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THE JURISDICTION OF PRIVATE INTERNATIONAL LAW REGARDING THE CLAIMS OF IMMOVABLE PROPERTY

Cătălina Georgeta DINU[1]

Abstract: *The analytical presentation of international legal rules and issues raised in relation to the casuistry presented, proved to be the essence of a study that addresses the jurisdiction of private international law in matters relating to premises' applications. The legal interpretation developed both in the reports o the Brussels and Lugano Conventions and the Court of Justice of the European Union (hereinafter, ECJ), through a long and constant jurisprudence, has generated enforcement incidents in this matter and established the scope of the intrinsic nature of concepts such as: property, real right (in rem), property action on real estate.*

Key words: *property, jurisdiction, immovable assets, Convention.*

1. Introduction

The issue of the jurisdiction of private international law relating to the category of real estate has led to evolutionary changes in the European law [1] from the early rules of the Treaty of Rome establishing the European Economic Community (hereinafter EEC Treaty) on 25 March 1957, continuing with the Convention on jurisdiction and enforcement of judgments in civil and commercial matters in Brussels (hereinafter Brussels Convention), the Convention on jurisdiction and enforcement of judgments in civil and commercial matters in Lugano [2] and deal with EC Regulation no.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [10].

The Brussels Convention was signed on 27 September 1968 by the Member States of CEE, entered into force on the 1st of February 1973 and it was published in the Official Journal of the European Communities (JO) 1998, volume 27, series C, p.1. Nowadays, being mostly replaced by the Regulation CE no.44/2001, it is applied only in Denmark and other 14 Member States of the European Union.

Also, other regulations with international character, to which we will return in the analysis essay, contain significant details including the jurisdiction of the buildings [8].

The analytical presentation of these legal rules and issues raised in relation to the casuistry presented, prove to be the essence of a study that addresses the jurisdiction of private international law in matters relating to premises' applications. The legal interpretation developed both in

[1] Faculty of Law, *Transilvania* University of Braşov.

the reports of the Brussels and Lugano Conventions and the Court of Justice of the European Union (hereinafter ECJ), through a long and constant jurisprudence has generated enforcement incidents in this matter and established the scope of the intrinsic nature of concepts such as: property, real right (*in rem*), property, action on real estate.

Finally, conflicting national legislation includes rules on jurisdiction in matters relating to real estate requests or real rights, namely Romanian doctrine and jurisprudence have helped to highlight the issues that these problems have faced in establishing competence and their solution.

2. Legal Framework

According to paragraph 4 of Article 6 of the Brussels Convention, the content of which was taken over by article 6, paragraph 4 of Regulation nr.44/2001, a person domiciled in a Contracting State may be sued in matters relating to a contract, if the action is combined with an action against the same defendant in matters relating to interests in land, at the court of the Contracting State in which the property is located.

According to Article 9 of the Brussels Convention, the contents of which can be found only in article 10 of Regulation nr.44/2001 in case of liability insurance or insurance of immovable property, the insurer may be brought also to justice to the court which is situated where the harmful event occurred. The same applies if movable and immovable property is covered by the same insurance policy and both are adversely affected by the same contingency.

Article 16 paragraph 1 of the Brussels Convention, the content of which was taken over by Article 22, paragraph 1 of Regulation nr.44/2001 provides that the following courts shall have exclusive jurisdiction, regardless of domicile: relating to rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, the tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State.

On 16 September 1988, the Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters was concluded between Member States of the European Community and several other states, but Article 16 of the Convention alin1 Brussels remained unchanged regarding the rules of exclusive jurisdiction.

According to article 12 paragraph 1 of the preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters from 1999, adopted by the Special Commission of the Hague Conference, in actions that have as their object rights *in rem* in immovable property or tenancies of a property, the courts of the Member State in which the property is located shall have exclusive jurisdiction, unless, with respect to actions on rental property, the tenant is domiciled in another state.

The convention on the law applicable to the succession of the estates of deceased persons, in article 1, paragraph 2 d) previsions the fact that the Convention does not apply to ownership interests or assets created or transmitted otherwise than by inheritance, and the Convention

regarding the recognition and enforcement of foreign judgments in civil and commercial matters since 1971 provides, in article 10, paragraph 3, that the state court of origin shall be deemed to have competence over the Convention, if the action was intended to determine an issue relating to immovable property situated in that State.

3. Procedural issues concerning the application of Article 22, paragraph 1 of Regulation (EC) nr. 44/2001

A correlation of national provisions on international jurisdiction and the recognition and enforcement of judgments led to the conclusion of the Brussels Convention, and later it was replaced by Regulation no.44/2001 applicable today.

