CJEU rules on Arts. 22 No 1 and 27(1) Brussels I-Regulation

On 3 April 2014 the Court of Justice of the European Union (CJEU) rendered a noteworthy decision on Arts. 22 No 1 and 27(1) Brussels I-Regulation (C-438/12 – Weber ./. Weber). The court clarified a number of issues relating to the scope of Art. 22 No 1, the obligations of the court second seised under Art. 27(1) as well as the relationship between Art. 22 No 1 and 27(1) Brussels I-Regulation.

The facts of the underlying case (as presented in the judgment) were as follows: Ms I. Weber (82) and Ms M. Weber (78) were co-owners of a property in Munich (Germany). On the basis of a notarised act of 20 December 1971, a right in rem of pre-emption over the share belonging to Ms M. Weber was entered in the Land Register in favour of Ms I. Weber. By a notorial contract of 28 October 2009, Ms M. Weber sold her share to Z. GbR, a company incorporated under German law, of which one of the directors is her son, Mr Calmetta, a lawyer established in Milan (Italy). According to that contract, Ms M. Weber, as the seller, reserved a right of withdrawal valid until 28 March 2010 and subject to certain conditions. Being informed by the notary who had drawn up the contract in Munich, Ms I. Weber exercised her right of pre- emption over that share of the property by letter of 18 December 2009. On 25 February 2010, by a contract concluded before that notary, Ms I. Weber and Ms M. Weber expressly recognised the effective exercise of the right of pre-emption by Ms I. Weber and agreed that the property should be transferred to her for the same price as that agreed in the contract for sale signed between Ms M. Weber and Z. GbR.

By an application of 29 March 2010, Z. GbR brought an action against Ms I. Weber and Ms M. Weber, before the Tribunale ordinario di Milano (District Court, Milan), seeking a declaration that the exercise of the right of pre-emption by Ms I. Weber was ineffective and invalid, and that the contract concluded between Ms M. Weber and that company was valid. On 15 July 2010, Ms I. Weber brought proceedings against Ms M. Weber before the Landgericht München I (Regional Court, Munich I) (Germany), seeking an order that Ms M. Weber register the transfer of ownership of the said share with the Land Register.

The Landgericht München I having regard to the proceedings brought before the

Tribunale ordinario di Milan decided to stay the proceedings in accordance with Article 27(1) Brussels I-Regulation. Ms I. Weber appealed against that decision to the Oberlandesgericht München (Higher Regional Court, Munich) (Germany) which, in turn, referred (among others) the following two questions to the CJEU for a preliminary ruling:

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?

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?

The CJEU started its reasoning with the first of these questions relating to the scope of Art. 22 No 1 Brussels I-Regulation. It held that actions seeking a declaration of invalidity of the exercise of a right of pre-emption attaching to that property and which produces effects with respect to all parties. ‘proceedings which have as their object rights in rem in immovable property’:

> *… the essential reason for conferring exclusive jurisdiction on the courts of the Contracting State in which the property is situated is that the courts of the locus rei sitae are the best placed, for reasons of proximity, to ascertain the facts satisfactorily and to apply the rules and practices which are generally those of the State in which the property is situated (Reichert and Kockler, paragraph 10).*
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> *The Court has already had the occasion to rule that Article 16 of the Brussels Convention and, accordingly, Article 22(1) of Regulation No 44/2001, must be interpreted as meaning that the exclusive jurisdiction of the courts of the*

Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the Convention or of Regulation No 44/2001 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 (Case C-386/12 Schneider [2013] ECR, paragraph 21 and the case-law cited).

Similarly, under reference to the Schlosser Report 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 59/71, p. 166), the Court has held that 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 (see order in Case C-518/99 Gaillard [2001] ECR I-2771, paragraph 17).

…

As is apparent from the file before the Court, a right of pre-emption, such as that provided for by Paragraph 1094 of the BGB, which attaches to immovable property and which is registered with the Land Register, produces its effects not only with respect to the debtor, but guarantees the right of the holder of that right to transfer the property also vis-à-vis third parties, so that, if a contract for sale is concluded between a third party and the owner of the property burdened, the proper exercise of that right of pre-emption has the consequence that the sale is without effect with respect to the holder of that right, and the sale is deemed to be concluded between the holder of that right and the owner of the property on the same conditions as those agreed between the latter and the third party.

