ENFORCING FOREIGN JUDGMENTS IN THE EUROPEAN UNION: A NEW APPROACH BY THE EUROPEAN COURT OF JUSTICE

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I. INTRODUCTION

Cross-border disputes have always been part of the legal landscape but have recently become increasingly prominent. Such disputes may eventually find their way into courtrooms, where rules regarding jurisdiction assign cases to the courts of a specific state. Once the internationally competent court has been found, it proceeds to address the case substantively, applying the appropriate law according to conflict-of-law rules. However, even after a decision on the merits has been rendered, questions often remain regarding how and, more importantly, where such a judgment can be enforced.

Enforcing a judgment in the country where it originated typically presents few challenges. However, difficulties often

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arise when attempting to enforce judgments in other countries. In the European Union, Chapter III of the Brussels Ibis Regulation[12] establishes specific rules governing the recognition and enforcement of judgments handed down in another E.U. Member State. Consequently, the legal framework for purely European judgments appears clear. On the other hand, there are no E.U. rules on the recognition and enforcement of judgments from non-Member States. These are still governed by domestic law of the respective Member States or by bilateral or multilateral treaties. But what about a domestic judgment of a court of a Member State recognizing a judgment from a non-Member State? Is this a judgment of a Member State which, therefore, is to be recognized in all other Member States, or is it a special kind of decision ("*exequatur* decision") which has only effects in the country where it was rendered? While traditionally the prevailing view clearly supported the latter alternative, a recent judgment of the ECJ seems to have turned matters upside down.

II. Recognition and Enforcement of Judgments under Brussels Ibis

A. *Judgments of E.U. Member States*

Ever since the establishment of an international framework on the cooperation in civil matters within the European Union, one of its main purposes has been the promotion of free movement of judgments within the European Union.[3] While originally being laid down in an international treaty, the Brussels Convention,[4] the applicable rules can today be found in Chapter III of the Brussels Ibis Regulation,[5] and as such they are directly applicable in all E.U. Member States.[6] As a matter of principle, judgments of E.U. Member States are not only

1. Regulation 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, 2012 O.J. (L 351).

2. Regulation 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, 2012 O.J. (L 351).

3. Recitals 6 and 27 Brussels Ibis.

4. 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1972 O.J. (L 299).

5. Recitals 6 and 27 Brussels Ibis.

6. Art 288 TFEU.

automatically recognized in every other Member State, but also *ipso iure* enforceable.[7] This provision is an expression of mutual confidence in the legal systems and judicial institutions of each other E.U. Member State and in the correctness of judicial procedures taken.[8]

B. *Third-Country Judgments*

The so-called principle of mutual trust contained in Chapter III of Brussels Ibis applies only between E.U. Member States. Chapter III of Brussels Ibis thus does not refer to judgments from countries outside the European Union.[9] Such decisions from third-country courts are, according to the prevailing view, not conceptually covered by the definition of the term "judgment . . . from a Member State" in Art 2(a) Brussels Ibis and therefore excluded from the scope of application of the regulation. It is up to each individual Member State itself to provide its own (national) rules for the recognition and enforcement of foreign judgments. Such provisions often state that a foreign judgment must be declared enforceable through a separate procedure ("*exequatur* proceedings"). These are not enforcement proceedings; rather, they are prerequisites for the recognition and the granting of enforceability within the country once examined. Only if the respective national requirements are met will the foreign judgment be declared enforceable within *this* state ("*exequatur* decision"). Based on this decision, subsequent enforcement proceedings can be initiated.

This raises the question of how to deal with the *exequatur* decision regarding recognition and enforcement according to the Brussels Ibis Regulation. At first glance, it might be tempting to argue that this decision should be recognized and enforced *ipso iure* according to the rules of Chapter III. The *exequatur*

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7. *See* art. 36 Brussels Ibis, which explicitly states that a judgment given in a Member State shall be recogni[z]ed in the other Member States without any special procedure being required. See also art. 39 Brussels Ibis: "A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required."

