Warsaw University Law Review
ISSN 1644-0242
Vol. XV, No. 2/2016

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# Exclusive jurisdiction in civil and commercial matters: EU law provisions and case-law review and analysis

## 1. Introduction

Once one of British judges said: "Although our powers are great, they are not unlimited – they are bounded by some lines of demarcation."[1] Indeed, no one can argue that there are no limits to the courts' power. For instance, such boundaries are set by rules on jurisdiction: they indicate when a court is empowered to adjudicate a particular case and when not. Since violation of these rules may lead to grave consequences – e.g. it may result in a judgment's revision, appellation or cassation – it is important for all law practitioners that the rules on jurisdiction are subject to thorough analysis and, therefore, they are well understood.

Moreover, a particular field for jurisdictional matters is constituted by transnational legal relationships. In such cases the question of jurisdiction is composed of two issues: the first task is to attribute jurisdiction to courts of a particular state; then to establish, according to laws of that state, which of its courts has the jurisdiction over the case.[2] It should be noticed that the importance of jurisdictional laws in transnational matters is growing along with their volume. Since the globalisation is a fact (as well as the European

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[1] C. Abbott, *The King v. Justices of Devon* (1819), 1 Chit. Rep. 37.

[2] As it is apparent, for Polish lawyers and law students the term 'jurisdiction' might be 'tricky' since it encompasses two Polish terms: 'jurysdykcja krajowa' (which refers to jurisdiction of particular state's courts; also 'właściwość międzynarodowa sądów danego państwa') and 'właściwość sądu' (which refers to jurisdiction of a particular court). In this paper the term is used in the first meaning unless the context provides otherwise. See K. Sznajder-Peroń [in:] *System Prawa Handlowego. Tom 9*, W. Popiołek (ed.), Warsaw 2013, p. 814–816. In English the distinction might not be so clear – see e.g. P. Jenard, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968)*, OJ C 59, 5.3.1979, p. 34–35. P. Jenard was the rapporteur of the committee which drafted the Brussels Convention of 1969.

integration), the number of such relationships is increasing and, therefore, the question of jurisdiction arises more and more often.

Hopefully for Europeans, there is a harmonised approach within EU (along with some other states) to the allocation of jurisdiction in transnational legal relationships. It results in the common European laws regulating jurisdiction of national courts in civil and commercial matters – the so-called Brussels Regime (hereinafter also 'the Regime').

Although the Regime leaves some space for domestic regulations on the national courts' jurisdiction (what has to be borne in mind), in most cases law practitioners are provided with unified European rules on that issue.[3] However, there are some of the provisions which are to be applied in **any** civil and commercial matter brought to a court of a state bound by the Regime (hereinafter: 'the State') – the rules on the exclusive jurisdiction are among them. Since these rules always prevail over national rules on jurisdiction (and so they are unavoidable), it is particularly important for law practitioners to know them well.

The rules on exclusive jurisdiction are long-lasting. They have been in force for almost fifty years and, regardless of changes of the legal acts in which they have been expressed, they have been changed a little so far. It is worth to note that some of these rules were derived from already existing international treaties regarding jurisdiction in civil and commercial matters and, therefore, it could be said that they are even older than the Regime itself.[4] On the one hand, such a rare stability of legal norms is a great achievement and value in terms of the predictability of law. On the other hand, as a consequence most of the case-law made within this time is still relevant. Unfortunately for Polish lawyers, the already existing European case-law on the exclusive jurisdiction was never officially translated into Polish.

The analysis below might be helpful since its main aim is to provide a comprehensive up-to-date compilation of the European provisions and

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[3] K. Sznajder-Peroń [in:] *System*…, p. 819.

[4] For instance, the exclusive jurisdiction over proceedings concerning immovable properties derives from the rules provided in the Treaty between France and Germany settling the question of the Saar (Article 49 of the Treaty on the Saar of 27 October 1956) – P. Jenard, *Report*…, p. 34.

case-law (with regard also to the official reports) on the exclusive jurisdiction within the Brussels Regime.

## 2. The term

First of all, few words should be spent on the defining of the term 'jurisdiction'. Although it is frequently used, it has no legal definition. It originates from the Roman term *iurisdictio* which was one kind of a power conferred on a magistrate (compare with e.g. *potestas*). Linguistically it derives from *ius* ('law') and *dicere* ('to tell') and might be understood as the power to tell what is the law in a particular case. It encompassed *inter alia* a power to appoint a judge for a dispute and to put a case into the legal terms ('tell what the law is').[5] This competence was exercised within the preliminary litigation phase called *in iure* which was followed by the proper litigation phase called *apud iudicem*. In the second phase the appointed judge exercised *iudicatio* – a power to solve the case according to the legal qualification made within the first phase.

Nowadays, the term 'jurisdiction' reflects its Roman ancestor in a very distant manner – it is used in various (not only judicial) contexts and is used mainly to describe the scope of someone's capacity to exercise power (see e.g. the meaning of 'state jurisdiction' under the international law or the meaning of 'universal jurisdiction' under the international criminal law).[6] Moreover, it might be used in different languages in a different manner (see *supra* note 2).

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[5] Dig.2.1.1. as well as Dig.2.1.3 – both excerpts are from works of Ulpian.

[6] See for instance M.N. Shaw, *International Law*, Cambridge 2008, p. 645–696. It is worth to quote here the opening remark on jurisdiction: "Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs." This activity might be legislative, executive or judicial. As it is apparent, the essence of this term across different branches of law remains the same: it is used to delimit the scope of matters in which someone can exercise his power.

There might be also the universal jurisdiction over some matters which indicates that anybody (in the international criminal law: any state) can exercise power over these matters regardless of any linking factors (in the international criminal law the universal jurisdiction concerns crimes under international law, e.g. crimes against humanity – any state is empowered to prosecute and punish them regardless of whether there is any link between the state and the crime).

In civil and commercial matters the term is used to indicate whether a court has power to adjudicate a particular case, in other words: whether it is empowered to administer justice in that field. The term 'exclusive jurisdiction' includes also an indication that no other court than the empowered one can exercise judicial powers within the scope of that jurisdiction.[7]

As it is apparent, the term 'exclusive jurisdiction' is used to describe features of a court's jurisdiction. The problem is that within the Brussels Regime it is used mainly as a name of one of particular kinds of jurisdiction granted under its provisions. This type of jurisdiction is meant to be exclusive but in some cases it may be disputed whether it actually is. Moreover, other types of jurisdiction conferred by the Regime might be exclusive (e.g. prorogation of jurisdiction). In consequence this terminology might be confusing under the Brussels Regime and, therefore, it is important to distinguish in that field the exclusive jurisdiction by its character from the exclusive jurisdiction by its name. To clarify, the subject of this paper is the latter one.

## 3. The Brussels Regime

The analysis should begin with the general features of the Brussels Regime as such – the legal acts constituting the Regime (and so with its history) and the core ideas the Regime is based on.

### 3.1. Acts

As it was stated earlier, the Brussels Regime is in force for almost fifty years – its history started with the Brussels Convention of 1969 (hereinafter also 'the Convention').[8] It was enacted within the members of the Council of the European Economic Community on the basis of the Article 220 of the Treaty establishing the European Economic Community (Treaty of

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[7] J. Golaczyński, *Jurysdykcja, uznawanie orzeczeń sądowych oraz ich wykonywanie w sprawach cywilnych i handlowych. Rozporządzenie Parlamentu Europejskiego i Rady (UE) nr 1215/2012. Komentarz*, Warsaw 2015, p. 125–131, pkt 1.

[8] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ L 299, 31.12.1972, p. 32–45). See the acts related to the Convention at http://curia.europa.eu/common/recdoc/convention/en/c-textes/_brux-textes.htm.

Rome) – hereinafter: TEEC. Soon the Court of Justice of the European Communities (hereinafter: ECJ) was granted jurisdiction to give rulings on interpretation of the Convention.[9]

In regard to the Convention, the amendments of the accession conventions of 1978, 1982, 1989 and 1996 should be also borne in mind (hereinafter respectively: the Luxembourg Convention of 1978, the Luxembourg Convention of 1982, the San Sebastian Convention of 1989, the Brussels Convention of 1996).[10]

The Convention was replaced on the 1st March, 2002, by an EC instrument: the so-called Brussels I Regulation.[11] However, the replacement was partial – the Convention remained in force for Denmark and territories excluded from the application *ratione loci* of the EC law (hereinafter: 'the other territories') by the virtue of Article 299 of TEEC (nowadays Article 349 and 355 of the Treaty on functioning of the European Union – hereinafter: TFEU). Nevertheless, Denmark soon signed its own agreement

[9] See Article 1 of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ L 204, 2.08.1975, p. 28).

