, *supra* note 24.

27. *See supra* notes 18-19.

28. *See supra* note 15.

29. Oberlandesgericht Wien, Austria, 1 June 2004 (CISG-online Case 1010), *available at* <http://www.cisg-online.ch/cisg/overview.php?test=1010>; Gerechtshof Hertogenbosch, the Netherlands, 12 May 2004, *available at* <http://cisgw3.law.pace.edu/cases/040512n1.html>.

30. Oberster Gerichtshof, Austria, 14 Dec. 2004, *available at* <http://cisgw3.law.pace.edu/cases/>

One commentator argues that the Brussels I change to Article 5(1)(b) means that Article 31 will “lose much of its relevance,”³¹ but this begs the question. Where is the place “where the goods were or should have been delivered” under the contract? If the contract does not provide otherwise but is governed by the CISG, and thus CISG Article 31 applies to substantive determination of the place of performance of the seller’s delivery obligation, the connection between CISG Article 31 and Article 5(1) of the Brussels I Regulation should be no different than it was with the same provision of the Brussels Convention.

IV. ARTICLE 31 OUTSIDE THE BRUSSELS REALM

All of the cases to date dealing with Article 31 and jurisdiction have been from courts applying the Brussels Convention, the Lugano Convention, or the Brussels I Regulation.³² This raises the question whether Article 31 has any impact on jurisdictional issues in courts not applying one of these European instruments: why has the same question not been raised outside of Europe in the application of the CISG? If Article 31 has no jurisdictional impact in other legal systems, then questions are raised about uniformity of application and the effect of the CISG on a global basis.

041214a3.html (“[F]or reasons of the place of performance pursuant to Art. 5(1) [of the Brussels Regulation], the *lex causa* is not decisive. The place of performance needs to be determined autonomously by means of actual criteria.”) (translation by Daniel Fritz).

31. See Ulrich G. Schroeter, *Vienna Sales Convention: Applicability to “Mixed Contracts” and Interaction with the 1968 Brussels Convention*, 5 *VINDOBONA J. INT’L COM. L. & ARB.* 74, 84 (2001):

The only novelty is the introduction of Article 5 No. 1(b) of the Brussels Regulation: in its first indent, this provision fixes the place of performance for all obligations arising out of a contract of sale—buyer’s and seller’s obligations alike—at the place where the goods were or should have been delivered, thus avoiding any reliance on the Vienna Sales Convention for the determination of the place of performance by fixing the place itself. This means that the frequently criticised interaction of Article 57(1)(a) CISG with Article 5 No. 1 will, under the new provision, lose much of its relevance, as will the effect of its counterpart, Article 31 CISG.

32. One Italian case technically applied the 1995 Italian Act on Private International Law to jurisdiction over a defendant from Malaysia, but it was the Brussels Convention rule under Article 5(1) that had been incorporated into that law that was applied. CLOUT Case No. 448 [Premier Steel Service Sdn. Bhd v. Ocam S.p.A, Suprema Corte di Cassazione, Italy, 19 June 2000], available at <http://cisgw3.law.pace.edu/cases/000619i3.html>.

A. *Comparative Foundations: U.S. Jurisdiction in Commercial Cases*³³

The United States furnishes an opportunity to consider the application of CISG Article 31 in a system in which jurisdictional issues are governed by rules different from those in the European system. In the United States, jurisdictional concepts are divided into categories for several purposes. Subject matter jurisdiction determines which court is appropriate for hearing a specific type of case. Most state trial courts are courts of general subject matter jurisdiction, and thus can hear any case. Federal courts, on the other hand, are courts of limited subject matter jurisdiction. Article III, Section 2 of the United States Constitution lists those areas in which federal subject-matter jurisdiction may be asserted.³⁴ For the most part, federal statutes further delineate the various bases of federal subject matter jurisdiction.³⁵

The type of jurisdiction dealt with in the European instruments discussed above (the Brussels and Lugano Conventions, and the Brussels I Regulation) is known as personal jurisdiction in the United States. Both subject matter and personal jurisdiction must exist in order for a case to proceed. Personal jurisdiction in the United States usually is described by asking whether the court has jurisdiction “over the person” in question—sometimes discussed as a “power based” approach to jurisdiction.³⁶ Since consent is a fundamental basis of jurisdiction, and a plaintiff is always deemed to have consented to jurisdiction, the personal jurisdiction issue is relevant to the relationship between the court and the defendant.

