JURISDICTION AND APPLICABLE LAW TO CLAIMS RELATED TO THE PAYMENT OF CONTRIBUTIONS TO THE BUDGET OF AN ASSOCIATION OF PROPERTY OWNERS FOR THE MAINTENANCE OF THE COMMUNAL AREAS OF A BUILDING. COMMENT ON THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION OF 8 MAY 2019, *BRIAN ANDREW KERR V PAVLO POSTNOV AND NATALIA POSTNOVA*, C-25/18

JURISDICCIÓN Y LEY APLICABLE A LAS RECLAMACIONES RELACIONADAS CON EL PAGO DE LAS CONTRIBUCIONES AL PRESUPUESTO DE UNA COMUNIDAD DE PROPIETARIOS PARA EL MANTENIMIENTO DE LAS ZONAS COMUNES DE UN EDIFICIO. COMENTARIO A LA SENTENCIA DEL TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA DE 8 DE MAYO DE 2019, *BRIAN ANDREW KERR CONTRA PAVLO POSTNOV Y NATALIA POSTNOVA*, C-25/18

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Recibido: 14.06.2019 / Aceptado: 05.07.2019
DOI: https://doi.org/10.20318/cdt.2019.4978

Abstract: This comment on the judgment C-25/18 analyses the characterisation of the outstanding amounts payable by the owners of an apartment to the manager of the association of owners of the building in concept of maintenance costs of communal areas. The Court of Justice of the European Union identifies the court having jurisdiction according to Article 7(1)(a) (matters related to contract) of the Brussels I Recast Regulation and the applicable law according to Articles 4(1)(b) (provision of services). However, Article 4(1)(c) (rights *in rem* in immovable property) of the Rome I Regulation is not applicable.

Keywords: actions in contract, provision of services, rights in rem, Court of Justice of the European Union, jurisdiction, applicable law, Brussels I Recast Regulation, Rome I Regulation, Rome II Regulation.

Resumen: Este comentario sobre la sentencia C-25/18 analiza la caracterización de las cantidades pendientes de pago por los propietarios de un apartamento al gerente de la asociación de propietarios del edificio en concepto de gastos de mantenimiento de las zonas comunes. El Tribunal de Justicia de la Unión Europea identifica al tribunal competente según el artículo 7(1)(a) (asuntos relacionados con el contrato) del Reglamento de Bruselas I y la legislación aplicable según el artículo 4(1)(b) (prestación de servicios).

* I would like to thank Professor J. CARRASCOSA GONZÁLEZ (Chair Professor of Private International Law at the University of Murcia) and Professor J. J. ÁLVAREZ RUBIO (Chair of Private International Law at the University of the Basque Country) for their advice during the preparation of this comment on the judgment.

Sin embargo, el artículo 4(1)(c) (derechos reales sobre bienes inmuebles) del Reglamento Roma I no es aplicable.

Palabras clave: acciones contractuales, prestación de servicios, derechos reales, Tribunal de Justicia de la Unión Europea, jurisdicción, legislación aplicable, Reglamento refundido de Bruselas I, Reglamento Roma I, Reglamento Roma II.

I. Introduction

1. The preliminary ruling of the First Chamber of the Court of Justice of the European Union (CJEU) of 8 May 2019, *Brian Andrew Kerr v Pavlo Postnov and Natalia Postnova*, has set out the criteria on how the obligation of the owners to pay annual financial contributions to the budget of the association of property owners based on the decisions taken between 2013 and 2017 by majority of its members. The ruling sheds light in how the obligations arising out of an association of property owners without legal personality may be enforced.

2. The analysis focuses on the enforcement of the collective decisions of a general meeting of property owners related to the maintenance of the communal areas of a property building located in Bansko, Bulgaria. The article focuses on Article 7(1)(a) dealing with the special jurisdiction in matters related to contract and the law applicable under Article 4(1)(b) and (c) in relation to the concepts of contracts for the provision of services and contracts related to a right *in rem* in an immovable property.

