Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 30 January 2014[1]

Case C-438/12

Irmengard Weber
v
Mechthilde Weber

(Request for a preliminary ruling from the Oberlandesgericht München (Germany))

(Jurisdiction in civil and commercial matters — Regulation (EC) No 44/2001 — Article 22(1) — Exclusive jurisdiction — Proceedings which have as their object rights in rem in immovable property — Inclusion of the right of pre-emption over immovable property — Article 27(1) — Lis pendens — Concept of proceedings 'between the same parties' — Concept of proceedings 'involving the same cause of action' — Penalty for abuse of process — Article 22(1) read in conjunction with Article 27(1) — Article 28(1) — Related actions — Criteria for staying proceedings — Article 27 read in conjunction with Article 28 — Right to effective judicial protection)

I – Introduction

1. The request for a preliminary ruling from the Oberlandesgericht München (Germany) concerns the interpretation 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,[2] and in particular Articles 22(1),[3] 27(1)[4] and 28(1).[5] The Court is accordingly called upon to rule on the interpretation of the rule on exclusive jurisdiction applicable in proceedings which have as their object rights *in rem* in immovable property and the rules applicable to *lis pendens* or related rights contained in that regulation.

2. At the outset, I would point out that it is, in my opinion, appropriate to reformulate the many questions which are referred to the Court, by examining them not in the order chosen by the referring court, but in an order which more closely follows the logic and scheme of Regulation No 44/2001.

1 — Original language: French.

2 — OJ 2001 L 12, p. 1.

3 — According to that provision, '[t]he following courts shall have exclusive jurisdiction, regardless of domicile: … in proceedings which have as their object rights *in rem* in immovable property …, the courts of the Member State in which the property is situated'.

4 — Article 27(1) provides that '[w]here proceedings *involving the same cause of action and between the same parties* are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established'. The words to which I have added emphasis are the two expressions whose interpretation is specifically sought in the present proceedings.

5 — Pursuant to Article 28(1), '[w]here related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings'. Article 28(3) states that '[f]or the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

3. First of all, the Court must determine whether Article 22(1) of that regulation, which reserves exclusive jurisdiction to the courts of the Member State in which the immovable property forming the subject-matter of the disputed rights *in rem* is located, applies to an action seeking a declaration that a right *in rem* of pre-emption has not been validly exercised. [6]

4. In connection with the preceding point, a further question [7] seeks to determine whether, in a case of *lis pendens* within the meaning of Article 27(1) of Regulation No 44/2001, the court second seised may take into account, in order to refrain from staying its proceedings, the fact that in its view the court first seised is not the court which has exclusive jurisdiction by virtue of Article 22(1) of that regulation and that, accordingly, the judgment which the court first seised is likely to give will not be recognised in the other Member States, pursuant to Article 35(1) of that regulation. [8]

5. The referring court also wishes to ascertain whether it is possible to regard as falling within the rule of *lis pendens* set out in Article 27 of Regulation No 44/2001 two sets of proceedings brought before courts of different Member States, on the one hand, where two people are respectively co-defendants in respect of a third party in one of those proceedings and opposing parties in the other and, on the other hand, where those sets of proceedings relate to claims based on different grounds, but the same preliminary legal issue must be decided at the outset in both cases. [9]

6. In addition, the Court is invited to clarify whether, in the context of the decision to stay proceedings which the court second seised must take under Article 27(1) of that regulation, the court second seised must not only examine the complaint of one party that the other party acted in abuse of process by bringing proceedings before the court first seised, but also safeguard the second applicant's entitlement to justice, and, if so, what conclusions should be drawn from this. [10]

7. Moreover, the Court is called upon to determine whether, before the court second seised can apply Article 28(1) of Regulation No 44/2001, concerning related actions which are pending before the courts of different Member States, it must have decided that Article 27(1) of that regulation, concerning cases of *lis pendens*, is not applicable to the case in question. [11]

8. Finally, the referring court asks what criteria it may take into consideration in the exercise of the discretion allowed by Article 28(1) of Regulation No 44/2001, bearing in mind that that provision provides that staying proceedings is optional in the case of related actions. [12]

II – The main proceedings, the questions referred and the procedure before the Court

9. The dispute in the main proceedings is between I. Weber and M. Weber, two elderly sisters who are co-owners to the extent of six tenths and four tenths respectively of a piece of land in Munich (Germany). Following a notarial instrument of 20 December 1971, a right of pre-emption over that immovable property was entered in the land register in favour of I. Weber, pursuant to Paragraph 1094(1) of the German Civil Code [13] (Bürgerliches Gesetzbuch, 'the BGB').

6 — See the third question referred.

7 — See the fourth question referred.

8 — Chapter III, Section 1, of Regulation No 44/2001 is concerned with the recognition in a Member State of judgments given in another Member State. Under that section, Article 34(3) provides that a judgment is not to be recognised, inter alia, if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought. Article 35(1) adds that the same applies 'if it conflicts with Sections 3, 4 or 6 of Chapter II ...', which includes exclusive jurisdiction in proceedings which have as their object rights *in rem* in immovable property.

9 — See the first and second questions referred.

10 — See the fifth question referred and the first part of the eighth question referred.

11 — See the sixth question referred.

12 — See the seventh question referred and the second part of the eighth question referred.

13 — That provision provides that '[a] piece of land may be burdened in such a way that the person in whose favour it is burdened has a right of pre-emption as against the owner'.

10. By notarial contract of 28 October 2009 M. Weber sold her four-tenths co-ownership share to the partnership governed by German law Z. GbR, one of the managers of which is her son, Mr Calmetta, a lawyer established in Milan (Italy). According to a clause included in that contract, M. Weber reserved to herself a right of rescission, valid until 28 March 2010 and subject to certain conditions.

11. Notified by the notary who had drawn up the contract in Munich, I. Weber exercised her right of pre-emption over that co-ownership share, by letter of 18 December 2009, pursuant to Paragraphs 463 and 464 of the BGB. [14]

12. On 25 February 2010 by contract concluded before the same notary, I. Weber and M. Weber expressly acknowledged the valid exercise of that right of pre-emption and agreed on the transfer of ownership to I. Weber, at the same price as that agreed in the contract of sale signed by M. Weber and Z. GbR. It seems that they agreed that the notary should take the steps to register the transfer of ownership in the property register only when M. Weber had waived the right to exercise her right of rescission under the contract of 28 October 2009, pursuant to Paragraph 873(1) of the BGB [15] and Paragraph 19 of the Regulation on the land register (Grundbuchordnung). [16] On 2 March 2010, I. Weber paid the agreed purchase price, that is to say EUR 4 million. By letter of 15 March 2010, M. Weber declared that contract rescinded.

13. By an application of 29 March 2010, served on I. Weber on 11 May 2010, Z. GbR brought proceedings against M. and I. Weber before the Tribunale Ordinario di Milano (the Milan civil court) seeking a declaration that the exercise by I. Weber of her right of pre-emption was invalid and that the contract concluded between M. Weber and that company was valid.

14. On 15 July 2010, I. Weber brought an application before the Landgericht München I seeking to require M. Weber to consent to the registration in the property register of the transfer of ownership relating to the four tenths of the property held by the latter. [17] M. Weber objected, relying, at the outset, on the existence of *lis pendens* on account of the dispute pending before that Italian court.

15. By orders of 1 April 2011 and 23 August 2011, the Landgericht München I stayed the proceedings before it in the light of the proceedings pending before the Tribunale Ordinario di Milano, the first court seised, by reference to Article 27(1) of Regulation No 44/2001 and, in the alternative, Article 28(1) and (3) of that regulation.

16. I. Weber brought an appeal before the Oberlandesgericht München. By decision of 16 February 2012, lodged on 2 October 2012, the latter court decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling, stating that it considered that the position adopted by the Landgericht München I was well founded:

‘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

14 — Paragraph 463 of the BGB states that ‘[a] person who has a pre-emption right in respect of an object can exercise the right as soon as the person burdened by the right has concluded a contract with a third party for the purchase of the object’. According to Paragraph 464 of the BGB: ‘[e]xercise of the right of pre-emption takes place by a declaration made to the person burdened by the right. The declaration need not be in the form determined for the contract of purchase. … On the exercise of the right of pre-emption, the sale is concluded between the person entitled and the person burdened by the right on the terms which the person burdened by the right agreed with the third party’.

15 — Pursuant to that provision, ‘[f]or the transfer of ownership of a piece of land ... the agreement of the person entitled and the other party as regards the occurrence of the change of title and the registration of the change of title in the land register are necessary, unless prescribed otherwise by law’.

16 — It provides that ‘[a] registration takes place when the person whose title is affected by it gives consent’.

17 — In support of that application, I. Weber relied on the fact that right of rescission agreed between Z. GbR and M. Weber was of no effect against her and did not form part of the contractual terms applicable to her, on account of the exercise of her right of pre-emption.

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 of [that regulation] 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 claimant's entitlement to justice be taken into account?'

17. It is clear from the documents subsequently put before the Court that, by judgment of 23 May 2013, the Tribunale Ordinario di Milano declined jurisdiction in favour of the German courts in connection with the proceedings brought by Z. GbR against I. and M. Weber.