Analysis of personal jurisdiction in U.S. courts generally involves a two-step process. The first step is the application of the state “long-arm” statute to determine if there is necessary statutory jurisdiction.³⁷ These statutes differ,

33. Portions of this section are taken from Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661 (1999).

34. U.S. CONST. art. III, § 2.

35. See 28 U.S.C. §§ 1330-1367 (2000). See also JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 9-21 (4th ed. 2005).

36. See FRIEDENTHAL ET AL., *supra* note 35, at 100; Kevin Clermont, *The Role of Private International Law in the United States: Beating the Not-Quite-Dead Horse of Jurisdiction*, in 2 CILE STUDIES, PRIVATE LAW, PRIVATE INTERNATIONAL LAW, & JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP 75, 91-94 (Ronald A. Brand ed., 2005).

37. Federal Courts generally are required to apply the state statute for the state in which they are located. Jurisdiction in the federal courts is governed by Rule 4(k) of the Federal Rules of Civil Procedure. This Rule provides three principal jurisdictional authorizations:

(1) Rule 4(k)(1)(A) authorizes a district court to borrow the jurisdictional powers of state courts in the state where it is located;

but generally can be categorized as list-type provisions, providing specific bases of jurisdiction,³⁸ and the constitutional limits statutes, providing that a

(2) Rule 4(k)(1)(D) confirms the availability of any applicable federal statute granting personal jurisdiction; and

(3) Rule 4(k)(2) grants district courts personal jurisdiction to the limits of the [Fifth Amendment] due process clause in certain federal question cases.

GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS* 172 (3d ed. 1996). This most often results in the federal court "borrowing" the state statute under Rule 4(k)(1)(A). *Id.* at 172-97.

38. New York and Pennsylvania both have such statutes. The New York statute provides in part: Personal Jurisdiction by Acts of Non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

(1) transacts any business within the state or contracts anywhere to supply goods or services in the state.

N.Y. C.P.L.R. § 302 (McKinney 1990). Section 302 is limited to what has become referred to as "specific jurisdiction" ("transacting business" in New York terminology) in which the cause of action must "arise out of" the defendant's connection with the state. Section 301 of the N.Y. C.P.L.R. incorporates "general jurisdiction" ("doing business" in New York terminology) by authorizing a court to "exercise such jurisdiction over persons, property, or status as might have been exercised" before the enactment of the C.P.L.R. *Id.* at § 301. Thus, if the cause of action does not arise out of a transaction of business in New York, "jurisdiction may be acquired only if the foreign corporation is doing business in the traditional sense, *i.e.*, it must do business 'not occasionally or casually, but with a fair measure of permanence and continuity.'" Practice Commentary to N.Y. C.P.L.R. § 301, at 9 (quoting *Tauza Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917)).

Pennsylvania's long-arm statute initially limits jurisdiction to actions arising out of the jurisdictional nexus, but then adds a constitutional limits provision:

§ 5322. Bases of personal jurisdiction over persons outside this Commonwealth

(a) GENERAL RULE.—A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

(v) The ownership, use or possession of any real property situate within this Commonwealth.

(2) Contracting to supply services or things in this Commonwealth. . . .

. . . .

court in the state can exercise in personam jurisdiction to the limits of the Due Process Clause.³⁹ The process of applying a list-type long-arm statute is not unlike the application of the jurisdictional rules of the Brussels Convention and Regulation.⁴⁰

The second step in the United States is the constitutional analysis by which it is determined whether the exercise of jurisdiction allowed by state statute in the particular case is within the limits of the Due Process Clauses. Because it usually is a state long-arm statute that is being considered,⁴¹ it is the Fourteenth Amendment with which courts are most often concerned.

