



## **WORKING GROUP 2**

### **LIS PENDENS**

Ms I. and Ms M., two sisters who are 82 and 78 years old respectively, are co-owners to the extent of six tenths and four tenths of a property in Munich (Germany).

On the basis of a notarised act of 20 December 1971, a right in rem of pre-emption over the four-tenths share belonging to Ms M. was entered in the Land Register in favour of Ms I.

By a notarial contract of 28 October 2014, Ms M. sold her four-tenths share to Z. GbR, a company incorporated under German law, of which one of the directors is her son, Mr C, a lawyer established in Milan (Italy). According to one of the clauses in that contract, Ms M., as the seller, reserved a right of withdrawal valid until 28 March 2015 and subject to certain conditions.

Being informed by the notary who had drawn up the contract in Munich, Ms I. exercised her right of pre-emption over that share of the property by letter of 18 December 2014.

On 25 February 2015, by a contract concluded before that notary, Ms I. and Ms M. once more expressly recognised the effective exercise of the right of pre-emption by Ms I. and agreed that the property should be transferred to her for the same price as that agreed in the contract for sale signed between Ms M. and Z. GbR. However, the two parties asked the notary not to carry out the procedures for the registration of the transfer of property in the Land Register in accordance with Paragraph 873(1) of the BGB until Ms M. had made a written declaration before the same notary that she had not exercised her right of withdrawal or that she had waived that right arising from the contract concluded with Z. GbR within the period laid down, which expired on 28 March 2015. On 2 March, Ms I. paid the agreed purchase price of EUR 4 million.

By letter of 15 March 2015, Ms M. declared that she had exercised her right of withdrawal, with respect to Ms I. , in accordance with the contract concluded on 28 October 2014.

By an application of 29 March 2015, Z. GbR brought an action against Ms I. and Ms M. , before the Tribunale ordinario di Milano (District Court, Milan), seeking a declaration that the exercise of the right of pre-emption by Ms I. was ineffective and invalid, and that the contract concluded between Ms M. and that company was valid.

On 15 July 2015, Ms I. brought proceedings against Ms M. before the Landgericht München I (Regional Court, Munich I) (Germany), seeking an order that Ms M. register the transfer of ownership of the four-tenths share with the Land Register. In support of her application, Ms I. argues, in particular, that by reason of the exercise of the right of pre-emption, the right of withdrawal agreed between Z. GbR and Ms M. did not form part of the contractual provisions that were applicable to her.



## LEGAL ASSESMENT:

### 1. Say whether the following statements are true or false:

- a) The essential reason for conferring exclusive jurisdiction on the courts of the Contracting State 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 and to apply the rules and practices which are generally those of the State in which the property is situated.
- b) The exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights *in rem* in immovable property,
- c) Only those actions which both come within the scope of the Convention or of Regulation No 1215/2015 and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with protection for the powers which attach to their interest comes into the exclusive jurisdiction of the courts of the Contracting State in which the property is situated.
- d) An action seeking a declaration of invalidity of the exercise of a right of pre-emption attaching to that property and which produces effects with respect to all the parties does not come into the exclusive jurisdiction of the courts of the Contracting State in which the property is situated.

### 2. Say whether the following statements are true or false:

- a) In the case, the German court cannot call in question the jurisdiction of Italian court, which is based clearly and solely on the chronological order in which the courts involved are seised
- b) The German court, even if it is the court second seised, is required to examine whether, by reason of a failure to take into consideration the exclusive jurisdiction laid down in Article 24(1), the decision of the court first seised will be recognised in the other Member States in accordance with Article 45(1) of that regulation.
- c) The German court has to stay the proceedings until the Italian court assesses if it had jurisdiction.



**3. Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24:**

- a) it shall declare of its own motion that it has no jurisdiction.
- b) it shall declare of its own motion that it has no jurisdiction, only when the defendant didn't enter into appearance
- c) it shall stay the proceedings until the court first seized establishes it has jurisdiction
- d) it shall declare it has no jurisdiction, but only after the application of one of the parties.

