Enforcement of Awards v. Enforcement of Judgments in the EU: Arbitration Must Catch Up

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Arbitral awards are easier to enforce across borders than court judgments, through the New York Convention, and this is one of arbitration's key advantages compared to court litigation. In the European Union, however, this comparative advantage has been lost since the Brussels I Regulation Recast provides for the enforcement of judgments throughout the Union without the need for a local exequatur, whilst arbitral awards still require enforcement proceedings in each country. This article submits that arbitration must catch up and proposes a limited amendment to the recast Regulation, providing that arbitral awards issued in the European Union are capable of enforcement throughout the Union on the basis of a single exequatur in the jurisdiction of the seat. The proposed single exequatur at the seat will be optional; there will be no 'double exequatur' requirement.

Keywords: arbitration, award, enforcement, exequatur, recognition, single exequatur, Brussels I Regulation Recast, New York Convention, parallel proceedings

Arbitral awards are generally easier to enforce across borders than court judgments. The roughly 150 countries bound by the New York Convention have undertaken to recognize and enforce arbitral awards made in another Contracting State. No comparable worldwide regime exists for the enforcement of court judgments. The Hague Convention of 30 June 2005 on Choice of Court Agreements organizes the mutual recognition and enforcement of certain court judgments and entered in force on 1 October 2015. So far, however, it is effective in thirty-one states only, of which just two – Mexico and Singapore – are non-European (the United States and China are signatories but have not ratified the Convention).[1] The Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters will enter in force on 1 September 2023 but will then

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1 *See* www.hcch.net.

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only bind the European Union, its Member States and Ukraine.[2] The New York Convention still leads by a long way.

The broader enforceability of awards is one of the main reasons why users of international commercial arbitration opt for arbitration rather than court litigation.[3] Even those sectors of industry that traditionally prefer to rely on state courts – banks are a prime example – tend to switch to arbitration when their counterparties are located in jurisdictions where enforcement of foreign judgments is problematic. The circumstance that most awards are voluntarily complied with does not detract from the importance of an efficient enforcement process. Award debtors pay of their own motion because they know that there is no escape; no debtor is more recalcitrant than the one who can rely on an immunity.

Since the entry into effect on 10 January 2015 of the Brussels I Regulation Recast ('recast Regulation'),[4] however, arbitration has been overtaken by court litigation in this respect. Judgments of any court in the European Union[5] can now be enforced throughout the Union without the need for a local exequatur, whilst arbitral awards still require exequatur proceedings in each country where they are to be enforced. Admittedly these exequatur proceedings do not raise excessive difficulties and the system operates satisfactorily. But this is not good enough. The recast Regulation has raised the bar and arbitration must catch up if it wishes to maintain its reputation for comparative ease of enforcement. This article will submit that arbitral awards issued in the European Union should be made capable of enforcement throughout the Union on the basis of a single exequatur in the jurisdiction of the seat. This can be achieved by way of a limited amendment to the recast Regulation, proposed in section 1 below.

The object of this article is not to reopen the debate about the appropriateness of the arbitration exclusion in the recast Regulation.[6] This debate has been settled

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2 As between Member States of the European Union, however, the Hague Convention does not apply and gives precedence to the recast Regulation (Art. 23(4) of the Convention).

3 *See* Queen Mary University of London/White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, at 2: 'Enforceability of awards continues to be perceived as arbitration's most valuable characteristic'.

4 Regulation 1215/2012 of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

5 The recast Regulation applies in Denmark, who initially opted out of it (*see* recital 41), pursuant to an Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ L299, 16 Nov. 2005, at 62 and L79, 21 Mar. 2013, at 4). This article will for the sake of simplicity refer to the application of the recast Regulation in the European Union without distinguishing between Denmark and the other Member States. Between the United Kingdom and the European Union, the recast Regulation continues to apply after Brexit 'to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period', i.e., by 31 Dec. 2020 (Withdrawal Agreement, OJ L29, 31 Jan. 2020, at 7, Art. 67(2)(a)).

6 *See infra* s. 7 and nn. 61 to 67.

for now. The amendment suggested by this article is carefully crafted so as to meet the concerns that were raised at the time by the arbitration community.

1 PROPOSED AMENDMENT TO THE RECAST REGULATION

This article proposes a single exequatur mechanism operating as follows. With regard to arbitrations seated in the European Union, an exequatur decision in the jurisdiction of the seat would be treated as a judgment for the purposes of the recast Regulation and would therefore render the award enforceable in the entire Union without further local proceedings. The award creditor would remain free to seek direct enforcement through local proceedings in any EU jurisdiction outside the seat if it wishes. The award debtor can apply for a refusal of enforcement before the local courts on the limited grounds permitted by the recast Regulation – public policy in particular – and on grounds of inarbitrability in the jurisdiction of enforcement. A decision by the court of the seat that denies enforcement, by contrast, would not be caught by the recast Regulation and would not prevent the award creditor from attempting enforcement in other jurisdictions.

This would require limited amendments only to the recast Regulation. The main recital of the amending regulation should read as follows:

> The free circulation of arbitral awards made in a Member State should be facilitated. A decision by a court of the Member State where the arbitration has its seat that grants enforcement to an arbitral award (whether in the form of an exequatur decision or of a judgment entered in the terms of the award) should be treated as a judgment for the purposes of Regulation (EU) No. 1215/2012 and should circulate accordingly together with the award. This should not prevent an award creditor from seeking enforcement of the award in other Member States without having obtained an enforcement decision in the Member State of the seat, or where enforcement of the award has been denied in that Member State.

In Article 1, point (d) of paragraph (2) should be replaced by the following:

> arbitration, subject to point (a) of Article 2;

In Article 2, the following third subparagraph should be inserted in point (a):

> For the purposes of Chapter III, 'judgment' also includes a decision by a court or tribunal of a Member State granting enforcement to an arbitral award where the arbitration has its seat in that Member State;

In Article 42, the following point (c) should be inserted in paragraph (1):

> where the judgment grants enforcement to an arbitral award, a copy of the award and, where that judgment was rendered without the defendant being summoned to appear, proof of service of the judgment;

In Article 45, the following point (f) should be inserted in paragraph (1):

> where the judgment grants enforcement to an arbitral award:
> (i) if the subject matter of the dispute is not capable of settlement by arbitration under the law of the Member State addressed; or
> (ii) if any enforcement measure in respect of the award, other than a protective measure, was sought in the Member State addressed prior to the date of the judgment.

In Article 51, paragraph (1) should be replaced by the following:[7]

> The court to which an application for refusal of enforcement is submitted or the court which hears an appeal lodged under Article 49 or Article 50 may stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin *or, where the judgment grants enforcement to an arbitral award, if an action for annulment of the award has been lodged in the Member State of origin*, or if the time for such an appeal *or action for annulment* has not yet expired. In the latter case, the court may specify the time within which such an appeal *or action for annulment* is to be lodged.

The amending regulation should include the following transitional provision:

> This Regulation shall apply only to enforcement proceedings instituted in the Member State where the arbitration has its seat on or after [date].

