Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 18 June 2020[1]

Case C‑433/19

Ellmes Property Services Limited
v
SP

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling – Jurisdiction – Regulation (EU) No 1215/2012 – Concept of 'rights *in rem* in immovable property' – Action for a prohibitory order against a co-owner – Use of the property subject to co-ownership for tourist purposes contrary to the designated use for residential purposes as defined in the co-ownership agreement)

I. Introduction

1. This reference for a preliminary ruling gives the Court of Justice an opportunity to rule on which court has jurisdiction to hear an action under Austrian law in which, in essence, a co-owner is requiring another co-owner to cease using its apartment subject to co-ownership for tourist purposes, on the ground that the co-ownership agreement does not permit that use. The referring court notes that the action could fall under two rules of jurisdiction contained in Regulation (EU) No 1215/2012[2]: the rule according to which the courts of the Member State in which the property is situated have exclusive jurisdiction in respect of rights *in rem* in immovable property and the rule according to which alternative jurisdiction in matters related to a contract lies with the courts of the place of performance of the obligation. In consequence, examination of the questions referred also affords the Court an opportunity to consider the nature of co-ownership agreements under Austrian law in the light of that regulation.

II. Legal context

A. EU law

2. Article 4(1) of Regulation No 1215/2012 states:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

1 Original language: French.

2 Regulation 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 2012 L 351, p. 1).

3. Article 7(1)(a) of that regulation provides that:

‘A person domiciled in a Member State may be sued in another Member State:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

…’

4. Article 24 of that regulation reads as follows:

‘The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

(1) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

…’

B. Austrian law

5. Paragraph 2 of the Wohnungseigentumsgesetz (Law on co-ownership [3]), in the version applicable to the dispute in the main proceedings (‘the Law on co-ownership’), states as follows:

‘(1) Co-ownership is the right *in rem*, granted to the joint owner of real property or to a partnership of owners, exclusively to use property subject to co-ownership and to dispose of it alone. …

(2) Properties subject to co-ownership are apartments, other independent premises and parking places for motor vehicles (properties suitable for co-ownership), over which co-ownership has been established. An apartment is a structurally closed and, in the perception of the public, independent part of a building of a nature and size capable of satisfying people’s individual housing needs. Other independent premises are structurally closed and, in the perception of the public, independent parts of a building whose nature and size is of considerable commercial importance, for example an independent business space or a garage. …

…

(5) A co-owner is a joint owner of real property who has co-ownership of a property subject to co-ownership situated thereon.

…’

6. Paragraph 3 of that law provides that:

‘(1) Co-ownership can be established based on

1. a written agreement between all joint owners (co-ownership agreement) …

…’

3 BGBl. I, 70/2002.

7. Paragraph 16 of that law states that:

‘(1) The co-owner has the right to use the property subject to co-ownership.

(2) The co-owner is entitled to make changes to his property subject to co-ownership (including changes in designated use) at his own expense, provided that

1. The change does not damage the building nor interfere with the legitimate interests of the other co-owners …

2. Where such a change also affects the common parts of the real property, that change must also be customary or serve an important interest of the co-owner. …’

III. The facts of the dispute in the main proceedings

8. Ellmes Property Services and SP are co-owners of an apartment block situated in Zell am See (Austria). Ellmes Property Services is established in the United Kingdom whilst SP’s home address is the address of the apartment he owns.

9. Ellmes Property Services uses the apartment owned by it, which has designated use for residential purposes, for tourist purposes and regularly lets it out to holiday guests.

10. By an action for a prohibitory order brought before the Bezirksgericht Zell am See (District Court, Zell am See, Austria), SP sought to prevent that ‘use for tourist purposes’ on the ground that it is contrary to the designated use of the building and, in the absence of consent by the other co-owners, arbitrary, and, in consequence, interferes with his co-ownership rights. In relation to the international jurisdiction of the Austrian courts, SP relied on the first subparagraph of Article 24(1) of Regulation No 1215/2012 which, in respect of rights *in rem* in immovable property, establishes that the courts of the Member State in which the property is situated have exclusive jurisdiction.

11. The court hearing the matter at first instance declined jurisdiction, taking the view that the dispute concerned a private-law use agreement and did not directly concern the rights *in rem* of the parties to that agreement.

12. By contrast, the Landesgericht Salzburg (Regional Court, Salzburg, Austria), hearing the matter on appeal by SP, held that the Austrian courts did have jurisdiction to hear the dispute under Article 24(1) of Regulation No 1215/2012. According to that court, the designated use of a property subject to co-ownership is based on a private-law agreement between the co-owners in the form, as a rule, of a co-ownership agreement. The designation of such property for a specific use and the adherence to the use thus defined are among the absolutely protected rights *in rem* of co-owners.

13. Ellmes Property Services lodged an appeal on points of law with the referring court.

IV. The questions referred and the procedure before the Court of Justice

14. In those circumstances, by decision of 21 May 2019, received at the Registry of the Court on 6 June 2019, the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the first alternative in the first subparagraph of Article 24(1) of Regulation [No 1215/2012] to be interpreted as meaning that actions brought by a co-owner seeking to prohibit another co-owner from carrying out changes to his property subject to co-ownership, in particular to its designated use, arbitrarily and without the consent of the other co-owners, concern the assertion of a right *in rem*?

(2) If the first question should be answered in the negative:

Is Article 7(1)(a) of [Regulation No 1215/2012] to be interpreted as meaning that the actions referred to in paragraph 1 concern contractual obligations to be performed at the location of the property?'

15. The parties to the main proceedings and the European Commission filed written observations in the ensuing proceedings. The Court decided to proceed without a hearing, taking the view that it had sufficient information to give a ruling.

V. Analysis

16. By its first question, the referring court asks whether Article 24(1) of Regulation No 1215/2012 is to be interpreted as meaning that actions brought by a co-owner seeking to prohibit another co-owner from carrying out changes to his property subject to co-ownership, in particular to its designated use, arbitrarily and without the consent of the other co-owners, fall under that provision. By its second question, the referring court asks the Court to interpret Article 7(1)(a) of that regulation in the light of the specific characteristics of such actions.

17. It is apparent from the wording of the questions referred that the referring court proceeds on the assumption that, regardless of the answer to be given, the action under Austrian law to which those questions relate falls under the definition of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012 and is covered by that regulation. There is nothing to shake that assumption. Indeed, the dispute in the main proceedings in which that action has been brought falls squarely within that definition and is not covered by the exclusions under Article 1(2) of that regulation.