In the 1877 case of *Pennoyer v. Neff*,⁴² the U.S. Supreme Court adopted a territorial approach to jurisdiction in its application of the Due Process Clause, stating that “[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”⁴³ The Court held that an Oregon court rendering a judgment against a California defendant was without jurisdiction over that defendant, and that the resulting judgment was therefore invalid.⁴⁴

Like Article 2 of the Brussels I Regulation,⁴⁵ U.S. jurisdictional principles begin with the idea that a defendant is always subject to personal jurisdiction in the courts where that defendant is located, no matter where the claim might arise.⁴⁶ The difference is that in the United States it is recognized that a defendant, particularly a corporate defendant, may be located for jurisdictional purposes in more than one territorial space. Thus, U.S. concepts of general jurisdiction are not limited to formal definitions of domicile.⁴⁷ A defendant

(b) EXERCISE OF FULL CONSTITUTIONAL POWER OVER NONRESIDENTS.—In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States. 42 PA. CONS. STAT. ANN. § 5322 (West 1997).

39. California has such a statute: “A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” CAL. CIV. PROC. CODE § 410.10 (West 1973). Paragraph (b) of the Pennsylvania Statute, *supra* note 38, adds this type of provision to the list-type format.

40. See, e.g., Brussels Convention, *supra* note 10, arts. 5 *et seq.*

41. See *supra* note 36 and accompanying text.

42. 95 U.S. 714 (1877).

43. *Id.* at 720.

44. *Id.* at 734.

45. See *supra* note 12.

46. Milliken v. Meyer, 311 U.S. 457, 462 (1940) (“[d]omicile in the state is alone sufficient to bring an absent defendant within the reach of the state’s jurisdiction for purposes of a personal judgment”).

47. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting Milliken v.

is found for jurisdictional purposes wherever it is doing business in a continuous and systematic manner, and thus wherever it is purposefully availing itself of the benefits of the local economy and legal system. It may be brought before a court in such a jurisdiction for claims arising anywhere.⁴⁸

If the defendant's activity in the forum state is not continuous and systematic, however, then the concept of specific jurisdiction applies, and suit may be brought only on claims arising out of the activity of the defendant within the forum state. In other words, if the activity of the defendant in the forum state is significant enough, general jurisdiction exists based solely on the connection between the defendant and the forum state; and if the activity is below this threshold, then jurisdiction may exist, but it is then "specific" jurisdiction based on a combination of the connections among the defendant, the forum state, and the claim.⁴⁹ Even then, however, "a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State,"⁵⁰

Meyer, *supra* note 46): "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

48. *International Shoe Co.*, 326 U.S. at 317:

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.

49. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) ("When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction."). The distinction between general and specific jurisdiction was first suggested in Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966).

50. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

Id. at 292.

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," . . . , it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. . . . The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased

and when “[t]he relationship between the defendant and the forum [is] such that it is ‘reasonable . . . to require the corporation to defend the particular suit which is brought there.’”⁵¹

One can summarize the comparison between European and U.S. concepts of personal jurisdiction by beginning with the concept of general jurisdiction. Here the two systems begin with the similar rule that jurisdiction exists in the courts of the state of the defendant’s domicile, for claims arising anywhere. In the United States, this concept extends beyond just the state of the defendant’s domicile to wherever the defendant has acted within the forum state in a continuous and systematic manner. Similarly, both systems acknowledge that it is appropriate to allow jurisdiction in a place other than where the defendant *is* so long as there exists a proper nexus with the forum state. The difference is that this nexus in the European system is nearly always described as being between the *claim* and the forum state. Thus, in Brussels Regulation Article 5(1) terms, jurisdiction exists at the place of performance of the obligation in question under the contract—focusing on the relationship between the contract and the forum state. In the United States, a nexus is required among the forum state, the claim, *and* the defendant, with the important factor for Due Process purposes being the relationship between the defendant and the forum state. When that relationship is not continuous and systematic, jurisdiction may still exist if there is also a relationship to the claim based upon the defendant’s contacts with the forum state. Finally, both systems rely on similar codified language, found now in Europe in a Community Regulation and in the United States in the relevant state long-arm statutes. While in Europe the analysis begins and ends with this codification, in the United States there is a necessary constitutional limitation that must additionally be met.

B. CISG Article 31 and U.S. Jurisdictional Rules

Looking at U.S. jurisdictional rules in conjunction with CISG Article 31, one finds that—unlike the situation in Europe—the place of performance of the seller’s obligation to deliver the goods is not determinative of jurisdiction for a plaintiff wanting to bring suit outside the state of the defendant’s domicile. In ascertaining whether specific jurisdiction exists, it may be one

by consumers in the forum State.
Id. at 297-98.