2 ENFORCEMENT OF JUDGMENTS UNDER THE RECAST REGULATION

Before the recast Regulation, the enforcement in an EU country (the 'Member State addressed', as per the vocabulary of the recast Regulation) of a judgment issued by a court of another EU country (the 'Member State of origin') required an exequatur decision by a court in the country of enforcement (a 'declaration of enforceability'). The application for exequatur was made *ex parte* and was to be accompanied by a copy of the judgment, a translation if necessary and a certificate issued by the court of origin confirming that the judgment was enforceable in its country of origin. The defendant could subsequently appeal against the exequatur decision, but only on limited grounds including manifest contrariety to public policy.[8] This is still the regime that applies under the Lugano Convention, where a judgment rendered in Switzerland, Norway or Iceland is to be enforced in the

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[7] The proposed amendment consists in the insertion of the emphasized words. The emphasis is shown for the clarity of this article and will of course not appear in the proposed Regulation.

[8] Regulation 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation'), Arts 38 to 56; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 Sep. 1968 ('Brussels Convention'), Arts 31 to 49.

European Union or conversely.[9] This regime also continues to apply in the European Union, in accordance with the transitional provisions of the recast Regulation, in respect of legal proceedings that were instituted before 10 January 2015.[10]

The recast Regulation removes the need for an exequatur decision. A judgment rendered by a court in any EU country, when accompanied by a certificate delivered by the court of origin in the standard form attached with the recast Regulation, can be immediately enforced by the enforcement authorities – bailiffs, for instance – of all other EU countries in the same manner as a local judgment: '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'.[11] In the countries where the enforcement of local judgments requires some involvement of the courts – for instance in order to obtain a third party debt order in England[12] – the same involvement of the local courts will be required for the enforcement of a foreign judgment under the recast Regulation.

The required certificate contains the identification of the judgment, the court and the parties. It summarizes the relief ordered – amount due in principal, details for the calculation of interest and costs, typically – and must state that the judgment is enforceable in the country of origin.[13] If the judgment is for a provisional measure, the certificate must also confirm that the court of origin has jurisdiction as to the substance of the matter[14] and, if the provisional measure was granted *ex parte*, the judgment must have been served on the defendant before it can be enforced under the recast Regulation.[15] A translation of the judgment may be required in certain circumstances.[16]

The defendant may object to the enforcement by submitting an 'application for refusal of enforcement' to the courts of the country of enforcement. The recast Regulation allows such a challenge on the basis of a limited number of grounds

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9 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed in Lugano on 30 Oct. 2007 ('Lugano Convention'), Arts 38 to 56.

10 Recast Regulation, Art. 66(1).

11 *Ibid.*, Art. 39.

12 The recast Regulation has a long tail after Brexit, *see supra* n. 5.

13 Annex I to the recast Regulation.

14 This is because, under the recast Regulation, courts which have jurisdiction on the substance of the dispute (for instance because of a choice of jurisdiction clause in the agreement to which the dispute relates) may issue provisional measures with effect throughout the European Union. Courts that would have no jurisdiction on the merits may nevertheless also order provisional measures, but these measures will not be enforced under the recast Regulation and their territorial effect is thus restricted to their jurisdiction of origin (recital 33, Arts 2(a), 35 and 42(2)(b)(i); a broader territorial effect may still be achieved by way of enforcement in accordance with national laws, where this is allowed).

15 Recast Regulation, *supra* n. 10, Art. 42(2).

16 *Ibid.*, Arts 42(4) and 43.

only: the judgment is manifestly contrary to public policy in the country of enforcement; the judgment was rendered by default whilst the defendant had not been properly summoned; the judgment is irreconcilable with a judgment given between the same parties in the country of enforcement or, in certain circumstances, in another jurisdiction; the court of origin lacked jurisdiction pursuant to certain rules of the recast Regulation relating in particular to 'weak party' protection (consumers, employees, insured). There can be no review on the merits nor, in general, any review of the jurisdiction of the court of origin. The public policy test may not be applied to questions of jurisdiction.[17]

In its initial draft for a revision of the Brussels I Regulation, the European Commission had proposed to reduce the powers of the courts of the country of enforcement even more; these courts could be involved, at the request of the defendant, only in the case of a breach of 'the fundamental principles underlying the right to a fair trial', and there was no control of substantive public policy.[18] This aspect of the proposal was ultimately found too drastic for defendants and was not adopted.

The court which receives an application for refusal of enforcement may at its discretion suspend the enforcement pending the proceedings, or require security from the creditor, or limit the enforcement to protective measures. If enforcement is suspended in the country of origin, then the defendant is entitled to obtain a similar suspension in the country of enforcement.[19]

3 RECAST REGULATION AND ITS ARBITRATION EXCEPTION

The recast Regulation 'shall not apply to … arbitration'.[20] This arbitration exclusion already appeared with the same wording in the two earlier iterations of the instrument, the Brussels Convention of 1968 (the 'Brussels Convention') and the original Brussels I Regulation 44/2001 (the 'Brussels I Regulation').

The novelty lies in the Preamble to the recast Regulation, where recital 12 provides an interpretation of the arbitration exclusion. Advocate General Wathelet noted in his *Gazprom* Opinion that this recital, 'somewhat in the manner of a retroactive interpretative law, explains how that exclusion must be and always should have been interpreted'.[21] The Court repeated in *London Steam-Ship Owners* its long-held view about the necessary continuity in the interpretation of the

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17 *Ibid.*, Art. 45.

18 Commission Proposal (14 Dec. 2010, COM(2010)748 final), s. 3.1.1 of the Explanatory Memorandum and Arts 45 and 46.

19 Recast Regulation, *supra* n. 10, Art. 44.

20 *Ibid.*, Art. 1(2)(d).

21 *Gazprom*, C-536/13, CJEU, Opinion of Advocate General Wathelet, para. 91. The judgment of the Court did not follow the Advocate General's Opinion with regard to the effect of recital 12 on the

Brussels Convention, the original Brussels I Regulation and the recast Regulation; it also expressly referred to the new recital 12 in a preliminary reference regarding the former Brussels I Regulation, which must imply that it endorsed the 'retrospective interpretation' theory of Advocate General Wathelet.[22]

Most aspects of the arbitration exclusion are now fairly clear.

Proceedings for the annulment or the enforcement of an arbitral award are not governed by the recast Regulation. This is expressly confirmed by paragraph 4 of recital 12. The recast Regulation, for instance, does not determine which national court has jurisdiction to hear an application for annulment – a party obviously cannot rely on Article 4(1) of the recast Regulation and sue for annulment of an award in the courts of the domicile of the defendant if these are not the courts of the seat of the arbitration. A judgment that sets aside an award need not be recognized in other Member States; its recognition is a matter of national law. France, for instance, refuses to recognize foreign annulment decisions (see below) whilst the Netherlands generally recognizes these decisions.[23] The recast Regulation leaves each of them free to do so.

Judicial proceedings that are ancillary to an arbitration are similarly caught by the arbitration exclusion. Paragraph 4 of recital 12 lists in this respect the proceedings that relate, 'in particular, [to] the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure'. *Marc Rich*, the first case in respect of the arbitration exclusion, related to the appointment of an arbitrator. The Italian respondent in a London-seated arbitration was arguing that the claimant's application to the English High Court for the appointment of an arbitrator should instead be heard in Italy, the country of its domicile, pursuant to the Brussels Convention. The European Court of Justice responded that the dispute fell outside the scope of the Convention.[24]

Where a defendant in national court proceedings raises the existence of an arbitration agreement and objects that the dispute should be referred to arbitration, the court must deal with the defence in accordance with its own national law (and with the New York Convention, if applicable). Each Member State is at liberty to recognize the negative effect of the competence-competence principle and to provide, as France does, that the defence must be looked at in priority by the

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permissibility of anti-suit injunctions under the recast Regulation, but this does not affect the authority of this particular passage of his Opinion.