18. In this Opinion I will therefore, at the outset, make a number of general observations about the action under Austrian law in the light of which the questions have been referred (Title A). I will then analyse the questions referred in the order chosen by the referring court. As that court correctly states, the second question in fact arises only if the answer to the first question is negative. If an action falls under Article 24(1) of Regulation No 1215/2012, which concerns *exclusive* jurisdiction in respect of rights *in rem* in immovable property (Title B), it is no longer necessary to examine whether there is an *alternative* jurisdiction, such as that provided for in Article 7(1)(a) of that regulation (Title C).

A. The action at issue

19. The referring court notes that, under Austrian law, co-ownership ('Wohnungseigentum') is a right *in rem*[4] which is protected not only against interference by third parties but against interference by the other co-owners.

20. That court explains that the designated use of a property subject to co-ownership for residential or business purposes is dictated by the private-law arrangements agreed between all the co-owners, which are usually laid down in the co-ownership agreement ('Wohnungseigentumsvertrag'). The co-owners are in a contractual relationship that, by virtue of the co-ownership agreement, they entered into voluntarily. The designated use of a property subject to co-ownership and adherence to the use thus defined constitute absolutely protected rights of each co-owner. In that regard, use for tourist purposes of a property subject to co-ownership with designated use for residential purposes is a change in designated use of that property.

21. It is apparent from the reference for a preliminary ruling that in the dispute in the main proceedings one of the co-owners has brought an action seeking to bring an end to use that allegedly interferes with his rights of co-ownership. The referring court explains that its questions stem from an action under Austrian law ('Eigentumsfreiheitsklage') that seeks to prevent or order the cessation of behaviour alleged against a defendant. By that court's account, each co-owner is entitled to bring such an action against a co-owner who, arbitrarily and without the consent of all the other co-owners or without a final court order replacing that authorisation, carries out changes to his co-ownership property, including to its designated use.[5]

B. The first question on Article 24(1) of Regulation No 1215/2012

22. Under Article 24(1) of Regulation No 1215/2012, the courts of the Member State in which the property is situated have exclusive jurisdiction in proceedings which have as their object rights *in rem* in immovable property. When drafting that provision, the EU legislature, in essence, reused the wording of Article 16(1)(a) of the Brussels Convention[6] and Article 22(1) of Regulation (EC) No 44/2001,[7] with the effect that the interpretation that the Court has developed in its case-law on those two provisions applies also to Article 24(1) of Regulation No 1215/2012.[8]

23. The expression 'rights *in rem* in immovable property' in Article 24(1) of Regulation No 1215/2012 must therefore continue to be interpreted autonomously.[9]

4 See also, to that effect, Faber, W., 'National Report on the Transfer of Movables in Austria', (Faber, W., and Lurger, B., eds), *National Reports on the Transfer of Movables in Europe, volume 1, Austria, Estonia, Italy, Slovenia*, Sellier, European Law Publishers, Munich, 2008, p. 17.

5 See also Stabentheiner, J., Vonkilch, A., Kersting, J., (Van Der Merwe, C., ed.), *European Condominium Law*, Cambridge University Press, Cambridge, 2015, p. 133.

6 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and – amended text – p. 77), the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) to that convention ('the Brussels Convention').

7 Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

8 See judgment of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraph 26). For the sake of completeness, I note that the wording of the introductory sentence of Article 24 of Regulation No 1215/2012 contains two amendments to the wording of Article 22 of Regulation No 44/2001. The first is the addition of the nuance that Article 24 of Regulation No 1215/2012 concerns only the *courts of a Member State*. That nuance does not affect the meaning of that provision in so far as concerns exercise of the jurisdiction to hear actions relating to immovable property situated, as in the dispute in the main proceedings, in the territory of the Member States. The second amendment is the addition of the words 'the parties' (the provision applies 'regardless of the domicile of *the parties*'), which likewise seems not to change the meaning of Article 22 of Regulation No 44/2001, which provided that the provision applied 'regardless of domicile'. Emphasis added. See, in relation to the second amendment, Hess, B., 'The Brussels I Regulation: Recent case-law of the Court of Justice and the Commission's proposed recast', *Common Market Law Review*, 2012, vol. 49, pp. 1105 to 1106.

9 See, recently, judgment of 14 February 2019, *Milivojević* (C-630/17, EU:C:2019:123, paragraph 97 and the case-law cited), and order of 15 May 2019, *MC* (C-827/18, not published, EU:C:2019:416, paragraph 23).

24. Two further series of criteria used by the Court to circumscribe the scope of the rule relating to jurisdiction in respect of rights *in rem* in immovable property remain valid now that Regulation No 1215/2012 is in force. The first series are criteria relating to the characteristics of rights *in rem* in immovable property and the actions relating to them that fall under Article 24(1) of that regulation. The second series are criteria relating to the underlying aims of that provision and determine which actions should be covered by it and which, since that provision lays down an exception that must be interpreted strictly, are outside its scope. Whether the action at issue in the main proceedings falls within Article 24(1) of Regulation No 1215/2012 must therefore be examined in the light of those two series of criteria.

1. The characteristics of rights **in rem** *in immovable property and of the actions relating to them*

(a) The characteristics of rights **in rem** *in immovable property in the light of the case-law*

25. The case-law defines the rights *in rem* in immovable property to which the wording of Article 24(1) of Regulation No 1215/2012 refers by opposition to rights *in personam*. The difference between the two kinds of right is that rights *in rem*, attached to an item of property, have effect *erga omnes*, whereas rights *in personam* can be claimed only against the debtor.[10]

26. I would observe in that respect that, in *Komu and Others*,[11] the Court held that the rule of jurisdiction laid down in Article 24(1) of Regulation No 1215/2012 covers an action for termination of the co-ownership of immovable property since that action, which is designed to bring about the transfer of a right of ownership in immovable property, concerns rights *in rem* that have effect *erga omnes* and is intended to ensure that the holders of those rights can protect the rights and powers attached to their interest. This means that rights of co-ownership, such as those at issue in the main proceedings, seem on a first analysis also to be rights *in rem* in immovable property within the meaning of the case-law on that provision.

