Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 10 September 2020 [1]

Case C-59/19

Wikingerhof GmbH & Co. KG
v
Booking.com BV

(Request for a preliminary ruling
from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in civil and commercial matters – International jurisdiction – Regulation (EU) No 1215/2012 – Article 7(1) and Article 7(2) – Special jurisdiction in 'matters relating to a contract' and in 'matters relating to tort, delict or quasi-delict' – Concepts – Classification of civil actions for damages between the parties to a contract – Civil action for damages based on infringement of the rules of competition law)

I. Introduction

1. Wikingerhof GmbH & Co. KG entered into a contract with Booking.com BV in order to have the hotel which it operates listed on the Booking.com online accommodation reservation platform. The former company nonetheless maintains that the latter company imposes unfair conditions on hoteliers registered on its platform, which, it claims, constitutes an abuse of a dominant position of such a kind as to cause harm to them.

2. In that context, Wikingerhof brought an action for an injunction against Booking.com before a German court, based on the rules of German competition law. The defendant in the main proceedings maintains, however, that that court does not have jurisdiction to hear the action. The Bundesgerichtshof (Federal Court of Justice, Germany), on an appeal on a point of law concerning that question, has requested the Court to interpret Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2] ('the Brussels I bis Regulation').

3. In essence, the referring court seeks to ascertain whether an action such as that brought by Wikingerhof against Booking.com, which is based on legal rules regarded as relating to delict in national law is an action in 'matters relating to tort, delict or quasi-delict', [3] within the meaning of

1 Original language: French.

2 Regulation of the European Parliament and of the Council of 12 December 2012 (OJ 2012 L 351, p. 1).

3 I shall use the expression 'matters relating to tort' in the remainder of this Opinion.

Article 7(2) of that regulation – in which case the court seised might derive its jurisdiction from that provision – or in 'matters relating to a contract', within the meaning of Article 7(1) of that regulation, given that what Wikingerhof alleges to be the anticompetitive acts committed by Booking.com occur in their contractual relationship – in which case Wikingerhof should in all likelihood bring its action, in application of the latter provision, before a Netherlands court. The Bundesgerichtshof (Federal Court of Justice) therefore asks the Court to clarify the content of the categories consisting in those 'matters', and the way in which those categories interact.

4. The questions referred to in the preceding point are by no means unexpected. They have already given rise to a consistent body of case-law of the Court,[4] beginning, some 30 years ago, with the judgments in *Kalfelis*[5] and *Handte*.[6] In spite of that, a number of uncertainties remain, relating to the classification of certain actions situated at the edge of the categories in question, such as civil actions for damages between the parties to a contract. Those uncertainties result, in particular, from the judgment in *Brogsitter*,[7] in which the Court attempted to formulate an abstract method for connecting those actions, the language of which is regularly discussed in the literature and before the national courts.[8]

5. The present request for a preliminary ruling thus provides the Court with the opportunity to summarise the important points of that case-law in the Grand Chamber and, in doing so, to clarify the grey areas that remain. Such an exercise is justified a fortiori because, since the entry into force of Regulation (EC) No 593/2008 on the law applicable to contractual obligations[9] ('the Rome I Regulation') and of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations[10] ('the Rome II Regulation'), the solutions applied by the Court in matters relating to jurisdiction influence the field of conflict of laws. In fact, those regulations constitute, in that field, the counterparts of Article 7(1) and Article 7(2) of Brussels I bis Regulation and that body of legislation must, so far as possible, be interpreted consistently.[11] In addition, the clarification which the Court will put on those general questions will clarify the rules of private international law applicable to civil actions for damages for infringements of competition law.[12]

6. In this Opinion, I shall explain that, generally, whether a civil claim for damages is connected with 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, or with 'matters relating to tort', within the meaning of Article 7(2) of that

4 It will be recalled that the Brussels I bis Regulation replaced Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) ('the Brussels I Regulation'), which had itself replaced the Convention on Jurisdiction and the Enforcement of Decisions in Civil and Commercial Matters, signed at Brussels 27 September 1968 (OJ 1978 L 304, p. 36) ('the Brussels Convention'). According to the Court's settled case-law, the Court's interpretation of the provisions of the Brussels Convention and the Brussels I Regulation can be transposed to the equivalent provisions of the Brussels I bis Regulation. In particular, the Court's interpretation of Article 5(1) of the Brussels Convention and of the Brussels I Regulation also applies to Article 7(1) of the Brussels I bis Regulation (see, in particular, judgment of 15 June 2017, *Kareda* (C-249/16, EU:C:2017:472, paragraph 27)). Likewise, the case-law relating to Article 5(3) of each of the first two instruments applies by analogy to Article 7(2) of the third instrument (see, in particular, judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 24 and the case-law cited)). For convenience, therefore, I shall refer in this Opinion only to the Brussels I bis Regulation, while citing without distinction judgments and Opinions relating to the instruments that preceded it.

5 Judgment of 27 September 1988 (189/87, EU:C:1988:459) ('the judgment in *Kalfelis*').

6 Judgment of 17 June 1992 (C-26/91, EU:C:1992:268) ('the judgment in *Handte*').

7 Judgment of 13 March 2014 (C-548/12, EU:C:2014:148) ('the judgment in *Brogsitter*').

8 See, recently, the questions referred, in that respect, by the Supreme Court of the United Kingdom in the case that gave rise to the judgment of 11 April 2019, *Bosworth and Hurley* (C-603/17, EU:C:2019:310), on which the Court was ultimately not required to rule.

9 Regulation of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 6).

10 Regulation of the European Parliament and of the Council of 11 July 2007 (OJ 2007 L 199, p. 40).

11 See recital 7 of the Rome I and Rome II Regulations.

12 I note that Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) does not regulate questions relating to jurisdiction and applicable law.

regulation, depends on its legal basis, namely the obligation – a 'contractual' obligation or a 'tortious' obligation – on which it is based and on which the claimant relies as against the defendant. The same logic applies with regard to civil actions for damages between the parties to a contract. I shall explain why, in application of those principles, an action seeking an injunction, such as that brought by Wikingerhof against Booking.com, based on infringement of the rules of competition law, comes under 'matters relating to tort', within the meaning of the latter provision.

II. Legal framework

7. Recital 16 of the Brussels I bis Regulation states:

'In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. …'

8. Section 2 of Chapter II of that regulation, entitled 'Special jurisdiction', contains, inter alia, Article 7 of that regulation, which provides, in paragraphs 1 and 2:

'A person domiciled in a Member State may be sued in another Member State:

(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 point (b) does not apply then point (a) applies;

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.'

III. The dispute in the main proceedings, the question for a preliminary ruling and the procedure before the Court

9. Wikingerhof, a company governed by German law established in Kropp (Germany), operates a hotel in the Land of Schleswig-Holstein (Germany). Booking.com, whose headquarters are in Amsterdam (Netherlands), operates the eponymous on-line accommodation reservation platform.

10. In March 2009, Wikingerhof signed a standard contract supplied by Booking.com. That contract stipulates that the general terms and conditions applied by Booking.com are to form an integral part of the contract. It also stipulates that by signing it the hotelier confirms that it has received a copy of those terms and conditions and confirms that it has read and understood them and agrees to them.

11. Booking.com's general terms and conditions provide, in particular, that Booking.com provides hoteliers registered on its platform with an internet system, called 'Extranet', that allows them to update information about their establishments and to consult the data relating to the reservations made via that platform. Those general terms and conditions also include an agreement as to jurisdiction which confers, in principle, exclusive jurisdiction to the Amsterdam courts to adjudicate in disputes arising from the contract.

12. Booking.com amended its general terms and conditions on a number of occasions. By letter of 30 June 2015, Wikingerhof objected to one of those amendments. It subsequently brought an action before the Landgericht Kiel (Regional Court, Kiel, Germany), seeking an injunction against Booking.com, on the basis of an infringement of the German rules of competition law.[13] In that context, Wikingerhof claimed that small hotel operators like it are required to enter into a contract with Booking.com because of the dominant position which the latter holds on the market for intermediary services and for hotel reservation portals. Wikingerhof maintains that certain practices followed by Booking.com when it forwards hotel reservations are unfair and constitute an abuse of that dominant position, contrary to competition law. Wikingerhof thus requested that court to prohibit Booking.com, on pain of penalties, from:

– displaying on its platform a given price as being specified by Wikingerhof for its hotel, with the description 'preferential price' or 'reduced price', without Wikingerhof's prior consent;

– depriving Wikingerhof of access, in whole or in part, to the contact data supplied by customers of its hotel via that platform and requiring that Wikingerhof contact those customers solely via the 'contact' function made available by Booking.com; and

– making the placing of the hotel operated by Wikingerhof in the results of searches carried out on that platform dependent on the grant of commission in excess of 15%.

13. Booking.com contended that the Landgericht Kiel (Regional Court, Kiel) lacked international and territorial jurisdiction. By judgment of 27 January 2017, that court held that Wikingerhof's action was inadmissible on that ground. It considered, more specifically, that the agreement conferring jurisdiction in Booking.com's general terms and conditions, which conferred exclusive jurisdiction on the Amsterdam courts, was validly concluded between the parties, in accordance with Article 25 of the Brussels I bis Regulation, and applicable to such an action.

14. On appeal, the Oberlandesgericht Schleswig (Higher Regional Court, Schleswig, Germany), by judgment of 12 October 2018, upheld the judgment at first instance, although on different grounds. In essence, it considered that the Landgericht Kiel (Regional Court, Kiel) could not derive its jurisdiction from the rule on 'matters relating to tort' laid down in Article 7(2) of the Brussels I bis Regulation, since Wikingerhof's action came under 'matters relating to a contract', within the meaning of Article 7(1) of that regulation. Nor could the jurisdiction of the court

[13] More specifically, Wikingerhof based its action on Paragraph 33 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions of competition) ('the GWB'), read in conjunction with Article 102 TFEU, and also on Paragraph 18 and Paragraph 19(1) and (2)(2) of the GWB and, in the alternative, on Paragraph 20(1) of the GWB.

seised be established on the basis of Article 7(1), since the 'place of performance of the obligation in question', within the meaning of that provision, is not within its territorial jurisdiction.[14] Consequently, the appellate court did not consider it necessary to resolve the question whether the agreement conferring jurisdiction in Booking.com's general terms and conditions was validly concluded between the parties to the main proceedings.

15. Wikingerhof lodged an appeal on a point of law against that judgment before the Bundesgerichtshof (Federal Court of Justice), which granted leave to appeal. In that context, Wikingerhof maintains that the appellate court erred in law in precluding the application, with regard to its action, of the rule of jurisdiction in 'matters relating to tort' laid down in Article 7(2) of the Brussels I bis Regulation.

16. The Bundesgerichtshof (Federal Court of Justice) observes that the appeal on a point of law before it is not directed against the appellate court's finding that the Landgericht Kiel (Regional Court, Kiel) cannot have jurisdiction on the basis of Article 7(1) of the Brussels I bis Regulation to adjudicate in the action brought by Wikingerhof. Nor is the question of the validity of the agreement conferring jurisdiction in Booking.com's general terms and conditions the object of that appeal.[15] The successful outcome of the appeal depends solely on whether such an action may come within Article 7(2) of that regulation.

17. In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 7(2) of [the Brussels I bis Regulation] to be interpreted as meaning that jurisdiction for matters relating to tort or delict exists in respect of an action seeking an injunction against specific practices if it is possible that the conduct complained of is covered by contractual provisions, but the applicant asserts that those provisions are based on an abuse of a dominant position on the part of the defendant?'

18. The request for a preliminary ruling, dated 11 December 2018, was received at the Court on 29 January 2019. Booking.com, the Czech Government and the European Commission lodged written observations before the Court. Wikingerhof, Booking.com and the Commission were represented at the hearing on 27 January 2020.

IV. Analysis

19. The background to the present case is civil actions for damages for infringement of competition law, brought between private parties, characteristic of what is commonly known as 'private enforcement'. Wikingerhof's action against Booking.com is based, more specifically, on infringement of the rules of German law, which correspond to Article 102 TFEU and prohibit abuse of a dominant position. Wikingerhof alleges, in essence, that Booking.com is abusively exploiting the dominant position which it allegedly holds on the market for intermediate services and for hotel reservation portals, by imposing unfair trading conditions[16] on the small hoteliers

14 That place corresponds to the headquarters of Booking.com, in Amsterdam, which is the centre of the commercial decisions of that company.

15 In any event, according to the referring court, that question should be answered in the negative, since that clause does not meet the conditions laid down in Article 25(1) and (2) of the Brussels I bis Regulation.

16 See, in EU law, point (a) of the second paragraph of Article 102 TFEU.

registered on its platform. In that context, the Court is not being asked to clarify the scope of Article 102 TFEU. On the other hand, it is being questioned about the rules of jurisdiction applicable to such an action.

20. The Court has already held that civil actions for damages based on infringement of the rules of competition law come under 'civil and commercial matters' within the meaning of Article 1(1) of the Brussels I bis Regulation and that they therefore fall within the scope *ratione materiae* of that regulation. [17]

21. Article 4(1) of the Brussels I bis Regulation provides, as a general rule, that the courts of the Member State in which the defendant is domiciled are to have jurisdiction. In this instance, it is common ground that the domicile of Booking.com, for the purposes of that regulation, [18] is in the Netherlands and that Wikingerhof was therefore not entitled to bring the matter before a German court on the basis of that provision.

22. Nonetheless, the Brussels I bis Regulation also lays down rules which, in certain situations, allow the claimant to sue the defendant before the courts of another Member State. [19] That regulation contains, in particular, categories of special jurisdiction, relating to different 'matters', which afford the claimant the option of bringing the action before one or more additional courts.

23. Such special jurisdiction exists, in particular, in 'matters relating to a contract' and in 'matters relating to tort'. In the case of actions coming within the first category, Article 7(1) of the Brussels I bis Regulation allows the claimant to bring the matter before the courts for the 'place of performance of the obligation in question'. In the case of those coming within the second category, Article 7(2) of that regulation provides that they may be brought before the courts 'for the place where the harmful event occurred or may occur'.

24. The choice of jurisdiction given to the claimant thus varies according to the classification of the action in question. In this instance, the parties in the main proceedings disagree as to which of the categories referred to in the point above Wikingerhof's action must be connected to. Whether the objection to jurisdiction raised by Booking.com can be upheld depends on that classification: while the 'place where the harmful event occurred or may occur', within the meaning of Article 7(2) of the Brussels I bis Regulation may be within the territorial jurisdiction

17 See, in particular, judgments of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraphs 23 to 38), and of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635, paragraph 24). While those judgments are concerned with infringement of *European Union* competition law, the solution reached is also applicable to actions based on infringement of *national* competition rules. The source of the rules at issue is irrelevant in that respect.

