# The Tango between the Brussels Ia Regulation and Rome I Regulation under the beat of directive 2008/122/EC on timeshare contracts towards consumer protection

Chen, Zhen

*Published in:*
Journal of Private International Law

*DOI:*
10.1080/17441048.2022.2148901

Routledge
Taylor & Francis Group

Journal of Private International Law

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rpil20

# The Tango between the Brussels Ia Regulation and Rome I Regulation under the beat of directive 2008/122/EC on timeshare contracts towards consumer protection

Zhen Chen

**To cite this article:** Zhen Chen (2022) The Tango between the Brussels Ia Regulation and Rome I Regulation under the beat of directive 2008/122/EC on timeshare contracts towards consumer protection, Journal of Private International Law, 18:3, 493-521, DOI: 10.1080/17441048.2022.2148901

**To link to this article:** https://doi.org/10.1080/17441048.2022.2148901



Published online: 17 Jan 2023.

*Journal of Private International Law*, 2022
Vol. 18, No. 3, 493–521, https://doi.org/10.1080/17441048.2022.2148901



# The Tango between the Brussels Ia Regulation and Rome I Regulation under the beat of directive 2008/122/EC on timeshare contracts towards consumer protection

Zhen Chen*

Timeshare contracts are expressly protected as consumer contracts under Article 6(4)(c) Rome I. With the extended notion of timeshare in Directive 2008/122/EC, the question is whether timeshare-related contracts should be protected as consumer contracts. Additionally, unlike Article 6(4)(c) Rome I, Article 17 Brussels Ia does not explicitly include timeshare contracts into its material scope nor mention the concept of timeshare. It gives rise to the question whether, and if yes, how, timeshare contracts should be protected as consumer contracts under Brussels Ia. This article argues that both timeshare contracts and timeshare-related contracts should be protected as consumer contracts under EU private international law. To this end, Brussels Ia should establish a new provision, Article 17(4), which expressly includes timeshare contracts in its material scope, by referring to the timeshare notion in Directive 2008/122/EC in the same way as in Article 6(4)(c) Rome I.

**Keywords:** conflict of laws; consumer contracts; timeshare tourists; weaker party protection; *lex rei sitae,* exclusive jurisdiction; special jurisdiction; rights *in rem*; rights *in personam*; minimum/maximum harmonisation

## A. Introduction

It takes two to tango, one as a leader and one as a follower. The leader and the follower are required to take concerted and harmonious steps under the beat of the same music to present a beautiful tango. The Brussels Ia Regulation[1] and Rome I Regulation[2] are dancing partners in the field of EU private international law with different roles: Brussels Ia as a leader and Rome I as a follower. This requires the same concepts provided in these two Regulations to be interpreted harmoniously across the EU.

*Department of Private International Law, University of Groningen, the Netherlands. Email: zhen.chen@rug.nl.

[1]Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L351.

[2]Regulation (EC) No 593/2008 on the law applicable to contractual obligations, [2008] OJ L177.

In terms of consumer protection, the Brussels Convention,[3] the predecessor of the Brussels I Regulation,[4] which in turn has been replaced by the Brussels Ia Regulation, is the leader who takes the first step by establishing protective consumer jurisdiction rules in Articles 13–15. Meanwhile, the Rome Convention,[5] the predecessor of the Rome I Regulation, follows the step of the Brussels Convention by creating protective consumer conflicts rules in Article 5. Currently, Articles 17–19 Brussels Ia Regulation and Article 6 Rome I Regulation work together to ensure that consumers are entitled to sue the professional party, or to be sued by the professional, in the courts of the country of the consumer's domicile (consumer's forum) and protected by the law of the country of the consumer's habitual residence. These protective jurisdiction and applicable law rules are based on the idea that consumers are the weaker party in comparison with the other party to the contract and require special protection.[6]

For the protective rules to apply to both jurisdiction and applicable law, three conditions must be fulfilled:

(i) the existence of a consumer, a professional and a concluded contract;
(ii) the requirements of the "pursues commercial or professional activities in" or "directs such activities to" test are met; and
(iii) the contract falls within the scope of such pursuing or directing activities conducted by the professional.[7]

In addition, even if a consumer contract fulfils these three conditions, it does not mean protective consumer conflict of laws rules will apply automatically. Certain types of consumer contracts are explicitly excluded by Article 6(4) Rome I and Article 17(3) Brussels Ia. Those excluded consumer contracts provided for in Article 6(4)(a),[8] Article 6(4)(b)[9] and Article 6(4)(c)[10] of Rome I are related to tourism and tourist-consumer protection. Package travel contracts

[3]1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1998] OJ C27.
[4]Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12.
[5]1980 Rome Convention on the law applicable to contractual obligations, [1998] OJ C27.
[6]Recital 18 of Brussels Ia and Recitals 23–24 of Rome I.
[7]Art 17(1) Brussels Ia and Art 6(1) Rome I.
[8]The excluded category is 'a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence'.
[9]The excluded category is 'a contract of carriage', however, 'a contract relating to package travel within the meaning of Council Directive 90/314/EEC', as an exception to a carriage contract, is protected as a consumer contract.
[10]The excluded category is 'a contract relating to a right *in rem* in immovable property or a tenancy of immovable property', yet 'a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC', as a re-exception, is protected as a consumer contract.

are protected as consumer contracts, as an exception to transport/carriage contracts under Article 6(4)(b) Rome I and Article 17(3) Brussels Ia, although the wording used in these two provisions is quite different.[11] There is a consensus that package travel contracts are subject to consumer protective private international law rules,[12] as shown in *Pammer*.[13]

However, there is no corresponding provision in Article 17 Brussels Ia that is comparable to Article 6(4)(c) Rome I, which protects timeshare contracts, as an exception to an exception, as consumer applicable law rules. Such inconsistency gives rise to the question whether timeshare contracts are protected as consumer contracts under Articles 17–19 Brussels Ia. Moreover, such discrepancy has been enlarged because of the extended notion of timeshare contracts from Directive 94/47/EC[14] to Directive 2008/122/EC.[15] As regards the interaction with the later Timeshare Directive, the question is whether timeshare-related contracts are covered by Article 6(4)(c) Rome I. Since Article 17 Brussels Ia has no direct interaction with Directive 2008/122/EC via a specific provision, it has been at least two steps behind Article 6(4)(c) Rome I, particularly considering the enlarged notion of timeshare under the later Timeshare Directive. The question is whether it is necessary, and, if so, how to establish a clear interaction between Article 17 Brussels Ia and Directive 2008/122/EC. The inconsistency with Article 6(4)(c) Rome I and the lack of interaction with the Timeshare Directive in Article 17 Brussels Ia may lead to an unsatisfactory result. Namely, timeshare tourists, on the one hand, are protected as consumers with more favourable applicable law rules under Rome I and, on the other hand, are not protected as consumers with more favourable jurisdiction rules under Brussels Ia. To avoid such paradox and enhance legal predictability, there should be a uniform concept of timeshare contract in these two Regulations.

To protect timeshare tourists as consumers consistently with favourable private international law rules, this article argues that Brussels Ia should be amended by adding a new provision, Article 17(4), to include the notion of timeshare employed

[11]As to whether the phrase in Art 17(3) Brussels Ia can be interpreted as equivalent to a package travel contract under Directive 2015/2302, see Z Chen, "The Tango between Brussels Ibis Regulation and Rome I Regulation under the beat of Directive 2015/2302/EU on Package Travel towards Consumer Protection" (2021) 28 *Maastricht Journal of European and Comparative Law* 878.

[12]M. Wilderspin, "Consumer Contracts", in J Basedow, G Rühl, et al (eds), *Encyclopedia of Private International Law*, (Edward Elgar Publishing, 2017) 468.

[13]Case C-585/08 *Pammer* EU:C:2010:740, paras 42–43. The CJEU held that it is appropriate to interpret Art 15(3) Brussels I in line with Art 6(4)(b) Rome I which refers to 'package travel' laid down in Directive 90/314 (repealed by Directive 2015/2302).

[14]Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, [1994] OJ L280.

[15]Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, [2009] OJ L33.

in Article 6(4)(c) Rome I which refers to Directive 2008/122/EC. Before reaching this conclusion, several other questions have to be answered first. For instance, why, and how, timeshare contracts are protected as consumer contracts under Rome I? What is the distinction between excluded "contracts relating to a right *in rem* in immovable property or a tenancy of immovable property" and the re-exception of "contracts relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC" under Article 6(4)(c) Rome I? What are the changes and challenges brought by the later Timeshare Directive? Whether Article 6(4)(c) Rome I covers merely timeshare contracts or also includes timeshare-related contracts? Without express inclusion of timeshare contracts into the material scope of consumer contracts under Article 17 Brussels Ia, what jurisdiction rules are applicable to timeshare contracts under Brussels Ia: rules of exclusive jurisdiction, protective jurisdiction or special jurisdiction? How does the classification of the legal nature of timeshare contracts influence the application of jurisdiction rules? Why timeshare contracts should not be subject to the exclusive jurisdiction of Article 24(1) Brussels Ia, nor the special jurisdiction under Article 7(1) Brussels Ia, but rather should be protected as consumer contracts under Articles 17–19 Brussels Ia?