8. Recital 26 Brussels Ibis.

9. Louise Merret, Article 2 Brussels Ibis Regulation ¶ 12 (Ulrich Magnus & Peter Mankowski eds., European Commentaries on Private International Law 2016).

decision, after all, is itself a "judgment" from an E.U. Member State in the sense of Chapter III of the Brussels Ibis Regulation. This view is a rather formal one, though; since the *exequatur* decision declares a judgment form a third state enforceable, recognizing it under Chapter III would mean, at its core, that the foreign judgment itself can be enforced within the *entire* European Union once an *exequatur* decision is handed down in only *one* E.U. Member State.

However, a so-called "double *exequatur*"[10]—i.e., the declaration of enforceability of a declaration of enforceability from another state—is considered impossible in the European Union. This basically means that the recognition procedure does not apply to a decision that itself recognizes a foreign judgment: enforcement upon enforcement is not permitted ("*exequatur sur exequatur ne vaut*").[11] The reason for this is that otherwise the party seeking enforcement could easily get around a Member State's conditions for recognition and enforcement. More so, it would interfere with the Member States' autonomy in deciding those conditions concerning third-country judgments. Consequently, and consistent with this reasoning, the prevailing opinion in legal doctrine is that judgments which merely "incorporate" a foreign judgment without examining the underlying claim and, as a result, enable enforcement of the judgment in the second state, are excluded from automatic recognition and enforcement under Chapter III of the Brussels Ibis Regulation.[12]

So far, the principle that *exequatur* decisions and functionally equivalent judgments, such as confirmation judgments, cannot be recognized and enforced was supported by case law of the ECJ. In the *Owens Bank* decision, the ECJ stated that

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10. There is no such thing as double *exequatur* in the European Union anymore. While a Member State still declares foreign judgments enforceable in *exequatur* proceedings, the decision resulting from these proceedings is either *automatically* recognized and enforceable in every other Member State or not. It is, however, not subject to a second recognition procedure, which could lead to a double *exequatur*. While formalities have changed, the underlying question is still the same: can a judgment declaring a foreign judgment enforceable be enforced in other Member States?

11. *See e.g.*, MERRET, *supra* note 9.

12. *Id.*

the Brussels Convention (now: Regulation[13]) "does not apply to proceedings or to issues in proceedings in Contracting States . . . concerning the recognition and enforcement of judgments in civil and commercial matters from third States."[14] The ECJ had explicitly based its reasoning, among other things, on the fact that the recognition and enforcement rules of the Brussels Convention (now: Regulation) only cover judgments from Member States, but not from third-countries.[15]

Therefore, until recently, it was essentially undisputed that the Brussels Ibis Regulation does not allow double *exequatur* and similar constellations.[16] A third-country judgment that can be recognized in one Member State should not be able to be "exported" to all other Member States via the Brussels Ibis Regulation. However, the decision in *J v. H Limited* recently handed down by the ECJ casts serious doubts upon this long-standing assumption.

III. ECJ's Recent Turnaround

A. *Facts and Procedural History*

The case *J v. H Limited* dealt with the enforcement of a confirmation judgment of the English High Court in Austria.[17]

The High Court of England issued a payment order in favor of the creditor H-Bank against the debtor J pursuant to two judgments delivered by Jordanian courts. The creditor H-Bank applied for enforcement of the English payment order in the jurisdiction of an Austrian court on the basis of Brussels Ibis, referring to Art 53 of that regulation.[18] The trial court as well as the appellate court granted H-Bank leave to enforce the English payment order, observing, *inter alia*, that

13. The Brussels Convention was superseded by the Brussels Regulation. However, it is commonly accepted in doctrine as well as in case law that the ECJ's interpretation of the Convention can be transposed to the corresponding provisions in the Regulation.

14. *Id.*, at ¶ 25.