22 *London Steam-Ship Owners*, C-700/20, CJEU, Judgment of 20 Jun. 2022, paras 42, 43 and 46, and Opinion of Advocate General Collins, para. 9.

23 *Novolipetsky Metallurgichesky*, Dutch Supreme Court, 24 Nov. 2017, 2018 TvA 33.

24 *Marc Rich*, C-190/89, CJEU, Judgment of 25 Jul. 1991.

arbitrators, i.e., that the arbitration should take place despite the objection raised.[25] Member States may prefer not to recognize the negative effect of that principle and may let their courts check first that an alleged arbitration agreement exists and is valid before referring the parties to arbitration. The related substantive questions are matters of national law as well. The existence and the validity of the alleged arbitration agreement are a matter of national law, not of European law.[26] The recast Regulation, for instance, has nothing to contribute to the assessment of whether a non-signatory is bound by an arbitration agreement.

Conflicts between parallel court and arbitration proceedings remain an unsettled matter under the recast Regulation and its recital 12.[27]

Paragraph 2 of recital 12 states that a court decision on the existence or validity of an arbitration agreement need not be recognized in other Members States 'regardless of whether the court decided on this as a principal issue or as an incidental question'.[28] Paragraph 3, however, goes on to say that, when a court considers that an alleged arbitration agreement is invalid or inapplicable and renders a judgment on the merits, the judgment on the merits should be recognized and enforced under the recast Regulation, 'without prejudice' to the enforcement of arbitral awards under the New York Convention 'which takes precedence over this Regulation'. Article 73(2) of the recast Regulation repeats this last point and provides that 'This Regulation shall not affect the application of the 1958 New York Convention'.

The logical consistency of these paragraphs is not immediately apparent. If a judgment on the merits is enforced in a Member State, this necessarily constitutes a recognition that the court which issued the judgment had jurisdiction to do so in the first place and, by implication, that the dispute did not belong to arbitration. Hence, a recognition of the decision on the merits would appear, logically, to imply a recognition of the decision dismissing the incidental defence that sought to have the matter referred to arbitration.[29] As to the award, it is obviously

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[25] A. Nuyts, *De Bruxelles I à Bruxelles I*bis, 2015 J.T. 89, §13; S. Bollée, *L'arbitrage et le nouveau Règlement Bruxelles I*, 2013 Rev. arb. 979, §6; A. Nuyts, *La refonte du règlement Bruxelles I*, 2013 Rev. crit. DIP 1, §10.

[26] Recital 12, para. 1.

[27] With regard to the different issue of parallel proceedings before courts of two different Member States in respect of the validity of an alleged arbitration agreement, *see* G. Carducci, *The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration*, 29 Arb. Int'l 467, 474 (2013).

[28] This is a reversal of the earlier case law. The Court had ruled in *West Tankers* that, when the merits of a dispute fall under the Brussels I Regulation, then 'a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within [the Brussels I Regulation's] scope of application' (*Allianz and Generali Assicurazioni v. West Tankers*, C-185/07, CJEU, Judgment of 10 Feb. 2009, para. 26).

[29] The Court of Appeal of Paris, however, appears to have taken the view that its power to deny recognition to the first part of an Italian judgment, deciding that the dispute was not arbitrable,

inconsistent to enforce both an award and a court judgment over the same dispute, where each of the arbitral tribunal and the court ruled that it had jurisdiction to the exclusion of the other.

The solution to this interpretation difficulty largely depends on timing, i.e., on whether an arbitral award already exists at the time when the enforcement of the foreign judgment is being challenged before the courts of the state of enforcement (the 'Member State addressed'), and on the seat of the arbitration.

If an award already exists and if the seat of the arbitration was outside the state of enforcement, then the New York Convention will in most cases apply, the award must be enforced under the Convention and the competing court judgment may be denied recognition under Article 45(1)(c) of the recast Regulation because it is irreconcilable with the recognition of the award. Given the precedence of the New York Convention over the recast Regulation, this solution should be uncontroversial.[30]

If an award already exists but the New York Convention does not apply, either because the seat of the arbitration was in the Member State addressed or (arguably) because enforcement of the award was sought under the more favourable terms of domestic legislation, then the solution depends on whether the award has already been subject to a decision of enforcement by the courts of the state of tentative enforcement of the competing court judgment. If so, then the earlier decision to enforce the award is irreconcilable with the competing judgment, which may be denied recognition under Article 45(1)(c) of the recast Regulation.[31] The Court of Justice confirmed in *London Steam-Ship Owners* that a decision to enforce an arbitral award, even though it is caught by the arbitration exclusion and is thus outside the scope of the Regulation, should nevertheless be

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entailed the power also to ignore the part of the judgment that ruled on the merits of the dispute. The Court consequently allowed the enforcement of the arbitral award issued between the same parties (*Armamenti e Aerospazio v. Iraq*, Paris Court of Appeal, 1 Feb. 2022, 2022 Cah. arb. 689).

30 M. Illmer, *The Arbitration Interface With the Brussels I Recast: Past, Present and Future*, in *The Impact of EU Law on International Commercial Arbitration* 31, 50 (F. Ferrari ed., Juris 2017); J. Gaffney, *Should the European Union Regulate Commercial Arbitration?*, 33 Arb. Int'l 81, 96 (2017); F. De Ly, *The Interface Between Arbitration and the Brussels Regulation*, 5 AUBLR 485, 507 (2015); A. Leandro, *Towards a New Interface Between Brussels I and Arbitration?*, 6 JIDS 188, 195 (2015); M. Moses, *Arbitration/Litigation Interface: The European Debate*, 35 Northwest. J. Int'l L. Bus. 1, 22, 36 (2014); S. Menétrey & J.-B. Racine, *L'arbitrage et le règlement Bruxelles I* bis, in *Le nouveau règlement Bruxelles I* bis 13 (E. Guinchard ed., Bruylant 2014) para. 45 (and para. 48, noting some hesitation); T. Cole et al., *Legal Instruments and Practice of Arbitration in the EU*, Study for the JURI Committee, European Parliament 194 (2014); S. Francq, *La refonte du Règlement Bruxelles I Champ d'application et compétence*, 2013 R.D.C. 307, 323. Some commentators, however, disagree or complain about the lack of clarity of the recast Regulation: N. Dowers & Z. S. Tang, *Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal*, 3 GroJIL 125, 138 (2015); L. Hauberg Wilhelmsen, *The Recast Brussels I Regulation and Arbitration: Revisited or Revised?*, 30 Arb. Int'l 169, 183 (2014); H. Gaudemet-Tallon & C. Kessedjian, *La refonte du règlement Bruxelles I*, 2013 Rev. trim. dr. eur. 435, para. 8.

