Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 27 November 2014[1]

Case C-557/13

Hermann Lutzv
Elke Bäuerle, as administrator in the insolvency proceedings concerning the assets of ECZ Autohandel GmbH

(Request for a preliminary ruling from the Bundesgerichtshof (Germany))

(Reference for a preliminary ruling — Regulation (EC) No 1346/2000 — Articles 4 and 13 — Action to set aside a detrimental act — Limitation periods or other time-bars — Procedural requirements — Determination of the law applicable — Payment made after the date on which insolvency proceedings were opened on the basis of attachment carried out before that date)

I – **Introduction**

1. The legal context of the present reference for a preliminary ruling is Regulation (EC) No 1346/2000.[2] In particular, the questions raised by the Bundesgerichtshof (Federal Supreme Court, Germany) will lead the Court to consider first of all whether Article 13 of that regulation is applicable if the payment made in order to comply with a payment order issued against a debtor ('the contested act' or 'the act at issue') took place after the opening of the insolvency proceedings. The Court will then be required to decide whether the law applicable to the contested act ('the *lex causae*'), in the present case Austrian law, also determines the legal effects of the lapse of time. Lastly, this reference for a preliminary ruling gives the Court the opportunity to clarify whether the procedural requirements to be observed upon the exercise of a right under Article 13 of Regulation No 1346/2000 are also determined by the *lex causae*.

2. Before addressing the interpretation of Article 13 of Regulation No 1346/2000, I think it may be helpful to ascertain the extent to which Article 5 of that regulation is applicable to the right to attach under which, in the present case, payment of the contested sum was enforced.

1 — Original language: French.

2 — Council Regulation of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

II – **Legal context**

A – *EU law*

3. Recital 11 of Regulation No 1346/2000 reads:

‘This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.’

4. Recital 24 of Regulation No 1346/2000 is worded as follows:

‘Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.’

5. Article 4(2)(f) and (m) of that regulation provides:

‘2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

…

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

…

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.’

6. Article 5 of that regulation provides:

‘1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets — both specific assets and collections of indefinite assets as a whole which change from time to time — belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

…

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).'

7. Under Article 13 of Regulation No 1346/2000:

'Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

— the said act is subject to the law of a Member State other than that of the State of the opening of proceedings,

  and

— that law does not allow any means of challenging that act in the relevant case.'

8. Under Article 20(1) of that regulation:

'A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.'

B – *German law*

9. Paragraph 88 of the Insolvenzordnung (German Insolvency Code, BGBl. 1994 I, p. 2866, 'the InsO') provides:

'If a creditor, during the month preceding the application to open the insolvency proceedings or thereafter, has acquired by virtue of enforcement a security over the debtor's assets forming part of the total assets, that security shall become legally invalid once the insolvency proceedings are opened.'

C – *Austrian law*

10. Paragraph 43(1) and (2) of the Insolvenzordnung (Austrian Insolvency Code, RGBl. 1914, p. 337, 'the IO') provides:

'(1) A transaction may be set aside only by means of a legal action …

(2) An action to set a transaction aside must be brought within one year after the opening of insolvency proceedings, failing which it shall be time-barred. …'

III – **Facts**

11. ECZ GmbH is a German company with its registered office in Tettnang (Germany). The company carried on a fraudulent business as a car dealer in the form of a 'snowball system'. In order to trade on the Austrian market the parent company used a subsidiary, the Austrian company ECZ Autohandel GmbH ('the debtor company'), with its registered office in Bregenz (Austria). The appellant in the main proceedings, Mr Lutz, residing in Austria, was a customer of the debtor company, from which he had purchased a car.

12. On 17 March 2008, as the debtor company had failed to perform the contract for the purchase of that vehicle, Mr Lutz obtained an enforceable payment order from the Bezirksgericht (District Court, Bregenz, Austria) against the debtor company for EUR 9 566 plus interest.

13. On 20 May 2008 the Bezirksgericht Bregenz granted leave for enforcement, by means of which three accounts held by the debtor company at an Austrian bank were attached. On 23 May 2008 the notice of enforcement was received by Sparkasse Feldkirch (Austria) ('the debtor company's bank').

14. On 13 April 2008, the debtor company itself filed an application for insolvency proceedings to be opened. On 4 August 2008, the Amtsgericht Ravensburg (Local Court, Ravensburg, Germany) opened insolvency proceedings against the debtor company in Germany. The respondent in the main proceedings, Ms Bäuerle, residing in Germany, is currently the 'liquidator'[3] in those proceedings.

15. On 17 March 2009, on the basis of the attachment, the debtor company's bank paid Mr Lutz the contested sum of EUR 11778.48. Prior to that, by letter of 10 March 2009, the liquidator at that time had, however, given notice that he would not assert any counterclaims against that bank, but reserved the right to bring an action to set aside the transaction.

16. In a letter of 3 June 2009, that is to say some ten months after the opening of the insolvency proceedings, the liquidator at that time gave notice that, in connection with the insolvency, he would challenge the enforcement of 20 May 2008 and the payment made on 17 March 2009. However, a court action was not brought until the statement of claim was served on 23 October 2009. In her action, Ms Bäuerle sought, before the German courts, the return of the sum paid out.

17. The Landgericht Ravensburg (Ravensburg Regional Court, Germany) allowed that claim. Mr Lutz's subsequent appeal was unsuccessful. By an appeal on a point of law, he continues to seek the dismissal of the claim.

18. The referring court holds that the success of the appeal on a point of law depends on the interpretation of Article 13 of Regulation No 1346/2000, on the assumption that that provision applies in the present case. Article 4(2)(m) of that regulation states that the question of the voidness, voidability or unenforceability of legal acts detrimental to all the creditors is governed by the law applicable to insolvency proceedings ('the *lex fori concursus*'). However, under Article 13 of that regulation, that provision does not apply where the person who benefited from an act detrimental to all the creditors provides proof that that act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case.

3 — The terms 'syndic' and 'masse' have not been used in French bankruptcy law since 1985 but they are used in the French version of Regulation No 1346/2000.

