Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 2 June 2016*

Case C-185/15

Marjan Kostanjevec
v
F&S Leasing GmbH(Request for a preliminary ruling

from the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia))

(Judicial cooperation in civil matters — Regulation (EC) No 44/2001 — Scope ratione temporis — Counterclaim alleging unjust enrichment — Matters relating to a contract — Place of performance of the obligation))

I – Introduction

1. In the present case the Court of Justice is confronted with a situation that is quite unusual both procedurally and factually, in relation to which the referring court has submitted to it several questions, all concerning Regulation (EC) No 44/2001.**

2. The questions referred for a preliminary ruling concern, first, whether a claim by which a consumer who was originally ordered to make a payment, after the setting aside of the judgment for payment, sues the opposing party for repayment of the payment made, alleging unjust enrichment, can be regarded as a counterclaim within the meaning of that regulation. Secondly, the present case concerns the interpretation of the rules of jurisdiction in Regulation No 44/2001 in matters relating to consumers and contracts.

3. Before answering the actual questions referred, the Court will also have to discuss whether Regulation No 44/2001 can apply to the present case at all, since the action for payment was brought against the consumer before the accession of the Republic of Slovenia to the European Union on 1 May 2004.

* Original language: German.

** Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

II – Legal framework

A – *EU law*

1. Regulation No 44/2001

4. Recital 11 of Regulation No 44/2001 states:

‘The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile … .’

5. According to Article 5 of Regulation No 44/2001:

‘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;

   (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 subparagraph (b) does not apply then subparagraph (a) applies; …’

6. Article 6 of Regulation No 44/2001 provides:

‘A person domiciled in a Member State may also be sued: …

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending; …’

7. Article 15(1) of Regulation No 44/2001 provides:

‘In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section … if:

(a) it is a contract for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.’

8. Article 16 of Regulation No 44/2001 provides that the rule on jurisdiction over consumer contracts 'shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending'.

9. Article 28 of Regulation No 44/2001 provides:

'… Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

…

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

10. The transitional provision in Article 66(1) of Regulation No 44/2001 is worded as follows:

'This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.'

2. Regulation No 864/2007 (Rome II)

11. Recital 7 of Regulation No 864/2007*** states:

'The substantive scope and the provisions of this Regulation should be consistent with … Regulation No 44/2001 … and the instruments dealing with the law applicable to contractual obligations.'

12. Article 10(1) of Regulation No 864/2007 provides:

'If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.'

3. Regulation No 593/2008 (Rome I)

13. Recital 7 of Regulation No 593/2008**** states:

'The substantive scope and the provisions of this Regulation should be consistent with Regulation (EC) No 44/2001 … and [the Rome II] Regulation … .'

14. Article 12(1) of Regulation No 593/2008 provides:

'The law applicable to a contract by virtue of this Regulation shall govern in particular: …

(e) the consequences of nullity of the contract.'

*** Regulation of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).

**** Regulation of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

B – *National law*

15. Under the Slovenian law of obligations, a person who has been enriched without any legal basis and to the detriment of others is required to return what he has received, if possible, or otherwise to compensate for the value of the advantage obtained. The obligation under the law on unjust enrichment to return or compensate exists even where a person receives something on the basis of a condition which subsequently ceases to apply.

III – The dispute in the main proceedings and the questions referred

16. On 14 January 1994 the parties to the main proceedings concluded a financial leasing contract from which the lessor derived a claim for payment. The lessor raised this claim by action against the lessee for the first time in 1995, and in 2004 it obtained a judgment which, after an unsuccessful appeal, became final and enforceable. In 2006 the parties agreed on payment of EUR 18678.45 in satisfaction of this judgment.

17. However, the lessee appealed against the order requiring him to make payment with a further available appeal.***** Following this appeal, on 9 July 2008 the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia) set aside the judgments allowing the lessor's claim for payment and referred the case back to the court of first instance for a fresh examination. At this stage of the proceedings the lessee raised a counterclaim against the lessor for repayment of the sum of EUR 18678.45 plus interest, basing his claim on unjust enrichment, since the judgment from 2004 making the lessor's claim legally enforceable had ceased to apply.