## B. Timeshare contracts under the Rome I Regulation

Why, and how, should timeshare contracts be protected as consumer contracts under Rome I? The explanatory memorandum of the Commission's Proposal for the Rome I Regulation explained that a consumer will make cross-border purchases only occasionally whereas most traders operating across borders may spread the cost of learning about one or more legal systems over a large range of transactions.[16] The application of the law of the consumer's country of habitual residence is "truly compatible with the high level of protection for the consumer demanded by the Treaty".[17] The Rome I Regulation no longer contains a list of contracts to which the special consumer choice of law rule applies, accordingly, its material scope is extended to all contracts with consumers except those expressly excluded.[18] Pursuant to Article 6(4)(c) Rome I, timeshare contracts are indirectly protected as consumer contracts as an exception to the excluded contracts "relating to a right *in rem* in immovable property or a tenancy of immovable property", and are defined as contracts "relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC". Albeit both having immovable property as their subjects, the former is governed by choice-of-law rules stipulated in Article 4(1)(c) or Article 4(1)(d) Rome I, whilst the latter is subject to protective consumer applicable law rules. As a

[16]COM (2005) 650 final, Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligation (Rome I), 7.
[17]*Ibid*.
[18]*Ibid*, 8.

re-exception, timeshare contracts must be regarded as "contracts relating to a right *in rem* in immovable property or a tenancy of immovable property" in order to be excluded from that scope. Since the protective consumer rules in Article 6 Rome I constitute a derogation from general contract choice-of-law rules, the notion of consumer or consumer contract stipulated in this protective conflicts rule should, in principle, be construed strictly. In the absence of express inclusion by virtue of Article 6(4)(c) Rome I, timeshare contracts would have been subject to choice-of-law rules in Article 4(1)(c) or Article 4(1)(d) Rome I and excluded from the material scope of Article 6 Rome I. The question is why timeshare contracts are considered as an exception to "contracts relating to a right *in rem* in immovable property or a tenancy of immovable property" under Article 6 (4)(c) Rome I and what is fundamentally different between these two concepts.

## 1. *The concept of "a contract relating to a right* in rem *in immovable property or a tenancy of immovable property"*

### (a) *The* lex situs *under Article 4(1)(c) Rome I*

The question why timeshare contracts are protected as consumer contracts under Article 6(4)(c) Rome I can be rephrased as why timeshare contracts should be regarded as an exception to "contracts relating to a right *in rem* in immovable property or a tenancy of immovable property". Apart from Article 6(4)(c) Rome I, Recital 27 of the Regulation also mentions the inclusion of timeshare contracts into the material scope of protective consumer applicable law rules, but it offers no further explanation. The reason could be that contracts relating to immovable property are traditionally governed by the *lex situs.*[19] Article 4 (1)(c) Rome I provides that, in the absence of choice by the parties, "a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated". This *lex situs* rule in Article 4(1)(c) Rome I is consistent with the exclusive jurisdiction of the courts where the property is situated (*forum rei sitae*) in Article 24(1) Brussels Ia. Since the substantive scope and the provisions of Rome I should be consistent with Brussels Ia,[20] the interpretation of the notion in Rome I should be in parallel with the equivalent concept in Brussels Ia.

### (b) *Right* in rem *or right* in personam

The term "right *in rem*" is provided in Articles 4(1)(c) and 6(4)(c) Rome I as well as in Articles 8(4) and 24(1) Brussels Ia. The term "a right *in rem* in immovable

[19]M Wilderspin, "Art 6: Consumer Contracts in Rome I Regulation" in Ulrich Magnus and Peter Mankowski, *Rome I Regulation, vol 2* (Sellier European Law Publishers, 2017) 470, para 39.
[20]Recital 7 Rome I.

property" in Article 4(1)(c) Rome I relates to rights that have *erga omnes* effects, ie towards everyone.[21] If a contract relates to a contractual right in a property, the *lex rei sitae* rule should not apply.[22]

The CJEU held in *Webb* that an action brought by a father against his son with regard to the legal ownership of the property was not *in rem* but *in personam*, and thus did not fall within the scope of exclusive jurisdiction.[23] Likewise the jurisdiction over disputes relating to the rescission of a contract for the sale of land and consequential damages was *in personam*.[24] In *Ellmes Property Services,* which involved a co-ownership agreement between co-owners on an apartment building in Austria designated for residential purposes, one co-owner brought an action before an Austrian court based on exclusive jurisdiction in Article 24(1) Brussels Ia and sought the cessation of the "touristic use" of the property by another co-owner.[25] As regards whether the action concerns the assertion of a right *in rem,* the CJEU held that the difference between a right *in rem* and a right *in personam* lies in the fact that the former, existing in corporeal property, has effect *erga omnes*, whereas the latter can be claimed only against the debtor.[26] In order to determine whether the action in dispute was based on a right *in rem* in immovable property under Article 24(1) Brussels Ia, it was necessary to examine whether the designated use of immovable property under the co-ownership agreement had effect *erga omnes*.[27] That would be the case if a co-owner could rely on that designated use not only against the other co-owners, but also against persons who cannot be regarded as parties to that agreement.[28] Clearly, a timeshare right, albeit involving the use of immovable property, has no effect *erga omnes*, but is a right *in personam* which imposes obligations only on contractual parties. Nevertheless, it is noticeable that Article 4(1)(c) Rome I employs the expression "a contract relating to a right *in rem*", instead of "right *in rem*" per se. This means that if a timeshare contract is classified as "a contract relating to a right *in rem* in immovable property or a tenancy of immovable property", it will still be governed by the *lex situs* under Article 4(1)(c) Rome I Regulation.

[21]Case C-115/88 *Reichert* [1990] ECR I-27, paras 13–14.
[22]F Ragno and JA Bischoff, "The Law applicable to Consumer Contracts under the Rome I Regulation" in F Ferrari and S Leible (eds) *Rome I Regulation* (Sellier European Law Publishers, 2009) 145, para 37.
[23]Case C-294/92 *Webb* [1994] ECR I-1717, para 19.
[24]Case C-518/99 *Gaillard* [2001] ECR I-2771, para 22.
[25]Case C-433/19 *Ellmes Property Services* EU:C:2020:900, paras 9-11.
[26]*Ibid*, para 26; citing Case C-417/15 *Schmidt* EU:C:2016:881, para 31; Case C-630/17 *Milivojević* EU:C:2019:123, para 100.
[27]*Ellmes Property Services*, *supra* n 25, para 31.
[28]*Ibid*, para 32. It is for the referring court to carry out the necessary verifications in that respect.

### 2. *The meaning of "a tenancy of immovable property"*

Just like the term "right *in rem*", whether a contract relates to a "tenancy" of immovable property set out in Articles 4(1)(c), 4(1)(d) and 6(4)(c) Rome I Regulation has to be determined autonomously.[29] If a timeshare contract does not fulfil conditions set out in Article 6(1) Rome I, protective consumer applicable law rules will not apply. Instead, in the absence of the parties' choice of law, Article 4(1) Rome I may apply to determine the applicable law of the excluded timeshare contracts.

First, if a timeshare contract is characterised as "a tenancy of immovable property" within the meaning of Article 4(1)(c) Rome I, the law of the country where the property is situated will be applicable. This means that lease contracts relating to holiday homes are governed by the *lex rei sitae*.[30] Yet Article 4(1)(d) Rome I provides an exceptional rule to the *lex situs* of Article 4(1)(c) Rome I. Namely, a tenancy of immovable property concluded for temporary private use for no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country. For the application of this exceptional rule, Article 4 (1)(d) Rome I essentially sets forth four cumulative conditions: (i) a short duration of the tenancy (no more than 6 months), (ii) the private use of the property, (iii) the tenant being a natural person and (iv) the tenant has a common habitual residence with the landlord. These conditions indicate that as long as one condition is not met, the law of the country of the landlord's habitual residence shall not apply. For instance, if the use of the property is not for a private purpose, the duration of the tenancy is over 6 months, the tenant is not a natural person, or the tenant and the landlord have their habitual residence in different countries, Article 4(1)(d) Rome I will be inapplicable and the *lex situs* in Article 4(1)(c) Rome I will apply instead.[31] However, whether timeshare contracts can be classified as tenancies of immovable property remains a question, and even so, not all timeshare contracts have the "tenant" and the "landlord" sharing the same habitual residence. In fact, most timeshare contracts are concluded with professionals who are not the landlord of a property. In the context where the landlord and the tenant have no common habitual residence in the same country, the exceptional rule in Article 4(1)(d) Rome I will not apply. Instead, the *lex situs* rule in Article 4(1)(c) Rome I will apply to timeshare contracts, which designates the law of the country where the property is situated.

### 3. *Timeshare contracts as service contracts and consumer contracts*

Timeshare contracts target a holiday property[32] to obtain one or more nights' accommodation for more than one period of occupation in a specified period of

[29]Ragno and Bischoff, *supra* n 22, 145, para 38.
[30]F Ferrari, *Concise Commentary on the Rome I Regulation* (2nd edn) (Cambridge University Press 2020) 107, para 38.
[31]Ragno and Bischoff, *supra* n 22, 147, para 40.
[32]COM (2007) 303 final, p 3 (1).

the year for a duration of one year or longer.[33] In most timeshare contracts, tourists acquire only the right to use the property for a short period of time each year, and such contracts are similar, in many ways, to contracts involving the right to stay in hotels or in other tourist premises.[34] Where a holiday apartment is not given on lease by the professional itself and the latter only acts as an intermediary, the contract clearly is not a tenancy of immovables but of services.[35] Thus, a timeshare contract might be classified as a contract for the provision of services.[36] Accordingly, Article 4(1)(b) Rome I will apply, which designates the law of the country where the service provider has his habitual residence.

