

## UNJUST ENRICHMENT AND THE BRUSSELS I REGULATION

*This article examines how the jurisdictional rules of the recast of the Brussels I Regulation, namely the rules of exclusive jurisdiction for immovable property and company law and governance matters and the rules of special jurisdiction for contracts and torts, deal with unjust enrichment claims and issues concerning unjust enrichment. It also asks whether a new special jurisdiction rule for unjust enrichment should be added to the Regulation.*

Private International Law – Conflict of Laws – Jurisdiction – Unjust Enrichment – Restitution – Brussels I Regulation Recast

### I. INTRODUCTION

Across Europe and beyond, unjust enrichment is an established branch of the law of obligations.<sup>1</sup> One may, therefore, find it surprising that the recast of the Brussels I Regulation,<sup>2</sup> which distributes adjudicatory authority in civil and commercial matters among European Union Member States, does not mention unjust enrichment. The surprise may be even greater once one finds out that the Regulation contains special jurisdiction rules for contracts<sup>3</sup> and torts<sup>4</sup> and that the Rome Regulations<sup>5</sup> set out choice-of-law rules for contracts, torts and unjust enrichment.<sup>6</sup>

Two questions arise. How does the Brussels I Regulation Recast deal with unjust enrichment claims and issues concerning unjust enrichment? Should a new special jurisdiction rule for unjust enrichment be added to the Regulation? These questions are important not only for EU private international law, but also potentially for the work of the Hague Conference on Private International Law. With the Judgments Project now completed,<sup>7</sup> the Hague Conference may shift its focus to the drafting of a convention on jurisdiction in civil and commercial matters. The inclusion of a special jurisdiction rule for unjust enrichment will then likely be raised.

This article is divided in five sections. Following this introduction, the next section shows that some unjust enrichment claims and issues concerning unjust enrichment raise difficult questions concerning the application of the Brussels I Regulation Recast's exclusive jurisdiction rules for immovable property and company law and governance matters. This not only gives rise to difficult practical problems, but also tests the suitability of the Regulation to accommodate the diversity of legal traditions that exist within the EU and to respond to some of the challenges of the global finance. This article then turns to the application of the special jurisdiction rules for contracts and torts to unjust enrichment. This discussion is timely given the recent pronouncements of the Court of Justice and its

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<sup>1</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) ch 38.

<sup>2</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1, replacing Regulation No 44/2001 [2001] OJ L12/1.

<sup>3</sup> Brussels I Regulation Recast Art 7(1).

<sup>4</sup> *Ibid* Art 7(2).

<sup>5</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

<sup>6</sup> For unjust enrichment, see Rome II Regulation Art 10.

<sup>7</sup> <<https://www.hcch.net/en/projects/legislative-projects/judgments>>.

Advocates General on this topic.<sup>8</sup> These pronouncements show that unjust enrichment claims connected with an existing or a supposed contract between the parties fall within the special jurisdiction rule for contracts and that unjust enrichment claims do not fall within the special jurisdiction rule for torts. This, in turn, means that the famous House of Lords' decision in *Kleinwort Benson Ltd v Glasgow City Council (No 2)*<sup>9</sup> was in part wrongly decided. The following section rejects the idea of adding a new special jurisdiction rule for unjust enrichment to the Regulation. The final section concludes.

This article does not deal with the question whether unjust enrichment claims brought by and against public authorities fall within the subject-matter scope of the Regulation and the application of the rules on choice-of-court agreements to unjust enrichment claims. This is partly for reasons of space and partly because unjust enrichment claims have raised exceptional theoretical and practical problems concerning the application of the rules of non-consensual exclusive jurisdiction and special jurisdiction for contracts and torts.

The concept of unjust enrichment used in this article is not derived from any national law because of the principle of autonomous interpretation underlying the Brussels I Regulation Recast. Advocate General Wahl attempted to define this concept in an autonomous way in the recent *Siemens* case: 'an action for restitution based on unjust enrichment aims to restore to the applicant a benefit which the defendant has acquired illegitimately at the former's expense (or the payment of its monetary equivalent)'.<sup>10</sup> Another attempt was made by the drafters of the Draft Common Frame of Reference.<sup>11</sup> Article 1:101(1) (Basic rule) in Book VII (Unjustified enrichment) provides: 'A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment.' Article 1:102 in Book VII defines the circumstances in which an enrichment is unjustified.

The autonomous concept of unjust enrichment is broad enough to cover situations which in a particular national legal system some might regard as falling within another branch of private law. The famous case of *Webb v Webb*<sup>12</sup> is a good example. On one view, *Webb* is not an unjust enrichment case because it was not pleaded as such – the claim was brought under English trust law and the question before the Court of Justice was whether a claim for the enforcement of equitable rights in immovable property fell within the scope of the exclusive jurisdiction rule for immovable property. On the other hand, since the father transferred a benefit to his son for a purpose which was not achieved or with an expectation which was not realised in the circumstances where the son knew of, or could reasonably have expected to know of, the purpose or expectation and accepted, or could reasonably have assumed to have accepted, that the enrichment must be reversed in such circumstances, the circumstances falls within the definition of unjust enrichment in the Draft Common Frame of Reference. As will be discussed, even in England there is a body of opinion which holds that claims for a declaration that property is subject to resulting trust are founded on the principle of unjust enrichment.

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<sup>8</sup> Case C-366/13 *Profit Investment SIM SpA v Ossi* ECLI:EU:C:2016:282, [2016] 1 WLR 3832; Case C-102/15 *Gazdasági Versenyhivatal v Siemens Aktiengesellschaft Österreich* ECLI:EU:C:2016:607, [2016] 5 CMLR 14; Case C-185/15 *Kostanjevec v F&S Leasing GmbH* ECLI:EU:C:2016:763, [2017] 4 WLR 7; Case C-417/15 *Schmidt v Schmidt* ECLI:EU:C:2016:881, [2017] IL Pr 6.

<sup>9</sup> [1999] 1 AC 153.

<sup>10</sup> *Siemens* (n 8), AG opinion [61].

<sup>11</sup> C von Bar and others (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier 2009).

<sup>12</sup> Case C-294/92 [1994] ECR I-1717.

## II. UNJUST ENRICHMENT AND EXCLUSIVE JURISDICTION

The question whether paragraphs 1 and 2 of Article 24 of the Brussels I Regulation Recast, which concern immovable property and certain company law and governance matters, apply to some unjust enrichment claims and issues concerning unjust enrichment should be addressed first because Article 24 occupies the highest place in the hierarchy of the Regulation's jurisdictional rules.

A distinctive feature of the common law approach to unjust enrichment is that it gives proprietary remedies. The question whether an English law claim for a declaration that immovable property is held under a resulting trust and for the transfer of legal title to the claimant falls within Article 24(1) can, therefore, also be regarded as the question of how well the Brussels I Regulation Recast, an instrument based largely on civilian concepts and solutions, deals with the diversity of legal traditions that exist within the EU.

The House of Lords decided *Kleinwort Benson*<sup>13</sup> in the wake of another famous decision in *Hazell v Hammersmith and Fulham London Borough Council*.<sup>14</sup> In *Hazell*, the House of Lords held that the derivatives contracts that British municipalities entered with British banks in the 1980s were invalid because of the municipalities' incapacity. Admittedly, *Kleinwort Benson* did not concern exclusive jurisdiction, but the application of the special jurisdiction rules for contracts and torts to unjust enrichment. Following the globalisation and contractual standardisation of the derivatives markets<sup>15</sup> and the 2008 financial crisis, the second wave of derivatives litigation reached England. The key jurisdictional question became whether exclusive English jurisdiction clauses contained in derivatives contracts entered between banks and foreign municipalities and publicly owned companies were ineffective because the municipalities and publicly owned companies might have acted *ultra vires*. The municipalities and publicly owned companies argued that the question of *vires*, which could lead to unjust enrichment claims, fell within the exclusive jurisdiction of the courts of their seat pursuant to Article 24(2). The question of application of Article 24(2) in the second wave of derivatives litigation can, therefore, also be regarded as the question of how well the Brussels I Regulation Recast responds to some of the challenges faced and raised by the global finance.

### A. Unjust Enrichment, Article 24(1) and Diversity of Legal Traditions

It is often said that the common law gives both personal and proprietary remedies to reverse an unjust enrichment, whereas the civil law gives only personal remedies.<sup>16</sup> This proposition is not without controversy. In English law, for example, there is a body of opinion, the main exponents of which include Birks and Chambers,<sup>17</sup> which holds that claims for a declaration

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<sup>13</sup> (n 9).

<sup>14</sup> [1992] 2 AC 1 (HL).

<sup>15</sup> J Braithwaite, 'Thirty Years of Ultra Vires: Local Authorities, National Courts and the Global Derivatives Markets' (2018) 71 CLP 369.

<sup>16</sup> G Gretton, 'Proprietary issues' in D Johnston and R Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 571; D Visser, 'Unjustified Enrichment' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd ed, Edward Elgar 2012) 947, 956; R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) ch 26; Zweigert and Kötz (n 1) 559-61.

<sup>17</sup> P Birks, *An Introduction to the Law of Restitution* (OUP 1985) 57-73; P Birks, 'Restitution and Resulting Trusts' in SR Goldstein (ed), *Equity and Contemporary Legal Developments* (Hebrew University of Jerusalem 1992) 335; R Chambers, *Resulting Trusts* (Clarendon 1997).

that property is subject to resulting trust are founded on the principle of unjust enrichment. Some, however, do not share this opinion.<sup>18</sup> Civilian systems have their own controversies:

the observation that in the common-law systems technical instruments such as trust or lien may provide ... priority [over other, general creditors of the defendant] makes it necessary to look beyond the unjust enrichment provisions in the continental codes and consider concurrent remedies which may also lead to 'restitution' in a wider sense, such as the *rei vindicatio* in the case of movables or immovables transferred without any valid legal ground.<sup>19</sup>

But the fact remains that the *rei vindicatio* does not depend on there being some unjust enrichment, whereas proprietary restitution is a well-established, albeit disputed, concept in English law.

The distinction between claims *in personam* and claims *in rem* is central to Article 24(1) of the Brussels I Regulation Recast. This Article provides that in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated shall have exclusive jurisdiction, regardless of the domicile of the parties.<sup>20</sup> The Brussels Convention, the Regulation's predecessor, was adopted in 1968,<sup>21</sup> five years before the accession of Ireland and the UK to the European Communities. It is, therefore, understandable that the drafters of this Convention adopted a strict distinction between claims *in personam* and claims *in rem* in what eventually became Article 24(1) of the Regulation. This distinction, which goes back to Roman law,<sup>22</sup> is at the heart of the systematisation of civilian systems of private law. Common law systems, on the other hand, distinguish between legal and equitable proprietary rights and remedies, with the latter playing an important role in the law of unjust enrichment. This inevitably leads to the problem of classification, for the purposes of what is now Article 24(1), of common law claims for a declaration that immovable property is held on trust and for the transfer of legal title with the aim of reversing the defendant's enrichment at the claimant's expense.

Article 24(1) has given rise to several interpretational difficulties. For present purposes, suffice it to focus on the definition of 'rights *in rem*'. The leading case is *Webb v Webb*.<sup>23</sup> The father purchased a flat in France, ownership of which was conveyed to the son. The parties fell out and the father commenced proceedings in England, where both parties were domiciled, seeking a declaration that the flat was held under a resulting trust and an order that the son should reconvey legal ownership of the flat to the father. The son argued that French courts had exclusive jurisdiction over the dispute. On one view, *Webb* is not an unjust enrichment case because it was not pleaded as such – the claim was brought under English trust law. A different view is that there was a mutual understanding between the parties, which failed, which makes *Webb* a case concerning a failure of consideration, which is one of the circumstances that give rise to unjust enrichment.<sup>24</sup>

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<sup>18</sup> J Mee, 'The Past, Present, and Future of Resulting Trusts' (2017) 70 CLP 189; W Swadling 'Explaining Resulting Trusts' (2008) 124 LQR 72.