18 See Article 63 of the Brussels I bis Regulation.

19 See Article 5(1) of the Brussels I bis Regulation.

of the German court seised by the applicant in the main proceedings,[20] it was established, on appeal, that the 'place of performance of the obligation in question', within the meaning of Article 7(1) of that regulation, is not within the territorial jurisdiction of that court.[21]

25. As the referring court observes, it is clear from the Court's case-law that, in principle, civil actions for damages based on infringement of the rules of competition law come within 'matters relating to tort', within the meaning of Article 7(2) of the Brussels I bis Regulation.[22]

26. Nonetheless, the action at issue in the present case has the particular feature that it is between the parties to a contract and that the alleged anticompetitive conduct of which Wikingerhof complains against Booking.com occurs within their contractual relationship, since it consists in the fact that Booking.com imposes, in the context of that relationship, unfair trading terms on Wikingerhof. It is possible, moreover, that some, or indeed all,[23] of those contested practices are covered by the provisions of the general terms and conditions applicable to the contract in question. It therefore falls to be ascertained whether, in such circumstances, the classification 'relating to a contract' prevails over the classification 'relating to tort' for the purposes of the Brussels I bis Regulation.

27. The Bundesgerichtshof (Federal Court of Justice) considers that that question should be answered in the negative. Like Wikingerhof and the Commission, I share that view. The opposite stance taken by Booking.com and by the Czech Government reflects, in my view, the uncertainties surrounding, in the Court's case-law, the dividing line between 'matters relating to a contract' and 'matters relating to tort'. As I indicated in the introduction to this Opinion, the present case provides the Court with a good opportunity to summarise the important points of that case-law and to eliminate those uncertainties. I shall therefore set out the broad outlines of that case-law (Section A) before specifically examining the classification of civil actions for damages between the parties to a contract (Section B). In that context, I shall develop certain reflections employed

20 I would emphasise that the Court is not being asked about the interpretation of criterion of jurisdiction laid down in Article 7(2) of the Brussels I bis Regulation. I shall merely observe that, according to the Court's settled case-law, the expression 'place where the harmful event occurred or may occur' refers both to the place where the harm occurred and to the place of the causal event that gives rise to that harm. Thus, when those two places do not coincide, the defendant may be sued, at the option of the claimant, before the courts of either of those places (see, in particular, judgments of 30 November 1976, *Bier* (21/76, EU:C:1976:166, paragraphs 24 and 25), and of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635, paragraph 25 and the case-law cited)). As regards actions for damages based on infringement of competition law, the place of the causal event corresponds, in the case of an anticompetitive agreement, decision or concerted practice, to the place where that agreement, decision or concerted practice was definitively concluded (see judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraphs 43 to 50)) and, in the case of abuse of a dominant position, to the place where the abuse is implemented (see judgment of 5 July 2018, *flyLAL-Lithuanian Airlines* (C-27/17, EU:C:2018:533, paragraph 52)). As regards the place where the harm occurred, the Court's case-law tends to favour the market affected by the anticompetitive conduct, within which the victim claims to have sustained damage (see judgments of 5 July 2018, *flyLAL-Lithuanian Airlines* (C-27/17, EU:C:2018:533, paragraphs 37 to 43), and of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635, paragraphs 27 to 37)).

21 Nor is the Court being asked about the interpretation of that criterion. I shall merely observe that, according to the Court's settled case-law, in order to identify the 'place of performance of the obligation in question', within the meaning of Article 7(1)(a) of the Brussels I bis Regulation, it is necessary to determine the obligation corresponding to contract law on which the claimant's action is based and to assess, in accordance with the law applicable to that obligation, the place where it was or must be performed (see, in particular, judgments of 6 October 1976, *Industrie Tessili Italiana Como* (12/76, EU:C:1976:133, paragraph 13), and *De Bloos* (14/76, EU:C:1976:134, paragraph 13)). An autonomous criterion of that 'place of performance' is nonetheless laid down in Article 7(1)(b) of that regulation for contracts for the sale of goods and contracts for the provision of services. In that context, the Court applies an autonomous and factual definition of the place of performance of the contract, without distinction between the obligations, and places more weight on its terms (see, in particular, judgments of 3 May 2007, *Color Drack* (C-386/05, EU:C:2007:262); of 23 April 2009, *Falco Privatstiftung and Rabitsch* (C-533/07, EU:C:2009:257); and of 25 February 2010, *Car Trim* (C-381/08, EU:C:2010:90)).

22 See, in particular, judgments of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraph 28); of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 43); and of 5 July 2018, *flyLAL-Lithuanian Airlines* (C-27/17, EU:C:2018:533, paragraph 51).

23 Wikingerhof and Booking.com disagree on this point. I shall return to this aspect, in particular, in Section C of this Opinion.

in my Opinion in *Bosworth and Hurley*.[24] Last, I shall apply the analytical framework resulting from that case-law to an action for damages based on infringement of the rules of competition law, such as that brought in this instance by Wikingerhof against Booking.com (Section C).

A. The broad outlines of the Court's case-law relating to 'matters relating to a contract' and to 'matters relating to tort'

28. It should be borne in mind, as a preliminary point, that the Brussels I bis Regulation does not provide a definition of 'matters relating to a contract', referred to in Article 7(1) of that regulation, or of 'matters relating to tort', provided for in Article 7(2): and yet the content of those categories is by no means clear. While they reflect well-known civil law concepts – 'contract' and 'tort' – the outlines of those concepts vary from one Member State to another. In addition, there are significant differences between the different language versions of that regulation as regards Article 7(1)[25] and Article 7(2).[26]

29. In that context, the Court has repeatedly held that 'matters relating to a contract' and 'matters relating to tort', within the meaning of the Brussels I bis Regulation, constitute autonomous concepts of EU law, to be interpreted principally by reference to the scheme and the purpose of that regulation, in order to ensure that the rules of jurisdiction which it lays down are given a uniform application in all Member States.[27] Whether a claim is connected with one or the other category therefore does not depend, in particular, on the solutions provided for in the domestic law of the court seised ('the *lex fori*').

30. As regards the *scheme* of the Brussels I bis Regulation, the Court has repeatedly held that it is based on the general rule, set out in Article 4(1) of that regulation, that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, and that the special jurisdictions provided for in Article 7 constitute derogations from that rule which, as such, must be interpreted strictly.[28]

31. As regards the *purpose* of the Brussels I bis Regulation, it should be borne in mind that, generally, the rules of jurisdiction provided for in that regulation are aimed at ensuring legal certainty and, in that context, to reinforce the legal protection available to persons established in the territory of the Member States. Those rules must, for that reason, have a high degree of

24 C-603/17, EU:C:2019:65 ('my Opinion in *Bosworth and Hurley*').

25 The expression '*matière contractuelle*', used in the French-language version of the Brussels I bis Regulation, to which the Spanish-, Danish-, Italian-, Portuguese-, Romanian-, and Finnish-language versions, in particular, of that regulation correspond, is relatively broad. The expression in the English version, on the other hand ('in matters relating to a contract'), which influenced the Bulgarian-, Croatian-, Dutch- and Swedish-language versions, tends to require the existence of a contract, while being satisfied with a simple link between the contract and the action. The German version is appreciably more precise and thus more demanding than the other versions ('*wenn ein Vertrag oder Ansprüche aus einem Vertrag den Gegenstand des Verfahrens bilden*').

26 In particular, the Spanish-, German-, Croatian-, Italian-, and Romanian-language versions correspond to the French-language version. The English language-version ('in matters relating to tort, delict or quasi-delict') is close to the French-language version. The Dutch-language version ('*ten aanzien van verbintenissen uit onrechtmatige daad*') refers expressly to the concept of tortious obligations. The Portuguese-language version ('*Em matéria extracontratual*') might seem to be broader, since it refers to all non-contractual obligations. Last, the Danish- ('*i sager om erstatning uden for kontrakt*'), Finnish ('*sopimukseen perustumatonta vahingonkorvausta koskevassa asiassa sen paikkakunnan*') and Swedish- ('*om talan avser skadestånd utanför avtalsförhållanden*') language versions refer to the idea of an action for damages where there is no contract.

27 See, regarding the concept of 'matters relating to contracts', in particular, judgments of 22 March 1983, *Peters Bauunternehmung* (34/82, EU:C:1983:87, paragraphs 9 and 10), and of 4 October 2018, *Feniks* (C-337/17, EU:C:2018:805, paragraph 38 and the case-law cited). See, regarding the concept of 'matters relating to tort', in particular, judgments in *Kalfelis* (paragraphs 15 and 16), and of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 25 and the case-law cited).

28 See, in particular, judgments in *Kalfelis* (paragraph 19); of 27 October 1998, *Réunion européenne and Others* (C-51/97, EU:C:1998:509, paragraph 16); and of 4 October 2018, *Feniks* (C-337/17, EU:C:2018:805, paragraph 37).

foreseeability: the claimant must be able readily to determine the courts before which he or she may bring his or her action and the defendant reasonably to foresee the courts before which he or she may be sued. In addition, those rules seek to ensure the sound administration of justice. [29]

32. The special jurisdiction in 'matters relating to a contract' and that in 'matters relating to tort', provided for in Article 7(1) and Article 7(2), of the Brussels I bis Regulation, pursue, specifically, an objective of proximity, which gives concrete expression to the two requirements referred to in the preceding point. In that regard, the Court has repeatedly held that the option given to the claimant by those provisions was introduced in consideration of the existence, in the 'matters' to which they refer, of a particularly close connection between a claim and the court that may be required to adjudicate on it, in the interest of the efficacious conduct of the proceedings. [30] In 'matters relating to a contract', the court of the 'place of performance of the obligation in question' is deemed to be the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence. The same applies, in 'matters relating to tort', to the court of the 'place where the harmful event occurred or may occur'. [31] At the same time, the existence of that close link ensures legal certainty, by precluding the possibility that the defendant will be sued before a court which he or she could not reasonably foresee.

33. In the light of those general considerations, the Court has gradually established, in its case-law, autonomous definitions of 'matters relating to a contract' and of 'matters relating to tort'. I shall examine those definitions, in turn, in the following two subsections.

1. The definition of 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation

34. A first step to a definition of 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, was formulated by the Court in the judgment in *Handte*, where it held that that concept 'is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another'. [32]

35. The Court consolidated that definition in its judgment in *Engler*. [33] Proceeding from the assertion that the identification of an obligation is essential for the application of Article 7(1) since jurisdiction on the basis of that provision is established by reference to the place where the 'obligation which serves as the basis for the claim' has been or is to be performed, the Court held that the application of that provision 'presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based'. [34]

29 See, in particular, judgments of 19 February 2002, *Besix* (C-256/00, EU:C:2002:99, paragraph 26), and of 10 April 2003, *Pugliese* (C-437/00, EU:C:2003:219, paragraph 16).

30 See recital 16 of the Brussels I bis Regulation. See further, in particular, judgments of 6 October 1976, *Industrie Tessili Italiana Como* (12/76, EU:C:1976:133, paragraph 13); of 20 February 1997, *MSG* (C-106/95, EU:C:1997:70, paragraph 29); and of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 26).

31 See, with regard to Article 7(1) of the Brussels I bis Regulation, judgments of 19 February 2002, *Besix* (C-256/00, EU:C:2002:99, paragraphs 30 and 31 and the case-law cited), and, with regard to Article 7(2) of that regulation, judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraphs 26 and 27 and the case-law cited).

32 Judgment in *Handte*, paragraph 15.

33 Judgment of 20 January 2005 (C-27/02, EU:C:2005:33).

34 Judgment of 20 January 2005, *Engler* (C-27/02, EU:C:2005:33, paragraphs 45 and 51).

36. Two cumulative conditions follow from that definition, which is now consistent in the Court's case-law:[35] an action comes under 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, provided (1) that it relates to a 'contractual obligation', understood as being a 'legal obligation freely consented to' by one person towards another'[36] and (2) that that action is, more specifically, based on that 'obligation'.

37. As regards the *first condition*, the Court has made clear that 'contractual obligations' include, first of all, obligations that have their source[37] in a contract,[38] that is to say, in essence, an agreement of wills between two persons.[39] Next, the Court has included in 'matters relating to a contract', by analogy, relations that resemble contracts in so far as they create between the persons concerned 'close links of the same kind' as those which are created between the parties to a contract. That applies, in particular, to the links between an association and its members and to those between the members of the association themselves,[40] to the relations between the shareholders of a company and to those between the shareholders and the company which they set up,[41] to the relation between the manager of a company and the company which he or she manages, as provided for in company law,[42] or to the obligations which the owners of property in a building assume, in accordance with the law, towards the association of property owners.[43] Last, since the application of Article 7(1) of the Brussels I bis Regulation 'does not require the conclusion of a contract' but only 'the identification of an obligation',[44] the Court has held that 'matters relating to a contract' also include the obligations that arise not by reason of such an agreement of wills, but from a voluntary unilateral commitment given by one person to another. That is the case, in particular, of the promise of a prize given by a business person to a consumer[45] and of the obligations of the giver of an aval who issued a promissory note, to the beneficiary of that note.[46]

38. In short, the Court applies a 'flexible' interpretation of the notion of 'contractual obligation', in the sense of Article 7(1) of the Brussels I bis Regulation.[47] That assertion might, on the face of it, be surprising, having regard to the Court's settled case-law that that provision must be interpreted

35 See, in particular, judgments of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 39), and of 5 December 2019, *Ordre des avocats du barreau de Dinant* (C-421/18, EU:C:2019:1053, paragraphs 25 and 26).

36 The Court transposed that definition to the Rome I Regulation, in accordance with the objective of consistency in the interpretation of the Brussels I bis, Rome I and Rome II Regulations (see point 5 of this Opinion). Thus, according to the Court's case-law, the concept of a 'contractual obligation', within the meaning of the Rome I Regulation, designates a 'legal obligation freely consented to by one person towards another'. See judgment of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraph 44).

37 In my view, the Court was thus referring to the obligations which arise *because of a contract*. Contractual obligations are both those stipulated by the parties in the contract and those imposed by law, on a suppletive or mandatory basis, for that type of contract. In any event, contractual obligations have their *primary source* in the law, since they are binding as between the parties only in so far as the law so provides (see my Opinion in *Bosworth and Hurley* (footnote 50)).

38 See, in particular, judgments of 6 October 1976, *De Bloos* (14/76, EU:C:1976:134, paragraphs 14 and 16); of 15 June 2017, *Kareda* (C-249/16, EU:C:2017:472, paragraph 30); and of 7 March 2018, *flightright and Others* (C-274/16, C-447/16 and C-448/16, EU:C:2018:160, paragraph 59). All obligations arising from a contract must be considered to be 'freely consented', without there being any need for the debtor to have consented to each individual obligation. By agreeing to contract, the parties accept all of the obligations placed on them because of their commitment.

39 See, in particular, judgment of 11 July 2002, *Gabriel* (C-96/00, EU:C:2002:436, paragraph 49). The Court has recently assimilated a contract to a 'tacit contractual relationship' (see judgment of 14 July 2016, *Granarolo* (C-196/15, EU:C:2016:559, paragraphs 24 to 27)).