II. The facts of the case

3. The apartment owners, Mr. Postnov and Ms. Postnova, domiciled in Dublin (Ireland) have not entirely paid the contributions to Mr. Kerr, the building manager. Mr. Kerr started proceedings at the Rayonen sad Razlog, the District Court of Razlog in Bulgaria, seeking an order to be paid those contributions plus a compensation for delay.

4. The District Court of Razlog considered that the exceptions of Article 4(1) of the 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 (hereafter Brussels I Recast Regulation)[1] did not provide the grounds for special jurisdiction in order to hear the case since Mr. Postnova and Ms. Postnova were domiciled in Dublin. Mr. Kerr appealed against such decision before the referring court. The Regional Court of Blagoevgrad (*Okrazhen sad – Blagoevgrad*) stayed the proceedings while referring the following questions concerning the legal nature of the decisions taken by an association of property owners without legal personality for a preliminary ruling to the CJEU (paragraph 16):

> '(1) Do the decisions of unincorporated associations created by operation of law due to the special ownership of a right, which are taken by a majority of their members but which bind all of them, including those who did not cast a vote, form the basis of a "contractual obligation" for the purposes of determining international jurisdiction pursuant to Article 7(1)(a) of [the Brussels I Recast Regulation]?

[1] 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 [2012] OJ L351/1.

(2) If the first question is answered in the negative: are the rules on determining the applicable law for contractual relationships under Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereafter Rome I Regulation)[2] applicable to such decisions?

(3) If the first and the second questions are answered in the negative: are the provisions of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereafter Rome II Regulation)[3] applicable to such decisions, and which of the non-contractual bases of liability referred to in that regulation is relevant here?

(4) If the first or second question is answered in the affirmative: should the decisions of unincorporated associations regarding expenditure for building maintenance be regarded as constituting a "contract for the provision of services" within the meaning of Article 4(1)(b) of Regulation No 593/2008 or as a contract relating to a "right *in rem*" or a "tenancy" within the meaning of Article 4(1)(c) of that regulation?'

III. The legal grounds of the decision

1. The first question

A) Jurisdiction under Article 7(1)(a) of the Brussels I Recast Regulation

5. The first question is answered by the CJEU affirming that payment obligations agreed by the general meeting of the owners by "the majority of its members" of a property in a building with no "legal personality" and "specifically established by law in order to exercise certain rights" are defined as 'matters relating to a contract' within the meaning of Article 7(1)(a) of the Brussels I Recast Regulation (paragraph 17). According to Article 7(1) of the Brussels I Recast Regulation:

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

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

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply then point (a) applies";

6. The substantive scope and the provisions [of the Rome I Regulation] should be consistent with the Brussels I Recast Regulation according to Recital 7 of the Rome I Regulation.[4] the Rome I Regulation in its Recital 17 ensures that "as far as the applicable law in the absence of choice is concerned, the concept of 'provision of services' and 'sale of goods' should be interpreted in the same way as when applying [Article 7(1)(b) of the Brussels I Recast Regulation] in so far as sale of goods and provision of services are covered by that Regulation".

7. The CJEU´s interpretation of Article 5(1) of the Brussels I Regulation applies to Article 7(1) of the Brussels I Recast Regulation.[5] The court´s criterion has been recently confirmed in paragraph 27 of the *Kareda v. Benko* judgment.[6]

[2] The Rome I Regulation (EU Regulation 593/2008) came into force on 17 December 2009 and is applicable to all EU Member States except Denmark.

[3] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ 2007 L 199/40 (Rome II Regulation).

[4] *Vid. ad ex*. the judgment of 15 March 2011, *Koelzsch v Grand Duchy of Luxembourg*, C-29/10, EU:C:2011:151.

[5] Paragraphs 18-20 of the judgment referring to paragraph 31 of the judgment of the CJEU of 15 November 2018, *Hellenische Republik v Leo Kuhn*, C-308/17. EU:C:2018:911.

[6] Judgment of 15 June 2017, *Saale Kareda v. Stefan Benkö*, C-249/16, EU:C:2017:472.