27. The rule of jurisdiction laid down in Article 24(1) of Regulation No 1215/2012 only applies where there are ‘disputes concerning rights *in rem* in immovable property’.[12] For an action brought before the court of a Member State to fall under that provision, it is not sufficient that the action involves a right *in rem* in immovable property or that the action has a link with immovable property: the action must be based on such a right.[13]

28. In that context, it is clear from the case-law that proceedings which have as their object rights *in rem* in immovable property are those actions which seek, first, to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein or, secondly, to provide the holders of those rights with the protection of the rights and powers which attach to their interest.[14]

10 See, recently, judgment of 14 February 2019, *Milivojević* (C-630/17, EU:C:2019:123, paragraph 100). In addition, according to paragraph 166 of the 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 (OJ 1979 C 59, p. 71), the most important legal consequence flowing from the nature of a right *in rem* that has effect *erga omnes* is that its owner is entitled to demand that the property burdened is given up by anyone not enjoying a prior right.

11 Judgment of 17 December 2015 (C-605/14, EU:C:2015:833, paragraph 29).

12 See, to that effect, judgment of 18 May 2006, *ČEZ* (C-343/04, EU:C:2006:330, paragraph 32).

13 See, recently, judgment of 10 July 2019, *Reitbauer and Others* (C-722/17, EU:C:2019:577, paragraph 45 and the case-law cited).

14 See judgments of 3 April 2014, *Weber* (C-438/12, EU:C:2014:212, paragraph 42), and of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraph 40).

29. It is therefore necessary to ascertain whether the action at issue in the main proceedings has as its object a right or power that relates directly to the immovable property and has effect *erga omnes*,[15] and can therefore be regarded as an action based on a 'right *in rem* in immovable property' within the meaning of the case-law referred to above.

(b) Application to the present case

(1) Preliminary observations

30. It is true that, as Ellmes Property Services notes, in *ČEZ*[16] the Court held that an action for cessation of a nuisance caused to land by the activity of a nuclear power station on the territory of a State neighbouring that in which that land was situated did not constitute a dispute having as its object rights *in rem* in immovable property. Indeed, although the basis of such an action is the interference with a right *in rem* in immovable property, the real and immovable nature of that right was nevertheless, in this context, of only marginal significance. The real and immovable nature of the right in question does not have a decisive influence on the issues to be determined in a dispute in which such an action for cessation has been brought, which would not have been raised in substantially different terms if the right whose protection was sought against the alleged nuisance were of a different type, such as, for example, the right to physical integrity or a personal right. Just like the action at issue in that judgment, such actions essentially seek an order requiring the person causing actual or potential interference to a right to put an end to that interference.

31. However, in contrast to the action at issue in *ČEZ*,[17] in that at issue in the main proceedings the cause of action lies not exclusively in the interference with a right *in rem* in immovable property of the co-owner who brought the action but primarily, it would appear, in the failure by another co-owner to adhere to the use agreed in the co-ownership agreement.

32. It is therefore arguable that the object of the action at issue in the main proceedings is a right of the co-owner who is not adhering to that use rather than a right of the co-owner bringing the action. The Commission seems to chime with that view when it states that, in the event that the use agreed in the co-ownership agreement is a right *in rem*, that circumstance could amount to a restriction on a co-owner's right to dispose of its co-ownership share. On that point, SP contends that, in the circumstances of the present case, the co-owner who has failed to adhere to the use established in the co-ownership agreement, first, claims to enjoy a right *in rem*, that is to say, the right to let its property for tourist purposes, even though there is no such right, and, secondly, in any event, is interfering with the right *in rem* of the other co-owners.

33. That being so, in order to determine whether the action at issue in the main proceedings can fall under Article 24(1) of Regulation No 1215/2012, it is necessary to determine whether the use agreed in the co-ownership agreement for an item of immovable property, that is to say an apartment subject to co-ownership, has effect *erga omnes*.

34. However, as the Commission observes, the referring court has not provided all the information necessary to undertake an accurate assessment as to the legal classification of one co-owner's entitlement to require another co-owner to terminate a particular use of its property.

15 See judgment of 17 May 1994, *Webb* (C-294/92, EU:C:1994:193, paragraph 15), and order of 5 April 2001, *Gaillard* (C-518/99, EU:C:2001:209, paragraph 18).

16 Judgment of 18 May 2006, *ČEZ* (C-343/04, EU:C:2006:330, paragraph 34).

17 Judgment of 18 May 2006 (C-343/04, EU:C:2006:330).

35. It will be recalled that it is apparent from the request for a preliminary ruling that, under Austrian law, co-ownership is a right *in rem* which is protected not only against interference by third parties but also against interference by the other co-owners. The designated use of a property subject to co-ownership and the adherence to the use thus defined '[constitute] an absolutely protected right of each co-owner'. That designated use is established by the private-law agreement between all the co-owners who are, by virtue of the co-ownership agreement, voluntarily in a contractual relationship. One co-owner can bring an action such as that at issue in the main proceedings against another co-owner who fails to adhere to the use established in that agreement.

36. It is not clear whether or not a co-owner's entitlement to require adherence to the use established in the co-ownership agreement enjoys the absolute protection to which the referring court alludes in the request for a preliminary ruling. If it does, it would have to be found that the fact that a use is established in the co-ownership agreement can also have effect vis-à-vis third parties.

37. Against that background, the Commission concedes that the dispute in the main proceedings must be examined in the light of the terms of the co-ownership agreement, thereby potentially casting doubt on whether Article 24(1) of Regulation No 1215/2012 applies to that dispute. Nevertheless, the Commission states that certain facts may be circumstantial evidence that the use agreed in the co-ownership agreement has effect *erga omnes*. According to the Commission, only if those facts are confirmed by the referring court would it be conceivable that an action to prevent the tourist use of an apartment could fall within that provision of Regulation No 1215/2012.

38. More specifically, the Commission refers, first, to the fact that, according to the information it has gathered, any person who acquires an apartment subject to co-ownership must accept the co-ownership agreement concluded between the original co-owners, and that that agreement can only be amended with the agreement of all the other co-owners. Secondly, the Commission states that, according to its information, that agreement and the use it establishes can be consulted at the land register and are therefore accessible and potentially known to the public.

39. For the reasons I will set out below, I am unsure whether those facts, which the referring court must verify, necessarily lead to a finding that the use agreed in the co-ownership agreement has effect *erga omnes*.