40 See judgment of 22 March 1983, *Peters Bauunternehmung* (34/82, EU:C:1983:87, paragraph 13).

41 See judgment of 10 March 1992, *Powell Duffryn* (C-214/89, EU:C:1992:115, paragraph 16).

42 See judgment of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraphs 53 and 54).

43 See judgment of 8 May 2019, *Kerr* (C-25/18, EU:C:2019:376, paragraphs 27 to 29).

44 See, in particular, judgments of 17 September 2002, *Tacconi* (C-334/00, EU:C:2002:499, paragraph 22), and of 8 May 2019, *Kerr* (C-25/18, EU:C:2019:376, paragraph 23).

45 See judgment of 20 January 2005, *Engler* (C-27/02, EU:C:2005:33, paragraph 53).

46 See judgment of 14 March 2013, *Česká spořitelna* (C-419/11, EU:C:2013:165, paragraphs 48 and 49).

47 See, to that effect, judgment of 20 January 2005, Engler (C-27/02, EU:C:2005:33, paragraph 48).

strictly. In reality, in my view, that requirement only prohibits the Court from departing from the clear terms of that provision and from giving it a more extensive meaning than its objective requires.[48] In that context, it is therefore permissible, in my eyes, to interpret the category consisting in 'matters relating to a contract' in such a way as to include institutions closely resembling contracts, in the interest of the smooth administration of international litigation.[49]

39. As regards the *second condition*, it is apparent from the Court's case-law that a claim does not come under 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, for the sole reason that it concerns, closely or remotely, a 'contractual obligation'. It is also necessary that that claim has such an obligation as its basis. The application of that provision therefore depends, as the Court has recently held, on the 'cause of the action'.[50] In other words, the claimant must rely on such an obligation to substantiate his or her claims.[51]

40. By that condition, the Court, correctly in my view, reserves the application of the rule of jurisdiction in 'matters relating to a contract' set out in Article 7(1) of the Brussels I bis Regulation to claims which are of a contractual nature, that is to say, those which, in substance, principally raise questions of contract law[52] – or, to put it differently, questions which come within the scope of the law applicable to a contract (or '*lex contractus*'), within the meaning of the Rome I Regulation[53] The Court thus ensures, in accordance with the objective of proximity underlying that provision, that the court with jurisdiction in respect of the contract essentially rules on such questions.[54] More fundamentally, the Court ensures the internal consistency of 'matters relating to a contract', as envisaged, in the case of the rules of jurisdiction, in Article 7(1) of the Brussels I bis Regulation and, in the case of conflicts of laws, in the Rome I Regulation.[55]

48 See, by analogy, judgments of 14 December 1977, *Sanders* (73/77, EU:C:1977:208, paragraphs 17 and 18), and of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149, paragraph 25). See also Opinion of Advocate General Jacobs in *Gabriel* (C-96/00, EU:C:2001:690, paragraphs 44 to 46).

49 See, in a similar vein, Minois, M., *Recherche sur la qualification en droit international privé des obligations*, LGDJ, Paris, 2020, pp. 174 to 180.

50 Judgments of 7 March 2018, *flightright and Others* (C-274/16, C-447/16 and C-448/16, EU:C:2018:160, paragraph 61); of 4 October 2018, *Feniks* (C-337/17, EU:C:2018:805, paragraph 48); and of 26 March 2020, *Primera Air Scandinavia* (C-215/18, EU:C:2020:235, paragraph 44).

51 See, to that effect, judgment of 8 March 1988, *Arcado* (9/87, EU:C:1988:127, paragraphs 12 and 13). This idea is expressed in various ways in the judgment of 6 October 1976, *De Bloos* (14/76, EU:C:1976:134): 'contractual obligation forming the basis of the … proceedings' (paragraph 11); 'obligation … which corresponds to the contractual right on which the plaintiff's action is based' (paragraph 13), or 'obligation … which corresponds to the contractual right relied on by the grantee in support of the application' (paragraph 15 and operative part). See also Opinion of Advocate General Bobek in *flightright and Others* (C-274/16, C-447/16 and C-448/16, EU:C:2017:787, point 54).

52 See, to that effect, Opinion of Advocate General Mayras in *Industrie Tessili Italiana Como* (12/76, EU:C:1976:119, ECR, p. 1489) and Opinion of Advocate General Jacobs in *Engler* (C-27/02, EU:C:2004:414, point 44). Since Article 7(1) of the Brussels I bis Regulation does not apply solely to contracts, I am referring here to all the legal rules that impose obligations because of a voluntary commitment given by one person to another.

53 Article 12 of the Rome I Regulation contains, moreover, a non-exhaustive list of the questions coming within the *lex contractus*, which to my mind provides indications that are relevant to the determination of whether a claim comes within 'matters relating to a contract' for the purposes of Article 7(1) of the Brussels I bis Regulation. See, by analogy, judgment of 8 March 1988, *Arcado* (9/87, EU:C:1988:127, paragraph 15).

54 That does not necessarily mean that the court with jurisdiction in respect of the contract will necessarily apply its own law. The forum with jurisdiction on the basis of Article 7(1) of the Brussels I bis Regulation does not necessarily coincide with the designated law under the provisions of the Rome I Regulation. Nor does it mean that the court with jurisdiction in respect of the contract will, when hearing the case, necessarily apply contract law in order to resolve the questions raised before it. A question regarded as 'contractual' for the purposes of EU private international law might be regarded in the applicable substantive law as being of a tortious nature etc.

55 See, to the same effect, Minois, M., op. cit., pp. 174 and 180 to 186. Although the scope *ratione materiae* of Article 7(1) of the Brussels I bis Regulation thus corresponds to that of the Rome I Regulation, the coincidence is not complete. For example, while Article 7(1) applies to certain actions governed by company law (see the case-law cited in footnotes 41 and 42 of this Opinion), Article 1(2)(f) of the Rome I Regulation excludes questions governed by the company law from its scope.

41. Specifically, actions to enforce a 'contractual obligation'[56] or civil actions for damages or actions seeking to set aside a contract following failure to perform such an obligation,[57] inter alia, satisfy those two conditions and thus constitute 'matters relating to a contract' within the meaning of Article 7(1). In both situations, the obligation in question corresponds to a 'contractual right' that justifies the claim. Determining the substance of that action involves, for the court dealing with the matter, essentially addressing questions of a contractual nature – such as those relating to the content of the obligation in question, the way in which it should have been performed, the consequences of its non-performance, etc.[58] In particular, actions for a declaration that a contract is null and void, provided that such an action is based on a breach of the rules governing the formation and entails, for the court, a ruling on the validity of the 'contractual obligations' that arise from the contract, also come under 'matters relating to a contract'.[59] I refer the reader wishing to have more details on 'matters relating to a contract' to the ample literature on the topic.[60]

2. The definition of 'matters relating to tort', within the meaning of Article 7(2) of the Brussels I bis Regulation

42. The Court has consistently held, beginning with its judgment in *Kalfelis*, that the concept of 'matters relating to tort', within the meaning of Article 7(2) of the Brussels I bis Regulation, covers 'all actions which seek to establish the liability of a defendant and which are not related to a "contract"' within the meaning of Article 7(1) of that regulation.[61]

43. Two cumulative conditions result from that definition: one, a *positive* condition, that the claim must seek to establish the defendant's civil liability; the other, a *negative* condition, that that claim must not be concerned with 'matters relating to a contract'.

44. The *first condition* relates to the object of the claim. The claim must, in principle, seek to compel the defendant to put an end to conduct capable of causing harm – the situation of a claim seeking an injunction such as that brought by Wikingerhof in this instance – or to make good the harm if it has occurred – the situation of a claim for damages.[62]

56 See, inter alia, the claims at issue in the cases that gave rise to the judgments of 15 January 1987, *Shenavai* (266/85, EU:C:1987:11, paragraphs 2 and 18); of 8 March 1988, *Arcado* (9/87, EU:C:1988:127, paragraph 12); and of 29 June 1994, *Custom Made Commercial* (C-288/92, EU:C:1994:268, paragraphs 2 and 11).

57 See, inter alia, the claims at issue in the case that gave rise to the judgments of 6 October 1976, *De Bloos* (14/76, EU:C:1976:134, paragraphs 3 and 14), and of 8 March 1988, *Arcado* (9/87, EU:C:1988:127, paragraph 13).

58 See, in that regard, Article 12(1)(a) to (c) of the Rome I Regulation.

59 See judgment of 20 April 2016, *Profit Investment SIM* (C-366/13, EU:C:2016:282, paragraphs 54 and 58). In that regard, it is apparent from Article 10(1) of the Rome I Regulation that the question of the existence and validity of a contract are covered by the *lex contractus*.

60 See, in particular, Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe*, LGDJ, Paris, 4th edition, 2010, pp. 165 to 177; Briggs, A., *Civil Jurisdiction and Judgments*, Informa Law, Oxon, 2015, 6th edition, pp. 209 to 220; Niboyet, M.-L., and Geouffre de la Pradelle, G., *Droit international privé*, LGDJ, Issy-les-Moulineaux, 5th edition, 2015, pp. 346 and 347; Calster (van), G., *European Private International Law*, Hart Publishing, Oxford, 2016, pp. 136 to 139; Magnus, U., and Mankowski, P., *Brussels Ibis Regulation – Commentary*, Otto Schmidt, Cologne, 2016, pp. 162 to 189; Hartley, T., *Civil Jurisdiction and Judgments in Europe – The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention*, Oxford University Press, Oxford, 2017, pp. 107 to 114, and Minois, M., op. cit.

61 See, in particular, judgments in *Kalfelis* (paragraph 18); of 1 October 2002, *Henkel* (C-167/00, EU:C:2002:555, paragraph 36); and of 12 September 2018, *Löber* (C-304/17, EU:C:2018:701, paragraph 19).

62 See, in particular, judgments of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149, paragraphs 19 and 20); of 1 October 2002, *Henkel* (C-167/00, EU:C:2002:555, paragraph 41); and of 12 September 2018, *Löber* (C-304/17, EU:C:2018:701, paragraph 21).

45. Nonetheless, here, too, the Court applies a 'flexible' interpretation of that condition. An action for a declaration, through which the claimant seeks a declaration that there has been a breach of a legal duty by the defendant, or an action for a negative declaration, through which the claimant seeks a declaration that he or she has not committed acts or omissions rendering him or her liable in tort vis-à-vis the defendant, may also come under Article 7(2) of the Brussels I bis Regulation. [63]

46. The *second condition*, in my view, mirrors the condition applied by the Court in the context of its case-law on 'matters relating to a contract'. Here, too, it is necessary to determine the legal basis of the claim. In order to come under 'matters relating to tort', that claim must be based not on a 'freely consented legal obligation', but on a 'tortious obligation', that is to say, an involuntary obligation, which exists without the defendant having intended to assume any commitment whatsoever vis-à-vis the claimant, and which arises from a harmful event consisting in breach of a duty imposed by law on everyone. [64] By that condition, the Court ensures, in accordance with the objective of proximity underlying Article 7(2) of the Brussels I bis Regulation, that the court with jurisdiction in respect of the tort rules only on claims in the field of tort, that is to say those which, in terms of their substance, principally raise questions concerning the rules of law establishing such duties. It also ensures the internal consistency of 'matters relating to tort', as envisaged, in the case of the rules of jurisdiction, in Article 7(2) of the Brussels I bis Regulation and, in the case of conflicts of laws, in the Rome II Regulation. [65]

47. It cannot therefore be considered that, as the literature sometimes suggests, that Article 7(2) of the Brussels I bis Regulation constitutes a purely residual provision that 'mops up' all claims not coming under 'matters relating to a contract', within the meaning of Article 7(1) of that regulation. On the contrary, claims exist that do not come under either of those provisions, on the ground that they are based on obligations that are neither 'contractual' nor 'tortious'. [66]

48. For the remainder, the Court has held that Article 7(2) of the Brussels I bis Regulation encompasses a wide diversity of types of liability [67] – for negligence, without negligence, etc. Apart from civil actions for damages based on infringements of competition law, already referred

63 See, respectively, judgment of 5 February 2004, *DFDS Torline* (C-18/02, EU:C:2004:74, paragraphs 19 to 28), and judgment of 25 October 2012, *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664, paragraphs 41 to 54).

64 See, to that effect, judgments of 17 September 2002, *Tacconi* (C-334/00, EU:C:2002:499, paragraphs 25 and 27); of 18 July 2013, *ÖFAB* (C-147/12, EU:C:2013:490, paragraphs 35 to 38); and of 21 April 2016, *Austro-Mechana* (C-572/14, EU:C:2016:286, paragraphs 37 and 50). See also Opinion of Advocate General Jacobs in *Engler* (C-27/02, EU:C:2004:414, point 59).

65 In fact, according to the Court's case-law, a 'non-contractual obligation', within the meaning of the Rome II Regulation, is an obligation which derives from tort/delict, unjust enrichment, '*negotiorum gestio*' or '*culpa in contrahendo*' (see judgment of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraphs 45 and 46)). It should nonetheless be emphasised that while 'obligations relating to tort' coming under Article 7(2) of the Brussels I bis Regulation form the core of the Rome II Regulation, the latter regulation has a broader scope, however, since it covers not only non-contractual obligations arising from tort/delict but also those arising from quasi-contracts such as undue enrichment or *negotiorum gestio* (see Article 2(1) of the Rome II Regulation).

66 See Opinion of Advocate General Gulmann in *Reichert and Kockler* (C-261/90, EU:C:1992:78, ECR, p. 2169); Opinion of Advocate General Jacobs in *Engler* (C-27/02, EU:C:2004:414, pointss 55 and 57); and Opinion of Advocate General Bobek in *Feniks* (C-337/17, EU:C:2018:487, point 98). As Wikingerhof has submitted, that is the case, in my view, of a claim for restitution based on undue enrichment where it does not arise from a declaration that a contract is null and void (see judgment of 20 April 2016, *Profit Investment SIM* (C-366/13, EU:C:2016:282, paragraph 55)), since such a claim is based on an obligation that does not arise from a harmful event (see, to that effect, Opinion of Advocate General Wahl in *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:225, points 54 to 75)).

67 Judgment of 30 November 1976, *Bier* (21/76, EU:C:1976:166, paragraph 18).

to above, that provision covers claims based on unfair competition,[68] breach of an intellectual property right[69] or for harm caused by defective products.[70] Here, again, I refer the reader wishing to have more details of 'matters relating to tort' to the ample literature on the topic.[71]

B. The classification of civil actions for damages between the parties to a contract, for the purposes of the Brussels I bis Regulation

49. It follows from the foregoing considerations that certain civil claims for damages come under 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, and others come under 'matters relating to tort', within the meaning of Article 7(2) of that regulation. It also follows that, in theory, whether a claim falls within one or other of those categories depends on its legal basis, which is to be understood as being the obligation on which the claim is based. If that obligation is imposed by reason of a contract or another form of voluntary commitment by one person to another, the claim is 'contractual'. If, on the other hand, the obligation at issue results from breach of a duty imposed by law on everyone independently of any voluntary commitment, the claim is 'tortious'.[72]

50. That being said, when two persons are bound by a contract and one of them brings a civil claim for damages against the other, it may be delicate, in practice, to distinguish 'matters relating to a contract' from 'matters relating to tort'.