18. On referral of the case back to the court of first instance the lessor's claim for payment was definitively dismissed. The lessee, on the other hand, was successful with his application, both at first instance and on appeal. The lessor, now the losing party, brought an appeal before the referring court and contested the international jurisdiction of the Slovenian courts for the lessee's claim.

19. In these circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the term "counterclaim" within the meaning of Article 6(3) of Regulation No 44/2001 be interpreted as extending also to a claim brought as a counterclaim in accordance with national law after, in proceedings on an appeal on a point of law,****** a judgment delivered in proceedings on the defendant's******* original claim that had become final and enforceable was set aside and the case referred back to the court of first instance for rehearing, where the applicant,******** in his counterclaim alleging unjust enrichment, seeks reimbursement of the amount which he was obliged to pay on the basis of the judgment delivered in the proceedings on the defendant's original claim and set aside?

(2) Must the expression "matters relating to a contract concluded by a person, the consumer" in Article 15(1) of Regulation No 44/2001 be interpreted as extending to a situation in which the consumer brings an action, in which he pursues a claim alleging unjust enrichment, by way of counterclaim for the purposes of national law, linked to the original claim, which however relates to a case concerning a consumer contract within the meaning of that provision of Regulation

***** In point 3 of the request for a preliminary ruling this Slovenian appeal is referred to as an appeal on a point of law ('Revision' in German); however, in the German understanding of the term, it is, rather, an application for the reopening of proceedings that have already been finally disposed of.

****** In relation to the term 'Revision', see footnote 5.

******* This means the lessor and defendant to the counterclaim.

******** This means the lessee and counterclaimant.

No 44/2001, and in which the consumer-applicant seeks reimbursement of the amount he was obliged to pay by a judgment (subsequently) set aside, delivered in proceedings on the defendant's original claim, and thus reimbursement of an amount arising from a case concerning a consumer contract?

(3) If, in the case described above, jurisdiction cannot be based either on the jurisdictional rules for counterclaims or on the jurisdictional rules for consumer contracts:

(a) Must the term "matters relating to a contract" in Article 5(1) of Regulation No 44/2001 be interpreted as extending to an action in which the applicant pursues a claim alleging unjust enrichment, but that is brought as a counterclaim under national law, linked to the defendant's original claim which relates to the contractual relationship between the parties, where the purpose of the claim alleging unjust enrichment is to obtain reimbursement of the amount the applicant was obliged to pay by a judgment (subsequently) set aside, delivered in proceedings on the defendant's original claim, and thus reimbursement of an amount arising from a contractual case?

If the foregoing question can be answered in the affirmative:

(b) In the case described above, must jurisdiction based on the place of performance within the meaning of Article 5(1) of Regulation No 44/2001 be examined on the basis of the rules governing the performance of obligations deriving from a claim alleging unjust enrichment?'

IV – Legal assessment

20. The referring court is asking, in the first place, about jurisdiction over the counterclaim by which the lessee seeks reimbursement and, with its second question, about jurisdiction in matters relating to consumer contracts. It asks its third question only in the event that the first two questions should be answered in the negative, and the second part of the third question only in the event that the first part is answered in the affirmative.

21. All the questions referred for a preliminary ruling concern the interpretation of Regulation No 44/2001. However, whether these questions have to be answered by the Court of Justice is not self-evident in the context of the course of proceedings presented by the national court. Instead it is questionable whether that regulation, in view of its scope *ratione temporis*, can be relevant at all for the main proceedings.

22. Regulation No 44/2001 came into force in Slovenian territory on Slovenia's accession to the Union on 1 May 2004.********* However, the proceedings against the counterclaiming lessee date back to 1995, that is to say, to a date prior to the accession of the Republic of Slovenia to the European Union.