It follows that, where the third party purchaser challenges the validity of the exercise of the right of pre- emption in an action such as that before the Tribunale ordinario di Milano, that action will seek essentially to determine whether the exercise of the right of pre-emption has enabled, for the benefit of its holder, the right to the transfer of the ownership of the immovable property

subject to the dispute to be respected. In such a case, as is clear from paragraph 166 of the Schlosser Report, referred to in paragraph 43 of the present judgment, the dispute concerns proceedings which have as their object a right in rem in immovable property and fall within the exclusive jurisdiction of the forum rei sitae.

The court then went on to discuss the second question (the fourth in total) relating to the obligations of the court second seised under Article 27(1) Brussels I-Regulation. It held that Article 27(1) must be interpreted as meaning that, before staying its proceedings, the court second seised must examine whether, by reason of a failure to take into consideration the exclusive jurisdiction laid down in Article 22(1), a decision on the substance by the court first seised will be recognised by other Member States in accordance with Article 35(1) of that regulation:

It is clear from the wording of Article 27 of Regulation No 44/2001 that, in a situation of lis pendens, any court other than the court first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established and, where that jurisdiction is established, it must decline jurisdiction in favour of that court.

Called on to rule on the question whether the provision of the Brussels Convention corresponding to Article 27 of Regulation No 44/2001, namely Article 21 thereof, authorises or requires the court second seised to examine the jurisdiction of the court first seised, the Court has held, without prejudice to the case where the court other than the court first seised has exclusive jurisdiction under the Brussels Convention and in particular under Article 16 thereof, that Article 21 concerning lis pendens must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court other than the court first seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised (see Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraphs 20 and 26).

It follows that, in the absence of any claim that the court other than the court first seised had exclusive jurisdiction in the main proceedings, the Court has simply declined to prejudge the interpretation of Article 21 of the Brussels

Convention in the hypothetical situation which it specifically excluded from its judgment (Case C-116/02 Gasser [2003] ECR I-14693, paragraph 45, and Case C-1/13 Cartier parfums — lunettes and Axa Corporate Solutions Assurances [2014] ECR, paragraph 26).

Having subsequently been asked about the relationship between Article 21 of the Brussels Convention and Article 17 thereof, relating to exclusive jurisdiction pursuant to a jurisdiction clause, which corresponds to Article 23 of Regulation No 44/2001, it is true that the Court held in Gasser that the fact that the jurisdiction of the court other than the court first seised is assessed under Article 17 of that Convention cannot call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.

However, as stated in paragraph 47 of the present judgment, and unlike the situation in case which gave rise to the judgment in Gasser, in the present case exclusive jurisdiction has been established in favour of the court second seised pursuant to Article 22(1) of Regulation No 44/2001, which is in Section 6 of Chapter II thereof.

According to Article 35(1) of that regulation, a judgment is not to be recognised in another Member State if it conflicts with Section 6 of Chapter II of that regulation, relating to exclusive jurisdiction.

It follows that, in a situation such as that at issue in the main proceedings, if the court first seised gives a judgment which fails to take account of Article 22(1) of Regulation No 44/2001, that judgment cannot be recognised in the Member State in which the court second seised is situated.

In those circumstances, the court second seised is no longer entitled to stay its proceedings or to decline jurisdiction, and it must give a ruling on the substance of the action before it in order to comply with the rule on exclusive jurisdiction.

Any other interpretation would run counter to the objectives which underlie the general scheme of Regulation No 44/2001, such as the harmonious administration of justice by avoiding negative conflicts of jurisdiction, the free movement of judgments in civil and commercial matters, in particular the

recognition of those judgments.

Thus, as the Advocate General also observed in point 41 of his Opinion, the fact that, in accordance with Article 27 of Regulation No 44/2001 the court second seised, which has exclusive jurisdiction under Article 22(1) thereof, must stay its proceedings until the jurisdiction of the court first seised is established and, where that jurisdiction is established, must decline jurisdiction in favour of the latter, does not correspond to the requirement of the sound administration of justice.

Furthermore, the objective referred to in Article 27 of that regulation, namely to avoid the non-recognition of a decision on account of its incompatibility with a judgment given between the same parties in the specific context in which the court second seised has exclusive jurisdiction under Article 22(1) of that regulation, would be undermined.

The full decision can be downloaded here. The press release is available here.