8. The *Kareda v. Benko* involved a loan repayment between two parties to a bank to fund the purchase of a property in Austria, constitutes a recent example of interpretation of the second indent of Article 7(1)(b) of the Brussels I Recast Regulation. Mr. Benko sued Ms. Kareda claiming the reimbursement of the loan before the Regional Court of St. Pölten, Austria. The court declared that it had no territorial jurisdiction on the basis that the domicile of Ms. Kareda, the debtor, was in Estonia.

9. Mr. Benko brought an appeal against the previous decision before the Higher Regional Court of Vienna on the basis that jurisdiction had to be determined according to the place of performance of the obligation to repay the loans. Ms. Kareda appealed at the Austrian Supreme Court seeking to establish that the Austrian courts had no jurisdiction. The court referred the case for preliminary ruling to the CJEU. Austria was the place of performance of the obligation. The CJEU held that Articles 7(1)(a) and 7(1)(c) were not applicable to the case. The two debtors were jointly and severally liable for the repayment obligation. The court where the lender had its registered office in Austria had jurisdiction under the second indent of Article 7(1)(b) of the Brussels I Recast Regulation.[7] Moreover, it was suggested that contracts of reinsurance or letters of credit extended by the banks can be defined as contracts of financial services.[8]

10. The general rule of the domicile of the defendant contained in Article 4 of the Brussels I Recast Regulation can only be excepted if the grounds for "special and exclusive jurisdiction" are met (paragraph 21)[9] and shall be "interpreted restrictively" (paragraph 22).[10] "The conclusion of a contract is not a condition for the application" of Article 7(1)(a) of the Brussels I Recast Regulation according to the CJEU´s case-law (paragraph 23).[11] "Contractual matters" in the context of Article 7(1)(b) require the "free commitment of one party to another" (paragraphs 24 and 25).[12] Moreover, it is confirmed "that membership of an association creates between the members close links of the same kind as those which are created between the parties to a contract" (paragraph 26).[13]

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[7] A. Arzandeh, "International Private Law. Cases", *Lloyd's Maritime and Commercial Law Quarterly*, 2018, pp. 163-164.

[8] P. Stone, *Stone on Private International Law in the European Union*, 4th ed., Elgar European Law and Practice series, 2018, at [4.44].

[9] "According to the Court's settled case-law, the jurisdiction provided for in Article 4 of Regulation No 1215/2012, namely that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, constitutes the general rule. It is only by way of derogation from that general rule that the regulation provides for rules of special and exclusive jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Member State" (judgments of 7 March 2018, *E.ON Czech Holding AG v Michael Dědouch and Others*, C-560/16, EU:C:2018:167, paragraph 26, of 12 September 2018, *Helga Löber v Barclays Bank PLC*, C-304/17, EU:C:2018:701, paragraph 18, of 13 July 2006, *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH*, C103/05, EU:C:2006:471, paragraph 22, and of 12 May 2011, *Berliner Verkehrsbetriebe (BVG), Anstalt des* ***öffentlichen*** *Rechts v JPMorgan Chase Bank NA, Frankfurt Branch*, C144/10, EU:C:2011:300, paragraph 30).

[10] "The Court has already held that those special jurisdictional rules must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by the regulation" (judgments of 18 July 2013, ÖFAB, Östergötlands *Fastigheter AB v Frank Koot and Evergreen Investments BV*, C-147/12, EU:C:2013:490, paragraph 31, and of 14 July 2016, *Granarolo SpA v. Ambrosi Emmi France SA,* C-196/15, EU:C:2016:559, paragraph 18).

[11] See the judgments of 28 January 2015, *Harald Kolassa v Barclays Bank plc*, C-375/13, EU:C:2015:37, paragraph 38, and of 21 April 2016, *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH v Amazon EU Sàrl and Others*, C-572/14, EU:C:2016:286, paragraph 34.