[10] Respectively: Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ L 304, 30.10.1978, p. 1–102), Convention of 25 October 1982 on the accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (OJ L 388, 31.12.1982, p. 1–36), Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic (OJ L 285, 3.10.1989, p. 1–98), Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention on the accession of the Hellenic Republic and by the Convention on the accession of the Kingdom of Spain and the Portuguese Republic (OJ C 15, 15.1.1997, p. 1–9).

[11] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1–23).

with European Community replacing the Brussels Convention with slightly changed provisions of the so-called Brussels I Regulation.[12] Nowadays the Convention remains in force for the other territories.

Finally, Brussels I Regulation was replaced on the 10th January, 2015,[13] by the so-called Brussels I Bis which is currently in force.[14] However, Denmark still has its own agreement on that issue and the Convention remains in force for the other territories.

Since the above-mentioned acts were enacted or binding only within the Community or Union (be it EEC, EC or EU), there was a need to adopt another instrument to allow other European states – e.g. from EFTA – to participate in the Brussels Regime. That was done by the Lugano Convention of 1988[15] replaced later by the Lugano Convention of 2007.[16] They were respectively copies of the Brussels Convention of 1968 and Brussels I Regulation (with some slight differences) – therefore, they are often called 'parallel conventions'.[17] Many of the Contracting Parties to the Lugano Convention of 1988 joined EU subsequently. Lichtenstein is the only present EFTA member which never acceded to any of the Lugano Conventions. On the other hand, Denmark is a contracting party to both of them.

### 3.2. General ideas

Taking into account that four out of the six historic legal acts constituting the Brussels Regime are still in force (and, for instance, Denmark

[12] Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 299, 16.11.2005, p. 62–70).

[13] In the case of Articles 75 and 76 – on the 10th January, 2014.

[14] 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 (OJ L 351, 20.12.2012, p. 1–32).

[15] Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ L 319, 25.11.1988, p. 9–48).

[16] Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 339, 21.12.2007, p. 3–41).

[17] F. Pocar, *Explanatory report on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007*, OJ C 319, 23.12.2009, p. 1–56 – see para. 1.

is a contracting party to three of them), it might be expected that the Brussels Regime is a complicated set of rules. Hopefully, as it was noted above, most of these acts are copies of the earlier ones just extended with some slight changes and developments. Moreover, these acts stress *expressis verbis* continuity and integrity within the Brussels Regime.[18] Therefore, the Brussels Regime might be seen as a single set of rules (with slight variations) which is expressed in several acts and has been evolving since the Convention was concluded.[19] It is not deprived of important consequences for practitioners. First of all, the European case-law made under former acts in most cases remains valid for new ones. Second, regardless of plurality of acts the European case-law on jurisdiction in civil and commercial matters remains solid.[20]

The main logic of the Regime remains unchanged – according to Article 4 of Brussels I Bis,[21] it is based upon the general rule granting the jurisdiction to a State in which a defendant has his domicile – regardless of citizenship.[22] Forsake of the criterion of nationality in favour of the residence constitutes one of the distinguishing (and also controversial) features of the Regime.[23] Such a rule is seen as the implementation of the principle *actor sequitur forum rei* which means that a plaintiff should seise

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[18] See, for instance, recital 34 of the Brussels I Bis; the Judgment of 3 October 2013, *Schneider*, C-386/12, EU:C:2013:633, para. 21 and 27; P. Jenard and G. Möller, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988*, OJ C 189, 28.7.1990, p. 57–121, point 48; F. Pocar, *Explanatory report*…, para. 10–12.

[19] F. Pocar, *Explanatory report*…, para. 10–11. Although the parallel conventions and regulations remain different acts (what is particularly important for technical issues concerning their application), their substance remains (in most cases) identical.

[20] See e.g. the Judgment of 20 May 2010, *ČPP Vienna Insurance Group*, C-111/09, EU:C:2010:290, para. 25; the Judgment of 11 November 2011 *Hypoteční banka*, C-327/10, EU:C:2011:745, para. 29; the Judgment of 12 July 2012, *Solvay*, C-616/10, EU:C:2012:445, para. 42. It is worth to note also the Judgment of 2 October 2008, *Hassett and Doherty*, C-372/07, EU:C:2008:534, para. 20 – although the judgment was under the Brussels I Regulation ECJ invoked comment to the Brussels Convetion of 1969.

[21] For convenience the paper is written from the perspective of the Brussels I Bis. Table of equivalent provisions in the other acts of the Brussels Regime is attached at the end. Similarly, for convenience the paper uses mainly the term 'Member State' but it should be borne in mind that in reference to the conventions the term should be 'Contracting Party'.

[22] See *Hypoteční banka* Judgment, para. 34.

[23] P. Jenard, *Report*…, see p. 8 and 14.

the court of a defendant.[24] This principle is justified with the protection of the defendant's rights.[25]

Whereas in case of natural persons it is for domestic laws of each state to decide who is resident in that state (Article 62 of the Brussels I Bis), in case of legal persons, nowadays, the term 'domicile' has the autonomous meaning described in Article 63 of the Brussels I Bis. If the residence remains unknown the last known domicile might be used for the purpose of the Regime.[26]

First of all, as a rule, defendant being domiciled in one of the States constitutes *conditio sine qua non* for the Brussels Regime application. On the one hand, it implicates that the Brussels Regime might be applied even to situations involving one Member State and one or more other states – as long as the defendant is resident in one of the States.[27] On the other hand, in other cases it is for domestic laws of each state to regulate the jurisdiction of its courts (Article 6 of the Brussels I Bis).[28]

However, it must be borne in mind that apart from the scope *ratione personae* the application of these rules is limited also to the 'civil and commercial' matters. The actual scope *ratione materiae* is set in Article 1. For the purpose of this paper it is sufficient to note that the notion of 'civil and commercial matters' has an autonomous meaning.[29]

Moreover, the Brussels Regime is applied only to matters with an international element.[30] However, it does not mean that the plaintiff and the defendant have to be in different states. To fulfil this prerequisite it is enough that the query about the international jurisdiction arises.[31]

Nevertheless, in regard of the application of the Regime the relations with other acts of international law should also be kept in mind – as stated

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[24] K. Sznajder-Peroń [in:] *System*…, p. 820. See also the Judgment of 13 July 2000 *Group Josi*, C-412/98, EU:C:2000:399, para. 35.

[25] P. Jenard, *Report*…, p. 18.

[26] See *Hypoteční banka*, para. 42 and further.

[27] Judgment of 1 March 2005, *Owusu*, C-281/02, EU:C:2005:120.

[28] See e.g. the Judgment of 15 September 1994, *Brenner*, C-318/93, EU:C:1994:331, para. 17.

[29] See e.g. the Judgment of 16 December 1980, *Rüffer*, 814/79, EU:C:1980:291, para. 7 and 14.

[30] P. Jenard, *Report*…, p. 8.

[31] See *Owusu*. Compare with P. Jenard, *Report*…, p. 8.

in the Chapter VII of the Brussels I Bis, the Regulation does not prevail over some conventions.[32] Because of the purpose of this paper there is no reason for further remarks on the application *ratione loci* and *ratione temporis* of the acts which constitute the Regime (see above – point 3.1).

The jurisdiction granted according to the above-described general rule has partially an exclusive character – courts of no other State are empowered to adjudicate a particular case **unless** such a case falls within one of the particular regulations (Article 5 of the Brussels I Bis), which are: 1) special jurisdiction, 2) jurisdiction in matters relating to insurance, 3) jurisdiction over consumer contracts, 4) jurisdiction over individual contracts of employment (that type was added in the Brussels I Regulation for the first time), 5) exclusive jurisdiction, 6) prorogation of jurisdiction. In all these cases the jurisdiction might be granted in exclusive or non-exclusive manner. It should be borne in mind that the jurisdiction over the substance matter does not influence the ability of courts to issue provisional (among them protective) measures – this is governed by the *lex fori* (Article 35 of the Brussels I Bis).