<sup>19</sup> P Schlechtriem, C Coen and R Hornung, 'Restitution and Unjust Enrichment in Europe' [2001] ERPL 377, 388.

<sup>20</sup> This rule is subject to an exclusion for tenancies of immovable property concluded for temporary private use for a maximum period of six months.

<sup>21</sup> Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32.

<sup>22</sup> Zimmermann (n 16) 29-30.

<sup>23</sup> (n 12).

<sup>24</sup> Draft Common Frame of Reference (n 11) Article 1:102 in Book VII; *Siemens* (n 8), AG opinion [61].

The Court of Justice held that it was not sufficient, for what is now Article 24(1) to apply, that a right *in rem* in immovable property was involved in the action or that the action had a link with immovable property. The action had to be based on a right *in rem*.<sup>25</sup> Nor was it the right approach to identify the claimant's ultimate purpose in commencing proceedings, which in this case was to obtain legal ownership of the flat.<sup>26</sup> The court found that the action was not based on a right *in rem* because the father did not claim to enjoy rights directly relating to the property enforceable against the whole world (*erga omnes*). He sought only to assert rights as against the son.<sup>27</sup> In the court's view, the interests of proper administration of justice did not support a finding that the rights asserted by the father were rights *in rem*. Exclusive jurisdiction under what is now Article 24(1) is justified because actions concerning rights *in rem* in immovable property often involve disputes necessitating checks, inquiries and expert assessments to be carried out on the spot.<sup>28</sup> The immovable nature of the trust property and its location were irrelevant to the issues that the referring court had to decide, 'which would have been the same if the dispute had concerned a flat situated in the United Kingdom or a yacht'.<sup>29</sup> The court concluded that the action was *in personam* and thus fell outside what is now Article 24(1). Hence, the proceedings could proceed in England because French courts did not have exclusive jurisdiction.

*Webb* has received a hostile reception in England. The critics have said that it was 'absurd',<sup>30</sup> 'bizarre',<sup>31</sup> and 'much to be regretted',<sup>32</sup> that the equitable rights that the father sought to enforce were treated as purely personal and that the reasoning of the Court of Justice was 'almost wholly spurious' and '[flew] in the face of legal sense'.<sup>33</sup>

But these criticisms miss the mark. The question before the Court of Justice was not whether, under English law, the equitable rights that the father sought to enforce were sufficiently similar, in their substance or operation, to legal proprietary rights and, on that basis, to be classified as rights *in rem*. The court had a much more difficult task of having to classify English equitable rights, which had no equivalent in the land laws of the majority of Contracting States, including France in which the property was located, for the purposes of a legal instrument which has as one of its principal objectives the proper distribution of adjudicatory authority within the EU.

The Court of Justice was right to examine the right sought to be enforced from the perspective of the legal system which created the right (the *lex causae*). The *lex causae* has to be taken into account because this legal system provides the data necessary to perform the autonomous classification exercise for the purposes of Article 24(1). In *Webb*, the Court of Justice was confronted with an unclear picture in this respect. As Lord Mance recently noted in *Akers v Samba Financial Group*, 'there is a school of thought (which can be dated to *FW Maitland, Equity – a Course of Lectures* (1936)) which analyses the equitable interests created by a common law trust not as proprietary, but as personal or "obligational", even as

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<sup>25</sup> Ibid [14]. The only exception are cases concerning tenancies of immovable property.

<sup>26</sup> Ibid [15].

<sup>27</sup> Ibid.

<sup>28</sup> Ibid [16]-[17].

<sup>29</sup> Ibid [18].

<sup>30</sup> J Harris, 'Jurisdiction and Enforcement of Foreign Judgments in Transnational Trust Litigation' in D Hayton (ed), *The International Trust* (3rd edn, Jordan Publishing 2011) 3, 14.

<sup>31</sup> A Briggs, 'Trusts of Land and the Brussels Convention' (1994) 110 LQR 526, 530; E Peel, 'Jurisdiction under the Brussels Convention' in F Rose (ed), *Restitution and the Conflict of Laws* (Mansfield Press 1995) 1, 35.

<sup>32</sup> P Kaye, 'Creation of an English Resulting Trust of Immovables Held to Fall outside Article 16(1) of the European Judgments Convention' [1995] IPRax 286, 289.

<sup>33</sup> A Briggs and P Rees, *Civil Jurisdiction and Judgments* (4th edn, Informa 2005) para 2.44.

against third parties.<sup>34</sup> Modern exponents of this view include McFarlane and Stevens,<sup>35</sup> who have argued that the idea of equitable proprietary rights in a trust fund:

cannot be fitted into the Roman dichotomy of rights *in personam* and rights *in rem*. If, following the Romans, we use ‘property’ to mean rights against a thing that are prima facie binding on anyone who interferes with the thing, there is no such thing as equitable property: it is a myth.<sup>36</sup>

Instead, in their view, beneficiaries have ‘persistent rights’ to, or against, the right of legal ownership of the trustee or any other legal owner of trust property. To McFarlane and Stevens, the decision in *Webb* makes good sense. What is now Article 24(1) did not apply because the father ‘was not claiming a right against the French land. [The father] was content to acknowledge that [the son] had a right *in rem* in that land, and alleged instead that he had an (English) right against [the son]’s (French) right to the land.’<sup>37</sup> Many disagree with McFarlane and Stevens.<sup>38</sup> But this only underlines the difficulty of the task that the Court of Justice faced in *Webb*, a task made no easier by the fact that the High Court had found that the father’s action had as its object not a right *in rem*, but the establishment of the defendant’s accountability as a trustee,<sup>39</sup> that a majority in the Court of Appeal had been inclined to dismiss the appeal<sup>40</sup> and that the UK had argued before the Court of Justice that the father’s action was concerned only with trustee-beneficiary relations internal to the trust, so that it could not be regarded as an action *in rem*.<sup>41</sup>

*Webb* can be conveniently contrasted with *Weber v Weber*.<sup>42</sup> This was not an unjust enrichment case, but it is useful for assessing the soundness of the judgment of the Court of Justice in *Webb*. *Weber* concerned an action seeking a declaration of invalidity of the exercise of a German right of pre-emption attaching to immovable property which produced effects with regard to third parties. The Court of Justice held that this action fell within what is now Article 24(1). Unfortunately, the court did not mention *Webb* in its judgment, so it is unclear on what basis it distinguished the two cases. One possibility is that, unlike the English equitable rights in *Webb*, the German pre-emption right in *Weber* was a registrable interest in property.<sup>43</sup> However, this seems an unsatisfactory basis for distinguishing the two cases. It is questionable whether registrability can be a good test to determine whether a right is a right *in rem*, since some systems admit the existence of unregistrable property rights. Another possibility is that, unlike *Webb* which concerned only trustee-beneficiary relations, *Weber* concerned not only internal relations between co-owners of immovable property, but also the external effects of a right of pre-emption with regard to a third party purchaser of the immovable property burdened with that right.

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<sup>34</sup> [2017] UKSC 6, [2017] AC 424 [15].

<sup>35</sup> B McFarlane, *The Structure of Property Law* (Hart 2008); B McFarlane and R Stevens, ‘The Nature of Equitable Property’ (2010) 4 *Journal of Equity* 1; B McFarlane and R Stevens, ‘What’s Special about Equity? Rights against Rights’ forthcoming in I Samet-Porat, H Smith and D Klimchuk (eds), *Philosophical Foundations of the Law of Equity* (OUP 2019).

<sup>36</sup> McFarlane and Stevens, ‘The Nature of Equitable Property’ (n 35) 1.

<sup>37</sup> *Ibid* 14.

<sup>38</sup> S Gardner, ‘“Persistent Rights” Appraised’ in N Hopkins (ed), *Modern Studies in Property Law – Volume 7* (Hart 2013) 321; P Jaffey, ‘Explaining the Trust’ (2015) 131 *LQR* 377; JE Penner, ‘The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust’ (2014) 27 *Canadian Journal of Law & Jurisprudence* 473; EC Zaccaria, ‘The Nature of the Beneficiary’s Right under a Trust: Proprietary Right, Purely Personal Right or Right against a Right?’ (2019) 135 *LQR* 460.

<sup>39</sup> [1991] 1 *WLR* 1410.

<sup>40</sup> [1992] *ILPr* 374 [13] (Scott LJ), [15] (Taylor LJ); cf [16] (Nourse LJ).

<sup>41</sup> *Webb* (n 12), AG opinion [24].

<sup>42</sup> Case C-438/12 *ECLI:EU:C:2014:212*, [2015] Ch 140.

<sup>43</sup> German Civil Code para 1094(1).

Yet another basis for distinguishing the two cases may be found in the characterisation of the right in question by the *lex situs*. The claim in *Webb* concerned immovable property situated in France and was based on English equitable rights which had no equivalent in French land law. In contrast, the claim in *Weber* concerned immovable property situated in Germany and was based on a German right which German law recognised as a right *in rem*. The Court of Justice has confirmed the link between Article 24(1) and the *lex situs*: '[t]he essential reason for conferring exclusive jurisdiction [under Article 24(1)] is that the courts of the *locus rei sitae* are the best placed ... to apply the rules and practices which are generally those of the State in which the property is situated.'<sup>44</sup> This link is also evident in the rationales for this provision mentioned in the Jenard Report accompanying the Brussels Convention.<sup>45</sup> Furthermore, the Schlosser Report accompanying the accession of Denmark, Ireland and the UK to the Brussels Convention, while discussing the problem of application of the rule of exclusive jurisdiction for immovable property when English equitable rights are involved, highlights the importance of the *lex situs*.<sup>46</sup> Given the link between Article 24(1) and the *lex situs* and the importance of the *lex situs* for the resolution of disputes over immovable property,<sup>47</sup> it makes sense to take into account the *lex situs* when deciding whether a right is a right *in rem* for the purposes of Article 24(1).

This approach is not a negation of the principle of autonomous interpretation. It is ultimately for EU law to classify the right in question for the purposes of Article 24(1). The argument advanced here is that autonomous classification cannot be performed without appropriate data, which should be obtained by taking into account both the *lex causae* and the *lex situs*. This approach enables the Brussels I Regulation Recast to perform its objective of proper distribution of adjudicatory authority within the EU. The outcome of *Webb* can hardly be criticised from this systemic perspective. Exclusive jurisdiction was not conferred on French courts, which had no claim to exclusive jurisdiction given that French law recognised no equivalent proprietary rights to the rights that the father sought to enforce. On the other hand, as MacMillan writes, it was preferable that the determination of a trust created in England be made by an English court:

The lack of an exclusive ownership of property is a peculiarity of the common law. The problems arising from this peculiarity are best dealt with by those courts most experienced with it. In addition ... if these actions did constitute a right *in rem* for the purposes of [Article 24(1)], practical difficulties could ensue. In cases where the trust was comprised of immovable property in a number of countries, there could be conflicting determinations on the very existence of a trust. Such a result is clearly undesirable.<sup>48</sup>

### *B. Unjust Enrichment, Article 24(2) and Global Finance*

*Hazell*,<sup>49</sup> in which the House of Lords held that the derivatives contracts that British municipalities entered with British banks in the 1980s were invalid because of the municipalities' incapacity, was a defining moment for the English law of unjust enrichment.<sup>50</sup>

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<sup>44</sup> Case C-605/14 *Komu v Komu* ECLI:EU:C:2015:833, [2016] 4 WLR 26 [25]. See also [31].

<sup>45</sup> [1979] OJ C59/1 35.

<sup>46</sup> [1979] OJ C59/71 para 168.

<sup>47</sup> L Collins (gen ed), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) para 23-063; A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (OUP 2015) para 8.23 (M Lehmann).