31 A. Mourre & M. Nioche, *Le règlement Bruxelles I « refondu » évite le risque d'une régionalisation de l'arbitrage*, 2013 Cah. arb. 567, para. 18.

regarded as a 'judgment' for the purposes of its Article 45(1)(c).[32] If not, then the situation is the same as that discussed below, where the debtor attempts to resist enforcement of the foreign court judgment on the grounds that the judgment failed to give effect to an arbitration agreement.

A significant caveat to the above analysis, however, is required since the Court of Justice issued its *London Steam-Ship Owners* judgment on 20 June 2022. The Court appears to have said that an award may not be recognized, and may not stand in the way of the enforcement of a competing court judgment, if the arbitral tribunal, on the assumption that it were a national court in the jurisdiction of the arbitral seat, would not have had jurisdiction under the recast Regulation.[33] In the specific facts of that case, there were two grounds that led the Court to the conclusion that the English award could not be given effect and could not block the enforcement in the United Kingdom of the competing Spanish judgment: first, the arbitration proceedings were commenced after the Spanish court proceedings and the arbitral tribunal seated in London, if it had been an English court, would thus have been obliged to stay its proceedings under the *lis pendens* rule in Article 27 of the Brussels I Regulation; second, the case was about a liability insurance claim brought directly by the victim against the insurer and, if the arbitration clause in the insurance policy had been a jurisdiction clause referring to the English courts, the jurisdiction clause could not have been invoked against a victim who wished to sue in Spain, being the place where the harmful event occurred or where the victim was domiciled. The case appears to significantly undermine the enforceability of arbitral awards. Its interpretation, however, is difficult – in particular because the convoluted reasoning of the Court finds no support in the Opinion of Advocate General Collins – and it is not the ambition of this article to provide the definitive view on the subject.

If the court judgment came first in time, the question is then whether the judgment debtor may oppose its enforcement under the recast Regulation on the grounds that the judgment was rendered in breach of an arbitration agreement. This is the situation where a court judgment is rendered (or, more precisely, comes up for a challenge to its enforcement) before any award is

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[32] *London Steam-Ship Owners' Mutual Insurance Association Ltd v. Spain*, C-700/20, CJEU, Judgment of 20 Jun. 2022, para. 48 and Opinion of Advocate General Collins, para. 59. The case actually related to Art. 34(3) of the Brussels I Regulation rather than to Art. 45(1)(c) of the recast Regulation, and to an English judgment into which the arbitral award had been merged ('a judgment entered in the terms of an arbitral award') rather than to a Continental-style exequatur judgment, but these features should not be seen as relevant to the authority of the case (*see* B. Audit, *Arbitration and the Brussels Convention*, 9 Arb. Int'. 1, 19 (1993)).

[33] *Ibid*. para. 54: 'where the award … was made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision falling within the scope of that regulation'.

issued in the same dispute – whether arbitration proceedings are ongoing or have not been started at all.

On its face, the recast Regulation appears not to allow such a defence. A conflict of the judgment with an arbitration agreement is not listed in Article 45 among the possible grounds for refusal of enforcement. Article 45(3) expressly provides that 'the jurisdiction of the court of origin may not be reviewed' on the occasion of the enforcement. The proviso in recital 12, paragraph 3, refers to 'the recognition and enforcement of arbitral awards' in accordance with the New York Convention, not to the recognition of arbitration agreements.

Many commentators nevertheless take the view that the existence of an arbitration agreement is sufficient, under the recast Regulation, to block the enforcement of a court judgment that wrongly refused to refer the dispute to arbitration. They generally rely on the reasoning that the New York Convention takes precedence over the recast Regulation and requires the courts of the state of enforcement to give effect to the arbitration agreement[34]; or they consider that the review of the judgment's incidental decision which dismissed the arbitration defence is a matter of national law[35]; there is sometimes also an argument that it is against public policy to deny effect to a valid arbitration agreement.[36] Other commentators argue that the foreign judgment must be enforced and that the recast Regulation does not allow any defence based on the mere existence of an arbitration agreement or of pending arbitration proceedings.[37] At this point in time, the law on the question remains unclear.

A second question that gave rise to uncertainty under the recast Regulation is whether courts of a Member State may issue anti-suit injunctions that stop a party to an arbitration agreement from initiating or pursuing court proceedings in

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[34] Nuyts, *De Bruxelles I*, *supra* n. 25, para. 15. *See also* A. Markus & S. Giroud, *A Swiss Perspective on West Tankers and Its Aftermath: What About the Lugano Convention?*, 28 ASA Bull. 230, 248 (2010); J.-P. Beraudo, *The Arbitration Exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgments*, 18 J. Int'l Arb. 13, 25 (2001).

[35] O. van der Haegen, *Back to the CJEU's Gazprom Judgment: Antisuit Injunctions, Arbitration and Brussels I (Recast)*, 2016 b-Arbitra 151, paras 30–35; Nuyts, *La refonte*, *supra* n. 25, para. 11.

[36] Menétrey & Racine, *supra* n. 30, para. 49; Mourre & Nioche, *supra* n. 31, para. 17 (rejecting the public policy defence save where the breach of the arbitration agreement is obvious or manifest); U. Magnus & P. Mankowski, *Joint Response to the Green Paper on the Review of the Brussels I Regulation*, para. 7.5 (noting that 'Only the backdoor of public policy might provide a somewhat tricky opportunity to refuse recognition or enforcement'). *See also* H. Van Houtte, *May Court Judgments that Disregard Arbitration Clauses and Awards Be Enforced Under the Brussels and Lugano Conventions?*, 13 Arb. Int'l 85, 88 (1997); C. Ambrose, *Arbitration and the Free Movement of Judgments*, 19 Arb. Int'l 3, 17 (2003) (expressing scepticism about the public policy argument but noting that 'There is widespread dissatisfaction with treating a judgment obtained in breach of an arbitration agreement as requiring recognition … It also runs counter to the purpose of the New York Convention'); *National Navigation v. Endesa Generacion* [2009] EWCA Civ 1397, paras 60–66 and 124–133.

[37] Leandro, *supra* n. 30, at 194; Dowers & Tang, *supra* n. 30, at 142; Cole et al., *supra* n. 30, at 194; Mourre & Nioche, *supra* n. 31, para. 19.

another Member State. The Court of Justice ruled in *West Tankers* that anti-suit injunctions were prohibited under the Brussels I Regulation because they are inconsistent with the mutual trust that the courts of the various Members States owe to each other.[38] In his *Gazprom* Opinion, Advocate General Wathelet considered that the recast Regulation made the *West Tankers* ruling obsolete and that anti-suit injunctions in support of arbitration were now permissible.[39] The Court did not agree with that opinion, however, and repeated its *West Tankers* case law.[40] Most authorities now take the view that *West Tankers* remains good law in this respect.[41]

In practice the issue is likely to go away – anti-suit injunctions mostly originate from the English courts, which are no longer bound by the recast Regulation since the end of the Brexit transition period on 31 December 2020.[42]

Whether liability claims against arbitrators are caught by the arbitration exclusion is another issue that remains in debate.[43]

The proposed amendment to the recast Regulation will not affect the current effects of the arbitration exclusion, nor will it resolve the remaining points of controversy. That is not its ambition.

