



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 20 June 2018¹

Case C-379/17

Società Immobiliare Al Bosco Srl

(Request for a preliminary ruling
from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Recognition and enforcement of judgments — Time limit for enforcement laid down in the law of the State addressed for attaching property — Applicability of that time limit to an instrument adopted in another Member State and declared enforceable in the State in which enforcement is sought)

I. Introduction

1. Under Regulation (EC) No 44/2001,² a preventive attachment order made in one Member State is, in principle, enforceable in another Member State after it has been declared enforceable there. However, the procedures for enforcing preventive attachment orders vary significantly. It is therefore not clear which provisions of the law of the Member State in which enforcement is sought are applicable in the enforcement of foreign judgments. This is the context of the main proceedings.
2. This reference for a preliminary ruling will enable the Court to decide whether, under the system introduced by Regulation No 44/2001, a provision of the national law of the Member State in which enforcement is sought, which fixes the time limit within which a creditor must enforce a preventive attachment order, applies to such orders issued in other Member States.
3. More specifically, the referring court has doubts as to the applicability of a provision of German law, namely Paragraph 929(2) of the Zivilprozessordnung (Code of Civil Procedure, 'the ZPO'), in connection with the main proceedings which concern the enforcement of a preventive attachment order issued by Italian authorities.³

¹ Original language: French.

² Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

³ So far as I know, this case gives the Court a second opportunity to interpret the rules concerning recognition and enforcement of foreign judgments in a case in which the provisions of the ZPO concerning preventive attachment may be applied. See judgment of 10 February 1994, *Mund & Fester* (C-398/92, EU:C:1994:52).

4. However, the relevance of the judgment which the Court will deliver in the present case goes beyond the context of the States to which this case relates. This is an issue which may be important for all Member States in which national law lays down a time limit for submitting an application for enforcement of a preventive attachment order. Moreover, this issue also arises in connection with Regulation (EU) No 1215/2012,⁴ which replaced Regulation No 44/2001.

II. Legal context

A. *European Union law*

1. *Regulation No 44/2001*

5. Chapter III of Regulation No 44/2001, which includes Articles 32 to 58 of that regulation, governs primarily the recognition and enforcement of judgments delivered by the courts of the Member States, including the exequatur procedure.

6. Under Article 38(1) of Regulation No 44/2001:

‘A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.’

2. *Regulation No 1215/2012*

7. Chapter III of Regulation No 1215/2012 includes Articles 36 to 57 and concerns the recognition and enforcement of judgments given by the courts of the Member States. However, when Regulation No 1215/2012 was adopted, the EU legislature decided to introduce the system of automatic recognition and enforcement. To that end, Article 39 of Regulation No 1215/2012 provides that judgments given in other Member States may be enforced without the need to resort to the exequatur procedure.

8. Moreover, Article 41(1) of Regulation No 1215/2012 is worded as follows:

‘Subject to the provisions of this Section, the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed.’

B. *German law*

9. Paragraph 929(2) of the ZPO provides:

‘Enforcement of the attachment order shall not be permitted if one month has elapsed since the date on which the order was issued or on which it was served on the requesting party.’

⁴ Regulation 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).

10. Furthermore, under Paragraph 932(1) and (3) of the ZPO:

‘(1) Execution of an attachment order against real property ... shall be effected by registering a debt-securing mortgage in respect of the debt ...

...

(3) For the purposes of Paragraph 929(2) and (3), the application to register the mortgage shall be regarded as the enforcement of the attachment order.’

III. Facts in the main proceedings

11. On 19 November 2013, Società Immobiliare Al Bosco Srl, a company established under Italian law, obtained before the Tribunale di Gorizia (District Court, Gorizia, Italy) a preventive attachment order (*sequestro conservativo*) in a maximum amount of EUR 1 million against the movable and immovable assets of Gunter Hober (‘the defendant’).

12. By order of 22 August 2014, the competent court declared the judgment enforceable in Germany.

13. More than eight months later, on 23 April 2015, the applicant applied for registration of a debt-securing mortgage against the real property of the debtor in Germany.

14. That application for registration was rejected by the court of first instance.

15. The appeal court subsequently rejected the applicant’s appeal against that decision. That court considered that the mortgage could not be registered owing to the fact that the applicant had not observed the one-month time limit provided for in Paragraph 929(2) of the ZPO.

16. According to the appeal court, the enforceability accorded by Article 38 of Regulation No 44/2001 to a judgment given in another State is identical, in essence, to the enforceability conferred on a corresponding national judgment. Furthermore, the enforcement as such of judgments given in other Member States is a matter for the *lex fori*.

17. Moreover, according to the appeal court, the preventive attachment order under Italian law (*sequestro conservativo*) and the seizure order under German law are similar. Consequently, owing to that similarity, it is necessary to observe, in the main proceedings, the procedural rules applying to that order and, consequently, Paragraph 929(2) of the ZPO.

18. By its appeal on a point of law authorised by the appeal court and brought before the Bundesgerichtshof (Federal Court of Justice, Germany), the applicant maintains its request for registration of the debt-securing mortgage.

IV. The question referred for a preliminary ruling and the procedure before the Court

19. Under those circumstances the Bundesgerichtshof (Federal Court of Justice) decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is it compatible with Article 38(1) of Regulation No 44/2001 to apply a time limit which is laid down in the law of the State in which enforcement is sought, and on the basis of which an instrument may no longer be enforced after the expiry of a particular period, also to a functionally comparable instrument issued in another Member State and recognised and declared enforceable in the State in which enforcement is sought?’

