Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 26 January 2017 [1]

Case C-29/16

HanseYachts AG
v
Port d'Hiver Yachting SARL,
Société Maritime Côte d'Azur,
Compagnie Generali IARD SA
(Reference for a preliminary ruling

from the Landgericht Stralsund (Regional Court, Stralsund, Germany))

(Reference for a preliminary ruling — Jurisdiction in civil and commercial matters — Regulation (EC) No 44/2001 — Article 27 — Lis pendens — Identification of the court first seised — Article 30(1) — Document instituting the proceedings or an equivalent document — Concept — Application for proceedings to preserve or establish, prior to any legal proceedings, evidence of facts on which a subsequent action could be based — Main action subsequently brought at a court of the same Member State)

I – Introduction

1. The request for a preliminary ruling from the Landgericht Stralsund (Regional Court, Stralsund, Germany) concerns 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 specifically, in essence, the interpretation of Article 30(1) in relation to Article 27 thereof. [3]

2. The request has been made in a dispute between a German company and French companies over the possible liability of the German company for damage displayed by a yacht which it manufactured and sold to one of the French companies. That damage gave rise to various proceedings instituted before courts of different Member States.

1 — Original language: French.

2 — OJ 2001 L 12, p. 1.

3 — I will state at the outset that the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968 (OJ 1972 L 299, p. 32), as amended by the successive conventions relating to the accession of new Member States to that Convention ('the Brussels Convention'), which was replaced by Regulation No 44/2001, laid down, in Article 21 thereof, a similar rule to Article 27 of the regulation, but did not contain a similar provision to Article 30 of the regulation. The Court's case-law concerning the interpretation of the Convention can be applied to the interpretation of Regulation No 44/2001 provided their provisions are substantively equivalent (see, in particular, judgment of 25 October 2011, *eDate Advertising and Others*, C-509/09 and C-161/10, EU:C:2011:685, paragraph 39).

3. First of all, the initial purchaser of the yacht concerned made an application to a French court for the preservation of evidence (*expertise judiciaire*) in order to establish, prior to any legal proceedings, evidence of facts on which a subsequent action could be based in accordance with Article 145 of the French Code de procédure civile (Code of Civil Procedure, CPC), which is a measure of inquiry normally referred to as '*in futurum*'.[4]

4. After the expert report had been submitted, three years later, the German seller and manufacturer brought an action at the referring court for a declaration that the defendants in the main proceedings were not entitled to bring any claims against it in connection with the yacht in question. A few weeks after that action had been lodged, a further main action[5] was brought by the initial purchaser at a second French court seeking compensation for its alleged damage and reimbursement of the costs of the proceedings for the preservation of evidence.

5. The referring court is uncertain whether, although the latter action was brought after the action which it is hearing, it should nevertheless stay its proceedings as the 'court other than the court first seised' pursuant to Article 27 of Regulation No 44/2001 by reason of the proceedings for the taking of evidence which were brought in France several years before the proceedings pending before it were instituted. It considers that such proceedings for the taking of evidence could form a single entity with the main action subsequently brought in the same Member State, in so far as the latter are the material continuation of the former.

6. It therefore asks the Court to determine whether, in a potential case of *lis pendens*, the document by which a court of a Member State which ordered a measure of inquiry prior to any legal proceedings was seised can constitute 'the document instituting the proceedings or an equivalent document' within the meaning of Article 30(1) of the regulation in respect of the main action subsequently brought before another court of that same Member State.

7. In the light of the considerations which I will set out below, I take the view that Articles 27 and 30 of Regulation No 44/2001 should be interpreted in combination and that the question which is, in essence, referred in the present case should be answered in the negative.

II – Legislative framework

A – *EU law*

8. Regulation No 44/2001 is applicable *ratione temporis* in this case.[6]

4 — Measures of inquiry ordered outside the context of any legal proceedings are classified as such, inter alia by the French Cour de cassation (Court of Cassation) (see, in particular, judgments No 15-19.671 of the Second Civil Chamber of 23 June 2016 and No 14-25.340 of the Commercial Chamber of 16 February 2016, available at https://www.legifrance.gouv.fr), in contrast with measures ordered in the course of proceedings (see, in particular, Combes, G., and Ménétrey, S., 'Incidents de procédure, Mesures d'instruction, Dispositions générales', *JurisClasseur Procédure civile*, fascicule 634, 2016, paragraphs 12 and 49 et seq.).

5 — The concept of 'main action' in this respect must be understood to mean any action seeking a final decision on the rights and obligations at issue, whether it is positive (such as the award of damages) or negative (such as a declaration of non-liability), in contrast with applications for decisions which are merely provisional or relate only to rules of procedure or jurisdiction.

6 — It is true that Regulation No 44/2001 was repealed by 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). However, the former regulation is still applicable in this case because the proceedings were instituted at the referring court before 10 January 2015, the date of application of the latter regulation (see Articles 66 and 81 of Regulation No 1215/2012). See also Beraudo, J.-P., and Beraudo, M.-J., 'Convention de Bruxelles, conventions de Lugano et règlements (CE) No 44/2001 et (UE) No 1215/2012 — Compétence — Règles de procédure ayant une incidence sur la compétence', *JurisClasseur Europe*, fascicule 3030, 2015, paragraph 62, where it is stated that Regulation No 44/2001 must be applied where at least one of the proceedings capable of giving rise to *lis pendens* was instituted before that date.

9. According to recital 15, 'in the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously'.

10. Chapter II of Regulation No 44/2001, which concerns 'Jurisdiction', includes a Section 9, which is entitled '*Lis pendens* — related actions'.

11. Article 27 of the regulation, which appears in that section, provides:

'1. Where 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.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

12. In the same Section 9, Article 30(1) is worded as follows:

'For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant …'

13. In Section 10 of that chapter, entitled 'Provisional, including protective, measures', Article 31 provides that 'application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter'.

B – *French law*

14. Under Article 145 of the CPC, which appears in Book I, entitled 'Provisions common to all courts and tribunals', Title VII, entitled 'Production of proof', Sub-title II, entitled 'Measures of inquiry', of that code, 'if there is a legitimate reason to preserve or establish, prior to any legal proceedings, evidence of facts upon which the outcome of a dispute could depend, legally permissible measures of inquiry may be ordered at the request of any interested party, by way of application or interlocutory proceedings'.

