OPINION OF ADVOCATE GENERAL DARMON
delivered on 22 March 1994 *

Mr President,
Members of the Court,

1. By order of 10 June 1992, received at the Court on 19 May 1993, the Oberlandesgericht (Higher Regional Court) Frankfurt am Main asks the Court for an interpretation of Article 16(1) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1] ('the Convention'), in the context of proceedings between Norbert Lieber, the appellant in the main proceedings, and Mr and Mrs Göbel, the owners of an apartment in Cannes (France), all three being domiciled in the Federal Republic of Germany.

2. Following earlier proceedings, the parties reached a settlement on 27 April 1978 in which Mr and Mrs Göbel agreed to transfer the ownership of the said apartment to Mr Lieber. The appellant in the main proceedings was thus put in possession of the apartment and used it from 1 June 1978 to 30 April 1987. The settlement was declared void under Paragraphs 313 and 125 of the Bürgerliches Gesetzbuch (German Civil Code), and the respondents in the main proceedings brought before the Landgericht (Regional Court) Frankfurt am Main a claim for compensation for use for the period in question.

3. The Landgericht, in order to assess the value of the use of the property, appointed a French expert, and on the basis of his report that court determined the amount of compensation payable to Mr and Mrs Göbel.

4. Mr Lieber appealed against that decision. He considered that in view of the location of the property, the French courts had exclusive jurisdiction under Article 16(1) of the Convention, which provides that:

'The following courts shall have exclusive jurisdiction, regardless of domicile: ... in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated ...'.

* Original language: French.

1 — As amended by the Accession Convention of 9 October 1978 (OJ 1978 L 304, p. 1).

5. In those circumstances the Oberlandesgericht Frankfurt am Main puts the following question to the Court:

'Do the matters governed by Article 16(1) of the Brussels Convention also cover questions of compensation for use made of a dwelling after a failed property transfer?'

6. To answer that question, the Court will have to determine the scope of Article 16(1) with respect not only to 'tenancies of immovable property' but also to 'rights *in rem* in immovable property'. I shall therefore examine those two aspects in turn.

7. *I.* The appellant in the main proceedings argues that although 'the counterclaim does not put forward any claims relating to the law on tenancies', [2] it must be regarded as relating to the law on tenancies with respect in particular to the determination of the amount of rent and the rules on protection for tenants, with the result that the French courts must be allowed exclusive jurisdiction.

8. Let me say straight away that neither the underlying objective of the rule nor the case-law of the Court supports such an argument.

9. The intention of the authors of the Convention was to limit the scope of Article 16(1) to tenancies in the strict sense. Thus the Jenard Report [3] states that tenancies of immovable property

'will include tenancies of dwellings and of premises for professional or commercial use, and agricultural holdings. In providing for the courts of the State in which the property is situated to have jurisdiction as regards tenancies in immovable property, the Committee intended to cover disputes between landlord and tenant over the existence or interpretation of tenancy agreements, compensation for damage caused by the tenant, eviction, etc.'. [4]

10. The reasons for conferring exclusive jurisdiction in this respect are that:

'This type of dispute often entails checks, enquiries and expert examinations which have to be made on the spot. Moreover, the matter is often governed in part by customary practices which are not generally known

2 — P. 2 of his observations.

3 — OJ 1979 C 59, p. 1.

4 — P. 35.

except in the courts of the place ... where the immovable property is situated.' [5]

11. Moreover, that exclusive jurisdiction cannot be derogated from by an agreement conferring jurisdiction (Article 17) or by an implied extension of jurisdiction (Article 18). Under Article 19 of the Convention, a court from a State other than the State whose courts have exclusive jurisdiction by virtue of Article 16 must declare of its own motion that it has no jurisdiction. Finally, a judgment given in another Contracting State which conflicts with a rule conferring exclusive jurisdiction cannot be recognized (Article 28) or enforced (Article 34).

12. The exclusive jurisdiction conferred in this respect on the courts of the place where the property is situated has incidentally been regarded as 'curious' by an authority on the subject. [6]

13. The Court for its part stated in the *Sanders* judgment [7] that

'the assignment, in the interests of the proper administration of justice, of exclusive jurisdiction to the courts of one Contracting State in accordance with Article 16 of the Convention results in depriving the parties of the choice of the forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of the domicile of any of them', [8]

and concluded that

'having regard to that consideration the provisions of Article 16 must not be given a wider interpretation than is required by their objective'. [9]

14. In that judgment, and also in three other judgments, [10] the Court had to rule on the interpretation of 'tenancies of immovable property' within the meaning of Article 16(1) of the Convention and in each case upheld the principle of an independent interpretation without reference to the rules of national law.