18. Before the Court, written observations were presented by I. Weber, M. Weber, the German, United Kingdom and Swiss Governments and by the European Commission. At the hearing of 9 October 2013, only the representatives of I. Weber, M. Weber and the Commission appeared.

III – Analysis

19. As a preliminary point, I would point out that, in so far as Regulation No 44/2001 replaces the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters,[18] the interpretation provided by the Court in respect of the provisions of that convention is also valid for those of the regulation whenever the provisions of those instruments may be regarded as equivalent.[19] In this case, it seems to me that such equivalence is established for all the provisions forming the subject-matter of the questions referred, since Articles 22(1), 27(1) and 28(1) of that regulation reflect the same scheme as the corresponding provisions of the Brussels Convention[20] and are, moreover, provisions couched in almost identical terms.[21]

20. Furthermore, I would note that I consider that it is necessary to look at the questions referred together and to deal with them in an order different from that chosen by the referring court. In particular, I shall start by analysing the third question, which concerns the head of exclusive jurisdiction under Article 22(1) of Regulation No 44/2001, before continuing the analysis with the fourth question, which seeks to clarify the effects of that provision in the light of the *lis pendens* rule set out in Article 27 of that regulation. That order seems logical to me because, in my opinion, where a referring court has such exclusive jurisdiction under that regulation, it cannot be required to examine whether the substantive criteria for *lis pendens*, which are referred to in the first two questions,[22] are fulfilled with respect to the dispute in respect of which it is the court second seised. Indeed, I consider that in such a situation, no court of another Member State can validly have jurisdiction concurrently.

A – *The interpretation of Article 22(1) of Regulation No 44/2001 and that provision read in conjunction with Article 27 of that regulation*

1. *The inclusion of the right in rem of pre-emption within the scope of the rule on exclusive jurisdiction under Article 22(1) of Regulation No 44/2001 (third question)*

21. By its third question, the referring court asks, in essence, whether, as it presumes, an action seeking a declaration that a defendant has not validly exercised his right *in rem* of pre-emption, which exists according to the substantive law of a Member State with respect to land situated in that State, is an action relating to one of the 'rights *in rem* in immovable property' covered by Article 22(1) of Regulation No 44/2001. If so, that action would fall within the head of exclusive jurisdiction which is laid down by that provision for 'the courts of the Member State in which the property is situated'.

18 — (OJ 1972 L 299, p. 32). Convention as amended by the successive conventions relating to the accession of new Member States to that convention ('the Brussels Convention').

19 — See, inter alia, Case C-478/12 *Maletic* [2013] ECR, paragraph 27 and case-law cited.

20 — That is to say, respectively, Articles 16(1)(a) and 21(1) of the Brussels Convention.

21 — See Case C-133/11 *Folien Fischer and Fofitec* [2012] ECR, paragraphs 31 and 32, and Case C-386/12 *Schneider* [2013] ECR, paragraph 21, concerning, respectively, Articles 27 and 22 of Regulation No 44/2001.

22 — That is the same parties, the same cause of action and the same subject-matter.

22. Specifically, it raises the question whether an action seeking a declaration that the exercise of a right of pre-emption relating to land situated in Germany is invalid, such as that which Z. GbR brought before the Italian court, falls within the scope of that article, from which it would follow that the German courts would have exclusive jurisdiction in this case.

23. I would point out that M. Weber claims that that question is inadmissible on the grounds, first, that the action for compulsory registration in the land register which was brought before the German courts does not have as its subject-matter rights *in rem* in immovable property within the meaning of Article 22(1) of Regulation No 44/2001 and, secondly, that it has no bearing on any decision to stay its proceedings which the referring court might give under Articles 27 and 28 of that regulation. [23]

24. Nevertheless, it is clear from the settled case-law that the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [24]

25. That is not the case in the present proceedings, in the light of the information provided by the Oberlandesgericht München, from which it is clear that the proceedings brought concurrently before an Italian court relate to the validity of the exercise by I. Weber of her right of pre-emption over immovable property, [25] while the action pending in Germany requires an examination of that same point as a preliminary issue. Since that court properly identified the grounds on which it based its reference for a preliminary ruling and a response is necessary for a ruling on the outcome of the dispute before it, the request for a preliminary ruling must be regarded as admissible.

26. It should be noted that, in line with the case-law on Article 16(1)(a) of the Brussels Convention, [26] the criterion of exclusive jurisdiction which is established by Article 22(1) of Regulation No 44/2001, that is 'in proceedings which have as their object rights *in rem* in immovable property', must be conceived as an autonomous concept specific to EU law. It follows that that expression should be interpreted by reference, first, to the objectives and scheme of that regulation and, secondly, to the general principles which are contained in all the systems of national law. [27] In that regard, I note that the principle of *forum rei sitae* is a widely accepted rule of jurisdiction for cross-border disputes concerning rights *in rem* in immovable property, both in domestic provisions and in those of international origin.

23 — In support of her claims, she argues that the proceedings initiated in Italy were based not on a right *in rem*, but on the obligations between Z. GbR and herself under the contract concluded on 28 October 2009. She adds that the preliminary issue submitted in the same proceedings, seeking to ascertain whether I. Weber exercised her right of pre-emption under valid conditions, does not fall within the scope of Article 22(1), since the existence of that right and the powers resulting therefrom have not been challenged.

24 — See, inter alia, Case C-332/11 *ProRail* [2013] ECR, paragraph 31.

25 — According to the order for reference, '[b]y its first principal claim Z. GbR sought from the Milan civil court a "finding and declaration of the invalid and ineffective exercise of the right of pre-emption on the part of I. [Weber], especially as she never accepted entirely the contractual terms of the original contract agreed between Z. GbR and M. [Weber], … specifically not the seller's right to rescind"'.

26 — See order of 5 April 2001 in Case C-518/99 *Gaillard* ECR I-2771, paragraph 13, in which it is stated that that independent definition makes it possible to ensure that the rights and obligations arising out of that convention for the Contracting States and for individuals concerned are as equal and uniform as possible, and Case C-343/04 *ČEZ* [2006] ECR I-4557, paragraph 25 and case-law cited.

27 — See, by analogy, in relation to the concept of 'civil and commercial matters' within the meaning of Regulation No 44/2001, *Schneider*, paragraph 18.

27. From a teleological perspective, I would recall that the principle rationale for vesting exclusive jurisdiction in the courts of the Member State where the property in question is situated [28] lies in the need for the proper administration of justice, since those courts are best placed, on account of their geographic proximity, to deal with matters relating to rights in that property, [29] as the Court has repeatedly held in relation to the Brussels Convention. [30]

28. From a systemic perspective, it is also clear that the scope of the rule of exclusive jurisdiction laid down in Article 22(1) of Regulation No 44/2001 may not be construed extensively and given an interpretation broader than is required by its objectives. [31] This follows from the fact that that provision establishes an exception not only with regard to the general rule of jurisdiction set out in Article 2(1) of the regulation, which prohibits the defendant from appearing before the courts near to his place of residence if the immovable property concerned is not located in the same Member State, but also with regard to special rules on jurisdiction contained in that regulation, which deprives the parties of the possibilities provided for therein of choosing the court. [32]

29. It is in that context that, by applying the case-law on Article 16(1)(a) of the Brussels Convention, the Court has already interpreted in a restrictive way the material scope Article 22(1) of Regulation No 44/2001. The rule of exclusive jurisdiction 'in proceedings which have as their object rights *in rem* in immovable property' which is set out in the latter has therefore been defined so that it 'does not encompass all actions concerning rights *in rem* in immovable property, but only those which both come within the scope of the convention [or of the regulation, respectively] 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'. [33]

30. Furthermore, it is clear from the case-law [34] that, for Article 16(1) of the Brussels Convention to apply, it is not sufficient that a right *in rem* in immovable property be involved in the action or that the action have any link with immovable property whatsoever. The action must be based on a right *in rem* and not on a right *in personam*. [35] The difference between a right *in rem* and a right *in personam* is that the former, existing in an item of property, has effect *erga omnes*, whereas the latter can be claimed only against the debtor. The same applies with regard to Article 22(1) of Regulation No 44/2001.

28 — I note that it is not only the court in whose jurisdiction the immovable property is located which has jurisdiction under Article 22 of Regulation No 44/2001, but all the courts of the Member State so designated.

29 — P. Jenard, in his report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1, in particular p. 35), emphasised that '[t]his type of dispute often entails checks, enquiries and expert examinations which have to be made on the spot. Moreover, the matter is often governed in part by customary practices which are not generally known except in the courts of the place, or possibly of the country, where the immovable property is situated'. I would add that in several Member States rights *in rem* in immovable property, in order to be relied on as against third parties, must be registered in the land register or another public register which enjoys the presumption of reliability, the keeping of which is sometimes entrusted to the courts of the place in which the immovable property is located, and that, in any event, the decisions given by those courts which have a bearing on the rights thus registered must be notified automatically for the purposes of registration.

30 — See, in particular, *ČEZ*, cited above, paragraphs 28 and 29, and the case-law cited.

