OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 10 December 1991 *

Mr President,
Members of the Court,

1. Article 16(1) of the Brussels Convention [1] gives exclusive jurisdiction in proceedings which have as their object tenancies of immovable property to the courts of the Contracting State in which the property is situated.

2. That provision has once again been submitted to the Court for interpretation by the Landgericht Köln in connection with a contract for the letting of a holiday home.

3. By a contract dated 5 April 1989, formally described as a 'tenancy agreement', Euro-Relais of Cologne, a travel organizer, undertook to make available for the use of Mrs Hacker, who is domiciled in Cologne, [2] a holiday home in the Netherlands which was not owned by the agency. The holiday home, which was chosen from a catalogue, was to be let for a fortnight, at a price of DM 1 520. The agency also undertook to make bookings for the ferry crossing to the island of Ameland.

4. Although the catalogue specified that the size of the holiday home was 100 square metres, according to Mrs Hacker it was only 55 square metres in area, which meant that she was obliged to rent additional accommodation locally at a cost of DM 288. Mrs Hacker was not satisfied with the arrangements and finally cut short her holiday.

5. In the Amtsgericht and then the Landgericht Köln Mrs Hacker claimed DM 760 as a reduction in the cost of the holiday, damages representing the cost of renting the extra room, and DM 3 046.35 damages as compensation for lost holiday enjoyment on behalf of herself and her husband.

6. The Landgericht Köln asks the Court essentially:

(1) if there is a tenancy agreement within the meaning of Article 16(1) of the Convention in circumstances such as those arising in this case;

(2) if so, does Article 16(1) also apply for the purpose of establishing which court has jurisdiction over claims such as those made by the plaintiff in the main proceedings as described above.

* Original language: French.

1 — Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, hereinafter referred to as the Convention, as amended by the 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 (OJ L 304, p. 77).

2 — as are the six persons who accompanied her.

7. The Court has already been called upon to interpret the concept of 'tenancies of immovable property' within the meaning of Article 16(1) of the Convention three times. The Court established the principle that the concept should be *interpreted independently* on the basis of the Convention itself, without reference to the law applicable under the conflict rules of the national court hearing the main proceedings. [3]

8. Only if there is *uniformity of interpretation* will *uniform application* of the Convention in all the Contracting States be ensured in this area and the 'free movement of decisions' which constitutes the primary objective of the Convention guaranteed.

9. As regards the method of interpretation the Court will recall the particularly instructive formula it offered in its judgment in *LTV* v *Eurocontrol*: [4]

'In the interpretation of the concept "civil and commercial matters" for the purposes of the application of the Convention ..., reference must not be made to the law of one of the States concerned but, *first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems*'. [5]

10. Article 16 appears in Title II, Section 5 'Exclusive jurisdiction'. It lists a series of exceptions to the basic principle set out in the first paragraph of Article 2 of the Convention, according to which persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

11. As the Jenard Report points out, [6] Article 16 provides for **exclusive jurisdiction** which may not be departed from either by an agreement purporting to confer jurisdiction on the courts of another Contracting State (Article 17) or by an implied submission to the jurisdiction (Article 18). Under Article 19 of the Convention any court of a State other than the State whose courts have exclusive jurisdiction pursuant to Article 16 must declare of its own motion that it has no jurisdiction. Finally, a foreign decision given in disregard of exclusive jurisdiction will not be recognized (Article 28) or enforced (Article 34).

12. In its judgment in *Sanders* [7] the Court emphasized that:

'the assignment, in the interests of the proper administration of justice, of exclusive jurisdiction to the courts of one Contracting State in accordance with Article 16 of the Convention results in depriving the parties of the choice of the forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of the domicile of any of them';

and that

3 — Judgements in Case 73/77 *Sanders* v *Van der Putte* [1977] ECR 2383; Case 241/83, *Rösler* v *Rottwinkel* [1985] ECR 99; Case 158/87 *Scherrens* v *Maenhout* [1988] ECR 3791.

4 — Case 29/76, [1976] ECR 1541.

5 — Paragraph 5, my emphasis.

6 — Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ C 59 of 5 March 1979, p. 34).

7 — Case 73/77, cited above.

