ARTICLE

THE NOTION OF "JUDGMENT" IN THE EU REGULATIONS ON CROSS-BORDER COLLECTION OF MONETARY CLAIMS: A CHANGE IN UNDERSTANDING?

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ABSTRACT: In the area of cross-border recognition and enforcement, judgments present the most important type of decisions that enjoy free movement within the European Union. The notion of a "judgment" may seem fairly obvious at first. However, given the broad definitions of EU's private international law instruments, the concept quickly proves to be much more complex. This became particularly clear after the recent rulings of the Court of Justice of the EU: the rulings in *H Limited* (C-568/20 ECLI:EU:C:2022:264) and *London Steam-Ship Owners* (C-700/20 ECLI:EU:C:2022:488). In light of the new case-law, this *Article* aims to answer the question as to what exactly constitutes a "judgment" in EU private international law, as well as determine whether the notion has been redefined after these rulings. The questions are answered with reference to the EU regulations dealing with monetary claims, while diverging aspects constituting a "judgment" under national laws of different Member States are highlighted as well.

KEYWORDS: notion of "judgment" – free movement of judgments – private international law – EU law – civil procedure – Brussels I Recast.

I. INTRODUCTION

Cross-border judicial cooperation in civil matters within the European Union (EU) is one of the fastest-expanding areas of EU law in the last decade or so. Initially one of the less-

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regulated ones, now it receives much attention from both the EU and its Member States. Aiming to ensure that natural and legal persons are not prevented or discouraged from exercising the four freedoms of movement due to incompatibilities between legal systems, it is founded on the principle of mutual recognition and enforcement among Member States to make sure that judgments as well can freely move across the EU.[1] Judgments are without a doubt the most important type of documents which represent an enforcement title in the Member States.[2] Although at first it may seem that the concept of a "judgment" is fairly obvious, even after years of applying the rules on the free movement of judgments, the question is still very much relevant today: what actually constitutes a "judgment" in the EU private international law?

The concept is defined very broadly in the EU's legislative instruments on civil and commercial matters. There is a reason for that, it being the need for inclusion of a broad spectrum of various judicial decisions emanating from different Member States. While it may be expected that such a broad concept should make the job easier for the national court,[3] the reality is that many courts have struggled to find the appropriate approach. This is also apparent from rich case law of the Court of Justice of the EU (CJEU). Recently, the question of defining a "judgment" has been addressed by the CJEU in the cases of *H Limited* (C-568/20)[4] and *London Steam-Ship Owners* (C-700/20).[5] The former ruling seems to go into an intricate territory of "double exequatur", *i.e.*, recognition of a Member State's judgment which constitutes a decision validating a foreign judgment's *res iudicata*. As it has long been thought that double exequatur is strictly forbidden,[6] this ruling opens up new questions on the matter and creates space for different interpretations of the notion of "judgment" in the EU. The latter CJEU ruling deals with the thorny interplay between the Brussels I Recast Regulation and arbitration, in the context of the recognition in the United Kingdom of a judgment given by a Spanish court. It requires examination as to the extent to which the scope of the notion of "judgment" is influenced by the notion of "earlier judgment". Additionally, the conclusions deriving from both rulings seem to clash

[1] Treaty on the Functioning of the European Union [2016] (hereinafter, TFEU), arts 67(4), 81.

[2] W Kennett, *Civil Enforcement in a Comparative Perspective. A Public Management Challenge* (Intersentia 2021) 27.

[3] W Kennett, *The Enforcement of Judgments in Europe* (Oxford University Press 2000) 216.

[4] Case C-568/20 *J v H Limited* ECLI:EU:C:2022:264.

[5] Case C-700/20 *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* ECLI:EU:C:2022:488. The notion of "judgment" has also been addressed in case C-646/20 *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB* ECLI:EU:C:2022:879. This case, however, will not be analysed in this *Article* as the research does not focus on the regulations on family matters that do not primarily concern monetary claims, as explained further on in the Introduction.

[6] K Kerameus, *Enforcement in the International Context* in *Collected Courses of the Hague Academy of International Law* (Brill 1997) 20; F Garau Sobrino, 'The Automatic Enforceability Statement. Towards a New General Theory of Exequatur' (2004) Anuario Espanol Derecho Internacional Privado 101, 104.

at a certain point, particularly in terms of the possibility of including judgments upon judgments under the EU notion of "judgment".

Against the background of these developments, this *Article* aims to analyse what has been established as falling under the notion of "judgment" and whether, in light of the new case law, the general notion of "judgment" has been redefined. These questions are answered here specifically with reference to the regulations dealing with monetary claims, which due to their common features merit being examined separately from other judgments. In fact, with monetary claims, plaintiffs seek satisfaction expressed in monetary terms and such judgments are executed differently than non-monetary ones, as they require the specific performance of monetary payment.[7] The regulations which apply to such claims are:[8] Regulation (EU) 1215/2012 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 (Brussels I Recast)[9] and its predecessors 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention)[10] and its updated versions, and Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation);[11] Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a Eu-

[7] K Kerameus, *Enforcement in the International Context* cit. 41, 42.

[8] Although dealing with monetary claims, Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (European Order for Payment Regulation) and Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (European Small Claims Procedure Regulation) are not dealt with in this analysis since they do not contain the definition of a "judgment". Those regulations establish a self-standing, mainly written procedure which is to be done through the use of forms, therefore it was not necessary to define a "judgment" for their purposes. Additionally, certain other EU regulations could also be viewed as dealing with monetary claims. These include *e.g.* Insolvency Regulation [Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)] or Succession Regulation [Regulation (EU) 650/2012 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]. However, these regulations are not included in the research as their scope of application concerns specific areas, *i.e.*, they contain special features, which distinguishes them from the rest of the regulations included in this research. In other words, only the regulations which are primarily dealing with monetary claims in civil and commercial matters, and do not regulate special matters such as insolvency or succession, are included.

[9] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition of judgments in civil and commercial matters (recast), (hereinafter, Brussels I Recast).

[10] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, (hereinafter, Brussels Convention).

[11] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (hereinafter, Brussels I Regulation).

ropean Enforcement Order for uncontested claims (European Enforcement Order Regulation);[12] Regulation (EU) 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 (European Account Preservation Order Regulation);[13] and Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation).[14] Although technically an instrument dealing with family matters, unlike the rest of the previously mentioned regulations in civil and commercial matters, the latter is listed here because its scope (matters relating to maintenance obligations) relates directly to monetary claims, and has previously been included under the scope of Brussels I Regulation.[15] The remaining regulations on family matters, which do not primarily concern monetary claims, will therefore not be included.[16]

Following the introduction, section II offers a comprehensive overview of the leading CJEU rulings that shaped the meaning of "judgment". In doing so, the *Article* relies not only on the pertinent CJEU case law but also takes on a comparative approach, since the aspects constituting a "judgment" can be vastly different under different national laws. Due to the scope of this *Article*, the comparative analysis may only be done by way of example limited to laws of Germany, Italy, Slovenia and Croatia.[17] Section III focuses specifically on the recent CJEU rulings in *H Limited* and *London Steam-Ship Owners*, and aims to examine whether, as a consequence of the rulings, new issues arise for the future interpretation of the term and consequently, the mechanisms of recognition and enforcement. Finally,

[12] Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, (hereinafter, European Enforcement Order Regulation).

[13] Regulation (EU) 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, (hereinafter, European Account Preservation Order Regulation).

[14] Regulation (EC) 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, (hereinafter, Maintenance Regulation).

[15] Additionally, maintenance is also included under the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention).

[16] Nevertheless, such regulations can in some cases also concern monetary claims, such as in *e.g.*, case C-4/14 *Christophe Bohez v Ingrid Wiertz* ECLI:EU:C:2015:563.

[17] These Member States are selected on the basis of their differing features, having in mind also the objective limitations as to paper volume and language of the legal sources. Importantly, these States differ as to whether they provide for special implementation laws on the relevant EU regulations or not. Furthermore, unlike for example Croatia, Germany adopted the strategy of synchronizing EU instruments with pre-existing domestic ones. Additionally, the judicial systems of Germany and Italy are intensely researched on this topic, whereas Croatian and Slovenian are not, leaving their special features comparatively unnoticed. On top of that, possible interconnections between these selected Member States are expected, since there is a large movement of people, goods, services and capital between these Member States (*e.g.*, Croatia's biggest trade partners in the EU are precisely the other three Member States from this group).

in section IV, conclusions are drawn concerning the currently operational definition of "judgment", and its consistency is evaluated.

II. The notion of "judgment" in the EU regulations on cross-border collection of monetary claims prior to *H Limited* and *London Steam-Ship Owners*

Before examining whether the two recent CJEU rulings have changed the notion of "judgment", it is necessary to first establish the general understanding of the notion that was held prior to those rulings. The first definition of a "judgment" in the EU regulations on the cross-border collection of monetary claims came with the Brussels Convention in 1968, which provides that, for its purposes, a "judgment" presents "any judgment given by a court or tribunal of a Contracting State [now, Member State], whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court".[18] The same definition was retained in the Brussels I Regulation as well,[19] and included in the European Enforcement Order Regulation in 2004[20] and the European Account Preservation Order Regulation in 2014.[21] Owing to the nature of the matters under its scope,[22] the Maintenance Regulation uses the notion of "decision" rather than "judgment" but the definition provided shows that it is essentially the same concept as the "judgment".[23] Therefore, both notions are analysed jointly.

The final step in the phraseological development of the rule is the additional paragraph inserted in the Brussels I Recast, to clarify that for the purposes of section III on recognition and enforcement, the notion of a "judgment" "includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on

[18] Art. 25 Brussels Convention cit.

[19] Art. 32 Brussels I Regulation cit.

[20] Art. 4 European Enforcement Order Regulation cit.

[21] Art. 4(8) European Account Preservation Order Regulation cit. There is only a minor difference – the absence of the term "tribunal" which has no significance in this context.

[22] As the cultural dimension is particularly prominent in the maintenance law, with substantive differences in terms of legal tradition, religion, language, culture and different areas with which maintenance is associated with, *e.g.*, family law or social security law, the term "decision" was more suited. See E Jayme, 'Cultural Dimensions of Maintenance Law from a Private International Law Perspective' in P Beaumont and others (eds), *The Recovery of Maintenance in the EU and Worldwide* (Hart Publishing 2014) 3, 14.

[23] Art. 2 Maintenance Regulation cit.: a "decision" means "a decision in matters relating to maintenance obligations given by a court of a Member State, whatever the decision may be called, including a decree, order, judgment or writ of execution, as well as a decision by an officer of the court determining the costs or expenses. For the purposes of Chapters VII and VIII, the term "decision" shall also mean a decision in matters relating to maintenance obligations given in a third State.

the defendant prior to enforcement".[24] This comes as a result of the CJEU case law, namely, the landmark ruling in *Denilauler*,[25] which will be further discussed below.

Based on the definition, several decisive elements of a "judgment" can be differentiated and are discussed in turn.

II.1. "ANY JUDGMENT"

The definitions all commence by stating that a "judgment" means "any judgment". This circular part of the definition is not owed to bad drafting or alike, but is actually intended to underline the breadth of the concept by using the word 'any' and the related clarification that follows: "whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court". The list is exemplary as evident from the wording of the provision itself. Thus, it may include various other judicial decisions regardless of their designation.[26]

The reason why the EU legislator opted for a broad definition of "judgment" is that there is a whole array of different types of decisions in different Member States.[27] To illustrate, some of the examples from national laws may be highlighted here. Focusing particularly on the national legal systems of Croatia, Slovenia, Germany and Italy, one may notice many similarities – the general understanding of the notion is the same, as a "judgment" usually pertains to a decision rendered by a court after certain proceeding, *i.e.*, a trial, has taken place before that court. Additionally, judgments are acts of state sovereignty, and its original effects are usually limited to the territory of the state of the court in question.[28] A "judgment" is usually issued when deciding on the merits of the

[24] Art. 2 Brussels I Recast cit.