[12] Judgment of 17 October 2013, *OTP Bank Nyilvánosan Működő Részvénytársaság v Hochtief Solution AG*, C519/12, EU:C:2013:674, paragraph 23. *Vid.* the judgments of 17 June 1992, *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA*, C-26/91, EU:C:1992:268, paragraph 15, of 27 October 1998, *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002*, C-51/97, EU:C:1998:509, paragraph 17, of 17 September 2002, *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, C-334/00, paragraph 23; of 5 February 2004, *Frahuil SA v Assitalia SpA*, C-265/02, EU:C:2004:77, paragraph 24, of 20 January 2005, Petra *Engler v Janus Versand GmbH*, C-27/02, EU:C:2005:33, paragraph 50, of 18 July 2013, ÖFAB, paragraph 33, of 14 March 2013, Česká *spořitelna, a.s. v Gerald Feichter*, C-419/11, EU:C:2013:165, paragraph 47 and of 21 April 2016, *Austro-Mechana*, C-572/14, EU:C:2016:286, paragraph 36.

[13] See the judgments of 22 March 1983, *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging*, C-34/82, EU:C:1983:87, paragraphs 13 and 15, of 10 March 1992, *Powell Duffryn plc v Wolfgang Petereit, C-214/89*, EU:C:1992:115, paragraph 15, and of 20 January 2005, *Engler*, paragraph 47.

11. The voluntary acquisition of the apartment entails the "ownership shares of the communal areas of the property" that are managed by the association of property owners according to Bulgarian law. The "arrangements for management of the communal areas of the building" are, where applicable, governed by contract" (paragraph 27 of the judgment and point 54 of the Opinion).

12. The co-owners freely joined the association by purchasing their apartment. The act of purchase of the apartment or the decision of the association of owners of property does not interfere in the application of Article 7(1)(a) of the Brussels I Recast Regulation (paragraph 28).[14] The decision of that association is binding on the property owners even if they did not cast their vote since they "agreed to be subject to all the provisions" adopted, "in accordance with the provisions of the applicable national law" (paragraph 29).[15]

B) The possibility of finding jurisdiction based on Articles 24(1) and 24(2) of the Brussels I Recast Regulation

13. "The rights *in rem* in immovable property also relate to Article 24(1) of the Brussels I Recast Regulation" under "an autonomous and strict interpretation" with *erga omnes* effect.[16] The CJEU´s case-law also requires that the "content and extent" of that right to be "the object of the proceedings".[17] It should be taken into consideration that the manager brought an action *in personam*. "The rights *in rem* of the defendant co-owners of the commonhold […] remain unaffected" (points 33-39 of the Advocate General´s Opinion).

14. The Bulgarian court did not decide on the action to secure enforcement brought by the appellant that may affect the rights *in rem* (the ownership share) of the defendants by applying Article 397(1) of the Bulgarian Code of civil procedure. Advocate General Kokott refers to the court´s case-law where "an action for the termination of co-ownership in undivided shares of immovable property by way of sale, by an appointed agent, falls under *in rem* jurisdiction".[18] Jurisdiction can be found on the application of the first subparagraph of Articles 24(1) of the Brussels I Recast Regulation. Equally, the Bulgarian court may find jurisdiction of based "on the secured monetary claim under Article 8(4) of that Regulation" (point 40 of the Opinion). The Advocate General clarifies that "by an association of property owners cannot be equated with use of a property and, for that reason, it can be ruled out that the main proceedings have as their object 'tenancies of immovable property' (point 41 of the Opinion)".

15. The judgment does not reflect the discussion of Advocate General´s Opinion by stating that "in so far as the action which gave rise to the dispute in the main proceedings does not fall within the scope of any of those actions, but is based on the rights of the association of property owners to payment of contributions relating to the maintenance of the communal areas of a building, that action must not be regarded as relating to a contract for a right *in rem* in immovable property, within the meaning of Article 4(1)(c)" of the Rome I Regulation (paragraph 38 of the judgment).

