

JUDGMENT OF THE COURT (Fourth Chamber)
15 January 1985 *

In Case 241/83

REFERENCE to the Court under the Protocol of 3 June 1973 to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Bundesgerichtshof [Federal Court of Justice] for a preliminary ruling in the action pending before that court between

Erich Rösler, Berlin,

and

Horst Rottwinkel, Bielefeld,

on the interpretation of Article 16 (1) of that convention concerning the exclusive jurisdiction in proceedings which have as their object rights *in rem* in, or tenancies of, immovable property of the courts of the Contracting State in which the property is situated,

THE COURT (Fourth Chamber)

composed of: G. Bosco, President of Chamber, P. Pescatore, A. O'Keeffe, T. Koopmans and K. Bahlmann, Judges,

Advocate General: Sir Gordon Slynn
Registrar: D. Louterman, Administrator

gives the following

* Language of the Case: German.

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

1. Facts and written procedure

By a written agreement dated 19 January 1980 the plaintiff in the main proceedings let a flat in his holiday villa at Cannobio in Italy to the defendant in the main proceedings for the period 12 July to 2 August 1980. The rent agreed for four persons was DM 2 625. By the terms of the agreement visitors were not allowed to stay overnight. The extra costs of gas, water and electricity had to be calculated according to the quantities consumed and there was also an extra charge for cleaning at the end of the letting. The parties further agreed that the agreement was to be governed by German law.

The plaintiff in the main proceedings spent his holiday in the holiday villa at the same time as the defendant.

On 7 January 1981 the plaintiff sued the defendant in the Landgericht [Regional Court] Berlin for damages and the payment of outstanding incidental charges. He claimed that throughout the holiday the defendant had accommodated more than four persons in the holiday home which caused the cesspool constantly to overflow, creating an intolerable smell, whilst the excessive number of occupants, which included a small child, was also a considerable nuisance owing to the noise.

Furthermore, the defendant's behaviour provoked repeated arguments between the parties at the holiday resort. The plaintiff claimed that his and his family's rest and quiet had been considerably disturbed. He claimed damages from the defendant for loss of holiday enjoyment, founding his claim on a breach of the lease, and reimbursement of the costs of travelling to the holiday resort which he needlessly incurred. He also claimed under the terms of the lease payment of incidental charges in respect of gas, electricity and water and for cleaning at the end of the letting.

The Landgericht Berlin dismissed the action as inadmissible on the ground that, according to Article 16 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters (hereinafter referred to as 'the Convention') the courts of Italy had exclusive jurisdiction to entertain the plaintiff's claims.

The Kammergericht [Higher Regional Court] in Berlin quashed the judgment of the Landgericht and referred the case back to that court for re-hearing and judgment. It considered that Article 16 (1) of the Convention did not apply to the plaintiff's claims; indeed, it considered it doubtful whether that provision applied to short leases of holiday homes at all and even if the provision did not distinguish between leases of long and short duration the plaintiff's claims were not within its ambit because the claim for damages for breach of the lease and for payment of the incidental charges payable thereunder had to be regarded as quite distinct from the rented property itself.

The defendant appealed on a point of law against the judgment of the Kammergericht to the Bundesgerichtshof [Federal Court of Justice] which by order of 5 October 1983 decided to submit the following questions to the Court of Justice for a preliminary ruling:

'In accordance with Article 3 of the Protocol of 3 June 1971 on the interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Bundesgesetzblatt II 1972, p. 773) and Article 2 of the German Law of 7 August 1972 (Bundesgesetzblatt II 1972, p. 845) the following questions shall be submitted to the Court of Justice of the European Communities in Luxembourg for a preliminary ruling:

- (1) Is Article 16 (1) of the Convention applicable if a lease concluded between persons resident in the Federal Republic of Germany is for the short letting only of a holiday home located in Italy and the parties to the lease have agreed that German law is to apply?
- (2) If Article 16 (1) is applicable, does it apply to actions for damages for breach of the lease, particularly for compensation for loss of holiday enjoyment and for the recovery of incidental charges payable under the lease?

The order for reference was registered at the Court on 24 October 1983.

In the grounds of its order for reference the Bundesgerichtshof argues as follows:

The conditions in which the Italian courts would have jurisdiction under Article 16 (1) of the Convention are not satisfied. Although the provision does not distinguish in terms between leases of long duration and agreements for the short letting of holiday homes, it would be in the interests of expediency for the provision not to apply at least in cases where the lease concerns only a very short letting of a holiday home, both parties ordinarily reside in a country other than that in which the property is located and they have agreed that the substantive law of their State of residence is to apply. Dicta of the Court of Justice in its judgment of 14 December 1977 in Case 73/77, *Sanders v van der Putte*, [1977] ECR 2383 also support a restrictive interpretation, for the Court there held that the provisions of Article 16 of the Convention must not be given a wider interpretation than their purpose requires since the effect of conferring exclusive jurisdiction under that provision is to deprive the parties of the choice of forum which they would otherwise have and to require them in such cases to appear before a court which is not that of the domicile of any of them.