[25] Case C-125/79 *Bernard Denilauler v SNC Couchet Frères* ECLI:EU:C:1980:130 para. 18. See also I Pretelli, 'Provisional and Protective Measures in the European Civil Procedure of the Brussels I System' in V Lazić and S Stuij (eds), *Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural Scheme* (T.M.C. Asser Press 2017) 114, 115.

[26] The broadness of the definition of "judgment" is also affirmed by the courts of the Member States, who have to determine whether a certain instrument is to be qualified as "judgment". See, *e.g.*, J von Hein and H Dittmers, 'Germany' in P Beaumont and others (eds), *Cross-Border Litigation in Europe* (Hart Publishing 2017) 150; S Bariattiand others, 'Italy' in P Beaumont and others (eds), *Cross-Border Litigation in Europe* cit. 177.

[27] J Caramelo Gomes and T Keresteš, 'Enforcement Titles in the EU: Common Core After All?' in V Rijavec and others (eds), *Diversity of Enforcement Titles in the EU* (Springer 2023) 77; S Leible, 'Artikel 2' in T Rauscher (ed.), *Europäisches Zivilprozess-und Kollisionsrecht EuZPR / EuIPR. Kommentar* (Verlag Dr. Otto Schmidt KG 2021) 181.

[28] H Linke and W Hau, *Internationales Zivilverfahrensrecht* (Verlag Dr. Otto Schmidt KG 2021) 244.

case,[29] while other types of decisions are reserved for other cases.[30] The types of judgments which can be found under the national laws can slightly differ. While all systems recognise, *e.g.*, partial judgments, interim judgments, waiver judgments or judgments by confession, some peculiarities can also be found. In that sense, Croatian courts can render a judgment without trial (*presuda bez održavanja rasprave*),[31] while Slovenian courts also issue similar type of judgments "based on the state of the file" (*sodba na podlagi stanja spisa*).[32] In Germany, a distinction between the types of judgments is made according to the content; the effect on the instance; and the criterion of conditionality, with many different types of judgments falling under each category.[33] Additionally, while all of these Member States also recognise default judgments, Croatia actually differentiates between two types of such judgments – *presuda zbog ogluhe*[34] and *presuda zbog izostanka*.[35] Additional difference in regards to default judgments can also be found in Germany – as opposed to the judgments from Croatia,[36] Slovenia[37] and Italy,[38] it seems that a German default judgment will be solely based on claimant's factual allegations, regardless of whether it is reasonably supported by evidence.[39] Differences can also be found in terms of the structure of a judgment. In some Member States, such as in Germany, Croatia and Slovenia, the reasoning of a judgment comes last in place; on the other hand, in Italy, the reasoning comes before the operative part.[40] Moreover, in some Member States, including Germany and Italy, reasoning can be further divided into different

[29] An exception may be found in Germany, where the court can render a so-called "procedural judgment" (*Prozessurteil*). More in Leibniz Universität Hannover, Institute for Procedural Law and Attorney Regulations, C Wolf, N Kurth and K Mieszaniec, *National Report Germany* (Project EU-En4s – JUST-AG-2018/JUST-JCOO-AG-2018 2020) 16; S Grubbs (ed.), *International Civil Procedure* (Kluwer Law International 2003) 252.

[30] Primarily decrees, orders and rulings.

[31] Croatian Civil Procedure Act (Zakon o parničnom postupku), Narodne novine 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19 (2019) (hereinafter CCPA), art. 332(a).

[32] Slovenian Civil Procedure Act (Zakon o pravdnem postopku) Uradni list Republike Slovenije, n. 73. (2007) (hereinafter SCPA), art. 282.

[33] Leibniz Universität Hannover, Institute for Procedural Law and Attorney Regulations, C Wolf, N Kurth and K Mieszaniec, *National Report Germany* cit. 16.

[34] CCPA cit. art. 331(b).

[35] *Ibid*. art. 332.

[36] *Ibid*. art. 331(b).

[37] SCPA art. 282.

[38] Codice di Procedura Civile, aggiornato con le modifiche apportate dal D.L. 2 marzo 2024, n. 19 convertito, con modificazioni, dalla L. 29 aprile 2024, n. 56 (hereinafter CPC), arts 290-294.

[39] S Huber, 'The German Approach to the Globalisation and Harmonisation of Civil Procedure: Balancing National Particularities and International Open-Mindedness' in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 299; German Code of Civil Procedure (Zivilprocessordnung), BGBI. I S. 3202; 2006 I S. 431; 2007 I S. 1781; 2023 I Nr. 51 (2005), (hereinafter, ZPO) art. 331.

[40] K Drnovšek, 'Comparative View on the Divergence of Structure and Substance of Judgments' in V Rijavec and others (eds), *Diversity of Enforcement Titles in the EU* cit. 118.

parts.[41] Additionally, in some Member States, such as in Croatia, the structure itself is regulated in Court Ordinance,[42] while in others, such as in Slovenia, more detailed standards in regards of structure have been formed through case law.[43] Regardless of national peculiarities, all of these types of decisions would fall under the EU notion of "judgment" as well. Thus, what is considered as judgment under national law, will oftentimes be also considered as an EU "judgment". On the other hand, other types of decisions that can be found in the national systems, such as orders, decrees and rulings, will usually not fall under the EU notion. However, certain deviations are possible, *e.g.*, Croatian decree on the protection of possession[44] and a German order that costs have to be fixed[45] would both qualify as "judgment" in the sense of the EU notion.

It is visible that, phrased in the current way, the definition ensures that all decisions, regardless of their formal characterisation under the national procedural law, can produce legal effects and be recognised and enforced throughout the EU, thus facilitating the free movement of judgments.[46] However, the national examples do not clearly show what would be the common denominator of a "judgment", as there are always certain exceptions and peculiarities. Thus, an answer as to what is the constituting element of the EU notion of "judgment", regardless of categorisation in the Member States, must be found. While the CJEU was never asked such question directly, an answer crystalized over time in its case law.

The constituting element was first presented in the previously mentioned *Denilauler* ruling, where the CJEU stated that decisions which fall under the scope of "judgment" must be "judicial decisions which, before the recognition and enforcement of them are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin and under various procedures, of an inquiry in adversary proceedings".[47] Thus, the adversarial principle, *i.e.*, the principle of *audi et alteram partem*, is highlighted as the constituting element of a "judgment". Adversarial nature of the proceedings can be described as "compliance with the rights of the defence and assurance given to the defendant in the proceedings".[48] Based on such understanding, it

[41] *Ibid*. 117, 118.

[42] Sudski poslovnik, Narodne novine 37/2014-663 (2014) cit. art. 62.

[43] K Drnovšek, 'Comparative View on the Divergence of Structure and Substance of Judgments' cit. 115, 116.

[44] E Kunštek and others, *National Report for Croatia* (Project EU-En4s – JUST-AG-2018/JUST-JCOO-AG_2018 2020) 7.

[45] Leibniz Universität Hannover, Institute for Procedural Law and Attorney Regulations, C Wolf, N Kurth and K Mieszaniec, *National Report Germany* cit. 18.

[46] M Requejo Isidro (ed.), *Brussels I Bis. A Commentary on Regulation (EU) No 1215/2012* (Edward Elgar Publishing Limited 2022) 38; V Rijavec, 'Enforcement Titles Under Brussels I bis Regulation from National to EU Frameworks' in V Rijavec and others (eds), *Diversity of Enforcement Titles in the EU* cit. 9, 10.

[47] *Bernard Denilauler v SNC Couchet Frères* cit. para. 13.

[48] L Vogel, *Jurisdiction and Enforcement of Judgments* (2nd edn Bruylant 2020) 113.

was held that provisional and protective measures ordered without prior notice to the defendant do not come within the system of recognition and enforcement.[49]

The importance of the adversarial principle was soon highlighted again. In *Maersk*,[50] the CJEU was met with a question of whether an order to establish a liability limitation fund falls under the EU notion of "judgment". Referring back to the same definition previously given in *Denilauler*,[51] the CJEU once again underlined the importance of the adversarial principle for any national decision to fall under "judgment" in the sense that it noted that the order in question "could have been the subject of submissions by both parties" and that "such an order does not have any effect in law prior to being notified to claimants".[52] Thus, an order such as the one referred to in the case at hand can also be considered as "judgment".

Not long after the ruling in *Maersk*, the notion of "judgment" was addressed again in *Gambazzi*.[53] Here, the inclusion of default judgments in the notion of "judgment" was questioned as, according to the claimant, they are "adopted in infringement of the adversarial principle and the right to a fair trial".[54] The CJEU, noting that the (then applicable) Brussels Convention refers to all judgments given by a court or tribunal of a Member State without distinction, once again repeated the previously given definition,[55] and concluded that a default judgment was given "in civil proceedings which, as a rule, adhere to the adversarial principle".[56] The inclusion of default judgments also becomes somewhat obvious when taking into account the articles regulating the refusal of recognition,[57] which allow for refusal of recognition of judgments which were given in default of appearance, in cases where the defendant was not duly served with the document that instituted the proceedings or an equivalent in sufficient time which would enable him/her to arrange defence. This would suggest that, in cases where the defendant was in fact duly served with the relevant document in time sufficient for the arrangement of the defence, refusal of recognition would not be possible solely because the judgment was given in default of appearance.[58]

This ruling further validated the adversarial principle as a constituting element of a "judgment", and removed the focus off of any national peculiarities when assessing whether particular decision constitutes a "judgment". To illustrate, particularly in terms of default judgments, a short comparison between the notions and effects of default

[49] *Bernard Denilauler v SNC Couchet Frères* cit. para. 18.

[50] Case C-39/02 *Maersk Olie & Gas A/S v Firma M. de Haan en W. de Boer* ECLI:EU:C:2004:615.

[51] *Ibid*. para. 50.

[52] *Ibid*. paras 50, 51.

[53] Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc., CIBC Mellon Trust Company* ECLI:EU:C:2009:219.

[54] *Ibid*. para. 21.

[55] *Ibid*. para. 23.

[56] *Ibid*. paras 22, 25.

[57] Brussels Convention cit. art. 27; Brussels I Regulation cit. art. 34; Brussels I Recast cit. art. 45.

[58] *Marco Gambazzi v DaimlerChrysler Canada Inc., CIBC Mellon Trust Company* cit. para. 24.

judgments between some national systems can be shown. If we take the example of the German legal system, default of appearance of a party is equated to an admission, *ficta confessio*.[59] The German Civil Procedure Act prescribes that, in the case of plaintiff's petition for a default judgment (*Versäumnisurteil*) against the defendant who did not appear at the hearing, the facts submitted by the plaintiff are considered as admitted.[60] On the other hand, in the Italian legal system, in cases when the defendant fails to appear at the first hearing, the court will declare him/her to be in default.[61] This fact of nonparticipation by a party in a procedure is called *contumacia*.[62] It does not introduce any shift of the burden of proof, neither does any presumption or admission follow from the defendant's absence.[63] Traditionally, the defendant's default was even qualified as *ficta contestatio*.[64] In Croatia, as already mentioned above, two types of default judgments are differentiated in the law.[65] Despite the fact that these differences may seem significant, what matters for the inclusion of these decisions under the notion of "judgment" is precisely the adherence to the adversarial principle.

Finally, in *Gothaer Allgemeine*, [66] the question arose of whether the so-called "procedural judgment" also qualifies as "judgment". In German legal doctrine, a "*Prozessurteil*" is a judgment dismissing the action as inadmissible based on the fact that it failed to satisfy the requirements necessary to deliver a judgment on the merits.[67] Although designated as "procedural judgment" in German law, it is merely a judgment in which jurisdiction is

[59] CG Paulus, *Zivilprozessrecht. Erkenntnisverfahren, Zwangsvollstreckung und Europäisches Zivilprozessrecht* (6th edn Springer 2017) 185; C Crifo, *Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment* (Kluwer Law International 2009) 183.

[60] ZPO cit. art. 331(1).

[61] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 2)* (Sweet & Maxwell Limited 2004) 323; M Cappelletti and JM Perillo, *Civil Procedure in Italy* (Springer Science+Business Media 1965) 298.

