THE PROVINCES OF CONTRACT AND TORT - BORDER DISPUTES IN THE CONFLICT OF LAWS

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Wikingerhof v Booking.com (C-59/19)

As the United Kingdom's membership of the European Union disappears in time's rear view mirror, it might be tempting to cast aside a judgment of the European Court of Justice delivered a little more than a month before the end of the implementation period, concerning an instrument (the Recast Brussels I Regulation[1]) that forms no part of the body of retained EU law to be applied by the courts of this nation going forwards.[2] The Court's Judgment in *Wikingerhof GmbH & Co KG v Booking.com BV*,[3] and the accompanying Opinion of Advocate General Saugmandsgaard Øe,[4] must not, however, be dismissed in this fashion. In staking out the previously hazy borderline between the rules of special jurisdiction in Art 7(1) (contract) and Art 7(2) (tort) of the Regulation, *Wikingerhof* elucidates the distinction between contractual and extra-contractual matters within the European private international framework to which the UK retains close ties through its unilateral decision to apply the Rome I and Rome II Regulations in matters of choice of law[5] and its declared (but as yet unrealised) ambition to re-join the 2007 Lugano Convention.[6]

The Booking.com website describes Hotel Wikingerhof as a Frisian-style hotel in the town of Kropp in Schleswig-Holstein, Germany. The website, based in the Netherlands, and the hotel management company entered into a contractual relationship in 2009 on the website's standard terms. In recent years, the relationship had soured as a result of changes made to those terms. The hotel company commenced proceedings in the Landgericht Kiel seeking an injunction to restrain the website from undertaking certain practices that the claimant contended were an abuse of the website's dominant position in the market for intermediary services and hotel reservation portals, contrary to the requirements of German competition law (corresponding to TFEU Art 102).

The website challenged the jurisdiction of the German court, relying on an exclusive choice of court agreement in its terms designating the courts of Amsterdam. The court upheld that challenge. Its decision was affirmed by the Oberlandesgericht Schleswig on a different basis, that the German court did not have special jurisdiction under the Brussels I regime even if the choice of court agreement

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1 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([2012] OJ L351/1).

2 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations (SI 2019/479), regs 89 and 92; Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (19 October 2019), Art 67.

3 (Case C-59/19) [2020] ECLI:EU:C:2020:950.

4 [2020] ECLI:EU:C2020.688.

5 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome I) ([2007] OJ L299/40); Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome II) ([2008] OJ L177/6); Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations (SI 2019/834).

6 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano, 30 October 2007) [2007] OJ L339/3 ('Lugano Convention').

were held ineffective, as the subject matter of the action was contractual within Art 7(1) of the Regulation[7] and the place of performance of the service contract was in the Netherlands, where Booking.com was based. On further appeal, the Bundesgerichtshof, having determined that the choice of court agreement did not meet the formal requirements within Art 25(1) of the Regulation, referred to the ECJ the question whether the action fell instead within Art 7(2),[8] concerning matters relating to tort, delict or quasi-delict.[9] A positive answer to that question would enable the German courts to assume special jurisdiction by reason of the occurrence of damage within the jurisdiction.[10]

This reference, in effect, invited the ECJ to revisit the reasoning of its Seventh Chamber in 2014 in responding to a request by another German regional court (Landgericht Krefeld) in a case bearing more than a passing resemblance to the present.[11] In the earlier case (*Brogsitter*), the ECJ had – inadvisedly given the significance of the question for the EU's private international law framework – proceeded to judgment without seeking an Opinion from the assigned Advocate General. The cryptic reasoning of its Judgment[12] left many questions unanswered.[13] Although concluding that a matter could be considered as falling within Art 7(1) if 'the conduct complained of may be considered a breach of the terms of the contract, which may be established by taking into account the purpose (*objet*) of the contract',[14] other passages in the judgment suggested (albeit without explanation or elaboration) additional criteria for delineating the scope of the contractual category: in particular whether 'the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter' or 'the legal basis (*cause*) for [the action] can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties in the main proceedings, which would make its taking into account indispensable in deciding the action'.[15]

The *Wikingerhof* reference was assigned to the Court's Grand Chamber which did seek the Opinion of its Advocate General.[16] His masterly analysis contrasts 'maximalist' and 'minimalist' readings of the category of 'contractual matters',[17] based on the earlier judgment,[18] and expresses a strong preference for the latter.[19] In his view, a claim will fall within Art 7(1) if, and only if, the existence of the obligation that the claimant has relied upon[20] depends on the terms of the contract. That is not

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7 Lugano Convention (n 6), Art 5(1).

