

C-379/17: Time limit for enforcement of a foreign preventive attachment order

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Michele Cuccaro
Judge - Court of Rovereto (Italy)

Set the scene

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').

- By order of 22 August 2014, the competent court declared the judgment enforceable in Germany.
- More than eight months later, on 23 April 2015, the applicant applied for the registration of a debt-securing mortgage against the debtor's real property located in Germany, namely a residential apartment and two underground parking spaces.
- That application for registration was rejected by the Amtsgericht München — Grundbuchamt (Land Registry attached to the Local Court)

- 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 § 929(2) of the of the Zivilprozessordnung (Code of Civil Procedure, 'the ZPO')

- 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*.

- 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, § 929(2) of the ZPO.

- By its appeal brought before the Bundesgerichtshof (Federal Court of Justice, Germany), the applicant maintains its request for registration of the debt-securing mortgage.
- Under those circumstances the Bundesgerichtshof decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

The question referred 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 MS and recognised and declared enforceable in the State in which enforcement is sought?’

Legal context - European Union law

Chapter III of Regulation No 44/2001 (Brussels I), 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

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

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

Brussels I recast

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.

Article 41(1) of Regulation No 1215/2012: ‘Subject to the provisions of this Section, the procedure for the enforcement of judgments given in another MS shall be governed by the law of the MS addressed. A judgment given in a MS which is enforceable in the MS addressed shall be enforced there under the same conditions as a judgment given in the MS addressed.’

German law

§ 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.’

- Furthermore, under § 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 § 929(2) and (3), the application to register the mortgage shall be regarded as the enforcement of the attachment order.’

Positions of the parties

- 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 MS addressed, such as § 929(2) of the ZPO.

- Secondly, the German Government refers to the judgments in *Apostolides* and *Prism Investments* 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 MS 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 § 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.

- 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.

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

- 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 BI had the effect of incorporating a foreign judgment into the legal order of the MS addressed, a ‘blind’ application of the law of that MS 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 § 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 MS of origin.

Opinion of Advocate Generale

- 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.

A time limit such as that laid down in § 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 MS 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

- the application of a rule, such as § 929(2) of the ZPO, to foreign preventive attachment orders may undermine the effectiveness of the system under Regulation No 44/2001.

a provision, first, which concerns not the execution of a foreign judgment but rather the exequatur procedure and, second, the application of which at the time of enforcement undermines the effectiveness of the system under BI does not constitute an enforcement rule of the *lex fori* of the MS addressed. Those considerations cannot be called in question by the insights gained from the analysis of Bia. That regulation has not altered either the logic or the principles governing the limits of the application of the *lex fori* of the MS addressed

Conclusion of the AG

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 MS 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 MS.

Judgment of the ECJ

- Since the enforcement, in the strict sense, of a decision issued by a court of a MS other than the MS in which enforcement is sought, and which is enforceable in the latter Member State, has not been the subject of harmonisation by the EU legislature, the procedural rules of the MS in which enforcement is sought are to apply to matters relating to enforcement.

- In so far as Regulation No 44/2001 has not laid down rules concerning the enforcement of decisions given by a court of a MS other than the MS in which enforcement is sought, the latter remains free to make provision, in its own legal order, for the application of a time limit for enforcing such decisions, which have been recognised and declared enforceable in the latter MS.

- In that regard, it is settled case-law that, once that judgment is incorporated into the legal order of the MS in which enforcement is sought, national legislation of that MS relating to enforcement applies in the same way as to judgments delivered by national courts (judgment of 13 October 2011, *Prism Investments*, C-139/10).

- The procedural rules of the MS in which enforcement is sought alone are applicable. The courts of that MS are not required to apply any provisions of the national legislation of the MS of origin which, in respect of the enforcement of decisions given by the courts of the MS of origin, lay down time limits which differ from those laid down by the law of the MS in which enforcement is sought.

- That interpretation is borne out by recital 26 of Regulation No 1215/2012, read in conjunction with Article 39 thereof, which incorporated the case-law cited in § 35 of the present judgment [*Prism Investments*, C-139/10], and whereby any decision given by the courts of a MS ought to be treated as though it had been given in the MS in which enforcement is sought.

- From a broader systematic perspective, it should be noted that that interpretation is also supported by Article 23 of Regulation (EC) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (OJ 2014 L 189, p. 59), according to which the preservation order is to be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the MS of enforcement.

- The fact that the failure by the applicant to observe the time limit laid down in § 929(2) of the ZPO has the effect of rendering impossible the enforcement of an order authorising a preventive attachment, issued by a court of a MS other than the MS in which enforcement is sought, by means of the registration of a debt-securing mortgage in the land register, even though that decision remains enforceable in the MS of origin, is not such as to call that interpretation into question

- The objective to ensure the free movement of judgments from MS in civil and commercial matters by simplifying the formalities with a view to their rapid and simple recognition and enforcement (judgment of 7 July 2016, *Lebek*, C-70/15, EU:C:2016:524, paragraph 33) cannot be achieved at the cost of another important principle, namely that of the legal certainty of registrations in land registers, for the protection both of rightsholders registered therein and third parties.

The time limit of one month thus laid down for the enforcement of preventive attachment orders, including in the context of orders delivered by the courts of Member States other than the MS in which enforcement is sought, and which is calculated from the date on which the declaration of enforceability was notified to the creditor, does not entail any real risk that the latter cannot enforce a preventive attachment order issued in another MS and which is enforceable.

Ruling

- Article 38 of Regulation No 44/2001 must be interpreted as not precluding legislation of a MS, such as that at issue in the main proceedings, which provides for the application of a time limit for the enforcement of a preventive attachment order, from being applied in the case of an order which has been adopted in another MS and is enforceable in the MS in which enforcement is sought