<sup>48</sup> C MacMillan, 'The European Court of Justice Agrees with Maitland: Trusts and the Brussels Convention' [1996] *Conveyancer and Property Lawyer* 125, 129 (footnote omitted).

<sup>49</sup> (n 14).

<sup>50</sup> Braithwaite (n 15) 384.

One of the claims brought in the immediate aftermath of *Hazell* concerning the losses faced by bank counterparties which had entered into void swaps with British municipalities was *Kleinwort Benson*,<sup>51</sup> a leading case on the application of the special jurisdiction rules for contracts and torts to unjust enrichment. The post-*Hazell* cases had several things in common. First, it was undisputed that the municipalities had acted *ultra vires*. Second, the parties had ceased to perform now void swaps. Third, the claims were brought in unjust enrichment.

We are currently witnessing the second wave of derivatives litigation, which differs from the first in several key respects. First, the parties are typically foreign. Second, the claims brought in England are not for the restitution of money paid. The claims are for a declaration of validity of derivatives contracts entered between international banks and foreign municipalities and publicly owned companies. The key jurisdictional question has become whether exclusive English jurisdiction clauses contained in the derivatives contracts are ineffective because the municipalities and publicly owned companies might have acted *ultra vires*. Since the argument that a contract is invalid because of incapacity seldom results in the invalidity of the jurisdiction clause contained in the contract,<sup>52</sup> the municipalities and publicly owned companies have tried to deprive the English jurisdiction clauses of effectiveness by arguing that the question of *vires* falls within the exclusive jurisdiction of the courts of their seat pursuant to Article 24(2) of the Brussels I Regulation Recast. This Article provides that in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat shall have exclusive jurisdiction, regardless of the domicile of the parties. In other words, the foreign municipalities and publicly owned companies rely on Article 24(2) in order to take litigation outside England and obtain declarations of invalidity of the derivatives contracts in their own courts. These cases raise issues concerning unjust enrichment. Acting *ultra vires* is a contractual defect that leads to the invalidity of the contract. Two consequences flow from invalidity. Invalid contracts need not be performed. If a benefit has been transferred, there is a claim in unjust enrichment.

*Hazell* was not just a defining moment for the English law of unjust enrichment, but also for the British financial services industry. As Braithwaite explains:

European bank counterparties who had entered local authority swaps in good faith were particularly angered by the decision. One account in the Economist described French bankers storming out of a meeting complaining that ‘Britain’s legal standards had sunk to the level of Venezuela’s’. Some criticism went so far as to portray the case as an existential threat to the City of London. The head of legal services at Midland Montagu was quoted as remarking that the *Hazell* decision ‘gave the French institutions an opportunity to shout out loud about the preference for using Paris over London’.<sup>53</sup>

The dire predictions of the effect of *Hazell* on the City have not materialised because English law and English courts adapted to market needs.<sup>54</sup> This has laid the foundations for an unprecedented globalisation and contractual standardisation of the derivatives markets

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<sup>51</sup> (n 9).

<sup>52</sup> Brussels I Regulation Recast Art 25(5); *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091, [2009] 2 All ER (Comm) 129.

<sup>53</sup> Braithwaite (n 15) 387-8.

<sup>54</sup> *Ibid* 388-9.

achieved by the widespread use of the ISDA (International Swaps and Derivatives Association) Master Agreement.<sup>55</sup>

Private international law supports this outstanding development in three different, although related ways. The financial derivatives contracts that British municipalities entered before the adoption of the first ISDA Master Agreement in 1987, which were the subject of the House of Lords' decisions in *Hazell* and *Kleinwort Benson*, look very unusual from today's perspective for their lack of jurisdiction clauses. In contrast, section 13(b) of the current version of the ISDA Master Agreement allows the parties to choose the jurisdiction of either English courts or New York courts, depending on whether they choose English law or New York law as the governing law. The Brussels I Regulation Recast supports section 13(b) by giving full effect to English jurisdiction agreements even when the parties are domiciled outside the EU or when the parties are domiciled in the same foreign country.<sup>56</sup> Private international law also supports the derivatives markets by giving full effect to English choice-of-law clauses even where the contact is otherwise connected with one foreign country only.<sup>57</sup> This discloses a deeply responsive attitude of English law and English courts to market needs<sup>58</sup>

The third way in which private international law supports the derivatives markets concerns the application of Article 24(2) of the Brussels I Regulation Recast. The leading case is the judgment of the Court of Justice in *Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts v JPMorgan Chase Bank NA, Frankfurt Branch*.<sup>59</sup> This case concerned a swap credit default contract entered between BVG, a German publicly owned company that provides public transportation services in Berlin, and JPM, an American investment bank. The contract contained an exclusive English jurisdiction clause. Following the occurrence of some trigger events during the 2008 financial crisis, JPM requested BVG to pay money due under the contract. BVG refused. JPM's English branch and its UK subsidiary commenced proceedings in London for enforcement of the contract and a declaration that the contract was valid and enforceable. BVG replied that the contract was invalid because it had no capacity to enter the contract and that the decisions of its organs leading to the entry into the contract were invalid. This, according to BVG, triggered the application of what is now Article 24(2), which gave exclusive jurisdiction to German courts. BVG also commenced proceedings in Germany against JPM's German branch asking the court, inter alia, to assume jurisdiction on the basis of what is now Article 24(2) and to declare the contract invalid. The Higher Regional Court in Berlin referred several questions for preliminary ruling to the Court of Justice, including whether Article 24(2) applied.

BVG's argument was clearly related to the alleged invalidity of the decisions of its organs. The Court of Justice, therefore, focused on the autonomous interpretation of the wording 'proceedings which have as their object'. The court adopted a strict interpretation of what is now Article 24(2) and held that it applied only where the validity of the decisions of

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<sup>55</sup> *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch), [2011] 2 BCLC 120 [5]; <[https://www.bis.org/publ/otc\\_hy1905.htm](https://www.bis.org/publ/otc_hy1905.htm)>.

<sup>56</sup> Brussels I Regulation Recast Art 25.

<sup>57</sup> *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267, [2017] 1 WLR 1323; *Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ 428, [2017] 1 CLC 969.

<sup>58</sup> G Cuniberti, 'Choice of Law in Domestic Contracts: Towards a Right to Access Foreign Financial Markets?' in H Muir Watt et al (ed), *Global Private International Law: Adjudication without Frontiers* (Edward Elgar 2019) 464, 469, fn 66: 'the architect of the *Santander* decision, Judge Blair, had participated in the drafting of ISDA's Master Agreements as a financial law specialist. The *Santander* case was the occasion to provide after-sales services.'

<sup>59</sup> Case C-144/10 [2011] ECR I-3961. See also *JP Morgan Chase Bank NA v Berliner Verkehrsbetriebe* [2010] EWCA Civ 390, [2012] QB 176.

the company's organs were the principal subject matter of the proceedings before the court. Since the dispute between BVG and JPM related principally to the validity, interpretation or enforceability of the credit default contract, and since BVG's capacity was an ancillary question, German courts did not have exclusive jurisdiction.

*BVG* has received a very warm welcome in English legal and banking circles. The Court of Justice has been praised for 'disarming the *ultra vires* torpedo'<sup>60</sup> and for the 'clarity of this judgment and the certainty it brings'.<sup>61</sup> Indeed, *BVG* supports the derivatives markets by guaranteeing that disputes that concern the validity of derivatives contracts,<sup>62</sup> as well as any restitutionary consequences of invalidity,<sup>63</sup> will be resolved in the contractually agreed English forum.

### III. UNJUST ENRICHMENT AND SPECIAL JURISDICTION

If the exclusive jurisdiction rules do not apply, the claimant can commence proceedings in the courts of the defendant's domicile<sup>64</sup> or in another court with jurisdiction under a rule of special jurisdiction. The Brussels I Regulation Recast contains special jurisdiction rules for 'matters relating to a contract'<sup>65</sup> and 'matters relating to tort, delict or quasi-delicts',<sup>66</sup> but not for unjust enrichment.<sup>67</sup> The question arises whether unjust enrichment claims, or some of them, fall within these special jurisdiction rules.

The following preliminary matters should be noted. 'Matters relating to a contract' and 'matters relating to tort, delict or quasi-delict' are autonomous concepts.<sup>68</sup> Paragraphs 1 and 2 of Article 7 are mutually exclusive.<sup>69</sup> The court with jurisdiction under Article 7(1) does not automatically have jurisdiction over related non-contractual claims;<sup>70</sup> similarly, the court with jurisdiction under Article 7(2) does not automatically have jurisdiction over related claims. The classification of a claim is, therefore, of utmost importance.

#### A. Unjust Enrichment and Article 7(1)

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<sup>60</sup> R Fentiman [2011] CLJ 513.

<sup>61</sup> T Strong and R Lewis, 'Swaps and Capacity – New Recession, Similar Challenges to Liability' (2011) 4(1) *Bankers' Law* 32, 37. Similarly, N Marsh and O Felton, 'Your Place or Mine? The ECJ Brings Clarity to the Rules on Jurisdiction' (2011) 26 *Butterworths Journal of International Banking and Financial Law* 500; PM Shine, 'Support from the English Courts and the European Court of Justice for Jurisdiction Clauses in the ISDA Master Agreement' (2012) 27 *Journal of International Banking Law and Regulation* 38, 42.

<sup>62</sup> *Depfa Bank plc v Provincia di Pisa* [2010] EWHC 1148 (Comm), [2010] 2 CLC 478 and [2012] EWHC 687 (Comm), [2012] 1 CLC 569; *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2010] EWHC 2566 (Comm), [2010] 2 CLC 499. See also *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298.

<sup>63</sup> *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] QB 549.

<sup>64</sup> Brussels I Regulation Recast Art 4(1).

<sup>65</sup> *Ibid* Art 7(1).

<sup>66</sup> *Ibid* Art 7(2).

<sup>67</sup> Cf *ibid* Art 7(3) on jurisdiction over civil claims for damages or restitution based on acts giving rise to criminal proceedings.

<sup>68</sup> Case 34/82 *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987; Case 189/87 *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co* [1988] ECR 5565.

<sup>69</sup> *Kalfelis* (n 68); Case C-548/12 *Brogstetter v Fabrication de Montres Normandes EURL and Fräßdorf* ECLI:EU:C:2014:148, [2014] QB 753.

<sup>70</sup> In *Kalfelis* (n 68), the Court of Justice did not accept AG Darmon's idea, advanced at [29] of his opinion, of 'channelling', according to which a court with jurisdiction under what is now Art 7(1) should also have jurisdiction over related non-contractual claims.

Article 7(1) provides that a person domiciled in a Member State may be sued in another Member State in matters relating to a contract, in the courts for the place of performance of the obligation in question. This can be contrasted with the wording of Article 24, which applies to ‘proceedings which have as their object’ certain matters. Article 7(1) clearly covers claims based on rights arising out of a contract. But does it also cover claims based on other legal bases, including unjust enrichment, which are connected with an existing or a supposed contract between the parties?