16. Van Calster[19] warns about the variation of the object of the rights and obligations enshrined in Article 24 of the Brussels I Recast Regulation and "the prospect of adding an enforcement claim to

[14] Advocate General Kokott refers to *Martin Peters* case, paragraph 18, by analogy.

[15] Referring to the judgment of 10 March 1992, *Powell Duffryn plc v Wolfgang Petereit*, C-214/89, EU:C:1992:115, paragraph 19.

[16] Judgment of 16 November 2016, *Wolfgang Schmidt v Christiane Schmidt*, C417/15, EU:C:2016:881, paragraph 31, and the judgment of 17 December 2015, *Virpi Komu and Others v Pekka Komu and Jelena Komu*, C605/14, EU:C:2015:833, paragraph 27.

[17] *Schmidt* case, paragraph 30; *Komu and Others* judgment, paragraph 26.

[18] Referring to the *Komu and Others* case.

[19] G. van Calster, "Kokott AG in Kerr v Postnov(a): How house association meetings turn into a jurisdictional and applicable law potpourri", *Conflict of Laws / Private international law* blog, 12 February 2019, accessed on 10 June 2019: <https://gavclaw.com/2019/02/12/kokott-ag-in-kerr-v-postnova-how-house-association-meetings-turn-into-a-jurisdictional-and-applicable-law-potpourri/>

an otherwise contractual action" that may lead to abusive *forum shopping*. He points out that the *forum societatis* is not engaged since there is no exclusive jurisdiction of the courts where companies, legal persons or associations have their seat according to Article 24(2) of the Brussels I Recast Regulation in respect of the validity of the decisions taken by ´unincorporated association`, i.e. an association of property owners that has no legal personality in the current case (points 42 and 43 of the Opinion).

17. When the *lex societatis* exception of Article 1(2)(f) of the Rome I Regulation is triggered the residual conflict-of-laws method will determine the place of obligation.[20] The Advocate General believes that such exception is applicable to the case (points 60 and 64 of the Opinion). However, the CJEU contradicts her Opinion by stating that "that the exclusion from the scope of Regulation No 593/2008 of matters relating to questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, set out in Article 1(2)(f) of that regulation, applies not to a request from an unincorporated association, in this case that constituted by the owners of property in an apartment building represented by the building manager, concerning the payment of annual financial contributions to the budget of the association of property owners relating to that building, which falls within the scope of the general law on contractual obligations, but rather exclusively to the structural aspects of those companies and other bodies, corporate or unincorporated" (paragraph 33).

18. The Court follows the Giuliano and Lagarde report[21] to justify that "the exclusion of those questions from the scope of application [of the Rome I Regulation] affects all the complex acts which are necessary to the creation of a company or firm and to the regulation of its internal organisation and winding-up, that is to say acts which fall within the scope of company law (paragraph 34 of the judgment)".[22]

2. The second and third questions

19. The CJEU does not provide an answer to the second and third questions since it has provided a positive answer to the first question (paragraph 31 of the judgment and point 59 of the Opinion).

20. Article 1(2)(f) of the Rome I Regulation excludes the "questions governed by the law of companies and other bodies, corporate or unincorporated" from its scope of application. "It follows from this exception that, under the conflict-of-law rules, claims for payment made by a legal association against its members are not to be assessed on the basis of the Rome I Regulation, even though such claims are to be regarded as 'matters relating to a contract' within the meaning of Article 7(1) of the Brussels I Recast Regulation, which does not contain a similar exception (point 60 of the Opinion in connection with 33 of the judgment)".

21. The Court provides an explanation to the second question regarding the possibility of applying the rules on determining the applicable law for contractual relationships under the Rome I Regulation.[23] The Regulation is applicable to the decisions of the homeowners association as detailed in the section below.

22. The third question, whether the provisions the Rome II Regulation are applicable to such decisions or not, and which of the non-contractual bases of liability referred to in that Regulation is relevant for the case is not answered by the CJEU.

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[20] *Ibid*.

[21] M. Giuliano and P. Lagarde, *Council Report on the Convention on the law applicable to contractual obligations*, 1980, OJ 1980 L 266, p. 1.