**I. Read the following judgment and choose the missing word(s):**

JUDGMENT OF THE COURT (Third Chamber)

3 April 2014 (\*)

In Case C-438/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht München (Germany), made by decision of 16 February 2012, received at the Court on 2 October 2012, in the proceedings

**Irmengard Weber**

v

**Mechthilde Weber,**

THE COURT (Third Chamber),

after hearing the Opinion of the Advocate General at the (1) ..... on 30 January 2014,

(1) a) session

b) meeting

c) sitting

d) action

gives the following



## Judgment

This request for a preliminary ruling concerns the interpretation of Articles 22(1), 27 and 28 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

The request has been made in (2) ..... between Ms Irmengard Weber ('Ms I. Weber') and her sister Ms Mechthilde Weber ('Ms M. Weber') in which Ms I. Weber seeks an order that her sister consent to the entry on the Land Register of Ms I. Weber as the owner.

(2) a) procedure      b) proceedings                      c) action                      d) case

## The dispute in the main proceedings and the questions referred for a preliminary ruling

Ms I. Weber and Ms M. Weber, two sisters who are 82 and 78 years old respectively, are co-owners to the (3) ..... of six tenths and four tenths of a property in Munich (Germany).

(3) a) measure                      b) degree                      c) extent                      d) amount

On the basis of a notarised act of 20 December 1971, a right in rem of pre-emption over the four-tenths share belonging to Ms M. Weber was entered in the Land Register in favour of Ms I. Weber.

By a notarial contract of 28 October 2009, Ms M. Weber sold her four-tenths (4) ..... to Z. GbR, a company incorporated under German law, of which one of the directors is her son, Mr Calmetta, a lawyer established in Milan (Italy). According to one of the clauses in that contract, Ms M. Weber, as the seller, reserved a right of (5) ..... valid until 28 March 2010 and subject to certain conditions.

(4) a) share                      b) part                                      c) dividends                      d) profit

(5) a) waiver                      b) denial                                      c) withdrawal                      d) refusal



Being informed by the notary who had (6) ..... the contract in Munich, Ms I. Weber exercised her right of pre-emption over that share of the property by letter of 18 December 2009.

- (6) a) set out                      b) carried out                      c) laid down                      d) drawn up

On 25 February 2010, by a contract concluded (7) ..... that notary, Ms I. Weber and Ms M. Weber once more expressly recognised the effective exercise of the right of pre-emption by Ms I. Weber and agreed that the property should be transferred to her for the same price as that (8) ..... in the contract for sale signed between Ms M. Weber and Z. GbR. However, the two parties asked the notary not to (9) ..... the procedures for the registration of the transfer of property in the Land Register in accordance (10) ..... Paragraph 873(1) of the BGB until Ms M. Weber had made a written declaration before the same notary that she had not exercised her right of withdrawal or that she had waived that right (11) ..... from the contract concluded with Z. GbR within the period laid down, which expired on 28 March 2010. On 2 March, Ms I. Weber paid the agreed purchase price of EUR 4 million.

- (7) a) to                      b) at                      c) in front of                      d) before
- (8) a) agreed                      b) approved                      c) admitted                      d) allowed
- (9) a) carry on                      b) carry out                      c) set out                      d) go on
- (10) a) to                      b) with                      c) of                      d) for
- (11) a) appearing                      b) occurring                      c) arising                      d) rising

By letter of 15 March 2010, Ms M. Weber declared that she had exercised her right of withdrawal, with respect to Ms I. Weber, in accordance with the contract concluded on 28 October 2009.



By an application of 29 March 2010, Z. GbR brought (12) ..... against Ms I. Weber and Ms M. Weber, before the Tribunale ordinario di Milano (District Court, Milan), seeking a declaration that the exercise of the right of pre-emption by Ms I. Weber was (13) ..... and invalid, and that the contract concluded between Ms M. Weber and that company was valid.

(12) a) an action      b) a trial                      c) a suit                      d) a procedure

(13) a) ineffective      b) inefficient                      c) immaterial                      d) inapplicable

On 15 July 2010, Ms I. Weber brought proceedings against Ms M. Weber before the Landgericht München I (Regional Court, Munich I) (Germany), seeking an order that Ms M. Weber register the transfer of ownership of the four-tenths share with the Land Register. In support (14) ..... her application, Ms I. Weber argues, in particular, that by reason of the exercise of the right of pre-emption, the right of withdrawal agreed between Z. GbR and Ms M. Weber did not form part of the contractual (15) ..... that were applicable to her.

(14) a) for                      b) to                      c) with                      d) of

(15) a) providings      b) provisions                      c) agreements                      d) approvals

Basing itself on Article 27(1) of Regulation No 44/2001 and, in the alternative, on Article 28(1) and (3) thereof, the Landgericht München I decided to stay the proceedings, having regard to the proceedings already brought before the Tribunale ordinario di Milano. Ms I. Weber appealed against that decision before the Oberlandesgericht München (Higher Regional Court, Munich) (Germany).