However, the original provisions relating to the determination of jurisdiction in matters related to buildings remained unchanged, so that the ECJ's interpretation of Article 16 paragraph 1 of the Brussels Convention before the entry into force of the regulation remains valid, so it can be invoked in the latest jurisprudence.

Article 22 of Regulation no.44/2001 refers to State courts, which means it regulates only international jurisdiction.

Territorial jurisdiction is governed by the law of the Member States. Thus, if the law of the state with exclusive jurisdiction provides internal territorial jurisdiction of a court, there is a gap in the judicial system [2].

Prior to the Brussels Convention, the recognition and enforcement of judgments was governed by the provisions of the agreements already concluded between Member States, conventions establishing the general rules of jurisdiction, but not the specific civil and commercial matters. The laws of Member States (Belgium, France, Italy, Luxembourg, the Netherlands and Germany) include rules of jurisdiction which were generally incorporated into bilateral agreements.

But the Brussels Convention's rules differ from these bilateral agreements in setting rules on exclusive jurisdiction.

The Convention follows, in this respect, the Treaty between France and Germany, which provides that the court of the country where the building is located shall have exclusive jurisdiction in all disputes relating to possession or ownership of such property, and those relating to rights *in rem* over the property.

4. Case *Land Oberösterreich / ČEZ*

The interpretation of Article 22, paragraph 1 of Regulation (EC) nr.44/2001 (Article 16 paragraph 1 of the Brussels Convention) [5] was issued in the case of the Province of Upper Austria and CEZ, on the negative consequences on the agricultural land owned by the Austrian province as a result of ionizing radiation emanating from a nuclear power plant located on the territory of the neighbouring country namely the Czech Republic.

In fact, the province of Upper Austria is the owner of several agricultural lands located approximately 60 km from the Temelin nuclear plant, commissioned in November 9, 2000. This centre is coordinated by ČEZ, a society where the Czech Republic has 70 % of the property. The applicant requested the Linz Regional Court to terminate the ČEZ influences caused by ionizing radiation, considered to exceed those that are normally released by nuclear plants which comply with industrial standards on soil contamination.

ČEZ said that Austrian courts lack jurisdiction, holding that Article 16 para 1 of the Brussels Convention is not applicable to an action to prevent negative consequences.

For the way in which the rules of exclusive jurisdiction referring to real estate claims apply even when the defendant is domiciled outside The European Economic Community, see also the Jenard Report no.C 59/34.

This action is by its nature an action for damages and falls under the incidence of Article 5, paragraph 3 of the Brussels Convention. Also, there is the possibility that judgments cannot be made in the Czech Republic that results in failure to comply with the rules on jurisdiction.

The Supreme Court (after declining jurisdiction of the Austrian first court and of the Austrian appeal court) decided to hold proceedings and to refer a question to the ECJ: is the expression "action whose subject is the right to *in rem* property" in accordance with the meaning of Article 16 paragraph 1 of the Brussels Convention which provisions an action to prevent the emission of ionizing radiation on land located in the neighbouring area - which is not an EU member state – which affects the land owned by the applicant?

CJEU noted that, while the Czech Republic was not a party of the Brussels Convention at the time, and the defendant was not in a Member State, that fact does not preclude the application of Article 16 of the Brussels Convention, as expressly provided in Article 4, paragraph 1 of the Convention.

Notwithstanding the general principle covered by the first paragraph of Article 4 of the Convention which states that if the defendant is not domiciled in a Contracting State, each Member State shall apply its rules of international jurisdiction, Article 16 paragraph 1 governs actions that have as their object rights *in rem* in immovable property or lease of real estate, as in the jurisdiction where the property is situated [6].

Moreover, the Brussels Convention applies under article 1, "in civil and commercial matters", but will not be extended to administrative matters. However, the national court did not appeal this to the ECJ in the present case.

Starting from the case *Sanders /Van der Putte*, it was reiterated that in light of the existing principles of interpretation, exclusive jurisdiction on actions involving buildings is not consistent with all actions relating to real property rights, but only with those who conform with the purposes of the Brussels Convention and are actions that seek to determine the extent, content, ownership or possession of property or the existence of other real rights for which holders of these rights are granted special protection [2].

The rationale for a restrictive interpretation emerges from the Jenard report, according to which, the very expansion of jurisdiction rules in force at that time in Germany and Italy was due to the interest of the proper administration of justice. According to the Jenard Report, the Committee of Experts that drafted the Brussels Convention established the rule of exclusive jurisdiction in this matter regarding buildings: thereof in Germany and Italy – the court where the property was located has exclusive jurisdiction, being considered a matter of public interest. Therefore, in the absence of a rule of exclusive jurisdiction, the judgment of courts in other states whose competence can be the result of other provisions of the Brussels Convention (the court under whose jurisdiction is the domicile of the defendant or by contract) will not be recognized or enforced in Germany or Italy. Such a system would be contrary to the free movement of judgments.