19. In that regard, the referring court notes that, according to the *lex fori concursus*, that is to say in the present case German law, the act at issue cannot be challenged, the only acts that may be contested being those occurring prior to the opening of the insolvency proceedings.[4] The payment of the sum attached from the account balance was not made until seven months after the proceedings were opened. However, the right to attach the credit balance on the bank accounts arose only after the insolvency application was made on 13 April 2008 and therefore became unenforceable, under Paragraph 88 of the InsO, when the insolvency proceedings were opened. The subsequent payment of the attached sum from the balance on the bank accounts is therefore also invalid.[5] Moreover, although Article 5 of Regulation No 1346/2000 provides that the opening of insolvency proceedings does not affect the rights in rem of creditors, Article 5(4) does not preclude the voidness, voidability or unenforceability of the act at issue.

20. It is clear none the less from the order for reference that Mr Lutz contended, on the basis of Article 13 of Regulation No 1346/2000, that the *lex causae* does not allow any means of challenging the payment of the contested sum,[6] because challenge is time-barred. Although under the relevant provisions of Austrian law the payment made on 17 March 2009 from the credit balance on the bank accounts could in principle have been challenged initially,[7] an action to set aside would not have succeeded since Paragraph 43(2) of the IO lays down a limitation period of one year from the opening of insolvency proceedings for commencing such an action.

21. The referring court notes in that regard that under German law the limitation period for bringing an action to set aside is three years and that that period was respected.

IV – **The questions referred for a preliminary ruling and the procedure before the Court**

22. In those circumstances, the Bundesgerichtshof decided, by order of 10 October 2013 lodged at the Court Registry on 29 October 2013, to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 13 of Regulation [No 1346/2000] applicable if the payment challenged by the insolvency administrator of a sum attached before the opening of the insolvency proceedings was made only after the opening of the proceedings?

(2) If the reply to the first question is in the affirmative: does the defence under Article 13 of Regulation [No 1346/2000] also apply to limitation periods or other time-bars relating to actions to set aside transactions under the law which governs the dispute concerning the contested legal transaction (*lex causae*)?

4 — Paragraph 129(1) of the InsO.

5 — Paragraph 91(1) of the InsO.

6 — According to the referring court, the right to attach arose in a Member State other than the State in which the insolvency proceedings were opened. The law applicable to the payment of the attached sum from the account balance is therefore the law of the Member State in which the payment has effects, that is to say, Austrian law.

7 — It is clear from the order for reference that, under Austrian law, after insolvency has arisen or after an application has been made for the opening of insolvency proceedings, an act whereby an insolvency creditor obtains a security or satisfaction when he knew or ought to have known of the insolvency or application for the opening of insolvency proceedings can be challenged. According to the referring court, the payment of the disputed sum gave Mr Lutz satisfaction at a time when he was aware of the application for the opening of insolvency proceedings because of a letter from the liquidator of 10 March 2009. At the hearing, Mr Lutz’s representative argued none the less that under Austrian law, for the purposes of bringing an action to set aside, the starting point is the opening of the insolvency proceedings. It is from that date that the proceedings are made public and creditors may therefore become aware of the debtor’s insolvency, and also the one-year limitation period for bringing a court action starts to run. Under German law, however, the starting point is the filing of the application for the opening of insolvency proceedings and the time-limit for bringing an action to set aside is three years. See also points 81 to 83 of this Opinion.

(3) If the reply to the second question is in the affirmative: are the relevant procedural requirements for asserting a claim for the purpose of Article 13 of Regulation [No 1346/2000] also to be determined according to the *lex causae* or by the *lex fori concursus*?'

23. Written observations were submitted by the parties to the main proceedings, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the Portuguese Republic and the European Commission.

24. The parties to the main proceedings, the Federal Republic of Germany, the Kingdom of Spain and the Commission made their oral observations at the hearing held on 18 September 2014.

V – **Analysis**

A – *The applicability of Article 5 of Regulation No 1346/2000*

25. The present case is set in a complex legal context and raises the question of the applicability of Article 13 of Regulation No 1346/2000 to a payment made after the date on which insolvency proceedings were opened on the basis of a right to attach created before those proceedings were opened. In order to answer that question, given the fact that the detrimental act in the present case is the creation of the right to attach,[8] it is necessary to determine whether a right in rem which relates to an asset located, at the time the proceedings are opened, within the territory of another Member State becomes invalid once proceedings have been opened, in accordance with the *lex fori concursus*.

26. I should point out first of all that the referring court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law.[9]

27. In those circumstances, although the referring court is questioning this Court about the interpretation of Article 13 of Regulation No 1346/2000, it seems to me necessary to examine first whether the right to attach does in fact constitute a right in rem and, consequently, whether the conditions of Article 5 of that regulation are satisfied in the present case. Indeed, it is only if the right to attach is a right in rem, a point which it is for the referring court to assess, that Mr Lutz is not required to return to the total assets the value of the secured debt.[10] The classification of a right as a right in rem therefore constitutes a prior condition for the application in the present case of Article 13 of Regulation No 1346/2000.

28. I shall therefore examine first of all the classification of the right to attach a credit balance on the bank accounts of the debtor company as a right in rem before clarifying, secondly, the scope of the protection of rights in rem conferred by Article 5(4) of that regulation.

1. Classification of a right to attach the credit balance on the bank accounts of the debtor company in the light of Article 5 of Regulation No 1346/2000

29. Under Article 4(1) of Regulation No 1346/2000, the law applicable to insolvency proceedings and their effects is that of the Member State within the territory of which such proceedings are opened (the *lex fori concursus*). As stated in recital 23 of that regulation, that law governs all the conditions for the opening, conduct and closure of the insolvency proceedings.[11]

8 — In the present case, enforcement of the payment of the contested sum follows on from the creation of a right to attach. Therefore, it is the right to attach which must be considered to be the detrimental act.

9 — *Econord* (C-182/11 and C-183/11, EU:C:2012:758, paragraph 21).

10 — See recital 25 and Article 20 of Regulation No 1346/2000 and footnote 19 to this Opinion.

11 — *ERSTE Bank Hungary* (C-527/10, EU:C:2012:417, paragraph 38 and the case-law cited).

