The last arrow in the quiver of the English courts? "Quasi" anti-suit injunctions and damages for breach of exclusive choice of court agreements

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This article analyses the last instance of failed integration of English common law instruments into the jurisdictional system of the Brussels regime. In its decision in Charles Taylor Adjusting, the ECJ held that decisions granting provisional damages for bringing proceedings in another Member State, where the subject matter of those proceedings is covered by a settlement agreement and the court before which proceedings were brought does not have jurisdiction on the basis of an exclusive choice of court agreement, are contrary to public policy under Art. 34(no1) and Art. 45(1) Brussels I Regulation. More specifically, they violate the principle of mutual trust by reviewing the jurisdiction of a court of another Member State and interfering with its jurisdiction. Such decisions also undermine access to justice for persons against whom they are issued. By and large, the decision merits approval as it unmasks the English decisions as "quasi-anti-suit injunctions" which are incompatible with the Brussels Regulation, just like their "real" siblings, anti-suit injunctions. The ECJ's analysis is, however, not in all respects compelling, particularly with regard to the point of reviewing another court's jurisdiction. Moreover, the Court's and the Advocate General's reluctance to engage with the English view on the issue is regrettable. In conclusion, the ECJ's decision may well – in terms of EU law – have broken the last arrow in the English courts quiver. It is unlikely, however, that English courts will be overly perturbed by this, considering that, following Brexit, their arsenal is no longer constrained by EU law.

I. Introduction

In 2005, *Dutta* and *Heinze* described "the integration of procedural instruments of the English common law into the continental European-influenced jurisdictional system of the Brussels I Regulation" as one of the "most interesting development lines in European procedural law".[1] At the latest, this integration can be considered to have failed with the decision of the ECJ in *Charles Taylor Adjusting.* It forms part of a line of cases by which the ECJ has, one by one, put an end to the use of those English common law procedural instruments.[2] Specifically, this has affected the exercise of jurisdiction by an exclusively chosen but subsequently seised court in the case of *lis alibi pendens,*[3] the non-exercise of jurisdiction as *forum non conveniens,*[4] and the anti-suit injunction.[5] As a result, the English courts have turned towards the substantive law instrument of damages in order to protect exclusive choice of court agreements.[6] The ECJ has now, however, ruled that a decision awarding provisional damages for breach of an exclusive choice of court agreement, the amount of which is not yet finally determined, may be refused recognition and enforcement on the ground that it is contrary to public policy.[7] Consequently, the ECJ may have broken the last arrow in the quiver of the English courts.

In the meantime, however, the integration of English common law instruments into the jurisdictional system of the Brussels I Regulation has failed even more fundamentally. Following the withdrawal of the United Kingdom (UK) from the European Union (EU) and the end of the transition period, the Brussels regime no longer applies to proceedings initiated before and judgments rendered by English courts after 31 December 2020.[8] Nonetheless, the decision is of great importance for EU law. It represents the first judgment of the ECJ on the enforcement of exclusive choice of court agreements by means of substantive law instruments. Unlike the doctrine of *forum non conveniens* and anti-suit injunctions, damages for breach of an exclusive choice of court agreement are no longer a peculiarity of the common law but have also been recognised in the civilian legal systems of Spain and Germany, most recently in a landmark decision by the German Federal Court of Justice in 2019.[9]

II. Procedural history and decision

From the perspective of the parties, the legal odyssey spanning 18 years and eight judgments to date represents the material which sometimes gives private international law a bad reputation. At the same time, it raises a number of interesting and complex

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1 *Dutta/Heinze,* Prozessführungsverbote im englischen und europäischen Zivilverfahrensrecht, ZEuP 2005, 428, 431.

2 For the partly fierce criticism from England, see *Hartley,* The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws, ICLQ 2005, 813; *Briggs,* The Impact of Recent Judgments of the European Court on English Procedural Law and Practice, ZSR 2005, 231; *Dickinson,* Once bitten – mutual distrust in European private international law, LQR 2015, 186.

3 ECJ, Judgment of 9/12/2003 – C-116/02, *Gasser ./. MISAT,* ECLI:EU:C:2003:657, IPRax 2004, 243 with comment *Grothe,* Zwei Einschränkungen des Prioritätsprinzips im europäischen Zuständigkeitsbereich: ausschließliche Gerichtsstände und Prozessverschleppung, IPRax 2004, 205.

4 ECJ, Judgment of 1/3/2005 – C-281/02, *Owusu ./. Jackson,* ECLI:EU:C:2005:120, IPRax 2005, 244 with comment *Heinze/Dutta,* Ungeschriebene Grenzen für europäische Zuständigkeiten bei Streitigkeiten mit Drittstaatenbezug, IPRax 2005, 224.

5 ECJ, Judgment of 27/4/2004 – C-159/02, *Turner ./. Grovit,* ECLI:EU:C:2004:228, IPRax 2004, 425 with comment *Rauscher,* Unzulässigkeit einer anti-suit injunction unter Brüssel I, IPRax 2004, 405; ECJ, Judgment of 10/2/2009, C-185/07, *Allianz ./. West Tankers,* ECLI:EU:C:2009:69, IPRax 2009, 336 with comment *Illmer,* Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa – der letzte Vorhang ist gefallen, IPRax 2009, 312.

6 This was predicted in England already nearly 20 years ago, see *Briggs,* ZSR 2005, 258–260, 262; *Merrett,* The Enforcement of Jurisdiction Agreements Within The Brussels Regime, ICLQ 2006, 315, 331.

7 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, IPRax 2024, 304 (in this issue).

8 Art. 67(1)(a), Art. 67(2)(a), 126, 127 Withdrawal Agreement (2019/C 384 I/01).

9 Federal Court of Justice, Judgment of 17/10/2019 – III ZR 42/19, BGHZ 223, 269, IPRax 2020, 459 with comment *Colberg,* Schadensersatz wegen Verletzung einer Gerichtsstandsvereinbarung, IPRax 2020, 426; Tribunal Supremo, Judgment of 12/1/2009, STS 263/2009; on this, see *Álvarez González,* The Spanish Tribunal Supremo Grants Damages for Breach of a Choice-of-Court Agreement, IPRax 2009, 529; already previously, Tribunal Supremo, Judgment of 23/2/2007, STS 1186/2007.

issues in this area of law, one of which has now made it to the ECJ. In 2006, the bulk carrier *Alexandros T* sank off the bay of Port Elizabeth in South Africa. Following the insurers' refusal to pay out the insurance sums, *Starlight Shipping (Starlight),* the owners of the ship, and *Overseas Marine Enterprises (OME),* its operator, brought an action in England against two insurers and initiated arbitration proceedings against another. All disputes were resolved in 2007 and 2008 by settlements containing exclusive choice of court agreements in favour of the High Court in London. In spite of this, *Starlight* and *OME* initiated actions for damages in Greece in 2011 and 2012 against the insurers and other parties, including the consulting firm *Charles Taylor Adjusting (CTA)* and its director *FD.* The claims were based on allegations made already in 2006 that the insurers had tried to avoid paying the insured sums by bribing witnesses and intentionally spreading false and defamatory rumours about *Starlight* and *OME.* The insurers in turn brought actions in England for, *inter alia,* declarations that the Greek proceedings were in breach of the exclusive jurisdiction agreements and for damages.