'Having regard to that consideration the provisions of Article 16 must not be given a wider interpretation than is required by their objective.' [8]

The Court concluded that the concept of a tenancy did not cover a contract relating to a business carried on in immovable property rented from a third person by the lessor.[9]

13. However, precisely in a case where there was a contract for the letting of a holiday home, the Court held in *Rösler*[10] that Article 16(1) of the Convention

'applies to all lettings of immovable property, even for a short term and even where they relate only to the use and occupation of a holiday home';[11]

and that disputes concerning the obligations of the landlord or of the tenant under the lease fell within the exclusive jurisdiction of the courts of the State in which the property was situated except disputes

'which are only indirectly related to the use of the property let, such as those concerning the loss of holiday enjoyment and travel expenses'.[12]

14. In that case *two private individuals*, both domiciled in Germany, concluded a letting agreement, which they expressly stated was to be governed by German law, for a holiday villa in Italy. It was agreed that the letting would be for four persons for a period of three weeks and that the tenant was not permitted to accommodate visitors. The owner, who spent his holiday in the same villa at the same time as the tenant, brought proceedings against the tenant in the courts of his domicile on the ground that the clauses in the contract had not been complied with, in particular in respect of the number of persons to be accommodated.

15. The Court stated:

'The *raison d'être* of the exclusive jurisdiction conferred by Article 16(1) on the courts of the Contracting State in which the property is situated is the fact that tenancies are closely bound up with the law of immovable property and with the provisions, generally of a mandatory character, governing its use, such as legislation controlling the level of rents and protecting the rights of tenants, including tenant farmers.

Article 16(1) seeks to ensure a rational allocation of jurisdiction by opting for a solution whereby the court having jurisdiction is determined on the basis of its proximity to the property since that court is in a better position to obtain first-hand knowledge of the facts relating to the creation of tenancies and to the performance of the terms thereof.

The question submitted by the Bundesgerichtshof is designed to ascertain whether

8 — Paragraphs 17 and 18, my emphasis.
9 — Paragraph 19.
10 — Case 241/83, cited above.
11 — Paragraph 25.
12 — Paragraph 28.

exceptions may be made to the general rule laid down in Article 16 owing to the special character of certain tenancies, such as short-term lettings of holiday homes, even though the wording of that article provides no indication in that respect.

It must be emphasized in this regard that (...) inherent in any exception to the general rule laid down in Article 16(1) is the risk of further extensions which might call in question the application of national legislation governing the use of immovable property.' [13]

16. It follows that when two nationals of a single Member State, both domiciled in that State, make a tenancy agreement for a holiday home in another Member State, actions arising from that tenancy fall within the exclusive jurisdiction of the courts of the latter State.

17. The Court's judgment failed, however, to dispel the unease [14] caused in the national legal systems and academic writing by the provision contained in Article 16 which is general and does not make distinctions.

18. In their commentary on the Brussels Convention, [15] Gothot and Holleaux had already stated: 'It may well be thought excessive to give exclusive jurisdiction over any dispute whatsoever arising from a tenancy of immovable property to the courts of the country where the immovable property is situated when the dispute will sometimes be purely a matter for the ordinary law governing contracts or rentals'. [16]

19. Speaking at a seminar on the Brussels Convention held in Luxembourg on 11 and 12 March 1991, Mr M. Carpenter concluded on the subject of Article 16 'it may be that parties to such lettings (of holiday accommodation) will increasingly resort to arbitration in future to avoid the inconveniences caused by Article 16'. [17]

20. Noting the solution arrived at in the *Rösler* judgment, the States who were parties to the San Sebastian Convention 'on the accession of Spain and Portugal' of 26 May 1989 decided to insert a new subparagraph (b) in Article 16(1) concerning short-term tenancies, in particular tenancies for holiday purposes. [18]

21. That Convention, which has not yet entered into force, provides in the new Article 16(1)(b) for the concurrent jurisdiction of the courts of the defendant's domicile 'in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months (...) provided that the landlord and the tenant are natural persons and are domiciled in the same Contracting State'. [19]

22. The exclusive jurisdiction rule contained in Article 16(1) of the Brussels Convention is applicable 'regardless of domicile' and links jurisdiction to a territory: the territory where the property is situated.

13 — Ibid., paragraphs 19 to 22.

14 — The phrase is Mr Rauscher's, NJW 1985, p. 893.