In the present case it cannot be the purpose of Article 16 (1) of the Convention to require that Italian courts should have international jurisdiction. The Court of Justice has explained that the reason why Article 16 (1) of the Convention must be applied to tenancies of immovable property is that they are generally governed by special legislation which in view of its complexity is best applied only by the courts of the States in which it is in force. In the case of lettings of holiday homes, that purpose cannot be achieved because special legislation on tenancies and leasehold property, which has a social purpose, does not normally apply to them.

In any event, in cases of this kind Article 16 (1) of the Convention should not be applied if the parties have agreed, as they are entitled to do, that the substantive law of a State other than that in which the rented property is situated shall apply. Were it otherwise the purpose of Article 16 (1) of the Convention would not be attained inasmuch as the courts of the State in which the rented property is situated would themselves have to consider foreign law.

Even if it must be assumed that in principle Article 16 (1) of the Convention applies to leases of holiday homes, the Bundesgerichtshof is inclined to the view that international jurisdiction under Article 16 (1) should be conferred only in respect of claims arising from the lease that are directly related to the rented property. Despite the clear difficulties of distinguishing between claims and although the Bundesgerichtshof is aware of the danger of splitting jurisdiction to entertain claims, it must accord with the purpose of Article 16 (1) not to confer jurisdiction under the provision in respect of every claim which may arise under a lease, but to distinguish between them. Accordingly, Article 16 (1) of the Convention ought not to apply to the claim for the payment of incidental charges (cleaning, gas, electricity and water) or *a fortiori* to claims for damages for a spoiled holiday and unnecessarily incurred travel expenses as the latter have no real connection with the rented property. Even in so far as compensation is claimed for damaged articles listed in the inventory, the rented property itself is not affected.

In accordance with Article 5 (1) of the Protocol of 3 June 1971 and Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were submitted by the plaintiff in the main proceedings, represented by Günter Groppe, Rechtsanwalt, Bielefeld, the Government of the Federal Republic of

Germany, represented by its Agent, Dr Christof Böhmer, the Italian Government, represented by its Agent, O. Fiumara, the Government of the United Kingdom, represented by J.R.J. Braggins of the Treasury Solicitor's Department, and by the Commission of the European Communities, represented by its Legal Adviser, E. Zimmermann, assisted by Wolf-Dietrich Krause-Ablass, of the Düsseldorf Bar.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory enquiry.

By order of 30 May 1984 the Court assigned the case to the Fourth Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

2. Written observations

The *plaintiff in the main proceedings* submits that Article 16 (1) of the Convention is not applicable in this case. The agreement in question is for the short letting of a holiday home which, on an economic view, is more akin to a lodging agreement than to a lease in the proper meaning of the word.

The claims involved are primarily for compensation for the loss of holiday enjoyment and for damage to, or loss of, movable property. Furthermore the place of performance is in the Federal Republic of Germany. In particular, monies due, including the rent, had to be paid in the Federal Republic of Germany and the keys also had to be returned there. All the witnesses named are German nationals and must be examined in Germany if the unnecessary costs of travelling to Italy are to be avoided. The court need not have any special local knowledge. A court inspection of the premises is out of the question.

The Government of the Federal Republic of Germany takes the view that Article 16 (1) of the Convention must be construed narrowly and, according to its spirit, must not be applied to claims arising from short leases. The reasons for its view are as follows:

- (a) In its judgment of 14 December 1977 in Case 73/77, *Sanders v van der Putte*, [1977] ECR 2383 the Court held that Article 16 (1) must be construed narrowly since the parties have no choice of forum: it must not be given a wider interpretation than its objective requires;
- (b) The *ratio legis* of Article 16 (1) is that tenancies of immovable property, especially of dwellings, are generally governed by complex legislation which is strongly influenced by social considerations best applied by the courts of the country in which it is in force.

The inexpediency of applying Article 16 (1) of the Convention to the letting of holiday homes becomes particularly clear if the parties have made their contract subject exclusively to German law as in this case. That choice of governing law would also have to be respected by the Italian courts. They would therefore have to examine the facts solely with regard to German substantive law. As a result, the purpose of conferring jurisdiction on the courts of the place where the property is situated, which is to make the mandatory provisions of the law of that place applicable by making the forum and applicable law coincide and generally to simplify the proceedings, is irrelevant in this case; on the contrary, the proceedings would be made unnecessarily more difficult.

A further aim of Article 16 (1) is that the tenant, who as a general rule is socially in a comparatively weak position, should not be put at any further disadvantage by the fact

that the trial takes place before a court far away from his place of residence. That aim is also irrelevant as far as leases of holiday homes are concerned because the lessee does not normally reside at the place where the holiday home is situated or require any special social consideration.

The spirit of Article 16 (1) of the Convention does not therefore require letting of holiday homes to be assigned to the exclusive jurisdiction of the courts of the place where they are situated. Consequently, the provision must be interpreted to the effect that short-term lettings of holiday homes must not be considered 'tenancies' within the meaning of Article 16 (1).

As regards Article 16, the *Schlosser Report* expressly states that: 'However, the underlying principle of the provision quite clearly does not require its application to short-term agreements for use and occupation such as, for example, holiday accommodation' (Official Journal 1979 C 59, p. 120).