15. *Id.*

16. Merret, *supra* note 9.

17. Case C-568/20, J v. H Limited, 2022 ECLI:EU:C:2022:264.

18. The case took place before Brexit, which is why Brussels Ibis was still applicable.

the proceedings before the High Court had complied with the adversarial principle.[19]

This "confirmation judgment" was issued on the basis of a so-called "action upon a foreign judgment" and basically converts a foreign judgment into an English decision. Neither the claim nor the judgment of the foreign court was subject to review on the merits by the English courts. The scope of the court's review was strictly limited to the perception of grounds for refusal of recognition, whereby, in addition to general public policy considerations, the focus often lies on the question of procedural fraud or fraudulent use of the judgment in the third-country proceedings.[20] The debtor brought an appeal before the Austrian Supreme Court, which granted certiorari. The Austrian Supreme Court inclined to the view that the principle of the exclusion of "double *exequatur*" also applies to orders made by a court of a member state on the basis of an action seeking enforcement of a foreign judgment, since the legal relationship underlying the debt recognized by a final judgment is not subject to a review as to substance. The decision at issue in the main proceedings therefore would not fall within the concept of a "judgment" within the meaning of Article 2(a) Brussels Ibis. However, the Austrian Supreme Court found that the correct application of E.U. law is not so obvious as to leave no scope for any reasonable doubt. It decided to refer the question to the ECJ for a preliminary ruling.[21]

B. *Essential Aspects of the Ruling*

1. *Definition of "Judgment"*

While it is—or at least was—common ground that a judgment that solely declares a foreign decision enforceable cannot be enforced directly in other Member States due to the prevailing view on the impermissibility of "double *exequatur*,"[22] the ECJ has recently taken a different approach.

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19. *Id.*, at ¶¶ 12–20.

20. Dicey, Morris & Collins on the Conflict of Laws, ch. 14 (Lord Collins of Mapesbury & Jonathan Harris eds., 15th ed. 2022).

21. Oberster Gerichtshof [OGH] [Austrian Supreme Court] May 19, 2022, 3 Ob 71/22w Juristische Blätter [JBl] 2023 (55).

22. Merret, *supra* note 9.

The court's reasoning is based on a broad interpretation of the term "judgment" in Art 2(a) and Art 39 Brussels Ibis, in which the ECJ states that "the concept of 'judgment' covers any judgment given by a court of a Member State, without any distinction being drawn according to the content of the judgment in question. It follows that that concept also includes an order for payment made by a court of a Member State on the basis of final judgments delivered in a third State."[23] In other words, there is no special status for *exequatur* or similar decisions; the term "judgment" must be interpreted broadly and includes any decision issued by a Member State's court no matter its content.

To justify this reasoning, the ECJ refers to *Gothaer Allgemeine Versicherung*.[24] In *Gothaer*, a Belgian court declined international jurisdiction on the grounds that there was an exclusive choice of forum clause between the parties in favor of Icelandic courts. The ECJ concluded that the Belgian court's judgment constituted a "judgment" in terms of Brussels Ibis and that a German court was bound by it.[25] Transferring this idea to *exequatur* proceedings, a judgment of an E.U. Member State declaring a third-country decision enforceable is also enforceable by all other Member States. Anything else, according to the ECJ, would undermine the principle of mutual trust.[26]

The ECJ appears to place significant emphasis on a consistent and most comprehensive definition of the term "judgment."[27] By doing so, however, the ECJ simultaneously sacrifices one of the court's previous decisions in *Owens Bank*, in which it explicitly stated that Brussels Ibis "does not apply to proceedings, or issues arising in proceedings, in Contracting States concerning the recognition and enforcement of judgments given in civil and commercial matters in non-contracting States."[28] It is safe to say that the ECJ's recent decision represents not only a complete departure from the prevailing view until now but also from its own ruling in the *Owens Bank* case.[29]

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23. Case C-568/20, J v. H Limited, 2022 ECLI:EU:C:2022:264, ¶¶ 24, 25.

24. Case C-456/11, Gothaer Allgemeine Versicherung AG v. Samskip GmbH. 2012 ECLI:EU:C:2012:719.

25. *Id.*

26. J v. H Limited, 2022 ECLI:EU:C:2022, ¶ 30.

27. Thomas Bachner & Lena Werderitsch, *Doppelexequatur: Schafft der EuGH neue Umgehungsmoeglichkeiten?*, 14 ZIVILRECHT AKTUELL (Zak) 264, 266 (2022).