8 Lugano Convention (n 6), Art 5(3).

9 Judgment of 11 Dec 2018 – KZR 66/17.

10 See *AB flyLAL-Lithuanian Airlines v Starptautiskā lidosta 'Rīga' VAS* (Case C-27/17) [2018] ECLI:EU:C:2018:533, [38]-[43].

11 *Brogsitter v Fabrication des Montres Normandes EURL* (Case C-548/12) ECLI:EU:C:2014:148; [2014] QB 673.

12 *Wikingerhof*, Opinion (n 4), [68] ('uncertain', 'open and abstract').

13 A Dickinson, 'Towards an agreement on the concept of "contract" in EU private international law?' [2014] LMCLQ 466.

14 *Brogsitter* (n 11), [24], [29].

15 Ibid, [25], [26].

16 Advocate General Saugmandsgaard Øe was particularly well qualified to give an opinion, having considered the relationship of contractual and extra-contractual matters in the context of an employment dispute in *Bosworth v Arcadia Petroleum Limited (*Case C-603/17) [2019] ECLI:EU:C:2019:65 (Opinion).

17 As to terminology, see *Wikingerhof*, Opinion (n 4), [28]. For ease of reference, this note will refer to 'contractual matters' (Art 7(1)) and 'tort matters' (Art 7(2)).

18 The minimalist reading centres upon para 25 of the judgment in *Brogsitter* (see text to n 14 above) whereas the maximalist reading centres upon para 24 (see text to n 13 above).

19 *Wikingerhof*, Opinion (n 4), [90].

20 See *Wikingerhof*, Opinion (n 4), [36]-[41], [46], [49], [62], [90]-[96], [118]-[119], emphasising the autonomous nature of the concept of the 'obligation in question' and the subsidiary role played by the rules of

the case for obligations imposed by law on everyone (or, one might add, on a particular class of persons), regardless of such a contract.[21] In cases of the latter kind, it is irrelevant that the interpretation of the contract is or might be relevant to an incidental or preliminary question in the proceedings,[22] or to a matter raised by way of defence.[23] Nor can Art 7(1) be interpreted in such a way as to allow 'tort matters' to be treated as an accessory to 'contractual matters' between the same parties.[24]

The Advocate General convincingly rejects the more expansive 'maximalist' approach to the scope of Art 7(1), according to which a matter is to be considered as contractual, regardless of the actual basis of the obligation in question, if the harmful event could also constitute a breach of contract such that the claimant could (hypothetically) have framed its claim on that basis.[25] Adopting that approach would undermine the objectives of legal certainty and proximity that the Regulation, and the rules of special jurisdiction within it, pursue.[26] It would (a) require the national court to investigate the merits of the claim at the jurisdiction stage by requiring an examination of the obligations imposed by the contract, expressly or otherwise,[27] (b) assign claims resting on the same harmful event, and with the same legal basis, to two different fora depending on whether a contractual relationship did, or did not, exist between the parties,[28] and (c) risk assigning a non-contractual claim to a court lacking a substantial connection to the harmful event.[29]

The maximalist approach would also jeopardise the harmonious relationship between the Brussels I Regulation, on the one hand, and the Rome I and Rome II Regulations, on the other,[30] as it would assign to the contractual category (Rome I), with its emphasis on party autonomy,[31] claims that are dealt with in the Rome II Regulation in a way that excludes all possibility for the parties to choose the law applicable.[32]

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law (if any) invoked by the claimant (the latter serving as 'a prism for reading the facts and the "obligation" that the applicant infers from them' (ibid, [94]-[96])).