III – The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

15. According to the order for reference and the case file provided to the Court, HanseYachts AG is a company which manufactures and sells yachts and is established in Greifswald (Germany), which lies within the judicial district of the referring court.

16. By contract of 14 April 2010, HanseYachts sold to Port d'Hiver Yachting SARL, the registered office of which is in France, a motor yacht manufactured by it, which was delivered on 18 May 2010 in Greifswald then transported to France.

17. The yacht was resold by Port d'Hiver Yachting to Société Maritime Côte d'Azur (SMCA), which is also established in France.

18. On 1 August 2011, HanseYachts and Port d'Hiver Yachting concluded a dealer contract which contained a clause conferring jurisdiction on the courts of Greifswald, designated German law as the applicable substantive law and provided that that contract replaced all previous written or verbal agreements between those parties.

19. After damage had appeared in one of the yacht's engines in August 2011, by a summons to appear in interlocutory proceedings issued to Port d'Hiver Yachting on 22 September 2011, SMCA applied to the Tribunal de commerce de Marseille (Commercial Court, Marseilles, France) for proceedings for the preservation of evidence (*expertise judiciaire*) prior to any legal proceedings under Article 145 of the CPC. It also issued a summons to Volvo Trucks France, as the manufacturer of those engines.

20. In 2012, the Compagnie Generali IARD SA ('Generali IARD') intervened in the proceedings voluntarily, as the insurer of Port d'Hiver Yachting. In 2013, HanseYachts also became a party to the proceedings, as the manufacturer of the yacht in question.

21. The expert appointed by the Tribunal de commerce de Marseille (Commercial Court, Marseilles) submitted his final report on 18 September 2014.

22. On 21 November 2014, HanseYachts made an application to the Landgericht Stralsund (Regional Court, Stralsund) for a declaration that Port d'Hiver Yachting, SMCA and Generali IARD are not entitled to bring any claims against it in connection with the yacht in question.

23. On 15 January 2015, SMCA brought an action against Port d'Hiver Yachting, Volvo Trucks France and HanseYachts at the Tribunal de commerce de Toulon (Commercial Court, Toulon, France) seeking an order that they pay compensation jointly and severally for the loss it claims to have suffered as a result of the damage at issue and reimburse it the costs incurred in the proceedings for the preservation of evidence.

24. As the defendants in the main proceedings have raised a plea of *lis pendens* based on Article 27 of Regulation No 44/2001, the referring court is uncertain whether, as the 'court other than the court first seised', it is required to stay its proceedings until such time as the jurisdiction of the Tribunal de commerce de Toulon (Commercial Court, Toulon) has been established [7] pursuant to paragraph 1 of that article or whether, conversely, it may consider itself to be the 'court first seised' within the meaning of that provision and therefore declare the action in the main proceedings to be admissible [8] and proceed to examine the substance of the action.

25. In its view, the second option should be taken if the Court ruled that the proceedings before the French courts were not instituted until the main action was lodged with the Tribunal de commerce de Toulon (Commercial Court, Toulon) in 2015, that is to say, after it was itself seised in 2014.

7 — Citing the judgment of 3 April 2014, *Weber* (C-438/12, EU:C:2014:212, paragraph 49 et seq.), the referring court states that a decision on the substance by that French court would not be liable to be refused recognition in other Member States. It adds that it would not be precluded by the exclusive jurisdiction of the German courts and that no choice of forum clause is binding on the applicant in the main proceedings (HanseYachts) and the applicant in the French proceedings (SMCA). In its view, the French courts could derive their jurisdiction from Article 5(3) of Regulation No 44/2001 because the harmful event occurred in France.

8 — The referring court considers that it has international jurisdiction based on Article 5(1) of Regulation No 44/2001, which is applicable in contractual matters.

26. On the other hand, it could be necessary to take the first option if it were held that it is not the lodging of that action, but the application for proceedings for the preservation of evidence made to the Tribunal de commerce de Marseille (Commercial Court, Marseilles) as early as 2011 that constitutes 'the document instituting the proceedings or an equivalent document' by which the French courts would be deemed to be seised within the meaning of Article 30(1) of Regulation No 44/2001.

27. The referring court considers that the conditions for *lis pendens* set out in Article 27(1) of the regulation are met in so far as the main action before the Tribunal de commerce de Toulon (Commercial Court, Toulon) and the action being heard by it are between the same parties and involve the same object and the same cause of action.

28. In that context, by decision of 8 January 2016, lodged at the Court on 18 January 2016, the Landgericht Stralsund (Regional Court, Stralsund) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Where the procedural law of a Member State provides for independent proceedings for the taking of evidence in which, by order of the court, an expert report is obtained (in this case the "*expertise judiciaire*" in French law), and where such independent proceedings for the taking of evidence are conducted in that Member State and an action based on the findings of those independent proceedings is subsequently brought in the same Member State between the same parties:

In that case, is the document by which the independent proceedings for the taking of evidence were instituted a "document instituting the proceedings or an equivalent document" within the meaning of Article 30(1) of Regulation (EC) No 44/2001? Or is it only the document by which the action is brought that is to be regarded as being the "document instituting the proceedings or an equivalent document"?'

29. Written observations were submitted by HanseYachts, Port d'Hiver Yachting, SMCA and Generali IARD and by the European Commission. The French Government gave a written reply to the questions put to it by the Court pursuant to Article 61(1) of its Rules of Procedure. No hearing took place.

IV – Analysis

A – *Preliminary remarks*

30. Before proceeding to the substantive analysis of the question referred to the Court, I wish to make a few remarks concerning the limits of the examination which it will be required to conduct.

31. First, it should be noted that the issue of the respective bases of international jurisdiction of the referring court and the Tribunal de commerce de Toulon (Commercial Court, Toulon) has not been referred for assessment by the Court in this case, notwithstanding the information provided by the referring court on this subject [9] and despite the reservations expressed in this regard by some of the parties which submitted observations to the Court, in particular by reason of the existence of a choice of forum clause in the present case. [10]

9 — See footnotes 7 and 8 of this Opinion.

10 — The Commission thus doubts that the clause conferring jurisdiction on the courts of Greifswald contained in the dealer contract concluded in 2011 between HanseYachts and Port d'Hiver Yachting can have retroactive effect in respect of the contract of sale signed by them in 2010 and that that clause can be applied to SMCA, the second defendant, which does not have a contractual relationship with the applicant in the main proceedings. However, in proceedings brought pursuant to Article 267 TFEU, it is for the referring court, and not the Court, to assess such aspects, which form part of the facts on which the dispute in the main proceedings is based (see, in particular, judgments of 25 October 2012, *Folien Fischer and Fofitec*, C-133/11, EU:C:2012:664, paragraph 24, and of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 41).