[62] CPC cit. arts 291-294; C Crifo, *Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment* cit. 48, 227; M Cappelletti and JM Perillo, *Civil Procedure in Italy* cit. 297.

[63] C Crifo, *Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment* cit. 227; M Cappelletti and JM Perillo, *Civil Procedure in Italy* cit. 299.

[64] This means that the defaulting defendant was presumed to contest the plaintiff's claim. This has, however, been changed in 2009, with law n. 60, which established that "the defendant now has a burden to specifically contest facts which he alleges not to be true". See more in MA Lupoi, 'Recent Developments in Italian Civil Procedure Law' (2012) Civil Procedure Review.

[65] E Kunštek and others, *National Report for Croatia* cit. 6.

[66] Case C-456/11 *Gothaer Allgemeine Versicherung AG and others v Samskip GmbH* ECLI:EU:C:2012:719. See also commentary by E D'Alessandro, 'L'influenza esercitata dal diritto nazionale nell'elaborazione di concetti 'europei' ad opera della Corte di giustizia. Il caso Gothaer' in D Dalfino (ed.), *Scritti dedicati a Maurizio Converso* (Roma Tre-Press 2016).

[67] L Merrett, 'Article 2', in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law. Brussels Ibis Regulation – Commentary* (Verlag Dr. Otto Schmidt KG 2023) 81; M Klöpfer, 'Unionsautonome Rechtskraft klageabweisender Prozessurteile – Paradigmenwechsel im Europäischen Zivilverfahrensrecht' (2015) Zeitschrift für das Privatrecht der Europäischen Union 210.

denied on the basis of a jurisdiction clause in favour of a court in another country. Such judgment, under German law, is not considered as capable of recognition. Although not explicitly referring to the adversarial requirement, the CJEU once again ruled in favour of including such judgment under the EU notion. The issue here was not actually about the specific requirement for inclusion under "judgment", more so the particular national categorisation which brings into question its quality for such inclusion.[68] What was explicitly confirmed here, is the fact that national categorisation of certain decisions does not matter – the EU conditions set by both definition and the case law do.

This overview of the case law demonstrates that the adversarial principle currently forms a core element for determining whether a decision falls under the notion of "judgment", although not explicitly included in the definitions. The importance of such principle is understandable given that the EU regulations operate on the basis of mutual recognition, which is subject to strict conditions – primarily, the respect of fundamental rights such as the right to a fair trial,[69] which is reinforced precisely through the adversarial principle. Its significance will be further discussed below, as it will also be relevant when analysing the notion of "court or tribunal".

Based on this understanding, it is clear that it does not matter whether decision itself is final and provisional, appealable and non-appealable.[70] The form of the decision is not relevant either – even decisions made by a court in an abbreviated form or not containing an explanation could be included[71] (although this could potentially be regarded as a ground for refusal of enforcement by reason of public policy).[72] It is interesting to note that some Member States took note of the difficulty of recognising and enforcing a judgment in an abbreviated form abroad; for example, the German Code of Civil Procedure explicitly prohibits judgment in an abbreviated form, if it is expected that it will have to be enforced abroad.[73]

[68] *Gothaer Allgemeine Versicherung AG and others v Samskip GmbH* cit. para. 26.

[69] K Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' (2015) The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford 4. See also I Kunda, 'Međunarodnoprivatnopravni odnosi' in E Mišćenić (ed.), *Europsko privatno pravo. Posebni dio* (Školska knjiga 2021) 504.

[70] M Requejo Isidro (ed.), *Brussels I Bis* cit. 38; R Fentiman, *International Commercial Litigation* (2nd Oxford University Press 2015) 640; J Caramelo Gomes and T Keresteš, 'Enforcement Titles in the EU' cit. 77; S Leible, 'Artikel 2' cit.183.

[71] S Leible, 'Artikel 2' cit. 182; H Sikirić, 'Reasons for Denying Recognition and Enforcement of Court Decisions According to the Council Regulation (EC) No. 44/2001 of December 22, 2000 on Court Jurisdiction and Recognition and Enforcement in Civil and Commercial Matters' (2010) Collected Papers of Zagreb Law Faculty 54.

[72] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* (Sweet & Maxwell Limited 2004) 871.

[73] ZPO cit. arts 313a (4), 313b (3). See also S Leible, 'Artikel 2' cit. 183.

Many other examples of decisions included in the notion can be given: interlocutory orders, injunctions and decrees of specific performance;[74] orders made in the German *Mahnverfahren* proceedings;[75] an *astreinte*, *i.e.*, an order for penalty payments for non-compliance with the court's order;[76] etc. Recently, the CJEU delivered a new ruling in *Starkinvest*,[77] which dealt with the possibility of an *astreinte* to be included under the notion of "judgment" for the purposes of the European Account Preservation Order Regulation. The ruling established that, for the purposes of that regulation, an *astreinte* could not qualify as "judgment" in terms of its art. 7.[78] Certain deviations between the understanding of the notion in different regulations on cross-border collection of monetary claims are therefore visible. Possible independent interpretation in the regulation relevant for the case at hand must thus always be taken into account.[79]

II.2. "A COURT OR TRIBUNAL"

The next element of the definition is that a "judgment" must emanate from "a court or a tribunal", or, according to the CJEU's interpretation, a decision constituting a "judgment" "must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties".[80] It is understood that this notion of "judicial body" covers "any judicial authority acting independently from other organs of the State and whose decisions are taken following a procedure having the characteristics of judicial proceedings, *i.e.*, based on the respect for the principle of due process".[81] Therefore, a "judgment" may be given by different types of courts or tribunals if they fulfil the necessary requirement of exercising judicial power in relation to the matters that are within

[74] A Briggs, *Civil Jurisdiction and Judgments* (7edn Informa law from Routledge 2021) 719; R Fentiman, *International Commercial Litigation* cit. 640.

[75] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 870.

[76] A Briggs, *Civil Jurisdiction and Judgments* cit. 720. For more information on *astreinte*, see also: K Kerameus, *Enforcement in the International Context* cit. 79, 80; W Kennett, *The Enforcement of Judgments in Europe* cit. 240; A Galič, 'Enforcement by Means of Periodic Penalties (Astreinte) in Slovenia: A Transplant Gone Wild' in A Uzelac and CH van Rhee (eds), *Transformation of Civil Justice. Unity and Diversity* (Springer 2018) 25-39; MP Michell, 'Imperium by the Back Door: The *Astreinte* and the Enforcement of Contractual Obligations in France' (1993) University of Toronto Faculty of Law Review 252; G Glos, '*Astreinte* in Belgian Law' (1985) International Journal of Legal Information 17; etc.

[77] Case C-291/21 *Starkinvest SRL* ECLI:EU:C:2023:299.

[78] *Starkinvest SRL* cit. para. 56. This is related to the requirement of proving the *fumus boni iuris* for the purposes of issuing the European Account Preservation Order. Given that multiple articles in the regulation explicitly refer to "amount specified in the judgment", it seems correct to conclude that a "judgment" in question needs to contain a specific amount of claim, which an *astreinte* does not fulfil. Therefore, the claimant will still need to provide sufficient proof that he/she will likely be successful on the merits of the claim against the debtor.

[79] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 868.

[80] Case C-414/92 *Solo Kleinmotoren GmbH v Emilio Boch* ECLI:EU:C:1994:221 paras 17, 18.

[81] P Wautelet, 'Recognition. Article 32' in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law. Brussels I Regulation* (Verlag Dr. Otto Schmidt KG 2007) 537.

the scope of the relevant regulations on the cross-border collection of monetary claims.[82] Hence, neither decisions of arbitral tribunals,[83] administrative bodies[84] nor any other decisions of private tribunals would qualify as "judgment".[85] The requirements, established primarily through the CJEU case law, thus significantly help with defining the otherwise broad notion of a "court", which can also differ substantially among the Member States.[86]

This element further differentiates judgments from other types of decisions. Particularly important is the differentiation from court settlements, as ruled in *Solo Kleinmotoren*, decided in the context of the Brussels Convention. As court settlements are contractual in their essence, they cannot be included under the notion of judgments, since the latter includes solely judicial decisions given by a court or a tribunal of a Member State, *i.e.*, a judgment must emanate from a judicial body.[87] As a result, the separation between judgments and court settlements is even clearer in the subsequent Brussels I and Brussels I Recast regulations, as both clearly distinguish between these types of decision, placing them under different recognition and enforcement regimes in separate chapters.[88] As provided in Brussels I Recast, court settlements enforceable in the Member State of origin shall be enforced in other Member States without any declaration of enforceability being required; possibility of refusal is only available if enforcement is manifestly contrary to public policy of the Member State addressed.[89]

The national approaches to court settlements vary greatly depending on the type and extent of the court's involvement which results also in lesser or stronger legal effects. Under German law, court settlements are in principle not enforceable. Instead, if there is a dispute

[82] A Briggs, *Civil Jurisdiction and Judgments* cit. 719; S Leible, 'Artikel 2' cit. 190.

[83] A Briggs, *Civil Jurisdiction and Judgments* cit. 719.

[84] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 872; H Sikirić, 'Reasons for Denying Recognition and Enforcement of Court Decisions According to the Council Regulation (EC) No. 44/2001 of December 22, 2000 on Court Jurisdiction and Recognition and Enforcement in Civil and Commercial Matters' cit. 60.

[85] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 871.

[86] See A Uzelac, 'Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations' in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 179, 180.

[87] *Solo Kleinmotoren GmbH v Emilio Boch* cit. paras 17, 18; L Merrett, 'Article 2' cit. 85; T Domej, 'Recognition and Enforcement of Judgments (Civil Law)' in J Basedow and others (eds), *Encyclopedia of Private International Law, (Vol 2)* (Edward Elgar Publishing 2017) 1473; L Vogel, *Jurisdiction and Enforcement of Judgments* cit. 112; W Kennett, *The Enforcement of Judgments in Europe* cit. 65; H Sikirić, 'Reasons for Denying Recognition and Enforcement of Court Decisions According to the Council Regulation (EC) No. 44/2001 of December 22, 2000 on Court Jurisdiction and Recognition and Enforcement in Civil and Commercial Matters' cit. 55.

[88] See ch. IV Brussels I Regulation cit.; ch. IV Brussels I Recast cit.

[89] Art. 59 Brussels I Recast cit.

between the parties, they must bring an action before a court on the basis of such settlement.[90] On the opposite end are the court settlements originating from Croatia and Slovenia, which actually fall under the notion of "judgment" in the Brussels I Recast. As explained elsewhere, such qualification is due to the special features of these court settlements.[91] In Croatia, a court settlement (*sudska nagodba*) represents parties' agreement made before the court and entered in the minutes of the proceedings.[92] Signed by all parties, the court settlement becomes final and enforceable in the same vein as the judgment (including the *res iudicata* effect). In the process, the court must *ex officio* ensure that there are no ongoing proceedings on the same case matter as the one on which the court settlement has been reached. The same is true for the Slovenian legal system and its concept of court settlements (*sodna poravnava*).[93] Such national court settlements are referred to as the "consent judgments", *e.g.*, in the Heidelberg Report, where the authors also advocated their qualification as judgments rather than court settlements.[94]

The term "court or tribunal" can also include authorities other than courts provided they exercise a judicial function. The Brussels I Recast, in its art. 3, expressly provides two options which include Hungarian public notaries (*közjegyző*) in summary proceedings concerning orders for payment (*fizetési meghagyásos eljárás*),[95] as well as Swedish Enforcement Authority (*Kronofogdemyndigheten*) in their summary proceedings concerning orders for payment (*betalningsföreläggande*) and assistance (*handräckning*).[96] This list of bodies that are included under the notion of "court or tribunal" is exhaustive;[97] however, this did not stop the preliminary questions referred to the CJEU regarding the potential inclusion of some other types of authorities under the notion.

[90] T Domej, 'Recognition and Enforcement of Judgments (Civil Law)' cit. 1473.