23. Prior to an analysis of the questions referred, it is therefore necessary to start by clarifying the applicability of Regulation No 44/2001 to the present case. If a negative answer should be reached, there would be no need to answer the questions referred because they would then bear no relation to the case pending before the national court and would be hypothetical.**********

********* On the scope *ratione temporis* of Regulation No 44/2001, see judgment in *Wolf Naturprodukte* (C-514/10, ECR, EU:C:2012:367, paragraph 19) and the Opinion of Advocate General Cruz Villalón in the same case (C-514/10, EU:C:2012:54, point 25).

********** See judgment in *Česká spořitelna* (C-419/11, EU:C:2013:165, paragraph 21 and the case-law cited).

A – *The scope ratione temporis of Regulation No 44/2001*

24. According to Article 66 of Regulation No 44/2001, the regulation is to apply only to legal proceedings instituted *after the entry into force of the regulation*.

25. In view of this, the regulation clearly does not apply to the lessor's original claim for payment from 1995.

26. However, that claim for payment by the lessor is not the direct reference point for the questions referred. Instead they relate to the lessee's counterclaim from 2008, which was brought by him when the Slovenian proceedings were referred back to the court of first instance after having concluded with a final judgment. At that date Regulation No 44/2001 was already applicable in the Republic of Slovenia.

27. The decisive point is therefore whether that application for legal protection is separate 'legal proceedings' within the meaning of Article 66 of Regulation No 44/2001 and whether, regardless of the fact that the proceedings as a whole date back to 1995, they come within the scope *ratione temporis* of the regulation.

28. The European Commission does not share such a view. For the Commission the proceedings must be considered as a whole and regarded as predating the entry into force of Regulation No 44/2001 in Slovenia. Accordingly, the Commission takes the view that the questions referred are inadmissible.

29. However, such a blanket approach is neither necessary nor reasonable.

30. First, the proceedings brought against the lessee had already ended in a final judgment before they were referred back to the court of first instance in 2008. Against this background, in view of the blocking effect to which *res judicata* gives rise, it is questionable whether, under EU law, one has to proceed on the basis of a continuity of proceedings dating back to 1995 at all or whether it does not appear necessary instead to regard the already ruptured procedural sequence as having been resumed in 2008, that is to say, at a time when Regulation No 44/2001 was already applicable.

31. Second, Article 66 of Regulation No 44/2001 — unlike, say, Article 30(1)********** — does not focus at all on the lodging of the (first) document instituting the proceedings, but focuses instead on the institution of particular proceedings. If such proceedings are instituted after the entry into force of the regulation, under Article 66 of the regulation, the regulation is applicable.

32. That this should mean only the *first* claim within complex proceedings combining a number of claims cannot be deduced from Article 66 of the regulation. If, furthermore, the term 'proceedings' is understood in accordance with the judgment in *Danværn Production*********** as meaning a separate application for legal protection seeking more than the mere dismissal of the opposing party's arguments, the raising of a claim for unjust enrichment against the opposing party can be covered by the term 'proceedings' in Article 66 of Regulation No 44/2001.

********** This provision concerns the delimitation of the jurisdiction of several courts successively seised of a dispute and applies, moreover, only to Section 9 of Chapter II of the regulation; however, Article 66 at issue here is not in that section.

*********** Judgment of 13 July 1995 in *Danværn Production* (C-341/93, EU:C:1995:239, paragraph 18).

33. Nor is that conclusion contradicted by the fact that Article 66 of Regulation No 44/2001 in some language versions uses not the concept of 'claim' but the concept of 'proceedings'.********** It does not follow from the use of the concept of 'proceedings' that a claim and counterclaim must form a single, continuous set of proceedings for the purposes of Article 66. Even if certain legal systems of the Member States were to go along those lines, that would not preclude the autonomous interpretation of Article 66 suggested here.

34. It therefore has to be considered that the request for a preliminary ruling, all of the questions in which relate to the lessee's claim alleging unjust enrichment brought in 2008, falls within the temporal scope of Regulation No 44/2001.

