Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 9 September 2021 [1]

Case C-242/20

HRVATSKE ŠUME d.o.o. Zagreb, acting as successor in title to HRVATSKE ŠUME javno poduzeće za gospodarenje šumama i šumskim zemljištima u Republici Hrvatskoj p.o., Zagreb,

v

BP EUROPA SE, acting as successor in title to DEUTSCHE BP AG, in turn successor in title to THE BURMAH OIL (Deutschland) GmbH

(Request for a preliminary ruling from the Visoki trgovački sud Republike Hrvatske (Commercial Court of Appeal, Croatia))

(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in civil and commercial matters – Jurisdiction – Regulation (EC) No 44/2001 – Action for restitution based on unjust enrichment – Classification – Article 5(1) and Article 5(3) – Special jurisdiction in 'matters relating to a contract' and in 'matters relating to tort, delict or quasi-delict')

I. Introduction

1. By the present request for a preliminary ruling, the Visoki trgovački sud Republike Hrvatske (Commercial Court of Appeal, Croatia) has referred two questions to the Court with regard to the interpretation of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2] ('the Brussels I Regulation').

2. Those questions have been posed in the context of a dispute between HRVATSKE ŠUME d.o.o., Zagreb, a company established under Croatian law, and BP EUROPA SE, a company established in Hamburg (Germany), concerning a sum of money seized from the bank account of the former company and transferred into the ownership of the latter company in the course of enforcement proceedings. As those proceedings were subsequently invalidated, the appellant in the main proceedings seeks restitution of the sum in question on the basis of unjust enrichment.

3. The dispute in the main proceedings is currently at an early stage, in the context of which the referring court must determine whether the Croatian courts have jurisdiction to rule on the claim for restitution, or whether it must be brought before the German courts, as the courts of the

[1] Original language: French.

[2] Council Regulation of 22 December 2000 (OJ 2001 L 12, p. 1).

Member State where BP EUROPA is domiciled. The answer depends, in particular, on whether such a claim is a matter 'relating to tort, delict or quasi-delict', within the meaning of Article 5(3) of the Brussels I Regulation.

4. This is not the first time the Court has been asked to rule on the classification of an unjust enrichment claim for the purposes of the Brussels I Regulation. To date, however, it has not unequivocally answered the question whether the jurisdictional rule concerning 'matters relating to tort, delict or quasi-delict', laid down in Article 5(3) of that regulation, is applicable to that type of claims. Since, within the scheme of the regulation, that provision is connected with the provision concerning 'matters relating to a contract', set out in Article 5(1) of that regulation, the present case provides the Court with the opportunity to provide an answer on both rules together.

5. In this Opinion, I will explain why claims for restitution based on unjust enrichment, *first*, are not 'matters relating to a contract' within the meaning of Article 5(1) of the Brussels I Regulation, except where they are closely linked to a contractual relationship existing, or deemed to exist, between the parties to the dispute, and, *second*, are not 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of that regulation.

II. The legal framework

A. The Brussels I Regulation

6. Recitals 11 and 12 of the Brussels I Regulation state:

'(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor. …

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

7. Article 2(1) of that regulation provides:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

8. Article 5 of that regulation provides, in paragraphs 1 and 3 thereof:

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

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

…

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

9. The Brussels I Regulation was replaced by Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [3] ('the Brussels Ia Regulation'). However, in accordance with Article 66 of that regulation, it applies only to legal proceedings instituted on or after 10 January 2015. As the main proceedings were instituted on 1 October 2014, the Brussels I Regulation applies to them *ratione temporis*.

B. Croatian law

10. In Croatian law, the rules concerning unjust enrichment are set out in Articles 1111 to 1120 of the zakon o obveznim odnosima (Law on obligations, Narodne novine, br. 35/05, 41/08, 125/11, 78/15 and 29/18).

11. Article 1111 of that law provides:

'1. Where part of the property of a particular person has been transferred in any way to another person, and that transfer has no basis in any legal transaction, decision of a court or other competent body [or] law, the beneficiary shall be required to restore it or – where that is not possible – to compensate for the value of the benefit gained.

2. Transfer of property shall be understood also as benefitting from the performance of an act.

3. The obligation to give restitution of the benefit or its value arises even where the benefit was obtained on a basis which was ineffective or subsequently ceased to exist.'

III. The case in the main proceedings, the questions referred and the procedure before the Court

12. It is apparent from the order for reference that, at a certain time, the Trgovački sud u Zagrebu (Commercial Court, Zagreb, Croatia) made an order, on the application of THE BURMAH OIL (Deutschland) GmbH, enforcing an obligation of FUTURA d.o.o., Zagreb (Croatia), by means of seizure, for the benefit of the former company, of a debt owed to the latter by a third company, namely HRVATSKE ŠUME. [4]

13. HRVATSKE ŠUME brought an extraordinary action before the Vrhovni sud Republike Hrvatske (Supreme Court, Croatia), seeking to have the enforcement measures ordered against it declared invalid. As that action did not have suspensory effect, enforcement took place on 11 March 2003, on which date an amount of 3 792 600.87 kuna (HRK) (about EUR 503 331) was debited from its bank account and transferred to DEUTSCHE BP AG (which, in the meantime, had succeeded to the rights of THE BURMAH OIL (Deutschland)) by way of recovery of the debt in question.

14. In the action brought by HRVATSKE ŠUME, the Vrhovni sud (Supreme Court) held, in a judgment of 21 May 2009, that the enforcement measures taken against that company were invalid.

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

[4] More specifically, the company in question at that point of time was HRVATSKE ŠUME javno poduzeće za gospodarenje šumama i šumskim zemljištima u Republici Hrvatskoj p.o., Zagreb. That company's successor in title is HRVATSKE ŠUME d.o.o., Zagreb. As that change has no bearing on the present case, I will, for the sake of convenience, refer to both companies as HRVATSKE ŠUME, without distinguishing between them.

15. By application of 1 October 2014, HRVATSKE ŠUME brought an action before the Trgovački sud u Zagrebu (Commercial Court, Zagreb) for recovery of sums unduly paid, on the basis of unjust enrichment,[5] against BP EUROPA (which, in the meantime, had succeeded to the rights of DEUTSCHE BP). In that action, the appellant in the main proceedings submitted, essentially, that the judgment of the Vrhovni sud (Supreme Court) of 21 May 2009 had removed the legal basis on which the seized debt had been transferred to DEUTSCHE BP, that that company had therefore been unjustly enriched, and that it was therefore entitled to restitution from BP EUROPA of the amount in question, together with statutory interest.

16. BP EUROPA defended that action, submitting that the Croatian courts had no jurisdiction to hear it. By order of 20 March 2019, the Trgovački sud u Zagrebu (Commercial Court, Zagreb) dismissed HRVATSKE ŠUME's action on that ground. In essence, that court held that, in the absence of any rule of special jurisdiction, in the Brussels Ia Regulation, concerning matters of unjust enrichment, it is only the general rule in Article 4(1) of that regulation, under which the courts of the Member State in which the defendant is domiciled have jurisdiction, that is applicable. The appellant in the main proceedings should therefore have brought its action in the German courts.

17. HRVATSKE ŠUME brought an appeal against that order before the Visoki trgovački sud Republike Hrvatske (Commercial Court of Appeal). That court observes that the Trgovački sud u Zagrebu (Commercial Court, Zagreb) was mistaken in referring to the Brussels Ia Regulation, as the Brussels I Regulation applies *ratione temporis* to the action brought by the appellant in the main proceedings.[6] It also raises the question of whether the Croatian courts might have jurisdiction to hear the action under Article 5(3) or Article 22(5) of the Brussels I Regulation. In that regard, it wishes to establish, *first*, whether an action for recovery of sums unduly paid based on unjust enrichment is a matter 'relating to tort, delict or quasi-delict' within the meaning of the former provision, and *second*, whether the action in question is 'concerned with the enforcement of judgments' within the meaning of the latter provision, bearing in mind that the alleged enrichment arose in connection with enforcement proceedings.

18. In those circumstances, the Visoki trgovački sud (Commercial Court of Appeal) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do actions for recovery of sums unduly paid by way of unjust enrichment fall within the scope of the ground of jurisdiction established in [the Brussels I Regulation] in respect of "quasi-delicts" since Article 5(3) thereof provides inter alia: "A person domiciled in a Member State may, in another Member State, be sued … in matters relating to … quasi-delict, in the courts for the place where the harmful event occurred or may occur"?