[91] I Kunda and M Tičić, 'Authentic Instruments and Court Settlements Under the Twin Regulations' in L Ruggeri and others (eds), *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Intersentia 2022) 72-74.

[92] CCPA cit. arts 321, 322.

[93] SCPA cit. arts 306, 307. For more information on court settlements in Slovenia, see, *e.g.*, A Galič, 'Vloga sodnika pri spodbujanju sodnih poravnav' (2002) Zbornik znanstvenih razprav.

[94] Heidelberg report - Report (JLS/2004/C4/03) on the application of the Brussels I Regulation in the Member States presented by B Hess, T Pfeiffer and P Schlosser, Study JLS/C4/2005/03, Final version September 2007, Ruprecht-Karls-Universität Heidelberg, 66, 277. See also A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 869; I Kunda and M Tičić, 'Authentic Instruments and Court Settlements Under the Twin Regulations' cit. 72-74.

[95] Art. 3(a) Brussels I Recast cit.

[96] *Ibid*. art. 3(b).

[97] P Mankowski, 'Article 3' in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law. Brussels Ibis Regulation – Commentary* (Verlag Dr. Otto Schmidt KG 2023) 93; S Leible, 'Artikel 2' cit. 190.

Whether public notaries from other Member States may be included in the concept of "court" in the sense of Brussels I Regulation and European Enforcement Order Regulation was at issue in *Pula Parking*[98] and *Zulfikarpašić*.[99] Under the then Croatian Enforcement Act, Croatian notaries had the standalone authority to issue writs of execution on the application for enforcement based on a "trustworthy document" (*vjerodostojna isprava*).[100] After the writ is issued by a notary, it is served on the debtor who may lodge an opposition. In that case, the notary must transfer the file to the court which decides on the opposition. In both rulings, the CJEU refused to include the Croatian public notaries under the notion of "court", pointing particularly to the fact that they are not mentioned in the regulation (as opposed to the Hungarian and Swedish notaries);[101] that there are fundamental differences between judicial and notarial functions;[102] and that the principle of *audi et alteram partem* was not complied with.[103] This reasoning, however, may be questioned[104] when taking into account that Hungarian notaries, which operate in the same manner as the Croatian ones,[105] do fall under the notion of 'court' in the Brussels I Regulation. The difference lies in the simple fact that Hungarian notaries are explicitly mentioned in the Brussels I Regulation as included in the notion of "court".[106] As Croatia did not participate in the negotiations on the amendment of Brussels I Regulation (since

[98] Case C-551/15 *Pula Parking d.o.o. v Sven Klaus Tederahn* ECLI:EU:C:2017:193.

[99] Case C-484/15 *Ibrica Zulfikarpašić v Slaven Gajer* ECLI:EU:C:2017:199.

[100] Croatian Enforcement Act (Ovršni zakon) of 2020, art. 31(1). For more on the enforcement on the basis of "trustworthy document", see *e.g.* J Borčić, 'Notaries Public and Distraint Proceedings' (2009) Collected Papers of Zagreb Law Faculty 1251-1320. Additionally, the notion of "trustworthy instrument" can also be found in the Slovenian system: see Zakon o izvršbi in zavarovanju, Uradni list RS, št. 3/07 – uradno prečiščeno besedilo, 93/07, 37/08 – ZST-1, 45/08 – ZArbit, 28/09, 51/10, 26/11, 17/13 – odl. US, 45/14 – odl. US, 53/14, 58/14 – odl. US, 54/15, 76/15 – odl. US, 11/18, 53/19 – odl. US, 66/19 – ZDavP-2M, 23/20 – SPZ-B, 36/21, 81/22 – odl. US in 81/22 – odl. US, art. 23; M Bratković, 'Reorganisation of Enforcement on the Basis of a Trustworthy Document in Slovenia' (2015) Collected Papers of Zagreb Law Faculty 1025-1050.

[101] *Pula Parking d.o.o. v Sven Klaus Tederahn* cit. para. 46; *Ibrica Zulfikarpašić v Slaven Gajer* cit. para. 36.

[102] *Pula Parking d.o.o. v Sven Klaus Tederahn* cit. para. 47; see also case C-53/08 *Commission v Austria* ECLI:EU:C:2011:338 para. 103; case C-32/14 *ERSTE Bank Hungary Zrt. v Attila Sugar* ECLI:EU:C:2015:637 para. 47; case C-392/15 *Commission v Hungary* ECLI:EU:C:2017:73 para. 111.

[103] *Pula Parking d.o.o. v Sven Klaus Tederahn* cit. paras 54, 58; *Ibrica Zulfikarpašić v Slaven Gajer* cit. paras 43, 46, 48.

[104] See also P Poretti, 'The Role of Notaries in EU Law with Reference to Case Law' (2019) Javni bilježnik 9-12.

[105] For more on the notarial order for payment procedure in Hungary, see, *e.g.*, V Harsági, 'The Notarial Order for Payment Procedure as a Hungarian Peculiarity' in R Geimer and R Schütze (eds), *Recht Ohne Grenzen. Festschrift für Athanassios Kaissis zum 65. Geburtstag* (Otto Schmidt/De Gruyter european law publishers 2012) 343-354; M Mantovani, 'Notaries and their Debt-Collection Writs under the Brussels Ia Regulation. A Difficult Characterisation' (2019) Journal of Private International Law 410-412.

[106] M Bratković, 'Why Croatian Notaries are not the Court. On Interpretation of Regulation No. 805/2004 and Regulation Brussels I bis in Judgements Zulfikarpašić and Pula parking' (2017) Collected Papers of Zagreb Law Faculty 307; M Mantovani, 'Notaries and Their Debt-Collection Writs under the Brussels Ia Regulation' cit. 397.

it was not yet a Member State), and has not requested such amendment upon entering the EU,[107] its notaries cannot be regarded as "court" in that sense.

However, with the 2020 Amendments to the Croatian Enforcement Act,[108] it appears that the Croatian notaries in these proceedings would be qualified as "courts" for the purposes of the of Brussels I Regulation and European Enforcement Order Regulation. Namely, the applications for enforcement on the basis of a "trustworthy document" must now be submitted to the municipal court according to the residence of the enforcement debtor, after which they are evenly assigned to public notaries, which are explicitly appointed as commissioners of the court.[109] This differs from the previous solution, where applications were to be submitted directly to the notary of choice – a solution which was previously often critiqued, regardless of the developments on the EU level.[110] Moreover, after receiving the application and assessing whether it is admissible and orderly, the notary notifies the enforcement debtor of the possibility to fulfil the obligation within fifteen days.[111] In that way, the rights of the debtor are protected, in line with the principle of *audi et alteram partem*, which was previously lacking, according to the CJEU. The debtor also has the opportunity to object the enforcement decision, after which the case is referred to court, as was the case before the amendments.[112] While these amendments would allow the Croatian notaries to be included under the notion of "court",[113] it remains to be seen whether the reform of the Brussels I Recast will bring additional changes.[114]

What *Pula Parking* and *Zulfikarpašić* show, in addition to clarifying the concept of "court or tribunal", is the importance of the previously discussed adversarial principle. In fact, it is visible that such principle is a *conditio sine qua non* when defining not only the "any judgment" part of the definition, but also when interpreting the "court or tribunal" part. In that sense, any orders or decisions given by a court or tribunal, but obtained and

[107] H Hoblaj, 'Prorogation of Jurisdiction in Civil and Commercial Matters According to Regulation no. 1215/2012' (2022) Javni bilježnik 78; M Bratković, 'Why Croatian Notaries are not the Court. On Interpretation of Regulation No. 805/2004 and Regulation Brussels I bis in Judgements Zulfikarpašić and Pula parking' cit. 307, 308.

[108] Act on the Amendments to the Enforcement Act (2020).

[109] Croatian Enforcement Act cit. art. 39(a)(4).

[110] A Maganić, 'Dejudicialisation of the Enforcement Procedure in Croatia and Some Neighbouring Countries' (2018) Collected Papers of Zagreb Law Faculty 711.

[111] Croatian Enforcement Act cit. art. 281(1).

[112] *Ibid*. art. 282.

[113] H Hoblaj, 'Prorogation of Jurisdiction in Civil and Commercial Matters According to Regulation no. 1215/2012' cit. 79.

[114] Proposals for reform in other directions are also possible, particularly in light of the recent Working Paper on the reform of the Brussels I Recast, in which the authors suggest that neither Croatian nor Hungarian notaries should qualify as "court", *i.e*., that art. 3(a) of the Brussels I Recast should be removed. See B Hess and others, 'The Reform of the Brussels Ibis Regulation' (MPILux Research Paper 6-2022). See also B Hess, 'La Reforma del Reglamento Bruselas I bis. Posibilidades y Perspectivas' (2022) Cuadernos de Derecho Transnacional 19.

"designed to be obtained *ex parte* or without notice to the defendant" do not qualify as "judgments",[115] *e.g.*, freezing injunctions obtained without notice to the defendant.[116]

II.3. "A MEMBER STATE"

Another element relates directly to the one formerly addressed: a "judgment" emanates from the court or tribunal of "a Member State". This narrows the scope of the notion of "judgment" to those rendered by the court or tribunal in the territory of a Member State, and to an organ of the state which exercises the juridical function of the state.[117] Even by simple grammatical interpretation, such wording suggests that any decision emanating from a Third State cannot constitute a "judgment" for purposes of the regulations. This was questioned early on in the CJEU's ruling in *Owens Bank*.[118] The CJEU stated that the Brussels Convention "does not apply to proceedings, or issues arising in proceedings, in Contracting States concerning the recognition and enforcement of judgments given in civil and commercial matters in non-contracting States".[119] Therefore, the merits of a "judgment" must have been determined in a Member State, not a Third State.[120] Additionally, as the "essential purpose" of a decision by a Member State on an issue arising in the proceedings for the enforcement of a judgment given in a Third State is to determine whether that judgment may be recognised or enforced, such decision cannot be separated from the question of recognition and enforcement, *i.e.*, such decision cannot be deemed as falling under the notion of "judgment" for the purposes of recognition and enforcement under the Brussels regime.[121] In this way, the ruling followed the opinion of Advocate General Lenz in which he stated that the "double exequatur" is also not allowed in situations when the Third State judgment is not declared enforceable as such in the Member State, but is "made on the basis of civil proceedings".[122] Following this ruling, the commentators concluded that decisions of a Member State incorporating the foreign decisions can therefore not qualify as "judgments".[123]

[115] A Briggs, *Civil Jurisdiction and Judgments* cit. 720; R Fentiman, *International Commercial Litigation* cit. 640.

[116] A Briggs, *Civil Jurisdiction and Judgments* cit. 720. See also: A Dickinson, 'English Private International Law Aspects of Provisional and Protective Measures' in M Andenas, B Hess and P Oberhammer (eds), *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) 292.

[117] L Merrett, 'Article 2' cit. 83; A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 871.

[118] Case C-129/92 *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA.* ECLI:EU:C:1994:13.

[119] *Ibid*. para. 37.

[120] L Merrett, 'Article 2' cit. 83.

[121] *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA.* cit. para. 29.

[122] Case C-129/92 *Owens Bank v Fulvio Bracco and Bracco Industria Chimica SpA.* ECLI:EU:C:1993:363, opinion of AG Lenz, para. 23.

[123] L Merrett, 'Article 2' cit. 84.

