

EXPLORING THE EVOLUTION OF CONTRACTUAL CONCEPTS WITHIN REGULATION NO 1215/2012 THROUGH CJEU JUDGMENTS: CIVIL AND COMMERCIAL MATTERS, CONTRACTS, TENANCIES OF IMMOVABLE PROPERTY, AND PROVISION OF SERVICES UNDER EXAMINATION

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Starting with the ruling of the Court of Justice of the European Union in the Obala case, this article explores: how the Court has redefined the concepts of ‘contract matters’ and ‘tort, delict, or quasi-delict matters’; actions related to ‘tenancy agreements for immovable property’ versus ‘rights in rem’; and the evolving interpretation of ‘services’ within the Brussels I Recast Regulation on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. It also illustrates the discrepancies in the analysis of the term ‘civil and commercial matters’. The Obala ruling has led to changes in how these concepts are understood and studied in certain contexts, thereby reshaping their interpretative contours. As a result, this article conducts a retrospective analysis to grasp these changes and their implications.

1 INTRODUCTION. OBALA CASE AND METHODOLOGY OF STUDY

Case C-307/19, under the name *Obala*,¹ concerns a monetary claim put forth by the corporate entity known as ‘Obala i lučice’ (Obala). This claim is directed towards ‘NLB Leasing’, a Slovenian entity. Obala operates as a municipal enterprise in Croatia and maintains authority over the management of the communal vehicular parking facility within the jurisdiction of the city of Zadar.

Obala’s monetary claim entails the restitution of a fee for a complete day’s usage of the parking ‘services’ provided by them, along with the expenses and foreseeable charges. This petition is contended against NLB Leasing in connection to a vehicle that was stationed on a specifically designated parking area situated along a public roadway within Zadar. A practicing notary in Pula (Croatia) initiated a claiming procedure on behalf of Obala, and NLB Leasing contested the claim at the Commercial Court of Pazin, which could have been deemed jurisdictionally competent based on the notary’s place of practice. However, this court declared its lack of jurisdiction and transferred the case to the Commercial Court of Zadar, where the designated parking area is located. The latter court also ruled on its lack of jurisdiction, leading to the resolution of this jurisdictional dispute by the Commercial Court

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¹ Case C-307/19 *Obala i lučice d.o.o. v NLB Leasing d.o.o.* [2021] EU:C:2021:236.

of Appeal of Croatia. Seeking guidance on the application of Regulation No 1215/2012² (also known as Brussels I Recast Regulation), the Commercial Court of Appeal of Croatia referred the matter to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

This article delves into four crucial concepts within the Regulation that formed part of the preliminary ruling: the classification of a case as ‘civil and commercial matter’; the distinction between ‘contract matters’ versus ‘tort, delict, or quasi-delict matters’; actions concerning ‘tenancy agreements for immovable property’ versus ‘rights *in rem*’; and the inclusion of ‘services provision’ within the Regulation’s ambit. To explore these areas, the analysis starts with a specific case (*Obala*)³ and thereafter conducts a retrospective study to comprehend various perspectives embedded within the most pertinent judgments in these domains.

The Regulation explicitly confines its scope to civil and commercial matters, as indicated by its name ([...] on jurisdiction and the recognition and enforcement of judgments in *civil and commercial matters*). Although the primary focus of this article is not to delve into this concept extensively, given its thorough examination in academia, this aspect cannot be overlooked since failure to align the case within the delineation of a civil and commercial matter would automatically lead to the dismissal of Brussels I Recast Regulation’s application.

The *Eurocontrol*⁴ case marked the inaugural analysis of this term, wherein the CJEU established a comprehensive interpretation. Notably, the CJEU treats it as an autonomous concept, thereby preventing interpretation solely based on terms employed in different legislations. Nevertheless, despite a relatively clear definition, Advocate General (AG) Mr. Michal Bobek⁵ observed three distinct approaches employed by the CJEU, namely: the ‘subject matter’ perspective, the ‘legal relationship’ perspective and a hybrid approach.

The ‘subject matter’ perspective focuses on the interrelation between involved parties and the legal action initiated by the plaintiff. Conversely, the ‘legal relationship’ approach is more intricate, relying on two indicators. Firstly, it establishes a ‘reference framework’ by determining the ordinary legal rules governing interactions between private individuals. This involves examining the ‘basis of the action brought’ and the procedural rules outlined in the relevant national law of the Member State. Secondly, it evaluates if the dispute arises from a unilateral exercise of public powers beyond this ‘reference framework’. Recent years have seen the application of both the ‘subject matter’ and ‘legal relationship’ approaches, with no clear preference identified within the case law. In fact, the most recent judgments of the CJEU use these two approaches indistinctively, constituting the third approach. Cases such

² 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 (Brussels I Recast Regulation).