51. In that regard, such a claim does not necessarily '[relate] to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation.[73] There can also be claims 'relating to tort' between contracting parties. That is readily conceivable in the case of claims which are wholly extraneous to the contract between the parties,[74] to which Article 7(2) of that regulation would clearly apply.

52. Things are less clear when, as is the case in the main proceedings, the claim has a certain link with the contract, in particular because it relates to a harmful event that arose in the performance of the contract. In that context, it may happen, in particular, that the harmful event relied on constitutes both failure to perform a 'contractual obligation' and breach of a duty imposed by law on everyone. There is then a coincidence of liabilities – or, in other terms, a coincidence of 'contractual' and 'tortious' liabilities – which may each potentially serve as the legal basis of the claim.[75]

68 See, in particular, judgment of 21 December 2016, *Concurrence* (C-618/15, EU:C:2016:976), and Article 6(1) of the Rome II Regulation.

69 See, in particular, in relation to copyright, judgments of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28), and of 3 April 2014, *Hi Hotel HCF* (C-387/12, EU:C:2014:215), and Article 8 of the Rome II Regulation.

70 See, in particular, judgment of 16 July 2009, *Zuid-Chemie* (C-189/08, EU:C:2009:475), and Article 5 of the Rome II Regulation.

71 See, in particular, Gaudemet-Tallon, H., op. cit., pp. 217 to 219; Briggs, A., op. cit., pp. 238 to 250; Calster (van), G., op. cit., pp. 144 to 147; Magnus, U., and Mankowski, P., op. cit., pp. 262 to 276; and Hartley, T., op. cit., pp. 125 to 126.

72 See Opinion of Advocate General Jacobs in *Handte* (C-26/91, EU:C:1992:176, point 16), and my Opinion in *Bosworth and Hurley* (point 67).

73 See, to that effect, judgment in *Brogsitter*, paragraph 23.

74 For example, if a banker and his or her customer live in the same building and the banker sues the customer because of abnormal neighbourhood disturbances.

75 See my Opinion in *Bosworth and Hurley* (point 68).

53. The number of situations in which the same harmful event is capable of giving rise to such a coincidence of liabilities varies with the national legal systems, according to the way in which they conceive contractual liability and tortious liability.[76] Nonetheless, the civil actions for damages referred to in point 48 of this Opinion – infringement of competition law, conduct constituting unfair competition, damage caused by defective products, infringement of an intellectual property right – are capable, when they are brought between the parties to a contract, of forming part of the context for such coincidence of liabilities.

54. For example, a refusal by a supplier to sell to his or her distributor might constitute not only an abuse of a dominant position but also a breach of the obligations arising from their framework contract, as Wikingerhof has very rightly stated. The same would apply in a situation in which the supplier favoured his or her own network to the detriment of the distributor, as that conduct might constitute, at the same time, a breach of contract, an abuse of a dominant position or conduct constituting unfair competition.[77] Furthermore, a defect in a product, sold by its manufacturer, that caused damage to the purchaser might give rise to both tortious liability – for breach of a legal duty linked with product safety – and contractual liability – for breach of the contractual obligation to supply a safe product, or of a contractual obligation to meet safety requirements. Last, where the holder of a contract licensing the use of a copyrighted work exceeds the limits of that licence, that harmful event may simultaneously constitute negligent breach of copyright – since the licensee breaches the exclusive rights of the other party to the contract – and breach of that contract.[78]

55. Faced with such coincidences of liability, some national legal systems, including English law and German law, allow the claimant to choose whether to base his or her claim on tortious liability or on contractual liability, according to what best meets his or her interests,[79] or even to 'accumulate' claims brought on those two bases.[80]

56. On the other hand, other legal systems, including French law and Belgian law, provide for a rule of allocation of liabilities, known as 'non-cumulation', which leaves no choice to the claimant: he or she cannot base his or her claim on tortious liability when the harmful event relied on also constitutes failure to perform a contractual obligation. In other words, in those systems 'the contractual prevails over the tortious'.[81]

76 Contractual liability and tortious liability do not have the same scope in all national systems and overlaps between those two types of liability do not occur with the same frequency. Such potential overlaps are particularly numerous in French law, for example. First, contractual liability is conceived broadly in France because, in particular, the case-law of the Cour de cassation (Court of Cassation, France) tends to include in the contract obligations to meet safety requirements and to provide information, which are the expression of general duties imposed by law, and also obligations inferred from the requirement to perform contracts in good faith. Second, tortious liability is also open in nature, since the rules on such liability are intended to catch all the harmful events that might arise in social life. See, on that topic, Ancel, P., 'Le concours de la responsabilité délictuelle et de la responsabilité contractuelle', *Responsabilité civile et assurances*, No 2, February 2012, Case 8, paragraphs 2 to 11.

77 See the case that gave rise to the judgment of 24 October 2018, *Apple Sales International and Others* (C-595/17, EU:C:2018:854).

78 See the cases that gave rise to judgments of 18 April 2013, *Commission* v *Systran and Systran Luxembourg* (C-103/11 P, EU:C:2013:245); of 3 April 2014, *Hi Hotel HCF* (C-387/12, EU:C:2014:215); and of 18 December 2019, *IT Development* (C-666/18, EU:C:2019:1099).

79 In the substantive law of the Member States, contractual liability and tortious liability may be governed by different regimes in terms of the burden of proof, the conditions of damages, limitation, etc. It may therefore be in an applicant's interest to choose one legal basis rather than the other. See, in particular, my Opinion in *Bosworth and Hurley* (footnote 51).

80 See, with regard to the law of England and Wales, Fentiman, R., *International Commercial Litigation*, Oxford University Press, Oxford, 2nd edition, 2015, pp. 177, 178 and 279. Such an accumulation does not entitle an applicant to double compensation for the same damage. On the other hand, the applicant increases his or her prospects of obtaining the compensation claimed.

81 See judgment of 18 December 2019, *IT Development* (C-666/18, EU:C:2019:1099, paragraph 23), and Gout, O., 'Le cumul des responsabilités contractuelle et extracontractuelle en droit belge et en droit français: de la genèse des règles aux perspectives d'évolution', in Van den Haute, E., *Le droit des obligations dans les jurisprudences française et belge*, Bruylant, Brussels, 2013, pp. 123 to 146.

57. In the context of the Brussels I bis Regulation, it is necessary to ascertain whether, and if so to what extent, the claimant's choice to rely, for the same harmful event, on the tortious liability and/or contractual liability of the other party to the contract influences the applicable rule of jurisdiction.[82] In that respect, I shall set out the solutions thus far adopted by the Court in its case-law (Subsection 1), before examining the interpretation which to my mind must be applied (Subsections 2 and 3).

1. The solutions thus far adopted by the Court

58. The Court first addressed the issue in the judgment in *Kalfelis*. In the case that gave rise to that judgment, an individual was suing his bank in order to obtain compensation for the damage he had sustained in stock-exchange transactions and brought, to that end, cumulative claims based on different rules of German law, some related to contractual liability, others to tortious liability and, last, others to undue enrichment – of a quasi-contractual nature. The question arose, in particular, whether the court with jurisdiction under Article 5(3) of the Brussels Convention – now Article 7(2) of the Brussels I bis Regulation – to rule on the claims based on tortious liability also had accessory jurisdiction over the claims based on contract and quasi-contract.

59. In his Opinion, Advocate General Darmon had proposed that the rule of jurisdiction in 'matters relating to a contract' should channel the entire action, including claims brought on tortious or quasi-contractual legal bases, in order to rationalise jurisdiction and centralise the dispute before the court with jurisdiction in respect of the contract, which, according to the Advocate General, was best placed to understand its context and its implications as regards legal proceedings.[83]

60. On that point, the Court did not follow the Opinion of its Advocate General. It did admittedly hold, as I stated in point 42 of this Opinion, that the concept of 'matters relating to tort' covers all actions which seek to establish the liability of a defendant and which are not related to 'matters relating to a contract'. However, the Court immediately stated, referring to the fact that the rules on special jurisdiction constitute derogations, that 'a court which has jurisdiction under [Article 7(2) of the Brussels I bis Regulation] over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based'.[84]

61. In spite of the somewhat ambiguous nature of that answer, the Court did not mean to state in the judgment in *Kalfelis* that Article 7(1) of the Brussels I bis Regulation prevails over Article 7(2). On the contrary, the Court considered that an action for damages relating to a single harmful event may be a matter for the court with jurisdiction in respect of the contract and/or the court with jurisdiction in respect of the tort, according to the legal bases on which the claimant relies, that is to say, the rules of substantive law which he or she invokes in his or her application. Thus, where cumulative claims are brought in the context of the same action, it is not the action as a whole that must thus be classified as 'matters relating to a contract' or as 'matters relating to tort', but each of those claims according to its legal basis, as the same claim/basis cannot come

[82] The same question arises, in the context of the Rome I and Rome II Regulations, for the determination of the applicable law, since those regulations establish different connecting factors depending on whether an obligation is 'contractual', within the meaning of the Rome I Regulation, or 'non-contractual', within the meaning of the Rome II Regulation.

[83] See Opinion of Advocate General Darmon in *Kalfelis* (189/87, EU:C:1988:312, points 25 to 30).

[84] Judgment in *Kalfelis* (paragraph 19). To my mind, it is clear beyond doubt from the reasoning followed by the Court that the opposite is also true: the court with jurisdiction, on the basis of Article 7(1) of the Brussels I bis Regulation, to hear and determine 'contractual' claims does not have jurisdiction to hear and determine ancillary claims having a non-contractual basis.

within both categories at the same time.[85] In that context, the court with jurisdiction in respect of the contract has jurisdiction to deal with claims brought on contractual bases, while the court with jurisdiction in respect of the tort has jurisdiction for the claims brought on tortious bases. Furthermore, neither of those courts has accessory jurisdiction to deal with what is not among its 'matters'.[86]

62. It should be emphasised that that does not mean applying, for the purposes of the Brussels I bis Regulation, the classification given to the substantive legal rules by the claimant under the national law from which they emerge. At the jurisdiction stage, moreover, the applicable law has not yet been determined by the court seised. It is not, therefore, certain that the claim will be decided in accordance with those rules. The substantive rules relied on in support of such a claim nonetheless provide the indications which are necessary for the identification of the characteristics of the 'obligation', in the independent meaning of the term, on which the claimant relies. As is apparent from point 49 of this Opinion, it is that 'obligation' which, in the light of its characteristics, must be categorised, in accordance with the criteria laid down by the Court in its case-law, as 'matters relating to a contract' or as 'matters relating to tort' and which thus determines the jurisdiction rule applicable.[87] Where the claimant brings cumulative claims based on substantive legal rules of different natures, he or she relies, potentially, on two different types of 'obligation',[88] which may fall under the jurisdiction of separate courts.

63. In short, jurisdiction under the Brussels I bis Regulation to hear a claim for damages between the parties to a contract may vary according to the substantive legal rules on which the claimant relies. I observe, moreover, that in the judgment in *Melzer*,[89] which concerned such a claim, the Court followed that approach. In that judgment, the Court confined itself to interpreting the rule of jurisdiction in 'matters relating to tort', as the national court requested it to do, without examining the rules of jurisdiction in 'matters relating to a contract', on which the defendant relied, on the ground that the claim in question was 'based solely on the law of tort or delict'.[90]

64. Nonetheless, the Court re-examined that problem in the judgment in *Brogsitter*. In the case that gave rise to that judgment, a watch seller, domiciled in Germany, had entered into a contract with a master watchmaker, then domiciled in France, concerning the development of watch movements intended to be marketed by the watch seller. Alongside its activity on behalf of the

85 See my Opinion in *Bosworth and Hurley* (point 74); Hess, B., Pfeiffer, T., Schlosser, P, *Report on the Application of Regulation Brussels I in the Member States*, JLS/C4/2005/03, 2007, paragraph 192; and Zogg, S., 'Accumulation of Contractual and Tortious Causes of Action Under the Judgments Regulation', *Journal of Private International Law*, 2013, vol. 9, No 1, pp. 39 to 76, especially pp. 42 and 43.

86 I shall return to the question of accessory jurisdiction in point 112 et seq. of this Opinion.

87 An obligation does not exist in a legal vacuum. That obligation arises from a factual situation entailing, by virtue of one or more legal rules, certain legal consequences. The factual situation at issue and the legal consequences which it entails may be difficult to comprehend independently of the relevant legal rules and an examination of those rules allows the nature of the obligation in question to be identified. See House of Lords (United Kingdom) (Lord Millet), *Agnew v Länsforsäkringsbolagens AB*, [2001] 1 AC 223, § 264; Bollée, S., 'La responsabilité extracontractuelle du cocontractant en droit international privé', in d'Avout, L., Bureau D., and Muir-Watt, H., *Mélanges en l'honneur du professeur Bernard Audit – Les relations privées internationales*, LGDJ, Issy-les-Moulineaux, 2014, pp. 119 to 135, especially. pp. 132 and 133; Scott, A., 'The Scope of "Non-Contractual Obligations"', in Ahern, J., and Binchy, W., *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*, Martinus Nijhoff Publishers, Leyde, 2009, pp. 57 to 83, especially pp. 58 to 62, and Minois, M., op. cit., pp. 129 and 130. The Court frequently applies such a method, consisting in proceeding from the substantive rules relied on in order to determine the characteristics of the obligation to be classified. See, in particular, judgments of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149, paragraphs 17 to 19); of 18 July 2013, *ÖFAB* (C-147/12, EU:C:2013:490, paragraphs 35 and 36); and of 21 April 2016, *Austro-Mechana* (C-572/14, EU:C:2016:286, paragraphs 27 and 37).

88 Likewise, in the field of conflicts of laws, the same harmful event may be seen from the aspect of two distinct obligations, one 'contractual', within the meaning of the Rome I Regulation, and the other 'non-contractual, within the meaning of Rome II Regulation.

89 Judgment of 16 May 2013 (C-228/11, EU:C:2013:305).

90 Judgment of 16 May 2013, *Melzer* (C-228/11, EU:C:2013:305, paragraph 21). See also, to that effect, judgments of 3 April 2014, *Hi Hotel HCF* (C-387/12, EU:C:2014:215, paragraphs 16 to 21), and of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 43). See further, at national level, Bundesgerichtshof (Federal Court of Justice (Germany)), 27 May 2008, [2009] IPRax, pp. 150 and 151, and Cour de cassation (Court of Cassation (France)), First Civil Chamber, 26 October 2011, No 10-17.026.

seller, the master watchmaker had developed other watch movements which he had marketed on his own account. Taking the view that that parallel activity infringed an exclusivity obligation under that contract, the seller had brought proceedings against the master watchmaker before a German court. In the context, the seller had sought an order that the activities in question be terminated and damages be paid, bringing cumulative claims on the basis of contractual liability and tortious liability, or more precisely on the rules of German law on unfair competition and liability in tort. Hesitating to split the proceedings according to the legal bases relied on by the claimant, the national court had asked the Court which classification, for the purposes of the Brussels I Regulation, should be given to the claims based on tort, having regard to the contract between the parties.