4 CHOICES MADE BY THE PROPOSED AMENDMENT

The proposed amendment is based on various policy choices, the reasons for which are explained below.

In the first place, the single exequatur is optional. An award creditor may apply for an enforcement decision in the courts of the seat, in which case it will be entitled to enforce that decision and the award in all other EU countries pursuant to the recast Regulation, but it need not do so. It may, as an alternative, pursue enforcement through local proceedings in any EU jurisdiction outside the seat without relying on a single exequatur decision from the courts of the seat. This may be the preferred route in certain circumstances, for instance where local

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38 *Allianz and Generali Assicurazioni, supra* n. 28, para. 30.

39 *Gazprom*, C-536/13, *supra* n. 21, paras 125–141.

40 *Gazprom*, C-536/13, CJEU, Judgment of 13 May 2015, paras 32–34.

41 *Nori Holdings v. Bank Otkritie* [2018] EWHC 1343 (Comm), paras 84–99; Illmer, *supra* n. 30, at 37; van der Haegen, *supra* n. 35, para. 51 ff; Nuyts, *De Bruxelles I*, *supra* n. 25, para. 11; De Ly, *supra* n. 30, at 501.

42 *See supra* n. 5 with regard to the transitional arrangement. The English High Court issued on 1 Aug. 2022 an anti-suit injunction restraining proceedings brought in Spain, in an alleged breach of an agreement providing for arbitration in London (*QBE Europe v. Generali Espana* [2022] EWHC 2062). This injunction would have been impossible before Brexit.

43 *Saad Buzwair Automotive v. Gerstenmaier*, Paris Court of Appeal, 22 Jun. 2021, 2021 Rev. arb. 960, 2022 b-Arbitra 151, with note P. Hollander, *Quel tribunal (étatique) est compétent pour connaître d'une action en responsabilité dirigée contre un arbitre ?*.

proceedings are conducted *ex parte* and move faster than the *inter partes* proceedings that would be required at the seat.

The opposite choice, where an enforcement decision from the seat would have been mandatory, would imply a revival of the so-called 'double exequatur' requirement that used to be prevalent until the New York Convention put an end to it.[44] This major progress achieved in 1958 should certainly not be rolled back.

The option for local proceedings in a particular country, once made, cannot be reversed. The proposed Article 45(1)(f)(ii) does not allow an award creditor who sought local enforcement measures to swap horses once an exequatur order is obtained at the seat.

The rationale is that it would be unfair on the award debtor who is preparing its defence against an application for enforcement measures, or on the local judge who is preparing his or her decision, if they were forced to abandon their arguments or their draft decision because an exequatur judgment has in the meantime been issued in the country of the seat. Also, and perhaps more importantly, if an application for local enforcement measures has been dismissed, there is a distinct risk that a subsequent exequatur decision at the seat may be irreconcilable with that earlier local dismissal and that it therefore faces an obstacle to its recognition pursuant to Article 45(1)(c) of the recast Regulation – it is preferable to avoid arguments on the question, which may need to involve a complex exegesis of both decisions.

An award creditor who wishes to opt for the single exequatur route, by contrast, should not be prevented from already taking protective measures, such as a preventive attachment order (*saisie conservatoire*), outside the country of the seat whilst its application for a single exequatur is being prepared or is pending. Remaining exposed to a risk of dissipation of assets cannot be the price to pay for a single exequatur.

Local enforcement measures taken in one country do not prevent the award creditor from subsequently relying on a single exequatur order when enforcing the award in other non-seat jurisdictions – there is no reason why they should.

The courts of the seat have exclusive jurisdiction to grant a single exequatur decision. Courts of other EU countries may also grant enforcement to the award, but their decisions will not be eligible for recognition in the rest of the EU under the recast Regulation.

This choice is consistent with the general structure of the Brussels regime in its successive iterations (Brussels Convention, Brussels I Regulation and recast Regulation): it provides for the mutual recognition of judgments but it also sets

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[44] A.-J. van den Berg, *The New York Arbitration Convention of 1958* 266 (Kluwer 1981); M. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016), para. 1.03.

out common rules of jurisdiction; the fact that the court seised must examine whether it has jurisdiction by applying these common rules justifies that the ensuing judgment deserves to be recognized throughout the Union. Claimants are not free to pick any court of their choice wherever in the European Union and then to invoke mutual recognition in the whole Union.

The courts of the seat, much more than those of other jurisdictions, have a natural legitimacy to issue enforcement decisions with a pan-European effect. The seat is in most cases selected by the parties (or, occasionally, by the arbitral tribunal). The courts of the seat, therefore, directly or indirectly derive their specific powers from the will of the parties, consistently with the principle of party autonomy. Furthermore, these courts are very often best placed to deal with the issues that typically arise when an award debtor attempts to resist enforcement, because many of these issues are governed by the law of the seat. This is in particular the case of alleged procedural breaches, which ordinarily fall to be determined by reference to the requirements of the procedural law, i.e., in most cases the law of the seat.[45] Disputes regarding the validity and scope of the arbitration agreement are governed by the *lex arbitri*, which in practice – if not necessarily in theory – often coincides with the law of the seat.[46]

The exclusive jurisdiction of the courts of the seat for the purposes of issuing single exequatur decisions also prevents forum shopping, which would see award creditors flock to the least scrupulous jurisdiction and trigger a race to the bottom.

The recognition of an exequatur judgment works one-way only: a judgment that grants a request for enforcement is to be recognized throughout the European Union, a judgment that dismisses the same request is not. This may at first sight appear illogical but there are three cogent reasons for this approach.

First, the proposed amendment to the recast Regulation does not have the ambition of forcing France to abandon its *Hilmarton/Putrabali* doctrine – an ambition that would in all likelihood provoke considerable opposition from the French arbitration community and lead to the failure of the proposal. The doctrine is well known: the French Court of Cassation considers that 'an international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought', with the consequence that the annulment of an award in the country of the seat is not an

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45 G. Born, *International Commercial Arbitration*, vol. II, 1650 (3rd ed., Wolters Kluwer 2021).

46 *Ibid.,* vol. I, at 894, 1509. An argument for leaving the assessment of *lex arbitri* matters to the courts of the seat is also made in M. Paulsson, *The 1958 New York Convention from an Unusual Perspective: Moving Forward by Parting with it*, 2017 Indian J. of Arb. Law 23 and M. Paulsson, *The Future of the New York Convention in Its Most Extreme Sense: A Dual Convention that Disposes of National Setting Aside Regimes*, Kluwer Arbitration Blog, 15 Aug. 2018.

obstacle to its enforcement in France.[47] In the same line, the dismissal of a request for enforcement of the award in the country of the seat could not become an obstacle to its enforcement in France.

Second, the opposite approach could be counterproductive. It would imply that an award creditor whose application for exequatur in the country of the seat is dismissed loses any possibility of still enforcing the award anywhere else in the European Union. The wiser strategy for an award creditor may then be to opt for risk containment. Rather than attempting to obtain a single exequatur, the creditor would first seek separate exequatur orders by way of local proceedings in jurisdictions outside the seat, so that failure in one jurisdiction would not jeopardise success elsewhere. This would defeat the very purpose of the proposed amendment.

Third, a mandatory recognition of a foreign judgment that dismisses a request for enforcement would breach the New York Convention (see below).