It was a problem whether timeshare contracts are contracts for services under the Rome Convention and thus protected as consumer contracts.[37] This question was brought up in Travel Vac SL, in which Travel Vac sold to Antelm Sanchís a 1/51 undivided share of a furnished apartment in a Spanish residential development, entitling him to the exclusive use of that apartment during the 19th week of the calendar year under a "time-share" scheme.[38] Under the contract, Travel Vac was also obliged to provide Sanchis with certain services such as maintenance of the building, management and administration of the time-share scheme, use of the common services of the residential estate and membership of Resort Condominium International, an international club allowing the purchaser to exchange his holidays in accordance with the rules of the club.[39] The question was whether time-share contracts were to be regarded as falling within the scope of Article 3(2)(a) of Directive 85/577/EEC.[40] Rome I brings clarity to this question through

[33]Art 2 Directive 94/47 and Art 2(1)(a) Directive 2008/122; R Steennot, "Rules of Jurisdiction and Conflict Rules Relating to Online Cross-border Contracts Concerning Touristic Services Provided to Consumers" (2016) 32 *Computer Law and Security Review* 489.
[34]R Plender and M Wilderspin, *The European Private International Law of Obligations* (Sweet & Maxwell, 5th edn, 2020) 266, 9–035.
[35]O Remien, "Tourism, Conflict of Laws and the Rome I Regulation", in KB Woelki, T Einhorn et al (eds), *Convergence and Divergence in Private International Law* (Eleven International Publishing, 2010) 507.
[36]*Ibid*.
[37]*Ibid*, 504.
[38]Case C-423/97 *Vac SL* [1999] ECR I-02195, para 9.
[39]*Ibid*, para10. According to the contract, the value of the provision of services is higher than that of the right to use the immovable property.
[40]*Ibid*, para16. Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, [1985] OJ L372. Travel Vac submitted that Directive 85/577 did not apply to time-share contracts, as those contracts are covered by Directive 94/47 (para18). Mr Antelm Sanchís argued that a time-share contract creates no rights over immovable property but relates to the provision of services (para 19). The Court held that although time-share contracts are covered by Directive 94/47, this does not preclude a contract having a time-share element from being covered by Directive 85/577, if the conditions for the application of that directive are otherwise fulfilled (para 22). Neither directive contains provisions ruling out the application of the other. Otherwise, it would defeat the object of Directive 85/577 to interpret it as meaning that the protection it provides is excluded solely because a contract generally falls under Directive 94/47. Such

Article 6(4)(c), timeshare contracts, as an exception to "contracts relating to rights *in rem* in immovable property or tenancies of immovable property", fall within the scope of consumer conflicts rules. Hence, timeshare tourists are protected as consumers under Article 6(4)(c) Rome I just like package travel tourists as consumers under Article 6(4)(b) Rome I.[41]

## C. The material scope of Article 6(4)(c) Rome I Regulation under the Timeshare Directive

The notion timeshare or timeshare contract is not defined in Rome I, instead, Article 6(4)(c) refers to the concept of timeshare within the meaning of Directive 94/47. The reference to the repealed Directive 94/47 is to be construed as referring to Directive 2008/122.[42] Hence, the notion of timeshare in Directive 2008/122 is of relevance for determining the material scope of Article 6 Rome I. The later Timeshare Directive has a broader scope than its predecessor in terms of the definition of "timeshare contracts" by including a number of related contracts that are not classified as timeshare contracts, namely "long-term holiday product contract", "resale contract", "exchange contract", and "ancillary contract".[43] It is unclear whether the EU legislature intended to include all contracts enshrined in the later Timeshare Directive within the scope of Article 6(4)(c) Rome I, or merely to cover "timeshare contracts" within the meaning of Directive 2008/122.[44]

### 1. *Full harmonisation and timeshare consumer protection under Directive 2008/122*

Although Rome I is applicable to all Member States, the Timeshare Directive referred to in Article 6(4)(c) Rome I has to be transposed by Member States in order to be applicable. This means the material scope of Article 6(4)(c) Rome I depends on the Member States' interpretation of timeshare in Directive 2008/122. This new Timeshare Directive adopts a full harmonisation approach to harmonise the laws on tourist protection in Member States "in order to enhance legal certainty and fully achieve the benefits of the internal market for consumers and businesses".[45] With a shift from minimum harmonisation to maximum harmonisation, the Member States have a reduced margin of

an interpretation would deprive consumers of the protection of Directive 85/577 even when the contract was concluded away from business premises (para 23).
[41]Remien, *supra* n 35, 505.
[42]Art 18 of Directive 2008/122.
[43]Plender and Wilderspin, *supra* n 34, 266, 9-036.
[44]*Ibid*.
[45]Recital (3) of Directive 2008/122/EC.

discretion.[46] Although the tendency of Directive 2008/122 was to harmonise certain rules relating to timeshare contracts, it left the legal classification regarding the nature of timeshare rights to Member States.[47] In this regard, each Member State may determine whether the legal nature of the right referring to timeshare ownership is about a tenancy (right *in personam*) or a real property right (right *in rem*).[48] Failing to reach a harmonisation on such issue might create more discrepancy and jeopardise legal predictability pursued by the Directive, for instance, with regard to whether all kinds of, or only certain types of, timeshare contracts stipulated in Directive 2008/122 should be protected as consumer contracts under Article 6(4)(c) Rome I.

*(a) Timeshare tourist in timeshare-related contracts as a consumer*

The distinction between timeshare contracts and timeshare-related contracts is not addressed in Directive 94/47, in fact, the term "timeshare contract" per se is not even explicitly mentioned. Instead, an equivalent concept is available in Articles 1–2 which refers to a contract "relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis". By contrast, the term "timeshare contract" is expressly defined in Article 2(1)(a) Directive 2008/122 as "a contract of a duration of more than one year under which a consumer acquires the right to use one or more overnight accommodation for more than one period of occupation". The common ground of these two timeshare Directives is that a tourist in a timeshare contract is to be protected as a consumer, although the definition of consumer in these two Directives is quite different.[49] The intention of protecting a timeshare tourist as a consumer is more apparent by using the term "a consumer", as opposed to "a purchaser". This can be seen particularly from the title of Directive 2008/122 on "the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and

[46]F Morandi, "The New Italian Regulation on Package Travel and Linked Travel Arrangements According to Directive (EU) 2015/2302" (2020) *Journal of European Consumer and Market Law* 93.

[47]Art 1(2)(d) Directive 2008/122.

[48]For instance, German courts may apply exclusive jurisdiction over a tenancy of immovable property only to property rented from its owner, whereas Austrian courts have held that exclusive jurisdiction is not limited to contracts where a house is rented from its owner but also to short-term rentals of holiday homes from tour operators. Steennot, *supra* n 33, 487.

[49]Art 2 Directive 94/47 uses the term 'purchaser', instead of 'consumer' which was widely used in other consumer Directives, although in essence they both refer to any natural person acting in transactions for purposes which may be regarded as being outwith their professional capacity. Art 2(f) Directive 2008/122 has changed the prior atypical notion of 'a purchaser' to the widely-used term 'a consumer' with a definition as 'a natural person who is acting for purposes which are outside that person's trade, business, craft or profession'. The definition is similar to the one in Rome I, Brussels Ia and other consumer Directives.

exchange contracts". However, the protection of consumers in consumer Directives is a general rule, whilst in Rome I consumer protection is an exceptional rule. The notion of consumer in Rome I is clearly narrower than that in consumer Directives.

*(b) Extended notion of timeshare contracts*

The timeshare industry in the EU continues to evolve as new holiday products are being introduced to the travel market.[50] The later timeshare directive has considered the new holiday products to prevent the development of products aimed at circumventing the directive.[51] For instance, there is a minimum requirement of time duration for a contract to be qualified as a timeshare contract. The older directive requires a minimum of three years for a specified period of no less than one week for the use of one immovable property, whereas the later directive merely requires a duration of more than one year of the timeshare contract in which there is a right to use one or more nights of accommodation.[52] Additionally, the property of the accommodation in a timeshare contract is not limited to merely immovables but also includes movables.[53] It means more timeshare consumers are protected under Directive 2008/122 and Article 6(4)(c) Rome I.

