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A New Chapter of the CJEU Case-Law Saga on the Arbitration Exclusion in The Brussel's Jurisdictional Regime – comments on Judgement of Court of Justice of the European Union of 20 June 2022, C 700/20, London Steam – Ship Owners

Keywords: *lis pendens, arbitration agreements, recognition and enforcement of judgments, recognition and enforcement of arbitral awards, arbitration and the EU law, arbitration and court proceedings, arbitration and litigation*

1. Theses

1) Article 34(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[1] must be interpreted as meaning that a judgment entered by a court of a Member State in the 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.

[1] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), hereinafter referred to as Brussels I.

2) Article 34(1) of Brussels I must be interpreted as meaning that, in the event that Article 34(3) of that regulation does not apply to a judgment entered in the terms of an arbitral award, the recognition or enforcement of a judgment from another Member State cannot be refused as being contrary to public policy on the ground that it would disregard the force of *res judicata* acquired by the judgment entered in the terms of an arbitral award.

2. The case

The salient facts of the case resolved in the recent CJEU judgment of 20 June 2022, London Steam-Ship Owners' Mutual Assistance Association Ltd v Spain[2], can be briefly summarized as follows. Pending the prior action for damages before the Spanish courts instigated by the Kingdom of Spain against the owners and the insurer of the Prestige vessel which sank off the coast of Spain, causing significant environmental damage remedied at the expense of the Kingdom of Spain, the arbitral tribunal seated in London allowed the opposite law-suit of the insurer against the Spanish state, declaring that the defendant was bound by the arbitration clause in the insurance contract concluded by the insurer with the owners of the Prestige and that, in any event, the claimant could not be liable for damages incurred by the respondent. Following the arbitral award, the Spanish court established insurers' liability against the Kingdom of Spain and granted the claimant a specific amount of damages sought. The insurer applied to the High Court of Justice (England & Wales) for the authorisation of the enforcement of the arbitral award in the United Kingdom additionally requesting the issuance of a judgment in the terms of that award pursuant to Article 66 sect. 2 of the Arbitration Act 1996[3]. The insurers' motions were granted by the High Court of Justice and the Kingdom of Spain's appeal against that decision was dismissed.

In response to those adverse developments, the Kingdom of Spain applied in the United Kingdom for the recognition of the favourable judgment rendered by the Spanish court, on the basis of Article 33 of Regulation No 44/2001. Upon appeal from this decision granting Spain's motion, the court of the second instance requested CJEU[4] for

[2] C-700/20, ECLI:EU:C:2022:488, hereinafter referred to as the London Steam-Ship Owners case or judgment.

[3] 1996, Chapter 23: available at: https://www.legislation.gov.uk/ukpga/1996/23/contents/enacted (accessed 20.10.2022). Pursuant to Article 66 sect. 1 of this act, an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Section 2 of that article specifies that where leave is so given, judgment may be entered in terms of the award.

[4] Interestingly, it has done so just 8 days before the expiry of the transitional period ending as of 31 December 2020 after the withdrawal of the United Kingdom from the European Union on 31 January 2020. According to Article 86(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, the Court retains jurisdiction to give preliminary rulings on requests from

a preliminary ruling asking three following questions concerning the interpretation of Article 1(2)(d) and Article 34(1) and (3) of Brussels I.

1) Given the nature of the issues which the national court is required to determine in deciding whether to enter judgment in the terms of an award under Section 66 of the Arbitration Act 1996, is a judgment granted pursuant to that provision capable of constituting a relevant "judgment" of the Member State in which recognition is sought for the purposes of Article 34(3) of Brussels I?
2) Given that a judgment entered in the terms of an award, such as a judgment under Section 66 of the Arbitration Act 1996, is a judgment falling outside the material scope of Brussels I by reason of the Article 1(2)(d) arbitration exception, is such a judgment capable of constituting a relevant "judgment" of the Member State in which recognition is sought for the purposes of Article 34(3) of that regulation?
3) On the hypothesis that Article 34(3) of Brussels I does not apply, if recognition and enforcement of a judgment of another Member State would be contrary to domestic public policy on the grounds that it would violate the principle of *res judicata* by reason of a prior domestic arbitration award or a prior judgment entered in the terms of the award granted by the court of the Member State in which recognition is sought, is it permissible to rely on Article 34(1) of that regulation as a ground of refusing recognition or enforcement or does article 34(3) and (4) of that regulation provide the exhaustive grounds by which *res judicata* and/or irreconcilability can prevent recognition and enforcement of a judgment?'

3. Opinion of the Advocate General

Before addressing the first two questions referred to the Court, in its opinion as of 5 May 2022[5] the Advocate General recalled the reasons for the exclusion of arbitration from the scope of Brussels I and its predecessor, namely the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters[6] as provided for in the relevant *travaux préparatoires*, as well as the meaning and scope of this exclusion as interpreted in the prior case-law of the Court[7].

courts and tribunals of the United Kingdom made before the end of the transition period. In addition, under Article 89(1) of that agreement, the judgment of the Court, whether handed down before the end of that transition period or at a future date, has binding force in its entirety on and in the United Kingdom.

5 Opinion of the Advocate General Collins delivered on 5 May 2022, C-700/20, The London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain, ECLI:EU:C:2022:358, hereinafter referred to as Opinion.

6 Brussels Convention of 27 September1968 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2007 L 339, p. 3), hereinafter referred to as Brussels Convention.

7 See paras 41–47.

According to these sources, arbitration was excluded from the scope of the Brussels Convention due to the existence of many multilateral international agreements on arbitration, with a special emphasis on the New York Convention on the recognition and enforcement of foreign arbitral awards[8], to which all Member States at the time of the Brussels Convention adoption, with the exception of Ireland and Luxembourg, were parties[9]. In short, the Brussels Convention and its successors included the arbitration exception in order to comply with international agreements already existing in that area, notably to avoid affecting the operation of the NY Convention in the Member States. To that same end, neither of those instruments addresses proceedings for the recognition and enforcement of arbitral awards, which are governed by the national and international law applicable in the Member State where such recognition and enforcement is sought.

Turning to the interpretation of the arbitration exclusion as provided for in Article 1 (2)(d) of Brussels I, the Advocate General noticed that whilst its text gives no clear indication as to the extent to which arbitration is excluded from its scope, it is well established that this exclusion is comprehensive and as such must be interpreted broadly. Thus, the arbitration exclusion is not limited to proceedings before an arbitrator but includes court proceedings relating to arbitration such as e.g. ancillary court proceedings initiated at the arbitral seat in support of arbitration to appoint an arbitrator[10]. In order to determine whether a dispute falls within the scope of the Brussels Convention and its successors, reference must be made exclusively to the subject matter of that dispute. Therefore, if, by virtue of its subject matter, a dispute falls outside the scope of these acts, the existence of a preliminary issue that the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify the application of that convention[11]. Conversely to the court proceedings concerning the appointment or dismissal of arbitrators, proceedings regarding the application of provisional measures (granting interim relief or another form of securing the claim brought before the arbitral tribunal) are not in principle ancillary to arbitration proceedings but are ordered in parallel thereto as measures of support[12]. They concern not arbitration as such but the protection of a wide variety of rights, and therefore their

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[8] Convention on the recognition and enforcement of foreign arbitral awards, done in New York on 10 June 1958, entered into force on 7 June 1959 (Journal of Laws 1962 No 9, item 41), hereinafter referred to as NY Convention.