20. The request for a preliminary ruling was received at the Court Registry on 26 June 2017.

21. Written observations have been submitted only by the Commission. The German Government and the European Commission attended the hearing which was held on 11 April 2018.

V. Analysis

22. By its question, the referring court wishes to know whether it is compatible with Article 38(1) of Regulation No 44/2001 to apply to a decision issued in another Member State a time limit laid down in the law of the Member State in which enforcement is sought, on the basis of which a preventive attachment order may no longer be enforced after the expiry of a particular period.

23. In order to reply to the question as formulated by the referring court, it is necessary to determine, in essence, whether a provision of the law of the Member State in which enforcement is sought on the basis of which a preventive attachment order may no longer be enforced after the expiry of a particular period, relates to the enforceability of the order, which is governed by the law of the Member State in which that order was issued (the Member State of origin), or whether that provision is to be regarded as a rule, relating to enforcement itself, of the law of the Member State in which enforcement of the order has been requested (the Member State addressed).

24. The referring court proceeds on the assumption that the Italian preventive attachment order is to be regarded, in functional terms, as a preventive attachment order under German law. In that context, the referring court has doubts as to whether, in this case, the conditions for enforcement of the Italian order in Germany are governed by the German provisions applying to enforcement of preventive attachment orders.

25. The referring court states, on the one hand, that, from a technical perspective, the time limit laid down in Paragraph 929(2) of the ZPO is not — unlike, for example, a rule placing a time bar on enforceable claims — connected with substantive law. From that perspective, that time limit could be classed as a matter of the law on enforcement in the strict sense, which is not governed by Regulation No 44/2001.

26. The referring court recognises, on the other hand, that application of the time limit laid down in Paragraph 929(2) of the ZPO results in the instrument ceasing to be enforceable as a consequence of the passage of time. In terms of outcome, the effect of the time limit is no different from the instrument being set aside in a review procedure. Against that background, the referring court wonders whether such a technical limitation on preventive attachment orders under the domestic law of the Member State in which enforcement is sought might be incompatible with the case-law of the Court of Justice, according to which the application of the procedural rules of the Member State in which enforcement is sought must not frustrate the principles laid down by Regulation No 44/2001.

A. *Positions of the parties*

27. The German Government states, first, that Regulation No 44/2001 concerns only the exequatur procedure. Actual enforcement of those orders is not governed by that regulation. Therefore, orders under Regulation No 44/2001 are enforced in accordance with the procedural rules of the national law of the Member State addressed, such as Paragraph 929(2) of the ZPO.

28. Secondly, the German Government refers to the judgments in *Apostolides*⁵ and *Prism Investments*⁶ and points out that the Court has already held that there is no reason to attribute to a judgment, at the time of its enforcement, effects which a judgment of the same type, given directly in the Member State addressed, would not produce. That government considers that, in the light of that case-law, it is necessary to apply the time limit laid down in Paragraph 929(2) of the ZPO to the preventive attachment order issued in Italy owing to the fact that a similar judgment, adopted in Germany, can no longer be enforced after one month has elapsed.

29. Finally, thirdly, the German Government, invoking the provisions of Regulation No 1215/2012, considers that the wording of the second sentence of Article 41(1) of that regulation supports the position set out above.

30. On the other hand, the Commission considers that reasoning based essentially on the judgment in *Prism Investments*⁷ does not take proper account of the cross-border nature of the main proceedings.

31. The Commission submits that the Court has indicated in its case-law that the distinction between the exequatur procedure and enforcement in the strict sense cannot frustrate the fundamental principles of Regulation No 1215/2012, particularly that of the free movement of judgments. Therefore, even if the exequatur procedure provided for by Regulation No 44/2001 had the effect of incorporating a foreign judgment into the legal order of the Member State addressed, a 'blind' application of the law of that Member State would fail to take account of the origin of the instrument to be enforced. In the present case, it may be that, owing to the application of Paragraph 929(2) of the ZPO at the time of the enforcement of the Italian preventive attachment order, enforcement of that order is no longer possible in the State addressed, even though it is enforceable in the Member State of origin.

32. In view of the doubts of the referring court and of the arguments put forward by the parties, I shall first analyse whether a rule which establishes a time limit for requesting enforcement of a preventive measure, such as Paragraph 929(2) of the ZPO, is to be classified as a procedural rule of the *lex fori* of the Member State addressed. I shall then reconsider the insights gained from that classification in the light of the case-law of the Court of Justice relating to the effects produced by foreign judgments in the system introduced by Regulation No 44/2001 with regard to exequatur. Finally, I shall compare these issues with the solutions adopted by the EU legislature in Regulation No 1215/2012.

⁵ Judgment of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271).

⁶ Judgment of 13 October 2011, *Prism Investments* (C-139/10, EU:C:2011:653).

⁷ Judgment of 13 October 2011, *Prism Investments* (C-139/10, EU:C:2011:653).

B. Classification

1. Preliminary observations

33. It should be noted that the Court held, with regard to the Brussels Convention,⁸ that that convention merely regulated the procedure for obtaining an order for the enforcement of foreign enforceable instruments and did not deal with enforcement itself, which continues to be governed by the domestic law of the court in which enforcement is sought.⁹ The Court subsequently confirmed that that case-law was applicable to Regulation No 44/2001 since that regulation also provides for the *exequatur* procedure.¹⁰

34. In the context of that case-law, the German Government states, as does the referring court, that Paragraph 929(2) of the ZPO is classified, under German law, as a procedural rule. Consequently, at least according to the referring court, the time limit laid down by that rule is a matter of the law of enforcement, which is not governed by Regulation No 44/2001.

