W(H)ITHER UNJUST ENRICHMENT? – BORDER DISPUTES IN THE CONFLICT OF LAWS (AGAIN)

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HRVATSKE ŠUME v BP Europe (C-242/20)

Under section 6 of the European Union (Withdrawal) Act 2018, a court or tribunal in the United Kingdom "may have regard" to decisions of the Court of Justice of the European Union delivered after 31 December 2020 so far as they are relevant to any matter to be decided, although it is "not bound by" them.[1] Although the recast Brussels I Regulation[2] and the parallel Lugano (II) Convention[3] do not apply to any proceedings commenced after that date,[4] the European Court's decisions regarding those instruments remain of considerable interest to UK lawyers as a result not only of their continuing transitional application and relevance to the intra-UK jurisdiction regime,[5] but also the link to the Rome I and Rome II Regulations on the law applicable to contractual and non-contractual obligations,[6] which form part of the body of retained EU law following Brexit.[7]

Just before the end of the transition period, the European Court gave its decision in the case of *Wikingerhof GmbH & Co KG v Booking.com BV*,[8] delineating the categories of contractual (Art 7(1)) and delictual (Art 7(2)) matters within the Brussels I regime. In *HRVATSKE ŠUME doo v BP EUROPA SE*,[9] delivered just over a year after its decision in *Wikingerhof*, the Court has built upon the foundations laid on that earlier occasion in assessing the place of obligations based on unjust enrichment within that scheme.

The facts may be briefly summarised.[10] In 2003, in enforcement proceedings in Croatia, the respondent German company entity enforced recovery of a debt owed to it by a Croatian company

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1 European Union (Withdrawal) Act 2018 ('2018 Act'), s 6(1)-(2).

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

3 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano, 30 October 2007) [2007] OJ L339/3. For the time being, the UK's wish to rejoin the Lugano regime as a third State has been rebuffed by the European Commission (see the Commission's Communication (COM (2021) 222 final, 4 May 2021) and the Note Verbale from the European Commission to the Swiss Federal Council as Depositary, 22 June 2021).

4 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations (SI 2019/479), regs 82, 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), Arts 67, 127 and 129.

5 Civil Jurisdiction and Judgments Act 1982, s 16 and Sch 4.

6 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome I) ([2007] OJ L299/40), Recital (7); Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome II) ([2008] OJ L177/6), Recital (7).

7 Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations (SI 2019/834).

8 (Case C-59/19) [2020] ECLI:EU:C:2020:950, noted A Dickinson [2021] LMCLQ 215.

9 [2021] ECLI:EU:C:2021:985 (Judgment, 9 December). See also [2021] ECLI:EU:C:2021:728 (Opinion of Saugmandsgaard Øe AG, 9 September).

10 The factual position is complicated somewhat by the fact that both the parties are the successors in law to the entities originally involved in the enforcement proceedings. As nothing turns on this for present purposes, the following summary refers only to 'the claimant' and 'the respondent'.

(FUTURA doo) by attaching a debt owed to the latter by the claimant, also incorporated in Croatia. Although the claimant promptly applied to the Croatian Supreme Court to set that attachment aside, the execution was implemented by a transfer of almost 4 million Croatian Kunas from the claimant's bank account to the respondent's account. Six years later, the Croatian court upheld the claimant's challenge and ruled that the attachment was invalid. By that time, it was not possible for the claimant to seek restitution of the monies transferred within the enforcement proceedings. Accordingly, upon the respondent's failure to reimburse it, the claimant brought a fresh action before the Commercial Court of Zagreb seeking to recover the amount transferred, with interest, on the basis of unjust enrichment. The Court upheld the respondent's challenge to its jurisdiction.

Upon an appeal by the claimant, the Commercial Court of Appeal referred two questions to the European Court. The first concerned the possible application of what is now Art 7(2) of the recast Brussels I Regulation to the claim, and the second the possible application of what is now Art 24(5).[11] The European Court answered both questions negatively.

With respect to Art 7(2), the Court reasoned in a number of steps. First, the rules of special jurisdiction within the Regulation must be interpreted restrictively and independently of the way in which the legal relationship at issue is classified by the applicable national law.[12] Secondly, Art 7(2) of the Regulation excludes contractual matters falling within Art 7(1), but otherwise covers "all actions which seek to establish the liability of a defendant".[13] Thirdly, the category of contractual matters covers "any claim based on an obligation freely consented to be one person towards another".[14] Fourthly, a claim for restitution based on unjust enrichment does not generally arise from a voluntary commitment made by the defendant to the applicant but rather arises independently of intention.[15] Fifthly, a claim of this kind may nonetheless, in certain circumstances, be closely linked to a contractual relationship between the parties to the dispute, so as to bring it within the category of contractual matters.[16] This includes where the claim "relates to a pre-existing contractual relationship between the parties", such as "where the applicant relies on unjust enrichment closely linked to a contractual obligation which he or she regards as invalid, which has not been performed by the defendant, or which the applicant considers he or she has 'over-performed', as the basis of his or her right to restitution".[17] Sixthly, the "liability" of the defendant to which Art 7(2) applies is liability for a harmful event, involving (a) an act or omission contrary to a duty or prohibition imposed by law, (b) damage, and (c) a causal connection between the damage and the event in question.[18] Liability which is not based on the existence of a harmful event, in that sense, is not a delictual (or quasi-delictual) matter and falls outside Art 7(2).[19] Seventhly, a claim for restitution based on unjust enrichment does not