31 — See the order in *Gaillard*, paragraph 14; Case C-73/04 [2005] *Klein* ECR I-8667, paragraph 15, and *ČEZ*, paragraph 26, and the case-law cited.

32 — Article 23(5) of that regulation provides, inter alia, that '[a]greements … conferring jurisdiction shall have no legal force … if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22'.

33 — *Schneider*, paragraph 21 and the case-law cited in relation to the Brussels Convention.

34 — See, inter alia, Case C-294/92 *Webb* [1994] ECR I-1717, paragraph 14, and the order in *Gaillard*, paragraphs 16 and 17 and the case-law cited.

35 — Save for the exception provided for by Article 16(1) in proceedings which have as their object tenancies of immovable property.

31. In this case, I consider that an action seeking a declaration that a right of pre-emption over land, and registered in the land register, has not been validly exercised, such as the one brought before the Italian court first seised by Z. GbR, is covered by the scope of the latter provision. Indeed, such an action is based on the existence of a kind of preferential right over immovable property [36] and is intended to determine what effects *erga omnes* the exercise of that right is able to produce for the benefit of its holder as regards the transfer of ownership, and in particular as against a third-party purchaser. The dispute therefore relates to a right which is both *in rem*, rather than personal, and over immovable property. I consider that the above considerations of proper administration of justice which underlie Article 22(1) support that interpretation.

32. Accordingly, I propose that the answer to the third question should be that proceedings concerning the validity of the exercise of a right of pre-emption over immovable property, such as those brought before the Italian court seised prior to the bringing of proceedings before the court making the reference in this case, fall within the concept of 'proceedings which have as their object rights *in rem* in immovable property' within the meaning of Article 22(1) of Regulation No 44/2001.

2. *The effects, as regards any stay of proceedings on grounds of* lis pendens*, of the exclusive jurisdiction of the court second seised under Article 22(1) of Regulation No 44/2001 (fourth question)*

33. The fourth question concerns, in essence, the relationship between Article 22(1) and Article 27(1) of Regulation No 44/2001, and in particular whether the first of those articles allows derogation from the second. The Court is asked to state whether, where concurrent proceedings are pending in two different Member States, the second court seised must take into consideration the fact that in its view any decision of the court first seised would not be recognised in the other Member States, in accordance with Article 35(1) of that regulation, on the basis of a failure to take account of the exclusive jurisdiction provided for in Article 22(1) in proceedings which have as their object rights *in rem* in immovable property.

34. I consider that it will be necessary to give an affirmative answer to that question. This seems to me to be necessary, first of all, in the light of the wording of Article 27 of Regulation No 44/2001, which reproduces that of Article 21 of the Brussels Convention. The wording of the latter provision has undergone significant changes, which should be taken into account. Before its amendment in 1989, [37] Article 21 was worded in such a way that the court second seised had the option to stay its proceedings, instead of the obligation to decline jurisdiction, only where the jurisdiction of the other court was contested.

35. The current mechanism is reversed, since the court second seised is, on the contrary, required to stay its proceedings 'until such time as the jurisdiction of the court first seised is established'. However, by definition, it will never be possible to establish that jurisdiction when the court second seised alone has exclusive jurisdiction by virtue of the subject-matter of the dispute, such as the exclusive jurisdiction resulting from Article 22(1) of that regulation, which must necessarily prevail. [38]

36 — I note that P. Schlosser, in his Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71), stated that the rights *in rem* existing in the original Member States, and in particular in Germany, included 'certain priority rights to secure liabilities' (see paragraph 166).

37 — By the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1).

38 — In that regard, see Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe*, LGDJ, Paris, 4th edition, 2010, paragraph 338-1; Magnus, U., and Mankowski, P. (ed.), *European Commentaries on Private International Law, Brussels I Regulation*, Sellier, Munich, 2nd edition, 2012, p. 478 *et* seq., paragraphs 5 and 10, and p. 496, paragraph 55.

36. I consider that the case-law of the Court relating to Article 21 of the Brussels Convention does not contradict that analysis. Indeed, *Overseas Union Insurance and Others* [39] contains a statement made *obiter dictum* which may be understood by contrary inference as meaning that in the event that the court second seised has exclusive jurisdiction as provided for by that convention, and in particular by Article 16 thereof (equivalent to Article 22 of Regulation No 44/2001), that court would have the option of taking into account the lack of jurisdiction of the court first seised. More specifically, in such a situation the court second seised examines solely the question of its own jurisdiction, which is exclusive in this case, as was pointed out by Advocate General Van Gerven in that case. [40]

37. That approach which was adopted with respect to the initial version of Article 21 should, in my opinion, *a fortiori* prevail with respect to Article 27 of Regulation No 44/2001, which contains even more explicit wording as to the need for the jurisdiction of the court first seised to be formally established before it is possible to draw all the appropriate conclusions from a situation of *lis pendens*.

38. I would add that the above case-law seems to me to be compatible with such an analysis. In *Gasser*, [41] which for its part is concerned with the amended version of Article 21 of the Brussels Convention, the Court ruled that the procedural rule contained therein 'is based clearly and solely on the chronological order in which the courts involved are seised'. The Court concluded therefrom that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction, in particular on grounds of legal certainty. [42]

39. However, that case was concerned with the specific question of exclusive jurisdiction based on a choice-of-court agreement, which the parties may cancel or the validity of which may be disputed, [43] and not on a head of jurisdiction linked directly to the subject-matter of the dispute, as is the case in proceedings which have as their object rights *in rem* in immovable property in accordance with Article 22(1) of Regulation No 44/2001.

40. Where the court second seised is the only one which has exclusive jurisdiction [44] on the basis of the latter provision, it would, in my opinion, be inappropriate for it to stay the proceedings pending before it, under Article 27(1) of that regulation, pending the decision of the court first seised, since the latter cannot validly declare that it has jurisdiction and therefore rule on the merits of the concurrent proceedings. A different approach would favour so-called 'torpedo' actions which could first be initiated unfairly in a Member State, for the sole purpose of circumventing the nevertheless exclusive jurisdiction of the courts of another Member State, that is to say, the one in which the immovable property involved in the dispute is located.

41. The interpretation which I am proposing is supported by the system of which Article 27(1) of Regulation No 44/2001 forms part. Indeed, under Article 25 of that regulation, an obligation to decline jurisdiction is imposed on all the courts of the Member States other than those where the immovable property forming the subject-matter of the dispute relating to rights *in rem* is

39 — Case C-351/89 [1991] ECR I-3317, paragraph 26 of which states: '*without prejudice* to the case where the court second seised has *exclusive jurisdiction* under the Convention and *in particular under Article 16 thereof* …, the court second seised may … only stay the proceedings' (emphasis added). Although no exclusive jurisdiction was claimed for the court second seised in the main proceedings (see paragraph 21 of the judgment), the Court none the less referred to that aspect, as did Advocate General Van Gerven (see point 9 of his Opinion in that Case).

40 — Ibid., paragraphs 21, 25 and 26 of that judgment and point 13 of that Opinion.

41 — Case C-116/02 [2003] ECR I-14693, paragraph 47.

42 — See paragraphs 41 to 54 of that judgment, it being noted that Advocate General Léger took the contrary view (see point 57 et seq. of his Opinion in that case).

43 — Paragraphs 49 to 51 of that judgment.

44 — However, pursuant to Article 29 of Regulation No 44/2001, applicable both in the event of *lis pendens* and in the event of related actions, '[w]here actions come within the *exclusive jurisdiction of several courts*, any court other than the court *first* seised *shall decline jurisdiction* in favour of that court' (emphasis added).

located.[45] Moreover, pursuant to Articles 35(1) and 45(1) of that regulation, it is clear that any judgment given by the court first seised which is contrary to the rule of jurisdiction laid down by Article 22(1) will be neither recognised nor enforced in the other Member States. Requiring the court second seised which has exclusive jurisdiction to stay its proceedings in such circumstances would simply lead to an absolute waste of time and would therefore not satisfy the requirement for the proper administration of justice.

42. However, in order not to render ineffective the mechanism provided for in Article 27(1), I consider that such an assertion of its own exclusive jurisdiction by the court second seised, to the detriment of the priority in principle accorded to the court first seised, should be limited to cases in which a reliable assessment can be made as to the issues concerning recognition and enforcement without risk of conflicting judgments. Like the Government of the United Kingdom and the Government of Switzerland, I consider that it is possible to make such a forecast where the disputes fall within the scope of Article 22(1) of Regulation No 44/2001. In that specific context, it will not undermine the objective of Regulation No 44/2001 and in particular Article 27 thereof, that is to say, preventing concurrent proceedings before the courts of different Member States and the irreconcilable judgments which may result,[46] since the probability of such judgments is then particularly reduced.

43. Accordingly, I propose that an affirmative answer should be given to the fourth question, since in a situation such as that in the present case, there are not two courts which both have jurisdiction, and therefore there is no positive conflict of jurisdiction to be resolved by application of the provisions of Regulation No 44/2001 relating to *lis pendens*.

