



## Reports of Cases

### JUDGMENT OF THE COURT (Eighth Chamber)

30 March 2023\*

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Lugano II Convention – Procedure on the recognition and enforcement of judgments – Article 34(2) – Document which institutes the proceedings in the State of origin – Due notification of an order for payment followed by improper service of a request for an action for repayment under Swiss law)

In Case C-343/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 20 January 2022, received at the Court on 27 May 2022, in the proceedings

**PT**

v

**VB,**

THE COURT (Eighth Chamber),

composed of M. Safjan (Rapporteur), President of the Chamber, N. Jääskinen and M. Gavalec, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the German Government, by J. Möller, M. Hellmann and U. Kühne, acting as Agents,
- the Swiss Government, by M. Kähr and L. Lanzrein, acting as Agents,
- the European Commission, by B. Ernst and S. Noë, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

\* Language of the case: German.

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 34(2) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, the conclusion of which was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1) ('the Lugano II Convention').
- 2 The request has been made in proceedings between PT and VB concerning a declaration of enforceability in Germany of a judgment delivered by a Swiss court.

### **Legal context**

#### ***The Hague Convention of 15 November 1965***

- 3 Article 5 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters is worded as follows:

'The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

- (a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or
- (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to subparagraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.'

#### ***The Lugano II Convention***

- 4 The Lugano II Convention was signed by the European Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation.

5 Article 34(2) of that convention provides:

‘A judgment shall not be recognised:

...

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so’.

6 Article 38(1) of that convention is worded as follows:

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

7 Under Article 53 of that convention:

‘1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.’

8 Article 54 of the Lugano II Convention provides:

‘The court or competent authority of a State bound by this Convention where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Convention.’

9 Article III(1) of Protocol 1 on certain questions of jurisdiction, procedure and enforcement of the Lugano II Convention provides:

‘Switzerland reserves the right to declare upon ratification that it will not apply the following part of the provision in Article 34(2):

“unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so”.

If Switzerland makes such declaration, the other Contracting Parties shall apply the same reservation in respect of judgments rendered by the courts of Switzerland.’

10 In accordance with that reservation, the Swiss Confederation has declared that it will not apply the relevant passage of Article 34(2) of the Lugano II Convention.

*Swiss law*

- 11 Article 38(2) of the Federal Law on debt enforcement and bankruptcy and insolvency of 11 April 1889, in the version applicable to the dispute in the main proceedings (RS 281.1) ('the LP'), provides:

'Enforcement shall begin upon notification of the order for payment. It shall continue by means of seizure, pledge, bankruptcy or insolvency.'

- 12 Under Article 67(1) of that law:

'An application for enforcement shall be made to the debt enforcement office in writing or orally. It shall set out:

1. the name and domicile of the creditor and, where applicable, his representative; an address for service in Switzerland, if he lives abroad. In the absence of specific information, the debt enforcement office shall be deemed an address for service;
2. the name and address of the debtor and, where applicable, his legal representative; in applications for enforcement against an inheritance, the heirs to whom notification must be given shall be designated;
3. the amount, in Swiss currency, of the claim or the sureties required under Swiss law; if the claim bears interest, the rate and the day from which that interest is to accrue;
4. the title and date; in the absence of title, the cause of the obligation.'

- 13 Article 69 of that law provides:

'1 Upon receipt of the application for enforcement, the debt enforcement office shall draw up the order for payment.

2 That document shall contain:

1. the information prescribed for the application for enforcement;
2. the summons to pay, within 20 days, the amount of the debt and the costs, or, where the enforcement involves sureties, to provide them within that period;
3. the notice that the debtor must lodge an objection within 10 days of the notification if he intends to contest all or part of the debt or the creditor's right to pursue proceedings;
4. the warning that, if the debtor fails to comply with the order for payment or to lodge an objection, enforcement shall follow its course.'

- 14 According to Article 71(1) of that law:

'An order for payment shall be served on the debtor upon receipt of the application for enforcement.'

15 Article 74(1) of the LP provides:

‘A debtor being pursued who seeks to lodge an objection must, orally or in writing, make an immediate declaration to the person issuing the order for payment or to the debt enforcement office within 10 days of service of the order for payment.’