32. It will be for each of those national courts to rule on its own jurisdiction in the light of the facts on which the dispute in the main proceedings is based and in accordance with the rules on jurisdiction under EU law, which in this case stem from the provisions of Regulation No 44/2001, as interpreted in the relevant case-law of the Court. [11]

33. I would point out, in particular, that the rule for resolving cases of *lis pendens* contained in Article 27 of Regulation No 44/2001 is not intended to establish a distinction, or indeed a hierarchy, between the different bases of jurisdiction provided for in the regulation and that this procedural rule, under which priority is given to any jurisdiction of the court first seised, is based solely on the chronological order in which the courts concerned were seised. [12]

34. In addition, it is settled case-law that it is solely for the national court to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [13]

35. In this regard, I will simply mention that in the light of the elements of the dispute in the main proceedings as presented by the referring court — in particular in view of the place where the object in question seems to have been delivered by the manufacturer and seller (HanseYachts) to the first purchaser (Port d'Hiver Yachting) — [14] there is no reason to consider, prima facie, that a decision by that court recognising its own international jurisdiction, in respect of those parties at least, would be manifestly unfounded and that the question referred would be irrelevant since it was not useful in resolving this dispute. [15]

36. Second, given the different points of view expressed by the referring court and by the parties which submitted observations regarding the applicable rules of national law in this case, and in particular concerning the legal regime of measures of inquiry *in futurum* provided for in Article 145 of the CPC, I would point out that the question of the precise interpretation of provisions of a Member State's domestic law cannot be settled by the Court. [16]

11 — In particular, it is settled case-law that in the case of *lis pendens* the jurisdiction of the court first seised must be assessed in principle by that court, and not by the court second seised (see, in particular, judgment of 27 June 1991, *Overseas Union Insurance and Others*, C-351/89, EU:C:1991:279, paragraphs 25 and 26).

12 — See, in particular, judgment of 22 October 2015, *Aannemingsbedrijf Aertssen and Aertssen Terrassements* (C-523/14, EU:C:2015:722, paragraph 48).

13 — See, in particular, judgments of 27 February 2014, *Cartier parfums-lunettes and Axa Corporate Solutions assurances* (C-1/13, EU:C:2014:109, paragraph 24 et seq.), and of 3 April 2014, *Weber* (C-438/12, EU:C:2014:212, paragraph 33 et seq.).

14 — See points 15 and 16 of this Opinion.

15 — I observe that the Court declines to rule on a question referred for a preliminary ruling, as being inadmissible, only where the interpretation of EU law that is sought is manifestly hypothetical and not useful in resolving the dispute in the main proceedings (see, in particular, judgments of 22 May 2014, *Érsekcsanádi Mezőgazdasági*, C-56/13, EU:C:2014:352, paragraphs 36 to 38, and of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 29).

16 — This task falls exclusively to national courts (see, in particular, judgments of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 58, and of 11 September 2014, *Essent Belgium*, C-204/12 to C-208/12, EU:C:2014:2192, paragraph 52). I note a peculiar feature of the present case, which relates to the fact that the referring court is German, whilst the procedural rules whose content is being debated by the parties are not those of German law, but those of French law, of whose content and scope it does not necessarily have a good knowledge. However, the Court cannot rule whether the interpretation given by that court is correct (judgment of 13 December 2012, *Caves Krier Frères*, C-379/11, EU:C:2012:798, paragraph 36).

37. In the preliminary ruling procedure, the Court is empowered only to rule on the interpretation or the validity of the acts of EU law referred to in Article 267 TFEU.[17] Nevertheless, the Court, which is called on to provide an answer of use to national courts in order to enable them to give judgment in the main proceedings, may provide them, in a spirit of cooperation, with the guidance which it considers necessary, based on all the information available to it.[18] Where there is uncertainty as regards the content of the provisions of domestic law in question, it will attempt to give a view, taking that factor into account.[19]

38. Lastly, the Court has repeatedly ruled that the terms contained in Regulation No 44/2001 must in principle be interpreted autonomously, that is to say in the light of the specific objectives of the provisions of that instrument and not by reference to the legal systems of the Member States, in order to ensure a uniform application of those provisions.[20] Thus, the interpretation of the rules on jurisdiction laid down in the regulation, and more particularly those in Articles 27 and 30, must not depend on concepts adopted by the legislatures or the case-law of those States[21] or on specific features of the dispute in the main proceedings.[22]

B – *The wording of the question referred to the Court*

39. By its question, the referring court asks the Court, in essence, whether, where the law of a Member State provides for proceedings for the taking of evidence prior to any legal proceedings and where a main action based on the findings of those proceedings is subsequently brought in that State between the same parties, the document by which the proceedings for the taking of evidence were initiated is 'the document instituting the proceedings or an equivalent document' within the meaning of Article 30(1) of Regulation No 44/2001 or only the document by which the main action was brought is to be regarded as such.

40. The referring court seems to tend towards the first approach, which corresponds to the view put forward by the three defendants in the main proceedings, while HanseYachts and the Commission opt for the second approach,[23] which is, in my view, the correct interpretation.

41. Like the Commission, I consider it necessary for the Court to reformulate the question referred to it, for the reasons set out below.

42. I would point out, first of all, that in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, the Court must provide the referring court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court may have to reformulate the questions referred to it.[24] It is also for the Court

17 — See, in particular, judgment of 22 May 2014, *Érsekcsanádi Mezőgazdasági* (C-56/13, EU:C:2014:352, paragraph 53).

18 — See, in particular, judgments of 24 February 2015, *Grünewald* (C-559/13, EU:C:2015:109, paragraph 32), and of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 35).

19 — See, in particular, judgment of 17 January 2013, *Zakaria* (C-23/12, EU:C:2013:24, paragraph 30).

20 — This autonomous approach was adopted by the Court some time ago (see, in particular, judgment of 8 December 1987, *Gubisch Maschinenfabrik*, 144/86, EU:C:1987:528, paragraphs 6 and 11, concerning the term '*lis pendens*' within the meaning of Article 21 of the Brussels Convention, to which Article 27 of Regulation No 44/2001 is substantively equivalent) and has been regularly confirmed (see, in particular, judgment of 28 July 2016, *Siemens Aktiengesellschaft Österreich*, C-102/15, EU:C:2016:607, paragraph 30, concerning the interpretation of provisions of Regulation No 44/2001).