As it was indicated in the introduction, some rules of the Brussels Regime prevail over domestic laws even if a defendant is not resident within any of the States but still the case falls within the application *ratione meteriae* of the Regime. These rules are: the exclusive jurisdiction and the prorogation of jurisdiction (tacit prorogation of jurisdiction excluded) as well as some single provisions on jurisdiction over consumer contracts and jurisdiction over individual contracts of employment (Article 6 of the Brussels I Bis). Therefore, these rules have a universal application – they are to be obeyed by courts of the States in any civil and commercial case (regardless of the defendant's domicile, citizenship, etc.).[33]

It has to be kept in mind that the exclusive jurisdiction may also result from a court choice clause (in the Brussels Regime: the prorogation of jurisdiction). In general, parties can include in their agreements either exclusive jurisdiction clause or non-exclusive jurisdiction clause. In the Brussels Regime, the chosen court has an exclusive jurisdiction (since the Brussels

[32] See also the Judgment of 14 July 1977, *Eurocontrol*, joined cases 9/77 and 10/77, EU:C:1977:132.

[33] See the Judgment of 18 May 2006, *ČEZ*, C-343/04, EU:C:2006:330, para. 21.

I Regulation: if parties did not decide otherwise). However, as it is shown below, in most cases the exclusive jurisdiction resulting from the prorogation of jurisdiction is treated in a different way from the exclusive jurisdiction under Article 24 of the Brussels I Bis. It is the only case when the Regime acts use the term 'exclusive jurisdiction' when describing other kinds of jurisdiction.

Finally, while discussing the general features of the Brussels Regime in the context of the exclusive jurisdiction it should be noted that terms used in the legal acts constituting the Brussels Regime should be interpreted independently so that these rules are applied in an equal and uniform manner across the States. However, they should also be interpreted with regard to the objectives and scheme (or, in other words, purpose and context) of these acts[34] – the main purpose of the Regime is to provide certain and predictable jurisdictional rules.[35]

## 4. Exclusive jurisdiction

Having described the general features of the Regime, the analysis can move on to the exclusive jurisdiction. It should be divided into two parts: the first one describing general features of the exclusive jurisdiction and the second one describing particular types of the exclusive jurisdiction.

### 4.1. General ideas

It is argued that it was the Convention to be the first to precisely define the exclusive jurisdiction.[36] The main justification for introducing such a kind of jurisdiction is that in these particular cases, because of the subject-matter, factors **different** from the defendant's domicile indicate which courts are best suited to adjudicate the case and, therefore, should be granted the jurisdiction.[37] In fact, these rules preserve states' jurisdiction over crucial areas

[34] See e.g. *Rüffer*, para. 7 and the case-law cited as well as para. 14.

[35] See *Brussels I Bis*, recital 15.

[36] P. Jenard, *Report*…, p. 8.

[37] See e.g. the Judgment of 14 December 1977, *Sanders*, 73/77, EU:C:1977:208, para. 11–13, 15. See also: K. Sznajder-Peroń [in:] *System*…, p. 820–821.

such as immovable properties.[38] Moreover, in some cases (e.g. tenancies or registers) the subject-matter might be governed by 'special legal provisions' and, therefore, the jurisdiction should be conferred to courts familiar with these laws.[39]

It should not be surprising then that this kind of jurisdiction cannot be excluded by agreements (Article 25 of the Brussels I Bis) nor it might be excluded by the so-called tacit prorogation of jurisdiction – i.e. when a court derives its jurisdiction from the appearance of a defendant (Article 26 of the Brussels I Bis, see also recital 19). On the other hand, as it was already stated, neither can states deviate from these rules (Article 6 of the Brussels I Bis, see also recital 14).[40]

The importance of the rules on the exclusive jurisdiction is shown also in courts' duties. Under the virtue of Article 27 of the Brussels I Bis any seised court of the State is obliged to declare *ex officio* that it has no jurisdiction over a case if such a case falls within the exclusive jurisdiction of courts of another state. However, in theory it does not apply if the issue that would fall under the exclusive jurisdiction of courts of another state is raised as a preliminary or incidental matter (not the principal).[41] It should be noted that this rule does not apply to the exclusive jurisdiction based upon an agreement on prorogation of jurisdiction.[42]

Under the virtue of Article 31 of the Brussels I Bis, if courts of several states are granted exclusive jurisdiction in a particular case, all courts other than the court first seised should decline jurisdiction in such a case. In respect of this rule the Brussels I Bis has introduced additional provision if the court first seised derives its jurisdiction from the agreement on prorogation of jurisdiction. In such a case other courts **stay** their proceedings until that court verifies validity of the agreement and, therefore, whether it has the exclusive jurisdiction over the dispute.

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[38] See *Group Josi*, para. 46; P. Jenard, *Report*…, p. 35; K. Sznajder-Peroń [in:] *System*…, p. 832–833.

[39] See *Sanders*, para. 14 and 15.

[40] P. Jenard, *Report*…, p. 34.

[41] P. Jenard, *Report*…, p. 39.

[42] Apart from Article 26 of the Brussels I Bis see the Judgment of 7 March 1985, *Spitzley*, 48/84, EU:C:1985:105, para. 24.

Should be so, other courts decline their jurisdiction. However, there is an exemption from that exemption – it does not apply to insurance, consumer or individual employment matters if the plaintiff is a policyholder, insured, beneficiary, injured, consumer or employee and the agreement is not valid under provisions of sections regulating these three categories of jurisdiction.

A violation of the exclusive jurisdiction rules leads to gravy consequences – a judgment issued under such circumstances shall not be recognised nor enforced in other States (under the virtue of Articles 45 and 46 of the Brussels I Bis). However, these rules do not apply to the violation of the exclusive jurisdiction arising from an agreement on prorogation of jurisdiction.

The importance of the ancient rule *exceptiones non sunt extendendae* might be deducted from the ECJ judgments – since the exclusive jurisdiction provisions constitute an exemption from the general rule they should be interpreted strictly (however, bearing in mind the objectives of the Regime since teleological interpretation is typical for whole the EU law).[43] Moreover, **as a rule**, it is not sufficient to apply these rules when a preliminary or incidental matters fall under the categories specified in Article 24 of the Brussels I Bis – it is the principal subject-matter that has to be covered by that provision in order to apply these rules.[44]

#### 4.2. Rights *in rem* in or tenancies of immovable property

The first rule on the exclusive jurisdiction regards 'proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property' (nowadays Article 24(1) of the Brussels I Bis). Jurisdiction over such proceedings is granted to courts of the State where the immovable property is situated (principle *forum rei sitae*). This rule is applied only if the immovable property is situated in one of the States

[43] See *Sanders*, para. 18. See also J. Gołaczyński, *Jurysdykcja*…, pkt 4; J. Zatorska, *Komentarz do rozporządzenia nr 2015/2012 w sprawie jurysdykcji i uznawania orzeczeń sądowych oraz ich wykonywania w sprawach cywilnych i handlowych*, LEX, point 1.

[44] P. Jenard, *Report*…, p. 34.

– if elsewhere, other rules apply (e.g. the general rule of the defendant's domicile).[45]

In regard of rights *in rem* such a rule is justified with a statement that this kind of disputes often require 'checks, enquires and expert examinations' to be conducted on the spot. Moreover, it might be necessary to take into account customary practices (which are known to the court of *locus rei sitae*) as well as entries in land registers. In regard of tenancies of immovable properties it is argued that they are subject to 'special legal provisions' as well as special tribunals within States. Therefore, such a rule is required by the sound administration of justice.[46]

#### 4.2.1. Early case-law on tenancies of immovable properties

Amongst the exclusive jurisdiction provisions this rule was not only the first to be written in the legal acts but also the first to be challenged at ECJ. The very first judicial problem regarding the exclusive jurisdiction in matters related to immovable property was to decide which actions arising from tenancies of immovable properties fall under this category.

The answer was given in the *Sanders* Judgment (see *supra* note 37) – ECJ stated that this provision does not apply to disputes of a different nature from those which, in particular, concern 'disputes between lessors and tenants as to the existence or interpretation of leases or to compensation for damage caused by the tenant and to giving up possession of the premises' (tenancies of immovable property properly so-called).[47] Therefore, disputes related to the operation of business are outside of the scope of this rule – e.g. an agreement to rent under a usufructuary lease a retail business carried on in immovable property, which was the subject-matter of this case. The

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[45] P. Jenard, G. Möller, *Report*…, para. 54. Similarly M. Almeida Cruz, M. Desantes Real, P. Jenard, *Report on the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britian and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic (Signed at Donostia/San Sebastian on 26 May 1989)*, OJ C 189, 28.7.1990, p. 35–56, para. 25(d); F. Pocar, *Report*…, para. 93.

