CJEU on action for unjust enrichment under Brussels I Regulation in the case HRVATSKE ŠUME, C-242/20

Do actions for recovery of sums unduly paid by way of unjust enrichment fall within exclusive jurisdiction under Article 22(5) of the Brussels I Regulation and, if not, do they fall within alternative jurisdiction set out in Article 5(3) in respect of "quasi-delicts"?

This is the twofold question that a Croatian court addressed to the Court of Justice in the case HRVATSKE ŠUME, C-242/20.

Last week, on 9th December, the Court handed down its judgment in this case.

Gilles Cuniberti and Geert van Calster reported and commented on the judgment. I am happy to refer to their contributions. As the judgment has already made object of their interesting analysis, the present post aims solely to complement the initial post about the Opinion presented by AG Saugmandsgaard Øe in the case at hand and the observations made there.

A brief reminder of the Opinion and its findings

Back in September, AG Saugmandsgaard Øe presented his Opinion in this case. At the request of the Court, he did only elaborate on the second part of the question presented above – and, technically speaking, the first preliminary question – pertaining to the interpretation of Article 3(5) of the Brussels I Regulation (point 20 of the Opinion).

In essence, he argued that an action for unjust enrichment is not a "matter relating to a contract" in the sense of Article 5(1), save where it is closely connected with a preexisting (or alleged to exist) contractual relationship (points

44-52). Nor it is a “matter relating to tort, delict or quasi-delict” within the meaning of Article 5(3) of the Regulation (point 79).

The judgment of the Court

On the exclusive jurisdiction

The Court starts its analysis with first part of the question presented in the introduction of the this post – and again, technically speaking, the second preliminary question – on the interpretation of Article 22(5) on the exclusive jurisdiction.

The Court reads this question in the context of a particularity of the case that is brought up by the referring court in its request for a preliminary ruling: an action for recovery of sums unduly paid by way of unjust enrichment falls within the scope of exclusive jurisdiction set out in Article 22(5) where that action concerns an amount levied in the enforcement proceedings and is brought before a court because it is not possible anymore, given the lapse of time (since the date of enforcement), to seek recovery of the levied amount in the same enforcement proceedings? (paragraph 26).

The reasoning of the Court relies heavily on the autonomous character of the action in question with regards to the enforcement proceedings (paragraph 31) and on the predictability argument (paragraphs 30 and 34).

This reasoning leads the Court to conclude that, despite the aforementioned particularity of the case, the action for recovery of sums unduly paid does not fall within the scope of Article 22(5) of the Brussels I Regulation (paragraph 37).

On the alternative jurisdiction for contracts/torts

After that, the Court, logically, proceeds to the interpretation of Article 5(3) in order to clarify whether the action in question falls within the scope of that provision.

In short, it considers that due to the lack of the “harmful event” in the meaning of

Article 5(3) , an action for recovery of sums unduly paid by way of unjust enrichment cannot fall within the scope of that provision (paragraph 55).

It also clarifies that the unjust enrichment does not, generally speaking, result from the act voluntarily undertaken by the party enriched at the expense of another. Thus, in principle it does not fall within the scope of Article 5(1), as a "matter relating to a contract" (paragraph 45). However, echoing the Opinion delivered by AG Saugmandsgaard Øe, the Cour considers that action "closely linked" to a contract would fall within the ambit of that provision (paragraphs 47 and 48).

Already second time's a charm ?

In the initial post on the Opinion, I speculated that the solution proposed by AG Saugmandsgaard Øe may have brought to mind the proposal made by AG Bobek in the context of actio pauliana in his Opinion delivered in the case Feniks, C-337/17. As a reminder, in the latter Opinion, AG Bobek proposed to consider, in essence, that an actio pauliana cannot be seen as a "matter relating to a contract", nor it is a "matter relating to tort, delict or quasi-delict". It has to be brought before the court having jurisdiction under the general rule of jurisdiction, according to the principle actor sequitur forum rei.

Let us speculate and take that proposal one step further: while in order to identify the law governing action pauliana it might be necessary to decide whether this action is contractual or non-contractual in nature and thus falls within the scope of the Rome I Regulation or within the scope of the Rome II Regulation, it is not the case for the contract/tort distinction under the rules of jurisdiction set out in Article 5(1) and 5(3) of the Brussels I Regulation.

In the judgment in the case Feniks, C-337/17, the Court did not follow the proposal advanced by AG Bobek (see paragraph 44 of that judgment). Thus, it did not have to face or even to consider the one-step-forward speculative consequence mentioned above.

By contrast, it decided to do exactly that in the present case.

The Court acknowledges that a non-contractual characterization of the unjust

enrichment is mandated by the Rome II Regulation (even though it falls within a scope of a special choice-of-law rule of Article 10), but it does not automatically translate to a similar characterization under the rules of jurisdiction of the Brussels I Regulation (paragraph 46).

The judgment can be consulted here.