35. In that regard, I note that most of the terms used by the EU legislature in acts of judicial cooperation in civil matters, including Regulation No 44/2001, are autonomous in nature.¹¹ Therefore, the classification of rules such as Paragraph 929(2) of the ZPO in the national context cannot be decisive for resolving the legal problem raised in the question referred for a preliminary ruling.

36. Moreover, for the purposes of the application of Regulation No 44/2001, the autonomous classification of ‘procedural rule’ attributed to Paragraph 929(2) of the ZPO is also not decisive as regards the reply to be given to the question referred. In the present case, it is not disputed that Italian law also lays down a time limit for requesting enforcement of a preventive attachment order. There is nothing to indicate that a provision laying down such a time limit cannot also be classified as a ‘procedural rule’ in the same way as Paragraph 929(2) of the ZPO. What is decisive is the issue of whether, according to the autonomous classification, that provision of the ZPO should be applied at the time of the enforcement in Germany of preventive attachment orders given in other Member States.¹²

37. The referring court considers that it is not necessary to examine whether Italian law also lays down a time limit for requesting enforcement of a preventive attachment order.

38. More specifically, that court maintains that, in the main proceedings, the German Land Registry authority cannot determine whether the law of the Member State in which the judgment was given provides for a time limit for enforcement, and, if so, what the rules of that enforcement are, nor is it permitted to apply a rule of foreign law. For the procedure before that authority, all that counts is whether or not Paragraph 929(2) of the ZPO must be applied. Finally, if, because of the expiry of the time limit provided for in Italian law, the instrument were no longer to be enforceable, it would be for the debtor to assert this by challenging the declaration of enforceability.

⁸ Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32).

⁹ See judgments of 2 July 1985, *Deutsche Genossenschaftsbank* (148/84, EU:C:1985:280, paragraph 19); of 3 October 1985 (*Capelloni and Aquilini*, 119/84, EU:C:1985:388, paragraph 16); of 4 February 1988, *Hoffmann* (145/86, EU:C:1988:61, paragraph 27); and of 29 April 1999 (*Coursier*, C-267/97, EU:C:1999:213, paragraph 28).

¹⁰ See judgments of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271, paragraph 69), and of 13 October 2011, *Prism Investments* (C-139/10, EU:C:2011:653, paragraph 40).

¹¹ See my Opinion in *Mahnkopf* (C-558/16, EU:C:2017:965, point 32). See also the Opinion I delivered in *Höszig* (C-222/15, EU:C:2016:224, points 31 and 47).

¹² I note in that regard that academic commentators are not unanimous with regard to the application of national provisions imposing a time limit for requesting enforcement of a preventive measure in the enforcement of foreign judgments. Some writers tend to think that such provisions are not intended to apply in that situation. See, inter alia, Kropholler, J., von Hein, J., *Europäisches Zivilprozessrecht: Kommentar zu EuGVO, Lugano-Übereinkommen*, 10th edition, Verlag Recht und Wirtschaft, C.H. Beck, Frankfurt am Main, 2011, pp. 615 and 616, paragraph 10. See, to the contrary, Schack, H., *Internationales Zivilverfahrensrecht mit internationalem Insolvenz- und Schiedsverfahrensrecht*, C.H. Beck, Munich, 2014, paragraph 1066.

39. Accordingly, the referring court considers that, apart from the enforcement procedure, the time limit provided for in Italian law is also applicable to the judgment whose enforcement has been requested in the main proceedings. It follows that, on German territory, a preventive attachment order given abroad is subject to the two regimes introduced, on the one hand, by the Member State of origin and, on the other, by the Member State addressed.

40. In that regard, I wonder whether fulfilment of that dual requirement by the creditor is not the weak point in the interpretation according to which Paragraph 929(2) of the ZPO should be applied as a rule of the *lex fori* concerning enforcement of foreign preventive attachment orders. In that case, the provision of German law which imposes a time limit for requesting enforcement would be applied as a provision governing enforcement itself, and a provision of the law of the Member State of origin establishing a similar time limit would be applied as a rule determining the enforceability of a foreign judgment.¹³

41. In the light of that finding, I have doubts, first, concerning the link between, on the one hand, the enforceability of a preventive attachment order, assessed in the light of a provision of the law of the Member State of origin which provides for a time limit for requesting enforcement of that order and, on the other hand, a limitation on actual enforcement owing to a similar time limit laid down by a provision of the Member State addressed.

42. Second, I wonder whether, from a systemic point of view, a provision such as Paragraph 929(2) of the ZPO is intended to be applied in isolation, irrespective of the cross-border context and origin of the judgment for which enforcement is sought in Germany.

43. Finally, third, I wonder whether the purpose of that provision of German law can be reconciled with its application, which does not take into account the cross-border context and origin of a preventive attachment order.

2. *The link between enforceability and a limitation on enforcement*

44. According to the Commission's observations, although, under German law, a preventive attachment order loses legal validity owing to the expiry of a time limit, that is not the case under Italian law, which provides that only the formal annulment of that preventive attachment order would deprive it of all legal validity. Moreover, whereas, under German law, failure to comply with that time limit is raised by the court of its own motion, under Italian law, it is the defendant himself who must invoke the expiry of that time limit. Enforcement of a preventive attachment order under Italian law is therefore, in principle, still possible even after expiry of the time limit.