[22] *Vid*. G. van Calster, "Judgment in Kerr v Postnov(a): a surprisingly swift conclusion on Article 24 and 'services' in Brussels Ia /Rome I", *Conflict of Laws / Private international law* blog, posted on 21 May 2019, accessed on 10 June 2019: <https://gavclaw.com/2019/05/21/judgment-in-kerr-v-postnova/>

[23] The Rome I Regulation (EU Regulation 593/2008) came into force on 17 December 2009 and is applicable to all EU Member States except Denmark.

3. The fourth question

23. The first question led to the application of Article 7(1)(a) of the Brussels I Recast Regulation. The fourth question relates to the applicability of Article 4(1)(b) (contract for the provision of services) or Article 4(1)(c) (contract relating to a "right *in rem*" or a "tenancy") of the Rome I Regulation regarding the decisions of unincorporated associations in respect of the expenses incurred for building maintenance.

A) The Advocate General Kokott´s Opinion on Article 7(1) of the Brussels I Recast Regulation regarding the provision of services and place of performance

24. As previously stated, the Advocate General contradicts the CJEU´s criterion by excluding the application of the Rome I Regulation based on its exception found in Article 1(2)(f). She suggests that "the referring court wishes in essence to ascertain to what extent the classification of the legal relationship on which the claim for payment at issue is based in the main proceedings affects the legal provisions applicable in determining the place of performance" (point 64 of the Opinion). She believes that the national court should reformulate the fourth question considering the "settled case-law" and the EU law provisions that the national court did not refer to the CJEU (point 65 of the Opinion). The Advocate General sets out that "the fourth question should thus be reformulated and interpreted as seeking to ascertain whether the place of performance of the obligation in question is to be determined on the basis of the second indent of Article 7(1)(b) of the [Brussels I Recast Regulation]" (point 67 of the Opinion).

25. A distinction should be drawn between Articles 7(1)(a) and 7(1)(b) of the Brussels I Recast Regulation. It is widely understood that the introduction of Article 7(1)(b) in the new Brussels I Recast Regulation and Article 5(3) in the revised Lugano Convention[24] has been a cornerstone. Such achievement has led to the autonomous interpretation of the place of performance as the place for the provision of services.

26. The CJEU points to the *Falco* and *Corman-Collins* case-law that requires carrying out a particular activity in return for remuneration (paragraph 39 of the case).[25] Although the Advocate General agrees with this requirement (point 69 of the Opinion), she believes that the relationship between "the contributions to be paid by the co-owners […] and the management tasks of the association of property owners is […] uncertain" (point 70 of the Opinion). She does not observe this requirement fulfilled in the current case but only if the management of the property would be assigned to specialised service provider (point 71 of the Opinion). The Advocate General justifies not applying the second indent of Article 7(1)(b) resorting on the "mixed or at least non-uniform nature of the contributions" and "the principles of legal certainty and predictability of the determination of international jurisdiction" (point 72 of the Opinion).

27. She considers that "regard should be had, in determining the place of performance according to the '*Tessili* rule',[26] to the *lex causae* defined as applicable by the valid conflict-of-law rules of the forum State" (point 74 of the Opinion). In the *Tessili* case, the Court held that it was in no position to impose an EU definition:[27]

> "[…] the determination of the place of performance of obligations depends on the contractual context to which the obligations belong".

[24] Council Decision 2007/712/EC of 15 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/3 (Lugano Convention).

[25] Judgments of 23 April 2009, *Falco Privatstiftung v.Weller-Lindhorst*, C-533/07, EU:C:2009:257. paragraph 29. The criteria was confirmed by relevant case-law such as the judgments of 19 December 2013, *Corman-Collins SA v La Maison du Whisky SA*, C-9/12, EU:C:2013:860, paragraph 37, of 10 September 2015, *Holterman Ferho Exploitatie and Others*, C47/14, EU:C:2015:574, paragraph 57, of 15 June 2017, *Saale Kareda v. Stefan Benkö*, C-249/16, EU:C:2017:472, paragraph 35 and of 8 March 2018, *Saey Home & Garden*, C64/17, EU:C:2018:173.