[5] The referring court states that, under the rules of Croatian law concerning enforcement proceedings (see, in particular, Article 58(5) of the Ovršni zakon (Law on enforcement, *Narodne novine*, br. 57/96, 29/99, 42/00, 173/03, 194/03, 151/04, 88/05, 121/05, 67/08, 139/10, 154/11 and 70/12)), where an obligation has been enforced and the enforcement measures are subsequently declared invalid, a claim for restitution of the property unduly recovered may be made within the same enforcement proceedings. However, any such claim must be made at the latest within a year of those proceedings coming to an end. In the present case, the judgment of the Vrhovni sud (Supreme Court) was given six years after execution of the enforcement measure at issue. HRVATSKE ŠUME was therefore obliged to bring its action for restitution in separate proceedings, rather than in the initial enforcement proceedings.

[6] See point 9 of this Opinion.

(2) Do civil proceedings brought as a result of a time limit within which sums unduly paid in enforcement proceedings may be recovered in the context of the same judicial enforcement proceedings fall within the scope of the exclusive jurisdiction under Article 22(5) of [the Brussels I Regulation] which provides that in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced are to have exclusive jurisdiction, regardless of domicile?'

19. The request for a preliminary ruling, which is dated 6 May 2020, was received at the Court on 8 June 2020. The Croatian and Czech Governments and the European Commission submitted written observations to the Court. No hearing was held in this case.

IV. Analysis

20. The two questions posed by the referring court relate to the jurisdiction of the courts of the Member States of the European Union, under the Brussels I Regulation,[7] to hear an action based on unjust enrichment. As requested by the Court, this Opinion will focus on the first of those questions.

21. As a preliminary remark, it must be borne in mind that Article 2(1) of the regulation provides, as a *general rule*, that the courts of the Member State where the defendant is domiciled are to have jurisdiction. In the present case, it is common ground that BP EUROPA is located, for the purpose of applying that regulation, in Germany.[8] That provision therefore assigns jurisdiction to the German courts.

22. However, the Brussels I Regulation also lays down rules which, in certain situations, enable the applicant to sue the defendant in another Member State.[9] In particular, it contains *rules of special jurisdiction*, in Article 5, relating to different 'matters', under which the applicant may bring the action before one or more other courts.

23. Such rules are laid down, in particular, for 'matters relating to a contract' and 'matters relating to tort, delict or quasi-delict'. For actions falling within the first category, Article 5(1) of the Brussels I Regulation enables the applicant to bring proceedings in the courts for 'the place of performance of the obligation in question'. As to actions falling within the second category, Article 5(3) of that regulation provides that those may be brought in the courts for 'the place where the harmful event occurred or may occur'.

24. Whether those jurisdictional options are available to an applicant depends on the classification of the action he or she is bringing – which is precisely the issue raised by the referring court. That court asks, essentially, whether an action for restitution based on unjust enrichment, such as that brought by HRVATSKE ŠUME is – in the absence of any specific rule

7 It is not in dispute that HRVATSKE ŠUME's action is governed by the Brussels I Regulation. *First of all*, the action falls within the substantive scope of that application, since, first, it arises in the context of a cross-border dispute and, second, it falls (a priori) within the scope of 'civil and commercial matters', within the meaning of Article 1(1) of that regulation. *Next*, the action falls within the personal scope of that regulation, given that the jurisdictional rules it lays down apply, in principle, where the defendant is domiciled in a Member State (see recital 8 of the regulation), and BP EUROPA is domiciled in Germany (see point 21 of this Opinion). *Lastly*, as has already been noted in point 9 of this Opinion, the action falls within the temporal scope of the regulation.

8 Article 60(1) of the Brussels I Regulation provides that, for the purposes of that regulation, a company is domiciled, inter alia, at the place where it has its statutory seat.

9 See, to that effect, Article 3(1) of the Brussels I Regulation.

in the Brussels I Regulation – a matter 'relating to tort, delict or quasi-delict' under Article 5(3) of that regulation. Ultimately, the issue is whether or not the Croatian court before which that company has brought its action has jurisdiction under that provision.

25. As I observed in the introduction to this Opinion, it would not be entirely true to say that the issue of classification of claims based on unjust enrichment, for the purposes of the Brussels I Regulation, has not previously been considered in the case-law of the Court.[10] In fact, the Court has heard a number of cases relating to that issue, in connection with various different provisions of the regulation.[11] Nevertheless, it has not yet ruled, unequivocally, on the question raised in the present case.[12]

26. The referring court is inclined to the view, shared by the Czech Government and the Commission, that an action based on unjust enrichment falls within Article 5(3) of the Brussels I Regulation. Like the Croatian Government, I do not share that view. Against that background, I should point out that, while the first question referred relates solely to Article 5(3), that provision – as I shall go on to explain in more detail – is schematically connected to Article 5(1) of the regulation. It is not possible to give a ruling on the former without first determining that the latter is inapplicable. I will therefore consider them in turn (in Section B). Before doing so, I will return briefly to the legal doctrine of unjust enrichment, as it emerges from the national legal systems of the Member States (in Section A).

A. Outline of unjust enrichment

27. To my knowledge, the legal doctrine of unjust enrichment exists in one form or another in the national legal systems of all the Member States (also being called 'enrichment without cause', 'unjustified enrichment' or 'wrongful enrichment').[13] Under that doctrine, a person who receives

[10] In this Opinion I will refer to cases relating to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels on 27 September 1968 (OJ 1978 L 304, p. 36) ('the Brussels Convention'), the Brussels I Regulation (which replaced the convention) and the Brussels Ia Regulation (which recast the first regulation), without distinguishing between those instruments. In accordance with the settled case-law of the Court, its rulings as to the interpretation of the provisions of the Brussels Convention and the Brussels I Regulation apply equally to the provisions of the Brussels Ia Regulation (and vice versa), whenever those provisions are 'equivalent'. That is the case with Article 5(1) and (3) of the first two instruments, on the one hand, and Article 7(1) and (2) of the third, on the other (see, in particular, judgment of 24 November 2020, *Wikingerhof* (C-59/19, ('the judgment in *Wikingerhof*'), EU:C:2020:950, paragraph 20 and the case-law cited).

[11] See judgments of 27 September 1988, *Kalfelis* (189/87, ('the judgment in *Kalfelis*'), EU:C:1988:459); of 28 March 1995, *Kleinwort Benson* (C-346/93, EU:C:1995:85); of 11 April 2013, *Sapir and Others* (C-645/11, EU:C:2013:228); of 20 April 2016, *Profit Investment SIM* (C-366/13, EU:C:2016:282); of 28 July 2016, *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:607); and of 12 October 2016, *Kostanjevec* (C-185/15, EU:C:2016:763).

[12] The question was posed in the cases which gave rise to the judgments of 28 March 1995, *Kleinwort Benson* (C-346/93, EU:C:1995:85), and of 28 July 2016, *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:607). However, in the first of those judgments, the Court held that it lacked jurisdiction, whereas in the second, it held that the question did not need to be answered, because the request before it did not relate to the scope of the Brussels I Regulation. In contrast, Advocate General Wahl gave a good deal of consideration to the question in his Opinion in *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:225, points 48 to 75), and his remarks have informed my Opinion in this case. Lastly, although it does not give an unequivocal answer to the question, some indications are to be found in that regard in the judgment in *Kalfelis* (see points 73 and 74 of this Opinion).

[13] For a comparative analysis, see Von Bar, C. et al. (Eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) – Interim Outline Edition; prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group)*, Sellier, European Law Publishers, Munich, 2008, Volume IV, Book VII ('Unjustified enrichment'), p. 3843 et seq., especially pp. 3850 to 3874. Unjust enrichment is also part of substantive EU law (see, in particular, judgments of 18 December 2014, *Somvao* (C-599/13, EU:C:2014:2462, paragraphs 35 and 36), and of 16 November 2006, *Masdar (UK)* v *Commission* (T-333/03, EU:T:2006:348, paragraph 94 and the case-law cited).

wrongful enrichment to the detriment of another person is obliged to restore it to that person.[14] The doctrine is generally considered to be an expression of the principle of equity under which a person may not enrich him or herself at another's expense.[15]

28. The contours of that doctrine vary from one Member State to another. In particular, under the national law of some Member States, such as Hungary and Poland, unjust enrichment is broadly conceived and corresponds to a single action, historically known as an action '*de in rem verso*'. Under the national law of other Member States, such as Denmark, Spain, France or Austria, the doctrine is compartmentalised into different variants and corresponding actions, with recovery of sums unduly paid (*condictio indebiti*), in particular, being distinguished from other forms of unjust enrichment. The legal categorisation of that doctrine and any variants also differs. For example, in French law, unjust enrichment (and recovery of sums unduly paid) are 'quasi-contractual' matters – a concept unknown to the legal systems of some other Member States, such as Germany – while in the common law, it belongs to a recent branch of the law, known as the law of restitution.[16]

29. That having been said, these nuances are not decisive in terms of the application of the rules of EU international private law. In particular, it does not seem to me to be necessary to distinguish repayment of sums unduly received from unjust enrichment, as the second of those concepts – taken in its broad sense – encompasses the first. Furthermore, the exact classification of unjust enrichment in the national law of each Member State is not as important as the fact that it is generally regarded as a sui generis *category*, not forming part, in particular, of the law of contract or the rules on civil liability.

