

## International Jurisdiction of the Place of Performance (summary)

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According to Article 5(1) of the Japanese Civil Procedure Law, a suit for proprietary claim may be brought before the court of the place of performance. Lacking express provision on international jurisdiction, Japanese theory and practice tend to apply this article *mutatis mutandis* for the determination of Japanese courts' jurisdiction in international contract disputes. As a connecting factor to determine *forum contractus* the place of performance is used predominantly in many domestic laws and conventions, such as Article 29(1) of the German Civil Procedure Code, Article 5(1) of the Brussels Convention and Article 5(1) of the Brussels I Regulation / Lugano Convention, although the content of those jurisdictional rules is not identical. According to the German court practice and prevailing view on Article 29(1) of the German Civil Procedure Code, if the place of performance is not specified in the contract of the parties, it shall be determined pursuant to the substantive law applicable to the contract in question. For the purposes of Article 5(1) of the Brussels Convention the European Court of Justice has also adopted this approach (*Tessili v. Dunlop*, [1976] ECR 1473 [Case 12/76]). Article 5 of the Brussels I Regulation and Lugano Convention has restricted the reference to *lex contractus*, in order to enhance predictability of the *forum contractus* for the parties. According to this provision, the place of performance shall be: (i) in the case of the sale of goods, the place where "the goods were delivered or should have been delivered," and (ii) in the case of provision of services, the place where "the services were provided or should have been provided."

As to the determination of the place of performance in this context, the Japanese theory is divided. Court practice and minority view insists the reference to the applicable substantive law, which is, on the contrary, denied by the prevailing view. The latter allows the jurisdiction of the place of performance, only if it is expressly agreed upon by the parties or if it can be ascertained clearly from the contents of the contract. However, in order to determine the validity of the

agreement of the place of performance, the reference to the applicable law of contract is inevitable. To assume the jurisdiction of the place of performance where the parties have no substantive duty to perform his obligation, may be contradictory to the purpose of this jurisdiction. Therefore, the reference to the applicable law of the contract must be basically sustained. On the other hand, if the governing law of the contract is not agreed upon by the parties, the place of performance determined pursuant to the governing law can be sometimes accidental and unpredictable for the parties. Considering above, *de lege ferenda*, the Japanese court jurisdiction in contract disputes shall be affirmed, if the place of performance is located in Japan, pursuant to the agreement of the parties or to the applicable law of the contract, which is agreed upon by the parties.