(c) *The inclusion of timeshare-related contracts*

As illustrated by the title of Directive 2008/122, namely "on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts", the material scope covered by that Directive has been expanded by including a number of timeshare-related contracts that are not classified as timeshare contracts under the older Directive.[54] Such timeshare-related contracts include "long-term holiday product contracts",[55] "resale contracts",[56] "exchange contracts"[57] and "ancillary

[50]Y Mupangavanhu, "Towards an Extensive Statutory Protection of Consumers in Timeshare Agreements: A Comparative Perspective" (2021) *African Journal of International and Comparative Law* 117.
[51]*Ibid*, 119.
[52]Art 2 Directive 94/47 and Art 2(1)(a) Directive 2008/122.
[53]Directive 2008/122, Annex I, Part 3(2).
[54]Plender and Wilderspin, *supra* n 34, 266, 9-036.
[55]Art 1(b) Directive 2008/122: 'long-term holiday product contract', a contract of a duration of more than one year under which a consumer acquires primarily the right to obtain discounts or other benefits in respect of accommodation, in isolation or together with travel or other services.
[56]Art 1(c) Directive 2008/122: 'resale contract', a contract under which a trader assists a consumer to sell or buy a timeshare or a long-term holiday product.
[57]Art 1(d) Directive 2008/122: 'exchange contract', a contract under which a consumer joins an exchange system which allows that consumer access to overnight accommodation

contracts".[58] These contracts are not, by definition, timeshare contracts per se but are related to a timeshare contract in one way or another, thus they are protected as consumer contracts under Directive 2008/122. The question is whether such timeshare-related contracts in Article 1 Directive 2008/122 can be protected as consumer contracts under Article 6 Rome I.

### 2. *Protecting timeshare-related contracts as consumer contracts under Article 6 Rome I*

It is unclear whether the concept of "a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC" enshrined in Article 6(4)(c) Rome I should be interpreted in the same way as "timeshare contract" in Article 1(a) Directive 2008/122, or should be expanded to encompass timeshare-related contracts.[59] Based solely on the wording in Article 6(4)(c) Rome I, the answer is not crystal clear, as different constructions might lead to different conclusions.

#### *(a) Strict interpretation or broad interpretation?*

On the one hand, the term used in Article 6(4)(c) Rome I does not specifically state that it has to be a timeshare contract. Indeed, there was still no direct expression of "timeshare contract" nor its distinction with timeshare-related contracts in Directive 94/47/EC. Yet the notion of "contract relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis" in Article 2 Directive 94/47 may already indicate or envisage the protection of a contract "directly or indirectly" relating to a timeshare contract as a consumer contract. Additionally, the extended timeshare-related contracts in Directive 2008/122 correspond to the notion of "contract relating directly or indirectly to" in Directive 94/47. Hence, a broad interpretation would answer the question in the affirmative.

On the other hand, the phrase used in Article 6(4)(c) Rome I is essentially comparable to the counterpart notion in Article 2 Directive 94/47, replaced by Article 1(a) Directive 2008/122. The reference to Article 1(a) Directive 2008/122 would expressly mean "timeshare contracts" per se, rather than timeshare-related contracts set out in other provisions. Moreover, Article 6(4)(c) Rome I, as a derogation to general contract conflicts rules, should be interpreted strictly.

---

or other services in exchange for granting to other persons temporary access to the benefits of the rights deriving from that consumer's timeshare contract.

[58]Art 1(g) Directive 2008/122: 'ancillary contract', a contract under which the consumer acquires services which are related to a timeshare contract or long-term holiday product contract and which are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.

[59]Wilderspin, *supra* n 19, 471, para 41.

Consequently, a strict interpretation would suggest that all timeshare-related contracts should be excluded from the protective regime of Article 6 Rome I.

*(b) Weaker party protection*

It seems more reasonable to cover timeshare-related contacts in the material scope of Article 6(4)(c) Rome I for several reasons. First, a literal interpretation of the wording "a contract relating to" in Article 6(4)(c) Rome I at least does not explicitly imply that all timeshare-related contracts should be excluded. Conversely, it suggests that if a contract relates to the right to use immovable properties on a timeshare basis, it should be protected as a consumer contract. In fact, "long-term holiday product contract", "resale contracts", "exchange contracts" and "ancillary contracts" are all timeshare-related contracts that relate to the right to use immovable properties on a timeshare basis. The enlargement of the material scope of Directive 2008/122 also illustrates the EU legislature's intention to protect timeshare-related contracts as consumer contracts.

Second, a timeshare contract is neither multiple reservations of accommodation, including hotel rooms, nor a lease contract, which usually refers to one single continuous period of occupation rather than multiple interval periods.[60] The property of the accommodation in a timeshare contract can be immovables or movables, such as a cruise ship.[61] Contracts for accommodation on cruise ships, canal boats and caravans are also covered by the later Timeshare Directive.[62] Thus, timeshare contracts might target properties comprising a pool of accommodation,[63] such as immovable (multi-resorts) or movable (cruises), for consumers to choose according to their availability.[64] Since Article 6(4)(c) Rome I only expressly covers timeshare contracts relating to an immovable property and does not mention those relating to movable properties, a strict interpretation would result in an unsatisfactory result that timeshare contracts on immovable properties are protected as consumer contracts, whereas timeshare contracts on movable properties are not. It is highly questionable to not protect timeshare tourists in the latter case as consumers. This can be avoided by a broad interpretation of Article 6(4)(c) Rome I to include all kinds of timeshare contracts in its material scope. Timeshare contracts relating to movable properties should not be excluded from the material scope of Article 6(4)(c) Rome

[60]Directive 2008/122, Recital 6.
[61]Directive 2008/122, Annex I, Part 3(2).
[62]COM/2015/0644 final, Report from the Commission to the European Parliament and the Council on the evaluation of Directive 2008/122/EC.
[63]Case C-270/09 *Macdonald Resorts Limited* [2010] ECR I-13194, AG's Opinion paras 107–110.
[64]MGS Lima, *Traveller Vulnerability in the Context of Travel and Tourism Contracts* (Springer Nature Switzerland AG, 2018) 133.

I. Likewise, other timeshare-related contracts should also not be excluded from the protective regime.

Third, the timeshare industry is known for abusive marketing practices, unfair contract terms including lifetime clauses, unavailability of accommodation during the preferred times, the ever increasing maintenance annual levies and membership fees.[65] Many timeshare holders experience problems with their timeshare contracts.[66] The fact that Directive 2008/122 replaced Directive 94/47 was because of the need to update the regulatory framework to cater for new timeshare-related contracts, such as resale contracts and exchange contracts. Likewise, there is a need to update the notion of timeshare under Article 6(4)(c) Rome I which refers to Directive 94/47. Otherwise, it is easy to circumvent the provisions that aim to protect timeshare tourists. For instance, it is prohibited to sell or market timeshare or timeshare-related products as an investment,[67] as this might be construed as "misleading".[68] More importantly, the trader shall explicitly draw the consumer's attention to the existence of the right of withdrawal, the length of the withdrawal period referred to in Article 6, and the ban on advance payments during the withdrawal period referred to in Article 9.[69] The inclusion of timeshare-related contracts in the material scope of Article 6(4)(c) Rome I may ensure that the protection afforded under Directive 2008/122 is not easily circumvented.

### 3. *Timeshare contracts as service contracts under Article 6(4)(a) Rome I*

Even if all kinds of timeshare contracts under Article 6(4)(c) Rome I are subject to protective consumer conflicts rules, the question whether the exception contained in Article 6(4)(a) Rome I shall apply may still arise.[70] It is argued that timeshare contracts that are, in essence, contracts for the provision of services may fall within the scope of Article 6(4)(a) Rome I.[71] If those services are provided exclusively outside the country of the consumer's habitual residence, the services contract should be excluded from the material scope of Article 6 Rome I.[72] The Giuliano/Lagarde Report defended the exclusion of such services contracts, eg the provision of hotel accommodation, based on the presumption that the

[65]Mupangavanhu, *supra* n 50, 118; Y Mupangavanhu and L F van Huysstteen, "The Statutory Regulation of Timeshare Agreements in Light of the Need for Greater Consumer Protection" (2017) *Stellenbosch Law Review* 665.
[66]Mupangavanhu, *supra* n 50, 117.
[67]Art 3(4) Directive 2008/122.
[68]Mupangavanhu, *supra* n 50, 120. These timeshare or timeshare-related products do not really amount to an investment.
[69]Art 5(4) Directive 2008/122.
[70]This exception applies only if the timeshare contract is a 'contract for the supply of services', but this until now remains doubtful and disputed. Remien, *supra* n 35, 505.
[71]Wilderspin, *supra* n 19, 471, para 41.
[72]*Ibid*.

consumer cannot reasonably expect the protection of his or her home law in such cases.[73] Yet such presumption is not entirely flawless in the context of E-commerce and the digital economy. For instance, if a Dutch hotel, that provides services exclusively in the Netherlands, has targeted the German market by using its website, it is reasonable for a German consumer who visited the website and concluded a hotel contract to expect the protection of his or her home law once disputes arise. The rationale of Article 6(4)(a) Rome I is to protect professionals that only provide services domestically and have no intention to target the international market. Such objective could be achieved by virtue of the strict interpretation of the targeting test set forth in Article 6(1)(a)-(b) Rome I. Moreover, the notion "services" under Article 6(4)(a) Rome I retains residual significance since certain types of contracts for services are excluded from its scope.[74] It is questionable whether there is a need to have Article 6(4)(a) Rome I or what role it can play for tourist-consumer protection.