B – *Interpretation of Article 27(1) of Regulation No 44/2001*

44. The four other questions relating to Article 27(1) of Regulation No 44/2001[47] will be considered together so as to address, first of all, the requirements which must be satisfied for *lis pendens* to arise within the meaning of that provision (1), and then the consequences of the possible existence of *lis pendens* (2).

45. In my view, it will not be necessary to provide an answer if, as I propose, the Court concludes that *lis pendens* within the meaning of that article is excluded in the present case based on the precedence of the exclusive jurisdiction of the *forum rei sitae* provided for in Article 22(1) of the regulation. Accordingly, those questions call for the following observations on my part only in the alternative.

1. *The requirements for the existence of* lis pendens *within the meaning of Article 27(1) of Regulation No 44/2001*

46. The first two questions relate to the requirements for *lis pendens* to be established for the purposes of Article 27(1) of Regulation No 44/2001. In particular, the Court must determine what is to be understood by the expressions 'proceedings … between the same parties' (a) and 'proceedings involving the same cause of action' (b), which are not defined in that provision.

45 — According to Article 25, '[w]here 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 22, it shall declare of its own motion that it has no jurisdiction'.

46 — Objective set out in recital 15 in the preamble to that regulation.

47 — That is to say the first, second, fifth and eighth questions referred.

47. At the outset, I would recall that those two expressions must be given an independent definition, and therefore one which is unrelated to the interpretations prevailing in a particular Member State. [48]

48. In my opinion, it is appropriate, in the context of interpreting the provisions of Regulation No 44/2001 on *lis pendens*, to take into account, indirectly, the approach adopted by the Court in *Tatry*, concerning the parallel concept of related actions, which covers 'all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive'. [49] I conclude from this that *lis pendens*, for its part, relates to situations in which *the judgments to be given cannot be separately enforced* and *their legal consequences are mutually exclusive*. That is, in my view, the rationale for the obligation imposed on the court second seised to stay its proceedings until the jurisdiction of the court first seised has been established. [50]

49. I would add that, on the basis of that interpretation, it will also be necessary to draw the appropriate conclusions from the fact that the scope, both objective and subjective, of the force of *res judicata* of a judgment delivered in civil proceedings is not harmonised by EU law. Accordingly, application of the provisions relating to *lis pendens* is not without difficulty, since *lis pendens* is, in my view, actually an advance form of the force of *res judicata* of the judgment which the court first seised would have to give. In addition, the implementation of the obligation to stay its proceedings under Article 27(1) of Regulation No 44/2001 cannot require the court second seised to acquaint itself with the specific features of the rules of civil law or civil procedure applicable in the Member State of the court first seised. I consider that that court must be able to give its judgment after a more technical review of the applications initiating the proceedings which are pending in parallel.

a) Interpretation of the expression 'between the same parties' within the meaning of Article 27(1) of Regulation No 44/2001 (first question)

50. By its first question, the referring court asks the Court whether it is possible to regard as proceedings 'between the same parties', a concept which is one of the criteria for application of Article 27(1) of Regulation No 44/2001, two sets of concurrent proceedings in which the persons involved in the two sets of proceedings are defendants in the first set of proceedings, whereas they are respectively the applicant and the defendant in the second set of proceedings.

51. Having already been called upon to define that expression in the context of the interpretation of the Brussels Convention, the Court ruled that 'the question whether the parties are the same cannot depend on the procedural position of each of them in the two actions, and that the plaintiff in the first action may be the defendant in the second', [51] and vice versa. A reversal of the procedural roles of the parties is therefore possible from one set of concurrent proceedings to the other.

52. It was also held that *lis pendens* arises where some but not all of the parties concerned are the same, provided that 'at least one of the plaintiffs and one of the defendants to the proceedings first commenced [is] also … among the plaintiffs and defendants in the second proceedings, or vice versa'. [52]

48 — As regards the case-law concerning the interpretation of Article 21 of the Brussels Convention, which is equivalent to Article 27 of Regulation No 44/2001, see, in particular, Case 144/86 *Gubisch Maschinenfabrik* [1987] ECR 4861, paragraph 11, and Case C-351/96 *Drouot Assurances* [1998] ECR I-3075, paragraph 16.

49 — Case C-406/92 [1994] ECR I-5439, paragraph 53.

50 — In fact, like the Swiss Government, I consider that the rules on *lis pendens* seek to prevent the risk of 'formally contradictory judgments' and therefore judgments which are wholly incompatible with each other at the enforcement stage.

51 — *Tatry*, paragraph 31, and the Opinion of Advocate General Tesauro in that case, points 14 and 20.

52 — *Tatry*, paragraphs 29 and 34. In that case, the second court seised is required to decline jurisdiction only to the extent to which the parties to the proceedings before it are also parties to the action previously started and its proceedings may continue between the other parties.

53. Moreover, adopting a particularly broad interpretation of that criterion, the Court stated in *Drouot Assurances* that application of the provisions relating to *lis pendens* may sometimes be necessary even where the parties to the two proceedings are not strictly identical, provided that there is such a degree of identity and indivisibility between the interests of the persons concerned that they must be considered to be one and the same party, since 'a judgment delivered against one of them would have the force of *res judicata* as against the other'.[53]

54. However, in my opinion, the scope of that judgment should be limited to cases of necessary joinder of litigants or similar situations in which there is no doubt, legally, that the parties' interests are the same and inseparable. Generally, the court second seised cannot be required to consider whether such criteria are fulfilled, since this could require a hearing of all the parties to the dispute which is pending before the court first seised or the gathering of the relevant evidence.

55. In the absence of such a limit, the application of that case-law might, in my opinion, lead to a denial of justice, because a dispute pending against a party in one Member State could prevent proceedings against another person in another Member State from being brought and completed, even if the judgment given in the first case is not enforceable against the defendant in the second case in the latter Member State.[54] In that regard, it should be borne in mind that the rights enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950,[55] and the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union[56] are individual rights which exist regardless of whether or not the natural or legal person concerned has interests inseparable from or identical to those of another person. Since individuals constitute distinct legal persons even though they have common interests, an individual cannot be legitimately deprived of the opportunity of having his action examined without delay because another individual is the defendant in a dispute brought before a court of another Member State.

56. As regards in particular the situation under consideration in the present case, it is clear in my view from the wording of Article 27(1) of Regulation No 44/2001 that for the parties to be the same parties, for the purposes of that provision, they must be opposing parties in the two sets of proceedings which are pending concurrently.[57] Such a requirement also reflects the traditional approach of civil procedure, which is based on procedural relationships of a binary nature in which an opposing applicant and defendant make submissions against each other.

57. Although, according to the case-law referred to above, in the case of potential *lis pendens*, the parties' positions in the concurrent proceedings can be reversed, the fact remains that nothing in the wording of that provision indicates that it should apply in situations where, as in the present case, both the parties are applicants or defendants in the first proceedings, but where one is the applicant and the other the defendant in the second proceedings.

53 — *Drouot Assurances*, paragraphs 19 and 23.

54 — For example, the interests of a company and its branch whose entire share capital is held by that company may be inseparable and identical in some cases, but that does not necessarily mean that a judgment given against that company in a Member State is enforceable against its branch in the Member State in which the latter is established.

55 — 'The ECHR'. The 'right to a fair trial' provided for in Article 6 thereof includes access to a court, in particular within a reasonable time, the fairness of proceedings, in particular with regard to evidence, and the right to *inter partes* proceedings (paragraph 1), as well as the presumption of innocence (paragraph 2) and the rights of the defence (paragraph 3). Article 13 protects the 'right to an effective remedy'.

56 — 'The Charter'. Those paragraphs relate, respectively, to the right to an effective remedy and the right to a fair trial, whereas the third paragraph of Article 47 relates to legal aid. On the origins and content of that provision, see the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) and, inter alia, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37, and Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, paragraph 61.

57 — That is true in the light of the French version of that provision, which requires proceedings brought '*entre les mêmes parties*', but also, as the German Government points out, in the light of the other language versions, in particular the German ('*zwischen* denselben Parteien'), Spanish ('*entre* las mismas partes'), English ('*between* the same parties'), Italian ('*tra* le stesse parti'), Netherlands ('*tussen* dezelfde partijen'), Portuguese ('*entre* as mesmas partes') and Finnish ('samojen asianosaisten *välillä*') versions (emphasis added).

58. I consider that applying the rule requiring proceedings to be stayed provided for in Article 27(1) in such a situation would be likely to jeopardise the effective judicial protection of the parties, and especially the rights of defence of a party who is the defendant in the first dispute. He will be unable to defend his interests effectively before the court first seised against a party who also has the status of defendant, and not of applicant, in that dispute.

59. Furthermore, this would in my view lead to a critical outcome with regard to the force of *res judicata* and the enforcement of the judgment given by the first court, to the benefit of one of the defendants and to the detriment of his co-defendant. In the event of a combined triangular position (A against B and C) and binary situation (B against C), I do not see why the judgments given in parallel cannot be separately enforced and how their legal effects might be mutually exclusive, since judgments in civil and commercial matters are not likely to have a subjective scope *erga omnes*, that is to say one which goes beyond the legal relationship between the applicant and the defendant.