The proposed single exequatur regime applies only where the seat of the arbitration is within the European Union. A Swiss award, for instance, does not qualify, even after it has been declared enforceable in one or more EU countries.

It would be constitutionally impossible to extend the scope of the recast Regulation to non-EU awards. The Regulation was adopted pursuant to Articles 67(4) and 81(2) of the Treaty on the Functioning of the European Union (TFEU). These provisions relate to the 'mutual' recognition and enforcement of judgments and extrajudicial decisions[48]; they do not confer upon the institutions of the Union the power to adopt regulations with regard to the recognition and enforcement of third-country judgments or awards. Cooperation with third countries in this field must take the form of international treaties, which the European Union has the power to negotiate and sign in accordance with Articles 216 and 218 TFEU.[49]

An extension of the proposed single exequatur to non-EU awards is not necessary anyway in order to achieve its purpose, i.e., the removal of the relative disadvantage of awards compared to judgments with regard to ease of enforcement:

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47 *Putrabali*, Cass. fr., 27 Jun. 2007, YB Com. Arb. 2007, 299; *Hilmarton*, Cass. fr., 23 Mar. 1994, YB Com. Arb. 1995, 663.

48 The words 'extrajudicial decisions' and 'decisions in extrajudicial cases' used in Arts 67(4) and 81 TFEU must be read as referring in particular to arbitration awards. Art. 220 of the founding 1957 Treaty, which served as the basis for the Brussels Convention, specifically referred to the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards ('la reconnaissance et l'exécution réciproques des décisions judiciaires ainsi que des sentences arbitrales' in the original French version). *See* M. Szpunar, *Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU*, in *The Impact of EU Law on International Commercial Arbitration* 85, 87, n. 11 (F. Ferrari ed., Juris 2017).

49 The 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters was signed by the European Union pursuant to Arts 61(c) and 300(2) of the then applicable Treaty establishing the European Community; *see* Council Decision of 15 Oct. 2007, OJ L339/1, 21 Dec. 2007, and Opinion 1/03 of 7 Feb. 2006 of the European Court of Justice.

non-EU judgments do not benefit either from the automatic recognition and enforcement regime put in place by the recast Regulation.

The proposed amendment is silent as to the consequences of an annulment of an award. This is consistent with the recast Regulation, which contains no express provision with regard to the reversal on appeal of a judgment which may already have been enforced.

For the sake of consistency as well, enforcement may be suspended under Article 51(1) of the recast Regulation, as amended, if the award is subject to setting aside proceedings in the country of the seat, in the same manner as enforcement of a judgment may be suspended whilst an appeal is pending in the country of origin. Such a suspension is at the discretion of the courts of the country of enforcement.

Under the proposed transitional provision, the new regime will only apply if the enforcement proceedings in the country of the seat are instituted on or after a specified date of application. This is inspired from the various transitional arrangements successively set out in the Brussels Convention, the Brussels I Regulation and the recast Regulation.[50]

Any earlier application of the new regime would not be appropriate. The effect of enforcement proceedings must be predictable at the time they are commenced, in particular from the perspective of the award debtor who may legitimately decide not to contest the case if it has no or little assets in the jurisdiction concerned. It would therefore not be just to give a broader territorial effect to an enforcement order issued in the country of the seat than was legally possible when the order was applied for.

Given that an enforcement decision at the seat cannot be relied on in other jurisdictions where enforcement measures were previously taken already (see above), the new regime will never be applicable in non-seat countries where enforcement proceedings were started before the set date of application.

There is by contrast no reason why the new regime could not apply to awards issued before its date of application or to awards issued after its date of application pursuant to arbitral proceedings that were already pending on that date. The proposed transitional provision, therefore, makes no reference to the date of the award or to the date of commencement of the arbitral proceedings.

5 PROPOSED AMENDMENT'S EFFECTS

In order to assess the practical effects of the proposed amendment to the recast Regulation, one should look at the various possible permutations between hypothetical outcomes of enforcement proceedings in the country of the seat

[50] Articles 54, 66 and 66, respectively.

and in one or more Member States addressed, under the recast Regulation as it now stands and under the proposed amendment, respectively.

The first such permutation, which is the base case and represents the most frequent situation, is that the award is capable of enforcement in all countries, at and outside the seat, and that the award debtor does not even attempt to dispute this: the arbitration agreement was clearly valid, the procedure was conducted in accordance with the rules of the art, public policy is not engaged, etc. In that situation the ultimate result is the same under the present recast Regulation and the proposed amendment – the award creditor can enforce the award in all countries it chooses to – but this result can be achieved at lesser expense and, possibly, in a shorter time through the single exequatur of the proposed amendment.

The second permutation is a variation on the first: the award is capable of enforcement in all countries, but the award debtor unsuccessfully attempts to challenge this. Again, the ultimate result is the same under the present recast Regulation and the proposed amendment – the award is enforced everywhere – but the savings brought by the proposed amendment can be significant. Whilst, under the recast Regulation, the same challenge may have to be repeatedly litigated before the courts of each country where enforcement is sought, the proposed amendment concentrates the dispute before the courts of the seat, or at the very least it reduces the scope of litigation in the Member States addressed to a much narrower range of possible arguments, being mainly public policy and inarbitrability.

A third situation is that where, under the recast Regulation, enforcement would be denied at the seat but granted in the Member States addressed. This is a *Putrabali*-like configuration, similar to that famous case where an English award was annulled (and was thus denied enforcement) at the seat by the High Court of England and Wales[51] and was subsequently declared enforceable in France.[52] The case related to a sale of white pepper to be shipped from Indonesia. The ship carrying the pepper sank and the dispute was about whether the buyers were still obliged to pay the price, their defence being that the ship – an unpowered barge that sank while being towed in open sea – did not meet the contractual requirements. The arbitral tribunal decided that the price was not due. The seller filed an appeal against the award under section 69 of the UK Arbitration Act 1996. The court disagreed with the arbitrators' reading of the contract and set aside the award.[53] An English court has the power to do so when seised of a section 69

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51 *PT Putrabali Adyamulia v. Société Est Épices* [2003] EWHC 3089 (Comm).

52 *Putrabali*, Cass. fr., 29 Jun. 2007, 2007 Rev. arb. 507 (two judgments).

53 The court also remitted the matter to the arbitral tribunal, which then issued a second award ordering the buyers to pay for the lost pepper. The buyers sought enforcement in France of the first award, which merely declared that no price was due, so that the seller would be blocked from enforcing the second award against them on the grounds that the two awards were irreconcilable. The Court of Cassation indeed confirmed, in another judgment of the same date between the same parties, that the

'appeal on a point of law', whilst in most other jurisdictions a similar challenge would be seen as an attempted revision of the award on the merits and would not be admitted, neither in annulment proceedings nor as a defence against enforcement of the award. This explains why the reasons that justified an annulment in England could not by themselves justify a refusal of enforcement in France. It is a perfect demonstration of the fact that the configuration being discussed, where enforcement is denied at the seat but granted elsewhere, does not necessarily imply that either court was wrong – both courts simply operate under different rules, which may legitimately lead them to divergent decisions.