³ *Obala* (n 1).

⁴ Case C-29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v European Organization for the Safety of Air Navigation (Eurocontrol)* [1976] EU:C:1976:137

⁵ Case C-307/19 *Obala i lučve d.o.o. v NLB Leasing d.o.o.* [2020] EU:C:2020:971, Opinion of AG Bobek, paras 73-66.

as *Sapir*,⁶ *flyLAL-Lithuanian Airlines*⁷ and *Aannemingsbedrijf Aertssen*⁸ serve as examples in this context.

In examining the *Obala*⁹ case, the highlighted aspect holds significance due to the notable divergence in perspectives among the legal entities involved. On one side, the German and Slovenian governments approached the case through the ‘subject matter’ perspective, emphasizing the origin and execution of the contract. From their viewpoint, the obligation to pay for parking usage was mandated, establishing a relationship of imposition between the plaintiff and the defendant. *Obala*, acting under the directives of the city government, delineated and managed parking spaces in Zadar. Additionally, the city government enforced the payment for parking, indicating a unilateral exercise of public powers.¹⁰

On the opposing side, the European Commission, the plaintiff, and the Croatian government adopted the ‘legal relationship’ perspective.¹¹ They highlighted the clear requirement for payment evident from street signals and supported by a law specifying the relationship publicly. Moreover, they underscored that the procedure for fee recovery, including interests and costs, operated under private law provisions governing contractual obligations. Consequently, they argued against the presence of any unilateral exercise of public powers.

In its resolution of the *Obala*¹² case, the CJEU consolidated these divergent perspectives and ultimately concluded that the matter falls within the realm of civil and commercial affairs. This determination stemmed from the observation that the legal action was pursued as a private litigation without *Obala* assuming a superior governmental position. This pivotal distinction – highlighting the absence of a governmental role for *Obala* – led to the ruling that the case pertains to a civil and commercial matter. However, the amalgamation of these varying perspectives within the *Obala*¹³ case has generated conflicting and confusing positions.

This distinction is crucial for readers, as cases like *BUAK*¹⁴ or the *Pula Parking*¹⁵ adopt solely the ‘legal relationship’ perspective, a trend often observed in the decisions of the Third Chamber.

Having witnessed how the interpretation of the civil and commercial matter concept

⁶ Case C-645/11 *Land Berlin v Ellen Mirjam Sapir, Michael J Busse, Mirjam M Birgansky, Gideon Rumney, Benjamin Ben-Zadok, and Hedda Brown* [2013] EU:C:2013:228.

⁷ Case C-302/13 *flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautiskā lidosta Rīga VAS, and Air Baltic Corporation AS* [2014] EU:C:2014:2319.

⁸ Case C-523/14 *Aannemingsbedrijf Aertssen NV, and Aertssen Terrasements SA v VSB Machineverbuur BV, Van Sommeren Bestrating BV, and Jos van Sommeren* [2015] EU:C:2015:722.

⁹ *Obala* (n 1).

¹⁰ Opinion of AG Bobek in *Obala* (n 5) paras 37-73. Van Calster also expresses surprise at the absence of consensus despite numerous cases. As he points out, ‘the divergent emphasis by different chambers of the Court has not helped’ – Geert Van Calster, ‘Groundhog day, but with Unicorns. Bobek AG in *Obala v NLB* i.a. on “civil and commercial”’ (*Gav Law*, 1 December 2020) <<https://gavclaw.com/2020/12/01/groundhog-day-but-with-unicorns-bobek-ag-in-obala-v-nlb-i-a-on-civil-and-commercial/>> accessed 01 March 2024.

¹¹ Opinion of AG Bobek in *Obala* (n 5), para 81.

¹² *Obala* (n 1).

¹³ *ibid.*

¹⁴ Case C-579/17 *BUAK Banarbeiter-Urlaubs- u. Abfertigungskasse v Gradbeništvo Korana d.o.o.* [2019] EU:C:2019:162.

¹⁵ Case C-551/15 *Pula Parking d.o.o. v Sven Klaus Tederahn* [2017] EU:C:2017:193.

generates uncertainty due to the CJEU's application of different analytical methods, the discussion now advances towards studying the concepts central to this research.