28. Case C-129/92, Owens Bank Ltd. v. Fulvio Bracco and Bracco Industria Chimica SpA, 1994 E.C.R. I-117 ¶ 37.

29. Bachner & Werderitsch, *supra* note 27, at 265.

2. *Re-Interpretation of Public Policy*

The broad interpretation of the term "judgment" was not the only surprise in the case of *J v. H-Bank*—the ECJ also voiced a novel idea of how to allow the courts of a Member State where recognition or enforcement is sought to refuse the enforcement of another Member State's payment order under special circumstances in spite of their general obligation to enforce it under Chapter III of the Brussels Ibis Regulation. For this, the ECJ referred to the public policy clause in Art 45(1)(a) Brussels Ibis and developed a view that slightly deviates from its previous interpretation. The ECJ stated that the courts of one E.U. Member State can refuse the enforcement of another Member State's payment order when the party against whom enforcement is sought can present "that it was impossible to contest, in the Member State of origin,[30] the substance of the claims which gave rise to the Jordanian judgments forming the subject matter of the order at issue in the main proceedings, that court could refuse enforcement of that order on the ground that it was manifestly incompatible with national public policy."[31]

Art 45(1)(a), as a matter of fact, gives the Member State in which recognition and enforcement is sought the option to refuse recognition of a judgment issued in another Member State.[32] However, Art 52 Brussels Ibis prohibits the substantial review of such decisions because the legal rules applied by the court of the Member State of origin differ from those the court in the requested member state would have applied if it had been seized of the dispute itself. The courts of the other Member State are also precluded from verifying whether the court of the state of origin has properly assessed the merits of the case.[33] These principles are no novelty of Brussels Ibis, but rather a "pivotal rule for any international instrument on recognition and enforcement or else such instrument would

30. Member State of origin in this context refers to the court of the E.U. Member State, where recognition and enforcement were first sought (here: England).

31. Case C-568/20, J v. H Limited, 2022 ECLI:EU:C:2022:264, para. 46.

32. *See* Stéphanie Francq, Article 45 Brussels Ibis Regulation (Ulrich Magnus & Peter Mankowski eds., European Commentaries on Private International Law 2016).

33. Peter Mankowski, Article 52 Brussels Ibis Regulation, ¶ 2 (Ulrich Magnus & Peter Mankowski eds., European Commentaries on Private International Law 2016).

lose much of its point."[34] In other words, even a wrong decision must be accepted by other Member States up to the limit of public policy.[35] In that sense, Art 52 Brussels Ibis explicitly states that "under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed."[36]

This so-called "prohibition of *révision au fond*" is not revolutionary but rather characteristic of recognition and enforcement of judgments from another Member State.[37] However, the ECJ seems to turn this principle around when allowing E.U. Member States to refuse the enforcement of another Member State's *exequatur* decision because the debtor has been denied *révision au fond* in relation to a third country in these *exequatur* proceedings. It is therefore almost inconceivable how a debtor should be able to invoke a breach of Austrian public policy if he has been treated before the English court in a way he would have been treated in a comparable procedural situation in Austria.[38] A violation of the defendant's rights of defense in the proceedings before the court of the Member State (in casu e.g., the English proceedings) relevant to public policy could only be assumed if the defendant was not heard there with the objection that his rights of defense were violated in the proceedings before the court of the third country because they did not comply with the standards set out above.[39] Therefore, at first glance, it seems that the ECJ's recourse to Art 45(1)(a) does not have any real scope of application.