45. Consequently, the enforceability of the preventive attachment order, which, under Article 38 of Regulation No 44/2001, is a prerequisite of enforcement of that order in the Member State addressed,¹⁴ may be jeopardised in so far as a creditor cannot enforce it in Germany, irrespective of the enforceability of that order under the law of the Member State of origin.

¹³ See, to that effect, with regard to the enforceability of a judgment for which enforcement is sought under Regulation No 44/2001, judgment of 13 October 2011, *Prism Investments* (C-139/10, EU:C:2011:653, paragraphs 37 and 39).

¹⁴ As regards the enforceability of a foreign judgment, see judgments of 29 April 1999, *Coursier* (C-267/97, EU:C:1999:213, paragraph 23), and of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271, paragraphs 65 and 66). I would point out that, in academic writings, it has even been suggested that the application of a provision of Spanish law, which provides for a time limit similar to that provided for in Paragraph 929(2) of the ZPO, in the enforcement of a foreign judgment is not in accordance with Article 38 of Regulation No 44/2001 in so far as a judgment cannot be enforced in the Member State addressed irrespective of the enforceability of that judgment under the law of the Member State of origin. See Steinmetz, A., 'Anwendbarkeit der Ausschlussfrist in der spanischen ZPO auch auf ausländische Vollstreckungstitel?', *Recht der internationalen Wirtschaft*, No 5, 2009, p. 304.

46. That observation may be an indication of the fact that Paragraph 929(2) of the ZPO does not concern the enforcement of a preventive measure but rather its enforceability, at least to the same extent as a similar provision in Italian law.

3. The relationship between the conditions for granting a preventive attachment order and the time limit for requesting enforcement of an attachment measure

47. A preventive attachment order is an exception to the general rule that only decisions which are taken at the end of proceedings on the merits and which have become final may be the subject of enforcement. Therefore, notwithstanding the fact that, owing to its exceptional nature, preventive attachment does not satisfy the creditor,¹⁵ it can only be ordered if certain conditions are met.

48. Indeed, in most legal systems, it is the fact that subsequent enforcement of a judgment on the merits is impossible which constitutes such a basic condition. However, according to comparative analyses, whereas the fundamental objective of preventive attachment determines that general condition, the national rules reveal differences as regards the detailed conditions under which a preventive attachment order may be adopted.¹⁶

49. The conditions for granting attachment are determined by the legislative choices made by the Member States in their search for a balance between the interests of creditors and those of debtors. The introduction of a time limit for the creditor to request enforcement of a preventive measure is also a consequence of that search.

50. It is apparent from the request for a preliminary ruling that the purpose of Paragraph 929(2) of the ZPO is to protect the debtor. More specifically, according to the referring court, that provision is intended to preclude the possibility of decisions based on a summary expedited procedure remaining amenable to execution and hence enforceable over an extended period and in spite of potential changes in circumstances. In the same vein, the German Government stated at the hearing that the time limit provided for in Paragraph 929(2) of the ZPO is intended to preclude a preventive attachment order being enforced after one month has elapsed even if the circumstances have significantly changed.

¹⁵ I consider that a preventive attachment order, such as that for which enforcement is sought in the main proceedings, constitutes a 'protective measure' within the meaning of Article 31 of Regulation No 44/2001. It is therefore a measure intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter. See judgment of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149, paragraph 34).

¹⁶ See, to that effect, Goldstein S., 'Recent developments and problems in the granting of preliminary relief: a comparative analysis', *Revue Hellénique de Droit International*, 1987-1988, 40th and 41st years p. 13. It seems to me that the conditions under which a preventive attachment order may be made are different from the point of view, inter alia, of the nature and seriousness of the threat generated by a failure to effect seizure. See, for example, in German law, paragraph 917 of the ZPO, which provides that a preventive attachment order may be issued where enforcement of the final judgment is impossible or significantly more difficult, this last condition being described by academic commentators as a 'much more specific' condition. See Cuniberti, G., *Les mesures conservatoires portant sur des biens situés à l'étranger*, LGDJ, Paris, 2000, p. 267. A similar condition is laid down, for example, in Polish law, in Paragraph 730¹(2) of the Kodeks postępowania cywilnego (Code of Civil Procedure) of 17 November 1964 (Dz. U. of 2014, position 101). So far as concerns Italian law, Paragraph 671 of the codice di procedura civile (Code of Civil Procedure) provides that a preventive attachment order may be issued where there is a risk with regard to recovery of the debt (*periculum in mora*). Therefore, Paragraph 671 of that code does not expressly refer to cases in which that of seizure may cause problems for the enforcement of the final judgment. With regard to preventive attachment in Italian law, see also de Cristofaro, M., 'National Report — Italy', in Harsági, V., Kengyel, M. (ed.), *Grenzüberschreitende Vollstreckung in der Europäischen Union*, Sellier, Munich, 2011, p. 119. However, I am aware that it is necessary to take into account the fact that the conditions for issuing a seizure order which are set out in legal texts are subject to developments in case-law which may extend or limit the differences between the legal systems of the Member States.

51. Moreover, even those academic commentators who consider that it is above all the effects of the preventive measures which vary significantly, whereas the conditions for granting them are much more similar,¹⁷ believe that those conditions highlight the fact that preventive measures are irrevocably linked to the proceedings in which they are issued.¹⁸ It may therefore be argued that, in the cross-border context, such a link exists between a preventive attachment order and rules of the Member State of origin.

52. Furthermore, from that perspective, the introduction by a legislature of a time limit such as that provided for in Paragraph 929(2) of the ZPO is to some extent comparable with the situation in which the court specifies in its ruling the time limit within which specific actions must be taken by the creditor. If a ruling were to contain such information, this would undoubtedly be an intrinsic part of that ruling.