Defining ‘matters relating to a contract’ is difficult. The Court of Justice has given several elements of a definition. There must be a contractual relationship between the parties,<sup>71</sup> express or tacit.<sup>72</sup> Because of the principle of autonomous interpretation, the relationship need not be classified as contractual under national law in order to fall within Article 7(1), nor does a relationship regarded as contractual under national law automatically fall within Article 7(1).<sup>73</sup> A party must have undertaken a contractual obligation towards the other party.<sup>74</sup> The concept of ‘contractual obligation’ is also autonomous. An obligation is regarded as contractual if it has been freely assumed by one party towards the other.<sup>75</sup> Freely assumed obligations do not only arise out of a contract, but also include obligations imposed by law which the parties freely assume as the legal incidents of their contract.<sup>76</sup> It is not necessary, however, for a contract to be actually concluded as long as there is an identifiable freely assumed obligation.<sup>77</sup> Article 7(1) applies even if a party denies the existence of a contract,<sup>78</sup> as long as a good arguable case has been shown that the conditions for the application of Article 7(1) have been met.<sup>79</sup>

How are these principles applied to unjust enrichment claims connected with an existing or a supposed contract between the parties? Four questions are particularly contentious. First, does Article 7(1) apply when a party seeks a declaration that a contract is invalid? Second, assuming that the answer to the first question is affirmative, does the court with jurisdiction to decide on the validity of a contract also have jurisdiction to decide on the consequences of invalidity?<sup>80</sup> Third, does Article 7(1) apply when the invalidity of a contract is undisputed and the court only has to decide on the consequences of invalidity? Fourth, does Article 7(1) apply to claims for restitution of mistaken payments under a contract? These questions will be answered in the following three sub-sections. The first sub-section deals with the first two questions. These questions were addressed in three recent cases that reached the Court of Justice.<sup>81</sup> The second sub-section turns to the third question. This question was addressed by the House of Lords in *Kleinwort Benson*,<sup>82</sup> one of the most controversial English judgments concerning the Brussels I Regulation Recast. The fourth question has not yet arisen in practice and is left for the third sub-section.

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<sup>71</sup> Case C-26/91 *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] ECR I-3967 [16].

<sup>72</sup> Case C-196/15 *Granarolo SpA v Ambrosi Emmi France SA* ECLI:EU:C:2016:559, [2016] ILPr 32.

<sup>73</sup> *Martin Peters* (n 68) [13]; *Jakob Handte* (n 71).

<sup>74</sup> *Jakob Handte* (n 75) [16].

<sup>75</sup> Case C-27/02 *Engler v Janus Versand GmbH* [2005] ECR I-481 [51].

<sup>76</sup> Case 9/87 *SPRL Arcado v SA Haviland* [1988] ECR 1539.

<sup>77</sup> Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] ECR I-7357 [22]. Cf Brussels I Regulation Recast Art 17.

<sup>78</sup> Case 38/81 *Effer SpA v Kantner* [1982] ECR 825; *Boss Group Ltd v Boss France SA* [1997] 1 WLR 351 (CA).

<sup>79</sup> *Tesam Distribution Ltd v Schuh Mode Team GmbH* [1990] ILPr 149 (CA).

<sup>80</sup> Similar questions arise when a party argues that a contract has been frustrated or terminated for another reason, eg breach, duress, undue influence, mistake or even pre-contractual misrepresentation and non-disclosure: *Agnew v Lansforsakringsbolagens AB* [2001] 1 AC 223 (HL).

<sup>81</sup> *Profit Investment* (n 8) *Kostanjevec* (n 8); *Schmidt* (n 8).

<sup>82</sup> (n 9).

1. Article 7(1) and claims for a declaration of invalidity and the consequences of invalidity *Profit Investment*<sup>83</sup> concerned an action for the annulment of a contract on the grounds of imbalance of the parties' relative bargaining strengths and inadequate consideration. The claimant also sought restitution of money paid under the contract. The Court of Justice held that the national court's jurisdiction to determine matters relating to a contract included the power, which the national court could exercise of its own motion, to consider the existence of the constituent parts of the contract; the national court could not otherwise assess its own jurisdiction.<sup>84</sup> The court further stated that the reason for the payment of money was the existence of the disputed contract:

[I]f there had not been a contractual relationship freely assumed between the parties, the obligation would not have been performed and there would be no right to restitution. That causal link between the right to restitution and the contractual relationship is sufficient to bring the action for restitution within the scope of matters relating to a contract.<sup>85</sup>

The Court of Justice followed Advocate General Bot's well-reasoned opinion. After finding that what is now Article 7(1) applied when a party sought the annulment of a contract,<sup>86</sup> he opined that the court with jurisdiction to decide on annulment also had jurisdiction to rule on the consequences of invalidity, particularly restitutionary ones.<sup>87</sup> The Advocate General advanced several arguments to support these conclusions.

The first conclusion, namely that an action for the annulment of a contract was a matter relating to a contract, was supported by five arguments. First, nullity was the penalty for non-compliance with the rules on formation of contracts; an action seeking the annulment of a contract based on the infringement of those rules, which are part and parcel of contract law, had to be a matter relating to a contract.<sup>88</sup> Second, the Advocate General invoked the principle of competence competence. If a court could not decide on the existence and validity of a contract at the jurisdictional stage, it would effectively be precluded from ruling on its own jurisdiction.<sup>89</sup> Third, by analogy with Article 10(1) of the Rome I Regulation, which provides that the existence and validity of a contract, or any term thereof, are issues within the scope of the putative *lex contractus*, an action seeking the annulment of a contract is a matter relating to a contract.<sup>90</sup> The Advocate General also drew an analogy with *Folien Fischer AG and Fofitec AG v Ritrama SpA*,<sup>91</sup> where the Court of Justice dealt with jurisdiction over actions for a negative declaration seeking to establish the absence of liability in tort. If a positive action for a declaration of liability and an action for a negative declaration formed two aspects of the same matter relating to tort, it was logical to treat an action for performance of a contract and an action for a declaration of invalidity of the contract as two facets of the same matter relating to a contract.<sup>92</sup> Finally, the Advocate General thought that 'an argument of expediency' supported his conclusion that what is now

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<sup>83</sup> (n 8).

<sup>84</sup> *Ibid* [54]. The court referred here to *Effer* (n 78).

<sup>85</sup> (n 8) [55].

<sup>86</sup> *Ibid*, AG opinion [68], [70].

<sup>87</sup> *Ibid* [69], [77]. See also *Kleinwort Benson* HL (n 9) 175-7 (Lord Nicholls); *Kleinwort Benson Ltd v Glasgow City Council (No 2)* [1996] QB 678 (CA), 700-1 (Millett LJ).

<sup>88</sup> *Profit Investment* (n 8), AG opinion [71].

<sup>89</sup> *Ibid* [72].

<sup>90</sup> *Ibid* [73].

<sup>91</sup> Case C-133/11 ECLI:EU:C:2012:664, [2013] QB 523.

<sup>92</sup> *Profit Investment* (n 8), AG opinion [74].

Article 7(1) applied where a party sought the annulment of a contract: there was no particular reason to deprive the party of the choice of jurisdiction afforded to him on the pretext that he was suing not for performance of the contract, but for a declaration of invalidity.<sup>93</sup>

Advocate General Bot then advanced several arguments in favour of his second conclusion, namely that the court with jurisdiction to decide on annulment also has jurisdiction to rule on the consequences of invalidity. If an action seeking the annulment of a contract was a matter relating to a contract, the same had to be true with respect to drawing the appropriate consequences from that nullity.<sup>94</sup> The Advocate General rejected the defendant's argument that the action for restitution, being separate from and independent of the action for nullity, was not based on a contractual obligation because it was predicated on the absence of any consideration and had its source directly in national law.<sup>95</sup> This argument was rejected because it did not comply with the principle of autonomous interpretation. This conclusion was followed by two sentences which were reproduced word-for-word by the Court of Justice and have already been quoted above.<sup>96</sup> The Advocate General's second argument was that it would not be in the interests of proper administration of justice or the parties to fragment jurisdiction between two courts, one establishing nullity and the other drawing the appropriate consequences from that nullity.<sup>97</sup> The final argument was based on the fact that Article 12(1)(e) of the Rome I Regulation provides that the issue of 'consequences of nullity of the contract' is within the scope of the putative *lex contractus*.<sup>98</sup>

The second relevant case which reached the Court of Justice is *Kostanjevec*.<sup>99</sup> A Slovenian court gave a judgment against *Kostanjevec*. The parties reached a settlement, under which *Kostanjevec* paid money to the other party. The Slovenian Supreme Court set aside the judgment. *Kostanjevec* brought a counterclaim for restitution. The opinion of Advocate General Kokott contains several paragraphs which bear on the present discussion. The Advocate General stated that what is now Article 7(1) covered not only direct contractual obligations, but also secondary obligations, such as obligations to pay damages or make restitution, which replaced an unperformed contractual obligation.<sup>100</sup> The Advocate General opined that the approach in *Profit Investment* could readily be applied to *Kostanjevec* 'in that, although it does not involve a void contract in the strict sense, [*Kostanjevec*] does involve a payment that became an undue payment as a consequence of the judgment for payment ceasing to have effect'.<sup>101</sup>

The third relevant case which reached the Court of Justice is *Schmidt*.<sup>102</sup> This case concerned an action seeking the avoidance of an Austrian contract of gift of immovable property on the ground of incapacity. If granted, the action would have produced effects *ab*

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<sup>93</sup> Ibid [75].

<sup>94</sup> Ibid [78].

<sup>95</sup> Ibid [79], [80].

<sup>96</sup> Ibid [80]. See n 85.

<sup>97</sup> *Profit Investment* (n 8), AG opinion [81].

<sup>98</sup> Ibid [82]. The AG concluded here that drawing an analogy with Art 12(1)(e) of Rome I required 'the action for restitution [to] be subject to the same jurisdiction as that which governs the contract'. This is plainly wrong. Art 7(1) of the Brussels I Regulation Recast gives jurisdiction to the place of performance of the obligation in question. The law governing a contract under the Rome I Regulation is the law chosen by the parties (art 3) or, in the absence of party autonomy, a law designated by Art 4. Art 4 does not use the place of performance as a relevant connecting factor.

<sup>99</sup> (n 8).

<sup>100</sup> Ibid, AG opinion [58].

<sup>101</sup> Ibid [60].

<sup>102</sup> (n 8).

*initio*, leading to the return of the property. The court held that the action was a matter relating to a contract.<sup>103</sup>

## 2. Article 7(1) and claims for the consequences of invalidity of undisputedly invalid contracts

The leading case in this area is the House of Lords decision in *Kleinwort Benson*,<sup>104</sup> which belongs to the first wave of derivatives litigation.<sup>105</sup> This case concerned the jurisdiction of English courts over a claim for restitution of money paid by the claimant English bank to the defendant Scottish municipality under interest rate swap contracts that the parties agreed were void *ab initio*. Jurisdiction was important because the rules on limitation and recovery under English law were more generous to claimants than those under Scots law.<sup>106</sup>

Since this was an intra-UK dispute, jurisdiction was determined under schedule 4 of the Civil Jurisdiction and Judgments Act 1982.<sup>107</sup> Schedule 4 of the 1982 Act contains special jurisdiction rules for contracts and torts which mirror the equivalent provisions of the Brussels Convention. Article 5(1) of schedule 4 of the 1982 Act gives jurisdiction, in matters relating to a contract, to the courts for the place of performance of the obligation in question. There is no equivalent of Article 7(1)(b) of the Brussels I Regulation Recast, which sets out an autonomous meaning of the concept of ‘the place of performance of the obligation in question’ for contracts for the sale of goods and provision of services. Article 5(3) of schedule 4 of the 1982 Act is in the relevant respects identical to Article 7(2) of the Brussels I Regulation Recast. By a majority of 3:2,<sup>108</sup> the House of Lords held that the claim for restitution on the ground of unjust enrichment fell outside Article 5(1) of schedule 4 of the 1982 Act. There was also a majority in the House of Lords<sup>109</sup> for the proposition that Article 5(1) of schedule 4 of the 1982 Act should be given the same interpretation as Article 5(1) of the Brussels Convention.