[9] With its progressive regional and global proliferation, it has now grown to become a pillar (sometimes even referred to as the "Constitution") of international commercial arbitration with 169 contracting parties, including 166 of the 193 states parties to the UN Charter and all European jurisdictions; see in this respect, e.g. G. Born, *International Arbitration Law and Practice*, Alphen aan den Rijn 2012, p. 19 *et. seq.* Current list of States Parties to the NY Convention with dates of ratification, accession, or legal succession available at: https://www.newyorkconvention.org/countries (accessed 28.09.2022).

[10] Judgment of the Court of 25 July 1991, C-190/89, Marc Rich & Co. AG v Società Italiana Impianti PA, EU:C:1991:319, para. 18, hereinafter referred to as Rich case.

[11] Rich, para. 18.

[12] Judgment of the Court of 17 November 1998, C-391/95, Van Uden Maritime v Kommanditgesellschaft in Firma Deco-Line and Others, EU:C:1998:543, paras 33 and 34, hereinafter referred to as Van Uden case.

place in the scope of the Brussels rules is to be determined not by their own nature but by the nature of the rights that they serve to protect. In line with the foregoing, where the subject matter of an application for provisional measures relates to a question that falls within the material scope of the Brussels rules, the latter will apply. Finally, in Gazprom case[13] the Court decided that due to the arbitration exclusion, the Brussels I does not preclude a Member State court from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award issued in another Member State that prohibited a party to arbitration proceedings from bringing certain claims before a court of the first Member State (so-called anti-suit injunction)[14] as this regulation is not applicable to the recognition and enforcement of arbitral awards.

On the basis of these initial assumptions as to the scope and the meaning of the arbitration exclusion as provided for in Article 1(2)(d) of Brussels I, the Advocate General submitted that a court judgment entered in the terms of an award, such as a judgment under section 66(2) of the Arbitration Act 1996, is clearly covered by the former provision[15]. The exclusion of arbitration from the material scope of Brussels I has the effect, in particular, of making it impossible to use that regulation to enforce an arbitral award in another Member State by first turning it into a judgment and then asking the courts of the other Member State to enforce that judgment under its provisions governing recognition and enforcement of judgments[16].

In spite of that initial conclusion as to the applicability of the arbitration exclusion, the Opinion contends that a judgment made under section 66 of the Arbitration Act 1996 plainly qualifies as a "judgment" in the requested State for the purposes of Article 34(3) of Brussels I[17] as the Advocate General argues, such position is supported by three reasons. Firstly, Article 32 of Brussels I defines the concept of a "judgment" in very broad

[13] Judgment of the Court of 13 May 2015, C-536/13, Gazprom OAO v Lietuvos Respublika, EU:C:2015:316, hereinafter referred to as Gazprom case.

[14] In this regard see however the preceding judgment of the Court of 10 February 2009, C-185/07, Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc., ECLI:EU:C:2009:69, hereinafter referred to as West Tankers case, ommitted by the Advocate General in his report. In this decision, the Court held that it is incompatible with Brussels I for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement. With regard to the interplay between the anti-suit injunctions and the Brussels jurisdictional system see, in particular: M. Kierska, *Anti-suit injunctions w świetle europeizacji prawa prywatnego międzynarodowego*, "Przegląd Prawa Handlowego" 2017/6, p. 39 *et seq.*; P. Marcisz, A. Orzeł, *Anti-suit injunctions wydawane przez sądy polubowne w świetle wyroku Trybunału Sprawiedliwości z 13.05.2015 r., C-536/13, Gazprom*, "Polski Proces Cywilny" 2017/3, p. 379 *et seq.*; P. Marcisz, A. Orzeł-Jakubowska, *The Right to Be Unheard: Recognition and Enforcement of Anti-Suit Injunctions Issued by Arbitrators in the EU*, "Journal of International Dispute Settlement" 2018, p. 1 *et seq.*

[15] Opinion, para. 48.

[16] Opinion, para. 49. See, to that effect, T. Hartley, *Arbitration and the Brussels I Regulation – Before and After Brexit*, "Journal of Private International Law" 2021/1, p. 72.

[17] Opinion, para. 52.

terms[18]. Thus, the Opinion concurs with the position previously taken by the Court in its judgment of 2 June 1994[19], that this definition applies to all of the provisions of that regulation where that concept appears including Article 34(3)[20]. Secondly, as it was also previously decided in Solo Kleinmotoren case, in order to be a "judgment" for the purposes of the Brussels I regime, the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties[21]. For the reasons specified in the Opinion, the Advocate General held that a judgment made pursuant to section 66(2) of the Arbitration Act 1996 fully satisfies those conditions[22]. Thirdly, the Opinion accepted the position that the fact that a judgment adopted pursuant to section 66 of the Arbitration Act 1996 does not address every issue before the arbitral tribunal does not prevent it from being a "judgment" for the purposes of Article 34(3) of Brussels I[23]. In particular, there is no requirement that a court must determine all of the substantive elements of a dispute in order to deliver a judgment that satisfies the purposes of that provision[24].

Moving to the issue at the heart of the dispute, the Advocate General submitted that Article 34(3) of Brussels I applies to any irreconcilable judgment given in a dispute between the same parties in the Member State in which recognition is sought, regardless of whether its subject matter comes within the material scope of this regulation or not[25]. In other words, the exclusion of arbitration under Article 1(2)(d) thereof does not result in the exclusion of such judgments from the ambit of Article 34(3). Thus, the Opinion recommended that the Court should answer the first and second questions by holding that a judgment entered in the terms of an arbitral award pursuant to section 66(2) of the Arbitration Act 1996 is capable of constituting a relevant "judgment" of the Member State in which recognition is sought for the purposes of Article 34(3) of Brussels I, notwithstanding that such a judgment falls outside the scope of that regulation by reason of Article 1(2)(d) thereof[26].

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[18] Opinion, para. 52.

[19] Judgment of the Court of 2 June 1994, C-414/92, Solo Kleinmotoren GmbH v Emilio Boch, ECLI:EU:C:1994:221, paras 15 and 20, hereinafter referred to as Solo Kleinmotoren case.

[20] Opinion, para. 52. See, to that effect, Solo Kleinmotoren case, paras 15 and 20.

[21] Opinion, para. 53; Solo Kleinmotoren case, para. 17.

[22] Opinion, paras 55–56.

[23] Opinion, para. 57.