At second glace, however, it seems that the ECJ was not referring to this traditional understanding of the public policy clause. According to the ECJ in *J v. H-Bank*, the Austrian courts could refuse the enforcement of the English judgment on the grounds of obvious incompatibility with national public policy if the debtor proves that he wasn't allowed to oppose on the merits the claims underlying the third-country judgments in

34. *Id.*, at ¶ 1.
35. Bachner & Werderitsch, *supra* note 27, at 265.
36. Art 52 Brussels Ibis.
37. *See e.g.*, Mankowski, *supra* note 33, at ¶ 1.
38. Bachner & Werderitsch, *supra* note 27, at 266.
39. *Id. See also* Florian Scholz-Berger, *Anerkennung und Vollstreckung drittstaatlicher Entscheidungen im System der Europäischen Urteilsfreizügigkeit – Bemerkungen aus Anlass von OGH 3 Ob 71/22w*, 1 Juristische Blaetter [JBl] 7, 13 (2023).

the E.U. Member State of origin. The wording "*contester au fond les prétentions ayant donné lieu aux jugements jordaniens*" in the French original text of the ECJ decision *J v. H-Bank*[40] makes it even more obvious: the breach of public policy is said to lie in the fact that the debtor was denied *révision au fond* in the English proceedings with respect to the third-country judgments.[41]

This different approach to the public policy clause, allowing courts of a Member State to refuse the recognition and enforcement of judgments from other Member States in certain cases was surprising. It seems that the ECJ intended to establish an extensive interpretation of the term "judgment" in Art 2(a) Brussels Ibis, including *exequatur* (and similar) decisions, but at the same time tried to give the addressed Member State the chance to refuse recognition and enforcement if the other Member State's judgment in question only declares a third-country decision enforceable. However, this attempt will be unsuccessful if the addressed Member State itself had complied with the principle of *révision au fond* when recognizing and enforcing a third-country judgment.[42]

VI. Future Implications

A. *Forum shopping*

The ECJ's recent decision on the enforcement of third-country judgments within the European Union opens new opportunities for forum shopping: a creditor only needs to find the Member State in the European Union that is the most generous in recognizing and enforcing foreign judgments. The declaration of enforceability in this Member State, regardless of how it is formulated, is then a "judgment of a Member State" within the meaning of Art 2(a) Brussels Ibis and therefore enforceable in any other Member State, unless, exceptionally, there is a public policy violation.[43]

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40. Case C-568/20, J v. H Limited, 2022 ECLI:EU:C:2022:264, ¶ 46.

41. Bachner & Werderitsch, *supra* note 27, at 266.

42. *See also* Bachner & Werderitsch, *supra* note 27, at 266, 267; Scholz-Berger, *supra* note 39, at 13.

43. J v. H Limited, 2022 ECLI:EU:C:2022:264, ¶ 47.

A U.S. judgment of performance, for example, is not enforceable in Austria.[44] However, it may very well be enforceable in Germany, where the rules of recognition and enforcement of foreign judgments are more generous than in Austria. Via "detour" to Germany, such U.S. judgments could nevertheless be enforced in Austria according to the ECJ's current ruling.[45]

The ECJ is well aware of this possibility of circumventing national enforcement requirements, because the court specifically addresses "the absence of harmonization at [the] E.U. level" and states that "the courts of a Member State may, in accordance with the applicable national law, legitimately adopt enforceable decisions on the basis of those judgments, even though taking those judgments into consideration in other Member States is still subject to the requirement for *exequatur*."[46] In doing so, the ECJ seems to accept that its recent decision on the enforcement of foreign judgments may create an incentive for forum shopping.

While it is needless to say that English law as "gateway" into the European Union is no longer relevant for this issue after Brexit, other E.U. Member States remain free to provide for similar procedures when enforcing third-country judgments in their national law and thus become Member State of choice for declaring a foreign judgment enforceable throughout the entire European Union.[47]

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44. This specific issue regarding Austria and the United States will no longer be of relevance since both countries recently signed the Hague Convention on Foreign Judgments in Civil and Commercial Matters.

45. Elisabeth Tretthahn-Wolski & Adrian Zwettler, *(Verfruehte) Angst vor dem Doppelexequatur?*, 7 Recht der Wirtschaft [RdW] 476, 478 (2023).