60. The interpretation which I propose is compatible with the principal objective of Article 27 of Regulation No 44/2001, which is to prevent the risk of conflicting decisions which therefore cannot be enforced in another Member State,[58] since there is no such risk in circumstances such as those of the present case. Indeed, a judgment given by a German court against M. Weber would not have the force of *res judicata*, and therefore no binding force, against Z. GbR in Italy, and vice versa in Germany as regards a judgment given by the Italian court first seised. Furthermore, the interests of M. Weber, as the person against whom the right of pre-emption can be asserted, are not identical to those of that company, which is the purchaser of the immovable property affected by that right.

61. For all of those reasons, and contrary to what is proposed by the referring court, I agree with all the interested parties, with the exception of M. Weber,[59] that proceedings such as those which have been brought before, respectively, the Italian and German courts in the present case cannot be regarded as being brought 'between the same parties' within the meaning of Article 27(1) of Regulation No 44/2001. Consequently, if the Court decides to give a ruling on the first question, I propose that it should answer it in the negative.

b) Interpretation of the expression 'the same cause of action' within the meaning of Article 27(1) of Regulation No 44/2001 (second question)

62. By its second question, the referring court asks whether two sets of proceedings have 'the same subject-matter', for the purposes of Article 27(1) of Regulation No 44/2001, where they relate to proceedings having different claims and arguments, but the same preliminary issue has to be answered in order to decide both those concurrent actions, or in one of them a declaration is sought, by a claim in the alternative, as to a legal relationship which features in the other as a preliminary issue.

63. I would point out that in this case, the issue arises only with regard to the first head of claims submitted to the Italian court first seised in conjunction with the proceedings brought before the German court second seised.

64. I would add that there would be no need to answer that question, in particular, if, as I propose, the answer to the first question is in the negative, since, given that the criteria laid down in Article 27 are expressly stated to be cumulative, the absence of one is sufficient for the *lis pendens* rule provided for therein to be regarded as not applicable in the circumstances of this case. In my view, the existence of the same cause of action and subject-matter cannot be assessed independently of the question whether

58 — See, in particular, recitals 10 and 15 in the preamble to that regulation and *Drouot Assurances*, paragraph 17.

59 — I would point out that M. Weber submits that the first question referred is irrelevant for the purposes of application of Article 27 of Regulation No 44/2001 in this particular case.

the parties are the same. The cause of action and the subject-matter are concerned with the objective scope both of the proceedings and of the force of *res judicata* of the judgment to be given. That objective scope cannot go beyond the subjective scope of proceedings, in disputes falling within the scope of Regulation No 44/2001.[60]

65. It is therefore only for the sake of completeness that I would point out, first of all, that the Court ruled, in *Gubisch Maschinenfabrik*,[61] that '[e]ven though the German version of Article 21' of the Brussels Convention, which is equivalent to Article 27 of Regulation No 44/2001, 'does not expressly distinguish between the terms "subject-matter" and "cause of action", it must be construed in the same manner as the other language versions, all of which make that distinction'.[62] Therefore, despite the wording of the second question raised here, I consider that the answer to be given to it must not be limited to the concept of subject-matter, but must also include the concept of cause of action.

66. I would recall that, according to the case-law, the concept of 'cause of action' 'comprises the facts and the rule of law relied on as the basis of the action', whereas the concept of 'object of the action' 'means the end the action has in view',[63] that is to say the desired outcome of the proceedings. Furthermore, in accordance with that purposive approach, the Court has already held that the same subject-matter is not limited to cases in which the claims made in the two sets of concurrent proceedings are worded in the same terms.[64] It has also held that, in order to determine whether two claims have the same subject-matter, account should be taken only of the claims of the respective applicants in those proceedings, to the exclusion of the defence submissions raised by a defendant.[65]

67. As regards the specific issues raised in the present case, I note at the outset that the fact that the same preliminary issue is raised in two sets of concurrent proceedings is not, in my view, conclusive as to whether those proceedings have the same cause of action and the same subject-matter.[66] I consider that the question whether those proceedings have the same cause of action and the same subject-matter must be considered in particular in the light of the potential effects of the judgment to be given by the court first seised. Thus, it is appropriate to ask whether the defendant in the first proceedings would still have something to gain, in the second proceedings, having been successful or unsuccessful in the first proceedings. In other words, it is necessary to take into account the desired legal consequence and the basis on which the judgment given in the first dispute would have force of *res judicata* before the court second seised.

68. It is sufficient to note that in principle the classification of an issue as 'preliminary' should exclude the legal relationship in question from the scope of the concept of subject-matter of the action for the purposes of Article 27 of Regulation No 44/2001, since the aim of proceedings cannot consist in obtaining solely a response concerning an issue of the type which a court has to decide before being able to either reject or uphold the outcome sought by the applicant. This applies regardless of whether the preliminary issue also features in the other proceedings as a preliminary request or as an application made in the context of an alternative claim.

60 — In other words, it would be unreasonable to ask whether the action brought by applicant A against defendant B has the same cause of action, for the purposes of Article 27 of that regulation, as an action brought by applicant C against defendant D.

61 — See paragraph 14 of that judgment.

62 — In contrast, inter alia, to the French version, which expressly distinguishes between the cause and the subject-matter of actions, the German version is worded as follows: 'Klagen wegen desselben Anspruchs', which may be translated as 'proceedings based on the same claims'. I note that this is not an isolated case, since the wording of the English version also makes no distinction ('proceedings involving the same cause of action'). In that regard, see Magnus, U., and Mankowski, P., op. cit., p. 502 et seq.

63 — *Tatry*, paragraphs 39 and 41, and Case C-39/02 *Mærsk Olie & Gas* [2004] ECR I-9657, paragraphs 35 and 38.

64 — *Gubisch Maschinenfabrik*, paragraph 15 et seq. The Court held that, since proceedings for enforcement of the contract brought in a Member State aim to render that contract effective and proceedings for rescission and discharge of the same contract brought in another Member State have the specific aim of rendering it ineffective, the binding force of that contract was accordingly 'at the heart' of those two concurrent sets of proceedings, and the second could even be regarded as merely constituting a defence against the first.

65 — Case C-111/01 *Gantner Electronic* [2003] ECR I-4207, paragraph 32.

66 — For example, the same preliminary issue relating to the powers of representation of an agent could be raised in disputes concerning separate contracts of sale.

69. In that regard, I would point out that in this case the action brought before the Italian court is concerned primarily with the invalidity and the absence of effects of the exercise by I. Weber of her right of pre-emption, because she did not accept all the terms of the contract between Z. GbR and M. Weber, and in particular the latter's right of rescission. Moreover, Z. GbR has sought, in the alternative, a declaration that I. Weber was bound by the terms of the contract between that company and M. Weber, including that right of rescission. However, the action brought before the German court seeks an order requiring M. Weber to consent to the registration in the land register of I. Weber as owner of four tenths of the co-ownership share which M. Weber possesses.

70. On a purely formal level, the subject-matter of those two proceedings is not the same and there is no risk of irreconcilable judgments. Nevertheless, there is an overlap between the alternative claim in the action brought in Italy and the reasoning of the action brought in Germany, as regards the question whether the contractual term relating to M. Weber's right of rescission is enforceable against I. Weber. To that extent, I consider, like the Commission, that the subject-matter of those actions may be sufficiently identical in the light of the criteria developed in the above case-law, which allows reference to be made to the issues which lie at the 'heart' of the two sets of concurrent proceedings,[67] that is to say, in the present case, the effectiveness of the exercise of the right of pre-emption in question.

71. However, as regards the cause of action, I am of the view that, although the two disputes are based on the same facts, the proceedings are, as the German Government argues, based on two separate legal instruments. The proceedings of Z. GbR before the Italian court were based on the contract which it concluded with M. Weber on 28 October 2009, whereas the action of I. Weber before the German courts is based on the agreement which she concluded with M. Weber as a result of the exercise of her right of pre-emption. I note that even though the order for reference does not specify the statutory provisions on which the applications of Z. GbR before the Italian court are based,[68] it none the less appears that those applications are worded so as to cover contractual relationships. By contrast, the dispute raised in the proceedings pending in Germany relies on Paragraph 464 of the BGB[69] and is derived from a right *in rem* of pre-emption. Taking into account the concept of 'cause of action' given by the Court,[70] which includes both the facts and the legal rule relied on as the basis for the application, it seems to me that it cannot be established that the two sets of proceedings involve the same cause of action, since the legal instrument at issue in the second is unconnected with the contract relied on in the first and the legal rules relied on in both sets of proceedings are not, in my view, the same.

72. Finally, I wish to emphasise that if the material scope of Article 27 of Regulation No 44/2001 application is determined too extensively, this could cause a difficulty in establishing the boundary between it and Article 28 of that regulation, or even a loss of effectiveness of the latter provision, which is intended to supplement the preceding one in the case of less directly concurrent proceedings.[71] I shall return to the relationship between those two provisions in the context of the answer to the sixth question raised by the referring court.

73. Therefore, I propose, in the alternative, that the second question referred should be answered in the negative.

67 — See footnote 64 of this Opinion.

68 — Nor does the judgment given on 23 May 2013 by the Tribunale Ordinario di Milano, which was placed on the file in the present case, specify the legal basis of the applications brought before it.

