# Coordination of contractual and tort claims in the European law of jurisdiction

# Koordination vertraglicher und deliktischer Ansprüche im europäischen Gerichtsstand

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**Abstract:** Under Article 7(1) and Article 7(2) Brussels I-bis Regulation of 2012, there is jurisdiction for contractual and tort claims. The delineation of these matters is not easy, particularly in cases where there is a concurrency of actions. The discussion is continuing even after the *Wikingerhof* judgment of the European Court of Justice of 24 November 2020. The present article discusses weaknesses associated with different concepts like duties and interests. The introduction of additional elements like the 'indispensability' of analysing the contract in cases of tort jurisdiction are difficult to apply and lead to new uncertainty. The admissibility of annex jurisdiction for contract and tort would alleviate the problem.

**Keywords:** Brussels I-bis Regulation (No. 1215/2012), characterisation, contractual and tort claims, jurisdiction under Article 7(1) and Article 7(2) Brussels I-bis Regulation.

**Zusammenfassung:** Nach Artikel 7 Absatz 1 und Artikel 7 Absatz 2 der Brüssel-Ia-Verordnung von 2012 besteht eine Zuständigkeit für vertragliche und deliktische Ansprüche. Die Abgrenzung dieser Angelegenheiten ist nicht einfach, insbesondere in Fällen, in denen mehrere Ansprüche gleichzeitig erhoben werden. Die Diskussion geht auch nach dem Wikingerhof-Urteil des Europäischen Gerichtshofs vom 24. November 2020 weiter. In diesem Artikel warden Schwachstellen der verschiedenen Konzepte wie Pflichten und Interessen erörtert. Die Einführung zusätzlicher Elemente wie die "Unerlässlichkeit" der Prüfung des Vertrags in Fällen der deliktischen Zuständigkeit sind schwer anzuwenden und führen zu neuer Unsicherheit. Die Zulässigkeit einer Annexzuständigkeit für Vertrag und unerlaubte Handlung würde das Problem mildern.

**Stichworte:** Brüssel-Ia-Verordnung (Nr. 1215/2012), Qualifikation, vertragliche und deliktische Ansprüche, Zuständigkeit nach Art. 7 Nr. 1 und Art. 7 Nr. 2 Brüssel-Ia-Verordnung.

## I. Introduction

**1.** I first met Alfonso Calvo Caravaca in 1987 in Hamburg at the Max Planck Institute for Comparative and International Private Law when he was conducting research in European private international law and international civil procedure. At that time he was at the beginning of his academic career. In the meantime he has become one of the most prominent experts in not only Spanish but also European private international law. The pages that follow, concentrating on an aspect of coherence in the European law of international civil procedure, are dedicated to him in recognition of his achievements and in appreciation of our friendship.

**2.** Obligations can have a different source – contractual and legal, extracontractual. Therefore, the delimitation and coordination of contractual claims and tort claims is a task not only in substantive law but also in European private international law. The relationship between contractual claims and tort claims will be examined on the level of substantive law (II) and then on the level of jurisdiction (III). The delimitation problem is a complex issue because the concepts used are only partly predetermined. The primary tasks are to define each of the matters, to find rules allowing ascertainment of a single jurisdiction, to formulate dividing lines and to develop rules for cases where the obligations coincide. Not only the relationship of the different fields is full of tensions and problems; also within the different single concepts there are many problems. These touch upon the role of courts and the parties and arise at the intersection of many questions. The reasoning is often based on procedural aspects and/or aspects of substantive law. It can therefore be no surprise that there is a plethora of conflicting and contradictory court decisions and disparate doctrinal efforts. However, even if recent case law seems to calm the dispute, it remains difficult to reach a common ground.

## II. Contractual and tort matters in substantive law

**3.** Contract and tort exist in the national law of obligations. Contractual relationships are possible for different arrangements of the parties. Non-contractual claims can be based on certain acts or omissions. They can also arise in the framework of contractual relationships which are of a considerable diversity. If there is a failure to perform, remedies can be specific performance (primary obligations) or compensation in the form of a monetary claim damages (secondary obligations).

**4.** Tortious claims are based on the breach of legal obligations. Specific torts concern not only the violation of legal positions of single private persons but also the violation of other more general legal duties. Tortious claims can arise under German law on the basis of §§ 823 et seq. Civil Code (CC). There are also several special legal provisions on different tortious acts. Under Spanish law, also contractual and tortious claims (Article 1902 et seq. Código civil) can arise. Between contractual and extracontractual relationships there are many points of contact. There is a certain common understanding that contractual obligations originate from the will of the parties, whereas tortious obligations are independent of this. Apart from this, the characterisation of obligations is different in national systems.[1] Tortious claims can also arise in the context of consumer transactions. The characterisation of obligations is not only an issue in domestic law but is also important in substantive private international law.

**5.** A special category is culpa in contrahendo. It encompasses the violation of a duty of disclosure and the breaking-off of contractual negotiations. German law acknowledges culpa in contrahendo as a special legal obligation in § 311(2) German CC).[2]

[1] See N. Hoffmann, *Die Koordination des Vertrags- und Deliktsrechts in Europa*, Mohr (Siebeck), Tübingen, 2006, pp. 24 et seq.

[2] See S. Kubis, 'Qualifikation oder "Pleading the Law"? Zur Konkurrenz von Vertrag und Delikt im europäischen Zuständigkeitsrecht', in: *Festschrift Schack*, Mohr (Siebeck), Tübingen, 2022, pp. 697, 698.

**6.** In many legal systems, concurrent contractual and extracontractual claims, particularly tortious claims, can arise.[3] The coordination of such claims, which are often of the same rank, can lead to complications. One type of obligation may exclude the other, but it is also possible that the obligations exist side by side. However, in French law and in Luxembourg there is the *principe de non-cumul*, which means that contractual claims prevail over tortious claims and that any parallel tortious claim will be excluded.[4]

## III. Contractual and tort matters in the framework of jurisdiction

### 1. The Approach of Article 7(1) and (2) Brussels I-*bis* Regulation

#### A) General approach to jurisdiction

**7.** The Brussels I-*bis* Regulation[5] tries to achieve several overarching objectives. As the European Court of Justice (CJEU) has stressed several times, particularly the objectives of proximity and the sound administration of justice are pursued by the Regulation.[6] The rules of jurisdiction must be highly predictable and are founded on the principle that jurisdiction is generally based on the defendant's domicile.[7] Under the Brussels I-*bis* Regulation there is a default rule for a general forum at the domicile of the defendant (Article 4). This default jurisdiction must always be available on this ground, save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different connecting factor.