15. Thus in the *Sanders* judgment the Court refused to apply that provision to an agreement whose principal aim concerned the

5 — Ibid.

6 — Bellet, P.: 'L'élaboration d'une convention sur la reconnaissance des jugements dans le cadre du Marché commun', *Journal de droit international*, 1965, p. 833, at p. 857.

7 — Judgment in Case 73/77 *Sanders* v *van der Putte* [1977] ECR 2383.

8 — Paragraph 17.

9 — Paragraph 18.

10 — Judgments in Case 241/83 *Rösler* v *Rottwinkel* [1985] ECR 99, Case 158/87 *Scherrens* v *Maenhout and Others* [1988] ECR 3791, and Case C-280/90 *Hacker* [1992] ECR I-1111.

operation of a business. [11] In the *Hacker* judgment the Court likewise declined to regard as a tenancy an agreement which

'irrespective of its title, and although providing a service concerning the use of short-term holiday accommodation, ... also includes other services ...'. [12]

16. In the *Rösler* judgment, on the other hand, the Court held that Article 16(1) applied

'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'. [13]

17. The conclusion reached by the Court in that judgment cannot be regarded as having extended the scope of that provision. As Huet writes in his observations on the decision, although

'... the conclusion may appear inappropriate, or even absurd, in that it makes the procedure considerably more complicated', [14]

it was nevertheless dictated by the provision itself.

18. However, in that case the parties had indeed concluded an agreement for a tenancy within the meaning of Article 16(1), certain characteristics of which were defined by the Court as follows:

'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.' [15]

19. An agreement relating to immovable property does not necessarily relate to a *transfer* of use and occupation as defined by the Court, and in that case Article 16(1) cannot be applied. *A fortiori*, there cannot be a transfer of occupation if, as a result of its being declared void, there is no contractual relationship. That is the case in particular

11 — Paragraph 16.
12 — Judgment in *Hacker*, cited above (note 10), paragraph 14.
13 — Paragraph 25.
14 — *Journal de droit international*, 1986, p. 440.
15 — Paragraph 27.

with respect to compensation for use for the period during which a person has occupied immovable property following a void contract for sale, in other words with no legal right or title.

20. Moreover, I believe that that conclusion is in harmony with the 'rule of reason' relating to this head of jurisdiction in cases concerning residential tenancies of immovable property, expressed as follows in the Court's judgment in *Sanders*:

'Tenancies of immovable property are generally governed by special rules and it is preferable, in the light of their complexity, that they be applied only by the courts of the States in which they are in force.' [16]

21. Assessment of the compensation for use will indeed depend on the letting value of the dwelling (already determined at first instance in the main proceedings after consulting a French expert), but it should be noted that national rules restricting or indexing rents are intended to protect persons holding under a lease, not mere occupiers.

16 — Paragraph 14.

22. I note, however, that the fact that some Member States have mandatory rules relating to commercial tenancies was not considered by the Court to justify the application of Article 16(1) in the aforesaid *Sanders* judgment, contrary incidentally to the opinion of the Advocate General. [17]

23. Moreover, according to Gothot and Holleaux, [18]

'... the scope of Article 16(1) cannot be extended on the pretext that reasons of the proper administration of justice and the concordance of the judicial and legislative functions, which are the basis of that provision, are also met with in cases other than those expressly provided for'. [19]

24. *II.* If the compensation in question cannot be based on the concept of a tenancy of immovable property, can it be regarded as relating to a right *in rem* in immovable property, in so far as it follows from a void contract of sale?

17 — *Sanders*, cited above (note 7), p. 2393.

18 — *La convention de Bruxelles du 27 septembre 1968 — Compétence judiciaire et effets des jugements dans la CEE*, Jupiter, 1985.

19 — Paragraph 149, p. 86.

25. With respect to the scope of that part of Article 16(1) which refers to 'rights *in rem* in immovable property' the Court has handed down only one judgment to date, the judgment in *Reichert I*, [20] since judgment has not yet been given in the *Webb* case, [21] which concerns the same provision and in which I delivered my Opinion on 8 February 1994.

26. In the *Reichert I* case a married couple domiciled in the Federal Republic of Germany had donated to their son, who was also domiciled in that State, the legal ownership of immovable property situated in France, reserving to themselves the right to use it. The German bank which was their creditor brought proceedings in France, namely the *action paulienne* provided for in Article 1167 of the French Civil Code, the effect of which is to render a transfer of property made in fraud of the creditor's rights ineffective as against him.