The proposed amendment would leave these divergent outcomes untouched and would have no effect on this particular permutation. The annulment judgment at the seat does not qualify for recognition; the proposed amendment does not remove annulment judgments from the scope of the arbitration exception set out in Article 1(2)(d) of the recast Regulation, and the fourth paragraph of its recital 12 ('This Regulation should not apply … to any action or judgment concerning the annulment … of an arbitral award') remains fully relevant in this respect. Similarly, judgments that deny enforcement at the seat are not eligible for recognition under the proposed amendment either. A reiteration of *Putrabali* under the new regime would therefore still be handled as it was in 2007: France would again give effect to the first award, despite its annulment, and England would again give effect to the second award, rendered after remission of the matter to the arbitral tribunal. Admittedly this is far from ideal but at present there seems to be no solution to this conundrum that could be supported by a sufficient consensus in the European Union. The problem should not be overemphasized, however – the factual permutation in which it arises is in reality extremely rare.

The fourth permutation, eventually, concerns the case where enforcement of the award is granted at the seat but would, under the recast Regulation, be refused in another country. *Dallah* is an example: an award issued by an arbitral tribunal seated in Paris was held as valid and enforceable in France but was denied enforcement in England. The Paris Court of Appeal decided that the award debtor, the Government of Pakistan, was bound by an arbitration clause contained in an agreement to which it was not a signatory because of its direct involvement in the performance of the agreement, and refused to set aside the award.[54] The English courts up to the Supreme Court, by contrast, applying French law to the same question but doing so before the Paris Court of Appeal had rendered its judgment, considered that the degree of involvement of the Government of Pakistan in the

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first award, because it had already been declared enforceable, operated as a bar against the enforcement of the second.

[54] *Gouvernement du Pakistan v. Dallah*, Paris Court of Appeal, 17 Feb. 2011, 2012 Rev. arb. 369.

performance of the agreement was insufficient to justify the conclusion that it had become a party to the arbitration agreement, and consequently rejected the request for enforcement of the award.[55] Contrary to *Putrabali*, where divergent applicable laws made it legitimate for the English and French courts to come to opposite decisions, *Dallah* is a case where there is no satisfactory justification for the different approaches taken by the Paris Court of Appeal and the English Supreme Court, since both courts were applying the same rules of French law to the same set of facts.

The impact of the proposed amendment on this fourth permutation depends on two factors, being the relative timing of the proceedings in the two countries concerned and the nature of the arguments raised against the enforcement of the award.

If an application for enforcement is sought in a jurisdiction outside the seat before enforcement is granted at the seat, then the proposed amendment changes nothing to the current situation. The enforcement proceedings outside the seat will run their own course, the award debtor can raise all objections that the law of the place of enforcement allows it to make, and the enforcement judgment rendered at the seat whilst the local proceedings are pending (or after they have been concluded) will not interfere with these proceedings. This was actually the situation in *Dallah*: enforcement was initially granted *ex parte* on 9 October 2006 in England and on 24 August 2009 in France.[56]

If the enforcement judgment at the seat comes first in time, then it qualifies as a single exequatur under the proposed amendment and most lines of arguments are closed. The award debtor cannot any longer, for instance, raise in other countries the defence that it was a non-signatory to the arbitration agreement and that the

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[55] *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

[56] It was also the situation in *Kabab-ji*, where enforcement was applied for in England on 21 Dec. 2017 and, as far as the author knows, no enforcement has (yet) been sought at the seat in France. *Kabab-ji* is another instance where the English and French Supreme Courts disagreed about whether an arbitration agreement was binding on a non-signatory. The dispute related to a franchise agreement that contained a choice of law clause opting for English law and an arbitration clause providing for a seat in Paris. The arbitral award ordered the parent company of the franchisee – which the tribunal considered bound by the arbitration clause, despite its not being a signatory – to pay damages to the franchisor. Enforcement of the award was denied in England; the Supreme Court considered that the express choice of English law in the franchise agreement also applied to its arbitration clause and that, under English law, the facts of the case did not justify a finding that the parent company had become a party to the arbitration agreement (*Kabab-Ji v. Kout Food* [2021] UKSC 48). In parallel, the franchisee's parent sought annulment of the award in France on the same grounds. The Paris Court of Appeal and the Court of Cassation took the view that the choice of law clause in the franchise agreement did not apply to its arbitration clause, that the validity and scope of the arbitration agreement was governed by a substantive rule (*une règle matérielle*) of international arbitration law – i.e., in effect, by French law – and that, accordingly, the parent company's involvement in the performance of the agreement implied its acceptance of the arbitration clause (Appeal No. K 20-20.260, Cass., 28 Sep. 2022; Paris, 23 Jun. 2020, 2020 Rev. arb. 839).

arbitral tribunal wrongly extended the scope of the arbitration agreement. This point will have been determined once and for all by the courts of the seat. In many cases this will be an issue that was governed by these courts' own law and there is thus a clear logic for letting them have the last word. *Dallah* shows that it is not desirable to duplicate litigation of the same point under the same governing law before courts of different jurisdictions.

Some defences can still be raised in each Member State addressed, notwithstanding the existence of an earlier single exequatur judgment rendered at the seat. They are listed in Article 45 of the recast Regulation, as amended by the proposal, and the list is limitative. In practice the two main possible pleas are manifest contrariety to public policy in the Member State addressed (Article 45(1)(a)) and the non-arbitrability of the dispute in the Member State addressed (Article 45(1)(f)(i) as amended). If the award debtor is able successfully to raise these specific defences, then ultimately the award will not be enforceable locally and the proposed amendment will have made no difference. Other grounds of objection to the enforcement of the award – for instance, the *Dallah* argument that the award debtor was not a party to the arbitration agreement – cease to be available.

In situations where the jurisdiction of the seat grants enforcement orders on an *ex parte* basis and the Member State addressed provides for adversarial proceedings, the proposed amendment will considerably facilitate the process, because one single *ex parte* application will be sufficient to permit enforcement in both countries. This would be the case, for instance, when the seat is in France or in Belgium and when enforcement is also sought in Germany or in Spain.

The opposite situation – seat in Germany and enforcement sought in France, for instance – would not suffer any setback under the proposed amendment, because the award creditor will still have the choice to benefit from the French *ex parte* process if that is its preference. It will in that case only need to file for enforcement in France before doing so in Germany.

A welcome side-effect of the proposed amendment is that enforcement of an award in EU countries outside the seat would no longer attract court fees or taxes. In the absence of any enforcement decision by the local courts, there is nothing that could trigger local taxation.[57] The 3% registration duties payable in Belgium on the enforcement of arbitral awards, for instance, would thus be saved when the creditor relies on a single exequatur order from another EU country.

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[57] This is the reason why the provisions in the Brussels Convention (Art. III of its Protocol) and in the Brussels I Regulation (Art. 52) that prohibited the country of enforcement from imposing any *ad valorem* charge, duty or fee are no longer included in the recast Regulation – which quite obviously did not mean to allow the reintroduction of these charges.

6 COMPATIBILITY WITH THE NEW YORK CONVENTION AND OTHER INSTRUMENTS

The proposed amendment is fully compatible with the New York Convention.

Since the proposed single exequatur is optional, it does not reintroduce the old 'double exequatur' requirement that the New York Convention did away with. An award creditor will remain entitled immediately to enforce the award in any EU country of its choice if it wishes, without first seeking an exequatur at the seat.