51. *Id.* at 292 (quoting from *International Shoe*, 326 U.S. at 317).

factor in a court's analysis of the contacts between the defendant, the claim, and the forum state. In fact, it may serve as the starting point under the relevant state long-arm statute. For example, under the Pennsylvania statute, personal jurisdiction exists over a person: "as to a cause of action or other matter arising from such person: . . . (2) Contracting to supply services or things in this Commonwealth."⁵² Similarly, in New York: "a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state. . . ."⁵³

Thus, statutory personal jurisdiction may exist based on the place of delivery of the goods. Like the European Court of Justice interpretation of Article 5(1) of the Brussels Convention,⁵⁴ neither of these statutes provides an independent definition of the term "contracting to supply goods in the state." Thus it is necessary to look to applicable substantive law to determine when such an event occurs. If that law is the CISG, then Article 31 would be the source of the substantive law rule. And if the Article 31 rule results in the place of delivery being within the forum state, then statutory jurisdiction would exist. But the jurisdictional inquiry in the United States does not end at this point. It is then necessary to apply the due process limitations, and to determine (1) whether the defendant has engaged in activity in or directed at the forum state (the "minimum contacts" analysis), and (2) whether that activity results in such a relationship between the defendant and the forum as to make it reasonable to require the defendant to defend the particular suit.⁵⁵

C. The Implications of Differing Jurisdictional Rules for the Application of CISG Article 31

The implications of Article 31 in systems applying differing jurisdictional rules is perhaps most easily understood by considering some of the possible circumstances in which it might be applied. For the situations discussed below, assume that the CISG is the applicable substantive law for each transaction in question.

Variation 1: Assume that:

- (1) the contract of sale is between a French seller and a German buyer;

52. 42 PA. CONS. STAT. ANN. § 5322(a)(2), *supra* note 38.

53. N.Y. C.P.L.R. § 302(a), *supra* note 38.

54. *See supra* notes 15-16 and accompanying text.

55. *See supra* notes 49-50 and accompanying text.

- (2) no specific designation of the place of delivery of the goods is stated in the contract;
- (3) the contract contains no use of a price-delivery term; and
- (4) the contract involves carriage of the goods.

A dispute arises, and the German buyer brings suit in a German court.

The Brussels I Regulation provides the applicable jurisdictional rules, since both France and Germany are Member States of the European Union. The court in which the action is brought is not in the state of the defendant's domicile, so general jurisdiction does not exist under Article 2 of the Brussels I Regulation. The overwhelming body of case law would compel that we look to CISG Article 31(a) to determine the place of performance of the seller's obligation to deliver the goods. Since the seller would hand the goods over to the first carrier in France, the seller's delivery obligation is situated in France. Thus, jurisdiction under both Article 2 and Article 5(1)(b) of the Brussels I Regulation lies in France. The German court has no jurisdiction under the Brussels I Regulation.

Variation 2: Assume the same facts as Variation 1, except that when the dispute arises, the French seller brings suit in a French court.

Once again, the overwhelming body of case law would compel that we look to CISG Article 31(a) to determine the place of performance of the seller's obligation to deliver the goods. Again, the court in which the action is brought is not in the state of the defendant's domicile, so general jurisdiction does not exist under Article 2 of the Brussels I Regulation. While CISG Article 57(1) deals with the location of the buyer's obligation to pay the price, that issue is no longer relevant under Article 5(1)(b) of the Brussels I Regulation for purposes of jurisdiction. Article 5(1)(b) continues to require, however, that we determine under the contract the place at which "the goods were delivered or should have been delivered," and now provides for jurisdiction in this location even for an action on the buyer's obligation to pay the purchase price. Since this location is determined for substantive law purposes by Article 31(a) CISG, jurisdiction under Article 5(1)(b) of the Brussels I Regulation lies where the goods are handed over to the first carrier, and that is in France. The French court thus has jurisdiction, even though the defendant is domiciled in Germany.