[24] Opinion, para. 57. See, to that effect, judgment of the Court of 2 April 2009, C-394/07, Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company, ECLI:EU:C:2009:219, para. 23, where the Court held that or decisions to qualify as "judgments" it was sufficient that they are judicial decisions which have been, or have been capable of being, the subject in the state of origin and under various procedures, of an inquiry in an adversarial proceeding. In the Gambazzi case, a default judgment an English court delivered when the defendant had been excluded from the proceedings by reason of his failure to comply with a court order was held to be a "judgment", notwithstanding that the court had not examined the substance of the applicant's claims but had limited its consideration to whether the requirements for issuing a default judgment had been met.

[25] Opinion, para. 59.

[26] Opinion, para. 70.

The opinion holds that Article 1(2) of Brussels I is not determinative as to whether a judgment under Article 34(3) thereof comes within the scope of the regulation due to the fact that those provisions were enacted for different purposes and pursue different objectives[27]. Broadly speaking, the material scope of Brussels I defined in its Article 1, with all exceptions included therein, serves to designate which "judgments" within the meaning of Article 32 of that regulation, can benefit from mutual recognition and enforcement, and thus freely circulate between the Member States[28]. On the contrary, Article 34(3) of Brussels I serves a different purpose and has different objectives, namely to protect the integrity of a Member State's internal legal order and to ensure that its rule of law is not undermined by being required to recognise a foreign judgment that is incompatible with a decision of its own courts[29]. In other words, the interpretation of Article 34(3) of Brussels I is informed by the requirement that the rule of law in the Member State in which recognition is sought ought not to be disturbed. The rule of law and the internal legal order of Member States would be seriously disrupted were their courts obliged to ignore judgments on all of those matters excluded from the scope of Brussels I regulation by virtue of its Article 1(2), delivered within their jurisdiction by other courts of that same Member State, and which may have acquired the force of *res judicata*, in favour of a – potentially subsequent – judgment emanating from a court of another Member State adjudicating upon the same issue[30]. Therefore, absent clear provisions to the contrary, the Advocate General contends that it is reasonable to conclude the EU legislature did not intend to

[27] Opinion, para. 60.

[28] Opinion, para. 61.

[29] Opinion, para. 62. See to that effect also Solo Kleinmotoren case, para. 21 and the Opinion of Advocate General Léger delivered on 21 February 2002, C-80/00, Italian Leather SpA v WECO Polstermöbel GmbH & Co., ECLI:EU:C:2002:107, para. 53.

[30] Opinion, para. 63. As the Advocate General noticed, the position that a judgment handed down by a court of the State in which the recognition of a foreign judgment is sought should be afforded due deference, notwithstanding that the subject matter of that first judgment falls outside the scope of Brussels I regime, finds support in the Court's judgment of 4 February 1988, 145/86, Horst Ludwig Martin Hoffmann v Adelheid Krieg, ECLI:EU:C:1988:61, hereinafter referred to as Hoffmann case. In Hoffmann case, the Court was asked whether enforcement of a German judgment granting maintenance payments between spouses should be refused under Article 27(3) of the Brussels Convention (corresponding with Article 34(3) of Brussels I) on the ground that it was irreconcilable with the Netherlands divorce decree. The Court held that the Netherlands court should refuse to enforce the German order despite of the fact that at the material time, the scope of the Brussels Convention excluded the status of natural persons but included spousal maintenance payments. The Court observed, *inter alia*, that "the judgments at issue have legal consequences which are mutually exclusive" and that "the foreign judgment, which necessarily presupposes the existence of the matrimonial relationship, would have to be enforced although that relationship has been dissolved by a judgment given in a dispute between the same parties in the State in which enforcement is sought". The German judgment and the Netherlands divorce decree could not exist in the same legal system as fundamentally irreconcilable. For the Brussels Convention to have permitted their co-existence would have undermined the rule of law in the Netherlands.

enact provisions that would have such a disturbing impact on the rule of law in the Member States[31].

Additionally, the Opinion asserted that the contrary view, e.g. that a judgment entered in the terms of an arbitral award pursuant to section 66(2) of the Arbitration Act 1996 is not capable of constituting a relevant "judgment" of the Member State in which recognition is sought for the purposes of Article 34(3) of Brussels I as such a judgment falls outside the scope of that regulation pursuant to Article 1(2)(d) thereof, would lead to adverse side-effects consisting in the discrimination of arbitral awards recognized in a member state (or more broadly: judgments deciding on matters excluded from the scope of the Brussels I such as arbitration) *vis-a vis* judgments rendered in third states (non-EU countries) and foreign arbitral awards recognized in that jurisdiction[32]. Firstly, pursuant to Article 34(4) of Brussels I, an earlier judgment given in a third State, which by definition falls outside the scope of that regulation, may preclude recognition of a later contradictory judgment given in a Member State other than that in which recognition is sought. On the other hand, an inconsistent judgment delivered in the Member State in which recognition is sought, the subject matter of which would be deemed to fall outside of the scope of Brussels I (e.g. a judgment entered in terms of an arbitral award), would not have that effect. By way of example, a judgment delivered by a court in Bolivia, a third State, could prevent a judgment delivered by a court in Ireland, a Member State, from being recognised in France, another Member State, whilst a judgment delivered by a French court could not be relied upon to prevent the Irish judgment from being recognised in France[33]. Secondly, where a Member State has recognised a non-domestic arbitral award under the NY Convention, it cannot subsequently invoke Brussels I in order to enforce a Member State judgment that contradicts that non-domestic arbitral award. On the contrary, a domestic arbitral award enforced by way of a judgment in the Member State in which recognition is sought would be in a worse position since it would neither enjoy the status of NY Convention award, nor be entitled to protection under Article 34(3) of Brussels I. As a result, a non-domestic arbitral award would be in a superior position in the legal order of the Member State in which recognition is sought as compared with a domestic arbitral award that had been enforced by that Member State's courts[34]. In the case at issue, should the section 66 judgment not preclude the enforcement of the Spanish judgment in England, the award would be deprived of legal effects in the jurisdiction of the seat of the arbitration but could, nevertheless, be enforced in another Member State in preference to the Spanish judgment.

Moving to the third question, the Advocate General advised the Court that should it find that Article 34(3) of Brussels I does not apply to the circumstances of the case at issue, the referring court cannot rely on Article 34(1) thereof to refuse to recognise or to enforce a judgment of another Member State by reason of the existence of a prior domestic

[31] Opinion, para. 63.
[32] Opinion, paras 66–68.
[33] Opinion, para. 67.
[34] Opinion, para. 68.

arbitral award or judgment entered in the terms of that award made by a court of the Member State in which recognition is sought and that Article 34(3) and (4) of that Regulation exhausts the grounds upon which recognition or enforcement may be refused by reason of *res judicata* and/or irreconcilability[35]. In this regard, the Opinion recalled that Article 34(1) of Brussels I must be interpreted strictly, inasmuch as it constitutes an impediment to the attainment of one of the fundamental objectives of that regulation, e.g. the free circulation of judgments in civil and commercial matters. Thus, it may be relied upon only in exceptional cases[36]. Thus, reliance upon the concept of public policy is envisaged only where recognition or enforcement of the judgment given in another Member State would constitute a manifest breach of a rule of law regarded as essential in the legal order of the Member State in which recognition is sought or of a right recognised as fundamental within that legal order[37]. In Hoffmann case, the Court held that reliance upon the concept of public policy, which is unavailable save in exceptional cases, is, in any event, precluded when the issue concerns the compatibility of a foreign judgment with a national judgment[38]. Finally, from the technical point of view Article 34(2), (3) and (4) of Brussels I constitute *lex specialis* in relation to Article 34(1), which is of a general nature. Thus, to the extent that the other exceptions address the relevant public policy considerations, the latter provision is inapplicable[39].