21 — I note that in the present case many national arguments have been put forward by the parties which submitted observations to the Court.

22 — In his View in *Purrucker* (C-296/10, EU:C:2010:578, point 89), which also concerned the interpretation of rules on jurisdiction under EU law, Advocate General Jääskinen rightly stated that 'the approach adopted by the Court to the matters of fact, procedure and law specific to the main proceedings must be neutral, objective and dispassionate. The facts in this case … cannot determine the approach to be adopted'.

23 — The French Government has not expressed a view in this regard, bearing in mind that it did not submit written observations in this case but replied to the questions put by the Court concerning the content of French law, and more specifically the measures of inquiry provided for in Article 145 of the CPC.

24 — See, in particular, judgments of 4 June 2015, *Brasserie Bouquet* (C-285/14, EU:C:2015:353, paragraph 15), and of 20 October 2016, *Danqua* (C-429/15, EU:C:2016:789, paragraph 36).

to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the provisions of EU law which require interpretation in relation to the subject matter of the dispute, whether or not the national court has referred to those provisions in the wording of the questions referred. [25]

43. In these circumstances, the fact that, formally speaking, the question directly mentions only Article 30(1) of Regulation No 44/2001 does not prevent the Court from providing the referring court with all the guidance on points of interpretation of EU law which may enable it to give judgment in the case pending before it.

44. It is clear from the grounds of the request for a preliminary ruling that, in order to determine whether it is required to stay its proceedings pursuant to Article 27 of Regulation No 44/2001, the referring court needs to know whether, in a situation like that in the dispute in the main proceedings, it must consider itself to be the 'court other than the court first seised' within the meaning of that provision given the time — to be identified by the Court having regard to Article 30 — when, in the view of the referring court, proceedings involving the same cause of action and between the same parties were brought in a French court. In my opinion, a combined interpretation of Articles 27 and 30 of that regulation should therefore be given.

45. However, I do not think that it is useful in the present case to define as such the concept of 'provisional, including protective, measures' within the meaning of Article 31 of Regulation No 44/2001, since the referring court merely suggests, at the end of its decision, the possibility of giving consideration to the Court's case-law on that concept for the purpose of interpreting Article 30 of the regulation by analogy. [26]

46. In view of these factors, I consider that the request for a preliminary ruling must be understood as seeking, in essence, to determine whether, in a potential case of *lis pendens*, the time when proceedings seeking a measure of inquiry prior to the initiation of any legal proceedings can constitute the time when a court called upon to decide on main proceedings brought in the same Member State further to the findings of that measure is 'deemed to be seised' within the meaning of Article 30(1) of Regulation No 44/2001, because the proceedings for the taking of evidence and the subsequent main proceedings could form a single procedural entity.

47. If this interpretation is rejected, as I suggest, this means, in practical terms, that a court of another Member State which, as in the dispute in the main proceedings, was seised of a main action brought after the end of the proceedings for the taking of evidence but before the main proceedings between the same parties and involving the same cause of action must be considered to be the 'court first seised' within the meaning of Article 27 of the regulation.

48. Before engaging properly in the requested interpretation, it is necessary to confirm the accuracy of the prior assertions made by the referring court that there might be a situation of *lis pendens* in accordance with Article 27 in circumstances like those in the dispute before it.

25 — See, in particular, judgments of 13 February 2014, *Airport Shuttle Express and Others* (C-162/12 and C-163/12, EU:C:2014:74, paragraphs 30 and 31), and of 3 July 2014, *Gross* (C-165/13, EU:C:2014:2042, paragraph 20).

26 — With regard to this ancillary issue, see point 77 et seq. of this Opinion.

C – *The potential existence of a situation of lis pendens having regard to Article 27 of Regulation No 44/2001*

49. As justification for its question, the Landgericht Stralsund (Regional Court, Stralsund) posits the premiss that the proceedings pending before it are likely to conflict with the main action brought at the Tribunal de commerce de Toulon (Commercial Court, Toulon) and that the rules concerning *lis pendens* in Article 27 of Regulation No 44/2001 lead to the German court having to stay its proceedings as the 'court other than the court first seised' in so far as that action can be considered to have commenced at the stage of the proceedings for the taking of evidence instituted at the Tribunal de commerce de Marseille (Commercial Court, Marseilles), with which it forms a single entity.

50. However, it seems to me that the referring court does not envisage that it is required to stay its proceedings on grounds of *lis pendens* in the event that the two French proceedings are, in contrast, understood as being separate from one another. In my view, the obligation to stay proceedings must clearly be excluded in this situation in the light of the points of EU law which I will discuss below, because, first, the French main action — if taken in isolation — was brought after the German main action and, second, the French proceedings for the taking of evidence did not involve the same cause of action as the German action and, moreover, were no longer pending when the German action was initiated.

51. I note that Article 27 of Regulation No 44/2001 governs only situations of *lis pendens* in which courts of different Member States are seised of concurrent proceedings which are likely to give rise to irreconcilable judgments,[27] namely 'where proceedings involving the same cause of action and between the same parties are brought'. The Court has ruled on many occasions on the interpretation to be given to the three-fold condition of parties, object and cause of action being the same,[28] holding that the definition of these concepts must be developed independently, by reference to the scheme and objectives of that regulation.[29]

52. The first of these three cumulative criteria is met, according to the Court's case-law, where the parties are the same in both concurrent proceedings, even though their procedural positions might be different.[30]

27 — According to recital 15 of the regulation, 'in the interests of the harmonious administration of justice it is necessary to minimise' the risk of such concurrent proceedings and it was precisely for that purpose that uniform rules were adopted to allow problems of *lis pendens* to be resolved more easily. See also judgment of 27 June 1991, *Overseas Union Insurance and Others* (C-351/89, EU:C:1991:279, paragraph 16), concerning the Brussels Convention.

28 — It is immaterial that, as the Commission observes, the German version of Article 27 of Regulation No 44/2001 does not expressly make the distinction between these latter two criteria which does appear in other language versions (see judgment of 8 December 1987, *Gubisch Maschinenfabrik*, 144/86, EU:C:1987:528, paragraph 14, concerning the German version of Article 21 of the Brussels Convention, which corresponds to Article 27).