35. The questions referred are therefore not hypothetical and accordingly must be answered by the Court of Justice.

B – *First question referred for a preliminary ruling*

36. By its first question referred for a preliminary ruling the national court is asking whether the jurisdiction over counterclaims laid down in Article 6(3) of Regulation No 44/2001 is applicable to an application for legal protection such as that in the main proceedings.

37. In addition to a general definition of the concept of counterclaim, it therefore needs to be determined whether the lessee's claim alleging unjust enrichment concerns 'the same contract or facts on which the [lessor's] original claim was based' within the meaning of that provision.

1. The term 'counterclaim' in Article 6(3) of Regulation No 44/2001

38. The term 'counterclaim' within the meaning of Article 6(3) of Regulation No 44/2001 must be given an autonomous interpretation. The Court of Justice clarified the term in *Danværn Production* by specifying that it applies to claims for a separate judgment against the plaintiff, which may also seek 'an amount exceeding that claimed by the plaintiff, and [the separate claim] can be proceeded with even if the plaintiff's claim is dismissed'.**********

39. The counterclaim must therefore pursue a claim that is distinguishable from the plaintiff's claim, seeking a separate judgment.**********

40. This can be presumed in the present case.

41. The application for reimbursement of the amount paid is a separate claim by the lessee seeking separate judgment against the lessor and the refund of the amount unduly paid. Such a claim does not constitute a mere defence to the opposing party's claim for payment.

2. The expression 'the same contract or facts on which the original claim was based'

42. Article 6(3) of Regulation No 44/2001 requires, in addition, that the counterclaim arises 'from the same contract or facts on which the original claim was based'.

********** See, for example, the English ('legal proceedings'), Swedish ('rättsliga förfaranden') and Slovene ('pravne postopke') versions. The French, Italian and Spanish versions, on the other hand, follow terminologically the concept of 'action judiciaire'.

********** See judgment in *Danværn Production* (C-341/93, EU:C:1995:239, paragraph 12).

********** See Opinion of Advocate General Léger in *Danværn Production* (C-341/93, EU:C:1995:139, point 26).

43. Interpretation of the concept of 'arising from the same contract or facts on which the original claim was based' has not yet been exhaustively addressed by the Court.********** It too must be given an autonomous interpretation in the light of the aims pursued by Regulation No 44/2001, although recourse to the Court's case-law in relation to Article 28 of the regulation is not necessary.**********

44. The purpose of the special jurisdiction over counterclaims is to enable the parties to have their claims against each other adjudicated in the same proceedings and before the same court,********** provided these claims are based on the same facts and thus 'arise from the contract or from the facts on which the original claim [instituting proceedings] was based'.**********

45. This is the case here. The claim for repayment brought by way of counterclaim arose from the leasing contract from which the original claim for payment was derived.

46. The claim for repayment of the amount paid in performance of an obligation deriving from a judicial decision is indeed of an unjust enrichment nature, but it can, however, be traced back to the leasing contract, as the claim alleging unjust enrichment would not have arisen in the absence of the leasing contract and the payment made for its performance.

47. As regards the question whether a sufficient link exists to the contract concluded by the parties, the rules in Regulation No 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II) can be considered in addition. The Rome I and Rome II regulations concur in adopting the principle that, for a reversal of payments on the ground of unjust enrichment, the law applicable to the underlying contract must be taken,********** and they thus view the claim alleging unjust enrichment as ultimately having its origin in the contract for the performance of which the payment in question was made.

48. Accordingly, it is reasonable to assume corresponding uniformity and a connection originating in the contract also in the case of counterclaims alleging unjust enrichment falling within the scope of Article 6(3) of Regulation No 44/2001.

49. In view of the foregoing, the answer to the first question is that the expression 'counterclaim arising from the same contract … on which the original claim was based' within the meaning of Article 6(3) of Regulation No 44/2001 extends also to a claim, brought after a judgment delivered in proceedings on the present defendant's original claim that had become final and enforceable was set aside and the case referred back to the court of first instance for rehearing, by which the present applicant, claiming on the basis of unjust enrichment, seeks reimbursement of an amount which he paid on the basis of the judgment delivered in the original proceedings and subsequently set aside.