[46] P. Jenard, *Report*…, p. 35.

[47] The wording comes exactly as it is in the report cited in the previous footnote.

fact that the existence of such an agreement had been contested was found irrelevant by ECJ.

The reasoning of ECJ was as follows: the justification for the exclusive jurisdiction in matters concerning tenancies of immovable property (as described above) does not apply to this kind of disputes. This understanding is supported by the view that rules on exclusive jurisdiction as an exception should not be given a wider interpretation than it is required by their aim. Moreover, such a strict interpretation preserves liberty of the parties to prorogate jurisdiction in disputes of different nature.

In this judgment ECJ found it unnecessary to give answer to the query whether the exclusive jurisdiction applies to claims for payments based on a tenancy agreement. Yet, it was discussed in the doctrine. On the one hand, P. Jenard, the rapporteur of the committee which drafted the Convention, stated that such claims are 'quite distinct' from the property itself and, therefore, the exclusive jurisdiction should not apply to them. On the other hand, the contrary view was presented in the opinion of the Advocate General delivered for that case – supported by the statements of some scholars.[48]

The committee which worked on the Luxembourg Convention of 1978 could not reach the conclusion on that issue either. In regard of the scope of that rule it stated only (in the so-called Schlosser Report) that the exclusive jurisdiction rule should not apply to short-term agreements, e.g. for holiday purposes.[49] However, such a view was rejected by ECJ in the subsequent *Rösler* Judgment.[50] ECJ ruled that the certainty of law and, therefore, the aim of these provisions would be hindered if such an exception, unexpressed in legal text, were allowed. Moreover, further exceptions could make the rules on exclusive jurisdiction of no practical meaning. Therefore, the exclusive jurisdiction applies to all tenancies of immovable properties – regardless of their features.

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[48] Opinion of Mr Advocate General Mayras delivered on 23 November 1977, *Sanders*, 73/77, EU:C:1977:191, p. 2397.

[49] P. Schlosser, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed at Luxembourg, 9 October 1978)*, OJ C 59, 5.3.1979, p. 71–151 – see para. 164.

[50] Judgment of 15 January 1985, *Rösler*, 241/83, EU:C:1985:6.

It is worth noting the *raison d'être* for the exclusive jurisdiction over tenancies which, in the view of ECJ, is that they are strictly connected to laws on immovable properties as well as mandatory laws governing the use of such properties. Moreover, the provision aims at the rational allocation of jurisdiction and, therefore, the jurisdiction should be granted to the court best suited to 'obtain first-hand knowledge of the facts relating to the creation of tenancies and to the performance of the terms thereof'. These arguments are often quoted in the subsequent judgments of ECJ.

This time ECJ did not evade the question about claims for payments arising from tenancy agreements. It stated that the list of issues falling under the meaning 'proceedings which have as their object tenancies of immovable property' made in the *Sanders* Judgment is not exhaustive; ECJ confirmed that the exclusive jurisdiction applies also to claims for payment – the view of P. Jenard was, therefore, rejected.[51]

The *criterium divisionis* which should be used to decide whether a particular claim should fall under the exclusive jurisdiction is the character of the connection of such a claim to the use of the property let. Should such a connection be indirect (e.g. travel expenses), an action should not fall within the rule. If such a connection were direct, e.g. actions regarding duration of a tenancy or recovery of rent or of incidental charges payable by the tenant (e.g. for consumption of water) – an action falls under the exclusive jurisdiction.

Reasoning of both these judgments was a subject to a synthesis in the *Hacker* Judgment.[52] Based on the *ratio legis* and the objectives of this provision ECJ stated that although the rule on exclusive jurisdiction applies to all tenancies (as stated in the *Rösler* case) it does not apply to the actions where the principal aim is of different nature (as said in the *Sanders* case). The question concerned the business organising travel which had agreed to procure for a client an accommodation (tenancy) and to make travel arrangements – so to provide wide range of services. In the view of ECJ actions concerning such a complex agreement are not in the scope of the exclusive jurisdiction.

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[51] For details see Opinion of Mr Advocate General Sir Gordon Slynn delivered on 23 October 1984, *Rösler*, 241/83, EU:C:1984:323, p. 106–107.

[52] Judgment of 26 February 1992, *Hacker v Euro Relais*, C-280/90, EU:C:1992:92.

From the completely different point of view – what if the property which is the subject of tenancy is placed in two or more States? That was the question raised in the chronologically third case – solved with the *Scherrens* Judgment.[53] ECJ answered that in such a case the exclusive jurisdiction is conferred to courts of each State – in respect of the part of the immovable property situated in that State. However, ECJ did not exclude possibility to deviate from that rule in some particular cases – for instance, when all components might be seen as a single property that could be deemed to be situated solely in the State in which the greater part is localised.

#### 4.2.2. The exemption for short-time tenancies

The *Rösler* Judgment and the contradictory Schlosser Report constituted the cause for a **legislative change**.[54] In the Lugano Convention of 1988 the provision on the exclusive jurisdiction over rights *in rem* in, or tenancies of, immovable properties was supplemented with an exception for short-term tenancies. It was so controversial that the Contracting States were enabled to make, and indeed made, reservations on that provision – i.e. a state could declare that it will not recognise nor enforce judgments made under that provision if they concerned an immovable property situated in that State.[55]

The jurisdiction in 'proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months' was granted **also** to courts of the state where the defendant is domiciled provided that a) the tenant is a natural person and b) neither party is domiciled in the state of *locus rei sitae*. Since the main aim was to exclude holiday agreements from the exclusive jurisdiction, there was no need to extend this exception to legal persons which are engaged mostly in commercial transactions (that is why the condition 'a' was made). On the other hand, if any of the parties is resident in the state of *locus rei sitae* there is no justification for such an exemption (reason for the condition 'b').

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[53] Judgment of 6 July 1988, *Scherrens*, 158/87, EU:C:1988:370.

[54] P. Jenard and G. Möller, *Report*…, para. 49–51.

[55] P. Jenard and G. Möller, *Report*…, para. 53.

This provision was quickly added to the Convention – by the virtue of the San Sebastian Convention of 1989. However, the conditions were respectively changed: a) both tenant and landlord are natural persons and b) they both are domiciled in the same state. In this shape the exemption was meant to be more restrictive. In exchange, no option for the reservation was left to the Contracting Parties.[56]

Finally, the compromise on the wording of the exemption was reached – since the Brussels I Regulation the conditions are as follows: a) the tenant is a natural person (as in the Lugano Convention of 1988) and b) both tenant and landlord are domiciled in the same state (as in the San Sebastian Convention of 1989).[57] In this form the exemption was included in the Lugano Convention of 2007 and the Brussels I Bis. It is worth noting that it confers the 'concurrent' exclusive jurisdiction[58] – it might be disputable whether such a jurisdiction is still an 'exclusive jurisdiction'. It is also worth noting that such an exemption corresponds with the provisions on the law applicable to the tenancies.[59]

There is no relevant ECJ case-law on that exemption – there is only the *Dansommer* Judgment in which ECJ stated that all conditions must be fulfilled in order to apply this provision (what seems rather obvious).[60]

#### 4.2.3. Early case-law on rights *in rem* in immovable properties

Not only tenancies were the subject of legal analysis of scholars and judges but also rights *in rem* in immovable properties. The above-mentioned Schlosser Report addressed three questions concerning this issue. First of all, it stated that the exclusive jurisdiction does not apply to disputes arising from infringements of rights *in rem* in immovable properties as well as from damages in properties which are subject of such laws.[61]

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[56] M. Almeida Cruz, M. Desantes Real, P. Jenard, *Report*…, para. 25.

[57] F. Pocar, *Report*…, para. 94.

[58] P. Jenard and G. Möller, *Report*…, para. 52.

[59] See Article 4 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, p. 6–16).

[60] Judgment of 27 January 2000, *Dansommer*, C-8/98, EU:C:2000:45, para. 17.

[61] P. Schlosser, *Report*…, para. 163.