53. I therefore consider that a time limit such as that laid down in Paragraph 929(2) of the ZPO cannot be disassociated from the conditions under which preventive attachment may be ordered and, in general, from the law of the Member State of origin. Consequently, such a time limit cannot be applied as a rule of enforcement, in the strict sense, of the *lex fori* in connection with the enforcement of foreign judgments in Germany.¹⁹

4. The purpose of a provision laying down a time limit for requesting enforcement of an attachment measure

54. It should be noted that it is apparent from the request for a preliminary ruling that the principal aim of Paragraph 929(2) of the ZPO is to ensure that a preventive measure is not enforced after a relatively long period and in spite of potential changes in circumstances. Moreover, as regards foreign judgments, it is apparent from the order for reference, and also from the explanations given by the German Government, that that time limit is calculated from the date on which a creditor is notified of a declaration of enforceability.

55. However, a creditor is not required to request enforcement of a preventive attachment order immediately after obtaining that order in the Member State of origin. He may therefore delay in making that request, notwithstanding a potential change in circumstances occurring after he has obtained the preventive attachment order.

56. Consequently, the explanation that Paragraph 929(2) of the ZPO applies as a rule of the *lex fori* of the Member State addressed and that the time limit laid down by that provision is calculated from the date on which an enforcement declaration is notified would enable a creditor automatically to disregard that potential change in circumstances and to enforce a preventive measure.

57. Therefore, I consider that the application of Paragraph 929(2) of the ZPO in connection with the enforcement of foreign judgments cannot be reconciled with the purpose of that provision, as set out by the referring court and the German Government.

17 Cuniberti, G., *Les mesures conservatoires portant sur des biens situés à l'étranger*, LGDJ, Paris, 2000, p. 267.

18 Cuniberti, G., op. cit. p. 255. As regards preventive measures in general, without reference to the issue of diversity of the conditions for granting them, see, to that effect, Hess, B., 'The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission's Proposed Recast', *Common Market Law Review* 2012, p. 1098.

19 See, to that effect, Wittmann, J., 'BGH, 11.05.2017 — V ZB 175/15: Anwendbarkeit der Vollziehungsfrist aus § 929 Abs. 2 ZPO bei Vollstreckung ausländischer Titel nach Maßgabe der EuGVVO' *Zeitschrift für Internationales Wirtschaftsrecht* 2018, No 1, p. 42, who, however, emphasises the fact that the temporal limitation imposed by Paragraph 929(2) of the ZPO is based not on the enforcement procedure itself but on the urgency procedure leading to enforcement.

58. It is apparent from this analysis, first, that a national provision such as Paragraph 929(2) of the ZPO concerns the enforceability of a preventive attachment order rather than its enforcement in the strict sense. Second, such a time limit cannot be applied in isolation, irrespective of the origin of a judgment for which enforcement is sought. Third, if we endorse the view of the referring court and the German Government with regard to the purpose of Article 929(2) of the ZPO, that provision could not fulfil its role if it were applied to foreign judgments whose enforcement has been sought in Germany.

59. In the light of the foregoing, I consider that a national provision which lays down a time limit for the creditor to apply for enforcement, such as Paragraph 929(2) of the ZPO, should not be classified as a procedural rule applicable in the case of enforcement in Germany of a preventive attachment order issued in another Member State.

C. The equivalent effects of national and foreign judgments

60. It is established case-law that there is no reason for granting to a judgment given in one Member State, when it is enforced in another Member State, rights which it does not have in the Member State of origin.²⁰ This is what is generally called the doctrine of ‘extended effects’.²¹ It is apparent from the judgment in *Health Service Executive*,²² given within the framework of Regulation (EC) No 2201/2003²³ but, to my mind, applicable to Regulation No 44/2001, that that limitation should be taken to mean *inter alia* that a foreign judgment may only serve as a basis for enforcement in the Member State addressed within the limitations of the judgment itself.

61. There is also no reason for granting to such a judgment effects that a similar judgment given directly in the Member State in which enforcement is sought would not have.²⁴ That limitation concerning the effects of judgments enforced in the Member State addressed is called the ‘doctrine of equivalent effects’.²⁵

62. On the basis of that case-law, the German Government considers that, in order to ensure equal treatment of foreign and national judgments, Paragraph 929(2) of the ZPO should be applied for the enforcement in Germany of Italian preventive attachment orders.

20 See, to that effect, under the Brussels Convention, judgment of 4 February 1988, *Hoffmann* (145/86, EU:C:1988:61, paragraph 11). So far as concerns Regulation No 44/2001, see judgments of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271, paragraph 66); of 13 October 2011, *Prism Investments* (C-139/10, EU:C:2011:653, paragraph 40); and of 15 November 2012, *Gothaer Allgemeine Versicherung and Others* (C-456/11, EU:C:2012:719, paragraph 34).

21 See, to that effect, Miguel Asensio, P.A., ‘Recognition and Enforcement of Judgments in Intellectual Property Litigation: the Clip Principles’, in Basedow, J., Kono, T., And Metzger, A. (ed.), *Intellectual Property in the Global Arena — Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US*, Mohr Siebeck, Tübingen, 2010, p. 251; Requejo Isidro, M., ‘The Enforcement of Monetary Final Judgments Under the Brussels Ibis Regulation (A Critical Assessment)’, in V. Lazić, Stuij S. (ed.), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme*, Springer, The Hague, 2017, p. 88.