65. Taking as its starting point the dictum in the judgment in *Kalfelis* that the concept of 'matters relating to tort' covers all actions which seek to establish the liability of a defendant and which do not concern 'matters relating to a contract', the Court considered that, in order to link such claims to either of those categories, it is necessary to check 'whether they are, regardless of their classification under national law, contractual in nature'. [91]

66. According to the Court, that is the case 'where the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract'. The Court explained, in that regard, that 'that will a priori be the case where 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'. It is therefore for the national court to 'determine whether the purpose of the claims brought [by the applicant] is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties …, which would make its taking into account indispensable in deciding the action'. [92]

67. The judgment in *Brogsitter* reflects, in my view, a certain relaxation in the approach taken in the judgment in *Kalfelis*. The Court seems to have changed its method as regards the classification of claims, for the purposes of the Brussels I bis Regulation. It did not appear to adhere to the substantive legal rules relied on by the claimant in his application and, it would appear, wished to apply a more objective classification of the facts.

68. Nonetheless, the precise scope of the judgment in *Brogsitter* is uncertain. The overt and abstract reasoning set out in that judgment lends itself to two readings.

69. According to a *first reading* of the judgment in *Brogsitter*, which I shall describe as 'maximalist', the 'test' that emerges from that judgment lies in the assertion that a given claim comes under 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, 'where the conduct complained of may be considered a breach of contract'. That assertion should be understood to mean that a claim based on tort should be linked with such 'matters relating to a contract' provided that it relates to a harmful event that might (also) constitute breach of a 'contractual obligation'. In concrete terms, the court dealing with the action would check whether the claimant might, hypothetically, have formulated his or her claim on the basis of a breach of contractual obligations, which entails examining whether there is in fact a potential correspondence between the alleged harmful event and the content of those

91 Judgment in *Brogsitter*, paragraphs 20 and 21.

92 Judgment in *Brogsitter*, paragraphs 24, 25 and 26, respectively.

obligations. It would follow that, in all circumstances in which the same harmful event is capable of constituting both a tort and a breach of contract, the classification as 'contractual' would prevail over the classification as 'tortious' for the purposes of that regulation. [93]

70. According to a *second reading* of the judgment in *Brogsitter*, which I shall describe as 'minimalist', the 'test' that emerges from that judgment lies, in reality, in the assertion that a claim comes under 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, where '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'. The Court thus intended to categorise as 'contractual' claims based on tort the merits of which are to be assessed in the light of the contractual obligations linking the parties to the dispute. [94]

71. That ambiguity has not been resolved by the subsequent case-law of the Court, which has essentially confined itself to repeating certain passages of the judgment in *Brogsitter* without providing further explanations. [95] To my mind, the Court should therefore clarify, in the present case, its case-law relating to potential coincidences of liabilities. The Court must define, on that subject, clear and foreseeable criteria, of such a kind as to avoid any legal uncertainty for the parties.

72. I would emphasise that the stakes involved in potential coincidences of liabilities are not necessarily the same in substantive law [96] and in private international law. The interpretation of Article 7(1) and Article 7(2) of the Brussels I bis Regulation with regard to that question must thus be determined only in the light of the objectives of legal certainty and the sound administration of justice inherent in that regulation. [97]

73. Having regard to those objectives, I suggest that the Court should reject the 'maximalist' reading of the judgment in *Brogsitter* (Subsection 2). In my view, it should, instead, apply the 'minimalist' reading of that judgment, while providing certain indispensable clarification in that regard (Subsection 3).

93 See my Opinion in *Bosworth and Hurley* (point 80). See, applying that reading of the judgment in *Brogsitter*, in particular, Briggs, A., op. cit., pp. 217 to 219, 239 and 247 to 250, and also Haftel, B., 'Absorption du délictuel par le contractuel, application du Règlement (CE) No 44/2001 à une action en responsabilité délictuelle', *Revue critique de droit international privé*, 2014, No 4, p. 863.

94 See my Opinion in *Bosworth and Hurley* (point 88). See also, applying that reading of the judgment in *Brogsitter*, Opinion of Advocate General Cruz Villalón in *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:309, point 48); Opinion of Advocate General Kokott in *Granarolo* (C-196/15, EU:C:2015:851, points 14 and 18); Court of Appeal (England and Wales, United Kingdom), 19 August 2016, *Peter Miles Bosworth, Colin Hurley v Arcadia Petroleum Ltd & Others*, [2016] EWCA Civ 818, paragraph 66; Weller, M., 'EuGH: Vertragsrechtliche Qualifikation vertragsakzessorischer Ansprüche' LMK 2014, 359127, and Hartley, T., op. cit., pp. 108 and 109.

95 See, inter alia, judgments of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraphs 32 and 71), and of 14 July 2016, *Granarolo* (C-196/15, EU:C:2016:559, paragraph 21).

96 In substantive law, the differences between the national systems of the Member States in the way in which they treat the coincidence of liabilities reflect, in particular, the question whether an applicant is permitted to choose the liability regime that best meets his or her interests. In French law and Belgian law, moreover, the 'non-cumulation' rule is intended to ensure the effectiveness of the arrangements for liability agreed by the parties. In that regard, while the laws of those countries do not allow the rules on tortious liability, which are a matter of public policy, to be contractually agreed in advance, the provisions relating to contractual damages are, on the other hand, capable of being arranged in advance, and the parties may, in particular, redefine the conditions giving rise to the right to compensation and thus mitigate or aggravate contractual liability. See, inter alia, Gout. O., op.cit.

97 See my Opinion in *Bosworth and Hurley* (point 83).

2. The rejection of the 'maximalist' reading of the judgment in Brogsitter

74. Like the Commission, I am of the view that the 'maximalist' reading of the judgment in *Brogsitter* – apart from the fact that it is difficult to reconcile with the judgment in *Kalfelis* – cannot in any event be applied.

75. *First of all*, I recall that, according to the Court's settled case-law, the aim of legal certainty pursued by the Brussels I bis Regulation requires the court seised to be able readily to decide whether it has jurisdiction, without having to consider the substance of the case. [98]

76. In fact, the 'test' resulting from the 'maximalist' reading of the judgment in *Brogsitter* is, in my opinion, contrary to that requirement of simplicity. To require the court seised to determine whether the harmful event alleged on the basis of tortious liability might (also) constitute a breach of contract would amount to requiring it to carry out a significant analysis of the substance of the claim at the jurisdiction stage. [99] To verify, at that stage, a possible correlation between that harmful event and the contractual obligations would not be a simple matter. Apart from the (rare) cases in which the parties are agreed on the existence of a potential coincidence of liabilities, [100] it would be particularly burdensome for the court to determine those obligations at that stage.

77. In fact, as I have explained in point 53 of this Opinion, the field of contractual liability varies significantly from one legal system to another. In some national legal orders, safety requirements, regarded as purely statutory duties in other legal orders, are incorporated in various contracts. [101] The same applies to the requirement that agreements be carried out in good faith which, under various national legal orders, implies ancillary contractual obligations, but which, there again, is not to be found in other legal systems. Specifically, in a large number of cases, the court will be unable to know or even imagine whether there is a potential coincidence of liabilities without establishing the law applicable to the contract in question, which will be the only law capable of genuinely informing the court of the obligations that arise from the contract. [102] Furthermore, it is the case that, even within that law, the extent of those obligations is not determined with certainty. The foreseeability of the rules of jurisdiction may well suffer from that complexity. [103] It

98 See, in particular, judgments of 22 March 1983, *Peters Bauunternehmung* (34/82, EU:C:1983:87, paragraph 17); du 3 July 1997, *Benincasa* (C-269/95, EU:C:1997:337, paragraph 27); and of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 61).

99 See, along the same lines, Magnus, U., and Mankowski, P., op. cit., p. 167; Calster (van), G., op. cit., p 164, and Haftel, B., op. cit.

100 That was the situation in the case that gave rise to the judgment of 11 April 2019, *Bosworth and Hurley* (C-603/17, EU:C:2019:310), where it was common ground between the parties that the tortious conduct complained of might also constitute a breach of contract.

101 For example, if a hotel customer falls in the hotel car park and claims that the hotel operator is liable, such an action could be based, in various legal systems, only on breach of a general duty of safety and would thus be covered solely by tortious liability. In French law, on the other hand, an obligation to ensure safety forms part of the accommodation contract. The same applies in many comparable situations (a person slipping on a station platform while waiting for his or her/a train, in a hairdressing salon, etc.). See Minois, M., op. cit., pp. 92 and 93.

102 Although the Court did admittedly indicate, in paragraph 24 of the judgment in *Brogsitter*, that the contractual obligations should be 'established by taking into account the purpose of the contract', I admit that I have trouble in conceiving such an analysis. Apart from knowing what the Court meant by that 'purpose' and whether it must be defined autonomously, the content of all contracts is not obvious. While it is possible to know the main obligations laid down in certain standard contracts without having to refer to the *lex contractus*, the same certainly does not apply to the other obligations arising under those contracts. In addition, I recall that Article 7(1) of the Brussels I bis Regulation may apply to a wide variety and multiplicity of contracts (see judgment of 15 January 1987, *Shenavai* (266/85, EU:C:1987:11, paragraph 17)).

103 See my Opinion in *Bosworth and Hurley* (point 88), and Haftel, B., op. cit. Generally, the determination of jurisdiction under the Brussels I bis Regulation should not depend on the applicable law (see judgment of 5 July 2018, *flyLAL-Lithuanian Airlines* (C-27/17, EU:C:2018:533, paragraph 55)). The principle established in the judgment of 6 October 1976, *Industrie Tessili Italiana Como* (12/76, EU:C:1976:133), set out in footnote 21 of this Opinion, is, and in my view should remain, an exception in that respect.

would open up to the pleaders a vast field for discussion and, in turn, would leave the court with a wide discretion, whereas the Brussels I bis Regulation is intended to ensure certainty as to the allocation of jurisdiction. [104]

78. *Next*, as Wikingerhof and the Commission asserted in answer to the questions put by the Court at the hearing, there is nothing to justify, to my mind, the rule of jurisdiction in 'matters relating to a contract', laid down in Article 7(1) of the Brussels I bis Regulation, taking precedence over the rule of jurisdiction in 'matters relating to tort' in Article 7(2).

79. Such precedence would not be justified in the light of the scheme of that regulation. As the applicant in the main proceedings emphasised, while that regulation establishes a relationship of subsidiarity between certain of its articles, [105] jurisdiction in respect of contracts and jurisdiction in respect of torts occupy the same hierarchical level. The EU legislature did not therefore appear to have wanted to preclude the possibility that those two types of jurisdiction will co-exist in parallel for the same harmful event.

80. Nor would that precedence be justified in the light of the objective of proximity pursued by Article 7(1) and Article 7(2) of the Brussels I bis Regulation. As Wikingerhof and the Commission submitted, and as stated in points 40 and 46 of this Opinion, proximity is conceived by reference to the main substantive points raised by the relevant claim. In that context, a claim based on breach of a duty imposed by law on everyone raises mainly non-contractual issues, and the nature of those issues does not in principle change where the claim is between the parties to a contract and the performance of the contract provided the occasion for that breach.

81. *Last*, to apply a 'maximalist' reading of the judgment in *Brogsitter* would give rise to an unfortunate inconsistency between, on the one hand, Article 7(1) and Article 7(2) of the Brussels I bis Regulation and, on the other, the Rome I and Rome II Regulations. In fact, different provisions of the latter regulation [106] recognise, implicitly but necessarily, that the same harmful event may relate to a 'contractual obligation' within the meaning of the Rome I Regulation and at the same time give rise to a 'non-contractual obligation' within the meaning of the Rome II Regulation, without the former regulation taking precedence over the second.

82. If, on the contrary, that logic of precedence were also to apply in the context of the Rome I and Rome II Regulations, it would lead to outcomes that cannot have been desired by the EU legislature. For example, the latter provided, in Article 6 of the Rome II Regulation, conflict of laws rules specific to unfair competition and to acts restricting competition. The connecting factors laid down in that article – namely, respectively, the law of the country where competitive relations are, or are likely to be, affected, and the law of the country where the market is, or is likely to be, affected – reflect a public interest. In that context, that article, in paragraph 4, logically

104 See, in particular, judgment of 1 March 2005, *Owusu* (C-281/02, EU:C:2005:120, paragraph 39).

105 For example, the types of exclusive jurisdiction provided for in Article 24 of the Brussels I bis Regulation take precedence of other rules of jurisdiction provided for in that regulation.

106 That is the case, in particular, of Article 4(3) of the Rome II Regulation, which provides that, where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2 of that article, the law of that other country is to apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question. It follows from the Proposal for a Regulation of the European Parliament and of the Council on the Law applicable to non-contractual obligations (COM(2003) 427 final, p. 13), that that solution was envisaged for potential coincidences of liability. Thus, in the event of such a coincidence, there is indeed both a 'contractual obligation', within the meaning of the Rome I Regulation, and a 'non-contractual obligation', within the meaning of the Rome II Regulation. Nonetheless, that same Article 4(3) allows, in certain circumstances, the same law to be applied to the latter obligation as to the former obligation. Nonetheless, it does not apply in all cases (see footnote 107 of this Opinion).

prohibits the parties from choosing to apply another law to their dispute.[107] If such an action for damages based on unfair competition or an act restricting competition were to come under the Rome I Regulation – which lays down, as the main connecting factor, the law chosen by the parties[108] – on the ground that the dispute is between the parties to a contract and that the harmful event might (also) constitute a breach of contract, that same article would lose a significant part of its practical effect.[109]

83. In addition, I recall that in 'matters relating to a contract', under Article 7(1) of the Brussels I bis Regulation, jurisdiction lies with the court of the place where the obligation on which the claim is based has been or must be performed. I therefore wonder about the way in which that rule should be implemented with regard to a claim which is not based on a 'contractual obligation' and which falls within such 'matters' solely on the ground that it could hypothetically have been.[110]

84. My conviction that the 'maximalist' reading of the judgment in *Brogsitter* must be rejected is not shaken by the argument, raised in academic legal writing,[111] that the solution that results from such a reading would ensure the sound administration of justice. In that regard, no one denies that that solution would have the advantage of concentrating before the court with jurisdiction in respect of the contract all disputes arising from its performance. Conversely, to make jurisdiction depend on the legal basis (or bases) put forward by the claimant, following the approach taken in the judgment in *Kalfelis*, may entail a division of those disputes, since the same harmful event, seen from the aspect of different bases, may come within the jurisdiction of different courts.