Since the Report was written in regard to the Luxembourg Convention of 1978 and among contracting parties there were common law states (for the first time in the history of the Regime), the second question addressed differences between continental law and common law concerning rights *in rem*. While this issue is clear and simple in the continent (where is only a *numerus clausus* of rights *in rem*, which are distinguished from rights *in personam* because they are effective not *inter partes* but *erga omnes*), it is not so in the Isles.[62] On the one hand, there is an insufficient number of statutory rights equivalent to the continental rights *in rem* in these states. On the other, since in the legal systems of these states law is distinguished from equity, an immovable property might be a subject also of equitable interests – their content and number are not limited by law. Some of these interests, if registered, are universally effective and, therefore, might be seen equivalent to the continental rights *in rem*.[63] Nevertheless, the answer given in the Schlosser Report was that it is for the law of the *locus rei sitae* to decide whether a particular action concerns rights *in rem* within the meaning of the exclusive jurisdiction provision.[64]

The third question concerned actions connected with obligations to transfer immovable property. In some states spheres of rights *in personam* and *in rem* are clearly separated and, therefore, claims arising from obligations (even to transfer right *in rem*) are seen as based only on the right *in personam* (e.g. German *Abstraktionsprinzip*). In such cases an act of conveyance (separate from an obligation) is required to transfer the right *in rem*. Whereas in other states these claims have mixed nature (both *in personam* and *in rem*) since an obligation to transfer a right *in rem* brings an immediate effect in the sphere *in rem* (no additional act required) – e.g. in France. Moreover, some of the common law states might be seen somewhere in the middle – they require additional act of conveyance but before it takes place a purchaser has an equitable interest in the property (which, if registered, might be effective against third parties). How to apply then the provision in an 'equal and uniform' manner across the States? Should such claims be considered as

[62] P. Schlosser, *Report*…, para. 166.

[63] P. Schlosser, *Report*…, para. 167.

[64] P. Schlosser, *Report*…, para. 168.

based on rights *in rem* or not? The answer of the Report was clear – even when according to a domestic law such claims are based both on right *in personam* and *in rem* it is the *in personam* element that prevails. Therefore, they are outside of the scope of the exclusive jurisdiction over rights *in rem*.[65]

The first judgment referring not to tenancies but to rights *in rem* in immovable property was the judgment in the *Reichert and Kockler* case.[66] The question was whether *actio pauliana* (in the form of the French *action paulienne*) falls under the exclusive jurisdiction. If a debtor makes a disposition of his right *in rem* in fraud of the creditor's rights, the creditor may bring an action in order to find such a disposition ineffective against him – so that he can settle his claims with this right. Such an action is called in Latin *actio pauliana*. As ECJ ruled, such an action does not fall under the exclusive jurisdiction since it is based on the creditor's right *in personam* and by its character is not so strictly connected to laws and practices of *locus rei sitate* as usually rights *in rem* are. Therefore, in such cases the justification for the *forum rei sitae* principle does not apply.

The action must be based upon a right *in rem* not just involving it (with an exception for tenancies – which are based on right *in personam* or, in another view, on a right of mixed nature) – as it was later clarified in the *Webb* Judgment.[67] In that case ECJ ruled that an action for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents (e.g. conveyance) as should be required to vest the legal ownership in the plaintiff does not fall under the application of the exclusive jurisdiction rule.

Such a strict interpretation was challenged in the *Lieber* Judgment with the *raison d'être* specified in the *Rösler* Judgment (see above).[68] The subject-matter of the case was the action for a compensation for unlawful possession of the property – the agreement conferring the ownership of the property appeared to be void *ex tunc* after nine years of use and so the purchaser's possession of the property during that time was found unlawful. In the view

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[65] P. Schlosser, *Report*…, para. 169–172.

[66] Judgment of 10 January 1990, *Reichert and Kockler*, C-115/88, EU:C:1990:3.

[67] Judgment of 17 May 1994, *Webb*, C-294/92, EU:C:1994:193.

[68] Judgment of 9 June 1994, *Liebier*, C-292/93, EU:C:1994:241.

of the defendant, since there is a need to recourse to the conditions of the *locus rei sitae* in order to calculate the compensation, the *raison d'être* should be valid in the same way for an action for such a compensation. This view was rejected by ECJ on actually two grounds: first, the *Rösler* case concerned tenancy whereas in the present case there was none; second, the recourse to the conditions of the *locus rei sitae* may be made also by the courts of another State – so there is no justification to confer the exclusive jurisdiction over such an action.

#### 4.2.4. Recent case-law on tenancies of immovable properties

The above-mentioned case-law was in some manner summarised in the *Dansommer* Judgment (see *supra* note 60). This judgment stressed the differences between rights *in rem* and tenancies. In the case of the former the matter cannot be merely connected to immovable property but it has to be based upon right *in rem* in order to be under the exclusive jurisdiction. Whereas, in the case of the latter the exclusive jurisdiction applies to any action directly concerning rights and obligations arising under an agreement for the letting of immovable property – irrespective of whether based upon right *in rem* or *in personam*.

However, this judgment not only summarised previous case-law but also extended it. The subject-matter of the *Dansommer* case was an action brought against the tenant by the business organising holiday. According to the agreement it played the role of an intermediary (a professional tour operator) but in the proceedings acted as if it were an owner (through subrogation). ECJ ruled that such an action falls under the exclusive jurisdiction. However, does not it sound similar to the subject of the *Hacker* case in which ECJ ruled otherwise? Where lies the difference, if any? The agreement in the *Dansommer* case covered provisions on letting of immovable property with only some other ancillary ones (such as on insurance or guarantee which regarded the tenancy). These, however, do not change the essence of the agreement as a tenancy agreement. In the case of the *Hacker* Judgment it was otherwise – the agreement covered other substantial provisions (such as on obligations on travel organisation). Here lies the *criterium divisionis* in the view of ECJ.

The same logic was applied in the *Klein* Judgment which regarded actions arising from membership contract under which members were allowed (in exchange for a membership fee) to use on time-share basis an immovable property (in specified localisation and of specified type but not specified individually; also with possible exchanges).[69] In the view of ECJ, the link between such an agreement and the property let is not sufficient to apply the exclusive jurisdiction provisions since these rules should be interpreted strictly. Moreover, such a complex contract concerning wide range of services cannot be seen as tenancy according to the reasoning of the *Hacker* Judgment.

#### 4.2.5. Recent case-law on rights *in rem* in immovable properties

More recent case-law on the exclusive jurisdiction over rights *in rem* in immovable properties found new elements in the old judgments. In the subsequent judgments concerning the scope of the rights *in rem* which fall under the exclusive jurisdiction the definition of these rights made in the *Reichert and Kockler* Judgment was recalled. According to this definition a right *in rem* in immovable property in order to be under the exclusive jurisdiction must: 1) come within the scope of the Regime, 2) seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein, and 3) seek to provide the holders of those rights with protection for the powers which attach to their interest.[70] A recourse to this formula was made in the Order in the *Gaillard* case which in some manner summarised above described case-law. In this case ECJ ruled that proceedings for rescission of a contract for the sale of immovable property do not have as their basis a right *in rem* but *in personam*. Therefore, even if they could affect rights *in rem* they do not fall within the exclusive jurisdiction.[71]

The same reasoning was applied in the last judgment under the Convention (the *ČEZ* case – see *supra* note 33). Based mainly on this rule the

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[69] Judgment of 13 October 2005, *Klein*, C-73/04, EU:C:2005:607.

[70] *Reichert and Kockler*, para. 11.

[71] Order of 5 April 2001, *Gaillard*, C-518/99, EU:C:2001:209.

judgment excluded from the exclusive jurisdiction an action for cassation of nuisance caused by ionising radiation which might have an impact on immovable property. The action was brought by the Province of Upper Austria against the Czech nuclear plant. In the view of ECJ, such a case does not have as an object a right *in rem* in immovable property in the above-described meaning of the Convention.

It was not otherwise in the *Schneider* Judgment (see *supra* note 18) – the first judgment on this issue under the Brussels I Regulation. In this judgment ECJ decided that 'non-contentious proceedings by which a national of a Member State who has been declared to be lacking full legal capacity and placed under guardianship in accordance with the law of that State applies to a court in another Member State for authorisation to sell his share of a property situated in that other Member State' do not fulfil the definition drawn in the *Reichert and Kockler* Judgment since legal capacity issues are excluded from the application *ratione materiae* of the Regime.

The same applies to the *Weber* Judgment in which ECJ stated that action for declaring invalidity of the exercise of a pre-emption right (in a form this right has under the German law: evidenced in Land Register and effective also against third parties) fulfils the definition of right *in rem* in immovable property (as provided in the *Reichert and Kockler* case) and, therefore, is within the scope the exclusive law provisions.[72] In this judgment the importance was attributed to the question of effect of a right: whether it is *erga omnes* (right *in rem*) or not (right *in personam*).