Variation 3: Assume that the contract is between a French seller and a German buyer, and that the contract includes a DDP price-delivery term (delivered duty paid) and expressly makes that term subject to the ICC Incoterms 2000. In other words, the facts are the same as in Variations 1 and 2, except that a specific designation of the place of delivery of the goods (the

buyer's place of business) is included. A dispute arises, and the German buyer brings suit in a German court.

This time the case law would again lead us to CISG Article 31, but the applicable provision would be the chapeau, since the existence of the price-delivery term (as governed by the Incoterms) means that "the seller [is] bound to deliver the goods at [a] particular place." That place is now in Germany, and under Article 5(1)(b) of the Brussels I Regulation the German court has jurisdiction over the case involving a French defendant.

These first three variations indicate that, so long as suit is brought in the courts of a state other than the state of the defendant's domicile, the place of delivery of the goods is determinative of jurisdiction under Article 5(1)(b) of the Brussels I Regulation, and CISG Article 31 provides the rule for determining the place of the seller's obligation to deliver the goods. Thus, consistent with the decision of the European Court of Justice in the *Tessili* case,⁵⁶ there is no independent rule defining the place of delivery of the goods in the Brussels I Regulation, and when the applicable law is the CISG, Article 31 will provide the determinative definition for purposes of jurisdictional analysis when the Brussels I Regulation applies.

Now consider the same type of case, but with one of the parties having its place of business in a state outside of the European Union.

Variation 4: Assume that:

- (1) the contract of sale is between a French seller and a New York buyer;
- (2) no specific designation of the place of delivery of the goods is stated in the contract;
- (3) the contract contains no use of a price-delivery term; and
- (4) the contract involves carriage of the goods.

A dispute arises, and the New York buyer brings suit in a New York court (*i.e.*, the same facts as Variation 1, but now with a New York buyer).

The jurisdictional analysis will begin with the New York long-arm statute, whether the action is brought in state or federal court.⁵⁷ Under section 301 of the New York Civil Practice Law & Rules, general jurisdiction will exist over the French defendant *if*, under a due process analysis, that defendant is engaged in continuous and systematic business activity in the State of New York.⁵⁸ Since that is unlikely in our hypothetical case, we must look to the specific jurisdiction ("transacting business") rules of section 302 of the New

56. See *supra* note 15.

57. See *supra* note 37.

58. See *supra* notes 38-51 and accompanying text.

York Civil Practice Law & Rules, which provide that “a court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent: (1) transacts any business within the state or contracts anywhere to supply goods or services in the state,” for “a cause of action arising from . . . the acts enumerated.”⁵⁹ The statute requires both that there be activity in, or directed at, the state of New York, and that the cause of action arise out of that activity. In our hypothetical case, this determination would require additional factual analysis focused on the conduct of the defendant in negotiating and carrying out the contract arrangements. Under CISG Article 31, the goods were “delivered” by the seller when handed over to the first carrier in France, so if the CISG substantive rule is determinative of the place at which the goods were “supplied” for purposes of the New York statute, then no jurisdiction would exist. Whatever the result of the application of the long-arm statute, jurisdiction in New York is further limited by the Due Process Clause, and will exist only if the French defendant had some “minimum contacts” with (*i.e.*, activity in or directed at) New York, and if it is reasonable to hale the defendant into a New York court based on the existing facts.

Variation 5: Assume that:

- (1) the contract of sale is between a New York seller and a French buyer;
- (2) no specific designation of the place of delivery of the goods is stated in the contract;
- (3) the contract contains no use of a price-delivery term; and
- (4) the contract involves carriage of the goods.

A dispute arises, and the New York seller brings suit in a New York court (*i.e.*, the U.S. equivalent of the facts of Variation 2, above).

Assuming once again that general jurisdiction does not exist as a result of continuous and systematic activity of the French defendant in the state of New York, these facts demonstrate perhaps the greatest difference between European and U.S. jurisdictional concepts. Under CISG Article 31, the place of performance of the Seller’s delivery obligation is in New York, since that is the place where the seller will hand the goods over to the first carrier. But, unlike Article 5(1)(b) of the Brussels I Regulation, the New York statute does not base jurisdiction over a claim brought against the buyer on the payment obligation on the place of performance of the seller’s obligation to deliver goods. The French buyer has not contracted to “supply goods or services in the state” of New York, so the specific transacting business rule of the long-arm statute is not met, and there is no need to continue to the due process

59. *See supra* note 38.

analysis. Unlike the situation in Variation 2, above, jurisdiction would not exist in the seller's court to sue on the buyer's payment obligation.⁶⁰ Nor would the provisions of CISG Article 31 be likely to have any impact on this jurisdictional analysis.⁶¹

Variation 6: Assume that the contract is between a French seller and a New York buyer, and the contract includes a DDP price-delivery term (delivered duty paid) and expressly makes that term subject to the ICC Incoterms 2000. A dispute arises, and the New York buyer brings suit in a New York court (facts similar to those in Variation 3, above).