In *Kleinwort Benson*, there were essentially three different approaches to the question whether the claim fell within Article 5(1) of schedule 4 of the 1982 Act.<sup>110</sup> According to the first approach, the claim was not based on an obligation arising out of a contract or contract law, but on an obligation imposed by the law of unjust enrichment. Since the obligation could not be classified as contractual, the claim could not be regarded as a matter relating to a contract.<sup>111</sup> According to the second approach, where the parties agreed their contract was void *ab initio*, there was no contract and, therefore, the matter could not relate to a contract.<sup>112</sup> According to the third approach, the concept of ‘matters relating to a contract’ was wide enough to cover a claim for restitution of money paid under a contract void *ab initio* because it was

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<sup>103</sup> Ibid [38]. See also *ibid* [42].

<sup>104</sup> (n 9).

<sup>105</sup> (n 15).

<sup>106</sup> For other explanations, see R Stevens, ‘Conflict of Laws’ in P Birks and F Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press 2000) 329, 332.

<sup>107</sup> The Court of Appeal had referred to the Court of Justice a question for preliminary ruling on Art 5(1) of the Brussels Convention. The Court of Justice declined to give a ruling on the basis that the case arose in the context of an intra-UK dispute under the 1984 Act: Case C-346/93 *Kleinwort Benson Ltd v City of Glasgow District Council* [1995] ECR I-615.

<sup>108</sup> Lords Goff, Clyde and Hutton. Lords Mustill and Nicholls dissenting.

<sup>109</sup> Lords Hutton, Mustill and Nicholls.

<sup>110</sup> G Panagopoulos, *Restitution in Private International Law* (Hart 2000) 206ff.

<sup>111</sup> (n 9) 167-9 (Lord Goff), 181-2 (Lord Clyde), 195 (Lord Hutton). This approach was also adopted by Leggatt LJ in the Court of Appeal (n 87) 689-91 and Hirst J in the High Court [1993] QB 429, 439-40.

<sup>112</sup> (n 9) 181 (Lord Clyde), 195 (Lord Hutton). This was also the approach of Leggatt LJ in the Court of Appeal (n 87) 689-91 and Hirst J in the High Court (n 111) 439-40.

*ultra vires* one of the parties.<sup>113</sup> The majority of the House of Lords rejected the third approach and endorsed the first, although two of their Lordships who were in the majority also supported the second approach.

The House of Lords' judgment can be criticised on the basis that the Court of Justice has never said that proceedings must have contract or contract law as their object for Article 7(1) of the Brussels I Regulation Recast to apply. The Court of Justice requires, for Article 24(1) to apply, that proceedings must be based on a right *in rem* or a tenancy of immovable property and, for Article 24(2) to apply, that proceedings must have as their object a matter listed in this provision. But the wording of Article 7(1) ('in matters relating to a contract') differs considerably from that of Article 24 ('in proceedings which have as their object'). Admittedly, Article 7(1) cannot apply without a contractual relationship between the parties and one party having undertaken a contractual obligation towards the other.<sup>114</sup> But 'contractual relationship' and 'contractual obligation' are autonomous concepts and have received a broad interpretation by the Court of Justice. The national law classification of the relationship, obligation, cause of action or claim in question is not determinative for the purposes of Article 7(1). As the Court of Justice confirmed in *Profit Investment*, a case concerning the application of what is now Article 7(1) to an unjust enrichment claim, the concept of 'matters relating to a contract' could not be taken to refer to classification under national law.<sup>115</sup> A relationship between the parties can be regarded as contractual only if one party has freely assumed an obligation towards the other.<sup>116</sup> It is not even necessary for a contract to be actually concluded as long as there is an identifiable obligation of this nature.<sup>117</sup> The key question, therefore, is whether the claim in *Kleinwort Benson* was based on such obligation.

With the benefit of hindsight, it can be said with some confidence that the claim in *Kleinwort Benson* was indeed based on such obligation.<sup>118</sup> The Court of Justice stated in *Profit Investment* that:

[I]f there had not been a contractual relationship freely assumed between the parties, the obligation would not have been performed and there would be no right to restitution. That causal link between the right to restitution and the contractual relationship is sufficient to bring the action for restitution within the scope of matters relating to a contract.<sup>119</sup>

There is no indication that the Court of Justice used the wording 'a contractual relationship freely assumed between the parties' in a legalistic sense and that this wording cannot encompass a situation in which, to use Millett LJ's words, there is 'an agreement in fact, ... [but] no contract in law.'<sup>120</sup> This proposition is supported by the fact that both the Court of Justice and Advocate General Bot found that the court with jurisdiction to decide on annulment also had jurisdiction to rule on the consequences of invalidity.<sup>121</sup>

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<sup>113</sup> (n 9) 174-7 (Lord Nicholls, with whom Lord Mustill agreed). This was also the approach of Roch and Millett LJ in the Court of Appeal (n 87) 694-6, 699-701.

<sup>114</sup> *Jakob Handte* (n 71) [16].

<sup>115</sup> (n 8) [53].

<sup>116</sup> *Engler* (n 75) [51].

<sup>117</sup> *Fonderie* (n 77) [22].

<sup>118</sup> Lord Millett wrote, with remarkable prescience, in P Millett, 'Jurisdiction and Choice of Law in the Law of Restitution' in TK Sood (ed), *Current Legal Issues in International Commercial Litigation* (Faculty of Law: National University of Singapore 1997) 203, 211, while *Kleinwort Benson* was in the House of Lords, that 'It is quite possible that we will be reversed by the House of Lords and vindicated by the European Court of Justice.'

<sup>119</sup> (n 8) [55].

<sup>120</sup> *Kleinwort Benson* CA (n 87) 699.

<sup>121</sup> *Profit Investment* (n 87), CJEU judgment [55], [58], AG opinion [80].

In *Kleinwort Benson*, the parties intended to create a valid, binding and legally enforceable contractual relationship. They performed their supposed obligations in the belief that such relationship had been created. This belief turned out to be mistaken and the defendant incurred a restitutionary liability. But that would not have taken the parties' relationship outside Article 7(1) of the Brussels I Regulation Recast. It is true that in English law and perhaps in the laws of other Member States an obligation to reverse unjust enrichment is imposed by law. However, this should not preclude the court from treating such obligation as having been 'freely assumed' for the purposes of Article 7(1). The parties who intend to enter a contractual relationship accept the possibility that, if the contract turns out to be invalid, frustrated or terminated for another reason, they may have to return benefits received under it. Article 7(1) should apply here just as it applies where there is no contract, but a stage has been reached where obligations have been freely assumed.<sup>122</sup>

Two other arguments advanced by Advocate General Bot in *Profit Investment* support this view. The first is the argument that if an action seeking the annulment of a contract is a matter relating to a contract, the same must be true with respect to drawing the appropriate consequences from that nullity.<sup>123</sup> One might object that *Kleinwort Benson* is distinguishable from *Profit Investment* because the former case, unlike the latter, was argued on the basis that the parties agreed their contract was void *ab initio*. However, the Advocate General's opinion in *Kostanjevec*<sup>124</sup> suggests that the two cases are indistinguishable on this basis. *Kostanjevec* concerned a counterclaim for restitution of money paid under a settlement made on the basis of a judgment that was set aside. A feature of this case was that the counterclaim was brought in fresh legal proceedings. The facts of *Kostanjevec* were in that sense similar to *Kleinwort Benson*. The Advocate General opined in *Kostanjevec* that what is now Article 7(1) of the Brussels I Regulation Recast applied on the basis that the approach of the Court of Justice in *Profit Investment* 'can readily be applied to the present case'.<sup>125</sup>

The second argument advanced by Advocate General Bot in *Profit Investment* to support a wide interpretation of Article 7(1) was that Article 12(1)(e) of the Rome I Regulation provides that the issue of 'consequences of nullity of the contract' is within the scope of the putative *lex contractus*.<sup>126</sup> This was said to imply the wish of the EU legislature to subject all disputes relating to a contract, including actions for restitution, to the same jurisdiction pursuant to Article 7(1) of the Brussels I Regulation Recast.<sup>127</sup> An argument along these lines based on Article 10(1)(e) of the Rome Convention<sup>128</sup> (identical to Article 12(1)(e) of the Rome I Regulation) was rejected in *Kleinwort Benson*.<sup>129</sup> Admittedly, Article 10(1)(e) of the Rome Convention was a weak guidance because the Contracting States were allowed to reserve the right not to apply this provision,<sup>130</sup> and the UK had made this reservation. But Member States cannot derogate from Article 12(1)(e) of the Rome I Regulation, which makes this provision relevant for the interpretation of Article 7(1) of the Brussels I Regulation Recast.

It follows that the majority's reasoning in *Kleinwort Benson*<sup>131</sup> has not withstood the test of time and that they would have done better to have held that the claim fell within Article

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<sup>122</sup> *Fonderie* (n 77), opinion of AG Geelhoed [81]-[83].

<sup>123</sup> (n 8), AG opinion [78].

<sup>124</sup> (n 8).

<sup>125</sup> *Ibid.*, AG opinion [60].

<sup>126</sup> (n 8), AG opinion [82].

<sup>127</sup> *Ibid.*

<sup>128</sup> Consolidated version of 1980 Rome Convention on the law applicable to contractual obligations [1998] OJ C27/34.

<sup>129</sup> (n 9) 168 (Lord Goff), 180-1 (Lord Clyde).

<sup>130</sup> Rome Convention Art 22(1)(b).

<sup>131</sup> Lords Goff, Clyde and Hutton. This was also the approach of Leggatt LJ and Hirst J in the lower courts.

5(1) of schedule 4 of the 1982 Act, notwithstanding the fact that it was based on an obligation imposed by the law of unjust enrichment and not one arising out of a contract or contract law.

Nor do later authorities support the second line of reasoning adopted by two of the majority judges in *Kleinwort Benson*<sup>132</sup> that there was no contract where the parties agreed their contract was void *ab initio* and, therefore, the matter could not relate to a contract. This approach requires the court to accept as determinative the nature of the legal consequences flowing from a contractual defect under national law, but this does not accord with the principle of autonomous interpretation. In *Profit Investment*,<sup>133</sup> the Court of Justice confirmed that unjust enrichment claims arising in connection with a contract whose validity has been contested fall within what is now Article 7(1) of the Brussels I Regulation Recast. The Court did not say anything to suggest that what is now Article 7(1) applies only where a defect leads, under the applicable national law, to the invalidity of the contract *ex nunc* or its termination, but not where it leads to the invalidity of the contract *ab initio*.

That the agreement between the parties that their contract is void *ab initio* has no bearing on the application of Article 7(1) is also supported by *Kostanjevec*.<sup>134</sup> In this case, neither the Court of Justice nor the Advocate General attached any weight to the fact that it was common ground between the parties, following a court decision, that the cause of their agreement had failed. Furthermore, the approach adopted by two of the majority judges in *Kleinwort Benson* is not supported by the fact that Article 12(1)(e) of the Rome I Regulation subjects the issue of ‘consequences of nullity of the contract’ to the putative *lex contractus*.

The interpretation according to which Article 7(1) of the Brussels I Regulation Recast applies even when the parties agree their contract is invalid and the court is only asked to decide on the consequences of invalidity also accords with the scheme and objectives of the Regulation.<sup>135</sup> To found jurisdiction under Article 7(1), the claimant should not be compelled to allege the validity of a contract if its invalidity is not seriously disputed.<sup>136</sup> This interpretation supports the objectives of predictability and legal certainty.<sup>137</sup>

Another argument made in *Kleinwort Benson* against the application of Article 5(1) of schedule 4 of the 1982 Act to unjust enrichment claims arising in connection with a contract void *ab initio* was that this would give jurisdiction to the courts for the place of performance of a supposed obligation under the void contract, which could not be said to be a close connecting factor in the case of an unjust enrichment claim.<sup>138</sup> But this argument no longer applies with the same force because the concept of ‘the place of performance of the obligation in question’ now has an autonomous meaning for two most important kinds of contract, namely sales and services contracts.<sup>139</sup> It is true that the application of Article 7(1) of the Brussels I Regulation Recast to unjust enrichment claims arising in connection with a contract void *ab*

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<sup>132</sup> Lords Clyde and Hutton. This was also the approach of Leggatt LJ and Hirst J in the lower courts.