The High Court ruled in favour of the insurers in 2011.[10] On appeal, the Court of Appeal initially stayed the proceedings pursuant to Art. 27 Brussels I Regulation.[11] However, following the Supreme Court's decision that neither Art. 27 nor Art. 28 Brussels I Regulation were applicable,[12] the Court of Appeal resumed proceedings and found in favour of the insurers.[13] Finally, on 26 September 2014, the High Court handed down a further judgment and two orders against *Starlight* and *OME,* granting the applications for declaratory relief and damages made by, *inter alia, CTA* and *FD,*[14] who subsequently sought their recognition and enforcement in Greece. It is only this part of the procedural history the ECJ was concerned with. The Greek Supreme Court had referred to it the question of whether Member State judgments may be refused recognition and enforcement pursuant to Art. 34(no1) and Art. 45(1) Brussels I Regulation for being manifestly contrary to EU public policy where they award provisional damages in respect of costs and expenses incurred in bringing an action or continuing proceedings before the court of another Member States on the basis that the dispute is covered by a settlement and the courts of the other Member State lack jurisdiction by virtue of an exclusive choice of court agreement.

Answering the question in the affirmative, the ECJ held that the decisions in question had "the effect [...] of deterring *Starlight* and *OME,* together with their representatives, from bringing proceedings before the Greek courts or continuing [an action] before those courts".[15] Moreover, the Court found the decisions to violate the principles underlying the prohibition of the anti-suit injunction, leading to their incompatibility with the Brussels I Regulation, and dubbed them "quasi" anti-suit injunctions.[16] This did not, however, result in the automatic refusal of recognition and enforcement. The merely incorrect application of the law does not constitute a violation of public policy.[17] Rather, a "manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State" is required.[18] The ECJ found two such essential rules of law to be violated: The principle of mutual trust and access to justice.[19]

III. Assessment

1. Unusually late reference

The unusually late reference during the recognition and enforcement proceedings is likely attributable to an aversion that has developed in the English courts to the preliminary reference procedure. In *Turner, Owusu,* and *West Tankers,* it was the House of Lords and the Court of Appeal themselves who had made the references to the ECJ. It appears as if the courts on the other side of the Channel have now drawn their lessons from these "mistakes".[20] To this effect, the Court of Appeal considered it certain that damages for breach of an exclusive choice of court agreement were compatible with EU law, expressly rejecting a referral of the question to the ECJ.[21] The High Court simply transposed this reasoning to a decree for specific performance enforcing the promise not to bring any action in respect of claims covered by the settlement, again without a reference to the ECJ.[22]

2. Applicability of the Brussels I Regulation

A legislative oversight prompted the ECJ to examine whether the Brussels I Regulation was applicable *ratione loci.* Art. 67(2)(a) Withdrawal Agreement provides for the continued application of the Recast Brussels I Regulation after the withdrawal for the duration of the transition period. However, no reference is made to the original Brussels I Regulation. When drafting the Withdrawal Agreement, it was apparently not considered that, during the transition period, recognition and enforcement could also be sought for judgments given in legal proceedings instituted before the cut-off date on 10/1/2015, which are thus governed by the Brussels I Regulation.[23] Remedying this oversight, the ECJ convincingly interprets Art. 67(2)(a) Withdrawal Agreement to also provide for the applicability of the Brussels I Regulation, which

10 *Starlight Shipping Co* v *Allianz Marine & Aviation Versicherungs AG* [2011] EWHC 3381 (Comm).
11 *Starlight Shipping Co* v *Allianz Marine & Aviation Versicherungs AG* [2012] EWCA Civ 1714.
12 *The Alexandros T (No 3)* [2013] UKSC 70.
13 *Starlight Shipping Co* v *Allianz Marine & Aviation Versicherungs AG* [2014] EWCA Civ 1010.
14 *Starlight Shipping Co* v *Allianz Marine & Aviation Versicherungs AG* [2014] EWHC 3068 (Comm); the orders are not published but have been summarised by *AG Richard de la Tour,* Opinion of 23/3/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:246, paras 32–34, IPRax 2024, 304 (in this issue).
15 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, para 27, IPRax 2024, 304 (in this issue).
16 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, para 27–28, IPRax 2024, 304 (in this issue).
17 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, para 29, IPRax 2024, 304 (in this issue).
18 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, para 36, IPRax 2024, 304 (in this issue).
19 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, para 37–40, IPRax 2024, 304 (in this issue).
20 See also, *Peel,* How Private is English Private International Law, in: Dickinson/Peel, A Conflict of Laws Companion, 2021, 299, 314, fn 75; *Dickinson,* LQR 2015, 186, 186, 188.
21 *Starlight Shipping Co* v *Allianz Marine & Aviation Versicherungs AG* [2014] EWCA Civ 1010, paras 15–16. See also the Supreme Court's strategy to avoid making a reference in the same litigation, *The Alexandros T (No 3)* [2013] UKSC 70, paras 58–59, 163.
22 *Starlight Shipping Co* v *Allianz Marine & Aviation Versicherungs AG* [2014] EWHC 3068 (Comm), paras 73–76. Such relief was, however, not granted to CTA and FD and is not relied upon in the recognition and enforcement proceedings, cf paras 69–82.
23 Art. 66, 81 Recast Brussels I Regulation.

had already been repealed and replaced by the Recast Brussels I Regulation when the Withdrawal Agreement was concluded.[24]

3. Incompatibility of "quasi" anti-suit injunctions with the Brussels I Regulation

At first glance, it may seem surprising that the ECJ relies on its case law regarding anti-suit injunctions in this context, considering that the English decisions award damages. However, upon closer inspection of the substantive claims, a procedural effect becomes apparent. Crucially, the High Court awarded provisional damages for breach of a settlement agreement and breach of an exclusive choice of court agreement, payable while the proceedings before the derogated court were still ongoing and the amount of which was predicated on their continuation.[25] Damages were thus awarded at a time when the English courts would normally issue an anti-suit injunction. Moreover, the dynamic assessment of damages has a certain deterring effect, bringing the remedy closer to an anti-suit injunction also in substantive terms.[26] Consequently, the principles relied upon were correctly chosen, given that the crux of the matter reveals itself in the functional comparability of this type of damages with the anti-suit injunction.