21 *Wikingerhof*, Opinion (n 4), [97]-[101].

22 Ibid, [102]-[104], [123]-[124].

23 Ibid, [107]-[110]. cf *Systran SA v Commission* (Case C-103/11) [2013] ECLI:EU:C:2013:245, a case involving the non-contractual liability of the EU which may have inspired the formulation in para 25 of the *Brogsitter* judgment; also *IT Development SAS v Free* Mobile SAS (Case C-666/18) [2019] ECLI:EU:C:2019:729, Opinion, [44]-[54].

24 Ibid, [112]-[115]. See *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co* [1988] ECR 5565.

25 Ibid, [69], [74], [117]. This is the view taken, among others, by Professor Adrian Briggs (*Civil Jurisdiction and Judgments* (Informa Law, 6th edn, 2015), [2.171], [2.192]). It comes as no surprise to discover his dissatisfaction with the decision and reasoning in *Wikingerhof* (A Briggs, '*Wikingerhof*: A View From Oxford', https://eapil.org/2020/12/07/briggs-on-wikingerhof/).

26 Brussels I Regulation (n 1), Recital (16).

27 *Wikingerhof*, Opinion (n 4), [75]-[77].

28 Ibid, [78]-[80].

29 Ibid; also [104].

The following example raises all three of the difficulties identified above: a taxi driver resident in one Member State is asked to take his customer across the border into a neighbouring Member State, where he collides with a vehicle driven by a resident of a third Member State, injuring the customer.

30 Ibid, [81]-[84], with reference to Recital (7) to the Rome I and Rome II Regulations (n 5). See also *"ERGO Insurance" SE v "If P&C Insurance" AS* (Case C-359/14) [2016] ECLI:EU:C:2016:40, [43]-[46].

31 Rome I Regulation (n 5), Recital (11).

32 Rome II Regulation (n 5), Arts 6(4) (unfair competition and acts restricting free competition) and 8(3) (infringement of intellectual property rights). If the Rome II Regulation were engaged, Art 6 would apply to the claim in *Wikingerhof*, excluding the facility for the parties to choose the applicable law. If the Rome I

The claimed advantages of the maximalist approach for the effective administration of justice, by avoiding the fragmentation of claims between contracting parties according to the basis of the obligation relied on, are overstated for the following reasons. First, any claimant may choose to bring all of its claims before the courts of the defendant's domicile.[33] Secondly, contracting parties can avoid the possibility of fragmentation or forum shopping within the sphere of their own relationship by designating a contractual forum for the resolution of disputes between them.[34] Thirdly, the maximalist approach would result in the scission of claims against co-tortfeasors according to the existence, or not of a contractual relationship between the parties.[35]

Finally, it is not necessary to align the category of contractual matters in Art 7 with the categories used in the provisions for insurance, consumer contracts and individual employment contracts in Sections 3, 4 and 5 of Chapter II of the Regulation. The latter provisions, unlike Art 7,[36] serve to protect the weaker party to the relationship and their scope can be fixed in line with that purpose to accommodate extra-contractual claims that are connected to the contractual relationship.[37]

Happily, the ECJ in *Wikingerhof* follows the Advocate General's approach. Emphasising the need for an autonomous interpretation of the categories of contractual and tort matters,[38] and their mutual exclusivity,[39] the Court observes that it is for the claimant to elect whether or not to invoke Art 7(1) and/or Art 7(2) to establish the jurisdiction of the court seised.[40] The claimant's procedural act of election does not, however, determine the jurisdictional issue: the national court must examine whether the conditions for the application of one or other of those provisions are met.[41] This involves an exercise in characterisation of the obligation, or obligations, underlying the claim.[42] A claim will involve a contractual matter if interpretation of the contract appears indispensable to establish the lawful or unlawful character of the relevant conduct,[43] in particular if the action is based on the terms of a contract or on rules of law which are applicable by reason of that contract.[44] By contrast, where the contract is not indispensable to the existence of the obligation in question, 'since that obligation applies to the defendant independently of that contract', the claim will involve a tort matter.[45] The

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Regulation were engaged, Art 3 would allow the parties to choose the law applicable to the contractual obligation.