Establishing an exclusive competence of the courts for the place where the building

was situated (*lex rei sitae*) is determined by the fact that the courts are best placed in relation to property (the proximity feature) to satisfactorily establish the facts and to apply rules and practices that generally pertain to the Member State where it is situated [7].

Also, from the Amendment 163 of the Schlosser Report, it results unequivocally that there was no difficulty in determining that actions for damages based on Real estate infringement or immovable property damage are not covered by article 16, paragraph 1 of the Brussels Convention. In this context, the existence and contents of real rights, the right to ownership of property are of marginal significance.

Exclusive jurisdiction only covers proceedings under real estate law (*in rem*) and not the right instruments (*in personam*) such as: the rescission action, the action for compensation regarding the suffered damage as a result of the breach of a contract of sale of immovable property, the action based on tort liability for violations of the real estate right, the paulian action or the annulment action for of ownership. Consequently, the ECJ held that an action that aims to cease the negative effects upon an immovable asset, does not aim the real estate right itself, since, although the basis of the action consists of a detriment brought to a real estate right, the real estate nature of the right is only of incidental importance, which does not change substantially the subject of the litigation. In agreement, the Bucharest Court of Appeal [3] ruled on a negative conflict of competence and established jurisdiction of the case to Zimnicea Court.

To conclude so, the court essentially held that the pending action seeks the evaluation of a personal right born from the pre-agreement of sale, right that has an obligation of doing as a correlative obligation. Therefore, being personal and not real, the action does not submit to the jurisdiction of the court where the property is situated.

5. Case *Sanders / Van der Putte*

Regarding Case *Sanders / Van der Putte[12]*, the CJEU held that, given the exclusive jurisdiction governed by the Article 16 of the Brussels Convention, it should not be given a wider interpretation than it is required by their objective. .

(19/2391)Therefore, the concept of "matters relating to tenancies of immovable property" must not be interpreted as including an agreement to rent under an usufructuary lease a retail business carried on in immovable property rented from a third person by the lessor.

The interpretation of the ECJ may be summarized as follows: Van der Putte and Sanders agreed in 1973 that the latter would take over the running of the florist's business in a shop which the former had rented at Wuppertal-Elberfeld (Federal republic of Germany).

After the conclusion of the contract, Sanders refused to start running the business. Subsequently the judgment decision from April the14th, 1973, the Regional Court of Appeal (Gerechtshof) found that there has already been concluded an agreement between those two according to that Sanders is, inter alia, bound to pay to Van der Putte, in respect of various periods, a sum representing the rent due under the head-lease of the shop and a further sum representing the usufructuary lease as such of the business and also of goodwill. Sanders pleaded that the court has no jurisdiction under Article 16, paragraph 1 of the Brussels Convention.

The court dismissed this argument on the ground that in the contract in question, the emphasis fell less on the rent of the immovable property than on the business so that provisions of the Article 16, paragraph 1 on renting of immovable property does not apply in this matter.

In this respect, the Jenard Report stated that the circumstances, in which the courts of a Member State have exclusive jurisdiction, are respected when they are the main topic of the action.

Jenard explanatory report was titled after the name of the developer - Paul Jenard, director of the Belgian Ministry of Foreign Affairs and Foreign Trade - following the establishment of a committee of experts, through the decision of the Committee of Permanent Representatives of the Member States, a committee that drafted a convention, which eventually became the Brussels Convention. The Committee was composed of government experts from 6 countries, representatives of the European Commission and observers.

The provisions of article 16 of the Brussels Convention cannot be removed either by a contract which confers jurisdiction on the courts of another Member State or an implicit subscription to that jurisdiction, as Article 17 and Article 18 of the Convention state.

Though, the exclusive jurisdiction of the courts of a Member State removes the general rule of the defendant's domicile or the special regulations on legal competence.

It also cannot be excluded by the parties' will. Any instance of a state other than the State whose courts have exclusive jurisdiction, shall declare by default that they have no jurisdiction under Article 19 of the Convention, and the failure to observe these rules constitute grounds for refusing recognition or enforcement.

These rules, which take the subject - matter of the action as a criterion, shall apply irrespective of the domicile or nationality of the parties.

Regarding the grounds which formulate such rules, the Jenard report states that it is necessary to call for a general application, even on defendants domiciled outside the European Community.