If Article 6(4)(a) Rome I applies to timeshare contracts, they would always be excluded from consumer conflicts rules because timeshare services are mostly provided in countries other than the consumer's habitual residence.[75] Such interpretation would make Article 6(4)(c) Rome I useless and unnecessary. The conclusion of disqualifying such timeshare contracts as consumer contracts is unsatisfactory and probably not what the EU legislature intended.[76] Therefore, Article 6(4)(a) Rome I does not apply to timeshare contracts, otherwise the exception stipulated in Article 6(4)(c) Rome I would have little or no real effect.[77]

### D. The inconsistency between Rome I and Brussels Ia

While timeshare contracts are protected as consumer contracts by virtue of Article 6(4)(c) Rome I, the notion "timeshare" is not provided for in Article 17 Brussels Ia nor mentioned anywhere in that Regulation. Such inconsistency will result in a paradox in EU private international law, namely, timeshare contracts are expressly protected as consumer contracts under Rome I but not explicitly protected as consumer contracts under Brussels Ia. The inconsistency of these two Regulations is hardly the intention of the EU legislature.[78] Despite the fact that these two Regulations have different functions and objectives, there is a need to ensure the consistency of the substantive scope and the provisions between these two Regulations.[79] In particular, with regard to the protection of consumers as the weaker contractual party with more favourable jurisdiction and choice-of-

[73]Wilderspin, *supra* n 12, 469.
[74]*Ibid*, 468.
[75]Remien, *supra* n 35, 505.
[76]Wilderspin, *supra* n 19, 471, para 41; Plender and Wilderspin, *supra* n 34, 266, 9-037.
[77]Remien, *supra* n 35, 505.
[78]Wilderspin, *supra* n 19, para 41.
[79]Recital 7 Rome I.

law rules than general rules,[80] a harmonious interpretation of the same concept is required.[81] Their discrepancy on timeshare contracts would inevitably affect the coherent construction of the notion of consumer and undermine legal predictability.[82] It gives rise to the question whether a timeshare tourist should also be protected as a consumer under Articles 17–19 Brussels Ia.

### 1. *"What law should be" and "what law it is"*

In fact, the explanatory memorandum accompanying the proposal for Brussels I Regulation[83] expressly stated that timeshare contracts, unlike contracts for the sale of real property, are within the scope of consumer jurisdiction rules, rather than exclusive jurisdiction rules. Additionally, it also referred to the "timeshare" definition in Directive 94/47/EC. This indicates that the EU legislature intended to subject timeshare contracts to protective consumer jurisdiction. Nevertheless, the final text of the Brussels I Regulation and its recast Brussels Ia[84] fail to explicitly include timeshare contracts and do not refer to the Timeshare Directive. By contrast, the explanatory memorandum also explicitly stated that "the exclusion of transport contracts does not apply where the contract covers both travel and accommodation for an all-in price (package holidays)", of which the "package" definition in Directive 90/314 was referred to.[85] Although the final text does not refer to this Package Travel Directive, at least, package travel contracts, as an exception to transport contracts, are expressly protected as consumer contracts by virtue of Article 17(3) Brussels Ia. Unfortunately, such reading is not possible for timeshare contracts, since timeshare contracts are not explicitly excluded from contracts in relation to immovable property which fall within exclusive jurisdiction. In this sense, it is hard to say that timeshare contracts are explicitly protected as consumer contracts under Brussels Ia.

### 2. *Broad interpretation or strict interpretation?*

It may be argued that, as Article 17 Brussels Ia does not set forth an exception for "contracts relating to rights *in rem* in immovable property or tenancies of immovable property", there is no need to set a re-exception for timeshare contracts. In the absence of explicit exclusion of timeshare in Article 17 Brussels Ia, protective consumer jurisdiction rules apply to timeshare contracts. Such reasoning

[80]Recital 23 Rome I and Recital 18 Brussels Ia.
[81]Recital 24 Rome I.
[82]Recital 15 Brussels Ia.
[83]COM (1999) 348 final, Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 16.
[84]COM (2010) 748 final, Proposal for a Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 29.
[85]COM (1999) 348 final, 16.

overlooks the exceptional nature of Articles 17–19 Brussels Ia. Jurisdiction rules should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile.[86] The CJEU has, indeed, continuously stated that jurisdiction rules over consumer contracts are considered as an exception to and a derogation from the general jurisdiction rule of Article 4(1) Brussels Ia, thus consumer jurisdiction rules which derogate from the general principle are to be strictly interpreted.[87] Accordingly, regarding the notion of consumer or consumer contract, the CJEU has consistently construed such notion strictly.[88] Since the CJEU has adopted a rather literal and restrictive approach to the definition of a consumer,[89] an interpretation going beyond the cases expressly envisaged by Brussels Ia is not allowed.[90]

Take a step back, if the fact that timeshare contracts are not explicitly excluded under Article 17 Brussels Ia means that timeshare contracts are protected as consumer contracts, it indicates that all contracts not expressly excluded by Article 17 Brussels Ia are protected as consumer contracts and the notion of consumer will be inevitably expanded. Such broad interpretation goes beyond the cases expressly envisaged by Brussels Ia and against the restrictive approach adopted by the CJEU because of the exceptional nature of protective consumer jurisdiction rules. In addition, if such reasoning is correct, there is no need to establish a specific provision in Article 6(4)(c) Rome I to include timeshare contracts as a re-exception. As a matter of fact, without the express inclusion by virtue of Article 6(4)(c) Rome I, timeshare contracts might be subject to general choice-of-law rules in Articles 4 (1)(c)-(d) Rome I, instead of consumer choice-of-law rules under Article 6 Rome I. The same goes for timeshare contracts in relation to jurisdiction rules.

### 3. *Jurisdiction hierarchy under Brussels Ia*

It is acknowledged that under the Brussels Ia Regulation exclusive jurisdiction trumps both protective jurisdiction and special jurisdiction, while protective jurisdiction over weaker parties trumps special jurisdiction.[91] Such hierarchy of

[86] *Ibid*.
[87] Case 150/77 *Bertrand* [1978] ECR 1431, para 21; Case C-464/01 *Gruber* EU:C:2005:32, paras 32 and 43.
[88] *Milivojević, supra* n 26, para 87; Case C-498/16 *Schrems* EU:C:2018:37, para 29; Case C-89/91 *Shearson Lehmann Hutton* EU:C:1993:15, paras 20 and 22; Case C-269/95 *Benincasa* EU:C:1997:337, para 15; *Gruber*, ibid, para 35; Case C-419/11 *Česká Spořitelna*, a.s. EU:C:2013:165, para 32.
[89] M Hesselink, "Towards a Sharp Distinction between B2B and B2C" (2010) 18 *European Review of Private Law* 71; P Mankowski and P Nielsen, "Jurisdiction Over Consumer Contract", in U Magnus and P Mankowski, *Brussels Ibis Regulation*, (Sellier European Law Publishers, 2016) 470.
[90] *Schrems, supra* n 88, para 27; *Gruber*, *supra* n 87, para 32.
[91] P Mankowski, "Special Jurisdiction", in U Magnus and P Mankowski, *Brussels Ibis Regulation*, (Sellier European Law Publishers, 2016) 156, para 29.

jurisdiction provisions is based on the nature of the contract in question. The exclusive jurisdiction in Article 24(1) Brussels Ia applies to "proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property". It overrides all other jurisdiction rules including protective jurisdiction. Since there is no specific provision in Article 17 Brussels Ia to exclude timeshare contracts, unlike in Article 6(4)(c) Rome I, timeshare contracts might fall within "proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property" and be subject to exclusive jurisdiction. The Commission's explanatory memorandum for Brussels I clarified that time-share contracts are within consumer jurisdiction rules and not exclusive jurisdiction rules, unlike contracts for the sale of real property.[92] Although timeshare contracts are different from "contracts for the sale of real property", such distinction is vague and does not touch upon tenancies of immovable properties.[93] Alternatively, timeshare contracts may also be classified as contracts for the provision of services and be subject to the special jurisdiction in Article 7(1)(b) Brussels Ia, which designates the courts of the place where the services were provided. Therefore, the application of exclusive jurisdiction or special jurisdiction depends on the classification of timeshare contracts.

## E. Exclusive jurisdiction, special jurisdiction or protective jurisdiction?

### 1. *Exclusive jurisdiction under Article 24(1) Brussels Ia*

In the absence of express inclusion under Article 17 Brussels Ia, timeshare contracts might be classified as "contracts which have as their object rights *in rem* in immovable property or tenancies of immovable property". Thus, if Article 24(1) Brussels Ia applies, the courts of the Member State where the property is situated have exclusive jurisdiction, regardless of the domicile of the parties. Yet this exclusive jurisdiction is not absolute, there is an exception for "the tenancy contract of immovable property concluded for temporary private use for a maximum of six consecutive months" in Article 24(1) Brussels Ia. It gives rise to the question whether such expression is comparable, if not equivalent, to the notion of timeshare contract within the meaning of the Timeshare Directive. If yes,

[92]COM (1999) 348 final, p 16. The Commission also specifically referred to the notion of timeshare in Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis ([1994] OJ L280). Despite this, in the final text, the notion of timeshare in the Timeshare Directive is not mentioned.

[93]Mankowski, *supra* n 91, 195, para 103. The sale of immovable property falls within the exclusive jurisdiction of Art 24(1) Brussels Ia only when it deals with claims founded in rights *in rem* and not with contracts on acquiring such rights. The sale of immovables is only excluded from Art 7(1)(b) Brussels Ia if the meaning 'goods' is restricted to merely movables, since immovables are also tangible and corporeal.

whether the condition that "the tenant and the landlord are domiciled in the same country" is to the benefit of timeshare tourists or not.