16 Under Article 78(1) of that law, the objection has the effect of suspending the debt enforcement proceedings.

17 Article 79 of that law provides:

‘A creditor against whom an objection has been lodged shall act by means of civil or administrative proceedings to have his right recognised. He may request the continuation of the enforcement only on the basis of an enforceable decision which expressly dismisses the objection.’

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

18 On 19 January 2013, upon VB’s application, the debt enforcement office in Geneva, Switzerland, notified PT, who resides in Germany, of an order to pay debts relating to rent. On 28 January 2013, PT lodged an objection against that order for payment, in accordance with Article 74 of the LP.

19 VB brought an action against PT before the tribunal des baux et loyers du canton de Genève (Court for Lease and Tenancy Matters of the Canton of Geneva, Switzerland), without applying for the objection to be lifted. That court attempted to serve the application, drafted in French, at PT’s place of residence in Germany. The latter, who did not understand French, refused to accept that service without a German translation of the application. According to the referring court, PT received no further information during the remainder of the proceedings. By judgment of 30 January 2014, served by way of publication, the tribunal des baux et loyers du canton de Genève (Court for Lease and Tenancy Matters of the Canton of Geneva) ordered PT to pay a total amount of 4 120.70 Swiss francs (CHF) (approximately EUR 4 090), plus interest. The objection to the order for payment was not dismissed in that judgment.

20 VB brought an application before the Landgericht (Regional Court, Germany) for a declaration of enforceability of the judgment of 30 January 2014 in Germany in accordance with Article 38(1) and Article 53 of the Lugano II Convention. To that end, he submitted certified and translated copies of that judgment and of the certificate referred to in Article 54 of that convention. Since that court granted that application, PT appealed against that decision before the Oberlandesgericht (Higher Regional Court, Germany).

21 That court dismissed that appeal, taking the view that Article 34(2) of the Lugano II Convention did not preclude the recognition of the judgment of 30 January 2014. In its opinion, the order for payment duly served on the defendant on 19 January 2013 had to be regarded as the document which instituted the proceedings.

22 PT brought an appeal against that decision before the referring court.

23 According to that court, the order for payment was duly notified but service of the application did not satisfy the conditions laid down in the first paragraph of Article 5 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or

Commercial Matters because that document had not been translated into German. The referring court considers that, in the absence of that translation, the service did not enable PT to arrange for his defence.

- 24 Since the notification of the order for payment was followed by improper service of the application, it is necessary, according to the referring court, to determine which of those documents must be regarded as the document which instituted the proceedings.
- 25 In those circumstances, the Bundesgerichtshof (Federal Court of Justice, Germany), decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 34(2) of the [Lugano II Convention] be interpreted as meaning that the statement of claim in an action seeking repayment of a debt, which was brought after a Swiss order for payment ... had been issued previously and which did not include an application for [dismissal] of the objection ... lodged against the order for payment, constitutes the document which instituted the proceedings?’

### **Consideration of the question referred**

- 26 By its single question, the referring court asks, in essence, whether Article 34(2) of the Lugano II Convention must be interpreted as meaning that a statement of claim in an action for repayment under Swiss law, which was brought after a Swiss order for payment had been issued and which did not include an application for dismissal of the objection lodged against that order for payment, constitutes the document which instituted the proceedings within the meaning of that provision.
- 27 It must be borne in mind that the Lugano II Convention is drafted in terms that are almost identical to the corresponding articles appearing in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) and a converging interpretation of the provisions of those instruments that are equivalent must be ensured (judgment of 2 May 2019, *Pillar Securitisation*, C-694/17, EU:C:2019:345, paragraph 27).
- 28 It follows from the Court’s case-law on Article 34(2) of Regulation No 44/2001, which corresponds to Article 34(2) of the Lugano II Convention, that the court of the Member State in which enforcement is sought must, where an appeal is lodged, refuse or revoke the enforcement of a foreign judgment given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence, unless he or she failed to commence proceedings to challenge that judgment before the courts of the Member State of origin, whereas it was possible for him or her to do so (judgment of 6 September 2012, *Trade Agency*, C-619/10, EU:C:2012:531, paragraph 32).
- 29 In that regard, since the Swiss Confederation has notified a reservation pursuant to Article III(1) of Protocol 1 to the Lugano II Convention as regards the application of the passage from Article 34(2) of that convention, referred to in paragraph 9 of this judgment, concerning the bringing of an appeal against the foreign judgment given in default of appearance, the other Contracting Parties are to apply the same reservation in respect of judgments of the Swiss courts.