29 — See, in particular, judgment of 22 October 2015, *Aannemingsbedrijf Aertssen and Aertssen Terrassements* (C-523/14, EU:C:2015:722, paragraph 38).

30 — See, in particular, judgments of 8 December 1987, *Gubisch Maschinenfabrik* (144/86, EU:C:1987:528, paragraph 13), and of 22 October 2015, *Aannemingsbedrijf Aertssen and Aertssen Terrassements* (C-523/14, EU:C:2015:722, paragraph 41).

53. In the circumstances of this case, it is immaterial that the party which is the applicant before the French courts, SMCA, is the defendant before the referring court, and conversely for HanseYachts.[31] It is also irrelevant if not all the parties are the same, but only some, as in the present case, although, in such a situation, the court other than the court first seised is required to decline jurisdiction only to the extent to which the parties to the proceedings pending before it are also parties to the action which has already been started, while the proceedings between the other parties may continue before that court.[32]

54. As regards the criterion of the cause of action being the same, the Court has held that that concept must be understood as comprising 'the facts and the legal rule invoked as the basis for the application'.[33] The condition relating to the object being the same, which is defined as corresponding to the 'end the action has in view'[34] — construed broadly[35] — is sometimes dealt with together with the preceding criterion in the Court's case-law.[36]

55. In the present case, as the referring court states, it is clear from that case-law that the latter two criteria are met as regards a potential case of *lis pendens* between an action seeking to have a defendant held liable for causing loss and ordered to pay damages in this regard, such as that brought against HanseYachts and others before the Tribunal de commerce de Toulon (Commercial Court, Toulon), and an action brought by that same defendant seeking a declaration that it is not liable for that loss, such as that pending before the Landgericht Stralsund (Regional Court, Stralsund) instituted by HanseYachts, since one of those proceedings is the antipode of the other.[37]

56. However, this does not prejudge the answer to be given to the question asked by the referring court, which relates more specifically to whether it must consider itself to be the 'court other than the court first seised' within the meaning of Article 27 in combination with Article 30 of Regulation No 44/2001, by virtue of the possible aggregationinto a single entity of the proceedings for the taking of evidence initiated in another Member State and the main action subsequently instituted in that same State, a view with which I do not concur.[38]

57. For the sake of completeness, I must state that I think that it is not possible to accept that the cause of action and object are the same for a main action like that in the dispute in the main proceedings seeking a declaration that there is no civil liability and proceedings seeking a measure of inquiry prior to any legal proceedings, like those for the preservation of evidence instituted before the

31 — The reversal of procedural positions is also characteristic of the action for a negative declaration brought at the referring court by HanseYachts, which wishes to be released from the liability which is the subject of the proceedings before the Tribunal de commerce de Toulon (Commercial Court, Toulon). See, to that effect, judgment of 25 October 2012, *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664, paragraph 43).

32 — See judgment of 6 December 1994, *Tatry* (C-406/92, EU:C:1994:400, paragraph 34 et seq.). In the present case, the referring court states that if it were required to stay the proceedings between HanseYachts and SMCA pursuant to Article 27(1) of Regulation No 44/2001 on grounds of *lis pendens*, it would then exercise the option under Article 28(1) of the regulation also to stay the proceedings between HanseYachts and the other defendants, this time on grounds of related actions.

33 — See, in particular, judgments of 8 December 1987, *Gubisch Maschinenfabrik* (144/86, EU:C:1987:528, paragraph 15), where the Court held that the concurrent proceedings involved the same cause of action, as they were based on 'the same contractual relationship', and of 14 October 2004, *Mærsk Olie & Gas* (C-39/02, EU:C:2004:615, paragraph 38), where the Court held, on the contrary, that 'the legal rule which form[ed] the basis of each of those applications [was] different'.

34 — See, in particular, judgment of 6 December 1994, *Tatry* (C-406/92, EU:C:1994:400, paragraph 41). In the judgment of 8 May 2003, *Gantner Electronic* (C-111/01, EU:C:2003:257, paragraph 31), the Court held that in assessing whether the object is the same, account should be taken only of the applicants' respective claims in the concurrent proceedings, and not the defence submissions made.

35 — See, in particular, judgment of 8 December 1987, *Gubisch Maschinenfabrik* (144/86, EU:C:1987:528, paragraph 17).

36 — See, in particular, judgment of 25 October 2012, *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664, paragraph 49), regarding an action for a negative declaration. These two criteria were clearly separated in other judgments (in particular, judgment of 22 October 2015, *Aannemingsbedrijf Aertssen and Aertssen Terrassements*, C-523/14, EU:C:2015:722, paragraphs 43 to 46).

37 — See judgment of 19 December 2013, *Nipponkoa Insurance* (C-452/12, EU:C:2013:858, paragraph 42 and the case-law cited).

38 — In this regard, see point 60 et seq. of this Opinion.

Tribunal de commerce de Marseille (Commercial Court, Marseilles), even if those two proceedings are based on the same facts. Such two-fold identity must be rejected, in my view, as both the legal rules invoked by the applicants and the objectives pursued by them in each of these two categories of proceedings are fundamentally different, irrespective of the specific features of the individual case.

58. As the Commission notes, the proceedings for the taking of evidence at issue here seek only an order for a measure of inquiry *in futurum*, the aim of which is to preserve or establish, prior to any legal proceedings, evidence of factswhich may possibly give rise to a subsequent main action. Although such proceedings may be adversarial,[39] their final result — in this case an expert report — nevertheless does not remove the need for a substantive assessment of the rights at issue — in this case with regard to civil liability. Conversely, the object of a main action like that of which the referring court is seised is a declaration that the applicant has no liability in connection with the loss resulting from the damage which appeared in the yacht sold by it. The applicant's objective is to obtain a substantive decision on the law in order to bring the dispute to an end. Consequently, the risk of irreconcilable judgments, on which the *lis pendens* mechanism under Article 27 of Regulation No 44/2001 is based, does not seem to exist where proceedings have such dissimilar objects.

59. In my view, the fundamental differences thus established between proceedings for the taking of evidence prior to any legal proceedings and a main action based on the findings of those proceedings militate against the possibility of accepting, as the referring court envisages, that the document marking the initiation of the former proceedings also constitutes the document instituting the latter proceedings.