That result also meets considerations of expediency in cases where the parties are both resident in Germany and the rented holiday home is situated abroad. Instructing foreign lawyers, appearing before a distant foreign court and arranging for the costly translation of correspondence is unnecessary.

The German Government concludes that the first question must be answered in the negative.

In case the Court answers the first question in the affirmative the German Government submits the following observations on the second question:

According to Article 16 (1), exclusive jurisdiction is to be assigned in proceedings 'which have as their object... tenancies of immovable property'. Since the provision must be interpreted restrictively, only proceedings involving claims directly related to the rented property itself, such as, for example, disputes about the existence of a lease, giving up possession or compensation for damage caused to the property, fall thereunder. In the view of the draftsmen of the Convention set forth in the *Jenard Report* (Official Journal 1979 C 59, p. 1), there will be no exclusive jurisdiction in proceedings for the recovery of rent since they must be regarded as relating to a subject-matter which is quite distinct from the rented property itself. That view must apply *a fortiori* to proceedings for compensation for indirect damage arising from a breach of the lease by one party and not related to the rented property itself. Therefore, the plaintiff's claims for compensation for lost holiday enjoyment and unnecessarily incurred travel expenses do not fall under Article 16 (1).

If actions for rent are not even covered by Article 16 (1), there can be no exclusive jurisdiction under that provision in actions for the payment by the tenant of incidental charges which form an integral part of the total rent.

The *Italian Government* points out that, according to the *Jenard Report*, the underlying purpose of Article 16 (1) is to avoid the creation of conflict with rules considered a matter of public policy in some Member States and the danger of impeding the 'free movement of judgments' which both gave rise to the exclusive jurisdiction. Moreover, the provision adopted is 'in the interests of the proper administration of justice' because 'this type of dispute often entails checks, enquiries and expert examinations which have to be made on the spot' and because 'the matter is often governed in

part by customary practices which are not generally known except in the courts of the place, or possibly of the country, where the immovable property is situated'.

As regards tenancies of immovable property in particular, the report goes on to state that these 'will include tenancies of dwellings and of premises for professional or commercial use, and agricultural holdings' and that disputes relating to them will mainly be 'disputes between landlord and tenant over the existence or interpretation of leases, compensation for damage caused by the tenant, eviction, etc.' whereas the rule does not apply to proceedings concerned only with the recovery of rent, since such proceedings can be considered to relate to a subject-matter which is quite distinct from the rented property itself. The report concludes that the adoption of the provision was dictated by the fact that tenancies of immovable property are often governed in the various States by special legislation which often provides for exclusive jurisdiction.

Although it is true that the rule in question may not be interpreted more widely than its objective requires (judgment of 14 December 1977 in Case 73/77, *Sanders v van der Putte*, [1977] ECR 2383), it is also true that it must be construed strictly in order to prevent that purpose from being defeated by opening the way in a very delicate area (one need only consider Italian 'fair rent' legislation governing tenancies of urban dwellings) to alternative jurisdictions or derogations agreed upon for the purpose of evading mandatory rules.

The present case may well appear special, but that appearance may not justify generalizations which could greatly change the scope of the entire provision.

None of the facts mentioned by the national court indicate that Article 16 (1) should not be applied. The fact that it was agreed to let immovable property for holiday accommodation is undoubtedly irrelevant. Article 16 (1) does not distinguish between short-term and long-term tenancies or between the different uses to which the property is put: it may be used for professional, commercial or agricultural purposes, as a dwelling, for holidays and so forth. Although some requirements, particularly rules of public policy, may govern only some situations and not others, any generalized limitation would be arbitrary and, since it could not be defined in precise terms, might easily be used to evade mandatory rules.

The fact that neither contracting party resides in Italy seems immaterial. It is sufficient to consider that the Convention presupposes the existence of a Community territory and that precisely by providing for exclusive jurisdiction and thus ruling out any derogation by agreement between the parties, Article 16 (1) seeks to guarantee 'the proper administration of justice' so that the parties' place of residence must be quite immaterial.

If it is accepted that the Convention may deprive the courts of the State in which the property is situated of jurisdiction, the way is open to evade the mandatory rules of that State. In order to evade the 'fair rent' legislation in Italy the landlord could compel the tenant to agree to the lease's being governed by the law of another Member State, by perhaps expressly including a jurisdiction clause as provided for by Article 17 of the Convention.

On the second question the Italian Government submits that the incidental charges relating to the letting are a charge to be borne by the lessee and should therefore be ascribed to the lease itself. A dispute over such costs must clearly fall within the exclusive jurisdiction conferred by Article 16 (1).

As regards the claim for damages, a distinction might be drawn between actions for damages accompanied by a claim for performance or rescission, in which case Article 16 (1) appears to be operative, and actions for damages in which the non-performance of the contract is an historical fact to be established only as an incidental matter (such might be the case with the claim of the lessee in this case for the payment of travel and other expenses on account of lost holiday enjoyment), in which case there might be some doubt as to whether Article 16 (1) applies since, as the *Jenard Report* points out, 'the matters referred to in this article will normally be the subject of exclusive jurisdiction only if they constitute the principal subject-matter of the proceedings of which the court is to be seised'.