22 Judgment of 26 April 2012, *Health Service Executive* (C-92/12 PPU, EU:C:2012:255, paragraphs 141 and 143).

23 Council Regulation of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

24 See judgments of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271, paragraph 66), and of 13 October 2011, *Prism Investments* (C-139/10, EU:C:2011:653, paragraph 40). It should be pointed out that that limitation concerning the effects granted to a foreign judgment was introduced by the Court in its case-law much later than the first limitation, relating to the doctrine of extended effects, which had already been enshrined in the judgment of 4 February 1988, *Hoffmann* (145/86, EU:C:1988:61, paragraph 11). I note that, in the Opinion delivered in the case which led to that judgment, Advocate General Darmon also envisaged that second limitation. He considered that that limitation was explained by the need to harmonise interpretations and the desirability of preventing excessive recourse to the public policy exception. See the Opinion of Advocate General Darmon in *Hoffmann* (145/86, not published, EU:C:1987:358, point 20). However those considerations are not reflected in the Court’s judgment.

25 See the publications cited in footnote 20.

63. I do not share that point of view, I consider, as does the Commission, that the German Government's position does not take into account certain cross-border aspects of the case in the main proceedings and the consequences of applying Paragraph 929(2) of the ZPO in such a case. Moreover, I consider that that position is based on an incomplete reading of the Court's case-law.

1. Concerning a possible lack of consistency between the procedural rules of the Member State of origin and the Member State addressed

(a) Definition of the issues

64. It is apparent from the order for reference, and from the German Government's views presented at the hearing, that in national situations, when it is the German authorities which issue a preventive attachment order and then enforce that order, a creditor who has not observed the time limit provided for in Paragraph 929(2) of the ZPO, may immediately obtain another preventive order.

65. However, if it is assumed that, in a cross-border context, Paragraph 929(2) of the ZPO applies as a rule of the *lex fori* of the Member State addressed, there is no clear answer to the question of how the creditor must proceed when he has not observed the time limit laid down by that provision.

66. I think it is symptomatic that neither the referring court nor the German Government has put forward the argument that the creditor may lodge another application for a declaration of enforceability in Germany in order to reopen the time limit provided for in Paragraph 929(2) of the ZPO. I wonder if that solution is in accordance with the spirit of Paragraph 929(2) of ZPO. In any event, the renewal of the application makes it possible to postpone indefinitely the date of registration of the debt-securing mortgage on the basis of the same order. It seems to me that such a possibility goes against the logic of that provision.

67. I note that, in response to a question put at the hearing, the German Government stated that a creditor may request another attachment order in the Member State of origin, if the time limits provided for in that Member State have also expired. On the other hand, the Commission stated that, in the present case, the creditor could not request a second order in Italy, since the initial preventive attachment order issued by the authorities of that Member State was still enforceable for the reasons set out in point 44 of this Opinion.

68. It is apparent from those observations that a creditor who has not observed the time limit provided for in Paragraph 929(2) of the ZPO should probably apply to the courts of the Member State of origin, in this case the Italian courts, in order to obtain a second preventive attachment order.

(b) The link between the procedural rules of the Member State of origin and those of the Member State addressed

69. Notwithstanding those considerations, it seems to me that the analysis relating to the question referred to the Court for a preliminary ruling should not be limited to the context of the present case. In this case, the judgment for which enforcement is sought in Germany was given under Italian law which provides for a time limit rather similar to that provided for in Paragraph 929(2) of the ZPO. However, I expect that the same doubts regarding the application of this provision in the enforcement of a preventive measure, declared enforceable in Germany, would arise with regard to any preventive attachment order issued in other Member States.

70. Therefore, although I do not wish to comment on the applicant's current position under Italian law, I consider that, in a situation such as that of the main proceedings, the creditor is in principle required to establish once again, in support of his second application before the authorities of the Member State of origin, at the very least, the plausibility of the circumstances in which a preventive attachment order may be issued. Consequently, it is not the second grant of the same order, but the adoption of a new order arising from a fresh assessment of all the conditions which must be met for ordering a preventive attachment.

71. Moreover, it cannot automatically be ruled out that the law of the Member State of origin does not establish, for various reasons, the right to reapply for an order. For example, from the perspective of the authorities of the Member State of origin, a new application may be inadmissible while the previous order has not been annulled or has not lost its legal validity for other reasons.²⁶

72. In certain cases, it could happen that the application of the rules established in the Member State addressed, namely, in the present case, the time limit provided for in paragraph 929(2) of the ZPO, in the enforcement of a judgment given in another Member State creates a deadlock. In particular, a debtor who has not observed the time limit laid down in that provision could no longer seek enforcement of that decision in Germany and, at the same time, could not apply for another order before the authorities of the Member State of origin.

2. Preserving the effectiveness of Regulation No 44/2001

(a) Reminder of the case-law concerning the preservation of the effectiveness of Regulation No 44/2001

73. I should point out that, with regard to the provisions of the Brussels Convention, the Court has stated that the application of the procedural rules of the Member State addressed must not impair the effectiveness of the system established by that convention.²⁷ In judgments in line with that case-law, the Court has also stated, with regard more specifically to national rules governing actual enforcement, that the application, for the purposes of the execution of a judgment, of the procedural rules of the State in which enforcement is sought may not impair the effectiveness of the scheme of the convention as regards enforcement orders by frustrating the principles laid down in that regard, whether expressly or by implication, by Regulation No 44/2001 itself.²⁸ The Court has subsequently confirmed that that case-law is transposable to Regulation No 44/2001.²⁹

74. I note, moreover, that that logic has also inspired the case-law relating to injunctions prohibiting a party from commencing or continuing legal proceedings before a court. The Court has held that such injunctions may limit the application of the rules on jurisdiction and render ineffective the specific mechanisms provided for in cases of *lis alibi pendens* and of related actions.³⁰ The Court has subsequently held that, in obstructing the court of another Member State in the exercise of the

²⁶ Moreover, it may happen that the adoption of a second preventive attachment order in the Member State of origin would involve the annulment of the previous order. Thus, in a situation in which a creditor has previously seized assets belonging to the debtor situated in the Member State of origin on the basis of that order, the adoption of a second order might cancel the effects of that seizure.