4. Judgment of the Court

The most salient issue submitted to the CJEU boiled down to the question of whether Article 34(3) of Brussels I must be interpreted as meaning that a judgment entered by a court of a Member State in the terms of an arbitral award may constitute a "judgment", within the meaning of that provision, which prevents the recognition, in that Member State, of a judgment given by a court in another Member State if those two judgments are irreconcilable. Addressing this question the Court stated that an arbitral award can, by means of a judgment entered in the terms of that award, produce effects in the context of Article 34(3) of Brussels I only if this does not infringe the right to an effective remedy guaranteed in Article 47 of the EU Charter of Fundamental Rights[40] and enables the objectives of the free movement of judgments in civil matters and of mutual trust in the administration of justice in the EU to be achieved under conditions at least as favourable

[35] Opinion, para. 78.
[36] Opinion, para. 73.
[37] Opinion, para. 74. See, to that effect, the judgment of the Court of 25 May 2016, C-559/14, Rudolfs Meroni v Recoletos Limited, ECLI:EU:C:2016:349, para. 38 and the case-law cited therein, hereinafter referred to as Meroni case.
[38] Opinion, para. 74; Hoffman case, para. 21.
[39] Opinion, para. 76. To the same effect, the Opinion of Advocate General Wahl delivered on 16 May 2013, C-157/12, Salzgitter Mannesmann Handel GmbH v SC Laminorul SA, ECLI:EU:C:2013:322, para. 30.
[40] Charter of Fundamental Rights of the European Union (consolidated version OJ 2016 C 202, p. 391).

as those resulting from the application of that regulation[41]. Those objectives are reflected in the principles which underlie judicial cooperation in civil matters in the EU, such as the principles of free movement of judgments in civil matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice[42].

Following the pronouncement of that broad principle, the Court established that in the present case, the content of the arbitral award at issue in the main proceedings could not have been the subject of a judicial decision falling within the scope of Brussels I without infringing two fundamental rules of that regulation concerning, firstly, the relative effect of an arbitration clause included in an insurance contract and, secondly, *lis pendens*[43].

In arriving at its first finding, the Court applied its own jurisprudence regarding the relative effect of choice of courts clauses agreed between an insurer and an insured party which does not extend to the third party seeking damages from the insurer on the basis of that insurance[44]. Pursuant to this case-law, a jurisdiction clause agreed between an insurer and an insured party cannot be invoked against a third party incurring the insured damage who, where permitted by national law, wishes to bring an action directly against the insurer, before the courts for the place where the harmful event occurred or before the courts for the place where the victim is domiciled[45]. It follows that, to guarantee the objective pursued by Brussels I, namely the protection of injured parties *vis-à-vis* the insurer concerned, a court other than that already seised of that direct action should not declare itself to have jurisdiction on the basis of such an arbitration clause[46]. Having reminded that jurisprudence, the Court found that the aforesaid objective of Brussels I to protect injured parties would be compromised if a judgment entered in the terms of an arbitral award by which an arbitral tribunal declared itself to have jurisdiction on the basis of such an arbitration clause, included in the insurance contract concerned, could be regarded as a "judgment given in a dispute between the same parties in the Member State in which recognition is sought", within the meaning of Article 34(3) of that regulation[47].

The second finding was based on the consideration that as the civil claims brought in Spain had the aim, *inter alia*, of having the insurer declared liable in that Member State, while the following arbitration proceedings in London were initiated by the insurer with the goal of obtaining a negative declaration regarding that liability, such circumstances

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[41] London Steam-Ship owners case, para. 58.

[42] London Steam-Ship owners case, para. 56.

[43] London Steam-Ship owners case, para. 59.

[44] London Steam-Ship owners case, paras 60–63.

[45] London Steam-Ship owners, para. 60. See, to that effect, the judgment of the Court of 13 July 2017, C-368/16, Assens Havn v Navigators Management (UK) Limited, ECLI:EU:C:2017:546, paras 31, 40 and the case-law cited therein, hereinafter referred to as Assens Havn case.

[46] London Steam-Ship owners, para. 61. See, to that effect Assens Havn case, paras 36, 41.

[47] London Steam-Ship owners case, para. 62.

amount to a situation of *lis pendens*[48] in which, in accordance with Article 27 of Brussels I, any court other than the court first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised has been established and then, where the jurisdiction of the court first seised is established, decline jurisdiction in favour of that court[49]. Having stated that, the Court recalled its initial finding that the minimisation of the risk of concurrent proceedings, which article 27 of Brussels I is intended to achieve, is one of the main objectives and principles underlying judicial cooperation in civil matters in the European Union[50].

Additionally, the Court determined that it is for the court seised with a view to entering a judgment in the terms of an arbitral award to verify that the provisions and fundamental objectives of Brussels I have been complied with, in order to prevent by-passing of those provisions and objectives, such as a circumvention consisting in the completion of arbitration proceedings in disregard of both the relative effect of an arbitration clause included in an insurance contract and the rules on *lis pendens* laid down in Article 27 of that regulation[51]. In the case at hand, there was no evidence of such review being conducted by the English courts, which prompted the Court to decide that in such circumstances, a judgment entered in the terms of an arbitral award, such as that at issue in the main proceedings, cannot prevent, under Article 34(3) of Brussels I, the recognition of a judgment from another Member State[52].

Referring to the third question posed by the English court, the Court recalled its previous case-law according to which the public policy as a ground of refusal of the recognition or enforcement pursuant to Article 34(1) of Brussels I must be interpreted strictly and may be relied upon only in exceptional cases as it constitutes an obstacle to the attainment of one of the fundamental objectives of that regulation[53]. In particular, the use of the "public-policy" concept is precluded when the issue is whether a foreign judgment is compatible with a national judgment[54]. This is so due to the fact that the EU legislature intended to regulate exhaustively the issue of the force of *res judicata* acquired by a judgment given previously and, in particular, the question of the irreconcilability of the judgment to be recognised with that earlier judgment by means of Article 34(3) and (4) of Brussels I[55]. This completeness and exhaustive nature of norms expressed in

[48] An action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action within the meaning of Article 27(1) of Brussels I as an action brought by that defendant seeking a declaration that he or she is not liable for that loss; see, to that effect, judgments of the Court of 19 December 2013, C-452/12, Nipponka Insurance Co. (Europe) Ltd v Inter--Zuid Transport BV, ECLI:EU:C:2013:858, para. 42, and judgment of the Court of 20 December 2017, C-467/16, Brigitte Schlömp v Landratsamt Schwäbisch Hall, ECLI:EU:C:2017:993, para. 51.

[49] London Steam-Ship owners case, paras 64–69.