The *United Kingdom* considers that the scope of Article 16 (1) of the Convention is to be determined by reference to the type of proceedings affecting the immovable property rather than to the nature of the lease or other interest in that property. Accordingly, the United Kingdom considers that it may be more appropriate to examine first the second of the specific questions referred by the Bundesgerichtshof in which it asks whether Article 16 (1) applies to actions for damages for breach of a lease and for the recovery of supplementary costs payable under a lease.

The plaintiff is not making any claim for rent but is claiming damages for breaches of the lease and consequential loss flowing therefrom. Claims for rent appear generally to have a closer connection with the rented property than the claims made in this case by the plaintiff.

The plaintiff's claims do not fall within the class of disputes mentioned by the Court in *Sanders v van der Putte* as falling within Article 16 (1). The Court identified disputes between landlords and tenants as to the existence or the interpretation of leases or to compensation for damage caused by the tenant and to the giving up of possession of premises as being particular instances of disputes in which jurisdiction is exclusively assigned to the courts of the State in which the immovable property is situated. Those disputes may require inquiries and expert assessments which must be carried out on the spot and frequently involve the application of complex special rules. As the Court explained, the assignment of exclusive jurisdiction in those cases satisfies the need for the proper administration of justice. In the view of the United Kingdom, that need does not require claims such as those in this case for breach of terms of a lease and for consequential loss to be assigned to the exclusive jurisdiction of the courts of the State in which the property is situated.

In this respect there is a parallel to be drawn with the judgment delivered on 15 November 1983 in Case 288/82, *Duijnste v Goderbauer*, [1983] ECR 3663 in which the Court considered that the proper administration of justice did not require the assignment of a dispute which did not itself concern the validity of a patent or of its registration to the exclusive jurisdiction of the State where the patent was granted or applied for. In the present case, the remedy

sought is the payment of sums of money by way of compensation, rather than, for example, an order of the court to give or surrender possession of premises. In the submission of the United Kingdom, the German court is as well, if not better, placed to provide a remedy as the Italian court. A judgment given in Germany ordering the payment of sums of money by a defendant domiciled in Germany would be directly enforceable against the defendant and execution could issue against any assets situated in that country. Equally, there are practical arguments for assigning such matters as orders to give or surrender possession to the exclusive jurisdiction of the State in which the property is situated and in which the order will necessarily be enforced. In such cases it does seem appropriate to apply the traditional principle of *actor sequitur forum rei*.

The claims made by the plaintiff do not appear to have a close connection with the rented property but consist of a claim for compensation for loss of holiday enjoyment which is entirely distinct from the rented property. Such a claim might also lie in the general law relating to liability for tort or delict. The question of the extent of the defendant's liability to make compensation is a problem of the general law of obligations and is not specific to leases of immovable property. There would seem to be no particular need, in the interests of the proper administration of justice, to assign such questions to the exclusive jurisdiction of the court of the State in which the property is situated.

Similar arguments apply to the claim by the plaintiff for incidental charges, namely those for the consumption of gas, electricity and water and for cleaning. Those claims may also be characterized as purely contractual

claims which have no need to be assigned to the exclusive jurisdiction of the courts where the property is situated.

expressly states that it applies regardless of domicile.

The United Kingdom therefore supports the view expressed by the Bundesgerichtshof that the plaintiff's claim for compensation for the loss of, or damage to, articles listed in the inventory does not affect the rented property. Such claims could arise from any form of agreement permitting the use or occupation of immovable property and do not depend on the existence of an agreement giving possession of the immovable property in which those articles are found. Such claims ought not, therefore, to be regarded as disputes which have as their object tenancies of immovable property for the purposes of Article 16 (1) of the Convention.

The United Kingdom concludes that for Article 16 (1) to apply, the objective of the proceedings must be the determination, enforcement or giving effect to, or the termination of, rights of possession. Accordingly, the answer to the second question referred by the Bundesgerichtshof should be that Article 16 (1) does not apply to actions for damages for breach of the lease, for compensation for lost holiday enjoyment or for recovery of incidental charges payable under the lease.

If the Court accepts the submission of the United Kingdom in respect of the second question, the Court may consider it unnecessary to answer the first question.

However, in the event that the Court does consider it necessary to answer the first question, the United Kingdom makes the following observations.

First, the fact that the parties are domiciled in Germany is irrelevant since Article 16

Secondly, the terms of Article 16 (1) show that it applies in respect of particular proceedings, and not in respect of particular rights *in rem* or tenancies. The terms of Article 16 (1) do not suggest that any distinction is to be drawn between tenancies of varying durations or between tenancies for particular purposes.

There does not seem to be any point at which a short-term agreement becomes readily distinguishable from an agreement of a longer duration. In the present case, for example, there would not appear to be any distinction in principle between a lease for a period of three weeks and a lease for two months or longer. It appears equally difficult to draw a distinction, for the purposes of Article 16 (1), between leases for different purposes such as holiday lettings, or leases of business premises.

The *Schlosser Report* on the Accession Convention of 9 October 1978 also emphasizes that it is the type of proceedings rather than the nature of the tenancy or other real property right which should determine the scope of Article 16 (1) (see paragraphs 163 and 164 of the Report).