(a) *"Right* in rem*" and "relating to a right* in rem*"*

As regards whether timeshare contracts are subject to exclusive jurisdiction, the answer depends on the distinction between "right *in rem*" and "relating to a right *in rem*". Unlike its cognate expression in Article 4(1)(c) Rome I which refers to a contract "relating to a right *in rem*", Article 24(1) Brussels Ia refers to "rights *in rem*".[94] The CJEU's judgment in *Ellmes Property Services* held that an independent definition must be given in EU law to the phrase "in proceedings which have as their object rights *in rem* in immovable property" provided in Article 24(1) Brussels Ia, in order to ensure its uniform application in all Member States.[95] The exclusive jurisdiction rule does not encompass all actions concerning rights *in rem* in immovable property, but only those actions which seek, first, to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein, and, second, to provide the holders of those rights with protection for the powers which attach to their interest.[96] The action must be based on a right *in rem* and not on a right *in personam*.[97] More importantly, it is not sufficient that the action concerns a right *in rem* in immovable property or that the action has a link with immovable property for the purpose of justifying exclusive jurisdiction of courts where the property is situated.[98] In *Weber*, the CJEU held that the action brought between two sisters, as co-owners, seeking a declaration of invalidity of the exercise of a right of pre-emption attaching to that property, which produces effects with respect to all the parties, falls within the scope of exclusive jurisdiction.[99] Likewise, the CJEU's judgment in *Komu* stated that an action for the termination of co-ownership in undivided shares of immovable property by way of sale, by an appointed agent, falls within the category of proceedings "which have as their object rights *in rem* in immovable property".[100]

The wording "right *in rem*" in Article 24(1) Brussels Ia seems narrower than its counterpart "relating to a right *in rem*" in Article 4(1)(c) Rome I, but the desire to achieve consistency between these two Regulations might lead the CJEU to overlook the difference in wording.[101] The contracts falling under the scope of

[94] Wilderspin, *supra* n 19, 470, para 40.
[95] *Ellmes Property Services*, *supra* n 25, para 23; *Milivojević*, *supra* n 26, para 97; Case C-438/12 *Weber*, EU:C:2014:212, para 40; Case C-605/14 *Komu*, EU:C:2015:833, para 23.
[96] *Ellmes Property Services*, *ibid*, para 24; citing Case C-722/17 *Reitbauer* EU:C:2019:577, para 44; *Milivojević, ibid*, para 99; *Schmidt*, *supra* n 26, para 30.
[97] *Ellmes Property Services, ibid*, para 25, citing *Reitbauer, ibid*, para 45.
[98] *Ellmes Property Services, ibid*.
[99] *Weber*, *supra* n 95, para 67.
[100] *Komu*, *supra* n 95, para 34.
[101] Wilderspin, *supra* n 19, 470, para 40; Wilderspin, *supra* n 12, 469.

application of Article 4(1)(c) Rome I as "relating to a right *in rem*" in immovable property are those that relate to rights that have *erga omnes* effects.[102] The exclusive jurisdiction rule has the effect of depriving the parties' choice of forum which would otherwise apply, and the action may be subject to a court which is not the domicile of either party.[103] The CJEU held that Article 24(1) Brussels Ia, as an exception to the general jurisdiction rule, must not be given a wider interpretation than required by its objective.[104] Accordingly, a strict interpretation would exclude actions "relating to a right *in rem*" from the material scope of Article 24(1) Brussels Ia. For instance, the proceedings brought by a creditor in *Reitbauer* regarding an immovable property falls outside the scope of exclusive jurisdiction.[105] Similarly, in *Milivojević*, the claim seeking a declaration of the invalidity of a credit agreement was based on a right in personam which can be claimed only against the defendant, and therefore fell outside the scope of exclusive jurisdiction.[106] However, the request for removal from the land register of a mortgage registration, which is based on relevant national legislation, constitutes a right *in rem*. Such right has effects *erga omnes*, and thus is subject to exclusive jurisdiction.[107]

*(b) Excluding timeshare contracts from exclusive jurisdiction rules*

Article 24(1) Brussels Ia, as a derogation to the general principle of *actor sequitur forum rei*, has been interpreted very narrowly by the CJEU.[108] In light of the CJEU's judgments in *Ellmes Property Services* and *Milivojević*, timeshare contracts do not fall within the scope of exclusive jurisdiction for two reasons. First, the claims over timeshare contracts do not concern the determination of the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein. Timeshare rights, which involve the usage of an immovable property during a fixed time period for several years, are not rights *in rem* that have effect *erga omnes* against everyone. Second, as discussed above, the right granted by a timeshare contract is, in essence, a right *in personam* that has effect only against the other party to the contract. A timeshare tourist might lodge a lawsuit for a refund after cancellation or a pecuniary compensation for a slip-and-fall accident in a bathroom during the performance of the timeshare

[102]Ferrari, *supra* n 30, 105, para 35.
[103]*Milivojević*, *supra* n 26, paras 96 and 98; *Schmidt*, *supra* n 26, para 28.
[104]*Milivojević*, *ibid*, para 98; Case C-73/04 *Klein* [2005] ECR I-8667, para 15; Citing Case 73/77 *Sanders* [1977] ECR I-2383, paras 17-18; Case C-115/88 *Reichert* [1990] ECR I-27, para 9; Case C-292/93 *Lieber* [1994] ECR 1-2535, para12; Case C-8/98 *Dansommer* [2000] ECR I-393, para 21.
[105]*Reitbauer*, *supra* n 96, para 63.
[106]*Milivojević*, *supra* n 26, paras 101 and 105.
[107]*Ibid*, paras102-103; *Schmidt*, *supra* n 26, para 41.
[108]Plender and Wilderspin, *supra* n 34, 265, 9-034.

contract. Such contractual right, albeit relating to an immovable property, is not a right *in rem* itself, but a right *in personam* having effect against the other contracting party. Therefore, a timeshare contract should not be subject to exclusive jurisdiction under Article 24(1) Brussels Ia.[109]

(c) *Excluding timeshare-related contracts from exclusive jurisdiction rules*

If timeshare contracts fall outside the scope of exclusive jurisdiction, timeshare-related contracts, such as exchange contracts and resale contracts, should also be excluded from the material scope. A contract for the provision of services, such as membership of a club entitling members to use a property in a specified period, albeit representing the essence of a timeshare contract, does not create "a right *in rem* in immovable property" or "a tenancy of immovable property" within the meaning of Article 24(1) Brussels Ia.[110] In *Klein*, Mr and Mrs Klein concluded with Rhodos a contract described as a "membership contract" to become members of a club and the club membership was a requirement for the purchase of a right to use a holiday property on a timeshare basis.[111] The membership contract with a membership fee of DEM 10,153, constituting the major part of the total price of DEM 13,300, enabled Mr and Mrs Klein to acquire the right to use an apartment of a specified type in a specified location for one week of the year for a period of nearly 40 years.[112] The CJEU held that the value of the right to use the property was of only secondary economic importance, compared with the right to membership.[113] A contract which does not only concern the right to use a time-share apartment, but also concerns the provision of separate services of a value higher than that of the right to use the property, is not a contract for the rental of immovable property within the meaning of Article 3(2)(a) Directive 85/577/EEC.[114] The CJEU concluded that the membership contract goes beyond the transfer of a right of use which constitutes the subject-matter of a tenancy agreement, and thus is outside the scope of exclusive jurisdiction.[115]

More importantly, in a timeshare-related contract, such as an exchange contract, which gives access to a service for the coordination of exchanges of holiday periods and locations, the right of use on a timeshare basis of an immovable property could relate to a different apartment in different countries each

[109]The fact that timeshare contracts are excluded from the exclusive jurisdiction rule does not mean that they are to be protected as consumer contracts, since they might still be classified as tenancy contracts of immovable properties and thus governed by the exceptional jurisdiction rule in the second para of Art 24(1) Brussels Ia.
[110]Wilderspin, *supra* n 19, 471, para 41.
[111]*Klein*, *supra* n 104, paras 5-6.
[112]*Ibid*, paras 7, 8, 18, 19.
[113]*Ibid*, para.20.
[114]*Ibid*, para.21.
[115]*Ibid*, para 27; citing Case C-280/90 *Hacker* [1992] ECR I-1111, para 15.

year.[116] The essential reason for conferring exclusive jurisdiction on the courts in which the property is situated is that the courts of the *locus rei sitae* are the best placed, for reasons of proximity, to ascertain the facts satisfactorily, by carrying out checks, inquiries and expert assessments on the spot.[117] Since the location of a timeshare apartment may vary each year, the courts in which the property is located will be fortuitous and unpredictable. Therefore, Article 24(1) Brussels Ia does not apply to exchange contracts or membership contracts.[118] Time-share-related contracts should be excluded from the scope of exclusive jurisdiction.