(2) Enforceability of the co-ownership agreement

40. It is admittedly true that, in *Weber*,[18] the Court held that an action seeking a declaration of invalidity of the exercise of a right of pre-emption, such as that to which that judgment referred, did fall within the rule of exclusive jurisdiction in matters relating to rights *in rem* in immovable property. The Court held that the right in question, which attached to immovable property and was registered at the land register, not only produced its effects with respect to the debtor, but also guaranteed the right of the holder of that right to transfer the property vis-à-vis third parties, so that, if a contract for sale was concluded between a third party and the owner of the property burdened, the proper exercise of that right of pre-emption had the consequence that the sale was without effect with respect to the holder of that right, and the sale was deemed to be concluded between the holder of that right and the owner of the property on the same conditions as those agreed between the latter and the third party. It was therefore a right *in rem* par excellence.

41. Nevertheless, a situation in which a right *in rem* has effect *erga omnes* should be distinguished from one in which a right *in personam* continues to have effect after a change in the person who is a party to a legal relationship on which that right *in personam* is based.

18 Judgment of 3 April 2014, *Weber* (C-438/12, EU:C:2014:212, paragraph 45).

42. *Weber*[19] is an example of the first situation. The right of pre-emption to which that judgment refers was enforceable against a third party with no requirement to establish that the third party had replaced the owner of immovable property burdened in the context of the relationship between the owner and the holder of the right of pre-emption, or that the third party had, at least, agreed to abide by the implications of that relationship. However, in my view, that situation is not necessarily the same as the position where, as the Commission states, any person who acquires an apartment subject to co-ownership must ‘accept’ the co-ownership agreement concluded between the original co-owners.

43. To illustrate my meaning, in *Kerr*,[20] the Court held that an action concerning a payment obligation arising from a decision taken by a general meeting of the owners of property in a building fell within Article 7(1) of Regulation No 1215/2012, which establishes non-exclusive competence in matters relating to a contract, even though that decision was binding on co-owners who were not involved in adopting it. Furthermore, in its order in *INA and Others*,[21] the Court upheld that interpretation in the context of a payment obligation under national law, where the practical details of the obligation were determined by an agreement between the owners of more than half the co-ownership shares. In making that finding the Court relied on the fact that, by becoming and remaining the co-owner of a property in a building, each co-owner agreed to be subject to all the provisions in the act governing the association of property owners concerned and the decisions adopted by the general meeting of the co-owners of property in that building.[22]

44. Admittedly, in the judgment in *Kerr*[23] and the order in *INA and Others*[24] the subject matter of the actions at issue did not directly concern the immovable property. The case-law developed in those two rulings nevertheless illustrates how a use agreed in a co-ownership agreement can have effect against everyone who acquires an apartment subject to co-ownership, but that such use does not thereby have effect *erga omnes* within the meaning of the case-law on exclusive jurisdiction over rights *in rem* in immovable property.

45. That being so, if a use agreed in a co-ownership agreement is to have effect *erga omnes*, it must also be enforceable against persons who cannot be regarded as those who voluntarily accepted the co-ownership agreement. That would be the case if a co-owner could also bring an action for a prohibitory order against a tenant who has failed to adhere to the use agreed in the co-ownership agreement.[25] It is nevertheless for the national court to carry out the necessary verifications in that regard.

(3) Registration at the land register

46. In respect of the fact that the co-ownership agreement can be consulted at the land register, it is indeed true that, in many legal systems, the principle of publicity is one of the principles inherent to rights *in rem*. That principle reflects, inter alia, the notion that, as a general rule, rights *in rem* can be upheld only if information about them is accessible to the general public. In relation to rights *in rem* in immovable property, that information can be publicly accessible including by means of registers that can be consulted by the public. The fact that information about a right over a tangible asset is registered at the land register can therefore indicate that the right is enforceable against any person and is, in consequence, a right *in rem*.

19 Judgment of 3 April 2014 (C-438/12, EU:C:2014:212).

20 Judgment of 8 May 2019 (C-25/18, EU:C:2019:376, paragraph 29).

21 Order of 19 November 2019 (C-200/19, not published, EU:C:2019:985, paragraph 29).

22 Judgment of 8 May 2019, *Kerr* (C-25/18, EU:C:2019:376, paragraph 29), and order of 19 November 2019, *INA and Others* (C-200/19, not published, EU:C:2019:985, paragraph 29).

23 Judgment of 8 May 2019 (C-25/18, EU:C:2019:376, paragraph 29).

24 Order of 19 November 2019 (C-200/19, not published, EU:C:2019:985, paragraph 29).

25 See, for situations where it is not, judgments of 17 May 1994, *Webb* (C-294/92, EU:C:1994:193, paragraph 15), and of 9 June 1994, *Lieber* (C-292/93, EU:C:1994:241, paragraph 15), and order of 5 April 2001, *Gaillard* (C-518/99, EU:C:2001:209, paragraph 18).

47. That notwithstanding, it must be borne in mind, first, that land registers may also contain information unrelated to rights that have effect *erga omnes* and, secondly, that it is apparent from the legal context, as described by the referring court, that the co-ownership itself has its basis in a co-ownership agreement. It cannot be precluded that the reason the agreement can be consulted at the land register is that it is an act on the basis of which co-ownership was established and entered in that register.

48. I would note, in that context, that an action relating to an act by which the right *in rem* registered at the land register was established does not fall under Article 24(1) of Regulation No 1215/2012 where that action is founded on a right *in personam*.

49. To illustrate my meaning, in *Schmidt*,[26] which concerned an application based on the invalidity of the conveyance of ownership and founded, as the Court noted, on a right *in rem* in the immovable property concerned, on which the applicant relied, the Court held that a request to remove the right of ownership from the land register is covered by that provision. It is nevertheless apparent from that judgment that the same did not apply to an application made against another party to the act on the basis of which that ownership should have been conveyed seeking a declaration that the act was invalid on the ground of the incapacity to contract of another party to that act. That application was, according to the Court, based on a right *in personam*.[27]

50. In the same vein, in *Milivojević*[28] the Court held that a request to remove the registration of a mortgage from the land register fell under Article 24(1) of Regulation No 1215/2012. The Court found that the mortgage, once duly constituted in accordance with the procedural and substantive rules laid down by the relevant national legislation, was a right *in rem* which had effects *erga omnes*. By contrast, a claim seeking a declaration of the invalidity of the notarised deed relating to the creation of that mortgage, on the ground that national consumer protection rules had been infringed, did not fall within the exclusive jurisdiction of the courts of the Member State where the immovable property was situated. According to the Court, such a claim is based on a right *in personam* that can only be claimed against the defendant in the dispute before the national court.[29]

51. Accordingly, as regards whether the action at issue in the main proceedings falls under Article 24(1) of Regulation No 1215/2012, the fact that it was possible to consult the co-ownership agreement at the land register does not in my view exempt the national court from the need, for the reasons set out in points 40 to 45 of this Opinion, to verify whether the use established in that agreement is enforceable *erga omnes*. If it is, that action would in principle fall under the rule of jurisdiction established in that provision. It therefore remains only to ascertain whether the objectives of that provision militate in favour of its being interpreted to the effect that an action seeking to ensure adherence to the use established in the co-ownership agreement falls under the same provision only if that use is enforceable *erga omnes*.