The United Kingdom submits that the reason why Article 16 (1) may not apply to short-term lettings of holiday accommodation is not because of the character of the letting but rather because of the nature of the proceedings. In most cases, disputes relating to the use and occupation of such premises will be matters of the law of obligations rather than matters concerning rights in immovable property.

If there are to be exceptions to the scope of Article 16 (1) by reason of the duration or purpose of the lease, there would be some danger that the operation of Article 16 (1) may be subject to prolonged uncertainty until the range of exceptions is established by the Court.

The distinctions forming the basis of any such exceptions could not in any event be left to the national law of Contracting States, but would fall to be determined by the Court as an independent concept capable of uniform application in all the Contracting States. The Court has consistently held that questions which determine the scope of the Convention must be interpreted independently and uniformly, and not by reference to the law of particular Contracting States.

The parties' choice of law should not be a determining factor in ascertaining the scope of Article 16 (1). It is clear from the express terms of Article 17 (2) of the Convention that an agreement conferring jurisdiction on a particular court is to have no legal force if it purports to exclude the jurisdiction of a court having exclusive jurisdiction by virtue of Article 16. If the choice of law were to determine the scope of Article 16 (1), the result might be that the courts of the place where the property was situated might be deprived of jurisdiction in cases where it was most appropriate, in the interests of the administration of justice, that they should have jurisdiction.

Moreover, it must be open to doubt whether the choice by the parties of a foreign law to govern their lease would in all cases be effective to exclude the operation of the law of the country in which the property is situated, since in many cases the rules of law of Contracting States concerning leases cannot be derogated from by contract.

The United Kingdom concludes that, if it is considered necessary to answer the first question, the Court should rule that the scope of Article 16 (1) depends on the type of the proceedings, and not on the nature or purpose of the letting to which those proceedings may relate or the parties' choice of law.

The *Commission* points out that in both the *Jenard Report* and the *Schlosser Report* on the Convention on the Accession of Denmark, Ireland and the United Kingdom to the Brussels Convention doubts are expressed about the exclusive jurisdiction provided for by Article 16 (1).

During the discussions which took place within the Council working party on the accession of Denmark, Ireland and the United Kingdom to the Convention the question of restricting exclusive jurisdiction under Article 16 (1) in cases concerning leases was again examined. The United Kingdom delegation proposed an amendment whereby in disputes relating to personal obligations arising from tenancies of immovable property jurisdiction under Article 16 (1) would not be exclusive; that non-exclusive jurisdiction would apply in particular to actions for the payment of rent and to actions concerning short-term agreements for use and occupation such as, for example, lettings of holiday flats or homes abroad. The majority of the other delegations did not agree with that proposal. The working party finally agreed to leave Article 16 (1) unchanged.

The *Commission* considers that the wording of Article 16 (1) provides no ground for excluding short-term leases of immovable property from its scope.

In the present case it is beyond dispute that the rented property in Italy is 'immovable property' within the meaning of Article 16 (1) but it may be doubtful whether the claim made in the main proceedings relates to a lease. None of the language versions of Article 16 (1) make any distinction as to the duration or type of lease. It is also silent on the question of the domicile of the parties to the lease and on the question of whether they have agreed to the application of a law other than that of the place where the property is situated.

However, the present case does not simply involve a lease of short duration, i.e. three weeks, but an agreement *sui generis* for the temporary use and occupation of a furnished holiday residence.

The Commission is inclined to the view that the assignment of exclusive international jurisdiction to the courts of the States in which holiday homes are situated would lead to results which would be both unfair and contrary to the *ratio legis*.

The Convention is meant to protect persons resident in the Community. The provision on international jurisdiction has that purpose as well. Disputes are assigned to the courts which, for procedural and geographical reasons and owing to their thorough knowledge of the legal rules to be applied in the individual case, are in the best position to decide them.

Such legal rules include mandatory provisions which must be observed in deciding the dispute, regardless of the law governing the contract, and which are therefore in the nature of public policy.

Provisions of that kind apply in all the Member States to agreements for the permanent use and occupation of immovable property, especially living accommodation, agricultural holdings and agricultural buildings, by persons for whom the leased property is an essential part of their livelihood.

That social purpose does not exist in the case of lettings of holiday accommodation. Normally such accommodation comprises not only the fittings usually found in empty rented accommodation but also all interior fittings and equipment such as furniture, curtains, bed linen and other household items. Lettings of holiday accommodation are often supplemented by agreements on the services to be provided by the lessor, i.e., as in the present case, the cleaning of the premises at the end of the letting and the washing of bed linen, towels and so forth to be provided by the owner. Hence a fundamental difference between short lettings of holiday accommodation and long-term leases is that the rented property is not an essential part of the holiday-maker's livelihood. For those reasons furnished accommodation in general and furnished holiday accommodation in particular are in some Contracting States expressly or implicitly excluded from the scope of special legislation designed to protect tenants.

Furthermore, the legislation of some Member States generally provides that leases cannot be relied upon as against third parties, particularly purchasers of leased property, unless they are entered in a public register whereas lettings of holiday accommodation do not have to be registered. That effect *vis à vis* third parties of registered leases has caused them to be categorized as rights *in rem* and brought them within the scope of Article 16 (1).