D – *Can the document which initiated proceedings for the taking of evidence prior to any legal proceedings be regarded as equivalent to the document by which a subsequent main action was instituted having regard to Article 30 of Regulation No 44/2001?*

60. The Court has already had occasion to interpret Article 30 of Regulation No 44/2001 in combination with Article 27 thereof. In that instance it held that the regulation does not set out in which circumstances the jurisdiction of the court or tribunal first seised is to be regarded as 'established' within the meaning of Article 27 thereof, which simply lays down a procedural rule based on the chronological order in which the courts or tribunals concerned have been seised, but that Article 30 defines uniformly and independently the time when a court is to be 'deemed to be seised' for the purposes of the application of the provisions of the regulation relating to *lis pendens*.[40]

61. I would state that, as is indicated by the first words used in Article 30 of Regulation No 44/2001, the substantive rule laid down therein applies to all the provisions contained in Section 9 of the regulation, that is to say, not only those applicable in the case of *lis pendens*, which are found in Article 27, but also those applicable in the case of related actions, which are found in Article 28, and those relating to the particular situation where concurrent actions come within the exclusive jurisdiction of several courts, which are found in Article 29. The interpretation to be given to Article 30 must therefore be appropriate to all these different situations.

39 — Where the court is not seised by means of an application, but following a summons to appear in interlocutory proceedings, as was the case with the Tribunal de commerce de Marseille (Commercial Court, Marseilles).

40 — Judgment of 22 October 2015, *Aannemingsbedrijf Aertssen and Aertssen Terrassements* (C-523/14, EU:C:2015:722, paragraphs 56 and 57), concerning the identification of the time when a court is deemed to be seised for the purposes of those articles, where a person lodges a complaint with an investigating magistrate seeking to join a civil action to proceedings.

62. In the present case, to justify its suggested broad interpretation, under which the proceedings for the taking of evidence are incorporated into the subsequent main proceedings in the same Member State, the referring court relies, first, on the wording of Article 30 of Regulation No 44/2001, under which a court may be seised on the basis of not only 'the document instituting the proceedings', but also 'an equivalent document', which could, in its view, correspond to the document by which the court which ordered the measure of inquiry *in futurum* was seised.

63. The *travaux préparatoires* for Regulation No 44/2001 do not shed any useful light on this alternative. I note that it already appeared in Article 19(1) and (4) of Regulation (EC) No 1348/2000, [41] the wording of which was inspired by an international instrument. [42] In the light of guidance on the concept of 'equivalent document' within the meaning of that instrument [43] and an assessment given in a judgment by the Court relating to the Brussels Convention, [44] it seems very doubtful that the view put forward by the referring court can be accepted.

64. Above all, I would state that Article 30 is worded in terms which, in so far as they are drafted in the singular, mean that this argument cannot be accepted in my view. That article defines the time when '*acourt* shall be deemed to be seised' and, in doing so, refers, in both paragraph 1 and paragraph 2, to 'the time when the document … is lodged with the *court*' concerned, [45] contrary to other provisions of that same regulation, which refer to 'the courts' of a Member State in general. [46]

65. This terminological fact is not neutral, in particular in the light of circumstances like those in this case, where the French court at which the proceedings for the taking of evidence were brought is not the same as the court seised of the main action which is said to be the continuation of those proceedings. The fact that these two courts sit in the same Member State is irrelevant with regard to the rule set out in Article 30 for determining the time when a specific court is seised.

41 — Council Regulation No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37). Article 19, which concerns cases where the defendant does not enter an appearance, was reproduced in the instrument that replaced Regulation No 1348/2000, namely Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 (OJ 2007 L 324, p. 79).

42 — The Proposal for a Council Directive, presented by the Commission on 26 May 1999, which led to the adoption of Regulation No 1348/2000 (COM(1999) 219 final) states that Article 19 thereof incorporates the content of Articles 15 and 16 of The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (see paragraph 4.4 of the Explanatory memorandum and comment on Article 19 of that proposal).

43 — In its *Practical Handbook on the Operation of the Hague Service Convention* (Wilson & Lafleur, Montreal, 2006, paragraphs 66 and 276), the Permanent Bureau of the Hague Conference on Private International Law distinguishes documents instituting proceedings from those in proceedings for the taking of evidence and states that 'the phrase "equivalent document" includes documents that have identical effects to a writ of summons, such as a notice of appeal [or] a third-party impleader'.

44 — According to the judgment of 14 October 2004, *Mærsk Olie & Gas* (C-39/02, EU:C:2004:615, paragraph 59), 'an order provisionally determining the maximum amount of liability[,] at first provisionally adopted by the court at the conclusion of a unilateral procedure, which is then followed by reasoned submissions by both parties, … must be treated as a document that is equivalent to a document instituting proceedings within the meaning of Article 27(2) of the Convention'. A writ of summons for the purposes of a measure of inquiry *in futurum* cannot, in my view, be treated as such an order.

45 — My emphasis.

46 — That is the case, in particular, for Article 2(1), Article 5(6), Article 12(1), Article 16(2) and Article 22(4) of the regulation. Those provisions are in contrast with the rules on international jurisdiction which are usually known as 'special', 'directly designating the competent court without [having to refer] to the rules of jurisdiction in force in the State where such a court might be situated' in order to identify, from all that State's courts, the one which is to rule on the dispute, as was stated by P. Jenard in his Report on the Brussels Convention (OJ 1979 C 59, p. 22).

66. Second, the referring court claims that the purpose of Article 30 of Regulation No 44/2001 is to prevent abuse by the parties of procedural differences within the European Union. It is true that the risk of 'torpedoing' mentioned by that court is not ruled out,[47] particularly in the case of an action for a negative declaration, like that in the main proceedings.[48] I consider, however, that 'forum shopping' is not prohibited per se by Regulation No 44/2001 and that in the present case the procedural approach taken by HanseYachts does not constitute abuse.

67. It is clear from recital 15 of Regulation No 44/2001[49] and the preceding legislative work[50] that the primary aim of the adoption of Article 30 was to reduce the problems and legal uncertainties caused by the wide variety of arrangements which existed in the Member States for determining the time when a court is seised, by means of a substantive rule permitting the easy and standardised identification of that time.[51]

68. The two sets of criteria laid down in paragraphs 1 and 2 of Article 30 establish a uniform mechanism which, as HanseYachts states, prevents an interpretation of the concepts contained therein being given by reference to the content of the diverse national rules.[52] I therefore suggest not adopting a broad approach to the meaning to be given to the provisions of Article 30, with a view to meeting the objectives of uniformity and legal certainty pursued by those provisions.[53]

69. Third, in support of its view, the referring court puts forward practical arguments which I do not find compelling. It asserts that the measure for preservation of evidence ordered in this case by a French court would be better tailored to the anticipated points of substantive law in the main proceedings being conducted in France and that the expenses which could be incurred by a possible hearing of the expert in Germany should be avoided. In my view, the constraints mentioned are far from insurmountable and such considerations cannot prevail over those based on both the wording and the purpose of Article 30 of Regulation No 44/2001 which I have just set out.