**8.** The Brussels I-*bis* Regulation covers a wide range of issues including contractual obligations and non-contractual liability. In addition to the defendant's domicile, there are alternative grounds of jurisdiction based on a close link between the court and the action, a particular proximity to the facts and evidence, or in order to facilitate the sound administration of justice.[8]

**9.** The heads of special jurisdiction in Articles 7 – 9 are understood as exceptions. These jurisdictional rules include special rules for insurance matters, consumer transactions and individual contracts of employment. It is therefore necessary to define and delineate different special jurisdictions. It is, however, not easy to use these criteria for the determination of all specific issues of jurisdiction.

**10.** In matters relating to a contract, a person domiciled in a Member State may be sued in another Member State in the courts for the place of performance of the obligation in question, Article 7(1)(a) Brussels I-*bis* Regulation (former Article 5 no. 1 of the Brussels I Regulation). This is to a certain degree a counterweight to the default rule which favours the defendant.[9]

**11.** The application of contract jurisdiction gives rise to some questions. It has to be determined, above all, what kind of contractual link must exist between the parties to the action. It is, however, not clear, which criteria should be used for characterisation purposes nor what kind of test can be used.

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[3] U. Magnus, 'Concurrent Claims', in: J. Basedow, K. Hopt, R. Zimmermann (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, OUP Oxford, 2012, pp. 344 et seq.

[4] See A. Betzelt, *Anspruchskonkurrenz bei grenzüberschreitendem Lebenssachverhalt*, Mohr (Siebeck), Tübingen, 2023, pp. 65 et seq.

[5] Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ EU 2012 L 351/1.

[6] CJEU, 24 Nov. 2020, *Wikingerhof,* C-55/19, ECLI:EU:C:2020:950, para. 37 with references.

[7] Recital 15.

[8] Recital 16.– A.-L. Calvo Caravaca, J. Carrascosa González, 'International jurisdiction and international business. The Brussels i-bis Regulation', in: A.-L. Calvo Caravaca, J. Carrascosa González (eds.), *European Private International Law*, Editorial Comares, Granada, 2022, p. 229, para. 600.

[9] M. Poesen, 'From Mirages to Aspirations – The Periphery of "Matters Relating to a Contract" in Regulation (EU) No 1215/2012', *Yearbook of Private International Law* (Yb. PIL) 22 (2020/21) 511, 537 et seq.

**12.** As regards contract jurisdiction, legal authors have proposed and adopted several approaches, though not always in a systematic way. In the background of the different approaches is the fundamental question regarding the basic function of the contract forum. According to one approach, contract jurisdiction offers the most appropriate and, hence, the natural forum for all claims that are even remotely linked to a contract (for the sake of proximity and so as to avoid multiple jurisdictional openings over claims relating to the same contract). It has been called the 'natural forum theory'.[10] A more narrow approach presumes that the contract jurisdiction should be delineated strictly ('ring-fencing theory'[11]). Contract jurisdiction is a consequence of the contractual relationship, but it is an exception to the default jurisdiction found at the defendant's domicile. In applying these different approaches, some different tests are used. However, it is not always explicitly disclosed or explained which of these basic assumptions is being followed.

**13.** The discussion is dominated by several types of approaches, which for their part justify the delineation for certain case groups. One approach has been called the 'cause of action test'[12] or the 'causa petendi test',[13] because it centres on the nature of the cause of action pleaded by the claimant. Sometimes it is proposed to use the cause of action of the claim as the main criterion.[14] It is true that the CJEU uses this approach when delineating the sphere of application of the Rome I Regulation.[15] The problem with this approach in the field of jurisdiction is, however, that it seems to be a reference to the substantive law and would need a determination of the applicable law already at the stage of verification of jurisdiction. This would also mean that the scope of application of the Rome Regulations would have to be determined. An autonomous determination would lead to similar problems as regards the jurisdiction issue.[16]

**14.** Another approach to characterisation is to focus primarily on the relationship between the parties. From this standpoint, only claims between litigants who are bound by a contract can be characterised as 'matters relating to a contract'. This relatively narrow approach has for example been adopted in the *Handte*[17] and *Réunion européenne*[18] decisions. This is sometimes called a 'privity test'. [19]

**15.** A third approach emphasises the nature of the facts underlying the claim brought by the claimant. This approach, developed in the *Brogsitter* case, has been called the 'factual breach test', since it looks to factual elements such as the defendant's behaviour and the indispensability of interpreting the contract.[20]

**16.** An important role in respect of interpretation is played by the CJEU, which interprets European Union law through its preliminary rulings (Article 267 TFEU[21]). The approach of the CJEU is, to the extent possible, to achieve an autonomous interpretation of the Regulations.[22] A uniform interpretation of

[10] M. Poesen, *Yb. PIL* 22 (2020/21) 511, 517 et seq.

[11] M. Poesen, *Yb. PIL* 22 (2020/21) 511, 517.

[12] M. Poesen, 'Regressing into the right direction - Non-contractual claims in proceedings between contracting parties under Article 7 of the Brussels Ia Regulation', *Maastricht Journal of European and Comparative Law* (Maastricht J. Eur. Comp. L.) 28 (2021), 390, 393.

[13] R. Ruiz Rodríguez, 'Aplicación de la jurisprudencia Wikingerhof del TJUE sobre delimitación entre materia contractual y extracontractual a supuestos de infracción del secreto comercial', in: A. F. Pérez (ed.), *El Derecho internacional privado ante la(s) crisis de la globalización*, Aranzadi, Pamplona, 2023, p. 183, 188.

[14] J. van Doninck, *Blog of the European Association of Private International Law* (*EAPIL)* 3 May 2022. See CJEU, *Wikingerhof,* para. 31.

[15] Excluding company law matters and a trust agreement, CJEU, 3 Oct. 2019, *Verein für Konsumenteninformation v TVP,* C272/18, ECLI:EU:C:2019:827, paras. 31, 37.

[16] B. Haftel, *EAPIL* 14 Dec. 2020.

[17] CJEU, 17 June 1992, *Handte*, C-26/91, ECLI:EU:C:1992:268, paras. 16, 20.

[18] CJEU, 27 Oct. 1998, *Réunion européenne,* C-51/97, ECLI:EU:C:1998:509.

[19] M. Poesen, *Yb. PIL* 22 (2020/21) 511, 520.

[20] M. Poesen, *Yb. PIL* 22 (2020/21) 511, 525 et seq.– Cf. CJEU, 13 March 2014, *Brogsitter,* C-548/12, ECLI:EU:C:2014:148, para. 24-26.

[21] Consolidated version of the Treaty on the Functioning of the European Union, OJ EU 2012 C 326, p. 47.

[22] CJEU, *Wikingerhof,* para. 25.

the Brussels I-*bis* Regulation and the Rome Regulations on obligations is also necessary. The scope of application of the Regulations is to be interpreted in a way so as to ensure – as far as possible – consistency.