30. In the national legal systems of the Member States, unjust enrichment is an *autonomous source of obligations*. More specifically, receiving such enrichment gives rise to an *obligation to give restitution*. The party enriched is obliged to restore to the party impoverished the property (or, where applicable, its monetary equivalent) which has been unjustly received to the detriment of that party. The law thus strives to remedy an unfair situation by requiring the *status quo ante* to be restored. The applicant invokes that obligation through an action for unjust enrichment.[17] In the remainder of this Opinion, I will therefore refer, for the sake of convenience, to action(s) for restitution or claim(s) for restitution based on unjust enrichment.

31. Under the national law of those various Member States, there are generally *four requirements* which must be met before an action can be brought: (1) enrichment of the defendant, (2) impoverishment of the applicant, (3) a correlation between the enrichment and the impoverishment, and (4) a lack of any 'justification' (in other words, any legal basis) for (1) to (3).[18]

[14] For a similar definition, see Article VII.-1:101, paragraph 1 of the DCFR.

[15] See, in particular, Opinion of Advocate General Mazák in *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:342, point 47). As the referring court notes, unjust enrichment can be traced back to the *condictiones* (*condictio indebti*, *condictio sine causa*, etc.) of Roman law (see, in particular, Romani, A.-M., 'Enrichissement injustifié', Répertoire de droit civil, Dalloz, February 2018, § 21).

[16] See, in particular, Von Bar, C. et al., op. cit., pp. 3860 to 3865.

[17] See judgment of 16 December 2008, *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:726, paragraphs 44 and 47), and the Opinion of Advocate General Wahl in *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:225, point 61).

[18] Enrichment may have a 'justification' that derives from a contract, a unilateral act, a legal obligation, a judicial decision etc. (see, in particular, judgment of 16 December 2008, *Masdar (UK) v Commission* (C-47/07 P, EU:C:2008:726, paragraph 46)). Furthermore, it is generally only possible to bring an action for restitution based on unjust enrichment as a subsidiary claim, or in other words where the party impoverished has no other legal means of obtaining what he or she is entitled to (see, in particular, Opinion of Advocate General Mazák in *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:342, points 47 and 48)).

32. HRVATSKE ŠUME submits that those requirements, as they exist under Croatian law, are met in the present case. As the referring court states, the seizure of several million kuna from the bank account of the appellant in the main proceedings, and the transfer of that sum into the ownership of THE BURMAH OIL (Deutschland) resulted in the enrichment of the latter company with a corresponding impoverishment of the former. While the transfer of value originally had a 'justification' derived from the enforcement proceedings brought by THE BURMAH OIL (Deutschland) against FUTURA, and more specifically the enforcement measures ordered by the Trgovački sud u Zagrebu (Commercial Court, Zagreb) in respect of HRVATSKE ŠUME, the Vrhovni sud Republike Hrvatske (Supreme Court) held those measures to be invalid and, in so doing, retroactively removed the 'justification'.[19]

B. The classification of actions for restitution based on unjust enrichment in view of Article 5(1) and Article 5(3) of the Brussels I Regulation

33. Having given an outline of unjust enrichment, I will now consider the *classification* of claims made on that basis with a view to Article 5(1) and Article 5(3) of the Brussels I Regulation. I should first make some observations concerning the approach to that issue.

34. In the absence of definitions in the Brussels I Regulation, the Court has repeatedly held that the 'matters relating to a contract' referred to in the first of those provisions, and the 'matters relating to tort, delict or quasi-delict' referred to in the second, constitute autonomous concepts of EU law, to be interpreted principally[20] 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. Thus, whether a claim falls within one or the other category does not depend on the approach taken in the national law of the court before which the matter is brought (the '*lex fori*'), or on the classification under the applicable law (the '*lex causae*').[21]

35. As regards, first of all, the *scheme* of the Brussels I Regulation, the Court has repeatedly held that it is based on the general rule, set out in Article 2(1) of that regulation, that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, whereas the special jurisdictional rules contained, in particular, in Article 5 thereof, constitute derogations from that rule which, as such, must be interpreted restrictively.[22]

36. As regards, second, the *purpose* of the Brussels I Regulation, it is apparent from recital 12 thereof that the rules of special jurisdiction it lays down in Article 5(1) and Article 5(3) of that regulation pursue objectives relating, inter alia,[23] to proximity and the sound administration of justice. In that regard, the Court has repeatedly held that the option given to the applicant by

19 See points 12 to 15 of this Opinion.

20 The general principles identified in the national legal systems are also important (see footnote 50 to this Opinion).

21 See, in particular, judgment of 22 March 1983, *Peters Bauunternehmung* (34/82, EU:C:1983:87, paragraphs 9 and 10); judgment in *Kalfelis* (paragraphs 15 and 16); and judgment in *Wikingerhof* (paragraph 25).

22 See, in particular, judgment in *Kalfelis* (paragraph 19); judgment of 27 October 1998, *Réunion européenne and Others* (C-51/97, EU:C:1998:509, paragraph 16); and judgment in *Wikingerhof* (paragraph 26).

23 The rules of jurisdiction laid down in the Brussels I Regulation aim, broadly, to ensure legal certainty and, in that context, to strengthen the legal protection of persons established in the territory of the Member States. Those rules must, for that reason, be highly predictable: the applicant must be easily able to identify the court in which he or she may sue, and the courts in which the action may be brought must be reasonably foreseeable to a normally well-informed defendant (see recital 11 of the regulation and judgment of 17 June 2021, *Mittelbayerischer Verlag* (C-800/19, EU:C:2021:489, paragraph 25 and the case-law cited)).

those provisions was introduced in consideration of the existence, in the 'matters' to which they refer, of a particularly close connecting factor between an action and the court which may be called upon to hear it, in the interest of the efficacious conduct of the proceedings. [24]

37. In the light of those general considerations, the Court has gradually defined, in its case-law, 'matters relating to a contract' and 'matters relating to tort'.

38. *First*, it is apparent from a consistent line of case-law of the Court, beginning with the judgment in *Handte*, [25] that the application of Article 5(1) of the Brussels I Regulation 'presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based'. [26] In other words, the 'matters relating to a contract' referred to in that provision include any claim based on such an obligation. [27]

39. *Second*, under an equally consistent line of case-law, beginning with the judgment in *Kalfelis* and recently clarified by the judgment in *Wikingerhof*, 'matters relating to tort, delict or quasi-delict', within the meaning of Article 5(3) of the Brussels I Regulation, include 'all actions which seek to establish the liability of a defendant and do not concern matters related to a contract', within the meaning of Article 5(1) of that regulation, or in other words are not based on 'a legal obligation freely consented to by one person towards another'. [28]

40. It follows from a joint reading of those definitions that – as I stated in my Opinion in *Wikingerhof*, [29] and as the Court held in its judgment in that case [30] – that whether a claim is to be categorised as a matter 'relating to a contract', within the meaning of Article 5(1) of the Brussels I Regulation, or as a matter 'relating to tort, delict or quasi-delict', within the meaning of Article 5(3) of that regulation, *depends on the obligation on which that claim is based*.

41. Essentially, the classification 'test' consists in *identifying the obligation* relied on by the applicant as against the defendant, and then *determining the nature of that obligation* – which depends, in turn, on the factual event or legal act which is the *source of the obligation*. A point I will return to is that if the obligation in question arises out of a contract or other form of voluntary commitment made by one person to another, that obligation, and therefore the claim, will be a matter 'relating to a contract', within the meaning of Article 5(1) of the Brussels I Regulation. In contrast, if the obligation in question arises from a 'harmful event', the obligation and the claim will be a matter 'relating to tort, delict or quasi-delict', within the meaning of Article 5(3) of that regulation. [31] Lastly, if the obligation has a different source, neither provision can apply.