2 THE CONCEPTS OF 'MATTERS RELATING TO A CONTRACT' AND 'MATTERS RELATING TO TORT, DELICT OR QUASI-DELICT' AS DICHOTOMY

The concepts at play here hold independent significance within the framework of Regulation No 1215/2012 which means that CJEU scrutinizes their fundamental principles and objectives along with the aim of the Regulation. The CJEU's rationale behind establishing autonomous definitions for concepts within this specific Regulation is to guarantee uniform enforcement throughout the European Union.¹⁶

The term 'matters relating to tort, delict or quasi-delict' is defined by its distinction from the domain encompassed by 'matters relating to a contract'.¹⁷ From the perspective of the CJEU, the first term encompasses a wide range of actions aimed at establishing a defendant's liability, arising from obligations not rooted in a voluntarily assumed legal commitment between parties. Conversely, contractual matters revolve around obligations voluntarily undertaken by one party toward another.

Different legal precedents are presented here to illustrate the various elements considered by the Court when dealing with cases involving contract, tort, delict and quasi-delict. These examples serve to demonstrate the nuanced factors taken into account by the Court within this legal landscape. However, it is important to note that they do not adhere to a specific pattern; instead, the Court approaches each case individually for resolution.

2.1 CORRELATION BETWEEN PRE-EXISTING RELATIONSHIPS AND ASSUMED CONTRACTUAL OBLIGATIONS

In the *Kerr* case,¹⁸ the legal dispute revolves around dues payment in a homeowners' community. This issue can be seen as either a result of a voluntary agreement or as a sign of a mandatory relationship. Previous case law such as *Martin Peters Bauunternehmung GmbH*,¹⁹ *Powell Duffryn*²⁰ and *Engler*,²¹ focused on the duties of members in their respective associations. The Court established that upon joining an association, individuals commit to certain obligations, which includes the acceptance of decisions made by the association's leaders. Essentially, when someone becomes a member, they accept a set of rights and responsibilities, including the duty to follow the association's decisions – similar to entering a contractual agreement where both parties have agreed-upon roles and obligations.

Expanding on that logic, in the *Kerr*²² case, the Court concluded that, even if owners' communities were imposed by legal requirements or if board resolutions were passed without

¹⁶ *Obala* (n 1), para 82.

¹⁷ *ibid*, para 83.

¹⁸ Case C-25/18 *Bryan Andrew Kerr v Pavlo Postnov, and Natalia Postnova* [2019] EU:C:2019:376.

¹⁹ Case C-34/82 *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* [2019] EU:C:1983:87.

²⁰ Case C-214/89 *Powell Duffryn plc v Wolfgang Peterleit* [1992] EU:C:1992:115.

²¹ Case C-27/02 *Petra Engler v Janus Versand GmbH* [2005] EU:C:2005:33.

²² *Kerr* (n 18).

a property owner's involvement or against their disagreement, the act of acquiring a residence – typically seen as a voluntary choice – automatically involves accepting associated responsibilities. These responsibilities include adhering to the regulations of an owners' community and the implicit assumption of resolutions approved by the collective decisions of the property owners' general assembly.

2.2 ENFORCING OBLIGATIONS: LEGAL IMPOSITIONS IN THE LITIGATED RELATIONSHIPS

Conversely, there are cases such as the *Austro-Mechana*²³ and *Ordre des avocats du barreau de Dinant*.²⁴ These cases shed light on instances where the Court opted against characterizing payment obligations as contractual in nature due to their *ex lege* origins. Specifically, the *Austro-Mechana*²⁵ case questioned whether compensation payments arising from the distribution of copyrighted materials be treated as part of a contractual agreement. Here, Austro-Mechana, an Austrian copyright-collecting society, is responsible for collecting fair compensation for authors due to unauthorized private reproductions of their protected works, as outlined in Section 42(b) of the UrhG.²⁶ Notably, the CJEU determined that the compensation stipulated by Austro-Mechana was not the result of a voluntary agreement with Amazon. Austro-Mechana's claim did not challenge Amazon's distribution of recording media in Austria; rather, it focused on Amazon's failure to meet the specified compensation obligation.

Just as associates comply with board decisions or property owners adhere to board resolutions, lawyers are aware that they may be required to regularly pay fees as directed by their governing board. However, the CJEU ruled that despite the legal obligation for registration, there's no fee component in the law. Therefore, while the mandatory requirement for registration is legally binding and necessary for practicing law, any board decision mandating payment cannot be considered as having been willingly accepted.