**17.** Without a characterisation of the claims it cannot be decided whether there are contractual or non-contractual obligations or both.[23] Characterisation in the context of jurisdiction means that the relevant facts fit into the concepts of the respective head of jurisdiction. The solution has to be found in the framework of already existing CJEU positions in the field of the law of jurisdiction; alternatively, it must be determined whether these positions must also be cast in doubt.

**18.** Jurisdiction and substantive law are different concepts. However, for jurisdictional purposes concepts of substantive law are often used. It has to be determined how to deal with them. Also in relation to the facts, problems arise.

**19.** The role of private international law approaches in the context of the examination of jurisdiction has to be clarified. There has to be a delimitation between the applicable rules regarding the admissibility and the merits of the claim. However, concepts of characterisation and preliminary question related to the general part of private international law can also play a role for issues of jurisdiction.

## B) Examination of jurisdiction

**20.** It has to be determined on which basis the examination of jurisdiction by the court has to be undertaken. The test must be practicable, fit in the European context and lead to meaningful results. For jurisdictional purposes, the legal concepts of jurisdiction have to be followed. Since only this issue has to be examined in the proceedings at the stage of jurisdiction, the merits of the claim under substantive law cannot be taken into account. The law applicable to the substantive claim can be determined only at a later stage of the proceedings.

**21.** It is the choice of the plaintiff to go to a certain court. Whether the claim can satisfy the prerequisites for a certain forum depends not only on the legal characterisation of the claim but, above all else, on the existence of the facts necessary for the establishment of jurisdiction. In this context, it has to determined what the factual basis is for a potential exercise of jurisdiction.

**22.** As regards the verification of jurisdiction, the CJEU has stressed the importance of the head of jurisdiction the claimant is 'relying on'.[24] One can assume this relates to whether the claimant is referring to a specific head of jurisdiction or to substantive law as a basis for his claim.[25] However, whether jurisdiction exists is determined by application of the relevant legal provisions. According to the rules of national civil procedure law, it is often not the task of the plaintiff to make a legal assessment of his claim or the admissibility of the action. In principle, he only has to present the facts. It is not clear if it is, instead, European union law that prevails here in terms of the standard used for the examination of jurisdiction.[26] Yet it is also not evident just what the standard of 'relying' really means.[27]

**23.** The emphasis on the behaviour of the plaintiff represents a certain contradiction because the European Court has at the same time declared that the *court* has to ascertain the conditions for jurisdic-

[23] S. Kubis (fn 2) pp. 697, 699.

[24] CJEU, *Wikingerhof*, paras. 28 – 30; AG Saugmandsgaard Øe, *Wikingerhof,* paras. 94 et seq.

[25] W. Wurmnest, 'Plotting the boundary between contract and tort jurisdiction in private actions against abuses of dominance', *CMLR* 58 (2021), 1571, 1583.

[26] C. Kern, C. Uhlmann, *GPR* 2021, 50, 53 et seq.

[27] S. Kubis (fn 2) pp. 697, 703 et seq. (on legal characterisation); W. Wurmnest, *CMLR* 58 (2021), 1571, 1583 et seq.; A. Betzelt (fn 4) p. 149 et seq.

tion.[28] The classification as contractual or tortious claims leads to a division of the cause of action. Its consequence is – according to the *Kalfelis* approach – that the examination of the court in the forum at stake is limited.[29] Only the contractual or tort claim can be examined.

**24.** In order to ascertain whether the essential conditions are fulfilled for asserting jurisdiction, the court identifies the connecting factors with the State in which the court is situated. The court examines all the evidence before it, in particular the relevant claims of the plaintiff as to the nature of the obligations on which the action is based. It is, however, not undisputed whether the court simply has to proceed under the allegations of the plaintiff[30] or if a certain examination has to take place.[31] This means that, where appropriate, allegations made by the defendant also have to be taken into account.[32] However, sometimes it is said that only the contentions of the claimant are relevant.[33] The case law of the CJEU gives no clear answer.

**25.** There is an interplay of the Union rules on jurisdiction and the scope of the national law of civil procedure. The borderline between national law and unified European jurisdiction rules is not easy to draw.[34] The starting point for the examination of jurisdiction under the Brussels I-*bis* Regulation is the application of European rules. The examination of jurisdiction is, however, only one aspect of the admissibility of actions.

**26.** Jurisdiction can be based on the same facts as those founding the claim. Therefore, the court may not only have to decide on its jurisdiction but will also need to analyse the case on the merits, considering, for example, the existence of a valid contract for an action based on a breach of contract. That a matter is both relevant for procedural and substantive (material) law is dealt with by the so-called 'doubly pertinent facts' approach (*doppelrelevante Tatsachen*). Here, the facts must only be presented and need not be proven already in examining the existence of jurisdiction.[35] The same is true for actions in the tort forum.[36] However, the CJEU has taken different positions, so that there is no uniform approach.[37]

## C) Contractual relationships

**27.** As a general rule, the courts of the Member State in which the obligation in question is performed will have special jurisdiction (Article 7(1)(a) Brussels I-*bis* Regulation). In contrast to the former practice of the CJEU under the Brussels I-*bis* Regulation, the examination of jurisdiction for the claim is independent of the *lex causae* of the claim. To a certain extent there is an explicit and uniform approach featuring legal definitions of the place of performance for some types of contracts in Article 7(1)(b) of the Regulation. But for 'contractual matters' as such there is no unform definition in the text of the Regulation.

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[28] CJEU, *Wikingerhof*, para. 29.

[29] So-called 'limitation to cognition' (*Kognitionsbeschränkung*), H. Roth, 'Konkurrierende vertragliche und deliktische Ansprüche im europäischen Zuständigkeitsrecht,' in: *Festschrift Neumayr* vol. I, Manz, Wien, 2023, p. 1359, 1360 et seq.– Critical of this approach, L. Rademacher, 'Anspruchskonkurrenz und Kognitionsbefugniskonzentration im europäischen Zuständigkeitsrecht', *Zeitschrift für Zivilprozess international* (*ZZPInt)* 24 (2019), 141 et seq.

[30] CJEU, *Wikingerhof*, paras. 30, 31.

[31] Cf. CJEU, 10 March 2016, *Flight Refund*, C-94/14, ECLI:EU:C:2016:148, para. 59 et seq.

[32] CJEU, 28 Jan. 2015, *Kolassa*, C-375/13, ECLI:EU:C:2015:37, para. 65.– Cf. Attorney General (AG) Szpunar, C-265/21, *AB and AB-CD,* paras. 78, 80.

[33] Opinion AG Saugmandsgaard Øe, C-55/19, *Wikingerhof*, ECLI:EU:C:2020:688*,* para. 107,

[34] C. Kern, C. Uhlmann, 'Vertrags- und Deliktsgerichtsstand revisited', *Zeitschrift für das Privatrecht der Europäischen Union* (*GPR)* 2021, 50, 53 et seq.