47 — The referring court asserts that if a measure of inquiry is conducted in a Member State, the opposing party in those proceedings for the taking of evidence will then be alerted that an action against him is imminent and will probably take the initiative, like HanseYachts in this case, by bringing a main action with a court of another Member State which is likely to be more favourable to him.

48 — See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation No 44/2001 (COM(2009) 174 final, paragraphs 3.4 and 3.5).

49 — According to recital 15, 'there must be a clear and effective mechanism for resolving cases of *lispendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously'.

50 — According to the Explanatory memorandum for the Commission proposal of 14 July 1997 which led to the adoption of Regulation No 44/2001 (COM(1999) 348 final), the 'autonomous definition of the date on which a case is "pending"' for the purposes of Articles 27 and 28 of the regulation was intended primarily to 'to fill a gap in the Brussels Convention' and it sought to reconcile 'the various procedural systems while ensuring both that applicants will all be on an equal footing and that there can be no abuse of procedures' (see pp. 7, 20 and 21).

51 — This diversity in the national rules had been underlined by the Court in the judgment of 7 June 1984, *Zelger* (129/83, EU:C:1984:215, paragraph 10 et seq.), which concerned the Brussels Convention.

52 — Article 30 provides that the time when a court is seised is either the time when the document instituting the proceedings or an equivalent document is lodged with the court for Member States in which that document must subsequently be served (paragraph 1) or the time when it is received by the authority responsible for service for Member States in which the document has to be served before being lodged with the court (paragraph 2). See also judgment of 22 October 2015, *Aannemingsbedrijf Aertssen and Aertssen Terrassements* (C-523/14, EU:C:2015:722, paragraph 57) and, by analogy, orders of 16 July 2015, *P* (C-507/14, not published, EU:C:2015:512, paragraph 30 et seq.), and of 22 June 2016, *M.H.* (C-173/16, EU:C:2016:542, paragraphs 24 to 28).

53 — The Commission Communication to the Council and the European Parliament of 26 November 1997, entitled 'Towards greater efficiency in obtaining and enforcing judgments in the European Union' (COM(97) 609 final), expressly mentioned that the inclusion of such a uniform definition would make it possible to enhance certainty as to the mechanisms applicable in relation to *lis pendens* and effectiveness (see p. 11, paragraph 15, and p. 35).

70. Moreover, if, as I recommend,[54] it is held that proceedings for the taking of evidence prior to any legal proceedings do not involve the same cause of action and the same object as main proceedings within the meaning of Article 27 of the regulation, it seems difficult to accept that the document which initiated those proceedings for the taking of evidence could still be regarded as 'the document or an equivalent document', within the meaning of Article 30 thereof, instituting main proceedings further to the findings of the proceedings for the taking of evidence.

71. The absence of procedural unity is confirmed more specifically in the light of the circumstances of the dispute in the main proceedings. As is noted by both the French Government and the Commission, the very wording of Article 145 of the CPC defeats the argument that there is material continuity between the proceedings for the taking of evidence provided for in that article and the subsequent main proceedings, as that provision expressly states that the application for a measure of inquiry must be made specifically 'prior to any legal proceedings', and not in connection with a legal action.[55]

72. My analysis is borne out by the fact that action taken in response to the measure of inquiry *in futurum*, in this case the consideration of the expert report, is not the responsibility of the court which ordered that measure. As the French Government states, the proceedings before that court have in principle run their full course once it delivers a decision granting or rejecting the application for such a measure. In addition, that decision is not *res judicata* in the main proceedings.[56]

73. Furthermore, a main action is not necessarily brought after the proceedings for the taking of evidence since, at the end of the measure of inquiry, the person concerned, who is not obliged to bring legal proceedings, may prefer to opt for an amicable settlement or to forego any recourse against the opposing party. Even if a main action has been brought, it may be before another court, as happened in the present case, bearing in mind that the expert report was ordered by the Tribunal de commerce de Marseille (Commercial Court, Marseilles) while the main action was brought at the Tribunal de commerce de Toulon (Commercial Court, Toulon).[57]

74. I concur with HanseYachts and the Commission that the rule on suspension of the limitation period in Article 2239 of the French Code civil,[58] on which the referring court and Port d'Hiver Yachting rely in asserting that there is a direct link between a measure of inquiry *in futurum* and the subsequent main proceedings, cannot legitimately call into question the above considerations, as that provision does not establish the existence of the alleged procedural entity.[59]

54 — See point 57 et seq. of this Opinion.

55 — The French Government mentions that it is settled case-law of the French Cour de cassation (Court of Cassation) (in particular, judgment No 07-21.572 of the Second Civil Chamber of 5 February 2009, available at https://www.legifrance.gouv.fr) that a measure of inquiry *in futurum* requested when main proceedings have already been instituted will be declared inadmissible.

56 — The French Government states that, with regard to interlocutory proceedings for the taking of evidence ordering an expert report, as in this case, the court which ordered the report on the basis of Article 145 of the CPC is no longer able, in the proceedings before it, either to order a new expert report or to take a view on the expert report delivered, as it is now only the responsibility of the court adjudicating on the main proceedings, if appropriate, to assess the expert report which has been ordered.

57 — The reasons for the courts seised being different are not apparent from the order for reference.

58 — Under that article, which appears in Book III, entitled 'Various ways in which ownership is acquired', Title XX, entitled 'Extinctive limitation period', of the Code civil, 'the limitation period shall also be suspended where the court grants an application for a measure of inquiry submitted prior to any legal proceedings' and 'the limitation period shall resume, for a period which may not be less than six months, from the date on which the measure was carried out'.

59 — Article 2239 seeks to provide the parties with a period for reflection to assess whether it is appropriate to institute main proceedings based on the findings of a measure of inquiry, without automaticity (see Marchand, X., Savatic, P., and Audouy, J., 'Mesures d'instruction exécutées par un technicien', *JurisClasseur Procédure civile*, fascicule 660, 2011, paragraphs 24 and 238 et seq.).