The reasoning was similar in the *Komu* case in which ECJ stated that an action leading to the termination of co-ownership, as resulting *erga omnes*, falls under the exclusive jurisdiction. The effect of the right at stake was pointed out as the *criterium divisionis* from the *Lieber* case in which the right (claim for compensation) had effect only *inter partes*.[73]

On the same ground ECJ, in the *Schmidt* case, rejected that proceedings concerning the avoidance of a contract of gift on the ground of the donor's incapacity to contract and the registration of the removal of an

[72] Judgment of 3 April 2014, *Weber*, C-438/12, EU:C:2014:212.

[73] Judgment of 17 December 2015, *Komu and Others*, C-605/14, EU:C:2015:833.

entry evidencing the donee's right of ownership are within the scope of the exclusive jurisdiction.[74]

An interesting problem arose in the *Apostolides* case.[75] As it is commonly known, the Republic of Cyprus does not control all of its territory. Therefore, the uncontrolled area was temporally excluded from application of *acquis communautaire*.[76] However, in the subject case the Cyprian court gave a judgment concerning the immovable property localised in the uncontrolled area. Therefore, there arose a question whether such a judgment was consistent with the exclusive jurisdiction rules. The immovable property was located outside of the factual state jurisdiction of the Cyprus. However, since the exclusion of the uncontrolled area constitutes an exemption, it should be interpreted strictly in such an extent which is required by its aim. Therefore, it does not preclude the application of the jurisdictional rules of the Regime. These rules govern inter-state questions not intra-state. As a consequence, if an immovable property lies within Cyprian territory, even uncontrolled, it is for the Cyprian law to choose which court has jurisdiction in disputes concerning that property.[77] To sum up, such a judgment is consistent with the exclusive jurisdiction provisions.

To sum up, it might be stated that the most significant judicial problem regarding the exclusive jurisdiction in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property was the scope of that provision. As long as the rights *in rem* are concerned, it may be stated that ECJ has reached a final conclusion in the *Gaillard* Judgment revoking the *Reichert and Kockler* rule. So **three conditions** have to be met in order to fall under the exclusive jurisdiction: 1) a right must come within the scope of the Regime, 2) it must seek to determine the extent, content, ownership or possession of immovable

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[74] Judgment of 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881.

[75] Judgment of 28 April 2009, *Apostolides*, C-420/07, EU:C:2009:271.

[76] Article 1(1) of Protocol No 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union.

[77] Compare P. Jenard, *Report*…, p. 34–35.

property or the existence of other rights *in rem* therein, and 3) it must seek to provide the holders of those rights with protection for the powers which attach to their interest. In reference to tenancies it seems that ECJ has reached the final conclusion in the *Dannsommer* Judgment – the exclusive jurisdiction applies to any action **directly** concerning rights and obligations arising under an agreement for the letting of immovable property, irrespective of whether based upon right *in rem* or *in personam*. The key question here is the link between the tenancy let and the claim. As it is apparent, this provision on the exclusive jurisdiction is governed by different logic: exclusive, when regarding the rights *in rem*, and inclusive, when regarding tenancies.

#### 4.3. Companies and associations of natural or legal persons

The second provision on the exclusive jurisdiction concerns two kinds of proceedings: the first one which concerns the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons; the second one concerns the validity of the decisions of their organs. In both these cases the exclusive jurisdiction is given to the courts of the state where the company has its seat – provided that this seat is in at least one of the States.[78]

The justification for such a rule is that legal certainty requires conflicting judgments regarding these issues being avoided. Moreover, this provision in most cases should provide the same result as the basic principle *actor sequitur forum rei*.[79]

Since the Brussels I Regulation this provision is supplemented with a statement that a court uses its own private international law rules in order to establish where that seat is (nowadays Article 24(2) of Brussels I Bis). It is worth noting that it is an exemption – for other provisions courts must not use *lex fori* but the harmonised provision of the Regime (as nowadays specified in Article 63 of Brussels I Bis).[80]

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[78] See also K. Sznajder-Peroń [in:] *System*…, p. 833.

[79] P. Jenard, *Report*…, p. 35.

[80] F. Pocar, *Explanatory report*…, para. 96.

The use of court's private international rules to establish where a company has its seat is justified with a statement that such a solution provides more certain rules – since concept of 'seat' under domestic law is usually narrower than the harmonised one.[81] It is the reminiscence of the approach to the domicile of legal persons under the Brussels Convention of 1969 and the parallel Lugano Convention of 1988 which did not provide a harmonised rule how to establish the seat of a company or other legal persons (Article 53 of the Convention – compare with Article 63 of the Brussels I Bis). Therefore, it might be argued that remarks on the legal person's seat made under these conventions remain valid today. The Schlosser Report states that if under a *lex fori* (which is used to establish where the seat is) a legal person may have two or more seats, it is up to a plaintiff to choose *forum* from amongst *fora* of these seats.[82]

In the Schlosser Report it was stated that this provision applies also to partnerships established under British or Irish laws.[83] Moreover, the term 'dissolution' does not have a narrow technical meaning as it has on the continent. It encompasses also the liquidation of a company which takes place after the dissolution in the narrow meaning (e.g. proceedings concerning the amount of money to be paid to a member) – since it is only a stage on the way of terminating the existence of the company.[84]

However, it must be borne in mind in this matter that insolvency proceedings are outside of the scope *ratione materiae* of the Regime. According to the Schlosser Report, in the Isles there are two conditions to be met in case of winding-up proceedings: first, they must not be based on the ground of insolvency; second, the company must be in fact solvent. Whereas, on the Continent only the first condition is relevant: the dissolution must not be on the ground of insolvency – rise of issues relating to the bankruptcy law does not affect the application of the Regime.[85] It is worth noting that

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81 F. Pocar, *Explanatory report*…, para. 96.

82 P. Schlosser, *Report*…, para. 162.

83 P. Schlosser, *Report*…, para. 162.

84 P. Schlosser, *Report*…, para. 58.

85 P. Schlosser, *Report*…, para. 57 and 59.

'only actions which derive directly from insolvency proceedings' fall outside of the application of the Regime.[86]

There are few judgments concerning this provision and none was issued under the Convention. The first of them is the *Hassett and Doherty* Judgment (see *supra* note 20) which concerned *inter alia* the decision of a company. As it was stated by ECJ, only proceedings in which a party seeks to find such a decision invalid under the law or the Articles of Association fall under the exclusive jurisdiction rule. In other words, the principal subject-matter must comprise these issues – just any link to the decision is not sufficient in that field. Otherwise, almost all legal actions against a company would be within jurisdiction of a state in which the company has its seat what would extend the scope of the article beyond what is required by its objective. Therefore, ECJ found that this rule is inapplicable to this case since the dispute concerned only the manner in which the organ exercised its power but not grounds of that power.

The same was stated in the *BVG* Judgment dealing *inter alia* with the question whether it is enough to apply this provision if the validity of the decision of a company arises as a preliminary question.[87] The answer was negative on the same grounds as above. It was not the otherwise in the *flyLAL-Lithuanian Airlines* Judgment which referred to action for compensation of damage resulting from the breach of competition law (made by the decision of the company).[88]

To sum up, also in this case it was the scope of the application of the provision on the exclusive jurisdiction that constituted the most crucial judicial problem. In reference to the proceedings concerning the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons the most crucial problem was to differentiate dissolution on the ground of insolvency (excluded from the Regime application) from dissolution on the other grounds (falling under the Regime). However, this rule did not produce any ECJ judgment,

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[86] Judgment of 19 April 2012, *F-Tex*, C-219/10, EU:C:2012:215. See also the Judgment of 22 February 1979, *Gourdain*, 133/78, EU:C:1979:49.

[87] Judgment of 12 May 2011, *BVG*, C-144/10, EU:C:2011:300.

[88] Judgment of 21 October 2014, *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319.

so it seems rather easy when applied. The second part of this provision – on the proceedings concerning the validity of the decisions of the organs of companies, legal persons or associations of natural or legal persons – produced few judgments. All of them stressed that this rule applies only when the **principal matter** is the validity of the decision made by these organs.

#### 4.4. Entries in public registers

The exclusive jurisdiction over matters which have as their object the validity of entries in public registers is granted to courts of the state in which the register is kept (nowadays Article 24(3) of the Brussels I Bis). It concerns mainly land or commercial registers.[89]

This provision remains unchanged since the Brussels Convention of 1969 (apart from change of 'Contracting Party' to 'Member State'). It is the only rule on the exclusive jurisdiction upon which there is no judgment of ECJ. Therefore, it might be summarised with the words of P. Jenard from his Report: "This provision does not require a lengthy commentary".[90] Since none of the other reports on the Regime acts provides further remarks, it might be taken for granted.[91]

#### 4.5. Intellectual property

The fourth provision on the exclusive jurisdiction (Article 24(4) of the Brussles I Bis) concerns registration or validity (other actions are governed by the general rules of the Regime) of two legal forms of intellectual property: national and European patents. They will be discussed below respectively.

