Opinion of AG Szpunar in the case of Ellmes Property Services, C-433/19, on Article 24(1) and Article 7(1)(a) of the Brussels I bis Regulation

Today, AG Szpunar delivered his Opinion in the case of Ellmes Property Services, C-433/19, on the interpretation of Article 24(1) and Article 7(1)(a) of the Brussels I bis Regulation. This case arose from the following facts:

Both parties are co-owners of a house situated in Zell am See, Austria. The applicant, who is the owner of apartment No 10, has his home address at this location. The defendant company, which is the owner of apartment No 20, has its registered office in the United Kingdom. It uses its apartment, which was designated for residential purposes, for tourist purposes by regularly letting it out to holiday guests.

In his action brought before the Bezirksgericht Zell am See (District Court, Zell am See), Austria, the applicant seeks to prevent the use of the apartment for tourist purposes, contrary to its designated use and arbitrarily in the absence of consent of the other co-owners, which interferes with the applicant's rights of co-ownership. He relied on the jurisdiction referred to in the first alternative in the first subparagraph of Article 24(1) of the Brussels Ia Regulation. The defendant objected on the basis of the lack of local and international jurisdiction.

The court of first instance declined local and international jurisdiction. In its view, the dispute relating to a private-law use agreement between co-owners did not directly concern their rights in rem. The court of second instance allowed the applicant's appeal and rejected the defence of lack of local and international jurisdiction. It held that the designated use of a property subject to co-ownership was based on the private-law agreement between the co-owners (usually laid down in the co-ownership agreement). The designation for a specific use and the adherence to the use thus defined was one of the absolutely protected rights in

rem of a co-owner. The defendant lodged an appeal with the Austrian Oberster Gerichtshof (Supreme Court) against that decision.

In this context, the Austrian Supreme Court referred to the ECJ the following questions:

(1) Is the first alternative in the first subparagraph of Article 24(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Ia Regulation') to be interpreted as meaning that actions brought by a co-owner seeking to prohibit another co-owner from carrying out changes to his property subject to co-ownership, in particular to its designated use, arbitrarily and without the consent of the other co-owners, concern the assertion of a right in rem?

(2) If the first question should be answered in the negative:
Is Article 7(1)(a) of the Brussels Ia Regulation to be interpreted as meaning that the actions referred to in paragraph 1 concern contractual obligations to be performed at the location of the property?

AG Szpunar, after scrutinizing the conditions, relevant case law and the purpose of Article 24(1), held that the application of that provision requires a right in rem which in turn necessitates an erga omnes effect of the underlying legal relationship of the co-owners regulating the modalities of the use of that co-ownership. Whether there was such an erga omnes effect in the concrete case at hand is to be determined by the national court according to the applicable national law. If there is no erga omnes effect, Article 7 (1) (a) will have to be applied to the applicant's claim in question. This would mean that the national court will have to resort to the law governing that claim in order to determine its place of performance.

The Opinion is available in French [original language] and, inter alia, in German but not yet in English.