[24] See, 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 the judgment in *Wikingerhof* (paragraphs 28 and 37).

[25] Judgment of 17 June 1992 (C-26/91, EU:C:1992:268, paragraph 15).

[26] Judgments of 20 January 2005, *Engler* (C-27/02, EU:C:2005:33, paragraphs 50 and 51); of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 39); and of 11 November 2020, *Ellmes Property Services* (C-433/19, EU:C:2020:900, paragraph 37).

[27] See my Opinion in *Wikingerhof* (C-59/19, ('my Opinion in *Wikingerhof*'), EU:C:2020:688, point 36).

[28] See, in particular, judgment in *Kalfelis* (paragraph 18); judgment of 1 October 2002, *Henkel* (C-167/00, EU:C:2002:555, paragraph 36); and judgment in *Wikingerhof* (paragraph 23).

[29] See, in particular, points 6, 39, 46, 49, 90 and 118.

[30] See judgment in *Wikingerhof* (paragraph 31).

[31] See my Opinion in *Wikingerhof* (point 49, and the material referred to). For a recent application of this 'test', see judgment of 25 March 2021, *Obala i lučice* (C-307/19, EU:C:2021:236, paragraphs 88 and 89).

42. Against that background, Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)[32] ('the Rome I Regulation'), and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)[33] ('the Rome II Regulation'), contain indications which are useful in determining the nature of a given obligation, and thus ruling on the classification of a claim based on that obligation. While those regulations do not have exactly the same scope as, respectively, Article 5(1) and Article 5(3) of the Brussels I Regulation,[34] they are nevertheless the counterparts to those provisions, and those three regulations must be interpreted, as far as possible, in a coherent manner.[35]

43. Having made those observations, I will explain in the following sections why claims for restitution based on unjust enrichment are not, in principle, 'matters relating to a contract', except in certain cases (Section 1), and why they are not 'matters relating to tort, delict or quasi-delict' (Section 2).

1. Claims for restitution based on unjust enrichment are not, in principle, 'matters relating to a contract'

44. As I explained in point 38 of this Opinion, 'matters relating to a contract', within the meaning of Article 5(1) of the Brussels I Regulation, encompass all claims based on a 'legal obligation freely consented to', or in other words on a 'contractual obligation', in the autonomous sense in which that term is understood in the international private law of the European Union.[36] Such an obligation arises from a contract or other form of voluntary commitment made by one person to another.[37]

45. In a claim based on unjust enrichment, the restitutionary obligation relied on by the applicant does not as a general rule arise from any such voluntary commitment made to him or her by the defendant. On the contrary, that obligation arises independently of the intentions of the party enriched. While, in the present case, the predecessor of BP EUROPA brought the enforcement proceedings that led to its enrichment, its intentions went no further than that. It did not intend to make any commitment to HRVATSKE ŠUME. In reality, the obligation to give restitution arises directly from the law, which – for reasons of equity – attaches legal consequences to the lack of any 'justification' for that enrichment.

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

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

34 See points 77 and 78 of this Opinion.

35 See recital 7 of the Rome I and Rome II Regulations, as well as my Opinion in *Wikingerhof* (point 5).

36 The Court has applied that definition to the Rome I Regulation (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 I would emphasise that any obligation, including a 'contractual obligation', ultimately arises from the law. Nevertheless, it is a question of whether, in accordance with the law, the obligation for the debtor arises *by reason of a contract or other voluntary commitment made by that person*, or independently of any such commitment (see, to that effect, judgment in *Wikingerhof* (paragraphs 33 and 34)). For the various types of voluntary commitment recognised in the case-law of the Court, see my Opinion in *Wikingerhof* (point 37).

46. Consequently, an obligation arising from unjust enrichment does not, as a general rule, constitute a 'legal obligation freely consented to' for the purposes of the case-law on Article 5(1) of the Brussels I Regulation. Claims for restitution based on unjust enrichment are thus, in principle, not 'matters relating to a contract' referred to in that provision. [38]

47. This interpretation is confirmed on reading the Rome II Regulation. It is apparent from Article 2(1) of that regulation that the restitutionary obligation arising out of unjust enrichment is regarded as a 'non-contractual obligation' falling within that regulation, [39] and subject to specific conflict of laws rules contained in Article 10 thereof.

48. *That being so*, the above interpretation needs to be tempered. As the Commission rightly notes, claims for restitution based on unjust enrichment may arise in different contexts. In particular, while such a claim may arise between persons having no other legal relationship, as is a priori the case with HRVATSKE ŠUME and BP EUROPA, [40] it may also be closely linked to a contractual relationship existing, or deemed to exist, between the parties to the dispute.

49. As the Court held in its judgment in *Profit Investment SIM*, [41] a claim for restitution relating to benefits provided under an invalid contract (void, lapsed, etc.), is a matter 'relating to a contract' within the meaning of Article 5(1) of the Brussels I Regulation. The same interpretation must apply, in my view, to claims for restitution which follow the termination of a contract for non-performance, or the making of an undue payment under a contract, for example where a contractual debtor has paid more than was actually due.

50. While such claims for restitution are sometimes (but not always) based, in terms of substantive law, on the rules of unjust enrichment, [42] they have to be regarded, for the purpose of applying the jurisdictional rules of the Brussels I Regulation, as arising out of a contract. In essence, the applicant is relying on a 'contractual obligation' which, in his or her view, is invalid or has not been performed by the defendant, or which he or she considers to have been 'over-performed', as the basis of his or her right to restitution, which is the remedy claimed. Such a claim is thus based, essentially, on 'the contractual obligation' in question, the restitutionary obligation relied on by the applicant not having any autonomous existence. [43]

38 See, in a similar vein, Minois, M., *Recherche sur la qualification en droit international privé des obligations*, LGDJ, Paris, 2020, p. 263. I am well aware that, in its judgment of 14 May 2009, *Ilsinger* (C-180/06, EU:C:2009:303, paragraph 57), the Court indicated, *obiter*, that 'pre-contractual or quasi contractual' claims fell systematically within Article 5(1) of the Brussels I Regulation. In my view however, this was an unfortunate choice of words. Besides the fact that has been established, since the judgment of 17 September 2002, *Tacconi* (C-334/00, EU:C:2002:499), that pre-contractual liability does not fall under Article 5(1), but under Article 5(3), of that regulation (see footnote 80 to this Opinion), the category of 'quasi contracts', which, in some national legal systems, includes unjust enrichment (see point 28 of this Opinion) cannot, as a general rule, fall under Article 5(1), for the reasons I have just given.

39 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). See also, by analogy, judgment of 16 December 2008, *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:726, paragraph 48).

40 The order for reference does not contain any information as to any contractual relationships which may form part of the background to the main proceedings. It is apparent from that order that, *first*, THE BURMAH OIL (Deutschland) was a creditor of FUTURA. The debt in question may have arisen out of a contract between those two companies. *Second*, FUTURA claimed to be a creditor of HRVATSKE ŠUME. There may therefore have been a contract between those two companies as well. In contrast, on the face of it there was no contractual relationship between THE BURMAH OIL (Deutschland) and HRVATSKE ŠUME (see point 12 of this Opinion).

41 Judgment of 20 April 2016 (C-366/13, EU:C:2016:282, paragraphs 55 and 58).

42 Where a contract under which services have been provided is invalidated, the enrichment of the beneficiary of those services loses its 'justification' (see judgment of 16 December 2008, *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:726, paragraph 55)). Similarly, an excessive payment made by a contractual debtor does not have a 'justification', precisely because it goes beyond what was justified in law. Nonetheless, in certain systems of law, such as the French and Hungarian systems, restitution following the extinguishment of a contract is the subject of specific contractual rules (see, in particular, Von Bar, C. et al., op. cit., p. 3860).

43 See, by analogy, my Opinion in *Wikingerhof* (point 99). It is also possible to consider that, in that context, the restitutionary obligation is imposed by law on account of the contract between, or purportedly between, the parties (see footnote 37 to this Opinion).