- 30 Consequently, in the context of Article 34(2) of the Lugano II Convention and as regards the relations with the Swiss Confederation, enforcement of the foreign judgment must be refused, without exception, where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence.
- 31 In the present case, such a refusal is required, according to the referring court, if the document which institutes the proceedings is not the order for payment issued by the debt enforcement office, but the application subsequently lodged before the tribunal des baux et loyers du canton de Genève (Court for Lease and Tenancy Matters of the Canton of Geneva).
- 32 It is apparent from the Court's case-law that the concept of the document which institutes the proceedings or an equivalent document means the document or documents which must be duly and timeously served on the defendant in order to enable him or her to assert his or her rights before an enforceable judgment is given in the State of origin (judgment of 13 July 1995, *Hengst Import*, C-474/93, EU:C:1995:243, paragraph 19).
- 33 On the basis of that definition, the Court has regarded as a document which institutes proceedings an order for payment under German law (*Zahlungsbefehl*), the service of which enables the applicant, in the absence of an objection, to obtain an enforceable judgment (judgment of 16 June 1981, *Klomps*, 166/80, EU:C:1981:137, paragraph 9), and an order for payment under Italian law (*decreto ingiuntivo*) served together with the application (judgment of 13 July 1995, *Hengst Import*, C-474/93, EU:C:1995:243, paragraphs 20 and 21).
- 34 By contrast, the Court has held that an authorisation for enforcement under German law (*Vollstreckungsbefehl*), which was in itself enforceable and was given following service of an order for payment, did not come within that definition of the document which institutes the proceedings (judgment of 16 June 1981, *Klomps*, 166/80, EU:C:1981:137, paragraph 9).
- 35 It follows that, in the event of a series of two procedures each allowing, at their end, an enforceable judgment relating to the same obligation to be obtained, the commencement of the former cannot constitute the document which institutes the latter, within the meaning of Article 34(2) of the Lugano II Convention, unless there is a functional unity between the two.
- 36 In the present case, it is apparent from the order for reference and from the written observations submitted before the Court that, under Swiss law, the procedure for issuing the order for payment before the debt enforcement office is separate from the judicial proceedings applicable to an action for repayment.
- 37 In the context of the first procedure, the debtor may, under Article 74(1) of the LP, object to the order for payment within 10 days. The objection results in the termination of the procedure before the debt enforcement office and compels the creditor to act through judicial means. Under Article 79 of the LP, the creditor may request the continuation of the proceedings only on the basis of an enforceable decision which expressly dismisses the objection. It is in the context of an ordinary payment procedure, which is subsequently initiated, that the court will be able to rule simultaneously on whether to lift the objection.
- 38 The second set of proceedings, namely the action for repayment through judicial proceedings, is independent of the procedure of debt enforcement. Admittedly, the action for repayment through judicial proceedings is intended to recover a debt, which has been the subject of

enforcement by way of an order for payment under Articles 38, 67 and 69 of the LP. However, according to the referring court, the bringing of an action for repayment without an order lifting the objection is not intended to terminate the debt enforcement proceedings, suspended by the objection which, for its part, is not the necessary prerequisite to the action for repayment.

- 39 Accordingly, in so far as the lifting of the objection was not applied for in the civil proceedings for repayment, it must be held, subject to the verifications which it is for the referring court to carry out, that there is no functional unity between the enforcement procedure and the action for repayment through judicial proceedings such as to make it possible for the order for payment to be regarded as a document which instituted the proceedings, within the meaning of Article 34(2) of the Lugano II Convention.
- 40 In the light of all of the foregoing, the answer to the question referred is that Article 34(2) of the Lugano II Convention must be interpreted as meaning that the statement of claim in an action for repayment under Swiss law, which was brought after a Swiss order for payment had been issued previously and which did not include an application for dismissal of the objection lodged against that order for payment, constitutes the document which instituted the proceedings, within the meaning of that provision.

### Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

**Article 34(2) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, the conclusion of which was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008,**

**must be interpreted as meaning that the statement of claim in an action for repayment under Swiss law, which was brought after a Swiss order for payment had been issued previously and which did not include an application for dismissal of the objection lodged against that order for payment, constitutes the document which instituted the proceedings, within the meaning of that provision.**

[Signatures]