##### 4.5.1. The provision on national patents

First rule concerns registration or validity of national patents, trademarks, designs, or other similar rights required to be deposited or registered – e.g. rights which protect fruit and vegetable varieties (and which

[89] P. Jenard, *Report*…, p. 35.

[90] P. Jenard, *Report*…, p. 35.

[91] F. Pocar, *Explanatory report*…, para. 91 *in fine*.

require to be deposited or registered).[92] Such cases fall under the exclusive jurisdiction of courts of the state in which the deposit or registration a) has been applied for or b) has taken place or c) is deemed to have taken place under terms of international convention (later extended also to Community instruments or instruments of the Union). The notion a) refers to internal laws of a State. The notion c) refers to the system concerning international registration of trademarks established with the Madrid Agreement of 14 April 1891 and revised several times. With regard to this system it is worth noting that a deposit at the International Office at Berne (done through the registry of the country of origin) has the same effect in another Contracting State as if it was directly registered in that state. Therefore, courts of another Contracting State should have the exclusive jurisdiction e.g. over proceedings relating to whether a trademark deposited at the International Office should be deemed to have been registered in that state.[93]

The reason for such a rule is that granting a patent is an exercise of national sovereignty. Therefore, in order to avoid contradictory judgments courts of the state which grants a patent should have jurisdiction over disputes concerning validity of this patent.[94]

#### 4.5.2. The provision on the European patent

At the time when the Convention was drafted, EEC Member States worked also on the convention on the community patent which was expected to contain some jurisdictional provisions. In fact it was done with the Luxembourg Convention of 1975 (one Community Patent valid for all EEC Members) as well as the Munich Convention of 1973 (European patent valid for one or more Contracting States in respective domestic forms – 'bundle of national patents').[95] As a result, the Luxembourg Convention of

[92] P. Jenard, *Report*…, p. 36.

[93] P. Jenard, *Report*…, p. 36 and the cited conventions.

[94] P. Jenard, *Report*…, p. 36.

[95] Convention on the Grant of European Patents of 5 October 1973 (European Patent Convention) – available at www.epo.org. Convention for the European patent for the common market (Community Patent Convention) – OJ L 17, 26.01.1976, p. 1–28.

1978 amended this provision with additional rule on the European patent – the second legal form of intellectual property covered by this provision.

Since these conventions contained jurisdictional rules only for specific matters, the Regime should apply to all other disputes. Therefore, the jurisdiction of the European Patent Office which encompasses all the oppositions to granting a European patent (Articles 99–105 of the Munich Convention of 1973) is to remain unhindered. In other cases the disputes on the registration or validity of an European patent are within the exclusive jurisdiction of the State in which the patent is granted. The action should be brought to the State in which the patent was applied for – not the State in which it was valid or challenged. The rest of disputes is governed by the general rules of the Regime.[96]

Since the Community Patent granted under the Luxembourg Convention of 1975 was to be valid across all the EEC members and not particular states it was *ex definitione* excluded from this provision. However, under the Article 86 of the Luxembourg Convention of 1978 there was also a possibility to grant such a patent for one or more (but not all) EEC states. Therefore, in the Convention there was also a provision excluding a Community patent issued under the Article 86 from the scope of its application.[97] Nevertheless, the Luxembourg Convention of 1978 never came into force and as a result this provision was not included in the subsequent acts.[98]

Finally it is worth noting that in 2013 25 EU members have concluded the Agreement on the Unified Patent Court which creates the Unified Patent Court with exclusive jurisdiction for litigation relating to European patents and European patents with unitary effect (unitary patents). Nonetheless, the agreement is signed but not ratified yet.[99]

Both above provisions were supplemented in the Lugano Convention of 2007 with a statement that disputes regarding the registration or validity of patents, etc., fall under the exclusive jurisdiction 'irrespective of whether the issue is raised by way of an action or as a defence'. This wording was

[96] F. Pocar, *Explanatory report*…, para. 98.

[97] P. Schlosser, *Report*…, para. 173.

[98] F. Pocar, *Explanatory report*…, para. 98. Replacement: OJ L 401, 30.12.1989, p. 1–27.

[99] OJ C 175, 20.6.2013, p. 1–40.

continued by the Brussels I Bis only with regard to national patents – not the European patent.

#### 4.5.3. Case-law

The first on that provision was the *Duijnstee* Judgment.[100] According to ECJ, the concept of proceedings 'concerned with the registration or validity of patents' has autonomous and restrictive meaning. Therefore, this provision does not encompass disputes which have different subject-matter (e.g. a right to patent, an infringement of such right) as the *ratio* of this provision does not apply to them. Such a reasoning is supported also by the wording of the Munich Convention of 1973 and the Luxembourg Convention of 1975 which differentiated disputes concerning the registration or the validity of a patent from disputes concerning the right to a patent.

It took some time before the next judgment was issued – it was in the *GAT* case.[101] As in the *Duijnstee* Judgment, ECJ stated that this provision does not apply to e.g. disputes concerning only an infringement of a right to patent. However, should the defendant rise as a plea in objection that the patent is invalid, what is quite frequent, the exclusive jurisdiction applies. Otherwise, the provision would be deprived of its binding nature. Therefore, no other court than the empowered by this provision can rule (even indirectly) on the validity of a patent. As a consequence this judgment led to a **legislative change** – the wording of the Lugano Convention of 2007 was supplemented in the above-mentioned manner (what was partially continued by the Brussels I Bis).

This was followed by the *Roche* Judgment which concerned the European patent.[102] This time ECJ ruled that an infringement of the same European patent by several parties, no matter whether connected or nor, in several states which were granted that patent should be regarded as unconnected in terms of Article 6(1) of the Convention and so fall within a jurisdiction of each state separately. Otherwise plaintiff would be granted the right to choose *forum* for all defendants (and so-called 'forum shopping'

[100] Judgment of 15 November 1983, *Duijnstee*, 288/82, EU:C:1983:326.

[101] Judgment of 13 July 2006, *GAT*, C-4/02, EU:C:2006:457.

[102] Judgment of 13 July 2006, *Roche Netherland and Others*, C-539/03, EU:C:2006:458.

would occur).[103] As a consequence the rules on jurisdiction would not be as transparent and predictable as they should.

Here it should be noted that when the process of granting of a European patent is finished, such a patent no longer exists but turns into the so-called 'bundle of national patents'. Therefore, each of them falls within the exclusive jurisdiction of a respective State separately. As a consequence not only the situation of facts but also the situation of law for each of the infringements is different. Therefore, these infringements may not be seen otherwise as unconnected in the terms of Article 6(1) of the Convention.[104]

The next judgment was issued under the Brussels I Regulation in the *Solvay* case (see *supra* note 19). This time ECJ set boundaries to the application of this provision. The question was whether the courts of a different state than the one granted the exclusive jurisdiction over the patent may issue a provisional measure (such as a provisional cross-border prohibition against infringement) if such proceeding require assessment of (but not decision on) the patent's validity. This time the answer of ECJ was negative on the grounds that reasons for the exclusive jurisdiction apply only to decisions regarding the validity of patents.

In the following *Taser International* Judgment,[105] ECJ evaded answering the question whether a request for the enforcement of the contractual obligation to assign trademarks is within the scope of the exclusive jurisdiction. Since in that case any answer would provide with jurisdiction the same courts, ECJ found that there was no reason to answer that question. Similarly, in the case *Brite Strike Technologies* ECJ also found no reason to answer the query concerning this provision since the dispute fell under the provisions of different convention.[106]

To sum up, on this ground ECJ presents mixed approach: exclusive, since the provision concerns **only** validity or registration of patents, and inclusive, since the application of this provision is **not** restricted only to

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[103] K. Sznajder-Peroń [in:] *System*…, p. 818.

[104] Apart from the Judgment see also Opinion of Advocate General Léger delivered on 8 December 2005, *Roche Netherland and Others*, C-539/03, EU:C:2005:749.

[105] Judgment of 17 March 2016, *Taser International*, C-175/15, EU:C:2016:176.