2.3 DIFFERENTIATING BETWEEN THE AFOREMENTIONED CASES

When examining the aforementioned case law, it is challenging to determine why the legally mandated relational obligation in the *Ordre des avocats du barreau de Dinant*²⁷ case outweighs the voluntary choice to become a lawyer.²⁸ Consider the installation of an elevator in a building: while not legally required, the owners' board has the power to make such decisions. Even if someone casts a dissenting vote against it, they are still bound to comply, as it is seen as a

²³ Case C-572/14 *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v Amazon EU Sàrl, Amazon Services Europe Sàrl, Amazon.de GmbH, Amazon Logistik GmbH, and Amazon Media Sàrl* [2016] EU:C:2016:286.

²⁴ Case C-421/18 *Ordre des avocats du barreau de Dinant v JN* [2019] EU:C:2019:1053.

²⁵ *Austro-Mechana* (n 23).

²⁶ Law on copyright (*Urheberrechtsgesetz*) of 9 April 1936, Federal Law Gazette (*BGBI*) No 111/1936 (AUST).

²⁷ *Ordre des avocats du barreau de Dinant* (n 24).

²⁸ In fact, in Case C-421/18 *Ordre des avocats du barreau de Dinant v JN* [2019] EU:C:2019:644, Opinion of AG Saugmandsgaard Øe, the Advocate General considered that lawyers willingly choose their profession. Drawing an analogy to associates assuming board decisions as part of their membership obligations or owners complying with proprietors' board resolutions, lawyers are aware that they may need to periodically pay fees, in consonance with the authority of bar's governing board.

contractual obligation. However, in the *Obala*²⁹ judgment, the party making the claim had no opportunity for active involvement in the decision-making process. For instance, when someone rents a vehicle, they are aware of legal requirements like paying circulation tax or periodic technical inspections. It is worth noting that the *Obala*³⁰ case is not delving into the enforcement of a law to which the principle ‘ignorance of the law excuses no one’ (*ignorantia juris non excusat*) would apply. If this is regarded as law enforcement, the case may not fall within the scope of civil or commercial matters. In accordance with the referenced legal precedents, entering into a contract with someone ought to be a voluntary choice rather than an imposition. If it is deemed an imposition, a freely made decision must have occurred at some point, similar to the process of purchasing a house. Yet, when we travel within the EU, it might seem that, under the principle of free movement of persons, there is generally unrestricted access to public parking spaces. This is not to suggest that governments lack the power to impose restrictions. However, such regulation is considered an exception, making it challenging to establish a connection between the free action of renting a car and the expectation, at the time of contracting, that they will be parking in a specific area where a government has decided to impose restrictions. In other words, it is puzzling how the imposition of a fee for utilizing public parking spaces can be regarded as a freely chosen legal association. It seems that the CJEU handles such issues on a case-by-case basis, posing a challenge in offering readers a definitive definition.

3 THE EXCEPTION OF ARTICLE 24(1): RIGHTS *IN REM* OVER IMMOVABLE PROPERTY AND TENANCIES INVOLVING IMMOVABLE PROPERTY

Article 24(1) of the Brussels I Recast Regulation delineates an exclusive jurisdiction that precludes the application of alternative legal venues. Given its exceptional nature, applying it demands caution,³¹ respecting its intended objective: a deeper understanding of the complexities – factual, legal, and customary – relevant to a specific immovable property.³² Therefore, this provision fundamentally relies on the idea of proximity, establishing that the court in the Member State where property sits holds the most comprehensive understanding of the case. It is worth noting that this Article distinguishes between rights *in rem* over immovable property and tenancy agreements involving immovable property.³³

The Croatian court, in pursuit of clarifying the potential nature of the parking agreement, submitted this preliminary inquiry specifically addressing contracts related to the

²⁹ *Obala* (n 1).

³⁰ *Obala* (n 1).

³¹ *ibid*, para 76.

³² *ibid*, para 77. In order to gain enhanced insight into the pursued objectives and the developmental trajectory of this specific concept, *vid.* Iván Heredia Cervantes, ‘Artículo 24.1’ in Pedro Pérez-Llorca (dir), *Comentario al Reglamento (UE) nº 1215/2012 relativo a la competencia judicial internacional, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil (Reglamento Bruselas I refundido)* (Aranzadi 2016) 507-512.