[35] H. Schack, *Internationales Zivilverfahrensrecht,* Beck, München, 8th ed. 2021, para. 489.

[36] S. Deuring, A. Spickhoff, 'Vertrag und Delikt im Europäischen Zuständigkeitsrecht', in: *Festschrift Becker-Eberhard,* Beck, München, 2022, pp. 107, 114 et seq.

[37] In greater detail, see S. Baumgartner, A. Kistler, 'Die Rechtsprechung des EuGH zu den doppelrelevanten Tatsachen beim Vertrags- und Deliktsgerichtsstand', *Festschrift Neumayr* vol. I, Manz, Wien, 2023, p.1075 et seq.

**28.** The concept of a matter relating to a contract cannot be interpreted as referring to the characterisation which the applicable national law gives to the legal relationship at issue before the national court. Rather, that concept must be interpreted independently with reference to the scheme and objectives of the Brussels I-*bis* Regulation in order to ensure the uniform application of that concept in all Member States.[38] The CJEU has traced the outlines of this concept on a case-by-case basis. The result may be that there will be a different characterisation under European and national rules.

**29.** The CJEU uses a very broad concept of contract. A matter is contractual when it features the establishment of a legal obligation freely assumed by one person towards another and where this obligation forms the basis of the applicant's action.[39] However, the contract must not necessarily be between the parties to the case. A contractual matter can exist even where that obligation is not directly binding on the parties to the dispute.[40] For the establishment of 'matters relating to a contract', within the meaning of Article 7(1) of the Regulation, the court hearing the matter is not required, at the stage of verifying its jurisdiction, to examine the contractual obligation nor, depending on the case,, the content of the contract or contracts at issue.

### D) Tort

**30.** In matters relating to tort, delict or quasi-delict, the courts of the place where the harmful event occurred or may occur have jurisdiction (Article 7(2) Brussels I-*bis*) (former Article 5 no. 3 of the Brussels I Regulation). This includes the place where the damage occurred and the place of the event giving rise to it. This head of special jurisdiction is also applicable for culpa in contrahendo.[41] There are special rules, inter alia, for antitrust and unfair competition (Article 6). Under certain circumstances, the tort forum can be more favourable for the plaintiff because it gives him access to more places or to a place at his own domicile. The fact that a claim can be classified under national law as tortious is irrelevant.[42] A uniform approach has to be followed also for the interpretation of tortious matters. The interests of the plaintiff and the protection of the defendant have to be taken into account. Proximity to the facts of the case and available evidence are bases of jurisdiction in tort claims.[43]

## 2. Delineation between jurisdictions

### A) In the Twilight Zone: *Brogsitter, Wikingerhof* and others

#### a) CJEU-Case law

**31.** It is possible that a claim could be based in several fora. In the framework of contractual relations of the parties and claims for breach of contract, it is not so much the definition of the terms that is the problem but the relationship between different conceptions of a jurisdictional basis. CJEU case-law has dealt several times with the problem of whether a claim can be simultaneously characterized as contractual and tortious or which characterization should prevail. Moreover, the exact borderline and the

[38] CJEU, 14 July 2016, *Granarolo,* C-196/15, ECLI:EU:C:2016:559, para. 19; CJEU, *Wikingerhof,* para. 25.

[39] CJEU, *Wikingerhof*, para. 23.– Since CJEU, 17 June 1992, *Handte*, C-26/91, ECLI:EU:C:1992:268, paras. 15 et seq.

[40] CJEU, 26 March 2020, *Królová*, C-215/18, ECLI:EU:C:2020:235, para. 52; CJEU, 15 June 2017, *Kareda*, C-249/16, EU:C:2017:472, para. 31, 33; CJEU, 7 March 2018, *flightright*, para. 61; Opinion AG Szpunar, *AB and AB-CD,* C-265/21, para. 68. – Contra P. Mankowski, 'Ein eigener Vertragsbegriff für das europäische Internationale Verbraucherprozessrecht?', *GPR* 2020, 281 et seq.

[41] CJEU, 17 Sept. 2002, *Tacconi,* C-334/00, ECLI:EU:C:2002:499, para. 27.

[42] CJEU, 14 July 2016, *Granarolo*, paras. 23 et seq.; F. Rieländer, 'Zur Qualifikation außervertraglicher Ansprüche zwischen Vertragsparteien im europäischen IZVR und IPR', *RIW* 2021, 103, 108 et seq.

[43] S. Kubis (fn 2) pp. 697, 700; J. von Hein, 'Zur Abgrenzung des Vertrags- und Deliktsgerichtsstandes in international-kartellrechtlichen Streitigkeiten,' *Festschrift Säcker,* Beck, München, 2021, pp. 215, 222 et seq.

mode of examination have been at the centre of several cases. Until recently there has been a tendency to identify the boundary between contract and tort to the detriment of tort and to the benefit of contract, thus giving deference to the latter.

**32.** A much debated case was the *Brogsitter* judgment. The plaintiff *Brogsitter* was a trader of luxury watches. He sued the defendant for compensation for having marketed on his own the mechanisms that *Brogsitter* had commissioned him to manufacture. The plaintiff argued that this was a case of unlawful competition, which is a tort under German law. The CJEU noted that the mere fact that a contract exists between two parties is not enough to determine that an action claiming liability is a matter relating to contract.[44] That is the case only where the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract. A case is contractual in nature 'where the interpretation of the contract … is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of'.[45] The basic idea for this recharacterisation of the action seems to reflect a certain 'coating' of the tortious claim within the dominating contractual relationship.[46] This introduction of an additional element and the prevalence of the contractual element would lead to an extension of the contract forum.

**33.** The implications of the approach adopted in the *Brogsitter* judgment are disputed. Under a so-called maximalist interpretation, the judgment has been interpreted broadly.[47] This interpretation holds that non-contractual claims should be characterised as contractual where the conduct complained of may be considered a breach of the terms of the contract, which may be established by taking into account the purpose of the contract. This would embrace all concurrent tort claims. By contrast, a so-called minimalist interpretation construes the *Brogsitter* judgment restrictively. According to this view, non-contractual claims would be characterised as contractual under Article 7(1) only where an interpretation of the contract is 'indispensable' for establishing the lawful or unlawful nature of the conduct complained of.[48] This would be the case if the tort claim is wholly dependent on the contract for its existence.[49]

**34.** In the subsequent *Wikingerhof* case, the plaintiff, a German hotel, sought an injunction against certain practices relating to the contract between the parties. *Wikingerhof* argued that the contractual conditions used by the Dutch defendant, the platform *Booking.com*, was an abuse of the dominant position of the defendant, which violated German competition law. If there is a breach of an obligation which exists independently of a contract, then, according to the CJEU in *Wikingerhof*, the liability is of a tortious nature.[50] The conditions for jurisdictional bases turn around a single test, which is whether an examination of the content of the contract is indispensable for an assessment of the lawfulness of the conduct of the defendant. Of decisive importance was that an interpretation of the contract was not 'indispensable' to establish the unlawful nature of *Booking.com*'s behaviour.[51] That the abuse of a dominant position resulted from unfavourable clauses found in the contract does not change anything. Insofar, the interpretation of the clauses was necessary only to establish the existence of an abuse.[52] Since the legal content as such was not in question, the contract was needed only as factual evidence. Following the 'minimalist approach', the interpretation of the contract was only a 'preliminary issue'.[53] That is to say, not every contractual

[44] CJEU, *Brogsitter,* ECLI:EU:C:2014:148, para. 23 (decided by a panel of only three judges).