<sup>133</sup> (n 8).

<sup>134</sup> (n 8).

<sup>135</sup> Similarly, A Briggs, *Civil Jurisdiction and Judgments* (5th edn, Informa 2015) para 2.170; E Peel, ‘Jurisdiction over Restitutionary Claims’ [1998] LMCLQ 22; G Virgo, ‘Jurisdiction over Unjust Enrichment Claims’ (1998) 114 LQR 386. Cf A Dickinson, ‘Restitution and the Conflict of Laws in the House of Lords’ [1998] RLR 104; R Leslie, ‘Unjustified Enrichment in the Conflict of Laws’ (1998) 2 *Edinburgh Law Review* 233; PA McGrath, ‘*Kleinwort Benson v Glasgow City Council*: A Simple Point of Jurisdiction’ (1998) 18 CJQ 41; Panagopoulos (n 110) 210-1; SGA Pitel, ‘Jurisdiction over Restitutionary Claims’ [1998] CLJ 19.

<sup>136</sup> *Kleinwort Benson CA* (n 87) 700 (Millett LJ).

<sup>137</sup> Brussels I Regulation Recast recitals 15, 16. These wider objectives can be taken into account in the interpretation of Art 7(1): *Profit Investment* (n 8), CJEU judgment [53], AG opinion [81].

<sup>138</sup> (n 9) 169 (Lord Goff), 184-5 (Lord Clyde), 191 (Lord Hutton).

<sup>139</sup> Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699; Case C-204/08 *Rehder v Air Baltic Corporation* [2009] ECR I-6073.

*initio* which is neither a sales nor a services contract leads to the problem of determining the place of performance of the obligation in question under Article 7(1)(a).<sup>140</sup> But that problem is inevitable following the decision of the Court of Justice in *Profit Investment*<sup>141</sup> that Article 7(1) applies to unjust enrichment claims arising in connection with a contract whose validity has been contested.

The question, therefore, arises how to determine the obligation in question in cases in which a claim in unjust enrichment falls within Article 7(1) and the contract or supposed contract between the parties is neither a sales nor a services contract. There are two alternatives. The first is to regard the restitutionary obligation arising out of unjust enrichment on which the claim is based<sup>142</sup> as the relevant obligation for the purposes of Article 7(1)(a). The second is to regard the obligation under the (supposed) contract between the parties whose performance or non-performance provides the basis for the restitutionary claim as the relevant obligation. Since the place of performance of a restitutionary obligation arising out of unjust enrichment would under the laws of the majority of Member States be at the domicile of the party seeking the return of money or other benefits,<sup>143</sup> the first alternative should be rejected because it is contrary to the principle of *actor sequitur forum rei* on which the Brussels I Regulation Recast is based. The second alternative is preferable, and supported by *Schmidt*.<sup>144</sup> There, the Court of Justice dealt with an action seeking the avoidance of an Austrian contract of gift of immovable property on the ground of incapacity. If granted, the court order would have produced effects *ab initio*, leading to the return of the property. The court held that the action was based on the alleged invalidity of the contractual obligation consisting of the conveyance of ownership of the immovable property. The place of performance of that obligation was in Austria, where the ownership was conveyed.<sup>145</sup> This was because ‘provided that the contract is valid, [the obligation in question] must be, and ... was initially, performed in Austria’.<sup>146</sup>

It is for these reasons that the House of Lord’s decision in *Kleinwort Benson* concerning what is now Article 7(1) is untenable in light of recent authorities and should be regarded as wrongly decided.

There should, however, be an exception to the conclusion that Article 7(1) covers claims for the consequences of invalidity of undisputedly invalid contracts. Article 7(1) should not apply where the parties agree on the existence of a defect, such as fraud, duress, forgery or lack of authority,<sup>147</sup> which implies that there cannot be an obligation freely assumed by one party towards the other. For example, if it is undisputed between the parties that C fraudulently impersonated A without apparent authority, which led B to enter a contract under the impression that they were contracting with A and to pay money to A, a claim against A for the

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<sup>140</sup> Case C-533/07 *Falco Privatstiftung and Rabitsch v Weller-Lindhorst* [2009] ECR I-3327; Case 14-76 A *De Bloos, SPRL v Société en commandite par actions Bouyer* [1976] ECR 1497; Case 12-76 *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1473.

<sup>141</sup> (n 8).

<sup>142</sup> See *Kleinwort Benson* CA (n 87) 694-6 (Roch LJ).

<sup>143</sup> Peel (n 31) 14-20, 25.

<sup>144</sup> (n 8).

<sup>145</sup> *Ibid* [39].

<sup>146</sup> *Ibid*. See also *Kleinwort Benson* CA (n 87) 699-701 (Millett LJ); JJ Fawcett, J Harris and M Bridge, *International Sale of Goods in the Conflict of Laws* (OUP 2005) para 8.31; Peel (n 135) 25; Peel (n 31) 11-20; Virgo (n 135) 389-90. In *Profit Investment* (n 8), AG Bot said, somewhat cryptically, at [85] of his opinion, that ‘in the specific case of an action for nullity, the obligation forming the basis of the action is the defining obligation’. In *Kleinwort Benson* HL (n 9), Lord Nicholls said, at 176, that where the existence of the contract is in dispute, the ‘obligation in question’ refers to the obligation whose existence is in dispute.

<sup>147</sup> An analogy can be drawn with the separability doctrine under Art 25 of the Brussels I Regulation Recast. Fraud, duress and forgery are examples of defects which can lead to the invalidity of both the main contract and the jurisdiction clause contained in the main contract: *Deutsche Bank* (n 51) [24].

restitution of money paid should not be regarded as falling within Article 7(1). Similarly, if it is undisputed that the signatures to the contract were forged or that a contracting party used duress which negated the exercise of free will to procure the signature of the other party, a claim for restitution should not be regarded as falling within Article 7(1). An agreement on the existence of a defect of this kind implies that – to use Lord Millett’s words – there can be no agreement in fact, let alone in law, and that no obligation can be freely assumed by the defendant to the claimant. The defect in question in *Kleinwort Benson*, namely that the action of the local authority was *ultra vires*, is of a different nature. Here, both parties intended to enter a contractual relationship and had made a start on performing the contract. These are precisely the circumstances from which, according to Advocate General Geelhoed, ‘it can be inferred ... that an obligation has been assumed between the parties’, which leads to the application of Article 7(1).<sup>148</sup> The conclusion, however, would be different if it is undisputed that the natural person purporting to act on behalf of a party had neither real nor apparent authority to enter the contract because in that situation the acts of the natural person cannot be attributed to the party on whose behalf the natural person purported to act. This defect is closer to the example of fraud given above than *ultra vires* in the sense of *Kleinwort Benson*.

### 3. Article 7(1) and claims for restitution of mistaken payments under a contract

The Court of Justice and English courts have not yet confronted the problem of application of Article 7(1) of the Brussels I Regulation Recast to claims for restitution of mistaken payments under a contract.

*Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd*<sup>149</sup> is a good example of such claim. This case concerned a claim for restitution of overpayments made in performance of a contract. The question before the High Court was whether the claim fell within the scope of the jurisdictional gateways for contracts in what is now paragraph 3.1 of the CPR Practice Direction 6B. The claim was not strictly a contractual one. The claimant’s right to restitution was said to have arisen because overpayment had been paid by mistake, and the claim was accordingly made in unjust enrichment. The court held that the jurisdictional gateways for contracts were not confined to claims arising under a contract but extended to claims made ‘in respect of a contract’,<sup>150</sup> which was interpreted as being synonymous to ‘relating to’ or ‘connected with’ a contract.<sup>151</sup> According to the court, the claim in unjust enrichment was based on an obligation which is ‘a like obligation’ to the one which would have existed if the claimant had pleaded, and it had been found, that there was an implied term in the contract for repayment of overpayment.<sup>152</sup> In other words, such claim in contract and the claim in unjust enrichment were ‘overlapping alternatives’.<sup>153</sup> The claim, consequently, fell within the jurisdictional gateways for contracts.<sup>154</sup> In a later case, the High Court remarked that the unjust enrichment claim in *Albon* was understood to be of ‘the contractual kind’.<sup>155</sup>

*Albon* illustrates the closeness of the connection between a claim for restitution of mistaken payments under a contract and the contract itself. The principle of autonomous interpretation mandates that such claim should be regarded as falling within Article 7(1) of

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<sup>148</sup> *Fonderie* (n 77), opinion of AG Geelhoed [83].

<sup>149</sup> [2007] EWHC 9 (Ch), [2007] 1 WLR 2489.

<sup>150</sup> *Ibid* [26].

<sup>151</sup> *Ibid* [27].

<sup>152</sup> *Ibid* [28].

<sup>153</sup> *Ibid*.

<sup>154</sup> *Ibid*.

<sup>155</sup> *Sharab v Prince Al-Waleed Bin Talal Bin Abdul-Aziz Al-Saud* [2012] EWHC 1798 (Ch), [2012] 2 CLC 612 [51].

the Brussels I Regulation Recast because the interpretation of the contract is ‘indispensable’<sup>156</sup> to establish the existence and extent of the defendant’s restitutionary obligation. The obligation can also be regarded as a freely assumed legal incident of the contract and for that reason within Article 7(1).<sup>157</sup> If a payment is mistakenly made under a contract, ‘[t]he causal link between the right to restitution and the contractual relationship is sufficient to bring the action for restitution within the scope of matters relating to a contract’.<sup>158</sup> The interpretation according to which Article 7(1) applies to claims for restitution of mistaken payments under a contract accords with the scheme and objectives of the Regulation, namely predictability, legal certainty and the avoidance of the fragmentation of jurisdiction and the risk of irreconcilable judgments. The Scottish authorities that reached the opposite conclusion must, therefore, be regarded as wrongly decided.<sup>159</sup>

### *B. Unjust Enrichment and Article 7(2)*

Many unjust enrichment claims do not arise in connection with a contract or a supposed contract between the parties and undoubtedly fall outside Article 7(1). Do such claims trigger Article 7(2) instead?

Article 7(2) gives jurisdiction, in matters relating to tort, delict or quasi-delict, to the courts for the place of the harmful event. The concept of ‘tort, delict or quasi-delict’ covers ‘all actions which seek to establish the liability of a defendant and which are not related to a “contract” within the meaning of [Article 7(1)]’.<sup>160</sup> The key question is whether Article 7(2) is a residual category, which covers all actions based on an obligation not falling within Article 7(1)?

There are indications that Article 7(2) is a residual category. The Court of Justice has stated in some cases, after finding that an action based on an obligation fell outside Article 7(1), that ‘it must be held that such an action is a matter relating to tort, delict or quasi-delict’.<sup>161</sup> Furthermore, Advocates General have expressly said, although without much explanation, that Article 7(2) is a ‘residual category’<sup>162</sup> that includes claims in unjust enrichment.<sup>163</sup> This view has some academic support.<sup>164</sup>

There are also authorities supporting the opposite view,<sup>165</sup> which is based on two arguments. First, the Court of Justice has stated in several cases that there has to be a harmful event and a causal connection between the damage and the event in which that damage

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<sup>156</sup> *Brogstetter* (n 69) [25]-[26].

<sup>157</sup> *Arcado* (n 76).

<sup>158</sup> *Profit Investment* (n 8) [55].

<sup>159</sup> *Strathaird Farms Ltd v GA Chattaway & Co* 1993 SLT (Sh Ct) 36; *Eddie v Apla Srl* [2000] SLT 1062.

<sup>160</sup> *Kalfelis* (n 68) [17].

<sup>161</sup> Case C-51/97 *Réunion européenne SA v Spliethoff's Bevrachtungskantoor BV and the Master of the vessel Alblasgracht V002* [1998] ECR I-6511 [24]. Similarly, *Brogstetter* (n 69) [27].