Sanders appealed, so that the trial court (Hoge Raad) decided, in implementation of Article 2, paragraph 3, and of Article 3, paragraph 2 of the Protocol of 3 June 1971 concerning the interpretation by the Court of Justice of the Convention of 1968, to stay the proceedings and to submit certain questions to the Court of Justice. According to ECJ case law, a national court may ask the ECJ a request for the interpretation of the Brussels Convention and Regulation (EC) no.44/2001, when it considers that, in relation to the prevailing circumstances, a preliminary ruling is necessary to solve the case, and the questions which are addressed to the Court are pertinent. In the case of *Sanders / Van der Putte*, the questions were:

1. Must 'tenancies of immovable property' within the meaning of article 16, paragraph 1 include an agreement of rent under a usufruct lease, of a business by a third party hired by the lessor?

2. If so, does the exclusive jurisdiction of the courts of the state where the property is located also apply to a claim on a basis of such an agreement with respect to: a) payment of the rent; b) payment of rent /rent owed by the property owner or lessor c) payment in consideration for the good faith of a retail business?

3. Is the answer to these questions affected by the fact that in the proceedings, the defendant (the tenant under the usufructuary lease) has contested the contract?

Sanders shows that, once the Brussels Convention is expressed in general terms, the Convention must be interpreted as referring to rights *in rem* and *in personam* on the premises. Thus, he makes reference to the Preamble and Article 10 paragraph 3 of the Draft of the Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial courts, which provides for the states where the judgment was held, to have jurisdiction "where case concerns a dispute concerning land situated in the State in which the judgment was rendered".

On the other hand, Van der Putte states that the Brussels Convention represents a clear break with the past and thus contractual relations are now the subject of the jurisdiction place where the property is located.

The development in international rules on jurisdiction leads to a restrictive interpretation of the new regulations, so the court where the immovable asset is situated has jurisdiction only where it is necessary as a result of the public nature of these rules.

In this regard, the Brussels Convention jurisdiction of the court removes the check of the international jurisdiction of the court that held the judgment and it was expressly provided that the rules of international jurisdiction are not part of the public policy of the State in which recognition is sought. Thus, there were removed the "cases where the court finds its home state under international jurisdiction arising as unacceptable in the State where recognition is sought, since it violates an exclusive international jurisdiction under the law of this state".

As a result, the complainant alleged that the termination of the contract between a tenant and a subtenant, and not between landlord and tenant, makes the act *res inter alios*, so a separate issue from the immovable property itself. The Government of the United Kingdom considered that the court shall have exclusive jurisdiction, whether in an action arising out of the rental business, a key issue concerns the interpretation of the lease or the right to possession of the business premises or the breach of the conditions of hiring. The doctrine has held that Regulation (EC) no.44/2001 does not allow the expansion of the matters of exclusive jurisdiction by analogy or under other legislative techniques.

If such an action regards other aspects of the business relationship or refers simply to a pecuniary claim, it does no longer fall within article 16, paragraph 1, and it is no need of exclusive jurisdiction.

The Commission, in turn, noted that such contracts shall not concern the lease in the strict sense (*stricto sensu),* but rather relate to a subcontracting shape. Only in the situations where the implementation of a specific contract raises specific issues regarding the relations between lessees and lessors, that contract falls under the Article 16, paragraph 1 of the Brussels Convention.

As a result, the Commission proposed the following answers:

1. Actions arising out of the implementation of a tenancy agreement under which each side allows the other to run a business for a certain period against payment of a rent, as well as actions for the payment, are not covered by Article 16, paragraph 1, unless the said action concerns specifically a relation between the lessor and lessee of immovable property the property;

2. Article No. 16, paragraph 1 is not applicable nor on whether a contract has been concluded;

3. The action for payment is independent and it is not related to the implementation of the lease.

The ECJ ruled that Article 16, paragraph 1 must be interpreted in the way that exclusive jurisdiction is given to the best placed court to deal with such disputes. The action on Real Property, is solved according to the regulations in force where the real estate is located. The establishing of an exclusive competence leads to the deprivation of the contracting parties to choose the applicable law of the forum. As a result, the concept of " matters relating to tenancies of immovable property within the context of article 16, paragraph 1 of the Brussels Convention must not be interpreted as including a contract to rent under an usufructuary lease, a retail business carried on in immovable property renting from a third person by the lessor.

The ECJ 's decision in Case Sanders / Van der Putte, reveals the strong character and the autonomous nature of the interpretation of the concepts covered by Article 22 on jurisdiction regarding the claims on immovable assets. This option for an autonomous interpretation of the provisions of the Brussels Convention was reaffirmed in other ECJ subsequent solutions, ensuring the order to assume the same rights and obligations for the Contracting States and for the persons covered by the Convention.

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