³³ In this regard, in Case C-8/98 *Dansommer A/S v Andreas Götz* [2000] EU:C:2000:45, the Court determined that the matter at hand did not revolve around rights *in rem*, but instead hinged upon a contractual arrangement concerning the leasing of immovable property. In the words of the Court, ‘Article 16(1) [of Brussels Convention] applies to any proceedings concerning rights and obligations arising under an agreement for the letting of immovable property, irrespective of whether the action is based on a right *in rem* or on a right *in personam* (Lieber, paragraphs 10, 13 and 20)’ (para 23).

leasing of immovable property. In prior jurisprudence,³⁴ when dealing with tenancy of immovable properties, the CJEU established that any legal dispute arising from obligations and rights stemming from a tenancy agreement concerning an immovable property falls within the purview of Article 24(1), regardless of the specific type of legal action employed in the case at hand. This exception was foreseen due to the intricate relationship between the landlord and lessee, and its impact to the commitments towards neighbours, property maintenance, tax payments, and eventual property restitution at the lease's end.³⁵

Conversely, to understand what a dispute over rights *in rem* (i.e. property rights, easements and securities) tied to immovable property is, cases like *Reitbauer and others*³⁶ can be used to illustrate readers. Here, a contractor sued a married couple trying to avoid a debt by auctioning a property where the husband had a security right within the renovated property in which the contractor had been involved. This case dealt with property rights and the utilization of a legal remedy to prevent fraudulent activities in aim of evading the creditor (often referred to as *actio pauliana*), rather than tenancy rights. Similarly, the *Schmidt*³⁷ case deliberated on annulling a real estate donation.

Notably, the *MC*³⁸ order delineated roles in litigation, differentiating between lessor-lessee and buyer-seller relationships. While the case did not pertain to the leasing of immovable property, the CJEU, in determining that the relationship in question was characterized as a purchase rather than a lease, defined the conceptual contours of a tenancy contract as stipulated by the Brussels I Recast Regulation. This holds significance because, as elucidated, Article 24(1) delineates two distinct scenarios for its application: one concerning rights *in rem*, where the fundamental nature of the action must be scrutinized regardless of the type of right over immovable properties, and a second scenario specifically addressing tenancy agreements involving immovable property, where the crux lies in the nature of the contract, irrespective of the action pleaded by the plaintiff.

In the *Obala* judgment, the CJEU chose not to adopt Article 24(1), citing that the action did not concern the use conditions of immovable property.³⁹ However, its prior jurisprudence makes clear that, under this provision, any kind of rights could be actioned if the case was on a lease agreement of an immovable. Upon reviewing this judgment, one could infer that the CJEU may have restricted any future litigation related to tenancy contracts solely to matters concerning the conditions of property use.

In conclusion, Article 24(1) represents a jurisdictional exception in the realm of immovable properties, distinguishing between rights *in rem* and disputes stemming from tenancy agreements. The section addressing rights *in rem* specifically pertains to actions linked to the immovable rights. On the other side, concerning tenancy agreements, it encompasses a broad spectrum of disputes related to the agreement itself, regardless of whether they concern the conditions of enjoyment. Thus, actions *in rem* focus solely on the immovable property itself, impacting its rights or status. On the other hand, actions based on the tenancy

³⁴ *ibid* para 23, and Case C-292/93 *Norbert Lieber v Willi S. Göbel, Siegrid Göbel* [1994] EU:C:1994:241.

³⁵ *Obala* (n 1), para 78.

³⁶ Case C-722/17 *Norbert Reitbauer, Dolinschek GmbH, B.T.S. Trendfloor Raumausstattungs-GmbH, Elektrounternehmen K. Maschke GmbH, Klaus Egger, and Architekt DI Klaus Egger Ziviltechniker GmbH v Enrico Casamassima* [2019] EU:C:2019:577.

³⁷ Case C-417/15 *Wolfgang Schmidt v Christiane Schmidt* [2016] EU:C:2016:881.

³⁸ Case C-827/18 *MC v ND* [2019] EU:C:2019:416. It is only available in German and French.

³⁹ *Obala* (n 1), para 79. The Court applied the definition of lease of an imovable used in *MC* order (n 38).

agreement can influence both the immovable property itself and the tenant as an individual.