a) The principle of mutual trust

The ECJ bases the incompatibility of "quasi" anti-suit injunctions with the Brussels I Regulation primarily on a violation of the principle of mutual trust. However, as in previous decisions, the Court fails to draw a clear distinction between the principle as a self-standing construct and the concrete rules to be derived from it. The principle of mutual trust is a principle underlying the (Recast) Brussels I Regulation in general and certain of its individual provisions in particular. It invariably requires concretisation in order to justify a finding of incompatibility with the Regulation.[27] Given its generality and lack of a normative anchor, the vagueness of the principle would otherwise push the door open too widely for legal uncertainty to enter into the Regulation. Apart from that, the ECJ was correct in holding that a violation of the principle of mutual trust leads to not only incompatibility with the Brussels I Regulation but also with EU public policy.

b) Reviewing the jurisdiction of another court

First of all, the ECJ considers the English decisions to be an unauthorised review of the jurisdiction of a court of a Member State by a court of another Member State.[28] Whether an award of damages for breach of an exclusive choice of court agreement in fact implicates such a review largely depends, however, on their doctrinal conception.[29] At least in England, the dominant view recognises the existence of both a procedural and a substantive dimension of exclusive choice of court agreements, attributing the bringing of an action contrary to the agreement solely to the latter dimension.[30] Thus, the award of damages amounts to nothing more than a decision about the substantive contractual obligations of the parties, without reviewing the jurisdiction of the foreign court. Although the distinction is rarely articulated in such express terms by the English courts,[31] it nonetheless forms the doctrinal foundation on which the relevant case law rests.[32]

However, the ECJ has already rejected such an understanding in the context of the prohibition of the anti-suit injunction. It was not convinced by the argument that an anti-suit injunction is solely intended at preventing an abuse of process[33] or the breach of an arbitration agreement.[34] More specifically, the Court reasoned that if the conduct for which the defendant is criticised consists in recourse to the jurisdiction of another court, the judgment made as to that conduct implies an assessment of the appropriateness of bringing the action. This would constitute an examination of the jurisdiction of the other court. Transferring this argument to an award of damages for breach of an exclusive choice of court agreement is only logical. If one equates the assessment of the appropriateness of bringing proceedings implicitly contained in the decision of the court second seised with a review of the jurisdiction of the court first seised, this applies equally to anti-suit injunctions and damages.[35]

Yet, the premise of the argument is dubious. It is not readily apparent why an implicit "assessment of appropriateness" should be tantamount to a review of jurisdiction. Apart from this questionable and unsubstantiated equation, a decision by the prorogated court granting damages for breach of an exclusive choice of court agreement does not necessarily involve a review of the derogated court's jurisdiction.[36] Although both questions depend on the validity and scope of the choice of court agreement, they are otherwise subject to different legal tests and requirements.[37] The dual relevance of the choice of court agreement does not necessitate that its examination as a preliminary question in the context of a damages claim must also be characterised as a review of jurisdiction of the derogated court. Against this background, the doctrinal division of exclusive choice of court agreements sheds a lot of light on the issue. It is unfortunate that the ECJ is closing its mind to this, especially as the recognition of a procedural and substantive dimension of exclusive choice of court agreements is also growing in continental Europe. Most recently, the German

24 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, paras 21–22, IPRax 2024, 304 (in this issue).

25 The ECJ does not address the settlement agreement separately, presumably due to its lack of jurisdictional relevance.

26 *Ruddell,* Monetary Remedies for Wrongful Foreign Proceedings, LMCLQ 2015, 9, 12.

27 Similarly, *Antomo,* Schadensersatz wegen der Verletzung einer internationalen Gerichtsstandsvereinbarung?, 2017, 614.

28 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, paras 24, 28, IPRax 2024, 304 (in this issue).

29 Cf *Theimer,* Protection against the breach of choice of court agreements: A comparative analysis of remedies in English and German courts, JPIL 2023, 208, 224–229.

30 Significantly shaped by *Briggs,* Civil Jurisdiction and Judgments, 7th ed 2021, para 29.06; Agreements on Jurisdiction and Choice of Law, 2008, paras 8.04, 8.71–8.72; see also *Merrett,* ICLQ 2006, 315, 332–333.

31 E.g. *West Tankers Inc* v *Allianz SpA* [2012] EWHC 854 (Comm), para 73 (arbitration agreement).

32 *Theimer,* JPIL 2023, 208, 225–227.

33 ECJ, Judgment of 27/4/2004 – C-159/02, *Turner ./. Grovit,* ECLI:EU:C:2004:228, para 28, IPRax 2004, 425 with comment *Rauscher,* Unzulässigkeit einer anti-suit injunction unter Brüssel I, IPRax 2004, 405.

34 ECJ, Judgment of 10/2/2009, C-185/07, *Allianz ./. West Tankers,* ECLI:EU:C:2009:69, para 29, IPRax 2009, 336 with comment *Illmer,* Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa – der letzte Vorhang ist gefallen, IPRax 2009, 312.

35 *Rieländer,* Schadensersatz wegen Klage vor einem aufgrund Gerichtsstandsvereinbarung unzuständigen Gericht, RabelsZ 2020, 548, 566–567; *Peiffer,* Klagen im *forum derogatum,* 2013, 481–482; *Dutta/Heinze,* ZEuP 2005, 428, 461.

36 In the entire article, the validity of the choice of court agreement and its effects of prorogation and derogation are assumed.

37 *Antomo* (fn 27), 632.

Federal Court of Justice granted damages for the breach of an exclusive choice of court agreement for the first time, explicitly reasoning that "the parties are free, as a matter of their freedom of contract, to agree on supplementary substantive obligations in addition to the regulation of purely procedural effects."[38]

c) Interfering with the jurisdiction of another court

Moreover, the ECJ considers the English decisions to constitute an interference with the jurisdiction of the Greek courts, contrary to the principle that every court seised determines itself, under the applicable rules, whether it has jurisdiction to resolve the dispute before it.[39] Again, the Court relies on its previous case law regarding anti-suit injunctions, according to which such orders interfere with the jurisdiction of a foreign court by restraining a party from commencing or continuing proceedings before it.[40] At first glance, one might question the interfering nature of a damages claim already on the basis that it contains neither a prohibition to commence nor to continue proceedings. In addition, damages are generally only awarded after the foreign proceedings have concluded, when the determination of jurisdiction has long been made. At any rate, the English courts did not perceive their decisions as an interference since the Greek court would be free to consider the claims made before it and to decide on the recognition and enforcement of any English judgment awarding damages. This would not be an interference but rather an acknowledgment of the Greek court's jurisdiction.[41]