The Bundesgerichtshof rightly points out in its order for reference that according to the decisions of the Court of Justice the provisions of Article 16 must be interpreted narrowly (judgment of 14 December 1977 in Case 73/77, *Sanders v van der Putte*, [1977] ECR 2383).

The reports on the Convention clearly indicate that no agreement was reached on the question of which agreements and which claims arising thereunder are to be covered by Article 16 (1). In the interests of a uniform application of the provision and for the sake of legal certainty that confusion must be removed.

That difficulty of interpretation can be resolved by considering the spirit of Article 16 (1). It seeks to protect a specific group of persons, namely tenants of immovable property for whom such property forms an essential part of their livelihood.

The fact that both parties are resident in Germany and not in the Contracting State in which the holiday home is situated is irrelevant, for according to its terms Article 16 applies generally, irrespective of the parties' 'domicile'.

The existence of an agreement between the parties regarding the application of the law of the State in which they reside cannot have the effect of depriving the courts of the place in which the holiday home is situated of exclusive jurisdiction either. In such a case those courts ought to have regard to the parties' choice of governing law in so far as the provisions of local law allow such choice and in so far as the public policy of the *lex fori* does not prohibit the application of foreign law or require local law to be applied.

All things considered the Commission takes the view that the grant of the use and

occupation of accommodation for valuable consideration, particularly furnished holiday accommodation, does not fall within the scope of Article 16 (1).

Should the Court hold, contrary to the view advanced by the Commission, that Article 16 (1) is applicable to the letting of holiday accommodation, it will need to be determined whether — and if so which of — the claims made in the main proceedings fall within the exclusive jurisdiction of the courts of the State in which the holiday home is situated.

The Commission observes that the plaintiff's claims are as follows:

First, he is claiming damages for the defendant's breach of the agreement in accommodating in the premises let more than the four persons agreed upon. This caused the cesspool to overflow, creating an intolerable smell, and a considerable nuisance owing to the noise due in particular to the presence of a small child. The plaintiff's rest and quiet was considerably disturbed. The travel costs to and from the holiday resort were therefore needlessly incurred and should therefore be paid by the defendant.

The question is whether such claims are directly related to tenancies of immovable property for the purposes of Article 16 (1). The answer to that question is affirmative as regards claims directly related to tenancies, such as, for example, those concerning the existence or inexistence of a tenancy, the termination of the tenancy and disputes over defects found in or damage caused to the rented property. The first head of claim does not relate to any of those matters but involves disputes admittedly arising from the use of the rented property in a way contrary to the agreement but such use did not cause

any direct damage, or at any rate no significant damage, to the rented property. The plaintiff's claims go much further since he seeks compensation for expenses and damage which arose only indirectly from the improper use of the rented property.

The plaintiff *secondly* claims compensation for damaged or missing (unreturned) articles. In the case of the grant of the use and occupation of holiday accommodation the main duty is to vacate the premises at the end of the letting period. Even if it arises from the agreement relating to a holiday home, the obligation to return or replace movable articles is not directly related to tenancies of immovable property. Even if a fact-finding inspection of the premises were necessary to ascertain the extent of the damage, that fact alone is not sufficient to confer exclusive jurisdiction on the court of the country in which the holiday accommodation is situated since the necessary taking of evidence could also be

ordered by another court and be done through mutual judicial assistance.

The plaintiff's *third* claim is for the payment of incidental charges for the consumption of gas, electricity and water and for cleaning. The Commission leaves it to the Court to decide this question. On this point too, it is inclined to the view that there is no direct relationship with the rented property and that therefore Article 16 (1) of the Convention does not apply.

3. Oral Procedure

At the sitting on 4 July 1984, the Commission, represented by its Legal Adviser, E. Zimmermann, presented oral argument.

The Advocate General delivered his opinion at the sitting on 23 October 1984.

Decision

1 By order of 5 October 1983, which was received at the Court on 24 October 1983, the Bundesgerichtshof [Federal Court of Justice] referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Convention') two questions on the interpretation of Article 16 (1) of that convention.

2 By a written agreement dated 19 January 1980, Horst Rottwinkel, the plaintiff in the main proceedings, let a flat in his holiday villa at Cannobio in Italy to Erich Rösler, the defendant in the main proceedings, for the period from 12 July to 2 August 1980. The rent agreed for four persons was DM 2 625. By the terms of the agreement visitors were not allowed to stay overnight. The incidental charges for gas, water and electricity had to be calculated according to the quantities consumed and there was also an extra charge for cleaning at the end of the letting. The parties further agreed that the agreement was to be governed by German law, that Bielefeld was to be the place of performance and that its courts were to have jurisdiction.