This ruling may seem obvious taking into account the idea behind the EU's free movement of judgments. In the EU's Area of Freedom, Security and Justice,[124] a judgment emanating from one Member State is recognised and directly enforceable in a different Member State, with limited grounds for refusal available. However, the problem can emerge in a situation in which a judgment emanating from a Third State is recognised in one Member State, and is to be enforced in another Member State. If "double exequatur" were possible, *i.e.*, if the second Member State were obliged to recognise and enforce a decision of the first Member State which basically recognises a Third State's judgment on the merits, this would increase the possibility of forum shopping, where the creditors of the foreign judgment could first try to recognise their judgment in the Member State with the least strict requirements.[125] Other Member States with stricter requirements as to the acceptance of foreign judgments would have no choice but to recognise the decision of the Member States which are more open to foreign judgments and have their rules completely disregarded by the creditors in the respective Third State. As a solution, "double exequatur" is prohibited, or as French would say "*exequatur sur exequatur ne vaut*", both in national laws of some of the Member States,[126] as well as at the EU level.[127] According to some authors, this prohibition includes not only decisions by a court of a Member State recognising a Third State judgment, but also any other judgments of Member States upon judgments of the Third States.[128] This approach, however, has been a matter of reconsideration in the CJEU ruling in *H Limited* discussed below. This ruling comes into clash with the previously mentioned scholarly positions on whether judgment of a Member State made upon judgment of Third States falls under the notion of "judgment" in the EU.

III. The notion of "judgment" in the EU regulation on cross-border collection of monetary claims after the *H Limited* and *London Steam-Ship Owners*

As explained above, the notion of judgments under EU law is to be interpreted broadly, but not without certain limits. As opposed to the differentiations that may exist between types of decisions under national law of a particular Member State, a "judgment" as interpreted in terms of EU regulations allows for a variety of such decisions, many of which

[124] Art. 67 TFEU in conjunction with art. 81 TFEU.

[125] M Holger Kall, 'Doppelexequatur: "ne vaut" oder "no worries"?' (2018) Internationales Handelsrecht. Zeitschrift für das Recht des Internationalen Warenkaufs und Warenvertriebs 141.

[126] For the development on the "double exequatur" in Germany, see M Holger Kall, 'Doppelexequatur: "ne vaut" oder "no worries"?' cit. 108.

[127] S Leible, 'Artikel 2' cit. 188; V Rijavec, 'Enforcement Titles Under Brussels I bis Regulation from National to EU Frameworks' cit. 19; E Bylander and M Linton, 'Types of Judgments According to Different Criteria' in V Rijavec and others (eds), *Diversity of Enforcement Titles in the EU* cit. 91.

[128] A Briggs, *Civil Jurisdiction and Judgments* cit. 721; H Sikirić, 'Reasons for Denying Recognition and Enforcement of Court Decisions According to the Council Regulation (EC) No. 44/2001 of December 22, 2000 on Court Jurisdiction and Recognition and Enforcement in Civil and Commercial Matters' cit. 58.

fall under this notion. However, some of the latest CJEU rulings may have additionally blurred the demarcation line between what does and what does not constitute a "judgment" in the EU private international law. In order to examine whether there are changes to the notion of "judgment" that was presented in the previous Chapter, the relevant rulings are discussed in turn.

III.1. *H LIMITED*: IS "DOUBLE EXEQUATUR" NOW ALLOWED?

On 7 April 2022, the CJEU delivered its ruling in *H Limited*, a case dealing specifically with the notion of "judgment" in Brussels I Recast. It particularly addressed the issue of the process of enforcing a judgment of a different Member State, which allowed the enforcement of a judgment of a Third State for the payment of a debt. This brings us to the slippery territory of "double exequatur", or, metaphorically termed, "judgment laundering",[129] previously unimaginable in the EU. Following this ruling, the notion of a "judgment" in the EU regulations has gained wider contours, whereas the notion of "double exequatur" has been narrowed down.

a) Dispute in the national proceedings

The dispute emerged after the English High Court ordered "J", a natural person with residence in Austria, to pay H Limited, a bank, approximately 9 200 000 euro, by the order for payment of 20 March 2019.[130] Although the UK has since left the EU, the case reached the CJEU as UK was still a Member State at the time.[131] The issue is owed to the fact that the order for payment was delivered pursuant to two different judgments by the courts of a Third State – Jordan.

After *H Limited* applied for the enforcement of the order for payment in Austria, the District Court in Austria granted the enforcement of the English judgment. The Austrian court particularly observed the fact that the proceedings in England had complied with the adversarial principle and the order for payment is therefore eligible for enforcement in Austria. The Regional Court confirmed such stance and refused an appeal by "J". The

[129] R Fentiman, *International Commercial Litigation* cit. 641.

[130] England and Wales High Court of 14 2019 [2019] EWHC 860 (Comm) *Arab Jordan Investment Bank Plc & Anor v Sharbain* www.bailii.org.

[131] The UK has officially left the EU in January 2020, while the transition period lasted until 31 December 2020. With the end of that transition period, the Brussels I Recast Regulation became inapplicable in the relation between the UK and the EU. The case at hand, however, occurred while the UK was still a Member State of the EU, therefore the EU regulations still applied. As stated in the Withdrawal Agreement, Brussels I Recast Regulation "shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period" (art. 67(2)(a)). For more information on the legislation regulating "Brexit", see: Council Agreement XT/21054/2019/INIT of 12 November 2019 on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community; Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, on the other part of 30 April 2021.

Austrian Supreme Court, however, did not support such decision based on its view that the exclusion of "double exequatur" applies also to the orders for payment, which are made by court of a Member State based on the action for enforcement of a judgment emanating from a Third State.[132] Given the emerging doubts, the Supreme Court decided to stay the proceedings and refer preliminary questions to the CJEU.

The questions concern the notion of a "judgment", particularly whether arts 2(a) and 39 of the Brussels I Recast need to be interpreted

> "as meaning that a judgment that is to be enforced exists even if, in a Member State, the judgment debtor is obliged, after summary examination in adversarial proceedings, albeit relating only to the binding nature of the force of res iudicata of a judgment given against him in a Third State, to pay to the party who was successful in the Third State proceedings the debt that was judicially recognised in the Third State, when the subject matter of the proceedings in the Member State was limited to examination of the existence of a claim derived from the judicially recognised debt against the judgment debtor".[133]

In case of a negative answer to the first question, the Supreme Court of Austria questions whether enforcement must be refused if the judgment under review is not a "judgment" within the meaning of the relevant provisions of Brussels I Recast, or if the application of the Member State of origin does not fall within its scope, irrespective of the existence of one of the refusal grounds.[134] In case of an affirmative answer to the second question, the question remains whether in the proceedings for refusal of enforcement, the court of the Member State addressed must assume that a judgment falling within the scope of Brussels I Recast exists, based solely on the information provided in the certificate issued pursuant to art. 53.[135]

In short, the CJEU stated that "an order for payment made by a court of a Member State on the basis of final judgments delivered in a Third State constitutes a judgment and is enforceable in other Member States if it was made at the end of adversarial proceedings in the Member State of origin and was declared to be enforceable in that Member State".[136] The CJEU also highlighted the possibility to apply for a refusal based on one of the refusal grounds referred to in art. 45 of Brussels I Recast.

b) Prohibition of "double exequatur" circumvented?

Although it was the settled CJEU case law that an "exequatur of an exequatur" is not permitted,[137] diverse methods of enforcement of foreign judgments in some Member States may still raise doubts in borderline cases like *H Limited*. The CJEU's first task in this case

[132] *J v H Limited* cit. para. 2.
[133] *Ibid*. para. 20.
[134] *Ibid*.
[135] *Ibid*.
[136] *Ibid*. para. 47.
[137] See *J v H Limited* cit. para. 38 and references contained therein.

was to provide interpretation as to whether the English summary order, *i.e.*, the object of recognition in Austria, falls under the notion of "judgment". The English summary order was given following a particular procedure which relates to a specific method of enforcement based in common law. While the concept of exequatur is used in the civil legal systems for the recognition and enforcement of foreign judgments, the approach differs in the legal systems of common law.[138] For a better understanding of the case at hand, a short overview of the English system of recognition and enforcement of foreign judgments is in order.

As opposed to the method of exequatur, the English law differentiates between recognition and enforcement of foreign judgments by virtue of rules of common law, or by virtue of one of the available statutory schemes, *e.g.*, Civil Jurisdiction and Judgments Act 1982, Administration of Justice Act 1920 or the Reciprocal Enforcement of Judgments Act 1933.[139] If a foreign judgment is not enforceable or recognisable under these statutory schemes, it may still be possible under the rules of common law by an "action on the judgment".[140] The idea behind this notion is that a foreign decision provides for a substantive obligation on the judgment debtor, which in itself can form a cause of action in debt which differs from the original cause of action.[141] This option will be available if the judgment is *in personam*, given for a sum of money, is final and conclusive, as well as under the condition that court which gave it had jurisdiction under the rules corresponding to the English private international law ones.[142]

This method was used in the case which prompted the *H Limited* ruling. The claimant applied for a summary judgment on the debt without trial. In such proceedings, the claimant must only prove that the defendant has "no real prospect of success"[143] and that there is "no other compelling reason for a trial".[144] In such cases, there exist a number of defences to the enforcement proceedings, including that a foreign judgment was obtained by fraud or that the proceedings in which the judgment was obtained were in breach of natural justice.[145] It was these two defences that the defendant raised in the

[138] Besides the "exequatur" method, common to the civil legal systems, two more methods for recognition and enforcement of foreign judgments can be distinguished: "registration" method and "transformation" method. While the former requires a registration of a foreign judgment under certain conditions, the latter requires the foreign judgment to be incorporated into a new, domestic one. See more in J Valdhans and T Kyselovská, 'Selected Issues of Recognition and Enforcement of Foreign Judgments from the Perspective of EU Member' in V Rijavec (ed.), *24th Conference Corporate Entities at the Market and European Dimensions (Conference Proceedings)* (University of Maribor Press 2016) 157-173.

[139] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 226.

[140] *Ibid*. 226; S Grubbs (ed.), *International Civil Procedure* cit.197.

[141] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 864, 865.

[142] *Ibid*. cit. 226.

[143] R Fentiman, *International Commercial Litigation* cit. 620.

[144] England and Wales High Court of 14 2019 [2019] EWHC 860 (Comm) *Arab Jordan Investment Bank Plc & Anor v Sharbain* cit. para. 10.

[145] P Barnett, *Res Iudicata, Estoppel and Foreign Judgments* (Oxford University Press 2001) 36, 37.

proceedings before the English High Court, particularly by alleging a fraudulent obtainment of the Jordanian judgments and lack of power of attorney by H Limited, which also related to the point that there was a breach of natural justice in the Jordanian courts which allegedly prejudiced "J".[146] The High Court, however, ruled that there is no real prospect of a successful defence to the claim to enforce the Jordanian judgments.

The crux of the issue at hand is in the peculiarity of the method of an action on a judgment. Although being a method of enforcing a foreign judgment, and despite the fact that throughout the proceedings in question, all of the questions were considered having regard to the Jordanian judgments in question and Jordanian law in general, the final decision was issued as a decision on its own, not a decision on recognition or enforcement of the Jordanian judgments, as is the case with the exequatur method. However, before the ruling in *H Limited*, scholars did not perceive the distinction in the methods as sufficient to treat the decisions brought by an action on the judgment in England as "judgment" under the Brussels regime.[147]

The CJEU, however, ruled otherwise. Its conclusion was reached after consideration of a number of relevant points of the case, starting from two interrelated arguments: first, that the concept of "judgment" is broad in light of the principle of mutual trust,[148] and second, that this concept is not linked to the content of the judgment or else it would jeopardize their free circulation.[149]

The CJEU relied on the mutual trust, stating that it would be undermined if a decision such as one from the English High Court would be denied as a "judgment".[150] This, in the CJEU's opinion, is in line with the broad definition of a "judgment", whereas a restrictive interpretation of the term would create a category of acts which the courts would not be required to enforce.[151] While the existence of mutual trust is one of EU's most important goals,[152] and while it has become a "leitmotiv" of judicial cooperation in the EU,[153] the

[146] England and Wales High Court of 14 2019 [2019] EWHC 860 (Comm) *Arab Jordan Investment Bank Plc & Anor v Sharbain* cit. paras 21-25, 102.

[147] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 865.

[148] *J v H Limited* cit. para. 29.

[149] *Ibid*. para. 28.

[150] *Ibid*. paras 29, 30.

[151] *Ibid*. para. 31.

[152] See, *e.g*., Communication COM(2014) 144 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 March 2014, The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union; European Council Conclusions of 26-27 June 2014.