In its formality, this euphemistic view fails to recognise the practical effects of a dynamic claim for damages which, on the one hand, must be paid while the foreign court has not yet decided on its jurisdiction and, on the other hand, the amount of which depends on the continuation of the foreign proceedings. Such a damages claim can interfere with the jurisdiction of the foreign court since the foreign proceedings are still ongoing. Despite the formal possibility for the foreign court to exercise jurisdiction, there may be an indirect interference, like in the case of anti-suit injunction. In fact, the interference caused by a claim for damages would be even *more* indirect, given that it does not contain a prohibition to commence or continue proceedings before a foreign court.[42] This should not, however, obscure the fact that the intention of the English decisions is identical and their effect equivalent to that of an anti-suit injunction.[43]

This finding can be illustrated by means of a comparison: A (hypothetical) anti-suit injunction would have prohibited *Starlight* and *OME* from continuing the Greek proceedings initiated in breach of the exclusive choice of court agreement. If they had not complied with this order, they would have been found in contempt of court, punishable with the payment of a fine, the sequestration of assets or imprisonment.[44] Instead, the English court found that the Greek proceedings were in breach of an exclusive choice of court agreement and sanctioned the breach by awarding provisional damages, the amount of which would continue to increase until the proceedings were concluded. Thus, both remedies aim at persuading the party in pursuit of foreign proceedings to abandon them by threatening the imposition of sanctions.[45] It is therefore entirely justified to label these particular damages claims "quasi" anti-suit injunctions. Nothing else follows from the doctrinal division of exclusive choice of court agreements. The interference with another court's jurisdiction does not concern the *doctrinal* question of what exactly the potentially interfering court examines legally. Rather, it concerns the *practical* question of whether a court seised may carry out the determination of its jurisdiction at all, without interference by another court.

d) Undermining access to justice

Finally, in substantiating that "quasi" anti-suit injunctions are contrary to public policy, the ECJ reasons that they undermine access to justice. If the party sued before the court of another Member State is awarded provisional damages for the costs incurred in these proceedings, their continuation is rendered difficult or even prevented.[46] Unlike the aspects discussed above, the criterion of access to justice cannot be derived from the principle of mutual trust. The latter only protects the legal systems and judicial institutions of the Member States. While the aspect of reviewing another court's jurisdiction is concerned with the prorogated court, the focus of the interference with another court's jurisdiction lies on the derogated court. In contrast, in the context of access to justice, the plaintiff and his fundamental rights take centre stage. However, a connection with the principle of mutual trust exists insofar as the direct influence on the plaintiff operates as a hinge for the indirect interference with the jurisdiction of the derogated court. Thus, the undermining of access to justice may be conceived of as the private flip side of the interreference with jurisdiction. In its case law regarding anti-suit injunctions, the ECJ problematised access to justice for the first time in *West Tankers*.[47] In the earlier decision in *Turner,* the aspect had not been mentioned and was thus introduced later than the review of jurisdiction and the interference with jurisdiction. In that respect, the emphasis on access to justice and fundamental rights may also be understood as a manifestation of the increasing constitutionalisation of private international law.[48]

The ECJ is correct in finding that a "quasi" anti-suit injunction, just like a "real" anti-suit injunction, undermines the access

38 Federal Court of Justice, Judgment of 17/10/2019 – III ZR 42/19, BGHZ 223, 269, paras 26–27, IPRax 2020, 459 with comment *Colberg,* Schadensersatz wegen Verletzung einer Gerichtsstandsvereinbarung, IPRax 2020, 426.

39 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, paras 25, 28, 37, 39, IPRax 2024, 304 (in this issue).

40 ECJ, Judgment of 27/4/2004 – C-159/02, *Turner ./. Grovit,* ECLI:EU:C:2004:228, para 27, IPRax 2004, 425 with comment *Rauscher,* Unzulässigkeit einer anti-suit injunction unter Brüssel I, IPRax 2004, 405; ECJ, Judgment of 10/2/2009, C-185/07, *Allianz ./. West Tankers,* ECLI:EU:C:2009:69, para 30, IPRax 2009, 336 with comment *Illmer,* Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa – der letzte Vorhang ist gefallen, IPRax 2009, 312.

41 *Starlight Shipping Co* v *Allianz Marine & Aviation Versicherungs AG* [2014] EWCA Civ 1010, para 16; referring to this, *Starlight Shipping Co* v *Allianz Marine & Aviation Versicherungs AG* [2014] EWHC 3068 (Comm), para 89.

42 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, para 37, IPRax 2024, 304 (in this issue).

43 *Dickinson,* LQR 2015, 186, 190.

44 *Londono/Eady/Smith/Eassie,* Arlidge, Eady & Smith on Contempt, 5th ed 2019, para 14-1.

45 *Dickinson,* LQR 2015, 186, 191; *Ruddell,* LMCLQ 2015, 9, 12.

46 ECJ, Judgment of 7/9/2023 – C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping,* ECLI:EU:C:2023:633, para 40, IPRax 2024, 304 (in this issue).

47 ECJ, Judgment of 10/2/2009, C-185/07, *Allianz ./. West Tankers,* ECLI:EU:C:2009:69, para 31, IPRax 2009, 336 with comment *Illmer,* Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa – der letzte Vorhang ist gefallen, IPRax 2009, 312.

48 Cf *Hess,* Die Konstitutionalisierung des europäischen Privat- und Prozessrechts, JZ 2005, 540, 544–547; *Heinze,* Zivilprozessrecht unter europäischem Einfluss, JZ 2011, 709, 715.

to justice for the person on whom it is imposed. This follows from the finding that both remedies aim at persuading the party in pursuit of foreign proceedings to abandon them by threatening the imposition of sanctions. Besides the payment of a fine and the sequestration of assets, the anti-suit injunction can even be enforced with imprisonment.[49] In contrast, the subject of a "quasi" anti-suit injunction is always only the obligation to pay damages, payable to the opposing party and not, like the fine for contempt of court, to the state. However, the extent to which access to justice is undermined depends solely on the debtor's perspective.[50] Hence, it makes no difference who stands to benefit from a financial sanction, given that the debtor is motivated by the loss of pecuniary loss. Differences in the degree of impairment of access remain with regard to the harsher sanctions for non-compliance with an anti-suit injunction, particularly imprisonment. However, these do not change the access-undermining effect of both remedies *per se*. Besides, the deterrent effect of a dynamic claim for damages should not be underestimated.[51]