The New York Convention accepts that a setting aside of the award in the country of the seat may justify a refusal of enforcement in other countries.[58] A denial of enforcement in the country of the seat, however, is not a valid ground for a refusal of enforcement abroad.[59] The proposed amendment respects this construction. Because the recognition of an exequatur judgment will work one-way only (see section 4 above), a Member State need not deny enforcement to an award on the grounds that enforcement has already been refused in the country of origin. There is thus no inconsistency with the closed list of non-enforcement grounds in Article V of the New York Convention.

As to the 1961 Geneva Convention,[60] there is no conflict with the proposed amendment because their respective scopes do not overlap. The proposed amendment only deals with the enforcement of awards, a subject that the Geneva Convention does not touch other than in its Article IX(1) which sets out the circumstances in which an annulment at the seat may justify a refusal of recognition in other jurisdictions. Because of the above mentioned 'one-way' operation of the proposed amendment, an annulment and a consequent denial of enforcement at the seat need not be recognized in other Member States. There is thus no conflict with Article IX(1).

7 EARLIER OBJECTIONS NOT APPLICABLE

The Commission's proposals, in 2009 and 2010, to do away with the arbitration exclusion on the occasion of the revision of the Brussels I Regulation gave rise to considerable criticism and was ultimately abandoned. The proposed amendment has a much more limited ambition and should not face the objections that were raised at the time.

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58 New York Convention, Art. V(1)(e).

59 A. J. van den Berg, *Should the Setting Aside of the Arbitral Award Be Abolished?*, 29 ICSID Review, 1 (2014), §II.E.

60 European Convention on International Commercial Arbitration, signed in Geneva on 21 Apr. 1961.

The starting premise of most objections to the Commission's proposal was that the existing treaties, being the 1958 New York Convention and the 1961 Geneva Convention, work satisfactorily, that real difficulties are rare and that it is therefore useless to add another layer of European legislation.[61] The argument was convincing until the adoption of the recast Regulation, but since then the bar has been raised. The enforcement of judgments within the European Union is now easier than that of arbitral awards and arbitration is at a comparative disadvantage in this respect. The proposed amendment aims at restoring the balance. It goes no further than that and is fully consistent with the idea that, for the rest, a European layer of legislation is not necessary.

A second objection was that arbitration cultures vary across jurisdictions and that it is undesirable to take away the Member States' liberty to tailor their arbitration laws in accordance with their respective preferences.[62] The proposed amendment leaves national idiosyncrasies largely untouched: Member States remain free, for instance, to give effect or not to foreign annulment decisions or to recognize or not the negative effect of the competence-competence principle.

The fear that the mandatory recognition of any judgment invalidating an arbitration agreement or setting aside an award would give prominence to the most arbitration-unfriendly jurisdictions and would lead to a lowest common denominator contagion[63] is not applicable to the proposed amendment, because of its 'one-way' feature. If anything, the proposed amendment will reinforce the weight of arbitration-friendly seat jurisdictions, whose enforcement decisions will now have effect throughout the European Union.

Concerns that the Commission's proposal conflicted in some respects with the New York or the Geneva Conventions[64] are not relevant to the proposed amendment, as discussed above.

Separately from the criticism levied at the Commission's proposal to reform the Brussels I Regulation, a powerful line of academic thinking opposes the so-called 'judgment route', i.e., the process whereby judgments rendered in one jurisdiction in relation to arbitration matters – annulments, recognition,

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61 M. Benedettelli, *'Communitarization' of International Arbitration: A New Spectre Haunting Europe?*, 27 Arb. Int'l 583, 585 (2011); C. Kessedjian, *Commentaire de la refonte du règlement n° 44/2001*, 47 RTD Eur., 117, 122 (2011); C. Kessedjian, *Le Règlement 44/2001 et l'arbitrage*, 2009 Rev. arb. 699, para. 21.

62 Benedettelli, *supra* n. 61.

63 P. Pinsolle, *The Proposed Reform of Regulation 44/2001: A Poison Pill for Arbitration in the European Union?*, Int. A.L.R. 62, 64 (2009).

64 Benedettelli, *supra* n. 61, at 605; Pinsolle, *supra* n. 63, at 63, 65; A. Mourre & A. Vagenheim, *The Arbitration Exclusion in Regulation 44/2001 After West Tankers*, 2009 Int. A.L.R. 75, 82; IBA Arbitration Committee, *Submission to the European Commission*, 15 Jun. 2009, para. 21; V. Lazić, *The Commission's Proposal to Amend the Arbitration Exception in the EC Jurisdiction Regulation*, 29 J. Int'l Arb. 19, para. 4.3 (2012).

enforcement – are recognized and given effect across borders in other jurisdictions.[65] The proposed amendment goes down that controversial route.

The main rationale for the opposition to the judgment route is that judgments in relation to an award are ancillary only. The central decision is, and should remain, the award. It is therefore inappropriate to apply the usual principles of private international law in respect of the recognition of foreign judgments. The old adage 'exequatur sur exequatur ne vaut' applied in civil law jurisdictions is an illustration of this theory. In many jurisdictions, however, the courts do not share the same concern; they look at the question whether to recognize a foreign award-related judgment in the same manner as for the recognition of any other type of judgment. This is in particular the case where a judgment issued at the seat in respect of an attempted setting aside of the award is later invoked in another country where enforcement of the award is sought.[66]

It is submitted that the controversy should be approached from a policy perspective, as indeed the authors concerned appear to propose. The issue is whether there are good reasons for giving effect to the seat country's exequatur decision throughout the European Union and whether doing so will promote decisional harmony.[67] The response is undoubtedly positive.

8 CONCLUSION

It is time, more than ten years after the last revision of the European Union's regime for the mutual recognition of judgments, to reconsider a specific aspect of its interface with arbitration. At present it is easier to enforce judgments under the Brussels I recast Regulation than it is to enforce arbitral awards under the New York Convention. This comparative disadvantage of arbitration should be removed by an amendment to the recast Regulation, providing for the mutual recognition of judgments of the seat jurisdictions that grant enforcement to an arbitral award.

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[65] M. Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?*, 4 JIDS 587 (2013); S. Besson, *La Portée Internationale des « Jugements sur Sentence »*, in *International Arbitration and the Rule of Law: Contribution and Conformity* 675 (A. Menaker ed., ICCA Congress Series, Vol. 19, Kluwer Law International 2017); M. Scherer, *The Effect of Foreign National Court Judgments Relating to the Arbitral Award: An Emerging Conceptual Framework?*, in *ibid.*, at 691; P. Mayer, *The French Approach as a Starting Point for General Reflections on the Recognition of Foreign Award Judgments*, in *ibid.* at 706.

[66] For some recent examples, *see VRG Linhas Aereas v. MatlinPatterson* [2022] UKPC 21, paras 32–60; *Doyen Sports v. URBSFA*, Brussels, 12 Dec. 2019, 2020 b-Arbitra 457, para. 97; OLG Brandenburg, 20 May 2020, ITA Board of Reporters, www.kluwerarbitration.com/document/kli-ka-ons-20-32-010.

[67] *See* Scherer, *Effects of Foreign Judgments, supra* n. 65, at 611; Mayer, *supra* n. 65, at 710.