69 — Provision cited in footnote 14 of this Opinion.

70 — *Tatry*, paragraph 39. In particular, in *Gubisch Maschinenfabrik*, the Court accepted that the two concurrent disputes were based on the same cause of action, because they were based on 'the same contractual relationship' (see paragraph 15).

71 — See, previously, on the relationship between Articles 21 and 22 of the Brussels Convention, Boularbah, H., 'La notion de "mêmes parties", condition de la litispendance communautaire', *Journal des tribunaux*, 1998, No 37, p. 774 et seq., in particular p. 776.

2. *The information to be considered by the court second seised in the context of the application of Article 27(1) of Regulation No 44/2001*

74. A feature common to the fifth question and the first part of the eighth question is that they relate to the consequences where *lis pendens* is established, and in particular the elements that the court second seised is required to take into account, in the context of its decision to stay its proceedings under Article 27(1) of Regulation No 44/2001. Those questions relate, respectively, to whether the court second seised is required prior to staying its proceedings under Article 27(1) of Regulation No 44/2001, first, to examine the complaint of one party that the other party acted in abuse of process by first bringing proceedings before a court of another Member State and, if so, what the consequences would be (a) and, secondly, to take into account the right to judicial protection of the applicant who brought proceedings before the court second seised (b).

75. I note that there will be no need to answer those two questions in the event that, in the answers to the questions raised by the referring court prior to those two questions, the Court concludes, as I suggest, that Article 27 is not applicable in circumstances such as those in the present case.

a) Whether the applicant acted in abuse of process by first bringing proceedings before another court (fifth question)

76. At the outset, I note that the fifth question seems to me to be hypothetical in nature. It is concerned with a situation where the applicant bringing proceedings before the court second seised argues before it that the earlier bringing of proceedings before another court by the defendant ('the other party' in the words of that question) was abusive, and does so before the latter court has ruled on its own jurisdiction.

77. However, as M. Weber argues, the parallel proceedings initiated in Italy were brought not by her but by Z. GbR, which is not a party to the proceedings which are pending before the referring court, bearing in mind that the latter proceedings were brought by I. Weber against M. Weber. Since according to settled case-law,[72] any answer which the Court may provide to that question is clearly irrelevant for the purpose of resolving the dispute in the main proceedings,[73] and would in that regard provide no assistance to the referring court in ruling on a stay of its proceedings under Article 27 of Regulation No 44/2001, I consider that that question is therefore inadmissible.

78. However, in the event that the Court should consider that it is necessary to rule on that question, I shall make some observations in the alternative.

79. In support of an answer in the affirmative,[74] it can be observed that a priority of jurisdiction based solely on a chronological criterion, such as that resulting from Article 27 of Regulation No 44/2001, favours the party which has been quicker to bring proceedings before a court of a Member State. However, it is well known that there is a risk of torpedo actions, whereby parties acting in bad faith

72 — See, in particular, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 41 and the case-law cited.

73 — I note that the Swiss Government has also pointed out that the order for reference does not make it possible to determine whether and to what extent there is an abuse of process in the present case.

74 — To support that position, that it is possible to derogate from the rule requiring proceedings to be stayed provided for in Article 27 where the sequence of events reveals that one party improperly relies on it, the Swiss Government argues that a judgment to that effect has already been given by the Swiss Bundesgericht (judgment of 6 July 2007, 4A_143/2007, E), concerning the equivalent provision of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9).

exercise their right to bring proceedings as quickly as possible for the sole purpose of circumventing the normal rules of jurisdiction, in particular the rule concerning the courts of the defendant's domicile, or in order purely to play for time.[75] I. Weber submits that this applies in the present case.[76]

80. However, I consider, like the Commission, that any abuse of process by the applicant who first brought proceedings before the court of another Member State is not an element which the court second seised can, or even must, take into account where there is a situation of *lis pendens* within the meaning of Article 27 of Regulation No 44/2001.

81. The Court has already held, with regard in particular to the claim that the first applicant allegedly used delaying tactics, that it would be manifestly contrary both to the letter and spirit and to the aim of the Brussels Convention, if Article 21 thereof (equivalent to Article 27 of Regulation No 44/2001) were interpreted as meaning that the application of that article should be set aside where the court first seised belongs to a Contracting State (or a Member State) in whose courts there are, in general, excessive delays in dealing with cases.[77]

82. That strict interpretation could, in my view, be generalised so as to include a complaint such as that alleging an abuse of process by bringing proceedings first, in light of the wording of Article 27,[78] which contains no requirements other than reviewing that the cause of action, the subject-matter and the parties are the same, and having regard to the principle of mutual trust in the equivalence of the legal systems of the Member States, which, inter alia, forms the basis of that provision.[79] That review has the advantage of being objective in nature and of not being subject to a case-by-case assessment.

83. I therefore consider, in the alternative, that a possible answer to the fifth question would be that, in the context of the application of Article 27(1) of Regulation No 44/2001, the court second seised cannot be required to take into consideration the applicant's complaint that the defendant acted in abuse of process by first bring proceedings before a court of another Member State.

b) The right to judicial protection of the applicant bringing the second set of proceedings (first part of the eighth question)

84. The first part of the eighth question is concerned, in essence, with whether Article 27 of Regulation No 44/2001 must be interpreted as meaning that the court second seised should take into account, when it is called upon to apply that article, not only the aim of avoiding irreconcilable or contradictory judgments,[80] but also the 'right to judicial protection' or 'entitlement to justice'[81] of the applicant who brought the second set of proceedings before it.

85. I consider that it is appropriate to limit the response to the interpretation of Article 27(1), even though this is not specified in that question. The present case is concerned with the situation in which the court second seised stays its proceedings until such time as the jurisdiction of the court first seised is established,[82] while Article 27(2) is concerned with the situation where jurisdiction must be declined where it has already been established.

75 — Concerning the risk of such procedural tactics, See Magnus, U., and Mankowski, P., op. cit., p. 483 et seq., paragraphs 17 and 18.

76 — She argues that Z. GbR brought proceedings in Italy because of the length of proceedings in that Member State, in order to defeat her lawful acquisition of M. Weber's co-ownership share in the immovable property located in Germany, and in order to discourage her from defending herself, particularly given her advanced age. She claims that shortly before the bringing of that action in Italy, M. Weber, who like I. Weber is a defendant in the Italian proceedings, moved to Milan, the location of the law firm of her son, who is a manager of Z. GbR.

77 — *Gasser*, paragraphs 70 and 73.

78 — Ibid., paragraph 71.

79 — Ibid., paragraph 72.

80 — Which constitutes the principal objective of that Article (see point 42 of this Opinion).

81 — That second expression appears in the grounds of the order for reference which relate to that question.

82 — See point 15 of this Opinion.

86. I would point out that the referring court suggests that protection of the right of access to justice cannot allow derogation from the rule applicable in cases of *lis pendens*. It argues that it would be contrary to the principle, which forms the basis of Regulation No 44/2001,[83] that the protection of individuals is guaranteed in an equivalent way in all the Member States,[84] save in exceptional circumstances,[85] which do not exist in the present case.

87. For my part, I consider that to allow a court of a Member State to take into account *in concreto* the right of an applicant to have access to justice would, in itself, be consistent with the right to effective judicial protection[86] guaranteed by Articles 6 and 13 of the ECHR and the first and second paragraphs of Article 47 of the Charter.[87] I would point out that the Court has already held that the fundamental rights 'to an effective remedy' and 'to a fair trial', within the meaning of that article of the Charter, must be protected, including in the context of the application of Regulation No 44/2001.[88]

88. Nevertheless, I consider that an interpretation of Article 27(1) of Regulation No 44/2001, though given in the light of the Charter, cannot amend the scope of that article. It is a purely technical provision,[89] the application of which should, in my opinion, raise no issue as regards Article 47 of the Charter, since the parties to the dispute brought before the court second seised benefit by definition, as regards the judicial systems of the Member States, from the right of access to justice and from the guarantee of a fair hearing before the court first seised.

89. As the Commission points out, where the exhaustive requirements laid down in Article 27 are fulfilled, the court second seised has an obligation to stay its proceedings, including of its own motion, and must do so without the possibility of taking into consideration other factors, such as the effectiveness of an applicant's access to justice. It has no discretion in that regard, by contrast with the power conferred upon it by Article 28(1) of that regulation.

90. Accordingly, I propose, in the alternative, that the answer to the first part of the eighth question should be in the negative.

83 — See, in particular, recital 16 in the preamble to that regulation.

84 — It states that that principle is established although, in fact, there are differences between Member States, a point which was known when Regulation No 44/2001 was adopted and still applies today.

85 — It refers to extreme situations in which the activity of the court first seised might be suspended, for instance, as a result of war or natural disasters whose effects persist for a long time and prevent the continued administration of justice.

86 — With regard to that concept, see, in particular, Prechal, S., and Widdershoven, R., 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection', *Review of European Administrative Law*, 2011, vol. 4, No 2, p. 31.