[26] Following the judgment of 6 October 1976, *Industrie Tessili Italiana Como v Dunlop AG*, C-12/76, EU:C:1976:133.

[27] Paragraph 14 of the *Tessili* case.

28. The CJEU went for the *acte clair* doctrine and did not follow the Advocate General´s Opinion. It is doubtful that her Opinion follows that doctrine since she suggested a "resurrection of the classic *Tessili* formula".[28] The place of performance of the obligation, the payment, is determined by national law according to the *Tessili* case, as later confirmed by the *Custom Made*[29] and *Concorde*[30] judgments.[31]

29. The *Concorde* case lead to the changes in Article 7(1)(b) of the Brussels I Recast Regulation stating that in order to determine the court having jurisdiction the "place of performance of an obligation is the place where the obligation which characterises the legal relationship in question was performed or was to be performed".[32] Such uniform rule displacing the ´*Tessili* rule` is applicable when the place for the provision of services could not be identified in the contract without relying on the applicable law to the contract.[33]

B) The applicability of Article 4(1)(b) of the Rome I Regulation to the provision of services

30. The judgment comes to a conclusion in paragraphs 40-42. The CJEU ruled that the remuneration requirement of the *Falco* case if fulfilled. Therefore, the Court confirms that there is no need to rely on the ´*Tessili* rule`. The determination of the applicable law in the absence of a choice of law of Article 3 of the Rome I regulation, is found in the list of the eight ´magnificent` contracts of Article 4.[34] Such list includes the sale of goods, provision of services and *in rem* rights in immovable property in its paragraphs (a), (b) and (c) of Article 4(1) of the Rome I Regulation, respectively. Such European typical contracts may not be regulated under national legislation. This is the case, for instance, of the contract for the provision of services that cannot be found in the Spanish Civil Code.[35]

32. It should be noted that the autonomous and broad concept of services of the Brussels I Recast Regulation coincides with the one provided in the Rome I Regulation as the Advocate General also confirms it in point 66 of her Opinion. The concept under the second indent of Article 7(1)(b) of the Brussels I Recast Regulation provides a uniform interpretation that avoids *forum shopping* between EU Member State courts. Such concept is based on an economic and non-legal notion.[36]

33. The law of the residence of the service provider represents a direct, rigid and not presumptive connecting factor that is economically inefficient for the contracting parties. It does not take into consi-

[28] G. van Calster (notes 19 and 22).

[29] Judgment of 29 June 1994, *Custom Made Commercial Ltd v. Stawa Metallbau GmbH*, C-288/92, EU:C:1994:268.

[30] Judgment of 28 September 1999, *GIE Groupe Concorde and Others v The Master of the vessel "Suhadiwarno Panjan" and Others*, C-440/97, EU:C:1999:456.

[31] A. Briggs, *Civil jurisdiction and judgments*, Informa law from Routledge, 2015, at [2.178].

[32] Opinion of Mr. Advocate General Ruiz-Jarabo Colomer of 16 March 1999, *GIE Groupe Concorde and Othes v. The Master of the vessel "Suhadiwarno Panjan" and Others*, Case C-440/97, EU:C:1999:146, paragraph 103.

[33] A. Briggs (note 31), at [2.179].

[34] Article 4(1) of the Rome I Convention states the following: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;"

[35] A.-L. Calvo Caravaca and J. Carrascosa González, *Derecho internacional privado*, vol. II, Comares, 2016, pp. 933-936 and pp. 945-949; *Ibid*., "Articles 1 & 2", in U. Magnus and P. Mankowski (eds.), *Rome I Regulation - Commentary, European Commentaries on Private International Law (ECPIL)*, Otto Schmidt, 2017, pp. 52-87.