[50] London Steam-Ship owners case, para. 70.

[51] London Steam-Ship owners case, para. 71.

[52] London Steam-Ship owners case, para. 72.

[53] London Steam-Ship owners case, para. 77. See, to that effect, Meroni case, para. 38 and the case-law cited therein.

[54] London Steam-Ship owners case, para. 78. See, to that effect, Hoffmann case, para. 21.

[55] London Steam-Ship owners case, para. 79.

Article 34(3) and (4) of Brussels I exclude the possibility of having recourse, to the public-policy exception set out in Article 34(1) of that regulation with regard to the issues concerning *res judicata.* In the light of the foregoing, the Court concluded that Article 34(1) of Brussels I must be interpreted as meaning that, in the event that Article 34(3) of that regulation does not apply to a judgment entered in the terms of an arbitral award, the recognition or enforcement of a judgment from another Member State cannot be refused as being contrary to public policy on the ground that it would disregard the force of *res judicata* acquired by the judgment entered in the terms of an arbitral award.

5. Commentary

Looking at the apparent plainness and clarity of Article 1(2)(d) of the Brussels I as well as corresponding provisions of its predecessor (Brussels Convention) and successor (Regulation (EU) No 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 (recast)[56]) which bluntly states that it shall not apply to arbitration, at the first glance one may feel baffled by the number of CJEU decisions on the subject of the relationship between the European civil procedure and the international arbitration[57] not to mention the scale of controversies, debates and emotions it has sparked among scholars, practitioners and other stakeholders in the field of international litigation and arbitration[58]. The issue of the interplay between the EU norms governing the jurisdiction of the courts, *lis pendens* as well as recognition and enforcement of judgments in civil and commercial matters and the laws of arbitration has proven difficult enough that the European lawmaker has decided to include clarifications on that arbitration exclusion in recital 12 of Brussels Ibis. This however neither resolved all outstanding issues in this matter nor prevented the appearance of new problems which need to be dealt with by courts of the Member States and arbitral tribunals.

The recent judgment of the Court in the London Steam-Ship Owners case provides yet another portion of twists and turns in the aforementioned saga, on the one hand,

[56] Regulation (EU) No 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 (recast) (OJ L 351, p. 1, as amended), hereinafter referred to as Brussels Ibis.

[57] In addition to Rich, Van Uden, West Tankers and Gazprom case cited above see also in particular the following decisions of the Court: judgment of the Court of 23 March 1982, C-102/81, Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG, ECLI:EU:C:1982:107, hereinafter referred to as Nordsee case; judgment of the Court of 1 June 1999, C-126/97, Eco Swiss China Time Ltd v Benetton International NV, ECLI:EU:C:1999:269, hereinafter referred to as Eco Swiss case.

[58] See L. Hauberg Wilhelmsen, *International Commercial Arbitration and the Brussels I Regulation*, Cheltenham 2018, *passim* and extensive literature cited therein. See also: J. Ciaptacz, *Jurysdykcja krajowa w sprawach wynikających z recepti arbitrii na gruncie rozporządzenia Bruksela I bis*, „Europejski Przegląd Sądowy" 2022/7, p. 18 *et seq*.

building upon views, interpretations, and concepts expressed in the previous case-law of the Court but, on the other, hand adding few new ideas and notions with substantial practical implications. Some of them can certainly be labelled as highly controversial as already evidenced by some harsh criticism conveyed by Adrian Briggs in his flamboyant comment on the EAPIL blog sarcastically entitled "Humpty-Dumpty, Arbitration, and the Brussels Regulation: A View from Oxford"[59].

The decision at hand undoubtedly addresses significant and, so far, unsolved issues arising at the interface between European civil procedural law and international arbitration law. Beyond any doubt, it also constitutes a significant contribution from the point of view of novelty and "weight" in shaping the jurisprudence of the Court as regards the understanding of the arbitration exception in the regime of the Brussels regulations. The only question is whether in this case, the decision contained in this judgment is juridically correct and whether it advances the jurisprudence of the Court in the analysed field in the right direction.

Before moving to difficult issues at the heart of the judgment, one is tempted to start with short notice on the easy one, that is the answer to the third question referred to the Court. In short, the answer given by the Court which concurs with the opinion of the Advocate General is clearly correct and leaves no space for criticism. Article 34(3) and (4) of Brussels I (currently Articles 45(1)(c) and 45(1)(d) of Brussels Ibis) exhausts the grounds upon which recognition or enforcement may be refused by reason of *res judicata* and/or irreconcilability, thus excluding the application of the general public policy ground for refusal provided for in Article 34(1) of that regulation (currently Article 45(1)(a) of Brussels Ibis).

The starting point for the debatable and, in the author's opinion, deserving of critical assessment views expressed in the judgment in question is the Court's statement that a judgment entered by a court of a Member State in the terms of an arbitral award can constitute a basis for refusing to recognize or enforce an incompatible judgment of a court of another member state pursuant to Article 34(3) of Brussels I, only if the arbitral award, the content of which was repeated in that award, was made in circumstances that would have allowed the issuance, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision. The practical consequence of this view is that in the event of a conflict between a judgment of a court of a Member State rendered in a civil or commercial matter falling within the scope of the Brussels I or Brussels Ibis, and

59 A. Briggs, *Humpty-Dumpty, Arbitration, and the Brussels Regulation: A View from Oxford*, The EAPIL Blog, https://eapil.org/2022/06/23/humpty-dumpty-arbitration-and-the-brussels-regulation-a-view-from-oxford/ (accessed 28.09.2022). The EAPIL Blog featured also some more moderate comments and opinions analysing this judgment from variety of angles, see: G. Cuniberti, *London Steam-Ship Owners: Extending Lis Pendens to Arbitral Tribunals?,* https://eapil.org/2022/06/23/london-steam-ship-owners-extending-lis-pendens-to-arbitral-tribunals/ (accessed 28.09.2022); A. Leandro, *London Steam-Ship Owners: Looking Beyond the Case through the Lens of Res Judicata*, https://eapil.org/2022/06/29/london-steam-ship-owners-looking-beyond-the-case-through-the-lens-of-res-judicata/ (accessed 28.09.2022); F. Mailhé, *London Steam-Ship, in the Eye of the Beholder*, https://eapil.org/2022/08/25/london-steam-ship-in-the-eye-of-the-beholder/ (accessed 29.09.2022).

a previous final judgment of a court of another Member State, based on an arbitral award (repeating its operative part), the court of a Member State, in deciding whether the first of the above-mentioned judgment is subject to refusal of recognition or enforcement under Article 34(3) of Brussels I Regulation (or Article 45(1)(c) of Brussels Ibis), will have to undertake a review of the proceedings before the arbitral tribunal and the award the content of which was subsequently reproduced in the judgment of the court of the place of its issuance, according to the standards and criteria applicable to court proceedings before the courts of the Member States in matters covered by the Brussels I regime. In doing so, this judicial review would be two-fold, since, according to the judgment at issue, the court obliged in the first instance to assess the coherence of the arbitration proceedings and the arbitral award rendered therein with the fundamental principles and objectives of the Brussels I jurisdictional regime is the court of the Member State hearing the request for entering a judgment in the terms of an arbitral award. There are however following two fundamental problems with this type of solution.