[45] CJEU, *Brogsitter,* para. 25.

[46] A. Junker, 'Zwei Schritte vor, einer zurück. Die Abgrenzung von Vertrags- und Deliktsgerichtsstand in der Rechtsprechung des Europäischen Gerichtshofs', in: *Festschrift Schack*, Mohr (Siebeck), Tübingen, 2022, pp. 653, 660.

[47] See AG Saugmandsgaard Øe, *Wikingerhof,* para. 69; L. Lundstedt, *Concurrent Claims against Licensees: Which Courts have International Jurisdiction?,* Stockholm University Research, 2022, pp. 5 et seq.

[48] AG Saugmandsgaard Øe, *Wikingerhof,* para. 70. See e.g. L. Lundstedt (fn 47) pp. 6 et seq.

[49] See AG Saugmandsgaard Øe, *Wikingerhof,* para. 99; F. Rieländer *RIW* 2021, 103, 110.

[50] CJEU, *Wikingerhof*, para. 33.

[51] CJEU, *Wikingerhof*, para. 35.

[52] CJEU, *Wikingerhof*, para. 35.

[53] See AG Saugmandsgaard Øe, *Wikingerhof,* para. 124.

question makes the action contractual.[54] Article 7(2) Brussels I-*bis* Regulation applies in cases of abuse of a dominant position, even if this is the consequence of an unfavourable contract.

**35.** Though, contrary to *Brogsitter*, a claim under Article 7(2) Brussels I-*bis* was found admissible, the CJEU nevertheless repeated the central statement from *Brogsitter*. The main reasoning for the characterisation was based on the following premise that where there is a legal obligation, it is not necessary to interpret the contract. In order to determine whether the practices alleged against *Booking.com* were lawful or unlawful under the relevant competition law, it was not essential to interpret the contract between the parties to the main proceedings, since such an interpretation was, at most, necessary in order to establish the existence of those practices.[55]

**36.** A recent CJEU case – where, however, the request for a preliminary ruling was later retracted – concerned a declaration of property for pieces of art.[56] AG *Szpunar* deemed the contract between the defendant's parents, who had the pieces of art in their possession, and the claimants' (step-)mother to be decisive for jurisdictional purposes.[57] The AG argued that the claim was contractual in nature as it was ultimately based on an obligation freely entered into, even though the particular contract did not bind the two parties to the dispute. This solution was in line in regards to the underlying jurisdictional values.

### b) Remaining Doubts

**37.** The *Wikingerhof* approach seems to lead at least in some cases to acceptable results. A positive effect of the approach is the restriction of the distributive effect of the *Kalfelis* judgment[58]. However, there is no uniform assessment of the judgment. While it is sometimes seen as a repudiation of *Brogsitter*,[59] others see it only as a restriction or clarification[60] or reject the judgment totally.[61] In any case, there remains a certain number of doubts.

**38.** It is not clear what understanding has to be given to the restricted analysis of the contract in the *Wikingerhof* judgment, which has been called a 'preliminary issue' by the Attorney General.[62] A preliminary question generally means an issue, which is not the object of the main question but which has to be decided in order to come to a result and which is a condition or is at least important for the main question. Here the main question is to a certain extent the lawfulness of the conduct of the defendant,[63] but chiefly the inquiry is a jurisdictional issue. To look into the contract seems to be only a step in the test. If the contract is only an 'accessory incident' ('*question incidente'*), this does not make the claim into a contractual one.[64] The application of the head of jurisdiction for torts cannot be blocked by simply objecting that there is an existing contract.

**39.**There can be a contractual arrangement of the parties which influences the lawfulness of their actions. But a contract which justifies the actions of the defendant does not make the whole matter

[54] F. Rieländer, *RIW* 2021, 103, 108.

[55] CJEU, *Wikingerhof*, para. 35.

[56] CJEU, *AB and AB-CD,* C-265/21. See Conflictoflaws.net 26 June 2022 (Accessed: 15 Mai 2024).

[57] AG Szpunar, C-265/21, *AB and AB-CD,* para. 84.

[58] C. Kern, C. Uhlmann, *GPR* 2021, 50, 54; S. Kubis (fn 2) pp. 697, 706 et seq.

[59] For example, A. Briggs, *EAPIL* 7 Dec. 2020; B. Haftel, *EAPIL* 14 Dec. 2020.

[60] W. Wurmnest, *CMLR* 58 (2021), pp 1571, 1581 - 1586; S. Deuring, A. Spickhoff (fn 36) pp. 107, 112 et seq.

[61] For example, B. Haftel, *EAPIL* 14 Dec. 2020.

[62] Opinion AG Saugmandsgaard Øe, *Wikingerhof,* para. 124 (*question préalable*).– Cf. F. Rieländer, *RIW* 2021, 103, 108 et seq.

[63] AG Saugmandsgaard Øe, *Wikingerhof,* para. 124.

[64] AG Saugmandsgaard Øe, *Wikingerhof*, paras. 104, 108; T. Pfeiffer, 'Deliktsrechtliche Ansprüche als Vertragsansprüche im Brüsseler Zuständigkeitsrecht', *Praxis des Internationalen Privat- und Verfahrensrechts* (*IPRax)* 2016, 111, 112 et seq.; S. Kubis (fn 2) pp. 697, 706; S. Deuring, A. Spickhoff (fn 36) pp. 107, 113; F. Rieländer, *RIW* 2021 103, 108; J. von Hein (fn 43) pp. 215, 219 et seq.

a contractual issue. It is also possible that in the framework of a damage claim for tort the existence of a declaration of consent would be advanced. Whether or not there is valid consent is a preliminary question in private international law, one for which the rules on contracts are applicable. However, in the context of the existence of contract jurisdiction, the concept of preliminary questions is not really an improvement.

**40.** As already mentioned, according to the CJEU, interpretation of the contract has to be 'indispensable' for there to be a contractual claim. The indispensability test introduces an additional element which serves to restrict the cause of action test and the use of the contract forum.[65] The test focuses on the single contract in question. The existence of the contract and its reach is a question of substantive law; this is in line with a 'factual breach test'.