(d) *The exceptional rule to the exclusive jurisdiction*

Although timeshare contracts are not rights *in rem* in relation to immovable property, they might still be classified as tenancies of immovable property and thus subject to the exceptional jurisdiction rule provided in the second paragraph of Article 24(1) Brussels Ia. The exception to the exclusive jurisdiction rule designates the courts of the country in which the claimant and the defendant are domiciled. Four conditions have to be fulfilled for such application: (i) the tenancy contract of immovable property is concluded for temporary private use; (ii) the use lasts for a maximum of six consecutive months; (iii) the tenant is a natural person; (iv) the tenant and the landlord are domiciled in the same country. These cumulative conditions are comparable to those in Article 4(1)(d) Rome I which designates the law of the landlord's habitual residence as an exception to applying the *lex situs*. Likewise, the failure to fulfil any of these conditions will not justify the jurisdiction of the courts of the defendant's country of domicile. In other words, if a tenancy contract of immovable property is concluded for a professional purpose, or for a temporary private use over 6 consecutive months, or the tenant is not a natural person, or the tenant and the landlord are domiciled in different countries, the exclusive jurisdiction rule still apples.

However, the notion of timeshare contract is broader than the term used in the second paragraph of Article 24(1) Brussels Ia in three aspects. First, a timeshare contract might concern a movable property, such as a cruise, or a combination of several immovable properties, instead of one immovable property. Second, the tenancy contract in Article 24(1) Brussels Ia requires a period of less than 6 consecutive months in a consecutive year, whilst a timeshare contract under the Timeshare Directive refers to the right to use one or more overnight accommodation for a duration of more than one year. The time limitation and duration of these two concepts are different. Third, the later Timeshare Directive also

[116] *Klein*, *ibid*, paras 7, 24.
[117] *Ibid*, para16; citing *Sanders*, *supra* n 104, para 13; *Reichert*, *supra* n 104, para 10; Case C-8/98 *Dansommer*, *supra* n 104, para 27.
[118] *Klein*, *ibid*, para 28.

covers "long-term holiday product contracts", "resale contracts", "exchange contracts" and "ancillary contracts". For instance, a membership contract or exchange contract mainly concerns services that are related to the use of an immovable property. The mere letting of immovables does not constitute a service, and thus is governed by Article 24(1) Brussels Ia.[119] Exclusive jurisdiction over tenancy of immovable property only applies if a consumer rents the property from the owner himself,[120] and does not apply when disputes are only indirectly related to the use of the property let.[121] It is hard to say that such timeshare-related contracts are tenancy contracts.

In addition, even if timeshare contracts fall within the scope of the second paragraph of Article 24(1) Brussels Ia. Such exceptional rule is not based on the consideration of weaker party protection. It reflects the general jurisdiction rule of *actor sequitur forum rei* enshrined in Article 4(1) Brussels Ia, namely, the defendant domiciled in a state shall be sued in the courts of that state. The courts of the country in which the tenant is domiciled may have jurisdiction only if the landlord is also domiciled in the same country. Such exceptional rule is still to the benefit of the landlord, since it initially stands in the shoes of the landlord, rather than the tenant. For instance, in a timeshare contract, if the parties are domiciled in two different countries, the exclusive jurisdiction still applies. The courts of the country in which the timeshare tourist is domiciled are not granted jurisdiction in whatsoever way. Hence, timeshare tourists are not protected as consumers with favourable jurisdiction rules.

### 2. *The place of performance of a contractual obligation under Article 7(1) Brussels Ia*

Considering the priority of protective jurisdiction over special jurisdiction, if timeshare contracts are explicitly protected as consumer contracts under Article 17 Brussels Ia, special jurisdiction must not apply to timeshare contracts, unless the conditions set out in Article 17(1) are not met. If the targeting test is not met, excluded timeshare contracts from consumer jurisdiction rules are subject to special jurisdiction rules set forth in Articles 7(1)(a)-(b) Brussels Ia. This is in line with choice of law rules applied to excluded consumer contracts under Article 6 Rome I. Under Article 6(3) Rome I, if a timeshare contract does not fall with the scope of targeting activities conducted by the business, the law applicable to the timeshare contract is to be determined pursuant to Articles 3–4 Rome I.

[119]The letting of rooms or flats is not covered by Art 7(1)(b) Brussels Ia, although the landlord may have some obligations to provide for activities. Such obligations are not the characteristic performance for a lease agreement. Mankowski, *supra* n 91, 207, para 126.
[120]Steennot, *supra* n 33, 487.
[121]Case C-280/90 *Hacker* [1992] ECR I-1111; Case C-241/83 *Rösler* EU:C:1985:6.

Currently, in the absence of a specific provision in Article 17 Brussels Ia, timeshare contracts not falling within the scope of exclusive jurisdiction might be subject to special jurisdiction under Article 7(1) Brussels Ia, since timeshare contracts in essence are services contracts, as discussed above. Accordingly, the courts of the country in which the contract is to be performed shall have jurisdiction. The question is how to interpret the "place of performance" of a timeshare contract which relates to the use of an immovable property if it falls under Article 7(1)(a) Brussels Ia. If it falls under Article 7(1)(b) of the Brussels Ia Regulation because it is a contract for services performed in one country, then the place where the services were provided or should have been provided has jurisdiction.[122]

In *Ellmes Property Services*, regarding the co-ownership contract relating to an immovable property that does not fall within the exclusive jurisdiction of Article 24(1) Brussels Ia, the question arose as to whether Article 7(1)(a) Brussels Ia is to be interpreted as meaning that the action concerns contractual obligations to be performed at the location of the property.[123] The CJEU held that Article 7(1)(a) Brussels Ia presupposes the establishment of a legal obligation freely consented to by one person towards another.[124] The co-ownership of an apartment building established a legal contractual obligation freely consented to between the co-owners in respect of the co-ownership.[125] Timeshare contracts may be regarded as contracts establishing a legal obligation freely consented to between the parties on timeshare rights. An action based on such a contractual obligation may be governed by the special jurisdiction of Article 7(1)(a) Brussels Ia.

As to whether the place of performance of the obligation under Article 7(1)(a) Brussels Ia is to be construed as the place where the property is situated, the CJEU held that the obligation of co-ownership agreement relates to the actual use of the property and must be performed in the place where the property is situated.[126] A co-owner bound by a co-ownership agreement may reasonably expect to be sued in the courts of the place where the immovable property concerned is situated.[127] The close connection between the courts where the immovable property is situated and the dispute at issue may justify that these courts are best placed to

[122]As to the determination of the place of contractual performance under Art 7(1) of the Brussels Ia Regulation, see A Poon, "Determining the Place of Performance under Article 7(1) of the Brussels I Recast" (2021) *International and Comparative Law Quarterly* 635-663; D Levina, "Jurisdiction at the Place of Performance of a Contract Revisited: a Case for the Theory of Characteristic Performance in EU Civil Procedure" (2022) 18 *Journal of Private International Law* 266–95.
[123]*Ellmes Property Services, supra* n 25, para 19.
[124]*Ibid*, paras 37, 40.
[125]*Ibid*, para 38.
[126]*Ibid*, paras 42–44.
[127]*Ibid*, para 45.

hear the dispute.[128] Additionally, such interpretation meets the objective of predictability of jurisdiction rules and facilitates the sound administration of justice.[129]

Surely timeshare contracts are very different from co-ownership contracts relating to an immovable property. However, issues relating to these two kinds of contracts may both be regarded as "matters relating to a contract" and thus subject to Article 7(1)(a) Brussels Ia. The CJEU's judgment in *Ellmes Property Services* indicates that the place of performance of the contractual obligation established in a timeshare contract may be interpreted as the place where the property is situated under Article 7(1)(a) Brussels Ia. However, such interpretation does not work very well on timeshare contracts for several reasons. First, a timeshare contract may involve a combination of several immovable properties, the place of performance of such a contract is fortuitous each year. The exercise of jurisdiction of the country where the property is situated may not correspond to the reasonable expectations of both parties nor enhance legal certainty or predictability. Second, for claims on the cancellation of timeshare contracts, the country where the property is situated does not have the closest connection with the dispute nor facilitate the sound administration of justice. Third, the place of performance in a timeshare contract is mostly in a country other than the timeshare tourist's home country. This means the courts of the country in which the timeshare tourist is domiciled will not be granted jurisdiction by virtue of Article 7 (1)(a) Brussels Ia. Such a special jurisdiction rule does not take into account the necessity of protecting timeshare tourists as consumers with favourable jurisdiction rules. The courts of the country in which the property is situated will have jurisdiction, irrespective of whether Article 7(1)(a) or Article 24(1) of Brussels Ia is applicable. Overall, this special jurisdiction rule is not beneficial to timeshare tourists who intended to sue foreign travel service providers, conversely, foreign touristic service providers will benefit from Article 7 Brussels Ia, since timeshare consumers might be sued in a foreign country where the services are or should have been provided.[130]

### 3. *Protecting timeshare tourists as consumers in Brussels Ia*

Timeshare contracts should be protected as consumer contracts under Articles 17–19 Brussels Ia for two reasons. First, the current jurisdiction rules fail to offer timeshare tourists the right to sue, or to be sued, at the courts of the country of the consumer's domicile. As mentioned above, timeshare contracts should not be classified as contracts relating to a right *in rem* in immovable property which has effect *erga omnes* against everyone. The right granted by a

[128] *Ibid*, para 46.
[129] *Ibid*.
[130] Steennot, *supra* n 33, 483.