51. Furthermore, it is concordant with the objectives of proximity and sound administration of justice, pursued through Article 5(1) of the Brussels I Regulation, for the court with jurisdiction in respect of the contract to be able to rule on the consequences of its invalidity, non-performance or 'over-performance', and especially on the restitutionary consequences arising.[44] In particular, jurisdiction should not depend on whether, in response to the defendant's non-performance of a contractual obligation, the applicant is seeking damages or termination of the contract with restitution of the benefits exchanged.[45] Furthermore, in order to adjudicate on such a claim for restitution, the court before which the matter is brought must, essentially, determine issues of a contractual nature (which, depending on the circumstances, might relate to the content of the contractual obligation in question, its validity, or the manner in which it was to be performed by the defendant) through an assessment of the corresponding evidence. There is thus a particularly close connecting factor between the claim and the court for the 'place of performance of the obligation in question', within the meaning of that provision.[46]

52. Furthermore, *first*, pursuant to Article 12(1)(c) and (e) of the Rome I Regulation, respectively, the law applicable to a contract (called the *lex contractus*) governs the consequences of non-performance of contractual obligations and the consequences of nullity of the contract. The EU legislature has thus taken the position that claims for restitution following the termination or invalidity of a contract – as well as the obligations underlying such claims – are 'contractual' in nature. *Second*, it is apparent from Article 10(1) of the Rome II Regulation that, where a non-contractual obligation arising out of unjust enrichment concerns a pre-existing contractual relationship between the parties (typically where a contractual debtor pays a greater sum than is in fact due), the law applicable to that obligation is the law that governs the contractual relationship, otherwise known as the *lex contractus*. Consistency between those two regulations and the Brussels I Regulation is thus ensured, so far as possible.

2. Claims for restitution based on unjust enrichment are not 'matters relating to tort, delict or quasi-delict'

53. Turning now to Article 5(3) of the Brussels I Regulation, I reiterate that two cumulative conditions have been identified in the case-law arising out of the judgment in *Kalfelis*, referred to in point 39 of this Opinion: a claim is a matter 'relating to tort, delict or quasi-delict' within the meaning of that provision in so far as, *first*, it 'seek[s] to establish the liability of a defendant' and, *second*, it 'do[es] not concern matters relating to a contract' within the meaning of Article 5(1) of that regulation.

[44] See, to that effect, Opinion of Advocate General Bot in *Profit Investment SIM* (C-366/13, EU:C:2015:274, points 69 to 82); Briggs, A., *Civil Jurisdiction and Judgments*, Informa Law, Oxon, 2009, 5th edition, pp. 225 to 227; Magnus, U., and Mankowski, P., *Brussels Ibis Regulation – Commentary*, Otto Schmidt, Cologne, 2016, pp. 174 to 176; 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, p. 111; Grušić, U., 'Unjust enrichment and the Brussels I Regulation', *International & Comparative Law Quarterly*, 2019, vol. 68, No 4, pp. 837 to 868, esp. pp. 849 to 861, and Minois, M., op. cit., p. 322.

[45] As a general rule, the classification must not depend on the remedy claimed by the applicant (see footnote 82 to this Opinion).

[46] See point 36 of this Opinion. I would emphasise that since, in my view, the 'obligation in question' within the meaning of Article 5(1) of the Brussels I Regulation is, in relation to such claims for restitution, the contractual obligation which is presented in the claim as invalid, as not having been performed by the defendant, or as having been 'over-performed' by the applicant (see point 50 of this Opinion), the court with jurisdiction is the court for the place of performance of that obligation (see, to that effect, Opinion of Advocate General Kokott in *Kostanjevec* (C-185/15, EU:C:2016:397, point 64)).

54. It is apparent from the previous section of this Opinion that claims for restitution based on unjust enrichment do not concern 'matters relating to a contract' where they are based not on a 'legal obligation freely consented to', but on a 'non-contractual obligation', except where they are closely linked to a prior contractual relationship existing, or deemed to exist, between the parties to the dispute.

55. It remains therefore to be considered whether such a claim 'seeks to establish the liability of a defendant' in the sense required by the *Kalfelis* case-law.

56. As I have already stated, I share the view of the Croatian Government that it does not. [47]

57. *In the first place*, Article 5(3) of Regulation No 44/2001 confers jurisdiction in 'matters relating to tort, delict or quasi-delict' on the courts for 'the place where the harmful event occurred or may occur'. It must therefore be possible to identify a 'harmful event', if that provision is to apply. This is thus a prerequisite of any claim 'relating to tort, delict or quasi-delict'.

58. Beginning with the judgment in *Bier*, [48] the Court has divided the concept of a 'harmful event', within the meaning of Article 5(3) of the Brussels I Regulation, into two separate concepts: the 'harm' (or 'damage') and 'the event giving rise to the damage'. [49] In that context, the Court has had regard to the components of non-contractual liability, as they emerge from the general principles stemming from the national legal systems of the Member States. [50] It has thus held that 'liability in tort, delict or quasi-delict can only arise provided that a causal connexion can be established between the damage and the event in which that damage originates'. [51]

59. Accordingly, a claim 'seeks to establish the liability of a defendant', in the sense required by the judgment in *Kalfelis*, if it is based on a 'harmful event' which can be imputed to the defendant and has caused harm to the applicant. [52] In accordance with the case-law of the Court and the

[47] See also Opinion of Advocate General Wahl in Siemens *Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:225, point 58), and my Opinion in *Wikingerhof* (footnote 66). For the contrary view, see Opinion of Advocate General Darmon in *Shearson Lehman Hutton* (C-89/91, not published, EU:C:1992:410, point 102).

[48] Judgment of 30 November 1976 (21/76, EU:C:1976:166).

[49] See judgment of 30 November 1976, *Bier* (21/76, EU:C:1976:166, paragraphs 13 to 15).

[50] See judgment of 30 November 1976, *Bier* (21/76, EU:C:1976:166, paragraph 17). In that regard, the Court has sometimes observed that the concepts employed by the Brussels I Regulation are to be interpreted by reference, first, to the objectives and scheme of that regulation and, second, *to the general principles which stem from the corpus of the national legal systems* (see, in particular, judgment of 25 March 2021, *Obala i lučice* (C-307/19, EU:C:2021:236, paragraph 60 and the case-law cited)). The categories appearing in the Brussels I Regulation incorporate concepts of civil, commercial and procedural law (such as 'contract' or 'tort'), the meaning of which cannot be determined from the objectives and scheme of the regulation alone. In order to arrive at an autonomous definition of those concepts, the Court draws, explicitly or implicitly (and amongst other things), on those same general principles, and is thus able to identify the 'kernel' of each one. In borderline cases, the classification which conforms best to the objectives and scheme of the regulation is to be preferred (see, by analogy, my Opinion in *Verein für Konsumenteninformation* (C-272/18, EU:C:2019:679, paragraph 47)).

[51] Judgment of 30 November 1976, *Bier* (21/76, EU:C:1976:166, paragraph 16). See also judgments of 16 July 2009, *Zuid-Chemie* (C-189/08, EU:C:2009:475, paragraph 28); of 18 July 2013, *ÖFAB* (C-147/12, EU:C:2013:490, paragraph 34), and of 21 April 2016, *Austro-Mechana* (C-572/14, EU:C:2016:286, paragraph 41).

[52] See judgment of 21 April 2016, *Austro-Mechana* (C-572/14, EU:C:2016:286, paragraphs 39 and 40).

general principles referred to in the preceding point of this Opinion, such a 'harmful event' is an unlawful event, or in other words an act or omission which is contrary to a duty or prohibition imposed by the law on everybody, and which has caused damage to another.[53]

60. The referring court nevertheless raises the question of whether the distinction between 'delict' and 'quasi-delict' that is drawn in Article 5(3) of the Brussels I Regulation, in several language versions, calls for a broader interpretation of the scope of that provision. In that regard, it is inclined to the view that 'quasi-delict' might – unlike 'delict' – extend to legal events other than 'harmful events'.

61. In my opinion, it does not. In its case-law on Article 5(3) of the Brussels I Regulation, the Court has never distinguished 'quasi-delict' from 'delict', and rightly so. Besides the fact that the distinction is not made in all language versions of the regulation,[54] the presence of the term 'quasi-delict' in some versions is not intended to widen the scope of that provision. In reality, it has been borrowed from French law, which has the particular feature that civil liability deriving from voluntary acts (delicts) is separated from civil liability arising from harmful events caused by carelessness or negligence (quasi-delicts).[55] In summary, that term simply indicates, in the versions concerned, that the provision covers 'harmful events' regardless of whether they are brought about intentionally or through negligence.[56] 'Delict' and 'quasi-delict' are two subcategories of such 'events'. Furthermore, as the referring court itself observes, if the concept of 'quasi-delict' encompassed other types of legal event, Article 5(3) would not provide any test of jurisdiction for the associated claims.