30. However, in order to uphold legitimate expectations and the legal certainty of transactions in Member States other than the State of the opening of the insolvency proceedings, Regulation No 1346/2000 sets out, in Articles 5 to 15, a certain number of exceptions to that rule of the law applicable in respect of certain rights and legal situations which are considered, according to recital 11 thereto, to be particularly important. [12] Thus, as regards inter alia rights in rem, Article 5(1) of that regulation states that the opening of insolvency proceedings does not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. [13]

31. According to the case-law of the Court, the scope of that provision is clarified by recitals 11 and 25 of Regulation No 1346/2000, according to which there is a need for a special reference 'diverging from the law of the opening State' in the case of rights in rem since these are of considerable importance for the granting of credit. Thus, according to recital 25, the basis, validity and extent of such a right in rem should therefore normally be determined according to law of the place where the asset concerned is situated (*lex rei sitae*) and not be affected by the opening of insolvency proceedings. [14] Therefore, Article 5(1) of that regulation must be understood as a provision which, derogating from the rule of the law of the State of the opening of the proceedings, allows the law of the Member State on whose territory the asset concerned is situated (*lex rei sitae*) to be applied to the right in rem of a creditor or a third party in respect of certain assets belonging to the debtor. [15] Protection under that article is given only to rights in rem in respect of the debtor's assets which are situated in a Member State other than the State of the opening of the insolvency proceedings at the time the proceedings are opened. [16] Article 5 of Regulation No 1346/2000 is not a conflict-of-laws rule but a 'negative' substantive rule, [17] the purpose of which is to uphold rights in rem acquired before the opening of the insolvency proceedings. [18]

32. Therefore, a preliminary question arises: can a right to attach the credit balance on bank accounts be classified in the present case as a right in rem held by Mr Lutz?

33. As regards classification of the right to attach, I would observe straight away that Regulation No 1346/2000 refers to national law, subject to the provisions of Article 5(2) and (3) of that regulation.

12 — Ibid., paragraph 39. See also recital 24 of Regulation No 1346/2000.

13 — I note that Article 5 of Regulation No 1346/2000 assumes the non-fraudulent location of the assets in a Member State other than the State of the opening of the insolvency proceedings. See, to that effect, the Report on the Convention on Insolvency Proceedings ('the Virgós/Schmit Report'), paragraph 105 and Ingelmann, T., 'Article 5', *European Insolvency Regulation*, K. Pannen (Ed.), De Gruyter Recht, Berlin, 2007, p. 252. In that regard, it should be pointed out that although the Virgós/Schmit Report only concerns the Convention on Insolvency Proceedings it provides useful guidance for interpreting Regulation No 1346/2000. See, to that effect, Opinion of Advocate General Jacobs, *Eurofood IFSC* (C-341/04, EU:C:2005:579, point 2).

14 — *ERSTE Bank Hungary* (C-527/10, EU:C:2012:417, paragraph 41).

15 — Ibid., paragraph 42.

16 — In order for Article 5 of Regulation No 1346/2000 to function, a teleological interpretation of that provision requires that all the acts needed in order to create a right in rem must have been carried out before the opening of the insolvency proceedings. See Virgós/Schmit Report, paragraph 95; Virgós Soriano, M., and Garcimartín Alférez, F.J., *Comentario al Reglamento europeo de insolvencia*, Thomson-Civitas, Madrid, 2003, pp. 96 and 101, and Moss, G., Fletcher, I.F., and Isaacs, S., *The EC Regulation on Insolvency Procedures: A Commentary and Annotated Guide*, Oxford University Press, 2nd edition, 2009, p. 287.

17 — Regarding the substantive nature of that provision, see Virgós/Schmit Report, paragraph 99; Virgós Soriano, M., and Garcimartín Alférez, F.J., op. cit., p. 105; Ingelmann, T., 'Article 5', op. cit., p. 250; Moss, G., Fletcher, I.F., and Isaacs, S., op. cit., p. 286; Hess, B., Oberhammer, P., and Pfeiffer, T., *European Insolvency Law. The Heidelberg-Luxembourg-Vienna Report on the Application of the Regulation No 1346/2000/EC on Insolvency Proceedings*, Beck-Hart-Nomos, C.H., Munich/Oxford, 2014 ('the Heidelberg-Luxembourg-Vienna Report'), p. 259, and Klyta, W., *Uznanie zagranicznych postępowań upadłościowych*, Oficyna Wolters Kluwer business, Warsaw, 2008, p. 149.

18 — In *German Graphics Graphische Maschinen*, with regard to Article 7 of Regulation No 1346/2000, a similar provision to Article 5 of the same regulation, the Court held that '[i]n other words, that provision only constitutes a substantive rule intended to protect the seller with respect to assets which are situated outside the Member State of opening of insolvency proceedings' (C-292/08, EU:C:2009:544, paragraph 35). According to the Heidelberg-Luxembourg-Vienna Report, p. 262, the majority of legal scholars in 17 Member States treat Article 5 as a substantive rule.

34. First, the classification of a right as a right in rem depends on the national law which, under the conflict-of-laws rules applying prior to the insolvency proceedings, governs rights in rem (*lex rei sitae*).[19] The creation, validity and scope of these rights in rem are therefore governed by the law of the place where the asset which forms the subject of the right in rem is situated.[20]

35. Secondly, once the actual nature of the right considered with regard to the *lex rei sitae* has been established, it is necessary to determine whether that right satisfies the criteria for the application of Article 5(2) and (3) of Regulation No 1346/2000. Those independent classification criteria[21] therefore limit the national classification of a subjective right as a right in rem for the purposes of applying Article 5 of that regulation.[22]

36. As regards the case in the main proceedings, it is clear, first of all, from the information in the documents submitted to the Court, which was confirmed at the hearing, that under Austrian law an enforceable lien is a right in rem that arises on notification to the debtor of the order to pay.[23]

37. In that regard, the order for reference states that an Austrian court, on 20 May 2008, granted leave for enforcement, by means of which three bank accounts held by the debtor company at its bank in Austria were attached. The notice of enforcement was received by that bank on 23 May 2008. Thus, according to the findings of the referring court, under Austrian law[24] the preferential right acquired with the attachment is not affected by the insolvency because it existed for more than 60 days before the opening of the insolvency proceedings. According to that court, Mr Lutz's preferential right allowed the attached credit balance to be paid to him.[25]

38. Secondly, as is clear from Article 5(2) of Regulation No 1346/2000, a right in rem includes 'the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee',[26] which covers attachment of the balance on an account under Austrian law. Thus, protection for Mr Lutz is, in principle, afforded by his right of enforcement in respect of the bank accounts of the debtor company in order to cover the claim as if

19 — Ingelmann, T., 'Article 5', op. cit., p. 253.