4 THE POSITIVE ACTS UNDERTAKEN BY A COMPANY THAT MAKES THE ACTIVITY BE CLASSIFIED AS SERVICE

Once parties are bound by a contract, the Brussels I Recast Regulation establishes a structured hierarchy for jurisdiction. Article 24 designates the primary jurisdiction, but, in the absence of such jurisdiction, Articles 25 and 26 govern jurisdictional matters based on the contract's terms. Parties can stipulate their preferred jurisdiction within the agreement. If these articles do not apply, two options remain. Article 4 permits legal action in the defendant's domicile, and Article 7 introduces a special forum based on the contract's nature. The plaintiff holds the choice between these options.⁴⁰ This section examines Article 7.

Article 7(1)(a) outlines that the suitable forum depends on where the obligation was fulfilled, but Article 7(1)(b) takes precedence in situations involving goods or services by specifying the exact location of performance, overriding the criterion in 7(1)(a).⁴¹ Consequently, courts must ascertain the actual location or intended place of service provision. This determination involves examining the terms laid out in the agreement to establish the relevant location for fulfilling the obligations.⁴²

The term 'services' under the Brussels I Recast Regulation implies that the supplier engages in an activity in exchange for compensation. However, it is crucial that this activity involves proactive actions rather than mere inaction or omissions.⁴³ To illustrate, the *Falco Privatstiftung*⁴⁴ case resolved a preliminary ruling of the Higher Regional Court of Vienna in relation to a claim involving royalties derived from the sales of video recordings originating from concerts. The involved parties comprised an intellectual property right holder and another entity aspiring to utilize said right through a licensing agreement. The Vienna Court sought clarification on whether this arrangement amounted to a contract encompassing the provision of services by the licensor. For the CJEU, in a contract where the owner of an

⁴⁰ See Juliana Rodríguez Rodrigo, 'Reglamento 1215/2012: foro de sumisión del artículo 25 y foro especial por razón de la materia del artículo 7.1, en relación a un contrato verbal de concesión mercantil internacional. comentario a la Sentencia del Tribunal de Justicia de la Unión Europea, 8 marzo 2018, Saey Home, c-64/17' (2018) 10(2) Cuadernos de Derecho Transnacional 906, 908.

⁴¹ *Obala* (n 1), para 92.

⁴² The distinction between Articles 25 and 26 versus Article 7(1) lies in their treatment of contractual terms determining the location chosen by parties for legal proceedings. Articles 25 and 26 impose stricter formal requirements as they pertain to a specific clause wherein parties explicitly select the litigation venue. Conversely, Article 7(1) focuses on studying the place of contract performance rather than the chosen litigation venue. In the case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] EU:C:1997:70, which revolved around a verbal agreement on the place of performance and its validity, the CJEU ruled that the purported place of performance didn't align with the actual object of the contract. Essentially, one party sought to create a forum clause without meeting all the requirements outlined in Articles 25 and 26. This doctrine aims to prevent the fraudulent manipulation of legal provisions aimed at creating ambiguity between the place designated for litigation and the genuine location of contract performance. It emphasizes that while Articles 25 and 26 focus on the explicit choice of litigation venue, Article 7(1) concentrates on the true place of contractual performance. For additional details, please refer to the accompanying article Jonatan Echebarría Fernández, 'Jurisdiction and applicable law to contracts for the sale of goods and the provision of services including the carriage of goods by sea and other means of transport in the European Union' (2019) 11(2) Cuadernos de Derecho Transnacional 58, 63.

⁴³ *Obala* (n 1) para 94.

⁴⁴ Case C-533/07 *Falco Privatstiftung, and Thomas Rabitsch v Gisela Weller-Lindhorst* [2009] EU:C:2009:257, paras 30-31.

intellectual property right grants his contractual partner the use of that right in return for remuneration, it cannot be inferred that there is an active activity.⁴⁵ The owner only refrains from challenging the partner's use of the copyrighted material.

Conversely, in the *Obala*⁴⁶ case, the CJEU asserted that *Obala*'s responsibility for managing public parking facilities involved distinct activities like defining parking spaces along roads and collecting parking fees. The Court considered actions related to space delineation and fee collection as integral components of the services provided by *Obala*.

This statement in the *Obala*⁴⁷ case presents an unexpected proposition, especially in light of paragraph 37 of the *Falco Privatstiftung*⁴⁸ case. This paragraph underscores the need for a strict interpretation of rules governing specialized jurisdiction, as they deviate from the principle that jurisdiction primarily depends on the defendant's domicile in many scenarios.