2. The objectives of the rule of jurisdiction over rights **in rem** *in immovable property*

52. The Court has repeatedly found that the scope of Article 24(1) of Regulation No 1215/2012 may not be construed extensively and given an interpretation broader than is required by its objectives.[30] Identifying those objectives is therefore crucial in order to define the scope of the rule of jurisdiction laid down by that provision.

26 Judgment of 16 November 2016 (C-417/15, EU:C:2016:881, paragraph 40).

27 Judgment of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraphs 34 and 43, first indent).

28 Judgment of 14 February 2019 (C-630/17, EU:C:2019:123, paragraph 102).

29 Judgment of 14 February 2019, *Milivojević* (C-630/17, EU:C:2019:123, paragraph 101).

30 See, to that effect, recently, order of 15 May 2019, *MC* (C-827/18, not published, EU:C:2019:416, paragraph 20).

53. The Court has held that the fundamental reason for rules of exclusive jurisdiction, in general terms, is the existence of a particularly close connecting factor between the dispute and a Member State that has jurisdiction.[31]

54. As regards exclusive jurisdiction in proceedings which have as their object rights *in rem* in immovable property, it has been established since *Reichert and Kockler*[32] that the courts of the Member State in which the property is situated are the best placed to hear such actions. In its case-law the Court has stated, more specifically, that, first, those actions should be judged according to the rules of that State, thereby reflecting the principle *lex rei sitae*, and, secondly, the disputes to which they give rise frequently necessitate checks, inquiries and expert assessments which have to be carried out there.[33] Attributing jurisdiction to those courts is therefore in the interests of the sound administration of justice.[34]

55. It can therefore be argued that one of the objectives of the rule of exclusive jurisdiction set out in Article 24(1) of Regulation No 1215/2012 is to establish the jurisdiction of the courts of the Member State which has a particularly close connecting factor with the dispute in order to facilitate the sound administration of justice. Nevertheless, to my mind, that objective as defined above, taken in isolation, is merely one of the grounds that explain why the EU legislature chose to make the jurisdiction established under that rule exclusive in nature.

(a) The argument based on examination of non-exclusive rules of jurisdiction

56. It should be noted that rules of non-exclusive jurisdiction also use connecting factors to ensure that a dispute has a connection with the courts with jurisdiction to hear it, and satisfy the interests of the sound administration of justice, but do not have the consequences characteristic of rules of exclusive jurisdiction.

57. As regards Regulation No 1215/2012 specifically, recital 16 of that regulation states that ‘in addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice’. Accordingly, the Court has repeatedly held that the rules of jurisdiction under Article 7(1) and (2) of that regulation are based on the existence of a particularly close connecting factor, which justifies the conferring of jurisdiction on the courts to which that provision relates for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.[35]

58. It is, admittedly, arguable that, unlike the rules of non-exclusive jurisdiction, the rule of exclusive jurisdiction over rights *in rem* in immovable property concerns situations in which the dispute has a particularly close connecting factor with only a single Member State.

31 See also, in general in relation to the rules of exclusive jurisdiction under Article 16 of the Brussels Convention, judgment of 13 July 2000, *Group Josi* (C-412/98, EU:C:2000:399, paragraph 46).

32 Judgment of 10 January 1990 (C-115/88, EU:C:1990:3, paragraph 9). The Court had previously upheld a similar interpretation in relation to actions relating to tenancies of immovable property in its judgment of 14 December 1977, *Sanders* (73/77, EU:C:1977:208, paragraphs 11 and 12).

33 See judgments of 10 January 1990, *Reichert and Kockler* (C-115/88, EU:C:1990:3, paragraph 10); of 17 December 2015, *Komu and Others* (C-605/14, EU:C:2015:833, paragraph 31); and of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraph 29).

34 See, to that effect, judgments of 17 December 2015, *Komu and Others* (C-605/14, EU:C:2015:833, paragraph 30), and of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraph 37).

35 See, recently, on jurisdiction in matters relating to a contract, judgment of 4 October 2018, *Feniks* (C-337/17, EU:C:2018:805, paragraph 36), and, on jurisdiction in matters relating to tort, judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraphs 26 and 27).

59. In principle, that interpretation explains why, in *ČEZ,*[36] the Court held that an *actio negatoria* under Austrian law ('Eigentumsfreiheitsklage'), brought by the owner of immovable property seeking to prevent nuisance caused to that land by the activity of a nuclear power station on the territory of a State neighbouring that in which that land was situated, did not fall under the rule of exclusive jurisdiction concerning rights *in rem* in immovable property. According to the Court, the checks necessary to hear that action had to be carried out both in the Member State where the first immovable property was situated and in that where the second immovable property was situated. It seems to me that the Court was also guided by that fact when it suggested that the action in question fell instead under the rule of jurisdiction in matters relating to tort, under Article 7(2) of Regulation No 1215/2012.[37] That rule of jurisdiction is, inherently, capable of distinguishing between the place where the damage occurred ('Erfolgsort') and the place of the event giving rise to it ('Handlungsort').[38]

60. It is arguable that certain actions that have a closer connection to one single Member State than to any other State fall under the rules of non-exclusive jurisdiction. For example, as regards the courts with jurisdiction in matters relating to a contract under Article 5(1) of the Brussels Convention, the Court has held that a single place of performance for the contractual obligation in question should be identified.[39] However, that provision did not confer exclusive jurisdiction on the courts of that place.