20 — Virgós/Schmit Report, paragraphs 95 and 100. Article 5 of Regulation No 1346/2000 states that insolvency proceedings do not affect rights in rem in respect of assets located in other Member States and not that the proceedings do not affect assets (or credit) located in another Member State that are protected by those rights. As main proceedings are universal they encompass all the debtor's assets. This is important if the value of the security is greater than the value of the claim guaranteed by the right in rem. Where no secondary proceedings are instituted, the creditor will be obliged to surrender to the liquidator in the main proceedings any surplus of the proceeds of sale (see recital 25 and Article 20 of Regulation No 1346/2000). However, if the claim is covered by the value of the security, a creditor who obtains satisfaction of claims guaranteed by rights in rem is not required to return anything to the other creditors. See, to that effect, Virgós/Schmit Report, paragraphs 99 and 173; Virgós Soriano, M., and Garcimartín Alférez, F.J., op. cit., pp. 106 and 236. See also, to that effect, Moss, G., Fletcher, I.F. and Isaacs, S., op. cit., p. 286, and Porzycki, M., Zabezpieczenia rzeczowe w transgranicznym postępowaniu upadłościowym w Unii Europejskiej, *Czasopismo kwartalne całego prawa handlowego, upadłościowego oraz rynku kapitałowego*, NR 3 (5) 2008, p. 405.

21 — See in that regard, Veder, P.M., *Cross-border insolvency proceedings and security rights: a comparison of Dutch and German law, the EC Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency*, Deventer, 2004, pp. 334 to 336: 'An independent interpretation of rights in rem is facilitated by the references that the second paragraph contains of the types of rights Art. 5 IR refers to'. See, also, Klyta, W., op. cit., p. 150.

22 — Virgós, M. and Garcimartín, F., op. cit., p. 96: 'Its function [of Article 5] is to operate as a limit to the characterisation of a right as a right in rem for the purposes of Article 5. Only those rights conferred by national laws that conform to its typological characterisation are protected by Article 5.1 of Regulation'.

23 — According to legal theory, rights in rem within the meaning of Article 5 of Regulation No 1346/2000 are not only those resulting from a legal act but also those that arise and are produced ipso jure, Porzycki, M., loc. cit., p. 405.

24 — Paragraphs 11(1) and 12(1), first sentence, of the Konkursordnung (Austrian Bankruptcy Code) in the version applicable at the material time in the main proceedings (öBGB1. I 2007/73, 'the östKO').

25 — Ibid., Paragraph 48(1). The referring court also states that the payment made to Mr Lutz extinguished the attachment, through the application of Paragraph 469 of the Austrian Civil Code ('Allgemeines Bürgerliches Gesetzbuch') *mutatis mutandis*, and therefore the attachment can no longer be challenged. On this point, see footnote 7.

26 — In order to facilitate its application, Article 5(2) of Regulation No 1346/2000 provides a list of rights that are normally considered by national laws as being rights in rem. That list is therefore not exhaustive. In that regard, see Virgós/Schmit Report, paragraph 103, and Moss, G., Fletcher, I.F., and Isaacs, S., op. cit., p. 287.

that claim was not the subject of insolvency proceedings in Germany. In the present case, even though the payment at issue was, initially, open to challenge under Austrian insolvency law,[27] according to the referring court[28] that finding does not alter the classification of the right to attach as a right in rem under Article 5 of Regulation No 1346/2000.

39. Furthermore, so far as concerns the location of the debtor's asset at the time when the insolvency proceedings were opened, it is also clear from the order for reference that on 4 August 2008 the asset of the debtor company to which the right to attach related, that is to say, the contested sum, was in the Austrian bank accounts of that debtor company.[29]

40. I therefore think that the conditions of Article 5 of Regulation No 1346/2000 are satisfied in the present case — a question which in any event it is for the referring court to determine, since it alone has jurisdiction to assess the facts in the case before it.

2. The scope of the protection of rights in rem in the light of Article 5(4) of Regulation No 1346/2000: detrimental acts

41. I note here that since protection of the rights in rem of third parties, and hence their immunity, is relative, the exclusion of such rights from the scope of the *lex fori concursus* is not absolute.

42. First, the rule in Article 5(1) of Regulation No 1346/2000 does not preclude the liquidator from applying for secondary proceedings to be opened in the Member State in which the assets are situated if the debtor has an establishment in that Member State.[30] Such secondary proceedings would have the same effects on rights in rem as main proceedings.[31]

43. Secondly, Article 5(4) of Regulation No 1346/2000 establishes an exception to the exception by providing that Article 5(1) does not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m) of that regulation. Thus, the *lex fori concursus* applies when the creation or exercise of rights in rem conflicts with the interests of the insolvency proceedings and the acts can be classified as acts detrimental to all the creditors' interests. That article therefore concerns, as in the present case, actions to set aside based on the rules for insolvency proceedings and not the rules of ordinary law (ordinary actions under civil and commercial law). The latter follow the general rules on conflict of laws. However, such ordinary law actions are admissible only in so far as the *lex fori concursus* allows.[32]

44. The basic rule is that the law of the Member State of opening governs, under Article 4 of Regulation No 1346/2000, any possible voidness, voidability or unenforceability of acts which may be detrimental to all the creditors' interests. In the present case, the action to set aside brought by Ms Bäuerle is therefore governed by German law. That same law determines the conditions under which acts that may be detrimental to all the creditors may be penalised (nullity and voidability), the manner in which penalties are to apply (automatically or pursuant to an action taken by the liquidator, with or without retrospective effects, etc.) and the legal consequences of nullity and voidability (for example, the status of a third party in respect of an action to set aside).[33]

27 — See, on that point, footnote 7 to this Opinion.

28 — See, also, point 20 of this Opinion.

29 — I consider it helpful to observe here that, as regards rights in rem, the location is the place where the asset to which those rights relate is situated. Moreover, Article 5 of Regulation No 1346/2000 applies to rights in rem relating to claims. See, to that effect, Virgós, M., and Garcimartín, F., *The European Insolvency Regulation: Law and Practice*, Kluwer Law International, The Hague, 2004, p. 103.

30 — The case-file in the possession of the Court does not give us any information concerning the opening of secondary proceedings in Austria.

31 — See, to that effect, Moss, G., Fletcher, I.F., and Isaacs, S., op. cit., p. 287. See also Article 27 of Regulation No 1346/2000.

32 — Virgós Soriano, M., and Garcimartín Alférez, F.J., op. cit., p. 135, and Virgós, M., and Garcimartín, F., op. cit., p. 135.