First, an arbitral tribunal acting on the basis of an arbitration agreement and the relevant *lex arbitri*, is not deemed as a court of a Member State within the meaning of treaties constituting EU[60], nor according to the norms of the Brussels regulations forming the core and European civil procedural law[61]. Secondly, proceedings before an arbitral tribunal are not proceedings before a court of a Member State – arbitration is a way of resolving disputes in civil and commercial matters separate from state courts, one of the fundamental manifestations of which is the far-reaching procedural autonomy of the parties to these proceedings and arbitrators, the limits of which are set only by mandatory procedural norms of the place of arbitration (*ius cogens*) and the fundamental procedural and substantive principles of the legal order of the arbitral forum (including constitutional and internationally recognised standards of fair trial and due process of law relating to procedural fairness and justice). With the above in mind, it should be considered grossly misguided to extrapolate the norms and rules of the Brussels regulations applicable to judgments of courts and judicial proceedings before the courts of member states, to arbitral proceedings and awards of arbitral tribunals covered by explicit exclusion included in Article 1(2)(d) of these regulations.

[60] See, in this regard, Nordsee case, paras 10–13; Eco Swiss case, para. 34. See also the ground breaking judgment of the Court of 6 March 2018, C-284/16, Slovak Republic v Achmea BV, ECLI:EU-:C:2018:158, in which the Court decided that Articles 267 and 344 of the Treaty on the Functioning of the European Union (consolidated version OJ 2016 C 202, p. 47) must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

[61] On the concept of court and court or tribunal of a member state in the Brussels I and Brussels Ibis, see, for example B. Trocha, *Zawisłość sprawy przed sądem zagranicznym w postępowaniu cywilnym – ujęcie prawnoporównawcze*, Poznań 2018, p. 163 *et seq*.

In contradiction to the assessment above, implementing its assumption of the necessity of the criticized above extrapolation, the Court in the ruling in question has made two highly questionable moves. First, it applied to arbitration agreements rules developed in the Court's jurisprudence with respect to choice of court (jurisdictional) agreements subject to the regime of the Brussels regulations (namely the doctrine of the relative effect of a choice of court agreement included in an insurance contract), thus equating arbitration agreements with choice of court agreements. Secondly, it applied the Brussels I provisions on *lis alibi pendens* which pertain to the parallel proceedings before courts of different Member States between the same parties concerning the same cause of action to the concurring proceedings pending before a court of a Member State and an arbitral tribunal seated in another Member State. These moves indirectly but inevitably lead to unwarranted expansion of the scope of application of the Brussels I regulation in violation of explicit arbitration exclusions contained in Article 1(2)(d).

In particular, one may not agree with the statement made in paras 59–60 of the London Steam-Ship Owners judgment that the preceding case-law of the Court has already acknowledged the principle of the relative effectiveness of an arbitration clause inserted in an insurance contract which – as alleged in the judgment at issue – can be derived from the Brussels regulations. Such a principle does not and cannot arise from these regulations, for, as has been already pointed out, the matter of arbitration, the foundation of which is the consent of the parties to submit disputes which have arisen or which may arise between them in respect of a defined legal relationship to the jurisdiction of a private, independent and neutral decision-making party, has been explicitly excluded from the scope of the regulation's norms. Thus, the Brussels regulations do not and cannot apply to the arbitration agreements embodying parties' consent to submit their disputes to arbitration. The fact that the Court's prior jurisprudence, correctly recognized that a court competent under the Brussels Regulations to examine its jurisdiction, must be authorized to assess the impact of an arbitration clause (including its existence, scope, validity, and operability) on the possibility of exercising that jurisdiction in a particular case[62], by no means implies admissibility (even less so the necessity) of the examination of the validity, effectiveness or scope of an arbitration agreement according to the rules derived from the Article 23 of Brussels I (or Article 25 of Brussels Ibis) which are applicable to the choice of court agreements. Moreover, the reference in paras 60–61 of the judgment at hand to the Assens Havn case and the Court's prior case-law cited therein as the source of the principle of the relative effectiveness of an arbitration clause embedded in an insurance contract is simply misleading. In fact, all of these judgments do not deal with the issue of arbitration agreements which are governed by the relevant norms of applicable arbitration or substantive law, determined on the basis of specific conflict of law rules, but pertain to the choice of court agreements that are subject to regulation under the Brussels I Regulation (Article 23) and Brussels Ibis (Article 25). At the same time, there can be no doubt that despite the notable similarities between choice of court and the arbitration agreements,

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[62] See, to that effect, West Tankers case, para. 26 *et seq*.

there are also some fundamental differences between these contracts in terms of their subject matter, effects, and particularly the legal regime governing them[63].

Putting aside justified criticism of the indirect submission of arbitration agreements (which clearly does not amount to the choice of court/jurisdictional agreements within the meaning of the Brussel I Regulation or its recast) to the rules applicable to the choice of courts agreements governed by the Brussels regulations one should move on to the equally questionable application of the Brussels rules on *lis alibi pendens* to the concurrence of arbitration and court proceedings between the same parties concerning the same cause of action.

Articles 27 and 29 of the Brussels I (Articles 29 and 31 of the Brussels Ibis) containing the norms defining the consequences of *lis pendens* refer – *verba legis* – to related actions "pending in the courts of different Member States" and not before a court of a Member State, on the one hand, and an arbitral tribunal, on the other – even if the place of arbitral proceedings (seat of arbitration) determining the relevant *lex arbitri*, is a Member State other than the State whose court was seised with an action on the same claim (or the related claim based on the same cause of action) in parallel. In other words, the arbitral tribunal is neither directly nor indirectly an addressee of the norms contained in the provisions of the Brussels regulations governing *lis pendens*. Therefore, there is no legal for assessing the arbitral tribunal's conduct through the prism of these norms. This conclusion is clearly supported by the arbitration exclusion contained in Article 1(2)(d) of Brussels regulation which curves arbitration out of the ambit of its applicability.