61. Article 24(1) of Regulation No 1215/2012, by contrast, confers exclusive jurisdiction on the courts of a single Member State. That provision has the effect of excluding any other rule of general or alternative jurisdiction laid down by Regulation No 1215/2012 and of depriving the parties of the choice of forum which would otherwise have been theirs under Article 25 of that regulation.[40] Moreover, derogating from the principle set out in Articles 4 and 7 of that regulation, according to which the courts of the Member States have jurisdiction to hear actions brought against persons domiciled in the territory of a Member State, that rule of exclusive jurisdiction applies regardless of the domicile of the parties. Nevertheless, in contrast to Article 7(1) and (2) of Regulation No 1215/2012, that rule of jurisdiction does not limit the ability of each Member State to allocate jurisdiction within its territory.[41] Arguably, if the rationale of Article 24(1) of that regulation was based on the particularly close connection between the subject matter of the dispute and the forum, that connection should dictate not only the international jurisdiction of a Member State but also its domestic jurisdiction.[42]

62. The fact that, first, Article 24(1) of Regulation No 1215/2012 excludes the parties' autonomy to choose the forum they believe most appropriate to hear the dispute and, secondly, jurisdiction is inevitably conferred on a court of a Member State, even if the parties are domiciled in a non-Member State, suggests that there was a considerable underlying interest at stake in the EU legislature's decision to make the jurisdiction established by that article exclusive in nature. Given that jurisdiction is conferred on one of the Member States to the detriment of considerations relating to individuals (the

36 Judgment of 18 May 2006 (C-343/04, EU:C:2006:330).

37 See judgment of 18 May 2006, *ČEZ* (C-343/04, EU:C:2006:330, paragraph 38).

38 Although in certain situations it is impossible to distinguish between the concepts of 'Handlungsort' and 'Erfolgsort' (see my Opinion in *Universal Music International Holding* (C-12/15, EU:C:2016:161, point 38)), the rule of jurisdiction under Article 7(2) of Regulation No 1215/2012 concerns actions in respect of which, in principle, that distinction can be drawn.

39 See, to that effect, judgment of 19 February 2002, *Besix* (C-256/00, EU:C:2002:99, paragraph 29). However, it is not clear that this interpretation can be transposed to Article 7(1)(a) of Regulation No 1215/2012. See judgment of 27 November 2014 of the High Court of Justice (England and Wales), United Kingdom, in Canon Offshore Ltd v GDF Suez E&P Nederland BV [2014] EWHC 3810 (Comm), paragraph 49 et seq. Further, for the development of the case-law on Article 7(1)(b) of that regulation and the proliferation of courts with jurisdiction under that provision, see Beaumont, P., Yüksel, B., 'Cross-Border Civil and Commercial Disputes Before the Court of Justice of the European Union', Beaumont, P., Danov, M., Trimmings, K., Yüksel, B., (eds), *Cross-border Litigation in Europe*, Hart Publishing, Oxford/Portland, 2017, p. 514 et seq.

40 See judgment of 17 December 2015, *Komu and Others* (C-605/14, EU:C:2015:833, paragraph 24).

41 Judgment of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271, paragraphs 48 and 50).

42 See also, to that effect, Lehmann, M., *The Brussels I Regulation Recast*, Dickinson, A., Lein, E., (eds), Oxford University Press, Oxford, 2015, p. 259, paragraph 8.10.

parties), my view is that this is a public interest. A public interest arises, in particular, where there are rights capable of affecting the legal situation of any person (effect *erga omnes*) or of the public in general.[43] Unless an action involves a public interest, there is no requirement for it to be caught by Article 24(1) of Regulation No 1215/2012 in order to meet the objectives of that provision.

(b) Argument based on the **travaux préparatoires** *and academic commentators*

63. The thesis set out in point 62 of this Opinion is borne out by an analysis of the *travaux préparatoires* relating to the rule of exclusive jurisdiction for rights *in rem* in immovable property and academic commentary on that rule.

64. The explanations in Mr P. Jenard's report on the Brussels Convention[44] show that the rule of exclusive jurisdiction for rights *in rem* in immovable property was introduced for several reasons. Those explanations suggest that the rule was introduced above all because, in a number of national systems, such a rule was regarded as a matter of public policy. By contrast, the fact that the inclusion of that rule – equivalent to Article 24(1) of Regulation No 1215/2012 – satisfied the interests of the proper administration of justice was referred to in that report only as a secondary reason for introducing the rule.

65. In the same vein, academic writers, for their part, take the view that an examination of the objectives of Article 24(1) of Regulation No 1215/2012, which are capable of circumscribing the scope of that provision, should not be confined to the objectives relating to a close connection or to the sound administration of justice. One section of academic thinking posits that, for a Member State, the matters to which Article 24(1) of Regulation No 1215/2012 relates are so important that it wants to secure exclusive jurisdiction over them[45] and that the exclusive jurisdiction to hear such proceedings protects the interests of that Member State.[46]

(c) Application to the present case

66. All the foregoing considerations should be borne in mind in ascertaining whether or not the objectives of Article 24(1) of Regulation No 1215/2012 are such as to require the action at issue in the main proceedings to fall under that provision.

67. I would note here that, in his written observations on the second question, SP states that the agreement by which he acquired ownership of an apartment in the immovable property at issue in the main proceedings stipulated that the property purchased was not in a zone designated for second homes and that, in consequence, there is a prohibition on letting for tourist purposes. It is not clear from those observations whether that prohibition is contained only in an agreement or also in the planning rules. In any event, those observations are made in relation to jurisdiction in matters relating to a contract. Furthermore, Ellmes Property Services has stated, less ambiguously, that if Austrian law does not impose any designated use on a property subject to co-ownership, that use can nevertheless be designated in the co-ownership agreement.

43 For the sake of completeness I note that Article 24(1) of Regulation No 1215/2012 also covers tenancies of immovable property. Admittedly, tenancies are not comparable with rights *in rem* in immovable property and the objectives that underpin the exclusive nature of the jurisdiction over tenancies of immovable property can be distinguished from those that underpin jurisdiction over rights *in rem* in immovable property. Nevertheless, according to my interpretation of the case-law, tenancies over immovable property likewise fall under a rule of exclusive jurisdiction for reasons concerning economic, social and political considerations which require mandatory legislation to control the level of rents and protect the rights of tenants, including tenant-farmers. See, to that effect, judgments of 26 February 1992, *Hacker* (C-280/90, EU:C:1992:92, paragraph 8); of 6 July 1988, *Scherrens* (158/87, EU:C:1988:370, paragraph 9), and order of 15 May 2019, *MC* (C-827/18, not published, EU:C:2019:416, paragraph 27).