**41.** The indispensability test fulfils a certain function. Particularly when based on the cause of action of the claim, the question regarding the law applicable to the action arises. This raises the question of whether an application of the conflict rules for contracts has to be followed and whether the Rome I Regulation has to be applied. A regular examination of the applicable law on the contractual agreement has not been proposed. However, in order to interpret the contractual rights of the defendant in the *Wikingerhof* case, the applicable law should have been determined.[66] Nevertheless, the European Court of Justice did not go into detail as regards the general terms of the agreement.

**42.** Up until now, there has, however, never been a convincing answer as to the circumstances under which this indispensability can be assumed.[67] More questionable, however, is that the systematic justification of the test, which sometimes has been proposed to be renounced,[68] is doubtful.

**43.** According to the CJEU, the use of the tort forum presupposes an examination as to whether the conduct of the defendant was lawful or not.[69] However, it is not clear which law is to decide on the interpretation of the contract and its lawfulness. 'Unlawfulness' is a concept of substantive law, and there is no convincing answer as to why the lawfulness of the defendant's behaviour should be determinative of jurisdiction. Lawfulness is only one criterion for a multitude of points of contact between contractual and non-contractual relationships. On the other hand, extracontractual claims are often a consequence of unlawful behaviour.

**44.** The solution which finds that contractual claims can be given priority has to be rejected.[70] It has therefore been correctly criticised that the *Brogsitter*-approach, with its inquiry as to a dominating contractual relationship, may change the characterisation of the main question and as a result give the contractual forum preponderance.[71]

### c) Alternative Approaches

**45.** Some of the critical objections raised against the *Brogsitter/Wikingerhof* judgments concern singular points of the test used by the CJEU. There is, however, also the question as to a comprehensive alternative. In this respect, often the same or similar criteria are used as are found in substantive law.

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[65] M. Poesen *Maastricht J. Eur. Comp. L.* 28 (2021), 390, 395 et seq.

[66] AG Saugmandsgaard Øe, *Wikingerhof,* para. 123. – Cf. also A. Spickhoff, 'Vertrag und Delikt im Europäischen Zuständigkeitsrecht', *IPRax* 2022, 476, 480 et seq.

[67] A. Briggs, *EAPIL* 7 Dec. 2020; M. Poesen, *Yb. PIL* 22 (2020/21), 511, 542 et seq

[68] Cf. R. Ruiz Rodríguez (fn 13) p. 183, 193 et seq.

[69] CJEU, *Wikingerhof,* para. 33.

[70] AG Saugmandsgaard Øe, *Wikingerhof,* paras. 78 – 80; F. Rieländer, *RIW* 2021, 103, 106 et seq.

[71] T. Pfeiffer, *IPRax* 2016, 111, 114.

**46.** When criticising the *Brogsitter/Wikingerhof* judgments, it has to be conceded that there are some peculiarities which have to be observed. Due to the jurisdictional nature of the questions, the examination by the court is restricted. An examination of the substantive essence of the claim is not possible.

**47.** One proposal is to consider, above all, the source of the obligation. Contractual obligations are based on the will of the parties.[72] This, however, seems too general and brings no further precision. With the use of a cause of action test, it is decisive if the claim is based on a freely assumed contractual obligation.[73] No indispensability test takes place; it is enough that there is a claim that would not exist but for the contract, and the contract forum is a counterweight to the default jurisdiction. Characterisation is also to be undertaken without regard for the nature of the claim under substantive law.

**48.** One approach for characterisation that has been proposed is a kind based on the notion of a violated duty. In substantive law, there exists a multitude of duties of the parties. It has been proposed that complex rules also be developed under Article 7(1) for individual contractual arrangements – and on the other side for everyone's duties under Article 7(2) of the Regulation.[74] The difficulty, however, is that many of the duties of the parties can be explained either as a contractual or as a legal duty or as both at the same time.

**49.** Sometimes it is argued that with the help of the notion of an 'interest', a solution could be found. If under the substantive law a general 'interest in integrity' (*Integritätsinteresse*) exists independently of the validity of a contract – e.g. for health or for general personality rights – then the claim is to be deemed tortious. If there is, on the other hand, an 'interest in performance' (*Leistungsinteresse*) – e.g. in the context of a sales contract – then it is contractual.[75] This means that in addition to primary claims for performance, contractual jurisdiction includes not only warranty claims but also claims arising from a reversal of the exchange of services, whether under contract or under unjust enrichment rules.[76] The *lex causae* of the obligation is irrelevant.[77]

**50**. Despite the fact that there can be a contract, it is argued by some authors that personal injuries resulting from medical malpractice are to be classified as tortious.[78] This solution is based on the high standard of duties owed by medical practitioners, but this assertion is not without doubt. Investment damages concerning the capital at stake that occur as a result of incorrect information about financial risks are also not to be qualified as contractual.[79] Damages that arise as a result of a party's exceeding a grant of contractual power are also to be decided under tort jurisdiction.[80] However, it is doubtful if the application of different kinds of interests having their origin in contract law can be undertaken/ without a specific *lex causae* of national law. The concept of interest has its origin in the German law of obligations. The establishment of an autonomous and Union-wide accepted list only for the purpose of European international civil procedure would not only be cumbersome but could ultimately even prove impossible.[81]

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[72] For a 'theory of liability based on intention' (*willensbasierte Haftungstheorie*), see C. Wendelstein, 'Wechselseitige Begrenzung von Vertrags- und Deliktsgerichtsstand im Rahmen des europäischen Zuständigkeitsrechts', *Zeitschrift für Europäisches Privatrecht* (*ZEuP)* 2015, 622, 627 et seq.

[73] M. Poesen, *Yb. PIL* 22 (2020/21), 511, 542 et seq.

[74] C. Kern, C. Uhlmann, *GPR* 2021, 50, 55; S. Deuring, A. Spickhoff (fn 36) pp. 107, 118 et seq.

[75] J. Hoffmann, *Zeitschrift für Zivilprozess* (*ZZP)* 128 (2015), 465, 475 et seq.; F. Rieländer, *RIW* 2021, 103, 109 et seq.; P. Gottwald, in: *Münchener Kommentar zur Zivilprozessordnung* vol. 3 , 6th ed. , Beck,

[M]ünchen, 2022, Brüssel Ia-VO Art. 7 para. 14.– Contra S. Deuring, A. Spickhoff (fn 36) pp. 107, 119 et seq. – Sceptical S. Kubis (fn 2) pp. 697, 701.

[76] J. Hoffmann, *ZZP* 128 (2015), 465, 486 (interest in integrity).

[77] J. Hoffmann, *ZZP* 128 (2015), 465, 481.