33 — Virgós/Schmit Report, paragraph 135; Virgós Soriano, M., and Garcimartín Alférez, F.J., op. cit., p. 135; Pannen, K., and Riedemann, S., 'Article 4', op. cit., p. 228, and Klyta, W., op. cit., p. 175.

45. In that regard, under German law, Paragraph 88 of the InsO provides that if a creditor of the insolvent person, during the month preceding the application to open the insolvency proceedings or thereafter, has acquired by virtue of enforcement a security over the debtor's assets forming part of the total assets, that security will become legally invalid once the insolvency proceedings are opened. It should therefore be noted that the article cited concerns the automatic (ipso jure) nullity of a security over the debtor's assets, without any action being taken by the liquidator. That raises a question which is decisive for the resolution of the dispute in the main proceedings and which was debated at the hearing in response to a question posed by the Court: does that rule of German law, as the referring court contends, fall within the scope of Article 5(4) of Regulation No 1346/2000? In other words, does the automatic nullity of a right in rem in respect of the debtor's assets come under Article 5(4) of that regulation, which provides that the *lex fori concursus* applies to judicial actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m)?

46. I believe that to be the case.

47. First of all, as is clear from the analysis in points 25 to 40 of this Opinion and the observations of the German Government and the Commission at the hearing, the purpose of Paragraph 88 of the InsO, that is to say acquisition, through enforcement, of a security over the debtor's assets forming part of the total assets in the insolvency, comes within the scope of Article 5 of Regulation No 1346/2000.

48. Moreover, the Virgós/Schmit Report appears to accept, in paragraphs 91 and 106, a broad interpretation of the concept of actions that appears in Article 5(4) of Regulation No 1346/2000. Thus, '[t]he establishment of a right in rem in favour of a particular creditor or third party could be an act detrimental to all the creditors. In this case, the general rules of [Regulation No 1346/2000] governing actions for voidness, voidability or unenforceability of legal acts are applicable (see Article 4(2)(m), and Article 13)'.[34] In that regard, the German Government contended at the hearing that to treat the provisions which provide for automatic nullity (ipso jure) differently from those which require judicial action would correspond neither to the purpose nor the spirit of Article 5(4) of Regulation No 1346/2000.

49. Lastly, as the German Government and the Commission rightly contend, the fact that there are differences in the various language versions regarding the reference to 'actions' for voidness does not indicate that the scope of Article 5(4) of Regulation No 1346/2000 is limited solely to judicial actions. That provision should be read in conjunction with Article 4(2)(m) of that regulation, which refers to 'the rules relating to … voidness, voidability or unenforceability'[35] and not solely to 'actions for voidness, voidability or unenforceability'. It is therefore national law which determines whether voidness, voidability or unenforceability result from legal action, from the effect of law[36] or from a legal measure. However, whether the national law requires action to be taken, as a first step, or whether the decision to open proceedings automatically entails invalidation[37] to the extent necessary,[38] the law of the State of opening (in the present case, German law) displaces the law normally applicable to the detrimental act (in the present case, Austrian law).[39]

34 — Even though that report refers to legal acts, I see no reason to exclude from the scope of Articles 4(2)(m) and 13 of Regulation No 1346/2000 legal effects which occur automatically (ipso jure) or are of a procedural nature.

35 — See judgment in *Seagon* (C-339/07, EU:C:2009:83, paragraph 28) regarding the international jurisdiction of courts in respect of actions to set a transaction aside by virtue of insolvency.

36 — Dammann, R., 'Article 13', op. cit., p. 291: 'Some legal systems automatically void any secured rights that have been granted within a specific period prior to the opening of insolvency proceedings. Whether such legal provisions are avoidance actions within the meaning of Art 4 (2) sentence 2 (m) of the European Insolvency Regulation is debatable'.

37 — Virgós/Schmit Report, paragraph 91.

38 — For example, a situation where an action to set aside was brought by the liquidator in office at the time of the bankruptcy, as in the case in the main proceedings. I note in that regard that Article 4(2)(m) of Regulation No 1346/2000 concerns actions or rules for the invalidation of acts on the basis of the *lex fori concursus*. However, the rules of ordinary law apply only in so far as the *lex fori concursus* so permits. See, to that effect, Virgós Soriano, M., and Garcimartín Alférez, F.J., op. cit., p. 135; Virgós, M., and Garcimartín, F., op. cit., p. 135. See, in that regard, point 43 of this Opinion.

39 — Virgós/Schmit Report, paragraph 91.

50. Thus, according to the referring court, the attachment of bank accounts in Austria was unenforceable, under Paragraph 88 of the InsO, solely because that attachment took place after the application to open insolvency proceedings had been filed in Germany. Consequently, the right to attach the credit balance on the bank accounts acquired before the proceedings were opened becomes, in principle, unenforceable following the opening of those proceedings, under the *lex fori concursus*.[40]

51. However, Article 4(2)(m) of Regulation No 1346/2000 must be read in conjunction with Article 13. Application of the *lex fori concursus* could therefore be excluded under the *lex causae*. It is precisely that which is the subject of the first question referred, which I shall examine below.

B – *Applicability of Article 13 of Regulation No 1346/2000 to an act occurring after the opening of the insolvency proceedings*

52. It is clear from the order for reference, and from points 45 and 49 of this Opinion, that the right to attach the credit balance on the bank accounts located in Austria was established after the application to open insolvency proceedings had been filed and therefore, under Paragraph 88 of the InsO, became unenforceable on the date on which the insolvency proceedings were opened.

53. However, Article 13 of Regulation No 1346/2000 provides an exception to application of the *lex fori concursus*, whereby the act at issue cannot be validly challenged where the person who benefited from an act detrimental to all the creditors provides proof that ‘the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case’.

54. By its first question, the referring court seeks in essence to ascertain whether Article 13 of Regulation No 1346/2000 is applicable to a situation in which a right in rem was created before the opening of the insolvency proceedings whilst the payment of the sum attached under that right was made after the opening of those proceedings.

55. In order to reply to that question, I shall consider first the scope of Article 13 of Regulation No 1346/2000 and then whether the creation of the right to attach is to be regarded as the decisive moment for the purposes of applying that article.

1. The scope of Article 13 of Regulation No 1346/2000

56. I should like to say first of all that I concur with the view expressed in essence by Mr Lutz and the German Government, that there is no indication in Article 13 of Regulation No 1346/2000 that a distinction should be made between detrimental acts according to whether they occurred before or after the opening of insolvency proceedings.