Taking the view that, in principle, the conditions laid down by Article 27(1) of that regulation or, at the very least, those laid down in Article 28(1) and (3) thereof had been fulfilled, the Oberlandesgericht München decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:



- ‘1. Does the scope of Article 27 of [Regulation No 44/2001] extend also to cases in which two parties in one action each have the role of defendant because both parties have been sued by a third party, and in the other action have the roles of applicant and defendant? In such a situation are there proceedings “between the same parties”, or must the different claims raised by the applicant against the two defendants in the first action be examined separately, so that there cannot be taken to be proceedings “between the same parties”?
  
2. Are there proceedings involving “the same cause of action” within the meaning of Article 27 of Regulation No 44/2001 if the claims and arguments in the two actions are indeed different, but
  - (a) the same preliminary issue has to be answered in order to decide both actions, or
  - (b) in one action, by a claim in the alternative, a declaration is sought as to a legal relationship which features in the other action as a preliminary issue?
  
3. Are there proceedings which have as their object a right in rem in immovable property within the meaning of Article 22(1) of Regulation No 44/2001 if a declaration is sought that the defendant did not validly exercise a right in rem of pre-emption over land situated in Germany which indisputably exists in German law?
  
4. Is the court second seised, when making its decision under Article 27(1) of Regulation No 44/2001, and hence before the question of jurisdiction is decided by the court first seised, obliged to ascertain whether the court first seised lacks jurisdiction because of Article 22(1) of Regulation No 44/2001, because such lack of jurisdiction of the court first seised would, under Article 35(1) of Regulation No 44/2001, lead to a judgment of the court first seised not being recognised? Is Article 27(1) of Regulation No 44/2001 not applicable for the court second seised if the court second seised comes to the conclusion that the court first seised lacks jurisdiction because of Article 22(1) of Regulation No 44/2001?



5. Is the court second seised, when making its decision under Article 27(1) of Regulation No 44/2001, and hence before the question of jurisdiction is decided by the court first seised, obliged to examine the complaint of one party that the other party acted in abuse of process by bringing proceedings before the court first seised? Is Article 27(1) of Regulation No 44/2001 not applicable for the court second seised if the court second seised comes to the conclusion that the bringing of proceedings before the court first seised was an abuse of process?
6. Does the application of Article 28(1) of Regulation No 44/2001 presuppose that the court second seised has previously decided that Article 27(1) of Regulation No 44/2001 does not apply in the specific case?
7. May account be taken in the exercise of the discretion allowed by Article 28(1) of Regulation No 44/2001:
- (a) of the fact that the court first seised is situated in a Member State in which proceedings statistically last considerably longer than in the Member State in which the court second seised is situated,
  - (b) of the fact that, in the assessment of the court second seised, the law of the Member State in which the court second seised is situated is applicable,
  - (c) of the age of one of the parties,
  - (d) of the prospects of success of the action before the court first seised?
8. In the interpretation and application of Articles 27 and 28 of Regulation No 44/2001, in addition to the aim of avoiding irreconcilable or contradictory judgments, must the second applicant's entitlement to justice be taken into account?



On those grounds, the Court (Third Chamber) hereby rules:

**1. Article 22(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, must be interpreted as meaning that there falls within the category of proceedings which have as their object ‘rights *in rem* in immovable property’ within the meaning of that provision an action such as that brought in the present case before the courts of another Member State, seeking a declaration of invalidity of the exercise of a right of pre-emption attaching to that property and which produces effects with respect to all the parties.**

**2. Article 27(1) of Regulation No 44/2001 must be interpreted as meaning that, before staying its proceedings in accordance with that provision, the court second seised is required to examine whether, by reason of a failure to take into consideration the exclusive jurisdiction laid down in Article 22(1) thereof, the decision of the court first seised will be recognised in the other Member States in accordance with Article 35(1) of that regulation.**

**II. Explain the following words and/or phrases or provide synonyms/near-synonyms for them.**

- (1) seeking a declaration;
- (2) questions referred for a preliminary ruling;
- (3) brought proceedings against;
- (4) stay the proceedings;
- (5) right of pre-emption.

**III. Answer the following questions:**

- (1) What legal aspects are involved in this judgment?
- (2) According to the Court, what should the court second seised examine?