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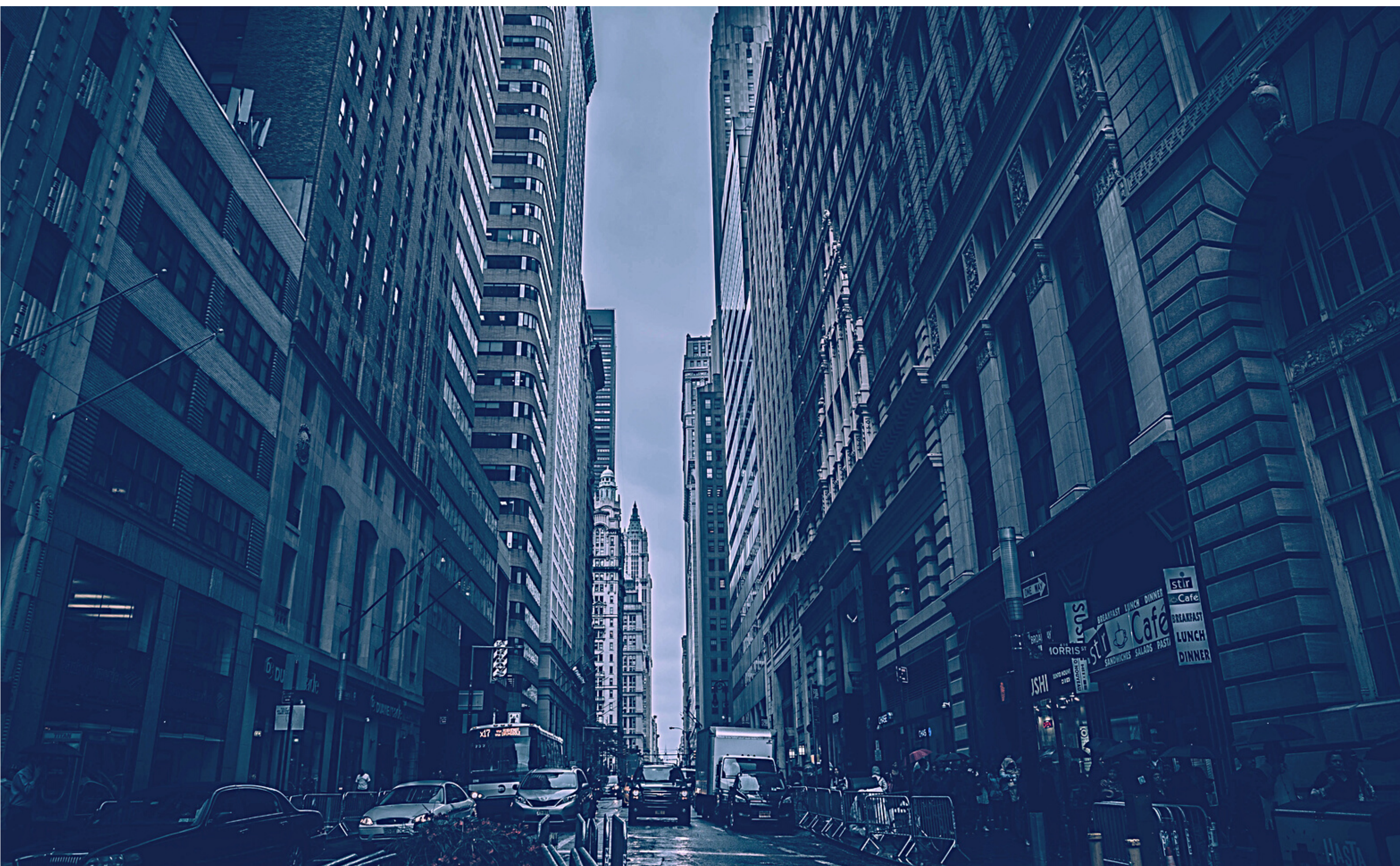

FROM COUCHSURFING TO THE UNIFORM JURISPRUDENCE RULING: THE REGULATION OF THE LOCAL ACCOMMODATION REGIME (AL)