57. In that regard, it is settled case-law that, in determining the scope of a provision of EU law, its wording, context and objectives must all be taken into account.[41] The origins of a provision of EU law may also provide information relevant to its interpretation.[42]

40 — See, by analogy, *LBI* (C-85/12, EU:C:2013:697), concerning the provisions of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ 2001 L 125, p. 1), in which the Court was required to interpret provisions that were in essence identical to those at issue in the present case.

41 — See judgments in *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 20) and *Kronos Titan and Rhein-Ruhr Beschichtungs-Service* (C-43/13 and C-44/13, EU:C:2014:216, paragraph 25).

42 — See judgment in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 50).

58. As regards the wording of Article 13 of Regulation No 1346/2000, the use of the phrases ‘the person who benefited from an act detrimental to all the creditors provides proof’, ‘in the relevant case’ and ‘[by] any means’ confirms the restrictive nature of the exception in relation to the general rule laid down in Article 4 of Regulation No 1346/2000. According to the Virgós/Schmit Report, the first phrase means that that provision is a substantive exception to the application of the *lex fori concursus*, at the request of the person concerned, on whom the burden of proof falls.[43] Moreover, at the hearing the Commission rightly and with due cause referred to the phrases ‘in the relevant case’ and ‘[by] any means’ taken from that report. So far as the first is concerned, it must be interpreted as meaning that the act must not be capable of being challenged in fact, that is to say, after taking into account all the concrete circumstances of the case. It is not sufficient to determine whether there is an abstract risk. Lastly, the phrase ‘[by] any means’ means that the act cannot be rendered unenforceable either using the rules on insolvency or the rules of ordinary law applicable.[44]

59. As regards the scheme and purpose of the rule of law interpreted, I note that the conflict-of-laws regime which results from the application of Article 4(2)(m) in conjunction with Article 13 of Regulation No 1346/2000 has general scope within the scheme of the regulation. That regime applies even to rights in rem protected by Article 5. Thus, Article 4(2)(m) of Regulation No 1346/2000 concerns the rules or actions for invalidation coming from the *lex fori concursus* and Article 13 of that regulation is the exception to the application of that law.[45] The latter article operates as a ‘veto’ over the invalidity of the detrimental act decreed by the law of the State of opening. That article has therefore no other purpose than to uphold legitimate expectations of creditors or third parties in respect of the validity of an act in accordance with the *lex causae* (both with regard to the provisions of ordinary law and to the rules relating to insolvency proceedings), against interference from a different *lex fori concursus*.[46]

60. Lastly, those considerations are corroborated by the origin of the provision at issue. As the Virgós/Schmit Report indicates, Article 13 of Regulation No 1346/2000 concerns ‘detrimental acts’ constituted or carried out prior to the opening of the insolvency proceedings and threatened, as in the present case, by actions to set aside brought by the liquidator. Thus, that article is not applicable to disposals occurring after the opening of the insolvency proceedings. Creditors’ reliance on the validity of such subsequent acts no longer warrants greater protection since that is no longer justified.

61. I therefore regard all those considerations as clearly militating in favour of a restrictive interpretation of Article 13 of Regulation No 1346/2000. However, as regards the present case, as the referring court rightly observes, it is doubtful whether such an interpretation would also apply where, as in the case in the main proceedings, the property is received by the creditor on the basis of a right in rem acquired before the opening of the proceedings. In that regard, if the payment had not yet taken place by the date when the action to set aside was brought, the liquidator should have applied for the setting aside of the right to attach that was granted before the opening of the insolvency proceedings. Article 13 of Regulation No 1346/2000 would have been applicable to such a situation.

43 — Moss, G., Fletcher, I.F., and Isaacs, S., op. cit., p. 297: ‘This will involve not only providing the relevant foreign law but also the relevant facts’.

44 — Virgós/Schmit Report, paragraph 138; Virgós Soriano, M., and Garcimartín Alférez, F.J., op. cit., p. 137, and Moss, G., Fletcher, I.F., and Isaacs, S., op. cit., p. 296.

45 — The regime for invalidation of acts carried out by the debtor before the opening of insolvency proceedings established by Regulation No 1346/2000 provides, first, for application of the *lex fori concursus* (Article 4(2)(m)) but allows for its effects to be set aside by relying on the law that governs the act (Article 13). However, since the term ‘act’ used by Article 13 of that regulation permits a fairly broad interpretation of that provision, it is relevant to state that that regime must be able to apply not only to the debtor’s acts that are detrimental but also to the legal effects that arise automatically (ipso jure) or are of a procedural nature, as in the present case. See, to that effect, Virgós Soriano, M., and Garcimartín Alférez, F.J., op. cit., pp. 134 and 135.

46 — See, to that effect, Virgós/Schmit Report, paragraphs 136 and 138, and Moss, G., Fletcher, I.F., and Isaacs, S., op. cit., p. 297.

2. The creation of the right to attach as a decisive factor for the purposes of applying Article 13 of Regulation No 1346/2000

62. I should like to begin this analysis with a question: is it appropriate in the present case to regard the moment when payment was made to Mr Lutz of the sum guaranteed by a right in rem, in the present case a right to attach, as an essential factor justifying the application of Article 13 of Regulation No 1346/2000?

63. I do not think so.

64. According to the Commission, where an effective right to attach in respect of the debtor's assets, although liable to be set aside, was created before the opening of the proceedings, it is irrelevant, in so far as the application of Article 13 of Regulation No 1346/2000 is concerned, whether the sum guaranteed by the right in rem was paid after the proceedings were opened. I find that argument convincing. In my view, only the creation of the right to attach should be decisive for the purposes of applying Article 13 of that regulation. Thus, it is only the creation of the right in rem that may be regarded as being the detrimental act. If the right in rem had not been created, the *lex fori concursus* would have applied and Mr Lutz would not have been able to rely on that provision. The payment made by the debtor company's bank to Mr Lutz is only the consequence of the enforceable lien created before the opening of the insolvency proceedings. Moreover, as his representative argued at the hearing, Mr Lutz was not able to foresee the opening of the insolvency proceedings, which was on 4 August 2008, either on the date on which he referred the matter to the Austrian courts or on the date on which that enforceable lien was created.