[153] M Safjan and D Düsterhaus, 'De l'encadrement de l'ordre public procédural des États membres à l'ordre procédural autonome de l'Union' in B Hess and K Lenaerts (eds), *The 50th Anniversary of the European Law of Civil Procedure* (Baden-Baden Nomos Hart Publishing 2020) 60; M Weller, *"Mutual Trust": A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?* in *Collected Courses of the Hague Academy of International Law* (Brill 2022) 138.

level of such trust is certainly not as high as it may be perceived.[154] It is questionable whether decisions such as one in the case at hand strengthen the idea of mutual trust in the EU, or they actually have the opposite effect by raising suspicions among Member States about appropriateness of their procedures.

Separating the notion of "judgment" from the respective contents entails that swift and simple recognition and enforcement may take place between Member States. This is the basis for the CJEU to conclude that the concept of "judgment" "also includes an order for payment made by a court of a Member State on the basis of final judgments delivered in a Third State".[155] The decisive factor for "judgment", as highlighted in the previous section, is the existence of an adversarial nature of the proceedings that led to the decision in question.[156] However, it is precisely in these English proceedings where the adversarial quality of the proceedings may itself be disputed. In such cases, no full trial takes place.[157] The defendant, when taking part in an action on a judgment proceeding, cannot present his/her case fully, but in view of only few defence grounds. As stated by the English High Court, final and conclusive foreign judgment for a definite sum is unimpeachable for error of law or fact, with only few exceptions, such as fraud, public policy, natural justice and penalties.[158] It is questionable whether this is enough for a proper defence,[159] and consequently, whether these are truly adversarial proceedings. Actually, such restricted defences seem logical given that the proceedings essentially aim at enforcement of a foreign judgment. In fact, the English proceedings were limited to examination of the existence of a claim derived from the debt judicially recognised in Jordan.[160] Not only is the English summary order fairly similar to a judgment enforcing Jordanian judgments, but such action on these judgments is actually a method of enforcing other judgments by "transforming" them into a new, domestic one. From the point of view of the purpose and contents of the English proceedings, it appears highly questionable whether the English judgment was actually an "original determination", rather than a validation of a foreign

[154] See, *e.g.*, Communication COM/2022/234 final from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions of 19 May 2022, 2022 EU Justice Scoreboard; Communication COM/2021/389 final from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions of 8 July 2021, 2021 EU Justice Scoreboard. See also M Weller, 'Mutual Trust: In Search of the Future of European Union Private International Law' (2015) Journal of Private International Law.

[155] *J v H Limited* cit. para. 25.

[156] *Ibid*. para. 26. See also *Bernard Denilauler v SNC Couchet Frères* cit. para. 13; *Marco Gambazzi v DaimlerChrysler Canada Inc., CIBC Mellon Trust Company* cit. para. 23.

[157] R Fentiman, *International Commercial Litigation* cit. 620.

[158] England and Wales Hight Court of 13 February 2014 [2014] EWHC 271 (Comm), *JSC VTB Bank v Skurikhin & Ors*, paras 18-20.

[159] P Lorenz Eichmüller, 'H Limited – The Austrian Sequel' (25 July 2022) EAPIL Blog eapil.org.

[160] *J v H Limited* cit. para. 20.

decision.[161] However, from the formal perspective, which the CJEU takes, it is possible to argue that no "double exequatur" *per se* happened in this scenario since an action on a judgment is indeed considered a separate procedure.

c) Public policy exception as a safety net

Aware of the concerns about the fact that its approach to defining the "judgment" incentivises forum shopping[162] and brings in the risks related to inadequate adversarial guarantees, the CJEU in *H Limited* confirms availability of the remedies, including public policy exception, against such English "judgment".[163] Why state the obvious?

Truth is that without the public policy exception, the judgment which is basically a replica of a Third State judgment would be allowed to enter the EU legal order. This case demonstrates the importance that the public policy exception, notwithstanding continuing calls for its abolishment.[164]

However, this solution is insufficient to prevent issues such as that of "double exequatur". After the *H Limited* ruling, the Austrian Supreme Court decided not to rely on the public policy to refuse enforcement.[165] As the Court found that "J" had the opportunity to oppose the claims in the English proceedings, the enforcement of English "judgment" was not refused in Austria.[166] Some may view this in positive light, particularly due to the fact that the public policy exception was used cautiously.[167] However, this may also be seen as a missed opportunity, as it is questionable whether the Jordanian judgments would even be enforced in Austria if not for the easy access provided by the English law. According to the Austrian law, for a foreign judgment to be enforced in Austria, one of the two core requirements[168] is that the reciprocity is guaranteed in the state of origin (in this case in Jordan), followed by a number of other conditions,[169] as well as additional grounds

[161] See A Briggs, *The Conflict of Laws* (Oxford University Press 2002) 118.

[162] It should be noted that since UK is no longer a Member State, this risk has been reduced. See more on the phenomenon of "forum shopping" in F Ferrari, 'Forum (and law) shopping' in J Basedow and others (eds), *Encyclopedia of Private International Law, (Vol 2)* (Edward Elgar Publishing 2017) 789; F Ferrari, *Forum Shopping Despite Unification of Law* in *Collected Courses of the Hague Academy of International Law* (Brill 2019).

[163] *J v H Limited* cit. para. 46.

[164] W Kennett, *The Enforcement of Judgments in Europe* cit. 221; T Keresteš, 'Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow' (2016) Lexonomica 82; G Mäsch and M Peiffer, 'New Enforcement Regime under the Brussels I bis Regulation: Does the Paradigm Shift Help Judgment Creditors?' in J von Hein and T Kruger (eds), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives* (Intersentia 2021) 39, 40; J Kramberger Škerl, 'Evropeizacija javnega reda v mednarodnem zasebnem pravu' (2008) Pravni Letopis 351.

[165] The Austrian Supreme Court of Justice, 19 May 2022, 3 Ob 71/22w.

[166] *Ibid*. 19, 20.

[167] P Lorenz Eichmüller, 'H Limited' cit.

[168] Austrian Enforcement Code (Exekutionsordnung), RGBl No 79/1896, BGBl No I 100/2016 (2016), art. 406.

[169] *Ibid*. art. 407.

for refusal.[170] The reciprocity between the states must be expressly provided by a formal certificate, *i.e*., in a bilateral or multilateral treaty,[171] which does not currently exist between Austria and Jordan.[172] It follows that Jordanian judgments could not as such be enforced in Austria, which points to the fact that the issue in *H Limited* was a deliberate instance of forum shopping, and a successful one at that. The English procedure was, indeed, "used as a Trojan horse to enter Austria".[173] Given the generally universal negative stance towards the phenomenon of forum shopping,[174] the CJEU's decision in *H Limited* seems even more surprising.

As visible from the above, stressed between the broad notion of "judgment" and narrow notion of "double exequatur", the loosing parties to the proceedings in the Third States may experience disadvantage, especially in the form of uncertainty when eventually the judgment is brought before EU national courts for the purpose of recognition or enforcement. With UK no longer in the EU, the mentioned uncertainty is reduced. However, the possibility of similar issues still remains as the common law system of enforcement of judgments is also used in Ireland.[175] In a similar vein, some authors point to the possibility that this ruling may actually prompt some Member States to incorporate merger judgments into national laws in view of attracting foreign creditors.[176] Additionally, with the UK outside of the EU, the number of cases from the Third States might be on the rise. As the epilogue of the case *H Limited* in Austria clearly demonstrates, the advantage, however, of this constellation of circumstances is in the potential for wider acceptance of the same Third State's judgment across the EU and additionally unifying the EU legal order beyond individual Member States.

d) Impact of H Limited *on the notion of "judgment"*

It follows from the former CJEU's rulings, that in addition to the elements in the law provision itself, the notion of "judgment" entails that it is rendered by an independent authority following the adversarial proceedings between the parties. The judgment in *H Limited* confirmed the broad notion of "judgment", while also stressing the importance of the adversarial principle. While independent of the content, the notion of "judgment" is ra-

[170] *Ibid*. art. 408.

[171] H Heiss, 'Austria' in J Basedow and others (eds), *Encyclopedia of Private International Law, (Vol 2)* (Edward Elgar Publishing 2017) 1893.

[172] N Bremer, 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in Egypt and the Mashriq Countries' (2018) Journal of Dispute Resolution 130.

[173] V Richard, 'The CJEU on Double Exequatur' (8 April 2022) EAPIL Blog eapil.org.

[174] See F Ferrari, 'Forum Shopping in the International Commercial Arbitration Context: Setting the Stage' in F Ferrari (ed.), *Forum Shopping in the International Commercial Arbitration Context* (Otto Schmidt/De Gruyter European Law publisher 2013).

[175] See, *e.g*., W Binchy, 'Ireland' in J Basedow and others (eds), *Encyclopedia of Private International Law, (Vol 2)* cit. 2183-2192.

[176] B Hess and others, 'The Reform of the Brussels Ibis Regulation' cit. 18; V Rijavec, 'Enforcement Titles Under Brussels I bis Regulation from National to EU Frameworks' cit. 19.

ther formalistic in line with the overall purpose of the EU private international law regulations being free circulation of judgments. Thus, a decision based on a Third State's judgment, such as English summary order, is included in the notion of "judgment".

Although the CJEU's tone in *H Limited* does not suggest that there is any change in the notion of "judgment" or the prohibition of "double exequatur", the sentiment that the latter is thereby breached remains strong. This is particularly so as earlier scholarly opinions stated that any judgments upon judgments emanating from Third States would not qualify as "judgment" in the sense of the relevant EU regulations. Thus, it could be said that the general understanding of the notion of "judgment" is changed, *i.e.*, broadened by the new ruling. At the same time, the notion of "double exequatur" becomes narrower.

Whatever the case may be, the current understanding of the notion of "judgment" is too broad. This is particularly so given that the circumvention of the Austrian national rules on recognition and enforcement of foreign judgments by way of English procedural facet admittedly fits very badly with the prohibition of "double exequatur" settled in the EU private international law. The purpose of the prohibition, *i.e.*, avoiding the forum shopping tactics, is disregarded by this ruling precisely because of the broadness of the current notion of "judgment". This new understanding of the notion also deprives the Member States of their right to assess foreign adjudications based on their own national rules on foreign judgments.

This ruling comes at an interesting time coinciding with the European Commission's assessment of the Brussels I Recast.[177] An opportunity is provided for a closer look at this matter to determine whether similar situations are possible under the laws of any of the Member States, now that UK has left the scene. Depending on the result of this analysis, there might or might not be a practical need to react on the EU level by codifying the rules.

III.2. *London Steam-Ship Owners*: New Rules of Interplay between Judgments and Arbitral Awards

a) Facts of the case

Not long after the decision in *H Limited*, the CJEU presented another ruling dealing with the meaning of "judgments" and their interplay with arbitral awards. The ruling in *London Steam-Ship Owners* ensued after long proceedings following the sinking of the *Prestige* oil tanker in 2002. After a criminal investigation was launched in Spain, several legal entities brought their civil claims against owners and the master of the tanker, as well as against the liability insurer, *i.e.*, the London P&I Club. Pursuant to art. 117 of the Spanish Criminal Code, the claimants had the right to a direct action against the P&I Club.[178] The Club,

[177] Art. 79 Brussels I Recast cit.

[178] Ley Orgánica 10/1995 of 23 November 1995 of Penal Code «BOE» n. 281, of 24 November 1995, art. 117.

however, did not enter an appearance in those proceedings. Instead, it commenced arbitration proceedings in London, in which it sought two declarations.[179] First, that the Kingdom of Spain needed to pursue its claims in the arbitration proceedings pursuant to the arbitration clause which was included in the insurance contract between the owners of *Prestige* and the P&I Club. Second, that it could not be held liable to the Kingdom of Spain in those matters, as the insurance contract stipulated that the insured party must first pay the injured one the compensation, which is in line with the "pay to be paid" clause common to all the insurance contracts concluded with P&I Clubs.[180] The Kingdom of Spain did not participate in the arbitration proceedings.