This time the New York long-arm statute would seem to apply. The French seller has contracted to "supply goods or services in the state" of New York. Under simple application of the DDP Incoterm, and by reference to the chapeau of CISG Article 31, the place of the delivery obligation is in New York. Unlike the analysis in Variation 3, however, this does not end the jurisdictional analysis. We must address the due process limitation and determine whether this is activity of the French defendant in or directed at the state of New York and then whether it is reasonable on the facts to bring that defendant into a New York court. If the contract was negotiated in France, and no representative of the French defendant has ever been in New York, the mere fact that the contract called for the delivery obligation to be satisfied in New York, without more, is unlikely to result in a determination of jurisdiction over the French defendant for due process purposes.

V. CONCLUSIONS

The vast majority of cases that have interpreted CISG Article 31 have dealt with the effect of the four rules found in that article on the question of whether the court seised has jurisdiction to hear the case. In each instance, this resulted from the concurrent application of the CISG and one of the European instruments dealing with jurisdiction over foreign defendants (the Brussels and Lugano Conventions, and the Brussels I Regulation). In every

60. It is possible that specific jurisdiction could exist under a more expansive long-arm statute in some U.S. states. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10, *supra* note 39 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."). This would, however, require that the French buyer have specific contacts with the U.S. state not found in our hypothetical, and would not involve the application of CISG Article 31.

61. Despite the apparently common belief that U.S. courts have a longer jurisdictional reach than do courts in other countries, this is a situation in which jurisdiction under Article 5(1) of the Brussels I Regulation clearly extends farther than does jurisdiction in a U.S. court, and would thus be considered exorbitant under U.S. due process standards.

case but two, the court has made the CISG Article 31 rule determinative of the application of the Article 5(1) rule of the applicable European instrument. The two exceptions conflict with the *Tessili* decision of the European Court of Justice and with every other court that has considered the same question under the Brussels and Lugano Conventions.

Consideration of jurisdictional rules in the United States, and consideration of a set of hypothetical variations comparing the application of those rules with Article 5(1) of the Brussels I Regulation, indicate that, while in some instances CISG Article 31 may have an impact on jurisdictional analysis in the United States, it will seldom (if ever) be determinative, and at times will have no impact on that analysis. This is rather different from its role under the European instruments. The result is different effects of the same provision, depending on the court (and legal system) in which the issue is addressed. While this may not indicate different interpretation of the *substantive rule* found in Article 31, it does indicate different interpretation of the *issue* most often raised to date in the application of that substantive rule in the courts of CISG Contracting States.

The fact that the substantive rules of the CISG may have an outcome-determinative effect for jurisdictional purposes brings into play one more indication of the “homeward trend” analysis.⁶² Professor Flechtner has elsewhere noted the challenge to uniform interpretation of the CISG triggered by different language versions of the text and by reservations made by the Contracting States.⁶³ He has also noted, that “[p]erhaps the single most important source of non-uniformity in the CISG is the different background assumptions and conceptions that those charged with interpreting and applying the Convention bring to the task.”⁶⁴ Article 31 poses one of those many parts of the CISG where these “background assumptions and conceptions” are not only a result of different legal training and thinking but also a result of the interplay of the CISG with other laws and conventions that

62. JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989):

The Convention, *faute de mieux*, will often be applied by tribunals (judges or arbitrators) who will be intimately familiar only with their own domestic law. The tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation. The mind sees what the mind has means of seeing.

63. Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187 (1998).

64. *Id.* at 200.

require reference to the CISG for final determination of the outcome of a case. While this is a positive law bias, and not in any way a subjective bias, it nonetheless can affect uniformity of results when resort to the CISG is required.