44 Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1979 C 59, p. 1).

45 See, to that effect, Lehmann, M., op. cit., p. 259, paragraph 8.11.

46 See, to that effect, Van Calster, G., *European Private International Law*, Hart Publishing, Oxford/Portland, 2016, p. 73.

68. That being so, it does not seem to me that the objectives of Article 24(1) of Regulation No 1215/2012 require the action at issue in the main proceedings to fall under that provision where the use agreed in the co-ownership agreement is only enforceable against persons who have consented to be subject to that agreement. I do not believe that, for the Member State where that property is situated, adherence to contractual arrangements between co-owners relating to the designated use of an immovable property is so important that the Member State must secure exclusive jurisdiction over proceedings relating to it. The situation would be different, however, if those arrangements had effects capable of affecting an interest other than the purely private interest of the parties to those contractual arrangements.

69. The fact that a number of checks must be carried out at the place where the immovable property subject to co-ownership is situated, in order to hear an action such as that at issue in the main proceedings, does not undermine that proposition. Indeed, in *Lieber*,[47] after finding that a claim for compensation for the use of immovable property concerned a right *in personam* instead of a right *in rem* that had effect *erga omnes*, the Court did not attach any decisive importance to the fact that the court of the Contracting State in which the property was situated could easily determine the amount of compensation payable. By contrast, the Court stated that it was possible for a court in a Member State other than the State in which the property was situated to consult a local expert in order to obtain the necessary information in order to determine that amount.[48]

3. Conclusion in respect of the first question referred

70. In the light of the foregoing, I propose to answer the referring court's first question to the effect that Article 24(1) of Regulation No 1215/2012 must be interpreted as meaning that an action by a co-owner seeking to prevent the use of an apartment by another co-owner for tourist purposes, on the ground that such use is not that agreed in the co-ownership agreement, only falls under that provision if that use is also enforceable against any person who is not a party to the agreement. It is for the national court to carry out the final appraisal in that respect.

71. In view of the answer that I propose should be given to the first question, it is necessary now to analyse the second question.

C. The second question referred, concerning Article 7(1)(a) of Regulation No 1215/2012

72. By its second question, the referring court enquires whether an action brought by a co-owner seeking to prevent the use of an apartment by another co-owner for tourist purposes, on the ground that such use is not that agreed in the co-ownership agreement, falls under Article 7(1)(a) of Regulation No 1215/2012. If it does, that court seeks to determine the obligation, within the meaning of that provision, on which that action is based. It also enquires whether the place of performance of the obligation is the place where the apartment is situated.

1. Preliminary observations

73. I believe it is important to make the following observations before examining the second question.

47 Judgment of 9 June 1994 (C-292/93, EU:C:1994:241, paragraph 15).
48 Judgment of 9 June 1994, *Lieber* (C-292/93, EU:C:1994:241, paragraph 21).

74. I would note, first, that this question relates expressly to the interpretation of Article 7(1)(a) of Regulation No 1215/2012. The referring court has therefore taken the view that Article 7(1)(b) of that regulation, which relates only to the sale of goods and the supply of services, is not intended to apply to the dispute in the main proceedings. Indeed, there is nothing to indicate that the dispute in the main proceedings concerns the sale of goods or the supply of services.[49] The distinction between the two provisions does have a bearing on which courts have jurisdiction in matters relating to a contract. Article 7(1)(b) of Regulation No 1215/2012 defines autonomously the criteria for a link to exist in relation to contracts for the sale of goods and for the supply of services. By contrast, upholding the principle laid down in *Industrie Tessili Italiana Como*,[50] Article 7(1)(a) of that regulation provides, first, that an action can be brought before the court of the place of performance of the obligation on which the action is based and, secondly, that the place of performance must be determined in accordance with the law governing the contractual obligation in question, according to the conflict-of-law rules of the court seised.[51]

75. Next, I note that SP contends that the co-owners agreed that an Austrian court would have territorial jurisdiction and jurisdiction *ratione materiae* regardless of their domicile. However, the referring court seems not to attach any significance to that agreed term and, in any event, has not asked the Court to clarify how it might influence determination of which court has jurisdiction.

76. Lastly, the wording of the second question to a certain extent contradicts the summary of reasons of the request for a preliminary ruling. The wording of that question could in fact suggest that the referring court is working on the premiss that the action in question necessarily falls under Article 7(1)(a) of Regulation No 1215/2012 and is enquiring how to identify the obligation, within the meaning of that provision, on which that action is based. The summary of reasons of the request for a preliminary ruling, by contrast, seems to imply that the referring court is uncertain whether the action at issue in the main proceedings falls under that provision. In order to provide an answer of use to the referring court and since it is impossible to dispel that ambiguity, I propose to construe the second question as worded in point 72 of this Opinion.

2. Assessment

77. If Article 7(1)(a) of Regulation No 1215/2012 is to apply to the action at issue in the main proceedings, the dispute must be found to fall within the concept of 'matters relating to a contract' within the meaning of that provision. This is an autonomous concept of EU law[52] which the Court initially interpreted in negative terms, that is to say, the concept is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.[53]

49 It seems obvious to me that the dispute in the main proceedings does not in any way concern the sale of goods. Nor does it concern services which, according to consistent case-law, imply that the party providing the services carries out a particular activity in return for remuneration (see judgment of 8 May 2019, *Kerr*, C-25/18, EU:C:2019:376, paragraph 39 and the case-law cited). The remuneration element is absent in the present case.

50 Judgment of 6 October 1976 (12/76, EU:C:1976:133).

51 See, on Article 5(1)(a) of Regulation No 44/2001, whose wording corresponds to that of Article 7(1)(a) of Regulation No 1215/2012, judgment of 23 April 2009, *Falco Privatstiftung and Rabitsch* (C-533/07, EU:C:2009:257, paragraphs 46 to 57).