timeshare contract is essentially a right *in personam* that has effect only against the other party to the contract. Thus, timeshare contracts fall outside the scope of exclusive jurisdiction of Article 24(1) Brussels Ia. In addition, timeshare contracts are not tenancy contracts, but services contracts under Article 7(1)(a) or 7 (1)(b) Brussels Ia, which grants jurisdiction to the courts of the country where the obligation in question is performed, or where the services are provided. Again, this special jurisdiction, just like exclusive jurisdiction under Article 24(1) Brussels Ia, designates the courts where the property is situated, rather than the country where the timeshare tourist is domiciled. Yet timeshare contracts and timeshare-related contracts are neither rights *in rem* in relation to immovable property nor a tenancy of immovable property, instead, they are services contracts that are qualified as "consumer contracts" with a tourism aspect.[131]

Second, timeshare tourists are consumers that need protective jurisdiction rules in the sense that they are weaker parties in comparison with the other party.[132] The CJEU held that the exceptional protection offered to consumers is out of the concern that a consumer is deemed to be economically weaker and less experienced in legal matters than the other party to the contract.[133] Articles 17–19 Brussels Ia ensure that consumers are not discouraged from suing by being compelled to bring an action before the courts of the state where the professional is domiciled.[134] As regards timeshare tourists, they are more vulnerable, economically weaker and legally inexperienced, and thus should be protected as consumers with favourable jurisdiction rules under Brussels Ia. In addition, it is highly debatable that while a package travel tourist is protected as a consumer in line with Article 17(3) Brussels Ia, a timeshare tourist is not protected as a consumer with favourable consumer jurisdiction rules.

However, the CJEU has repeatedly construed Articles 17–19 Brussels Ia strictly. A broad interpretation that goes beyond the cases expressly envisaged by the Brussels Ia Regulation is not allowed. The same goes for Article 6 Rome I which acts as an exceptional choice of law rule. Article 6(4)(c) Rome I constitutes an exception to Article 4(1)(c) Rome I, without the re-exception in Article 6(4)(c) Rome I, timeshare contracts might be subject to Article 4(1)(c) Rome I. Yet timeshare contracts covered in Article 6(4)(c) Rome I are less substantially connected to the property than a purchase or tenancy and thus are less appropriate to subject them to the *lex situs* enshrined in Article 4(1)(c) Rome I.[135] Likewise, Article 24(1) Brussels Ia constitutes an exception to Articles 17–19 Brussels Ia, without a specific provision to exclude timeshare contracts from such exception in Article 17 Brussels Ia, timeshare contracts are not

[131]Lima, *supra* n 64, 132.
[132]The legal status of a timeshare tourist as a consumer has been embodied in Recitals (2), (3), (11), (17), (19), (22) and Art 2(1)(f) of Directive 2008/122/EC.
[133]*Shearson Lehmann Hutton, supra* n 88, para 18.
[134]*Ibid*; *Gruber*, *supra* n 87, para 34.
[135]Wilderspin, *supra* n 12, 470.

explicitly protected as consumer contracts. Such inconsistency between Article 17 Brussels Ia and Article 6(4)(c) Rome I may create a legal gap between these two Regulations on the protection of timeshare tourists in the field of EU private international law. Consequently, a timeshare tourist who would otherwise have been protected by the favourable consumer jurisdiction rules may not be protected as a consumer and the courts of the tourist's country of domicile may not have jurisdiction over timeshare disputes relating to a timeshare contract.

Timeshare contracts should be considered as consumer contracts and governed by consumer jurisdiction and choice of law rules under Articles 17–19 Brussels Ia and Article 6 Rome I. The application of such consumer protective rules is under the conditions that the targeting test is fulfilled, and the conclusion of the contract falls within the targeting activities. In such a case, Article 4(1)(b) Rome I does not apply to determine the law applicable to service contracts that are consumer contracts as defined by Article 6 Rome I.[136] Likewise, Article 7(1)(b) Brussels Ia takes a backseat vis-a-vis Articles 17–19 Brussels Ia. However, for timeshare contracts not governed by Articles 17–19 Brussels Ia and Article 6 Rome I, for instance, in the context where the targeting test is not fulfilled, Article 7(1) Brussels Ia and Article 4(1)(b) Rome I will apply, just like other consumer contracts which do not fulfil the conditions to apply consumer jurisdiction and choice of law rules.[137] Under Article 7(1)(b) Brussels Ia and Article 4(1)(b) Rome I, excluded timeshare contracts are subject to the court of the place where the services were provided or should have been provided and are governed by the law of the country where the service provider has his habitual residence.

As regards the interaction with the Timeshare Directive, unlike Article 6(4)(c) Rome I which refers to the notion of timeshare enshrined in the Timeshare Directive, the whole text of Brussels Ia does not mention such concept. Although Recital 18 Directive 2008/122 expressly refers to Brussels I, it does not specify that protective consumer jurisdiction rules apply. Hence, the interaction between the Timeshare Directive and Brussels Ia is one-sided. Without a direct and explicit reference to Directive 2008/122, it is difficult to reach a conclusion that the extended notion of timeshare-related contracts is covered by Articles 17–19 Brussels Ia. Put simply, there is no specific provision available for a timeshare tourist to rely upon to sue before the courts of the tourist's country of domicile. The interaction is merely unilateral from the Timeshare Directive to Brussels I, not from Brussels Ia to the Timeshare Directive. Yet the explanatory memorandum accompanying the proposal for the Brussels I Regulation had expressly provided that timeshare contracts are within the scope of consumer jurisdiction rules, unlike contracts for the sale of real property which fall within

[136]Ferrari, *supra* n 30, 103, para 30.
[137]The determination of the place of performance of service contracts is discussed in Ferrari, *supra* n 30, 101–103, paras 26–31.

exclusive jurisdiction.[138] This explanatory memorandum also referred to the notion "timeshare" in Directive 94/47. Although the final text of the Brussels I Regulation did not mention "timeshare" at all nor refer to the Timeshare Directive, it indicates that timeshare contracts could have been expressly included in the material scope of consumer jurisdiction rules. The question is how to draft a consumer-friendly jurisdiction rule for timeshare tourists.

In this regard, the expression in Article 6(4)(c) Rome I is relevant. To eliminate inconsistency with Article 6 Rome I and enhance interaction with the Timeshare Directive, timeshare contracts and timeshare-related contracts should be explicitly protected as consumer contracts under Articles 17–19 Brussels Ia. To this end, the solution might be the exclusion of timeshare contracts from the exclusive jurisdiction of Article 24(1) Brussels Ia[139] and the express inclusion of timeshare contracts in Articles 17–19 Brussels Ia by establishing an additional Article 17(4) with a reference to the timeshare definition in Directive 2008/122, just like that in Article 6(4)(c) Rome I. Accordingly, a possible draft of a new Article 17(4) Brussels Ia could be: "this Section shall not apply to a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 2008/122/EC".

## F. Conclusion

Brussels Ia and Rome I are a tango dancing couple in the field of EU private international law. As regards consumer protection for timeshare contracts, when the background music has been changed from Directive 94/47 to Directive 2008/122, it is essential for Brussels Ia and Rome I to change their steps accordingly by following the new beat. However, when Article 6(4)(c) Rome I is dancing under the beat of Directive 2008/122, Article 17 of Brussels Ia is basically dancing under no beat. Moreover, the interaction of Directive 2008/122 with Article 6 Rome I may lead to the conclusion that both timeshare contracts and timeshare-related contracts are protected as consumer contracts under Article 6(4)(c) Rome I. By contrast, Articles 17–19 Brussels Ia have no direct interaction with Directive 2008/122 at all, other than one-sided interaction by virtue of Recital 18 of the Directive. Therefore, Article 17 Brussels Ia is already at least two steps behind Article 6(4)(c) Rome I.

Notwithstanding this, it is never too late to take action and change steps. When your footsteps are wrong or slow in Tango, the best strategy is adjusting your steps as quickly as possible to keep pace with your dancing partner. Likewise, it is necessary for the Brussels Ia Regulation to change its next step by referring to the timeshare notion stipulated in Directive 2008/122, to protect timeshare

[138] COM (1999) 348 final, 16.
[139] J. Hill, *Cross-border Consumer Contracts* (Oxford University Press, 2008) 125–127.

contracts as an exception to contracts in relation to immovable property. Such express inclusion of timeshare contracts into the material scope of protective jurisdiction may reduce legal uncertainty on different classifications, which may lead to the application of exclusive jurisdiction or special jurisdiction. Having considered the wording used in Article 6(4)(c) Rome I, a possible proposal for establishing a new provision in Article 17(4) of the Brussels Ia Regulation may read as follows:

> this Section shall not apply to a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 2008/122/EC.

Despite this, if the targeting test is not fulfilled or the conclusion of the timeshare contract does not fall within the scope of the business's targeting activities, timeshare contracts will not be protected as consumer contracts under Articles 17–19 Brussels Ia. In such cases, the excluded timeshare contracts will be subject to special jurisdiction rules set forth in Articles 7(1)(a)-(b) Brussels Ia, which designates the courts of the place of performance of the obligation in question, or the courts of the place where the services were provided or should have been provided.

**Disclosure statement**

No potential conflict of interest was reported by the author(s).