85. Nonetheless, on the one hand, the significance of the problem described in the preceding point must be put into perspective. On the assumption that the court with jurisdiction in respect of the contract and the court with jurisdiction in respect of the tort do not coincide in the situation in question,[112] the claimant could still bring his or her action before the courts of the Member State in which the defendant is domiciled, in accordance with Article 4(1) of the Brussels I bis Regulation, which will then have jurisdiction to adjudicate on the action in its entirety.[113] On the other hand, the argument related to the sound administration of justice is double edged. If the solution resulting from the 'maximalist' reading of the judgment in *Brogsitter* allowed all the disputes that arose in the performance of the contract to be brought before the court with jurisdiction in respect of the contract, that solution would, conversely, be of such a kind as to lead to an expansion in the litigation relating to the same tort: if, for example, such a tort was committed by three persons together, and one of them is a contracting partner of the victim, the victim might be unable to bring a single action against the three co-defendants before the court with jurisdiction in respect of the tort, under Article 7(2) of that regulation.[114]

107 I recall that, in principle, Article 14 of the Rome II Regulation allows the parties to choose the law applicable to a non-contractual obligation. Nor, in my view, does Article 4(3) of that regulation apply in such a situation.

108 See Article 3 of the Rome I Regulation.

109 See, to the same effect, Dickinson, A., 'Towards an agreement on the concept of "contract" in EU Private International Law?', *Lloyd's Maritime and Commercial Law Quarterly*, 2014, pp. 466 to 474, especially p. 473.

110 See my Opinion in *Bosworth and Hurley* (point 90).

111 See, in particular, Briggs, A., op. cit.

112 It will nonetheless happen that the court designated by Article 7(1) of the Brussels I bis Regulation and, at least, one of the courts designated by Article 7(2) of that regulation coincide. See, in particular, judgment of 27 October 1998, *Réunion européenne and Others* (C-51/97, EU:C:1998:509, paragraph 35), where the Court held that the place where the damage arose in the case of the international maritime transport of goods corresponded to the place where the carrier was to deliver the goods.

113 See judgment in *Kalfelis* (paragraph 20), and my Opinion in *Bosworth and Hurley* (point 85).

114 In particular, civil actions for damages entailing 'private enforcement' often involve a claimant acting against several defendants – for example, the different undertakings that are members of an anticompetitive cartel – and it seems appropriate allow the former to bring proceedings against the latter together before the court with jurisdiction in respect of the tort. That possibility should not be frustrated by the fact that one of those undertakings is the claimant's contracting partner.

86. Nor can the 'maximalist' reading of the judgment in *Brogsitter* be justified by considerations related to the desire to combat forum shopping. Admittedly, to make jurisdiction, in the case of a potential coincidence of liability, depend on the substantive legal basis (or bases) relied on by the claimant permits such forum shopping. First, the applicant has available to him or her not only the court with jurisdiction in respect of the contract, but also the court with jurisdiction in respect of tort, namely potentially two additional courts, [115] and, second, he or she may, to a certain extent, 'choose jurisdiction' by formulating his or her claim on the basis of the appropriate rules. [116]

87. However, the fact that the claimant is able to choose between a number of courts is by no means unusual in the context of the Brussels I bis Regulation. The EU legislature itself allowed a certain amount of forum shopping, by providing for options of jurisdiction. In that context, the fact that a claimant chooses from among the available courts the one that best corresponds with his or her interests, in the light of the procedural or substantive advantages which it offers, is not to be criticised in itself. [117] To my mind, forum shopping is problematic only when it degenerates into abuse. [118]

88. In fact, the risk of such unlawful forum shopping is restricted by the fact that, as Wikingerhof has emphasised, the jurisdiction of the court with jurisdiction in respect of the contract and that of the court with jurisdiction in respect of the tort are limited, in accordance with the judgment in *Kalfelis*, to the claims coming within their 'matters' for which the respective courts are competent. Furthermore, as the Commission claimed, any abuse in the way in which a claimant based his or her claim would not be inconsequential for him or her. If he or she brought the claim on the basis of tort with the sole aim of avoiding the court with jurisdiction in respect of the contract and if it happened that the applicable law, [119] like French law or Belgian law, prohibits such a choice, that claim would be rejected as to its substance. In addition, if a claimant were to formulate a claim based on tort that was manifestly ill-founded, purely as a delaying tactic, his or her conduct might be caught by the rules on abuse of procedure laid down in the *lex fori*.

89. Moreover, I recall that it is open to the contracting parties wishing to avoid any possibility of forum shopping to enter into an agreement conferring jurisdiction giving, where appropriate, exclusive jurisdiction to a specific court, as provided for in Article 25 of the Brussels I bis Regulation. Provided that it is valid and formulated in sufficiently broad terms, such an agreement will apply to all disputes that have arisen or that may arise in connection with their contractual relationship, including actions in 'matters relating to tort' connected with that relationship. [120]

115 See footnote 20 of this Opinion.

116 See my Opinion in *Bosworth and Hurley* (point 84), and also Haftel, B., op. cit. Likewise, to allow the applicant to rely, for the same harmful event, on a 'contractual obligation, within the meaning of the Rome I Regulation, and/or a 'non-contractual obligation', within the meaning of the Rome II Regulation, provides him or her with the possibility of a certain *law shopping*.

117 See my Opinion in *Bosworth and Hurley* (point 85), and also Fentiman, R., op. cit., p. 278.

118 Such abuse exists, in my view, when the claimant misuses his or her right to choose a court from its purpose with the sole aim of harming the defendant, or when he or she brings the matter before a court which to his or her certain knowledge lacks jurisdiction, with a purely dilatory aim, or when he or she employs other techniques of procedural harassment against the defendant. See, in particular, Usunier, L., 'Le règlement Brussels I bis et la théorie de l'abus de droit', in Guinchard, E., *Le nouveau règlement Bruxelles I* bis, Bruylant, Brussels, 2014, pp. 449 to 480.

119 More precisely, it is necessary to know whether, substantively, the *lex causae*, prohibits the accumulation of claims. In the case of cumulative claims based on two separate 'obligations', two *leges causae* may have to be examined in that regard. In that case, it would also be necessary to know whether the rules of procedure of the court seised, which are governed by the *lex fori*, allow cumulative claims to be brought for the same harmful event. For further details, see Plender, R., and Wilderspin M., *The European Private International Law of Obligations*, Sweet & Maxwell, London, 4th edition, 2015, pp. 67 to 71.

120 See point 140 of this Opinion.

3. The need to clarify the 'minimalist' reading of the judgment in Brogsitter

90. As is apparent from the preceding subsection, the only valid reading of the judgment in *Brogsitter* is, to my mind, the 'minimalist' interpretation referred to in point 70 of this Opinion. Like the Commission, I am of the view that that reading can be reconciled with the judgment in *Kalfelis*. In fact, provided that that reading is applied, those two judgments are essentially based on the same logic: whether a claim for liability between parties to a contract is connected with 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, or with 'matters relating to tort', within the meaning of Article 7(2) of that regulation, depends on the obligation – either 'contractual' or 'tortious' – which forms the legal basis of the claim. [121] In the case of cumulative claims based on separate 'obligations', each must be connected, individually, to one or other category.

91. With regard to such claims, there is no reason to depart from the approach summarised in point 49 of this Opinion. Generally, the legal basis of a claim put before a court sets out both the questions that that court will have to decide and, consequently, the 'contractual' or 'tortious' nature of the claim.

92. The judgments in *Kalfelis* and *Brogsitter* differ, in reality, solely in terms of the method used to identify the 'obligation' serving as the basis for the claim. In the first judgment, the Court proceeded from the substantive legal rules on which the claimant relied in his application. In the second judgment, it proposed a classification method that is meant to be more objective, based on the 'indispensable' nature of the 'interpretation' or the 'taking into account' of a contract for the purpose of 'establish[ing] the lawful or, on the contrary, unlawful nature of the conduct complained of' against the defendant by the claimant'. [122]

93. Nevertheless, in my view, those methods are reconcilable, and indeed complementary.

94. In order to ascertain whether it has jurisdiction under Article 7(1) or Article 7(2) of the Brussels I bis Regulation, it is therefore logical, for the court seised, to address, as a priority, the rules of substantive law on which the claimant relies in his application. As I explained in point 62 of this Opinion, those rules serve as a lens through which to read the facts and the 'obligation'

[121] In particular, the assertion, in paragraph 26 of the judgment in *Brogsitter*, that it is for the national court to 'determine whether the purpose of the claims brought … is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties' must in my view be understood in that sense.

[122] See judgment in *Brogsitter* (paragraphs 25 and 26). The Court appears to have taken inspiration in that judgment from its case-law relating to civil actions for damages brought against the European Union. I recall that the FEU Treaty provides, in such matters, for an allocation of jurisdiction between the Courts of the European Union and the national courts: while disputes relating to the *non-contractual liability* of the Union are within the exclusive jurisdiction of the Courts of the European Union (see Article 256(1), Article 268 and the second paragraph of Article 340 TFEU), those relating to its *contractual liability* fall, in the absence of any arbitration clause to the contrary, within the jurisdiction of the national courts (see Articles 272 and 274 TFEU). According to that case-law, in order to determine whether a civil action for damages brought against the Union comes within their jurisdiction, the Courts of the European Union cannot merely rely on the legal rules invoked by the applicant, but are required to ascertain whether the object of the action for damages before them is a claim for damages based objectively and wholly on rights and obligations of a contractual origin or on rights and obligations of a non-contractual origin. In order to do so, those Courts must ascertain, on the basis of an analysis of the various elements in the file, such as the legal rule which is alleged to have been breached, the nature of the damage relied on, the conduct complained of and the legal relations existing between the parties, whether there is a contractual context between the parties, linked to the object of the dispute, a thorough examination of which is indispensable for the purposes of resolving the action. In that context, the action will be considered to be based on the contractual liability of the Union if it is apparent on a preliminary analysis of those elements *that it is necessary to interpret one or more contracts concluded between the parties in question in order to establish the merits of the applicant's claims* (see, in particular, judgments of 18 April 2013, *Commission* v *Systran and Systran Luxembourg* (C-103/11 P, EU:C:2013:245, paragraphs 61 to 67), and of 10 July 2019, *VG* v *Commission* (C-19/18 P, EU:C:2019:578, paragraphs 28 to 30)).

which the claimant infers therefrom. A similar logic consisting of examining the rules of substantive law in support of a claim in order to determine how to categorise that claim can be found in the case-law relating to the other provisions of that regulation. [123]

95. Specifically, if the claimant relies on the terms of a contract and/or on legal rules which apply by reason of that contract, such as those relating to the mandatory effect of agreements and the liability of the debtor for non-performance of his or her contractual obligations, [124] it follows that the claim is based on a 'contractual obligation', within the meaning of the Court's case-law. Conversely, if he or she relies on legal rules that impose a duty on everyone, independently of any voluntary commitment, the claim is based on a 'tortious obligation', within the meaning of that case-law.

96. In a situation in which the claimant does not rely on substantive legal rules in his application, [125] the method does not change fundamentally. As I have stated, those rules do not in themselves form the object of the classification. They merely provide a lens through which to read the facts and give an indication of the 'obligation' which the claimant wishes to derive from them. Specifically, if the application does not indicate any substantive legal rules, the court must extract from the other parts of it – such as the statement of the facts or the form of order sought – the 'obligation' on which the claimant relies.

97. In that context, the 'test' resulting from the judgment in *Brogsitter* may allow the court, where there is doubt, to identify the obligation forming the basis of the claim by changing its perspective. If the 'interpretation' or the 'taking into account' of a contract (or other form of voluntary commitment) seems to that court to be 'indispensable' for the purpose of 'establish[ing] the lawful or, on the contrary, unlawful nature of the conduct complained of' against the defendant by the claimant, it will infer from this that the claim is based on the infringement of a 'contractual obligation'; the conduct complained of in that claim is unlawful and gives rise to the defendant's liability to the extent that he or she failed to comply with such an 'obligation', which depends on the terms of the contract at issue and the law which applies to him or her. However, if the claim is based on an infringement of a duty imposed by law on everyone, it would not be necessary to

123 In particular, in order to determine whether an action is excluded from the scope of the Brussels I bis Regulation on the basis of Article 1(2)(b) of that regulation, on 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings', it is necessary to ascertain whether the action 'is based on the law relating to bankruptcy' (see, in particular, judgment of 22 February 1979, *Gourdain* (133/78, EU:C:1979:49, paragraph 4), and, by analogy, judgment of 4 December 2019, *Tiger and Others* (C-493/18, EU:C:2019:1046, paragraph 27)). Likewise, in order to determine whether an action has been brought 'in proceedings which have as their object rights *in rem* in immovable property', within the meaning of Article 24(1) of the Brussels I bis Regulation, it is necessary to ascertain whether the action is 'based on a right *in rem*' (see, in particular, judgment of 10 July 2019, *Reitbauer and Others* (C-722/17, EU:C:2019:577, paragraph 45)). In order to determine whether an action has been brought 'in proceedings which have as their object … the validity of the decisions of [the] organs [of companies or other legal persons or associations of natural or legal persons]', within the meaning of Article 24(2) of that regulation, it is necessary to ascertain whether the applicant is challenging the validity of a decision of a company's organ 'under the company law applicable or under the provisions governing the functioning of its organs' (see, in particular, judgment of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraph 40)).

124 See, for example, Court of Appeal (England and Wales (United Kingdom)), 9 August 2018, *Cristiano Committeri v Club Méditerranée SA and Another*, [2018] EWCA Civ 1889.

125 While certain national legal systems, including English law, require claimants to state in their application not only the facts and the subject matter of their claim, but also the legal rules on which they are relying, other legal orders, including French law, do not make such demands of claimants. See my Opinion in *Bosworth and Hurley* (point 86).

'interpret' or 'take into account' the contract in order to determine that the conduct complained of in that claim is unlawful, since that duty exists independently of that contract; the unlawfulness of the conduct will depend on the rule or rules of law establishing that duty. [126]

98. As the Commission has claimed, the judgment in *Brogsitter* allows the court to determine the classification of a claim as 'relating to a contract' or 'relating to tort' according to the reference point against which it will have to assess the lawfulness of the conduct alleged by the claimant against the defendant, depending on whether it involves a contract – and what the applicable law is – or legal rules imposing a duty on everyone independently of such a contract. To my mind, the method resulting from the judgment in *Kalfelis* and that resulting from the judgment in *Brogsitter* – to the extent that they are interpreted in that way – will in the majority of cases lead to the same result, since the conduct at issue and the reference point for assessing the lawfulness of it depend, in principle, on what the claimant relies on in his application.