<sup>162</sup> *Jakob Handte* (n 71), opinion of AG Jacobs [11]; *Fonderie* (n 77), opinion of AG Geelhoed [73].

<sup>163</sup> Case C-89/91 *Shearson Lehmann Hutton Inc v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] ECR I-139, opinion of AG Darmon [102]; Case C-341/16 *Hanssen Beleggingen BV v Prast-Knipping*, opinion of AG Øe [31].

<sup>164</sup> A Briggs, *Private International Law in English Courts* (OUP 2014) paras 4.236, 4.252, 4.253, 4.256, 4.258 (cf Briggs (n 135) paras 2.190, 2.197); Dickinson and Lein (eds) (n 47) paras 4.80-4.81 (M Lehmann); T Hartley, *Civil Jurisdiction and Judgments in Europe* (OUP 2017) paras 8.25, 8.76, 8.138; Peel (n 31) 20-31.

<sup>165</sup> *Engler* (n 75), opinion of AG Jacobs [57]: ‘The category of tort, delict or quasi-delict is not merely negative or residual, but has a positive content.’ See also Case C-603/17 *Bosworth v Arcadia Petroleum Ltd* ECLI:EU:C:2019:65, opinion of AG Øe [74].

originates.<sup>166</sup> The second argument is based on the fact that the Court of Justice held in *Kalfelis*<sup>167</sup> that the concept of ‘tort, delict or quasi-delict’ covers ‘all actions which seek to establish the liability of a defendant’. The language of this case was German. The word ‘*Schadenshaftung*’, translated into English as ‘liability’, implies the existence of a wrong.<sup>168</sup> Article 7(2) thus does not cover non-contractual claims based on an obligation where there is no harmful event giving rise to damage and that do not arise from a wrong.<sup>169</sup> Unjust enrichment claims that do not presuppose any wrongdoing on the part of the defendant fall into this category. These claims are to be distinguished from restitutionary claims that do presuppose some wrongdoing, such as claims for restitution for wrongs in common law systems and *Eingriffskonditionen* in German law, some of which fall within Article 7(2).

This point arose in the recent *Siemens* case.<sup>170</sup> The Court of Justice held that an action brought by the Hungarian Competition Authority before a Hungarian civil court for recovery of sums not due, based on the provisions relating to unjust enrichment in the Hungarian Civil Code, fell outside the subject-matter scope of the Brussels I Regulation Recast.<sup>171</sup> Consequently, the Court of Justice did not deal with the Article 7(2) point. But Advocate General Wahl advanced several arguments in favour of the conclusion that what is now Article 7(2) did not apply to unjust enrichment claims. First, this Article requires a ‘harmful event’ giving rise to ‘damage’, which the Advocate General equated with ‘loss’.<sup>172</sup> Since, in the Advocate General’s view, the primary focus of an unjust enrichment claim is on the defendant’s gain rather than the claimant’s loss, such claim falls outside Article 7(2).<sup>173</sup> Moreover, a mere refusal to reverse unjust enrichment is not a ‘harmful event’ giving rise to a ‘loss’.<sup>174</sup> Second, an obligation to reverse unjust enrichment does not coincide with non-contractual liability in the sense of Article 7(2) because this presupposes a ground for holding the defendant responsible for the loss sustained by the claimant, be it in the form of intent, negligence or strict liability.<sup>175</sup> An unjust enrichment claim that does not presuppose any wrongdoing falls outside this Article.<sup>176</sup> Third, the Advocate General found support for his approach in the case law of the Court of Justice<sup>177</sup> and national courts.<sup>178</sup> Fourth, a broad

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<sup>166</sup> Case 21-76 *Handelskwekerij GJ Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735 [16]; Case C-572/14 *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH v Amazon EU Sàrl* ECLI:EU:C:2016:286, [2016] ECDR 23 [41].

<sup>167</sup> (n 68).

<sup>168</sup> Briggs (n 135) para 2.188; Panagopoulos (n 110) 203.

<sup>169</sup> Case C-261/90 *Reichert v Dresdner Bank AG (No 2)* [1992] ECR I-2149, opinion of AG Gulmann 2169.

<sup>170</sup> (n 8).

<sup>171</sup> Brussels I Regulation Recast Art 1(1).

<sup>172</sup> (n 8), AG opinion [60].

<sup>173</sup> *Ibid* [61].

<sup>174</sup> *Ibid*.

<sup>175</sup> *Ibid* [62].

<sup>176</sup> *Ibid*. The AG relied here on the fact that where charges have been levied by a Member State in a manner incompatible with EU law, the repayment thereof is not premised on any liability on the part of that Member State: Case C-188/95 *Fantask A/S ea v Industriministeriet (Erhvervministeriet)* [1997] ECR I-6783 [38].

<sup>177</sup> In *Reichert* (n 169), the Court of Justice held that an action under national law, such as the *action paulienne* in French law, whereby a creditor seeks to set aside a gift of property made by the debtor in a way which the creditor regards as being in fraud of his rights does not come within what is now Art 7(2). AG Wahl described the action in question in *Reichert* as having a ‘quasi-restitutionary nature’: *Siemens* (n 8), AG opinion [65].

<sup>178</sup> *Kleinwort Benson* (n 9); judgment of the Oberster Gerichtshof (Supreme Court, Austria) of 13 January 1998 in case 7 Ob 375/97s; judgment of the Högsta Domstolen (Supreme Court, Sweden) of 31 August 2009 in case Ö 1900-08 (NJA 2000:49). These cases are cited in *Siemens* (n 8), AG opinion [67], fn 44. One could add here the judgments of the Corte di cassazione (Supreme Court, Italy) of 27 March 2009, no 7429 and of 29 May 2008, no 14201 and of a court in Bergamo, 21 January 2002, referred to in P Beaumont et al (eds), *Cross-border Litigation in Europe* (Hart 2017) 174 (S Bariati et al).

interpretation of Article 7(2) runs against the principles of proximity,<sup>179</sup> strict interpretation of Article 7(2)<sup>180</sup> and predictability.<sup>181</sup> Fifth, the Rome II Regulation regards unjust enrichment as a category separate from contract and tort.<sup>182</sup> Sixth, Article 7(3) of the Brussels I Regulation Recast contains a special jurisdiction rule regarding a ‘civil claim for damages or *restitution* which is based on an act giving rise to criminal proceedings’.<sup>183</sup> This shows that the Regulation differentiates between claims for damages and claims for restitution. Consequently, the fact that Article 7(2) does not expressly encompass claims for restitution shows that these are outside its scope.<sup>184</sup> The disadvantages arising from the fragmentation of jurisdiction are mitigated by the fact that the courts of the defendant’s domicile have general jurisdiction over the defendant.<sup>185</sup>

The leading English case is the House of Lords judgment in *Kleinwort Benson*.<sup>186</sup> The House of Lords held unanimously that the claim for restitution on the ground of unjust enrichment fell outside Article 5(3) of schedule 4 of the Civil Jurisdiction and Judgments Act 1982. The majority found that a claim for restitution based on unjust enrichment did not presuppose a harmful event<sup>187</sup> and that the argument that such claim fell within Article 5(3) was based on a misreading or imprecise translation of *Kalfelis*.<sup>188</sup> Lord Goff, with whom Lord Nicholls agreed, qualified his conclusion by stating that a claim for restitution based on unjust enrichment did not, ‘save in exceptional circumstance’, presuppose a harmful event.<sup>189</sup> Another reason for reaching this conclusion was that, according to Lord Hutton,<sup>190</sup> the part of the judgment in *Kalfelis* in which the Court of Justice stated that ‘a court which has jurisdiction under [Article 7(2)] 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’<sup>191</sup> concerned the content of the concept of ‘tort, delict or quasi-delict’. Since the claim in *Kalfelis* was for restitution on the ground of unjust enrichment and not in tort, delict or quasi-delict, it fell outside Article 5(3) of schedule 4 of the 1982 Act.

The House of Lords’ reliance on the classification of claims in English law does not accord with the principle of autonomous interpretation. Furthermore, the part of the *Kalfelis* judgment invoked by Lord Hutton does not deal with the concept of ‘tort, delict or quasi-delict’, but with the questions whether a court with jurisdiction over a claim under what is now Article 7(2) also has jurisdiction over related claims and whether a claimant can rely on both paragraphs 1 and 2 of what is now Article 7 with respect to one claim.<sup>192</sup> Nevertheless, the argument that claims for restitution based on unjust enrichment do not presuppose a harmful

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<sup>179</sup> *Siemens* (n 8), AG opinion [69].

<sup>180</sup> *Ibid* [68], [70].

<sup>181</sup> *Ibid* [74].

<sup>182</sup> *Ibid* [72]. Similarly, Briggs (n 135) para 2.190. One should note, however, that Art 2 of the Rome II Regulation defines ‘damage’ as any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.

<sup>183</sup> See also Brussels I Regulation Recast Art 7(4).

<sup>184</sup> *Siemens* (n 8), AG opinion [73].

<sup>185</sup> *Ibid* [74].

<sup>186</sup> (n 9).

<sup>187</sup> *Ibid* 172 (Lord Goff), 177 (Lord Nicholls), 196 (Lord Hutton). Similarly, *Kleinwort Benson* HC (n 111) 442-3 (Hirst J).

<sup>188</sup> *Ibid* 172 (Lord Goff), 177 (Lord Nicholls), 185 (Lord Clyde).

<sup>189</sup> *Ibid* 172 (Lord Goff), 177 (Lord Nicholls).

<sup>190</sup> *Ibid* 196. Similarly, *Kleinwort Benson* CA (n 87) 691-2 (Leggatt LJ); *Kleinwort Benson* HC (n 111) 443 (Hirst J).

<sup>191</sup> (n 68) [19].

<sup>192</sup> This is clear if one considers the wording of the reference for a preliminary ruling: ‘Does [art 7(2)] confer, in respect of an action based on claims in tort and contract and for unjust enrichment, accessory jurisdiction on account of factual connection even in respect of the claims not based on tort?’

event and are, therefore, outside this Article is strong and in line with the recent European authorities. This aspect of *Kleinwort Benson* has been correctly followed in subsequent cases.<sup>193</sup>

#### IV. A NEW RULE OF SPECIAL JURISDICTION?

Paragraphs 1 and 2 of Article 24 of the Brussels I Regulation Recast respond well to problems raised by unjust enrichment claims and issues concerning unjust enrichment. Paragraphs 1 and 2 of Article 7 do not cover all claims based on a civil or commercial obligation. Unjust enrichment claims not connected with an existing or a supposed contract between the parties which do not presuppose any wrongdoing on the part of the defendant find themselves in *terra nullius*. The question arises whether a new special jurisdiction rule for unjust enrichment should be added to the Regulation? This question will also be relevant should the Hague Conference decide to draft a convention on jurisdiction in civil and commercial matters.

The first step in answering this question is to understand why a special jurisdiction rule for unjust enrichment is not included in the Brussels I Regulation Recast. After all, unjustified enrichment was an established branch of the law of obligations in the six original Member States which negotiated the original Brussels Convention.<sup>194</sup> Unfortunately, the reports accompanying different iterations of the Brussels and Lugano Conventions and the Brussels I Regulation do not mention unjust enrichment or restitution.<sup>195</sup> Advocate General Wahl, however, gave an explanation in his opinion in *Siemens*: ‘it is legitimate to infer from the omission made in [Article 7(2)] of claims based on restitution that this is precisely due to the absence of any close connecting factor consistently linking such claims to any jurisdiction other than the defendant’s domicile’.<sup>196</sup> If this is true, then there would indeed be little need to add a new special jurisdiction rule for unjust enrichment to the Regulation.