65. That interpretation is supported by the scheme of the mechanism introduced by Regulation No 1346/2000, which is based, first, on rights in rem in respect of assets situated in other Member States not being affected (Article 5), which amounts to excluding such rights from the effects of the insolvency proceedings and, secondly, on the legitimate expectations of creditors or third parties in the validity of an act being protected (Article 13).

66. As regards, first of all, the protection of rights in rem provided by Article 5 of Regulation No 1346/2000, that solution was adopted on substantive grounds, for example, the objective of protecting trade in the Member State where the assets are situated and legal certainty of the rights over them. Rights in rem have a very important function with regard to credit and the mobilisation of wealth. They insulate their holders against the risk of insolvency of the debtor and allow credit to be obtained under advantageous conditions.[47] Thus, legal certainty and protection of the legitimate expectations of creditors in transactions carried out appear, in my view, to be fundamental factors. Moreover, grounds of a procedural nature also justify increased protection for rights in rem, such as the institutional objectives of Regulation No 1346/2000 connected with the need to simplify and facilitate administration of the estate.[48]

67. Secondly, so far as Article 13 of Regulation No 1346/2000 is concerned, it is clear from the considerations set out in points 30 and 65 above that the solution adopted by that provision is designed, principally, to uphold the legitimate expectations of creditors or third parties in the validity of an act complying with the *lex causae*. In that regard, I concur with the view expressed by Mr Lutz and the Commission that, in the light of Austrian law and given all the circumstances of the case in the main proceedings, the act at issue was not open to challenge.[49]

47 — Virgós/Schmit Report, paragraph 97.

48 — Ibid., paragraph 97.

49 — See point 20 of this Opinion.

68. On the basis of all the above considerations, I am of the view that Article 13 of Regulation No 1346/2000 must be interpreted as being applicable to a situation in which a right in rem was created before the opening of insolvency proceedings and the sum attached under that right was paid after the opening of those proceedings.

C – *Limitation periods or other time-bars relating to actions to set aside transactions under the lex causae in the context of the exception rules laid down in Article 13 of Regulation No 1346/2000*

69. The second question concerns whether Article 13 of Regulation No 1346/2000 must be interpreted as meaning that the *lex causae* also governs legal effects connected with the lapse of time. Specifically, the referring court seeks to ascertain whether the exception rules laid down in Article 13 also cover limitation periods or other time-bars relating to actions to set aside transactions under the *lex causae*.

70. It is clear from the order for reference that, according to the rules of German law, the right to attach the credit balance on the bank accounts arose after the application to open the insolvency proceedings was filed and therefore, under Paragraph 88 of the InsO, it became unenforceable when the insolvency proceedings were opened.[50] However, according to the relevant rules of Austrian law, Ms Bäuerle’s action to set aside is time-barred as a result of the expiry of the period of one year from the opening of the insolvency proceedings within which the liquidator may bring a legal action. Under German law, however, the period within which such an action must be brought is three years.

71. The referring court states that German commentators differ on this point. Thus, according to some commentators, the *lex causae* should not govern the limitation periods or other time-bars applicable. Such time-limits, being provisions of procedural law should be inferred from the *lex fori concursus*.[51] On the other hand, other commentators contend that the reference to the *lex causae* should be understood as being an overall reference to all its rules, including those relating to limitation periods or other time-bars.

72. I cannot support the first view and therefore, as I shall explain below, I support the second.[52]

73. During my examination of the first question, I have already stated, at points 57 to 60 above, with regard to determining the scope of Article 13 of Regulation No 1346/2000, that its wording, context and objectives must all be taken into account.[53] It follows, inter alia, from that analysis that the phrase ‘in the relevant case’ refers to situations in which the act must not be capable of being challenged, in the light of all the concrete circumstances of the case. It seems clear to me that the lapse of time and, hence, the substantive and procedural rules which govern it belong to the circumstances of the present case.[54] In that regard, the referring court itself also confirms that the loss of a right owing to lapse of time could be a concrete circumstance of that kind.

74. Moreover, pursuing that same line of thought, it is appropriate to refer to the observations of Mr Lutz, the Portuguese Government and the Commission. They consider, in essence, that Article 13 of Regulation No 1346/2000 refers to an act that cannot be challenged by ‘any means’, so that it is not limited to substantive conditions for setting aside in accordance with the *lex causae*, but extends

50 — See also point 19 of this Opinion.

51 — The referring court states, in that regard, that some supporters of that view expressly exclude time-limits for exercising a right to set aside. In their view, those time-limits must be examined by reference to both the *lex fori concursus* and the *lex causae* in order to adopt the shorter of the two time-limits as the time-limit for exercising that right, which in the present case would favour Mr Lutz.

52 — The Commission observes in its pleadings that the argument that the limitation periods or other time-bars of the *lex causae* should not, by reason of their procedural nature, be taken into consideration in the context of Article 13 of Regulation No 1346/2000 is, in the present case, problematical in view of the substantive nature of a time-bar in Austrian law.

53 — See judgments in *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 20) and *Kronos Titan and Rhein-Ruhr Beschichtungs-Service* (C-43/13 and C-44/13, EU:C:2014:216, paragraph 25).

54 — Virgós/Schmit Report, paragraph 137.

therefore, in particular, to the provisions concerning limitation periods or other time-bars. As I stated above, that phrase means that, as in the present case, the act cannot be invalidated either under the rules on insolvency proceedings or under the rules of ordinary law applicable to it.[55] So far as the latter are concerned, and in view of the different nature, in particular, of limitation within the various legal systems, application of the *lex causae*, in my view, militates in favour of respect for consistency of the legal order to which it belongs and, consequently, for consistency between its substantive law and procedural law provisions.

75. In that regard, the Commission maintains in its pleadings that any interpretation of Article 13 of Regulation No 1346/2000 which excludes limitation periods classified, under national law, as procedural in nature would discriminate arbitrarily between the legal-theory models adopted by the Member States and would be an obstacle to a uniform interpretation of that provision.

76. That position is supported by the provisions of the Rome I Regulation.[56] Thus, the referring court, Mr Lutz and the Commission refer, rightly, to Article 12(1)(d) of that regulation, under which the influence of the lapse of time on a contractual right is determined by the law applicable to that right.[57] Specifically, according to that article, the law applicable to a contract by virtue of the Rome I Regulation governs in particular 'the various ways of extinguishing obligations, and prescription and limitation of actions',[58] which, therefore, have a *substantive classification* and are governed by the *lex causae*.