62. It follows from the preceding considerations that a claim 'seeks to establish the liability of a defendant', within the meaning of the judgment in *Kalfelis*, and therefore concerns a matter 'relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of the Brussels I Regulation, where it is based on a non-contractual obligation which, as I have explained in point 41 of this Opinion, originates in a 'harmful event' (a 'delict' or 'quasi-delict'), as defined in point 59 of this Opinion.[57] In contrast, a claim based on a non-contractual obligation originating in a legal event other than a 'harmful event' does not fall within that provision. In summary, Article 5(3) of the Brussels I Regulation does not cover all non-contractual obligations, but only a sub-category of them, which I would refer to as 'tortious, delictual or quasi-delictual obligations'.

[53] See, to that effect, judgments of 17 September 2002, *Tacconi* (C-334/00, EU:C:2002:499, paragraphs 25 and 27); of 1 October 2002, *Henkel* (C-167/00, EU:C:2002:555, paragraphs 41 and 42); of 18 July 2013, *ÖFAB* (C-147/12, EU:C:2013:490, paragraphs 35 to 38); of 21 April 2016, *Austro-Mechana* (C-572/14, EU:C:2016:286, paragraph 50); and the judgment in *Wikingherhof* (paragraphs 33, 34 and 36). The concept of an unlawful event is found in various language versions of the Brussels I Regulation (see, in particular, the Italian-language version ('in materia di *illeciti civili* dolosi o colposi') and the Dutch-language version ('*onrechtmatige* daad') (my emphasis)). At the same time, the possibility cannot be ruled out that Article 5(3) of that regulation may also apply in specific cases of strict liability, where the law provides that certain – otherwise lawful – activities give rise to liability where they cause specific harm to others. That particular situation is not at issue in the present case, however.

[54] On the basis of my research, the term 'quasi-delict' appears, in some form, in Article 5(3) of the Brussels I Regulation in the Bulgarian-, Spanish-, Czech-, German-, Greek-, English-, French-, Croatian-, Italian-, Latvian-, Lithuanian-, Hungarian-, Maltese-, Polish-, Romanian- and Slovenian-language versions. It does not appear in the Danish-, Estonian-, Dutch-, Portuguese-, Slovakian-, Finnish- or Swedish-language versions of that regulation.

[55] See Article 1241 of the French Civil Code. That distinction is also clear in the Italian-language version of the Brussels I Regulation ('in materia di illeciti civili *dolosi* o *colposi*') (my emphasis).

[56] See, in particular, Dickinson, A., *The Rome II Regulation*, Oxford University Press, 2008, pp. 347 and 348, and Magnus, U., and Mankowski, P., op. cit., p. 271. Furthermore, in my view, even cases of strict liability, which depend only on a finding that a harmful event has occurred, and not on any mental element, fall within that provision.

[57] See my Opinion in *Wikingerhof* (point 46). Approaching the matter from the other end, the Court has employed the concept of 'a claim based on a tort or a delict' (judgment of 25 October 2012, *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664, paragraph 43)).

63. Thus, while the category consisting of 'matters relating to tort, delict or quasi-delict', as interpreted in the judgment in *Kalfelis*, encompasses a wide range of types of liability,[58] it is not, as the Commission suggested, a 'residual category' accommodating any claim based on a civil or commercial obligation that is not a 'matter relating to a contract' within the meaning of Article 5(1) of the Brussels I Regulation.[59] In that judgment, the Court merely indicated that that provision and Article 5(3) of that regulation were *mutually exclusive*, such that a civil liability claim cannot come within both provisions at once.[60] That being so, there are claims which do not fall within either provision, being based on obligations which are neither 'matters relating to a contract' nor 'matters relating to tort, delict or quasi-delict'.

64. However, and *in the second place*, while a claim for restitution based on unjust enrichment is indeed, in principle, grounded in a non-contractual obligation,[61] that obligation does not originate in a 'harmful event' which can be imputed to the defendant, within the meaning of Article 5(3) of the Brussels I Regulation.[62] As the referring court has observed, unjust enrichment cannot be regarded as such an 'event'. Thus, contrary to the submissions of the Czech Government and the Commission, there is no 'quasi-delict' within the meaning of that provision.

65. The restitutionary obligation which underlies such a claim arises from the enrichment of the defendant and the absence (or in this case, the retroactive removal) of a 'justification' for it.[63] Accordingly, as the Croatian Government rightly observes, such a claim *does not presuppose any harmful act or omission attributable to the defendant*. The obligation in question arises spontaneously, *independently* of the defendant's conduct.[64]

66. The Czech Government replies, in essence, that the event giving rise to the enrichment (namely, in the present case, the use of the enforcement proceedings, by the respondent in the main proceedings, which were later invalidated), should be assimilated to a 'harmful event' within the meaning of Article 5(3) of the Brussels I Regulation.

67. In my view, however, that would not be appropriate. *First of all*, strictly speaking, the obligation underlying a claim for restitution based on unjust enrichment does not originate in the event giving rise to the enrichment, but in the enrichment itself. *Next*, the event giving rise to the enrichment cannot always be imputed to the defendant. Often, it will actually be imputable to the applicant – who may for example have mistakenly transferred a sum of money that was not due. *Lastly*, while, in the present case, the enforcement proceedings were brought by the

58 See judgment of 30 November 1976, *Bier* (21/76, EU:C:1976:166, paragraph 18). For various examples, see my Opinion in *Wikingerhof* (point 48).

59 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, points 53 and 57); and Opinion of Advocate General Bobek in *Feniks* (C-337/17, EU:C:2018:487, point 98). It is true that in the judgments of 27 October 1998, *Réunion Européene and Others* (C-51/97, EU:C:1998:509, paragraph 24); of 13 March 2014, *Brogsitter* (C-548/12, EU:C:2014:148, paragraph 27), and of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 44), the Court stated that if the claims in question were not 'matters relating to a contract', they had to be regarded as 'matters relating to tort, delict or quasi-delict'. However, the basis of this reasoning was that those claims were, on any view, grounded in an unlawful event which could be imputed to the defendant and had caused harm to the applicant. The only question was whether that liability was contractual or tortious.

60 See judgment in *Wikingerhof* (paragraph 26).

61 See point 54 of this Opinion.

62 See, to the same effect, House of Lords (United Kingdom), judgment of 30 October 1997, *Kleinwort Benson Ltd* v. *City of Glasgow District Council* [1997] UKHL 43; Magnus, U., and Mankowski, P., op. cit., p. 272; Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe*, LGDJ, Paris, 4th edition, 2010, p. 219; Grušić, U., op. cit., p. 86; and Minois, M., op. cit., pp. 262 to 265.

63 See point 32 of this Opinion.

64 See, to that effect, judgment of 16 December 2008, *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:726, paragraph 49), and Opinion of Advocate General Wahl in *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:225, point 62).

respondent in the main proceedings, that cannot be regarded as a 'harmful event', because it was not in any way unlawful and did not cause, in the legal sense of the term, any 'damage' to the appellant in the main proceedings.

68. The Commission, for its part, replies that the 'harmful event', within the meaning of Article 5(3) of the Brussels I Regulation, lies in the fact that the respondent in the main proceedings did not restore the sum at issue to the appellant in the main proceedings, contrary to Article 1111 of the Law on obligations. [65]

69. That argument cannot succeed. The restitutionary obligation relied on existed, *ex hypothesi*, before any refusal by the respondent in the main proceedings to perform it. To consider that that obligation arose from the respondent's conduct would therefore be a circular argument. The obligation in question originated at an earlier stage; it arose, as I have said, from the moment the unjust enrichment took place (or, in the present case, when the enforcement proceedings were declared invalid *ex tunc*).

70. Furthermore, if a defendant's failure to perform a pre-existing obligation were to be regarded as a 'harmful event', Article 5(3) of the Brussels I Regulation would be extremely broad in scope, as civil and commercial claims are generally based on the non-performance by the defendant of an alleged obligation. [66]

71. Contrary to the Commission's submissions, the situation is not comparable to that considered in the case giving rise to the judgment in *Austro-Mechana*, [67] which was also cited by the referring court. Indeed, the facts of that case are, in my view, very particular.