27. On a question being referred by the Cour d'Appel, Aix-en-Provence, on the nature of such an action with respect to Article 16(1), the Court, referring expressly to its judgments in *Sanders*, cited above, and *Duijnstee*, [22] noted that

'an independent definition must be given in Community law to the phrase "in proceedings which have as their object rights *in rem* in immovable property" ...'. [23]

28. The Court then held that that provision had to be given a restrictive interpretation, and stated that

'the exclusive jurisdiction of the Contracting State in which the property is situated does not encompass all actions concerning rights *in rem* in immovable property but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with the protection of the powers which attach to their interest'. [24]

29. On the distinction between rights *in personam* and rights *in rem*, the Schlosser Report [25] states:

'A right *in personam* can only be claimed against a particular person ... A right *in rem*, on the other hand, is available against the whole world. The most important legal con-

20 — Judgment in Case C-115/88 [1990] ECR I-27. Following that judgment, the national court made a fresh reference to the Court of Justice to ascertain whether an *action paulienne* under Article 1167 of the French Civil Code could come under Articles 5(3), 16(5), and 24 of the Convention (judgment in Case C-261/90 *Reichert II* [1992] ECR I-2149). The latter decision is of no relevance for the present proceedings.

21 — Case C-294/92, judgment of 17 May 1994 [1994] ECR I-1717, I-1719.

22 — Judgment in Case 288/82 *Duijnstee* v *Goderbauer* [1983] ECR 3663.

23 — Paragraph 8.

24 — Paragraph 11.

25 — OJ 1979 C 59, p. 71.

sequence flowing from the nature of a right *in rem* is that its owner is entitled to demand that the thing in which it exists be given up by anyone not enjoying a prior right.' [26]

30. Schlosser then states with reference to the particular field of actions concerning the obligation to transfer the ownership of immovable property,

'Where a purchaser of German immovable property brings proceedings on the basis of a contract for sale of immovable property which is governed by German law, the subject-matter of such proceedings is never a right *in rem* in the property. The only matter in issue is the defendant's personal obligation to carry out all acts necessary to transfer and hand over the property.' [27]

31. Although such an action may have an effect on a right *in rem*, its basis is thus a relationship of a personal nature, so that in Professor Schlosser's opinion it should not come within the scope of Article 16(1). That situation is different from the one before the national court, which is characterized by a legal relationship corresponding to a mere claim for protection of a right *in personam* by virtue of which a creditor's estate includes an asset, while conversely as a result of the same relationship there is a liability — in other words, a debt — in the debtor's estate. [28]

32. An action claiming compensation for use as a result of the annulment of a contract of sale is a consequence of the annulment of a contractual relationship which furthermore has no bearing on the existence, content or structure of the property right. It thus does not come within the category of rights *in rem*.

33. Moreover, as L. Collins writes: [29]

'The expression (rights in rem in ... immovable property) is clearly aimed at actions involving title or possession. Thus, it does not include an action for damages caused to an immovable. Nor is it concerned, it seems, with an action concerning the purely contractual aspects of a property transaction ...'. [30]

34. It would moreover be paradoxical, as the French Government has incidentally rightly pointed out, if such an action came under the

26 — Paragraph 166(a), p. 120.

27 — Paragraph 170(a), pp. 121 and 122.

28 — See Mazeaud-Chabas: *Leçons de droit civil*, Introduction à l'étude du droit, p. 213 et seq., Vol. I, part 1, 8th edition by Chabas, Éditions Montchrestien, 1986.

29 — *The Civil Jurisdiction and Judgments Act 1982*, Butterworths, 1983.

30 — P. 79.

rule on jurisdiction in Article 16, even though the action for annulment did not.

35. Although the latter action altered the structure of a right *in rem*, that does not mean that it can be regarded as being strictly of an *in rem* nature, since it is based on a legal relationship of a personal nature.

36. That opinion is shared by Professor Schlosser in his report, and is also supported by the most authoritative writers, in particular by Gothot and Holleaux who write that:

'Mixed actions in which a person at one and the same time asserts a right *in rem* and a right *in personam* deriving from the same legal operation also appear to be outside the scope of Article 16(1), since that provision is probably not intended to reserve to the courts of the country where the immovable property is situated actions such as those for the annulment, cancellation or rescission of a sale, or even actions for delivery of the immovable property which has been sold.' [31]

37. Bischoff, commenting on the Court's judgment in *Reichert I*, also considers that:

'the fact that immovable property is concerned is not enough to impose exclusive jurisdiction under Article 16. It is necessary, much more narrowly, that the action constitutes the exercise of a right *in rem* in immovable property ...'. [32]

38. I therefore propose that the Court should rule as follows:

A claim for compensation for the use of immovable property after the annulment of a contract of sale does not fall within the scope of Article 16(1) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

31 — Paragraph 145, p. 84.

32 — *Journal de droit international*, 1990, p. 503, at p. 504 *in fine*.