[106] Judgment of 14 July 2016, *Brite Strike Technologies*, C-230/15, EU:C:2016:560.

principal matter. The latter feature seems to deviate from the general rule on the exclusive jurisdiction restricting its application only to principal matters (according to the Latin principle *exceptiones non sunt extendendae*). This provision seems most likely to produce further ECJ judgments since there still remain questions unanswered (see the *Taser International* Judgment).

#### 4.6. Judgments' enforcement

As far as the judgments' enforcement is concerned it has to be noted that the legal provision governing that issue remains unchanged since the Convention (nowadays Article 24(5) of the Brussels I Bis). It states that the exclusive jurisdiction 'in proceedings concerned with the enforcement of judgments' should be granted to courts of a State in which the judgment has been or is to be enforced.

Taking judicature into account it must be stressed that this provision does not apply just to any objection raised by a party in the course of these proceedings. The rule on the exclusive jurisdiction over judgments' enforcement must not be used in order to evade from jurisdiction granted over the subject of the dispute. Therefore, the courts of the place of enforcement must not decide (even indirectly) on matters falling under jurisdiction of courts of another state – e.g. under the virtue of Article 2 over the subject matter. Applying this rule to such extent would be contrary to division of jurisdiction between the court of the defendant's domicile and the court of the place of enforcement. In the *Malhé* Judgment ECJ again applied *exceptiones non sunt extendendae* principle combined with teleological interpretation.[107] In this judgment ECJ stated that this provision does not apply to an opposition to the enforcement of a judgment by a plea to a set-off which would involve a claim over which the court of the place of enforcement has no jurisdiction.

It is worth noting the already mentioned *Reichert and Kockler* Judgment (Case 115/88) which referred to the question whether *actio pauliana* (in the form of the French *action paulienne*) falls under the exclusive jurisdiction over rights *in rem* in immovable properties (the ECJ answer was negative). This

[107] Judgment of 4 July 1985, *Malhé*, 280/84, EU:C:1985:302.

case returned to ECJ registered under signature C-261/90.[108] This time the query was as follows: which jurisdictional provision does apply to such an action? Among possible provisions the referring court mentioned the exclusive jurisdiction over judgments' enforcement.

To answer the question whether *actio pauliana* falls under provisions on the exclusive jurisdiction over judgments' enforcement ECJ referred (apart from the above-mentioned reasoning of the *Malhé* Judgment) to the explanation of the term 'in proceedings concerned with the enforcement of judgments' included in the Jenard Report. Although *actio pauliana* seeks to preserve rights of the creditor in the terms of subsequent enforcement of an obligation, it does not constitute an action relating to 'recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments'.[109] It is not directly connected with the enforcement of judicial decisions already taken nor other enforceable instruments but it concerns alteration of the legal relationship between the creditor and the transferee.[110]

It is also worth noting ECJ statement on the question whether this provision applies also to judgment issued in other states than the States. The answer to that question was given in the *Owens Bank* Judgment.[111] In the view of the Court this provision should be read in conjunction with the Article 25 of the Convention (nowadays Article 2(a) of the Brussels I Bis) and, therefore, does not apply to judgments given in civil and commercial matters in the states not bound by the Regime.

To sum up, although this provision seems rather obvious in its interpretation, ECJ had to answer some questions. As it is apparent from its judgments, this rule should be understood narrowly, so that it is never used to deviate from the jurisdictional rules on the subject matter – it concerns exclusively a judgment's enforcement. Moreover, as the application of the provision regarding immovable properties was restricted exclusively to the

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[108] Judgment of 26 March 1992, *Reichert and Kockler*, C-261/90, EU:C:1992:149.

[109] Apart from the Judgment see P. Jenard, *Report*…, p. 36.

[110] Opinion of Mr Advocate General Gulmann delivered on 20 February 1992, *Reichert and Kockler*, C-261/90, EU:C:1992:78, p. 2164–2165.

[111] Judgment of 20 January 1994, *Owens Bank*, C-129/92, EU:C:1994:13. See particularly para. 24.

cases concerning immovable properties situated within the States, this rule also applies only to the proceeding concerning judgments issued within the States. In other cases, other rules apply.

## 5. Conclusions

First of all, the legal practise has shown strong continuity of the exclusive jurisdiction rules within the Brussels Regime – as if the changes of legal acts were irrelevant. Many times ECJ stated that since these provisions are almost identical findings on earlier ones remain valid for subsequent provisions.

Second observation is that the judicature of ECJ shaped the exclusive jurisdiction rules in two different manners. Some of the provisions ECJ got used to interpret strictly – i.e. only if the principal matter concerns one of narrowly specified matters the exclusive jurisdiction may apply (e.g. rights *in rem* in immovable property, validity of the constitution of a legal person). The others are interpreted in a more flexible approach – i.e. it is sufficient for the exclusive jurisdiction to apply that one of the specified matters is risen anyhow in proceedings (e.g. validity of patents) or that an action concern any right or obligation derived from a particular type of an agreement (e.g. tenancies of immovable properties).

The reports on the Regime acts, along with some opinions of Advocates General, have shown the significance of differences between legal systems as well as legal cultures across the States. Many times these differences caused problems for doctrine since the provisions of the Regime are to be applied in equal and uniform manner everywhere within the States.

Since the number of the judicial decisions of ECJ is not impressive (this paper comprises almost 30 judgments concerning the exclusive jurisdiction), it may be concluded that the rules on the exclusive jurisdiction are not a source of gravy problems for national courts. Moreover, the vast majority of the judgments concern the exclusive jurisdiction over immovable properties – mainly tenancies of these. It may suggest two conclusions. First, tenancies constitute an important part of European's lives. Second, the provision was so unclear that it required a thorough clarification from ECJ.

It is worth noting the rules and case-law on the exclusive jurisdiction over intellectual property which reflects the dynamic evolution of this branch of law. Predictably, in the foregoing years this will be the most typical field for the ECJ judgments on the exclusive jurisdiction.

Nevertheless, few times ECJ decisions caused changes in the wording of the provisions in which the rules on the exclusive jurisdiction were expressed. This undoubtedly proves the importance of the European judicature (or at least the ability of the European 'legislators' to provide rules which would override unwelcomed interpretation of ECJ).

Finally, the rules on the exclusive jurisdiction proved to be typical EU law. First, they have autonomous meaning so that they can be applied in the equal and uniform manner across the States. Second, their meaning is established according to their justification and objectives as well as the scheme of the Regime. Few times the interpretation of ECJ seemed to be cunning – on one hand, ECJ expressed its approval of its earlier findings and on the other it led its interpretation in a different direction.

Table of the cited Brussels I Bis provisions and their equivalents in the other acts

| **Brussels I Bis** | Brussels I Regulation | Lugano Convention of 2007 | Brussels Convention of 1969 | Lugano Convention of 1988 |
|---|---|---|---|---|
| **1** | 1 | 1 | 1 | 1 |
| **2(a)** | 32 | 32 | 25 | 25 |
| **4** | 2 | 2 | 2 | 2 |
| **5** | 3 | 3 | 3 | 3 |
| **6** | 4 | 4 | 4 | 4 |
| **8** | 6 | 6 | 6 | 6 |
| **24** | 22 | 22 | 16 | 16 |
| **25** | 23 | 23 | 17 | 17 |
| **26** | 24 | 24 | 18 | 18 |
| **27** | 25 | 25 | 19 | 19 |
| **31** | 29 | 29 | 23 | 23 |
| **35** | 31 | 31 | 24 | 24 |
| **45** | 35 | 35 | 28 | 28 |
| **46** | 41 | 41 | 34 | 34 |
| **62** | 59 | 59 | 52 | 52 |
| **63** | 60 | 60 | 53 | 53 |

**Summary**

The jurisdictional provisions (which set boundaries to courts' power) are of the utmost importance. Their violation leads to grave consequences: as a rule a judgment issued under such circumstances is to be annulled. A particular field of the jurisdictional provisions is constituted by the rules governing jurisdiction over transnational disputes. In Europe these provisions are subject to harmonisation within the so-called Brussels Regime. The exclusive jurisdiction is one of the types of jurisdiction granted under the Regime. This kind of jurisdiction is particularly important because of the universal application of the rules which govern it. Since the Regime has lasted for almost 50 years so far, there is a significant and still relevant case law of the Court of Justice of the European Union on the exclusive jurisdiction which requires a thorough analysis.

**Keywords:** international civil procedure, state jurisdiction, Brussels Regime, exclusive jurisdiction, CJEU jurisprudence