²⁷ As regards the procedural provisions governing the scope of the review conducted by the Court of cassation, see judgment of 15 November 1983, *Duijnste* (288/82, EU:C:1983:326, paragraph 13 and 14). As regards the procedural rules concerning the admissibility of applications, see judgment of 15 May 1990, *Hagen* (C-365/88, EU:C:1990:203, paragraphs 21 and 22).

²⁸ See judgments of 3 October 1985, *Capelloni and Aquilini* (119/84, EU:C:1985:388, paragraph 21), and of 4 February 1988, *Hoffmann* (145/86, EU:C:1988:61, paragraph 29).

²⁹ See judgment of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271, paragraph 69).

³⁰ See judgment of 27 April 2004, *Turner* (C-159/02, EU:C:2004:228, paragraphs 29 and 30).

powers conferred on it by Regulation No 44/2001, such injunctions, issued in an arbitration, bar an applicant from access to the court before which he has brought proceedings under the rules of jurisdiction provided for by that regulation and therefore deprive the applicant of a form of judicial protection to which it is entitled.³¹

(b) Specific application of the case-law relating to the preservation of the effectiveness of Regulation No 44/2001

75. So far as concerns preventive measures, I consider that the fact that the application of a rule, such as Paragraph 929(2) of the ZPO, to foreign preventive attachment orders may create a deadlock, as explained in points 71 and 72 this Opinion, may undermine the effectiveness of the system under Regulation No 44/2001.

76. Indeed, I consider, as does the Commission, that it is conceivable that, in a situation such as that in the main proceedings, the creditor may apply, pursuant to Article 31³² of Regulation No 44/2001, for a preventive measure before the authorities of the Member State addressed. Nevertheless, that creditor would be at a disadvantage since he would be obliged to have recourse to the courts of another Member State, with all that that implies.³³ That confirms, in my view, the possibility of creating a deadlock as a result of applying Paragraph 929(2) of the ZPO when enforcing the foreign judgment.

77. In that case, it may be that the courts of a Member State, which have jurisdiction to hear the case on the merits, cannot afford a creditor the legal protection to which he is entitled at the stage of the proceedings leading to the adoption of the final judgment. Also, the jurisdiction of those courts, which is based on the provisions of Regulation No 44/2001, would be undermined if a creditor were required to have recourse to the courts of another Member State in order to lodge an application for a preventive attachment order although he wished, correctly, to lodge that application before the Court having jurisdiction to hear the case on the merits.

78. Therefore, in the light of the case-law relating to the preservation of the effectiveness of Regulation No 44/2001, I consider that a rule of the Member State addressed, such as Paragraph 929(2) of the ZPO, is not intended to be applied in the enforcement of preventive attachment orders from other Member States.

(c) Interim conclusion

79. I would point out that it is apparent from the foregoing that a provision such as Paragraph 929(2) of the ZPO cannot be classified as a rule applying to the enforcement of foreign judgments under the system introduced by Regulation No 44/2001.³⁴

80. Even if it were considered that that provision should be classified as an enforcement provision, in the strict sense, of the *lex fori* of the Member State addressed, it cannot be applied in connection with the enforcement of foreign judgments in Germany since it would undermine the effectiveness of that regulation.

³¹ See judgment of 10 February 2009, *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69, paragraph 3).

³² Under Article 31 of Regulation No 44/2001, application may be made to the courts of a Member State for such provisional or 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.

³³ In any event, it would be a new application, based on the current circumstances and examined again by the judicial authorities of another Member State. Moreover, only measures provided for by the law of that Member State can be requested. Furthermore, the creditor would be obliged to follow the procedure established by the law of that Member State. In that regard, it should be noted that, according to the contracting Member States of the Brussels Convention, national procedural rules as to interim measures are liable to vary to a greater degree than rules governing proceedings on the substance. See, to that effect, judgment of 6 June 2002, *Italian Leather* (C-80/00, EU:C:2002:342, paragraph 42).

³⁴ See points 33 to 59 of this Opinion.

81. Moreover, in my view, the rationale and effects of applying the case-law relating to the preservation of the effectiveness of Regulation No 44/2001 recall the solution recently adopted by the Court in its case-law relating to Regulation (EU) No 650/2012.³⁵ It is apparent from that case-law that classification of national provisions for the purpose of applying them in the circumstances covered by Regulation No 650/2012 cannot impede the attainment of the objectives of that regulation or the effectiveness of its provisions.³⁶ Therefore, the effectiveness of an act of EU law which concerns judicial cooperation in civil matters is likely to have an impact on the autonomous classification, made for the purposes of applying that act, of national provisions which fall within its scope. In the same vein, Paragraph 929(2) of the ZPO should likewise not be classified as an enforcement rule in the strict sense since it is liable to undermine the effectiveness of Regulation No 44/2001.