In this regard, one must additionally notice that Brussels Ibis which replaced its predecessor – Brussels I, introduced a fundamental amendment to its rules governing *lis alibi pendens*. Pursuant to Article 31(2) of the Brussels Ibis, without prejudice to Article 26 (which governs the establishment of jurisdiction through a failure to object to it on appearance before a court), where a court of a Member State on which a choice of court agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement. Consequently, according to Article 31(3) of this regulation, where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

Having that in mind, it seems irresistible to conclude, that applying the same line of arguments as the Court did in the London Steam-Ship Owners case under Brussels Ibis as opposed to Brussels I, would lead to completely different outcomes with regard to *lis*

[63] With regard to the law applicable to the arbitration agreements which belongs to most contentious and prominent issues in the theory and practice of the international commercial arbitration in recent years see e.g. J. Koepp, D. Turner, *A Massive Fire and a Mass of Confusion: Enka v. Chubb and the Need for a Fresh Approach to the Choice of Law Governing the Arbitration Agreement*, "Journal of International Arbitration" 2021/3, p. 377 *et seq.*; M. Scherer, O. Jensen, *Empirical Research on the Alleged Invalidity of Arbitration Agreements: Success Rates and Applicable Law in Setting Aside and Enforcement Proceedings*, "Journal of International Arbitration" 2022/3, p. 331 *et seq.*; M. Gutowska, *Prawo właściwe dla umowy o arbitraż – zarys problematyki kolizyjnoprawnej*, "ADR – Arbitraż i Mediacja" 2022/1, p. 31 *et seq.*

alibi pendens. Article 31(2) and 31(3) of the Brussels Ibis applied *mutatis mutandis* to parallel proceedings before a court of a member state and arbitral proceedings seated in another member state would clearly require courts of member states first seised to stay the proceedings so as to allow the arbitral tribunal seised with the action involving the same cause of action and between the same parties to determine its own jurisdiction based on that arbitration agreement and if the arbitral tribunal designated in the agreement establishes its jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that tribunal, i.e. refer the parties to arbitration, so as to apply the language of the NY Convention Art. II(3) and Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration[64]. If, instead, the court of a member state chooses to continue its proceedings, defying the arbitral tribunal's competence to decide on its own jurisdiction under the arbitral agreement relied upon by one of the parties, and render a judgment, such judgment may be subject to refusal of recognition or enforcement in another member states either: 1) as manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought (Article 45(1)(a) of the Brussels Ibis), as according to the London Steam-Ship Owners decision, the *lis pendens* rules are instrumental in realising objectives of the EU law which underlie judicial cooperation in civil matters in the European Union, or 2) as irreconcilable with a judgment recognizing the arbitral award given in a dispute between the same parties in the Member State in which recognition is sought (Article 45(1)(c) of the Brussels Ibis) or 3) as irreconcilable with a prior judgment recognizing the arbitral award given in another Member State or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed (Article 45(1)(d) of the Brussels Ibis).

This outcome would certainly transform EU Member States into an emphatically arbitration-friendly forum when it comes to the realization of the *Kompetenz – Kompetenz* doctrine in its strongest possible formulation[65], e.g. that the arbitral tribunals seised

[64] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (United Nations documents A/40/17, annex I and A/61/17, annex I), hereinafter referred to as Model Law.

[65] In the theory of commercial arbitration, different approaches to this principle are presented. In general, one can contrast the principle of *Kompetenz – Kompetenz* in broad and narrow (proper) terms. According to the first conception, it is about the mere power of the arbitral tribunal to independently assess its jurisdiction and decide positively or negatively on it, without presuming the exclusivity or even the priority of its competence over the state court. In the strict sense, the principle of *Kompetenz – Kompetenz* means the exclusivity, or at least the priority of the arbitral tribunal's own assessment of its jurisdiction over state courts. The arbitral tribunal's jurisdictional decision would also be final and binding on state courts examining their competence to hear the case on the merits. Close to this position is the French approach, under which, with regard to the validity and effectiveness of the arbitration agreement, state courts only make a *prima facie* review, relying to a large extent on the arbitral tribunal's determination of their own jurisdiction; see in this regard e.g. G. Born, *International Arbitration...*, p. 52 *et seq.*; A. Wach, *Stosowanie zasady Kompetenz – Kompetenz w postępowaniu arbitrażowym*, „Radca Prawny" 2007/1, p. 74 i *et seq.*; T. Ereciński, K. Weitz, *Sąd arbitrażowy*, Warszawa 2008, p. 228–230 and the literature cited therein.

with action are not only competent to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, but also that the courts seised with concurrent action involving the same cause of action and between the same parties, should basically pay deference to the decisions of the arbitral tribunals confirming their jurisdiction by staying their proceedings until such time as the jurisdiction of the arbitral tribunal is established and decline jurisdiction in favour of the arbitral tribunal once it confirms its jurisdiction. This, in turn, would encourage the arbitral tribunals to give full effect to Article 8(2) of Model Law and the domestic arbitration laws that follow[66] or are in line with it[67]. The former provision stipulates that where an action has been brought before a court in a matter which is the subject of an arbitration agreement, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

In the London Steam-Ship Owners case, the Court stated however that the mutual trust in the administration of justice in the EU, on which the rules laid down in Brussels regulations concerning the recognition of judgments are based, does not extend to decisions made by arbitral tribunals or to judicial decisions entered in their terms[68]. Therefore, realistically speaking, one would expect that when seised with a sort of London Steam--Ship Owners 2.0. case, this time under Brussels Ibis, to avoid the fate of the Humpty--Dumpty, the Court would likely take a few steps back from its latest decision to its more traditional position adopted already in Nordsee case. This stance basically assumes that an arbitral tribunal constituted pursuant to an agreement under private law, without state

[66] See e.g. section 584(1) of the Austrian *Zivilprozessordnung*, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699 (accessed 25.10.2022); Article 1146 of the French *Code de procédure civile*, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070716/ (accessed 25.10.2022); section 1032(3) of the German *Zivilprozessordnung*, https://www.gesetze-im-internet.de/zpo/ (accessed 25.10.2022); Article 1165(3) of the Polish Code of Civil Procedure (Journal of Laws 2022 item 1360 as amended), hereinafter referred to as the Polish CCP; Article 186(1bis) of the Swiss *Bundesgesetz über das Internationale Privatrecht* as amended in 2007, https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/de (accessed 25.10.2022). According to the prevailing view of the Polish academia, under Article 1165(3) of the Polish CCP, the filing of an action in a state court does not prevent the arbitral tribunal from initiating and conducting proceedings in the same case. This means that a party who, in violation of a binding arbitration agreement, brings a case to a state court cannot thereby hinder possible proceedings before an arbitral tribunal. As a result, it is possible to have parallel proceedings before a state court and an arbitral tribunal in the same case, which, however, clearly raises the risk of conflicting decisions and may lead to significant difficulties at the post-arbitration stage (proceedings for recognition or declaration of enforceability of the arbitral award, proceedings on an action to set aside this award before the competent state court at the seat of arbitration); see to that effect e.g. T. Ereciński, K. Weitz, *Sąd...*, p. 249–251; A. Orzeł--Jakubowska [in:] *Kodeks postępowania cywilnego. Komentarz*, ed. P. Rylski, Legalis 2022, art. 1165, para. 36; M. Kłos [in:] *Kodeks postępowania cywilnego. Tom V. Komentarz. Art. 1096–1217*, ed. A. Marciniak, Warszawa 2020, art. 1165, para. 12. The contrary view, questioning the admissibility of parallel court and arbitration proceedings in the same case, see M. Asłanowicz, *Sąd polubowny (arbitrażowy). Komentarz do części piątej Kodeksu postępowania cywilnego*, Warszawa 2017, art. 1165, paras 22–25.

[67] See e.g. Article 32(4) of the Arbitration Act 1996.