15 — Published before the *Rösler* judgment.

16 — La Convention de Bruxelles du 27 août 1968, Paris 1985, p. 85.

17 — Mr M. Carpenter's speech, on p. 12 of the roneotyped English version.

18 — See the de Almeida Cruz, Desantes Real and Jenard Report of 26 May 1989 (OJ C 189 of 28 July 1990, p. 46).

19 — OJ L 285, p. 1.

23. It follows that if there was a departure from that rule the Convention might not be applied where, for instance, all the parties to the dispute were domiciled in the same Contracting State.

24. As the law stands at present, should the contract whereby a travel firm makes holiday accommodation available to an individual for a limited period and undertakes at the same time to make connected arrangements be characterized as a tenancy within the meaning of Article 16 of the Brussels Convention?

25. It should first be noted that, as a business organizing holiday accommodation, the agency undertakes in that type of contract more than just to make a holiday home available. It seems clear to me that the travel agency's obligations are not at an end once it has made the holiday home available.

26. All the other services provided by the agency must be taken into account when characterizing the contract: advising the client, booking the chosen villa, making ferry bookings, providing cancellation insurance, paying the rental to the owner (avoiding the need for the holidaymaker to do so), etc. That multitude of services is reflected in the fact that the price paid by the holidaymaker represents not merely the rent but also the cost of insurance, 'booking fees' and the agency's remuneration.

27. There is thus a complex contract that includes certain services which do not fall under the heading of a tenancy and are not bound up with that concept.

28. It does not therefore appear that the specific feature of such a contract necessarily lies in the nature of what is rented. In particular it does not confer on the holidaymaker the benefit of legislation protecting lessees. [20]

29. If the holidaymaker were to benefit from protective legislation it would be in order to put him back on equal terms with the business rather than to safeguard his right to accommodation or to stay in the property, for instance. The adoption by the Council [21] of a directive on package travel, package holidays and package tours is significant in this connection.

30. With regard to the jurisdiction *ratione loci* it might well be considered that disputes concerning whether the accommodation was in conformity with that offered in the catalogue, cancellation insurance, the validity of clauses limiting liability or the duty to give professional advice fall within the jurisdiction of the courts where the contract was negotiated and concluded rather than the courts for the place in which the property is situated. The same is true of the price: as the Landgericht Frankfurt judiciously observed, [22] the price of accommodation is often a catalogue price determined by the state of supply and demand in travel agencies rather than by the state of the rental market in the place where the property is situated.

31. In circumstances such as those that arose in this case, there is not, therefore, a *tenancy* within the meaning of Article 16 of

20 — The essential provisions of which, such as the right to have the lease renewed and to have the property maintained and the conditions under which the lease may be terminated, are not applicable to short-term stays.

21 — Directive 90/314/EEC of 13 June 1990 (OJ L 158, p. 58).

22 — Judgment of 10 May 1982, NJW 1982, p. 1942.

the Brussels Convention which makes a strong link between the rules on tenancies and those on rights *in rem.* [23] It is striking to note that in this case the claims of the plaintiff in the main proceedings are *personal* claims in contractual liability which, moreover, in no sense put at issue the status of the property.

32. Finally, it should be remembered that because Article 16 provides for exclusive jurisdiction, the Court interprets the article narrowly, stating in the *Sanders* [24] judgment that it applies only

'to tenancies of immovable property *properly so-called*, that is to say, in particular, 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'. [25]

The Court held that Article 16 does not apply

'where the *principal aim* of the agreement is of a different nature'. [26]

33. I do not therefore think it possible to describe as a tenancy, within the meaning of Article 16 of the Convention, a contract in which the principal aim is the provision of a *bundle* of services and to make subject to the exclusive jurisdiction of the courts where the property is situated a contract whose 'centre of gravity' is the place where it was concluded.

34. The Landgericht Köln asks solely in the event that the Court should find that there was a tenancy within the meaning of Article 16(1) of the Convention whether a distinction should be drawn between the different claims put forward by the plaintiff in the main proceedings. I shall therefore examine the question only in the alternative. The Court will recall that the plaintiff is seeking a reduction in the price because of a shortcoming in the holiday home (which was smaller in area than had been specified), claiming damages for having had to rent an extra room and compensation for a disturbed holiday.