75. The continuity mentioned by the referring court does not therefore exist, in my view, in a situation like this. It seems, moreover, that the referring court acknowledges that the proceedings for the taking of evidence in question are legally separate from the main action, in particular having regard to Article 145 of the CPC,[60] since, as is stated inter alia in its question, it regards the former as being 'independent' of the latter.

76. In the light of all these factors, I take the view that Articles 27 and 30 of Regulation No 44/2001 must be interpreted in combination in so far as, where main proceedings are instituted in a Member State further to the findings of a measure of inquiry *in futurum*, those proceedings cannot be considered to have been brought from the initiation of the proceedings seeking an order for that measure in that same State. Consequently, a court of another Member State which has been seised, after those proceedings for the taking of evidence but before the institution of the main proceedings, of an action having the same parties, the same object and the same cause of action as the main proceedings is not required to stay its proceedings on grounds of *lis pendens* pursuant to the regulation, as it is not the court other than the court first seised.

77. As I have already stated,[61] I do not think that there is a need to interpret Article 31 of Regulation No 44/2001 in the present case. Nevertheless, for the sake of completeness, I will mention that at the end of the grounds for its decision the referring court mentions the possibility of giving consideration to the judgment in *St. Paul Dairy*,[62] concerning Article 24 of the Brussels Convention, which corresponds in essence to Article 31. In that judgment, the Court ruled that measures of inquiry whose sole purpose is to enable the applicant to assess, prior to any legal proceedings, the prospects of success of possible legal action are not covered by the classification 'provisional, including protective, measures' within the meaning of Article 24,[63] in particular on account of the need to avoid a multiplication of the bases of jurisdiction in relation to one and the same legal relationship.

78. The referring court suggests that the measures of inquiry provided for in Article 145 of the CPC could be measures in the sense referred to in that judgment and that the grounds of that judgment could mean, for the interpretation of Article 30 of Regulation No 44/2001 in relation to its question referred for a preliminary ruling, that where a measure for the taking of evidence of this kind has been ordered in one Member State, it is not permissible to bring a main action in another Member State.

60 — The French Cour de cassation (Court of Cassation) has ruled to that effect, as it held that where a dispute has international character, the implementation of a measure of inquiry on French territory based on Article 145 of the CPC is subject to French law, irrespective of the legislation which may be applied to any main action to be brought further to that measure (judgment No 15-20.495 of the First Civil Chamber of 3 November 2016, available at https://www.legifrance.gouv.fr). It is possible to separate the proceedings relating to the measure of inquiry *in futurum* and any subsequent main proceedings, and thus to make them subject to different rules of law, because the latter are 'not the continuation' of the former, according to Théry, P., 'Le référé probatoire et l'application dans le temps de la loi du 17 juin 2008', RDI, 2009, p. 481.

61 — See point 45 of this Opinion.

62 — Judgment of 28 April 2005 (C-104/03, EU:C:2005:255), paragraph 19 et seq., is mentioned specifically by the referring court.

63 — Namely a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard.

79. It seems to me that the question whether a measure of inquiry prior to any legal proceedings may be regarded as a provisional, including protective, measure within the meaning of Article 31 of Regulation No 44/2001 requires only brief consideration in this context, given that it is raised only by the referring court as an ancillary issue and that it has given rise to divergent views, in particular with regard to Article 145 of the CPC, not only in the written observations and responses submitted to the Court in this case,[64] but also in legal literature.[65]

80. I will simply note in this regard that, structurally, Article 31 forms Section 10 of Regulation No 44/2001, concerning provisional, including protective, measures, while Articles 27 and 30 of the regulation — which alone must be interpreted in the present case — appear in Section 9, concerning *lis pendens* and related actions. Substantively, unlike the latter provisions, which govern the relationship between parallel proceedings in different Member States, Article 31 is based on an entirely different logic, as it lays down a derogating rule on jurisdiction — which must, as such, be interpreted strictly by the Court[66] — under which the courts of a Member State may order a provisional, including protective, measure even if the courts of another Member State hold jurisdiction to rule on the substance pursuant to the regulation.

81. I therefore consider that, having regard to the subject matter of the question referred, as reformulated, it is not appropriate to apply by analogy the reasoning set out in the judgment in *St. Paul Dairy*[67] and that, in any event, the content of that judgment cannot call into question my suggested interpretation of Articles 27 and 30 of Regulation No 44/2001 in this case.[68]

V – Conclusion

82. In the light of the above considerations, I propose that the Court answer the question referred for a preliminary ruling by the Landgericht Stralsund (Regional Court, Stralsund, Germany) as follows:

Article 27 and Article 30(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 to the effect that, where independent proceedings for the taking of evidence seeking an order for a measure of inquiry prior to any legal proceedings have been conducted in a Member State and where a main action has been brought before a court of that same Member State further to the findings of that measure of inquiry, the time when that court is 'deemed to be seised' within the meaning of Article 30 does not date back to the initiation of the proceedings for the taking of evidence and, accordingly, a court of another Member State which has, in the meantime, been seised of a main action between the same parties and involving the same object and the same cause of action as that mentioned above must be considered to be the 'court first seised' within the meaning of Article 27.

64 — In particular, the French Government asserts that a measure of inquiry *in futurum*, like that ordered in the present case pursuant to Article 145 of the CPC, could be classified as a 'provisional, including protective, measure' within the meaning of Article 31 of Regulation No 44/2001, relying on a judgment of the French Cour de cassation to that effect (judgment No 00-18.547 of the First Civil Chamber of 11 December 2001, available at https://www.legifrance.gouv.fr), whilst the Commission takes the opposite view.

65 — See, in particular, Beraudo, J.-P., and Beraudo, M.-J., 'Convention de Bruxelles du 27 septembre 1698, convention de Lugano du 16 septembre 1988 et règlement (CE) nº 44/2001 du Conseil du 2 décembre 2000 — Compétence — Règles de compétence dérogatoires', *JurisClasseur Europe*, fascicule 3031, 2012, paragraph 39; Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe*, LGDJ-Lextenso, Issy-les-Moulineaux, 5th ed., 2015, paragraph 308-1 and the legal literature cited.

66 — See, to that effect, judgment of 27 April 1999, *Mietz* (C-99/96, EU:C:1999:202, paragraphs 46 and 47), regarding the equivalent provision in Article 24 of the Brussels Convention.

67 — Judgment of 28 April 2005 (C-104/03, EU:C:2005:255).

68 — See point 76 of this Opinion.