********** See order in the manifestly inadmissible request for a preliminary ruling *Reichling* (C-69/02, EU:C:2002:221).

********** The issue of the 'connection' between two actions arises in this provision too. However, as a consequence of the wording of Article 28(3) ('for the purposes of this Article') and its schematic position, it relates *exclusively* to a procedural situation in which there is a risk of irreconcilable judgments because related actions have been brought in different courts of different Member States. By contrast, where a counterclaim is brought in one and the same set of proceedings, there is no risk of irreconcilable judgments.

********** See Opinion of Advocate General Léger in *Danværn Production* (C-341/93, EU:C:1995:139, points 7 and 35).

********** Report on the Convention of 17 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters by P. Jenard (OJ 1979 C 59, p. 1, at p. 28).

********** Schematically, in the case of void contracts, Article 12(1)(e) of the Rome I Regulation is to be regarded as having priority over Article 10(1) of the Rome II Regulation (cf. *NomosKommentar-BGB/Leible*, Art. 12 Rom I, paragraph 35 with further references).

C – *Second question referred for a preliminary ruling*

50. By its second question referred for a preliminary ruling the national court is asking for clarification as to whether a claim by which a consumer, by way of counterclaim, pursues an allegation of unjust enrichment in connection with a consumer contract within the meaning of Regulation No 44/2001 is also a matter relating to a consumer contract.

1. Admissibility of the second question referred

51. The national court has not confined this question to the situation, which does not obtain here, where the Court answers the question concerning jurisdiction over counterclaims in the negative.

52. However, in the situation present here, answering the second question would no longer seem to be relevant, given that in the main proceedings jurisdiction over the counterclaim under Article 6(3) of Regulation No 44/2001 exists in any case, and accordingly the question of the international jurisdiction of the Slovenian courts must therefore already be answered in the affirmative.

2. As a precautionary measure: substantive analysis of the second question referred

53. As a precautionary measure, the second question will be examined briefly and the legal nature of the unjust enrichment claim brought by way of counterclaim will be considered in the light of the jurisdiction over consumer contracts.

54. In relation to jurisdiction over consumer contracts, the Court of Justice has taken a broad approach and also included claims that are merely 'closely linked' to a consumer contract.********** An application for legal protection such as the claim brought in the main proceedings seeking the refund of a payment made in performance of a consumer contract — in the present case, the financial leasing contract — has such a close link.

55. In view of the foregoing, the answer to the second question referred would have to be that the expression 'matters relating to a contract concluded by a person, the consumer' within the meaning of Article 15(1) of Regulation No 44/2001 is to be interpreted as extending to a claim by a consumer alleging unjust enrichment which is linked to other proceedings concerning a consumer contract being conducted against the consumer, and which seeks the refund of the amount that the consumer was obliged to pay by a judgment which was delivered in the other proceedings concerning a consumer contract and subsequently set aside.

D – *Third question referred for a preliminary ruling*

56. By its third question referred for a preliminary ruling the national court wishes to know whether (and, where relevant, how) the rule of jurisdiction for contractual matters in Article 5(1) of Regulation No 44/2001 is applicable where, as in the main proceedings, the lessee pursues a claim alleging unjust enrichment.

57. Since the jurisdiction of the Slovenian courts can be based both on the rules of jurisdiction over counterclaims and on the rules of jurisdiction over consumer contracts, there is no need to reply to the third question. As a precautionary measure, this question will be examined briefly.

********** See, most recently, judgment in *Hobohm* (C-297/14, EU:C:2015:844, paragraph 33).

1. First part of the third question referred

58. The expression 'matters relating to a contract' within the meaning of Article 5(1) of Regulation No 44/2001 concerns, in the first place, any obligation freely assumed by one party towards another.********** However, Article 5(1) of Regulation No 44/2001 covers not only direct contractual obligations but also secondary obligations, such as damages or repayment claims, which replace an unperformed contractual obligation.**********

59. Only recently the Court clarified in this regard in the case of *Profit Investment SIM* that 'actions seeking the annulment of a contract and the restitution of sums paid but not due on the basis of that contract constitute "matters relating to a contract" within the meaning of that provision',********** and in doing so took into consideration the 'causal link between the right to restitution and the contractual relationship'.**********

60. This approach can readily be applied to the present case in that, although it does not involve a void contract in the strict sense, it does involve a payment that became an undue payment as a consequence of the judgment for payment ceasing to have effect.