The arbitral tribunal delivered an award before the Spanish court. It held that the claims for damages by the Kingdom of Spain needed to be referred to arbitration in London, as well as that the P&I Club was not liable in the absence of prior payment of the damages by the owners of *Prestige*. Afterwards, the High Court of Justice in England granted the P&I Club leave to enforce the award and handed down a judgment in terms of the award, despite the opposition from the Kingdom of Spain.

The Spanish court, on the other hand, delivered a judgment in criminal proceedings and acquitted the master of the *Prestige* in regards to the charges of offence against the environment and convicted him of the offence of serious disobedience towards authorities. After appeals brought by multiple parties, the court convicted the master of the offence of negligence against the environment, held both master and the owners, as well as the P&I Club liable in respect of civil claims, amount of which was to be determined by the Provincial Court of Corunna. That court later held the master, owner and the P&I Club liable to over 200 parties.

After the Spanish judgment was submitted to the High Court of Justice in England for recognition, which was granted, the P&I Club lodged an appeal, claiming that this judgment was irreconcilable with the order and judgment by the High Court, within the meaning of art. 34(3) of Brussels I Regulation. This is where the referring court raised the question of whether a judgment given under Section 66 of the Arbitration Act 1996,[181] such as the one in the present case, falls under the notion of "judgment" within the meaning of art. 34(3) of the Brussels I Regulation. The court also wondered whether a judgment entered in terms of award can fall under the notion of "judgment" of the Member State in which recognition is sought. Finally, the court asked whether, in case that the art. 34(3)

[179] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 26.

[180] More on the "pay to be paid" clause in *e.g.*, N Ronneberg Jr., 'An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide' (1990) University of San Francisco Maritime Law Journal; J Kimball, 'The Central Role of P&I Insurance in Maritime Law' (2013) TulLRev.

[181] United Kingdom's Arbitration Act 1996, 'An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes' ch. 23, section 66.

does not apply, it is permissible to rely on the public policy exception in Brussels I Regulation as a ground for refusal of recognition and enforcement, or do arts 34(3) and (4) provide exhaustive grounds in terms of *res iudicata* and irreconcilability.[182]

Going against the opinion of the Advocate General Collins,[183] the CJEU ruled that

> "a judgment entered by a court of a Member State in terms of an arbitral award does not constitute a "judgment", within the meaning of that provision, where a judicial decision resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of that Member State without infringing the provisions and the fundamental objectives of that regulation, in particular as regards the relative effect of an arbitration clause included in the insurance contract in question and the rules on lis pendens contained in Article 27 of that regulation, and that, in that situation, the judgment in question cannot prevent, in that Member State, the recognition of a judgment given by a court in another Member State".[184]

In terms of the last question, the CJEU considered that a judgment cannot be refused recognition and enforcement as being contrary to the public policy "on the ground that it would disregard the force of *res judicata* acquired by the judgment entered in terms of an arbitral award".[185]

b) "Judgment" in London Steam-Ship Owners as compared to "Judgment" in H Limited

London Steam-Ship Owners, without a doubt, creates changes to the concept of "earlier judgment". However, before moving on to these new requirements and the question of whether this change also potentially influences the general understanding of "judgment", it is important to view the notion of "judgment" as understood here, and compare it with the conclusions given by the CJEU in its prior judgment of *H Limited*, as the two rulings seem to be incoherent.

As explicitly stated, arbitration falls outside the scope of the Brussels I Recast.[186] The same was the case with its predecessors, Brussels I Regulation and Brussels Convention. This exception covers all matters related to arbitration and excludes it in its entirety, including the ancillary proceedings brought before national courts.[187] As established in *Gazprom*,[188] proceedings for recognition and enforcement of arbitral awards are covered

[182] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 40.

[183] Case C-700/20 *The London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* ECLI:EU:C:2022:358, opinion of AG Collins.

[184] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 81.

[185] *Ibid*.

[186] Art. 1(2)(d) Brussels I Recast cit.; recital 12 of the Preamble of the Brussels I Recast Regulation.

[187] Case C-190/89 *Marc Rich & Co. AG v Società Italiana Impianti PA* ECLI:EU:C:1991:319 para. 18. See also T Hartley, 'Arbitration and the Brussels I Regulation – Before and After Brexit' (2021) Journal of Private International Law 70.

[188] Case C-536/13 *"Gazprom" OAO v Lietuvos Respublika* ECLI:EU:C:2015:316 para. 41.

by the national and international law, such as the New York Convention on the recognition and enforcement of foreign arbitral awards,[189] applicable in the Member State in which recognition and enforcement are sought. It is because of the (almost) universal acceptance of the New York Convention that the arbitration exception was included in the Brussels Convention in the first place.[190]

Since all matters relating to arbitration fall within this exception, it has been held that judgments entered in terms of arbitration awards do not enjoy the benefits of mutual trust and cannot circulate freely within the EU judicial area in a way that "judgments" do. Scholarly opinions[191] and Member States' domestic case law[192] agree that the judgments entered in terms of arbitral awards do not fall within the notion of "judgment". Given that the similar opinion related to the judgments upon judgments of the Third States proved to be false by the CJEU's ruling in *H Limited*, may this by analogy extend also in regards to judgments entered in terms of arbitration awards?

Both judgments entered in terms of arbitral awards and judgments upon judgments of Third States are ancillary in nature – they are dependent on a prior adjudication, *i.e.*, an originating act.[193] Both aim to assess the validity of the originating act, whether it be a foreign judgment or an arbitral award, as well as determine its effects in the Member State in question.[194] In *H Limited*, "judgment" was made upon the judgment of a Third State in a matter within the scope of the Brussels I Recast, while in *London Steam-Ship Owners*, the original decision was an arbitral award. Hence, in comparison with the former ruling, the decision in the latter can be viewed as a reduction of the scope in the broad understanding that was reaffirmed there, this reduction being the result of the limitation in the scope *ratione materiae* of the Brussels I Recast, and not the notion of "judgment" *per se*.[195]

[189] The New York Arbitration Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, New York.

[190] L Radicati di Brozolo, 'The Relation between Courts and Arbitration: Support or Hostility' (2012) Opinio Juris in Comparatione 1, 2; Report C 59/72 by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, para. 61.

[191] A Briggs, *Civil Jurisdiction and Judgments* cit. 721; Report C 59/72 cit. para. 65; A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 362.

[192] See, *e.g.*, a 2009 decision by the German Federal Court of Justice, in which this Court decided that a judgment by a court of a Member State, which incorporated a foreign arbitral award, according to the merger doctrine cannot be enforced under the Brussels I regime. German Federal Court of Justice (Bundesgerichtshof), 2 July 2009, IX ZR 152/06.

[193] M Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards: Is the "Judgment Route" the Wrong Road?' (2013) Journal of International Dispute Settlement 607.

[194] *Ibid*.

[195] B Hess, 'Arbitration and the Brussels I bis Regulation: London Steam-Ship Owners' Mutual Insurance Association (2023) CMLRev 538.

However, stating that judgments entered in terms of arbitral awards cannot fall under the notion of "judgment" because arbitration is excluded from the scope of Brussels I Recast is not enough to warrant the different treatment of judgments which similarly confirm a Third State's judgment, as seen in *H Limited*. There, the CJEU focuses on the second level judgment in England to establish it is a "judgment" under Brussels I (Recast), and not on the originating acts – the two judgments from Jordan, *i.e.*, a Third State. On the other hand, in *London Steam-Ship Owners*, the mere possibility of recognising or enforcing the judgment entered in terms of arbitral awards through Brussels I (Recast) is not even considered, while the same judgment could fall under the notion of "earlier judgment" only under strict requirements. Here, the originating act, that being the arbitral award, is clearly of utmost importance for the possibility of its inclusion under "judgment". Why was the same standard not held for judgments whose originating act is a Third State judgment? After all, recognition and enforcement of a Third State judgment under Brussels I Recast is not possible – national rules of the Member State of enforcement apply here. It has been previously noted that arbitral awards do not change their nature nor function by being approved by a court of a Member State, *i.e.*, the arbitral awards still remain outside of the scope of the Brussels I (Recast).[196] This argument can be equally expanded to Third State judgments – while such judgment can be recognised and enforced in a certain Member State (even if it may be through the English procedure of "action on a judgment"), it does not change their nature and origin, which stems from a State whose judgments do not benefit from the free movement of judgments allowed through the relevant regulation such as the Brussels I (Recast). Other Member States must still retain their right to assess whether the originating act, *i.e.*, a Third State judgment, can be recognised and/or enforced according to their own rules on recognition and enforcement of foreign decisions. Thus, arbitration being out of scope of Brussels I (Recast) is not a proper argument, as enforcing Third State judgments is also outside of its scope.

When dealing with the situations such as the ones at hand, there should either be consistent focus on the second level judgment in a Member State (without looking back at the originating act), or the first level judgment, *i.e.*, the originating act. In the former case, merger judgments and any judgments upon judgments would be allowed recognition and enforcement under the relevant EU regulations, if the second level judgment, which is rendered in the Member State, falls under the scope of application. In the latter case, if the originating act cannot fall under the notion of "judgment", neither should the second level act. The biggest issue that arises when comparing the rulings in *H Limited* and *London Steam-Ship Owners* is precisely the fact that CJEU does not take a consistent, coherent stance in regards to judgments upon judgments. While one ruling focuses on the first level judgment, therefore prohibiting its recognition or enforcement under the EU regulation, the other focuses on the second level judgment, allowing it to freely move among the other Member States in the future.

[196] K Kerameus, *Enforcement in the International Context* cit. 20.

These rulings highlight the lack of consistency in the interpretation of "judgment", especially in view of decisions stemming from common law systems. If a judgment based on an arbitral award does not constitute a "judgment", neither should a judgment based on a Third State's judgment. This is primarily because the second level judgment does not decide on the merits "afresh" – as the dispute in question is decided by the first level judgment, it is that judgment that should be taken into account.[197] The additional reasons against inclusion of judgments based on Third States' judgments under the EU notion of "judgment" have already been described above. On the occasion that the ruling in *H Limited* is to be deemed as the proper understanding, and the first level judgment should not matter for the sake of inclusion under "judgment", the same criteria should be held also for judgments entered in terms of arbitral awards. This position, however, would open a Pandora's box in terms of the interplay of judgments and arbitral awards, as well as in terms of the purpose of arbitral exception in Brussels I Recast. Moreover, it would also bring additional changes to the general notion of "judgment" due to the new requirements in terms of the notion of "earlier judgment", which will be further elaborated below.