4. Effects of the Recast Brussels I Regulation

The decision was rendered under the Brussels I Regulation. Its Art. 27 contained a rule of strict priority for *lis alibi pendens,* applicable even in the case of an exclusive choice of court agreement.[52] In order to strengthen their enforceability, the Recast Brussels I Regulation now reverses this rule of priority in Art. 31(2)(3). Consequently, *CTA* and *FD* could have initiated parallel proceedings in England, thus triggering the Greek court's obligation to stay proceedings and – after the establishment of jurisdiction by the English court – decline jurisdiction. In this way, the mechanism offers a more direct, faster, and less costly solution to the problem of enforcing exclusive choice of court agreements. However, this has no direct bearing on an action for damages before the prorogated court. Art. 31(2)(3) applies only where the disputes before the derogated and the prorogated court have the same subject matter.[53] Crucially, this is not the case where an action for damages for breach of an exclusive choice of court agreement and an action arising out of the main contract are concerned.[54] However, when examined more closely, Art. 31(2)(3) contains an exception to the principle of mutual trust.[55] The prorogated court need no longer trust the derogated court to recognise its lack of jurisdiction, but is instead given priority to make its own decision, which – in the event that it establishes its jurisdiction – is binding on all other Member State courts. This applies even if the derogated court has already decided on its jurisdiction.[56]

Antomo takes this deviation from the principle of mutual trust to mean that the prorogated court may also decide on the derogated court's jurisdiction in the context of an action for damages.[57] She argues that, with the introduction of Art. 31(2)(3) Recast Brussels I Regulation, the legislator has expressed that reviewing the jurisdiction of another court no longer violates the values underlying the Regulation *per se* but can be justified in order to protect other interests, such as party autonomy. This view should be rejected already on the basis that the Commission proposal for the Recast Brussels I Regulation provided for the prorogated court's general priority in its Art. 32(2), independent of the initiation of parallel proceedings, but this was ultimately not adopted.[58] Thus, Art. 31 (2)(3) Recast Brussels I Regulation contains a situation-specific correction of the law on *lis alibi pendens* in the case of an exclusive choice of court agreement, to which *Gasser* had drawn attention. As an exception to the principle of mutual trust, the provision must be interpreted narrowly and cannot be extended to a general rule of jurisdiction for exclusive choice of court agreements.[59]

In light of the view taken in this article on the review of jurisdiction, there is no need for *Antomo's* balancing approach in any case. Besides, Art. 31(2)(3) Brussels I Regulation concerns a situation in which a court may actually be seen to review the jurisdiction of another court. Where the same subject matter is asserted before the derogated court and the prorogated court, both courts will first examine their jurisdiction under the Recast Brussels I Regulation – the legal test is identical. This is not the case with regard to a decision on jurisdiction by the derogated court on the one hand and a decision on damages for breach of an exclusive choice of court agreement by the prorogated court on the other.[60] In this situation, the principle of mutual trust is not affected from the outset. The real danger for the trust between the courts of the Member States originates not from an alleged review of jurisdiction but from the fact that the decision of one court may produce effects which interfere with another court's ability to determine its jurisdiction at all. As long as a court's power to determine its own jurisdiction is not restricted, as is exceptionally the case in Art. 31(2)(3) Recast Brussels I Regulation, such interferences are incompatible with the Recast Brussels I Regulation.

5. Lack of engagement with English jurisprudence and literature

Finally, a few words on the working methods of the ECJ and the Advocate General: Neither the reasons for the decision nor the Opinion deal with the English perspective on the issue at hand, even though both the anti-suit injunction and damages for breach of an exclusive choice of court agreement originate from the common law.[61] This is hardly surprising in light of the previous case law, but regrettable nonetheless. The English courts partly share the blame. By not making the reference to the ECJ

49 *Dell Emerging Markets (EMEA) Ltd* v *Systems Equipment Telecommunications Services SAL* [2020] EWHC 1384 (Comm).

50 *Mankowski,* Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?, IPRax 2009, 23, 30.

51 *Theimer,* JPIL 2023, 208, 222.

52 ECJ, Judgment of 9/12/2003 – C-116/02, *Gasser ./. MISAT,* ECLI:EU:C:2003:657, paras 41–54, IPRax 2004, 243 with comment *Grothe,* Zwei Einschränkungen des Prioritätsprinzips im europäischen Zuständigkeitsbereich: ausschließliche Gerichtsstände und Prozessverschleppung, IPRax 2004, 205.

53 Recital 22 Recast Brussels I Regulation; *Leible,* in: Rauscher, EuZPR/EuIPR, 5th ed 2021, Art. 31 Brussels Ia Regulation, para 6.

54 *The Alexandros T (No 3)* [2013] UKSC 70, paras 36-39, 55–57; *Mankowski,* in: Rauscher, EuZPR/EuIPR, 5th ed 2021, Art. 25 Brussels Ia Regulation, para 412; *Antomo* (fn 27), 634–635; differently, seemingly *Hess,* JZ 2014, 538, 542.

55 *Pohl,* Die Neufassung der EuGVVO – im Spannungsfeld zwischen Vertrauen und Kontrolle, IPRax 2013, 109, 111.

56 *Antomo* (fn 27), 603, 632; *Gottwald,* in: MünchKomm, ZPO, vol 3, 6th ed 2022, Art. 31 Brussels Ia Regulation, para 7.

57 *Antomo* (fn 27), 604, 632; seemingly also *Hausmann,* in: Reithmann/Martiny, Internationales Vertragsrecht, 9th ed 2021, para 7.181.

58 *European Commission,* Proposal of 14/12/2010, COM(2010) 748 final.

59 *Rogerson/Lehmann/Garcimartín,* in: Dickinson/Lein, The Brussels I Regulation Recast, 2015, para 11.48; similarly, *Mankowski,* in: Rauscher, EuZPR/EuIPR, 5th ed 2021, Art. 25 Brussels Ia Regulation, para 417.

60 See above, III. 3. b).

61 On the history of the anti-suit injunction, *Dickinson,* Taming Anti-suit Injunctions, in: Dickinson/Peel, A Conflict of Laws Companion, 2021, 77, 88–92; on damages, *Antomo* (fn 27), 275–285.

themselves, they forfeited their chance to directly influence its jurisprudence. However, if even the Advocate General predominantly cites only French and other continental European literature, one can, to a certain extent, understand the displeasure which has built up in England over the ECJ's jurisprudence in European procedural law. For example, *Briggs* recently commented on the decision discussed with characteristic bluntness: "If this proves to be the Court's final contribution to English private law, it will be a fitting end."[62] Even if the comment does not deserve approval with regard to its assessment of the decision's findings, it symbolises the failed integration of English procedural and substantive law instruments into the system of the (Recast) Brussels I Regulation.