61. Consequently, the answer to the first part of the third question referred would have to be that the expression 'matters relating to a contract' within the meaning of Article 5(1) of Regulation No 44/2001 is to be interpreted as extending to a claim, such as that in the main proceedings, by which a lessee pursues an allegation of unjust enrichment.

2. Second part of the third question referred

62. The second part of the third question referred applies to the determination of the place of performance of the claim in question.

63. As the financial leasing contract at issue in the main proceedings, which is the connecting factor for the claim alleging unjust enrichment, is neither a contract of sale********** nor a contract for the provision of services within the meaning of Article 5(1)(b),********** in the present case the place of performance is determined pursuant to Article 5(1)(c) in conjunction with subparagraph (a), that is to say on the basis of the national law applicable to the claim in question.**********

********** See judgments in *Handte* (C-26/91, EU:C:1992:268), *Tacconi* (C-334/00, EU:C:2002:499, paragraph 23) and *Engler* (C-27/02, EU:C:2005:33, paragraphs 48 and 50).

********** See judgment in *De Bloos* (Case 14/76, EU:C:1976:134).

********** Judgment in *Profit Investment SIM* (C-366/13, EU:C:2016:282, paragraph 58).

********** Judgment in *Profit Investment SIM* (C-366/13, EU:C:2016:282, paragraph 55).

********** On the requirement of the supply of goods, see judgment in *Car Trim* (C-381/08, EU:C:2010:90, paragraph 32 et seq.).

********** On the grant of a right to use intellectual property not being a provision of services, see judgment in *Falco Privatstiftung* (C-533/07, EU:C:2007:257, paragraph 29).

********** See judgment in *Tessili/Dunlop* (Case 12/76, EU:C:1976:133, paragraphs 13 and 15); on the application of that case-law to Article 5(1)(a) of Regulation No 44/2001 see judgment in *Falco Privatstiftung* (C-533/07, EU:C:2007:257, paragraph 47 et seq.).

64. Since, in the case of secondary claims, the case-law regards as material the obligation whose non-performance is put forward to support the claims,********** it would seem appropriate to take into account the place of performance of the original (alleged) payment obligation also in the case of the unjust enrichment claim alleging undue payment. To the same effect are the rules expressed in Article 12(1)(e) of the Rome I Regulation, which also make the consequences of a failed contract (such as its rescission) subject to the law applicable to the contract.**********

65. Consequently, the answer to the second part of the third question referred would have to be that the place of performance of the obligation within the meaning of Article 5(1)(a) of Regulation No 44/2001 would have to be determined by applying the provisions of national law that are applicable for the performance of the original contractual payment liability which is now being reclaimed.

V – Conclusion

66. In the light of the foregoing considerations, since only the first question referred for a preliminary ruling is of relevance to the national court's decision, I propose that the Court should give the following reply to the questions referred:

67. The expression 'counterclaim arising from the same contract … on which the original claim was based' within the meaning of Article 6(3) of Regulation No 44/2001 extends also to a claim, brought after a judgment delivered in proceedings on the present defendant's original claim that had become final and enforceable was set aside and the case referred back to the court of first instance for rehearing, by which the present applicant, claiming on the basis of unjust enrichment, seeks reimbursement of an amount which he paid on the basis of the judgment delivered in the original proceedings and subsequently set aside.

********** See judgment in *De Bloos* (Case 14/76, EU:C:1976:134, paragraphs 13 and 14).

********** See in this regard paragraph 46 above and Rauscher/Leible, *EuZPR/EuIPR* (2011), paragraph 30 with further references.