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11 The questions were formulated with reference to Arts 5(3) and 22(5) of original Brussels I Regulation (Regulation (EC) No 44/2001, [2001] L12/1), which applied *ratione temporis* (*HRVATSKE ŠUME*, Judgment (n 9), [22]-[25]). Again, this does not affect the subject-matter of this note, which uses the numbering of the recast Regulation.

12 *HRVATSKE ŠUME*, Judgment (n 9), [40]-[41].

13 Ibid, [42]-[43].

14 Ibid, [44].

15 Ibid, [45]; also *HRVATSKE ŠUME*, Opinion (n 9), [45].

16 Ibid, [47], [51].

17 Ibid, [48]-[50], with reference to *Profit Investment SIM SpA v Ossi* (Case C-366/13) [2016] ECLI:EU:C:2016:282.

18 Ibid, [53].

19 Ibid, [54], noting the varying terminology used in different language versions of the Regulation.

originate in a harmful event.[20] The obligation arises irrespective of the defendant's conduct, precluding a finding as to the existence of a causal link between the damage and any unlawful act or omission committed by the defendant.[21] Eighthly, it follows that such a claim may fall neither within Art 7(1) nor Art. 7(2).[22]

The first three steps are uncontroversial. The last three are consistent not only with the connecting factor used in Art 7(2),[23] but also with the term (*Schadenshaftung*) used in the original German text of the Court's judgment in *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co*[24] and in the more recent judgment in *Wikingerhof* to which the Court explicitly referred in *HRVATSKE ŠUME*.[25] They also accord with the decision and reasoning, on this point, of the House of Lords in *Kleinwort Benson Ltd v Glasgow City Council*[26] and the Court of Appeal in *Aspen Underwriting Ltd v Credit Europe Bank*.[27] These two cases, however, present a difficulty with respect to the adoption of the reasoning of the European Court (in its fourth and fifth steps) with respect to the relationship between Arts 7(1) and 7(2). In *Kleinwort Benson*, a claim to recover sums paid under a contract held void as an *ultra vires* act of a local authority was held to fall outside the category of contractual matters in Schedule 4 of the Civil Jurisdiction and Judgments Act (modelled on Art 5(1) of the 1968 Brussels Convention).[28] In *Aspen Underwriting*, a restitutionary claim founded on mistake as to the existence of a contractual obligation was held to fall outside Art 7(2), although it does not appear to have been argued that it fell within Art 7(1).[29] If *HRVATSKE ŠUME* were to stand alone, an English court (applying s 6 of the 2018 Act) may well "have regard" to it in examining the treatment of unjust enrichment claims within the body of retained EU law, but would nevertheless be potentially bound to follow the earlier English decisions on this question.

Fortunately, *HRVATSKE ŠUME* does not stand alone. In *Profit Investment SIM SpA v Ossi*, a decision pre-dating the UK's withdrawal which the Court cited in the present case,[30] the European Court held that actions seeking the annulment of a contract and the restitution of sums paid but not due on the basis of that contract fell within what is now Art 7(1).[31] The European Court reasoned as follows:[32]

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20 Cases in which the claimant seeks to strip the defendant of gains made as the result of wrongful conduct stand apart. See *Banque Cantonale de Genève v Polevent Ltd* [2015] EWHC 1968 (Comm), [2016] QB 394 (Rome II Regulation).

21 Ibid, [55].

22 Ibid, [58].

23 "the courts for the place where the harmful event occurred or may occur".

24 (Case 189/87), [1988] ECR 5565, [17].

25 Judgment (n 9), [42], referring to *Wikingerhof* (n 8), [23]. See also *Gazdasagi Versenyhivatal v Siemens Aktiengesellschaft Osterreich* [2016] ECLI:EU:C:2016:607 (Opinion of Wahl AG); *XL Insurance Co SE v AXA Corporate Solutions Assurance* [2015] 3431 (Comm), [2015] 2 CLC 983, [45] (HHJ Waksman QC).

26 [1999] 1 AC 153, 172 (Lord Goff), 185 (Lord Clyde), 192 (Lord Hutton).

27 [2018] EWCA Civ 2590, [2019] 1 Lloyd's Rep 221, [145]-[153], reversed in part without considering this issue [2020] UKSC 11, [2021] AC 493.

28 [1999] 1 AC 153, 167-172 (Lord Goff), 180-185 (Lord Clyde), 188-197 (Lord Hutton). Lord Nicholls (with whom Lord Mustill agreed) dissented on this issue (ibid, 172-177).

29 [2018] 1 Lloyd's Rep 22, [152].