IV. Conclusion and outlook

By and large, the decision merits approval. The ECJ unmasks the English decisions on dynamic claims for damages as "quasi" anti-suit injunctions. Like their "real" siblings, the anti-suit injunctions, they are incompatible with the (Recast) Brussels I Regulation and contrary to EU public policy. This may be conceived of as weakening the protection of exclusive choice of court agreements in the European judicial area, but in view of the rather obvious attempt to circumvent the prohibition of the anti-suit injunction, it is more accurately described as maintaining the *status quo*. It remains to be seen whether "ordinary" damages, which are awarded by the prorogated court *after* the proceedings before the derogated court have concluded and the amount of which is certain, are also incompatible with the (Recast) Brussels I Regulation. At least with regard to an interference with another court's jurisdiction and access to justice, the potential for conflict with the (Recast) Brussels I Regulation seems to be lower. Thus, whether the ECJ's decision has indeed – in terms of EU law – broken the last arrow in the quiver of the English courts cannot be stated with absolute certainty. In any case, the English courts are unlikely to care much about the answer to this question, given that their entire arsenal in the arena of private international law is now open to them once more.

62 *Briggs,* Comment of 11/9/2023 on *Cuniberti,* CJEU Rules Quasi Antisuit Injunctions Violate Mutual Trust, EAPIL Blog, 8/9/2023, https://bit.ly/48AigY2 (accessed on 27/2/2024).

*** EuGH – EuGVVO 2001 Art. 34 I, 45 I**

(Urteil v. 7.9.2023 – Rs. C-590/21, *Charles Taylor Adjusting ./. Starlight Shipping*)

Article 34(1) Brussels I Regulation, read in conjunction with Article 45(1) thereof, must be interpreted as meaning that a court or tribunal of a Member State may refuse to recognise and enforce a judgment of a court or tribunal of another Member State on the ground that it is contrary to public policy, where that judgment impedes the continuation of proceedings pending before another court or tribunal of the former Member State, in that it grants one of the parties provisional damages in respect of the costs borne by that party on account of its bringing those proceedings on the grounds that, first, the subject matter of those proceedings is covered by a settlement agreement, lawfully concluded and ratified by the court or tribunal of the Member State which gave that judgment and, second, the court of the former Member State, before which the proceedings at issue were brought, does not have jurisdiction on account of a clause conferring exclusive jurisdiction.

Judgment

[1] This request for a preliminary ruling concerns the interpretation of Article 34(1) and Article 45(1) Brussels I Regulation (OJ 2001 L 12, p. 1).

[2] The request has been made in proceedings between, on the one hand, *Charles Taylor Adjusting Ltd ("Charles Taylor")* and *FD,* the representatives of the insurers of a maritime vessel named *Alexandros T,* and, on the other hand, *Starlight Shipping Co. ("Starlight"),* the proprietor of that vessel, and *Overseas Marine Enterprises Inc. ("OME"),* the operator of that vessel, concerning the recognition and enforcement, in Greece, of a judgment and two orders handed down by the High Court of Justice (England & Wales), Queen's Bench Division (Commercial Court) (United Kingdom) ("the judgment and orders of the High Court").

Legal context

[…]

The dispute in the main proceedings and the questions referred for a preliminary ruling

[8] On 3/5/2006, the vessel Alexandros T sank and was lost, along with its cargo, off the bay of Port Elizabeth (South Africa). Starlight and OME, the owner and operator, respectively, of that vessel, requested that the insurers of that vessel pay an indemnity, on the basis of their contractual liability arising from the occurrence of the insured incident.

[9] On account of the refusal on the part of those insurers to pay that indemnity, Starlight, during the same year, brought legal action against them in the United Kingdom, and filed a request for arbitration against one of those insurers. While the legal action and arbitration were pending, Starlight, OME and the insurers of the vessel concluded settlement agreements ("the settlement agreements") by way of which the proceedings between the parties were brought to an end. Those insurers thus paid, on the basis of the occurrence of the insured incident and within an agreed period, the indemnity provided for by the insurance contracts, in full and final settlement of all claims in connection with the loss of that vessel.

[10] On 14/12/2007 and 7/1/2008, the settlement agreements were ratified in the United Kingdom by the court before which the legal action was pending. That court ordered the suspension of any and all subsequent proceedings relating to the case concerned and arising from the same action.

[11] Following the conclusion of those agreements, Starlight and OME, along with the other owners of the vessel Alexandros T and the natural persons legally representing them, brought several fresh legal actions before the Polymeles Protodikeio Peiraios (Court of First Instance, Piraeus, Greece), including those of 21/4/2011 and 13/1/2012, in particular against Charles Taylor, a legal and technical consultancy, which had defended the insurers of that vessel against the claims made by Starlight before the court referred to in the preceding paragraph, and against FD, the director of that consultancy.

[12] By those fresh actions, Starlight and OME sought compensation in respect of the harm, both material and non-material, allegedly suffered as a result of the false and defamatory allegations concerning them made by the insurers of that vessel and their representatives. Starlight and OME claimed that, when the initial action for payment of the indemnity due by those insurers was still pending and the refusal to pay that indemnity persisted, the underwriters and representatives of those insurers had spread, to the Ethniki Trapeza tis Ellados (National Bank of Greece), the mortgage creditor of one of the owners of that vessel, and on the insurance market, in particular, the false rumour that the loss of the vessel Alexandros T was caused by serious defects in that vessel, of which the owners thereof were aware.

[13] While those fresh actions were pending, the insurers of the vessel and their representatives – including, in particular, Charles Taylor and FD – who were the defendants in those actions, brought legal action against Starlight and OME before the English courts seeking a declaration that those fresh legal actions, instituted in Greece, had been brought in breach of the settlement agreements, and requesting that their applications for "declarative relief and compensation" be granted.

[14] Following the exhaustion of all legal remedies, those actions against Starlight and OME in the United Kingdom gave rise, on 26/9/2014, to the judgment and orders of the High Court. Under that judgment and those orders, which were based on the content of the settlement agreements and on the choice of jurisdiction clause, the applicants in the main proceedings obtained compensation in respect of the proceedings instituted in Greece and payment of their costs incurred in England.

[15] The Monomeles Protodikeio Peiraios, Naftiko Tmima (Court of First Instance (single judge), Piraeus, Maritime Division, Greece) granted the application made by Charles Taylor and FD on 7/1/2015 seeking recognition of the judgment and orders of the High Court and a declaration of partial enforceability in Greece, in accordance with the Brussels I Regulation.

[16] On 11/9/2015, Starlight and OME brought an appeal against the judgment of the Monomeles Protodikeio Peiraios, Naftiko Tmima (Court of First Instance (single judge), Piraeus, Maritime Division) before the Monomeles Efeteio Peiraios, Naftiko Tmima (Court of Appeal (single judge), Piraeus, Maritime Division, Greece).

[17] By judgment of 1/7/2019, the latter court allowed the appeal on the ground that the judgments in respect of which recognition and enforcement were sought contained "'quasi' anti-suit injunctions" which preclude the persons concerned bringing an action before the Greek courts, in breach of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4/11/1950, and Article 8(1) and Article 20 of the Syntagma (Greek Constitution), articles which "go to the very heart" of the concept of "public policy" in Greece.