87 — See point 55 of this Opinion. Two aspects of that law seem particularly relevant here: first, the application of *lis pendens* could create a barrier to access to justice for the applicant bringing the second set of proceedings and, secondly, if the first set of proceedings are lengthy it could result in an infringement of the right to a fair hearing.

88 — See, with regard to respect for the rights of the defence Case C-292/10 *G* [2012] ECR, paragraph 47 et seq. See also, by analogy, Case C-491/10 PPU *Aguirre Zarraga* [2010] ECR I-14247, paragraph 59 et seq., with regard to Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1), in which the Court pointed out that the systems for recognition and enforcement of judgments handed down in a Member State which are established by that regulation are based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at EU level, in particular, in the Charter.

89 — Article 27 of Regulation No 44/2001 merely organises the allocation of jurisdiction between the courts of the Member States seised concurrently of identical disputes. See, by analogy, *Gasser*, in which, invited to interpret Article 21 of the Brussels Convention (equivalent to Article 27 of Regulation No 44/2001) particularly with respect of Article 6 of the ECHR (see paragraph 59 et seq.), the Court oriented its response on the spirit and the aim of that convention and on the trust which the Contracting States accord to each other's legal systems and judicial institutions (paragraph 70 et seq.). See also Magnus, U., and Mankowski, P., op. cit., p. 487 et seq.

C – *The interpretation of Article 28(1) of Regulation No 44/2001*

91. The three questions referred relating to Article 28(1) of Regulation No 44/2001 [90] will be considered together to examine, first of all, whether that provision is applicable only if the conditions for the application of Article 27(1) of that regulation are not fulfilled (1), and, then, which elements may be taken into consideration by the court second seised when it exercises the power to assess the appropriateness of staying proceedings which is conferred on it in the case of related actions by Article 28(2).

1. *The relationship between Articles 27(1) and 28(1) of Regulation No 44/2001 (sixth question)*

92. In essence, the sixth question seeks to determine whether, before it is able to apply Article 28(1) of Regulation No 44/2001 — relating to the staying of proceedings in the case of related actions –, the court second seised must ensure that Article 27(1) of that regulation — relating to the staying of proceedings in the case of *lis pendens* — does not apply to the dispute which is pending before it, or whether it may opt directly to apply Article 28 without examining the possibility that Article 27 may apply. [91]

93. In my view, an answer to the sixth question will be necessary only in the event that, contrary to what I propose, the Court answers the first four questions referred to the effect that the provisions of Article 27 of Regulation No 44/2001 are intended to apply in the present case, on the basis that the subject-matter, cause of action and parties are the same and notwithstanding the possible exclusive jurisdiction of the court second seised, and that those provisions are therefore capable of applying at the same time as those of Article 28 of that regulation.

94. I consider that it is appropriate to establish a logical, or even hierarchical, relationship between those provisions, so that the application of Article 27 is recognised as taking precedence over that of Article 28, in the light of the differences between them. [92]

95. First, those articles seek to attain objectives which are somewhat different. It is true that both contain rules which are intended to ensure, in so far as is possible, that irreconcilable judgments will not be given, in relation to the same dispute, in different States. [93] Nevertheless, it is clear from the case-law of the Court that irreconcilability is more flexibly understood in relation to Article 28 of Regulation No 44/2001 [94] than in relation to Article 27 of that regulation, since Article 28 is intended simply to encourage improved coordination in judicial activity in the various Member States. [95]

90 — That is the sixth, seventh and eighth questions referred.

91 — I. Weber indicates that that question arises because the Landgericht München I twice decided to stay its proceedings, first on the basis of Article 27(1) and then on the basis of Article 28(1) and (3), stating that the Oberlandesgericht München was at the source of that correction.

92 — To that effect I. Weber and the Swiss Government cite the analysis of Article 28 in German legal writings (Rauscher, T., and Leible, S., *Europäisches Zivilprozeß- und Kollisionsrecht EuZPR/EuIPR, Kommentar, Brüssel I-VO, LugÜbk 2007*, Sellier, Munich, 2011; Hüßtege, R., in Thomas, H., and Putzo, H. (ed.), *Zivilprozessordnung, Kommentar*, Beck, Munich, 32nd edition, 2011) and in Swiss legal writings (Bucher, A., *Loi sur le droit international privé. Convention de Lugano*, Helbing Lichtenhahn, Basle, 2011; Mabillard, R., in Oetiker, C., and Weibel, T. (ed.), *Lugano Übereinkommen*, Helbing & Lichtenhahn, Basle, 2011).

93 — See page 13 of the report of P. Jenard, referred to in footnote 29 of this Opinion, with regard to the equivalent provisions of the Brussels Convention, and recital 15 in the preamble to Regulation No 44/2001.

94 — In *Tatry*, paragraph 53, concerning Article 22 of the Brussels Convention, the Court held that '[the] interpretation [of the concept of related actions] must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive'. See also Case C-539/03 *Roche Nederland and Others* [2006] ECR I-6535, paragraph 22.

95 — *Tatry*, paragraph 55, and the Opinion of Advocate General Tesauro in that case, point 28.

96. Secondly, the detailed rules of application of those provisions differ. While the application of Article 27 requires, in particular, the concurrent existence of the identical elements which it sets out, the application of Article 28 is less demanding. Thus, in the absence of a review of the requirements for the existence of *lis pendens* within the meaning of Article 27, two sets of proceedings which are none the less sufficiently connected may fall within the provisions concerning related actions, if the criteria in Article 28(3) are also fulfilled. [96]

97. Thirdly, the effects produced by Article 27(1) and Article 28(1) of Regulation No 44/2001 are very different, although both are concerned with the staying of proceedings. [97] The court second seised has a discretion in the case of related actions, [98] a situation in which it is free not to raise this issue of its own motion and not to stay its proceedings, which does not exist in the case of *lis pendens*, a situation in which the stay of proceedings must necessarily be implemented, even if no party has relied on that plea.

98. Furthermore, I would point out that the Court stated, in *Tatry*, that the question referred to it concerning the scope of Article 22 of the Brussels Convention (equivalent to Article 28 of Regulation No 44/2001) '[arose] … *only if* the conditions for the application of Article 21 of the Convention [equivalent to Article 27 of that regulation] are not satisfied'. [99] It follows, in my view, that there is a relationship of subordination between those provisions, Article 28 applying only where Article 27 is not applicable. [100]

99. Accordingly, I propose that the answer to the sixth question should be that the application of Article 28(1) of Regulation No 44/2001 actually presupposes that the court second seised has previously reviewed the criteria for the application of Article 27(1) of that regulation and reached the conclusion that they are not fulfilled in the proceedings pending before it.

100. However, given the wording of that question, [101] I would point out that in my opinion it is not necessary for the court second seised to rule formally, by an express judgment, on the non-application of Article 27 of Regulation No 44/2001 in the case concerned. It is sufficient that that court systematically carries out a prior review as to whether Article 27 is applicable when it intends to stay its proceedings under Article 28 of that regulation.

2. *The information to be examined by the court second seised in the context of the application of Article 28(1) of Regulation No 44/2001*

101. In essence, the seventh question and the second part of the eighth question ask the Court to rule on the criteria that a court second seised of a dispute is able to take into account in exercising the power to stay proceedings allowed by Article 28(1) of Regulation No 44/2001, where another court is already seised of a related dispute. While one of those questions sets out a series of particular factors (a), the other is concerned with the right to judicial protection of the applicant bringing the second set of proceedings (b).

96 — Provision cited in footnote 5 of this Opinion.

97 — I would point out that the subject-matter of the question at issue does not include Article 27(2) and Article 28(2), which for their part concern the relinquishment of jurisdiction by the court second seised.

98 — In that regard, see the answer given below to the seventh question referred.

99 — Paragraphs 49 and 50 (emphasis added).

100 — According to Cadiet, L., Jeuland, E. and Amrani-Mekki, S. (ed.), *Droit processuel civil de l'Union européenne*, LexisNexis, Paris, 2011, paragraph 129, the concept of related actions is 'une sorte de litispendance imparfaite', since 'les conditions pour établir une situation de connexité sont moins rigoureuses que celles de la litispendance. Il en résulte que les effets qui en découlent le sont aussi'.

101 — The referring court refers to the requirement that the court second seised 'has … decided'.

a) Consideration, in the case of a stay of proceedings on the basis that actions are related actions, of circumstances specific to the pending disputes (seventh question)

102. In its seventh question, the referring court asks whether four factors which it lists could, and not should, be relevant to the second court seised in assessing whether it is appropriate to stay its proceedings or to give a ruling in the case of related actions, pursuant to Article 28(1) of Regulation No 44/2001. [102]

103. The wording of Article 28(1) does not contain an answer. The Commission asserts that the legislature's intention was not to draw up such a list. It seems to me that discretion is, as a result, left to that court, subject nevertheless to the requirement that it respects in any event the purpose of Article 28 of that regulation, which is, in the interests of the proper administration of justice within the Union, to prevent parallel proceedings before the courts of different Member States and to avoid conflicts between decisions which might result therefrom. [103]

104. In my opinion, it should be possible for the court second seised to take into account all the specific circumstances enabling it to determine whether it would be appropriate to stay its proceedings in each individual case brought before it. [104] There can be no question here of stating that a particular assessment criterion is valid in the absolute, without any tangible context, since a factor which is likely to be relevant in one case will not be necessarily be relevant in another case.