In the context of public parking spaces managed by *Obala*, it is important to recognize that this arrangement involves not just a single contract between *Obala* and the user but two distinct agreements: one is the public administration's license for exploitation obtained by *Obala*, and the other is the user-specific utilization contract. If the concept of 'services' is narrowed down to only cover interactions stemming from the *Obala*-user contract, it becomes clear that it primarily involves granting usage rights in exchange of a payment. On the other hand, activities like establishing, marking, and managing parking spaces fall within the realm of the public license for exploitation or, at the very least, contribute to the operational functionality. This can be compared with the pursuit of a debtor's claim, which is seen as an inherent part of the business operation that initially led to the debt. According to the European Commission, simply providing parking space on its own holds a marginal character that does not fully qualify as a genuine 'service'.⁴⁹

In conclusion, the Brussels I Recast Regulation meticulously establishes a structured hierarchy for determining jurisdiction, prioritizing Article 24 as the primary jurisdictional basis. When Article 24 is not applicable, general jurisdiction based on the defendant's domicile comes into play, complemented by specific jurisdiction outlined in Article 7.

The Regulation defines 'services' as involving active engagements for compensation, emphasizing proactive actions over mere inaction or omissions. *Falco Privatstiftung*⁵⁰ case clarifies that granting usage rights in exchange for remuneration, without proactive activity, does not constitute a service provision. However, the *Obala*⁵¹ case expands the scope by recognizing actions like defining parking spaces and collecting fees as integral components of the services provided. Arguably, the distinction between inherent operational actions and the core provision of services remains a pivotal yet intricate aspect, influencing the determination of jurisdiction and contractual obligations under the Brussels I Recast Regulation.

⁴⁵ As articulated by the CJEU in *Falco Privatstiftung* (n 44), para 31, '[...] the owner of an intellectual property right does not perform any service in granting a right to use that property and undertakes merely to permit the licensee to exploit that right freely'.

⁴⁶ *Obala* (n 1).

⁴⁷ *Obala* (n 1), para 95.

⁴⁸ *Falco Privatstiftung* (n 44).

⁴⁹ *Obala* (n 5), Opinion of AG Bobek, para 118.

⁵⁰ *Falco Privatstiftung* (n 44).

⁵¹ *Obala* (n 1).

5 CONCLUSIONS

The *Obala*⁵² case has instigated significant modifications in the paradigm for appraising the distinction between ‘contract matters’ versus ‘tort, delict, or quasi-delict matters’, actions concerning ‘tenancy agreements for immovable property’ versus ‘rights *in rem*’, and the inclusion of ‘services provision’ within the Brussels I Recast Regulation’s ambit. An issue has also been identified in analysing the scope of ‘civil and commercial matters’. While there may not be a significant alteration to the term itself, the approach of the Court is notable. Given its relevance to the application of the Regulation, it is essential to conduct a thorough examination thereof.

It is important to note that this Regulation holds immense significance within the European Union due to its role in providing clear guidelines for determining jurisdiction in cross-border civil and commercial cases. It also establishes frameworks for recognizing and enforcing judgments across EU member states, thereby reducing legal uncertainties and streamlining legal procedures. In light of its extensive scope, the *Obala*⁵³ case provides an opportunity to analyse the four crucial sets of concepts previously mentioned, which focus on delineating the structured hierarchy established by the Brussels I Recast Regulation, especially when parties are bound by a contract – a prevalent scenario in commerce.

In the conceptualization of ‘civil and commercial matters’, the Court of Justice of the European Union has made efforts to impart a uniform construal thereof. Nonetheless, AG Bobek has suggested that there exist two, if not three, divergent approaches in the different Chambers of the Court to the elucidation of the concept.⁵⁴ It is pertinent to note that the CJEU has not explicitly delineated this classification, but an examination of prior jurisprudence reveals the pattern indicated by the AG. Furthermore, within the context of the *Obala*⁵⁵ case, it is evident that legal operators offering their opinions exhibit varied approaches and yield different outcomes,⁵⁶ all grounded in the accepted methodologies of the CJEU. As Van Calster has stated, the lack of consensus, even considering the numerous cases the Court has ruled, is, to say the least, unexpected.⁵⁷

Once the case falls within the purview of the Brussels I Recast Regulation, it becomes imperative to delve into the various jurisdictions provided by this Regulation. Initially, it must be asked whether the case falls within the realm of contractual matters or pertains to tort, delict or quasi-delict. Traditionally, the Court has approached this by scrutinizing the freedom to establish agreements from which legal actions arise. However, in the *Obala*⁵⁸ case, a departure from this conventional methodology was notable, as the Court chose to presume this freedom to contract and forego its exhaustive examination, instead assuming a direct analysis of the tacit contract between NLB Leasing and the municipal agent.