- 3 The plaintiff in the main proceedings spent his holiday in the holiday villa at the same time as the defendant.
- 4 On 7 January 1981 the plaintiff sued the defendant in the Landgericht [Regional Court] Berlin, for damages and for the payment of outstanding incidental charges. He claimed that throughout the holiday the defendant had accommodated more than four persons in the holiday home which caused the cesspool constantly to overflow, creating an intolerable smell, and was a considerable nuisance owing to the noise.
- 5 According to the plaintiff, his and his family's rest and quiet had been considerably disturbed. He claimed damages from the defendant for loss of holiday enjoyment, founding his claim on a breach of the lease, and sought reimbursement of the costs of travelling to the holiday resort. He also claimed, under the terms of the lease, payment of incidental charges in respect of gas, electricity and water and of cleaning at the end of the letting.
- 6 The Landgericht Berlin dismissed the action as inadmissible on the ground that, according to Article 16 (1) of the Convention, the courts of the Contracting State in which the property was situated, namely Italy, had exclusive jurisdiction to entertain the plaintiff's claims. The Kammergericht [Higher Regional Court] in Berlin quashed the judgment of the Landgericht and referred the case back to that court for re-hearing and judgment.
- 7 The defendant appealed against the judgment of the Kammergericht to the Bundesgerichtshof on a point of law.
- 8 Considering that the dispute raised questions as to the interpretation of the Convention, the Bundesgerichtshof, by order of 5 October 1983, stayed the proceedings and submitted the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 16 (1) of the Convention applicable if a lease concluded between persons resident in the Federal Republic of Germany is for the short letting only of a holiday home located in Italy and the parties to the lease have agreed that German law is to apply?

- (2) If Article 16 (1) is applicable, does it apply to actions for damages for breach of the lease, particularly for compensation for loss of holiday enjoyment and for the recovery of incidental charges payable under the lease?’
- 9 The plaintiff submits that Article 16 (1) of the Convention is not applicable to this case. In his view, the agreement in question is for the short letting of a holiday home which, on an economic view, is more akin to a lodging agreement than to a lease in the proper meaning of the word. The claims involved are primarily for compensation for the loss of holiday enjoyment and for damage to, or loss of, movable property. Furthermore, the place of performance is in the Federal Republic of Germany. The agreement provided that monies due, including the rent, had to be paid in the Federal Republic and the keys also had to be returned there. A court inspection of the premises is out of the question as a means of resolving the dispute.
- 10 The Government of the Federal Republic of Germany takes the view that it would be contrary to the spirit of Article 16 (1) of the Convention to apply it to claims arising from short-term leases. It points out in this regard that in its judgment of 14 December 1977 in Case 73/77, *Sanders v van der Putte*, [1977] ECR 2383 the Court stated that Article 16 (1) must not be given a wider interpretation than its objective requires. The *ratio legis* of Article 16 (1) is that tenancies of immovable property, especially of dwellings, are generally governed by complex legislation which is strongly influenced by social considerations and which is best applied by the courts of the country in which it is in force. However, that situation does not arise in the case of agreements which relate only to the short-term letting of holiday homes situated abroad. In such cases the interests involved do not require the application of social legislation in the matter of tenancies. In German legislation, for example, short-term lettings of housing accommodation, which cover lettings of holiday homes, are expressly excluded from the ambit of social legislation on tenancies.
- 11 The Government of the Federal Republic of Germany also considers that the inexpediency of applying Article 16 (1) of the Convention to the letting of holiday homes becomes particularly clear if, as in this case, the parties have made their contract subject exclusively to German law and to the jurisdiction of the German

courts. The primary purpose of entrusting the proceedings to the courts of the place where the property is situated, which is to enable the mandatory provisions of the law of that place to apply by making the forum and applicable law coincide and, generally, to simplify the proceedings, is irrelevant in this case.

- 12 A further aim of Article 16 (1) is that the tenant of a dwelling, who as a general rule is socially in a comparatively weak position, should not be put at any further disadvantage by the fact that the trial takes place before a court far away from his place of residence. That aim is also irrelevant as far as leases of holiday homes are concerned because the lessee does not normally reside at the place where the holiday home is situated or require any special social consideration.
- 13 With regard to the second question, the Government of the Federal Republic of Germany points out that in its judgment in *Sanders v van der Putte*, cited above, the Court stated that the special considerations relating to tenancies of immovable property explained why exclusive jurisdiction was conferred on the courts of the State in which the immovable property was situated in the case of disputes relating to tenancies of immovable property properly so-called, that is to say, in particular, disputes between landlords and tenants as to the existence or interpretation of leases or to compensation for damage caused by the tenant and to the giving up of possession of the premises. According to the Rapporteur of the Committee of Experts on the Convention (Official Journal, 1979 C 59, p. 1), the rule conferring exclusive jurisdiction does not apply to proceedings concerned only with the recovery of rent, since such proceedings can be considered to relate to a subject-matter which is quite distinct from the rented property itself. That view must apply *a fortiori* to actions for compensation for indirect damage arising from a breach of the lease by one party and unrelated to the rented property itself. Therefore, the plaintiff's claims for compensation for loss of holiday enjoyment and unnecessarily incurred travel expenses do not fall under Article 16 (1). Nor can there be any exclusive jurisdiction under that provision in respect of claims for the payment of incidental charges which form an integral part of the total rent.
- 14 The United Kingdom considers that the scope of Article 16 (1) is to be determined by reference to the type of proceedings affecting the immovable property rather than to the nature of the lease or other interest in that property. In this case, the plaintiff is not making any claim for rent but is claiming damages for breaches of the lease and consequential loss flowing therefrom. The plaintiff's claims do not fall within the class of disputes mentioned by the Court in *Sanders v van der Putte*. The need for the proper administration of justice does not require claims, such as

those in this case for breach of terms of a lease and for consequential loss, to be assigned to the exclusive jurisdiction of the courts of the State in which the property is situated. Similar arguments apply to the claim by the plaintiff for incidental charges, namely those relating to the consumption of gas, electricity and water and for cleaning. The claims concerning the loss of, or damage to, articles listed in the inventory do not affect the rented property and ought not to be regarded as disputes which have as their object tenancies of immovable property for the purposes of Article 16 (1) of the Convention. For that provision to apply, the objective of the proceedings must be the determination, enforcement or giving effect to, or the termination of, rights of possession.