99. That said, the judgment in *Brogsitter* may constitute a corrective for individual cases where a claimant relies on certain rules of law, considered to be tortious in nature under national law, which oblige compliance with contractual obligations and which, if not complied with, presuppose a breach of contract. Specifically, I am referring to situations in which the infringement of a 'contractual obligation' is, in itself, presented as constituting a 'tort'. [127] In such situations, ruling on a claim involves, essentially, 'interpreting' and 'taking into account' the contract at issue in order to establish such an infringement and, consequently, the existence of the alleged tort. Therefore, such a claim does in fact raise, in principle, questions of a contractual nature. Consequently, it is necessary to find that such a claim is, in essence, based on the infringement of a 'contractual obligation', since the 'tortious obligation' on which the claimant relies does not exist in isolation.

100. To summarise, when the claimant relies, in his or her application, on the substantive legal rules imposing an obligation on everyone and it does not seem 'indispensable' to establish the content of the contract in order to assess the lawful or unlawful nature of the defendant's alleged conduct, the claim is based on a 'tortious obligation' and, consequently, comes under 'matters relating to tort', within the meaning of Article 7(2) of the Brussels I bis Regulation. [128]

101. Conversely, where, independently of the legal rules relied on, the court can assess the legality of the alleged conduct only by reference to a contract, the claim is based, in essence, on a 'contractual obligation' and, consequently, falls within 'matters relating to a contract' within the meaning of Article 7(1) of that regulation.

102. Two points must nonetheless be made. *In the first place*, I observe that, taken literally, the judgment in *Brogsitter* might tend to indicate that 'interpretation' or 'taking into account' of a contract should never take place at any stage of the examination of the tort in order for a claim for damages to come under 'matters relating to tort'.

126 See, to that effect, Weller, M, op. cit. In the case of coincidence of liability, 'contractual' and 'tortious' obligations relating to the same harmful event are, in principle, independent from one another. For example, in the case of damage caused by a defective product, referred to in point 54 of this Opinion, the court may rule on whether there has been an infringement of a legal duty in the field of product safely irrespective of the contract of sale. That duty applies regardless of the contract at issue and it is not, therefore, in any way 'indispensable' to 'take into account' or to 'interpret' that contract in order to determine that it is unlawful to manufacture a product with a safety defect or to decide what constitutes such a defect.

127 The judgment in *Brogsitter* may be understood as meaning that, according to the Court, the infringement of the exclusivity obligation which was allegedly binding on the parties under the contract was, in itself, an essential part of the torts relied upon. The claims brought on a tortious basis and those brought on a contractual basis are, for the Court, essentially founded on the very same obligation, namely the 'contractual obligation' of exclusivity.

128 See my Opinion in *Bosworth and Hurley* (points 79 and 83).

103. In that regard, it may happen that, in the context of a claim for damages in tort, a preliminary question or an interlocutory question of a contractual nature may also arise. As I shall explain in point 123 of this Opinion, that is the position in the main proceedings. In fact, it is necessary, in this instance, to interpret, as a preliminary issue, the contract between Wikingerhof and Booking.com in order to establish certain allegations of fact made by the former company against the latter in the light of competition law. [129]

104. According to the Court's settled case-law, for the purposes of the Brussels I bis Regulation, a claim must be classified in the light of the principal question of law raised therein. The existence of a mere preliminary or interlocutory issue of a contractual nature, which the court must resolve in order to determine that claim, is not decisive for the purposes of the classification of that claim. [130] Otherwise, that would amount to conferring jurisdiction on the court with jurisdiction in respect of the contract to adjudicate on a claim which does not essentially raise questions of a contractual nature and which therefore does not have a particularly close link with that court. Such a result would be contrary to the objective of proximity and, therefore, to the objective of the sound administration of justice. [131] The judgment in *Brogsitter* cannot therefore be interpreted in the opposite sense.

105. *In the second place*, it is not clear from the judgment in *Brogsitter* whether the 'indispensable' nature of the interpretation or taking into account of the contract, for the purpose of determining whether a claim for damages comes under 'matters relating to a contract' or 'matters relating to tort', is assessed solely by reference to that claim, as formulated by the claimant, or also by reference to any ground of defence put forward by the defendant before the court seised in order to counter that claim.

106. I am thinking, for example, of a situation in which a claimant brought an action for damages in tort for infringement of copyright, in the context of which the defendant pleaded the existence of a licensing agreement between the parties. Since the tort of infringement of copyright assumes that a third party makes use of a protected work covered by the exclusive rights which the law confers on the author of that work, without the holder's authorisation, [132] the court must, in order to determine that action, determine whether or not that contract authorised the use of the work complained of. A further example is a claim to establish liability in tort, made by the victim of physical injury, that occurred while he or she was using sports equipment, against the renter of that equipment, against which the latter raised a clause in the rental agreement that was intended to exempt the hirer of liability in respect of such injury.

107. It is apparent from the Court's settled case-law that, at the stage during which jurisdiction is verified, the court seised must not assess the admissibility or the merits of the claim, but must confine itself to identifying the points of connection with the State in which it sits that would

[129] Let us take another example, in which X has a contract with Y and Z incites Y to breach that contract. If X sues Z, on the basis of tortious liability for having deliberately incited Y to breach the contract, he or she will have to show that Y did indeed breach the contract. To that end, the court will have to interpret the contract. That is a preliminary question which allows a fact pertaining to the case to be established in the context of the examination of an action which is otherwise tortious in nature (see Hartley, T., op. cit., p. 109).

[130] See, to that effect, judgments of 25 July 1991, *Rich* (C-190/89, EU:C:1991:319, paragraphs 26 to 28); of 14 November 2002, *Baten* (C-271/00, EU:C:2002:656, paragraphs 46 and 47); and of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraph 25). In the field of the conflict of laws, on the other hand, each of the questions of law raised in a claim must, in principle, be classified separately. See judgments of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraphs 50 to 62); of 7 April 2016, *KA Finanz* (C-483/14, EU:C:2016:205, paragraphs 52 to 58); and of 28 July 2016, *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:612, paragraphs 35 to 60). See also my Opinion in *Verein für Konsumenteninformation* (C-272/18, EU:C:2019:679, point 51).

[131] See, by analogy, judgment of 12 May 2011, *BVG* (C-144/10, EU:C:2011:300, paragraph 39).

[132] See, in particular, judgment of 14 November 2019, *Spedidam* (C-484/18, EU:C:2019:970, paragraph 38 and the case-law cited).

justify its jurisdiction under a provision of the Brussels I bis Regulation. To that end, that court may take as settled the claimant's assertions. [133] In other words, the court seised must determine whether it has jurisdiction with regard to the claim brought by the claimant, the grounds of defence put forward by the defendant being irrelevant in that respect. [134]

108. Following that logic, the Court has held that a court seised of an action to enforce a contract has jurisdiction under Article 7(1) of the Brussels I bis Regulation, even where the defendant pleads, as a ground of defence, that that contract does not exist (or is null and void). [135] By analogy, a court seised of a claim based on an 'obligation based on tort' cannot consider that the claim is a 'matter relating to a contract' on the sole ground that the defendant has put forward, as a ground of defence, the existence of a contract between the parties. Here, too, the judgment in *Brogsitter* cannot be interpreted in the opposite sense. The question of any contractual justification or exemption for the alleged conduct constitutes, once again, a simple accessory issue to be resolved before the tort is examined.

109. That interpretation in my view guarantees legal certainty, since it allows the court seised to verify its jurisdiction *ab initio*, in the light of the claim, without being required to carry out a detailed analysis of the substance, and independently of whether the defendant takes part in the procedure. [136] Conversely, it would be contrary to the principle of legal certainty and the aim of a high degree of foreseeability of the rules of jurisdiction if the applicability of Article 7(1) or of Article 7(2) of the Brussels I bis Regulation depends on a ground of defence, which may be raised at a late stage by the defendant. [137] In addition, that would mean that it would be sufficient for the latter to invoke the existence of a contract with the claimant to frustrate the jurisdiction rule in 'matters relating to tort' provided for in Article 7(2). [138]

110. It seems to me that that interpretation is supported by the judgment in *Hi Hotel HCF*. [139] In the case that gave rise to that judgment, which was delivered shortly after the judgment in *Brogsitter*, the claimant had seised a court, in accordance with Article 7(2) of the Brussels I bis Regulation, of an action for damages in tort based on infringement of his copyright. The defendant relied as against that action on a contract previously concluded between the parties, which, it contended, provided for the assignment of the rights in question to the defendant, and, on that ground, disputed the existence of the tort and the relevance of Article 7(2). The Court

133 See, in particular, judgments of 25 October 2012, *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664, paragraph 50), and of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 62).

134 See, in particular, judgment of 29 June 1994, *Custom Made Commercial* (C-288/92, EU:C:1994:268, paragraph 19), where the Court emphasised that the court seised should not be required, in order to determine whether it has jurisdiction, to 'consider … the pleas relied on by the defendant'. On that point, there is in my view no contradiction between that assertion and the Court's subsequent case-law, according to which the court seised must, at the stage of determining its jurisdiction, 'assess all the evidence available to it, including, where appropriate, the arguments put forward by the defendant' (judgment of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraph 46)). That case-law must be understood as meaning that the court seised must take account, at that stage, not of the substantive grounds of defence raised by the defendant, but of *any arguments which the defendant might raise as to jurisdiction* – concerning, for example, the place where the damage occurred, for the purposes of Article 7(2) of the Brussels I bis Regulation, etc. (see, to that effect, Opinion of Advocate General Szpunar in *Kolassa* (C-375/13, EU:C:2014:2135, point 77)).

135 See, in particular, judgment of 4 March 1982, *Effer* (38/81, EU:C:1982:79, paragraphs 7 and 8).

136 See, to the same effect, Dickinson, A., op. cit., especially p. 471.

137 See, by analogy, judgments of 25 July 1991, *Rich* (C-190/89, EU:C:1991:319, paragraph 27); of 8 May 2003, *Gantner Electronic* (C-111/01, EU:C:2003:257, paragraphs 24 to 32); and of 12 May 2011, *BVG* (C-144/10, EU:C:2011:300, paragraph 35). See also, to the same effect, Zogg, S., op. cit., pp. 50 and 51.

138 See, by analogy, judgments of 4 March 1982, *Effer* (38/81, EU:C:1982:79, paragraph 8), and of 12 May 2011, *BVG* (C-144/10, EU:C:2011:300, paragraphs 34 and 35). See also my Opinion in *Bosworth and Hurley* (point 89); Brosch, M., 'Die Brogsitter-Defence: Neues zur Annexzuständigkeit am Vertragsgerichtsstand für deliktische Ansprüche in der EuGVVO, zugl Anmerkung zu EuGH 13. 3. 2014, C-548/12, Marc Brogsitter/Fabrication de Montres Normandes EURL und Karsten Fräßdorf', ÖJZ 2015, pp. 958 to 960, and also Magnus, U., Mankowski, P., op. cit., p. 168.

139 Judgment of 3 April 2014 (C-387/12, EU:C:2014:215).

observed, in essence, that the court seised was to determine whether it had jurisdiction on the basis of the claim in tort brought by the claimant, regardless of the defence in contract raised by the defendant.[140]

111. Two points remain to be examined before this section is complete. *In the first place*, as the Commission claimed at the hearing, the classification of a claim is not made in the same way where the parties are bound by a contract of insurance, a consumer contract or a contract of employment. Unlike the rules of special jurisdiction in Article 7 of the Brussels I bis Regulation,[141] Sections 3, 4 and 5 of Chapter II of that regulation, on jurisdiction 'in matters relating to insurance', 'over consumer contracts' and 'over individual contracts of employment', respectively, pursue the aim of protecting the weaker party to the contract – the insured, the consumer or the worker –[142] and are binding. The aim is therefore to ensure that the other party to the contract cannot circumvent those sections by basing its claim on tortious liability. In addition, those sections do not pursue, as such, an objective of proximity and the identification of a contractual obligation on which the claim in question is based is not necessary in order for the jurisdiction rules which they lay down to take effect. Thus, all claims between parties to the same contracts, which relate to disputes that arose in the performance of such contracts come, in principle, within those sections, irrespective of the legal basis of those claims.[143]

112. *In the second place*, some writers suggest[144] recognising that the court with jurisdiction to hear contractual matters has accessory jurisdiction, under Article 7(1) of the Brussels I bis Regulation, to hear claims 'relating to tort' that are closely linked to 'contractual' claims, especially in disputes entailing a potential coincidence of liabilities. Therefore, it must be ascertained whether, on that point, it is appropriate to distinguish the judgment in *Kalfelis*.

113. I must emphasise that this question is a separate issue from the question of classification discussed in the preceding points of this Opinion. Where a claim based on a legal basis that is considered to be tortious under national law must be classified as 'relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, in application of the judgment in *Brogsitter*, it cannot be brought, on account of that classification, before the court with jurisdiction in respect of the tort, under Article 7(2) of that regulation. Conversely, to accept that the court with jurisdiction in respect of the contract had jurisdiction to determine claims 'relating to tort', in the autonomous sense of that expression, which are ancillary to the claims 'relating to a contract', would not prevent the claimant from bringing the former claims before the court with jurisdiction in respect of the tort. He or she would simply also have the option to bring all those claims before the court with jurisdiction in respect of the contract.

140 See, to that effect, judgment of 3 April 2014, *Hi Hotel HCF* (C-387/12, EU:C:2014:215, paragraphs 16 to 22).

141 The Court has repeatedly held that Article 7(2) of the Brussels I bis Regulation is not designed to protect one of the parties to the dispute (see, in particular, judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraphs 38 and 39)). The same analysis must in my view apply in the case of Article 7(1) of that regulation.

142 See recital 18 of the Brussels I bis Regulation.

143 See, with regard to Section 4 of Chapter II of the Brussels I bis Regulation, judgments of 11 July 2002, *Gabriel* (C-96/00, EU:C:2002:436, paragraphs 54 to 58), and of 2 April 2020, *Reliantco Investment and Reliantco Investment Limassol Sucursala București* (C-500/18, EU:C:2020:264, paragraphs 58 to 73), and, with regard to Section 5 of that chapter, my Opinion in *Bosworth and Hurley* (points 91 to 103). The Court has not yet had the opportunity to rule on that question in the context of Section 3 of that chapter. See, nonetheless, taking an analogous approach with regard to Section 3, Supreme Court of the United Kingdom, 1 April 2020, *Aspen Underwriting Ltd and others v Credit Europe Bank NV*, [2020] UKSC 11, paragraphs 34 to 41.

144 See, in particular Briggs, A., op. cit., p. 237, and Weller, M., op. cit.

114. Admittedly, the principle that the accessory follows the principal is not unknown to the Court's case-law relating to the Bruxelles I bis Regulation.[145] In addition, such accessory jurisdiction would have advantages in terms of the sound administration of justice, since it would permit certain procedural economies.