30 See n 17 above. As part of the body of 'retained EU case law', *Profit Investment* continues to bind courts in the United Kingdom on the terms set out in s 6 of the 2018 Act. On this point, see A Burrows, 'The Conflict of Laws and Unjust Enrichment' in A Dickinson and E Peel (eds), *A Conflict of Laws Companion* (Oxford, 2021), 187-188, suggesting that the Court of Appeal in *Aspen Underwriting* (n 27) was wrong to treat itself as bound by *Kleinwort Benson* even if inconsistent with retained EU case law.

31 [2016] ECLI:EU:C:2016:282, [52]-[58].

32 Ibid, [55].

> "[I]f there had not been a contractual relationship freely assumed between the parties, the obligation would not have been performed and there would be no right to restitution. That causal link between the right to restitution and the contractual relationship is sufficient to bring the action for restitution within the scope of matters relating to a contract."

By contrast, in Kleinwort Benson, Lord Goff had reasoned as follows:[33]

> "I have to confess that I find it very difficult to see how such a claim can fall within [article 7(1)]. It can only do so if it can properly be said to be based upon a particular contractual obligation, the place of performance of which is within the jurisdiction of the court. Where however, as here, the claim is for the recovery of money paid under a supposed contract which in law never existed, it seems impossible to say that the claim for the recovery of the money is based upon a particular contractual obligation."

The difference lies in the interpretation of the connecting factor, which in terms informs the scope of the category. For Lord Goff, only an enforceable obligation could have a place of performance. For the European Court, in both *Profit Investment* and *HRVATSKE ŠUME*, a putative contractual obligation may equally have an objectively ascertainable place of performance capable of establishing a sufficiently close link between that place and an obligation arising from the attempted or purported performance of the obligation.[34] As *HRVATSKE ŠUME* emphasises, this reasoning applies not only to claims arising with respect to invalid or ineffective contracts, but also those involving 'over-performance', most commonly on the basis of a mistake of fact or law. The basis of the claim in all these cases is the voluntary commitment to perform upon which enrichment was founded.

On this issue, the European Court's reasoning is to be preferred to that of the majority in *Kleinwort Benson*. Not least, it avoids unsatisfactory distinctions, first, between cases in which the parties accept that no valid, enforceable contract has been concluded and those in which validity is in issue, and, secondly, between cases in which a remedy such as rescission serves both a contractual and proprietary/restitutionary function and those in which the claim in unjust enrichment follows, but is juridically separate, from a finding that there is no valid, enforceable contract.

That is not to say that the reasoning of the European Court in *HRVATSKE ŠUME* escapes criticism. Three points may be briefly made. First, in light of its frequent statements that the rule in Art 7(1) is based on the cause of action, not the identity of the parties,[35] it was unwise for the Court to suggest the need for a "pre-existing contractual relationship between the parties". Secondly, the Court unhelpfully referred to Art 10 of the Rome II Regulation to support its argument that obligations arising from unjust enrichment are considered, in principle, to be non-contractual obligations.[36] Given that the Rome II Regulation only applies to non-contractual obligations, and some claims in unjust enrichment manifestly do fall within the Rome I Regulation,[37] this assertion rests upon a false logic.

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33 [1999] 1 AC 153, 167. See also his Lordship's analysis of the judgment of Millett LJ in the Court of Appeal in that case (ibid, 169-172).

34 See, in particular, *HRVATSKE ŠUME*, Judgment (n 9), [50]. Note that, under Art 7(1)(b) of the Brussels I Regulation, by contrast with Art 7(1)(a), the place of performance may well fall to be assessed otherwise than by reference to the specific obligation whose 'performance' gave rise to the claim in unjust enrichment. This does not invalidate the proposition in the text, any more than it does for breach of contract claims.

35 *Králová v Primera Air Scandinavia* (Case C-215/18) [2020] ECLI:EU:C:2020:235, [44].

36 *HRVATSKE ŠUME*, Judgment (n 9), [46].

37 Most obviously, those concerned with the consequences of nullity of a contract (Rome I Regulation, Art 12(1)(e)). Additionally, the reasoning in *HRVATSKE ŠUME* supports the view that obligations to make restitution arising from non-performance and over-performance of a contract should also be classified as contractual with reference to Art 12(1)(b) or (c) of the Rome I Regulation. See also Burrows (n 30), 193-194.

Thirdly, there is a tension between the Court's analysis of Art 7 of the recast Brussels I Regulation and its analysis of Art 24(5), concluding that an action based on unjust enrichment to reverse the consequences of an enforcement measure held invalid in separate, prior proceedings does not fall within the exclusive jurisdiction of the Court which granted the enforcement measure. In reaching that conclusion the Court explicitly rejected reasoning of the kind which, in a contractual context, it found to be compelling, based on the existence of a close link between the transfer giving rise to the unjust enrichment claim and the relevant enforcement measure.[38] In so doing, it seemed to give undue significance to the specific procedural structures adopted within the Croatian legal system.[39] These points may require closer consideration in the event that they fall to be considered by a court or tribunal in the UK.

38 *HRVATSKE ŠUME*, Judgment (n 9), [33]-[34].

39 Ibid.