- 15 The Government of the Italian Republic takes the view that the reasons given by the national court for its decision, namely that considerations of expediency suggest that Article 16 (1) should not be applied to cases in which the lease is only for the short-term letting of a holiday home, both parties habitually reside in a country other than the one in which the property is situated and have agreed to apply the substantive law of the State in which they habitually reside, are not of such a nature as to exclude the application of that provision. The rule laid down in Article 16 (1) does not distinguish between short-term and long-term lettings or between the different uses to which the property is put: it may be used for professional, commercial or agricultural purposes, as a dwelling, for holidays and so forth. The fact that neither contracting party resides in Italy is immaterial. The argument based on the clause concerning the application of the law of a Member State other than that in which the property is situated is unacceptable. In any event, in some circumstances at least, the clause would not be valid, for example if it were meant to defeat the application of the 'fair rent' legislation in Italy. If it were accepted that an agreement of that kind, incorporated into the contract by means of a jurisdiction clause, might even deprive the courts of the State in which the property is situated of jurisdiction, the way would be open to the possibility of evading mandatory rules of that State.
- 16 With regard to the incidental charges, there can be no doubt, in the view of the Government of the Italian Republic, that they are related to the lease itself since their payment is a contractual obligation undertaken by the tenant. A dispute over such charges must clearly fall within the exclusive jurisdiction conferred by Article 16 (1). The possibility of depriving the courts of the State in which the property is situated of jurisdiction in such disputes might enable mandatory rules to be evaded by means of cleverly drafted agreements.

17 The Commission states that in some Contracting States furnished accommodation in general and furnished holiday accommodation in particular are expressly or impliedly excluded from the matters covered by special legislation for the protection of tenants. For those reasons it considers that the letting for consideration of furnished accommodation, particularly furnished holiday accommodation, does not come within the scope of application of Article 16 (1).

18 Article 16 of the Convention provides as follows:

‘The following courts shall have exclusive jurisdiction, regardless of domicile:

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

19 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.

20 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.

21 The question submitted by the Bundesgerichtshof is designed to ascertain whether 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.

- 22 It must be emphasized in this regard that, as the Italian Government has rightly pointed out, 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.
- 23 Account must also be taken of the uncertainty which would be created if the courts allowed exceptions to be made to the general rule laid down in Article 16 (1), which has the advantage of providing for a clear and certain attribution of jurisdiction covering all circumstances, thus fulfilling the purpose of the Convention, which is to assign jurisdiction in a certain and predictable way.
- 24 It follows that the provision in question applies to all tenancies of immovable property irrespective of their special characteristics.
- 25 The reply to the first question must therefore be 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.
- 26 With regard to the second question, it must be noted that the Convention grants exclusive jurisdiction 'in proceedings which have as their object . . . tenancies of immovable property'. In its judgment in *Sanders v van der Putte*, cited above, the Court considered that that expression covers disputes between landlords and tenants as to the existence or the interpretation of leases or to compensation for damage caused by the tenant. The Court must point out that that list is not exhaustive. The Government of the Italian Republic is right in arguing that disputes concerning the payment of rent fall under that exclusive jurisdiction. It would in fact be contrary to one of the aims of the provision in question, namely the correct application of national legislation on tenancies, to exclude from that exclusive jurisdiction disputes which are, in some Member States at least, governed by special legislation, such as the Italian 'fair rent' legislation.
- 27 Leases generally contain terms concerning entry into possession by the tenant, the use to which the property is to be put, the obligations of the landlord and tenant regarding the maintenance of the property, the duration of the lease and the giving up of possession to the landlord, the rent and the incidental charges to be paid by the tenant, such as water, gas and electricity charges.
- 28 Disputes concerning the obligations of the landlord or of the tenant under the lease come within the ambit of Article 16 (1) of the Convention, being

'proceedings which have as their object . . . tenancies of immovable property'. 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.

- 29 The reply to the second question must therefore be that any dispute 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, falls within the exclusive jurisdiction conferred by Article 16 (1) of the Convention on the courts of the State in which the property is situated. Disputes concerning the obligations of the landlord or of the tenant under the terms of the tenancy fall within that exclusive jurisdiction. 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.

Costs

- 30 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Italian Republic, the United Kingdom, and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber)

in answer to the questions referred to it by the Bundesgerichtshof, by order of 3 October 1983, hereby rules:

1. 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.

2. 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.

Bosco

Pescatore

O'Keeffe

Koopmans

Bahlmann

Delivered in open court in Luxembourg on 15 January 1985.

P. Heim

Registrar

G. Bosco

President of the Fourth Chamber