77. Furthermore, as stated in points 30, 65 and 67 above, Article 13 of Regulation No 1346/2000 is intended to protect the expectations of the creditor as regards the permanency of an act. Thus, a creditor who trusts in the validity of the act under the *lex causae* must not be caught unaware by the application of the insolvency law of another Member State.[59]

78. In any event, I am in no doubt that the rules on limitation or time-barring form part of the system for invalidating acts. Thus, where an act is open to challenge under the *lex causae* by means of an action to set aside, as in the case in the main proceedings, but the time-limit for bringing such an action has elapsed, I see no reason to consider that such an act remains open to challenge under Article 13 of Regulation No 1346/2000.[60]

79. Consequently, in view of the foregoing, I am of the view that the exception rules laid down in Article 13 of Regulation No 1346/2000 include limitation periods or other time-bars that are provided for by the *lex causae*.

55 — Ibid., paragraph 138, and Virgós Soriano, M., and Garcimartín Alférez, F.J., op. cit., p. 136. See also Virgós, M., and Garcimartín, F., op. cit., p. 136.

56 — Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

57 — The Commission adds that the rules of the Rome I Regulation relating to the law applicable require generally that an insolvency administrator should comply with foreign law in cases where another country is concerned; that does not present any major difficulties in practice.

58 — See, in that regard, Gaudemet-Tallon, H., 'Convention de Rome du 19 juin 1980 et règlement "Rome I" du 17 juin 2008. Détermination de la loi applicable. Domaine de la loi applicable', *JurisClasseur Europe Traité*, fasc. No 3201, 2009, pp. 119 to 121: 'The law applicable to the substance of the contract will determine the duration of the limitation and grounds of interruption and suspension. The same articles make lapse of rights subject to the law of the contract'. Within the legal systems of the States of continental Europe it is generally accepted that limitation is governed by the *lex causae*, Zrałek, J., *Przedawnienie w międzynarodowym obrocie handlowym, Zakamycze*, Krakow, 2005, p. 142.

59 — Virgós Soriano, M., and Garcimartín Alférez, F.J., op. cit., p. 135.

60 — Ibid., p. 136.

D – *The law applicable to determination of the procedural requirements for bringing an action to set aside*

80. By its third question, the referring court seeks to ascertain whether the procedural requirements for an action to set aside are determined, for the purpose of Article 13 of Regulation No 1346/2000, by the *lex causae* or by the *lex fori concursus*.

81. The order for reference states that, under German law, an informal declaration of the insolvency administrator's intention to assert a right to restitution suffices to eliminate a creditor's reliance on the validity of the payment. However, under Austrian law, set-aside may be sought only by legal action taken within one year after the opening of insolvency proceedings, and the creditor's reliance is irrelevant in that regard.

82. I support the Commission's argument that the beneficiary of the act is not aware either of the time-limits or the procedural rules under another legal system. The only decisive factor for him is whether, within the time-limit in force under his own legal system, the action to set aside was properly brought. Thus, in the present case, under Austrian law, whether or not the asset acquired is to be retained depends solely on whether an action for its return has or has not been brought within a period of one year from the opening of the insolvency proceedings, and, in the present case, the liquidator's out-of-court letter of 10 March 2009 is not such an action.

83. In that regard, recital 24 of Regulation No 1346/2000 states that to protect legitimate expectations and the certainty of transactions in States other than that in which proceedings are opened, provision should be made for a number of exceptions to the general rule. Thus, the conception of Article 13 of that regulation as a 'veto' available to the beneficiary does not require the liquidator to establish the revocability of an act under both the legal systems concerned.

84. Moreover, I refer to my analysis above of the phrase '[by] any means', in which I stated that the reference to the *lex causae* must be a reference to it as a whole.

85. I also note that formal rules may constitute not only substantive conditions but also procedural conditions. Accordingly, the rules for a right to set aside must be determined principally according to the *lex causae*. It is contrary to the coherence of the legal system applicable to distinguish between questions concerning limitation periods and those concerning procedure in order to make them subject to different laws. Consequently, in the present case, a detrimental act cannot be called into question by the out-of-court exercise of a right to set aside deriving from the *lex fori concursus*.

86. That view is, moreover, supported by the Report on the evaluation of the application of Regulation No 1346/2000.[61] Thus, several national reports emphasise that Article 13 of Regulation No 1346/2000 is necessary in order to protect the legitimate expectations of the parties with regard to the legal regime applicable to their legal relationship.[62]

87. However, I am not convinced by the German Government's reasoning, expressed in its oral observations at the hearing, that the full application of the *lex causae* would encounter practical difficulties in connection with the determination and examination by the liquidator of other legal systems. In my view, the duty to analyse the procedural requirements of other legal systems for bringing an action to set aside does not constitute an excessive burden for the liquidator. It is clear from the evaluation report mentioned above that Article 13 of Regulation No 1346/2000 requires nothing more than what is quite common in international cases (and therefore in private international

61 — See Heidelberg-Luxembourg-Vienna Report, p. 310.

62 — In that regard, see reply to question 24 in the Belgian, Estonian, Spanish, Latvian and Romanian national reports. For example, in the United Kingdom's report, Article 13 of Regulation No 1346/2000 is considered to be successful in upholding creditors' legitimate interests. Ibid., p. 310.

law), which is the need to take more than one national law into account. According to practical experience based on a considerable number of national reports, considering a second legal regime does not raise insurmountable difficulties.[63] Thus, that report did not suggest altering or limiting the reference to the *lex causae* in that article.[64]

88. Consequently, in the light of all the above considerations, I take the view that the procedural requirements to be observed in exercising a right under Article 13 of Regulation No 1346/2000 are determined by the *lex causae*.

VI – **Conclusion**

89. In the light of all the foregoing considerations, I propose that the Court should answer the question from the Bundesgerichtshof as follows:

(1) Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as applying to a situation in which a right in rem was created before the opening of the insolvency proceedings and the sum attached under that right was paid after the opening of the proceedings.

(2) The exception provided for in Article 13 of Regulation No 1346/2000 must be interpreted as also covering limitation periods or other time-bars relating to actions to set aside transactions under the *lex causae*.

(3) The procedural requirements to be observed for exercising the right under Article 13 of Regulation No 1346/2000 are determined by the *lex causae*.

63 — Ibid., p. 312.
64 — Ibid., p. 313.