72. I would observe that, in that judgment, the Court held that a claim for the 'fair compensation' provided for by Article 5(2)(b) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, [68] such as that which had been brought by Austro-Mechana, a copyright-collecting society, against the Amazon companies, was a matter 'relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of the Brussels I Regulation. [69] The claim was based on the obligation to pay such 'compensation' which was incumbent on Amazon, under Austrian law, because it had offered recording material for sale in Austria. [70] This was not an unlawful event. Nonetheless, the conduct of Amazon contributed to the harm caused to copyright holders by the making of private copies of their protected material. In accordance with the settled case-law of the Court, the 'compensation' is intended to make that harm good. As a copyright-collecting society, Austro-Mechana collected the 'compensation' on behalf of the copyright holders it represented. The harm relied on by that society was thus, in reality, suffered by the copyright holders. In summary, the obligation which formed the basis for the claim did indeed originate, all things considered, in a 'harmful event'. [71] Furthermore, the

65 Reproduced in point 11 of this Opinion.

66 See Opinion of Advocate General Wahl in *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:225, point 61). Such an outcome would run counter to the principle that that provision is to be restrictively interpreted (see point 83 of this Opinion).

67 Judgment of 21 April 2016 (C-572/14, EU:C:2016:286).

68 Directive of the European Parliament and of the Council of 22 May 2001 (OJ 2001 L 167, p. 10).

69 I would note that the Member States opting to provide, in their legislation, for an exception to the right of reproduction enjoyed by copyright holders, permitting the use of private copies of the protected material (known as the 'private copying exception'), must provide for 'fair compensation' to be paid to the copyright holders. While, in principle, that 'fair compensation' ought to be paid by the users making the copies, it is also open to the Member States to provide for it to be payable by those selling the recording material which enables those copies to be made (see Article 5(2)(b) of Directive 2001/29 and judgment of 21 April 2016, *Austro-Mechana* (C-572/14, EU:C:2016:286, paragraphs 17 to 26 and the case-law cited)).

70 See judgment of 21 April 2016, *Austro-Mechana* (C-572/14, EU:C:2016:286, paragraph 37).

71 That judgment therefore comes within the particular situations set out in footnote 53 of this Opinion.

Austrian courts were best placed to assess the harm caused to the copyright-holders by the private copies made by Austrian consumers (which depended on the quantity of recording material sold by the Amazon companies in Austria), and therefore to rule on the amount of the 'fair compensation' to be paid by those companies.[72]

73. *In the third place*, the interpretation on which a claim for restitution based on unjust enrichment does not fall within Article 5(3) of the Brussels I Regulation is confirmed, in my view, by another passage in the judgment in *Kalfelis*. I would note that, in the case giving rise to that judgment, an individual had brought proceedings against his bank following unprofitable stock exchange transactions and, in those proceedings, had made cumulative claims on three bases, namely contractual liability, tortious liability and unjust enrichment. In that context, the referring court had asked the Court, amongst other things, whether the court which had jurisdiction, under Article 5(3) of the Brussels I Regulation, to rule on the claim based on tortious liability, also had ancillary jurisdiction in respect of the claims based on contractual liability and unjust enrichment.

74. The Court's answer to that question was that 'a court which has jurisdiction under [Article 5(3) of that the Brussels I 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*'.[73] Read in the context given in the preceding point of this Opinion, the words '*in so far as it is not so based*' refer, implicitly but necessarily, to contractual liability and *unjust enrichment*.

75. *In the fourth place*, unlike the Czech Government and the Commission, I do not consider that the interpretation suggested in this Opinion is contradicted on reading the Rome II Regulation, but on the contrary that it is supported.

76. While, as I have indicated in point 47 of this Opinion, that regulation includes, among the 'non-contractual obligations' falling within its scope, obligations originating in unjust enrichment, those occupy a *specific category* within the regulation.[74]

77. More specifically, the Rome II Regulation includes, *first*, in Chapter II, rules applicable to non-contractual obligations arising out of a 'tort/delict'. That concept has, in my view, the same meaning as in Article 5(3) of the Brussels I Regulation.[75] Thus, the obligations in question are the 'tortious, delictual or quasi-delictual obligations' referred to in point 62 of this Opinion.[76] In summary, that Chapter II of the Rome II Regulation therefore covers the same obligations as Article 5(3).[77]

[72] See, to that effect, my Opinion in *Austro-Mechana* (C-572/14, EU:C:2016:90, point 93). In contrast, I do not consider that there is any such proximity in the present case (see points 84 to 89 of this Opinion).

[73] Judgment in *Kalfelis* (paragraph 19) (my emphasis).

[74] This is consistent with the fact that, in the substantive law of the Member States, unjust enrichment is regarded as a category *sui generis* (see point 29 of this Opinion).

[75] Bearing in mind the indication from the EU legislature that the two regulations should be interpreted in a consistent manner (see point 42 of this Opinion).

[76] Unlike some language versions of the Brussels I Regulation, the Rome II Regulation does not refer to the concept of 'quasi-delict'. Recitals 11 and 12 of that regulation nevertheless state that the conflict-of-law rules it sets out apply, in particular, to 'tort/delict' and 'strict liability'.

[77] See, to that effect, judgment of 28 July 2016, *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:612, paragraph 39). There is a caveat in that the substantive scope of the Brussels I Regulation is subject to exceptions that are not found in the Rome II Regulation, and vice versa.

78. *Second*, the Rome II Regulation brings together, in Chapter III, the rules applicable to non-contractual obligations resulting from an 'act other than a tort/delict'.[78] Claims based on those obligations should not, *ex hypothesi*, fall within Article 5(3) of the Brussels I Regulation.[79] Chapter III includes unjust enrichment. That classification thus confirms that the restitutionary obligation underlying a claim based on unjust enrichment does not originate in a 'harmful event' within the meaning of Article 5(3) of the Brussels I Regulation.[80]

79. *In the light of the foregoing*, my view is that claims for restitution based on unjust enrichment do not fall within Article 5(3) of the Brussels I Regulation.[81]

80. Contrary to what has been suggested by the Czech Government, that interpretation does not give rise to any denial of justice. In the situations where Article 5(1) of the regulation is not applicable,[82] the consequence is simply that a litigant has no choice of jurisdiction as regards a claim based on unjust enrichment, which must be brought in the courts of the Member State in which the defendant is domiciled, in accordance with the general rule laid down in Article 2(1) of that regulation.[83]

81. *Furthermore*, that outcome is, *first*, entirely in conformity with the scheme of the Brussels I Regulation. I reiterate that that regulation is based on the *principle* that the court for the place where the defendant is domiciled has jurisdiction.[84] In that regard, the Court has repeatedly held that the rationale for that general rule, which expresses the maxim *actor sequitur forum rei*,[85] is that, in principle, the defendant is better able to defend him or herself before the courts for the

[78] See recital 29 of the Rome II Regulation.

[79] I refer once again to point 62 of this Opinion. To that extent, the scope of the Rome II Regulation is, in my view, broader than that of Article 5(3) of the Brussels I Regulation. It is true that, in its judgment of 17 September 2002, *Tacconi* (C-334/00, EU:C:2002:499), the Court held that an action based on pre-contractual liability was a matter 'relating to tort, delict or quasi-delict' within the meaning of that provision, whereas in Article 12 of the Rome II Regulation, the EU legislature categorised '*culpa in contrahendo*' as an 'act other than a tort/delict'. That does result in a degree of inconsistency. As the Court held, the obligation to make good the damage caused by the unjustified breaking off of contractual negotiations does originate in a 'harmful event' imputable to the defendant, namely the infringement of legal rules requiring the parties to act in good faith in such negotiations (see paragraphs 25 and 27 of that judgment).

[80] I therefore consider the Commission's statement, at page 8 of the Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Non-Contractual Regulation ('Rome II'), presented on 22 July 2003 (COM(2003) 427 final), that unjust enrichment belongs to the category of 'quasi-delict', to be incorrect. 'Quasi-delicts', as 'torts/delicts', fall within Chapter II of the Rome II Regulation, unlike unjust enrichment.

[81] I would emphasise that the crucial point is not that such a claim seeks *restitution* of property. As I stated in point 41 of this Opinion, the classification of a claim depends on the *source* of the obligation on which it is based, not on the remedy sought by the applicant. Thus, in my view, claims for restitution based on a 'harmful event' (compare with the common law concept of restitution for wrongdoing) do come within Article 5(3) of the Brussels I Regulation (see, to the same effect, Magnus, U. and Mankowski, P., op. cit., p. 272). The same is true, *mutatis mutandis*, in relation to the Rome II Regulation (see Dickinson, A., op. cit., pp. 301 to 307, 496 and 497).

[82] See points 44 to 52 of this Opinion.