[78] J. Hoffmann, *ZZP* 128 (2015), 465, 487; F. Rieländer, *RIW* 2021, 103, 110. Arguing for a contractual characterisation in the event of 'indispensability', A. Spickhoff, *IPRax* 2022, 476, 480.

[79] P. Gottwald (fn 75) Brüssel Ia-VO Art. 7 para.48.

[80] J. Hoffmann, *ZZP* 128 (2015), 465, 485 et seq.

[81] C. Kern, C. Uhlmann, *GPR* 2021, 50, 55.

**51.** In considering the multitude and complexity of numerous duties, it has also been argued that a general answer would be unrealistic[82] and that the development of a case-by-case solution would be more promising.[83] The uniform statutory determination of the place of performance for several types of contracts in Article 7(1)(b) Brussels I-*bis* Regulation is an indicator that a uniform solution is in principle possible.

### B) Case groups in respect of jurisdiction

**52.** Despite all the divergent approaches, several cases groups can be distinguished in respect of jurisdiction. If there is no connection at all between the tortious behaviour and a contractual relationship, then only a tort claim can be brought; there is only tort jurisdiction. Some other examples may be mentioned.

#### a) Tort at the conclusion of a contract

**53**. The German Federal Supreme Court dealt recently with a case regarding the sale of a Bulgarian car which had been involved in an accident.[84] A German company had bought the car on the internet. After it obtained the car in Sofia, it discovered that the car had serious defects. The German plaintiff argued that he had been induced to buy the car by deceit and claimed compensation. The Federal Supreme Court followed the *Winkingerhof* approach. The plaintiff did not base his action on a contractual claim, i.e. on an obligation voluntarily entered into under a purchase contract concluded between the parties, but on a tortious claim, i.e. a claim based on a legal obligation. The claim was based on an allegation of fraudulent misrepresentation in the run-up to the conclusion of the contract and in this respect was about the breach of the duty incumbent on all individuals not to place fraudulent sales advertisements. This constituted, according to the Federal Supreme Court, a tortious act and not a mere breach of a duty arising from a concluded contract. The conclusion of the contract was relevant only insofar as it was the aim and consequence of the fraudulent misrepresentation. The unlawfulness of the alleged conduct resulted from § 823(2) German CC in conjunction with § 263(1) German Penal Code and thus directly from the law.[85] This case shows that despite the existence of a contractual background, it is possible to establish jurisdiction in tort for the initiation of a contractual relationship.

#### c) Culpa in contrahendo

**54.** Damage claims in the category of culpa in contrahendo have been classified by the CJEU as non-contractual if there was no conclusion of a contract.[86] In the *Granarolo* case,[87] the plaintiff had expected the continuation of a tacit contractual relationship. On the other hand, the French compensation for a sudden breach of an established commercial relationship (*rupture brutale des relations commerciales*, Article L 442-1 para. 2 Commercial Code) has been classified by the CJEU as contractual.[88] In that case, the court followed the *Brogsitter* approach; in the case there was, however, no complicated relationship between the two potential fora. According to the CJEU, it was enough for the contractual characterisation that a tacit contractual relationship existed between the parties.[89]

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[82] Cf. A. Spickhoff, *IPRax* 2022, 476, 480.

[83] A. Junker (fn 46) pp. 653, 664 et seq.

[84] Federal Supreme Court, 20 July 2021, *Neue Juristische Wochenschrift* (*NJW*) 2021, 2977 = *IPRax* 2022, 519 note A. Spickhoff p. 476.– A request for a preliminary ruling has been withdrawn. Cf. also A. Junker (fn 46) pp. 653.

[85] In the same sense, F. Rieländer, *RIW* 2021, 103, 110; S. Deuring, A. Spickhoff (fn 36) pp. 107, 120 et seq.

[86] CJEU, *Tacconi,* para. 27. In the same sense, J. Hoffmann, *ZZP* 128 (2015), 465, 485 (interest in integrity).

[87] CJEU, 14 July 2016, *Granarolo,* para. 28.

[88] CJEU, 14 July 2016, *Granarolo*, para. 28. In the same sense, S. Deuring, A. Spickhoff (fn 36) pp. 107, 119. Contra J. Hoffmann, *ZZP* 128 (2015), 465 (478); P. Gottwald (fn 75) Brüssel Ia-VO Art. 7 para. 12.

[89] CJEU, 14 July 2016, *Granarolo*, para. 24.

**d) Neglect of duties of protection**

**55.** A party's failure to adhere to duties intended to protect the legal position of a another party is seen as a special constellation.[90] It can potentially constitute a contractual relationship.

**e) Duties to ascertain**

**56**. For duties to ascertain matters and duties to provide advice, a differentiated treatment has been proposed. If there is a relationship with a transaction, then it should be deemed a contractual matter.[91] However, duties of protection not specific for a transaction belong to the area of tortious matters.

**f) Antitrust, unfair competition**

**57**. For antitrust and unfair competition claims based on statutory obligations, it has been clarified by the *Wikingerhof* judgment that a tortious nature can be assumed.[92]

**g) Infringement of legal positions**

**58.** It is possible that in the context of a contractual arrangement the defendant interfered with a legal position of the claimant what could be justified by the contract. Particularly where there is a purported infringement of a legal position of intellectual property or personal rights, this may be the central point of a compensation claim of the rights holder. A characterisation as tortious may be appropriate. Where a claimant brings an action for damages in tort for infringement of copyright, in the context of which the defendant pleads the existence of a licensing agreement between the parties, the court must, in order to decide on the characterisation of the action , determine whether or not the contract authorised the use of the work complained of.[93]

**59.** For the infringement of trade secrets, there is a European directive under which the holder of such a secret has a protected position.[94] It has been argued that, if there is a contractual relationship between the parties, this is not the basis for a damage claim. In the framework of a contractual relationship, there can exist a tort claim. However, if there is a contractual arrangement on trade secrets, a contractual litigation may arise.[95] On the other hand, it has been argued that contract clauses which only mirror generally binding legal obligations are not sufficient for a tortious characterisation.[96]

**3. Concurrency of actions, annex jurisdiction**

**60.** There is no hierarchy between the different objectives of the Brussels I-*bis* Regulation. This means that neither interpretation can take priority over the other. It follows that each interpretation,

[90] S. Deuring, A. Spickhoff (fn 36) pp. 107, 118 et seq. ('*Schutzpflichten*').

[91] S. Deuring, A. Spickhoff (fn 36) pp. 107, 118 ('*Aufklärungs- und Beratungspflichten*').

[92] P. Mankowski, 'Wikingerhof: A View from Hamburg', *EAPIL* 9 Dec. 2020.– Cf. also A. Junker (fn 46) pp. 653, 644.

