Is Tessili still good law?

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Most readers of this blog will be well aware that, according to the ECJ, the "place of performance" of a contractual obligation within the meaning of Article 7(1)(a) Brussels I*bis* is not a concept to be understood independently from national law. Rather, in order to determine this place, one must apply the substantive law designated by the forum's conflict-of-law rules. The ECJ has held so for decades, starting with *Tessili* (Case C-12/76, ECLI:EU:C:1976:133, at 13). Recent decisions by the ECJ have led me to doubt that *Tessili* still is *lex terrae Europaea*, at least as far as contracts with some relation to a right *in rem* in immovable property are concerned. (And I am not alone: Just today, Marion Ho-Dac analyses this issue as well over at the EAPIL Blog.)

The applicability of Article 7(1)(a) Brussels I*bis* in the context of co-ownership agreements

To begin with, it is necessary to establish what Article 7(1)(a) Brussels I*bis* has to do with co-ownership agreements. Article 24(1) Brussels I*bis* might appear to be the more natural jurisdictional rule in this context. But it does not suffice that a case has some connection to property law. Article 24(1) Brussels I*bis* only applies if the action is based on a right *in rem*. The Court has been characterising rights as rights *in rem* independently from national law (a point I would agree with). The main feature of a right *in rem* is its effect *erga omnes* (*Wirkung gegenüber jedermann; effet à l'egard de tous* – see Case C-292/93, ECLI:EU:C:1994:241– *Lieber*, at 14). Thus, Art. 24(1) Brussels I*bis* will not apply to a dispute concerning rights whose effect is limited to other co-owners and/or the association of co-owners. Rather, Article 7(1)(a) Brussels I*bis* comes into play. The Court considers the corresponding obligations as freely consented to, as they ultimately arise from the voluntary acquisition of property, regardless of the fact that the resulting membership in the association of co-owners is prescribed by law (Case C-25/18, ECLI:EU:C:2019:376 – *Kerr*, at 27). This applies, e.g., to a co-owner's payment obligation arising from a decision taken by the general meeting of co-owners.

From *Schmidt* to *Ellmes Property*

Kerr only concerned the question of whether Art. 7(1)(a) Brussels I*bis* applies to

such disputes at all. The Court had reasoned (to my mind quite correctly) in *Schmidt* (Case C-417/15, ECLI:EU:C:2016:881, at 39) earlier that an action based on the alleged invalidity of a contractual obligation for the conveyance of the ownership of immovable property is no matter falling under Article 24(1) Brussels I*bis*. It then had gone beyond the question referred to it and stated that Article 7(1)(a) Brussels I*bis* applies, noting that this contractual obligation would have to be performed in Austria (being the location of the immovable property in question). *Ellmes Property* (Case C-433/19, ECLI:EU:C:2020:900, reported on this blog here and here) now combines the two strands from Kerr and Schmidt. This recent case again concerns a dispute in the context of a co-ownership agreement. One co-owner sued the other for an alleged contravention of the designated use of the respective apartment building (i.e., letting an apartment out to tourists). If this designated use does not have effect *erga omnes*, e.g. cannot be relied on against a tenant, the CJEU would apply Article 7(1)(a) Brussels I*bis*. But once again, the Court does not stop there. It goes on to assert that "[The obligation to adhere to the designated use] relates to the actual use of such property and must be performed in the place in which it is situated." (at 44).

A *Tessili*-shaped hole in the Court's reasoning

In other words, the Court seems at least twice to have determined the place of performance itself, without reference to the applicable law – even though there does not seem to be any pertinent rule of substantive law that the Court would have been competent to interpret. A reference to *Tessili* or any decision made in its wake is missing from both *Schmidt* and *Ellmes Property*. (In his Opinion on *Ellmes Property*, Advocate General Szpunar did not fail to mention *Tessili*, by the way.) And in *Ellmes Property*, the Court proceeds to argue that this very place of performance makes sense in light of the goals of Brussels I*bis* and its Article 7 in particular. The Court thus uses jurisdictional arguments for a question supposedly subject to considerations of substantive law.

"Here's your answer, but please make sure it is correct."

Admittedly, the statement in *Schmidt* was made *obiter*, and the Court locates the place of performance only "subject to verification by the referring court" in *Ellmes Property*. The latter might be a veiled reference to *Tessili*. But why not make it explicit? Why not at least refer to the Advocate General's opinion (also) in this regard? And why the strange choice of the word "verification" for question of

law? But the Court has not expressly overruled Tessili. Furthermore, I do not want to believe that it has simply overlooked such an important strand of its case-law presented to it on a silver platter by the Advocate-General, one arguably enshrined in the structure of Article 7(1) Brussels I*bis*, anyway. Hence, I (unlike Marion Ho-Dac, although I certainly agree with her as to the low quality of the judgment in *Ellmes Property*) still hesitate to conclude that *Tessili* must be disregarded from now on. This assumption, however, leads to one further odd result. While the referring court that had asked the ECJ for clarification of the place of performance does receive a concrete answer, it now has to check whether this answer is actually correct. Granted, it is not uncommon for the Court to assign certain homework to the referring court. Yet here, the former employed some new standard and tasked the latter to check whether the result holds up if one applies the old standard. I fail to see the point of this exchange between the national court and the Court of Justice.

(A full case note of mine (in German) on *Ellmes Property*, touching on this issue as well as others, is forthcoming in the *Zeitschrift für das Privatrecht der Europäischen Union (GPR)*.)