[18] Charles Taylor and FD brought an appeal on a point of law against that judgment before the Areios Pagos (Court of Cassation, Greece), which is the referring court. They submit that the judgment and orders of the High Court are not manifestly contrary to the public policy of either the forum State or the European Union, and do not infringe fundamental principles thereof. They submit that the fact that they were awarded provisional damages on the basis of proceedings commenced in Greece before the actions at issue were brought before the English courts did not prohibit the persons concerned from having continued access to the Greek courts and to judicial protection by them. Consequently, the

* Dazu oben *Theimer,* The last arrow in the quiver of the English courts? "Quasi" anti-suit injunctions and damages for breach of exclusive choice of court agreements, die deutsche Fassung des Urteils ist abgedruckt in IPRax 2024, 304.

judgment and orders of the High Court were wrongly treated as though they were "anti-suit injunctions".

[19] In these circumstances, the Areios Pagos (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

"(1) Is the expression 'manifestly contrary to public policy' in the EU and, by extension, to domestic public policy, which constitutes a ground for non-recognition and non-enforcement pursuant to point 1 of Article 34 and Article 45(1) Brussels I Regulation, to be understood as meaning that it extends beyond explicit anti-suit injunctions prohibiting the commencement and continuation of proceedings before a court of another Member State to judgments or orders delivered by courts of Member States where: (i) they impede or prevent the claimant in obtaining judicial protection by the court of another Member State or from continuing proceedings already commenced before it; and (ii) is that form of interference in the jurisdiction of a court of another Member State to adjudicate a dispute of which it has already been seised, and which it has admitted, compatible with public policy in the EU? In particular, is it contrary to public policy in the EU within the meaning of point 1 of Article 34 and Article 45(1) Brussels I Regulation, to recognise and/or declare enforceable a judgment or order of a court of a Member State awarding provisional damages to claimants seeking recognition and a declaration of enforceability in respect of the costs and expenses incurred by them in bringing an action or continuing proceedings before the court of another Member State, where the reasons given are that: (a) it follows from an examination of that action that the case is covered by a settlement duly established and ratified by the court of the Member State delivering the judgment (or order); and (b) the court of the other Member State seised in a fresh action by the party against which the judgment or order was delivered lacks jurisdiction by virtue of a clause conferring exclusive jurisdiction?

(2) If the first question is answered in the negative, is point 1 of Article 34 Brussels I Regulation, as interpreted by the Court of Justice of the European Union, to be understood as constituting a ground for non-recognition and non-enforcement in Greece of the judgment and orders delivered by a court of another Member State (the United Kingdom), as described under [(1)] above, where they are directly and manifestly contrary to national public policy in accordance with fundamental social and legal perceptions which prevail in Greece and the fundamental provisions of Greek law that lie at the very heart of the right to judicial protection (Articles 8 and 20 of the Greek Constitution, Article 33 of the [Astikos Kodikas (Greek Civil Code)] and the principle of protection of that right that underpins the entire system of Greek procedural law, as laid down in [Article 176, Article 173(1) to (3) and Articles 185, 205 and 191] of the [Kodikas Politikis Dikonomias (Greek Code of Civil Procedure)] […]) and Article 6(1) of the [European Convention on Human Rights and Fundamental Freedoms], such that, in that case, it is permissible to disapply the principle of EU law on the free movement of judgments, and is the non-recognition resulting therefrom compatible with the views that assimilate and promote the European perspective?"

Consideration of the questions referred

Preliminary observations

[20] As regards the applicability ratione loci of the Brussels I Regulation, notwithstanding the United Kingdom's withdrawal from the European Union, it should be noted, as a preliminary point, that in accordance with Article 67(2)(a) of the Withdrawal Agreement, read in conjunction with Articles 126 and 127 thereof, Brussels Ia Regulation applies, to the United Kingdom and in the Member States in a situation involving the United Kingdom, to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, namely 31/12/2020.

[21] It follows that the provisions relating to recognition and enforcement contained in the Brussels I Regulation, which had already been repealed and replaced by the Brussels Ia Regulation when the Withdrawal Agreement was adopted, also remain applicable under the same conditions.

[22] In the present case, given that the judgment and orders of the High Court were delivered on 26/9/2014, the Brussels I Regulation is applicable ratione loci to the dispute in the main proceedings.

The first question

[23] By its first question, the referring court is asking, in essence, whether Article 34(1) Brussels I Regulation, read in conjunction with Article 45(1) thereof, must be interpreted as meaning that a court or tribunal of a Member State may refuse to recognise and enforce a judgment of a court or tribunal of another Member State on the ground that it is contrary to public policy, where that judgment impedes the continuation of proceedings pending before another court or tribunal of the former Member State, in that it grants one of the parties provisional damages in respect of the costs borne by that party on account of its bringing those proceedings on the grounds that, first, the subject matter of those proceedings is covered by a settlement agreement, lawfully concluded and ratified by the court or tribunal of the Member State which gave that judgment and, second, the court of the former Member State, before which the proceedings at issue were brought, does not have jurisdiction on account of a clause conferring exclusive jurisdiction.

[24] The Brussels I Regulation is based on the trust which the Member States accord to each other's legal systems and judicial institutions (judgment of 9/12/2003, *Gasser,* C-116/02, EU:C:2003:657, paragraph 72). Accordingly, apart from a few limited exceptions, including inconsistency with public policy in the Member State in which recognition and enforcement are sought, referred to in Article 34(1) Brussels I Regulation, that regulation does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State (see, to that effect, judgments of 27/4/2004, *Turner,* C-159/02, EU:C:2004:228, paragraph 26, and of 10/2/2009, *Allianz and Generali Assicurazioni Generali,* C-185/07, EU:C:2009:69, paragraph 29).

[25] A prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court, in the context of an "anti-suit injunction", undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with that regulation (see, to that effect, judgments of 27/4/2004, *Turner,* C-159/02, EU:C:2004:228, paragraph 27; of 10/2/2009, *Allianz and Generali Assicurazioni Generali,* C-185/07, EU:C:2009:69, paragraph 34; and of 13/5/2015, *Gazprom,* C-536/13, EU:C:2015:316, paragraph 32).

[26] In the present case, it is essentially apparent from the order for reference, as has been mentioned in paragraph 14 above, that the judgment and orders of the High Court, the exclusive

jurisdiction of which was elected by the parties in the context of the settlement agreements, are not addressed directly to the Greek courts and also do not formally prohibit the proceedings before the referring court. That judgment and those orders nonetheless contain grounds relating to, first, the breach, by *Starlight* and *OME* together with the natural persons representing them, of those settlement agreements; second, the penalties for which they will be liable if they fail to comply with that judgment and those orders; and, third, the jurisdiction of the Greek courts in the light of those settlement agreements. Moreover, that judgment and those orders also contain grounds relating to the financial penalties for which *Starlight* and *OME,* together with the natural persons representing them, will be liable, in particular a decision on the provisional award of damages, the amount of which is not final and is predicated on the continuation of the proceedings before the Greek courts.