46. J v. H Limited, 2022 ECLI:EU:C:2022:264, para. 35; *see also* Bachner & Werderitsch, *supra* note 27, at 266.

47. Christian Kohler, *The enforcement of non-Member States' judgments: The role of the 2005 and 2019 Hague Conventions*, *in* Towards more Effective Enforcement of Claims in civil and commercial matters within the EU – "EFFORTS" Final Study 2022 157, 159 (Francesca C. Villata & Burkhard Hess eds., 2023) https://efforts.unimi.it/wp-content/uploads/sites/8/2023/02/D4.6-Final-Study-DEF.pdf; *see also* Burkhard Hess, *Exequatur sur exequatur (ne) vaut? Der EuGH erweitert die Freizügigkeit von Drittstaatenurteilen nach Art. 39 ff. EuGVVO*, IPRax 349, 351 (2022).

B. *The role of the Hague Convention*

On August 29, 2022, the European Union became the first contracting party to the Hague Convention on Foreign Judgments in Civil and Commercial Matters, binding all E.U. Member States except Denmark. The convention aims to set a minimum standard for mutual recognition between the contracting states.[48] Within its scope of application, the convention bears the potential to alleviate the question of enforcement of foreign judgments within the European Union. However, it does not (yet) solve this issue: the Convention so far has very limited geographical scope and it is uncertain to what extend that scope will be extended to new Contracting States.[49] So far, the Convention was signed, e.g., by the European Union, Uruguay, Ukraine, Israel, Costa Rica, Russia, the United States and by Montenegro and North Macedonia,[50] and, just recently, the UK announced that it intends to sign the Convention in the near future.[51]

V. Conclusion

In conclusion, it appears that the ECJ aimed to establish a broad interpretation of the term "judgment" within the scope of Art 2(a) Brussels Ibis.[52] It is possible that the court considered this approach harmless, because it tried to pave a different way to prevent the enforcement of Member State judgments that merely import third-country judgments: apparently, the

48. Kohler, *supra* note 47, at 166.

49. *Id.*

50. *See* Hague Conference on Private International Law, *Status Table*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 (last visited Jan. 3, 2024).

51. *See* UK Ministry of Justice, *Government response to the Hague Convention of July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters (Hague 2019)*, https://www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019/outcome/government-response-to-the-hague-convention-of-july-2019-on-the-recognition-and-enforcement-of-foreign-judgements-in-civil-or-commercial-matters-hagu (Nov. 23, 2023).

52. *See* Case C-568/20, J v. H Limited, 2022 ECLI:EU:C:2022:264, ¶ 29, where the court refers to recital 26, assuming this recital presupposes that the concept of a "judgment" is not interpreted restrictively.

ECJ intended to provide national courts with a corrective mechanism under the public policy doctrine, giving the addressed Member State the option to refuse recognition and enforcement of such judgments.[53]

However, the proposed interpretation of public policy not only conflicts with Article 52 of Brussels Ibis but is likely to fail if the addressed Member State, in turn, excludes *révision au fond* in *exequatur* proceedings.[54] Consequently, based on the ECJ's decision in the discussed case, there appears to be limited recourse against the enforcement of a Member State's judgments that transform a third-country judgment into a "new" judgment, which the ECJ categorizes as a "judgment from a Member State."

Even though the case of *J v. H-Bank* had elements specific to common law,[55] its relevance has not diminished due to Brexit. It remains entirely possible that other Member States may follow the ECJ's lead and implement similar mechanisms.

Given the legal uncertainty created by the ECJ's decision in *J v. H-Bank*, it is likely that future references for preliminary rulings on these issues will arise.[56] In such cases, the ECJ may use these opportunities to provide further clarification. Additionally, it would be desirable for the European Union legislature to address this issue explicitly in any future reform of the Brussels Regulation.[57]

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53. *Id.* ¶ 40 *et seq. See also* Bachner & Werderitsch, *supra* note 27, at 266, 267.

54. Bachner & Werderitsch, *supra* note 27, at 266–67.

55. Meaning that the decision recognizing the foreign judgment looks like a judgment originally from the UK.

56. *See e.g.*, Case C-700/20, London Steam-Ship Owners' Mutual Insurance Association Limited v. Kingdom of Spain, ECLI:EU:C:2022:488. In this case, the ECJ stated that English merger judgments based on arbitral awards do not participate in the free movement of judgments within the European Union.

57. *See also* Hess, *supra* note 47, at 351.