The only option left, which is the current state of affairs, is leaving this inconsistent interpretation of "judgment" as it is, and hoping it does not lead to any more issues in the future. This option may be appealing, particularly due to the fact that all of the problems brought to the surface through these two rulings are a product of England, *i.e.*, of its common law system which at points comes at a clash with the civil law system. After Brexit, the relevance of these rulings for the future is undoubtedly diminished. At the same time, common law is still used in Ireland, therefore the possibility of similar issues is not completely erased. Regardless of the practical repercussions, it is regretful that the CJEU has not given these issues a proper conclusion.

c) Extending the principles of EU judicial cooperation in civil matters to arbitral tribunals

Regardless of the previously presented inconsistencies in interpretation between *H Limited* and *London Steam-Ship Owners*, the impossibility of including judgments entered in terms of arbitral awards under "judgment" in terms of Brussels I (Recast) was taken as a fact in the CJEU's ruling in *London Steam-Ship Owners*. However, a distinction was made between the general notion of "judgment" and the notion of "earlier judgment" in the sense of art. 45(1)(c) of the Brussels I Recast (formerly, art. 34(3) Brussels I Regulation), which provides the ground for refusal of recognition and enforcement based on irreconcilability. In contrast to the notion of "judgment" in general, the notion of "earlier judgment" within the ground for refusal must therefore be interpreted in a way that it also covers judgments entered in terms of an arbitral award. Such bar to the recognition and enforcement remains possible as the fact that an "earlier judgment" is outside of the

[197] M Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards' cit. 611.

scope of the EU regulation does not make a conflict of two judgments acceptable, as long as they are both valid in the relevant legal system.[198] Thus, some have interpreted this to cause the notion of "earlier judgment" to expand outside of the material scope of the Brussels I (Recast) regulation itself.[199] This view, however, does not entail that also the notion of "judgment" is expanded indirectly to arbitral awards. It is to note that the focus is not on the arbitral award (or the Third State judgment as in the CJEU's ruling in *H Limited*). This was regarded as one of the positives of the CJEU's ruling in *London Steam-Ship Owners*: it confirmed a different understanding of the notion of "judgment" within different contexts of the Brussels I Recast and its predecessors, thereby additionally consolidating the differing interpretation of the relevant notions.[200]

What is not regarded as positive are conditions that the CJEU sets for arbitral awards to be included within the concept of "earlier judgment". After concluding that a judgment entered in terms of an arbitral award is fully capable of constituting an "earlier judgment",[201] the CJEU goes on to establish that this is dependent on certain factors. It states that "the position is different where the award in the terms of which that judgment was entered was made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision falling within the scope of that regulation".[202] As an argument for this stance, the CJEU recalls that interpretation of a provision of EU law must be done by considering the context of that provision and all of the objectives that are pursued by the relevant regulation. Therefore, the principles underlying judicial cooperation in civil matters in the EU must be kept in mind.[203] In the case at hand, the CJEU highlights two of those principles that were infringed by the judgment entered in terms of an arbitral award: the relative effect of an arbitration clause included in an insurance contract, and the principle of *lis pendens*.

These requirements were unforeseeable. With regards to the first principle, the CJEU recalls that "a jurisdiction clause agreed between an insurer and an insured party cannot be invoked against a victim of insured damage who, where permitted by national law, wishes to bring an action directly against the insurer, in tort, delict or quasi-delict, before the courts for the place where the harmful event occurred or before the courts for the place where the victim is domiciled",[204] as previously established in *Assens Havn*.[205] The *Assens Havn* ruling, however, stems from the need to uphold the objective pursued by the

[198] T Hartley, 'Arbitration and the Brussels I Regulation' cit. 72.

[199] B Hess, 'Arbitration and the Brussels I bis Regulation: London Steam-Ship Owners' Mutual Insurance Association' cit. 538; A Mourre, 'Is Commercial Arbitration Entering in Dangerous Waters in the European Union' (2023) Asian International Arbitration Journal 3.

[200] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 53.

[201] Within the meaning of art. 34(3) of the Brussels I Regulation.

[202] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 54.

[203] *Ibid*. para. 58.

[204] *Ibid*. para. 60.

[205] Case C-368/16 *Assens Havn v Navigators Management (UK) Limited* ECLI:EU:C:2017:546 paras 31, 40.

regulation, namely its ch. II, section 3.[206] Such objectives cannot be expected to be upheld in regards to matters outside of the scope of the regulation itself, *i.e.*, it is questionable how in the matter explicitly excluded from the scope of the regulation, account should be taken of the fundamental rules of that same regulation.

With regards to the principle of *lis pendens*, the CJEU stated that "the minimisation of the risk of concurrent proceedings is one of the objectives and principles underlying judicial cooperation in civil matters in the European Union".[207] Because of this, a judgment entered in terms of arbitral award cannot prevent recognition and enforcement of a judgment from a different Member State. However, *lis pendens* between arbitration and court proceedings is hardly ever regulated, primarily because an arbitration agreement usually confers exclusive jurisdiction and derogates court jurisdiction.[208] It has been suggested that "*lis pendens* in favour of judicial proceedings has no place in arbitration"[209] as "arbitration and court proceedings belong to separate worlds".[210] Along these lines are also provisions on *lis pendens* in Brussels I Recast as they do not apply to arbitration, only to parallel proceedings before the courts.[211] The CJEU's argument is also questionable considering the ruling in *Liberato*, where the CJEU stated that a breach of the *lis pendens* rule cannot in itself justify non-recognition of a judgment on the ground that it is manifestly contrary to public policy in that Member State.[212] Although this was stated in the context of the public policy exception, it still indicates that the *lis pendens* rule does not carry such an "importance" to cause refusal of recognition and enforcement of a judgment. This being the case for judgments, why should it be any different for arbitral awards?[213]

If the rules relevant for recognition and enforcement of "judgments" in the EU should now be extended to arbitral awards, this would point to the fact that judgments enjoy higher importance than arbitral awards, as some of the well-known rules of arbitration are being disregarded in order to allow enforceability of judgments over arbitral awards on the same matter. Though not explicitly, a hierarchy among different types of decisions would be made. Indication of such hierarchy could perhaps have been sensed from the

[206] *Ibid*. para. 41.

[207] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 70.

[208] Z Nový, 'Lis Pendens Between International Investments Tribunals and National Courts' (2017) Czech Society of International Law 542; E Gaillard, 'Abuse of Process in International Arbitration' (2017) ICSID Rev 28.

[209] G Bermann, *International Arbitration and Private International Law General Course on Private International Law* in *Collected Courses of the Hague Academy of International Law* (Brill 2016) 85.

[210] Z Nový, 'Lis Pendens Between International Investments Tribunals and National Courts' cit. 539.

[211] *Ibid*. 538.

[212] Case C-386/17 *Stefano Liberato v Luminita Luisa Grigorescu* ECLI:EU:C:2019:24.

[213] G Cuniberti, 'London Steam-Ship Owners: Extending Lis Pendens to Arbitral Tribunals?' (23 June 2022) EAPIL Blog eapil.org.

CJEU's previous ruling in *West Tankers*,[214] where the rules of the Brussels I Regulation were set above those of the New York Arbitration Convention.[215] In any case, these requirements for judgments entered in terms of arbitral awards to qualify as "judgments" in the sense of art. 34(3) could not have been foreseen.[216] Going by the previously established elements necessary for a decision to qualify as "judgment",[217] as well as the previously established understanding that even the decisions not falling under the general notion of "judgment" may still qualify as an "earlier judgment" under art. 34(3) of Brussels I and 45(1)(c) of Brussels I Recast, the judgment entered in terms of arbitral award should have been capable of constituting an "earlier judgment" in the sense of art. 34(3) of Brussels I and art. 45(1)(c) of Brussels I Recast.[218] As it stands now, it may seem that the political happenings at the time,[219] as well as financial repercussions[220] that would follow if siding with the AG's Opinion, had an influence on the CJEU's ruling. Regretfully, this has been done at the cost of legal certainty.

Although the notion of "earlier judgment" has undoubtedly been changed, *i.e.*, significantly restricted, it remains left to inspect whether this has any effect on the general notion of "judgment". Going by the assumption that (regardless of the contrasting conclusion in *H Limited*) judgments whose originating act was an arbitral award do not fall under the notion of "judgment", this change in the notion of "earlier judgment" does not affect the general notion of "judgment". This is due to the former's broader scope – what falls under "earlier judgment" does not necessarily fall under "judgment".

IV. Conclusion

It is quite difficult to grasp that in the EU judicial area in which judgments from all of the 27 Member States should circulate without frontiers, the notion of "judgment" is still not sufficiently clear. Although the broadness of definitions given in the EU regulations on

[214] Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* ECLI:EU:C:2009:69.

[215] R Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments* in *Collected Courses of the Hague Academy of International Law* (Brill 2013) 238.

[216] Also pointed in A Briggs, 'Humpty-Dumpty, Arbitration, and the Brussels Regulation: A View from Oxford' (23 June 2022) EAPIL Blog eapil.org.

[217] As established in section II of this *Article*.

[218] As supported in *The London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain*, opinion of AG Collins, cit.

[219] Particularly referring to the United Kingdom leaving the EU.

[220] On the basis of the Spanish judgment, the master, owners and the London P&I Club were "liable to over 200 separate parties, including the Spanish State, in sums in excess of EUR 1.6 billion, subject, in case of the Club, to the global limit of liability of USD 1 billion". However, on the basis of the London award, "in the absence of prior payment of the insured liability by the owners, the Club was not liable to the Spanish State in respect of the claims". See *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. paras 18, 22.

cross-border collection of monetary claims is understandable, additional criteria are often necessary to conclude whether a certain decision falls under this notion. This is the result of the vast variety of judicial decisions in different Member States not known in others, which prompted their courts in multiple instances over the years to seek the CJEU's clarification. Although the line of cases improved general understanding of the notion of "judgment" in the EU since 1968, there is more to be done to enhance legal certainty. This has only been confirmed by the recent CJEU's rulings in *H Limited* and *London Steam-Ship Owners*. While these cases directly address the notion of "judgment", they also touch upon some of the particularly intricate matters of "double exequatur" and the interplay of judgments and arbitral awards.

Common to both CJEU rulings is that they affect the previous understanding of the notions of "judgment" or "earlier judgment", the former in the general context of recognition and enforcement, and the latter in the special context of refusal of recognition and enforcement on the grounds of irreconcilability. The ruling in *H Limited* explains that the notion of "judgment" covers also an English payment order issued in the special summary contested examination of a judgment given in a Third State. This ruling effectively distorts the general idea of the "double exequatur" as understood previously, allowing for its circumvention if the Member State's national law provides for a respective type of proceedings. As the UK has since left the EU, the threat of a wave of such cases is lessened, but some cases might still come along, particularly from Ireland. As a matter of principle, the notion of "judgment" is overly broad, at the expense of the prohibition of "double exequatur". The CJEU held that the risks associated with the adversarial nature of the proceedings may be counter-balanced by means of the public policy clause. Despite the fact that no qualitative conclusion can be drawn from the fact that in the case at hand the Austrian court found no reasons to invoke public policy, this mechanism is extremely rarely used and may prove insufficient.

In *London Steam-Ship Owners*, the difference between "judgment" in the process of recognition and enforcement according to the provisions of the EU regulations, and the "earlier judgments" being the grounds of refusal of recognition and enforcement of a "judgment", has been established. While the CJEU ruling clearly establishes that judgments entered in terms of arbitral awards do not fall under the former notion, they can fall under the latter one under certain conditions. This conditionality substantially changes the previous understanding and establishes additional requirements that were unforeseeable. Thus, the ruling revised understanding of the interplay between judgments and arbitral awards in the EU. This was done, however, based on highly questionable reasoning.

Following the two CJEU rulings in 2022, the notion of "judgment" has undergone changes in different directions. On the one hand, *H Limited* confirms the sheer broadness of the notion by including the English payment orders given after a limited examination of a Third State judgment, and subsequently diminishing the relevance of the principle of the prohibition of double exequatur. Here, the CJEU focused on the ancillary judgment, *i.e.*, a

second level judgment, without giving much thought to the originating act, *i.e.*, a first level judgment which was rendered in a Third State and as such was not susceptible to recognition and enforcement under the Brussels regime. In that sense, the notion seems to have become over-encompassing. On the other hand, *London Steam-Ship Owners* confirms the exclusion of judgments entered upon arbitral awards from the general notion of "judgment", while at the same time introducing significant restrictions to decisions that can fall under the notion of "earlier judgment" in the sense of articles on refusal of recognition and/or enforcement. In that sense, the general notion of "judgment" has not undergone additional changes, while the notion of "earlier judgment" has gotten additionally restricted. At the same time, the logic of *H Limited* is severely diminished by this ruling as here, the CJEU does not even consider the fact that an ancillary, second level judgment such as judgment entered in terms of arbitral award could be included under the notion of "judgment" for the purpose of recognition and enforcement under Brussels I (Recast) – in this case, the originating act, *i.e.*, the arbitral award, is the only thing that matters.

While acknowledging that the root cause of the issues in interpreting the notion of "judgment" in both cases arose due to peculiarities of the English, *i.e.*, common law, legal system, it can still be concluded that the case law continues to be the source of confusion and uncertainty for the parties. Establishing that, further research into the extent of those uncertainties is necessary and could provide basis for conclusion regarding the possible legislative actions at the EU level. As it stands now, the rulings only brought confusing and inconsistent interpretation of the EU notion of "judgment".