[27] It follows from the foregoing that, as the Advocate General states in point 38 of his Opinion, the judgment and orders of the High Court could be classified as ""quasi" anti-suit injunctions". While the purpose of that judgment and those orders is not to prohibit a party from bringing or continuing legal action before a foreign court, they may be regarded as having, at the very least, the effect of deterring *Starlight* and *OME,* together with their representatives, from bringing proceedings before the Greek courts or continuing before those courts an action the purpose of which is the same as those actions brought before the courts of the United Kingdom, which matter is, in any event, for the referring court to determine.

[28] An injunction having such effects would not, having regard to the principles recalled in paragraphs 24 and 25 of the present judgment, be compatible with the Brussels I Regulation.

[29] However, the court of the Member State in which enforcement is sought cannot, without undermining the aim of the Brussels I Regulation, refuse recognition of a judgment emanating from another Member State solely on the ground that it considers that national or EU law was misapplied in that judgment (judgments of 28/4/2009, *Apostolides,* C-420/07, EU:C:2009:271, paragraph 60, and of 16/1/2019, *Liberato,* C-386/17, EU:C:2019:24, paragraph 54).

[30] It follows that it is necessary to examine whether a court of a Member State can, in the context of the examination of an action against a declaration finding that a judgment of a court of another Member State is enforceable, revoke such a declaration on the ground that that judgment is akin to a "'quasi' anti-suit injunction" which is, in principle, incompatible with the Brussels I Regulation.

[31] In that connection, it should be recalled, in the first place, that Article 45(1) of that regulation circumscribes the possibility of refusing or revoking a declaration of enforceability to one of the grounds specified in Articles 34 and 35 of that regulation. In the second place, Article 34(1) of that regulation provides, in essence, that a judgment is not to be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.

[32] The Court has held, in so far as concerns the concept of "public policy" set out in that provision, that Article 34 Brussels I Regulation must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of that regulation. The public-policy clause contained in Article 34(1) of that regulation may be relied on only in exceptional cases (judgments of 28/3/2000, *Krombach,* C-7/98, EU:C:2000:164, paragraph 21, and of 25/5/2016, *Meroni,* C-559/14, EU:C:2016:349, paragraph 38 and the case-law cited).

[33] While the Member States remain in principle free, by virtue of the proviso in that article, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter of interpretation of that regulation (judgments of 28/3/2000, *Krombach,* C-7/98, EU:C:2000:164, paragraph 22, and of 7/4/2022, *H Limited,* C-568/20, EU:C:2022:264, paragraph 42).

[34] Consequently, while it is not for the Court to define the content of the public policy of a Member State, it is nonetheless required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State (judgments of 28/3/2000, *Krombach,* C-7/98, EU:C:2000:164, paragraph 23, and of 7/4/2022, *H Limited,* C-568/20, EU:C:2022:264, paragraph 42).

[35] Recourse to the public-policy clause in Article 34(1) Brussels I Regulation can be envisaged only where recognition of the judgment delivered in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the substance of a judgment of another Member State to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the Member State in which enforcement is sought or of a right recognised as being fundamental within that legal order (judgments of 28/3/2000, *Krombach,* C-7/98, EU:C:2000:164, paragraph 37, and of 16/7/2015, *Diageo Brands,* C-681/13, EU:C:2015:471, paragraph 44).

[36] The fact that the manifest error committed by the court of the Member State of origin concerns a rule of EU law does not alter the conditions for reliance upon the public-policy clause for the purpose of Article 34(1) Brussels I Regulation. It is for the national court to ensure with equal diligence the protection of rights established in national law and rights conferred by EU law. That clause would apply only where that error of law means that the recognition of the judgment concerned in the State in which recognition is sought would result in the manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State (judgments of 11/5/2000, *Renault,* C-38/98, EU:C:2000:225, paragraph 32, and of 16/7/2015, *Diageo Brands,* C-681/13, EU:C:2015:471, paragraphs 48 and 50).

[37] In the present case, the judgment and orders of the High Court – which, in accordance with paragraph 27 of the present judgment, could be classified as "'quasi' anti-suit injunctions", in that they indirectly influence the continuation of proceedings brought before the courts of another Member State – are contrary to the general principle which emerges from the case-law of the Court that every court seised itself determines, under the applicable rules, whether it has jurisdiction to resolve the dispute before it (see, by analogy, judgments of 10/2/2009, *Allianz and Generali Assicurazioni Generali,* C-185/07, EU:C:2009:69, paragraph 29, and of 13/5/2015, *Gazprom,* C-536/13, EU:C:2015:316, paragraph 33).

[38] Such "'quasi' anti-suit injunctions" run counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdic-

tion under Brussels I Regulation is based (see, by analogy, judgment of 10/2/2009, *Allianz and Generali Assicurazioni Generali,* C-185/07, EU:C:2009:69, paragraph 30).

[39] Under those circumstances, as the Advocate General observes in point 53 of his Opinion, subject to the examination to be conducted by the referring court, the recognition and enforcement of the judgment and orders of the High Court are liable to be incompatible with public policy in the legal order of the Member State in which recognition and enforcement are sought, inasmuch as that judgment and those orders are such as to infringe the fundamental principle, in the European judicial area based on mutual trust, that every court is to rule on its own jurisdiction.

[40] Furthermore, that type of "'quasi' anti-suit injunction" is also such as to undermine access to justice for persons on whom such injunctions are imposed. As the European Commission has pointed out, by granting, in the form of provisional damages, the costs borne by the defendant as a result of having brought proceedings which are pending before a court of the Member State in which recognition and enforcement are sought, such compensation makes it more difficult for the applicant to continue those proceedings, or even prevents that applicant from doing so.

[41] In the light of all the foregoing considerations, the answer to the first question is that Article 34(1) Brussels I Regulation, read in conjunction with Article 45(1) thereof, must be interpreted as meaning that a court or tribunal of a Member State may refuse to recognise and enforce a judgment of a court or tribunal of another Member State on the ground that it is contrary to public policy, where that judgment impedes the continuation of proceedings pending before another court or tribunal of the former Member State, in that it grants one of the parties provisional damages in respect of the costs borne by that party on account of its bringing those proceedings on the grounds that, first, the subject matter of those proceedings is covered by a settlement agreement, lawfully concluded and ratified by the court or tribunal of the Member State which gave that judgment and, second, the court of the former Member State, before which the proceedings at issue were brought, does not have jurisdiction on account of a clause conferring exclusive jurisdiction.

The second question

[42] The second question is asked in the event that the first question is answered in the negative. Having regard to the answer to the first question, there is no need to answer the second question.

Costs

[…]