[83] The situation is thus appreciably different from that considered in the judgment of 16 December 2008, *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:726), referred to by the Czech Government. In that judgment, the Court held that the courts of the European Union, which have exclusive jurisdiction, under Articles 268 and the second paragraph of Article 340 TFEU, to rule on claims relating to 'non-contractual liability' brought against the European Union, also have jurisdiction, on that basis, to hear actions based on unjust enrichment (see paragraph 48 of that judgment). The contrary interpretation might, in the Court's view, lead to a denial of justice. Given that the national courts have jurisdiction, within the scheme of the TFEU, to rule on the 'contractual liability' of the European Union, whereas the EU courts have jurisdiction to rule on its 'non-contractual liability', a restrictive interpretation of the latter concept would potentially lead to a negative conflict of jurisdiction, with neither the national courts nor those of the European Union having jurisdiction to hear such an action (see paragraph 49 of that judgment). In contrast, that problem does not arise within the scheme of the Brussels I Regulation.

[84] See point 35 of this Opinion.

[85] This maxim expresses the idea that the applicant must sue the defendant before the courts for the place where the defendant is domiciled.

place where he or she is domiciled.[86] The advantage thus given to the defendant is, in turn, justified by the fact that generally speaking, the defendant – who has not taken the initiative but has been sued by the applicant – is in a weaker position in the proceedings.[87]

82. Thus it is not legitimate to argue, as the Commission does, that as regards civil and commercial obligations, there should be no 'legal vacuum' between Article 5(1) and Article 5(3) of the Brussels I Regulation, and accordingly that there must always be an alternative to bringing the proceedings in the courts of the Member State in which the defendant is domiciled. If the additional fora referred to in those provisions were always available, the general rule would be relegated to a position of secondary importance, and the advantage would be largely given to the applicant, contrary to the intention of the EU legislature.[88]

83. Far from that – and in line with what I have stated immediately above – the Court has repeatedly held that Article 5(3) of the Brussels I Regulation, as a derogation from the general rule, is to be restrictively interpreted, and cannot 'give rise to an interpretation going beyond the cases expressly envisaged' in that provision.[89] To read the concept 'harmful event' as widely as the Czech Government and the Commission suggest would be to apply that provision in a situation which it does not expressly envisage, namely that of unjust enrichment.[90]

84. *Second*, I am not persuaded that the objectives of proximity and sound administration of justice which underlie Article 5(3) of the Brussels I Regulation[91] call for a different interpretation.

85. Besides the fact that those objectives could not, in any circumstances, provide a justification for disregarding the wording of Article 5(3), I am not persuaded that there is a 'particularly close connecting factor' between the claim in the main proceedings and the Croatian court in which the appellant in the main proceedings has sued, or – for that reason – that that court is necessarily in a better position than the German courts to rule on the allegations of that company, or in other words to determine whether all the conditions of unjust enrichment are met,[92] particularly in terms of gathering and evaluating the relevant evidence.

86. The referring court, expressing a view supported by the Czech Government and the Commission, submits that that is the case, on the ground that the event giving rise to the enrichment, or in other words the enforcement proceedings brought by the predecessor of BP EUROPA, occurred in Croatia. All relevant matters of fact are thus connected to that country, it suggests, whereas it is only the domicile of the defendant that is located in Germany.

[86] See, in particular, judgments of 17 June 1992, *Handte* (C-26/91, EU:C:1992:268, paragraph 14); of 13 July 2000, *Group Josi* (C-412/98, EU:C:2000:399, paragraph 35); and of 19 February 2002, *Besix* (C-256/00, EU:C:2002:99, paragraph 52).

[87] See judgment of 20 March 1997, *Farrell* (C-295/95, EU:C:1997:168, paragraph 19).

[88] See, to that effect, Opinion of Advocate General Jacobs in *Engler* (C-27/02, EU:C:2004:414, point 55).

[89] See, in particular, judgment of 18 July 2013, *ÖFAB* (C-147/12, EU:C:2013:490, paragraph 31 and the case-law cited).

[90] The rationale for this restrictive interpretation is all the more compelling for the fact that the contrary approach would result, in many cases, in the courts for the place where the applicant is domiciled having jurisdiction, thus establishing a *forum actoris* in direct contradiction of the general rule laid down by the Brussels I Regulation (see judgment of 19 September 1995, *Marinari* (C-364/93, EU:C:1995:289, paragraph 13)). The Commission suggests that the place where restitution of the unjust enrichment to the applicant ought to have taken place should be regarded as the 'place where the damage occurs', which in my view would once again, in most cases, designate the applicant's place of domicile.

[91] See point 36 of this Opinion.

[92] Set out in point 31 of this Opinion.

87. However, the first step in dealing with a claim for restitution based on unjust enrichment is, logically enough, to determine whether there has been any such enrichment. Thus, it is not the courts for the place where the event giving rise to the enrichment took place, but those for the place where the defendant has allegedly been enriched, that seem best placed to determine such a claim.

88. By analogy, Article 10(3) of the Rome II Regulation provides that, where unjust enrichment has occurred in the absence of any pre-existing relationship between the parties, and where the parties are not habitually resident in the same country, the law applicable to the resulting non-contractual obligation is that of the country in which 'the unjust enrichment took place'. Thus it is not the country in which the event giving rise to the enrichment occurred, but that in which the defendant received the economic benefit at issue, that is designated by that provision. In a situation where funds have been transferred to a bank account, as in the present case, the country where the enrichment takes place is that in which the banking institution with which the account is held is located. [93]

89. In the present case, that is likely to be Germany. [94] The courts of the Member State where the defendant is domiciled, in so far as they are also the courts for the place where the enrichment occurred, are thus best placed to determine the actual nature of that enrichment. [95] It is apparent from this, in my view, that, in general, there is no 'particularly close connecting factor' to justify claims based on unjust enrichment being heard by a court other than that for the place where the defendant is domiciled. [96]

90. In addition, the practical inconvenience to HRVATSKE ŠUME of having to sue BP EUROPA in the courts of the Member State where it is domiciled (and I reiterate that that inconvenience reflects the intention of the EU legislature) [97] is compensated for by a procedural advantage: supposing that the claim is well-founded, and in so far as the assets of the respondent in the main proceedings are located in Germany, the appellant in the main proceedings will immediately have an enforceable national instrument (the judgment to be given by the German courts) under which it can recover the amount at issue, and will not have to resort to the *exequatur* procedure in order to have a Croatian judgment declared enforceable in that Member State. [98]

[93] See, in that regard, High Court of Justice, Queen's Bench Division (Commercial Court) (United Kingdom), judgment of 15 July 2015, *Banque Cantonale de Genève* v. *Polevent Ltd and others*, [2016] 2 W.L.R. 550, § 18, and Dickinson, A., op. cit., pp. 503 to 508. Furthermore, during the legislative process, the Parliament proposed, as the linking factor, '*the law of the country in which the event giving rise to unjust enrichment substantially occurred*, irrespective of the country in which the enrichment occurred' (my emphasis) (see Position of the European Parliament adopted at first reading on 6 July 2005 with a view to the adoption of Regulation (EC) No …/2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II'), document P6 _TC1-COD(2003)0168). Ultimately however, this proposal was not accepted by the EU legislature.

[94] The order for reference does not indicate whether that is in fact the case, however.

[95] As to proof of the corresponding impoverishment of the appellant in the main proceedings and the lack of any 'justification', it seems to me that, in the present case, those matters have been established by the judgment of the Vrhovni sud (Supreme Court) (see point 14 of this Opinion), which can be recognised in Germany without any special procedure being required (see Article 33 of the Brussels I Regulation).

[96] See Opinion of Advocate General Wahl in *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:225, point 69), and House of Lords (United Kingdom), *Kleinwort Benson Limited* v. *City of Glasgow District Council*, opinion of Lord Goff.

[97] See point 81 of this Opinion.

[98] See Articles 38 to 41 of the Brussels I Regulation.

V. Conclusion

91. Having regard to all the foregoing considerations, I propose that the Court should give the following answer to the first question referred by the Visoki trgovački sud Republike Hrvatske (Commercial Court of Appeal, Croatia):

Article 5(1) and Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a claim for restitution based on unjust enrichment:

– is not a matter 'relating to a contract' within the meaning of the former provision, except where it is closely linked to a prior contractual relationship existing, or deemed to exist, between the parties to the dispute; and

– is not a matter 'relating to tort, delict or quasi-delict' within the meaning of the latter provision.