[36] *Ibid.*, p. 855; J.-M. Jacquet, "Nota a Sents. Cour Cass. Francia de 23 enero 2007, 27 marzo 2007, 14 noviembre 2007, 5 marzo 2008", *JDI Clunet*, 2008, pp. 521-531; M. J. Castellanos Ruiz, "International leasing contracts for large civil aircrafts", *CDT*, vol. 8, no. 2, 2016, pp. 173-174. In favour of an autonomous concept, *vid.* P. Franzina, *La giurisdizione in materia contrattuale. L'art. 5 n. 1 del regolamento n. 44/2001/CE nella prospettiva della armonia delle decisioni*, Cedam, Padua. For more information on the economic concept of the provision of services, *vid.* P. Berlioz, "La notion de fourniture de services au sens de l'article 5-1 b) du Règlement «Bruxelles I»", vol. 135, no. 3 Journal du Droit International, Clunet, 2008, pp. 675–717.

deration the principle of proximity or the close connecting of the contract to a specific country.[37] In the current case, Article 4(1)(b) is applicable to the contract for the provision of services that will be governed by the law of the country where the service provider has his habitual residence. Carrascosa González criticises that solution and prefers instead the one found in Article 4(3) of the Rome I Regulation that resorts on most closely connected country to the contract.[38] However, in Garcimartín Alférez and Jayme´s opinion such broad concept enhances the effectiveness of Article 4(1)(b) of the Rome I Regulation preventing any potential discussions on how to identify the characteristic performance of the contract.[39]

IV. Final remarks

34. In the current case, "the place of performance within the meaning of Article 7(1)(a) of the [Brussels I Recast Regulation] would have to be determined in the light of the specific obligation at issue, which, in the main proceedings, is the payment obligation and not the characteristic performance of the contract as in point (b).[40] The conclusion of a contract is not a requirement for the application of that Article since the parties freely entered into that relationship with the manager of the owners association.

35. The Advocate General concludes in point 76 of her Opinion that according to Article 7(1) of the Brussels I Recast Regulation "the performance of a management task by an association of owners […] is not to be classified as 'services' within the meaning of the second indent of point (b)". Moreover, "the place of performance of a payment obligation arising from" the decisions of the association of owners "is to be determined on the basis of the law applicable to the legal relationship in question under the conflict-of-law rules of the forum State under Article 7(1)(a) of the Brussels I Recast Regulation.

36. As a general conclusion, it can be said that the CJEU diverged from the *Tessili* formula and did not follow Advocate General Kokkot´s Opinion regarding the enforcement of an obligation to pay the contributions to the charges for the building according to Article 4(1)(c) of the Rome I Regulation (rights *in rem* in immovable property), but the provision of services, within the meaning of Article 4(1)(b) of that Regulation.

[37] S. Francq, "Le règlement «Rome I» sur la loi applicable aux obligations contractuelles. De quelques changements...", *Journal du droit international (Clunet)*, vol. 136, 2009, no. 1, pp. 41-69.

[38] J. Carrascosa González, *Conflicto de leyes y teoría económica*, Colex, 2011, pp. 235-237.

[39] *Vid*. F. J. Garcimartín Alférez, *Derecho de sociedades y conflictos de leyes: una aproximación contractual,* Editoriales de Derecho Reunidas, 2002; *Ibid*., "La racionalidad económica del DIPr", *Cursos de Derecho Internacional de Vitoria-Gasteiz 2001,* 2002, pp. 88-154; E. Jayme and Ch. Kohler, "Europäisches Kollisionsrecht 1995 - Der Dialog der Quellen", *Praxis des Intemationalen Privat-und Verfahrensrechts,* 6, 1995, pp. 343-353; *Ibid*., "L'interaction des règles de conflit contenues dans le droit dérivé de la Communauté Européenne et des conventions de Bruxelles et de Rome", *Revue Critique de Droit International Privé*, 1995, pp. 1-40, at pp. 25 *et seq*.

[40] According to settled case-law such as the judgment of 6 October 1976, *A. De Bloos, SPRL v. Société en commandite par actions Bouyer*, C-14/76, EU:C:1976:134, in point 75 of the Advocate General´s Opinion.