[68] London Steam-Ship owners case, para. 57.

intervention, is not to be regarded as a court or tribunal of a Member State under EU law. That, in turn, shall consequently lead to the refusal of the application of the Brussels regulations provisions governing *lis pendens* to the proceedings before the arbitral tribunal. In the same vein, it rules out analogies between the choice of court agreements governed by Brussels regulations and the arbitration agreements which are subject to different sets of conflict of laws and substantive rules.

At the same time, nothing in the above analysis seems to undermine arguments presented by the Advocate General in his Opinion as regards the applicability of Article 34(3) of Brussels I (Article 45(1)(c) of Brussels Ibis) to judgments entered by a court of a Member State in the terms of an arbitral award which is not hindered by the arbitration exclusion proclaimed by Article 1(2)(d) of these regulations. Article 34(3) of Brussels I (Article 45(1)(c) of Brussels Ibis) clearly refers to judgments in the meaning of Article 34(3) of the former and Article 2(a) of the latter regulation. This concept clearly covers judgments given by a court or tribunal of a Member State recognizing arbitral awards by mirroring decisions on the merits of the dispute contained therein in its operative parts as long as the recognition proceedings before the court leading to this judgment include deciding on the contentious issues between the parties as opposed to a purely formal act of confirmation of the award with no review or hearing of the parties arguments in support of or against such confirmation.

One should also agree that Article 34(3) of Brussels I (Article 45(1)(c) of Brussels Ibis) applies to any irreconcilable judgment given in a dispute between the same parties in the Member State in which recognition is sought, regardless of whether its subject matter comes within the material scope of this regulation or not. The purpose of these provisions is to protect the integrity of a Member State's internal legal order and to ensure that its rule of law is not undermined by being required to recognise a foreign judgment that is incompatible with a decision of its own courts. It is undeniable that the objective of safeguarding the rule of law and the internal legal order of Member States would be seriously obstructed were their courts obliged to ignore judgments on all of those matters excluded from the scope of Brussels regulations by virtue of its Article 1(2)(d), delivered within their jurisdiction by courts of that same Member State, and which may have acquired the force of *res judicata*, in favour of a contradictory judgment emanating from a court of another Member State adjudicating upon the same issue. At the same time, the conclusion that the judgment entered by a court of a Member State in the terms of an arbitral award constitutes a "judgment" protected under Article 34(3) of Brussels I (Article 45(1)(c) of Brussels Ibis) by no means lead to the breach of arbitration exclusion provided for in Article 1(2)(d) of these regulations. As clearly indicated by the legislative history, the purpose of this exclusion was to remove arbitral awards from the Brussels jurisdictional system of the free circulation of judgments in the civil and commercial matters so as to avoid overlaps and potential conflicts with the operation of the NY Convention or other legal instruments governing recognition and enforcement of arbitral awards in the Member States. This purpose is fully achieved as long as it is uncontested that in no circumstances can judgments rendered by the court of a member state recognizing arbitral awards

(including by way of entering a judgment in terms of such awards) enjoy recognition or enforcement in another member states pursuant to the provisions of the Brussels regulation.

Abstrakt

Nowy rozdział orzeczniczej sagi w sprawie wyłączenia arbitrażu w brukselskim systemie jurysdykcyjnym – uwagi do wyroku Trybunału Sprawiedliwości Unii Europejskiej z 20.06.2022 r., C-700/20, London Steam – Ship Owners

dr hab. Andrzej Olaś – *adiunkt, Katedra Postępowania Cywilnego, Wydział Prawa i Administracji, Uniwersytet Jagielloński w Krakowie; radca prawny*
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W artykule autor przedstawia i komentuje najnowsze orzeczenie Trybunału Sprawiedliwości (wyrok z 20.06.2022 r., C-700/20, London Steam – Ship Owners) dotyczące dwóch wysoce kontrowersyjnych kwestii na styku europejskiego prawa procesowego cywilnego i międzynarodowego prawa arbitrażowego, które w istotny sposób wpływają na ramy prawne rozwiązywania sporów transgranicznych w państwach członkowskich Unii Europejskiej. W wyroku Trybunał orzekł, że art. 34 pkt 3 rozporządzenia nr 44/2001 należy interpretować w ten sposób, iż wyrok wydany przez sąd państwa członkowskiego i powtarzający treść orzeczenia arbitrażowego nie stanowi orzeczenia w rozumieniu tego przepisu, jeżeli orzeczenie prowadzące do skutku równoważnego skutkowi tego orzeczenia arbitrażowego nie mogłoby zostać wydane przez sąd tego państwa członkowskiego bez naruszenia przepisów i podstawowych celów tego rozporządzenia, w szczególności względnej skuteczności klauzuli arbitrażowej umieszczonej w rozpatrywanej umowie ubezpieczenia i norm dotyczących zawisłości sporu ujętych w art. 27 tego rozporządzenia, przy czym wyrok ten nie może w tym przypadku stać na przeszkodzie we wspomnianym państwie członkowskim uznaniu orzeczenia wydanego przez sąd w innym państwie członkowskim. Ponadto Trybunał stwierdził, że art. 34 pkt 1 rozporządzenia nr 44/2001 należy interpretować w ten sposób, że przy założeniu, iż art. 34 pkt 3 tego rozporządzenia nie ma zastosowania do wyroku powtarzającego treść orzeczenia arbitrażowego, nie można odmówić uznania lub wykonania orzeczenia pochodzącego z innego państwa członkowskiego z powodu sprzeczności z porządkiem publicznym na tej podstawie, że orzeczenie to naruszałoby powagę rzeczy osądzonej przysługującą temu wyrokowi. O ile drugie z wymienionych rozstrzygnięć zasługuje na pełne poparcie jako zgodne zarówno z brzmieniem, jak i celem omawianych przepisów, o tyle zgodnie z poglądem autora przedstawionym w artykule pierwsze z nich wydaje się być błędne, gdyż opiera się na nieuzasadnionych analogiach pomiędzy postępowaniem arbitrażowym (umowami o arbitraż/orzeczeniami arbitrażowymi) a postępowaniem sądowym (umowami o wybór sądu/orzeczeniami

sądowymi), co prowadzi do błędnego zastosowania przez Trybunał zasad i norm zawartych w rozporządzeniu nr 44/2001, z naruszeniem arbitrażowego wyłączenia przewidzianego w jego art. 1 ust. 2 lit. d. Opierając się na dogłębnej analizie uzasadnienia komentowanego wyroku oraz poprzedzającej go opinii Rzecznika Generalnego, autor wskazuje na potencjalne niezamierzone konsekwencje orzeczenia Trybunału Sprawiedliwości w przypadku zastosowania sformułowanych w nim reguł na gruncie przepisów rozporządzenia nr 1215/2012, które zastąpiło rozporządzenie nr 44/2001. Ponadto autor przedstawił kilka wniosków co do właściwej interpretacji i stosowania odnośnych norm wskazanych rozporządzeń.

Słowa kluczowe: *lis pendens, umowa o arbitraż, uznawanie i wykonywanie orzeczeń sądowych, uznawanie i wykonywanie orzeczeń arbitrażowych, arbitraż a prawo UE, arbitraż a postępowanie sądowe*

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