105. I would add that the referring court does not specify whether it envisages that each of the criteria in relation to which it seeks a ruling from the Court should be considered in isolation, inasmuch as it would be sufficient in itself. However, I consider that none of them can be decisive in itself. Rather, the court second seised must weigh up all the elements for or against staying the proceedings in the case before it.

106. Whatever position the Court should take in relation to the four criteria set out in the seventh question, the list which is drawn up therein by the referring court cannot be regarded as exhaustive. A variety of other assessment factors may warrant consideration under Article 28(1) of Regulation No 44/2001. For example, it would be possible to take into account information such as that referred to in the German legal writings cited in that respect by I. Weber [105] or the elements identified, non-exhaustively, by Advocate General Lenz. [106]

102 — It is necessary to draw a distinction between that discretion and the act of determining whether the actions are actually related, having regard to the criteria concerning the relatedness of concurrent proceedings which are defined in Article 28(3).

103 — See, *Tatry*, paragraph 55, and *Overseas Union Insurance and Others*, paragraph 16, concerning the objective of Article 22 of the Brussels Convention, the provision equivalent to Article 28 of Regulation No 44/2001, and recital 15 in the preamble to that regulation.

104 — See point 75 of the Opinion of Advocate General Lenz in Case C-129/92 *Owens Bank* [1994] ECR I-117, concerning Article 22 of that convention.

105 — This refers to the interests, behaviour and motivations of the parties; the intensity of the connection; the stage and the duration of the proceedings in the case in question; the chances of success of the application; the principle of procedural economy, in terms of effort, costs and proximity of evidence; whether or not the court first seised has jurisdiction, and the possibility of recognition.

106 — That is to say, 'the extent of the relatedness and the risk of mutually irreconcilable decisions', 'the stage reached in each set of proceedings' and 'the proximity of the courts to the subject-matter of the case' (see point 76 of the Opinion of Advocate General Lenz in *Owens Bank*). Those criteria are analagous to those which were accepted by the legislature in the context of the recasting of Regulation No 44/2001, but only as regards sets of concurrent proceedings which are pending in a Member State and in a third State. See recitals 23 and 24 in the preamble to and Articles 33 (concerning *lis pendens*) and 34 (concerning related actions) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1), applicable for the most part from 10 January 2015.

107. The first of the criteria listed in the order for reference concerns the fact that the court first seised is located in a Member State in which proceedings, statistically speaking, last significantly longer than in the Member State in which the court second seised is located. In my view, such a general assessment of the judicial system of another Member State cannot allow derogation from Article 28(1) of Regulation No 44/2001,[107] having regard to the principle of the equivalence of the systems of the Member States upon which that article is based.

108. However, in the event that the court second seised finds *in concreto* that the length of the proceedings brought first in another Member State is manifestly excessive, that court could lawfully conclude that it is not appropriate, in that particular case, to suspend its proceedings on the basis that the actions are related. In that regard, it should be noted, by analogy, that the Court has already held, in relation to Regulation No 2201/2003, that the court second seised may proceed with the consideration of the action brought before it, after a reasonable period of time awaiting answers to questions raised by it has elapsed.[108]

109. The second criterion contemplated is concerned with cases where the court second seised considers that it is appropriate to apply to the dispute the law of the Member State in which that court is located. However, in my view, the court second seised cannot be allowed to give a ruling determining either the law applicable to the substance of the dispute pending before the court first seised, or whether the latter court is able to apply the provisions of substantive law in question.[109]

110. The third criterion referred to, clearly inspired by the advanced age of both parties to the main proceedings, relates to the age of one of the parties. It seems obvious to me that that element relating to an individual cannot be taken into account, since the rights and obligations falling within the scope of Regulation No 44/2001 are, almost without exception, of a non-personal nature.[110]

111. The fourth and final criterion referred to in the seventh question relates to the prospects of success of the action before the court first seised. I consider that the court second seised cannot, in this way, be allowed to rule in advance on the outcome of the proceedings before another court. Given that the court second seised will neither have heard all the claims of the parties in the first proceedings, nor have been given access to the evidence on which they rely, such an approach would be contrary to the principle of proper administration of justice and the fundamental right to a fair hearing.

b) Consideration, in the case of a stay of proceedings on the basis that actions are related, of a possible infringement of one party's right to judicial protection (second part of the eighth question)

112. The second part of the eighth question asks the Court to rule on whether the court second seised may or must take into account the protection of the right of access to justice of the applicant who has brought proceedings before it, in the context of the application of Article 28 of Regulation No 44/2001, and accordingly where the proceedings pending before that court are related to proceedings pending before a court of another Member State.

107 — In Gasser, paragraph 70 et seq., the Court ruled to that effect, but in connection with the provision of the Brussels Convention equivalent to Article 27 of Regulation No 44/2001, and therefore in relation to *lis pendens* and not to related actions.

108 — Case C-296/10 *Purrucker* [2010] ECR I-11163, paragraphs 82 and 83.

109 — See, by analogy, on the subject of the refusal to apply the doctrine of '*forum non conveniens*' in the event of *lis pendens* falling within the Brussels Convention, paragraphs 78 and 181 of the report of P. Schlosser referred to in footnote 36 of this Opinion.

110 — With the exception, inter alia, of actions relating to the moral rights of an author in his works.

113. As with regard to the first part of that question, I consider that, although the referring court did not specify the subject-matter of the claim, the answer should be limited to the interpretation of Article 28(1), taking into account the evidence in this case. Therefore, the only situation examined here is that in which the court second seised intends to stay its proceedings, and not to decline jurisdiction. [111]

114. In my view, protection of the fundamental right referred to may play a significant role with respect to the application of Article 28(1) of that regulation. Contrary to what applies in the case of Article 27(1) of that regulation, the court second seised has in that context discretion which enables it to ensure that the right of access to justice of the applicant who has brought proceedings before it will not be seriously infringed, pursuant to Article 47 of the Charter, [112] in the event that it decides to stay its proceedings. Consequently, it is appropriate, in my view, to answer that second part of the eighth question in the affirmative.

IV – Conclusion

115. In the light of the foregoing considerations, I propose that the Court should answer as follows the questions referred by the Oberlandesgericht München:

(1) Primarily:

— In answer to the third question: 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 an action seeking a declaration that the defendant has not validly exercised his right *in rem* of pre-emption over immovable property falls within the head of exclusive jurisdiction which that provision provides for 'in proceedings which have as their object rights *in rem* in immovable property'.

— In answer to the fourth question:Article 27(1) of Regulation No 44/2001 must be interpreted as meaning that the court second seised is required to examine whether it has exclusive jurisdiction under Article 22(1) of that regulation, which would mean that the court first seised lacks jurisdiction and that any judgment given by the latter court would not be recognised under Article 35(1) of that regulation.

— In answer to the seventh question: Article 28(1) of Regulation No 44/2001 must be interpreted as meaning that the court second seised cannot take account, in the exercise of the discretion allowed it by that provision, of considerations such as: the fact that the court first seised is situated in a Member State in which proceedings, statistically and not *in concreto*, last considerably longer than in the Member State in which the court second seised is situated; 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; the age of one of the parties; or the prospects of success of the action before the court first seised.

— In answer to the second part of the eighth question: Article 28(1) of Regulation No 44/2001 must be interpreted as meaning that, in the context of its decision to stay its proceedings on that basis, the court second seised is required to take into account the right to effective judicial protection of the applicant who brought the second set of proceedings before it.

111 — Article 28(2) is concerned with the possibility of relinquishment of jurisdiction on the application of one of the parties, provided that it has already been established that the court first seised has jurisdiction to give a ruling on the related actions and its law permits the consolidation thereof.

112 — See also point 87 of this Opinion.

— There is no need to answer the other questions.

(2) In the alternative:

— In answer to the first and second questions: The concept of 'proceedings … between the same parties' within the meaning of Article 27 of Regulation No 44/2001 must be interpreted as meaning that it does not include situations in which two parties are defendants in the first dispute and are respectively the applicant and the defendant in the second dispute. The concept of 'proceedings involving the same cause of action' within the meaning of that article must be interpreted as meaning that it does not include the case of two disputes giving rise to different claims and arguments, even where they have in common the same preliminary issue.

— In answer to the fifth question: Article 27(1) of Regulation No 44/2001 must be interpreted as meaning that the court second seised is not required, in the context of its decision under that provision, to examine the complaint of one party that the other party acted in abuse of process by bringing proceedings before the court first seised.

— In answer to the sixth question: Articles 27(1) and 28(1) of Regulation No 44/2001 must be interpreted as meaning that the application of that latter provision presupposes that the court second seised has previously determined that that first provision does not apply in the case pending before it.

— In answer to the first part of the eighth question: Article 27(1) of Regulation No 44/2001 must be interpreted as meaning that, in the context of its decision to stay its proceedings on that basis, the court second seised is not required to take into account the right to effective judicial protection of the applicant who brought the second set of proceedings before it.