35. In the *Rösler* case the Court held:

'All disputes concerning the obligations of the landlord or of the tenant under a tenancy, in particular those concerning the existence of tenancies or the interpretation of the terms thereof, their duration, the giving up of possession to the landlord, the repairing of damage caused by the tenant or the recovery of rent and of incidental charges payable by the tenant, such as charges for the consumption of water, gas and electricity, fall within the exclusive jurisdiction conferred by Article 16(1) of the Convention on the courts of the State in which the property is situated. *On the other hand, disputes which are only indirectly related to the use of the property let, such as those concerning the loss of holiday enjoyment and travel expenses, do not fall within the exclusive jurisdiction conferred by that article.*' [27]

23 — Note the actual wording of Article 16(1), which juxtaposes 'rights *in rem*' in with tenancies of immovable property.

24 — Case 73/77, cited above.

25 — Paragraph 15, my emphasis; it should be noted that such disputes are precisely those where legislation protecting the lessee will come into play.

26 — Paragraph 16, my emphasis.

27 — Case 241/83, cited above, paragraph 29, my emphasis.

36. The action which the Court considered in that case to be inseparable from the tenancy agreement was brought by the owner who, having spent his holiday at the same time as the tenant in the villa that he had let, complained about the noise and excessive number of people in the villa. He was seeking compensation for 'lost holiday enjoyment' as a *holidaymaker* staying in the same villa as the tenant, not as its owner.

37. Conversely, in this case all the claims before the Landgericht Köln are made by the tenant against the travel organizer that let the property on the ground that it failed to perform its contractual obligations. The claims for a reduction in the rent and for damages, in so far as they relate to renting an additional room, must be regarded as claims directly connected with the use of the property let. Similarly, the claim for damages for a disturbed holiday is here also linked to the failure by the travel organizer to perform its obligation to make available to the tenant property that conformed to what had been agreed. There is thus a close link between that claim and the letting agreement.

38. All the claims put forward by the plaintiff in the main proceedings therefore relate directly to the use of the property let within the meaning of the Court's judgment in *Rösler*.

39. Finally we should not underestimate the major practical difficulties which could result from a 'Zuständigkeitssplitting',[28] referred to by the Landgericht Köln in its decision: the risk of conflicting decisions, the risk of both courts declining jurisdiction with no possibility of any court resolving the issue, and in addition the excessive costs and burden on the parties.

40. The Court will recall that in the *Peters* judgment it stated:

'multiplication of the bases of jurisdiction in one and the same type of case is not likely to encourage legal certainty and effective legal protection throughout the territory of the Community. The provisions of the Convention should therefore be interpreted in such a way that the court seised is not required to declare that it has jurisdiction to adjudicate upon certain applications but has no jurisdiction to hear certain other applications, even though they are closely related.'[29]

41. The Court concluded that obligations in regard to the payment of a sum of money which have their basis in the relationship existing between an association and its members by virtue of membership are 'matters relating to a contract' within the meaning of Article 5(1) of the Convention, whether or not the obligations in question arise simply from the act of becoming a member or from that act in conjunction with one or more decisions made by organs of the association.

42. Consequently I consider that in the event that the Court should not share my

28 — 'Splitting of jurisdiction.'

29 — Case 34/82 *Peters* v *ZNAV* [1983] ECR 987, paragraph 17.

opinion but takes the view that a contract such as that concluded by the parties to the main proceedings should be regarded as a tenancy within the meaning of Article 16(1) of the Convention, all the plaintiff's claims are sufficiently connected with that tenancy and therefore fall within the ambit of that article.

43. I therefore conclude that the Court should hold that:

(1) Article 16(1) of the Brussels Convention should be interpreted as not applicable to a contract concluded in a Contracting State between a travel organizer and a client, both of whom are domiciled in that State, which obliges the travel organizer, amongst other services provided, to procure for the use of the client for a few weeks holiday accomodation — whether or not the travel organizer owns the accommodation — situated in another Contracting State;

(2) in the alternative, if Article 16 of the Convention does apply to such a contract, it must also apply to the claim for a reduction in the cost linked to a shortcoming in the holiday home, to the claim for damages for having had to rent an additional room and to the claim for compensation for a disturbed holiday.