[93] AG Saugmandsgaard Øe, *Wikingerhof,* para. 106.

[94] Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets), OJ EU 2016 L 157/1**.**

[95] R. Ruiz Rodríguez (fn 13) pp. 183, 194 et seq. Both characterisations are possible according to K. Vollmöller, 'Die kollisionsrechtliche Behandlung von Geheimnisverletzungen in Vertragsverhältnissen', *IPRax* 2021, 417, 419.

[96] L. Lundstedt, *Cross-Border Trade Secret Disputes in the European Union*, Cheltenham, 2023, pp. 145 et seq.

restrictive or broad, of the concept of 'matters relating to a contract' can refute the other interpretation's viewpoint.[97] There is no higher rank of contractual claims.[98]

**61.** For the relationship between the different kinds of jurisdiction laid down in Article 7 Brussels I-*bis* Regulation, the CJEU developed a rule in the *Kalfelis* case,[99] which is still followed by the court[100] The court had ruled that the concepts of contract and tort are mutually exclusive, which means that also both heads of jurisdiction are mutually exclusive.[101] The mutual exclusivity means, as a consequence, that several special rules in Article 7 cannot be applied at the same time. If one rule is used, the application of the other is excluded. This assumption with its forced 'either-or' exacerbates the delimitation issue[102] and has been criticised many times.[103] It favours a 'distributive approach' and brings for cases with several contractual and tortious elements the danger of a dispersal of the proceedings in several courts in different countries.[104]

**62.** Another consequence is, according to the CJEU, that there is no annex competence for contractual claims if there is only a forum delicti.[105] There are, however, some proposals for an annex competence for contractual claims in the context of tort claims.[106] An annex competence will also exist for tort claims at the contract forum[107] or for both types of cases.[108] The establishment of such an annex competence would defuse the problems of delineation. Arguments for this are procedural economy, effective procedural protection and the synchronisation of international civil procedure and private international law.[109] The introduction of an annex competence would, however, presuppose abandoning the dividing approach of *Kalfelis* and be a major reform of the prevailing interpretation.

## 4. Contracts with weaker parties

**63.** For the special jurisdiction for consumer claims (Article 17 et seq. Brussels I-*bis* Regulation), the CJEU stresses the necessity of protecting consumers. There is a certain tendency that, when deciding on a contractual consumer claim, also claims with a tortious nature are to be classified as contractual.[110] However, a multiplicity of courts having jurisdiction would risk disadvantaging the weaker party. It is therefore in the interest of the proper administration of justice that a consumer should be able to bring before one and the same court all of the difficulties that have arisen from a contract which the consumer has allegedly been induced to conclude by reason of the professional's use of wording liable to mislead the other contracting party. The inseparable link of the other claim with the consumer contract is used as an argument.[111] The same solution has been proposed for insurance and individual employ-

[97] In this regard, see M. Poesen, *Yb. PIL* 22 (2021, 511 to 545, in particular p. 518.

[98] However, in favour of a priority, A. Betzelt (fn 4) p. 185 et seq.

[99] CJEU, 27 September 1988, Kalfelis, C-189/87, ECLI:EU:C:1988:459, paras. 19 – 20.

[100] CJEU, *Wikingerhof,* para. 26.

[101] For Article 5(1) and Article 5(3) of the Brussels Convention.

[102] S. Kubis (fn 2) pp. 697, 706 et seq.

[103] See B. Haftel, *EAPIL* 14 Dec. 2020; M. Poesen, *Yb. PIL* 22 (20/21) 511, 525; H. Roth (fn 25) p. 1359, 1350 et seq.; A. Betzelt (fn 4), p. 157.

[104] See B. Haftel, *EAPIL* 14 Dec. 2020.

[105] AG Saugmandsgaard Øe, *Wikingerhof,* para. 112; F. Rieländer, *RIW* 2021, 103, 107 et seq.

[106] Geimer, in: Geimer/Schütze (eds.), Europäisches Zivilverfahrensrecht, 4th ed 2020, Beck, München, Art. 7 EuGVO paras. 222, 223.

[107] J. von Hein (fn 43) pp. 215, 233 et seq.; S. Kubis (fn 2) pp. 697, 707 et seq.; A. Betzelt (fn 4) p. 185 et seq., finding annex competence if there is a closer connection of the factual circumstances of the case in the sense of Article 4 para. 3 sent. 2 Rome II Regulation.

[108] H. Roth (fn 39) p. 1359, 1367. – See also P. Mankowski, *EAPIL* 9 Dec. 2020.

[109] M. Henrich, 'Der Vertrags- und Deliktsgerichtsstand der EuGVVO nach der Rechtsprechung des EuGH und deren Auswirkungen auf die Kognitionsbefugnis und das anwendbare Recht', *GPR* 2018, 232, 237.

[110] See F. Rieländer, *RIW* 2021, 103, 110 et seq.

[111] CJEU, 2 April 2020, *Reliantco Investment Ltd,* C-500/18, ECLI:EU:C:2020:264, paras. 64, 69, 73.

ment contracts.[112] The concept of accessory jurisdiction for tort claims has not been used as a legal basis by the CJEU.[113]

## IV. Conclusion

**64.** The coordination of contractual and tort claims in European private international law is necessary not only for substantive law but also for the determination of jurisdiction. It is necessary to determine whether there is jurisdiction for contractual matters under Article 7(1) or for tortious matters under Article 7(2) of the Brussels I-*bis* Regulation. In the search for convincing criteria for the delineation of contractual and tort matters, different criteria have been used and discussed. The case law is not totally consistent. The questionable but nevertheless established starting point of the CJEU in the *Kalfelis* judgment, under which these types of jurisdiction are mutually exclusive, is one reason for the importance of delimitation.

**65.** There must be a way of reaching consistent results in making the necessary characterisation for the respective fora. Establishing more categories for more groups of cases would be useful. The test in *Wikingerhof* means that a contractual matter can be assumed if the interpretation of the contract between the defendant and the applicant appears 'indispensable' for establishing the lawful or, conversely, the unlawful nature of the conduct complained of against the former by the latter. This test seems to be suitable to stop the tendency to overstretch the concept of contractual matters at least for some cases. For other constellations, however, the problems of delineation remain. The proximity of other proposals to substantive law criteria like duties and interests can create new problems impeding the development of a uniform solution. The solution of developing rules for an accessory jurisdiction has been used by the CJEU in consumer cases without naming it in this way. The introduction of a general annex jurisdiction would improve the situation.

[112] See AG Saugmandsgaard Øe, *Wikingerhof,* para. 111; M. Poesen, *Maastricht J. Eur. Comp. L.* 28 (2021), 390, 397 et seq.*;* Ruiz Rodríguez (fn 13) 183, 196 et seq.

[113] Critical P. Mankowski, *GPR* 2020, 281, 284.