Other provisions of the Rome II Regulation, such as the general limits on party autonomy (Art 14) and specific rule governing direct actions against insurers (Art 18) would also potentially be rendered less effective by the maximalist approach, if applied in the sphere of choice of law.

33 *Wikingerhof*, Opinion (n 4), [84]-[85]. See Brussels I Regulation (n 1), Art 4; Lugano Convention (n 6), Art 2; *Kalfelis* (n 23), [20].

34 Ibid, [89], [140]. See *Apple Sales International v MJA* (Case C-595/17) [2018] ECLI:EU:C:2018:854.

35 Ibid, [85].

36 *Kainz v Pantherwerke AG* (Case C-45/13) [2014] ECLI:EU:C:2014:7, [31].

37 *Wikingerhof*, Opinion (n 4), [111], referring to *Bosworth v Arcadia*, Opinion (n 16), [91]-[103]; *AU v Reliantco Investments Ltd* [2020] ECLI:EU:C:2020:264, [58]-[73].

38 *Wikingerhof* (n 3), [25].

39 Ibid, [26]

40 Ibid, [29].

41 Ibid, [29]-[30].

42 Ibid, [31], with reference to *Wikingerhof*, Opinion (n 4), [90], with the latter emphasising the possibility of two distinctly characterised obligations arising from the same set of facts.

43 Following the wording of para 25 of the *Brogsitter* judgment (text to n 14 above). The Court does not refer to para 24, or para 26, of that judgment. See B Haftel, 'Here lies the *Brogsitter* judgment', https://eapil.org/2020/12/14/here-lies-the-late-brogsitter-ruling/ regretting the repudiation of the ECJ's reasoning in the earlier case.

44 *Wikingerhof* (n 3), [32].

45 Ibid, [33]; also [34] adding the words 'or other voluntary commitment' after 'contract'. As to the extension of Art 7(1) to relationships that are not strictly contractual, see *Wikingerhof*, Opinion (n 4), [37]-[38].

ECJ considers the latter characterisation to be the correct one in *Wikingerhof*, subject to verification by the referring court.[46] This conclusion, in the Court's view, accords with the objectives of proximity and the sound administration of justice as it ensures that the court for the place in which the relevant market was located has jurisdiction over a claim for abuse of a dominant position in that market.[47]

The ECJ's decision in *Wikingerhof*, and the thorough analysis of the Advocate General on which it rests, are timely and welcome. Although one might lament the continued usage of the ambiguous terminology of 'indispensability',[48] this serves as an escape hatch from the regrettable uncertainties resulting from the earlier decision in *Brogsitter* and emphasises the European Court's adoption of the minimalist approach to the category of contractual matters. Over time, it is to be hoped that the ECJ and national courts will fix their gaze upon the factual and legal basis of the obligation owed (or denied[49]) by one party toward the other with 'dependence' of that obligation on a contractual or other voluntary commitment being the key criterion in defining the outer limits of the contractual category within the Brussels/Lugano regimes a well as the Rome Regulations.[50]

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46 Ibid, [35]-[36].

47 Ibid, [37].

48 A Dickinson (n 13), 471-472.

49 Arts 7(1) and 7(2) apply also to claims for negative declaratory relief: *Folien Fischer AG v Ritrama SpA* (Case C-133/11) [2012] ECLI:EU:C:2012:664.

50 See eg *Kareda v Benkö* (Case C-249/16) [2017] ECLI:EU:C:2017:472, [30]-[31]; *flightright GmbH v Air Nostrum,Líneas Aéreas del Mediterráneo SA* (Case C-274/16) [2018] ECLI:EU:C:2018:160, [59]; *Ordre des avocats du barreau de Dinant v* JN (Case C-421/18) [2019] ECLI:EU:C:2019:1053, [26]-[33]; also *Committeri v Club Méditerranée SA* [2018] EWCA Civ 1889, [2019] ILPr 407, [52]-[56] (Rome II Regulation).