52 See, recently, judgment of 26 March 2020, *Primera Air Scandinavia* (C-215/18, EU:C:2020:235, paragraph 41).

53 Judgment of 17 June 1992, *Handte* (C-26/91, EU:C:1992:268, paragraph 15).

78. Given that no such situation was ever put before the Austrian courts hearing the case in the main proceedings, the action at issue can fall under that provision. The referring court has in fact stated that the co-owners entered into a contractual relationship voluntarily by virtue of the co-ownership agreement. Furthermore, in the light of the case-law referred to in point 44 of this Opinion, the fact that such a relationship also exists with a co-owner who is not a party to the co-ownership agreement, as concluded by the original co-owners, is irrelevant for the purposes of applying Article 7(1)(a) of Regulation No 1215/2012.[54]

79. As regards identifying 'the obligation in question' within the meaning of that provision, the referring court seems to take the view, to borrow the words it used in the summary of reasons of the request for a preliminary ruling, that use of his co-ownership property in the agreed manner is a contractual obligation of a co-owner. On that basis, for SP, this is a 'positive obligation', that is to say, here, an obligation to use the property in question in accordance with its designated use as laid down in the co-ownership agreement relating to that property. Ellmes Property Services, by contrast, contends that it is an 'obligation not to do something' that is to say, to refrain from letting a co-ownership property for tourist purposes, which is not limited geographically and is characterised by a multiplicity of places where it was or should have been performed. Accordingly, it submits that, in the light of *Besix*,[55]Article 7(1)(a) of Regulation No 1215/2012 does not apply to the dispute in the main proceedings.

80. According to settled case-law, the concept of 'obligation' in Article 7(1)(a) of Regulation No 1215/2012 refers to the obligation corresponding to the contractual right relied upon in support of the action.[56] Since the present case concerns an action for a prohibitory order, my view is that the contractual obligation at issue is an obligation not to do something, specifically, not to change the designated use of a property, in breach of the co-ownership agreement, at the place where the property is situated. That view is borne out by the fact that a co-owner cannot require another co-owner to use its property when it declines to do so.

81. I am however unpersuaded by Ellmes Property Services' thesis according to which the contractual obligation at issue, consisting of an obligation not to do something, has to be performed with no geographical limitation, with the effect that Article 7(1)(a) of Regulation No 1215/2012 does not apply.

82. The circumstances of the present case are not comparable to those which resulted in the judgment in *Besix*.[57] In that case, as can be seen from the wording of the question referred to the Court, the contractual obligation at issue was an undertaking to act exclusively with another party to a contract with a view to submitting a joint bid for a public contract and not to enter into a commitment with another partner. The referring court in that case first of all identified the place of performance of the obligation at issue in line with the principle established in *Industrie Tessili Italiana Como*,[58] according to which that place is determined by the law indicated by the conflict-of-law rules of the court seised. It then established, on the basis of the law indicated as applicable to that obligation, that the obligation had to be performed anywhere in the world.[59] In the present case, by contrast, the referring court has not definitively identified the obligation on which SP's action is based or, with all the more reason, the place where that obligation must be performed.

54 See judgment of 8 May 2019, *Kerr* (C-25/18, EU:C:2019:376, paragraph 29). See, also, order of 19 November 2019, *INA and Others* (C-200/19, not published, EU:C:2019:985, paragraph 29).

55 Judgment of 19 February 2002 (C-256/00, EU:C:2002:99).

56 See, to that effect, judgments of 6 October 1976, *De Bloos* (14/76, EU:C:1976:134, paragraph 13), and of 23 April 2009, *Falco Privatstiftung and Rabitsch* (C-533/07, EU:C:2009:257, paragraph 47).

57 Judgment of 19 February 2002 (C-256/00, EU:C:2002:99).

58 Judgment of 6 October 1976 (12/76, EU:C:1976:133).

59 Judgment of 19 February 2002, *Besix* (C-256/00, EU:C:2002:99, paragraphs 16 to 20).

83. In addition, Ellmes Property Services' analysis that an obligation not to do something, such as that in the present case, does not have a specific place of performance seems to disregard the principle established in *Industrie Tessili Italiana Como.*[60] Indeed, that analysis makes no mention of the solutions arrived at in Austrian law, which that company seems to regard as applicable to the contractual obligation at issue. It is nevertheless not inconceivable that the place of performance of that obligation can be identified in accordance with the law applicable to it and that the place of performance is the place where the apartment subject to co-ownership is situated.[61] It is for the referring court to carry out verifications in that regard, in accordance with the principle established in that judgment.

84. Lastly, for the sake of completeness, I would add that, to my mind, the Court does not have before it the factual or legal material necessary to provide additional clarification on the application of that principle in the circumstances of the present case. Indeed, one of the parties to the dispute in the main proceedings has noted that the co-ownership agreement dates from 1978. It is therefore unlikely that the law applicable to the contractual obligation at issue is identified by any conflict-of-law rules that the Court could interpret.

VI. Conclusion

85. On those grounds, I propose that the Court should reply as follows to the questions referred by the Oberster Gerichtshof (Supreme Court, Austria) for a preliminary ruling:

(1) Article 24(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action by a co-owner seeking to prevent the use of an apartment by another co-owner for tourist purposes, on the ground that such use is not that agreed in the co-ownership agreement, only falls under that provision if that use is enforceable *erga omnes*. It is for the national court to carry out the final appraisal in that respect.

(2) Article 7(1)(a) of that regulation must be interpreted as meaning that, where the use agreed in the co-ownership agreement is not enforceable *erga omnes*, such an action falls within the concept of 'matters relating to a contract' within the meaning of that provision. In those circumstances, the contractual obligation at issue is an obligation not to do something, specifically, not to change the designated use of a property, in breach of the co-ownership agreement, at the place where the property is situated. In order to ascertain whether the place of performance of that obligation is the place where the apartment subject to co-ownership is situated, it is for the national court to determine that place of performance in accordance with the law governing that obligation on the basis of the conflict of law rules of the court seised.

60 Judgment of 6 October 1976 (12/76, EU:C:1976:133).

61 Indeed, there are many arguments that suggest to me that the applicable law should recognise the relevance of the location of a property whose designated use cannot be changed. That outcome is also warranted on the basis of considerations relating to the connection between the dispute and the court with jurisdiction and those concerned with preventing overuse of the *forum actoris*. However, given the nature of the reference to substantive law, on which Article 7(1)(a) of Regulation No 1215/2012 is based, it cannot be ruled out that the applicable law may determine the place of performance of the contractual obligation at issue by reference to the domicile of a debtor or creditor. See, to that effect, Mankowski, P., 'Article 7', Magnus, U., Mankowski, P., (eds), *Brussels I bis Regulation*, Otto Schmidt, Cologne, 2016, p. 253, paragraph 208.