The CJEU's Decision in Wikingerhof: Towards a New Distinction Between Contract and Tort?

Earlier today, the Grand Chamber of the CJEU rendered its long-awaited decision in Case C-59/19 *Wikingerhof*. The case, which concerns the claim for an injunction brought by a German hotel against the online platform *booking.com*, goes back to the age-old question of where to draw the line between special jurisdiction for contract and tort under Article 7 Brussels Ia if the two parties are bound by a contract but the claim is not strictly-speaking based on it.

Arguably the Court's most authorative statement on this question can be found in Case C-548/12 *Brogsitter*, where the Court held that a claim needed to be qualified as contractual if the parties are bound by a contract and 'the conduct complained of may be considered a breach of [this] contract, which may be established by taking into account the purpose of the contract' (para. 24). Some of the Court's later decisions such as the one in Joined Cases C-274/16, C-447/16, and C- 448/16 *flightright* could however be seen as a (cautious) deviation from this test.

In *Wikingerhof*, the claimant sought an injunction against certain practices relating to the contract between the parties, which the claimant argued they had been forced to agree to due to the dominant market position of the defendant, which violated German competition law. According to AG Saugsmandsgaard Øe – whose Opinion has been discussed on this blog here and here – this claim had to be qualified as non-contractual as it was effectively based not on the contract, but on rules of competition law which did not require a taking into account of the contract in the sense seemingly required under *Brogsitter*.

In its relatively short judgment, the Court appears to agree with this assessment. Using the applicant's choice of the relevant rule of special jurisdiction as the starting point (para. 29; which might be seen as a deviation from the purely objective characterisation attempted in Case 189/87 *Kalfelis* and *Brogsitter*), the

Court held that

> *[33] … where the applicant relies, in its application, on rules of liability in tort, delict or quasi-delict, namely breach of an obligation imposed by law,* ***and where it does not appear indispensable to examine the content of the contract concluded with the defendant in order to assess whether the conduct of which the latter is accused is lawful or unlawful****, since that obligation applies to the defendant independently of that contract, the cause of the action is a matter relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of Regulation No 1215/2012.*

Despite repeated references to the decision in *Brogsitter*, the Court thus seems to move the focus away from whether 'the conduct complained of may be considered a breach of contract' towards what may be seen as a lower threshold of whether an examination of the content of the contract is 'indispensable'. (Similar wording was admittedly also used in *Brogsitter* (paras. 25–26) but did not made it into the *dispositif* of the decision.) Applying this test to the case at hand, the Court explained that

> *[34] In the present case, Wikingerhof relies, in its application, on an infringement of German competition law, which lays down a general prohibition of abuse of a dominant position, independently of any contract or other voluntary commitment. Specifically, Wikingerhof takes the view that it had no choice but to conclude the contract at issue and to suffer the effect of subsequent amendments to Booking.com's general terms and conditions by reason of the latter's strong position on the relevant market, even though certain of Booking.com's practices are unfair.*
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> *[35] Thus, the legal issue at the heart of the case in the main proceedings is whether Booking.com committed an abuse of a dominant position within the meaning of German competition law. As the Advocate General stated in points 122 and 123 of his Opinion, in order to determine whether the practices complained of against Booking.com are lawful or unlawful in the light of that law,* ***it is not indispensable to interpret the contract between the parties to the main proceedings****, such interpretation being necessary, at most, in order to establish that those practices actually occur.*
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> *[36] It must therefore be held that, subject to verification by the referring court,*

> *the action brought by Wikingerhof, in so far as it is based on the legal obligation to refrain from any abuse of a dominant position,* ***is a matter relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of Regulation No 1215/2012****.*

Considering the limited popularity of the *Brogsitter* judgment, today's restatement of the test will presumably be welcomed by many scholars.