115. In my view, however, the fact remains that, in its current version, the Brussels I bis Regulation does not permit such a solution. It will be recalled that the special jurisdiction laid down in that regulation depends on the 'matters' to which the dispute relates. Article 7(1) and Article 7(2) of that regulation draw a clear distinction between claims 'relating to a contract' and those 'relating to tort'. It is not therefore possible to attach claims coming within the second category to Article 7(1) without ignoring that system and extending the scope of the latter provision – which must, I note, be interpreted strictly – beyond its stated objective, which is to ensure that questions of a contractual nature may be examined, at the choice of the claimant, by the court that is closest to the contractual obligation at issue.[146] It would be for the EU legislature to make provision for such accessory jurisdiction, either by amending Article 7(1) or by transforming the rule on 'related actions' laid down in Article 30 of the Brussels I bis Regulation into a head of jurisdiction.[147] In the meantime, as I stated in point 85 of this Opinion, a claimant wishing to make a procedural economy has the option of bringing all of his or her claims before the courts of the Member State in which the defendant is domiciled, in accordance with Article 4(1) of that regulation.

C. The classification of actions for damages between the parties to a contract based on infringement of the rules of competition law

116. In the light of the Court's case-law, as clarified in the two preceding sections of this Opinion, there is to my mind little doubt as to the classification of a claim for damages, as brought, in this instance, by Wikingerhof against Booking.com.

117. I note that the fact that the two companies are bound by a contract is not sufficient for that claim to be considered to be a claim in 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation. The question of whether the applicant in the main proceedings might, in theory, have relied on a breach of that contract[148] is also not decisive in that regard.

118. In fact, as I have stated throughout this Opinion, the connection of a claim to 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, or to 'matters relating to tort', within the meaning of Article 7(2) of that regulation, depends on its legal basis, that is to say the obligation on which that claim is (in fact) based.

119. In this instance, Wikingerhof relied, in its application, on the German rules of competition law. Those rules are intended to protect the market and, to that end, impose duties on all undertakings. Irrespective of whether German law is actually applicable to the action at issue in

145 See, in particular, judgment of 15 January 1987, *Shenavai* (266/85, EU:C:1987:11, paragraph 19).

146 See, to the same effect, Zogg, S., op. cit., pp. 57 to 62, and Minois, M., op. cit., p. 250.

147 As the Brussels I bis Regulation currently stands, Article 30 of that regulation constitutes an exception which, when related actions are pending before the courts of different Member States, allows the second court to be seised to stay its proceedings. See, in favour of the extension of the 'related actions' rule, Gaudemet-Tallon, H., op. cit., p. 175.

148 In that regard, Wikingerhof stated at the hearing, in answer to a question from the Court, that it could, in theory, have based its claim on the rules of German law on contractual liability, more specifically on breach of the obligation to perform contracts in good faith.

the main proceedings, which is not determined at the stage of examination of jurisdiction,[149] the fact that it invokes those rules indicates that Wikingerhof is relying on the alleged breach, by Booking.com, of a duty imposed by law independently of a contract or another voluntary commitment. That action is therefore based on an obligation 'relating to tort' for the purposes of Article 7(2) of the Brussels I bis Regulation.[150]

120. The 'tortious' nature of that obligation is further confirmed, as Wikingerhof and the Commission correctly observed, by the judgment in *CDC Hydrogen Peroxide*.[151] In that judgment, which, it will be recalled, concerned claims for damages submitted, on the basis of the rules of competition law, by buyers[152] of a chemical product against the undertakings manufacturing that product, which had participated in an anticompetitive cartel in the context of which they had, inter alia, fixed the prices of the product in question, the Court held that, although the buyers had indeed obtained supplies in the context of contractual relations with different participants in the cartel in question, 'the event giving rise to the alleged loss did not consist in a potential breach of contractual obligations, but in a restriction of the buyer's freedom of contract as a result of that cartel in the sense that that restriction prevented the buyer from being supplied at a price determined by the rules of supply and demand'.[153]

121. Similarly, in the present case, Wikingerhof relies not on a breach of a contract that is binding on Booking.com, but on the fact that the latter company was abusing its dominant position by imposing unfair trading conditions on the former company, including through its general terms that it applies in the context of their relationship.

122. In addition, as the Commission submits, in order to 'establish the lawful or, on the contrary, unlawful nature of the conduct complained of', it does not appear to be 'indispensable' to interpret the contract between the parties to the main proceedings, within the meaning of the judgment in *Brogsitter*, even though the allegedly anticompetitive conduct occurs in the context of their contractual relationship.[154]

123. Admittedly, since the various practices complained of by Wikingerhof against Booking.com[155] take place in the context of their contractual relationship, it will be necessary to determine the precise content of their commitments in order to establish the reality of those practices. I observe, in that respect, that Wikingerhof claims, inter alia, that, when Booking.com displays the prices for its hotel as being more advantageous, there is no valid contractual basis for

149 Which will, however, certainly be the case with regard to Article 6(3) of the Rome II Regulation.

150 See, by analogy, judgments of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraph 28); of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraphs 34 to 56); of 5 July 2018, *flyLAL-Lithuanian Airlines* (C-27/17, EU:C:2018:533, paragraph 51); and of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635, paragraphs 22 à 37). See, to the same effect, Behar-Touchais, M., 'Abus de puissance économique en droit international privé', *Revue internationale de droit économique*, 2010, vol. 1, pp. 37 to 59, especially pp. 41 and 42.

151 Judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335).

152 Admittedly, the undertakings that were victims of the cartel had transferred their claims to the applicant company in the main proceedings, which had not itself concluded a contract with the defendant undertakings. Nonetheless, as a result of that transfer of claims, that company exercised the rights held by the victim against those undertakings (see, to that effect, judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 35)).

153 Judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 43).

154 See, by analogy, Oberlandesgericht München (Higher Regional Court, Munich, Germany), 23 November 2017, WRP 2018, 629, paragraphs 22 and 23.

155 As summarised in point 12 of this Opinion.

that practice. Since the parties disagree on that point,[156] the court will have to interpret Booking.com's general terms and conditions in order to establish their precise wording, which will undeniably constitute a question of contract law, coming within the *lex contractus*.

124. However, that is a simple preliminary issue, which cannot, as such, alter the classification of the claim. Once that preliminary issue has been resolved and the *reality* of the conduct alleged by Wikingerhof against Booking.com has been established, the court will have to address the main question of the *lawfulness* of that conduct, which determines the principle and the extent of the right to compensation.[157]

125. The reference point for establishing whether that conduct is lawful is not the contract or the general terms and the law applicable to it, but, I repeat, the rules of competition law. The main question of whether the practices adopted by Booking.com are such as to incur its liability depends on the criteria of the prohibition on abuse of a dominant position, as provided for in those rules.

126. As the referring court states, and as Wikingerhof and the Commission claimed, the question of whether Booking.com abused a dominant position, within the meaning of the rules of competition law, can be divided into numerous sub-questions, namely, first, what is the definition of the relevant market, second, what are the relative powers of the undertakings on that market – in order to know whether Booking.com holds a dominant position on that market – and, third, what are the effects of the practices alleged against that company on that market – in order to determine, if that is the case, whether Booking.com abuses its dominant position.

127. Those questions are questions relating solely to competition law which must be decided in the light of the national rules referred to in Article 6(3) of the Rome II Regulation.

128. The contract is even less decisive for the purpose of adjudicating on the lawful or unlawful nature of the conduct alleged by Wikingerhof because, as the Commission submits, the contract does not even constitute, in that regard, a *ground of defence* for Booking.com.[158] Unlike the situation of an action for infringement of copyright in which the defendant relies on a licensing agreement, referred to in point 106 of this Opinion, the contested practices, on the assumption that they are unlawful, would not become lawful on the ground that they were covered, in whole or in part, by the terms of the contract or of the general terms and conditions applicable to it, since a contract cannot 'authorise' conduct contrary to competition law.

129. In the light of the foregoing, it is my opinion that an action such as the one brought by Wikingerhof comes within 'matters relating to tort' within the meaning of Article 7(2) of the Brussels I bis Regulation.

156 See footnote 23 of this Opinion.

157 By analogy, in the context of an action for damages for abuse of a dominant position in which a buyer takes issue with his or her supplier for imposing unfair selling prices (see point (a) of the second paragraph of Article 102 TFEU), it may be necessary, in order to establish that that conduct actually occurred, to determine what is said in the contract. Where the parties disagree as to the exact prices specified in the contract – for example because the prices are based on a complex calculation formula, because they take different variables into account, etc. – the clauses in the contract relating to prices may have to be interpreted by the court. Here too, however, it will be a matter of a simple *preliminary issue*, seeking to establish the reality of the conduct complained of, in order to allow the court to resolve the main issue of the legality of the conduct in the light of competition law.

158 In any event, as I pointed out in point 107 of this Opinion, the existence of such a ground of defence is not relevant for the classification of the claim.

130. As Wikingerhof and the Commission have emphasised, that interpretation is consistent with the objective of proximity pursued by Article 7(2) of the Brussels I bis Regulation. In fact, the court with jurisdiction in respect of the tort is best placed to adjudicate on the principal questions raised in such an action, in particular after gathering and assessing the corresponding evidence – regardless of whether they relate to the relevant market, the relative powers on that market or the effects of the contested practices on that market. [159]

131. In addition, that interpretation ensures consistency between the scope *ratione materiae* of Article 7(2) of the Brussels I bis Regulation and that of Article 6(3) of the Rome II Regulation.

132. The interpretation suggested in this Opinion is not called into question by the argument put forward by Booking.com and the Czech Government that an action such as Wikingerhof's comes under 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, on the ground that, in requesting that the alleged anticompetitive conduct be brought to an end, Wikingerhof is in reality seeking to secure an amendment, in its favour, of Booking.com's general terms and conditions and, by doing so, new contractual rights.

133. In fact, since Wikingerhof intends, by its action, not to sever the contractual relationship between it and Booking.com but to ensure that that relationship continues in compliance with competition law, Booking.com will, on the assumption that the action is well founded, inevitably have to adjust its conduct vis-à-vis the applicant in the main proceedings, including the general terms and conditions which it applies in the context of that relationship, to the limits imposed by competition law. In that regard, it is not unusual, to my knowledge, for the termination of an abuse of a dominant position to lead to new rights for the claimant, for example where the abuse consists in a refusal to sell or the fixing of abusive prices. In the former case, bringing the abuse to an end will, in practical terms, mean that the undertaking in a dominant position is forced to contract with the claimant and, in the latter case – simplifying somewhat – lead to a reduction in its prices which is favourable to the claimant.

134. Nor is that interpretation called into question by Booking.com's argument that Wikingerhof's claim has as its objective the partial annulment of the contract between the two companies, since it entails checking whether certain provisions in Booking.com's general terms and conditions are contrary to competition law and therefore null and void.

135. Admittedly, an action for a declaration that a contract is null and void comes under Article 7(1) of the Brussels I bis Regulation. [160] However, as Wikingerhof claimed at the hearing, in answer to a question from the Court, that company does not seek, through its claim, to have its contract with Booking.com declared null and void, on the basis of the rules of contract law relating to the conditions governing the formation of contracts. In that context, the annulment of those provisions of the general terms and conditions in question would constitute at most an indirect consequence of that claim. [161]

136. Nor is that interpretation called into question by Booking.com's argument that Wikingerhof's claim comes under 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, on the ground that the latter 'freely consented', within the meaning of the case-law relating to that provision, to Booking.com's general terms, even on the assumption that Booking.com is in a dominant position.

159 See, by analogy, judgment of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635, paragraph 34 and the case-law cited).

160 See point 41 of this Opinion.

161 See, by analogy, judgment of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraph 36).

137. Booking.com's argument would in my view be well founded if the context were inverted. If Booking.com had brought an action before a court for specific performance of the obligations arising under the general terms, and if Wikingerhof had claimed, as a ground of defence, that it had not 'freely consented' to those general terms, the imposition of which would constitute abuse of a dominant position by Booking.com which is incompatible with competition law, that action would come under 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation.[162] In fact, as I have said, that classification depends on the claim as formulated by the claimant, not on the grounds of defence put forward by the defendant.

138. However, in the present case, Wikingerhof relies, as claimant, on a 'tortious obligation' resulting from the alleged breach of the rules of competition law. In that procedural context, the court seised must, in order to determine its jurisdiction, consider that Wikingerhof's allegations are made out, including the fact that it was compelled to agree to Booking.com's general terms and conditions because of that company's dominant position. Nor can Booking.com alter the classification of the claim of the applicant in the main proceedings by raising, in its defence, the argument that Wikingerhof 'freely consented' to those general terms.

139. Last, the interpretation suggested in this Opinion is not called into question by the judgment in *Apple Sales International and Others*,[163] in which the Court held that an agreement conferring jurisdiction, within the meaning of Article 25 of the Brussels I bis Regulation, in a contract between a distributor and its supplier may apply to an action for damages brought by the distributor against the supplier on the basis of Article 102 TFEU, when the alleged abuse of a dominant position materialises, as in the present case, in their contractual relations.[164]

140. In fact, as I stated in point 89 of this Opinion, an agreement conferring jurisdiction may, depending on its terms, concern all disputes which have arisen or which may arise *in connection with a particular legal relationship*.[165] That 'test' requires neither more nor less than a (sufficiently direct) link between the contract concerned and the claim in question. The legal basis of the action is not decisive in that context. Such an agreement may therefore apply with regard to both claims in 'matters relating to a contract', within the meaning of Article 7(1) of the Brussels I bis Regulation, and claims in 'matters relating to tort', within the meaning of Article 7(2) of that regulation, provided that such a link exists.[166] Consequently, the interpretation according to which a civil action for damages, such as the action brought by Wikingerhof against Booking.com, comes under 'matters relating to tort', is fully compatible with the judgment in *Apple Sales International and Others*.[167]

162 See, to the same effect, Vilà Costa, B., 'How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach', in Basedow, J., Francq, S., and Idot, L., (eds), *International antitrust litigation: Conflict of laws and coordination*, Hart Publishing, Oxford, 2012, especially p. 24.

163 Judgment of 24 October 2018 (C-595/17, EU:C:2018:854).

164 See judgment of 24 October 2018, *Apple Sales International and Others* (C-595/17, EU:C:2018:854, paragraphs 28 and 30).

165 See, in particular, judgment of 24 October 2018, *Apple Sales International and Others* (C-595/17, EU:C:2018:854, paragraph 22 and the case-law cited).

166 See Opinion of Advocate General Wahl in *Apple Sales International and Others* (C-595/17, EU:C:2018:541, points 34, 35 and 71).

167 Judgment of 24 October 2018 (C-595/17, EU:C:2018:854).

V. Conclusion

141. Having regard to all of the foregoing considerations, I suggest that the Court answer the question referred by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a civil action for damages, based on infringement of the rules of competition law, comes under 'matters relating to tort, delict or quasi-delict', within the meaning of that provision, including where the claimant and the defendant are parties to a contract and the alleged anticompetitive acts of which the former complains against the latter materialise in their contractual relations.