In buildings under horizontal property regime, commonly known as condominiums, the constitutive title may contain, among other specifications, each autonomous fraction or common part of the building purposes, as well as a regulation on the respective use, fruition and maintenance (article 1418 of the Civil Code).
Recently, the Supreme Court of Justice (STJ) issued a judgement (4/2022 of 10 May) that standardizes jurisprudence in the sense of determining that an autonomous fraction destined to habitation, under the terms of the respective constitutive title, cannot be used for local accommodation", putting an end to the polemic generated by two contradictory judgements issued by the STJ at different moments.
In the first ruling, it was decided that local accommodation is an activity that infringes the habitational destination, so it is not considered legal to exercise local accommodation in autonomous fractions destined to habitation. In the second judgement a different understanding prevailed, deciding that local accommodation is not contrary to the residential purpose.
The unifying decision follows now the jurisprudential interpretation of the first one, namely as regards to the meaning of dwelling and dwelling purposes:

«under the horizontal property regime, the indication in the constitutive title that a certain fraction is intended for dwelling purposes must be interpreted as meaning that local accommodation is not permitted therein".».

What are the main highlights of this decision?

- The rights of each unit-holder may be subject to limitations, and the other unit-holders may react to the violation of such limits, namely when the use given to the respective unit is different from that foreseen in the title deed of the horizontal property;
- Local accommodation does not configure a mere dwelling of the fraction, but rather an experience that impacts on the inter-habitational or condominium environment of which is part of;
- Local accommodation is a different relationship from short-term renting and is legally autonomous. While renting is a provision of housing enjoyment, local accommodation is an activity of provision of housing services;
- "The use of autonomous fractions in lodging under a lease contract, in seasonal short-term leases in summer holiday areas or "accommodation" of students in certain university urban nuclei are inserted in another economic-social context, distinct from the LA, and do not necessarily justify the same legal solution";
- The Constitution does not absolutize private property in terms of preventing the legislator from establishing some specific limits to the exercise of the right of property, such as those provided for in Article 1422(2) of the Civil Code;
- In terms of taxation, local accommodation is not configured as housing.

What impacts for the future?

This unifying judgement will from now on guide the courts in the sense that, by means of the prohibition set out in Article 1422, no. 2, paragraph c) of the Civil Code, they will offer the other joint owners additional means of protection against the installation of local lodging in apartment units intended as dwellings. And we say additional, because the regime of authorisation for the exploration of local accommodation establishments in force already contains, in its Article 9, nr. 2, a provision that allows the opposition of the other condominium members against the exercise of such accommodation, due to proven disturbances and nuisance.
The expectations and the quietness of the other unit owners are privileged and protected.

In short, the other unitholders can oppose by two ways, according to the predictions:

- In article 1422, no. 2, paragraph c) of the Civil Code, in case of use other than the purpose for which the independent fraction is intended;

- In Article 9, nr. 2 of the regime of authorisation to operate local lodging establishments, "by decision of more than 50% of the building ownership, in a grounded resolution, due to the repeated and proven practice of acts that disturb the normal use of the building, as well as acts that cause nuisance and affect the condominium members' rest".

This ruling will not bind future Court decisions. However, it will have relevance and jurisprudential importance in the future as a guiding and interpretative principle, within the framework of a tendency and ever-growing mantle of normativity that has laid foundations in the Portuguese and European legal systems.
Local accommodation, whose origins date back to initiatives that arose at the beginning of the millennium within ideas, and in some cases ideals, of the shared economy and by way of the emerging peer-to-peer digital means, has been subject in the last decade to the corset of the norm, which in the Portuguese context has been reflected in the regime approved in 2014 by Decree-Law no. 128/2014, of 29 August, subject already, and in the meantime, to two amendments.
What, a little less than twenty years ago, was embodied as a “couchsurfing” or a simple “home sofa loan”, or even as an advertisement for a holiday house in the internet - airbnb -, in the scope of networks of direct exchanges of global dimension and geographic reach, but in which the only subjects were the people directly involved, has currently changed into an autonomous legal figure, protected by a network of norms, legal phenomena, actors and interpretations: the legislator, the law and its subsequent amendments, the administrative authorities, the neighbouring condominium owners or this unifying jurisprudence judgment.
It is certain, however, that in this, such as in other cases, the tendency and the course of the densification of the regulation will depend on the perspectives and antagonistic interests at stake.

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