D. The impact of the abolition of the exequatur procedure under Regulation No 1250/2012 on the foregoing considerations

82. This request for a preliminary ruling concerns only Regulation No 44/2001. Nevertheless, the referring court considers that the question it has referred also arises in connection with Regulation No 1215/2012. Moreover, the parties also referred to that regulation in the pleadings they presented at the hearing.

83. In that regard, I consider that the insights gained from Regulation No 1215/2012 are not likely to affect the considerations set out above.

84. First, although Regulation No 44/2001 does not expressly govern the issue of the role of the *lex fori* of the Member State addressed in the enforcement of foreign judgments, Regulation No 1215/2012 provides, in Article 41(1), inter alia, that a foreign judgment shall be enforced in the Member State addressed *under the same conditions* as a judgment given in that Member State.³⁷

85. However, notwithstanding the abolition of the exequatur procedure under the system introduced by Regulation No 1215/2012, the distinction between enforceability and enforcement in the strict sense, governed by the *lex fori* of the Member State addressed, was maintained by the EU legislature in that regulation.³⁸

35 Regulation of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ 2012 L 201, p. 107).

36 See judgment of 1 March 2018, *Mahnkopf* (C-558/16, EU:C:2018:138). See also my Opinion in *Mahnkopf* (C-558/16, EU:C:2017:965, points 101 and 102). See also, to that effect, judgment of 12 October 2017, *Kubicka* (C-218/16, EU:C:2017:755, paragraph 56).

37 Furthermore, academic commentators have maintained that the reference to the 'same conditions' in Article 41(1) of that regulation does not apply only to the role of the *lex fori*, but also establishes the principle of non-discrimination of foreign judgments. See, to that effect, Grzegorzczuk, P., 'Wykonywanie w Polsce orzeczeń pochodzących z państw członkowskich Unii Europejskiej objętych reżimem automatycznej wykonalności', in Marciniak, A. (ed.), *Egzekucja sądowa w świetle przepisów z zakresu międzynarodowego postępowania cywilnego*, Currenda, Sopot, 2015, p. 142. Moreover there is also a reference to the 'same conditions' in Article 47(2) of Regulation No 2201/2003. In the judgment of 1 July 2010, *Povse* (C-211/10 PPU, EU:C:2010:400), the Court considered that that reference must be interpreted strictly. According to the Court, that reference can refer only to the procedural arrangements for enforcement. Moreover, that reference can on no account provide a substantive ground of opposition to the judgment at issue owing to the fact that circumstances had changed after its adoption. The reason given was therefore based on the same logic as Paragraph 929(2) of the ZPO, namely, according to the referring court and the German Government, to prevent enforcement owing to a potential change in circumstances.

38 See, to that effect, Cuniberti, G., Rueda, I., 'European Commentaries on Private International Law', vol. I, *Brussels Ibis Regulation-Commentary*, Magnus, U., and Mankowski, P. (ed.), Otto Schmidt, Cologne, 2016, p. 846; Hartley, T., *Civil Jurisdiction and Judgments in Europe. The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention*, Oxford University Press, Oxford, 2017, p. 302; Kramer, X., 'Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights', *Netherlands International Law Review*, 2013, No 60(3), p. 360; Nuyts, A., 'La refonte du règlement Bruxelles I', *Revue critique de droit international privé*, 2013, No 1, p. 1. et seq. paragraph 15.

86. This is also the interpretation offered by the German Government which, while reaching different conclusions, states that the second sentence of Article 41(1) of Regulation No 1215/2012 states the principles which were applied under Regulation No 44/2001. Moreover, some writers consider that that provision of Regulation No 1215/2012 consolidates the principles stated by the Court in its case-law relating to Regulation No 44/2001.³⁹

87. Therefore, there is nothing to indicate that the entry into force of Regulation No 1215/2012 is likely to affect the classification of a provision such as Paragraph 929(2) of the ZPO.

88. Secondly, I consider that, under Regulation No 1215/2012, the problem of a deadlock created by the application of a national rule, such as Paragraph 929(2) of the ZPO, as a rule of the Member State addressed arises in the same way. Therefore, the case-law relating to the preservation of the effectiveness of the system under Regulation No 1215/2002 is intended to apply.⁴⁰

89. For these reasons, I consider that neither the insights gained from the abolition of exequatur nor those gained from the introduction of a provision like Article 41(1) of Regulation No 1215/2012 can justify the theory that, under Regulation No 44/2001, a provision such as Paragraph 929(2) of the ZPO can be applied in the enforcement of foreign judgments in Germany.

90. To conclude, a provision, first, which concerns not the execution of a foreign judgment but rather the exequatur procedure⁴¹ and, second, the application of which at the time of enforcement undermines the effectiveness of the system under Regulation No 44/2001 does not constitute an enforcement rule of the *lex fori* of the Member State addressed.⁴² Those considerations cannot be called in question by the insights gained from the analysis of Regulation No 1215/2012. That regulation has not altered either the logic or the principles governing the limits of the application of the *lex fori* of the Member State addressed.

VI. Conclusion

91. In the light of the foregoing considerations, I propose that the Court give the following reply to the question referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany):

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and particularly Article 38(1) thereof, is to be interpreted as precluding the application of a provision of the law of the Member State addressed, such as that at issue in the main proceedings, which lays down a time limit for requesting enforcement of a preventive attachment order, in the context of the enforcement in the strict sense of a preventive attachment order issued in another Member State.

³⁹ Kramer, X., *op. cit.*, p. 360.

⁴⁰ See points 73 to 77 of this Opinion.

⁴¹ See points 33 to 59 of this Opinion.

⁴² See points 75 to 77 of this Opinion.