The mere publication of general terms and conditions should not be regarded as irrefutable evidence of a freely entered agreement concerning parking in the designated area.

⁵² *ibid.*

⁵³ *Obala* (n 1).

⁵⁴ *Obala* (n 5), Opinion of AG Bobek, paras 73-76.

⁵⁵ *Obala* (n 1).

⁵⁶ (n 5), Opinion of AG Bobek, paras 73-78.

⁵⁷ Van Calster (n 10).

⁵⁸ *Obala* (n 1).

The user, foremost, needs to be aware that they are parking within a restricted zone – without being bound by the principle ‘ignorance of the law excuses no one’, as it is a private case, not a law enforcement matter – and secondly, needs to comprehend the associated terms and conditions. Unfortunately, this crucial aspect has been omitted from the Court’s deliberations.

Furthermore, by reintroducing the omitted step typically undertaken by the Court, two distinct categories of jurisprudence can be discerned. One underscores the significance of the freedom exercised in the antecedent decision to enter into the litigious agreement. An example could be when an individual willingly purchases a property and thereby voluntarily assumes the obligations associated with participation in an owners’ community. The other category is related to scenarios wherein, despite the voluntary nature of the initial decision, there is a lack of freedom in consenting the contract that precipitates the dispute since it is a consequence of a relationship imposed by law. A pertinent illustration of the latter can be found in instances where individuals are compelled to join a bar association as a prerequisite for becoming a lawyer. Applying this analytical framework, it can be inferred that NLB Leasing did not genuinely and voluntarily accept the terms of the relationship with Obala, since it is a relationship imposed by law and there may be a presumption of free parking as part of the fundamental right of free movement.

Nevertheless, since the Court posits the existence of a tacit agreement between the parties, it proceeds to study the exceptional jurisdiction outlined in Article 24(1), which presents two options for application: cases concerning rights *in rem* over immovable property and cases pertaining to tenancies of immovable property. The CJEU tends to adopt a literal interpretation of these provisions. Hence, first it becomes imperative to study whether the subject matter of the case involves an immovable property. Subsequently, the emphasis shifts towards examining the nature of the contract. If it is a lease, Article 24(1) applies, courtesy of its second provision, regardless of the type of legal action pursued. However, if it involves a different type of contract, the analysis centres on the impact of the action on rights associated with the property itself – such as property rights, usufruct, mortgages, etc. Only in instances where these rights are affected will the Article be applicable under its first provision. The Court determined that Obala did not enter into a tenancy agreement for the parking area with NLB Leasing, a point which appears correct. However, it resolves the dispute by asserting that the legal action does not concern the conditions of use of an immovable property. This stance appears to be contentious as, up until now, the court consistently held that any controversy regarding a tenancy of immovable property falls under Article 24(1), no matter the legal action used in the legal proceeding. Therefore, it remains uncertain whether this ruling alters the Court’s established precedents.

Finally, this article culminates in the application of Article 7 when the exception in Article 24(1) does not apply, specifically focusing on contracts of goods purchase or service provision. The term ‘service’ has undergone modulation in jurisprudence because some businesses do not engage in active actions. Take, for instance, an author who permits the reproduction of their art. The act involves granting permission and receiving remuneration, without any active involvement beyond that. For the CJEU, this does not constitute a provision of services as the licensor merely grants permission without actively providing a

service. However, in the *Obala*⁵⁹ case, the CJEU established that the responsibility of managing a payable public parking area involves specific activities like defining parking spaces along roads and collecting parking fees. The Court deems actions related to space delineation and fee collection as integral components of the services provided by *Obala*. This interpretation seems to deviate from the previous doctrine established in the *Falco Privatstiftung*⁶⁰ case since the user-specific utilization contract consisted solely of granting usage rights of the floor in exchange for payment. Defining parking spaces and collecting fees appear to be part of a pre-existing contract with the city government or, at the very least, the operational function of the business.

As evident, these terms are complex and form the cornerstone of this legislation. The objective of this article has been to reduce certain doubts and underscore the complexities inherent in this Regulation.

⁵⁹ *Obala* (n 1).

⁶⁰ *Falco Privatstiftung* (n 44).

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