It is now necessary to see if national systems of private international law within the EU contain special jurisdiction rules for unjust enrichment or restitution. A *Study on Residual Jurisdiction* from 2007<sup>197</sup> reveals that a special jurisdiction rule of this kind exists in only two Member States, Belgium and England. Article 96(3) of the Belgian Code of Private International Law,<sup>198</sup> which contains a special jurisdiction rule for ‘quasi-contractual obligations’, gives jurisdiction to Belgian courts when ‘the fact which generates such obligation is located in Belgium’. English courts can permit service of the claim form out of the jurisdiction in claims for restitution where:

- (a) the defendant’s alleged liability arises out of acts committed within the jurisdiction;
- or
- (b) the enrichment is obtained within the jurisdiction; or
- (c) the claim is governed by the law of England and Wales.<sup>199</sup>

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<sup>193</sup> *Dexter Ltd (In Administrative Receivership) v Harley*, Times, 2 April 2001; *Aspen Underwriting Ltd v Kairos Shipping Ltd* [2018] EWCA Civ 2590, [2019] 1 Lloyd’s Rep 221 [147]-[152]. See also *Davenport v Corinthian Motor Policies at Lloyds* 1991 SLT 774, 781; *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd (No 1)* 1999 SLT 1051, 1059-60.

<sup>194</sup> Zweigert and Kötz (n 1) ch 38.

<sup>195</sup> With the exception of a very brief mention of what is now Art 7(3) of the Brussels I Regulation Recast in some reports.

<sup>196</sup> (n 8), AG opinion [69]. See also *Kleinwort Benson* HL (n 9) 167 (Lord Goff).

<sup>197</sup> A Nuyts, ‘Study on Residual Jurisdiction: Review of the Member States’ Rules Concerning the “Residual Jurisdiction” of Their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations’ (3 September 2007) <[http://ec.europa.eu/civiljustice/news/docs/study\\_residual\\_jurisdiction\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf)>.

<sup>198</sup> Moniteur belge, 27 July 2004, 57344.

<sup>199</sup> CPR Practice Direction 6B para 3.1(16).

This suggests that, if the EU legislature or the drafters of the Hague convention were minded to add a new special jurisdiction rule for unjust enrichment, they would have to consider two things: the subject-matter scope of any such jurisdictional rule and the connecting factor or factors that would be used to allocate adjudicatory authority over covered claims. The subject-matter scope of any special jurisdiction rule could cover either unjust/unjustified enrichment or restitution. The category of unjust/unjustified enrichment is preferable in the context of a legal instrument that aims to apply across the civilian/common law divide.<sup>200</sup> Unjust/unjustified enrichment is a well-established concept in civilian legal systems<sup>201</sup> and the autonomous nature of this field of law has also been recognised in England.<sup>202</sup>

The more difficult question is whether there is any connecting factor that can possibly be used in a special jurisdiction rule for unjust enrichment that would attract international acceptance. Three criteria can be used to assess the appropriateness of a connecting factor:<sup>203</sup> 1) the likelihood that the designated court will have a sufficiently close connection with the dispute, 2) the likelihood of fragmentation of jurisdiction and irreconcilable judgments and 3) predictability and legal certainty. A rule which would give jurisdiction to the courts of the country whose law governs unjust enrichment under Article 10 or Article 14 of the Rome II Regulation should be rejected at the outset because this rule has a low likelihood that the designated court will have a sufficiently close factual connection with the dispute. Paragraph 3.1(16)(c) of the CPR Practice Direction 6B may work in the context of English traditional law in which the exercise of jurisdiction is controlled by the doctrine of *forum non conveniens*. But a jurisdictional rule that used governing law as the connecting factor would be inappropriate in the context of the Brussels I Regulation Recast. Moreover, such rule would routinely give rise choice-of-law disputes at the jurisdictional stage.

This leaves us with three territorial connecting factors, which correspond to the three core elements of liability in unjust enrichment: the place of enrichment, the place of loss and the place of the act giving rise to enrichment.

The place of loss has several flaws. It depends on an inappropriate analogy between unjust enrichment and tort.<sup>204</sup> A jurisdictional rule based on this connecting factor would give little guarantee that the designated court would have a sufficiently close connection with the dispute and would fall foul of the principle of *actor sequitur forum rei*.<sup>205</sup> The place of economic loss is typically unpredictable and uncertain, as the case law on Article 7(2) amply demonstrates.<sup>206</sup>

The connecting factor of the place of the act giving rise to enrichment<sup>207</sup> is also said to suffer from several flaws: it is the fact of enrichment that gives rise to liability in unjust enrichment, not the act giving rise to enrichment; since the primary focus of an unjust enrichment claim is on the defendant's enrichment,<sup>208</sup> the place of the act will not normally be

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<sup>200</sup> Rome II Regulation Art 10; A Chong, 'Choice of Law for Unjust Enrichment/Restitution and the Rome II Regulation' (2008) 57 ICLQ 863, 864-72.

<sup>201</sup> Zweigert and Kötz (n 1) ch 38.

<sup>202</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL); C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016).

<sup>203</sup> J Hill, 'Jurisdiction in Matters Relating to a Contract under the Brussels Convention' (1995) 44 ICLQ 591; Brussels I Regulation Recast recitals 15, 16, 21.

<sup>204</sup> Chong (n 200) 882, 883, fn 145.

<sup>205</sup> Dickinson (n 135) 116; Panagopoulos (n 110) 201-3; Peel (n 31) 23-4.

<sup>206</sup> See T Hartley, 'Jurisdiction in Tort Claims for Non-physical Harm under Brussels 2012, Article 7(2)' (2018) 67 ICLQ 987.

<sup>207</sup> In favour of this connecting factor are Hartley (n 164) para 8.139 and Peel (n 31) 23-31.

<sup>208</sup> See *Siemens* (n 8), AG opinion [61].

closely connected with the obligation to reverse an unjust enrichment;<sup>209</sup> the *locus* of a transfer is often unpredictable and uncertain.<sup>210</sup>

Perhaps the best way to consider the connecting factor of the place of the act giving rise to enrichment is to look at the case law on the jurisdictional gateway contained in paragraph 3.1(16)(a) of CPR Practice Direction 6B. Two interpretational difficulties surrounding this paragraph are relevant for the present discussion. The first is whether acts committed within the jurisdiction have to be attributable to the defendant or the claimant, or whether it suffices for such acts to have been committed by a third party. Although English courts have held that the focus of the jurisdictional gateway is principally, although not exclusively, on the acts of the claimant,<sup>211</sup> they do not exclude the possibility that in an appropriate case the focus should be on the acts of the defendant or even of a third party if those acts have a connection with the defendant's enrichment.<sup>212</sup> The second interpretational difficulty is whether paragraph 3.1(16)(a) applies only when all the relevant acts are committed within the jurisdiction or whether it suffices that only some of them are. If it is the latter, how much of the relevant acts should be committed within the jurisdiction? English courts have held that it suffices that a substantial part of the acts, viewed as a whole, takes place within the jurisdiction or that substantial and efficacious acts have been committed within the jurisdiction.<sup>213</sup> The wide interpretation of this jurisdictional gateway may work in the context of English traditional law. But it would be inappropriate in the context of the Brussels I Regulation Recast because it would give little guarantee that the designated court would have a sufficiently close connection with the dispute and might, therefore, undermine predictability and legal certainty. These disadvantages could be mitigated if jurisdiction were given only to the courts for the place where the claimant committed all or a substantial part of the acts. But such jurisdictional rule would fall foul of the principle of *actor sequitur forum rei*.

This leaves us with the connecting factor of the place of enrichment.<sup>214</sup> It is said to suffer from several flaws because it may be: fortuitous and have little connection with the unjust enrichment claim, difficult to identify when the place of immediate and ultimate enrichment do not coincide, especially in relation to electronic transfers of funds and e-commerce, and open to manipulation by the defendant.<sup>215</sup> There is no case law on the jurisdictional gateway contained in paragraph 3.1(16)(b) of CPR Practice Direction 6B. But the case law on Article 10(3) of the Rome II Regulation, which is based on the connecting factor of the place of enrichment, might indicate how a jurisdictional rule based on the same connecting factor would work. There are currently three reported English cases on the interpretation of Article 10(3). In all the cases, the law designated by Article 10(3) was the law of the country where the defendant was based.<sup>216</sup>

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<sup>209</sup> Chong (n 200) 884.

<sup>210</sup> Dickinson (n 135) 116; Panagopoulos (n 110) 201-2.

<sup>211</sup> *Sharab* (n 155) [68]; *Bazhanov v Fosman* [2017] EWHC 3404 (Comm) [85].

<sup>212</sup> Briggs (n 135) para 4.81.

<sup>213</sup> *ISC Technologies Ltd v Guerin* [1992] 2 Lloyd's Rep 430, 433; *Polly Peck International plc v Nadir (No 3)*, 22 March 1993 (CA); *Nycal (UK) Ltd v Lacey* [1994] CLC 12, 17; *Cecil v Bayat* [2010] EWHC 641 (Comm) [115](3), reversed on other grounds in [2011] EWCA Civ 135, [2011] 1 WLR 3086; *Sharab* (n 155) [69], [72]-[77]; *Bazhanov v Fosman* (n 211) [85]. See also *Zumax Nigeria Ltd v First City Monument Bank Plc* [2016] EWCA Civ 567, [2016] 1 CLC 953 [79], [80].

<sup>214</sup> In favour of this connecting factor is Peel (n 31) 23-31.

<sup>215</sup> Chong (n 200) 885-8.

<sup>216</sup> *Bazhanov v Fosman* (n 211) [76]; *Banque Cantonale de Geneve v Polevent Ltd* [2015] EWHC 1968 (Comm), [2016] QB 394 [18]; *ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd* [2019] EWHC 1661 (Comm) [73]. See also the judgment of a court in Bologna, 9 November 2015, referred to in Beaumont et al (eds) (n 178) 181 (S Bariati et al).

Advocate General Wahl was, therefore, right to assume that what is now Article 7(2) of the Brussels I Regulation Recast does not include unjust enrichment claims because of ‘the absence of any close connecting factor consistently linking such claims to any jurisdiction other than the defendant’s domicile’.<sup>217</sup> There is, therefore, no justification to include a special jurisdiction rule for unjust enrichment in Article 7 of the Regulation or in a future Hague convention, unless such convention incorporates the doctrine of *forum non conveniens*.

## V. CONCLUSION

The Brussels I Regulation Recast’s exclusive jurisdiction rules respond well to problems raised by unjust enrichment claims and issues concerning unjust enrichment. The exclusive jurisdiction rule for immovable property accommodates well the diversity of legal traditions that exist within the EU. By adopting an interpretation of the exclusive jurisdiction rules for company law and governance matters that has ‘disarmed the *ultra vires* torpedo’, the Court of Justice has responded to the needs of the global finance. The recent pronouncements of the Court of Justice and its Advocates General show that unjust enrichment claims connected with an existing or a supposed contract between the parties (including claims for a declaration of invalidity, the consequences of invalidity – even of undisputedly invalid contracts – and restitution of mistaken payments under a contract) fall within the special jurisdiction rule for contracts and that unjust enrichment claims do not fall within the special jurisdiction rule for torts. This, in turn, means that the House of Lords’ decision in *Kleinwort Benson* was in part wrongly decided. Despite the fact that unjust enrichment claims do not fall within the special jurisdiction rule for torts, the idea of adding a new special jurisdiction rule for unjust enrichment to the Regulation should be rejected. None of the possible special jurisdiction rules for unjust enrichment accords with the principles of proximity, predictability and legal certainty. The same idea should be rejected by the drafters of any future Hague convention on jurisdiction in civil and commercial matters, unless the use of wide jurisdictional bases is offset by the incorporation of the doctrine of *forum non conveniens*.

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<sup>217</sup> *Siemens* (n 8), AG opinion [69].